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**PART III: COMMENT**



**PART IV: STUDENT SUBMISSION**



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# EDITORS' PREFACE

## Forum: "Diversity of Canadian Legal Traditions"

On April 7th, 2022, the Viscount Bennett Memorial Lecture series was ushered back into the lecture halls of UNB Law after a COVID-imposed hiatus, by none other than The Right Honourable Richard Wagner P.C., Chief Justice of Canada. Chief Justice Wagner delivered a lecture reflecting on the diversity of legal traditions in Canada, brimming with his experience as a litigator, a judge, and of course as Chief Justice of the Supreme Court.

The themes of Chief Justice Wagner's lecture provide the motif for this year's issue of the *University of New Brunswick Law Journal*. With a focus on the parallel and yet paradoxically interwoven legal traditions which operate simultaneously across Canada, we are proud to enter Volume 73 into the annals of one of the oldest student-run legal publications in Canada.

The articles contained within this issue are broadly divided into two categories. The first category consists of articles which explicitly engage with the forum topic, and includes discussions on Indigenous, religious, and common-law legal traditions. The second category of articles provides commentary on important developments in Canadian law, and in doing so offers poignant and powerful insight on individual rights to equality and justice under current Canadian jurisprudence. The final article, as is traditionally included in the UNB Law Journal, is a student submission from the UNB Faculty of Law by Sarah Dalton (JD class of 2022).

Each issue of the *University of New Brunswick Law Journal* is created through the collaboration of many members of the Faculty of Law and beyond. We are extremely grateful to our supporters in this endeavour: the University of New Brunswick, its Faculty of Law, its professors and staff, the librarians of the Gérard V La Forest Law Library, our contributors, our peer reviewers, our subscribers, the Law Society of New Brunswick, and the New Brunswick Law Foundation. We also extend our sincerest thanks and gratitude to our Associate Editors and volunteers. Without the dedication of Rebekah Robbins, Graham Manderville, Chloe Jardine, Lauren Ogden, Peyton Carmichael, and Alexander Marshall, Volume 73 would not have come to fruition.

We hope that this issue opens our readers' eyes to the intricacies of Canada's unique system of legal pluralism. While the balancing of these diverse legal traditions is by no means an easy task, we would echo the words of Chief Justice Wagner that it is undoubtedly one of "the strengths of the Canadian legal system".

Graeme Hiebert & Julia O'Hanley
Editors in Chief, Volume 73

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# REFLECTIONS ON THE DIVERSITY OF LEGAL TRADITIONS IN CANADIAN LAW*

**The Rt. Hon. Richard Wagner, P.C., Chief Justice of Canada**

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## I. Introductory Remarks

Good afternoon, and thank you Professor La Forest for the kind introduction. Thank you also for the invitation to present the Viscount Bennett Memorial Lecture. It is a real privilege for me to be here. The Right Honourable Viscount Bennett led Canada through some of the most challenging years of the depression. He did so with courage and determination. As an elected official, and later Prime Minister of Canada, he also helped put social policies and institutions in place. These include the Bank of Canada and the CBC, which continue to serve our country today. He also hoped, through this lecture series, to promote a greater appreciation of the law in contemporary Canadian society. I am pleased to be a part of that effort because I agree that the law plays a very important role in society.

Je suis ravi de le faire ici, à l'Université du Nouveau-Brunswick, où tant de distingués juristes ont amorcé leur carrière juridique. Le nom de l'honorable Gérard La Forest figure, comme vous le savez toutes et tous, sur la longue liste des éminents diplômés de cette institution. Le juge La Forest m'a précédé au sein de la Cour suprême, mais sa jurisprudence continue, à ce jour, d'influencer les travaux de la Cour et elle continue d'influencer la société canadienne en général, tout comme le fait l'œuvre du vicomte Bennett à d'autres égards.

In these uncertain times, I have been thinking a great deal about the role of the law. On the morning of March 15th, I was sitting in the House of Commons when the Ukrainian President, Mr. Zelensky, addressed parliamentarians. The House of Commons was absolutely silent as he asked Canadians to imagine bombs falling on our cities and our homes. The President said, and I quote, "We're not asking for much. We're just asking for justice (…)".

Indeed, under the most horrific conditions, the Ukrainian government has sought a legal means to end the violence. For example, it has taken Russia to the International Court of Justice (the ICJ). Even when Russia did not show up for the hearing, Ukraine said it still had faith in the law. At the end of that court proceeding, the ICJ ordered Russia to stop the invasion,[1] but as we all know, it has not stopped.

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* This Viscount Bennett Memorial Lecture was delivered 7 April 2022.

[1] Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Order of 16 March 2022, online: <https://www.icj-cij.org/en/decisions/order/2022/2022/desc> [perma.cc/46XG-3RS2].

Yet again, Ukraine said it still believed in the importance of the rule of law. That conviction inspires me, and gives me hope for the future.

We can all play a part in making the future better, which is the spirit of this lecture series. After all, it is not just for the courts to uphold the rule of law. Everyone can play a part. How? Well, take the time to share your knowledge about Canada's laws and legal system. Learn how to identify and stop the spread of misinformation and disinformation. We have seen how the spread of lies, even half-truths, can threaten democratic institutions around the world. In Canada, our courts are open, impartial and independent. Our justice system is strong and stable. These make up the foundation of a healthy democracy, which is something we should never take for granted.

We are lucky to live in this country. Canada may not be an economic or military superpower, but it certainly is a democratic superpower. And we like to share that power! We did so, for example, with Ukraine. For many years, Canadian judges and staff from all court levels have worked closely with Ukrainian judges and their own staff to help them improve their judicial system. For example, we have helped them improve their processes for the selection and appointment of judges, for managing conflicts of interest, for processing cases, and even for judgment writing. Once the invasion ends, we will still be there, standing with Ukrainians, to help them restore their judicial system.

Canada can indeed be proud of its laws and legal institutions. They reflect the diversity of its people, as well as their different legal traditions. This includes the common law and civil law, and even longer-standing Indigenous traditions. Canadian law is also influenced by international law.

I would like us to consider this diversity of legal traditions together this afternoon. I propose to review some cases from each of these sources to explain how they influence one another. All of these cases will be different. I will start with a common law case where the civil law concept of good faith was considered. I will also explain a case involving an Aboriginal title claim. And I will end with a lawsuit against a Canadian mining company for violations of customary international law. You might think that these cases have nothing in common. But they do. They all demonstrate how Canadian law has many sources.

## II. Historical Context

Let me pause here to make a quick point. I will be referring this afternoon to Indigenous law. By this, I mean the law developed by Indigenous peoples.[2]

Through history, Indigenous and non-Indigenous peoples maintained their own legal traditions. But with time, legislative drafters began to recognize more than one legal tradition. We can see two legal traditions reflected, for example, in the

[2] Andrée Lajoie, "Introduction: Which Way Out of Colonialism" in Law Commission of Canada, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007), at 3.

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enabling statute of the Supreme Court of Canada. Being a court of appeal for the entire country, the Supreme Court is responsible for deciding some cases according to the common law and some according to the Quebec civil law. The original *Supreme Court Act* required two of the six judges of the Court to be from Quebec.[3] As the size of the bench grew, so did the number of judges from Quebec.[4] There are currently nine judges on the Court, three of whom are Québécois. This ensures both common law and civil law representation on the Court.

The *Constitution Act, 1982* is another example of legislation that recognizes more than one legal tradition within Canada. When it was adopted, it provided constitutional recognition of Aboriginal and treaty rights. Section 35(1) says explicitly that Aboriginal and treaty rights were being recognized at the time.[5] In the decades since 1982, the Supreme Court has also recognized the importance of Indigenous perspectives on the law in its section 35 jurisprudence, particularly in areas directly applicable to Indigenous Peoples.

With the *Constitution Act, 1982* came the *Canadian Charter of Rights and Freedoms*.[6] The *Charter* is inspired by various international treaties, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*.[7] It is perhaps no surprise that the influence of international law has been especially noticeable since the *Charter*. We can see this influence in both the case law and federal legislation, including in international trade, taxation, maritime law, environmental law and other areas.[8]

Today, Canadian lawyers and judges increasingly draw on civil law, the common law, Indigenous legal traditions and international law. As a judge of the Supreme Court of Canada, and now as Chief Justice, I can see this first-hand. As I mentioned earlier, the Court is composed of judges trained in civil law and others in the common law. In our exchanges, we often draw from both legal traditions. Also, we will often hear submissions from parties and interveners trained in either or both traditions, or trained in Indigenous legal traditions, or practicing international law. They provide us with perspectives from these various legal traditions, which are very helpful when they differ from the law-in-force in a given case. Drawing on these different perspectives and applying them where appropriate can inform a legal issue.

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[3] *Supreme and Exchequer Court Act*, SC 1875, c 11, s 4.

[4] The balance was temporarily distorted in 1927 when one judge was added to the Court without providing that it be filled by a member of the Quebec bench or bar: *Act to amend the Supreme Court Act*, SC 1926-27, c 38, s 1; *Supreme Court Act*, RSC 1927, c 35, ss 4, 6. The balance was restored in 1949 when the number of judges on the Court increased to nine: *An Act to Amend the Supreme Court Act*, SC 1949 (2nd Sess), c 37, s 1.

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

[6] *Ibid.*

[7] *Cf* 7th Triennial Conference of the ACCPUF, *La suprématie de la Constitution* (Lausanne, Switzerland: April 2015).

[8] Armand de Mestral & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53:4 McGill LJ 573 at 578–79.

It enables my colleagues and me to consider perspectives developed by all the people we were appointed to serve.

The existence of different legal traditions is one of the strengths of the Canadian legal system. It allows us to draw on more than one perspective when addressing a legal problem. Let me now explain how the Supreme Court of Canada has done this in different cases.

## III. The Callow Case: An example of the civil law informing common law

I will begin with a case decided under the common law, but in which the Supreme Court considered civil law sources from Quebec to resolve the matter.

It was the *Callow* case, which was decided by the Supreme Court in late 2020.[9] The case came up from Ontario. For those who do not know the facts, let me explain them. In 2012, a condo corporation called Baycrest entered into a two-year winter-maintenance-contract and a separate summer-maintenance-contract with a company owned by Mr. Callow. According to clause nine of the winter contract, Baycrest could end it if Mr. Callow did not provide good service. It could also end the contract for any other reason by giving Mr. Callow 10 days' written notice.

In early 2013, Baycrest decided to end the winter contract but did not inform Mr. Callow. Throughout the spring and summer of 2013, Mr. Callow and Baycrest discussed the renewal of that contract. From those discussions, Mr. Callow thought Baycrest was satisfied with his services and was likely to offer him a 2-year renewal. During that time, Mr. Callow performed work above and beyond the summer contract at no charge. He hoped that this would convince Baycrest to renew the winter contract. But in the fall of 2013, Baycrest told Mr. Callow that it was not renewing it. Mr. Callow sued, alleging that Baycrest acted in bad faith. The trial judge sided with Baycrest, but then the Court of Appeal sided with Mr. Callow.

A majority of the Supreme Court agreed with Mr. Callow. Justice Kasirer wrote for the majority and said that Baycrest breached its duty to act honestly toward Mr. Callow. As Justice Kasirer explained, the duty of honest performance did not require Baycrest to tell Mr. Callow that they would end the contract early. But it did require the company not to mislead him.

Even though this case was decided under Ontario law, the majority of judges considered civil law sources from Quebec. While the requirements of honest contractual performance in the two legal traditions have distinct histories, they address similar issues.[10]

So, looking to Quebec law can be very helpful. The Court has often done this over the years, not just in appeals from Quebec or in matters relating to federal

[9] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45.

[10] *Ibid* at para 72.

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legislation.[11] The *Callow* case is a good example of this. It is from Ontario, and does not relate to federal legislation.

Just remember that this exercise is not limited to cases where there is a gap in the law.[12] As Justice Kasirer wrote in *Callow*, not considering solutions from other legal traditions would limit the Court's ability to understand how problems are addressed elsewhere in Canada.[13] What do you think? Is there any downside to considering helpful material from other legal traditions?

## IV. The *Tsilhqot'in* Case: An example of the Supreme Court referencing both the common law and Indigenous perspectives

Let me now turn to Indigenous perspectives and explain how they, too, have informed legal issues. I will be taking Aboriginal title as an example to illustrate this. Aboriginal title refers to the exclusive right to use a particular territory.

This concept has become important in Canadian jurisprudence. But the story began almost 50 years ago, with the Supreme Court's decision in *Calder*.[14] The appellants were asking the Court to declare that their Aboriginal title had not been extinguished. Although they were unsuccessful, all of the judges on the Court recognized the possibility of the existence of Aboriginal title.

In the years since *Calder*, there have been other cases where the Supreme Court has discussed Aboriginal title. In *Delgamuukw*, the Court set out the test for evaluating Aboriginal title, but decided that there was not enough evidence in that case to establish the claim.[15]

So, while the test was set out in *Delgamuukw*, it was only in 2014, in the *Tsilhqot'in* case, that the Supreme Court upheld a declaration of Aboriginal title for the first time.[16] The Tsilhqot'in Nation is a semi-nomadic group of six bands that share a common culture and history. For centuries, they have lived in central British Columbia. In 1983, British Columbia allowed logging in that area. The band tried to stop the logging, claiming Aboriginal title to the land. The federal and provincial governments opposed the claim. The trial judge found the Tsilhqot'in had proved Aboriginal title, but the Court of Appeal reversed that decision.

A unanimous Supreme Court agreed with the trial judge. What is important for you to remember is this: the Supreme Court said to look to the Aboriginal culture and practices, and compare them in a culturally sensitive way with what is required at

[11] *Ibid* at paras 57–58.

[12] *Ibid* at para 59.

[13] *Ibid* at para 58.

[14] *Calder et al v Attorney General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145.

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

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

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common law to establish title based on occupation. In other words, Aboriginal title must be understood by reference to both common law and Aboriginal perspectives.[17]

While the decisions in *Calder*, *Delgamuukw* and *Tsilhqot'in* acknowledged the relevance of Indigenous perspectives, they did not turn on Indigenous law. Recognizing the existence of Indigenous legal traditions is a relatively modern development in Canadian legal history.

## V. From *Baker* to *Nevsun*: The application of international law within Canadian law

International law is also an important source in Canada. We can see this from a recent case called *Nevsun*. It was decided by the Supreme Court in 2020.[18] The case involved three Eritrean workers. Their country has a national service program. All Eritreans have to do military training or other public service when they turn 18. They are often forced to continue that work for many years afterward. The three workers helped build a mine, which is partly owned by a Canadian company called Nevsun. The workers sued Nevsun for forced labour and other crimes against humanity. They said that those crimes were violations of customary international law and that Canadian courts should hold Nevsun responsible. Nevsun brought a motion to strike the proceedings. It argued that it could not be sued for violating customary international law. The chambers judge dismissed Nevsun's motion to strike, and the Court of Appeal agreed.

A majority of the Supreme Court also agreed. They explained that customary international law is the common law of the international legal system. They also explained that in Canada, we automatically incorporate customary international law into domestic law without any need for legislative action. This is known as the doctrine of adoption. The fact that customary international law is part of our common law means that it must be treated with the same respect.

In *Nevsun*, the Court did not decide whether the company violated the workers' rights. That question was not before our Court. The question was simply whether the workers' lawsuit could proceed. Since customary international law is part of Canadian common law, the Court said that a Canadian company could be held responsible for violating it. As a result, the lawsuit could indeed proceed. And not to leave any of you hanging, I will tell you how that story ended. A few months after the Supreme Court decision, the parties settled. It was reported that Nevsun agreed to pay an undisclosed but what, I understand, was a significant amount of money to the workers.[19]

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[17] *Ibid*.

[18] *Nevsun Resoucres Ltd. v Araya*, 2020 SCC 5.

[19] Amnesty International, News Release, "Amnesty International applauds settlement in landmark Nevsun Resources mining case" (23 October 2020), online: <https://www.amnesty.ca/news/amnesty-international-applauds-settlement-in-landmark-nevsun-resources-mining-case/> [perma.cc/N3QK-H6KN].

*Nevsun* is one example of the application of international law within Canadian law. I will leave you to read up on the others.

## VI. Conclusion

This brief overview of the Supreme Court's jurisprudence was not intended to be exhaustive. I could have given you many more examples from each source of law. But time does not allow. In the years ahead, the Court will consider more cases like these. So, there will be even more opportunities for dialogue between the different sources of law.

Par le dialogue, nous sommes davantage en mesure de comprendre chacune de ces traditions juridiques ou sources de droit. Et davantage aptes à reconnaître les occasions où une ou plusieurs d'entre elles permettent d'éclairer une question de droit. Autrement dit, il y a plus qu'une perspective susceptible d'aider à résoudre un problème juridique. Au cours des prochaines années, la common law et le droit civil, tout comme les traditions autochtones et le droit international, continueront d'évoluer. Certes, ces sources et traditions évolueront séparément, selon leurs propres besoins et contextes, mais elles évolueront également en raison de l'influence qu'elles ont les unes sur les autres.

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# POWER AND POLICY: NAVIGATING LEGAL PLURALISM IN CANADIAN MIGRATION LAW

**Asad Kiyani**

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## I. Introduction

Legal pluralism is, at its core, a description of the extent and sources of legal obligations beyond state law.[1] While that boundary may be difficult to identify in many areas,[2] it seems clearer in the context of migration law. Given the state's sovereign right to control entry and membership, there does not seem to be much space for alternative, non-state legal orders to play a role. State laws remain paramount,[3] with allowances made in federal law for national variation, such as provincial needs to preserve particular cultural and linguistic traditions,[4] or the acknowledgement that provinces are best positioned to decide which immigrants will best fill their labour market needs.[5] Canadian courts have repeatedly affirmed the federal government's

[1] See e.g. Leopold Pospisil, *The Anthropology of Law: A Comparative Theory of Law* (New York: Harper & Row, 1971) ("every functioning subgroup in a society has its own legal system which is necessarily different in some respects from those of the other subgroups" at 107); Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev 869, 873 ("According to the new legal pluralism, plural normative orders are found in virtually all societies. This is an extraordinarily powerful move, in that it places at the center of investigation the relationship between the official legal system and other forms of ordering that connect with but are in some ways separate from and dependent on it").

[2] John Griffiths, "The division of labor in social control" in Donald Black (ed.), *Toward a General Theory of Social Control* (New York: Academic Press, 1984) at 45 ("It is as if people had quarreled for years about whether the difference between "hot" and "cold" lay at the freezing point of water, at body temperature, or at the boiling point and then realized that a single dimension of continuous variation underlies the contending positions").

[3] Provinces have concurrent jurisdiction over immigration, subject to the doctrine of federal paramountcy: *Constitutional Act, 1867* (UK) 20 & 31 Vict, c 3, s 95, reprinted in RSC 1985, app II, no 5.

[4] Starting in 1971, a series of agreements have been concluded between the federal government and Québec that grant the province greater authority over migration to the province. See Government of Canada, *Canada-Québec Accord Relating to Immigration and Temporary Admission of Aliens* (5 February 1991), preamble ("An objective of this Accord is, among other things, the preservation of Québec's demographic importance within Canada and the integration of immigrants to that province in a manner that respects the distinct identity of Québec"); *Loi sur l'immigration au Québec*, CQLR, c I-0.2.1.

[5] While the federal government has a range of economic streams of migration, including for both temporary and permanent migrants, provinces and territories are permitted under federal regulations to negotiate agreements with the federal government that allow them to establish their own immigration programs. Most have negotiated agreements to establish Provincial Nominee Programs (PNPs), which are independent of federal immigration programs and permit skilled, semi-skilled, and low-skilled workers to apply to fill provincial employment needs. Provinces with PNPs are also able to send "notifications of interest" to individuals who are applying through federal economic migrant categories. See *Immigration and Refugee Protection and Regulations*, SOR/2002-27, s 87 [*IRPR*]. See also Sasha Baglay, "Provincial Nominee Programs: A Note on Policy Implications and Future Research Directions" (2012) 13:1 J Intl Migration & Integration 121; Asha Kaushal, "Do the Means Change the Ends? Express Entry and

authority to control entry into Canada.[6] All of this suggests that while immigration and refugee law trade in varying degrees in notions of cultural pluralism, they do not—some would say cannot—accommodate legal pluralism simply because it is *solely* the role of state law, and not some other normative order, to delineate the terms of entrance into and membership in Canada.

Given this understanding, there is little room for non-state legal orders to exert influence in Canadian migration law. Yet it may be that there both is and ought to be a space for legal pluralism to operate in migration law. Migration law is about legal status, but it is also about the regulation of cultural pluralism. Liberal and open migration regimes can diversify the demographics of a state by inviting and including newcomers in greater numbers from a greater number of places around the world. Closed systems will tend to welcome fewer people from fewer places. One will lend itself to greater cultural pluralism—to greater diversity of *identity* as it is currently and popularly understood—and the other will not. With cultural pluralism, however, comes some need for legal pluralism. Different societies will have different understandings of relationships of belonging—to family, to fellow Canadians, to the state itself—that will themselves be conditioned by local normative orders that may well be distinct from Canadian legal norms. Understanding how Canadian migration law can account for these differential understandings (and if it does account for them at all) is thus a way of understanding the openness and flexibility of the migration system, and why the system is or is not particularly pluralist.

Taking this position of constraint as its starting point, this paper addresses legal pluralism in Canadian immigration and refugee law in three parts. The paper analyzes how different forms of migration law—refugee law, immigration law, and citizenship law—take up the challenge and possibilities of legal pluralism, to consider whether Canadian migration law can or will accommodate legal pluralism. Understanding *why* legal pluralism is visible or accommodated is valuable to understanding the nature of the migration law regime. This paper argues that a close examination of legal pluralism reveals an important relationship between legal and cultural diversity, and that migration law tends to accommodate one more than the other. Relatedly, a study of the dynamics of legal pluralism shows that the relative insularity of state law—its inoculation from legal diversity—protects and projects a

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Economic Immigration in Canada" (2019) 42:1 Dal LJ 83, 119 (warning about the potential divergence between national interests, provincial and territorial interests, and private sector/employer interests).

[6] *Canada (MEI) v Chiarelli*, [1992] 1 SCR 711 at 733, 90 DLR (4th) 289 ("The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country…The distinction between citizens and non-citizens is recognized in the *Charter*. While permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2), only citizens are accorded the right "to enter, remain in and leave Canada" in s. 6(1). Thus, Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada."). See also *Prata v Minister of Manpower and Immigration*, [1976] 1 SCR 376, 52 DLR (3d) 383; *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779, 84 DLR (4th) 438; *Bensalah v Canada (Minister of Citizenship and Immigration)*, [1999] 173 FTR 73, 1999 CanLII 8562; *Gill v Canada (Minister of Citizenship and Immigration)*, [1999] 173 FTR 183, 1999 CanLII 8561 (FC); *Medovarski v Canada (MCI)*, 2005 SCC 51; *Haj Khalil v Canada*, 2007 FC 923.

specific Canadian identity that is not strictly legal. In this way, the contours of legal pluralism reflect the inclusion (and exclusion) of specific communities as legal agents because their legal orders or rules are (or are not) accommodated within the state's legal system. Mapping legal pluralism in migration law thus illustrates surprising ways in which minority groups may be able to obtain substantive equality under the law, and, as is a point of emphasis in this article, how that equality is denied through the treatment of pluralism. Thus, while one might not expect to find much pluralism, studying the ways in which pluralism is restricted nonetheless shines important light on the design and goals of Canadian migration law.

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Addressing this requires some basic understanding of legal pluralism as a field of study concerned with fundamental questions about the nature of law. Core to the very idea of legal pluralism is that the answer to the permanently vexing question of "what is law?" is "more than you think."[7] In so far as that answer is addressed to a positivist tradition that sees the state as the only authoritative source of law,[8] it remains as complete a response as necessary by avoiding the interminable difficulties of drawing the boundaries between law and non-law.[9] This acknowledges the pervasiveness of alternative, non-state normative orders that for some are at least as binding or obligation-producing as state law.[10] Legal pluralism thus describes situations where there is a multiplicity of normative orders in the same social field.[11] It is aimed primarily at understanding the structure of these overlapping orders and how those structures relate to one another, and secondarily about the content of those orders. Yet it is the very particular content of those orders—and their effect on those who adhere to the rules of those orders—that confirm the nature and structure of those orders.

Religions, Indigenous legal systems, and customary rules have been cited as examples of binding non-state legal orders, and their very nature as non-state law is what suggests the disconnect between legal pluralism and immigration and refugee

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[7] John Griffiths, "What is Legal Pluralism?" (1986) 24 J Leg Pluralism & Unofficial L 1 at 38 ("The idea that the law of the state is law 'properly so called' is a feature of the ideology of legal centralism and has for empirical purposes nothing to be said for it….").

[8] Ronald Dworkin, "The Model of Rules" (1967) 35:1 U Chicago L Rev at 18 (critiquing positivist definitions of law on the basis that "different versions of legal positivism differ chiefly in their description of the fundamental test of pedigree a rule must meet to count as a rule of law" and thus positivist definitions of law invariably collapse into descriptions of moral or political standards).

[9] Brian Tamanaha, "The Folly of the Social Scientific Concept of Legal Pluralism" (1993) 20 JL & Soc'y 192.

[10] See Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999" (2001) 7 J Royal Anthropological Institute 95; John Griffiths, "The Idea of Sociology of Law and its Relation to Law and to Sociology" in *Law and Society*, Michael Freeman, ed (New York: Oxford University Press, 2006).

[11] Merry, *supra* note 1 at 870. See also André-Jean Arnaud, "Legal Pluralism and the Building of Europe" in *Legal Polycentricity: Consequences of Pluralism in Law*, Hanne Petersen & Henrik Zahle, eds (Aldershot: Dartmouth Publishing Co, 1995).

law. Yet pluralism is also identifiable in how life in refugee camps is regulated,[12] how borders are controlled by different states,[13] and how migrant rights can be protected through different regional and international human rights laws.[14] At the same time, immigration and refugee law is about the crossing of international borders, and entry and membership into a particular state, meaning that the state's rules about entry and membership will likely be paramount because of the perceived centrality of such laws to state sovereignty. State legal orders may differ from one another, but alternative legal orders largely do not have a role here because, by definition, they cannot operate in parallel to state law.[15] The Catholic Church may have competing understandings of what it means to be a member or what members are entitled to do, but it cannot negate the decisions of the Canadian state.

Legal pluralism thus identifies and generates a conflict of laws problem that the simple description of pluralism cannot readily resolve.[16] When that conflict arises in respect of a state's sovereign right to decide who to admit into its territory, and on what terms, there is likely to be less conflict because states will simply exclude any alternative consideration or interpretation. This is not to say that it is futile to approach migration law from the lens of legal pluralism. It rather suggests the importance of using this lens, as studying legal pluralism will invariably demand a study of power relationships.[17]

On this understanding, if pluralism matters to Canadian migration law, it is in the state's justification of those laws, and their impacts. Inbound migration has a tendency to increase the diversity of a given population, and the merits or extent of this diversity is the primary mode of studying pluralism in migration; it centers *cultural* pluralism as a focal point of public anxieties about *how many* immigrants from *which places* and of *what backgrounds* and *what will happen to national unity*.[18] As

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[12] Kirsten McConnachie, *Governing Refugees: Justice, Order and Legal Pluralism* (Abingdon, UK: Routledge, 2014).

[13] Galina Cornelisse, "Legal Pluralism in the European Regulation of Border Control: Disassembling, Diffusing, and Legalizing the Power to Exclude" in *Research Handbook on Legal Pluralism and EU Law*, Gareth Davies & Matej Avbelj, eds (Cheltenham, UK: Edward Elgar Publishing, 2018) at 373–91.

[14] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford: Oxford University Press, 2015) at 41–62.

[15] Franz von Benda-Beckmann, "Who's Afraid of Legal Pluralism?" (2002) 47 J Leg Pluralism & Unofficial L 37 (that legal pluralism is concerned with "the frequent existence of parallel or duplicatory legal regulations").

[16] Ralf Michaels, "Global Legal Pluralism and Conflict of Laws" in *The Oxford Handbook of Global Legal Pluralism*, ed by Paul Schiff Berman (Oxford: Oxford University Press, 2020) at 629–30.

[17] Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009) at 118; Anne Griffiths, "Pursuing Legal Pluralism: The Power of Paradigms in a Global World" (2011) 43 J Leg Pluralism & Unofficial L 173 at 194.

[18] See e.g. Sarah V Wayland, "Immigration, Multiculturalism and National Identity in Canada" (1997) 5 Intl J on Group Rights 33; Antoine Bilodeau, Luc Turgeon & Ekrem Karakoç, "Small Worlds of Diversity: Views toward Immigration and Racial Minorities in Canadian Provinces" (2012) 45:3 Can J

part of the attempt to understand how changing patterns of migration may have affected public responsiveness to migration,[19] population diversity has been tracked to varying degrees for at least a century.[20] Yet while migration law is a facilitator of cultural pluralism, it is not necessarily a guarantor of *legal* pluralism because policies of admittance and membership are so closely associated with the sovereign authority of the state. Cultural pluralism's relationship to legal pluralism (and vice-versa) is thus mediated in part by migration law.

Having acknowledged this tripartite relationship, this paper focuses on the presence or absence of legal pluralism in three different spheres of migration law. Studying these areas involves analyzing the interaction of different legal systems and normative orders with Canadian law. The paper assesses domestic Canadian law's interaction with the domestic legal regimes of other jurisdictions (immigration law), international law's interaction with domestic Canadian law (refugee law), and, finally to Canadian state law's interaction with non-state legal orders in Canada (citizenship law). These boundaries are not neat and clean; as will be shown, migration law is routinely interacting with external and internal legal orders, even if indirectly.

The first substantive section of the paper explores the atomized spaces at which Canadian immigration law has approached pluralism. While Canadian migration law is itself unlikely to be deeply pluralist, it is continually faced with individual claims that require Canadian decision-makers to assess and at times recognize both non-Canadian state legal orders and non-Canadian non-*state* legal orders. The (non-)recognition of Islamic guardian relationships in the immigration context are areas where governments, courts and administrative decision-makers have had to confront law beyond Canada and resisted accommodation or negotiation with those legal systems. The second part shifts from immigration law to refugee law specifically and considers its liminal position as international law that is interpreted domestically. That position invites a degree of pluralism, which this part examines by addressing the role of the state in interpreting international law, and the focus on security as the overriding policy concern guiding the interpretation and application of international law. By showing how domestic laws formally intersect with the security

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Political Science 579; Garth Stevenson, *Buildings Nations from Diversity: Canadian and American Experience Compared* (Montreal: McGill-Queen's University Press, 2014).

[19] Canada, Department of Justice Canada, Peter S Li, *Cultural Diversity in Canada: The Social Construction of Racial Differences*, (Research Paper), online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rp02_8-dr02_8/index.html> [perma.cc/B48P-GEXA].

[20] *Ibid (*an example of contemporary analysis of such patterns). For early examples, see J H Haslam, "The Canadianization of the Immigrant Settler" (1923) 107 Annals American Academy Political Soc Science 45; Anthony H Richmond, "Immigration and Pluralism in Canada" (1969) 4:1 The Intl Migration Rev 5 at 8–12. Statistics Canada now regularly tracks the evolving ethnic composition of Canada: see e.g. Canada, Statistics Canada, *2021 Census Fact Sheets: Updated content for the 2021 Census of Population: Immigration, ethnocultural diversity and languages in Canada*, (Fact Sheet), (Ottawa: Statistics Canada, July 17, 2020). The Minister for Immigration, Refugees and Citizenship Canada regularly reports on the same: see e.g. Canada, Minister of Immigration, Refugees and Citizenship, *2020 Annual Report to Parliament on Immigration* (Ottawa: Minister of Immigration, Refugees and Citizenship, 2020) at 33.

apparatuses of other foreign states through information-sharing and migrant-management agreements, this part explains how security concerns drive refugee law choices and importantly the discourse around legal pluralism. This suggests that the apparent pluralism of refugee law is sometimes materially undone by an anti-pluralism driven by state policy choices. Something quite distinct happens in other scenarios, where it is state policy to deny the legal pluralism that *does* exist to advance that security agenda. Thus, pluralism is subject to discursive strategizing. The third part considers citizenship law, and specifically the relationship between citizenship and coloniality in Canada. It considers how the special position of various Indigenous groups in relation to mobility and citizenship rights might be evidence of genuinely legally pluralist space. Yet it also resists this point by showing how this complexity is surface level at best. It argues that cultural pluralism is less a propellant of legal pluralism than a victim of its absence. This insight has particular resonance for the colonial-citizenship context, but arguably manifests throughout Canadian migration law.

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While this paper concludes that Canadian migration law is not as legally pluralist as it *could* be, and points to a variety of concerns that follow from this deficiency, it does not argue that more legal pluralism is necessarily a good thing. As Boaventura de Sousa Santos has argued, "there is nothing inherently good, progressive or emancipatory about legal pluralism."[21] The degree of pluralism in a particular social field is merely indicative of the range of normative orders or social control labour happening in that space, rather than an evaluation of the content of those orders or of the outcomes produced by their interaction. To assess the range or depth of pluralism is not to pass a value judgment, but to attempt to understand the factors that shape the relevant legal system, and the impact of the presence or absence of pluralism.

Several conclusions are evident from this brief study of Canadian migration law. First, it suggests that while cultural pluralism is no guarantor of legal pluralism, an absence of legal pluralism can meaningfully limit cultural variety and diversity within a society. As an example, the inability to recognize particular familial relationships which may be uncommon in Canada (or at least uncommon in its lawmaking and governing classes) will discriminate against communities where those relationships are not unusual while also limiting the ability of their members to lay claim to the right to enter and remain in Canada. Second, it shows that even a state legal system that operates in a pluralist fashion by recognizing the validity of two different European legal systems—the common and civil law traditions—can struggle to account for non-European systems as legal. This incapacity or unwillingness carves out certain societies and individuals as genuine norm-producing agents and excludes others. Line-drawing of this sort has particular significance for Indigenous communities in Canada, whose presence pre-dates the arrival of European colonizers and their legal systems, and for whom the revitalization of Indigenous legal orders is

[21] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge: Cambridge University Press, 2002) at 89 ("there is nothing inherently good, progressive, or emancipatory about Legal Pluralism").

seen as essential to the reconciliation process. Finally, the reticence with which the Canadian legal system approaches non-state legal orders or even the legal orders of other states (such as some Muslim-majority states) suggests a wariness that is intensely protective of the state legal system but also conditioned to perceive alternative legal orders and arrangements as existential threats to the idea of Canadian identity. Mapping the manifestations of legal pluralism and parsing the rhetoric around it illustrates the significance of understanding the mechanisms of norm development in migration law, their relationship to larger debates in Canadian society, and the anxieties that continue to condition the development of the law.

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## II. Islamic Personal Law and Adoption from Muslim-Majority States

As a first step in attempting to understand how Canadian migration law grapples with legal pluralism, this section engages with the central question of familial relationships. Like migration law itself, questions of kinship are questions about membership and belonging more broadly.[22] This section examines the Canadian legal system's struggles to identify which declared members of a family ought to be considered family members for the purposes of immigration law by focusing on the issue of overseas adoptions. Vigilance around overseas adoptions is necessary because it presents risks of child exploitation and human trafficking.[23] But this vigilance can lead to the denial of genuine relationships that are suspicious not because they are exploitative but because they are novel to the Canadian legal system. Studying pluralism through an examination of parent–child relationships is a fruitful enquiry for two reasons. It first exposes the inability or unwillingness of migration law to incorporate alternative forms of parent–child relationships found in non-Canadian legal systems. As well, it points to the material discrepancies between what is legally recognized as a valid immigration-based parent–child relationship and what is legally recognized as a valid exclusively domestic parent–child relationship. Studying these dynamics of exclusion prompts further enquiry into why such distinctions are drawn in migration law, and the relationship between cultural and legal pluralism.

One way in which Canadian migration law fails to give effect to pluralist legal orders is through the prohibition of adoptions from children from states who

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[22] See Michael Walzer, *Spheres of Justice* (Boston: Basic Books, 1983) at 35–42 (analogizing political membership to membership in neighbourhoods, clubs, and families).

[23] Judith L Gibbons, "Human Trafficking and Intercountry Adoption" (2017) 40:1-2 Women & Therapy 170 (arguing that there are eight parallels between patterns of intercountry adoption and human trafficking); Erin Siegal McIntyre, "Saviours, Scandal, and Representation: Dominant Media Narratives Around Human Trafficking in International Adoption" (2018) 4:1 J Human Trafficking 92 (describing bribery and corruption in intercountry adoptions in Central and South America); Anqi Shen, Georgios A Antonopoulos & Georgious Papanicolaou, "China's stolen children: Internal child trafficking in the People's Republic of China" (2013) 16 Trends in Organized Crime 3; Zhongliang Huang & Wenguo Weng, "Analysis on geographical migration networks of child trafficking crime for illegal adoption from 2008-2017 in China" (2019) 528 Physica A 121404; Andréa Cardarello, "The Movement of the Mothers of the Courthouse Square: "Legal Child Trafficking," Adoption and Poverty in Brazil" (2009) 14:1 J Latin American & Caribbean Anthropology 140 (all describing how domestic child trafficking can fuel both domestic and intercountry adoptions).

apply Islamic family or personal law. These restrictions flow from the Canadian state's interpretation of international law, *shari'a* law, and foreign state law. Canadian citizens are facing increasing obstacles in sponsoring children who are protected under what *shari'a* law describes as *kafala* because that protection is not perfectly coextensive with adoption, even though it is otherwise internationally recognized as an alternative form of care.[24] The abrupt elimination of such adoptions has only compounded the problem.

From the state's perspective, Canadian law cannot recognize adoptions that commence in the form of Islamic guardianship known as *kafala*.[25] Decade-long restrictions covertly imposed by federal and provincial governments indicate the suspicions and fears that animate the anti-pluralism of migration law. They show that Canadian migration law tends to resolve any potential conflict of laws or imperfect coordination of legal systems by either simply ignoring the alien norms or requiring that they be substituted with Canadian state norms. Inflexibility and the interpretative hegemony imposed by the Canadian state in this area stands in sharp contrast to that of other Western states dealing with adoptions from Muslim-majority states.

It is helpful to understand the broad strokes of the adoption process as integrated into the migration system, as well as the impact of the prohibition. For the purposes of migration to Canada, adoptions have to be processed at both the federal and sub-federal level. Key to this approach is the need for the adoption to be in conformity with the law in the home state and Canada, as well as the constitutional division of powers that assigns jurisdiction over Canadian migration broadly to the federal government, but jurisdiction over family matters to provincial governments.[26] The federal government designs general rules for international adoptions, including identifying states from which adoptions are prohibited or suspended.[27] Provincial and territorial governments are important because they regulate the adoption process in the

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[24] See e.g. *Convention on the Rights of the Child* (1989), 1577 UNTS 3, art 20 (describing *kafala*, along with adoption and foster placement, as "alternative care" for children "deprived of [their] family environment"); *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (1996), 2204 UNTS 503, art 3(e); *Guidelines for the Alternative Care of Children*, GA Res 142, 64th Sess, UN Doc A/Res/64/142 (2010) at para 161 (describing *kafala* as a "stable and definitive" solution for children).

[25] *Kafala* relationships do not grant the same entitlements to children as adoptions, which has been interpreted as violating the legal requirement in cases of family migration and sponsorship that there be a parent-child relationship: *IRPR*, *supra* note 5, s 3(2). See e.g. British Columbia, Ministry of Children and Family Development, Intercountry Adoption Alerts: DRC, Russia, Pakistan, Nepal, Liberia (Alert), (May 2019), online: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/births-and-adoptions/adoption/intercountry-adoption/ica_alerts_non-hague_countries.pdf> [perma.cc/983N-STAN].

[26] On the need for compliance with provincial, national, foreign, and international law, see *IRPR*, *supra* note 5, ss 117(3)(d)–(g).

[27] Immigration, Refugees and Citizenship Canada, "Countries with suspensions or restrictions on international adoptions (29 April 2022), online: <www.canada.ca/en/immigration-refugees-citizenship/services/canadians/adopt-child-abroad/restrictions.html> [perma.cc/56KM-YGW6].

jurisdiction where the parents and adopted child are to reside.[28] If either level of government prohibits or disapproves of the proposed adoption, it will fail. While this issue has come to light largely because it limits the ability of Canadian citizen parents to adopt overseas non-Canadian Muslim children who are affected by Islamic personal law, it also impacts those families with non-biological children that are applying to immigrate to Canada and who will struggle to have those relationships recognized. The potential scope of the ban is both extensive and anomalous.

*Kafala* is a form of child guardianship developed in Islamic law that places protective obligations on the parents who take in a child in need of protection, but does not usually sever the birth parents' relationship with the child.[29] Adoption as defined in Canadian immigration law, however, requires the creation of a legal parent–child relationship.[30] *Kafala* relationships thus do not qualify, which poses a problem for Western legal systems because in places where *kafala* exists, adoption usually does not. If a child in one of those states is to be adopted domestically or internationally, it usually must be through the guardianship of *kafala* rather than through formal adoption. That being said, conceptual disagreement on child entitlements need not be an obstacle to adoptions in Western states. In the United States, United Kingdom, and Australia, overseas adoptions of children through *kafala* relationships continue, as they did in Canada until 2013.

Canada first introduced a ban on adoptions that turn on *kafala* in 2013, in respect of adoptions from Pakistan.[31] This ban was later extended to all Muslim countries with *kafala* and no adoption system, although the same formal notice that accompanied the Pakistan ban was not made.[32] Instead, the federal government engaged in discussion with provincial and territorial governments to confirm that no *kafala*-based adoptions would be provincially recognized.[33] Confusion followed. The lack of notice left putative families bewildered and adrift, with no clear information

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[28] As a result of provincial jurisdiction over adoption, Canadians who seek to adopt overseas must obtain a letter of non-objection from "the competent authority of the child's province of intended destination": *IRPR*, *supra* note 5, s 117(3)(e).

[29] Karen Smith Rotabi et al, "The Care of Orphaned and Vulnerable Children in Islam: Exploring Kafala with Unaccompanied Refugee Minors in the United States" (2017) 2 J Human Rights & Social Work 16 at 17.

[30] *IRPR*, *supra* note 5, s 3(2).

[31] Immigration, Refugees and Citizenship Canada, Archived notice - Adoptions from Pakistan (2 July 2013), online: <www.canada.ca/en/immigration> [perma.cc/X4QA-FRL4]; Nicolas Keung, "Canada's ban on Pakistani adoptions baffles parents, clerics", *Toronto Star* (5 August 2013), online: <https://www.thestar.com/news/canada/2013/08/05/canadas_ban_on_pakistani_adoptions_baffles_parents_clerics.html> [perma.cc/S2ZP-AYCD].

[32] Shanifa Nasser, "How Canada barred adoptions from Muslim countries - and used Shariah law to do it", *CBC News* (29 October 2018), online: <https://www.cbc.ca/news/canada/adoptions-kafalah-pakistan-canada-ban-muslim-1.4855852> [perma.cc/D9G5-GWT5] [Nasser, "Canada barred adoptions"].

[33] Shanifa Nasser, "Canadians adopting from Muslim counties caught in legal limbo", *CBC News* (1 June 2015), online: <https://www.cbc.ca/news/canada/canadians-adopting-from-muslim-countries-caught-in-legal-limbo-1.3089651> [perma.cc/U5KA-GAEY] [Nasser, "Adopting from Muslin countries"].

from any branch of government.[34] Some families moved to the countries where their adoptive children resided, rather than endure years more uncertainty and separation. Investigative reporters suggest that alongside the formal legal issue of discordance between *kafala* and adoption, the Canadian government wanted to counter an unspecified terrorist threat in an unspecified manner by banning the adoptions,[35] as well as respond to Pakistan's concerns about human smuggling.[36] At the same time, Pakistan has repeatedly insisted that adoptions are permitted under domestic Pakistani law, that *kafala* is recognized as a valid mode of child protection under international law, and that there is no objection *ab initio* to *kafala* relationships that become adoptions in Canadian law.[37]

Yet while *kafala* adoptions continue in other countries, Canada's review of the ban has led to no change. In fact, the prohibition has expanded beyond Pakistan and beyond the Canadian government's stated concerns about human trafficking. The federal government has suspended processing all *kafala*-based immigration applications, and provincial and territorial governments do not recognize them either.[38] In explaining their non-recognition, these governments all rely on two points. First, the fact that most Muslim majority states (Turkey being one significant exception) have not ratified the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*[39] ("Hague Convention on Intercountry Adoption"), which does not recognize *kafala*. Yet some of those states, including Egypt, Pakistan and Lebanon nonetheless do permit adoptions for non-Muslims,[40] suggesting that emphasis on Hague Convention ratification oversimplifies the issue. Moreover, as noted above, other international agreements do recognize the legitimacy of both *kafala* and adoption as ways of ensuring care for a child without a family.

The second reason for non-recognition is in fact an engagement with a different legal order. Contrary to the interpretation of Pakistani officials and jurists, *kafala* and adoption are not equivalent or compatible. In other words, those who practice *shari'a* law are misinterpreting it. At a high level of generality, this assumed

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[34] See Keung, *supra* note 31; Nasser, "Adopting from Muslin countries", *supra* note 33; Nasser, "Canada barred adoptions", *supra* note 32; Brian Hill & Megan Robinson, "Canada's ban on adoptions unjustified, Pakistan says; leaves family desperate for change", *Global News* (9 August 2019), online: <https://globalnews.ca/news/5731362/canadas-ban-adoptions-pakistan-family/> [perma.cc/UB6L-HY3Z].

[35] Nasser, "Canada barred adoptions", *supra* note 32.

[36] Hill and Robinson, *supra* note 34.

[37] *Ibid.*

[38] See e.g. Secrétariat à la adoption internationale Québec, Countries that prohibit adoption, online: <adoption.gouv.qc.ca/en_kafala-et-adoption> [perma.cc/89BX-HKD3].

[39] *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 29 May 1993, 1870 UNTS 167, 32 ILM 1134 (entered into force 1 May 1995).

[40] Usang M Assim & Julia Sloth-Nielsen, "Islamic *kafalah* as an alternative care option for children deprived of a family environment" (2014) 14 African Human Rights LJ 322 at 337.

incompatibility between *kafala* and adoption thus cuts both ways.[41] *Kafala* may be unacceptable to systems that prefer adoption, but adoption is also anathema to the idea of *kafala* because it generally requires the severance of the birth parents' rights over the child, because of the severance of kinship ties through the changing of the child's name (and at some points the issuance of new birth certificates entirely), and because of the erasure of the child's right to inheritance from the birth family.[42] Yet the inherent plurality of *shari'a* law significantly disturbs this conclusion,[43] which is the same one that has otherwise animated the total Canadian ban on *kafala*-based adoptions. Muslim-majority states assess the compatibility of *kafala* with adoption in a variety of ways, including internally.[44] According to Eadie, only one of four national level approaches involves strict prohibition; of the remainder, all three are relatively compatible with the notion of an "open" adoption as currently predominates in Canada, in which an adoptee is able to discover her birth identity.[45] As well, there is a transnational Islamic jurisprudence that suggests the compatibility of adoption and *kafala* rooted in the best interests of the child.[46] Pakistani practices suggest compatibility, with jurisprudence that allows for permanent guardianship, the routine creation of contractual relationships with birth parents that confirm the waiver of parental rights, the use of care plans and home studies to evaluate the suitability of proposed guardians, and the judicial recognition of the permissibility of overseas relocation for children.[47] Assertions to the contrary, by Canadian officials or otherwise, reflect "the perceived gap between Islamic and international law" that ignores the similarities between adoption and *kafala*; the latter ought to be understood as "a pathway toward adoption as understood in the West."[48]

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[41] Nermeen Mouftah, "The Muslim orphan paradox: Muslim Americans negotiating the Islamic law of adoption" (2020) 14 Contemporary Islam 207 at 218–19.

[42] Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law, Policy and* Practice, 2nd ed (Dordrecht: Springer, 2015) at 605.

[43] *Ibid* at 604; Shaheen Sardar Ali, "A Step Too Far? The Journey from "Biological" to "Societal" Filiation in the Child's Right to Name and Identity in Islamic and International Law" (2019) 34:3 JL & Religion 383 at 384, 398–402; Kieran Mclean Eadie, "The application of *kafala* in the West" in Nadirsyah Hosen, ed, *Research Handbook on Islamic Law and Society* (Northampton, MA: Edward Elgar, 2018) 48.

[44] Jamila Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco* (Lanham, MD: Rowman & Littlefield, 2002); Eadie, *supra* note 43 at 56 (adapting and altering Bargach's categories).

[45] Eadie, *supra* note 43 at 67. For evidence that closed adoption systems limit the ability of Muslim adoptions, see Amira Daher, Yaakov Rosenfeld & Lital Keinan-Boker, "Adoption Law, Dilemmas, Attitudes and Barriers to Adoption Among Infertility Patients in Israel" (2015) 34:1 Med & L 55.

[46] See Mouftah, *supra* note 41 at 219–20; Muslim Women's Shura Council, "Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child", *Report of the American Society for Muslim Advancement* (2011), online: <https://bettercarenetwork.org/library/the-continuum-of-care/adoption-and-kafala/adoption-and-the-care-of-orphan-children-islam-and-the-best-interests-of-the-child> [perma.cc/5SQH-533W]; Faisal Kutty, "Islamic Adoptions and the Best Interests of the Child", *Islamic Horizons* (2015), 38 online: <https://issuu.com/isnacreative/docs/ih_jan-feb_15> [perma.cc/D2ZZ-NDGS].

[47] Eadie, *supra* note 43 at 64–67.

[48] Ali, *supra* note 43 at 387–88.

Canada's dismissal of *kafala* sharply differs from that of other Western states that have developed methods to integrate the *kafala* system into the inter-country adoption regime. Different regimes exist for reconciling *kafala* with adoption, *inter alia*, in the United States,[49] United Kingdom,[50] and Australia.[51] In the European Union, various civil law states have developed mechanisms to recognize the essential parallels between *kafala* and adoption, even if the two are not perfect. This has been crystallized into European Court of Human Rights (ECtHR) decisions regarding *kafala* and the right to family life in France[52] and Belgium.[53] The Court of Justice of the European Union similarly confirmed that children in a *kafala* relationship with European Union (EU) citizens are granted the same mobility rights as other children of EU citizens even though they are not "direct descendants" for the purposes of the Citizens' Directive that confirms the right to free movement within the EU.[54] Canada thus occupies a unique space of intransigence as compared to both other Western states as well as those Muslim-majority states which have reconciled *kafala* and adoption.

While there is no perfect analogy between adoption and *kafala*, solutions can certainly be negotiated between and within states by identifying the common aspirations of both *kafala* and open adoptions.[55] What is telling in the Canadian context is that in spite of the provincial and federal governmental implications that it is Muslim-majority states that are being inherently inflexible by generally not

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[49] In order to adopt from Pakistan, parents must obtain legal guardianship in Pakistan, then demonstrate that the child is an orphan in accordance with US law. See US Department of State Bureau of Consular Affairs, Pakistan - Intercountry Adoption, online: <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Pakistan.html> [perma.cc/9F2H-44KZ]. Similar provisions exist with respect to adoptions of children in other Muslim-majority states that have not ratified the *Hague Convention on Intercountry Adoption*.

[50] As in the United States, direct intercountry adoption is not available, but parents who obtain guardianship in Pakistan may return to the UK and have their adoption formalized in spite of the fact of non-ratification of the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, provided that certain other regulations are complied with upon return to the UK. See *Adoptions with a Foreign Element Regulations 2005* (UK), SI 2005 No. 392, Regs 23–27.

[51] Ann Black, "Can there be a compromise? Australia's confusion regarding shari'a family law" in Elisa Giunchi, ed, *Muslim Family Law in Western Courts*, 1st ed (London: Routledge, 2014) 149 at 165; Eadie, *supra* note 43 at 51.

[52] See *Harroudj v France*, App No 43631/09 (4 October 2012), where the European Court of Human Rights upheld a decision of domestic French courts to deny a woman the ability to adopt a child in her care under the Algerian *kafala* system on the basis that *kafala* and adoption in France offered substantively the same rights, and there was no denial of a right to family life under Art 8 of the European Convention on Human Rights. In a survey of national treatments of *kafala*, the Court noted that at least 9 European states presented no fundamental legal objection to the recognition of *kafala*.

[53] *Chbihi Loudoudi and others v Belgium*, (2010) 52265/10 ECtHR, [2014] ECHR 1393 (that Art 8 of the European Convention on the right to family life depended on "de facto family ties", and that relationships based on *kafala* are such ties even if Belgium does not equate adoption and *kafala*).

[54] *SM v Entry Clearance Officer, UK Visa Section*, (C-129/18, EU:C:2019:140).

[55] Eadie, *supra* note 43 at 67.

recognizing adoption or signing the *Hague Convention on Intercountry Adoption*,[56] the reality is that many Muslim states have developed nuanced approaches to guardianship and child protection that significantly bridge the gap to open adoptions. What is missing is a comparable willingness on the part of Canada to engage in the legal negotiation inherent to existing in a legally pluralist space.[57]

The resistance to working through the complexity of *shari'a* in the immigration context reflects its treatment in domestic Canadian family and citizenship law. Non-cooperation with *kafala* in respect of immigration, a nuanced yet integral part of the personal law of members of the world's second largest religion, mirrors domestic suspicion of *shari'a* law. In particular, the negation of *kafala* as a valid option for Canadian citizens reflects the larger negation or nullification of Islamic law in the personal lives of Canadians. Quebec's 2019 ban on religious symbols[58] for various government employees is another such attack on Muslim personal law. While the ban is framed in neutral terms, public support is largely animated by Islamophobia.[59] The 2019 ban is paired with 2017's Bill 62, which asserts the religious neutrality of the state and obligates members of the public to uncover their faces while receiving specific government services.[60] Again, while framed as non-discriminatory, Bill 62 makes particular allowance for "emblematic and toponymic elements of Quebec's cultural heritage that testify to its history",[61] clearly suggesting that symbols of Catholicism will be unaffected by the Act. Both the 2017 and 2019 laws clearly target the head and face coverings worn out of religious obligation by some Muslim women, many of whom serve as public school teachers in the province, with the 2017 law making education a special point of emphasis.[62] These acts were accompanied by new provincial citizenship guides that explained to immigrants and refugees that Quebec

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[56] US Department of State Bureau of Consular Affairs, *supra* note 49.

[57] An option was proposed as early as 1994. See Syed Mumtaz Ali, "Establishing guardianship: The Islamic alternative to family adoption in the Canadian context" (1994) 14 Institute Muslim Minority Affairs 202.

[58] *An Act respecting the laicity of the State*, SQ 2019, c 12.

[59] Jason Magder, "A new poll shows support for Bill 21 is built on anti-Islam sentiment", *Montreal Gazette* (18 May 2019) online: <https://montrealgazette.com/news/local-news/a-new-poll-shows-support-for-bill-21-is-built-on-anti-islam-sentiment> [perma.cc/9HEP-8XBC].

[60] *An Act to foster adherence to state religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies*, SQ 2017, c 19, s1.

[61] *Ibid*.

[62] *Ibid*. See also the factum of the Canadian Civil Liberties Association in its challenge to the constitutionality of the laws. *Hak et al c. Québec (PG)*, No. 500-09-0294546-215 (QCCA) (2 décembre 2021) (Mémoire des appellants at para 85) *("*Encore plus troublante, la preuve présentée au procès confirme que la politique d'exclusion de la Loi 21 s'applique d'une façon disproportionnée aux minorités religieuses. Toute personne qui a perdu son emploi en raison de la Loi 21 auprès d'un centre de service, scolaire au Québec était une femme musulmane. Et les experts s'entendent sur le fait que l'interdiction du port de signes religieux affecte davantage les minorités religieuses." [citations omitted]). The Act also made consequential amendments to the *Educational Childcare Act*, RSQ 2005, c 47, S-4.1.1.

had its own distinct view of religious neutrality, unironically pointing to the pluralist justification for its anti-pluralist approach to Muslims.[63]

Quebec's legislative acts will be familiar to those who followed the evolution of family law in Ontario some fifteen years earlier. Prior to Quebec's religious neutrality acts, Ontario moved to eliminate access to non-state law in family law disputes. Until 2005, the province's arbitration act permitted citizens to agree to settle family disputes, including inheritance, through forms of law other than state law.[64] Decisions made under religious or non-state family law were nonetheless subject to oversight by Canadian courts, which had the jurisdiction to vary the decisions in order to ensure that they did not fundamentally deviate from the requirements of state family law.[65] Yet when it became apparent that Muslim families were relying on certain provisions of *shari'a* law under the Act, the provincial government moved swiftly to negate the ability to rely on religious family law.[66] As with the Quebec laws, public support here was galvanized by Islamophobia, and in particular the assertion by one retired Muslim lawyer that the *Arbitration Act* could give effect to *shari'a* more broadly. While the statement emphasized that such arbitrations would be subject to judicial oversight, the self-aggrandizing nature of the announcement and the overbroad assertions mobilized resistance based on misunderstandings and objections to Islamic law.[67] In spite of commissioning an extensive set of consultations and analysis of the provision that concluded there was no evidence of systemic discrimination against women,[68] and that the practice could continue with some enhanced oversight without risking either the grand fantasy of total *shari'a* or the more tangible possibility of

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[63] Gouvernement du Québec, Settle and Integrate in Québec, online: <https://www.quebec.ca/en/immigration/settle-and-integrate-in-quebec> [perma.cc/M4AV-M2D2].

[64] *Arbitration Act,* SO 1991, c 17. While the Act did not specifically name religious laws, it permitted them to be relied upon by the parties by not specifically excluding them: Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Ministry of the Attorney General, 2004), at 12, online: <https://wayback.archive-it.org/16312/20210402062351/http:/www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.html> [perma.cc/3M84-ACK7] [Boyd, "Protecting Choice"].

[65] While there was no clear provision describing the problem of deviation from family law norms, s 50(7) of the *Arbitration Act* permitted courts to refuse to enforce any order they would not have had jurisdiction to make or would not have granted, providing an indirect route to give effect to state family law. As Boyd describes, many courts used this jurisdictional provision to avoid enforcement: *Ibid* at 16.

[66] The *Family Statute Law Amendment Act*, SO 2006, c 1, *inter alia*, did the following: (i) eliminated the possibility of the parties choosing what rules to apply, (ii) required that family arbitration be conducted in accordance with the substantive law of Ontario or another Canadian jurisdiction; (iii) and, declared that any decisions made in violation of these requirements were not considered to be family arbitrations and would have no legal effect; and, (iv) declared the supremacy of the *Family Law Act* in the event of any conflicts between it and the *Arbitration Act*. See *Arbitration Act, supra* note 64 at ss 2.1–2.2, 32(3)–(4).

[67] Boyd, "Protecting Choice", *supra* note 64 at 4–5; Marion Boyd, "Religion-Based Alternative Dispute Resolution: A Challenge to Multiculturalism" in Keith Banting, Thomas J Courchene & F Leslie Seidle eds, *Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2007) 468 [Boyd, "Belonging?"].

[68] Boyd, "Protecting Choice", *supra* note 64 at 133.

gender inequity in family law decision making,[69] the government nonetheless eliminated the possibility entirely by granting no legal status to religious principles.[70] Again, the negotiated solution was deliberately avoided.

In each of these three spheres—federal immigration law, Quebec public law, and Ontario family law—the fear of Islam and *shari'a* as competing normative orders led to strict and unqualified legal responses that left virtually no room for the expression of Islamic legal concepts. In each case, there was clear evidence of a lack of engagement with the alternative legal norms. Instead, Islamic legal norms were only acceptable if they strictly complied with the state's legal norms; otherwise, the blunt tools of effective non-recognition were employed.

An unwillingness or inability to work in a legally pluralist fashion has secondary effects. Muslim Canadians who want to adopt children from the Muslim-majority states they have ancestral roots in or ties to, are prohibited from doing so. Discrimination thus manifests in two ways: children in those states are simply not able to be adopted in Canada, and Muslim Canadian citizens are unfairly treated within the adoption regime. Adoptions now generally are open, and part of deciding the suitability of an adoptive placement rests on the ability of the adoptive family to nurture the cultural background of the adoptee. By prohibiting adoptions of overseas Muslim children, Canadian Muslim parents are prejudiced in their ability to adopt because the state does not allow them to adopt the children who, due to their language, culture, and religion, would otherwise be the best matches for them. By denying immigrants the ability to develop the same kind of complex or non-traditional parent–child relationships that are permitted under domestic law, immigrant families are similarly prejudiced by migration law. In this respect, anti-pluralism operates in migration law to externally project the internalized biases of the domestic legal system. It also compounds the impact of such laws on marginalized communities, reducing their ability to adopt is another way of producing a diminished citizenship status. Anti-pluralism in a legal context can thus also manifest as anti-pluralism in a cultural context, reinforcing both the relationship between the two and the need to hold them apart from one another.

## III. Refugee Law and the Policy-Based Denial of Pluralism

Migration law's relationship to legal pluralism is highly conditioned by its connection to state sovereignty, and the right to control who enters a state and on what terms. On its face, refugee law ought to be subject to a similar analysis, given that it also centers on a state's right to determine who is allowed to access the state and its asylum system. That right is inherent to all states but is also mediated by a variety of international law rules and documents that guide, without limiting, the process by which states make such determinations. This flexibility allows for states to develop different domestic legal approaches to refugees while still conforming to the general requirements of

[69] *Ibid* at 133–42.

[70] Boyd, "Belonging?", *supra* note 67 at 472 (describing the decision as "without warning").

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international law. This section explores the relationship between this legal pluralism that refugee law both contemplates and permits,[71] and the tendency of the Canadian state to downplay legal pluralism in service of its goal of limiting refugee claims.

While there is a great deal of domestic law interpreting and applying refugee law, its core substance is rooted in two foundational international agreements, opening the door for the interaction between two different legal systems: one domestic, and one international. As well, other international treaties and jurisprudence continue to be meaningful tools for understanding refugee law domestically, leading to the further interaction between domestic law and other international laws. Finally, each sovereign state will also interpret and apply the international obligations in slightly or substantially different manners, suggesting a pluralism of state laws in relation to the overarching international law. At the same time, state policies have both created areas of convergence and homogeneity that are centered around common concerns among states and denied the significance of legal pluralism where it otherwise seems to exist.

Refugee law flows from obligations that states agree to when they ratify the 1951 *Convention relating to the status of refugees* ("Refugee Convention").[72] Chief among these is the obligation of *non-refoulement* in Article 33 of the Refugee Convention,[73] and which is reproduced in the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[74] States should not return any individual to a place where there is a well-founded fear of persecution on account of that person's race, religion, nationality, political opinion or membership in a particular social group, and the state is unwilling or unable to protect that person.[75] Similarly, the *Convention Against Torture* limits the ability of states to return individuals to a risk of torture. States that have accepted these obligations are not required to accept any refugees but are essentially required to develop a system to identify people genuinely in need of protection to ensure that the *non-refoulement* commitments are not violated.

Aside from offering a definition of who qualifies as a refugee, and who is unable to claim refugee protection,[76] the Refugee Convention does not detail the procedures to be used or how the legal definitions are to be interpreted. States have relative autonomy to craft their own responses in accordance with their national

[71] And, arguably, requires. See Jenny Poon, "A Legal Pluralist Approach to Migration Control: Norm Compliance in a Globalized World" (2020) 34 Emory Intl L Rev Recent Developments 2037 at 2039.

[72] *Convention relating to the status of refugees*, 28 July 1951, 189 UNTS 137 (entered into force on 22 April 1954) [*Refugee Convention*].

[73] *Ibid*.

[74] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) [*Convention Against Torture*].

[75] This is the combined effect of Art 1 and Art 33 of the *Refugee Convention*, *supra* note 72.

[76] While people who are fleeing torture do not necessarily satisfy the definition of a refugee, they are offered equivalent protection in Canada and subject to effectively the same status determination processes.

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interpretations of these international obligations. On its face then, this structure encourages legal pluralism. It establishes an overarching framework in the form of the Refugee Convention but allows crucial legal decisions about how to implement and interpret the treaty to be made by national legal systems. In this form of umbrella pluralism,[77] a state is granted a great deal of latitude to develop independent solutions that fit the specific needs and understandings of that state. Thus "a refugee in Canada may not be a refugee in the United States, and vice versa."[78] Yet it is important to understand that in respect of refugees, there is an understandable degree of substantive convergence but also an ongoing desire to *assert convergence* for the specific purpose of excluding asylum-seekers from the refugee protection system. In other words, refugee law is not necessarily *substantively* homogenous, but states nonetheless have an interest in denying the degree of pluralism that may exist.

As most states do not accept resettled refugees in any meaningful way,[79] their primary concern is dealing with asylum-seekers: those foreigners who arrive uninvited and, immediately or after some delay,[80] make a refugee claim. While Canada's laws in this regard are not perfectly duplicative of any other state, there is much conceptual overlap, reliance on comparable legal and policy instruments and, at times, integration between the refugee regimes of many Western states. All of these states recognize that as there is no obligation to accept any resettled refugees, they ought to pay particular attention to stopping asylum-seekers—those refugee claimants who show up at the border unannounced and eliminate international agencies such as the UN High Commission for Refugees as an interloper by making their pleas for protection directly to the state. States are developing convergent and at times coordinated legal responses to this common concern.

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[77] In which an international law provides general conditions by which domestic law should operate, while not requiring perfect homogeneity between different domestic systems. See Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007) at 187–89 (discussion of "interpretive guidelines" in respect of pluralism in international criminal law).

[78] Anthony M North & Joyce Chia, "Towards convergence in the interpretation of the Refugee Convention: A proposal for the establishment of an International Judicial Commission for Refugees" in James C Simeon, ed, *The UNHCR and the Supervision of International Refugee Law* (Cambridge: Cambridge University Press, 2013), 214.

[79] See UNHCR, "Projected Global Resettlement Needs 2018" (9 June 2017), online (pdf): *The UN Human Rights Agency* <https://www.unhcr.org/protection/resettlement/593a88f27/unhcr-projected-global-resettlement-needs-2018.html> [perma.cc/P4BU-7FHG] (In 2016, the UN High Commission for Refugees stated that it had a "20-year high" in terms of successfully resettling refugees. That year, 125,800 refugees (of an estimated 1.19 million in need of resettlement) were resettled across 37 states); UNHCR, "Projected Global Resettlement Needs 2022" (23 June 2021), online (pdf): *The UN Human Rights Agency* <https://www.unhcr.org/protection/resettlement/60d320a64/projected-global-resettlement-needs-2022-pdf.html> [perma.cc/8E4Y-92M7] (In 2020–a pandemic affected year–22,770 refugees were resettled across 22 states. 1.44 million refugees had previously been identified in need of resettlement). See also Benedicta Solf & Katherine Rehberg, "The Resettlement Gap: A Record Number of Global Refugees, but Few Are Resettled", Migration Policy Institute – Washington, DC (22 October 2021), online: <https://www.migrationpolicy.org/article/refugee-resettlement-gap> [perma.cc/9WY7-EKQU**]**.

[80] Not all asylum-seekers start off as such. They may be classified as a distinct kind of migrant—a tourist, or temporary worker or student—who is then compelled by changed circumstances in their home state to seek reclassification as a refugee.

Canadian refugee law finds its greatest points of convergence with the United States, with whom it shares its only land borders.[81] Both states have been criticized for increasingly harsh policies towards asylum-seekers, with far greater attention given to their respective regimes since the terrorist attacks of September 11, 2001. Yet as Obiora Okafor persuasively argues, the securitization of refugee law in both the United States and Canada is not a post-9/11 trend. Legal changes that followed 9/11 were already moving towards greater restrictions, with 9/11 only confirming rather than introducing the two states' parallel steps towards securitizing refugee law.[82] The securitization process truly began in the 1990s, where Democrat developed legislation expanded the detention and removal regime in US refugee law, while simultaneously limiting access to the refugee system.[83] Canada introduced its new immigration and refugee laws several years later through the *Immigration and Refugee Protection Act* (*IRPA*),[84] which now contains multiple provisions that also expand detention and removal systems in Canada.[85]

One particularly controversial provision contained in the *IRPA* is that of the "safe third country." A safe third country is a state that an asylum-seeker has transited through before arriving at another state's border. Asylum-seekers in this position will generally be barred from making their refugee claim at the new state's border; they will instead be directed back to the "third state" to make their claim. This is an admittedly confusing term, given that in the paradigmatic example, an asylum-seeker will leave their state of nationality or habitual residence (1st state), travel through a "safe" state (2nd state), and then arrive at the border of the state they wish to make the claim (3rd state). Nonetheless, from the point of view of the state receiving the asylum-seeker, this "safe" state is the third one in the relationship. Canada has only designated one such country, the United States, via the Regulations of the *IRPA*[86] and a bilateral

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[81] Along the 49th parallel separating Canada's provinces from the continental United States, and along the 141st meridian west, which defines most of the border separating Alaska from British Columbia and the Yukon Territory.

[82] Obiora Chinedu Okafor, *Refugee Law after 9/11: Sanctuary and Security in Canada and the United States* (Vancouver: UBC Press, 2020) at 9.

[83] See the *Illegal Immigration Reform and Immigration Responsibility Act*, Pub L No 104-208, 110 Stat 3009-546 (1996), and the *Anti-Terrorism and Effective Death Penalty Act*, Pub L No 104-132, 110 Stat 1214 (1996).

[84] *Immigration and Refugee Protection Act*, SC 2001, c 20 [*IRPA*].

[85] Including the Designated Foreign National (DFN) standard, which allows the Minister of Immigration, Refugees and Citizenship to compel the detention of individuals arriving in a designated group, reduces their ability to challenge their detention, and restricts their ability to access other procedural protections or apply for permanent residence even if successful in their asylum claim (*ibid*, ss 20.1, 20.2, 55(3.1)(a)). For an extensive critique of Canada's immigration detention regime see Canada, Immigration and Refugee Board of Canada, *Report of 2017/2018 External Audit (Detention Review)*, (Report), (Ottawa: March 2018), online: <https://irb.gc.ca/en/transparency/reviews-audit-evaluations/Pages/ID-external-audit-1718.aspx> [perma.cc/6P5N-65V3].

[86] IRPR, *supra* note 5, ss 159.3–159.6.

treaty.[87] Although several exceptions to the general rule of returning asylum-seekers to the third state exist in the context of Canada's relationship with the United States,[88] the relationship otherwise follows the general form of safe third country designations by rendering transiting asylum-seekers ineligible to make a refugee claim in Canada.[89] In the specific Canada–US relationship, this ineligibility further only applies when the claimant arrives (i) at the land border between Canada and the United States, that (ii) has an official border crossing point.[90] This limitation stems from a concern that it would otherwise be impossible to determine whether a claimant had traveled from either the US or Canada, and thus impossible to confirm which of the two states was responsible for that asylum claim.[91]

The logic of designating a country as safe does not necessarily require some degree of legal alignment between Canada and the third state. In the case of the *Safe Third Country Agreement* ("*STCA*"), cabinet is required to assess the safe third country's human rights record, both generally as well as specifically in relation to refugee law. States are declared to be safe based on their ratification and implementation of the *Refugee Convention* and the *Convention Against Torture*, as well as their overall human rights record.[92] In other words, what is assessed is the degree of compliance with *international* human rights law rather than domestic Canadian law. While the *Refugee Convention* permits some measure of legal pluralism, the *STCA* requires some level of legal homogeneity. Litigation challenging the designation of the United States as safe on this basis has twice been filed, but substantive successes at trial (determinations that there is *not* sufficient concordance with international human rights law) have both been overturned on appeal on procedural grounds and admonishments about an alleged lack of evidentiary foundation.[93]

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[87] *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, United States and Canada, 5 December 2002, Can TS 2004 No 2 (entered into force 29 December 2004) [STCA].

[88] Most turn on whether the asylum-seeker has a family member in Canada or permission to travel to Canada. See IRPR, *supra* note 5, ss 159.5(a)–(h).

[89] *IRPA*, *supra* note 84, s 101(1)(e).

[90] STCA, *supra* note 87, Art 4(1).

[91] US, *United States and Canada Safe Third Country Agreement: Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary (House of Representatives)*" 107th Cong (16 October 2002), online: <http://commdocs.house.gov/committees/judiciary/hju82363.000/hju82363_0f.htm> [perma.cc/BB5T-3SPW] at 13 [STCA Hearings].

[92] *IRPA*, *supra* note 84, s 102.

[93] See *Canadian Council for Refugees v R*, 2007 FC 1262 [*CCR 2007*]; *Canadian Council for Refugees v Canada*, 2008 FCA 229; *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 770 [*CCR 2020*]; *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2021 FCA 72.

What is revealing about the designation of the United States as a safe third country is not merely that it is substantively contestable, but that it is now desirable to Canada. When the notion of a safe third country was first introduced in Canadian immigration law in the 1980s, Canada decided not to declare the United States a safe third country. This was because of the US practice of denying the right to make a claim to specific applicants from Central America,[94] a practice with disturbing parallels to contemporary US refugee policies that have only recently been revisited: the over policing of migrants in the southern US, mass trials of irregular border crossers, detention of children and separation of families, closing the border specifically to Latin-appearing migrants, and attempting to shift asylum claimant processing to Latin American states.[95] These apparently contradictory approaches can be reconciled by understanding that Canada's support of the *STCA* was rooted in the desire to limit the number of asylum-seekers arriving from the United States at its borders; Canadian cooperation on enhanced post-9/11 border security measures was granted in return for a reduction in the number of asylum seekers arriving in Canada from the United States via the STCA.[96] Once the Agreement was in force, Canada further built on this rationale of limitation by eliminating an exception which exempted from the *STCA* claims from anyone who was from a country to which Canada was temporarily suspending removals because of the generalized risks and dangers in that state.[97] Canada is therefore effectively compelled to assert the safety of the American refugee system and its compliance with international human rights law in order to insulate the *STCA*—the key limiting instrument—from litigious or judicial attack. In this way, Canada is pragmatically obligated to minimize the legal pluralism that has otherwise been identified by litigants and judges.[98]

This approach is mirrored in other steps Canada has taken in refugee law, such as the expansion of the safe third country concept to limit asylum claims even further by explicitly denying any meaningful pluralism as between the refugee laws of certain foreign states and Canada's own domestic refugee law system. Under this new system, Canada refuses to hear any refugee claim made by an asylum-seeker who has

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[94] Lara Sarbit, "The Reality beneath the Rhetoric: Probing the Discourses Surrounding the Safe Third Country Agreement" (2003) 18 J L & Soc Pol'y 138 at 143.

[95] *See* Asad G Kiyani, "Criminalization, Safety and the Safe Third Country Agreement", in Michael Carpenter, Melissa Kelly & Oliver Schmidtke, eds, *Borders and Migration: The Canadian Experience in Comparative Perspective* (Ottawa: University of Ottawa Press, 2022) at 147–72.

[96] STCA Hearings, *supra* note 91 at 12, 16–17, 63. In defending the STCA to Congress, the State Department noted that while the STCA *appears* balanced in its language it responds to an unbalanced problem in which thousands of refugee claimants cross from the United States to Canada but only a few hundred cross the other direction. The STCA was described as a "trade-off" (*ibid* at 61 and 63) between the United States' security needs and Canada's logistical goals. One witness complained that refugees were "being made a bargaining chip" (*ibid* at 40). On the disparity between asylum seekers moving from one state to the other, see Audrey Macklin, "Disappearing Refugees: Reflections on the Canada-US Safe Third Country Agreement" (2004-5) 36:2 Colum HRLR 365 at 394–95.

[97] Okafor, *supra* note 82 at 188.

[98] See e.g. *CCR 2007*, *supra* note 93; *CCR 2020*, *supra* note 93.

made a claim in any other designated country.[99] The only requirement is that Canada enter into an information sharing agreement with the designated state. Countries that have so far been designated are the other members of the so-called Five Country Conference ("FCC") of Canada, the United States, United Kingdom, Australia, and New Zealand.[100] The FCC is a consortium of states that share information between themselves to enable the enforcement of immigration and refugee law. There are important practical and conceptual differences here from the *STCA*. First, there are no exceptions to the rule, as there would be in the case of the *STCA* for claimants with certain family members in Canada. Second, there is no legislative requirement to assess the ongoing compliance of these designated countries with international human rights norms such as the *Refugee Convention* or the *Convention Against Torture*. Finally, even though it is the alleged correspondence between the domestic refugee law systems of the FCC that justifies the rule, there is no requirement for ongoing monitoring of this declared consonance.

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According to Canada, what links the members of the FCC are "the commonalities among [their] immigration programs."[101] In other words, it is the absence of pluralism that matters, and which justifies both a tremendous amount of information sharing between the states, as well as the new provision prohibiting second asylum claims within the FCC. The prohibition is justified on two bases. First, as with the *STCA*, there is a minimization of legal pluralism. Canada has declared the provision justified because of the alleged substantive equivalence of the refugee law systems of these safe countries.[102] Second, the lack of *cultural* pluralism between states also justifies the prohibitions within the FCC. This minimization of cultural differences between the states rests on claims that the states have "many historical ties and a common language" and "share many common patterns of both regular and

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[99] *IRPA*, *supra* note 84, s 101(1)(c.1). Operational instructions and guidelines describe the process by which the exclusionary ground is to be enforced by IRCC staff. See Canada, Immigration, Refugees and Citizenship Canada, *In-Canada refugee claims: Grounds for ineligibility*, (Operational Instructions and Guidelines) (Ottawa: updated 31 March 2022), online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/canada/processing-canada-refugee-claims-grounds-ineligibility.html> [perma.cc/Z6XT-SRYJ]. See also, Canada, Immigration, Refugees and Citizenship Canada, *GCMA workarounds due to IRPA changes to the refugee claim process – June 21, 2019*, (Operational Instructions and Guidelines) (Ottawa: 21 June 2019), online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/bulletins-2019/663.html> [perma.cc/WXT8-JPDY].

[100] IRPR, *supra* note 5, ss 315.21, 315.36.

[101] Regulatory Impact Analysis Statement, *Regulations Amending the Immigration and Refugee Protection Regulations*, PC 2017-462 (17 May 2017), C Gaz II, vol 151, no 10, online: <https://canadagazette.gc.ca/rp-pr/p2/2017/2017-05-17/html/sor-dors79-eng.html> [perma.cc/MJC4-4C2S].

[102] *Ibid*. See also Kathleen Harris, "Liberals move to stem surge in asylum-seekers – but new measure will stop just fraction of claimants", *CBC News* (10 April 2019), online: <https://www.cbc.ca/news/politics/refugee-asylum-seekers-border-changes-1.5092192> [perma.cc/6ECU-HNZE] (quoting government ministers describing all five states as 'safe' for the purposes of refugee law).

irregular migration".[103] Here, the policy decisions both compel a denial of two forms of pluralism—legal and cultural—while encouraging horizontal integration that may well have the effect of turning rhetoric into reality by producing further legal and cultural convergence between the various systems and states.

Implicit in these declarations of legal and cultural commonalities is a shared ideological position that border securitization is a singularly pressing imperative, and that migrants pose a criminal if not existential threat to the border. It is no surprise that the *STCA* was signed in the aftermath of 9/11, and only once Canada promised to engage in greater information sharing and cooperation on border security arrangements.[104] Language of "crimmigration"[105] has been used to describe the convergence of domestic criminal and immigration laws. The subsequent convergence of the *national* legal regimes of like-minded states is only the natural consequence of that initial domestic conflation. As Okafor argues, this convergence of priorities is clear in the context of the United States–Canada relationship, which have both spent decades attempting to secure their borders against asylum-seekers and use quasi-criminal tools to deter them.[106] At the same time, there are significant differences in the substantive law and legal instruments used by the two states in pursuit of this common policy agenda.[107]

The safe third country concept is distinct from other related ideas such as “first country of origin” or “safe country of origin” because of the centrality of legal pluralism to its analysis. While the safe third country idea achieves a familiar result—precluding a claim by the asylum-seeker—it uses a different method.[108] It relies on descriptions of legal process rather than the variable and unpredictable country conditions of any particular state. In this understanding, what makes a third country safe is less the on–the–ground reality and lived experience of the migrant, and more the presumed fairness and rationality of the law that adjudicates the claim. Crucially, the reference point for assessing this third state’s legal system is its concordance with

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[103] Tim Legrand, "Transgovernmental Policy Networks in the Anglosphere" (2015) 93:4 Public Administration 973 at 982–83.

[104] STCA Hearings, *supra* note 91 at 12–13 (noting that the STCA is one component to “be viewed in the context of the overall 30-point action plan” agreed between the US Attorney General, the US Director of Homeland Security, and Canadian Foreign Minister, and describing the integration of border enforcement, information sharing, and the potential for visa system harmonization).

[105] Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power" (2006) 56 Am U L Rev 367 at 378–81.

[106] Okafor, *supra* note 82.

[107] *Ibid*.

[108] The ‘first country of origin’ doctrine presumes that *any* country other than the state of origin is safe enough for a genuine refugee (and thus that an asylum-seeker should make their claim in the first state in which they arrive), while the ‘safe country of origin' presumes that the *general* conditions of the state of origin are proxies for whether any given individual faces persecution (and thus that individuals fleeing those states aren't truly refugees. See James C Hathaway, *The Rights of Refugees Under International Law*, 2nd ed (Cambridge: Cambridge University Press, 2021) at 330–35.

international law as well as the law of the state that has received the migrant. Declarations of, and concrete moves toward, a lack of meaningful variation between legal systems are integral to this task because they reduce the scope for identifying discrepancies that can be used to attack the premise of "safety by common process."

In this way, and in spite of both international refugee law's invitation to pluralist approaches and often the presence of meaningful legal pluralism, a policy of anti-pluralism is integral to the political task at hand. Denying the fact of legal pluralism is essential to justifying the exclusion of asylum-seekers on the procedural grounds of the safe third country concept. While the ideas of "safe countries of origin" and "first countries of origin" are both divorced from the experience of the asylum-seeker because they do not enquire into the relationship between the specific migrant and the specific country of origin, the safe third country concept goes further by denying the relevance of that experience at all and simply focusing on the formalities of the legal system instead. These approaches are justified on the basis of a lack of both legal and cultural pluralism.

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## IV. Citizenship and the Bivalence of Legal Pluralism

Having considered the demonstrations and denials of pluralism in the immigration and then refugee spheres, this paper now turns to pluralism in citizenship law and considers how different understandings of citizenship are treated by state law. For many migrants, obtaining citizenship is the guarantor of the greatest freedom and security, acting as an indicator of formal equality between all members of a political community. At a base level, citizenship is valuable to the migrant because of how it affects their mobility. It offers two important guarantees: a right to enter Canada, [109] and to remain in Canada.[110] Citizenship additionally permits equal participation in the electoral political sphere.[111] These assurances make citizenship an unlikely space for studying legal pluralism, but not if citizenship status is understood as a guarantor of a constitutional minimum set of entitlements, rather than as a set of uniform entitlements. This idea of asymmetric citizenship—that some citizens are legally owed additional privileges as compared to others—is present in Canada. This section examines this issue by addressing the position of Indigenous peoples in Canada, whether the citizenship rights owed to them is evidence of legal pluralism, and what can be gleaned from the Canadian state's response to this apparently pluralist understanding of citizenship. Studying pluralism in respect of citizenship and Indigenous peoples illustrates that Canadian migration law's uncertain relationship with legal pluralism is deeply connected to anxieties about the initial imposition of

[109] The right to enter does not, however, entail a right to leave to the extent that it does not entail a right to obtain a passport: *Canadian Passport Order*, SI/81-86, s 9.

[110] Citizenship can be renounced voluntarily, but it can also be revoked by the government in certain instances of fraud or misrepresentation: *Citizenship Act*, RSC 1985, c C-29, ss 9–10.

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

colonial law and the need to minimize the degree of both legal and cultural pluralism when building the nation-state of Canada.

Much has been written on the citizenship status of Indigenous peoples in Canada, the manipulation of that status by the federal government, and the effect of non-unitary citizenship models on national identity.[112] In short, the idea of non-unitary citizenship is controversial because it implies that some citizens have greater entitlements than others, which conflicts with the liberal democratic notion of equal treatment of all under the law. This is differentiated citizenship, and in Canada largely reflects the notion that Indigenous peoples in Canada are not only Canadian citizens but may also have additional entitlements flowing from "promises made to [Indigenous peoples], from expectations they were encouraged to hold, and from the simple fact that they once occupied and used a country to which others came to gain enormous wealth in which the Indians have shared little."[113] Indigenous peoples and others have noted that Crown–Indigenous relations formally require the "citizens plus" approach defended by the Hawthorn Commission and advanced by the so-called "Red Paper."[114] This includes s 35(1) of the *Constitution Act, 1982*,[115] which recognizes Aboriginal rights and title claims in the abstract without actually defining their specific content. As Aboriginal rights and title are not accessible to non-Indigenous Canadians, theirs is a lesser form of citizenship. In this light it might be said that by developing distinct citizenship regimes based on Indigenous rights and legal orders, Canadian migration law *is* legally and not merely culturally pluralist. At the same time, this is arguably a theoretical possibility rather than one put into practice, and while there may be strong reasons for preferring a legally pluralist citizenship structure, it would be misleading to say that this potential is realized in Canada.

Three examples serve to illustrate the difficulties surrounding claims of pluralism in respect of citizenship. Broadly speaking, this is the argument that by

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[112] See e.g. John Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court" (2001) 80 Can Bar Rev 15; Alan C Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000); Martin J Cannon, "First Nations Citizenship: An Act to Amend the Indian Act (1985) and the Accommodation of Sex Discriminatory Policy" (2006) 56 Can Rev Soc Policy 40; Wendy Cornet, "Indian Status, Band Membership, First Nation Citizenship, Kinship, Gender, and Race: Reconsidering the Role of Federal Law" (2007) Aboriginal Policy Research Consortium Intl 92; Kirsty Gover, "When Tribalism Meets Liberalism: Human Rights and Indigenous Boundary Problems in Canada" (2014) 64 UTLJ 206; Martin Papillon, "Segmented Citizenship: Indigenous Peoples and the Limits of Universality" in Daniel Béland, Gregory Marchildon & Michael J Prince eds, *Universality and Social Policy in Canada* (Toronto: University of Toronto Press, 2018) at 137–54.

[113] HAC Cairns, SM Jamieson & K Lysyk, in HB Hawthorn, ed, *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies*, vol 1 (Ottawa: Indian Affairs Branch, 1967) 6.

[114] Indian Chiefs of Alberta, *Citizens Plus* (Edmonton: Indian Association of Alberta, June 1970), *reprinted* in (2011) 1:1 Aboriginal Policy Studies 188 at 194 (emphasizing the treaty relationship as a justification). See also James (Sákéj) Youngblood Henderson, "*Sui Generis* and Treaty Citizenship" (2002) 6:4 Citizenship Studies 415 at 416 (describing "formally equal" citizenship as "an invitation to compliance with colonialism and domination"); Cairns, *supra* note 112.

[115] Borrows, *supra* note 112.

creating exemptions from the ordinary immigration rules that apply on both sides of the border, and recognizing alternative forms of citizenship, the treatment of various Indigenous groups can be seen as carving out a pluralist space. The first example is the Nisga'a Final Agreement.[116] Negotiated after the *Calder*[117] decision, the Final Agreement included a large financial settlement, the grant of 2,000 square kilometers of land in northwestern British Columbia, and a variety of resource allocations (including wildlife, timber, minerals, and other rights) on treaty lands.[118] Alongside this came the ability of the Nisga'a to decide for themselves who was a Nisga'a citizen. This grant of citizenship power was controversial because of the specific use of "citizen", which implied a sovereign authority that competed with or supplanted that of the state.[119] Understood in this way, there was a pluralist space created in immigration law, with differential citizenship rights granted to the Nisga'a. Another example, this time concerned with mobility rights, is the Jay Treaty of 1794.[120] Negotiated with the British Crown by US Supreme Court Chief Justice John Jay, the treaty recognized the division of groups of Indigenous peoples who straddled what is now the US–Canada border. Article 3 of the Jay Treaty allows members of those groups to travel freely across the border, free of the restrictions that constrain other citizens of both countries. Finally, border restrictions introduced in response to the COVID–19 pandemic have not applied equally to all Canadians. In the Mohawk reserve of Akwesasne, whose traditional territorial boundaries straddle three Canadian and US jurisdictions—what are now known as Ontario, Quebec, and New York State—distinct border crossing rules apply to Indigenous residents. Indigenous residents with proof of their status and residency were unaffected by the pandemic-induced closure of the US-Canada border. Once the border reopened generally, these residents were still exempted from COVID–19 testing and vaccination requirements on return to Canada.[121] On their face, each of these differentiations suggest the possibility of a legally pluralist migration and citizenship law, one that accommodates the unique position of Indigenous peoples in Canada.

Yet immigration and refugee law has carefully circumscribed the boundaries of such deviations, with state law often acting as an umbrella under which differences are accommodated on a case–by–case basis. Federal and provincial legislative approval (along with that of a majority of Nisga'a voters) was required for the Nisga'a

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[116] Canada, BC & Nisga'a Tribal Council, *Final Agreement* (1999), online: <www.nnkn.ca> [perma.cc/6CFG-UY8F].

[117] *Calder v BC (AG)*, [1973] SCR 313, [1973] 4 WWR 1.

[118] *Nisga'a Final Agreement Act*, SC 2000, c 7.

[119] Carole Blackburn, "Differentiating indigenous citizenship: Seeking multiplicity in rights, identity, and sovereignty in Canada" (2009) 36:1 American Ethnologist 66 at 72–74.

[120] *The Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America*, Great Britain and USA, 19 November 1794 (entered into force 29 February 1796).

[121] Mohawk Council of Akwesasne, Press Release, "Akwesasne residents exempt from Covid-19 testing at Canada's border crossings" (17 February 2021), online: <http://www.akwesasne.ca/akwesasne-residents-exempt-from-covid-19-testing-at-canadas-border-crossings/> [perma.cc/HD9F-85WE].

Final Agreement. The scope of Nisga'a authority only extends to membership in the Nisga'a community, not the ability to grant Canadian state citizenship. While it may be a step towards a form of legal pluralism within Canada,[122] these are two distinct forms of citizenship, only one of which is covered by the Agreement. Both membership in Canada, and the ability to cross Canada's borders to visit other foreign states, depends upon decisions and documentation issued by the Canadian state. This same reality applies to all other discussions of Indigenous citizenship: currently Indigenous citizenship models have not led to the Canadian state loosening its exclusive authority to decide who to permit into Canada, and on what terms.

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The *Jay Treaty* is less an allowance under immigration law, and more a vestigial artifact in the form of a treaty that pre-dates Confederation and was incorporated as a holdover into Canadian immigration law. Importantly, the substantive effects of the treaty—allowing Indigenous people born in one country to claim rights and privileges in the other—largely manifest in the United States.[123] Canadian-born Indigenous people wishing to cross into the United States are able to rely on a statutory provision in American law,[124] but American-born Indigenous people seeking to cross into Canada must demonstrate that the *Jay Treaty* reflects an unextinguished Aboriginal right under s 35(1) of the Constitution Act.[125] The Treaty itself is not part of Canadian law because it has not been ratified by the legislature, and was agreed between the United States and Great Britain rather than with any Indigenous nation.[126] The rights under it are recognized but only as questions to be addressed through the generalized framework of constitutional Aboriginal rights litigation.

Finally, Mohawk movement rights in the Ontario–New York border region are limited in their exceptionality. While the ability to freely cross the border has survived the COVID–19 pandemic, border crossing in Akwesasne remains fraught with allegations of racism and discrimination against residents using the crossing[127] as well as Mohawk employees of the border agency.[128] As well, these mobility rights—as with the Nisga'a—do not affect the ongoing citizenship and membership debate

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[122] Blackburn, *supra* note 119.

[123] Caitlin Smith, "The Jay Treaty Free Passage Right in Theory and Practice" (2012) 1:1 American Indian LJ 161.

[124] *Immigration and Nationality Act*, 8 USC § 1359 (2006).

[125] See Nell Jessup Newton et al, eds, *Cohen's Handbook of Federal Indian Law*, 2012 ed (New York: LexisNexis, 2012).

[126] *Francis v The Queen*, [1956] SCR 618, 3 DLR (2d) 641.

[127] APTN National News, "Mohawks of Akwesasne face discrimination at border crossing says class-action suit", *APTN* (18 July 2019) online: <https://www.aptnnews.ca/national-news/mohawks-of-akwesasne-face-discrimination-at-border-crossing-says-class-action-suit/> [perma.cc/VL8E-9WQ6].

[128] Catharine Tunney, "Episodes of racism, harassment, homophobia recorded at border crossing", *CBC News* (30 June 2021) online: <https://www.cbc.ca/news/politics/cbsa-cornwall-akwesasne-1.6085999> [perma.cc/S9G3-YM5Y].

between the Mohawks of Kahnawà:ke, which itself flows from the federal government's depredation of Indigenous sovereignty and autonomy *in spite of* the unique position of Akwesasne.[129]

Moreover, pointing to the treatment of select Indigenous groups as evidence of a legally pluralist order misses four important features of Indigenous existence in Canada. The first is that Aboriginal rights are hotly contested, often through litigation and protracted negotiation. The Nisga'a success in *Calder* came in 1973, but the *Final Agreement* was not concluded until 1998. The ongoing non-recognition of the *Jay Treaty* in Canada is another example of such contestation. While the law formally recognizes the *potential* of these rights, the fact that they must be litigated, that process often takes decades, and, if actually adjudicated, depends on questionable tests of the veracity of the claim, suggests that any legal pluralism that exists is minimal and highly circumscribed by the state legal order.

Second, despite the minor exceptions carved out by and for some Indigenous groups, it would be overly generous to transpose these distinctions to Canadian immigration and refugee law generally. Unlike the exceptional approaches noted above, that general body of law routinely applies to hundreds of thousands of individuals every year, with the bureaucratic relentlessness and indifference characteristic of immense administrative structures developed to process massive amounts of information and applications. It would thus be an optimistic interpretation of the actual accommodation of non-state legal orders to say that Canadian migration law is openly legally pluralist. In reality, migration law has, under great pressure and in very specific circumstances, made limited concessions to the fact of Indigenous presence that predates European arrivals in Canada. On this evidence, Canadian migration law is iteratively and unpredictably open to some degree of pluralism in highly regulated circumstances whilst otherwise preserving the hegemonic weight of state law on migration.

Third, Canadian governments have very deliberately tried to not only eradicate Indigenous traditions and legal orders, but also to sanitize the attendant cultural genocide[130] by reframing the civilizing mission of residential schools and the

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[129] On the membership debate and its origins, see Audra Simpson, "Paths Toward a Mohawk Nation: Narratives of Citizenship and Nationhood in Kahnawake" in Duncan Ivison, Paul Patton & Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 113; EJ Dickson-Gilmore, "*Iati-Onkwehonwe:* blood quantum, membership and the politics of exclusion in kahnawake" (1999) 3:1 Citizenship Studies 27; Daniel Rück, *The laws and the land: the settler colonial invasion of Kahnawà:ke in nineteenth-century Canada* (Vancouver & Toronto: UBC Press for the Osgoode Society for Canadian Legal History, 2021).

[130] 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" (2015), online (pdf): *Government of Canada* <https://publications.gc.ca/site/eng/9.800288/publication.html> [perma.cc/4DS2-KD7B] at 1 ("For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and

governance of Indigenous peoples in the language of migration. During the 1950s and 1960s, federal governments conceptualized and treated Indigenous peoples as immigrants. Indian Affairs and Immigration were one federal department, and assimilation programs targeted at newcomers to Canada were also adapted and applied to Indigenous peoples.[131] While the idea that Indigenous peoples are merely "our oldest Canadians"[132] and the rhetoric that "We are all immigrants" has since subsided,[133] the practices of assimilation and suppression have not.

This connects to the fourth and final feature missing from an analysis that suggests there is a legally pluralist citizenship order because of the treatment of *some* Indigenous groups (such as the Nisga'a, the Mohawks of Kahnawà:ke) or the existence of the *Jay Treaty*. While these three pieces might suggest a "citizenship *plus*" model, whereby some Indigenous peoples have a Canadian citizenship that is *enhanced* with additional privileges, the history of Canada–Indigenous relations shows us something very different. As Papillon writes, and as with the earlier discussion of the impact on Muslim Canadians of excluding *kafala*-based intercountry adoptions, Canadian and Indigenous citizenship must be considered relationally:

> Throughout Canada's colonial history, Indigenous peoples were progressively subjugated by the Canadian state and forcibly included in the citizenship regime. In the process, their own forms of citizenship were destroyed and replaced with a ward-like status.[134]

While Muslim Canadians have not had their citizenship status "destroyed" in the same way as Indigenous peoples in Canada, the larger point remains: to speak of Indigenous citizenship—indeed citizenship in any form—is to speak of more than simply the formal legal category of citizen. To be a citizen is to have certain fundamental freedoms and rights, including rights of mobility and voting, but it also encompasses more. Citizenship also connotes a form of *belonging* and membership in a society and community, which can be conditioned by the granting of formal entitlements, but also by informal depredations.

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racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide").

[131] Heidi Bohaker & Franca Iacovetta, "Making Aboriginal People 'Immigrants Too': A Comparison of Citizenship Programs for Newcomers and Indigenous Peoples in Postwar Canada, 1940s - 1960s" (2009) 90:3 Can Historical Rev 427.

[132] House of Commons, *House of Commons Debates*, 24-4, No 2 (16 February 1961) at 21:36 (Hon Ellen L Fairclough).

[133] Although the then-leader of the federal Liberal party, Michael Ignatieff, used it in 2009: Kenneth Whyte, "Maclean's Interview: Michael Ignatieff", *Maclean's* (12 February 2009), online: <https://www.macleans.ca/general/macleans-interview-michael-ignatieff/> [perma.cc/4BPD-R25B].

[134] Martin Papillon, "Structure, Agency, and the Reconfiguration of Indigenous Citizenship in Canada" in Mireille Paquet, Nora Nagles & Aude-Claire Fourot, eds, *Citizenship as a Regime: Canadian and International Perspectives* (Montréal and Kingston: McGill-Queen's University Press, 2018) at 76–77.

Canada's partial recognition of some elements of Indigenous citizenship thus cannot be disentangled from the experience of Canadian citizenship that Indigenous peoples have within the state system. Arguably the lived experience of Indigenous peoples is of an unequal, *diminished* citizenship[135] generated by informal means (say, prejudice against Indigenous peoples on the part of employers, educators, health care workers and so on) and formal means. The latter includes but is not limited to the underfunding of education and health care for Indigenous peoples; a lack of clean drinking water, over-policing (of Indigenous people as offenders in both the criminal and child welfare context) and under-policing (in support of Indigenous complainants and victims), and, of course, territorial dispossession. This "segmented citizenship" has been continued rather than eliminated by the transition from colonial rule to the admission of Indigenous peoples into the welfare state.[136] Thus while "citizens plus" may have been the aspirational goal, the reality may be closer to "citizens minus."[137] While competing modalities of citizenship may be evidence of a legally pluralist citizenship regime, the evaluation of that regime must be holistic. Any assessment of citizenship entitlements that purportedly accrue to Indigenous peoples above and beyond that which accrue to other Canadian citizens must consider the pervasive *disentitlements* that also condition their experience of Canadian citizenship.

Disentitlement is a particularly important feature of citizenship in the Canadian settler–colonial context and is a way of understanding the relationship between cultural pluralism and legal pluralism in Canada. As in all settler–colonial states, cultural pluralism in Canada is generated internally and externally. External sources of cultural pluralism are immigration laws and policies that permit foreigners to enter Canada temporarily or permanently and perhaps obtain the status of legal citizen. Cultural pluralism is generated internally by the continued existence of Indigenous peoples, and their continued assertions of distinct claims, rights, and entitlements that flow from Indigenous legal and cultural orders. Each of these generators of cultural diversity are simultaneously potential sources of legal diversity. As Muslim Canadians may wish to have family law disputes settled through reference to Islamic precept, Indigenous communities may wish to adhere to their own conceptions of environmental stewardship. What connects the two is not that "we are all immigrants", but that the Canadian state has resisted the demand for legal pluralism and pursued a multiculturalism policy that to its critics remains deeply racialized and

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[135] See Borrows, *supra* note 112 (Borrows suggests this is one reason justifying a formal differentiated citizenship favouring Indigenous peoples).

[136] Papillon, *supra* note 112.

[137] David Mercer, "'Citizen Minus'?: indigenous Australians and the citizenship question" (2003) 7:4 Citizenship Studies 421.

hierarchical,[138] in part because of its anchoring in the bicultural framework of Anglo/Francophone settlement.[139]

That anchoring, which flows from the terms of reference of the Royal Commission on Bilingualism & Biculturalism[140] which effectively posited Canada's founding "races" as having equal status, need not continue to restrain legal pluralism in the present day. Yet the trope of considering all people in Canada as "immigrants", whether they are first or twelfth generation, disguises the absence of formally and substantively equal citizenship and decision-making authority that different immigrants were permitted, and erases the different social, cultural, and political demands and concessions placed on or granted to these various communities.[141]

One concession that has not been granted to Indigenous peoples—at least not willingly—is the differentiated citizenship implied by s 35(1) of the Constitution. Here again is an opportunity for the Canadian state to meaningfully engage with and give effect to legal pluralism that has not been taken up. The promise of Aboriginal rights and title, and the consequential effects on the *Canadian* citizenship of Indigenous peoples, thus reflects a latent, *potential* pluralism rather than an acceptance of pluralism as a feature of migration law or indeed any aspect of state law. On the part of the Canadian state, taking up this option for pluralism would be fundamentally different because of the unique relationship of Indigenous people to Canada. Indigenous peoples are not just newcomers who wish to have select elements of their legal cultures recognized or affirmed, but pre-contact inhabitants whose entire ways of life, including their legal traditions, were involuntarily subjugated by the Canadian state. The historical facts of involuntariness and indigeneity strengthen the demand for legal pluralism, as well as the potential scope of the claim. In other words, differentiated Indigenous citizenship implies something far more extensive than merely the granting of additional privileges to Muslim individuals on a case–by–case basis, because differentiated citizenship implies at least a partial repudiation of the Canadian state and sovereign authority in multiple areas of the law.

Not only is there a lack of pluralism in spite of the potential for a truly differentiated citizenship, but there are also different reasons for the state's turn away from it. The denial of pluralism in respect of citizenship is not only to achieve a specific policy goal such as limiting the intake of asylum-seekers or rooted in cultural prejudice against alternative forms of parent–child relationships, but to avoid the existential repudiation of the state and its mechanics of governance. Indigenous differentiated citizenship is not a direct grant from the state to an individual; it flows

[138] MA Lee, "Multiculturalism as nationalism: A discussion of nationalism in pluralistic nations" (2003) Can Rev Studies Nationalism 103 at 111.

[139] Eve Haque, *Multiculturalism Within a Bilingual Framework: Language, Race, and Belonging in Canada* (Toronto: University of Toronto Press, 2012).

[140] Will Kymlicka, "The Three Lives of Multiculturalism" in Shibao Guo & Lloyd Wong, eds, *Revisiting Multiculturalism in Canada* (Rotterdam: Sense Publishers, 2015) 17.

[141] This holds true even if Indigenous peoples are rightly carved out from the paradigm of "newcomers".

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from group-based entitlements. It is not, as an example, a grant of monetary reparations to members of a group historically oppressed by the state. It is not the goal but instead a necessary yet incidental consequence of collective challenges to the legal–political order. In this way, the presence of differentiated citizenship is evidence of the risk of systemic changes to social, political, and economic structures, and fundamentally challenges the sovereign authority of the state. In this light, both the demand for and absence of differentiated citizenship should come as no surprise.

## V. Conclusion

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This brief survey of three dimensions of migration law points to the value of engaging with legal pluralism as a field of study. Legal pluralism is not merely descriptive in nature but analytic. It can explain the seemingly natural, non-pluralist features of an area of the law that may not seem a natural site for pluralist engagement. It can also help uncover why specific legal choices or arrangements are pursued and not others, including when there is homogeneity across legal systems. While it is true that Canadian migration law is becoming more culturally adept—willing to recognize that religious practices might manifest differently in other parts of the world, or that arranged marriages can be genuine spousal relationships—the goal of this paper has never been to confirm or deny that Canadian migration law is or is not legally pluralist. To do so would assume that the descriptive origins of legal pluralism have some normative weight—that being legally pluralist is inherently good or bad.[142]

What is gained from applying a legal pluralist lens is a richer understanding of the state legal system, its capacity for accommodation, and the reasons for actualizing that potential or not. The non-recognition of alternative legal orders says more about the pre-occupations of Canada's legal system than it does about *shari'a* law, international or foreign state law, or Indigenous precepts. That in some cases the state presumes the ability to know foreign law better than those who practice it, suggests an extraordinary sense of who is a law-making agent, and who is competent to interpret the law (foreign or otherwise), and who is not. In studying these dynamics, this analysis of migration law also describes the power relationships that condition the law and challenges the notion that the common law is inherently rational, inevitable, or natural.

Four conclusions can be drawn from this treatment of legal pluralism. First, the breadth or depth of legal pluralism is connected to the degree of cultural pluralism within Canada. Cultural diversity cannot be neatly severed from diversity in legal normativity. An inflexibility in respect of migration law limits the ability of Muslim children to be adopted, and for Muslim families within Canada to adopt. Enfeebled Indigenous legal orders, meaningfully constrained by the state's overarching exercise of control, restrict the ability of Indigenous peoples in Canada to fully flourish as

[142] Asad G Kiyani & James G Stewart, "The Ahistoricism of Legal Pluralism in International Criminal Law" (2017) 65:2 Am J Comp L 393 at 403–04 (showing the potential problems with a legally pluralist criminal order, and identifying the possibility "that a single universal norm may enjoy stronger credentials in (value) pluralism than the variety of standards in existing doctrine").

collectives, and to develop revitalized post-colonial Indigenous communities.[143] The rhetorical denial of the existence of legal pluralism—the flattening of differences between Western states' refugee status determination systems—in order to limit asylum claims only serves to hinder the ability of poor and often racialized migrants to reach safety in Canada. Circumscribing legal pluralism in the way Canada does has the concrete effect of inhibiting cultural pluralism.

Second, understanding where and when legal pluralism does not manifest helps illustrate who constitutes a legal agent. The non-recognition of *kafala* relationships and the diminished status of Indigenous legal orders and authority shows how shallow the pool of legitimate sources of law is in Canada. The literature on the politics of legal knowledge shows that non-Western legal systems have continually been marginalized at the expense of Western legal norms in international law,[144] with Indigenous legal orders having been particularly marginalized in Canadian law.[145] This has two effects. It is self-reinforcing, with the legal system defining what is legal knowledge, how it is to be understood, and who can act as a legal actor.[146] As a result, it limits the ability of minoritized groups to access the mechanisms of state power. It also restricts the ability of the state to engage in the creative experimentation that is one justification for a more deliberate engagement with legal pluralism that pushes

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[143] On the importance of revitalizing Indigenous legal orders, see the Truth And Reconciliation Commission Report's Call to Action 50: Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: James Lorimer & Company, 2015) at 207–14.

[144] See e.g. Kiyani & Stewart, *supra* note 142; RP Anand, ed, *Asian States and the Development of Universal International Law*, (Delhi: Vikas Publications, 1972); Antony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law" (1996) 5:3 Soc & Leg Stud 321; Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (London: Verso, 1996) at 175–76; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Asad G Kiyani, "International Crime and the Politics of Criminal Theory: Voices and Conduct of Exclusion" (2015) 48 NYUJ Intl L & Pol 129; ONUMA Yasuaki, *International Law in a Transcivilizational World* (Cambridge: Cambridge University Press, 2017); Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017); Daniel Bonilla Maldonado, "The Political Economy of Legal Knowledge" in Daniel Bonilla & Colin Crawford, eds, *Constitutionalism in the Americas* (Northampton, MA: Edward Elgar, 2018) 29 at 30–31 (describing "the colonial model of the production of legal knowledge" that privileges the legal systems of the West, and in particular the "grammar of modern constitutionalism" as "primarily created and managed by a small group of European and North American political theorists").

[145] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 22 ("While civil and common law traditions are generally recognized across the country, this is not always the case with Indigenous legal traditions…Indigenous legal traditions are a reality in Canada and should be more effectively recognized."); Lisa Monchalin, "Euro-Canadian 'Justice' Systems and Traditional Indigenous Justice" in *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016) 258; Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019) at 4 (describing Canadian state law as "implicated in efforts to remove these competing [Indigenous] authorities?"); Val Napoleon & Emily Snyder, "Housing on Reserve: Developing a Critical Indigenous Feminist Property Theory" in Angela Cameron, Sari Graben & Val Napoleon, eds, *Creating Indigenous Property: Power, Rights, and Relationships* (Toronto: University of Toronto Press, 2020) at 41–93.

[146] Maldonado, *supra* note 144 at 29–30.

past what Berman describes as the "pluralist justification for federalism" [147] to a more robust internal legal pluralism that continuously interacts with non-state law, particularly Indigenous legal orders, alongside state laws. It further forecasts a diminished form of reconciliation in which Indigenous peoples, despite their prior presence and unique legal and constitutional rights, are not seen as co-equal legal agents to European settlers.

Third, the substantive and rhetorical turn away from legal pluralism reflects an uncertainty and insecurity about the status of Canadian common law, and its integral association with Canadian identity. While no formal explanation has been offered for the anomalous treatment of *kafala*, one possible reason offered in this article is that there is a generalized anxiety about the consequences of recognizing *shari'a* law concepts in Canadian state law, whether at the national or provincial levels, or even admitting Muslim immigrants into Canada.[148] In other words, alien laws—like alien peoples—pose a threat. Similarly, the thin notions of Indigenous citizenship that are permitted in Canadian migration law reflect the legal system's persistent inability and unwillingness to recognize Aboriginal rights and title claims. Validating Indigenous legal orders in any sense—including through the recognition of Indigenous-specific movement or citizenship entitlements—risks implying the irrelevance of the state's legal system to the adjudication of rights and title claims.[149] In both contexts, patterns in domestic law and policy reproduce themselves in migration law.

The denial of substantive pluralism in respect of refugee law similarly employs rhetoric about common challenges, histories and legal systems as a way of counter-intuitively confirming the sovereign right of the state to design its own refugee determination system independent of international views. It allows Canada to decide for itself where it fits into the range of state practices on refugee law, and—through alliances with what it deems to be states offering equivalent protections—normalize its own approach. This has the effect of protecting Canada from external threats to sovereignty, both real and imagined, that might attempt to impose different standards. Coordination also allows Canada to claim that if standards are to be imposed, then it should be those of the like-minded Western states it already cooperates with. Canada's treatment of legal pluralism in migration law thus insulates the Canadian legal system in very specific ways, while also declaring—internally and externally—that it is the appropriate and arguably model legal system. While the Refugee Convention was intentionally designed to accommodate state sovereignty by requiring only the development of a refugee determination process[150]—in other words, by permitting

[147] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012).

[148] Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (Cambridge: Cambridge University Press, 2016) at 62–89.

[149] Christie, *supra* note 145.

[150] Hathaway, *supra* note 108 at 27–28 (describing the balance struck at the negotiation of the Refugee Convention between international coordination and independent control by states).

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legal pluralism—the denial of pluralism is now central to attempts to limit state obligations under the Refugee Convention. Continual arrivals of asylum-seekers, the practice of religiously grounded kinship traditions of Muslims, and the persistence of demands for Indigenous sovereignty are all distinct sites for exploring pluralism but are linked through the shared threat they present—that the totalizing assimilationism of the state cannot be taken for granted. It must be managed, articulated, and directed.

This leads to the final concluding point: the absence of legal pluralism can be interpreted as an indicator of aggression rather than defence. As Gordon Christie writes, "pull[ing] Indigenous peoples fully and completely into worlds built according to non-Indigenous ways of thinking of such things as sovereignty, law, and authority" is a way of ensuring that "Indigenous self-determination fades from the landscape."[151] Constraining the scope and strength of Indigenous legal orders is a deliberate way to control the Indigenous claim to self-determination and the fundamental challenge to political sovereignty of the Crown. Moreover, this examination of the limits on *kafala* adoption, refugee status determination, and Indigenous citizenship suggests that the security agenda that seems most overt in respect of refugee claimants is not just about protecting tangible people and objects from physical threats—the well-trodden ground of "securing the border"—but about securing the intangible goods of the legal system and perhaps the nation itself. In this light, there is an *overarching* security agenda within migration law, one as concerned with protecting bodies as it is with protecting the associated incorporealities of the rule of law and statehood.

While this analysis has by no means claimed to be a comprehensive analysis of the entire system, it has illustrated the meaningful limits and constraints upon pluralism in the field. The denial of legal pluralism in migration law seems to pose a challenge to cultural diversity through the impacts on specific groups. Seemingly natural features of the law of sovereignty, such as the right to control entry into a state, have adverse impacts on minoritized groups both at home and abroad. There are clearly implied policy prescriptions, which are aimed not at engaging in pluralism simply for its own sake, but as a way of responding to the multifarious challenges and choices faced by those individuals caught up in the strict bounds of Canadian migration law. The details of such responses are beyond the scope of this overview. If there is a value to nonetheless in studying where and why legal pluralism does or does not manifest, it is in that it sketches out a more three-dimensional understanding of migration law: not just its norms, but its concerns about legitimacy and identity, and its responses. It illustrates the inhibited reflexivity of the law—a dynamism stifled by its anxieties. The resultant picture is not an attractive one: it suggests fear, institutionalized discrimination, and the ongoing coloniality of the state legal system. Yet if the "secret virtue of immigration [is that it] provides an introduction, and perhaps the best introduction of all, to the sociology of the state",[152] then at a minimum the value of studying pluralism in migration is to consider the contents of that introduction more carefully.

[151] Christie, *supra* note 145 at 5–6.

[152] Abdelmalek Sayad, *The Suffering of the Immigrant* (Cambridge, MA: Polity, 2004) at 279.

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# SHELTERS OF JUSTICE IN DISPLACED PERSONS SETTLEMENTS: A PROPOSAL FOR ROHINGYA CAMPS

**Louise Otis[*] and Jérémy Boulanger-Bonnelly[**]**

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**Abstract**

Hundreds of thousands of Rohingya refugees live in camps in Bangladesh, where their everyday legal needs remain unmet. This article puts forward a front-line justice system aimed at addressing those needs. It proceeds in three steps. First, it reviews the documented legal needs of Rohingya and the current approaches to the administration of justice in displaced persons camps. Second, it examines the model of front-line justice, which rests on the implementation of justice shelters providing legal information, mediation, and safeguard orders. In doing so, it discusses how the confluence of legal traditions in Canada can provide inspiration for a justice system that reflects the legal pluralism prevailing in Rohingya camps and empowers them to build their own justice structures. The second part also reviews the implementation of front-line justice in Mali and Haiti, and the lessons we can draw from these two cases. Building on those lessons, the third part puts forward an adapted front-line justice system tailored to the Rohingyas' legal needs.

## Introduction

Natural disasters, armed conflicts, persecution, and other catastrophes have led to unprecedented forced displacements in recent years. Those displacements represent a significant challenge for host states and the international community, who have often responded by confining refugees and migrants to official settlements and unofficial makeshift camps. For example, more than 900,000 Rohingyas currently live in refugee camps in Bangladesh, right across the border from their home country, Myanmar.[1] Life in those camps and similar environments poses many challenges: health risks are increased; food and water are scarce or unhealthy; violence is frequent; and housing is inadequate. Basic needs are left unaddressed, often for long periods of time.

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[1] UNHCR, "Bangladesh Operational Update" (November 2021) at 1, online (pdf): <https://data2.unhcr.org/en/documents/download/90088> [UNHCR, "November 2021 Update"].

These basic needs also include justice needs. Camps are dynamic communities in which interpersonal tensions inevitably arise, often amplified by a preexisting context of violence.[2] While host states generally provide some security apparatus to the camps, they usually focus on addressing urgent manifestations of violence and controlling movements at the camps' borders. The ordinary justice needs of displaced persons are little more than an afterthought, when they are dealt with at all.

In this article, we argue that host states and the international community can and must do more to address the everyday legal needs of displaced persons living in camps. To that end, we put forward a solution that builds on the model of front-line justice, which rests on the quick deployment of 'justice shelters' providing legal information, mediation services, and safeguard orders when necessary.[3] We argue that this model, which was implemented in Haiti and Mali in response to a natural catastrophe and a civil war, respectively, is well suited to respond to the documented needs of displaced persons living in camps, including Rohingya refugees.

In addressing this topic—and in line with the theme of this special issue—we also reflect on the contribution that the Canadian experience in alternative dispute resolution can make to the administration of justice in other contexts and jurisdictions. Under the inspiration and impulse of Quebec and other provinces, Canada has become an international leader in dispute resolution. In particular, the implementation in 1998 of judicial mediation (also called judge-led mediation) in Quebec contributed to "a new, participant-centered normative order […] that conceptualizes litigation more broadly and holistically and, thus, offers justice that is fuller and better adapted to the needs of parties with a variety of conflicts".[4] Moreover, the confluence of legal traditions characteristic of Canada can inspire the development of justice structures that are more responsive to situations of legal pluralism. As we argue in this paper, this openness to legal pluralism is particularly important for refugees who find themselves governed by the laws of their host country but continue to rely on their own norms and the laws of their home country to resolve disputes arising among themselves.

This article is divided into three parts. The first one reviews the literature on the justice needs of displaced persons living in camps, including Rohingya refugees living in Bangladesh, and examines current approaches to the administration of justice in those contexts, with a focus on legal empowerment. The second part explains the model of front-line justice and how it contributes to legal empowerment and to the

[2] See e.g. Kazi Fahmida Farzana, *Memories of Burmese Rohingya Refugees* (New York: Palgrave Macmillan, 2017) at 184.

[3] Louise Otis & Eric H Reiter, "Front-Line Justice" (2006) 46 Va J Intl L 677 [Otis & Reiter, "Front-Line Justice"]. See section 2.1, below, for a description of the model's main features and the context in which it was developed.

[4] Louise Otis & Eric H Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 Pepp Disp Resol LJ 341 at 353–54 [Otis & Reiter, "Mediation by Judges"].

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recognition of legal pluralism in camps. The second part also examines how front-line justice has been implemented in Haiti and Mali and draws some important lessons from these two examples. The last part builds on those lessons to adapt front-line justice to the documented reality of Rohingya refugee camps in Bangladesh. Finally, it identifies some potential hurdles that must be anticipated when designing a front-line justice system tailored to displaced persons settlements.[5]

## 1. Justice in Displaced Persons Camps

In this first section, we review the main justice needs of displaced persons living in camps (1.1) and we discuss current approaches to the administration of justice in that context, with a focus on legal empowerment (1.2). Before we turn to these points, a brief clarification of the notion of "displaced persons" is in order.

"Displaced persons" is an umbrella term which encompasses internally displaced persons (IDPs) and refugees. Both categories refer to people who were forced to flee their homes for various reasons including armed conflicts, situations of generalized violence, human rights violations, natural disasters, or persecution.[6] However, they remain conceptually distinct because while refugees have crossed an international border and find themselves outside their country of origin, IDPs remain in their home state.[7]

This difference is important for the administration of justice in camps because it determines the official law that applies to displaced persons. While IDPs remain under the jurisdiction of their home state and subject to its laws (even when they face persecution at the hands of that same state), refugees become subject to the laws of the

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[5] The solutions we put forward here are far from definitive. As with most other institutional reforms, their success depends on multiple factors and can only be tested after their implementation: see Mariana Mota Prado & Michael J Trebilcock, *Institutional Bypasses* (Cambridge: Cambridge University Press, 2019) at xi–xii, 10–11.

[6] For IDPs, see UN Commission on Human Rights, "Report of the Representative of the Secretary-General, Mr. Francis M. Deng – Addendum: Guiding Principles on Internal Displacement", UN Doc E/CN.4/1998/53/Add.2 (1998) at para 2 [UNCHR, "Guiding Principles"]; see also UN Office for the Coordination of Humanitarian Affairs, *Guiding Principles on Internal Displacement*, 2nd ed (Washington, DC: Brookings, 2004) at 1. The definition of "refugee" is limited to displacements resulting from "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion": *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, art 1(A) [*1951 Convention*]; as amended by the *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 UNTS 267, art 1(2) [*Protocol*].

[7] *Guiding Principles*, *ibid* at para 2 (IDPs "have not crossed an internationally recognized State border"); *1951 Convention*, *ibid*, art 1(A); as amended by the *Protocol*, art 1(2). See also the *1951 Convention*, *ibid*, arts 1(D), (E) and (F), which excludes those receiving protection or assistance from another organ of the UN, those enjoying rights normally accorded to nationals in their country of residence, and those who have committed or participated in the commission of certain serious crimes or heinous acts.

country in which they find themselves following their displacement.[8] In both cases, international instruments guarantee some basic rights, including free access to the courts, but those protections often remain theoretical.[9] These considerations and the difference between IDPs and refugees must be considered when designing justice institutions for displaced persons camps. Having made that clarification, we turn to a review of their everyday justice needs.

### 1.1 Justice Needs in Displaced Persons Camps

#### 1.1.1 Main Justice Needs

This article focuses on everyday justice needs arising within camps. These needs are distinct from other types of legal issues, for example claims against the host state or claims stemming from the underlying displacement, although these types of disputes can be interrelated and generate everyday justice needs in the camps. Any claims against the host state must be brought before that state's justice system—which is however often difficult to access for refugees—and claims related to the displacement, which pertain for example to human rights abuses suffered in a refugee's home state, are usually best addressed by other solutions such as transitional justice mechanisms, which have been relatively successful in some contexts and are already discussed at length in the literature.[10] Although these two types of legal issues are critically important for displaced persons, this paper focuses instead on everyday legal issues which arise within the camps, among its residents.

These everyday justice needs usually coalesce around four main areas of concern: (1) sexual and gender-based violence (SGBV); (2) land and property-related disputes, including theft; (3) human rights violations; and (4) discrimination, although this fourth category overlaps with the others.[11] These four categories are not unique to

[8] See respectively *Guiding Principles*, *supra* note 6, principles 1(1), 2(1) (noting that IDPs "shall enjoy […] the same rights and freedoms […] as do other persons in their country" and that national authorities must protect them); and *1951 Convention*, *supra* note 6, art 2.

[9] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 2(3); for refugees, see *1951 Convention*, *supra* note 6, art 16.

[10] See e.g. Erin K Baines, "The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda" (2007) 1 Intl J Trans Justice 91; Luc Huyse & Mark Salter, "Introduction: tradition-based approaches in peace-making, transitional justice and reconciliation policies" in Luc Huyse & Mark Salter, eds, *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: International Institute for Democracy and Electoral Assistance, 2008) 1; Susan Harris Rimmer, "Wearing his Jacket: A Feminist Analysis of the Serious Crimes Process in Timor-Leste" (2009) 16 Austl Intl LJ 81; *Report of the UN Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UNSC, UN Doc S/2004/616 (2004) at para 8; see also Jeffrey R Seul, "Coordinating Transitional Justice" (2019) 35 Negotiation J 9 at 10; Ruti G Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000); Alexandra Barahona De Brito, Carmen Gonzalez-Enriquez & Paloma Aguilar, eds, *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001); Lavinia Stan & Nadya Nedelsky, eds, *Encyclopedia of Transitional Justice* (Cambridge: Cambridge University Press, 2013).

[11] Carolien Jacobs et al, "Justice Needs, Strategies, and Mechanisms for the Displaced: Reviewing the Evidence" (Social Science Research Council, Working Paper, 2017, online:

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the context of camps, nor are they the only legal needs that arise in camps, but they have been identified as the main everyday justice issues arising in that context. It is worth discussing them in greater detail.

First, SGBV issues are particularly prevalent. They include rape and defilement, to which youth and female refugees are frequently exposed,[12] but also "forced and/or early (child) marriage; abuse by authorities, including physical abuse; sexual exploitation; sexual assault; other inappropriate sexual behaviour, indecent acts and sexual harassment; incest; abductions or kidnapping (especially of girls and women); trafficking of women and girls; forced prostitution; and disappearances of women and girls".[13] SGBV issues are even more pressing considering their systemic underreporting[14] and the fact that they are often compounded by relationship disputes, "including cases of domestic violence but also situations of abandonment […] and a myriad of other potential problems between couples and families".[15]

The second category of everyday justice needs arising in camps concerns theft and property disputes. The incidents reported in that category generally range from petty theft to violent robberies,[16] and include land ownership disputes between displaced persons and local residents (although as previously mentioned, this paper does not focus on these types of issues, but instead on disputes arising among camp residents).[17] Connected to these concerns are financial issues including debt disputes between the camps' inhabitants.[18] These incidents are similar to those which occur in any community where money and property are regulated.

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<https://www.ssrc.org/publications/view/justice-needs-strategies-and-mechanisms-for-the-displaced-reviewing-the-evidence/>; see also Rosa da Costa, *The Administration of Justice in Refugee Camps: A Study of Practice*, UN Doc PPLA/2006/01 (2006) at 40–41; Julie Veroff, "Crimes, conflicts and courts : the administration of justice in a Zambian refugee settlement" (Department of International Development at Oxford University, Research Paper No. 192, 2010) at 11–15, online: <https://www.unhcr.org/research/working/4cd7bfa99/crimes-conflicts-courts-administration-justice-zambian-refugee-settlement.html>; Kirsten McConnachie, *Governing Refugees: Justice, Order and Legal Pluralism* (Oxford: Routledge, 2014) at 107 (mentioning theft, assault, disorder, fighting, and relationship disputes); Anna Lise Purkey, *Refugee Dignity in Protracted Exile: Rights, Capabilities and Legal Empowerment* (Oxford: Routledge, 2020) at 118–20.

[12] See e.g. Veroff, *supra* note 11 at 15.

[13] Da Costa, *supra* note 11 at 11.

[14] See Adrienne L Fricke & Amira Khair, "Laws without Justice: An Assessment of Sudanese Laws Affecting Survivors of Rape" (Washington, DC: Refugees International Report, 2007), online (pdf): <https://www.refworld.org/pdfid/47a6eb870.pdf>; see also Da Costa, *supra* note 11 at 46.

[15] McConnachie, *supra* note 11 at 107.

[16] Veroff, *supra* note 11 at 12–15, 22.

[17] *Ibid* at 12–13.

[18] See e.g. Faustina Pereira, Jessica Olney & Azizul Hoque, "Community Perspectives on Access to Civil Justice After Cross-Border Displacement: The Needs of Rohingya Refugees in Bangladesh" (San Francisco: Centre for Peace and Justice & The Asia Foundation, 2021) at 7, online (pdf): <https://asiafoundation.org/wp-content/uploads/2021/02/X-Border_Community-Perspectives-on-Access-to-Civil-Justice-after-Cross-Border-Displacement-The-needs-of-Rohingya-Refugees-in-Bangladesh.pdf>.

The third area of concern pertains to restrictions and violations of basic human rights. "[R]efugees are often subject to a wide range of restrictions on their rights", including "be[ing] prohibited from leaving the camps, [a restricted] ability to seek employment outside of the camp [and] limitations on their right to protest or to express themselves freely".[19] State restrictions on freedom of movement are also commonplace.[20] For instance, those living in the Meheba camps in Zambia reported that they could not move outside the camps without a permit specifying their terms of travel, despite the qualified freedom of movement enshrined in the *1951 Convention Relating to the Status of Refugees*.[21]

The fourth category of everyday legal needs concerns systemic discrimination, which can hamper the displaced persons' equal access to employment, security, education and other services.[22] Some respondents living in the aforementioned Meheba camps reported that events of discrimination occurred not only between refugees, but also at the hands of local officials and citizens.[23] The UNHCR's Protection Division confirmed this finding more generally and also documented severe access to justice barriers in host countries.[24]

These four categories of legal needs, as well as other everyday civil and criminal disputes, affect the quality of life in displaced persons settlements. Their impact is even greater in protracted situations, when IDPs and refugees "find themselves in a long-lasting and intractable state of limbo" in which "their basic rights and essential economic, social and psychological needs remain unfulfilled after years".[25] The Rohingya refugee camps in Bangladesh, to which we now turn, are an example of such a protracted situation in which many everyday legal needs remain unmet.

### 1.1.2 Justice Needs of the Rohingya in Bangladesh

Since 1978, the Rohingya have been fleeing Myanmar and taking refuge in Bangladesh and other neighbouring countries, sometimes living in makeshift camps

[19] Purkey, *supra* note 11 at 85.

[20] Da Costa, *supra* note 11 at 6, 13, 27; Veroff, *supra* note 11 at 14.

[21] Veroff, *supra* note 11 at 6; *1951 Convention*, *supra* note 6, art 26 (specifying that this right should be qualified only by the "regulations applicable to aliens generally in the same circumstances"; see also art 31 applying to refugees unlawfully in the country of refuge).

[22] *Ibid* at 15.

[23] *Ibid*.

[24] UNHCR, *Operational Protection in Camps and Settlements* (Geneva: UNHCR, 2006) at 27 [UNHCR, *Operational Protection*].

[25] Adapted from UNHCR Executive Committee Standing Committee, *Protracted Refugee Situations*, UN Doc EC/54/SC/CRP.14 (2004) at 1; usually, a protracted situation is one that lasts five years or more: UNHCR Executive Committee, *Conclusion on Protracted Refugee Situations*, No 109 (LXI), UN Doc A/AC 96/1080 (2009).

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for decades.[26] During the most recent wave of displacement, an unprecedented number of Rohingya crossed the border in a short period of time: from August 2017 to August 2018, "over 700,000 Rohingya people from Myanmar fled to Bangladesh following a military campaign against them which several high-level UN officials, including the Secretary General himself, have described as 'ethnic cleansing'".[27] Thousands more have crossed the border since then, with a total of 907,766 Rohingya refugees living in the Cox's Bazar area as of November 2021.[28] These refugees live in more than 34 camps,[29] the largest being the Kutupalong camp which hosts more than 620,000 people within its 13 square kilometers.[30]

The main challenges faced by the Rohingya refugees who live in those camps relate to various needs such as access to food, clean drinking water, robust shelters, electricity, and education.[31] Fortunately, there has been some improvement on these fronts in the past few years.[32] As a result, humanitarian assistance has turned towards other needs, including justice issues.[33] The Rohingya refugee camps are "a physical and material site of complex social and political phenomena, a site of both impasse and negotiation",[34] prone to everyday conflicts. Life in those camps "is neither monolithic nor static"; rather, "the space is a highly contested political space where multiplicities of authorities of various degrees are interactive with each other".[35] This constant interaction gives rise to the same types of tensions that exist in any

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[26] Farzana, *supra* note 2 at 145–46.

[27] Inter Sector Coordination Group, "Situation Report – Rohingya Refugee Crisis" (2 August 2018), online (pdf): <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/iscg_situation_report_02_august_2018.pdf>; UN, News Release, "Secretary General Urges Justice for Rohingya Community, in Video Message on Refugee Joint Response Plan" (16 March 2018), online: <https://www.un.org/press/en/2018/sgsm18939.doc.htm>. Myanmar's actions have also been described by various experts as involving elements of genocide, see e.g. Michael A Becker, "The Plight of the Rohingya: Genocide Allegations and Provisional Measures in *The Gambia v Myanmar* at that International Court of Justice" (2020) 21 Melb J Intl L 428.

[28] UNHCR, "November 2021 Update", *supra* note 1 at 1.

[29] Strategic Executive Group, "2021 Joint Response Plan – Rohingya Humanitarian Crisis" (10 May 2021), online (pdf): <https://reporting.unhcr.org/sites/default/files/2021%20JRP.pdf> [2021 JRP].

[30] *Ibid* at 6.

[31] *Ibid* at 11.

[32] Strategic Executive Group, "2020 Joint Response Plan – Rohingya Humanitarian Crisis" (March 2020) at 14–16, online (pdf): <https://reliefweb.int/sites/reliefweb.int/files/resources/jrp_2020_final_in-design_280220.2mb_0.pdf> [2020 JRP].

[33] See e.g. Pereira, Olney & Hoque, *supra* note 18.

[34] Ashika L Singh, "Arendt in the refugee camp: The political agency of world-building" (2020) 77 Pol Geo 102149 at 2.

[35] Farzana, *supra* note 2 at 184.

community, amplified by a crowded environment that blurs the distinction between the public and private spheres.[36]

SGBV is a particular concern. The 2019 *Joint Response Plan* noted that many Rohingya women and girls living in camps "continue to be at disproportionate risk of GBV, including domestic and intimate partner violence, forced marriage, exploitation and trafficking".[37] This statement echoes a 2017 study which concluded that a significant number of Rohingya respondents had been exposed to SGBV,[38] as well as a recent round of camp profiling which noted in November 2019 that "violence against women as a perceived risk appeared to increase", especially with respect to domestic violence and sexual assault.[39] A related issue is human trafficking, defined as the trade or even the sale of human beings. In the sixth round of camp profiling completed in November 2019, that issue was consistently reported as one of the most pressing protection and safety concerns among the Rohingya refugees, although its prevalence was slightly lower than before.[40]

Another justice issue that extends beyond the four categories discussed previously is the corruption of officials. The governance of refugee camps in Bangladesh is an intricate matter, with multiple overlapping levels of authority. Camps are formally under the jurisdiction of the Bangladeshi government, which however focuses on controlling the refugees' movements and punishing offences they commit. The camps' daily management and the provision of aid is ensured by humanitarian organizations and the United Nations, usually through UNHCR's coordination. These multiple levels of governance are all potentially subject to corruption. For instance, officials in some camps have been reported to seek bribes or confiscate rations,[41] although the issue is not extensively documented. Everyday justice needs arise from those situations, with Rohingya refugees seeking to avoid corruption or remedy its consequences.

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[36] *Ibid* at 128.

[37] Strategic Executive Group, "2019 Joint Response Plan for Rohingya Humanitarian Crisis" (February 2019) at 16, online (pdf): <https://reliefweb.int/sites/reliefweb.int/files/resources/2019%20JRP%20for%20Rohingya%20Humanitarian%20Crisis%20%28February%202019%29.compressed_0.pdf> [2019 JRP].

[38] Andrew Riley et al, "Daily stressors, trauma exposure, and mental health among stateless Rohingya refugees in Bangladesh" (2017) 54 Transcultural Psychiatry 304 at 310.

[39] REACH, "Cox's Bazar – Settlement and Protection Profiling: Round 6 – Report 5" (November 2019) at 11, online (pdf): <https://reliefweb.int/sites/reliefweb.int/files/resources/73601.pdf> [REACH, "Profiling: Round 6"]; see also International Rescue Committee, "Access to Justice for Rohingya and Host Community in Cox's Bazar" (New York: IRC, 2019) at 4, online: <https://www.rescue.org/sites/default/files/document/3929/accessingjusticeassessmentexternalfinalsmall.pdf>.

[40] REACH, "Profiling: Round 6", *supra* note 39 at 10–11.

[41] Farzana, *supra* note 2 at 177.

Unfortunately, those justice needs remain largely unaddressed, with Rohingya refugees identifying access to justice as one of their primary concerns. A round of camp profiling completed in April 2018 showed that in many sectors, legal assistance was part of the top ten most commonly reported needs.[42] While in 2019 13,512 Rohingya refugees living in Bangladeshi camps received "legal assistance to support their access to formal justice mechanisms",[43] access to justice remains a pressing issue.[44] In 2021, a study concluded that refugees "lack […] an adequate camp dispute resolution system" and "need better access to civil justice", with "two-thirds of respondents sa[ying] they were unable to access information, justice-related services, and expert help in the camps when needed".[45] These issues constitute a significant daily stressor which negatively impacts the refugees' mental health.[46]

Efforts are underway to address these needs more effectively. The 2021 *Joint Response Plan* prepared by UN agencies, international NGOs, and the Red Cross/Red Crescent identifies as a primary strategic objective the protection of refugees, including the improvement of dispute resolution mechanisms.[47] More specifically, it notes the importance of "enhancing access to justice through standardized mediation and alternative dispute resolution mechanisms".[48] It also emphasizes the importance of "community-based protection mechanisms" relying on "meaningful, inclusive, equitable, and gender-responsive community representation".[49] That type of representation can count on the Rohingya's desire for participation: in March 2020, the UNHCR noted that "22,109 refugees are estimated to be actively involved in [community] structures".[50] This represents an opportunity for potential new justice institutions. Before presenting our proposal, we turn to a review of current approaches to the administration of justice in camps.

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[42] REACH, "Rohingya Refugee Crisis – Camp Settlement and Protection Profiling – Cox's Bazar, Bangladesh – Round 3" (April 2018), online (pdf): <https://data2.unhcr.org/en/documents/download/63821> [REACH, "Profiling: Round 3"]. Round 6, in November 2019, did not question refugees regarding "legal assistance" but asked them questions about the reporting of incidents, which showed that security was a concern and that "[a]wareness of alternative community-based protection mechanisms […] remain[s] low": REACH, "Profiling: Round 6", *supra* note 39 at 10–11.

[43] UNHCR, "Bangladesh Operational Update" (February 2020) at 3, online (pdf): <https://reliefweb.int/sites/reliefweb.int/files/resources/74560.pdf>.

[44] Shahnam Karin, Arif Chowdhury & Ishrat Shamim, "Status of Rohingya Refugees in Bangladesh: A Comparative Study with Emphasis on Aspects of Women and Girls in Camps of Kutupalong, Cox's Bazar, Bangladesh" (2020) 7 Open Access Lib J e5831 at 10.

[45] Pereira, Olney & Hoque, *supra* note 18 at 2.

[46] Riley et al, *supra* note 38 at 309, 320.

[47] 2021 JRP, *supra* note 29 at 13–14.

[48] *Ibid* at 30.

[49] 2021 JRP, *supra* note 29 at 14.

[50] UNHCR, "Bangladesh Operational Update" (March 2020) at 5, online (pdf): <https://reliefweb.int/sites/reliefweb.int/files/resources/75569.pdf>.

### 1.2 Current Approaches to the Administration of Justice in Camps

The legal support provided to displaced persons living in camps can take different forms. The traditional "care and maintenance approach" focuses primarily on basic needs such as shelter, food, education, and healthcare. As part of that approach, justice needs are often a mere afterthought, and no specific system is implemented to deal with everyday disputes arising in camps. Instead, officials encourage refugees to petition the host state's legal system, which is however often completely inaccessible to them.[51] While that approach is "potentially effective in the first stages of a refugee crisis", it has been criticized for failing in "substantially and sustainably bettering the lives of refugees in protracted refugee situations, in leading to durable solutions for those refugees, or in providing any substantive benefit for the host state and local communities".[52] With respect to justice issues, it has been criticized for placing displaced persons living in camps in a situation of "simultaneous engagement with and alienation from the law",[53] being controlled by a legal apparatus in which they have no say nor power.

Recent initiatives have distanced themselves from that traditional approach and focused on different objectives, including legal empowerment. In 2008, the Commission on the Legal Empowerment of the Poor (CLEP) defined legal empowerment as "a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors".[54] This "bottom-up approach" calls for cooperation "with communities, civil society organisations, paralegals, and customary justice".[55] Although it has been criticized, this definition of legal empowerment has been endorsed by many scholars and UN agencies.[56]

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[51] In Mae La Oon (Thailand), officials were reluctant to establish a "separate system of community supported camp justice", but their approach was described as a failure since "refugees still prefer their own system of camp justice": Marc Hertogh, "Your rule of law is not mine: rethinking empirical approaches to EU rule of law promotion" (2016) 14 Asia Eur J 43 at 55.

[52] Purkey, *supra* note 11 at 28.

[53] Elizabeth Holzer, "What Happens to Law in a Refugee Camp?" (2013) 47 Law & Soc'y Rev 837 at 839.

[54] Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, vol 1 (New York: UN, 2008) at 3, online: <https://www.un.org/ruleoflaw/files/Making_the_Law_Work_for_Everyone.pdf>. For an earlier definition, see Stephen Golub, "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative" (Carnegie Endowment for International Peace, Rule of Law Series Working Paper No 41, 2003) at 25, online (pdf): <https://carnegieendowment.org/files/wp41.pdf>.

[55] Lars Waldorf, "Legal empowerment and liberal-local peace-building" in Matthew Saul & James A Sweeney, eds, *International Law and Post-Conflict Reconstruction Policy* (Oxford: Routledge, 2015) 229.

[56] See e.g. *Legal empowerment of the poor and eradication of poverty*, GA Res 63/142, UNGAOR, 66th sess, UN Doc A/RES/63/142 (2009); Stephen Golub, "The Commission on Legal Empowerment of the Poor: One Big Step Forward and a Few Steps Back for Development Policy and Practice" (2009) 1 Hague J Rule of Law 101.

Anna Lise Purkey recently argued that justice interventions in the context of protracted refugee situations should be guided by legal empowerment.[57] This new approach broadens the range of rights with which the justice system is concerned, focusing not only on the fulfillment of the refugees' basic needs, but also on their ability to enforce their rights and participate in the "development of social norms of behavior and civic education".[58] This emphasis on the refugees' participation seeks to allow them to construct their own legal space and implement justice structures adapted to their own situation.[59]

This legal empowerment approach embraces and fosters legal pluralism both with respect to the institutions responsible for administering justice in camps and with respect to the norms and laws these institutions are called upon to apply. Instead of disregarding the refugees' own informal institutions, it recognizes that these mechanisms can and should coexist with formal justice structures, the latter being reserved primarily for serious crimes.[60] From an institutional perspective, "legal empowerment includes both top-down and bottom-up components and emphasizes the importance of partnership between different actors".[61]

In terms of the laws and norms to be applied by those institutions, we mentioned earlier that while refugees are officially governed by their host country's laws, they often continue to rely on their own norms to resolve disputes arising among themselves. An approach grounded in legal empowerment reflects and gives effect to those "multiple overlapping legal and quasi-legal regimes"[62] to which refugees are subject, including "camp by-laws, regulations and codes of conduct, religious or traditional laws and mores, informal codes of conduct outlining gender roles and expectations, the laws of the country of origin, and international laws and standards".[63] In that sense, it allows people living in camps to take control of their legal landscape and build it in parallel to the official law of the state.

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[57] Purkey, *supra* note 11 at 2; in that context, she views legal empowerment as "the process through which refugees and refugee populations become able to use the law and legal mechanisms and services to protect and advance all of their rights and to acquire greater control over their lives, as well as the actual achievement of that increased control": *ibid* at 85, 99.

[58] *Ibid* at 117–18.

[59] *Ibid* at 99; McConnachie, *supra* note 11 at 104 ("the value of local dispute resolution is not restricted to an immediate case but includes the benefits gained from community participation in establishing shared values through rule definition and enforcement"); Annett Bochmann, "The Power of Local Micro Structures in the Context of Refugee Camps" (2018) 32 J Refugee Stud 63 at 79–80; see also UNHCR, *Operational Protection*, *supra* note 24 at 13.

[60] Purkey, *supra* note 11 at 120–22; McConnachie, *supra* note 11 at 104, 123.

[61] Purkey, *supra* note 11 at 95.

[62] *Ibid* at 120.

[63] *Ibid*.

In short, in contrast to traditional approaches to the administration of justice in displaced persons camps, an approach that emphasizes legal empowerment fosters first and foremost the active participation of the displaced persons themselves, encouraging capacity-building, bottom-up structures and informal justice mechanisms. The next section describes the front-line justice model and how it builds on this approach.

## 2. Front-Line Justice: Model and Examples

Front-line justice was developed more than a decade ago. Since then, it has served as the conceptual foundation for several justice interventions in post-crisis contexts. In this section, we summarize the model's history and main features (2.1), before examining its implementation in Haiti and Mali (2.2) and the lessons learned from these two cases (2.3).

### 2.1 History and Features

Front-line justice rests on the image of a justice shelter "which represents present justice as lived by its community: […] tactile, engaged, and local".[64] This shelter, a "kind of judicial Red Cross",[65] is "a rapidly deployable core of essential legal dispute-resolution mechanisms designed to restore a working framework of legality" by addressing everyday legal disputes.[66] Its deployment is made "in such a way as to build organically on indigenous institutions and values, rather than replacing them".[67]

Front-line justice is based on three areas of intervention: (1) informational justice; (2) safeguard justice; and (3) mediational justice. The informational justice area is the first and more visible, where jurists triage cases to determine the appropriate recourse. Cases deriving from the crisis (mass killings, sexual abuse, torture, expulsion, etc.) are beyond the reach of justice shelters and may be referred to other dispute resolution mechanisms—we mentioned transitional justice mechanisms earlier, for example—but other cases arising from everyday life in camps should fall within their mandate. Jurists in the triage area should be able to resolve many, but not all, simple matters by providing legal information and advice.[68] For more complex cases or those requiring urgent measures, they should refer the parties to one of the two other areas of the justice shelters.

The safeguard area, staffed with local judges or people having the same authority, should deal with cases requiring urgent relief such as *habeas corpus*, interim releases, injunctions, and other similar measures. These orders should be granted

[64] Otis & Reiter, *supra* note 3 at 679.

[65] *Ibid* at 694.

[66] *Ibid* at 679, 693.

[67] *Ibid* at 692.

[68] *Ibid* at 695–96.

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quickly because of their urgency, but for a limited renewable term only. Judges should be domestic actors experienced in the applicable law, supported by international actors. While policing is also crucial for addressing these types of urgent issues, especially when violence is involved, the possibility of quickly accessing a judge for safeguard orders makes sure that these situations are not viewed only through the lens of policing, but also as a step towards the reconstruction of justice and public confidence in it.[69]

Whether they go through the safeguard area or not, cases that are too complex to be resolved in the informational justice area should be referred to experienced mediators available quickly and free of charge.[70] This mediation service should be designed and explained using traditional or community dispute resolution mechanisms and mediators should be "local members of civil society who have credibility and who have been carefully trained in mediation techniques by international resource personnel".[71] Importantly, the mediators should not impose solutions but facilitate negotiation between the parties. A three- or four-hour session should be sufficient in most cases.[72] However, not all cases are prone to mediation: disputes involving violence, power imbalances, and other similar characteristics, should be referred to adjudicative methods.[73] Importantly, front-line justice shelters are precisely that—a front line—and should not be seen as an all-encompassing solution to all justice issues arising in post-crisis contexts.

For cases amenable to it, mediation presents significant advantages. More flexible and less procedural than formal adjudication, it usually reduces delays and costs in resolving disputes.[74] Additionally, since mediation is based on reconciliation, it helps the community "mov[e] away from the adversarial mindset that generates and characterizes crisis".[75] It also performs an essential pedagogical function: since the participants directly take part in the resolution of their conflicts, they usually learn conflict-resolution skills that they can then apply in their daily lives to prevent further disputes.[76]

This model reflects the goals of legal empowerment, including participation and the reinforcement of local capacities. To that end, the people providing services in justice shelters, including jurists, should be drawn from the local populations and the law applied in the informational and mediational justice areas should be flexible

[69] *Ibid* at 697–98.

[70] *Ibid* at 698.

[71] *Ibid* at 699; on training, see Otis & Reiter, "Mediation by Judges", *supra* note 4 at 367.

[72] Otis & Reiter, *supra* note 3 at 699–700.

[73] *Ibid* at 702.

[74] *Ibid* at 700–01.

[75] *Ibid* at 701.

[76] *Ibid*.

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enough to reflect the legal pluralism present in the camps. This openness to bottom-up structures and multiple overlapping legal and quasi-legal orders, central to front-line justice,[77] is crucial for the system to gain acceptance and legitimacy in the eyes of the people living in the camps. This success also depends on appropriate training being provided to those who operate justice shelters, covering both the techniques relevant to their area of intervention but also the official and unofficial law that they should apply.

The recognition of legal pluralism embodied in the model of front-line justice, while reflecting recent trends towards legal empowerment, is grounded more deeply in the Canadian origins of that model. Front-line justice emerged as an extension of the successful implementation of judicial mediation in the province of Quebec.[78] While led by judges—actors recognized in their communities—judicial mediation follows a mix of official law and unofficial norms and expectations to find solutions tailored to the parties' relationship. It allows the parties, with the help of an experienced mediator, to construct their own legal space in true pluralist fashion, an impulse that is also reflected in front-line justice.

While the pluralist and informal ethos of mediation is not unique to Canada, the confluence of legal traditions—including common law, civil law and indigenous legal orders—characteristic of our country's legal landscape may have been a contributing factor in the successful implementation of judicial mediation in Quebec, at the turn of the 21st century.[79] This same ethos provides fertile ground for the development of front-line justice and appears particularly apposite in the context of refugee camps. As Nicholas Kasirer noted, the confluence of legal traditions allows us to focus on their points of encounter and untether ourselves from the territorial confines of the law.[80] In the context of refugee camps, that approach opens the door to the construction of a legal landscape that reflects, beyond the territoriality of laws coming from the home and host states of refugees, the multiple orders and norms to which they are subject.

### 2.2 Recent Experiences: Haiti and Mali

Front-line justice has served as a conceptual basis for at least two post-crisis interventions, which we survey in this section: the front-line justice projects implemented in Haiti after the 2010 earthquake and in Mali during the ongoing political crisis that developed around 2011. This analysis is far from exhaustive and

[77] *Ibid* at 702–03.

[78] See *ibid* at 699–700.

[79] Otis & Reiter, "Mediation by Judges", *supra* note 4 at 357–58, 402; see also Jean-Pierre Bonafé-Schmitt, "La médiation: une alternative à la justice?" in Nicholas Kasirer & Pierre Noreau, eds, *Sources et instruments de justice en droit privé* (Montreal: Éditions Thémis, 2002) 141 (arguing that mediation represents an increasing acceptance of legal pluralism).

[80] Nicholas Kasirer, "Legal Education as *Métissage*" (2003) 78 Tul L Rev 481 at 492–93.

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the two overviews we provide are succinct.[81] The objective is to give a general idea of the concrete operation of front-line justice in two different contexts and to draw some lessons for the adapted model we put forward in the last section.

### 2.2.1 Haiti

On 12 January 2010, Haiti was struck by a powerful earthquake. Countless lives were lost, and even more people lost their homes. The country's institutions were shattered, including the justice system which was profoundly affected by the death of officials and by the destruction of courthouses and other important buildings. Lawyers Without Borders (LWB), who was already on the ground at that time, decided to develop and implement a front-line justice program in collaboration with other international and local organizations.

The system was not designed to replace the official justice system. It did not seek to obtain coercive dispute resolution powers and was instead aimed at helping people navigate the official system while also providing information, advice and assistance in collaboration with local organizations.[82] The problems addressed by that system were identified with the help of local organizations as well. The most important one was to provide people with identity papers, the destruction of which impaired the ability of relatives to access the bank accounts and other property of deceased persons.[83] Another important issue was SGBV, which affected many women and girls after the earthquake.[84]

The first response was to send interdisciplinary teams in IDP camps to identify pressing needs and, if possible, to help people resolve their legal issues on-site. The members of these teams were mostly local lawyers and social workers who received training from international and non-governmental organizations.[85] In parallel, LWB sought to establish a more permanent front-line justice center. The implementation took a few months due to limitations resulting from the crisis, including the unavailability of materials and the difficulty in finding available land. In

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[81] It should be noted that only limited documentation is available on these two initiatives. Therefore, these documents have been completed by an interview with Pascal Paradis, Executive Director of Lawyers Without Borders Canada, an organization that actively participated in both initiatives. The interview took place on 9 November 2018.

[82] Lawyers Without Borders, "Projet 'Justice de première ligne' en Haïti – Sommaire et résultats du projet" (April 2013) at 3 (on file with the authors).

[83] *Ibid* at 1.

[84] *Ibid* at 3.

[85] Lawyers Without Borders Canada, "Rapport d'activités 2010-2011" at 13, online (pdf): <https://www.asfcanada.ca/uploads/publications/uploaded_asf-rapport-annuel-2010-2011-web-pdf-18.pdf>.

2011, LWB finally established a center in front of the largest camp located on Champ de Mars, the biggest public park in the downtown area of the capital, Port-au-Prince.[86]

The center, while relatively small, was structured with a reception and triage area where initial discussions with participants could take place. That same area also served to provide legal information and advice. In some cases, the lawyers providing advice considered that the participants had to be assisted further, for instance by accompanying them and representing them in court. This service was mostly provided in cases of SGBV, although it was not formally restricted to that type of case. In parallel, teams continued to go into the camps and began offering services in Delmas and Tabarre. These mobile services were focused on information and advice, but informal mediation was also provided in appropriate cases.[87]

Contrary to the initial model of front-line justice, safeguard orders were not offered through the local system. Haiti's justice system was still somewhat operational and the front-line justice shelters did not have the required powers to implement that aspect which, in any event, did not appear to be of central concern to local communities.

Throughout the project, one of the most important features was the training and empowerment of local agents.[88] The services offered in the front-line justice center were almost exclusively provided by local personnel, and the international assistance was limited to offering training and advice to these employees. The public's opinion also had an important impact on the design of the front-line justice center. The feedback of local organizations was that justice shelters installed in tents—as initially envisaged by the front-line justice model—would signal that the services were of poor quality. Therefore, despite the inherent difficulties in building a more permanent center, that solution was ultimately adopted.

### 2.2.2 Mali

The crisis in Mali was much different. For many years, the population had criticized the government and specifically the corruption plaguing the justice system, in addition to the lack of resources. In 2011 and 2012, armed groups and militia took control of some regions, including northern Mali. In some cases, justice institutions were replaced by illegal tribunals, some of which applied a radical interpretation of Islamic law. In that context, a consortium of international organizations united their forces to

[86] Lawyers Without Borders Canada, "Rapport d'activités 2011-2012" at 13, online (pdf): <https://www.asfcanada.ca/uploads/publications/uploaded_rapport-d-activites-asfc-2011-2012-final-pdf-36.pdf>.

[87] Interview with Pascal Paradis, Lawyers Without Borders Canada, 9 November 2018.

[88] *Ibid*.

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develop a comprehensive front-line response to the crisis, which formed part of a program called JUPREC (*Justice, Prévention et Réconciliation*).[89]

The front-line system addressed multiple types of cases. Some lawyers worked on emblematic cases of human rights violations, including cases of SGBV. Other services were aimed at providing advice and information to participants regarding their ordinary legal needs. An overarching goal was to provide training to local teams in order to support their services.[90] These services were channeled through local organizations, to which international organizations provided support and help. As a result, programs and services were implemented through various institutions and actors, including law clerks (*parajuristes*), who were more present than lawyers in rural Mali.[91]

As was the case in Haiti, the services offered to the population were primarily information, training, and advice. In some cases, mostly of SGBV, assistance and representation services were also provided. Interestingly, some organizations also engaged in policy support to reinforce the capacity of the local system. For instance, organizations helped in designing codes of ethics for local institutions, and to identify and prevent corruption. Mediation and safeguard services were not offered as part of the program, although informal mediation may have been provided in some cases. The focus was truly on information, advice, assistance, and representation within existing structures.

### 2.3 Lessons Learned

These two examples, while only briefly surveyed, suggest a few lessons. One essential aspect that was frequently mentioned in reports is the importance of local input and empowerment. In Haiti, local input was central in defining the services to be offered and the physical appearance of the justice center. In Mali, it was central in defining the nature and scope of the response. Importantly, all services were provided by local teams and the contribution of international organizations was limited to offering support, advice, and training. These aspects were instrumental in ensuring that the system would be efficient and accepted.

Another important feature of both systems is the interdisciplinarity of their services. The teams sent in Haitian camps were composed not only of lawyers but also of social workers and other professionals. These teams noticed that the problems experienced by the populations they served intersected with each other and that legal issues could not be isolated from other needs such as housing, food and water supplies. Psychological support often went hand in hand with legal support.

[89] Lawyers Without Borders Canada, "Accès à la justice au Mali : Une réalité à bâtir" (Ottawa: CECI, 2017) at 11, online (pdf): <https://www.ceci.ca/data/fr-asf-juprec-mali-acces-a-la-justice.pdf>.

[90] *Ibid* at 39.

[91] *Ibid* at 37.

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In addition to considering local input, any response must take into account the limitations resulting from the context in which the intervention takes place. For instance, in Haiti, the unavailability of resources was particularly problematic; while the population was unable to satisfy their basic needs, the front-line justice system similarly had problems in accessing sufficient resources to continue operating. In the same vein, other justice institutions must be considered. The integration of these institutions with front-line justice is essential to avoid duplication and to leverage the strengths of other mechanisms, for example some policing or adjudicative institutions, where front-line justice is not capable to act. These lessons should be kept in mind when designing and implementing new front-line justice mechanisms.

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## 3. Front-Line Justice for Rohingya Camps in Bangladesh

The model of front-line justice and the above-mentioned examples were designed having in mind crisis situations in which people lost access to their own justice system. The situation of refugees living in camps is much different, since their lack of access to a proper justice system stems not from the collapse of their own country, but from their isolation in host states and the fact that in many instances the host state may adopt measures limiting their access to formal justice institutions. These two types of situations present differences that require an adaptation of the model of front-line justice to fit the reality of refugee camps.

The last section of this article builds on the initial model of front-line justice, the above-mentioned examples, as well as the documented reality of Rohingya camps in Bangladesh, to suggest an adapted model of front-line justice for these camps. It describes the main features of that system (3.1) before turning to the hurdles it could face (3.2). Lastly, we discuss the potential long-term contribution of front-line justice for the Rohingya (3.3).

### 3.1 Main Features

#### 3.1.1 Mandate, Powers, and Implementation

An eventual justice system for Rohingya camps should focus on the legal needs voiced by camp members themselves. As such, SGBV should be central to its mandate. Of course, these cases may not be amenable to mediation, but justice shelters can still serve as helpful front-line institutions welcoming survivors of SGBV, providing them legal information and advice on their situation, referring them to appropriate dispute resolution mechanisms and, perhaps, providing them with safeguard orders when necessary. In the same vein, the front-line justice system should adapt its processes to protect women and girls, for instance by making sure that their perspective can be heard and ensuring that a victim does not have to confront the perpetrator if that is not her wish.

Beyond SGBV, front-line justice shelters should be able to deal with most ordinary legal issues arising from the life in camps, including theft and other minor

offences, property disputes, and issues of discrimination. Ideally, the system should also deal with reports of corruption. The main exception to the mandate and powers of the front-line justice system should be with respect to crimes pertaining to the conflict in Myanmar. The system should focus on everyday legal issues arising in camps and should leave these other issues to either a transitional justice system, international tribunals, or the domestic justice system.

The implementation of the system, from a material and a human resources perspective, should take into account the current structure and organization of Rohingya camps. From a material perspective, the existing physical configuration of camps could serve as a starting point. Centers have already been established to provide safe spaces for women or to provide services to the population,[92] and the 2020 *Joint Response Plan* clearly expresses a preference for "offering counselling and legal services in single locations, in order to facilitate access for Rohingya refugees and ensure the most effective utilization of limited space within the camps".[93] Contrary to the prototypical front-line justice system, which would use tents to quickly deploy in the aftermath of a crisis, a front-line justice system in Rohingya camps should leverage that existing infrastructure to offer its services, in order to align with the JRP. Concretely, the system should benefit from a designated and well-identified space in these centers. This integration would also foster collaboration between different types of professionals and therefore encourage the type of interdisciplinarity that proved crucial in previous iterations of front-line justice. This integration, however, should not prevent the development of other services, such as mobile teams of lawyers and social workers which could provide legal information and advice elsewhere in the camps.

The system should also take advantage of existing communication infrastructure to publicize its services and provide general legal information. For instance, the system could benefit from the emerging popularity of Radio Listening Groups, "where groups of refugees gather in safe public spaces to listen to the radio".[94] Interestingly, UNHCR and partners already underwent training by BBC Media Action "on radio programming with a focus on sexual and gender-based and intimate partner violence".[95] This programming could be expanded to provide legal information on SGBV and other related topics.

The system should also leverage the camps' existing structure from a human resources perspective. The majhi system, for instance, consists of "Rohingya community representative[s], [who are] primarily responsible for information dissemination, coordination of distributions, estimating population numbers, and

[92] See e.g. the General Infrastructure Maps contained in REACH, "Profiling: Round 3", *supra* note 42.

[93] 2020 JRP, *supra* note 32 at 19.

[94] UNHCR, "Bangladesh Operational Update" (March 2019), online (pdf): <https://reliefweb.int/sites/reliefweb.int/files/resources/68914.pdf>.

[95] *Ibid.*

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linking the needs of Rohingya to humanitarian aid".[96] In 2009, facing allegations of corruption, this system was replaced by elected Camp and Block Committees, but majhis were eventually reintroduced alongside them. While instances of corruption are still being reported,[97] majhis remain one of the refugees' most trusted sources of information and their primary point of contact to report legal issues.[98] The majhis also play a central role in the informal resolution of disputes. They function "as an interlocutor who may work to resolve conflicts or escalate them to higher authorities", and as such they form part of an informal justice system which "follows a conciliation model where community leaders attempt to resolve conflicts".[99]

In fact, Rohingyas clearly rely on and prefer informal mechanisms to the Bangladeshi justice system,[100] despite concerns for the representativeness of informal mechanisms and their potentially harmful effect on gender dynamics.[101] These community leaders, whether they be majhis or members of committees, are therefore central to the success of a potential front-line justice system. They are trusted local actors who could legitimately take part in the justice system and act, for instance, as mediators or triage agents. They could also be helpful in disseminating legal information and publicizing the services offered, considering that they remain one of the most trusted sources of information in camps. In that sense, front-line justice has the potential to anchor the system in the legitimacy of local dynamics while providing guarantees, notably for fundamental rights.

It is important to emphasize that the system should be driven as much as possible by members of the Rohingya community, ideally those who enjoy great legitimacy and respect such as elders, social workers, nurses, teachers, doctors, medical and legal practitioners, or others. The role of international organizations should be to train and support them. In addition to encouraging adhesion from the community, having Rohingya people at the helm would provide employment to these people, which would inject additional resources in the camps' economy.

### 3.1.2 Triage, Information and Training

The justice shelters should be divided into three areas. The first and most visible should be a triage area in which selected and trained members of the community would welcome refugees to discuss their legal needs. With proper training and support, these triage agents would provide information and basic advice, with a view to resolving the

[96] International Rescue Committee, *supra* note 39 at 16.

[97] *Ibid*; REACH, "Profiling: Round 6", *supra* note 39 at 12.

[98] REACH, "Profiling: Round 6", *supra* note 39 at 12.

[99] International Rescue Committee, *supra* note 39 at 4.

[100] *Ibid* at 5.

[101] *Ibid* at 4–5.

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great majority of cases. In a sense, this would be similar to legal clinics found in many jurisdictions.

Importantly, the triage and information area should not simply be a reception desk. The jurists operating in that area should be skilled and trained to resolve cases. They should also be able to identify quickly whether a case is prone for mediation, or whether it requires safeguard measures. These jurists will also be confronted with many queries that will not be within the jurisdiction of the justice system, and they should be able to redirect people towards appropriate services. They should contextualize the system and explain why it is not able to deal with grievances emerging from the conflict in Myanmar.

Due to concerns of corruption that appear to be prevalent within camps, files should not necessarily be documented at length at the outset. Otherwise, there may be concerns that the details of a person's case documented in the system's records may be accessed for improper motives by corrupt officials. Information and advice could be provided without opening a file. However, as soon as a case requires a follow-up or a transfer to the mediation or safeguard areas, it should be properly documented to ensure continuity of service. In any event, anonymized data should be gathered to ensure the efficiency of the system and to adapt it as necessary.

Lastly, another function of the triage and information area should be to provide public training and information sessions. These sessions could be open to all or to specific constituencies within the camps and would allow them to gain greater knowledge about their rights and obligations. This would serve a preventive function.

### 3.1.3 Mediation

For cases that are not particularly urgent, mediation should be considered as the primary dispute resolution mechanism. This approach ties into current efforts made in camps, where mediation training has already been provided.[102] Not all cases will be prone to mediation, however, and cases involving serious crimes or violence, for instance, will often not be amenable to it. In any event, victims of SGBV should not have to face the perpetrator if they do not want to.

Whenever possible, mediation should be designed and explained using terms and processes connected to the traditional dispute-resolution mechanisms of the Rohingya. It should adapt to their local and cultural traditions in order to seamlessly integrate with their community. In the same line of thought, mediation should be provided by locals trained by international support staff, in order to ensure that the focus of the process remains local. Should an insufficient number of locally-trained mediators be available, additional mediation services could temporarily be provided by international staff, but training should continue in parallel to establish a local capacity.

[102] 2020 JRP, *supra* note 32 at 95.

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The mediation sessions themselves should be brief and flexible, and the parties should be in control of the process, with the mediator simply facilitating their negotiation. Follow-up sessions may be organized if a solution cannot be reached or if remaining issues need to be addressed at a later stage.

### 3.1.4 Safeguard

Safeguard justice is not an aspect of front-line justice that has been implemented in Haiti and Mali, and its relevance in the Rohingya context should be explored further with actors on the ground. The current relative stability achieved in camps may be an indication that safeguard orders are not necessary at this stage. However, the safeguard justice area could still help in addressing the most urgent matters in a context where Rohingya living in camps appear to have little to no access to the court system in Bangladesh. In the absence of adjudicative functions, safeguard orders could be useful.

To respect the jurisdiction over camps, these orders could be rendered by Bangladesh judges if the government prefers that option. Otherwise, with its approval, adjudicative functions for matters that stay within the confines of camps could be delegated to Rohingya judges or to members of the international community. For cases that require the intervention of local courts, the justice system could offer some degree of assistance. In that sense, the front-line justice system could be complemented by other initiatives, including for instance mobile courts which have been successful in other refugee camps.[103]

### 3.1.5 Local Focus and Applicable Law

An overarching focus and concern of the justice system should be to involve and empower the Rohingya, taking primarily a bottom-up approach. It is worth repeating that international organizations and staff should remain confined to training and support. Local actors are best placed to know the situation in the camp, the stories behind the cases that are brought before them, and the people involved in them. While mediators should remain independent and impartial, their link to the community is an important factor of success.

This brings us to the issue of the applicable law, which is of particular importance for all areas of the justice shelters. In line with the legal empowerment approach, the justice shelters should be flexible in the law they apply.[104] While international instruments such as the *1951 Convention* and the *1967 Protocol* provide

[103] Purkey, *supra* note 11 at 125; Elizabeth Rose Donnelly & Viknes Muthiah, "Protecting Women and Girls in Refugee Camps: States' Obligations under International Law" (London, UK: Centre for Women, Peace and Security, 2017) at 41, online (pdf): <http://www.lse.ac.uk/women-peace-security/assets/documents/2019/LSE-WPS-refugees-camp.pdf>; Jacobs et al, *supra* note 11 at 21; village courts in Bangladesh could be empowered to sit in camps, which could alleviate some of the barriers that currently prevent Rohingyas from accessing the formal justice system: International Rescue Committee, *supra* note 39 at 31.

[104] Otis & Reiter, "Front-Line Justice", *supra* note 3 at 710.

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that refugees are subject to the law of the country in which they find themselves, except for personal status issues such as questions of marriage,[105] Bangladesh has yet to adhere to these instruments. As a result, in many respects, the Bangladesh government has decided to remove the refugee camps from the jurisdiction of local laws, and to replace them with specific rules, regulations and restrictions.[106]

While these rules and restrictions imposed by the host state may make sense in cases where refugees have legal issues with people outside the camps—for example if they have a dispute with a Bangladeshi employer or if they have a land-related dispute with Bangladeshi owners around the camps—situations that strictly involve Rohingya people living in camps may not need this external set of rules and may be resolved according to other norms, in pluralist fashion. The justice system, and especially its mediation area, should be flexible enough to allow for the application of the laws, rules and customs prevailing among the Rohingya. Front-line justice can be an important vector for the expression of this pluralism.

Lastly, while these main features are those that we currently foresee for a potential justice system in Rohingya camps, they remain preliminary. They should be flexible enough to accommodate the reality on the ground and the evolving needs of the local population. In the same line of thought, we turn now to important considerations that should be kept in mind to ensure the success of that new justice system.

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### 3.2 Potential Hurdles

Several hurdles may jeopardize the success of a justice system and should therefore be considered in establishing and operating it.

First, cultural considerations are key. Building a new system of justice comes with inherent tensions and resistance that tends "to crisscross, with the interests of local, regional, and national political authorities, religious and ethnic groups, and individuals".[107] Therefore, "[r]ebuilding a justice system […] requires a high degree of cultural sensitivity: to language, to indigenous attitudes towards law and dispute resolution, to local legal traditions and institutions, and to the role of religion and other values in law".[108]

The main risk with such interventions is that the creation of a new system of justice be perceived as "a form of ideological imperialism or neo-colonialism".[109] An important way to avoid this perception, as mentioned previously, is to place local

[105] *1951 Convention*, *supra* note 6, arts 2, 12.

[106] Farzana, *supra* note 2 at 146.

[107] Otis & Reiter, "Front-Line Justice", *supra* note 3 at 711.

[108] *Ibid*.

[109] *Ibid*.

actors at the center of the justice system and to confine international actors to a supervisory role. International actors may also be empowered to preserve a limited number of unnegotiable principles such as the guarantees set out in international human rights instruments.[110]

Second, corruption has been mentioned as a significant issue by many refugees living in camps. That issue has several implications. On the one hand, the initial reaction of refugees towards a new system implemented in their camps could be tainted by their fear of corruption. Using trusted local actors with existing legitimacy should help alleviate those concerns, but it is also necessary that the system itself be protected from corruption and appearance of corruption. International staff bringing support to the system should be aware of this issue and should be able to intervene whenever they see corruption arising.

On the other hand, the existence of corruption will most certainly lead many people to bring corruption-related issues to the justice system. If the justice system is not empowered to deal with corruption—since it may not have jurisdiction over the officials concerned or since the power imbalance may make these cases unfit for mediation—it should redirect people towards an efficient mechanism or it should take these complaints and submit them directly to the appropriate forum, for example a whistleblowing program.

### 3.3 Long-Term Perspective

Finally, an important point in the initial front-line justice model was the long-term help that it could bring to the people concerned. The initial model discussed the potential of a transition between the front-line justice system and the new permanent justice system to be rebuilt by the state in the aftermath of a crisis. However, that goal presumes that the rebuilding of the justice system takes place locally, at the same place where the permanent justice system will be established. In the context of displaced persons settlements, the reality is much different, since camps are meant to be temporary and the ultimate goal is to dismantle them when the displaced will safely return to their home country. Still, a front-line justice system has much to offer in the long run, even in that context. It may even help in ensuring a peaceful return.

First, considering that many of the people living together in camps will eventually return to Myanmar—although such return remains uncertain at this stage—the prevention and early resolution of conflicts between them may prevent these conflicts from growing and replicating themselves in the future. Some conflicts that arise in camps may persist over time if they are not resolved, and if the persons involved live in the same community after their return, these conflicts could hamper their peaceful resettlement. Second, providing information and training on rights and obligations may help the Rohingya to understand their situation better, and it may provide them with tools that will be helpful after their return. Lastly, exposing the

[110] *Ibid* at 712.

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Rohingya to mediation may hone their ability to resolve some conflicts themselves, skills that will be transferrable to their communities when they return to their home state.

**Conclusion**

At first, the justice needs of displaced persons living in camps may not seem to be a primary concern, with health, sanitary, food and water issues rightly being at the forefront of humanitarian efforts. Still, everyday legal problems arise in camps as they do in every society and leaving them unaddressed has serious consequences on other aspects of the life within camps, in addition to hampering the successful and peaceful return of displaced persons in their home state. The current efforts made in the Rohingya camps in Bangladesh recognize the importance of this issue, expressing a will to "expand protection-oriented alternative dispute resolution mechanisms […] to enhance access to justice".[111]

The lessons learned in other countries such as Haiti and Mali show that it is possible to design temporary, front-line justice institutions to provide legal services to those who need them. These efforts may in turn increase the level of security in camps, bring down the interpersonal tensions inherent to such crowded environments and ensure the peaceful settlement of disputes. While in contrast with a post-crisis context located in a single country, front-line justice institutions may serve as a basis for a long-lasting justice system, the peaceful settlement of disputes within camps may contribute to a harmonious return of displaced persons in their home state and may also contribute to the maintaining of peace after their return.

Issues such as the political stance of the host state, the availability of funding, the political reality of camps—including the potential corruption of individuals in situations of power—as well as the cultural background of camp inhabitants, are all potential hurdles for front-line justice. Taking these into consideration when designing a system for a particular situation may however help in ensuring that the endeavor is successful.

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[111] 2020 JRP, *supra* note 32 at 19.

# RELIGION, PUBLIC LAW, AND THE REFUGE OF FORMALISM

**Howard Kislowicz[*] and Benjamin L. Berger[**]**

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## 1. Introduction

We discover ourselves through encounter with others.[1] We tell various stories about ourselves, about our essential character or identity, but it is only when we are drawn into relationship with another that the adequacy of these accounts is tested. If we are paying attention, we invariably learn that aspects of our self-accounts include features that are idealized, incompletely realized, or positively false, and that other important parts of who we are were less apparent to ourselves.[2] In particular, in the most difficult, complex, and fraught encounters with others it is not necessarily our most valued or noble traits and habits that emerge, it is, rather, the ones that most serve us.[3]

In this article we indulge a legal anthropomorphism by following the intuition that something like this process occurs within legal systems and the development of public law traditions. We accept the dangers of so doing because of its heuristic upside: we think that it helps us see something both interesting and true about the encounter between state law and religious legal traditions, and about contemporary Canadian public law. There are precedents for this kind of argument in the literature on law and religion and in constitutional theory. There is Harold Berman's work, which demonstrates, in magisterial detail, that state authority learned the shape and character

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[1] On the dialogical nature of identity, see Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed, *Multiculturalism* (Princeton: Princeton University Press, 1992).

[2] On the deep difficulty of telling these stories about ourselves, see Judith Butler, *Giving an Account of Oneself* (New York: Fordham University Press, 2005).

[3] This is one of the essential insights of the psychoanalytic tradition. See e.g. Adam Phillips, *Terrors and Experts* (Cambridge, Mass: Harvard University Press, 1996).

of a modern legal order from engagement and struggle with religious legal traditions.[4] And in the field of constitutional theory, one might think also of Robert Cover. Following Kenneth Burke's claim that "Constitutions are agonistic instruments," in that "they establish a normative world on the basis of their opposition to other worlds,"[5] Cover exposed the violence at the heart of constitutional interpretation.[6] *Nomos and Narrative*[7] was, famously, an application of this insight to the interaction of state public law and religion.

Our inquiry is less historical and dramatic than either Berman's or Cover's, but it follows a sympathetic path. We look to two recent cases from the Supreme Court of Canada, *Wall*[8] and *Aga*,[9] as a springboard or occasion for suggesting that the encounter with religious legal traditions has surfaced a distinct vein of formalism in Canadian public law, discernable across the Court's law and religion jurisprudence. Otherwise put, one effect on Canadian public law of its interaction with the complexity, challenge, and unruliness[10] of religion has been to rediscover the virtues of, and reengage with, formalist tools of public law analysis. This is so despite the centrality of substantive analysis in the account that contemporary Canadian public law gives of itself. This avowed aversion to formalist analysis is apparent across a variety of areas and doctrines of constitutional and public law. The symbolic heartland of this commitment to substantive analysis is, of course, the jurisprudence interpreting the *Charter* equality guarantee, in which the embrace of "substantive equality [as] the 'animating norm'"[11] and "philosophical premise"[12] of s. 15(1) serves as a near synecdoche for the movement from pre- to post-*Charter* public law.[13] The (until recent)[14] embrace of purposive interpretation[15] is another expression of this

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[4] Harold Joseph Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1983). See also Harold Joseph Berman, *The Interaction of Law and Religion* (Nashville: Abingdon Press, 1974).

[5] Cited in Robert M Cover, "The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role" (1985) 20 Ga L Rev 815 at 816.

[6] Cover, *supra* note 5; Robert M Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601.

[7] Robert M Cover, "The Supreme Court 1982 Term — Foreword: Nomos and Narrative" (1983) 97 Harv L Rev 4.

[8] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 [*Wall*].

[9] *Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga*, 2021 SCC 22 [*Aga*].

[10] Benjamin L Berger, "Liberal Constitutionalism and the Unsettling of the Secular" in Rex Ahdar, ed, *Research Handbook on Law and Religion* (Northampton, Mass: Edward Elgar, 2018) 198 at 214.

[11] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 42 [*Fraser*].

[12] *Ibid* at para 40.

[13] This is so despite the push-back on substantive equality found in the dissenting judgment of Brown and Rowe JJ in *Fraser*.

[14] *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32.

[15] See Vanessa MacDonnell, "The Enduring Wisdom of the Purposive Approach to Charter Interpretation" (2022), online: <https://papers.ssrn.com/abstract=4032661>.

commitment to substantive engagement, as is the (again, until recent)[16] general movement away from categorical analysis in the law governing judicial review of administrative action.[17]

Further afield, an echo of this substantive posture can be found in the contemporary law of evidence, which has been defined by the so-called "principled revolution." This revolution is a response to the "blind and empty formalism"[18] of categorical rules of admissibility, preferring engagement with the contextual application of the principles and concerns that animate these historical rules. And yet this example drawn from the law of evidence is instructive (as are, perhaps, the counter-trends noted parenthetically above). Even in thrall to this "revolutionary" story, the virtues of formal categories are never far from mind. So, we see in the law of evidence that when met with particularly knotty problems or deep complexity generated by the principled approach, the Courts have returned to the shed to recover their formalist tools.[19]

We tell a similar story here, one impelled by the distinctive challenges of encounter with religious legal traditions. The Court has variously described the nature and source of these challenges. It has emphasized the role that religion plays in the lives of individuals and communities, noting the connection between religion and human dignity,[20] and its integral link "to one's self-definition and spiritual fulfilment."[21] It has traced the "particular challenge"[22] that religion poses for law and the state to the breadth and variety of religious beliefs,[23] as well as their legal inscrutability[24] and alleged obstinacy.[25] But underlying these practical and conceptual legal challenges—both real and imagined—are fundamental questions of sovereignty and pluralism that have defined the interaction of law, religion, and state over the

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[16] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[17] The selection of a standard of review in administrative previously relied on the balancing of contextual factors rather than the current more categorical approach: *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 1998 CanLII 778 (SCC); *Dunsmuir v New Brunswick*, 2008 SCC 9.

[18] *R v Vetrovec*, [1982] 1 SCR 811 at 823, 1982 CanLII 20 (SCC).

[19] A telling example is the reintroduction of more categorical, formal analysis into the very field of evidence law that generated the "blind and empty formalism" critique, the law of corroboration. See *R v Khela*, 2009 SCC 4.

[20] *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 94, 1985 CanLII 69 (SCC).

[21] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 39 [*Amselem*].

[22] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 36 [*Wilson Colony*].

[23] *Ibid*: "Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief."

[24] *Ibid* at para 89: "There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture."

[25] *Ibid* at para 61: "Freedom of religion cases may often present this 'all or nothing' dilemma. Compromising religious beliefs is something adherents may understandably be unwilling to do."

*longue durée*.[26] We argue here that these abiding sovereignty and pluralism problems presented by the law-religion encounter has led Canadian public law to rediscover its formalist habits, and the comfort that they bring.[27]

In what follows, we bring more precision to how we understand "formalism" for the purpose of this article (Part 2), then turn to the *Wall* and *Aga* cases, drawing out the formalist moves that, in our view, define these cases (Part 3). We then look to the law and religion jurisprudence more generally, pointing to various echoes of this use of formalism to manage the complexity and risks raised by engagement with religious difference (Part 4). Having made the case that this phenomenon is not idiosyncratic to *Wall* and *Aga* but, rather, a pattern endemic in the encounter between liberal legal orders and religious pluralism, we seek to explain both the appeal (Part 5) and challenges (Part 6) presented by this resort to formalist tools.

We do not offer this as a complete, nor even a wholly consistent, story of what is occurring across the law and religion jurisprudence in Canada. It is one, however, suggested by this corner of the law and worth thinking with. Nor do we offer this by way of critique, though the prevailing normative valence of the labels "substantive" and "formalist" might give that impression to a casual reader. Instead, we are interested in showing this element of Canadian public law's "personality," drawn less to assessing if it is the right approach to these issues than to understanding how it serves state law.

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## 2. What We Talk About When We Talk About Formalism

The charge of formalism is often denigrating[28] and can sometimes lack precision. We want to avoid both these alternatives here. The label "formalism" sometimes describes the mechanistic application of rules without the consideration of their purposes.[29] Other times self-avowed formalists focus on a rigorous separation of law and politics.[30] Though there are echoes of these themes in our use of the term here, we are more precisely concerned with the generation of legal conclusions through the reliance on categories rather than a deep engagement with particular facts and contexts. Of course, categories are unavoidable in legal analysis: one of the virtues of law is that it provides a mediated, organizing system of ideas through which we can gather greater clarity on complex matters. In this, categories can play an important role. However, it is always

[26] See e.g. Berger, "Unsettling of the Secular," *supra* note 10.

[27] Benjamin L Berger tells a different but sympathetic story in "The Virtues of Law in the Politics of Religious Freedom" (2014) 29:3 JL & Religion 378. He argues that some of the features of legal processes, including their proceduralism, allow law "to serve as a tool of adhesion, rather than ultimate decision, and a temporary relief from the hyper-realism of the politics of religious difference" (395).

[28] Ernest J Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97:6 Yale LJ 949 at 950.

[29] See Lawrence B Solum, "The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights" (2006) 9:1 U Pa J Const L 155.

[30] Weinrib, "Legal Formalism", *supra* note 28 at 952.

possible to call on courts to engage in a detailed consideration of facts and context (a more substantive engagement), or to limit their analysis by recourse to a more categorical approach (a more formal analysis). In this latter mode, the finding that an issue falls into a particular category predisposes or even determines an outcome.

This is the sort of formalism we will examine in this article. Our posture here is diagnostic, not normative. We seek to uncover and display the way that formalist patterns appear in *Wall* and *Aga*, and then trace the way that this reflects a broader tendency in Canadian public law's treatment of religion. As in equality rights, constitutional interpretation, and the law of evidence, whether formalist tools are normatively attractive or offensive ultimately turns on understanding the "work" that they're doing — that is, the reasons they are appealing and the risks that they present. That is the purpose of this piece and the diagnostic path begins with *Wall* and *Aga*.

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## 3. Formalism in *Wall* and *Aga*

A signal that the Court is headed down a formalist path appears in the way it tells the story of *Wall*. The details that courts include or exclude from the narratives they tell shape the paths of necessary and available reasoning and, with this, the ultimate conclusions. The story told by the SCC in *Wall* is notable for its scant detail and terseness. The Court tells us: "Randy Wall became a member of the Congregation in 1980. He remained a member of the Congregation until he was disfellowshipped by the Judicial Committee."[31] We learn very little about the circumstances of his disfellowship. Instead, the Court draws our focus to the formal characteristics of the congregation:

> The Congregation is a voluntary association. It is not incorporated and has no articles of association or by-laws. It has no statutory foundation. It does not own property. No member of the Congregation receives any salary or pecuniary benefit from membership. Congregational activities and spiritual guidance are provided on a volunteer basis by a group of elders.[32]

Compare this with the narrative told by the Alberta Court of Appeal, which held that the court had jurisdiction to hear the case. In this telling, Mr Wall "was directed by letter to appear before the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses, a four-person committee of elders." The letter said little other than that the "alleged wrongdoing involves drunkenness."[33] Mr. Wall admitted to two episodes of drunkenness and the associated verbal abuse of his wife. He explained, however, that "the wrongdoing related to the previous expulsion by the Congregation of his 15-year old daughter."[34] The church had ordered "that the entire

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[31] *Wall*, *supra* note 8 at para 6.

[32] *Ibid* at para 3.

[33] *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255 at para 4 [*Wall ABCA*].

[34] *Ibid* at para 5.

family shun aspects of their relationship with her," which "pressured the family to evict their daughter from the family home."[35] The message of the missing (and perhaps compelling) details and the focus on legal form in the Supreme Court's narrative is that it is more concerned with categories than context in this case.[36]

The formalism we see in *Wall* and *Aga* is an instance of the categorical formalism described in Part 2. In both cases, the Court draws conclusions from the form of the organizations before the Court rather than the substance of the dispute between the parties, with its necessarily religious character. In *Wall*, what matters is that the congregation is neither a public body nor an incorporated entity, and thus not subject to judicial review.[37] In *Aga*, likewise, it matters that the congregation was not incorporated under any statute,[38] so there was no statutory basis upon which the court could assume jurisdiction. The form of these organizations—unincorporated voluntary associations—leads the court to determine their legal character and to state that the legal consequences that follow are generic to any group that has the same form.[39] Even if we have the sense that the disputes are in important ways about religion and religious communities (more on this in Part 6), this generic logic allows the Court to sidestep any thorny questions specific to religion-state relations, as the reasoning applies to any similarly organized groups. The Court need not ask whether the organization's leadership is acting on the basis of sincerely held religious beliefs, whether interference with the leadership's decisions would be inconsistent with the *Charter* value of religious freedom or a principle of the "freedom of the church,"[40] or whether the expelled parties have some other compelling interest that would justify such interference.

This formalist logic takes more precise shape in three analytical moves in *Wall* and *Aga*, and these moves more specifically disclose the formalist posture that the Court assumes in these cases. The first move is the easy disposal of *Wall* based on its placement in the public/private divide. The second is the move to determine that, as no pre-existing legal right existed, the court had no jurisdiction to hear the case. The third move arises in *Aga*, where the court's analysis of contract law demonstrates the

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[35] *Ibid*.

[36] Admittedly, the factual background in *Aga* contains more detail, but this is arguably necessitated by the existence of the Constitution and Bylaw relied on by the expelled members.

[37] *Wall*, *supra* note 8 at para 22.

[38] *Aga*, *supra* note 9 at paras 5, 39.

[39] Weinrib, "Legal Formalism", *supra* note 28 at 959–60.

[40] Though the concept of "freedom of the church" has not gained traction yet in Canada, it has been given extensive elaboration by American legal academics. See e.g. Richard W Garnett, "'The Freedom of the Church': (Towards) an Exposition, Translation, and Defense" (2013) 21 J Contemp Legal Issues 33; Ira C Lupu & Robert W Tuttle, "Courts, Clergy, and Congregations: Disputes between Religious Institutions and Their Leaders Church Autonomy Conference" (2009) 7:1 Geo JL & Pub Pol'y 119; Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy" (1981) 81:7 Colum L Rev 1373.

salience of the category of "religious obligations," interpreting its presence as a sign that parties do not intend to create legal relations. We deal with each of these in turn.

### 3.1 Move 1: The Public/Private Divide

One of the challenges Mr. Wall faced was the form of litigation he pursued at the Court of Queen's Bench. Rather than launching a private action, he applied for judicial review, a form used when a litigant asks a court to review the decision of a government actor or delegate. This placed the burden on Mr. Wall to show that his was the right sort of case for this kind of application. The Supreme Court held that it was not: "Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character."[41] The Court draws the distinction between "'public' in a generic sense and 'public' in a public law sense," which latter refers more specifically to "questions about the rule of law and the limits of an administrative decision maker's exercise of power… the legality of state decision making."[42]

We do not suggest that the religious congregation in *Wall* should have been considered a public body, and therefore subject to judicial review. Indeed, *Wall*'s guidance on the scope of availability for judicial review was likely overdue in administrative law.[43] What is telling, however, is the ease with which the Court moves from "this is not a public body" to "there is no jurisdiction." The Alberta Court of Appeal held that "a court has jurisdiction to review the decision of a religious organization when a breach of the rules of natural justice is alleged."[44] The point here is that the decision to disclaim jurisdiction is a choice, but is not explained in this way. Instead, the Court rests on a stark distinction between public and private, as though drawing that distinction is simple, wholly effacing the juridical policy choice that lies at the heart of questions of jurisdiction.

The stability and sharpness of the public/private divide is particularly fraught in matters involving religion, especially once we start asking about the degree to which individuals can draw on religious ideas and principles in public decision-making.[45] But even absent religious issues, what qualifies as "public" is not as clear-cut as the *Wall* Court makes it seem. As Paul Daly has argued, while statements in *Wall* may be correct, "they are unhelpful, question-begging formulations. One is driven to ask: *what*

[41] *Wall*, *supra* note 8 at para 14.

[42] *Ibid* at para 20.

[43] See *Air Canada v Toronto Port Authority Et Al*, [2013] 3 FCR 605 at para 56, 2011 FCA 347 (CanLII).

[44] *Wall ABCA*, *supra* note 33 at para 22.

[45] See *Chamberlain v Surrey School District No 36*, 2002 SCC 86. For scholarly discussion of this point, see Richard Moon & Benjamin L Berger, "Introduction: Religious Neutrality and the Exercise of Public Authority" in Benjamin L Berger & Richard Moon, eds, *Religion and the Exercise of Public Authority* (Oxford and Portland: Hart Publishing, 2016) 1. See also Howard Kislowicz, "Judging Religion and Judges' Religions" (2018) 33:1 Journal of Law and Religion 42 for a discussion of the complexities of the influence of religion on judicial decisions.

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*is the state*?"[46] Here, again, we see the kind of formalism identified above. The statement of the category "public/private" leads inexorably to the conclusion that judicial review is unavailable, without acknowledging either the complexity of defining what "sufficiently public" means or the choice inherent in restricting judicial review to public decisions.[47] Though courts source the constitutional authority for their powers of judicial review in the text of the Constitution,[48] it is ultimately the courts themselves that name the limits of their own jurisdiction. But here, the court does not tell us precisely why it is choosing to limit its jurisdiction in this way.

### 3.2 Move 2: No Legal Right

Another formalist move we see in *Wall* and *Aga* lies in how the Court distinguishes these cases from previous cases in which it had intervened in the affairs of voluntary associations. The leading case is *Lakeside Colony*,[49] in which the court required a Hutterite community to observe the rules of natural justice before expelling one of its members. The Supreme Court held in *Wall* that *Lakeside Colony* differed because a "legal right" was at stake – either a property right of the colony to exclude people from its land or a contractual right of the member to remain subject to certain conditions. "Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated."[50] There is not, according to the SCC, a "free-standing right to procedural fairness."[51]

There is a compelling logic to this argument. It implicitly relies on several bodies of precedent that establish when the conditions are met for a private law action. It uses a generic form – the legal right – to assert the court's independence from the politics that inhere in the assumption of jurisdiction over religious minority groups.[52] The decision not to assume jurisdiction is presented as the inexorable and mechanistic

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[46] Paul Daly, "Right and Wrong on the Scope of Judicial Review: Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 SCC 26", online: *Administrative Law Matters* <https://www.administrativelawmatters.com/blog/2018/06/03/right-and-wrong-on-the-scope-of-judicial-review-highwood-congregation-of-jehovahs-witnesses-judicial-committee-v-wall-2018-scc-26/> (emphasis in original).

[47] As Gerald Heckman et al note, what cases centred on whether a decision is "sufficiently public... reveal most clearly are policy choices behind technical issues." Gerald Heckman et al, *Administrative Law: Cases, Text, and Materials, 8th Edition* (Toronto, Canada: Emond, 2022) at 817.

[48] *Dunsmuir v New Brunswick*, *supra* note 17 at para 31.

[49] *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165, 1992 CanLII 37 (SCC).

[50] *Wall*, *supra* note 8 at para 24.

[51] *Ibid* at para 25; For a thorough analysis of the difference between jurisidiction and justiciability in this case, see Kathryn Chan, "Lakeside Colony of Hutterian v Hofer: Jurisdiction, Justiciability and Religious Law" in Renae Barker, Paul T Babie & Neil Foster, eds, *Law and Religion in the Commonwealth: The Evolution of Case Law* (Oxford: Hart Publishing, 2022) 211.

[52] Weinrib, "Legal Formalism", *supra* note 28 at 986.

application of neutral principles (no legal right = no jurisdiction).[53] What it does not mention, however, is that the courts, particularly the Supreme Court, are the very actors who decide when and whether to recognize a new legal right. Just as the prior move treated public/private as natural categories, to be discovered, not constructed, by courts, here the Court treats a "legal right" as something ontologically independent of judicial decision-making, which of course it is not.

Indeed, there is an interesting slippage in the *Wall* reasoning, which starts by saying that private law "claims must be founded on a valid cause of action, for example, contract, tort or restitution,"[54] but later focuses almost exclusively on questions of property and contract. Similarly, in *Aga*, the Court notes that the legal rights that can ground jurisdiction include "rights in property, contract, tort or unjust enrichment… and statutory causes of action,"[55] but the entire analysis is framed by the contractual argument, due to how the parties argued their cases.[56] Jurisdiction based in tort disappears from the discussion, but the category reminds us that courts have often found legal rights to exist even where no property or contract is involved.

Consider, for example, the tort of defamation: the common law has created an enforceable legal right to be compensated when one's reputation is damaged by a published statement.[57] Of course, there are many factors to be considered when a particular action is commenced, but the point for present purposes is that the law has something to say about how people speak about one another in the absence of a pre-existing legal relationship. Courts have deemed the interest individuals have in their reputation sufficient to ground a legal right. So while we have a legal right not to be defamed because the precedents say so, those precedents justify the creation of the legal right by reference to the importance of reputation.

Interestingly, this focus on the importance of the underlying interest seems also to have motivated the Court in *Lakeside*: "the question is not so much whether this is a property right or a contractual right, but whether it is of sufficient importance to deserve the intervention of the court and whether the remedy sought is susceptible of enforcement by the court."[58] This is precisely the style of reasoning absent in *Wall* and *Aga*. One might reply that the *Lakeside* Court merely meant that, from the perspective of either party, a legal right was in play: the colony's property right or the member's contractual right. This is true, but it does not answer the question of why there is not a sufficient interest on the facts of *Wall* or *Aga* capable of grounding a new legal right or, in the alternative, why the Court chose to break from its earlier, more

[53] See Frederick Schauer, "Formalism" (1988) 97:4 Yale LJ 509 at 511–13.

[54] *Wall*, *supra* note 8 at para 13.

[55] *Aga*, *supra* note 9 at para 29.

[56] *Ibid* at para 32.

[57] For an empirical account of how defamation litigation has shifted over time, see Hilary Young, "The Canadian Defamation Action: An Empirical Study" (2017) 95:3 Can B Rev 591.

[58] *Lakeside Colony of Hutterian Brethren v Hofer*, *supra* note 49 at 175.

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substantive approach. Creating such a right would require extensive justification, but the choice not to pursue the argument is still a choice. The Alberta Court of Appeal in *Wall* was prepared to entertain the argument,[59] and the SCC's explanation for why it was not rests on a formalist logic: this claim does not belong to a recognized category, so it cannot proceed.[60]

### 3.3 Move 3: "No Intention to Create Legal Relations"

The third instance of formalism at play in these cases is both somewhat different than the other two and perhaps the most vivid. In respect of the previous two examples, the formalist reasoning works by suppressing the salience of religion in the analysis. The public/private and legal right categories present the issues as, in essence, not meaningfully about religion, thereby eliminating the need for substantive wrestling with the complex and unruly nature of religion and the theological issues and relationships at work in *Wall* and *Aga*. In this final example, an inversion takes place. Substantive engagement with the particular documents, relationships, and structures of authority at play in *Aga* is avoided by emphasizing and exploiting the religious context—by stressing, without examining, the salience of religion. In this instance, the formal category that enables the disengagement of secular and religious legal traditions is "religion" itself. Put briefly, the Court in *Aga* takes the occasion to generate a new presumption in the law of contracts: unlike most other forms of agreement, a "religious" agreement—even in the presence of the other elements of a binding contract—is presumed not to be contractual and is therefore unenforceable by the courts.[61]

As discussed above, the central question in *Aga* was whether a legal right existed such that the Court had the jurisdiction over the issues raised, and the Court's focus was on whether such a right was generated by the law of contract. Was there a valid contract in *Aga*? In answering this question in the negative, the Court might have had recourse to the rules of offer and acceptance or to the doctrine of consideration, the essential elements of contract formation.[62] Indeed, it seems plausible that, were it interested solely in dispensing with the case before it, the argument that there was no offer and acceptance would have had purchase, given that the claimants appeared to have no knowledge, prior to this dispute, of the constitution that formed the substance of the alleged contract. Instead, the Court seized on the requirement that parties that enter into an agreement have the intention to create legal relations—otherwise put, an expectation that the agreement will be enforceable in the courts.

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[59] *Wall*, *supra* note 8 at para 25.

[60] *Ibid* at para 31.

[61] For an example of a case where a commitment to provide a religious divorce was successfully transformed into a civil obligation, see *Bruker v Marcovitz*, 2007 SCC 54; for a compelling analysis of this case arguing that the conclusion is consistent with Quebec civil law, but also only part of the picture for religious individuals, see Rosalie Jukier & Shauna Van Praagh, "Civil Law and Religion in the Supreme Court of Canada: What should we get out of Bruker v. Marcovitz?" (2008) 43 SCLR (2d) 381.

[62] See generally John McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020).

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This doctrine, like offer and acceptance and consideration, is "one of a cluster of doctrines designed to isolate from the universe of promising behaviour those promises and agreements that are appropriately subject to legal enforcement."[63] But it normally operates as a kind of negative category: in respect of commercial arrangements, it is generally presumed that, with offer, acceptance, and consideration, there is also an intention that the agreement will be enforceable and a defendant would have to adduce evidence of the absence of such an intention.[64] There are, however, certain narrow categories of agreement in which the presumption is reversed. The strongest example is that of agreements made in a family setting:[65] in such cases, it is presumed that the parties to such agreements did not intend to create a legally enforceable contract and it falls to the plaintiff to provide evidence that legal relations were intended.

More than concluding that there was no contract in the case before it, the Court in *Aga* creates a new and general presumption that agreements made "in the religious context"—like those made in the context of family relations—are not intended to be enforceable. Justice Rowe explains that "[t]he local stamp club or bridge night might have rules, but without more, nobody would suppose that the members intend them to be legally enforceable."[66] So, too, with religion: "While an objective intention to enter into legal relations is possible in a religious context,"[67] particularly in cases in which property or employment is at stake,[68] "courts should not be too quick to characterize religious commitments as legally binding".[69] It is reasonably clear that this outcome is not just a product of the *Aga* case being about a voluntary association,

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[63] *Ibid* at 169.

[64] See e.g. *Edwards v Ksyways Ltd*, [1964] 1 All ER 494 (QB).

[65] See *Balfour v Balfour*, [1919] 2 KB 571 (CA).

[66] *Aga*, *supra* note 9 at para 39. In Richard Moon, "Bruker v Marcovitz: Divorce and the Marriage of Law and Religion" (2008) 42 SCLR (2d) 37, Moon anticipates this equation of contracting in the family and religious settings, and the reasoning that motivates it. Canvassing reasons why courts might be reluctant to enforce religious contracts, he explains, at 46–47, that "[a] religious contract is based on norms that are often faith-based and deeply held and that bind the members of the religious community. When entering an agreement or 'contract' the parties may not understand themselves as creating legal obligations. They may consider themselves bound not by secular law but by the spiritual norms of the community—by higher law—and by their commitment to each other as members of a spiritual community." We raise, below, the question of why we would begin with an assumption that these expectations and intentions are mutually exclusive.

[67] *Aga*, *supra* note 9 at para 41. Justice Rowe's frequent emphasis on the objective nature of the test (e.g., para 37) might be misleading. It is only if a plaintiff subjectively intended to create legal relations and thought that was a shared intention, and the defendant contests this, that one turns to the objective test, namely an assessment of what the conduct of the defendant would suggest to a reasonable person. In this sense, the subjective intentions of the plaintiff matter a great deal: if a plaintiff did not subjectively intend that the agreement be enforceable, they will not prevail, irrespective of what a third party observer might infer from the conduct of the parties.

[68] *Ibid* at para 39.

[69] *Ibid* at para 42.

thereby applicable to all such associations. It's the religion that is doing the work here, as the emphasis in the original makes clear:

> becoming a member of a *religious* voluntary association — and even agreeing to be bound by certain rules in that religious voluntary association — does not, without more, evince an objective intention to enter into a legal contract enforceable by the courts. Members of a religious voluntary association may undertake religious obligations without undertaking legal ones.[70]

Justice Rowe thus creates a new categorical presumption applicable to "agreements made in a religious context": such agreements, even in the presence of the other indicia of legal enforceability, are presumptively not contracts.[71]

Much of interest is going on here. What, precisely, constitutes a "religious context," and one of a sort sufficient to trigger this presumption, is far from clear, particularly when one considers the many ways in which religion and commerce (the classic zone of presumptive intention to create legal relations) can intermingle. In this respect, the Court's equation of the of religious organizations and their multifaceted activities with stamp clubs and bridge nights seems willfully jejune. Similarly, Justice Rowe's explanation of why this presumption should be installed in the law of contract—that parties are likely intending to undertake religious obligations *rather than* legal ones—is a curious response to the legal pluralism at work here. Why would we not assume an intention to do both, in the absence of evidence to the contrary? The absence of detail and the thinness of principled explanation all point to the strength of the pull to formalism. In the hands of Justice Rowe in *Aga*, "religious" becomes a formal category, the function of which is to distance the law of contract (and with it the Courts) from the domain of religion.[72]

## 4. The Formalism of Religious Freedom

The *Wall* and *Aga* decisions evidence a decided turn to, or re-engagement with, formalism as a response to public law being called upon to engage with religious legal traditions. And yet this pattern does not appear "suddenly" from these two cases, vivid though they make it. Nor is this formalism contained to the distinctive presentation of the law and religion encounter that *Wall* and *Aga* admittedly represent. Rather, sensitized to this move or tendency by *Wall* and *Aga*, we now see it across various,

[70] *Ibid* at para 51.

[71] That this is a genuine presumption is clear from the Court's observation that, on the record in *Aga*, "there is no evidence of an objective intention to enter into legal relations." This is a failure to discharge a persuasive burden that is "fatal to the respondents' claim." (para 52)

[72] It is notable that, post-*Aga*, familial and religious agreements now generate similar exceptional presumptions. This tracks the traditional liberal treatment of both the family and religion as quintessentially private domains. See Paul W Kahn, *Putting Liberalism in Its Place* (Princeton: Princeton University Press, 2004) at 130; Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45:2 Osgoode Hall LJ 277 at 291.

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and central, features of the law and religion jurisprudence in Canada. In this section of the article, we therefore turn to elements of the Supreme Court's religion jurisprudence that share the formalist features or sensibilities of the sort that we see on display in *Wall* and *Aga*. We identify and discuss three important examples below. The resulting picture is of the Court consistently, repeatedly reaching toward the formal as a means of managing the complexity and risks involved in the legal engagement with religion. This comforting repossession of formalism is one of the notable effects on public law of its encounter with religion.

### 4.1 The Subjective Sincerity Test

A hallmark of the Canadian approach to the constitutional protection of religious freedom is the subjective sincerity test adopted by the court in *Syndicat Northcrest v Amselem*.[73] This aspect of the analysis of s 2(a) holds that, in assessing a claim that the state has interfered with religious freedom, a court ought not "to rule on the validity or veracity of any given religious practice or belief, or to choose among various interpretations of belief."[74] Instead, it limits itself to assessing whether the claimant "sincerely believes in a practice or belief that has a nexus with religion"[75] (and whether the state has interfered in the claimant's ability to act in accordance with that belief in a more than trivial fashion). This approach to analyzing s 2(a) claims has several justifications and virtues.[76] It is also, effectively, a formalist evasion (or deferral) of engagement.

For Justice Iacobucci, this approach flowed naturally, even necessarily, from the very nature of the right.[77] The subjective sincerity test does, indeed, map the individualist, autonomy-based understanding of freedom of religion that so defines the jurisprudence. This approach also effectively removes the risk of having to pronounce on the "authentic" character or doctrines of a given religion, a danger very much on the mind of the Court in *Amselem*, which was being asked to select as between interpretations of Judaism. Instead, a court need only rule on the effects of state action on religion as sincerely understood and practiced by the claimant.

[73] 2004 SCC 47 [*Amselem*]. For a helpful discussion of *Amselem* and the subjective sincerity test (and of much of the historical jurisprudence on freedom of religion) see Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014).

[74] *Amselem, supra* note 73 at para 51.

[75] Most recently articulated in this way in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 63 [*TWU (LSBC)*].

[76] For a helpful discussion, see Lori Beaman, "Is Religious Freedom Impossible in Canada" (2010) 8(2) L Culture & Humanities 266.

[77] He explained the subjective sincerity test as honouring "a personal or subjective conception of freedom of religion, one that is integrally linked with an individual's self-definition and fulfilment and is a function of personal autonomy and choice, elements which undergird the right" (*Amselem, supra* note 73 at para 42).

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But for present purposes it bears noting that these virtues are obtained by resort to a tool for substantive disengagement from the more unruly and fraught aspects of religion. It may be somewhat arresting to see the association of "subjectivity" with "formalism." One usually thinks of subjectivism as a methodology that requires close engagement with an individual. But the "subjective sincerity" test ultimately amounts to a credibility assessment and referring issues to the category of "a matter of credibility" is one of the great tools of redirection available to the law. Something is a question of credibility rather than some other kind of question. In the analysis of religious freedom, the adoption of a subjective sincerity test is the choice to judge credibility about religion rather than engaging in the risky business of judging religion, more richly understood. The anxiety about engagement with religion to which the subjective sincerity test in part responded was overt: "Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion."[78] Distance from religion is secured through the particular species of close engagement with the individual required by a credibility assessment.

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In the end, this evasion is not wholly successful and often serves more as a fig leaf. The nature of the s 1 analysis means that evaluation of the history, theology, and spiritual infrastructure of religion is inexorable.[79] To assess proportionality, one must get the measure, somehow, of the substantive effect of a limit on religious freedom. Subjective sincerity is, however, a tool that, among the many things it does, achieves at least rhetorical distance from judicial engagement with the most disruptive features of religious pluralism.

### 4.2 Limits on Religious Freedom

Until recently, the analytical "thinness" of s 2(a) was a product not only of the subjective sincerity methodology but the absence of any recognized internal limit to the scope of freedom of religion. This capaciousness left most of the hard work (and deeper engagement with religion) to be done at the s. 1 stage. This changed in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations*).[80] The Ktunaxa objected to a ski resort development in an area the Ktunaxa call Qat'muk, known to the state as the Jumbo Valley in British Columbia. They claimed that the development would cause Grizzly Bear Spirit to leave the territory, thereby seriously interfering with their religious beliefs and practices. On the strength of the law to that point, the claim looked promising: there was no real question of the subjective sincerity of the Ktunaxa[81] and, with that accepted, it seemed clear that the approval of this development would be a more than trivial interference, thereby satisfying the s

[78] *Amselem, supra* note 73 at para 50.

[79] Berger, "Unsettling of the Secular," *supra* note 10 at 207.

[80] 2017 SCC 54 [*Ktunaxa*].

[81] *Ibid* at paras 30, 34–36 (in which there is arguably some subtext casting doubt on the sincerity of the claim).

2(a) test and putting the government in the unenviable position of having to justify the limit in the name of a ski resort. But the disruptive implications of a successful claim for government use of land, given the close ties between land and Indigenous spirituality,[82] were also apparent to all.

The majority's solution was to reject the s 2(a) claim on the basis of a newly installed limit within the right: Chief Justice McLachlin and Justice Rowe explained that s 2(a) protects freedom to hold and act on religious beliefs, but that "[t]he state's duty under s 2(*a*) is not to protect the object of beliefs, such as Grizzly Bear Spirit."[83] The Ktunaxa, the majority concludes, remain free to believe what they wish and engage in such practices as they prefer; that the ski resort might affect the significance and meaning of those beliefs and actions is not a matter that engages freedom of religion. This analytic manoeuvre requires delicate ontological work—splitting subject, action, and object in this fashion—and there is deep awkwardness in the Court using the occasion of its first analysis of an Indigenous nation's s 2(a) claim to install a new and highly specific limit on the right. But for present purposes what is most arresting about the majority's decision is the unapologetic embrace of a notably formalist analysis. The decision expressly carves the "spiritual meaning"[84] derived from religious belief and actions out of the ambit of s 2(a)'s concern.

This is the gravamen of the minority's objection, penned by Justice Moldaver. To him, "where a belief or practice is rendered devoid of spiritual significance, there is obviously an interference with the ability to act in accordance with that *religious* belief or practice."[85] Though he would ultimately (and perhaps even more troublingly given his conclusion on s 2(a)) justify the limit under s 1, he condemns the majority's approach as amounting "to protecting empty gestures and hollow rituals"[86]—a kind of "blind and empty formalism," one might say. Met with a case in which the complexity and unsettling potential of religious difference was keenly felt, the majority's management strategy leaned on a quintessentially formal pattern of reasoning, carving off meaning and significance in favour of the outward forms of religious life.

If *Ktunaxa* offers evidence of formalism in the setting of internal limits on the scope freedom of religion, *Wilson Colony*[87] suggests similar tendencies in the s 1

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[82] John Borrows, "Living Law on a Living Earth: Religion, Law, and the Constitution" in *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) 239.

[83] *Ktunaxa, supra* note 80 at para 71. For an extended critique of this development, see Howard Kislowicz & Senwung Luk, "Recontextualizing *Ktunaxa Nation v. British Columbia*: Crown Land, History and Indigenous Religious Freedom" (2019) 88:1 SCLR (2d) 205.

[84] *Ktunaxa, supra* note 80 at para 71.

[85] *Ibid* at para 130.

[86] *Ibid*.

[87] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Wilson Colony*].

assessment of state-imposed limitations on the right. This expression of the habit takes the form of the Court's use of an abstract and substantively thin conception of choice.

The small Hutterite community of Wilson Colony refused, on grounds of religious freedom, to comply with the Government of Alberta's universal photograph requirement for driver's licences. This objection (which had been accommodated by the government in the past) flowed from the Hutterites' interpretation of the Second Commandment. The subjective sincerity of the religious beliefs and the non-trivial interference of the photograph requirement was uncontested in the proceedings and the case focused on whether the government had established a s 1 justification. The majority of the Supreme Court, in a judgment written by Chief Justice McLachlin, concluded that it had.

The result in *Wilson Colony* has been widely critiqued, including on grounds of being too deferential to the government's view of whether the small number of exemptions involved would truly threaten the policy goals of the regulations, and being insufficiently sensitive to the communal religious life of the members of Wilson Colony, which emphasized self-sufficiency.[88] Of central interest in this article is the majority's analysis of the deleterious effects of the limit and, in particular, the way in which it deploys the concept of choice as a means of responding to the complexity and difficulty of engaging with religion. As she embarks on her s 1 analysis, Chief Justice McLachlin makes several claims about what makes freedom of religion such a difficult right. She notes that the potential scope of conflict between religious beliefs and the regulatory state,[89] as well as the high-stakes and (to her mind) often non-negotiable nature of religious commitments.[90] But central to the challenge, she explains, is the complexity of religious beliefs and practices and the consequential challenge of gauging the impact of a state measure on religious life:

> There is no magic barometer to measure the seriousness of a particular limit on a religious practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.[91]

[88] See e.g. Richard Moon, "Accommodation Without Compromise: Comment on *Alberta v. Hutterian Brethren of Wilson Colony*" (2010) 51 SCLR 95; Howard Kislowicz, Richard Haigh & Adrienne Ng, "Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom" (2011) 48:3 Alberta L Rev 679; Benjamin L Berger, "Section 1, Constitutional Reasoning, and Cultural Difference: Assessing the Impacts of Alberta v Hutterian Brethren of Wilson Colony" (2010) 51 SCLR (2d) 25; Sara Weinrib, "An Exemption for Sincere Believers: The Challenge of Alberta v Hutterian Brethren of Wilson Colony" (2010) 56 McGill LJ 719.

[89] *Wilson Colony*, *supra* note 87 at para 36.

[90] *Ibid* at para 61.

[91] *Ibid* at para 89.

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Met with this contextual, substantive complexity, what is a court to do? The category of choice comes in aid and is installed as the litmus test for s 1 analyses of limits of religious freedom: the ultimate question in the overall balancing stage "is whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices."[92] Here, Chief Justice McLachlin posits that the community could hire non-member drivers or otherwise arrange third-party transport. This would impose non-trivial costs on the community, but on the evidence before the Court, she concludes that "[t]hey do not negate the choice that lies at the heart of freedom of religion."[93]

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The formal presence of choice is a salve for the complexity of religion. It is a stand-in for the "magic barometer" of the Court's imaginings. In *Wilson Colony*, resort to "choice" seems to relieve the Court of closer scrutiny of government purposes and the scope of possible accommodations, as well as the substantive character of the choice being offered, as shaped by both broader social facts (like economics and community relations) and the architecture of the religious beliefs and practices of the community.

Deployments of simultaneously abstract and muscular conceptions of choice have been recognized as the enemy of substantive justice in other contexts, from the law governing police powers[94] to the analysis of equality under s 15(1).[95] The point is vividly displayed in Chief Justice McLachlin's summary of her conclusion on s 1: the Colony members were not deprived of a meaningful choice to honour their religious commitments; after all, "[t]he law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver's licence must permit a photo to be taken for the photo identification data bank."[96] This style of reasoning seems more at home in our pre-*Charter* jurisprudence than anything we would expect in a world of substantive equality, an observation that points to our final "echo" of the formalism in *Wall* and *Aga*.

### 4.3 Avoidance of Section 15(1) Analysis

The marginality of s 15(1) in the religious freedom cases is a final and telling reflection of the formalist tendencies in this arena. Being the symbolic heart of Canadian law's commitment to substantive justice, the lack of influence of s 15(1) on the field of law and religion is revealing. One might begin by pointing to the surprising fact that, despite the presence of religion as a listed characteristic in s 15(1), there has never

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[92] *Ibid* at para 88.

[93] *Ibid* at para 99.

[94] *R v Grant*, 2009 SCC 32; *R v Spencer*, 2014 SCC 43.

[95] See e.g. Diana Majury, "Women are Themselves to Blame: Choice as a Justification for Unequal Treatment" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 209.

[96] *Wilson Colony*, *supra* note 87 at para 98.

been a *Charter* religion case decided by the Supreme Court under that section.[97] When it is raised by claimants, the pattern has been to claim that the substance of the s 15(1) claim added nothing to, or was adequately addressed by, the s 2(a) analysis.[98] This means that, as an empirical matter, courts have not brought the specific tools of s 15 analysis to the problem of state interactions with religion. One might seek to explain this by noting the references to s 15 and equality in the foundational s 2(a) case, *Big M*,[99] made necessary because s 15(1) was not yet in force when *Big M* worked its way through the Courts. The thought here would be that the logic of substantive equality has been meaningfully absorbed into s 2(a). But that seems not to be true.[100]

In various ways the cases deploy concepts and reasoning in notable tension with the logic of substantive equality. Indeed, another way of describing the reasoning in both *Ktunaxa* and *Wilson Colony* is that both decisions stand as evidence of the notable failure of substantive equality thinking to penetrate the borders of freedom of religion. The characterization of the regulations in *Wilson Colony* as not compelling the taking of a photograph, merely requiring one for the purpose of driving, is the kind of formal, *Bliss*-like[101] analysis of the effects of a law that the Court sought to break from in its *Charter* approach to equality. The contemporary s 15(1) analysis insists that an individual's treatment and choices before the law are assessed in a contextual, subtle way that is focused on how, given their "enumerated or analogous" identity characteristic, state treatment affects their life. Although the extent to which the Court, in a given decision, gives satisfying effect to this substantive equality commitment is always up for debate, the presence of that commitment is never really at issue.

The spirit of substantive equality is similarly absent in the *Ktunaxa* case, with the new limit imposed by the Court—that s 2(a) does not protect the "object" of one's beliefs—presented as though it is an internal limit of universal applicability to all religions. It is presented as a matter of abstract and structural logic when, in fact, it has a substantively disparate impact on Indigenous religion and spirituality. Briefly put, there are no other religious traditions for which the link between *this land* over which the State purports to have authority and exercises control is also so intimately linked with the metaphysical architecture of the religion.[102] Justice Moldaver recognizes this

[97] For a reimagining of *Hutterian Brethren* in which the s 15(1) rights of the colony members are analyzed and vindicated, see Jennifer Koshan & Jonnette Watson Hamilton, "*Alberta v Hutterian Brethren of Wilson Colony*" (2018) 30:2 Can J Women & L 292.

[98] See e.g. *Wilson Colony*, *supra* note 87.

[99] *R v Big M Drug Mart*, [1985] 1 SCR 295, 1985 CanLII 69 (SCC) [*Big M*].

[100] See *contra* Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto; Buffalo; London: University of Toronto Press, 2014). Concerned that the early cases like *Big M* and *Zylberberg*, which focused on the discriminatory or exclusionary messages sent by the practices or legislation at issue, set the s 2(a) jurisprudence "off on the wrong foot," Waldron objects that equality concerns have played too-significant a role in the courts' analysis of religious freedom claims.

[101] *Bliss v Attorney General of Canada*, [1979] 1 SCR 183, 1978 CanLII 25 (SCC).

[102] See Natasha Bakht & Lynda Collins, "'The Earth is Our Mother': Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada" (2017) 62:3 McGill LJ 777.

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in his separate reasons in *Ktunaxa*, noting that the majority fails to take into account the "inextricable link between spirituality and land in Indigenous religious traditions,"[103] having earlier observed that "[t]o ensure that all religions are afforded the same level of protection under s 2(a), courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices."[104] This is an objection in the register of substantive equality.

Indeed, the very concept in ascendency as the Court's framework for thinking about the interaction of law and religion—state neutrality—is in awkward relationship with substantive notions of equality. As developed in *Saguenay*,[105] the Court describes the state's duty of religious neutrality as requiring both that the state "abstain from taking a position on religious questions"[106] and that it be evenhanded as among various systems of belief and being: "[t]his neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief."[107] Evenhandedness can, of course, take a more formal or substantive character, but the overall tenor of the cases thus far suggests an approach to neutrality focused on an assessment of state treatment that leans in the formal direction. When, for example, one thinks of the appropriate contemporary treatment of Indigenous religion in light of both the historical use and suppression of religion in service of colonialism, "neutrality" does not seem to capture what one would ask of the state.[108]

There are other examples. The durable reliance on the public/private divide as a tool for carving up a much more phenomenologically messy world is one.[109] Another is the presumed divisibility of belief and action, identity and behaviour, another mainstay of s 2(a) analysis that sounds uncomfortably in a substantive equality register and has been the sustained target of academic critique in other domains.[110] The point is that it would be much more difficult to engage in any of these patterns of analysis, all of which have a formal character or texture, within a s 15(1) framework.

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[103] *Ktunaxa*, *supra* note 80 at para 131.

[104] *Ibid* at para 128.

[105] *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 [*Saguenay*].

[106] *Ibid* at para 132.

[107] *Ibid* at para 72.

[108] See Benjamin L Berger, "Is State Neutrality Bad for Indigenous Religious Freedom?" (1 July 2019) in Jeffrey Hewitt, Beverly Jacobs, and Richard Moon, eds, *Indigenous Spirituality and Religious Freedom* (Toronto: University of Toronto Press, Forthcoming), Osgoode Legal Studies Research Paper, Available at SSRN: <https://ssrn.com/abstract=3508967>. See also *Servatius v Alberni School District No. 70*, 2020 BCSC 15, in which the Court's conclusion that the exposure of public school children to Indigenous spiritual rituals and prayer was acceptably neutral does not seem descriptive of why we might regard such learning as important.

[109] See e.g. Moon & Berger, *supra* note 45.

[110] See e.g. Lori G Beaman, "Is Religious Freedom Impossible in Canada?" (2012) 8:2 L Culture & Humanities 266 at 281–84.

The avoidance of s 15(1) is thus another finger pointed suggestively to the role of formalism and formalist tools in public law's engagement with religious traditions. And this brings us to the next natural questions: what, precisely, is the appeal of formalism, and what are its virtues and risks?

## 5. Formalism's Appeal in Response to Religion

Though, as noted above, the label of formalism is often used pejoratively, we might hold this normative judgment in abeyance and instead consider what it is about religious freedom cases that drives the court to adopt a formalist position. In the cases we have discussed, there is a sense that, while religious practices and differences drove the disputes, the Court's response has been to retreat from substantive engagement. How can we explain the impulse towards a formalist response to state-religion relations? The Court gives a hint in its finding in *Wall* that "courts have neither legitimacy nor institutional capacity to deal with [issues of religious doctrine]."[111] In framing the justiciability question, the Court relies on the writings of Lorne Sossin. Sossin writes that the questions of legitimacy and institutional capacity are answered by considering whether

> the matter before the court would be an economical and efficient investment of judicial resources to resolve, [whether] there is a sufficient factual and evidentiary basis for the claim, [whether] there would be an adequate adversarial presentation of the parties' positions and [whether] no other administrative or political body has been given prior jurisdiction of the matter by statute.[112]

Interestingly, none of these considerations figure in the *Wall* Court's analysis. Instead, it focuses on whether the court will be unjustifiably entangled in religious matters.[113]

Through this emphasis, the legitimacy/institutional capacity question is tied directly to the religious elements of the dispute, rather than to a more generic concern about efficient use of judicial resources or the sufficiency of evidence and argument. But the Court does not explain precisely what the institutional capacity limitation is, nor why it would be illegitimate for a court to intervene in these kinds of religious disputes. We think the institutional capacity question is something of a red herring, or at least a proxy for a more foundational concern. "Institutional capacity" might refer simply to knowledge and expertise. There is no institutional requirement for judges in Canada to have familiarity with any religious tradition, so one might say the court, as an institution, lacks expertise on these matters. But the same could be said of many subjects. In *Amselem*, for example, expert testimony was produced about religious

[111] *Wall*, *supra* note 8 at para 36.

[112] Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) at 7, as cited in *ibid* at para 34.

[113] *Ibid* at para 36.

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obligations, but also about architecture and engineering.[114] Though the courts have no institutional expertise in these latter fields, they do not hesitate to select the expert testimony that is more convincing on these matters.[115] We think that the point in *Wall* about institutional capacity can therefore be folded into a broader concern about legitimacy, with "capacity" really standing for a prudential judgment about what a court ought to be deciding in order to preserve its legitimacy in a particular historical and political configuration of religion and state.

We can thus get to the heart of the legitimacy question: why would it be illegitimate for the court to answer questions of religious doctrine, where resolution of a legal issue in a given case calls upon it to do so? Why is it that courts can be *unjustifiably* entangled in religion, but not architecture? While some might point to the existence of a *Charter* right of religious freedom to account for the distinction, and that might have some formal explanatory force, it is also a kind of question-begging. Why do limits on the scope of legitimate state involvement in religion reflected in s 2(a) bind the courts' reasoning, resulting in a similar reticence to engage with religion, even when it is faced with matters not subject to the *Charter*, for example where corporate or contractual documents refer to religious matters?[116]

This concern with legitimacy appears sourced in a kind of anxiety. One dimension of this anxiety is practical: if courts make rulings that an increasing number of legal subjects and law enforcement agents see as illegitimate, perhaps the people the court depends upon will stop doing the work of turning judicial words into action.[117] In this framing, the main reason courts do not want to involve themselves in religious disputes is that they sense that people would not abide by their pronouncements, and perhaps that law enforcement agents may not enforce them. The worry is that a single instance in which law enforcement refuses to comply could lead to others, and this might begin to make courts' claims to authority less credible.

But this anxiety could also be cast in a more inchoate fashion, which is perhaps how it is felt, even if "subconsciously," by courts. The history of the development of modern liberal legal orders is one that has been in conversation and sometimes direct competition with religious authority.[118] That story is not just one of

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[114] *Syndicat Northcrest c Amselem*, [1998] RJQ 1892 at para 20, 1998 CanLII 11688 (QC CS).

[115] Thanks to Jean-François Gaudreault-Desbiens for raising this point in conversation.

[116] *Wall*, *supra* note 8 at para 38; see also *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101; *Gill v Kalgidhar Darbar Sahib Society*, 2017 BCSC 1423; *Lutz v Faith Lutheran Church of Kelowna*, 2009 BCSC 59.

[117] Austin Sarat & Thomas Kearns, eds, *Law's Violence* (Ann Arbor, MI: University of Michigan Press, 1992) at 248; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 30-32: "courts have no physical or economic means to enforce their judgments. Ultimately, courts depend on both the executive and the citizenry to recognize and abide by their judgments."; see also Robert Cover, "The Bonds of Constitutional Interpretation: Of the World, the Deed, and the Role" (1986) 20 Ga L Rev 815.

[118] See e.g. Berman, *supra* note 4.

boundary-setting, but also about mutual influence, as one can see, for example, in the historical impact of the law of equity on modern common law.[119] Yet one moral of the story for modern secular courts has been that "theological matters" are uniquely dangerous, messy, and generally inappropriate issues with which to engage.[120] The sense is that the public and secular character of law is threatened by even adjudicative proximity to religion. Becoming entangled with religious matters—even if those matters are no more private, complex, or unruly than other issues with which courts habitually deal—thus presents as a risk it is uniquely important to avoid. Formalism (be it in the ways seen in *Aga* and *Wall*, the subjective sincerity test, or a formal approach to neutrality and equality) is a technique to achieve distance.

It is possible that this anxiety co-exists with, or could be more positively framed as, a juridical acknowledgement of legal pluralism and the use of formalist tools to ensure room for non-state normative and legal orders to operate. Some element of courts' desire for distance, expressed through formalism, may flow from a recognition that citizens see themselves as participating in multiple normative (even legal) orders, each of which makes claims over how they behave. And in some of its expressions, the use of formal postures and tools to ensure that law does not "weigh in" on religion does, indeed, secure forms of religious autonomy and self-direction/self-definition. This is the effect of the subjective sincerity test, at least before s 1 enters the picture. One can see this effect in the posture taken in *Wall* and *Aga* very clearly, too: in *Wall* and *Aga*, the formalism becomes a "substantive interpretive abstention"[121] as religious norms are non-justiciable. It does not matter what the particular norm is, which community invokes it, or what its consequences are for members. If no (previously established) legal rights are affected, the court will not adjudicate, leaving to community leadership the ability to sort through disagreements.[122] In these modes, formalism can be seen instead as a way to use the language of law to modestly[123] limit the extent of the state's dominion and respect alternative sources of authority.

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[119] For an engaging account of this, see Debora Shuger, *Political Theologies in Shakespeare's England: The Sacred and the State in Measure for Measure* (New York: Palgrave Macmillan, 2001).

[120] See Natasha Bakht, "Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy-Another Perspective" (2005) 40th Anniversary Ottawa L Rev 67 at 74–75.

[121] Perry Dane, "The Varieties of Religious Autonomy" in Gerhard Robbers, ed, *Church Autonomy: A Comparative Survey* (Frankfurt am Main: Peter Lang, 2001) at 13 of PDF.

[122] On the gendered impact of religious institutional autonomy, see Kathryn Chan, "Religious Institutionalism: A Feminist Response" (2021) 71:4 U of T LJ 443. Interestingly, however, the approach allows for individuals to convert their religious obligations into legally enforceable ones. The clearest way to do this is to make the religious obligations the subject of a civil contract (See *Bruker v Marcovitz*, *supra* note 61; *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*, 2011 ONCA 728) or perhaps to adopt a corporate form under state law that allows corporate constitutions and bylaws to have legal force.

[123] Schauer, *supra* note 53 at 543. For a different analysis of "humility" as a judicial virtue, see e.g., Benjamin L Berger, "What Humility Isn't: Responsibility and the Judicial Role" in Marcus Moore &

## 6. Challenges of Formalism

While formalism holds various forms of appeal, it can also bring with it significant challenges. At a general level, formalism is designed to remove at least some measure of discretion from decision-makers (in our case, trial and appellate judges). This can create inconsistencies in the treatment of substantively similar cases. For instance, there is a strangeness to how the non-justiciability of religious doctrine works in practice. Contracts or corporate bylaws that refer to religious sources directly (such as the Book of Matthew)[124] are not justiciable, but those that spell out the same obligations sanitized of their religious origins would likely be.[125] This seems both artificial and fragile: the enforceability of a contract or corporate bylaw is determined by its technical wording rather than a larger appreciation of context, allowing parties to do indirectly what they cannot do directly.

These pretensions and logical frailties can ultimately undermine legitimacy, which is itself a risk associated with the formalist posture. Formalism can inhibit courts from making some of their reasons for decision explicit, damaging the transparency that is essential to structures of legitimacy. In *Wall* and *Aga*, for instance, the formal bases for the rulings in both cases make the religious nature of the organizations involved legally irrelevant. Yet, in both cases, State-religion relations were a major preoccupation of the parties before the SCC,[126] and it would be hard to believe that that the Court would have granted leave to appeal for a dispute over a member's expulsion from a bridge night, stamp club, or soccer association.[127] Further, despite making only oblique reference to the *Charter* right or value of religious freedom,[128] there are signals in both decisions that what motivates the decision is a particular sensitivity to courts' oversight of *religious* organizations. Though *Wall* could have been disposed of on the question of jurisdiction alone,[129] the Court nonetheless offers commentary on the question of the justiciability of religious matters.[130] We see this as

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Daniel Jutras, eds, *Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership* (Toronto: LexisNexis, 2018) 569.

[124] *Wall*, *supra* note 8 at para 38.

[125] Bruce Ryder notes a similar dynamic in the incorporation of religious norms into marriage contracts and separation agreements: Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 87 at 105.

[126] Of the 10 interveners in *Wall*, seven had religious affiliations, and the remaining three were civil liberties-oriented organizations. In *Aga*, seven of 10 interveners had religious affiliations, one was a Humanist association, and the remaining two were civil liberties-oriented organizations.

[127] These examples figure in the analogies and case law drawn upon by the Court: *Wall*, *supra* note 8 at paras 19, 35; *Aga*, *supra* note 9 at para 39.

[128] *Wall*, *supra* note 8 at para 39.

[129] *Ibid* at para 32.

[130] *Ibid* at paras 36-39.

well in the special consideration that the Court gives to religion in *Aga* in its evaluation of whether the parties had an intention to create legal relations.[131]

There is a sense here that religion is simultaneously of decisive importance and also not worthy of attention. Though Dane speaks of such "double-coding" as a virtue,[132] it can come to be seen as a poor fit with the "culture of justification"[133] that the Court has encouraged in administrative decision-making and public law more generally. The risk is that such double-coding might undermine the court's credibility. When legal subjects have the sense that cases are actually decided on a basis other than the rules relied on in the cases, the mismatch of motivations and rules may come to be seen as a lack of candor.

Ultimately, the foundational concern with a commitment to formalism is that it can prevent courts from remedying injustices that do not fit the pre-defined categories. The worry is always that the virtues of formalism are secured in the coin of injustice. Injustices that are dependent on understanding context and history, or that elude the categories recognized by law, are left unaddressed. This is the concern that led to the principled revolution in the law of evidence: that formalism was getting in the way of principled justice.[134] And it is partly for this reason that Canadian jurisdictions have moved away from the formal requirements of prerogative writs in administrative law.[135] Likewise, all Canadian jurisdictions have adopted the "oppression remedy" into their business corporation legislation,[136] and several into

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[131] *Aga*, *supra* note 9 at paras 31, 41, 42.

[132] Perry Dane, "Master Metaphors and Double-Coding in the Encounters of Religion and State" (2016) 53 San Diego L Rev 53 at 76–81.

[133] *Canada (Minister of Citizenship and Immigration) v Alexander Vavilov*, 2019 SCC 65 at paras 2, 14; see also Paul Daly, "Vavilov and the Culture of Justification in Administrative Law", (20 April 2020), online: *Administrative Law Matters* <https://www.administrativelawmatters.com/blog/2020/04/20/vavilov-and-the-culture-of-justification-in-administrative-law/>.

[134] See e.g. *R v Khan*, [1990] 2 SCR 531, 1990 CanLII 77 (SCC). This basis for the "principled revolution," or purposive approach, to evidence law is discussed in David M Paciocco, Palma Paciocco & Lee Steusser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020) at 11–13.

[135] See Cristie Ford, "What People Want, What They Get, and the Administrative State" in Coleen M Flood & Paul Daly, eds, *Administrative Law in Context* (Toronto: Emond Montgomery Publications Limited, 2022) 39 at 63.

[136] *Canada Business Corporations Act*, RSC 1985 c C-44, s 241; *Business Corporations Act*, RSA 2000 c B-9, s 242; *Business Corporations Act*, SBC 2002, c 57, s 227; *The Corporations Act*, CCSM c C225, s 234; *Business Corporations Act*, SNB 1981, c B-9.1, s 166; *Corporations Act*, RSNL 1990, c C-36, s 371; *Business Corporations Act*, SNWT 1996, c 19 s 243; *Companies Act*, RSNS 1989, c 81, s 135A, Third Schedule s 5; *Business Corporations Act*, SNWT (Nu) 1996, c 19, s 243: *Business Corporations Act*, RSPEI 1988, c B-6.01, s 194; *Business Corporations Act*, CQLR c S-31.1, s 450; *Business Corporations Act*, RSY 2002, c 20, s 243.

their statutes governing not-for-profit entities.[137] The oppression remedy allows courts wide discretion to redress behaviour that is technically valid but oppressive or unfair,[138] signalling that meeting technical requirements is not the same as behaving fairly.[139] In our context, this risk of substantive injustice occasioned by formalism is realized in courts' tendency to avoid s 15(1) analysis where religion is concerned, as well as in its adoption of state neutrality as a governing framework for thinking through the interactions between the state and religion. And it appears vividly in *Ktunaxa*, with the adoption of a categorical limit on religious freedom that excludes central elements of Indigenous spirituality from the scope of s 2(a).

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## 7. Conclusion

This article has diagnosed something about the character—the habits of behaviour and tendencies of thought—of Canadian public law by watching how it behaves in relationship with religion and religious legal traditions. When confronted with the often-messy realities of the religious lives of its subjects, it frequently adopts categorical postures and tools. We have suggested that this impulse might stem from an anxiety over its identity as secular, its claims to authority, from a respect for the multiple sources of authority that guide people's lives, or perhaps some combination of these. This habit may, thus, serve public law rather well in a variety of ways, including shoring up legitimacy, encouraging certainty, manifesting a commitment to secular neutrality, or honouring a complicated past with religion. All of these effects are ultimately traceable to avoiding the kind of complex entanglement with religion that a more substantive and evaluative mode of encounter would risk. Reaching for the formal is a protective and comforting instinct.

The pathologies that can flow from this tendency are also readily identifiable. The formalist move is always fragile, continuously stumbling on its own artifice. It suppresses, rather than addresses, conflict and complexity, and as with any pattern of distancing behaviour, it risks resolving into a kind of alienation, in this case between subject and legal order. Most immediately concerning, adhering to formalism involves detaching from forms of justice that turn on context and the particular, which is precisely where the meaning and significance of so much of religious life is found. We have seen this danger materialize in cases like *Ktunaxa* and *Wilson Colony*.

The pattern here is a characteristic of law, not a domain-specific reaction to religion: law is constantly positioning itself between the relative virtues and risks of formal and substantive analysis. As we noted by way of example at the outset of this piece, we have watched that pattern at work over the last 20 years in the fields of administrative law and the law of evidence. Our purpose here, provoked by our

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[137] *The Non-profit Corporations Act*, 1995, SS 1995, c N-4.2, s 225(1); *Societies Act*, SBC 2015, c 18, s102. But see *Canada Not-For-Profit Corporations Act*, SC 2009, c 23, s 253, which includes an oppression remedy but makes it unavailable where conduct was "reasonably" based on a "tenet of faith."

[138] See e.g. *Canada Business Corporations Act*, RSC 1985, c C-44, s 241.

[139] *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 58.

reaction to reading *Wall* and *Aga*, which ultimately took us to the religion jurisprudence at large, was to show the particular causes, dangers, and jurisprudential shape that this habit assumes in the interaction of law and religion. Seeing both this particularity and how it channels an essential feature of a legal order, in this piece we have sought to facilitate self-awareness about this tendency in public law's encounter with religion. Alive to the propensity, we ought to be monitoring the relative weight of its gifts and harms, hopeful that the desire for comfort does not overtake the need for true engagement in doing justice, though our sense is that this may currently be happening.

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# ABORIGINAL TITLE, SELF-GOVERNMENT, AND INDIGENOUS JURISDICTION IN CANADIAN LAW

**Ryan Beaton, Robert Hamilton, and Joshua Nichols**

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## 0. Introduction

This article considers inherent Indigenous jurisdiction in the Canadian constitution in light of recent developments in Aboriginal law. Particular attention is paid to the doctrine of Aboriginal title and the relationship between title and Indigenous self-government or jurisdiction. From *Calder* (1973)[1] through *Guerin* (1984),[2] *Delgamuukw* (1997),[3] *Haida Nation* (2004),[4] and *Tsilhqot'in* (2014),[5] the Supreme Court of Canada has steadily built a foundation for recognizing Indigenous sovereignty and jurisdiction as a component of Canadian federalism. However, the Court has yet to clear up confusion surrounding the legal effect of the doctrine of discovery in Canadian law, to state unambiguously that Indigenous jurisdiction is a feature of Aboriginal title, to comment substantively on the right of self-government as a section 35 right, or to offer a clear constitutional vision of the place of Indigenous jurisdiction within Canadian federalism. Drawing on recent trends in the case law, including the Quebec Court of Appeal's recent recognition of an inherent right of self-government,[6] this article explains how Canadian law can develop a clearer framework for the relationship between Indigenous and state legal authority through post-*Tsilhqot'in* doctrines of self-government and Aboriginal title.

The doctrine of Aboriginal title, and its relationship to the right of self-government, is central to the development of Canadian Aboriginal law. It will determine, to an extent, whether that law can meaningfully respond to Indigenous claims to jurisdiction and facilitate the development of a constitutional order that

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[1] *Calder v Attorney-General of British Columbia*, [1973] SCR 313, [1973] 4 WWR 1 [*Calder*].

[2] *Guerin v The Queen*, [1984] 2 SCR 335, [1984] 6 WWR 481 [*Guerin*].

[3] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] ACS no 108 [*Delgamuukw*].

[4] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].

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

[6] See *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 [*Quebec Reference*].

enjoys broad legitimacy. Since the *Pamajewon*[7] decision, Indigenous peoples have rarely asserted rights of self-government in the courts. The reason is plain enough: the test established in *Pamajewon* for establishing a right of self-government is so restrictive that it cannot be met.[8] As a result, what are in effect jurisdictional claims – that is, claims to authority to control the use and allocation of lands and resources – have been dealt with through a limited rights-framework that provides for use of resources but not meaningful decision-making authority in relation to them. This, as discussed in section two, has exposed several fault lines and limitations in the doctrine. It has also given rise to an untenable discrepancy in which Canadian governments recognize the inherent right of self-government (such recognition has been federal policy since 1995), while judicial doctrine effectively precludes recognition of such a right in specific instances.[9] The Quebec Court of Appeal's recent decision in *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*[10] is a notable development that may introduce an era in which the doctrine can more ably meditate Crown-Indigenous conflicts. The QCCA recognized that section 35 protects an inherent right of self-government in relation to the provision and regulation of child and family services.[11]

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[7] *R v Pamajewon*, [1996] 2 SCR 821, [1996] 4 CNLR 164.

[8] The challenge with *Pamajeown* is the relationship between the characterization and proof stages of the test. The SCC held that self-government claims must be framed or characterized narrowly (not, that is, as a right of self-government, but as a right to regulate a specific subject matter) *and* that the *Van der Peet* test for proving and Aboriginal right applies to self-government. As a result, the claimants in *Pamajewon* had to prove not that they were a self-governing political community prior to the imposition of European law, but that the regulation of high stakes gaming was integral to their culture at the time of European contact. This legal test effectively precludes Indigenous claims from succeeding. Indeed, in the few instances self-government claims have been brought forward, the results have been predictable: courts have followed *Pamajewon* in narrowly characterizing the claims and the claims have failed at the proof stage. See for example *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814; *Conseil des Innus de Pessamit v Association des policiers et policières de Pessamit*, 2010 FCA 306 ; *Kátlodééche First Nation v HMTQ et al*, 2003 NWTSC 70. For critiques see Bradford W Morse, ''Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*'' (1997) 42 McGill LJ l011; John Borrows, ''Frozen Rights in Canada: Constitutional Interpretation and the Trickster'' (1997) 22 Am Indian L Rev 37.

[9] See e.g. "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Self-Government" (15 September 2010), online: *Government of Canada*, <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136> ("The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982").

[10] *Quebec Reference*, *supra* note 6.

[11] See Kerry Wilkins, "With a Little Help from the Feds: Incorporation by Reference and Bill C-92" (17 May 2022), online (blog): *ABlawg* <http://ablawg.ca/wp-content/uploads/2022/05/Blog_KW_Quebec_Reference_Comment .pdf>; Naiomi W Metallic, "Extending Paramountcy to Indigenous Child Welfare Laws Does Not Offend our Constitutional Architecture or Jordan's Principle" (29 August 2022), online (blog): *ABlawg* <http://ablawg.ca/wp-content/uploads/2022/08/Blog_NWM_Paramountcy_Indigenous_Child_Law.pdf>; Robert Hamilton, "Is the Act respecting First Nations, Inuit and Métis children, youth and families Constitutional?" (28 April 2022), online (blog): *ABlawg* <http://ablawg.ca/wp-content/uploads/2022/04/Blog_RH_Reference_Child_Family_Services.pdf>.

In doing so, the QCCA stepped around *Pamajewon*, eschewing its restrictive test and emphasizing "cultural continuity and survival."[12] The reasoning, should it be upheld by the Supreme Court, could make similar self-government claims possible.

But the limits of the decision show why a jurisdictional conception of Aboriginal title—or recognition of Indigenous territorial jurisdiction—remains central to the development of a section 35 doctrine that seeks to meaningfully "recognize the prior occupation of Canada by Aboriginal *societies*."[13] The QCCA decision applies only to the regulation of child and family services. The Court understood such regulation as central to Indigenous cultural continuity and survival. We can imagine this analysis being extended on a case-by-case basis to other issues that trigger this key cultural component such as language, education, and health. Divorced from a broader base of territorial jurisdiction, however, two issues arise. First, governance over some of these subject matters may be dependent on access to lands and resources. Language, for example, can be tied to specific locations and resources. Spiritual practices, in particular, may be associated with specific places.[14] Perhaps more importantly, "cultural" issues are, in relative terms, easy and uncontroversial to deal with. Most Crown-Indigenous litigation is about control of lands and resources. Thus, while the QCCA decision is meaningful, even if upheld there remains a need to articulate a coherent account of territorial jurisdiction under section 35 and how such jurisdiction impacts the constitutional framework. A jurisdictional conception of Aboriginal title can help develop the doctrine along these lines.

Section one explores the issue of Indigenous jurisdiction in light of the ambiguity that has developed at the heart of Canadian Aboriginal law and that rose clearly to the surface in *Tsilhqot'in:* the Court's explicit rejection of the doctrine of *terra nullius* yet simultaneous affirmation of the Crown's acquisition of sovereignty and underlying title to Canadian territory through the simple assertion of sovereignty.[15] As we discuss, this ambiguity—what we call the *Marshall ambiguity*—can be traced to the common law's earliest considerations of Aboriginal rights. The Marshall ambiguity produces a related tension in *Tsilhqot'in*: the Court's uncertain recognition of Indigenous jurisdiction as a component of Aboriginal title (what the Court labels

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[12] *Quebec Reference*, *supra* note 6 at para 59. For comment on this aspect of the decision, see Kent McNeil, "The Inherent Indigenous Right of Self-Government" (4 May 2022), online (blog): *ABlawg* <http://ablawg.ca/wp-content/uploads/2022/05/Blog_KM_Quebec_Reference.pdf> [McNeil, "Inherent Right of Self-Government"].

[13] *R v Desautel*, 2021 SCC 17 at para 31.

[14] This is the issue that arose in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, which illustrated the challenges of dealing with such issues and the importance of title as a means of protecting not only "ownership" of land, but of protecting place-based practices crucial to cultural continuity. See Howard Kislowicz & Senwung Luk, "Recontextualizing *Ktunaxa Nation v. British Columbia*: Crown Land, History and Indigenous Religious Freedom" (2019) 88:2 SCLR 205.

[15] *Tsilhqot'in*, *supra* note 5 at para 69.

the Aboriginal title-holders' "right to pro-actively use and manage the land"[16]) alongside the Court's worry that "legislative vacuums" might arise if provincial laws do not apply to Aboriginal title land.[17] This worry, in part, led the Court to recognize provincial power to infringe section 35 rights and minimize the role of the doctrine of interjurisdictional immunity where Aboriginal title is concerned. The rules of federalism, in other words, were adapted in light of jurisdictional concerns, though without explicit consideration of Indigenous jurisdiction or the coordination of that jurisdiction with that of the federal and provincial governments. The reticence to engage these issues explicitly relates to the court's interpretation of Crown sovereignty and their own role in relation to Crown power.

Section two argues that the Marshall ambiguity, though it takes a particular form in the Aboriginal title context, ripples across all major issues of Aboriginal law. In essence, the ambiguity springs from a disconnect between the boldness of the Court in stating broad principles and its caution or indecision in drawing doctrinal conclusions in line with those principles. The Court has spoken, for instance, of the need "to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty"[18]—a task that cries out for a doctrinal framework to structure the negotiated coordination of Indigenous, federal, and provincial jurisdictions. Yet the Court has said almost nothing about Indigenous jurisdiction and its relation to federal and provincial jurisdictions. Again, this stems in part from judicial deference to Crown sovereign claims and an unwillingness to discuss s.35 rights in jurisdictional language. As exemplified in *Tsilhqot'in*, however, the Court's reticence has contributed to a vacuum of (or confusion about the source of) legal authority. The absence of any doctrinal framework for assessing the interrelation of Indigenous with federal and provincial jurisdictions is thus one cause of the extensive litigation surrounding many economic development projects, e.g. pipeline expansion projects like Enbridge's Northern Gateway and TransMountain. Similarly, treaty rights have been interpreted as devoid of jurisdictional content (aside from internal allocation) and the meaning of the "Indigenous perspective" in treaty interpretation has only begun to be imagined as having *legal* content. Developments in each of these areas are considered in section two as examples of the importance of judicial consideration of the jurisdictional character of Indigenous claims.

Section three considers paths forward, returning our focus to Aboriginal title while also highlighting the broader relevance of addressing the core ambiguity of Canadian Aboriginal law. We underscore the value of clearly recognizing Indigenous jurisdiction and acknowledging that the Crown assertion of sovereignty is, on its own, an insufficient legal basis for entirely subsuming pre-existing Indigenous jurisdiction under federal and provincial jurisdictions. Such acknowledgment does not require Canadian courts to reject Crown assertions of sovereignty; rather, it requires them to

[16] *Ibid* at para 73.

[17] *Ibid* at para 147.

[18] *Haida*, *supra* note 4 at para 20.

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treat assertions of Crown sovereignty over Indigenous territory as raising questions of coordinating jurisdictions. In addressing questions of coordination, the courts will have to evaluate the scope and source of the Crown's assertions, whether made on the basis of treaty relationships, sovereign incompatibility, or some other ground raised by the Crown. Such an approach would, we argue, provide a much-needed shifting of burdens of proof and justification in Aboriginal title cases. Doing so would also align Aboriginal title doctrine with the QCCA's reference decision on self-government, acknowledging title as a generic right with jurisdictional aspects that are central to particular Indigenous peoples' social, cultural, and political integrity and, indeed, their existence and survival as a *people*. This section identifies five specific clarifications of Aboriginal title doctrine that could facilitate this process. In closing section three, we provide a concrete example of how courts might navigate Aboriginal title issues where Indigenous jurisdiction is explicitly recognized and argue that Canada's commitment to implementing UNDRIP[19] also supports the proposals we make here and may prove valuable in developing the institutional basis for effective coordination of Indigenous and state law-making authorities.[20]

Finally, section four returns to the question of legitimacy and outlines how the proposals advanced in this article can strengthen the legitimacy of Canada's constitutional order.

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## 1. Tsilhqot'in Nation: A new lens on old ambiguities surrounding Aboriginal title, Indigenous jurisdiction, and Crown sovereignty

### a) The Marshall trilogy and the foundations of domestic court authority

There is a seductively simple picture of domestic courts that portrays their lawful authority as a currency flowing from state assertions of sovereignty. This picture foregrounds a basic political reality: the *de facto* success of a state's assertions of sovereignty lays the foundation for the establishment of the state's domestic courts and for the regular enforcement of their judgments. Is it not natural, then, to view the lawful authority of domestic court judgements as resting ultimately on the state's successful assertion of sovereignty? Surely, the thinking goes, domestic courts cannot reason about the foundations of the state's claims to sovereignty. To raise such questions would cut the legs out from under their own lawful authority.[21]

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[19] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007) [UNDRIP].

[20] The Parliament of Canada recently adopted a bill intended to help implement UNDRIP into Canadian law: *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, SC 2021, c 14 [*UNDRIP Act*]. A similar bill at the provincial level was adopted by British Columbia in 2019: *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*UNDRIP Act BC*].

[21] The Supreme Court of British Columbia recently considered this issue much more explicitly than Canadian courts have in the past. As the Court wrote: "… regardless of any legal frailties underlying the Crown's assertion of sovereignty over British Columbia in 1846, the plaintiffs' claims confront certain harsh realities, unpalatable though they may be to many. First and foremost is the fact that the system of law and government imported by settlers into British Columbia and superimposed upon Indigenous peoples has become firmly and intractably entrenched. It is the foundation for Canadian society as it exists

In one of the most cited common law cases on Indigenous-state relations, United States Chief Justice John Marshall painted such a picture of domestic courts somewhat ruefully, though perhaps more compellingly for that reason. In a pithy encapsulation, Chief Justice Marshall explained that "[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."[22] He explained his use of "conquest" in a fuller statement that is revealing for the opposition it draws between the successfully asserted and sustained foundations of the US legal system, on the one hand, and principles of natural right, on the other:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; *if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned*. So, too, with respect to the concomitant principle that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. *However this restriction may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice*.[23]

As this passage suggests, the presence of Indigenous peoples governing the land under their own legal orders threatens to turn our simple picture of the state's domestic courts into a puzzle. How is it that the authority of domestic courts to proclaim "the law of the land" flows solely from state assertions of sovereignty if those assertions were made in the face of pre-existing legal orders that were never conquered, on the normal use of that term? The strategy adopted in *M'Intosh* is to focus on the institutional role of the state's domestic courts: yes, it may be an extravagant pretension to convert "discovery" into "conquest" so as to displace prior legal orders; and, yes, to do so may be opposed to natural right and to the usages of civilized nations; but if that pretension is indispensable to the legal system that has taken *de facto* control of the land, then *the courts of that legal system* must accept it. In a word, the *M'Intosh* solution is to place the relevance of pre-existing Indigenous legal orders outside the frame of our picture of domestic court authority, in a realm of "private and speculative opinions of individuals."[24]

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today. The laws relating to ownership of land are the basis for this country's wealth and the very foundation for its economy. It is these same laws which provide legitimacy to this Court": *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc,* 2022 BCSC 15 at paras 201–02 [*Thomas and Saik'uz*].

[22] *Johnson v M'Intosh*, 21 US 543 (1823) at 588 [*M'Intosh*].

[23] *Ibid* at 591–92 [emphasis added].

[24] *Ibid.*

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Chief Justice Marshall was himself clearly dissatisfied with this solution. There are striking passages in *M'Intosh* in which the Chief Justice upholds the pretense of conquest while nonetheless highlighting that it is extravagant and contrary to natural right. Given the opportunity to revise *M'Intosh* almost a decade later, in *Cherokee Nation* and *Worcester*,[25] Chief Justice Marshall was even more forceful in his condemnation of the pretense that US assertions of sovereignty had somehow wiped clear pre-existing Indigenous legal orders. In *Cherokee Nation*, he introduced the concept of "domestic dependent nation" in an attempt to craft a legal doctrine to adequately capture the relationships between Indigenous nations and the state.[26] In *Cherokee Nation* and *Worcester*, these relationships are characterized as diminishing the sovereignty of Indigenous nations in the conduct of foreign affairs, but otherwise leaving internal Indigenous law-making authority largely intact.[27] Thus, the "first principle" of American Indian law is that Indigenous nations possess "inherent powers of a limited sovereignty that has never been extinguished."[28]

The point here is not to review the doctrine of the Marshall trilogy in detail. We simply wish to highlight that the very foundations of common law doctrine on Indigenous-state relations in the US, subsequently also adopted in Canada, begin with a profound ambiguity that both (1) affirms a picture of domestic court authority flowing from state sovereignty and (2) acknowledges that this picture is complicated if the courts accept the domestic legal relevance of pre-existing Indigenous legal orders. We refer to this as *the Marshall ambiguity*.

## 2. The Marshall Ambiguity in Canadian Aboriginal Law

The core issue of Canadian Aboriginal law today is the development of a framework for the coordination of Indigenous, federal, and provincial jurisdictions. There is now broad recognition and acceptance of Indigenous peoples' inherent right of self-government and of the need to create space for Indigenous legal orders within the Canadian constitutional landscape. The dominant pre-*Calder* judicial approach, in which domestic courts largely disregarded such traditions as a source of lawful authority, is no longer sustainable. The Marshall ambiguity, however, has shaped Canadian legal doctrine on section 35 of the *Constitution Act, 1982* and continues to

[25] *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) [*Cherokee Nation*]; *Worcester v the State of Georgia*, 31 US (6 Pet) 515 (1832) [*Worcester*].

[26] *Cherokee Nation*, *supra* note 25 at 17.

[27] For more on the legacy of the Marshall trilogy in the United States, see Nell Jessup Newton, "Federal Power over Indians: Its Sources, Scope, and Limitations" (1984) 132:2 U Pa L Rev 195–288; Philip P Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993) 107:2 Harv L Rev 381–440; Robert Williams Jr, "'The People of the States Where They Are Found Are Often Their Deadliest Enemies': The Indian Side of the Story of Indian Rights and Federalism" (1996) 38 Ariz L Rev 981–98; Robert N Clinton, "There is no Federal Supremacy Clause for Indian Tribes" (2002) 34:1 Ariz St LJ 113-260; Philp P Frickey, "(Native) American Exceptionalism in Federal Public Law" (2005) 119:2 Harv L Rev 431–90; and Maggie Blackhawk, "Federal Indian Law as Paradigm within Public Law" (2019) 132 Harv L Rev 1787–1877.

[28] *Brackeen v Haaland*, No 18-11479 (5th Cir. 2021).

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constrain its development in important ways.[29] Exhibit A is the foundational section 35 decision of the Supreme Court in *Sparrow*.[30] The unanimous *Sparrow* Court endorsed the following statement: "Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."[31] Yet, the Court relied on *M'Intosh* for the following conclusion:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, *there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown*.[32]

That is, while the new "rules" of the game may permit courts to "question sovereign claims made by the Crown", a range of foundational sovereign claims are unquestionable. *Sparrow* is not a case of temporary incongruity. This seeming contradiction runs throughout the case law on section 35. In *Tsilhqot'in*, the contrasting positions are condensed into a single paragraph, with the Court stating both that "[t]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada" and that "[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province [of British Columbia]."[33] That one might find a technical way to read these statements as internally consistent resolves little, as doing so requires minimizing the nature of Indigenous interests from the outset.

Thus, we are left with seemingly incongruous ideas flowing from the same decisions. On the one hand, there is the notion, traced above to *M'Intosh*, that state assertions of sovereignty preclude domestic courts from considering apparently

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

[30] *R v Sparrow*, [1990] 1 SCR 1075, [1990] 4 WWR 410 [*Sparrow*].

[31] *Ibid* at 1106, quoting Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26:1 Osgoode Hall LJ 95 at 100.

[32] *Ibid* at 1103 [emphasis added]. For critique, see Mark D Walters, "'Looking for a Knot in the Bulrush': Reflections on Law, Sovereignty, and Aboriginal Rights" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 35; Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases" (1992) 21:3 Man LJ 343; Robert Hamilton & Joshua Nichols, "Reconciliation and the Straitjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*" (2021) 52:2 Ottawa L Rev 205.

[33] *Tsilhqot'in*, *supra* note 5 at para 69. The Ontario Superior Court recognized this tension in the terms of the *Royal Proclamation, 1763* and Canadian Aboriginal title cases. See e.g. *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at para 76 [*Restoule*] ("the Supreme Court of Canada has considered the imposition of a colonial legal order throughout a series of decisions, from *St. Catharines Milling & Lumber Co. v. R.* to *Tsilhqot'in Nation v. British Columbia*, and has attempted to reconcile the two fundamentally contrary concepts found in the *Royal Proclamation*, namely the assertion of Crown sovereignty (the right to acquire title and the right to govern) and the pre-existence of Indigenous societies").

competing assertions of Indigenous sovereignty or inherent lawful authority. This is a positivist picture of judicial interpretation in domestic courts.[34] On the other hand, there is the growing acknowledgment that we cannot sensibly describe the legal and historical relations between Indigenous peoples and the state without a clear recognition of the inherent lawful authority of Indigenous political communities. What sense, for instance, would treaty relationships have if they were not agreements between representatives exercising lawful authority on behalf of their respective orders of self-government? This is a more pragmatic vision of judicial interpretation in domestic courts, one already found to some extent in the Marshall trilogy, particularly in *Cherokee Nation* and *Worcester*. Such a profound and long-standing tension in the legal doctrine is not the product of judicial carelessness. Entrenched interpretations of the legal history and a judicial imagination of Indigenous-state relations tied to particular legal and historical constructs push the courts to continue reaffirming sharply contrasting positions alongside each other or minimizing Indigenous claims in order to fit the model they have crafted.[35] That said, recognizing inherent Indigenous law-making authority raises, but does not answer, difficult questions about how to relate such authority to the state's own law-making powers, in particular how domestic courts should (or should not) speak to the relationship between Indigenous law and state law.

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In a recent discussion of positivist and pragmatic approaches in judicial interpretation and legal philosophy, David Dyzenhaus argues for "a reconstructed legal positivism."[36] This "reconstruction" would see legal positivism incorporating the "deeply pragmatic"[37] requirement that *de facto* successful state assertions of

[34] The High Court of Australia has defended this picture in modern legal terms. In *Coe v Commonwealth of Australia*, [1979] HCA 68, Justice Jacobs stated that a challenge to a nation's sovereignty was "not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged" (para 3 of his reasons). Justice Jacobs was dissenting in the outcome (the appeal before the Court dealing with an application to amend pleadings), though this substantive point was not in dispute between members of the Court. The principal reasons of the Court were written by Justice Gibbs, who similarly stated, at para 12 of his reasons: "The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged". In *Mabo v Queensland (No 2)*, [1992] HCA 23 at para 31 of the reasons of Justice Brennan, the High Court upheld the proposition that "[t]he acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state." Note that in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 28, a majority of the SCC insisted that the act of state doctrine, on which the High Court of Australia is drawing, forms no part of Canadian law: "The act of state doctrine is a known (and heavily criticized) doctrine in England and Australia. It has, by contrast, played no role in Canadian law."

[35] We do not mean that rejecting *terra nullius* while simultaneously affirming the acquisition of Crown sovereignty through assertion is necessarily conceptually incoherent or that no legal doctrine could conceivably reconcile these two contrasting moments. Indeed, the Canadian doctrine of Aboriginal title proposes to do just this by giving effect to pre-existing legal orders. For present purposes, the point is simply that the very fact the SCC feels repeatedly compelled to attempt this reconciliation is a symptom of the tension between different strands of the legal and political history the Court must interpret. For a critique of the Court's supposed rejection of *terra nullius*, see Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v. British Columbia*" (2015) 48:3 UBC L Rev 701 [Borrows, "Durability"].

[36] David Dyzenhaus, "The Inevitable Social Contract" (2021) 27 Res Publica 187.

[37] *Ibid* at 196.

sovereignty must be legitimated through a legal order capable of answering the question "but, how can that be law for me?", asked by anyone whom the state considers a legal subject. The state's legal order must develop answers that are at least adequate from the perspective of those whom the state asks or expects to recognize the legitimacy of its sovereign claims. Though we do not pursue these philosophical points in detail in this paper, Dyzenhaus's reconstructed legal positivism provides a framework for understanding the SCC's struggles with the ongoing tension between positivism and pragmatism in its Aboriginal law doctrines. The Court is arguably working itself towards a synthesis—or, at least, an interweaving, unsteady balance—of positivism and pragmatism in roughly Dyzenhaus's sense.[38]

Historical examples of the tension between positivism and pragmatism in the legal imagination of Indigenous-state relations make these issue more concrete. The tension could once be managed by ignoring or minimizing the legal capacity of Indigenous peoples as self-governing political communities with their own legal orders (in effect suppressing the pragmatic vision in favour of a narrow positivist one tied to state law-making authority). An infamous example is found in *Syliboy*, a 1928 decision of the Nova Scotia County Court that considered the potentially binding nature of Indigenous-Crown treaties and concluded that the Mi'kmaq did not have the capacity to enter treaties because "the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized."[39]

In *Simon*, the SCC repudiated this interpretive strategy, stating that this language "reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada."[40] The SCC recognized the legal character of the treaties and the Mi'kmaq capacity to enter such agreements. This repudiation brought the tension between positivism and pragmatism back to the surface of judicial interpretation in Aboriginal law cases.

Following *Simon*, the positivist impulse or sensibility has continued to evolve, shedding explicit ideologies of civilizational hierarchy while reasserting its core vision of lawful authority flowing ultimately from sovereign intent. In *Bear*

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[38] On how the court may see the duty to consult and accommodate as a path to the legitimation of Crown sovereignty, see Ryan Beaton, "*De Facto* and *de Jure* Crown Sovereignty: Reconcilation and Legitimation at the Supreme Court of Canada" (2018) 27:1 Constitutional Forum 25; Richard Stacey, "Honour in Sovereignty: Can Crown consultation with Indigenous peoples erase Canada's sovereignty deficit?" (2018) 68 UTLJ 405.

[39] *Simon v The Queen*, [1985] 2 SCR 387 at 399, 24 DLR (4th) 390 [*Simon*], citing *R v Syliboy*, [1929] 1 DLR 307 at 313–14, 1928 CanLII 352 (NS SC) [*Syliboy*].

[40] *Simon, supra* note 39 at 399. See also C*ampbell et al v AG BC/AG Cda & Nisga'a Nation et al,* 2000 BCSC 1123 at paras 94–95 [*Campbell*], relying on *R v Sioui*, [1990] 1 SCR 1025, [1990] 3 CNLR 127.

*Island Foundation*, for instance, the courts heard from representatives of the Temagami, an Anishinaabe people, who argued that they had never signed or adhered to the Robinson Huron Treaty, despite the fact that the Treaty purported to cover Temagami territory. The Superior Court of Ontario (ONSC), upheld by the Court of Appeal for Ontario (ONCA), concluded that the Temagami had in fact adhered to the Treaty.[41] Both courts added, however, that *even if they had not* been parties to the Treaty or subsequently adhered to it, the Treaty nonetheless extinguished (at least from the perspective of Canadian courts) any rights the Temagami might have had to land covered by the Treaty. In the view of the ONSC and the ONCA, the Treaty expressed the intent of the British sovereign to extinguish Aboriginal title to any lands covered by the Treaty and that was sufficient (at least for purposes of the domestic courts) to extinguish Temagami claims, *even if the Temagami had never joined the Treaty*. As the ONCA put it, "a sovereign may express the intent to extinguish aboriginal rights through a treaty even though the treaty itself may be imperfect in the sense that not all of the Indian bands or tribes whose lands are involved are signatories."[42]

In 2018, the ONSC again had occasion to interpret the Robinson Huron Treaty in *Restoule*.[43] The Court found that the proper interpretive approach was to consider the terms of the Treaty from the perspectives of both the Anishinaabe and British negotiators. Crucially, the perspective of Anishinaabe negotiators was understood as tied to Anishinaabe political and legal systems. The Court recognized the sovereign legal capacity of Anishinaabe peoples to enter binding agreements with the Crown and determined that the Treaty could not be interpreted, even by a domestic court, solely in terms of the intent of the sovereign. Rather, the interpretive task for the Court was to determine what the parties *agreed to*. The judgment in *Restoule* made no mention of *Bear Island Foundation*.

As in *Simon*, the move in *Restoule* away from a simple positivist picture of domestic courts raises several doctrinal questions, for instance whether Canadian courts should *interpret* Indigenous law as they do domestic law or rather *take expert evidence* on Indigenous law and draw factual conclusions, as they would with foreign law.[44] Given the general lack of expertise by Canadian judges in Indigenous law, the Court in *Restoule* sensibly opted to take expert evidence on Anishinaabe law, without deciding whether this was generally the correct approach for Canadian courts.[45]

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[41] *Ontario (Attorney General) v Bear Island Foundation* (1984), 49 OR (2d) 353, 1984 CanLII 2136 (ONSC) at 9; *Ontario (Attorney General) v Bear Island Foundation* (1989), 68 OR (2d) 394, 1989 CanLII 4403 (ONCA).

[42] *Ibid* at para 25.

[43] *Ibid*.

[44] See Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev 1 [Grammond, "Conceptual Framework"].

[45] The plaintiffs in *Restoule* asked the Court to accept expert evidence on Anishinaabe law and to draw factual conclusions, not to provide legal interpretation. Canada, one of the defendants, supported this approach and Ontario, the other defendant, does not seem to have objected: *Restoule*, *supra* note 33 at para 13.

These two pairs of cases—*Syliboy* and *Simon*, *Bear Island* and *Restoule*—highlight some of the ways the tension between more positivist and more pragmatic judicial approaches has evolved in light of the increasing recognition, by Canadian governments and courts, of Indigenous legal orders and the inherent lawful authority of Indigenous peoples. To paraphrase *Simon*, it is no longer acceptable in Canadian law to place the existence of Indigenous legal orders and inherent law-making authority beyond the frame of domestic judicial interpretation. We could point to many significant developments underscoring this reality, including stated government commitments to implement UNDRIP,[46] federal legislation that affirms the principle of Indigenous self-government,[47] a growing body of case law that explicitly affirms Indigenous sovereignty and inherent jurisdiction or law-making authority.[48]

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Yet, this shift has been incomplete, and the Marshall ambiguity has forestalled judicial consideration of Indigenous jurisdiction and its relationship to federal and provincial jurisdiction. The consequences of this are not only doctrinal, but practical. Several recent conflicts and judicial decisions show how a failure to deal with jurisdiction is limiting the courts' ability to mediate conflict and articulate effective legal rules. They also show why the Quebec Court of Appeal's recognition of the right of self-government in relation to child and family services, while significant, will not have an immediate impact on the coordination of Crown-Indigenous jurisdiction in other areas.

This can be seen in considering (a) tensions between the possibility of commercial rights and the meaning of moderate livelihood in *Marshall* and *Ahousaht*; (b) the role of consent and the judicial concern with "vetoes" in *Tsleil-Waututh* and *Coldwater*; and, finally, (c) the need to legally engage with Indigenous perspectives on treaties and Indigenous law in cases like *Grassy Narrows* and *Coastal GasLink*. These examples illustrate the practical consequences of the failure to meaningfully engage with Indigenous jurisdiction.

### a) *Marshall* and *Ahousaht*: Regulation in the fisheries

The *Marshall* and *Ahousaht* cases each involved multiple court judgments. In both instances, the courts initially attempted to encourage negotiation by declaring the

[46] UNDRIP, *supra* note 19, articles 3 and 4 (affirming the rights of Indigenous peoples to self-determination, autonomy, and self-government).

[47] See e.g. *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24. The Preamble states that "Parliament affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services". Sections 18–24 provide for coordination of applicable Indigenous, provincial, and federal laws. See also *Quebec Reference*, *supra* note 6 at para 191.

[48] See e.g. *Haida*, *supra* note 4 at para 20, which speaks of reconciling "pre-existing Aboriginal sovereignty with assumed Crown sovereignty". This language is taken up, slightly modified, in *Restoule*, *supra* note 33 at para 337 ("the reconciliation of the pre-existence of Indigenous sovereignty with assumed Crown sovereignty"). See also *Pastion v Dene Tha' First Nation*, 2018 FC 648, at paras 7-14 [*Pastion*]; *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 at paras 145, 206.

existence of a broadly framed right. When negotiations failed, they presented a considerably narrowed version of the right. In *Marshall I* the Court found that the "surviving substance" of the Peace and Friendship Treaties of 1760-61 was "a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities."[49] This right was subject to three forms of limitation: permissible regulations, justified infringement under the *Badger* test, and the more open-textured limitations imposed by the concept of "moderate livelihood."[50] The Court explained that "[c]atch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right."[51] This left the open the question of precisely who determines the meaning of "moderate livelihood" and how regulatory conflicts would be managed.

In *Marshall II*, which the Court considered only after significant conflict and violence arose following Mi'kmaw attempts to exercise the rights recognized in *Marshall I*, the Court attempted to resolve that question by providing a more detailed interpretation of the regulatory authority of Parliament. The Court placed significant emphasis on the limited nature of treaty rights, explaining:

> regulations that do no more than reasonably define the Mi'kmaq treaty right in terms that can be administered by the regulator and understood by the Mi'kmaq community that holds the treaty rights do not impair the exercise of the treaty right and therefore do not have to meet the *Badger* standard of justification.[52]

The Court was careful to stress that this merely elaborates the principles of justified infringement in *Marshall I*.[53] Yet, there is a noticeable, if subtle, shift from *reasonable expectations* to *reasonable definition*. This is a shift away from an emphasis on the substantive character of rights and towards the process of their regulatory limitation. At a minimum, reference to reasonable expectations of producing a moderate livelihood seems to suggest a process of negotiation with those whose livelihoods are at issue. A focus on reasonable regulatory definition is less suggestive of a process of negotiation or collaborative management of fisheries.

Yet negotiation and collaborative management of resources are precisely the kinds of processes that can begin the work of coordinating Indigenous and state regulatory approaches. Hewing instead to a doctrine of unilateral state regulation means holding to property-like rights conceptions of Aboriginal and treaty rights under which internal allocation is the only role for Indigenous law and jurisdiction. This

[49] *R v Marshall*, [1999] 3 SCR 456 at para 56, 177 DLR (4th) 513 [*Marshall 1*].

[50] *Ibid* at paras 56, 59.

[51] *Ibid* at para 61.

[52] *R v Marshall*, [1999] 3 SCR 533 at para 37, 179 DLR (4th) 193 [*"Marshall 2"*].

[53] *Ibid* at para 6.

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default setting is a recipe for extended litigation and for shifting focus away from efforts at recognizing and coordinating Indigenous law with federal and provincial law. Indeed, the conflicts in Nova Scotia in the fall of 2020, themselves a replay of the conflicts that followed *Marshall I* 20 years earlier, illustrate the consequences that can result when negotiations fail to resolve jurisdictional issues.

The *Ahousaht* litigation is a case in point: from 2006 to today this litigation has resulted in thirteen decisions of the BCSC, seven from the BCCA, four from the FC, two from the FCA and two applications for leave to the SCC.[54] The results thus far have been muddled. In the first trial the judge characterized the right as "simply the right to fish and sell fish."[55] Almost a decade later, a second trial judge determined that what the first judge had meant was "a right to a small-scale, artisanal, local, multi-species fishery, to be conducted in a nine-mile strip from shore, using small, low-cost boats with limited technology and restricted catching power, and aimed at wide community participation."[56] Justice Humphries explicitly stated that she cannot "recharacterize the right" that was declared by Justice Garson, but she maintained that she "can interpret her reasons to determine what she meant in order to apply some precision to her broad declaration."[57] The BCCA disagreed. Justice Groberman explained that Justice Humphries was "required to assess the case on the basis of the plaintiffs' established commercial fishing rights" and she "did not have jurisdiction to place new limits" on that right.[58]

Yet, the level of precision she applied suggests that "broad declaration" is properly the province of the courts, while exacting precision ought to be the work of legislation and regulation. Unfortunately, the courts are drawn into the role of regulators because Aboriginal and treaty rights are defined as property rights subject to unilateral state regulation, in turn subject to judicial review with "some precision."

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[54] This case was bifurcated at trial. The first stage of the trial was focused on proving the right and this resulted in Justice Garson's decision in *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2009 BCSC 1494 [*Ahousaht* BCSC 2009]. The justification stage of the trial was then adjourned for two years to enable the parties to negotiate the accommodation of the right. These negotiations proved unfruitful and so the parties proceeded to the justification stage of the trial before Justice Humphries, which resulted in her decision in *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2018 BCSC 633 [*Ahousaht* BCSC 2018]. The highlights of this extensive history of litigation before the British Columbia courts can be found summarized in *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2018 BCCA 413 at paras 1–5. In the Federal Courts there have been two duty to consult cases, which preceded the trial: *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2007 FC 567; *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212. At the federal level there has also been a series of injunctive relief decisions following the trial: *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2014 FC 197; *Canada (Fisheries and Oceans) v Ahousaht First Nation*, 2014 FCA 211; *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2015 FC 253; *Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116.

[55] *Ahousaht* BCSC 2009, *supra* note 54 at para 487.

[56] *Ahousaht* BCSC 2018, *supra* note 54 at para 441.

[57] *Ibid* at para 301.

[58] *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2021 BCCA 155 at paras 148–49.

As Justice Groberman noted, the justification phase of the posed a "herculean, and perhaps even impossible task" on the court.

> …it is not the task of a court to "design a fishery". At best, a court can provide legal guidance that will assist the parties (and particularly the regulators) to craft fisheries regulations that respect the plaintiffs' rights. Specific areas of disagreement may have to be resolved in judicial review applications or in more narrowly focussed civil claims.[59]

What we can say for certain is that whatever the failures here are not for lack of judicial effort. The reasons for decision in both of the *Ahousaht* trials are Herculean in length (the former was 910 paragraphs plus appendices and the later nearly doubles that at 1783 paragraphs). *Marshall* and *Ahousaht* illustrate the practical and doctrinal problems that arise when jurisdictional disputes are dealt with through a legal doctrine that cannot use jurisdictional language.

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### b) *Tsleil-Waututh* and *Coldwater*: Limitations of the duty to consult

*Tsleil-Waututh* and *Coldwater* involved the judicial review of federal cabinet approvals for the Transmountain Pipeline Expansion project ("TMX"), which was opposed by several First Nations and Indigenous and environmental organizations, among others. In its judgment in these two cases, the Federal Court of Appeal moved from a version of the duty to consult emphasizing the need for "meaningful two-way dialogue" (in *Tsleil-Waututh*) to one more centered on the decision of the Governor in Council (in *Coldwater*).[60] In order to get a sense of the significance of the doctrinal contrast between these two cases it is helpful to remember that in *Haida Nation* the SCC built a framework whose express purpose was to provide an alternative remedy to interlocutory injunctions.[61] In constructing this framework the Court drew from the "special relationship" between the Crown and the Haida.[62] As the Court explained, the process of reconciliation mandated from this special relationship "arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."[63] Thus, in crafting the duty to consult and accommodate, the Court's aim was to "go further" than interlocutory relief, so as to ensure that reconciliation would not be limited to the "post-proof sphere" and thereby become "a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title."[64]

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[59] *Ibid* at paras 156, 158.

[60] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*]; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 [*Coldwater*].

[61] *Haida*, *supra* note 4 at paras 12–15.

[62] *Ibid* at para 15.

[63] *Ibid* at para 32.

[64] *Ibid* at paras 15, 33.

In *Tsleil-Waututh* the Federal Court of Appeal focused on determining what constitutes a "meaningful process of consultation."[65] The Court insisted that meaningful consultation is not merely a process for "exchanging and discussing information" or "to allow Indigenous peoples 'to blow off steam' before the Crown proceeds to do what it always intended to do."[66] Rather, "[t]here must be a substantive dimension to the duty", for consultation is a two-way dialogue that "must focus on rights" and be geared towards achieving "mutual understanding".[67] The Court found that Canada had failed to fulfill this duty and quashed cabinet approval for TMX. Notably, the Court held that Canada had failed to meaningfully respond to co-management and Indigenous governance proposals by First Nations. The Court summarized the experience of the Stó:lō in submitting detailed co-management proposals to Canada in relation to TMX, without receiving any meaningful response from Canadian representatives.[68] Similarly, the Court explained that the "Upper Nicola [Band] had proposed numerous potential mitigation measures and had requested accommodation related to stewardship, use and governance of the water. No response was given as to why Canada rejected this request. This was not meaningful, two-way dialogue or reasonable consultation."[69]

In *Coldwater*, however, the Court upheld cabinet's decision to re-approve TMX as reasonable, following "focused consultation to address the shortcomings" identified in *Tsleil-Waututh*.[70] The "Opening observations" in the *Coldwater* reasons convey the frustration of First Nations and other applicants with the narrow focus of the Court in reviewing this additional round of consultation. The Court explained that "[t]he applicants have argued their case very much as if this was the first time that their case was adjudicated. In fact our task is more limited."[71] Moreover, "all the applicants contend that Canada did not engage in the consultation process with an open mind. The suggestion in each case is that the outcome was pre-determined because Canada owned Trans Mountain."[72] Again, however, the Court explained that its limited task was to determine whether Canada had reasonably addressed "the precise issues within the overall consultation process" identified as shortcomings in *Tsleil-Waututh*.[73]

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[65] *Ibid* at para 42; *Tsleil-Waututh*, *supra* note 60 at paras 494, 496.

[66] *Ibid* at paras 499–500, citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 54.

[67] *Tsleil-Waututh*, *supra* note 60 at paras 500, 504.

[68] *Ibid* at paras 681–727.

[69] *Ibid* at para 736.

[70] *Coldwater*, *supra* note 60 at para 14.

[71] *Ibid* at para 12.

[72] *Ibid* at para 21.

[73] *Ibid* at para 14.

The frustration of the *Coldwater* applicants is understandable, insofar as they may have hoped for the courts to develop a framework to support negotiations centered on recognition and coordination of Indigenous law and co-management proposals with federal and provincial law. *Tsleil-Waututh* can be read as holding out some promise that the Crown duty to consult and accommodate might develop in that direction. *Coldwater*, however, did not perceive the judicial task or the issues before it as inviting the development of the duty to consult and accommodate along those lines. The narrow approach of *Coldwater* provides context for the statement of a spokesperson for the Tsleil-Waututh Nation, in response to the Court's judgment, that "reconciliation stopped today."[74]

### c) *Grassy Narrows* and *Coastal GasLink*: What to make of the Indigenous perspective?

*Grassy Narrows* and *Coastal GasLink* address the legal significance of the Indigenous perspective and Indigenous law. These concepts are related, but distinct in important ways. The former is particularly relevant to treaty interpretation and the need for courts to determine the nature of the agreement between parties to a treaty. As noted above, Canadian law has at times disregarded the very legal capacity of Indigenous peoples to enter binding treaties with the Crown. In modern Canadian law, however, the concept of the Indigenous perspective is rooted in the principle of liberal construction that was affirmed in *Nowegijick* and the *sui generis* nature of the fiduciary relationship set out in *Guerin*.[75] Applied to s. 35 interpretation, this requires that when defining rights it is "crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[76]

The concept of Indigenous law appears in cases where the court is dealing with problems that involve claims about the role of Indigenous law that lead courts to draw interpretive principles from judicial comity or conflicts of law.[77] For example, in *Connolly v. Woolrich* Monk J. held that "in not abolishing or altering the Indian law"

[74]Judith Sayers, "Federal Court's Trans Mountain Ruling Betrays Principles of Reconciliation", *The Tyee* (5 February 2020), online: <https://thetyee.ca/Opinion/2020/02/05/Federal-Court-Trans-Mountain-Ruling-Betrays-Reconciliation/>.

[75] *Nowegijick v The Queen*, [1983] 1 SCR 29, 144 DLR (3d) 193; *Guerin*, *supra* note 2. See also *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 108, [1990] 5 WWR 97 (where the Court explicitly acknowledges the connection between *Nowegijick* and *Guerin).*

[76] *Sparrow*, *supra* note 30.

[77] The examples of judicial comity we have in mind relate to the decisions of tribal courts in the United States. The decisions of tribal courts also have the potential for Indigenous law in conflict of law cases. In fact, it is possible to read *M'Intosh*, *supra* note 22 as a conflicts case given that Chief Justice Marshall holds that the purchase agreement is not enforceable in US courts, but that leaves open the possibility of it being a legal agreement under Piankeshaw law. Philip P Frickey interprets the case as a narrow decision that holds that the plaintiff is seeking the remedy in the wrong court as his contract is only subject to the law of the Piankeshaw: Philp P Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993) 107 Harv L Rev 381.

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the Crown had, by implication, sanctioned it.[78] more recently, in *Pastion v Dene Tha' First Nation* Grammond J held that "Indigenous legal traditions are among Canada's legal traditions" and so "[t]hey form part of the law of the land."[79] This helps us to see how questions of Indigenous law and the Aboriginal perspective are constitutively entangled. As Lamer C.J. notes in *Delgamuukw* "pre-existing systems of aboriginal law" serves as one of the sources for Aboriginal title, but this does not strictly confine Indigenous law to the rules of evidence.[80] The connection between the concepts of Aboriginal perspective and Indigenous law is that both acknowledge the legal capacity of Indigenous peoples. This acknowledgment of full legal capacity is necessary to both the honour of the Crown and reconciliation. As the Court acknowledged in *Van der Peet* "true reconciliation" requires the courts to place equal weight on the Aboriginal perspective and the common law.[81]

The process of finding the "fair and just" balance between perspectives has been an uneven one, often shifting on a case-by-case basis.[82] This struggle is exemplified in *Grassy Narrows.* At trial Sanderson J found that while the Ojibway understood that "they were dealing with the Queen's Government of Canada, and were relying only on the Government of Canada to implement and enforce the Treaty", they did "not agree to unlimited uses by the Euro-Canadians in a manner that would significantly interfere with their Harvesting Rights.[83] Thus, "[i]n Keewatin, Ontario does not have the right to limit Treaty Rights by "taking up lands under the Treaty."[84]

Yet, the Supreme Court came to precisely the opposite conclusion. In their view, the Ontario Court of Appeal was correct in finding that s. 109 of the *Constitution Act, 1867* gave Ontario beneficial ownership of Keewatin. This, combined with provincial jurisdiction under s. 92, gives Ontario the exclusive legislative authority to manage and sell lands in accordance with Treaty 3 and s. 35 of the *Constitution Act, 1982*.[85] Neither the Ontario Court of Appeal nor the Supreme Court mentioned the

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[78] *Connolly v Woolrich et al* (1867), 17 RJRQ 75 at 143. See Mark D Walters, "The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150" (2017) 22:3 Rev Const Stud 347.

[79] *Pastion, supra* note 48.

[80] *Delgamuukw, supra* note 3 at paras 114, 126, 145–47. Justice Williamson provides an instructive analysis of the continuing legislative power of Indigenous peoples in *Campbell, supra* note 40 at para 86 ("the most salient fact, for the purposes of the question of whether a power to make and rely upon aboriginal law survived Canadian Confederation, is that since 1867 courts in Canada have enforced laws made by aboriginal societies. This demonstrates not only that at least a limited right to self-government, or a limited degree of legislative power, remained with aboriginal peoples after the assertion of sovereignty and after Confederation, but also that such rules, whether they result from custom, tradition, agreement, or some other decision making process, are "laws" in the Dicey constitutional sense").

[81] *R v Van der Peet*, [1996] 2 SCR 507 at 50, [1996] 9 WWR 1.

[82] *Ibid*.

[83] *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801 at paras 1292–93.

[84] *Ibid* at para 1452.

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

Aboriginal perspective.[86] The only part of the Supreme Court decision that mentions the Aboriginal perspective is the claim that "Ontario has exercised the power to take up lands for a period of over 100 years, without any objection by the Ojibway".[87] This statement is puzzling as it implies that laches or adverse possession applies without any analysis of such.[88] In *Grassy Narrows* the Court seems to take the position that its understanding of cooperative federalism overrides its commitments to prior case law on treaty interpretation and its own quest for "true reconciliation".

*Coastal GasLink* exhibits a similar reliance on narrow and legalistic reasoning to by-pass the need to consider the Aboriginal perspective.[89] The case itself concerned an application by the plaintiff (Coastal GasLink Pipeline Ltd.) for an interlocutory injunction to restrain the defendants (Freda Huson and Warner Naziel) from preventing access to the area. The defendants maintained that they have a legal right for their actions based on traditional Wet'suwet'en law. In response, Church J. found that:

> As a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence or statutory provisions.[90]

If this were indeed a general rule, we would have difficulty explaining much of our own jurisprudence from pre-confederation cases like *Connolly v Woolrich*, through to *Calder* and *Delgamuukw* and, beyond that, the very nature of customary law itself. As Lord Denning held in *R v Secretary of State For Foreign and Commonwealth Affairs*, like custom in the common law, Indigenous law is "handed down by tradition" but it is "beyond doubt that they are well established and have the force of law within the

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[86] *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158; *Grassy Narrows*, *supra* note 85. By not engaging with the Aboriginal perspective the notion of common intention is lost to a one-sided interpretive approach. For a recent example of a court finding a more balanced approach, see *Restoule*, *supra* note 33 ("The role of Anishinaabe law and legal principles presented at trial was part of the fact evidence into the Indigenous perspective. The Plaintiffs did not ask the court to apply Anishinaabe law. Rather, the Plaintiffs and Canada submit that the court should take respectful consideration of Anishinaabe law as part of the Anishinaabe perspective that informs the common intention analysis" at para 13). For an engagement with the principles of treaty interpretation see Joshua Nichols, "A Narrowing Field of View: An Investigation into the Relationship between the Principles of Treaty Interpretation and the Conceptual Framework of Canadian Federalism" (2019) 56:2 Osgoode Hall LJ 350.

[87] *Grassy Narrows*, *supra* note 85 at para 40.

[88] On laches and limitations periods applied to Aboriginal rights claims, see Senwung Luk & Brooke Barrett, "Time is on Our Side: Colonialism Through Laches and Limitations of Actions in the Age of Reconciliation" in *The Law Society of Upper Canada Special Lectures 2017* (Irwin, 2021) at 394; Kent McNeil & Thomas Enns, "Procedural Injustice: Indigenous Claims, Limitation Periods, and Laches" (2022), online: *Osgoode Digital Commons* <https://digitalcommons.osgoode.yorku.ca/all_papers/336/>.

[89] *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264.

[90] *Ibid* at para 127.

community."[91] This is why the Ontario Court of Appeal has maintained that "[f]or the purpose of applying s. 35 of the *Constitution Act, 1982*, Aboriginal rights or Indigenous law do not constitute "foreign law", even conceptually."[92] Read more generously, however, Church J's statement makes an important point: Canadian law needs a clearer doctrinal framework for recognizing and coordinating Indigenous law with federal and provincial law. That much is clear, we hope, from the review provided here of current issues vexing the courts in Aboriginal law cases.

Ultimately, the doctrinal difficulties radiate from the lack of a principled explanation for the acquisition of Crown sovereignty through unilateral assertion or for the resulting disregard for the inherent law-making authority of Indigenous peoples. The path to doctrinal remediation of these difficulties lies in clearer recognition of inherent Indigenous jurisdiction and so that fundamental issues in Aboriginal law can be reframed around the coordination of Indigenous with federal and provincial jurisdictions. The aim of the discussion above has been to provide some context on the Marshall ambiguity in Canadian law, so that we can better understand the evolution of that ambiguity in response to the growing recognition of inherent Indigenous law-making authority. This, in turn, helps us to diagnose the tension found in *Tsilhqot'in* and to get a clearer view of the available paths for legal doctrine moving forward. The following section looks at the Marshall ambiguity in the SCC doctrine on Aboriginal title in particular.

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## 3. Resolving the Marshall Ambiguity in Aboriginal Title Doctrine

### a) The failure to clearly recognize Indigenous jurisdiction as a component of Aboriginal title

The path towards recognition of inherent Indigenous jurisdiction, or law-making authority, as a component of Aboriginal title has been slow but steady since *Calder*.[93] The Court had an opportunity to take the next step in *Tsilhqot'in* and state unambiguously that Indigenous jurisdiction must now be recognized as an incident of Aboriginal title. That would have been a natural progression in the Court's doctrine, though the Court stopped short.

*Calder* established that Aboriginal title survived the assertion of Crown sovereignty over territory in what is now British Columbia, with six of seven justices affirming that conclusion.[94] Those six justices split evenly on the question whether Aboriginal title had been extinguished in the province, though all accepted that

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[91] *R v Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 CNLR 86 at 123.

[92] *Beaver v Hill*, 2018 ONCA 816 at para 17 [*Beaver* ONCA].

[93] As discussed in the introduction, the approach of the QCCA represents a possible alternative to self-government through jurisdictional title. In our view, however, jurisdictional title is compatible with that decision.

[94] *Calder*, *supra* note 1.

Aboriginal title was grounded in prior Aboriginal occupation of the land in political communities, not solely in the *Royal Proclamation, 1763* or other Crown acts or legislation. A majority of the Court thus found that Aboriginal land rights had their ultimate source outside the British and Canadian legal systems in the Indigenous occupation of land prior to the arrival of Europeans but concluded nonetheless that the Crown had legislative power to extinguish those rights.[95]

The SCC reiterated the unique character of Aboriginal title, as an estate whose sources pre-date Crown assertions of sovereignty, in *Guerin* a decade later. Justice Dickson explained that the Crown had, through the *Royal Proclamation of 1763*[96] regime allowing surrender of Indigenous territories to the Crown alone, taken on a fiduciary responsibility towards Indigenous peoples with respect to any territories surrendered: "[t]he surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians."[97] While the Crown fiduciary duty thus has its source in the *Royal Proclamation*, Justice Dickson made clear, after reviewing the reasons in *Calder*, *St. Catharines Milling*, and the Marshall trilogy, that Indigenous peoples' "interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision."[98]

In *Delgamuukw*, Chief Justice Lamer consolidated these points with an added emphasis on pre-existing systems of Indigenous law: "aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law."[99] He also highlighted the uniqueness of Aboriginal title in Canadian law: "What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward."[100] With this recognition that Aboriginal title has its source, at least in part, in the existence

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[95] A majority of the Court in *Calder* ultimately denied the Nisga'a claims for recognition of legal rights to their land on the grounds that British Columbia had not yet waived sovereign immunity and had not consented to the courts' jurisdiction to hear the case. On this procedural issue, see *Calder*, *supra* note 1 at 422–27, Pigeon J.

[96] George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [*Royal Proclamation*]. The SCC has repeatedly referred to the *Royal Proclamation* as the "Indian Bill of Rights": see e.g. *R v Marshall; R v Bernard*, 2005 SCC 43 at para 86 ("the *Royal Proclamation* must be interpreted in light of its status as the 'Magna Carta' of Indian rights in North America and Indian 'Bill of Rights'"). The term can be traced back at least as far as *St Catharines Milling and Lumber Co v R* (1887), 13 SCR 577 at 652, 887 CanLII 3 (SCC) (Justice Gwynne wrote that the *Royal Proclamation*, "together with the Royal instructions given to the Governors as to its strict enforcement, may, not in aptly be termed the Indian Bill of Rights").

[97] *Guerin*, *supra* note 2 at 376.

[98] *Ibid* at 379.

[99] *Delgamuukw*, *supra* note 3 at para 126.

[100] *Ibid* at para 114, citing Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (1997) at 144 [emphasis in original].

of Indigenous legal orders pre-dating the Crown assertion of sovereignty, the tension of the Marshall ambiguity rises to the doctrinal surface. The most obvious and pressing question becomes: how does the Crown assertion of sovereignty displace or subordinate Indigenous sovereignty, particularly in territories not subject to treaty?[101]

The SCC addressed this question squarely in its paired judgments in *Haida* and *Taku River Tlingit*. Chief Justice McLachlin emphasized the role of treaties in reconciling "pre-existing Aboriginal sovereignty with assumed Crown sovereignty"[102] and described Crown sovereignty as "*de facto*" where such reconciliation is lacking.[103] The Chief Justice also elaborated the Crown's duty to consult and accommodate Aboriginal interests where credible *prima facie* claims of Aboriginal rights and title are asserted and may be adversely impacted by proposed Crown action. In other words, the Court acknowledged that the prior existence of Indigenous sovereignty raised issues for the legitimacy of Crown sovereignty and, in response, developed doctrine to restrain acts of *de facto* Crown sovereignty.[104]

There is thus a line of landmark SCC cases, one for each decade from the 1970s to the 2000s, that recognize a source of Aboriginal title in Indigenous legal systems pre-dating Crown assertion of sovereignty and that affirm the need to coordinate (or otherwise "reconcile") pre-existing Indigenous sovereignty with assumed Crown sovereignty. These developments would seem to set the stage for a recognition of Indigenous jurisdiction (or sovereignty or self-government or law-making authority by another name) as a component of Aboriginal title. *Tsilhqot'in*, the SCC's landmark Aboriginal title case of the 2010s, presented a clear opportunity.

In *Tsilhqot'in*, however, the Chief Justice preferred a carefully ambiguous characterization of the governance dimension that attaches to Aboriginal title, writing that "Aboriginal title confers ownership rights similar to those associated with fee simple, including: *the right to decide how the land will be used*; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic

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[101] For more commentary on the doctrinal confusion surrounding the relationship between Crown and Indigenous sovereignty see John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37 Osgoode Hall LJ 537; Paul Chartrand, "Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy in Canada" (2011) 19:2 Waikato L Rev 14; Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012); Brian Slattery, "The Aboriginal Constitution" (2014) 67 SCLR (2d) 319; Borrows, "Durability", *supra* note 35; Richard Stacey, "Honour in Sovereignty: Can Crown consultation with Indigenous peoples erase Canada's sovereignty deficit?" (2018) 68:3 UTLJ 405; Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019); Joshua Nichols, *A Reconciliation without Recollection?: An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020).

[102] *Haida*, *supra* note 4 at para 20.

[103] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42 [*Taku River Tlingit*].

[104] *Haida*, *supra* note 4 at para 27.

benefits of the land; and *the right to pro-actively use and manage the land*."[105] It is unclear whether these rights, particularly the last one, are meant to convey governance or law-making power beyond those associated with property rights. Yet the use and management of Aboriginal title land will be governed under the legal order of the Aboriginal title-holders, as Aboriginal title is held communally. As several commentators have pointed out, such governance necessarily construes title as having a jurisdictional component.[106] The Court's wording, however, studiously avoids explicitly jurisdictional language. Given that *Tsilhqot'in* was a landmark case focused on the nature of Aboriginal title, this wording, and the ambiguity or hesitation it conveys, are surely deliberate.

Certainly, the Court's decision not to explicitly recognize jurisdiction or law-making power as an incident of Aboriginal title resonates with a second striking feature of *Tsilhqot'in*. The Court minimizes and all but eulogizes the role of interjurisdictional immunity ("IJI") in examining whether provincial laws of general application improperly impinge on the core federal jurisdiction in relation to "Indians and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*. The Court concluded "that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title."[107] Rather, the applicability of provincial laws to Aboriginal title land should simply be subject to the same justifiable-infringement test as federal laws: "[t]he s. 35 framework applies to exercises of both provincial and federal power."[108]

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[105] *Tsilhqot'in*, *supra* note 5 at para 73 [italics added].

[106] See e.g. Brian Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015) 71 SCLR 45 at 56 [Slattery, "Constitutional Dimensions"]. Slattery argues that the recognition of collective decision-making authority over the management of title lands "means that some authoritative body or bodies within the Nation must be vested with the power to ascertain and allocate rights to the land and to control its use and preservation, including the power to expropriate individual interests." Thus, "[w]hile the existence and scope of this jurisdiction are determined globally by the common law of Aboriginal rights, the legal machinery and modalities through which it is exercised are governed by the particular constitution and laws of the Nation in question." Slattery also argues that Aboriginal title "does not deal with the rights of private entities but with the rights and powers of constitutional entities that form part of the Canadian federation." For these reasons, among others, Slattery argues that proprietary interests such as the fee simple estate are not the best analogy for Aboriginal title. As we argue in this paper, a recognition of the jurisdictional aspects of title ought to shift the frame of Aboriginal title doctrinal development away from Crown infringement of property rights to coordination of Indigenous jurisdiction with provincial and federal law, i.e. to questions of federalism. See also Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873; Jeremy Webber, "The Public-Law Dimension of Indigenous Property Rights" in Nigel Bankes & Timo Koivurova, eds, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Oxford, UK: Hart, 2013) 79; Sari Graben & Christian Morey, "Aboriginal Title in Tsilhqot'in: Exploring the Public Power of Private Property at the Supreme Court of Canada" in Angela Cameron, Sari Graben, & Val Napoleon, eds, *Creating Indigenous Property: Power, Rights, Relationship*s (Toronto: University of Toronto Press, 2020) 287; Sari Graben & Christian Morey, "Aboriginal Title and Controlling Liberalization: Use It Like the Crown" (2019) 52:2 UBC L Rev 435.

[107] *Tsilhqot'in*, *supra* note 5 at para 151.

[108] *Ibid* at para 152.

In reaching this conclusion, the Court expressed particular concern that "applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests—some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all."[109] In other words, when the Court explicitly addressed issues of coordinating jurisdictions, it defaulted to the application of federal and provincial law. As detailed below, This framing construes Aboriginal title primarily as a proprietary interest, subject to provincial and federal infringement, rather than as including Indigenous law-making power and inherent jurisdiction that must be coordinated with provincial and federal jurisdictions. Such coordination is precisely what the QCCA saw as an inescapable consequence of recognizing Indigenous jurisdiction in the child and family services reference.[110] *Tsilhqot'in,* however, is ambiguous about the jurisdictional aspects of title and therefore provides little guidance about coordinating Crown and Indigenous jurisdictions. In this, *Tsilhqot'in* amounts to a doctrinal reversion to a more strictly positivist picture of all lawful authority flowing from the state, allowing only property rights or delegated authority to Indigenous peoples.

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We do not mean to minimize a practical reality that must partly underlie the Court's reasoning. The courts cannot claim to have the interpretive resources that would be needed to meaningfully interpret Indigenous law. Further, Indigenous peoples and their legal orders have been radically disrupted through colonial interference and disruption. This is obviously not meant as criticism of Indigenous legal orders, but simply an acknowledgment of the disruption they have experienced. Simply put, there are important practical questions about the current institutional capacity of both the courts and Indigenous peoples to fully implement a jurisdictional understanding of Aboriginal title.[111] We do not, therefore, criticize the Court on the basis that such practical concerns may animate its reasons in *Tsilhqot'in*. To the contrary, we think that the Court would have done well to acknowledge them explicitly, along with the practical questions of jurisdictional coordination involved, rather than to avoid them by minimizing or obscuring the inescapable jurisdictional component of Aboriginal title. Indeed, the failure to recognize a jurisdictional component of Aboriginal title is out of step not only with the momentum of the Court's own jurisprudence, but also with recent legislative developments and evolution in other areas of the case law.

The central tension or ambiguity in Aboriginal law, what we've called the Marshall ambiguity, has tangible effects. Framing section 35 rights as involving a jurisdictional component that must be coordinated with federal and provincial jurisdictions has important practical and doctrinal consequences. Interpretations which

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[109] *Ibid* at para 147.

[110] *Quebec Reference, supra* note 6.

[111] See Grammond, "Conceptual Framework", *supra* note 44.

acquiesce to inflated claims of sovereign authority serve as the explicit justification for the Crown's authority to infringe Aboriginal and treaty rights and for placing the burden for proving inherent rights on Indigenous peoples. Upholding the Crown's unilateral decision-making authority on the basis of a limited conception of section 35 rights and deference to Crown claims undermines the legitimacy of the doctrine in the eyes of many.[112] This problem is vividly illustrated by Kent J. in Saik'uz when he notes,

> As the Court noted in *Delgamuukw*, "we are all here to stay", and while the legal justification for Crown sovereignty may well be debatable, its existence is undeniable and its continuation is certain. The task of the Court is therefore to somehow reconcile continued settler occupation and Crown sovereignty with the acknowledged pre-existence of Aboriginal societies.[113]

The tension between the presumption of Crown sovereignty and the task of reconciliation is aptly expressed by the choice of the indefinite "somehow". The judiciary is caught between presumptions that it must accept and unilateral authority that it cannot explain. On the one hand, the *de facto* existence of Crown sovereignty constrains the constitutional remedies that the judiciary can provide. While on the other, the courts are tasked with interpreting the constitution in a manner that will "provide a continuing framework for the legitimate exercise of governmental power."[114] The legitimacy problem does not arise, however, merely because the courts recognize a legally and morally dubious sovereign claim; rather, the problem arises because of the ongoing effects assigned to that recognition. Where the Court continues to give effect to sovereignty and underlying title in a way that constrains the Court's own generative ambitions for s. 35 and continues to send the parties to an unbalanced negotiating table, it is difficult to establish meaningful consent-based decision-making structures and practices of shared governance. In short, without guidance it is difficult to "coordinate jurisdiction" in the manner advocated for by the QCCA.[115]

We agree with the many commentators who have noted the implicit recognition of Indigenous jurisdiction in the doctrine of Aboriginal title.[116] There remains, however, a considerable lack of clarity on this issue. The explanation of the doctrine in *Tsilhqot'in* left many issues unsettled, and the Marshall ambiguity continues to shape the doctrine in ways that undermine its ability to effectively mediate disputes. Five areas of uncertainty in Aboriginal title doctrine, in particular, present an opportunity to make explicit the jurisdictional aspects of the title interest and, in so

[112] As Abella J wrote in Mikisew Cree "Unilateral action is the very antithesis of honour and reconciliation": *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 87.

[113] *Thomas and Saik'uz*, *supra* note 21 at para 203.

[114] *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 155, [1984] 6 WWR 577 [emphasis added].

[115] *Quebec Reference*, *supra* note 6 at paras 559–60.

[116] See note 106, above.

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doing, bring needed clarity to the doctrine while situating the courts to be able to better mediate the negotiated resolution of contested jurisdictional issues.

### a) Doctrinal clarifications

#### i. Jurisdiction is an incident of Aboriginal title

In *Tsilhqot'in,* the Court emphasized the "use," "control," and "management" of title lands by title holders. Yet, as Gordon Christie has pointed out, without more this does not tell us a great deal about the nature of the use and control that title holders are entitled to.[117] To use Christie's example, a group of individuals who collectively own real property in British Columbia in fee simple have the right to exclude others and to determine the uses of the land. They may design rules outlining a collective decision-making process on land use and determining the allocation of resources or proceeds flowing from the property. Yet, their "control" of the land remains subject to federal, provincial, and perhaps municipal laws. Their collective rules are subordinate to these jurisdictions.[118] The language in *Tsilhqot'in* permits an interpretation in which Aboriginal title more closely resembles this arrangement than it does territorial jurisdiction. In particular, while the Court cautioned against understanding title through analogy to fee simple ownership, in doing so the court held that "analogies to *other forms of property ownership*—for example, fee simple—may help us to understand aspects of Aboriginal title."[119] While acknowledging that such analogies "cannot dictate precisely what [title] is or is not," the phrase "other forms of property ownership" suggests title is to be conceived of as a property interest, regardless of what the proper analogy might be. Again, property interests are typically conceived of as conferring rights to use, control, and manage, though not law-making authority on par with the legal systems which surround it: property includes decision-making authority, but not jurisdiction.

As outlined above, however, the Court's recognition of collective decision-making authority over title lands and the grounding of title in prior the social organization of Indigenous peoples suggests a jurisdictional aspect to title. The *Tsilhqot'in* Court's citation of *Delgamuukw*, holding that Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts,"[120] seems to more clearly capture the Court's intent than a more limited reading. Strengthening this conclusion, the Court emphasized that the incidents of Aboriginal title reflect the pre-sovereignty nature of the title holding nation's use and occupation of the land: Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with "all the pre-sovereignty incidents of use

[117] Gordon Christie, "Who Makes Decisions over Aboriginal Title Lands" (2015) 48:3 UBC L Rev 743 at 747–50.

[118] *Ibid*.

[119] *Tsilhqot'in, supra* note 5 at para 72 [emphasis added].

[120] *Delgamuukw*, *supra* note 3 at para 190, cited in *Tsilhqot'in*, *supra* note 5 at para 73.

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and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group—most notably the right to control how the land is used."[121] Pre-sovereignty occupation was governed by Indigenous systems of law and political authority, as recognized by the Supreme Court in *Calder*: "the fact is that when the settlers came, the Indians were there, *organized in societies* and occupying the land as their forefathers had done for centuries."[122] Similarly, in *Haida Nation* the Court spoke of pre-existing *Aboriginal sovereignty*, while in *Mitchell* the Court relied on the doctrine of continuity in holding that pre-existing Indigenous legal orders survived the assertion of Crown sovereignty.[123] More recently, a majority of SCC stressed in *Uashaunnuat*: "We reiterate that the legal source of Aboriginal rights and title is not state recognition, but rather the realities of prior occupation, sovereignty and control".[124]

By linking the incidents of Aboriginal title to the nature of pre-sovereignty occupation, the Supreme Court has indicated that Aboriginal title is a means of recognizing and giving effect to these pre-existing social and legal orders.[125] The alternative – that title is a mere proprietary interest without jurisdictional or law-making features - would mean that Indigenous peoples invest the considerable time and expense required to achieve a declaration of Aboriginal title, only to need subsequent litigation to determine the scope of their governing authority and inherent right of self-government on title lands. A clear recognition that Aboriginal title includes legislative and executive authority – those terms being construed broadly and by way of analogy to include various forms of Indigenous law and political association—would avoid the need for multi-stage litigation and direct the parties to the negotiation and co-ordination of jurisdictional issues.

### ii. 'Legislative vacuums' should not be understood as a lack of legal authority but as an absence of currently enforceable law

In *Tsilhqot'in Nation* the Court justified the recognition of provincial authority on Aboriginal title lands by explaining that the absence of such authority "may lead to legislative vacuums."[126] This framing raised concerns with many, as it seemed to ignore the existence of Indigenous legal orders and imply that title could exist without Indigenous law-making authority. John Borrows, for example, argues that "[a] legal vacuum would not be created if the Court recognized the pre-existing and continuing nature of Indigenous jurisdiction along with Aboriginal title. Indigenous law exists in

[121] *Tsilhqot'in, supra* note 5 at para 75; Borrows, "Durability", *supra* note 35.

[122] *Calder, supra* note 1.

[123] *Haida, supra* note 4 at para 20; *Mitchell v MNR*, 2001 SCC 33 at para 9 [*Mitchell*].

[124] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 49.

[125] Borrows, "Durability", *supra* note 35 at 739.

[126] *Tsilhqot'in*, *supra* note 5 at para 147.

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Canada."[127] This is an understandable concern, especially in light of the history of the subordination of Indigenous law. The notion of legislative vacuums, then, seems on its face to work against the Court's intention to recognize jurisdictional aspects of title, and some clarity is required to resolve any contradictions.

The only way to read the concern with legal vacuums as consistent with a jurisdictional conception of title and an understanding of the purpose of s. 35 as reconciling Crown and Indigenous legal orders is to read it as a temporary practical concern. The Court's concern here, it seems to us, is that upon a declaration of title there may well be some issues of considerable immediate importance that the title holding Indigenous jurisdiction will not *yet* have legislated about or otherwise be prepared to regulate under their laws. Note, the Court did not hold that vacuums *will* arise, but that they *may*. The "vacuum", then, arises not because of a lack of legal or legislative *authority*, but because of a lack of cognizable and applicable law in relation to specific subject matters. Federal or provincial law may continue to apply after a declaration of title in relation to subject matters that Indigenous law has not yet regulated.[128] The application of such laws is subject to the consent of the title holders unless justified under the test for infringement where such consent cannot be obtained.[129] In British Columbia, or where federal legislation is at issue, the legislating government also must ensure that all steps have been taken to ensure that any legislation impacting title lands is consistent with the *United Nations Declaration on the Rights of Indigenous Peoples.*[130]

Understood as emphasizing currently enforceable laws rather than legal authority, the language of "vacuum" reveals the need for transitional co-ordination of jurisdictions in areas where gaps in regulation or enforcement could pose serious collective problems.[131] The title holding group may enter into agreements with provincial or federal governments permitting laws to apply until such time as the Indigenous nation develops their own. That may be in one year, or it may be in ten. The choice belongs to the title holding group. This is what the consent requirement recognized in *Tsilhqot'in* requires. Indigenous nations can expedite this process by ensuring that they develop laws before title is declared in any areas where they anticipate federal or provincial governments may try to exercise jurisdiction. In either event, proceeding without consent would constitute an infringement requiring justification. As in *Yahey*, a court may craft remedies designed to prevent

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[127] Borrows, "Durability", *supra* note 35 at 739.

[128] Subject of course to the proviso that a jurisdiction may consciously decide not to make laws about a given issue without ceding jurisdiction over that matter to another level of government.

[129] *Tsilhqot'in, supra* note 5 at paras 76, 88, 90.

[130] *UNDRIP Act*, *supra* note 20; *UNDRIP Act BC*, *supra* note 20.

[131] Borrows anticipates this: "If there was a concern about interim transitional authority between the time when provincial laws would cease to apply and when First Nations laws would take effect, the Court could have created an order to this effect": Borrows, "Durability", *supra* note 35 at 739.

infringements by requiring negotiated agreements be reached to mitigate the impacts to Aboriginal rights *before* the Crown can authorize actions that may infringe.[132]

### iii. "Inalienable except to the Crown" refers to Indigenous territorial jurisdiction not property

Aboriginal title can only be alienated to the Crown.[133] Clarification around the meaning of this feature of the title interest highlights the jurisdictional nature of title and assists with resolving challenging areas of doctrinal development such as title to submerged lands and conflicts with private property. As currently articulated, there is considerable ambiguity in the doctrine concerning the relationship between Aboriginal title and property rights held by individuals outside the title holding group.[134] Can title co-exist with private ownership, or are title and other interests mutually exclusive? The rationale behind the inalienability of title clarifies some conceptual issues raised by this problem.

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While the Court in *Delgamuukw* held that "[l]ands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown,"[135] this overstates the historical position. The rule itself originates in the 17th and 18th centuries and was articulated in the *Royal Proclamation,* 1763.[136] There were several historical justifications. One, at common law the doctrine of tenure requires that all titles in land originate from the Crown.[137] Common law courts, therefore, were hesitant recognize titles acquired by purchase from Indigenous peoples. Second, common law courts in several jurisdictions prohibited such purchases because a subject of the Crown could not purchase *territory* from another polity: Indigenous lands had to be ceded to the Crown before they could be converted into property.[138] This was recognized in *Johnson v M'Intosh:* "The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject-to their laws."[139] Thus, as Professor

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[132] See *Yahey v British Columbia*, 2021 BCSC 1287 at para 1894. For analysis, see Robert Hamilton & Nick Ettinger "The Future of Treaty Interpretation in *Yahey v British Columbia*: Clarification on Cumulative Effects, Common Intentions, and Treaty Infringement" (2022) 54:1 Ottawa L Rev.

[133] *Tsilhqot'in, supra* note 5 at para 74; *Delgamuukw, supra* note 3 at para 113.

[134] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 293.

[135] *Delgamuukw*, *supra* note 3 at para 113.

[136] Slattery, "Constitutional Dimensions", *supra* note 106 at 55.

[137] *Ibid.*

[138] Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47:3 McGill LJ 473. See also Kent McNeil, "The Source, Nature, and Content of the Crown's, Underlying Title to Aboriginal Title Lands" (2018) 96:3 Can Bar Rev 273 at 286 ("Aboriginal title cannot be acquired by private persons or corporations, as they lack the legal capacity to acquire governmental authority from anyone other than the Crown") [McNeil, "The Crown's Underlying Title to Aboriginal Title Lands"].

[139] See e.g. *M'Intosh, supra* note 22 at page 593: "If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their

Slattery concludes: "the rule against alienation does not affect the Aboriginal Nation's capacity to grant or lease lands under its own laws, so long as the lands remain part of the communal territory and subject to the Nation's jurisdiction."[140] Inalienability, in others words, applies to the territory over which the title holding group holds jurisdiction, not any discrete property interest within that territory. This is one of the reasons Slattery argues that the most accurate analogy for Aboriginal title is not fee simple but provincial title.[141] Similarly, Val Napoleon argues that title incorporates Indigenous institutions of public law which regulate the specific allocation of lands and resources within the territory.[142] Thus, the prohibition on alienation except to the Crown applies to *territory*, not *property*. This aligns with Marshall CJ's position in *Johnson* outlined above.

Note that these are generic properties of Aboriginal title. Other Aboriginal rights—e.g. rights to hunt or fish or to gather timber—are defined by properties specific to the Aboriginal rights-holders. That is, the scope of such rights is established by the specific historical practices of the Aboriginal people claiming the right—the specific locations and species they traditionally hunted or fished or how they traditionally used forests or other resources. Professor Slattery has emphasized this distinction between the generic properties of Aboriginal title and the specific properties of other Aboriginal rights to argue that Aboriginal self-government should, like Aboriginal title be understood in terms of generic properties. The QCCA adopted Professor Slattery's analysis as key to its own reasoning about Indigenous jurisdiction over child and family services, quoting a long passage from Professor Slattery and highlighting his conclusion that "In light of *Delgamuukw*, it seems more sensible to treat the right of self-government as a generic Aboriginal right, on the model of Aboriginal title, rather than as a bundle of specific rights."[143] The QCCA relied on this point to set aside the analysis found in *Pamajewon*.[144]

This clarity helps reframe the ongoing debate in Canada concerning the relationship between Aboriginal title and private property interests. Recognizing that private property interests and Aboriginal title are not necessarily inconsistent or

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power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject-to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty."

[140] Slattery, "Constitutional Dimensions", *supra* note 106 at 56.

[141] *Ibid*.

[142] *Ibid*.

[143] *Quebec Reference*, *supra* note 6 at para 422 [underlining in original].

[144] See McNeil, "Inherent Right of Self-Government", *supra* note 12.

irreconcilable, alternatives can be explored other than those typically on offer. A declaration of title need not disturb private interests, as Aboriginal title as a jurisdictional interest can sit "under" existing fee simple estates. This is the argument the Haida Nation put forward when the Crown alleged that all private property owners in within their claimed title area needed to be made parties to the title litigation.[145] Clarity concerning the inalienability of title would help future courts resolve these difficult questions.

### iv. The attributes of the Crown's underlying or radical title

In *Tsilhqot'in,* the Court introduced some confusion concerning the nature of the Crown's underlying title. To review, outside of Quebec it is assumed that the doctrine of tenure was received with the common law, meaning that the Crown acquired underlying title when it acquired sovereignty.[146] Aboriginal title has been conceived of as a burden on this underlying title, with the extent of the burden changing over time.[147] In *Tsilhqot'in,* the Court held that Aboriginal title includes the full beneficial interest in lands subject to title. Given this, the Court asks the next logical question: "what is left of the Crown's underlying title?" The Court posited that underlying title has two attributes: the Crown's fiduciary duty and the authority (what the Court terms the "right") to encroach on title.[148]

This has caused confusion because these principles have typically been associated with Crown *jurisdiction*, not Crown *property*. In *Guerin*, for example, the Court held that the Crown's fiduciary duty derives from the *Royal Proclamation, 1763* when the Crown asserted that Indigenous lands could only be surrendered to the Crown.[149] This duty was derived from the jurisdiction assumed in relation to Indigenous interests, not the Crown's underlying title.[150] The authority to encroach, by turn, has been assumed to have "always" existed, to use the *Sparrow* court's language, and was incorporated into s.91(24) as part of the Crown's jurisdiction in relation to "Indians, and lands reserved for the Indians."[151] This approach is not without its problems, many of which have been discussed at length in the literature. Nonetheless, it provided a reasonably straightforward explanatory model, and the apparent change in *Tsilhqot'in* raised important questions.

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[145] *The Council of the Haida Nation v British Columbia*, 2017 BCSC 1665 at para 7.

[146] McNeil, "The Crown's Underlying Title to Aboriginal Title Lands", *supra* note 138 at 278.

[147] *Ibid*. See also Nigel Bankes & Jonnette Watson-Hamilton **"**What Does Radical Title Add to the Concept of Sovereignty?" (31 July 2014), online (blog): *ABlawg* <https://ablawg.ca/2014/07/31/what-does-radical-title-add-to-the-concept-of-sovereignty/>.

[148] *Tsilhqot'in*, *supra* note 5 at para 71.

[149] Guerin, *supra* note 2 at 349, 376.

[150] See Bankes & Watson-Hamilton, *supra* note 147 ("On the question of the Crown's duties, our pre-Tsilhqot'in understanding was that there were none arising from radical title").

[151] *Sparrow*, *supra* note 30.

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In our view, however, the problem is more superficial than it seems. The Court, it seems, used "underlying title" as synonymous with sovereign jurisdiction. The fiduciary duty and the authority to encroach flow not from the Crown's property interest, but from its *de facto* jurisdiction (setting aside questions of the legitimacy and legality of such). That jurisdiction, however, is better considered a part of the Crown's sovereign authority than as an incident of its underlying proprietary interest. As Professor McNeil notes, "It is important to understand that the Crown's underlying title is a property right derived from the doctrine of tenure, rather than a source of jurisdiction (governmental authority)."[152]

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If the Court intended to refer to jurisdiction, this leaves the question of what incidents of the Crown's underlying title remain. There are two possible answers. The first is escheat or something analogous to it. Having clarified the issue of inalienability above, it can be seen that aboriginal title land can be granted or otherwise encumbered while remaining under the jurisdiction of the title holding group (subject only to the inherent limit). Actions that might require a surrender to the Crown under the *Indian Act*—to create leasehold interests, for example—do not on title lands. The only way for the Crown's underlying title to vest, then, is for the territorial interest itself to be surrendered or to otherwise no longer be held by the title holding group.

The second possibility, if it is correct that the Court has taken to speaking of underlying title as synonymous with the jurisdictional powers of the Crown, is that there no distinct doctrinal role for underlying title. If we take the SCC at its word in *Tsilhqot'in*, "underlying title" is a term that refers only to the Crown fiduciary duty relating to Aboriginal title land and to the Crown's power to infringe Aboriginal title in the broader public interest. It seems that the court has already removed all the proprietary features of the interest, instead emphasizing only those aspects that are redundant to the jurisdictional aspects of Crown sovereignty. The doctrinal role for a traditional conception of underlying title is therefore minimized and may play no role at all where Aboriginal title lands are concerned. While it may seem radical to excise underlying title, there is no compelling reason why underlying title must remain where Aboriginal title is concerned. Aboriginal title is unique precisely because it is a form of allodial title that is not dependent on Crown grant.[153] In other words, its existence does not depend on the explanatory model provided by the doctrine of tenure, and it is an exception to the rule that all interests must be held of the Crown. There is precedent for the recognition of such exceptions and forms of allodial title: title to much of the land in Shetland and Orkney is held under udal law and is not held of the Crown.[154]

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[152] McNeil, "Crown's Underlying Title to Aboriginal Title Lands", *supra* note 138 at 280.

[153] It pre-exists Crown sovereignty. See *Tsilhqot'in*, *supra* note 5 ("what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*" at para 14).

[154] Michael RH Jones, "Perceptions of Udal Law in Orkney and Shetland" in Doreen Waugh & Brian Smith, eds, *Shetland's Northern Links* (Edinburgh: Scottish Society for Northern Studies, 1996) at 186–88. Sakej Henderson argues that Aboriginal title is a form of allodial title: James [Sakéj] Youngblood Henderson, "Mi'kmaw Tenure in Atlantic Canada" (1995) 18 Dal LJ 196.

Clarity on the nature of, and distinction between, Crown jurisdiction and underlying title would help bring clarity to discussions about how to best co-ordinate Crown and Indigenous jurisdiction on title lands.

### v. Relationship between Indigenous and state legal orders

A jurisdictional approach to Aboriginal title requires clarity on the interaction between Indigenous legal orders and state law. These rules will ideally be developed through negotiation. Yet, courts will undoubtedly have a role to play and will need to identify and articulate tools adequate to the task. Further, courts should not be concerned that moving to a jurisdictional frame will create intractable issues: a variety of judicial tools exist to mediate jurisdictional disputes and co-ordinate the co-existence of multiple legal orders. Some of these tools may foreshadow the types of agreements that may be reached in negotiation.

The common law has long recognized the legal orders of Indigenous peoples. In the earliest Indigenous land claim in a common law jurisdiction, *Mohegan Indians v Connecticut*, the Privy Council recognized the existence and relevance of Indigenous law.[155] In 1823, Nova Scotia Judge T.C. Haliburton wrote of the Mi'kmaq: "[t]hey never litigate or are in any way impleaded. They have a code of traditionary and customary laws among themselves."[156] In 1959, the Ontario High Court recognized that "it might be unjust or unfair under the circumstances for the Parliament of Canada to interfere with [the Six Nations'] system of internal Government by hereditary Chiefs."[157] Indigenous legal and political orders have long been recognized as existing prior to Crown assertions of sovereignty and as surviving such assertions.

Despite this recognition, Canadian courts have been unclear, and likely very uncertain, about how to best recognize and give effect to these laws.[158] As outlined above, the Supreme Court has consistently recognized both that Indigenous law is relevant to proving aboriginal rights and title, particularly as evidence of the 'Aboriginal perspective' and as evidence of exclusive occupation of territory, and that Indigenous law survived the Crown assertion of sovereignty. The particular effects of the continuation of Indigenous law, however, has been more difficult to peg.

One line of argument mentioned above holds that courts cannot give effect to Indigenous customary law until such time as it is recognized through a formal legal

[155] See Mark Walters, "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33:4 Osgoode Hall LJ 785.

[156] Leslie FS Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: UBC Press, 1979) at 143.

[157] *Logan v Styres*, [1959] OWN 361, 1959 CanLII 406 (ON SC) at 424 (the Court upheld the authority of the federal government to displace that traditional government through the *Indian Act*, but its recognition of the ongoing existence and relevance of traditional governance is important).

[158] See Grammond, "Conceptual Framework", *supra* note 44.

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instrument.[159] In respect of adoptions and marriages, however, there is some historical precedent for the recognition and application of Indigenous law in Canadian courts.[160] Recently, the Federal Courts have turned to Indigenous law in resolving elections disputes on First Nations.[161] Indigenous law has been relied on in interpreting a constitution drafted under an Indigenous self-government agreement.[162] These latter examples invite us to draw a distinction between customary and written law when considering judicial approaches. In sum, there is considerable uncertainty about how, and to what extent, courts can consider or give effect to Indigenous law. Neither is it clear that Indigenous peoples support Canadian courts interpreting and applying their laws. The courts have, however, explored several approaches that have potential in these areas. The three we consider briefly here are: conflicts of laws analysis; application of traditional doctrines of federalism; and judicial deference to Indigenous decision-makers.

Conflicts of laws rules may have a role to play in co-ordinating Crown and Indigenous jurisdictions. In *Beaver v Hill*, a Haudenosaunee man defended against a claim for child support and spousal support under the Ontario *Family Law Act*[163] by asserting a right to have the dispute decided by Haudenosaunee law.[164] The ONSC developed a modified conflicts of laws analysis to resolve both the challenge to its own jurisdiction and the relationship between provincial and Haudenosaunee law.[165] The approach in *Beaver v Hill* illustrates how the doctrine may apply in modified form where Indigenous customary law is at issue. While this decision was overturned with the ONCA declining to apply the modified conflicts of law analysis,[166] the case illustrates the potential for rules of private international law to be adopted to situations where conflicts arise between state and Indigenous legal orders. Whether conflicts of laws rules are appropriate in respect of Indigenous customary or unwritten law, as in this case, its utility in respect of written law can be seen in the fact that many self-government agreements explicitly state that common law conflicts of laws rules will apply to resolve jurisdictional disputes not contemplated or explicitly dealt with in the agreement.

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[159] *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264 at paras 127–29

[160] See Sébastien Grammond, *Terms of Co-Existence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013).

[161] See *Alexander v Roseau River Anishinabe First Nation Custom Council*, 2019 FC 124 at para 18; *Henry v Roseau River Anishinabe First Nation Government*, 2017 FC 1038 at paras 7–11; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 34; *Mclean v Tallcree First Nation*, 2018 FC 962 at para 10; *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732, at paras 31–40; *Clark v Abegweit First Nation Band Council*, 2019 FC 721 at para 79; *Potts v Alexis Nakota Sioux Nation*, 2019 FC 1121 at para 41.

[162] See *Harpe v Massie and Ta'an Kwäch'än Council*, 2006 YKSC 1.

[163] *Family Law Act*, RSO 1990, c F.3.

[164] *Beaver v Hill*, 2017 ONSC 7245 at para 2.

[165] *Ibid* at paras 50–74.

[166] *Beaver* ONCA, *supra* note 92.

Conventional doctrines of federalism may also play an important role. *Indian Act* by-laws provide an example of how this might work. By-laws passed under s.81 of the *Indian Act* prevail over inconsistent provincial legislation and regulation.[167] By-laws also take priority over inconsistent federal regulations.[168] Some cases have suggested they also take priority over inconsistent federal legislation,[169] though some case law has held that the *Criminal Code* will prevail in the event of a conflict between the *Criminal Code* and *Indian Act* by-laws.[170] In either event, the direction of paramountcy is not important for the purposes of this example: what is relevant here is that, while the by-law powers under the *Indian Act* are clearly a constrained and inadequate basis for Indigenous jurisdiction, the courts have no problem resolving jurisdictional claims when they are explicitly framed as such and when directed to do so under the governing statutory regime. Laws passed by an Indigenous governing body on the basis of the inherent rights of self-government and territorial jurisdiction could be dealt with in much the same way.

Indeed, it is along these lines that the QCCA dealt with Indigenous jurisdiction over child welfare and family services. The Court held that exercises of Indigenous jurisdiction in these areas would prevail over inconsistent provincial or federal laws, unless the relevant provincial or federal government could justify overriding Indigenous law to the extent such law conflicts with any provincial or federal law at issue. The QCCA framed this as an application of the *Sparrow* test, which the courts use to determine whether provincial or federal governments can justify infringements of s. 35 rights. However, the QCCA's application of the *Sparrow* test amounts to a substantial reframing—*away* from the analogy between infringement of *Charter* rights and of s. 35 rights established in previous case law and specially emphasized in *Tsilhqot'in*,[171] so as to *reorient* the *Sparrow* test along jurisdictional lines. The QCCA thus establishes the relevance of principles of federalism to the analysis of s. 35 rights, at least those with an acknowledged jurisdictional dimension. Within its analysis of the right of Indigenous self-government over child welfare and family services, in particular, the QCCA notably adopts a principle of Indigenous paramountcy, subject only to the justification of infringements according to the *Sparrow* test.

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[167] *R v Meechance*, 2000 SKQB 156.

[168] *R v Nikal*, [1996] 1 SCR 1013, [1996] 5 WWR 305.

[169] This was the position of the BCCA in *R v Jimmy*, [1987] 3 CNLR 77, 15 BCLR (2d) 145. See Naiomi Metallic, "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211.

[170] *St. Mary's Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, [1995] 3 FC 461, [1996] 2 CNLR 214. See also Metallic, *supra* note 169.

[171] *Tsilhqot'in*, *supra* note 5 at paras 142–44 ("The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers" at para 142).

A further potentially generative way to recognize or give effect to customary or traditional law is through deference to Indigenous decision makers. In *Pastion*, for example, Grammond J. held:

> Indigenous decision-makers are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions. They are particularly well-placed to understand the purposes that Indigenous laws pursue. They are also sensitive to Indigenous experience generally and to the conditions of the particular nation or community involved in the decision. They may be able to take judicial notice of facts that are obvious and indisputable to the members of that particular community or nation, which this Court may be unaware of. Indeed, for many Indigenous peoples, a person is best placed to make a decision if that person has close knowledge of the situation at issue … This Court has recognized that certain of those reasons militate in favour of greater deference towards Indigenous decision-makers.[172]

That is, courts can support the autonomy and agency of Indigenous decision-makers by adopting a deferential approach to reviewing their decisions concerning the application and interpretation of Indigenous laws.

All of these are examples of courts mediating Crown-Indigenous jurisdictional disputes. The suggestion here is not that any of these approaches be adopted unchanged. The rules governing jurisdictional co-ordination ultimately need to be negotiated, and the tools the judiciary adopts will be shaped by the nature of the negotiated agreements. Once those agreements have been reached, courts ought to adopt a deferential approach to the agreements, ensuring that jurisdictional issues are dealt with through political agreement to the greatest extent possible.[173] Explicit recognition of the jurisdiction aspects of title would help the court step into this more comfortable judicial role.

### b) An example of jurisdictional contests on title lands

With these five doctrinal clarifications in mind, how would a declaration of title play out in this jurisdictional context? Suppose, for instance, the Tsilhqot'in Nation adopted, through its governance structures, specific laws to govern forest management on the land the Nation holds under Aboriginal title, including the issuing of licences to cut and remove timber. *Tsilhqot'in* makes clear, of course, that if British Columbia or private proponents wish to engage in timber activities on Tsilhqot'in Aboriginal title land, they must seek Tsilhqot'in consent. The exercise of Indigenous jurisdiction to adopt forestry laws helps all parties to understand what consent means in this

[172] *Pastion*, *supra* note 48 at para 22.

[173] *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at 36; Julie Jai, "The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference" (2010) 26 NJCL 25. While these sources deal with the interpretation of modern treaties, we do not mean to suggest that all jurisdictional agreements will take this form, only that the deferential judicial attitude ought to extend to all agreements.

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context: in particular, we move away from consultation models and worry about "vetoes" to the simple application of Tsilhqot'in law. Proponents should simply apply for timber licences under Tsilhqot'in law.

If the Province believes that Tsilhqot'in law is somehow inadequate or unconstitutional and wishes to authorize proponent activity contrary to existing Tsilhqot'in law, the first step for the Province should of course be to engage the Tsilhqot'in in negotiation. But note that such negotiations will now be centered on coordination of provincial and Tsilhqot'in laws and whether a satisfactory agreement can be reached to amend Tsilhqot'in laws in ways acceptable to all parties.
If no agreement can be reached through negotiation and the Province intends to proceed with issuing licences or adopting regulations that purport to override Tsilhqot'in law, that raises questions about the Province's power to infringe section 35 rights. This is the framework envisioned by the QCCA in the *Quebec Reference:*

> Where there is a real conflict between Aboriginal and federal or provincial legislation, one must conclude that there is an infringement of the Aboriginal right. Since the Aboriginal right is recognized and affirmed by s. 35, the Aboriginal legislation must prevail. Concluding otherwise would render s. 35 meaningless. Thus, in principle, Aboriginal legislation prevails over incompatible federal or provincial legislation, unless the government concerned can establish that the infringement is justified.[174]

Under current title doctrine, the Province can proceed with its infringing action, subject to judicial review if the Tsilhqot'in bring the matter to court. Current doctrine does not determine precisely how this burden might shift if Indigenous jurisdiction were explicitly recognized as a component of Aboriginal title. We think, however, that the explicit recognition of Indigenous jurisdiction would at least suggest the need to reconsider who should bear the burden of bringing matters of potential infringement to court. In the scenario considered here, if the Province wished to act or regulate contrary to Tsilhqot'in forestry laws, should the presumption not be that such laws are valid over Tsilhqot'in Aboriginal title lands, with the burden on the Province to take the matter to court if it wishes to act contrary to Tsilhqot'in laws?

In other words, in this scenario, (1) obtaining the consent of Aboriginal title-holders means accepting that relevant matters are governed by the laws of the title-holding nation, and (2) for the Crown to proceed without Indigenous consent, i.e. for the Crown to act contrary to governing Indigenous laws, the Crown should first have to establish the justifiability of this proposed infringement. This scenario also suggests the need for dispute resolution processes that can interpret Indigenous laws and their interaction with provincial and federal laws. The burden for this work cannot fall entirely to Canadian courts in the first instance; coordination of jurisdictions will require co-management and co-adjudicatory processes and bodies.[175] While joint

[174] *Quebec Reference*, *supra* note 6 at para 497.

[175] For an elaboration of this point in the context of implementing UNDRIP into Canadian law, see Ryan Beaton, "Articles 27 and 46(2): *UNDRIP* signposts pointing beyond the justifiable-infringement morass of

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Indigenous-state processes and institutional forms develop, Canadian courts are not without doctrinal tools for assessing jurisdictional coordination and conflict between Indigenous laws and federal and provincial laws. Principles drawn from conflicts-of-laws doctrine, federalism jurisprudence, and a commitment to providing deference to Indigenous law-makers in the exercise of their own jurisdiction provide tools for courts to develop doctrine recognizing Indigenous jurisdiction within a renewed framework of Canadian federalism. Thoughtful elaboration of these principles may be especially important for dealing with issues such as conservation and environmental protection, which will likely require greater coordination and integration of Indigenous and provincial and federal laws, as compared with matters of resource extraction that may be, in many cases, more thoroughly governed under local Indigenous laws.[176]

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### 4. Jurisdictional Title and the Constitution

The trajectory of Aboriginal title, as developed since *Calder*, seemed destined to arrive at a jurisdictional conception, or at least as including a clear jurisdictional component. Section 1 of this paper noted how that trajectory stalled in *Tsilhqot'in*, leaving Aboriginal title hovering somewhat uncertainly between a set of property rights (limiting federal and provincial law-making powers by analogy with *Charter* rights) and inherent law-making authority. Section 2 highlighted ways in which this ambiguity troubles Canadian Aboriginal law more broadly, with courts recognizing the existence of Indigenous law and the importance of the Indigenous perspective, yet unsure of how to incorporate Indigenous law and perspective within Canadian Aboriginal law. Section 3 returned to Aboriginal title as a particularly compelling doctrinal site for the explicit recognition of Indigenous jurisdiction. We reviewed how certain specific elements of Aboriginal title doctrine might evolve if the courts were to take this step of explicitly recognizing Indigenous jurisdiction as a component of title.

Taking this step does not require domestic courts to call into question state sovereignty itself. It is clear, of course, that courts can (and do) review legislative and executive *exercises* of sovereignty. Such judicial oversight is at the heart of public law and of the rule of law. The courts also have a role in defining the *attributes* of Crown sovereign authority. In *Mitchell v MNR*, Justice Binnie noted that the Crown is the "inheritor of the historical attributes of sovereignty."[177] The courts may be called on to determine specific contours of these historical attributes. Further, section 35

section 35", in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019).

[176] This is evident, for example, in the example the Supreme Court relied on in *Tsilhqot'in*—pine beetle infestations—which would present a policy problem that crossed jurisdictional lines and required co-ordination. The most prominent recent example may be climate change, as discussed by the SCC in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

[177] *Mitchell*, *supra* note 123 at para 129.

requires these inherited attributes be assessed to ensure that the sovereignty of the Crown can be reconciled with pre-existing Indigenous interests.[178]

The justification for the review of attributes and exercises of sovereignty is analogous to the review of prerogative power: unfettered discretionary authority undermines the legitimacy of a legal and political order. As Mark Walters writes, "[a]s a construct of ordinary legal discourse, sovereignty is, like all ordinary legal constructs, something that must be constantly interpreted and reinterpreted over time to ensure that it contributes to the general understanding of law as an enterprise that integrates legality and legitimacy."[179] The attributes of Crown sovereignty in Canada are inevitably intertwined with those of Indigenous sovereignty, through treaty relationships, of course, but more broadly through their very co-existence within Canadian territory. The broad question of whether Indigenous legal orders, law-making capacity, and jurisdiction survived the Crown's acquisition of sovereignty is settled.[180] Yet the forms taken by Indigenous law and jurisdiction today must not, in the Court's view, be "incompatible with the historical attributes of Canadian sovereignty."[181] The early American case law and Justice Binnie's discussion of sovereign incompatibility in *Mitchell v MNR* both illustrate that there is no fatal inconsistency between Crown and Indigenous sovereignties.[182] Both can, and indeed do, exist within a single federated constitutional order. While Indigenous legal and political regimes may have been modified by the Crown's assertion of sovereign authority, they survived.[183] Indigenous sovereignty may be limited, diminished to an extent, by Crown sovereignty. But Indigenous sovereignty also places boundaries on Crown sovereignty. A consideration of the legal history of Crown sovereignty illustrates that it has always been shaped in relation to Indigenous sovereignty.[184]

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[178] *Ibid.*

[179] Mark D. Walters, "Law, Sovereignty, and Aboriginal Rights" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) at 40.

[180] See the discussion above, especially the text accompanying notes 33–36 and 42–47.

[181] *Mitchell, supra* note 123 at para 163.

[182] *Ibid* at paras 9, 62. The approaches mapped out in the Marshall Trilogy and by Justice Binnie in *Mitchell* are distinct as to the extent Chief Justice Marshall recognizes Indigenous laws, he says that the US courts do not recognize or apply them and so parties would have to find Indigenous tribunals or processes if they want Indigenous laws applied. Whereas the concept of "merged" or "shared" sovereignty that Justice Binnie takes up from the Two-Row Wampum (or *Guswenta*) and the final *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (Restructuring the Relationship (1996)) contemplates a more integrated "single vessel", which he helpfully refers to at para 130 as "partnership without assimilation." These differences aside, as Justice Binnie notes at para. 169 the U.S. law demonstrates that "[t]he United States has lived with internal tribal self-government within the framework of external relations determined wholly by the United States government without doctrinal difficulties since *M'Intosh* was decided almost 170 years ago." For a critical analysis of the concept of merged sovereignty in *Mitchell*, see Gordon Christie, "The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum" (2002) 16 SCLR 285.

[183] *Mitchell, supra* note 123; *Campbell, supra* note 40 at paras 83–86.

[184] See Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (New York: Cambridge University Press, 2005) (argues that legal conceptions of sovereignty were developed *through*

Rather than the absolute idea of sovereignty sometimes asserted by the Crown, historical practices of Crown-Indigenous treaty making and customary intersocietal law suggest a more limited conception of sovereignty and political authority that was worked out over time in collaboration with Indigenous peoples.

The scope of both Crown and Indigenous sovereignty is determined by their historical and ongoing entanglements. Furthermore, Crown *assertions* of absolute sovereignty are just that: assertions. The legality of those assertions is always subject to review.[185] The prior existence of Indigenous legal and political orders is incorporated into the Constitution as a limit on Crown sovereignty. An explicitly jurisdictional approach to Aboriginal title promotes the reconciliation of Crown sovereignty and these pre-existing orders. It recognizes a conception of Crown sovereignty that can accommodate and recognize, in Val Napoleon's words, "the continuation of Indigenous public-law institutions and legal orders."[186] In this way, the effect of doctrines of discovery and *terra nullius* in Canadian law can be minimized. Under the property-rights conception of Aboriginal title partially reaffirmed in *Tsilhqot'in*, Crown sovereignty encompasses both a fiduciary duty owed to the Aboriginal title holders and the authority to infringe Aboriginal title in the broader public interest. By contrast, on a jurisdictional conception of Aboriginal title, while Crown sovereignty may still encompass the fiduciary duty and infringing power, the doctrinal focus is shifted towards a constitutional obligation to co-ordinate jurisdictional issues arising from the co-existence of Indigenous and state law. If the Court were to move to embracing this jurisdictional conception of Aboriginal title, they would come far closer to being able to provide a reasonable response to Indigenous claimants who, to adopt Dyzenhaus' framing, ask, "how is this law for me?" An explicitly jurisdictional conception of Aboriginal title, and of section 35 rights more generally, may help heal some of the current confusion and pathologies in Canadian Aboriginal law.

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the colonial encounter while simultaneously shaping it). See also Lindsay G Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2007).

[185] See e.g. *Restoule*, *supra* note 33 at paras 3–4, where Hennessy J. found that the Crown has a "mandatory and reviewable obligation" to increase treaty annuity payments in order to fulfill its commitments under the Robinson treaties. Further, the Crown's discretionary authority "must be exercised honourably and with a view to fulfilling the Treaties' promise. The discretion is not unfettered and is subject to review". While dealing with treaty implementation, the principle applies to all s.35 rights: the Crown's discretionary authority is limited by its constitutional obligations and is subject to review and curtailment by the courts.

[186] Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873 at 877.

# SIX EXAMPLES APPLYING THE META-PRINCIPLE LINGUISTIC METHOD: LESSONS FOR INDIGENOUS LAW IMPLEMENTATION

**Naiomi Metallic***

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**Abstract**

Building on "Five Linguistic Methods for Revitalizing Indigenous Laws," this article explains and analyses six examples of implementation of the 'meta-principle' or 'word-bundle' linguistic method for Indigenous law revitalization. The method refers to using a word in an Indigenous language that conveys an overarching, normative principle of the Indigenous group, and is the most utilized form of the five linguistic methods to date. The examples span its use by judges, public governments as well as Indigenous governments, and these actors employ different methods for identifying and interpreting the meta-principles. The variations between them reveal four categories of approaches to identifying, interpreting and implementing meta-principles: (1) inherent knowledge of decision-maker; (2) in-court evidence; (3) official ratification; and (4) advisory bodies. There are different benefits and challenges associated with each category, and there are several lessons we can take from studying them. These examples and the categories show us that communities and their governments have real options, and precedents, to not only begin to revive their laws, but also to put them into practice. Introduction

This paper builds on my article, "Five Linguistic Methods for Revitalizing Indigenous Laws", where I identify and give illustrations of five distinct ways that Indigenous languages can be analyzed to draw out Indigenous law.[1] In that article, I propose and explain that there are at least five linguistic methods for Indigenous law revitalization, namely: 1) the "Meta-principle" method; 2) the "Grammar as revealing worldview" method; 3) the 'Word-part' method; 4) the "Word-clusters" method; and 5) the "Place names" method. Essentially, these methods are different ways to look at Indigenous languages to see how Indigenous groups think about and organize the world around them, and they can be revealing of values, principles and rules within an Indigenous group's legal order.

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[1] Naiomi Metallic, "Five Linguistic Methods for Revitalizing Indigenous Laws," [forthcoming in McGill LJ (2022)].

In this article, I focus specifically on the meta-principle linguistic method. The method entails using a word in an Indigenous language that conveys an overarching, normative principle of the Indigenous group that can be used as an interpretive prism through which to assess other laws, rules, actions or decisions, or to inform the creation of new rules or decisions.[2] Métis elder and scholar, Maria Campbell, described this idea as "[e]ach word is a bundle," meaning that each word is a bundle with teachings and tools to draw on.[3] The meta-principle (or "word-bundle") method is, by far, the most well-recognized and utilized form of the five linguistic methods. As the examples in this article show, its use in different contexts teaches that various approaches can be taken to identify, interpret and implement the meta-principle method. For this reason, the meta-principle method deserves particular study to help Indigenous communities appreciate the different ways to implement it.

Through these two articles, my aim is to make a modest contribution to the ground-breaking writing on Indigenous law revitalization that has happening for the past decade.[4] Referred to as the "Indigenous law renaissance"[5], Indigenous law scholars have been writing about the various resources, methods and frameworks to support Indigenous nations and communities in drawing out their laws.[6] This includes describing ways to find law in Indigenous stories, ceremonies, songs, the knowledge and experience of elders and other community members, the land and more.[7] While

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[2] *Ibid.*

[3] Maria Campbell shared this idea at a gathering of Indigenous scholars who form the Prairie Relationality Network in a gathering at the Banff Centre, Banff, Alberta, in Fall, 2019. Elder Campbell raised this specifically to address the issue of lack of fluency. She said rather than waiting for everyone to become fluent before drawing on the language, a lot can be learned by seeing each word as a bundle with teachings and tools to draw on. It makes it more accessible to a broader number of people in the community. My thanks to Hadley Friedland for sharing the knowledge gained from Elder Campbell with me.

[4] "Indigenous law" refers to the specific legal orders of Indigenous peoples, as distinct from "Aboriginal law" which refers to Canadian laws in relation to Indigenous peoples, for example, s 35 of the *Constitution Act, 1867* and s 91(24) of the *Constitution Act, 1867*, as well as legislation relating to Indigenous peoples, such as the *Indian Act*, RSC 1985, c I-5, as well numerous other federal and some provincial statutes. In this article I will be using the umbrella term "Indigenous peoples" which includes First Nations, Inuit and Métis people, unless the context calls for identifying a particular Indigenous nation (e.g. Mìgmaq, Cree, etc.).

[5] See Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014).

[6] "Drawing out law" is a phrase frequently used by Indigenous law scholars to refer to the act of identifying values, principles and rules from a variety of sources (e.g., stories, language, observations from nature and ceremonies, etc.) through processes of analysis and interpretation (methods). See e.g. Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1 at 19–21 [Friedland, "Reflective Frameworks"]; John Borrows, *Drawing Out Law: A Spirit Guide* (Toronto: University of Toronto Press, 2010).

[7] See e.g. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, *Canada's Indigenous Constitution*]; Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015) 1:1 Lakehead LJ 33 [Friedland & Napoleon, "Gathering the Threads"]; Darcy Lindberg, "Miyo

there has been some writing to-date from scholars in this field on the use of language to reveal Indigenous laws,[8] there is room for more. My articles seek to add to the analytical tools and examples available to Indigenous communities in using their languages to both draw out and implement their laws.

This paper is in two parts. In Part 1, I unpack six different examples of the implementation of the meta-principle method, each varying to some degree from the other. The variations are based on who identifies and interprets the meta-principle and how (e.g., what informs their identification and interpretation). In Part 2, I classify the examples into four categories of approaches to identify, interpret and implement meta-principles: (1) inherent knowledge of decision-maker; (2) in-court evidence; (3) official ratification; and (4) advisory bodies. I also discuss benefits and challenges of each implementation approach. This is intended to give Indigenous communities and governments an informed picture of what some of their options for Indigenous law implementation may include in relation to the meta-principle method. The implementation approaches discussed also shed light on opportunities and challenges in Indigenous law implementation more generally, both within Indigenous communities as well as within the Canadian legal system.

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## Part 1: Six Examples of Meta-Principle Implementation

Here I review six examples of implementation of the meta-principle linguistic approach. One is from a tribal court in the United States, and the rest are from Canada. Of the Canadian examples, one is from the territorial court in Nunavut, another from the government of Nunavut, another from the government of Nova Scotia, and the remaining two are from Indigenous governments. As noted earlier, each example varies to some extent from the others in terms of who identified and/or interpreted the meta-principle, and what informed their choices. To assist in navigating these variances, I provide the following summary table of the examples:

| Examples | Who identified the principle? | Who interprets the principle? | What is the interpretation based on? |
|---|---|---|---|
| ***Navajo Nation v Rodriguez*** **(Navajo Nation - US)** | Tribal judges fluent in language | Tribal judges fluent in language | Inherent knowledge |

Nêhiyâwiwin (Beautiful Creeness) Ceremonial Aesthetics and Nêhiyaw Legal Pedagogy" (2018) 16/17 Indigenous LJ 51; Kerry Sloan, "Dancing the Nation" (2021) 1:1 Rooted 17; Eva Ottawa, *Wactenamakanicic e opikihakaniwitc - Comment se manifeste le « droit » coutumier en matière de circulation des enfants chez les Atikamekw Nehirowisiwok de Manawan?* (LLM Thesis, University of Ottawa, Civil Law Section, 2021) [unpublished]; Sarah Morales, "Stl'ul nup: Legal Landscapes of the Hul'Qumi'um Mustimuhw" (2016) 33 Windsor YB Access Just 103.

[8] See Mathew Fletcher, "Rethinking Customary Law in Tribal Court Jurisprudence" (2006) Michigan J Race & L 57. See also Tuma Young, "L'nuwita'simk: A Foundational Worldview for a L'nuwey Justice System" (2015) 13 Indigenous LJ 75; Lindsay Keegitah Borrows, *Otter's Journey through Indigenous Languages and Law* (Vancouver, British Columbia: UBC Press, 2018).

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| ***R. v Itturiligaq* + (NU)** | NU judges | NU judges | Inherent knowledge<br>**Held to be in error by Court of Appeal – evidence or advice from Inuit on meaning of Inuit Qaujimajatuqangit to community needed* |
| ***Wildlife Act* + (NU)** | GN government, based on significant Inuit engagement over Inuit Qaujimajatuqangit, including identification and description of principles | NU government and public servants (NU judges) | Definition within the law;<br>descriptions within government documents and statements; and<br>Advisory panels |
| ***Sustainable Development Goals Act* (NS)** | NS Legislature<br>**Not clear whether this was with Mìgmaq involvement* | NS government and public servants (NS judges) | Definition within the law |
| ***Lobster Law* (Listuguj Mi'gmaq First Nation (LMG), QC)** | LMG, following analysis of community engagement | Listuguj law oversight board (made up of community members) | Definition within the law; and<br>The oversight board's knowledge and Mìgmaq custom |
| **7 Cree Principles (Aseniwuche Winewak Nation (AWN), AB)** | Aseniwuche Elders Council and leadership identified. Elaboration based on community interviews and synthesis, followed by adoption by AWN. | Members and employees of AWN government | Analysis of interviews; and<br>Handouts with summary of analysis |

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### 1. Navajo Nation v Rodriguez (Navajo Nation - US)

This example comes from US Anishinaabe tribal judge, Matthew Fletcher, one of the first Indigenous law scholars to focus on the use of Indigenous languages to draw out Indigenous law. Fletcher relied on philosopher H.L.A. Hart's theory of primary and secondary rules to explain the meta-principle method.[9] Hart conceived of "primary rules of obligation" as non-optional duties or obligations that are part of a group's customs or traditions.[10] Secondary rules are rules of "recognition", which Hart explained as procedural rules for deciding such things as when and how rules can be

[9] Fletcher, *supra* note 8.

[10] *Ibid* at 63, referencing HLA Hart, *The Concept of Law*, (Oxford: Oxford University Press, 1961).

passed, when a rule has been broken, and how disputes will be adjudicated.[11] Using the case *Navajo Nation v Rodriguez* from the Navajo Nation Supreme Court in 2004[12] as his main example, Fletcher proposed that a tribal court judge would identify "an important and fundamental value signified by a word or phrase in the tribal language" (e.g., a primary rule), and next apply that value to an Anglo-American or intertribal secondary rule in order to "harmonize these outside rules to the tribe's customs and traditions."[13]

The issue before the tribal judge in *Navajo Nation v Rodriguez* was whether the Navajo's *Bill of Rights* required the tribe's police force to inform suspects taken into custody of their right to remain silent and right to a lawyer (in the United States this is called a "*Miranda* warning"). The *Bill of Rights* protected suspects from being "compelled… to be a witness against themselves", but the question was whether this extended to *Miranda*-type protections. To resolve this question, the tribal judge, who was from the nation and spoke the language, drew upon the Navajo concept of *Hazhó'ógo*, which the judge described as a fundamental tenet of how the Navajo approach each other as individuals and relatives, serving as a reminder that patience and respect are due to all.[14] Based on this principle, the judge held that tribal police had an obligation pursuant to *Hazhó'ógo* to give suspects the equivalent of *Miranda* warnings.

Fletcher praised this case as a practical method for introducing "customary law into the modern era" in an incremental way and "without creating much additional confusion as to the application of the law."[15] The identity of the tribal judge as a member of the nation and a fluent speaker of the language is suggested by Fletcher to be important factors to the success of this approach, particularly language fluency, which Fletcher acknowledges is rare even among tribal judges. However, Fletcher also suggests that a tribal judge who is a member of a nation, but not a fluent speaker, could also apply primary rules.[16]

### 2. R v Itturiligaq + (NU)

The application of the meta-principle approach is starting to be seen in a growing number of cases from Nunavut. By way of context, it is important to note that the creation of Nunavut as a Canadian territory was the result of land claim negotiations between Inuit in what was then the Northwest Territories, represented by the Inuit

[11] Fletcher, *supra* note 8 at 63–64.

[12] *Navajo Nation v Rodriguez*, SC-CR-03-04, 11 (Navajo 2004) cited and discussed in Fletcher, *supra* note 8 at 72–75.

[13] Fletcher, *supra* note 8 at 94.

[14] Navajo courts are required to take the "Fundamental laws of the Diné [Navajo]" into consideration when interpreting Navajo statutory law (*ibid* at 18).

[15] *Ibid* at 42.

[16] *Ibid* at 21, 28, 30, 42.

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Tapirisat of Canada (ITC), and Canada. As part of these negotiations, the ITC opted for the creation of a public government as a new territory as opposed to Indigenous self-government. In part, this decision was motivated by the reasoning that since the Inuit represented 85% of the territory's population, this arrangement would still effectively allow Inuit control over decision-making in the territory.[17]

Early into the life of the new territory, an Inuit-led organization, the Nunavut Social Development Council (NSDC), was created to implement Inuit values, culture, and traditions in the operations of the Nunavut government. In 1998, the NSDC brought together elders from all of Nunavut's communities to identify "processes designed to ensure that Inuit culture, language, and values are democratically reflected in the policies, programs, and day-to-day operations of the new Nunavut government."[18] During the conference, the term *Inuit Qaujimajatuqangit* (IQ) was introduced as a way to "replace and broaden the limited connotations usually attached to the term Inuit Traditional Knowledge."[19] IQ was defined as "all aspects of traditional Inuit culture including values, world-view, language, social organization, knowledge, life skills, perceptions and expectations."[20] Further meetings and workshops with Inuit knowledge-holders would identify and document a number of Inuit language concepts informing IQ.[21] All departments of the Nunavut Government and Inuit organizations created pursuant to the land claim are expected to implement IQ. Some departments have developed their own IQ policies.[22]

Several statutes of the Nunavut Government explicitly incorporate IQ, which will be discussed further in the next section. Interestingly, the majority of cases considering IQ in the courts to date have not been under the statutes that explicitly incorporate IQ. Rather, Nunavut judges have started to apply these principles even without explicit statutory instructions to do so, treating such principles as generally relevant to the interpretation of law in the territory. A growing area where we have started to see application of IQ principles has been in criminal law cases involving Inuit offenders. To date, there have been six decisions from the Nunavut Court of

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[17] Francis Levesque, "Revisiting Inuit Qaujimajatuqangit: Inuit knowledge, culture, language, and values in Nunavut institutions since 1999" (2014) 38:1-2 Études/Inuit/Studies 115 at 118.

[18] *Ibid* at 121.

[19] *Ibid*.

[20] *Ibid*.

[21] *Ibid* at 122–23. See also Shirley Tagalik, "Inuit Qaujimajatuqangit: The role of Indigenous knowledge in supporting wellness in Inuit communities in Nunavut" (2009–2010), online (pdf): *National Collaborating Centre for Aboriginal Health* <www.ccnsa-nccah.ca/docs/health/FS-InuitQaujimajatuqangitWellnessNunavut-Tagalik-EN.pdf> [perma.cc/K3AR-TKFD] (describing how Inuit elders have been documenting Inuit worldview and IQ).

[22] Levesque, *supra* note 17 at 123. See also Thomas Wilhelm Ahlfors, "Challenges related to the incorporation of Inuit Qaujimajatuqangit into legislation" (2018) 1 J Commonwealth Assoc Legislative Counsel 63 at 68.

Justice (NCJ), all penned by Justice Bychok, that incorporate IQ and traditional concepts of Inuit justice.[23]

While linking the jurisdiction to apply Inuit justice principles in criminal cases to the directions of the Supreme Court in *R v Gladue*,[24] Justice Bychok, has gone beyond this to suggest that IQ is relevant in all proceedings in the territory:

> I have written extensively concerning Gladue sentencing principles in the context of sentencing Nunavummiut. More than 86% of Nunavut's population is Inuit. Inuit social governance runs parallel to the application of pan-Canadian legal norms. Therefore, the norms of Inuit Qaujimajatuqangit must be considered at every stage of civil and criminal proceedings in the Nunavut Court of Justice. This includes at a pre-trial bail – or show cause – hearing.[25]

While the Nunavut Court of Appeal (NUCA) overturned Justice Bychok's decision on IQ in *R v Itturiligaq* (where the judge found that a mandatory minimum criminal sentence was unconstitutional) the panel did not question the application of IQ to the criminal sentencing context more generally, and in fact noted, "[t]here is undoubtedly an important intersection between Inuit Qaujimajatuqangit and Canadian criminal law rules and processes."[26] Further, in a decision from Nunavut's Privacy Commission under the *Access to Information and Protection of Privacy Act* (containing no explicit mention of IQ),[27] the Commissioner expressed the importance of considering IQ principles in deciding such matters.[28] These are positive developments for the recognition of Inuit law in Nunavut, and for Indigenous law within Canada more broadly.

In some of his decisions Justice Bychok has referenced the traditional Inuit practice of banishment when a person threatens group safety and security to support his finding for custodial sentences.[29] In another case, he took into account Inuit

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[23] *R v Mikijuk*, 2017 NUCJ 2 at paras 17, 46 [*Mikijuk*] (sentencing); *R v Anugaa*, 2018 NUCJ 2 at paras 37–44 [*Anugaa*] (applied for stay of prosecution); *R v Itturiligaq*, 2018 NUCJ 31 at paras 62–63, 70, 86, 106–124 [*Itturiligaq* NUCJ] (sentencing and *Charter* challenge to statutory minimums); *R v Jaypoody*, 2018 NUCJ 36 at paras 75, 97–99 [*Jaypoody*] (bail application); *R v Arnaquq*, 2020 NUCJ 14 at paras 54–56 [*Arnaquq*] (sentencing); *R v Iqalukjuaq*, 2020 NUCJ 15 at paras 15, 39 [*Iqalukjuaq*] (sentencing).

[24] *Anugaa*, *supra* note 23 at 42; *Itturiligaq* NUCJ, *supra* note 23 at paras 106, 118; *Jaypoody*, *supra* note 23 at 99.

[25] *Jaypoody*, *supra* note 23 at para 75; see also *Mikijuk*, *supra* note 23 at 46 [emphasis added].

[26] *R v Itturiligaq*, 2020 NUCA 6 at para 75 [*Itturiligaq* NUCA].

[27] *Access to Information and Protection of Privacy Act*, CSNu, c.A-20.

[28] *Department of Human Resources (Re)*, 2021 NUIPC 14 [*Department of Human Resources (Re)*]. The decision was in relation to a policy of the Nunavut government to entirely redact employee reference checks before disclosing these to employees. As noted further below, however, the Privacy Commission felt constrained from applying IQ principles in the matter before him given the evidentiary record. The challenges surrounding this will be explored further in Part 2.

[29] *Mikijuk*, *supra* note 23 at para 46; *Arnaquq*, *supra* note 23 at paras 54–55; *Iqalukjuaq*, *supra* note 23 at paras 15, 39.

seasonal land use and hunting practices in considering whether there had been unreasonable delay in prosecuting an offence.[30] In *R v Itturiligaq*, Bychok J emphasized the principles of forgiveness, reconciliation, reintegration, restitution and understanding, as well as group cohesion, as part of IQ, to support his conclusion that a custodial, mandatory four-year sentence to be served in a federal penitentiary outside Nunavut violated the accused's *Charter* right not to be subjected to cruel and unusual punishment.[31] In all of these decisions, it appears that Justice Bychok relied on his own inherent knowledge of IQ when identifying and applying its principles. Justice Bychok does not identify as Inuk or having fluency in Inuit, but his biography on the NCJ's website notes that he worked as a prosecutor for Public Prosecution Services Canada in Nunavut for over 12 years, working in every one of Nunavut's 25 hamlets and that he "worked very hard to develop an understanding of Inuit culture and traditions as well as a sensitivity to Inuit traditional legal norms."[32]

The NUCA overturned Justice Bychok's decision in *R v Itturiligaq* that the mandatory minimum sentence violated Mr. Itturiligaq's *Charter* rights, finding that the Justice Bychok both overemphasized and underemphasized important considerations in his reasoning. With respect to his application of IQ principles, the Court of Appeal found that he overemphasized the importance of Inuit social justice concepts in respect of the "forgiveness" factor and failed to consider how the Inuit community in question might equally support a longer custodial sentence to send a strong message of not tolerating domestic violence and gun violence as a part of IQ.[33] The offender in the case had pleaded guilty to discharging a firearm in the direction of a home where his wife was visiting, having been angry at her refusal to come home, as well as hitting her with the gun when she reluctantly decided to return home.

Ultimately, the Court of Appeal found that the lack of evidence to support the trial judge's interpretation of IQ in the circumstances to be in error:

> … In light of the paucity of evidence as to how, when and in what circumstances Inuit Qaujimajatuqangit might have weighed in on any one, or all, of the mitigating and aggravating factors identified, including the domestic violence context, the sentencing judge was wrong to place mitigating emphasis on the bare, but unexplored, fact that this victim was prepared to continue associating with Mr. Itturiligaq. Simply put, there was no evidence to suggest that Inuit Qaujimajatuqangit would place any less emphasis on denunciation and deterrence than Parliament or the Criminal Code, or that Inuit Qaujimajatuqangit would invariably treat as mitigating what the victim said. On these matters, no one asked for the advice of the

[30] *Anugaa*, *supra* note 23 at paras 43–44.

[31] *Itturiligaq* NUCJ, *supra* note 23 at paras 86, 106–109, 116–124; *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*].

[32] Nuvanut Court of Justice, "The Judiciary", online: *Nunavut Courts* <www.nunavutcourts.ca/index.php/judiciary-nucj> [perma.cc/KVE5-XWMN].

[33] *Itturiligaq* NUCA, *supra* note 26 at paras 75–79.

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> Inuit community, or for direct evidence from those tasked with interpreting and applying Inuit Qaujimajatuqangit.[34]

In a decision of the Privacy Commissioner of Nunavut, where the Commissioner stated it was important to consider IQ in the circumstances, the Commissioner noted the NUCA decision in *R v Itturiligaq* and the need for an evidentiary record on IQ. As a result, he suggested he could not apply IQ in the circumstances:

> In the present case, I have no evidence about Inuit Qaujimajatuqangit before me. I take heed of the Court of Appeal's warning in *Itturiligaq* not to overreach. I hope in future cases to develop the evidentiary record from which we might be able to learn how Inuit Qaujimajatuqangit can help in the exercise of interpreting and applying the ATIPPA. That will require the active participation of public bodies individually, and the GN more generally through the Department of Executive and Intergovernmental Affairs, which has overall responsibility for the administration of the ATIPPA.[35]

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Despite this conclusion, the Commissioner noted that "Inuit Piqqusingginnik (Inuit societal values) is another concept with possible application to the case. Inuit societal values overlap with Inuit Qaujimajatuqangit but they are not the same."[36] He then noted that he could consider a vision document prepared by the Legislative Assembly setting out Inuit societal values (which were also incorporated into a government Human Resources Manual),[37] identifying the values relevant to the matter at hand. Considering these, as well as commitments of the Nunavut government to have a more representative public service, the Commissioner recommended that the government rethink its approach to redacting reference checks before providing these to employees for reasons of transparency and accountability of referees.[38]

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[34] *Ibid* at para 78 [emphasis added].

[35] *Department of Human Resources (Re), supra* note 28 at para 79.

[36] *Ibid* at para 80.

[37] *Ibid* at paras 82–84.

[38] Nunavut continues to be challenged with meeting its commitment to have its public service representative of its Inuit population (further discussion on this will be found at note 60, *below*). Here, the job applicant was Inuk and the redaction made it impossible for him to understand why he was unsuccessful for the job competition. As noted by the Privacy Commissioner he had no obvious employment history that would explain the negative reference, and he was left no knowing how he could change or do things differently to improve his changes in future competition: *Department of Human Resources (Re), supra* note 28 at paras 86–93.

### 3. Wildlife Act + (NU)

As noted above, several statutes of the Nunavut Government explicitly incorporate IQ.[39] This incorporation has drawn upon the knowledge of Inuit elders and knowledge-holders, including documents produced in workshops and meetings with elders detailing definitions and descriptions of IQ. The government's Department of Culture and Heritage has an Inuit Qaujimajatuqangit Division that coordinates the development of IQ and Inuit Societal Values initiatives across government.[40] The Division works with the Inuit Qaujimajatuqangit Katimajiit, a non-governmental advisory body, that acts as a resource to all departments on their IQ initiatives.[41]

For illustration, I will focus on the *Wildlife Act*, passed in 2003.[42] IQ is identified as one of 10 values that must inform the fulfillment of the purpose of the *Act*:

> **Values**
>
> (2) To fulfill its purpose, this Act is intended to uphold the following values:
> …
> (f) the guiding principles and concepts of Inuit Qaujimajatuqangit are important to the management of wildlife and habitat and should be described and made an integral part of this Act;[43]

IQ is defined in the *Act* as meaning "traditional Inuit values, knowledge, behaviour, perceptions and expectations."[44] All persons and bodies performing functions under this Act and the courts are directed to interpret and apply this Act in accordance with the purpose, values and principles of the Act.[45] At section 8, a number of IQ principles are identified as applicable under the *Act*:

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[39] There are currently nine (9): *Legislative Assembly and Executive Council Act*, SNu 2002, c 5; *Nunavut Elections Act*, SNu 2002, c 17; *Human Rights Act*, SNu 2003, c 12; *Wildlife Act*, SNu 2003, c 26; *Family Abuse Intervention Act*, SNu 2006, c 18; *Education Act*, SNu 2008, c 15; *Official Languages Act*, SNu 2008, c 10; *Inuit Language Protection Act*, SNu 2008, c 17; *Plebiscite Act*, SNu 2013, c 25.

[40] Inuit Quajimajatuqangit Division, Department of Culture and Heritage, "Inuit Qaujimajatuqangit", online: *Government of Nunavut* <www.gov.nu.ca/culture-and-heritage/information/inuit-qaujimajatuqangit> [perma.cc/8QCM-KLL7].

[41] Inuit Quajimajatuqangit Division, Department of Culture and Heritage, "Inuit Qaujimajatuqangit Katimajiit: Terms of Reference" (3 January 2017), online (pdf): *Government of Nunavut* <www.gov.nu.ca/sites/default/files/2017-01-03-tor_-call_for_nomination_iq-eng-logo-x.pdf> [perma.cc/39ED-E3Z8].

[42] *Wildlife Act*, *supra* note 39.

[43] *Ibid*, s 1(2)(f). The purpose of the *Wildlife Act* is to "establish a comprehensive regime for the management of wildlife and habitat in Nunavut, including the conservation, protection and recovery of species at risk, in a manner that implements provisions of the Nunavut Land Claims Agreement respecting wildlife, habitat and the rights of Inuit in relation to wildlife and habitat" (*ibid*, s 1(1)).

[44] *Ibid*, s 2. Many of the other NU statutes do not define IQ.

[45] *Ibid*, s 3(1).

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8. The following guiding principles and concepts of *Inuit Qaujimajatuqangit* apply under this Act:

(a) *Pijitsirniq/Ihumaliukti*, which means that a person with the power to make decisions must exercise that power to serve the people to whom he or she is responsible;
(b) *Papattiniq/Munakhinik*, which means the obligation of guardianship or stewardship that a person may owe in relation to something that does not belong to the person;
(c) *Aajiiqatigiingniq/Pitiakatigiiklotik*, which means that people who wish to resolve important matters or any differences of interest must treat each other with respect and discuss them in a meaningful way, keeping in mind that just because a person is silent does not necessarily mean he or she agrees;
(d) *Pilimmaksarniq/Ayoikyumikatakhimanik*, which means that skills must be improved and maintained through experience and practice;
(e) *Piliriqatigiingniq/Havakatigiiklutik*, which means that people must work together in harmony to achieve a common purpose;
(f) *Avatimik Kamattiarniq/Amiginik Avatimik*, which means that people are stewards of the environment and must treat all of nature holistically and with respect, because humans, wildlife and habitat are inter-connected and each person's actions and intentions towards everything else have consequences, for good or ill;
(g) *Qanuqtuurunnarniq/Kaujimatukanut*, which means the ability to be creative and flexible and to improvise with whatever is at hand to achieve a purpose or solve a problem;
(h) *Qaujimanilik/Ihumatuyuk*, which means a person who is recognized by the community as having in-depth knowledge of a subject;
(i) *Surattittailimaniq/Hugattittailimanik*, also called *Iksinnaittailimaniq/Ikhinnaittailimanik*, which means that hunters should hunt only what is necessary for their needs and not waste the wildlife they hunt;
(j) *Iliijaqsuittailiniq/Kimaitailinik*, which means that, even though wild animals are harvested for food and other purposes, malice towards them is prohibited;
(k) *Sirliqsaaqtittittailiniq/Naklihaaktitihuiluhi*, which means that hunters should avoid causing wild animals unnecessary suffering when harvesting them;
(l) *Akiraqtuutijariaqanginniq Nirjutiit Pijjutigillugit/Hangiaguikluhi Nekyutit InuupPiutigingitait*, which means that wildlife and habitat are not possessions and so hunters should avoid disputes over the wildlife they harvest or the areas in which they harvest them; and
(m) *Ikpigusuttiarniq Nirjutilimaanik/Pitiaklugit nekyutit*, which means that all wildlife should be treated respectfully.[46]

[46] *Ibid*, s 8.

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Section 9 contains seven subsections that identify how specific actors under the *Act* must carry out certain principles in the exercise of their functions. To give two examples:

> *Pijitsirniq/Ihumaliukti*
> 9. (1) The Government of Nunavut, the NWMB, the NSRC, every RWO and HTO and every conservation officer and wildlife guardian must follow the principle of *Pijitsirniq/Ihumaliukti* [s 8(a)] when performing their functions under this Act.
>
> *Papattiniq/Munakhinik*
> (2) Although the principle of *Papattiniq/Munakhinik* traditionally applied to objects rather than to living things, because the Government of Nunavut and the NWMB have responsibilities to conserve wildlife, they must endeavour to apply the principle of *Papattiniq/Munakhinik* [s 8(b)] to wildlife and habitat and conserve these resources for future generations of Nunavummiut…[47]

Beyond this, the *Act* also provides that the Minister is required to appoint an advisory committee of elders to review methods and technologies of harvesting wildlife in the context of IQ and advise the Minister on those it considers safe and humane.[48] The Minister is also empowered to support and implement suitable programs of education and training respecting IQ.[49] Finally, the *Act* directs that the Inuit language may be used to interpret the meaning of guiding principles or concepts of IQ.[50]

The presence of IQ within the *Act* has only been referenced once in the courts to date. In *Government of Nunavut (Attorney General and Minister of Environment) v Arctic Kingdom Inc.*, the Nunavut Court of Justice relied on IQ as part of a contextual interpretation of the *Wildlife Act* to conclude that the *Act* did not impose a licensing requirement on Inuit hunters for subsistence hunting on Crown lands.[51] This is the only case so far to comment on the inclusion of IQ in a Nunavut statute.

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[47] *Ibid*, s 9.

[48] *Ibid*, s 160. An example of a similar advisory committee can be found in Nunavut's recently passed *Corrections Act*, which creates an Inuit Societal Values Committee, made up mostly of members from outside the correctional system, who hears submissions and suggestions for incorporating Inuit societal values into corrections programming: *Corrections Act*, SNu 2019 c 13, ss 59, 61–64.

[49] *Wildlife Act*, *supra* note 39, s 149(d).

[50] *Ibid*, s 3(2).

[51] *Government of Nunavut (Attorney General and Minister of Environment) v Arctic Kingdom Inc.*, 2019 NUCJ 10. This was a constitutional challenge, brought by an outdoor tour operating company, to the licensing regime set up under the *Wildlife Act*, *supra* note 39. The company argued, among other things, that the *Act* prohibited Inuit from hunting for food without a licence in contravention of the land claim agreement and the *Nunavut Act*, SC 1993, c 28.

In addition (and similar to its approach to IQ), some Nunavut statutes explicitly list and require respect of "Inuit societal values" in the interpretation and execution of statutory duties.[52] For example, s 2(2) and (3) of the *Child and Family Services Act* requires that

> **Inuit societal values**
>
> (2) This Act shall be administered and interpreted in accordance with the following Inuit societal values:
>
> (a) *Inuuqatigiitsiarniq* (respecting others, relationships and caring for people);
> (b) *Tunnganarniq* (fostering good spirit by being open, welcoming and inclusive);
> (c) *Pijitsirniq* (serving and providing for family or community, or both);
> (d) *Aajiiqatigiinniq* (decision making through discussion and consensus);
> (e) *Piliriqatigiinniq* or *Ikajuqtigiinniq* (working together for a common cause); and
> (f) *Qanuqtuurniq* (being innovative and resourceful).
>
> **Other Inuit societal values**
>
> (3) In addition to the Inuit societal values named in subsection (2), the following Inuit societal values may be used or incorporated in the administration or interpretation of this Act:
>
> (a) *Inunguqsainiq* (nurturing or raising an individual to be a productive member of society);
> (b) *Inuttiavaunasuaqniq* (working towards a good or problem-free life);
> (c) *Piijutingani qiniriaquqtugu* (the importance of assessing and addressing the root cause of undesirable behaviour or circumstances).[53]

In one reported case to date, Justice Bychok drew on two of these principles (*Inuuqatigiitsiarniq* and *Pijitsirniq*) in interpreting the *Child and Family Services Act*, to aid in his conclusion that the *Act* gave him the power to make temporary supervision orders in favour of parents despite ambiguity in the *Act* in this regard.[54]

A non-Inuk legislative drafter working for the Government of Nunavut, Thomas Ahlfors, has written about the challenges of incorporating IQ and its related

[52] See *Child and Family Services Act*, SNWT (Nu) 1997, c 13; *Education Act*, *supra* note 39; *Representative for Children and Youth Act*, SNu 2013, c 27; *Public Service Act*, SNu 2013, c 26; *Public Health Act*, SNu 2016, c 13; *Unlawful Property Forfeiture Act*, SNu 2017, c 14.

[53] *Child and Family Services Act*, *supra* note 52, ss 2(2)–(3).

[54] *Director of Child and Family Services v AM and NN*, 2018 NUCJ 22 at para 26.

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principles into statutes and explaining these in English.[55] He speaks at some length about the truncation of meaning in expressing Inuit principles in English given the broadness of the meaning of IQ.[56] While there is merit to such a concern, as I have argued in "Five Linguistic Methods for Revitalizing Indigenous Laws," there is a risk of loss of meaning when working with English interpretations of Indigenous concepts as part of law revitalization. However, the alternative—not engaging at all—is worse.[57]

Ahlfors also raises the problem of how providing definitions of IQ and relevant principles in an *Act* can limit decision-makers' interpretive powers.[58] An interesting counterpoint to this, however, which suggests that judges do not necessarily feel bound just to the expression of IQ or Inuit societal values expressed within a statute, is *S (J) v Nunavut (Minister of Health and Social Services)*.[59] In this case, a judge reached beyond the Inuit social values referenced in the *Children and Family Services Act* and applied an IQ principle that was referenced and explained in a Government of Nunavut publication (*Pinasuaqtavut*: providing for those who are not able to care for themselves).[60]

Ahlfors further raises concerns that presenting IQ and Inuit societal values as broad overarching principles that inform the exercise of functions and duties in the rest of the statute can be unclear for those without significant cultural knowledge or the time and resources to learn how to make their actions or decisions accord with such principles.[61] On this, he provides the example of Nunavut's *Education Act*, which was criticized by some for including too many requirements to fulfilling statutory duties in accordance with IQ that were felt to be vague and difficult for educators and administrators to implement.[62] As a result of such complaints, Nunavut's Legislature

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[55] Ahlfors, *supra* note 22.

[56] *Ibid* at 68–69.

[57] Metallic, *supra* note 1.

[58] Ahlfors, *supra* note 22 at 70.

[59] *S (J) v Nunavut (Minister of Health and Social Services*), 2006 NUCJ 20 at paras 21, 49–53 [*S (J)*].

[60] They were used to inform a finding that a distinction in treatment between children under 16 and those between 16 and 18 in *Children and Family Services Act*, *supra* note 50, violated the *Charter*, *supra* note 31, s 15.

[61] This concern seems to reflect the reality that, despite commitments by Government of Nunavut and Canada to ensure the public service in Nunavut is representative of Inuk, much of the public service jobs, especially the upper echelon of decision-makers, are non-Inuk. For an article about the difference having Inuk in leadership can make, particularly in education, see Shelley Tulloch et al, "Inuit principals and the changing context of bilingual

education in Nunavut" (2016) 40:1 Inuit Studies 189.

[62] Ahlfors, *supra* note 22 at 68–70. See also Nunavut, Special Committee to Review the Education Act, *Final Report*, 4 (November 2015) (Co-Chairs: George Hickes and Simeon Mikkungwak).

amended the *Education Act* to scale back references to IQ.[63] However, the general statement that public education in Nunavut shall be based on Inuit societal values and IQ, as well as elucidation and definition of relevant principles, remains in Part 1 of the *Education Act*. In general, for greater predictability and certainty, Ahlfors recommends a drafting approach that spells out precisely what IQ requires in a given context:

> Ideally, policies would be developed in such a way that the requirements of Inuit Qaujimajatuqangit are seamlessly built into them. This would mean that simply by following the rule set out in legislation, the requirements of Inuit Qaujimajatuqangit would be met; there would be no need to refer to Inuit Qaujimajatuqangit directly, as the law would inherently be compatible with Inuit Qaujimajatuqangit.[64]

He recognizes, however, that such "seamless incorporation" might not always be possible, because some situations may need to be analyzed on a case-by-case basis for compatibility with IQ, or because the requirements of IQ with respect to a certain subject matter may not be sufficiently clear or known to policy officials.[65] Some have argued, contrary to Ahlfors, that the absence of a clear definition of IQ can be positive, creating "sites of struggle over words and meaning" leading to co-management and assessment panels to decide for themselves the meaning of IQ, as opposed to requiring Inuit to compromise from the start on the meaning of words to appease Western development interests.[66] While John Borrows, an Anishnaabe Indigenous law scholar, generally reminds us that any legal system can benefit from giving greater attention to the intelligibility of principles, he also notes that "what may be unintelligible to those inexperienced with Indigenous culture may be quite intelligible to those familiar with it. A Eurocentric approach to legal interpretation must not be allowed to undermine Indigenous legal traditions."[67]

Ahlfors may also be overemphasizing the extent to which a society's normative principles can be distilled and codified into precise rules in advance. The law is not only made up of "black letter rules." As I explained in "Five Linguistic Methods for Revitalizing Indigenous Laws," legal orders are also made up of a community's values and principles, and these play separate but important functions from rules in the delineation and interpretation of law.[68] It is impossible to codify rules for all situations, which is why there is a need for values and principles. Even in the

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[63] Bill 25, *An Act to amend the Education Act and the Inuit Language Protection Act*, 2nd Sess, 5th Leg, Nunavut, 2019 (assented to 2020-11-10), SNu 2008, c 15.

[64] Ahlfors, *supra* note 22 at 75.

[65] *Ibid* at 76.

[66] See Frank James Tester & Peter Irniq, "Inuit Qaujimajatuqangit: Social History, Politics and the Practice of Resistance" (2008) 61:1 Arctic 48 at 55–56.

[67] Borrows, *Canada's Indigenous Constitution*, *supra* note 7 at 140.

[68] Metallic, *supra* note 1.

Canadian legal system, we would be challenged to write a comprehensive code on what it means to "respect equality" in every situation.[69] Further, judges turn to overarching principles to assist in interpretation of the law, even when dealing with established rules.[70] Simply put, interpretation is a central part of all law,[71] and enshrining meta-principles into statutes as interpretive guides in the form of preambular clauses, purpose or value statements is something that is common even in Western legal orders.[72] This is what renders the meta-principle linguistic method for Indigenous law revitalization appealing as it incorporates Indigenous law in a form that is easily understood from a Western legal perspective.[73]

The Nunavut government has also developed important infrastructure, in the form of the Department of Culture and Heritage and the Inuit Qaujimajatuqangit Katimajiit advisory body, who can assist public servants, including legislative drafters, in their understanding of IQ and Inuit societal values.[74] A further development that may assist public servants and judges interpreting statutes in Nunavut is the requirement in the new *Legislation Act* that any department or regulatory authority introducing new legislation or regulations must provide a statement setting out how Inuit societal values are integrated into the provisions of the bill or regulations.[75]

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### 4. Sustainable Development Goals Act (NS)

Section 4 of Nova Scotia's *Sustainable Development Goals Act*, passed in 2019 (but not yet in force),[76] identifies the relevant principles that inform the rest of the *Act*:

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[69] Friedland, "Reflective Frameworks", *supra* note 6. See also Borrows, *Canada's Indigenous Constitution*, *supra* note 7 at 139.

[70] See Ronald Dworkin, "The Model of Rules" (1967) 35:1 U Chicago L Rev 14 at 23–24. (Dworkin gives the US case of *Riggs v Palmer*, 115 NY 506, 22 NE 188 (1889) as an example. Here, the court's application of established statutory inheritance rules was challenged by the fact that the inheriting party had murdered the testator. The New York court relied on the principle, "no one shall be permitted to profit by his own fraud," to avoid what they felt would be the injustice result of applying the established rules in the circumstances).

[71] *Ibid* at 29–30.

[72] Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law Inc, 2016) at 189–93.

[73] See Fletcher, *supra* note 8 at 95 (Fletcher describes the approach as a form of "judicial minimalism" which "allows tribal courts to bring customary law into the modern era without creating much additional confusion as to the application of the law").

[74] See "Inuit Qaujimajatuqangit Katimajiit", online: *Department of Culture and Heritage* <www.gov.nu.ca/culture-and-heritage/programs-services/inuit-qaujimajatuqangit-katimajiit> [perma.cc/X489-E328].

[75] *Legislation Act*, SNu 2020, c 15, ss 46(2), 54(1). The Privacy Commissioner has expressly noted this would be a useful tool to aid in interpretation of IQ and Inuit societal values in the future: *Department of Human Resources (Re)*, *supra* note 28 at para 81.

[76] *Sustainable Development Goals Act*, SNS 2019, c 26 (not yet in force). The Nova Scotia government pledged that the *Act* would be proclaimed in force once the regulations under the *Act* were developed. Consultation on the regulations began in May 2021. See Premier's Office, News Release, "Province

> 4 This Act is based on the following principles:
>
> (a) the achievement of sustainable prosperity in the Province must include all of the following elements:
> **(i) Netukulimk,**
> (ii) sustainable development,
> (iii) a circular economy, and
> (iv) an inclusive economy;
> (b) the achievement of sustainable prosperity is a shared responsibility among all levels of government, the private sector and all Nova Scotians;
> (c) climate change is recognized as a global emergency requiring urgent action; and
> (d) such other principles as may be prescribed by the regulations.[77]

The definition section of the *Act* defines "Netukulimk" as follows:

> "Netukulimk" means, as defined by the Mi'kmaq, the use of the natural bounty provided by the Creator for the self-support and well-being of the individual and the community by achieving adequate standards of community nutrition and economic well-being without jeopardizing the integrity, diversity or productivity of the environment;[78]

To my knowledge, the *Act* is the first statute of a Canadian government, outside of Nunavut, to incorporate an Indigenous legal concept using the meta-principle approach. It is not clear from the Department of Environment's website or Hansard how this specific definition of *Netukulimk* was chosen and the extent of Mìgmaq[79] involvement or consultation in relation to the definition of *Netukulimk* and its role within the *Act*.[80] The definition used is identical to the description of the concept on the website of the Unama'ki Institute of Natural Resources.[81] That

Begins Consultation on Climate Change, Sustainable Development Goals" (27 May 2021), online: *Government of Nova Scotia*: <novascotia.ca/news/release/?id=20210527001> [perma.cc/8VA3-76B5].

[77] *Sustainable Development Goals Act*, *supra* note 76, s 4.

[78] *Ibid*, s 2(e).

[79] There are different spellings of Mìgmaq depending on the writing system (orthography) one is using. There are currently four different writing systems used across Mìgmàgi. Here, I use the Metallic Orthography spelling of Mìgmaq except where another orthography appears in a quoted source. For more on the different writing systems, see Metallic, *supra* note 1.

[80] During the debates at the second reading of the Bill, a member of the NDP asked whether the government had consulted with the Mìgmaq and gained their permission to include the concept in the bill. She noted that she hadn't heard anything in public speeches from the government on the bill about consultations with Mìgmaq communities: Nova Scotia, Legislative Assembly, *Hansard*, 63-2, No 66 (30 October 2019) at 5020-21 (Susan Leblanc). I did not find any clear answer to her question from the government from the debates on second or third reading.

[81] See Unama'ki Institute of Natural Resources (UINR), "Netukulimk", online: *Unama'ki Institue of Natural Resources* <www.uinr.ca/programs/netukulimk/> [perma.cc/P4WN-DJ5N] (UNIR is an organization representing the five Mìgmaq communities of Cape Breton on natural resources and environmental concerns).

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definition may not be exhaustive of the concept, however. Others have written about the concept having a spiritual,[82] as well as a governance dimension.[83] Work continues throughout Mìgmàgi[84] to unpack the meaning of *Netukulimk* as a Mìgmaq principle.[85]

Some have raised concerns that the inclusion of *Netukulimk* in the *Act* appears more performative than a serious attempt to meaningfully engage with Mìgmaq land and resource stewardship laws, especially when the *Act* does not stipulate mechanisms for ongoing engagement and advice from the Mìgmaq on the implementation of *Netukulimk* as a sustainability goal.[86] The NDP put forward amendments to the *Act* and NS *Environment Act* that require participation of at least one Mìgmaq representative in the official advisory body to the Minister of the implementation of the *Act*, but this amendment died on the order paper when an election was called in July 2021.[87] It remains to be seen how the government, and possibly the courts, will interpret *Netukulimk* in the *Act* once it comes into force.

## 5. Lobster Law (Listuguj Mi'gmaq Government (LMG), QC)

Turning now to examples of Indigenous nations in Canada who have used the meta-principle approach, we will first look at the Listuguj Mi'gmaq Government's (LMG) Lobster Law, enacted in June 2019.[88] By way of context, the Listuguj Mi'gmaq First Nation, located at the mouth of Chaleur Bay on the border between Québec and New Brunswick in the Gespègewàgi district of Mìgmàgi, has a long history of asserting and exercising jurisdiction over their fisheries.[89] They are also beneficiaries under the

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[82] See L Jane McMillan & Kerry Prosper, "Remobilizing *netukulimk*: indigenous cultural and spiritual connections with resource stewardship and fisheries management in Atlantic Canada" (2016) 26:4 Reviews Fish Biology & Fisheries 629 at 629 (noting "Netukulimk" "embraces cultural and spiritual connections with resource stewardship", and it reflects "culturally rooted ways of being that foreground respect and responsibility in resource management").

[83] "Fishing Under Netukulimk", *The Nova Scotia Advocate* (6 October 2020), online: <nsadvocate.org/2020/10/06/fishing-under-netukulimk/> [perma.cc/3BYG-WLVL]; Naomi Metallic & Constance MacIntosh, "Canada's actions around the Mi'kmaq fisheries rest on shaky legal ground", *Policy Options* (9 November 2020), online: <policyoptions.irpp.org/magazines/november-2020/canadas-actions-around-the-mikmaq-fisheries-rest-on-shaky-legal-ground/> [perma.cc/DC9P-WA2K].

[84] "Mìgmàgi" refers to homelands of the Mìgmaq which includes what is now known as Nova Scotia, Prince Edward Island, and parts of New Brunswick, the Gaspé Coast of Québec, Newfoundland and Maine.

[85] See e.g. Metallic, *supra* note 1 (the project it describes).

[86] Sadie Beaton, "Sadie Beaton on Bill 213 at Law Amendments: Centre the wisdom and authority of Mi'kmaw laws", *The Nova Scotia Advocate* (30 October 2019), online: <nsadvocate.org/2019/10/30/sadie-beaton-on-bill-213-at-law-amendments-centre-the-wisdom-and-authority-of-mikmaw-laws/> [perma.cc/UJX3-Y43K].

[87] Bill 62, *An Act to amend the Sustainable Development Goals Act and Environment Act*, 3rd Sess, 63rd Leg, Nova Scotia, 2021 (first reading 25 March 2021).

[88] Listuguj Mi'gmaq First Nation, Law No 2019-01, *Listuguj Lobster Law* (17 June 2019) [*Lobster Law*].

[89] Stephen Cornell et al, "Making First Nation Law: The Listuguj Mi'gmaq Fishery" (August 2010), online (pdf): *National Centre for First Nations Governance*

Peace and Friendship Treaties,[90] including having a treaty right to fish for a moderate livelihood recognized in *R v Marshall*.[91] Pursuant to the Marshall Response Initiative,[92] the community has participated in both a food and commercial fishery for more than 20 years.[93] Over time, however, LMG became weary of Canada's unilateral management of the fishery, its prioritization of the economy and narrow conception of sustainability.[94] The *Lobster Law*, as an assertion of inherent jurisdiction, seeks instead to create a framework for management of Listuguj's fishery rooted in Mìgmaq social and cultural values, reflective of local and traditional knowledge, economically sustainable, ecologically responsible, accessible to community members and demonstrative of Listuguj's ability to manage, monitor and govern its own lobster fishery.[95]

The *Lobster Law* was the product of intensive community engagement that sought to collect insight, knowledge and feedback from Listuguj community members to help develop a lobster fishing plan and the lobster law.[96] According to the LMG, there were over 800 acts of participation from Listuguj community members in

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<nni.arizona.edu/application/files/6514/6057/7040/Cornell_making_first_nation_law.pdf> [perma.cc/92PQ-5235].

[90] "Peace and Friendship Treaties" refer to a series of treaties of peace between the Mìgmaq and the British between 1726 and 1779. As described by James (Sa'ke'j) Henderson, they "established the transsystemic

law of the transatlantic treaty order ("Treaties"). The Mi'kmaw appellants relied on these Treaties based on retained inherent powers and rights. The Treaties structured the relationship with the British sovereign. They limited the authority of the British sovereign to its own subjects in a few coastal, lawful settlements in the ancestral territory of the Mi'kmaw Nation": see Sakej Henderson, "R v Marshall-Henderson" in Kent McNeil & Naiomi Metallic, eds, *Judicial Tales Retold: Reimagining Indigenous Rights Jurisprudence* (Saskatchewan: Indigenous Law Centre, 2020). These treaties did not involve any cession or surrender of Mìgmaq title to land.

[91] *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 514.

[92] Following the *Marshall* decision, the Department of Fisheries and Oceans Canada finally started negotiations with the Mi'kmaq and Maliseet communities in the Maritimes to support some access to the commercial fishery by issuing licenses to the communities and providing them boats and fishing gear: see Metallic & MacIntosh, *supra* note 83.

[93] Listuguj Mi'gmaq Government, News-PSA, "Listuguj Mi'gmaq Rangers to Oversee First Nation's Fall Lobster Fishery" (28 September 2022), online: <listuguj.ca/listuguj-migmaq-rangers-to-oversee-first-nations-fall-lobster-fishery/> [perma.cc/UCL5-4VQ6].

[94] Naomi Metallic interview of Fred Metallic, Director of Natural Resources for the Listuguj Mi'gmaq Government, 7 July 2021 ["Interview of Fred Metallic"].

[95] Listuguj Mi'gmaq Government, "Listuguj Lobster Fishing Plan & Listuguj Lobster Law Community Engagement Summary" (April 2019), online (pdf): *Listugui Mi'gmaq Government* <listuguj.ca/wp-content/uploads/2019/04/2019-04-11-LLFP-Lobster-Law-Summary-Final.pdf> [perma.cc/XR4X-2D97] at 1.

[96] *Ibid*.

creating the law.[97] Further, 97% of participants agreed that the community should exercise its right to develop, manage and enforce and govern its lobster fishery.[98] The Director of Natural Resources for LMG, Fred Metallic, with his staff, oversaw the community engagement and the development of the lobster plan and lobster law. He is a fluent Mìgmaq speaker, a Geptin (captain) of the Santè Mawiomi (Mìgmaq Grand Council, the traditional governing body of the Mìgmaq Nation), and holds a Ph.D. in Environmental Studies, which he wrote and defended entirely in the Mìgmaq language.[99] He explains that during the community engagement, he and his staff repeatedly heard the expression of core values by participants both in English and in Mìgmaq: "the principles were glaring at us."[100] He and his staff decided to express these in Mìgmaq as guiding principles with English explanations within the *Lobster Law* as follows:

> **Part III Guiding Principles**
>
> 6. This Law will be interpreted and implemented in accordance with the following guiding principles:
>
> a. *Ango'tmu'q*: "Taking care of something in a careful manner." *Ango'tmu'q* also suggests "acknowledgement" and "responsibility" when using the resources of the territory, e.g., "I take care of it." As Mi'gmaq, we acknowledge our territory, our lands, waters, and all life forms that have sustained our nation for generations;
>
> b. *Apajignmuen*: "Sharing" and "giving back" to one's community, thereby strengthening relations. Mi'gmaq customary practices, ceremonies, and feasts, as well as information sessions and meetings, are ways of giving back. *Apajignmuen* also implies having gratitude, being aware, and being grateful for what has been given to you;
>
> c. *Gepmite'tmnej*: "Respect." In caring for the lobster, we need to respect that everybody brings knowledge and has a role to play in fishery management. We need to recognize and incorporate both Indigenous and scientific knowledge into decision-making processes; and
>
> d. *Welte'tmeg*: "We agree in thought." This is a form of consensus-building to reach a shared agreement. Elders emphasize that, as Mi'gmaq, we need to work together to come to an agreement about how best to take care of the

[97] *Ibid* at 2 (these are broken down in the summary as: 115 Engagement Surveys completed; 101 Prioritization Surveys completed; 244 Student Workshop participants; 117 Community Workshop participants; 165 Community Meeting participants; and 11 Live Stream participants).

[98] *Ibid*.

[99] See Alfred Gopit Metallic, *Ta'n teligji'tegen 'nnuigtug aq ta'n goqwei wejgu'aqamulti'gw*, (PhD Thesis, York University, 2010) [unpublished] (addresses reclaiming Mìgmaq political history and having a conversation with Mìgmaq people about how they govern ourselves, their relationship with their territory, where they are as a Nation, and the challenges they face today as a collective as they try to move forward and live our values, beliefs, and philosophies).

[100] Interview of Fred Metallic, *supra* note 94.

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> lobster. We can achieve *welte'tmeg* through building awareness, education, sharing, and exchange of views. *Welte'tmeg* requires that we be open to other views, experiences, and possibilities.[101]

In addition to providing definitions of these Mìgmaq principles, the *Lobster Law* also provides that the primary interpreter of these principles will be the "Listuguj Lobster Oversight Board" to be composed of six members appointed by the LMG.[102] These members should represent "the Listuguj Mi'gmaq First Nation's broad interest in the lobster fishery" including fishers, Elders, women, youth, members of Council or other community members with interest in the fisheries.[103] The responsibilities of the Oversight Board include monitoring and overseeing the implementation of the *Lobster Law* including advising LMG on the preparation of yearly lobster fishing plans and running the community consultations on these, as well as advising on the development of rules concerning monitoring, advising on amendments to the *Lobster Law*, and reviewing and advising on any violations of the law, including appropriate resolutions in keeping with Mìgmaq customs.[104] Fred Metallic explains that the rationale behind having the Oversight Board was to "keep the law alive" by continuing to engage knowledge-holders and as the best way to interpret the principles and the law.[105] He also described the importance of the role of the Oversight Board in advising on specific instances of violations of the *Lobster Law*, ensuring the emphasis in resolution is not punishment, but adherence to the core principles, such as giving back and showing respect.[106]

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### 6. 7 Cree Principles (Aseniwuche Winewak Nation (AWN), AB)

Our final example relates to the identification, elaboration and use of seven Cree principles by the Aseniwuche Winewak Nation (AWN). Aseniwuche Winewak is a distinct Indigenous community located near Grande Cache, Alberta,[107] in Treaty 8 territory with ancestry from Cree, Mohawk (Iroquois or Haudenosaunee), Beaver, Shuswap, Sekani, Assiniboine (Sioux), Saulteaux (Anishinaabe) and Métis lineages. Their traditional territory ranges from what is now the eastern boundary of Jasper National Park to the upper Smoky River just north of the present hamlet of Grande Cache. The Aseniwuche Winewak speak a distinct dialect of Cree, reflecting their unique culture and relative isolation from other Cree peoples. Most Aseniwuche

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[101] *Lobster Law*, *supra* note 88, s 6.

[102] *Ibid*, ss 7, 8.

[103] *Ibid*, s 8.

[104] *Ibid*, ss 9, 13, 32–33.

[105] Interview of Fred Metallic, *supra* note 94.

[106] *Ibid*.

[107] "Aseniwuche Winewak Nation", online: *Aseniwuche Winewak Nation* <www.aseniwuche.ca> [perma.cc/GB5E-JVP9].

Winewak adults speak Cree as their first language and continue to live their traditional way of life.[108]

In 2017, the Elders Council and leadership of AWN identified the following seven Cree principles to serve as the foundation in the development of their Constitution:

1) ᓀᐦᐃᔨᐤ ᐱᑕᑎᓯᐧᐃᐣ nehiyaw pimatisiwin: Cree traditional way of life
2) ᓀᐦᐃᔨᐧᐁᐣ nehiyawewin: Cree language
3) ᐊᓂᐦᑯᐦᑐᐃᐣ wahkôtowin: Relatedness or interrelatedness: we are not only related to human beings, we are related to everything in Creation
4) ᒥᔭ ᐃᓂᕀᐦᑐᐃᐣ miyo-wîcihtowin: Getting along well: everyone to help each other and to get along well through sharing and good will
5) ᓯᐦᑐᑫᑲᐦᑐᐃᐣ sihtoskâtowin: Supporting and pulling together to strengthen each other
6) ᒪᓇᑎᐦᑐᐃᐣ manâcihtâwin: The act of respect or to be considerate, gentle, and mannerly. To mitigate or conserve something for the future
7) ᑕᐯᐧᐃᐣ tapwewin: Honesty.[109]

Over 2018-2019, graduate student, Johanne Johnson, a French-Canadian woman who had previously worked as a human resource manager and through her work had become a colleague of AWN, explored each of these principles and how they apply to the Nation as part of her Master's thesis in Native Studies.[110] Ms. Johnson conducted interviews with seven AWN Elders and knowledge holders, with the help of fluent community member, Carol Wanyandie. The Elders and knowledge holders were asked questions to elicit their understandings of the meaning behind each principle, how they have seen these principles being applied in past and present actions in their lives, and how they believed the principles should apply in the future.[111] The interviews were transcribed and each interview was provided with a transcript to review and approve before it was included in the study.[112] Ms. Johnson next transcribed and analyzed the interview data, identifying emerging themes and sub-themes from the interviews, and described these in her thesis.[113]

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[108] *Reference re an Act Respecting First Nations Inuit and Métis Children, Youth and Families*, 2022 QCCA 185 (Factum of the Intervener Aseniwuche Winewak Nation at paras 1-2) ["Aseniwuche Winewak Nation Factum"].

[109] Johanne Johnson, *Cree legal principles to resolving employment-related issues: An applied study for the Aseniwuche Winewak Nation* (Master of Arts, University of Alberta, 2020) at 58 [unpublished].

[110] *Ibid*. See also "7 Cree Principles", online: *Aseniwuche Winewak Nation* <www.aseniwuche.ca/7-cree-principles> [perma.cc/2Y4M-J33T] ["7 Cree Principles"].

[111] *Ibid*.

[112] Johnson, *supra* note 109 at 56.

[113] *Ibid* at 56, 58–103.

Johnson describes her methodology as supplementing the Fletcher "primary rule" approach with community interviews (which she identifies as the "community/implicit law" method co-developed by Friedland and Napoleon),[114] which allows for much richer meaning and context to be ascribed to the principles.[115] Johnson's analysis also complements the community interpretations with knowledge sourced from academic writings, the majority of which originate from Cree knowledge keepers from other communities.[116] The AWN website comments that the method used by Johnson "helps everyone, fluent or not, deepen and broaden their understanding of the principles."[117]

Johnson's objective with her thesis was to see how the synthesis of these principles could provide a framework to inform AWN's employment policies. However, her (and the Elders') work continues to be used by AWN in a number of ways beyond the original intent of employment policies. The principles have assisted in the development of the community's draft Citizenship Code, have been incorporated into a Child and Family Wellbeing Policy and Cultural Connection Plan template, and can be used for AWN's future constitutional and other governance work.[118] Finally, summaries of Johnson's analysis of the seven principles, sourcing her interviews with the elders as well as other supporting sources, can be found on the AWN website, which provides an accessible way for community members and others to learn about the 7 Cree Principles.[119]

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## Part 2: Four categories of meta-principle implementation

Having presented these six examples, I now turn to analyzing some of the lessons to be learned from the different approaches to implementing the meta-principle method. I do this by organizing my discussion under four categories of implementation approaches that I believe the examples illustrate. The examples show approaches to identifying and interpreting meta-principles based on: (1) inherent knowledge of the decision-maker; (2) in-court evidence; (3) official ratification; and (4) advisory bodies. Some of the examples fall into more than one category. I do not intend these as exhaustive. There could well be other implementation approaches; but I believe these are helpful categories in which to think through implementation of the meta-principle method. These categories could also be relevant to the implementation of other Indigenous law revitalization methods.

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[114] See Friedland, "Reflective Frameworks", *supra* note 6; Friedland & Napoleon, "Gathering the Threads", *supra* note 7.

[115] Johnson, *supra* note 105 at 51–52.

[116] *Ibid* at 58.

[117] "7 Cree Principles", *supra* note 110.

[118] *Ibid*; Aseniwuche Winewak Nation Factum, *supra* note 108 at para 11.

[119] "7 Cree Principles", *supra* note 110.

My discussion will also comment on some of the benefits and challenges of each approach. Common challenges include the challenge of legitimacy, in particular concerns about who should (and who should not) engage with Indigenous law.[120] From my examples, this takes the form of issues around the role of non-members (including non-Indigenous people) interpreting and implementing Indigenous law, as well as how much community engagement should inform the processes of identification, interpretation and implementation. Borrows reminds us that, while there is a role for governments and courts in the implementation of Indigenous laws, their role should not usurp the vital functions that are often best performed by Elders, families, clans, and other bodies within Indigenous societies.[121] Other challenges include practical and access to justice barriers to implementation, such as the time, costs and effort it might take to establish Indigenous law in court.

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### 1. Inherent knowledge

*Navajo Nation* and *R v Itturiligaq* are interesting cases to compare in the context of judges seeking to apply meta-principles, where there is no express identification and definition in a law or policy (unlike my other examples). In such situations, the arguments to apply (and how to interpret) a meta-principle could come from the parties, or they could be raised by the judge themselves.[122] In both of these examples, the identification was judge-initiated, and the judges relied on their own inherent knowledge to interpret the meta-principle. Fletcher praised this approach for allowing courts to bring Indigenous law into the modern era without creating too much confusion as to the application of the law (a form of "judicial minimalism"),[123] but there are some challenges with this approach.

The first is the question of whether a judge who is not from the community can apply the meta-principle method. While Fletcher suggests that a fluent judge from the tribe is ideally placed to work with the meta-principle approach, he also thinks a non-fluent member judge could engage with the method. But he suggests that having a non-member judge engaging with Indigenous law can raise concerns about legitimacy from the community.[124] While the Court of Appeal in *R v Itturiligaq* did not say it rejected Justice Bychok's interpretation of IQ because he was not an Inuk, their overturning his ruling, citing the need for direct evidence or advice from the Inuit community, could leave the impression that his identity did weigh in on their decision (the Court of Appeal did not indicate one way or another). The question of who is a legitimate interpreter of Indigenous law is difficult. On the one hand, some people

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[120] See generally Borrows, *Canada's Indigenous Constitution*, *supra* note 7 at 165–74; Friedland, "Reflective Frameworks", *supra* note 6.

[121] Borrows, *Canada's Indigenous Constitution*, supra note 7 at 178–79.

[122] See Fletcher, *supra* note 8 at 83 (observing that it is rare for parties or their lawyers to cite tribal custom in the courts).

[123] *Ibid* at 42.

[124] *Ibid* at 28–29.

might reflexively say that only members of an Indigenous nation in an Indigenous court can engage with its laws, as Fletcher suggests. Friedland points out that these engrained feelings about who should and should not speak about Indigenous laws reflect a reasonable distrust rooted in a long and painful history.[125] On the other hand, restricting active engagement with Indigenous laws to members in an Indigenous court may unduly limit the reach of Indigenous laws and perpetuate their historic denial and erasure. Most Indigenous communities in Canada currently do not have their own courts or alternative dispute resolution process and so even disputes that are purely internal to the community are heard in Canadian courts, often by non-Indigenous judges.[126] Further, many of the legal disputes Indigenous peoples have are against Canadian governments and, for the time being at least, these are heard in Canadian courts.[127] A position that maintains that only community members may directly engage with Indigenous laws doesn't necessarily preclude a Canadian judge from making decisions in relation to Indigenous law, but it means their role is much more passive. It would mean the judge would be required to treat the Indigenous law like a law from a foreign country. The Ontario Court of Appeal has rejected the idea that Indigenous law should be conceived or treated as foreign law.[128]

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Further, practically speaking, treating Indigenous law as foreign law entails that the meaning of Indigenous meta-principles could *only* be established exclusively by expert witnesses in court.[129] While there have been some proposals from

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[125] Friedland, "Reflective Frameworks", *supra* note 6 at 16. See also Borrows, *Canada's Indigenous Constitution*, *supra* note 7 at 169–70.

[126] See Angelique EagleWoman, "Envisioning Indigenous Community Courts to Realize Justice in Canada for First Nations" (2019) 56:3 Alta L Rev 669. See also Jonathan Rudin, *Indigenous Peoples and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Edmond Publishing, 2019) at 235-51. John Borrows argues that it is imperative that more Indigenous judges should be appointed to the bench in all common law and civil law jurisdiction, and it is especially important to have representation at the Supreme Court of Canada: Borrows, *Canada's Indigenous Constitution, supra* note 7 at 215–18.

[127] There have been long been calls for an alternative to the courts for addressing Aboriginal rights and Indigenous human rights claims: see Larry Chartrand, "A Section 35 Watchdog: Furthering Accountability of Federal, Provincial and Territorial Governments to Aboriginal Peoples" (Paper delivered at the Governance, Self-Government and Legal Pluralism Conference in Hull, Quebec, 23-24 April 2003) [unpublished]. Call for Justice 1.7 of the National Inquiry into Missing and Murdered Indigenous Women was for the establishment of a National Indigenous and Human Rights Ombudsman, as well as a National Indigenous and Human Tribunal: Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place – The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, (Report), vol 1b (Vancouver, Privy Council Office, 2019) at 181. The *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s 6(2)(b) requires Canada to develop an action plan on implement the UN Declaration on the Rights of Indigenous Peoples that includes monitoring, oversight and recourse measures. The Inuit Tapiriit Kanatami has urged that this should result in the establishment of an Indigenous Human Rights Commission: "Position Paper—Establishing an Indigenous Human Rights Commission Through Federal UN Declaration Legislation" (June 2021), online (pdf): *Inuit Tapiriit Kanatami* <www.itk.ca/establishing-an-indigenous-human-rights-commission-through-federal-un-declaration-legislation> [perma.cc/7G4P-AGH6].

[128] *Beaver v Hill*, 2018 ONCA 816 at para 17.

[129] See CED 4th (online), *Conflicts or Law*, "Characterization of the Legal Issue: Proof of Foreign Law" (III.4) at § 101, §108 ("Foreign law is a factual matter which requires proof in the same manner as other

Indigenous scholars that the testimony of elders and knowledge-holders should be treated as expert evidence, because this is preferable to the *status quo*, where Indigenous oral history evidence is often treated as hearsay (discussed further below), I do not understand these scholars as intending that this should be the only way Indigenous law comes before the courts. Treating Indigenous law as foreign law would also imply that Canadian judges are under no obligation to learn or become familiar about Indigenous law, something that the Truth and Reconciliation Commission, and some Indigenous law scholars, have insisted is necessary for meaningful reconciliation and decolonization.[130] More than one prominent Canadian judge has publicly acknowledged that members of the Canadian judiciary have a 'duty to learn' Indigenous law.[131]

Further, Friedland and Napoleon have emphasized that the most important quality for engaging with Indigenous laws is having an "insider" or internal perspective of the Indigenous legal order.[132] This does not mean having to be a member of the Indigenous group,[133] but rather, as I understand it, approaching the exercise of engagement with a group's legal order with a certain set of commitments and mindset. While I do not intend this as an exhaustive list, the writing on this to-date suggests that an insider perspective is one that (1) sees that Indigenous peoples were and are

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questions of fact. Foreign law must be pleaded and proven by the party who relies upon it. In the absence of any evidence of the foreign law, the court presumes it to be the same as the *lex fori* [home jurisdiction]" ... "Foreign law is normally proven by oral evidence of an expert witness or affidavit of an expert witness").

[130] See Canada, 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*, (Report), (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 16, 215, 255–60 (The TRC has said that "[e]stablishing respectful relationships … requires the revitalization of Indigenous laws and legal traditions," and in this regard has called for the training of all lawyers and law students in Indigenous laws at Call to Action 27 and 28, as well as calling for the establishment of Indigenous law institutes for the development, use and understanding of Indigenous laws). See also Borrows, *Canada's Indigenous Constitution*, *supra* note 7; Friedland, "Reflective Frameworks", *supra* note 6; Friedland & Napoleon, "Gathering the Threads", *supra* note 7; Val Napoleon & Hadley Friedland, "An Inside Job: Engaging With Indigenous Legal Traditions Through Stories" (2016) 61:4 McGill LJ 725 [Napoleon & Friedland, "An Inside Job"].

[131] See Chief Justice Lance Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper delivered at the Continuing Legal Education Society of British Columbia, November 2012) [unpublished]. See also Chief Justice Beverley McLachlin, PC, "Keynote Address" (delivered at the Annual Conference of the Canadian Institute for the Administration of Justice, Saskatoon, 16 October 2015) [unpublished] (Former Chief Justice Beverley McLachlin called for "all members of the judiciary" to have access to education and materials about Indigenous legal traditions. She framed her call as a critical, national "access to justice" measure, which must necessarily mean having concepts of Indigenous justice and the legal processes of achieving justice at the "Canadian justice table"); Justice Robert J. Bauman, "A Duty to Act" (delivered at Canadian Institute of the Administration of Justice Annual Conference: Indigenous Peoples and the Law, Vancouver, 17 November 2021) [unpublished].

[132] See Friedland, "Reflective Frameworks", *supra* note 6 at 7; Napoleon & Friedland, "Gathering the Threads", *supra* note 7 at 27–28; Napoleon & Friedland, "An Inside Job", *supra* note 130 at 734, 741–48.

[133] Friedland, "Reflective Frameworks", *supra* note 6 at 29 ("To be clear, legal scholarship from an internal viewpoint does *not* refer to the legal scholar's Indigenous descent or membership in a specific Indigenous community prior to engaging with an Indigenous legal tradition").

reasoning peoples with reasonable social and legal orders, (2) discusses Indigenous law in the present tense and does not see it as relegated to the past, (3) thinks about Indigenous laws as particular responses to universal human problems,[134] and (4) engages with Indigenous law as *law*, including engaging in analysis and synthesis of that law as legal scholarship.[135] Taking an insider perspective should also involve a commitment to learning about the worldview and intellectual life of Indigenous peoples, not just descriptive facts about their existence (e.g., where and how they lived, contemporary statistics, etc.);[136] as well as exercising humility,[137] being open and flexible in one's thinking,[138] being conscious of power dynamics within both Indigenous and broader societies,[139] and avoiding romanticism and fundamentalism when thinking about Indigenous law.[140]

If we accept that it is possible that Justice Bychok has an insider perspective of Inuit law (which his biography suggests he has been working to acquire), it could still have been reasonable for the Court of Appeal to overturn his decision, not because of his identity as a non-Inuk engaging with Inuit law, but because judges can reasonably disagree on the meaning of legal principles (the justices of the Supreme Court of Canada frequently disagree in their interpretation of law). Even as an "insider," it was fair for the NUCA to question his analysis because he did not weigh power dynamics and the vulnerable position of Inuit women as part of his analysis of IQ. I propose this is a preferable way of understanding the NUCA's decision than understanding the decision as having rejected Justice Bychok's interpretation of IQ based on his identity. This is also supported by the fact that the Court of Appeal did not insist on any evidence of IQ had to be admitted in the form of expert evidence as foreign law. But it is clear the Court of Appeal wanted Justice Bychok to provide greater support for his interpretation, suggesting he should have gotten the advice of the Inuit community or heard direct evidence, which leads to the second challenge with this approach.

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[134] See Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions Core Workshop Material" 2011/2015 [unpublished] at 2; Hadley Friedland, "Navigating through Narratives of Despair: Making Room for the Cree Reasonable Person in the Canadian Justice System" (2016) 67 UNBLJ 270 [Friedland, "Narratives of Despair"].

[135] See Friedland, "Reflective Frameworks", *supra* note 6 at 29–30 (Friedland discusses how taking an internal viewpoint "refers to a specific *type* of legal scholarship" one that allows the learner "to access, understand and apply laws—in class, in our exams, and eventually in legal practice").

[136] See Basil H Johnston, "Is That All There Is?: Tribal Literature" (1991) 128 Can Literature 54. See also Friedland, "Narratives of Despair", *supra* note 134.

[137] See Lindsay Borrows, "Dabaadendiziwin: Practices of Humility In A Multi-Juridical Legal Landscape" (2016) 33:1 Windsor YB Access Just 149.

[138] See Borrows, *Canada's Indigenous Constitution*, *supra* note 7 at 35–46. See also John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

[139] Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" 48 UBC L Rev 593.

[140] *Ibid*. See also Borrows, *Canada's Indigenous Constitution*, *supra* note 7 at 10–11.

A second legitimacy challenge with this approach is the fact that it is the judge alone who decides the meaning of the meta-principle. It has been noted that the inherent knowledge approach opens up the possibility of "boundless indeterminacy of meaning":[141] the judge draws from their own knowledge and may not cite any sources or authorities in support of their interpretation. When this happens, it has been argued that this approach does little to advance useful scholarship and engagement with a meta-principle.[142] The judge is essentially decreeing the meaning of the meta-principles without engaging with or being in conversation (actual or intellectual) with elders, knowledge-holders, community members, scholars, lawyers and leaders, and this raises legitimacy issues. Even if the judge is from the community or takes an insider perspective, nonetheless, such an approach may have somewhat of an authoritarian or fundamentalist flavour.[143]

While I think implementation approaches that involve a greater amount of actors participating in the identification and interpretation of Indigenous laws garners the greatest legitimacy, I would be reluctant to assert the "judge applying inherent knowledge" approach should never be used. I can imagine situations where this is the only practical option for Indigenous laws to be applied and so using this implementation approach would be a matter of access to justice. There may well be situations where supporting written sources might not be available, or the parties might not be able to lead expert or advisory evidence because of costs, timing or unavailability of knowledge-holders. Most of Justice Bychok's decisions where he has applied IQ have been in the criminal sentencing context. It does not appear that the Nunavut government has made this area a priority in articulating relevant IQ principles to criminal sentencing. Offenders, especially Indigenous offenders, are also unlikely able to afford putting forward experts (in many cases, Indigenous offenders are represented by legal aid services,[144] who often have limited resources).

### 2. In-court evidence

In *R v Itturiligaq*, the Court of Appeal identified "direct evidence from those tasked with interpreting and applying [IQ]" as one of the appropriate ways IQ evidence ought to have come before the court.[145] What form would such direct evidence need to take?

[141] Friedland, "Reflective Frameworks", *supra* note 6 at 22.

[142] *Ibid* at 18.

[143] See Borrows, *Canada's Indigenous Constitution*, *supra* note 7 at 46–48 (Borrows' discussion of his concern about the use of positivistic laws without drawing on other sources of law).

[144] In a survey of legal aid plans from 2019-2020, for the 9 out of 12 jurisdictions that track self-identification data for Indigenous clients, it appears that Indigenous clients make up 24% of those receiving full criminal law representation. This is significant, considering that Indigenous peoples only make up 4.9% of the population. See Department of Justice Canada, "Legal Aid in Canada 2019-2020" (1 November 2021), online: *Government of Canada* <www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1920/p1.html#t6> [perma.cc/7Y3D-ATZG] (comparing Tables 6 and 16).

[145] *Itturiligaq* NUCA, *supra* note 26 at para 78.

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One obvious form could be having a fluent elder or other knowledge holder from the community called as a witness on the meaning of an Indigenous meta-principle.

There can be challenges with Indigenous witnesses giving in-court evidence. Often in court hearings, Indigenous elders' and knowledge holders' testimony has been treated as factual evidence, and, where based on orally transmitted knowledge (which language tends to be), their knowledge had been treated like hearsay (an out-of-court statement) and, therefore, presumptively inadmissible subject to recognized exceptions.[146] This has often led to a devaluing of important evidence from Indigenous witnesses.[147] However, both John Borrows and Karen Drake have argued that where an Indigenous elder or knowledge holder is providing evidence about Indigenous law, they are in fact providing expert opinion evidence, and so their testimony should be treated according to procedural rules respecting expert testimony as opposed to hearsay.[148]

Even as expert testimony, however, Fletcher sees challenges with this way of bringing Indigenous law into the courts. One issue is the problem of presenting one community member's view as the authoritative expert may be misleading: "Reasonable minds may differ on customs and traditions."[149] This raises the potential of having a "battle of expert witnesses" which, in Fletcher's experience, has resulted in preventing the application of Indigenous law in tribal courts.[150] He also suggests that it may be impractical to tap the knowledge of tribal speakers during litigation.[151] Subjecting elders and knowledge holders to direct and cross-examination, in the adversarial litigation context, and questioning their knowledge is often experienced as a demeaning and harmful process as it is so fundamentally inconsistent with how elders are treated in Indigenous communities.[152] As a means of being responsive to

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[146] Karen Drake, "Indigenous Oral Traditions in Court: Hearsay or Foreign Law?" in Karen Drake & Brenda L Gunn, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Center, 2019) at 281–308. See also Brenda L Gunn, "The Federal Court Aboriginal Bar Liaison Committee as a Mode of Reconciliation: Weaving Together Indigenous Law, Common Law, and International Human Rights Law" in *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Center, 2019) at 310–17.

[147] See e.g. Robin Ridington, "Fieldwork in Courtroom 53: A Witness to *Delgamuukw v BC*" (1992) 95 BC Studies 12. See also Borrows, *Canada's Indigenous Constitution*, *supra* note 7 at 67–72.

[148] See Borrows, *Canada's Indigenous Constitution*, *supra* note 7; Drake, *supra* note 146, 299 (Drake analogizes knowledge-holder evidence of Indigenous law to foreign law. However, she also emphasizes that the rules of foreign law should not be applied wholesale and in an unaltered form to Indigenous traditions. Any rules adopted to assess Indigenous laws must accommodate their unique features).

[149] Fletcher, *supra* note 8 at 92.

[150] *Ibid* at 17, 28.

[151] *Ibid* at 38.

[152] See Gunn, *supra* note 146 at 314–17.

this problem, the Federal Court of Canada has adopted practice guidelines on Elder testimony on oral history to attempt to minimize some of these effects.[153]

To be even more responsive to the recognition and revitalization of Indigenous law, the Federal Court has also developed a framework for the appointment of neutral advisors to advise the court regarding Indigenous law or traditions, which it is currently in the process of piloting.[154] The Federal Court Rules provide for the appointment of an "assessor," defined as someone "to assist the court in understanding technical evidence, or to provide a written opinion in a proceeding."[155] The assessor rules stands separate from the expert evidence rules and do not entail direct questioning from the parties. Rather, communications with the assessor happen directly with the judge.[156] Through using these rules, the framework intends that a neutral advisor could assist the court in matters related to reception, interpretation, or application of Indigenous Law.[157] The framework also provides that when the Court is considering appointing such an assessor, it may first seek the advice of an Indigenous Law Advisory Committee made up of persons who are knowledgeable in Indigenous Law (appointed by the Federal Court) for their aid in identifying an appropriate assessor in a given case.[158]

I am not aware of any other court that has similar guidelines, and not all provinces or territories have similar assessor rules. However, the inherent jurisdiction of courts to appoint *amicus curiae* (a friend of the court) could likely be used to achieve something similar. This is something to which other courts in Canada should give attention.[159] While the Federal Court's specific jurisdiction situates it to hear matters potentially involving Indigenous law regularly, as work on revitalization continues, we will see Indigenous law issues arise in many more contexts, at all levels of court.

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[153] *Ibid*.

[154] Justice Paul Flavel, "Federal Court Aboriginal Law Bar Liaison Committee" (Presentation given at an Online Symposium for CBA Aboriginal Law, 10 June 2021) [unpublished] at 12.

[155] *Federal Courts Rules*, SOR/98-106, s 52(1).

[156] *Ibid* at 52(3)–(5). However, the judge must disclose any questions submitted to the assessor in any opinion provided, with an opportunity for the parties to make any submissions thereon. On the use of assessors, see *Porto Seguro Companhia De Seguros Gerais v Belcan S.A.*, [1997] 3 SCR 1278, 153 DLR (4th) 577 (SCC). For a discussion on its use in a First Nations case, see *Henry v Roseau River Anishinabe First Nation*, 2017 FC 1038 at paras 32–36.

[157] Flavel, *supra* note 154 at 18–19.

[158] *Ibid*.

[159] See *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 (the Supreme Court confirmed that the appointment of *amici curiae* is an inherent jurisdiction of superior courts, as well as an implied power of statutory courts. The Court provides a test for appointing *amici* at paras 47–48. The ultimate and primary purpose of *amici* are to help trial judges on issues of law or facts, where the trial judge is of the view that an effective, fair and just decision cannot be made without such assistance. There are many scenarios to which *amicus* may apply. The class of scenarios is not closed). For a helpful summary on the law relating to *amici*, see *Morwald-Benevides v Benevides*, 2019 ONSC 1136 at para 20.

With ongoing developments in the recognition of Indigenous self-government,[160] we may well also see the proliferation of Indigenous courts within Indigenous communities.[161]

Beyond having elders and knowledge holders testify to their personal knowledge, there is a growing body of scholarship (articles, books, and dissertations) about different nations' Indigenous legal orders written by Indigenous law scholars,[162] as well as reports developed out of partnerships between communities and academics and organizations committed to supporting Indigenous law revitalization.[163] Some of these have incorporated the meta-principle approach into their analysis of a nations' laws, weaving this with other methods of law revitalization, as Johanne Johnson did in her work with AWN.[164] While Fletcher was skeptical about using the work of anthropologists and ethnohistorians since this can be questioned by communities for being biased and lacking legitimacy,[165] he was writing in the US in 2007 before there was a significant uptick in writing on Indigenous law by legal scholars, who are often from the communities they write about, or have close connections to these communities. While not decisive or binding sources of information about a community's laws, these can be helpful and persuasive sources for judges to consider.

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[160] See *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 (which upholds federal legislation recognizing self-government, noting that the inherent right to self-government is a generic right protected under s 35 of the *Constitution Act, 1982*). The case is on appeal to the Supreme Court of Canada.

[161] By this I mean courts appointed under the jurisdiction of Indigenous governments. Currently, there is only one inherent jurisdiction Indigenous court operating in Canada, that of the Akwesasne First Nation, which borders New York State, Ontario, and Quebec. For further information about the Court, see "Justice", online: *Mohawk Council of Akwesasne* <www.akwesasne.ca/justice/> [perma.cc/F5HQ-RWJ6]. EagleWoman argues for the need for First Nations in Canada to have tribal courts like their American counterparts: EagleWoman, *supra* note 126. See also *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s 18(1)–(2) (which recognizes the ability of Indigenous governing bodies to self-govern in relation to child and family services and this includes the authority to provide for dispute resolution mechanisms, which could include an Indigenous court).

[162] See e.g. Young, *supra* note 8; Morales, *supra* note 7; Lindberg, *supra* note 7; Ottawa, *supra* note 7.

[163] See e.g. "Revitalizing Indigenous Laws", online: *Accessing Justice and Reconciliation Project* <indigenousbar.ca/indigenouslaw> [perma.cc/KE2T-5LQY] (seven community reports written for the 2012 "Accessing Justice and Reconciliation Project", a partnership between the University of Victoria, Indigenous Law Research Unit, the TRC Commission, the Indigenous Bar Association, and the Law Foundation of Ontario, and Indigenous communities and organizations); Shuswap Nation Tribal Council & Indigenous Law Resource Unit Team, "Secwépemc: Lands and Resources Law Research Project" (July 2018), online (pdf): *University of Victoria* <www.uvic.ca/law/assets/docs/ilru/SNTC%20Law%20Book%20July%202018.pdf> [perma.cc/T9RB-WXXZ] [Secwépemc Lands and Resources] (the Secwépemc Lands and Resources Law Research Project undertaken by the Indigenous Law Resource Unit at the University of Victoria and Secwépemc Nation and the Shuswap Nation Tribal Council); Hadley Friedland et al, "Porcupine and Other Stories: Legal Relations in Secwépemcúlecw" (2018) 48:1 *Revue générale de droit* 153.

[164] See e.g. Ottawa, *supra* note 7; Secwépemc Lands and Resources, *supra* note 163.

[165] Fletcher, *supra* note 8 at 82.

### 3. Official ratification

This implementation approach refers to when governments (Nunavut and Nova Scotia), including Indigenous governments (Listuguj Mi'gmaq First Nation and Aseniwuche Winewak Nation), incorporate Indigenous law meta-principles and definitions or explanations into their statutes, policies and other government documents. In this sense, leadership officially "ratifies" the particular principles and interpretations that they wish to have apply to areas within their jurisdiction.[166]

In both *Department of Human Resources (Re)* and *S (J) v Nunavut (Minister of Health and Social Services)*, we see Nunavut judges and tribunals (the Privacy Commissioner) use definitions and discussions of IQ principles set out in government of Nunavut publications.[167] The Privacy Commissioner also mentions his intention to use statements from the government, required under the NU *Legislation Act*, that explain how Inuit societal values are incorporated into new law and regulations for the same purpose in the future.[168] Similarly, Fletcher, explains a rule of court of the Hoopa Tribe that accepts "written" law as binding law, which he explains as follows:

> "If the traditional Tribal law has been acknowledged by a legal writing of the Tribe the court will apply the written law." Tribal custom is "written" if the Hoopa tribal council has taken action that amounts to a ratification of the custom:
>
> > Evidence that a traditional law is written includes written reference to a traditional law, right, or custom in a Tribal resolution, motion, order, ordinance or other document acted upon by the Tribal Council. Anthropological writings and publications, and personal writings are not evidence that the traditional law is written, but may be presented as persuasive or supporting evidence that the traditional law or custom exists.[169]

Notably, the Hoopa rule distinguishes academic and personal writings on Indigenous law from "written law." It appears that the Tribal Council would have to take some steps to include or 'ratify' findings from academic or personal writing to convert these to government-sanctioned statements of Indigenous law. This appears similar to how the Nunavut government draws on the documents on IQ and Inuit societal values developed in workshops and meetings with elders, as well as resources prepared by the Qaujimajatuqangit Division of the Department of Culture and Heritage and incorporates these into statements, policies or other government documents. Another illustration would be how the AWN leadership drew on Johanne Johnson's

[166] I do not intend "ratifies" here in the sense of a community-wide referendum. That may be one way a government decides to garner community support for a law, but it is not the only way.

[167] *Department of Human Resources (Re)*, *supra* note 28; *S (J)*, supra note 59.

[168] *Department of Human Resources (Re)*, *supra* note 28 at para 81, referring to *Legislation Act*, *supra* note 75, ss 46(2), 54(1).

[169] Fletcher, *supra* note 8 at 70 [emphasis added].

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dissertation (itself based on interviews with community elders) to produce statements on the meaning of their 7 Cree Principles and incorporated these principles into their Child and Family Wellbeing Policy.

The most formal expression of this ratification occurs when governments include an Indigenous meta-principle, possibly with its definition, within a statute. Illustrations include the multiple Nunavut statutes that expressly include IQ principles and Inuit societal values, the inclusion of *Netukulimk* in the NS *Sustainable Development Goals Act*, the Mìgmaq guiding principles defined in the Listuguj *Lobster Law*, and the AWN's inclusion of its 7 Principles in its Constitution and draft *Citizenship Law*.

It is also possible that a government could use policy or guidelines to supplement a definition of an Indigenous meta-principle that appears in a statute. There are ways to draft definition sections in order to ensure that it is not intended as exhaustive of the meaning of a concept.[170] Where a definition is non-exhaustive, administrative interpretations of the concept can be relied upon to assist in defining a concept.[171] This could be useful, for example, where a case or issue has revealed a need for extrapolation on how an Indigenous principle might apply in specific circumstances. For example, Alfhors suggests that educators and administrators need greater guidance on how IQ principles apply in the context of education.[172] The Qaujimajatuqangit Division of the Department of Culture and Heritage, working with the Inuit Qaujimajatuqangit Katimajiit advisory body, could prepare a document giving specific guidance and examples of IQ application in schools.

The "official ratification" approach seems to be at its best when it includes multiple levels of engagement from elders and knowledge-holders, community members and leadership, and academics, lawyers or technicians that can assist in the identification, articulation and analysis and synthesis of principles. Such robust engagement lends credibility to the law-making process. The examples that reflect this is the work with elders and knowledge holders on IQ in Nunavut, the 7 Cree Principles at AWN and the Listuguj *Lobster Law*. The sites of intersection between the different participants provide many opportunities for debate and deliberation on the meaning of the meta-principle(s), increasing the likelihood that the majority of participants support the interpretation(s), thereby increasing its legitimacy. Where the "ratification" approach may fall short (at least from the point of view of legitimacy),

[170] Statutory definitions can be exhaustive or not exhaustive. An exhaustive definition is usually introduced by the word "means" followed by definition that comprises the sole meaning of the word. A non-exhaustive definition is usually introduced by the expression "includes" followed by a directive which adds to the meaning of the defined term. See Sullivan, *supra* note 72 at 78–80.

[171] *Ibid* at 283 (Sullivan cites the basic rule governing judicial use of administrative materials stated by Dickson J. in *R v Nowegijick*, [1983] 1 SCR 29, 144 DLR (3d) 193 (SCC) at para 37: "Administrative policy and interpretation are not determinative but are entitled to wait and can be an 'important factor' in case of doubt about the meaning of legislation").

[172] Ahlfors, *supra* note 22 at 68–69.

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however, is where this rich and layered engagement is lacking. It is hard to determine with certainty, but it seems like this may be the case with the use of *Netukulimk* in the NS *Sustainable Development Goals Act*, where it is unclear whether the Nova Scotia Mìgmaq participated in a specific process with the Mìgmaq on the inclusion of the meta-principle in the *Act*, and the definition used may have simply been pulled from a website.

The "official ratification" approach avoids the "boundless indeterminacy" and legitimacy concerns that can arise with the inherent knowledge approach since we effectively have the government of a community endorsing specific Indigenous meta-principles and their meaning. It also avoids the issues that come with having to prove Indigenous law on a case-by-case basis in the courts. Further, this process provides not only guidance for courts, but also for public servants. Simply put, it makes Indigenous law accessible by having the government commit to it in writing. However, it may not always be appropriate for a community to write down their laws and insisting on this could be seen as imposing more Western forms of law-making on Indigenous communities.[173] Communities should be free to write their laws down if that is what the community wants; equally, they should be entitled to maintain their laws orally if they see fit. Borrows also reminds us that we should be careful that Indigenous law's formal implementation by governments should not undercut Indigenous civil society and should not cause us to discount the role of non-governmental organizations, families or individuals in creating, interpreting, and enforcing Indigenous law.[174]

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### 4. Advisory bodies

Some of these examples show us yet another way to implement Indigenous meta-principles, which is the appointment of advisory bodies made up of community members, including elders, to advise decision-makers on how to properly implement Indigenous meta-principles. A clear example of this is the Oversight Board created in the Listuguj *Lobster Law*, composed of a diverse collection of community members.[175] The Oversight Board is tasked with monitoring and oversight of implementation of the *Lobster Law*, providing advice to the LMG on annual lobster plans and changes to the law, as well as advising on the proper resolution in situations where someone has violated the *Lobster Law*.[176] We also saw this with Nunavut's *Wildlife Act* where the Minister is required to appoint an advisory committee of elders to review methods and technologies of harvesting wildlife in the context of IQ and advise the Minister on those it considers safe and humane.[177]

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[173] See Borrows, *Canada's Indigenous Constitution*, *supra* note 7 at 142–49.

[174] *Ibid* at 178–79.

[175] *Lobster Law*, *supra* note 88, ss 7–10.

[176] *Ibid*, s 9.

[177] *Wildlife Act*, *supra* note 39, s 160.

With the *Wildlife Act* and *Lobster Law*, the appointment of advisory boards appears to occur alongside the official ratification approach.[178] This layering of implementation approaches is another way to supplement statutory definitions of meta-principles, and for decision-makers to get community advice about the application of a principle to particular fact-scenarios, as in the case of the Oversight Body providing advice on how to respond to violations of the *Lobster Law*. In this regard, Fred Metallic described one goal of having the Oversight Body as a way to "keep the law alive."[179] His comments also suggest that this way of obtaining community-informed interpretations lend legitimacy to the ongoing application of the law.

Even where a statute does not explicitly provide for the appointment of an advisory body to advise on the interpretation of Indigenous law, there is nothing preventing a government (Canadian or Indigenous) from assembling such a body to advise it on decision-making in accordance with Indigenous laws. It is also possible that judges may be able to assemble and draw on such bodies to assist them in their deliberations on Indigenous law. In the criminal context, judges have long been drawing on sentencing circles to gain community advice on appropriate sentencing, without specific provision for such circles in the *Criminal Code*.[180] Courts have held that the jurisdiction to order a sentencing circle comes from a judge's power to issue sentence.[181] By analogy, a jurisdiction to assemble a body of community members to advise on the application of a community's law would emanate from the judge's power to decide and interpret the law. The judge would not be abdicating its jurisdiction to the body, as the final decision would still lay with the judge, though one would hope, the decision would be informed by the community's advice. This approach could be adopted whether the decision-maker is from the community or not (e.g., a tribal judge or a Canadian judge). Such an approach might be a way to supplement the inherent knowledge approach and give the judge's conclusions more legitimacy. Indeed, in *R v Itturiligaq*, the NUCA suggested that obtaining "the advice of the Inuit community" was a possible alternative to obtaining direct evidence on the meaning of IQ.[182] This may be a preferable approach to calling expert witnesses or *amicus curiae* or assessors,

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[178] See e.g. *Corrections Act*, *supra* note 48 (An example of an advisory board that advises of Indigenous law principles in the absence of definitions in their enabling statute is the Inuit Societal Values Committee created by the recent. They can provide direct advice on matters, but more generally they are empowered to receive and hear submissions and suggestions from individuals and groups concerning the incorporation of Inuit perspectives, Inuit societal values and Inuit traditional knowledge in the corrections system, recommend policies and practices to better incorporate Inuit perspectives, recommend new correctional programs or amendments to existing correctional programs to better incorporate Inuit perspectives, Inuit societal values and Inuit traditional knowledge in the corrections system).

[179] Interview of Fred Metallic, *supra* note 94.

[180] See Rudin, *supra* note 123 at 207-31.

[181] See *R v Munson*, 2003 SKCA 28 at para 70; *R v McDonald*, 2012 SKQB 158 at paras 7–11; Jon Nadler, "Sentencing Circles A Way To Envision Justice as a Community Responsibility" (delivered at 30th Annual Criminal Law Conference, Ottawa, 13-14 October 2018), 2018 CanLIIDocs 10836 at 7.

[182] *Itturiligaq* NUCA, *supra* note 26 at para 78.

because all of the latter options entail a person giving their individual opinion versus a group's views that would incorporate group dialogue and deliberation on the application of an Indigenous law principle in practice.

**Conclusion**

In this article, I have provided a detailed examination of six examples of implementation of the meta-principle method. The various examples of how the linguistic meta-principle method is being applied by law-makers and decision-makers in different jurisdictions, both Indigenous and non-Indigenous, is an exciting development in the ongoing renaissance of Indigenous laws. Already, we are seeing a diversity in approaches and there are several lessons we can take away from these examples. From these examples, at least four categories of implementation approaches emerge: (1) inherent knowledge of decision-maker; (2) in-court evidence; (3) official ratification; and (4) advisory bodies. The categories present different considerations, risks and benefits for engagement with Indigenous law, depending on the Indigenous law in question and how it is sought to be used. This shows us that there is no "one-size fits all" approach for implementation; it truly depends on context. However, these examples show us that communities and their governments have real options, and precedents, to not only begin to revive their laws, but also to put them into practice. This article represents only an early foray into analyzing implementation approaches around Indigenous laws. Likely, the approaches, considerations, risks and benefits of each implementation category raise additional questions in the minds of readers. Strategies for interpretation and argument of Indigenous laws, as well as how to meaningfully engage community members in deliberations on Indigenous law, are areas for future scholarship that would make important contributions to this area.

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# BANISHMENT IN ABORIGINAL LAW: RULES, RIGHTS, PRACTICE AND LIMITATIONS

**David Schulze**

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## 1. Introduction

It is not unusual for First Nations to assert the power to banish members and resident non-members from their reserves. News reports regularly discuss communities which take such initiatives,[1] but the form which banishment takes varies, as do the grounds. Subject to the exceptions discussed below, members and other residents have rarely challenged banishment in court. Banishment is thus a widespread phenomenon whose legality has largely gone unexamined. Analyzing the possible basis for such a power and the limits imposed on it draws on almost every area of Canadian law: criminal law, administrative law, human rights, the *Charter*, Aboriginal rights and international law.

It should be noted that support for banishment is far from unanimous in Aboriginal communities. The former Crown prosecutor Harold Johnson, who is also a member of the Montreal Lake Cree Nation in Saskatchewan, has eloquently expressed his view that banishment is punitive in nature and therefore unlikely to produce results because it does not promote healing among community members:

> First Nations leadership, needing to do something in the face of a crisis, have sometimes turned to banishment of those selling drugs in our communities.
>
> The problem with banishing a drug dealer, or locking them up, is that as soon as they are removed from the community, someone takes their place.
>
> We do not have a drug dealer problem. We have a substance use problem.
>
> …
>
> The fundamental reason community members demand substances is to self-medicate their trauma. As First Nations people we have a lot of trauma to

[1] For a recent example at Poundmaker Cree Nation, see Jacob Cardinal, "Saskatchewan First Nation creates its own police force to enforce a war on drugs," *Toronto Star* (29 March 2021), online: <https://www.thestar.com/news/canada/2021/03/29/saskatchewan-first-nation-creates-its-own-police-force-to-enforce-a-war-on-drugs.html>.

> heal from. Residential schools, the Sixties Scoop, loss of traditional lifestyles, the over-incarceration of our people and the resultant ongoing intergenerational violence all add to the trauma load.[2]

It is therefore important to point out that this article is about the legality of banishment, not its advisability or effectiveness, which are questions that Aboriginal communities can best answer themselves.

In addition, the legality of banishment that this article addresses refers to Euro-Canadian law, not to the criteria of any Indigenous legal order that applies of its own force. This limitation has two reasons, the first of which is methodological: the dozens of distinct Aboriginal nations in Canada have varying legal traditions, each of which would require its own analysis. The second reason is practical: to the extent that an Aboriginal nation or community's decision to impose banishment on a member is accepted by that member, the legality of his or her banishment is not an issue. However, when a banishment is challenged in court, the legal issues surveyed below are those most likely to arise.

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## 2. The practice

In many First Nations,[3] band councils impose banishment on members or residents engaged in drug trafficking or violent behaviour and is often imposed on those who refuse treatment for addiction.[4] For instance, the Tsawout First Nation north of Victoria, British Columbia, banned five individuals from Tsawout lands for a period of two years in 2009 and required that:

> Before they can return they must demonstrate sobriety, drug free and have successfully completed counselling and anger management treatment. The RCMP have been alerted to this situation and they are willing to pick up and escort these people out of the Community upon receiving a telephone request from [members].[5]

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[2] Harold Johnson, "'Banishment doesn't promote healing': You can't fight addiction with punishment," *CBC SK Opinion* (4 February 2020), online: <https://www.cbc.ca/news/canada/saskatchewan/harold-johnson-banishment-opinion-1.5446777>.

[3] No example of formal banishment by elected bodies was found among the Inuit, who are not subject to the *Indian Act*, RSC 1985, c. I-5, s 4(1) [*Indian Act*]. However, Inuit justices of the peace in Spence Bay (now Taloyoak) in what is now Nunavut did order an Inuk from another community who was convicted of theft "not to return"; the appeal court held that the condition had to be understood to last only as long as his one-year probation: *R v Saila*, [1984] NWTR 176 (SC), [1983] NWTJ No 46 (QL). Tribal councils of Yupik communities in the State of Alaska have recently banished resident non-members engaged in bootlegging or drug-dealing: Halley Petersen, "Banishment of Non-Natives by Alaska Native Tribes: A Response to Alcoholism and Drug Addiction" (2018) 35 Alaska L Rev 267 at 267–68. Banishment of a violent member from an Alutiiq (Aleut) community was upheld in *Native Village of Perryville v Tague*, 2003 WL 25446105, (Alaska Superior Court) (Trial Order).

[4] See Ken MacQueen, "Tough love among the Ahousaht", *Macleans* (30 August 2010), online: < https://www.macleans.ca/news/canada/get-clean-or-get-out/>.

[5] "5 Tsawout Members Banned", *Tsawout First Nation Newsletter*, August 2009 at 8.

This is similar to a recent case in a Nisga'a community in British Columbia. After a resident who was a member of another nation had been convicted on charges including assaulting his Nisga'a wife in front of an elementary school and assaulting a police officer,[6] the village government advised the probation officer at his correctional facility that he was banished until he had fulfilled the following requirements:

> a) He enters a treatment centre to address is challenges with addictions;
> b) He enters a treatment program, for anger and violence with a weapon; and
> c) He prepares himself for a "retribution feast" [omitted for publication] to his partner's family, the staff members involved, and the children impacted by his actions.[7]

The controversial nature of such decisions is revealed by the fact that subsequently, a new chief in the same Nisga'a village commenced an inquiry into the banishment, which had apparently not been sanctioned by the Council. Others in the community expressed "concerns about expelling troubled citizens from the community rather than reaching out and helping them deal with the hardships they may be experiencing."[8] For some offenders, the consequences of banishment are real: the executive director of a halfway house in Vancouver for Aboriginal men released from prison told a reporter in 2016 that many of the sex offenders residing at the facility were banned by their communities from returning home, even after they had finished serving parole.[9]

On the other hand, at the Grand Rapid First Nation in Manitoba, an administrator admitted in 2006 that some "just sneak back onto the reserve."[10] Similarly, a recent case reveals that a resident of an Ontario First Nation simply returned after a year to the reserve from which he had been banished, though its social assistance administrator subsequently refused to pay him any benefits.[11] In addition, while the stereotype of a reserve is a remote community that is difficult to reach, many reserves are actually in urban or semi-urban locations where banishment could leave individuals residing only a few blocks or a few kilometers from where they previously

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[6] *R v LR*, 2020 BCPC 80.

[7] *R v LR*, 2021 BCPC 7 at para 71.

[8] *Ibid* at para 74.

[9] Wawmeesh G. Hamilton, "Aboriginal man found not guilty of sex offence but banished from home: Robert Hopkins hopes to return to his community, despite the obstacles", *CBC News* (21 May 2016) online: <https://www.cbc.ca/news/indigenous/aboriginal-man-found-not-guilty-of-sex-offence-banished-from-home-1.3568057>.

[10] Katherine Harding & Dawn Walton, "Natives try 'banishment' to fight crime: Faced with modern ills of gangs and drugs, bands turn to the past for an antidote", *Globe and Mail* (8 February 2006), online: <https://www.theglobeandmail.com/news/national/natives-try-banishment-to-fight-crime/article1094479/>.

[11] *1905-03649 (Re)*, 2020 ONSBT 1489 (CanLII) at paras 10–12.

lived. For instance, in 2010, a non-member was banished from the Squamish Nation reserves in North Vancouver and West Vancouver, where his mother and girlfriend resided, but continued to live on the street in Vancouver.[12]

Banishment is also used as a political measure. Thus, the Council of the Gull Bay First Nation, in north-western Ontario, banned two off-reserve members from attending the community's powwow on reserve, allegedly because of a petition they wanted to circulate concerning health services.[13] More recently, Rainy River First Nation in northwestern Ontario informed a non-member who lived in the community with a member who was her common-law husband that her "continued attacks against our Rainy River First Nation Community Care Program will no longer be tolerated and [will] result in the issuance of a Band Council Resolution authorizing your immediate removal from our properties and lands of Rainy River First Nation."[14]

The record in the United States indicates federally-recognized tribes impose "disenrollment" or loss of membership—with resulting banishment from the reservation—more often for political reasons than for community protection:

> In a few cases, especially those centered around criminal activity, it appears that tribes have reluctantly determined that disenrollment is one mechanism they may sometimes have to employ in order to maintain community stability and they have carefully constructed clear guidelines and procedures to carry out this most difficult process.
>
> In a majority of disenrollment cases, however, some tribal officials are, without any concern for human rights, tribal traditions or due process, arbitrarily and capriciously disenrolling tribal members as a means to solidify their own economic and political bases and to winnow out opposition families who disapprove of the direction the tribal leadership is headed.[15]

## 3. Banishment as a sentencing measure

### a. Historically

Banishment exists in Canadian criminal law as a sentencing measure, but the courts are reluctant to recognize it, let alone impose it. A judge of the Provincial Court in

[12] *R v RHGM*, 2010 BCPC 434 at paras 27, 52 [*RHGM*].

[13] Carl Clutchey, "Gull Bay Chief's sisters banned from reserve", (2010) Thunder Bay *Chronicle Journal*.

[14] Kenneth Jackson & Todd Lamirande, "APTN News source threatened with banishment from community in northwestern Ontario" *APTN News* (4 March 2021), online: <https://www.aptnnews.ca/nation-to-nation/aptn-news-source-threatened-with-banishment-from-community-in-northwestern-ontario/>. The same First Nation had adopted such BCRs in the past: *Hazel v Rainy River First Nations*, 2014 ONSC 3632 at para 3.

[15] David Wilkins, "Self-determination or Self-Decimation?: Banishment and Disenrollment in *Indian Country*", *Indian Country Today* (30 August 2006).

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Newfoundland wrote as follows before prohibiting an offender from entering the municipality where his victim resided:

> Banishment, as a form of sentencing, has a long and dreadful history in our common law. The *Transportation Act* of 1784, 24 Geo. III, c. 56, [by which the British Parliament authorized convicts to be sent to any place designated by the King in Council, such as Australia] is a notorious example. In more modern times, this is a sanction that has fallen into disuse. […][16]

It is clear American courts will only impose "a sentence of banishment" when there is "affirmative legislative authority to do so."[17] Nevertheless, the United States Court of Appeals noted—while ruling on the issue of banishment among the Seneca—that banishment had been imposed since the earliest times of the Republic and was held to form part of any sovereign government's legislative authority:

> Early in American history, the punishment of banishment was imposed upon British loyalists, and was even celebrated as a matter of sound policy in dictum by a Justice of the Supreme Court. See *Cooper v Telfair*, 4 U.S. (4 Dall) 14, 20, 1 LEd. 721 (1800) ("The right to confiscate and banish, in the case of an offending citizen, must belong to every government.") (Cushing, J.).[18]

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### b. In contemporary criminal law

#### i. An exceptional measure authorized by the *Criminal Code*

The courts have held that the power to impose a banishment condition can be found in s. 732.1(3) of the *Criminal Code*,[19] which provides that a court may, as an additional condition of a probation order, require that the offender:

> (h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender's successful reintegration into the community.

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[16] *R v Skinner*, 2002 CanLII 23568 (NL PC) at para 57, aff'd 2002 NLCA 44. See also *Kennedy v Mendoza-Martinez*, 372 US 144 (1963), 170, n 23 ("Banishment was a weapon in the English legal arsenal for centuries, but it was always adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice").

[17] Michael F Armstrong, "Banishment: Cruel and Unusual Punishment" (1963) 111 U Pa L Rev 758 at 762.

[18] *Poodry v Tonawanda Band of Seneca Indians*, 85 F (3d) 874 (CA2 1996) at 896; cert. denied, 519 US 1041, 1996 [*Poodry*].

[19] *R v Felix*, 2002 NWTSC 63 at para 25 [*Felix*].

Banishment also appears to be an allowable condition for bail, presumably under para. 515(4.2) (a.1) of the *Criminal Code*, or for common law peace bonds.[20]

However, the Saskatchewan Court of Appeal summed up the state of the law by stating that banishment "should very much be considered the exception rather than the rule" in sentencing.[21] In another case, the same court held that while "judicial banishment decrees should not be encouraged" because they resemble dumping one community's problem on another, such orders could nevertheless be appropriate in certain cases.[22]

The Ontario Court of Appeal agreed and noted that "orders banishing an offender from a specific community have been made against estranged spouses with a view to protecting the victim or to assisting with the offender's rehabilitation" but that "the larger the ambit of the banishment, the more difficult the order will be to justify."[23] Summing up recent appellate case law, the Nunavut Court of Appeal noted that "[e]xceptional circumstances include the offender having consented to be banished" or "cases where banishment is necessary to protect a victim of a campaign of violence and the offender has somewhere else to live and banishment serves some rehabilitative purpose."[24]

Another court rejected even the offender's consent as sufficient grounds and held that "the unease of certain members of the community and their having to tolerate seeing these offenders within their community" are insufficient; they have instead required sufficient "connection of such an order to the objectives of protecting the public or securing the good conduct of the accused."[25] Banishment orders have also been set aside on procedural fairness grounds where the offender had no opportunity to be heard before the measure was imposed because s. 723 of the *Criminal Code* requires a court to give "the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed."[26]

### ii. Community banishment versus individualized probation

Reviewing a variety of sentencing cases from Aboriginal communities, the courts have distinguished between "community banishment cases" and individualized probation orders:

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[20] *R v NJS*, 2012 ABQB 479 at para 24; *R v Siemens*, 2012 ABPC 116 at para 29.

[21] *R v Kehijekonaham*, 2008 SKCA 105 at para 10 [*Kehijekonaham*].

[22] *Ibid* at para 11, citing *R v Malboeuf*, [1982] 4 WWR 573 (SKCA) at 576, 1982 CanLII 2540 (SK CA). See also *R v Serafino*, 2021 SKCA 29 at para 23.

[23] *R v Rowe* (2006), 212 CCC (3d) 254, 2006 CanLII 32312 (ONCA) at paras 6–7 [*Rowe*]. See also *R v Bishop*, 2017 CanLII 45561 (NLSC) at para 30.

[24] *R v GN*, 2019 NUCA 5 at para 17.

[25] *R v L et al*, 2012 BCPC 503 at para 76 [*R v L*].

> [A] probation condition that restricts or prohibits the accused's presence in a certain community, where its purpose is to protect certain individuals and there is a logical connection between the offence and the condition, is not really "banishment". It is instead a form of restraining order, albeit one which applies to a much larger geographic area than is normally the case. It does not give rise to the concerns noted about one community foisting its problem members off on another community. It seeks instead to protect certain members of the community in an effective way.[27]

Moreover, even an individual banishment requires some tie to the community in question, without which it is simply an order not to go where the offender has no business:

> The notion of banishment has inherent within it the idea of requiring a person to *leave* or *remove* himself or herself from a particular place where he or she might have otherwise been. It assumes some sort of personal connection by virtue of residence, employment or educational activities, family heritage or cultural affiliation. For example, the banishment legislation in colonial Newfoundland spoke of "removal" of offenders from the colony by requiring them to "leave" the colony and to "remain away" from it (*Removal of Criminal Offenders from this Colony*, CSN 1872, c 44).[28]

By contrast, community banishment cases "involve an accused who is considered to be a nuisance or an undesirable in the community where he committed his crime" and where "banishment is considered a means of protecting the community as a whole," rather than individual victims.[29]

The most noteworthy case of community banishment is surely *R v Taylor*, in which the Saskatchewan Court of Appeal upheld an order that a violent rapist live alone for a year in a cabin on an island near the Lac La Ronge reserve. The Chief Justice noted "that First Nations people, including the Plains Cree and Dene, have for centuries used banishment in one form or another as a method of redress for a wrongdoing, particularly serious wrongdoing such as murder." His own research revealed that banishment took many forms—from outright expulsion to simply being ostracized—and that, "whatever form it took, was never for life, but could be 'for many years' and could be commuted."[30] He wrote:

> [B]anishment, generally speaking, tends to be more an individualized measure having as its central purpose the influencing of the offender's future behaviour – securing his "good conduct" – than a punitive measure

[27] *Felix*, *supra* note 19 at para 27. See also *R v Banks* (1991), 3 CRR (2d) 366, 1991 CanLII 1879 (BC CA) [*Banks*].

[28] *R v Deering*, 2019 NLCA 31 at para 13 [emphasis in original].

[29] *Felix*, *supra* note 19 at para 18.

[30] *R v Taylor*, [1998] 2 CNLR 140, 1997 CanLII 9813 (SKCA) at para 35.

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> having denunciation, punishment and the like as the dominant purpose. Speaking more particularly, the type of banishment directed in the present case, isolation, has as its central feature an imperative — at the very least, an opportunity, — for self-discipline, self-treatment, introspection, self-examination of one's goals, one's place in the scheme of life, and such other notions designed to produce a better person. True, there is present a strong element of deprivation with the attendant curtailment of the freedom of mobility, Spartan amenities, lack of intimate personal contact, all of which translate into punishment, but the deprivation does not vitiate, displace or dilute the central purpose of influencing the offender's future conduct and securing his good behaviour.[31]

On the Mohawk territory at Kanesatake, however, the Québec Superior Court set aside a bail condition forbidding a member from returning: Justice Fraser Martin declined what he described as the Crown's invitation for his court "to maintain the 'banishment' so as to ostensibly relieve those who have the responsibility for ensuring the peace and security of the community from doing that job which, for reasons that I need not speculate upon, they appear to be either unable, unwilling or incapable of doing."[32]

In another case, the court declined to use its sentencing jurisdiction to effectively enforce the First Nation's banishment order, yet still relied on that order as evidence of the community's views on where the offender should be allowed to reside. The result was an order forbidding the offender to be found on the reserve.[33] Where a First Nation imposes banishment on an offender, some courts have also taken that fact into account as a mitigating factor that can reduce the sentence.[34]

## 4. Banishment under the *Indian Act*

### a. Sources of jurisdiction

#### i. Membership

A number of First Nations adopted restrictive membership codes between 1985 and 1987, the period when they were allowed to exclude from membership those who acquired status under the 1985 *Indian Act* amendments known as Bill C-31.[35] Some of these First Nations also included in their codes a right to "banish" and remove from their membership lists "any member [who] has shown a lifestyle that would cause his or her continued membership in the First Nation to be seriously harmful to the future

[31] *Ibid* at para 37.

[32] *R v Gabriel*, 2004 CanLII 41362 (QC CS) at paras 6–7 [*Gabriel*].

[33] *RHGM*, *supra* note 12 at paras 46–48.

[34] *R v RRM*, 2009 BCCA 578 at para 26.

[35] *Indian Act*, supra note 3, s 11(2).

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welfare and advancement of the… First Nation," though a majority vote of the members is required.[36]

The legality of these provisions has not been tested in court but the guidance from the Department of Indian Affairs and Northern Development at the time was that "Parliament did not intend the new residency by-law powers to be used to displace existing residents,"[37] referring to the power in para. 81(1) (p.1) of the *Indian Act* over "the residence of band members and other persons on the reserve."

### ii. Trespass

When challenged in 2000 on a banishment decision, as discussed below, the Norway House Cree Nation in Manitoba defended itself based on a Band Council's power under para. 81(1)(c) and (d) to regulate "law and order" and "disorderly conduct."[38] It could presumably also have relied on the powers under s. 81(1) concerning "(p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes."

According to the leading case, however, trespass on reserve is not a notion that a band council can define as it chooses and then prohibit. In 1958, the Alberta Court of Appeal ruled on the prosecution of a missionary who had been refused a permit by the Band Council to enter the Blood reserve but had nonetheless gone to the home of a member and held a service there. The Court held that to constitute trespass under the *Indian Act*, the *actus reus* had to meet the common law definition of the tort of trespass to land, which consists of entering upon another's land without lawful justification. A person who entered upon a reserve for a lawful purpose at the invitation of a member, even without Council's permission, was therefore not trespassing.[39]

In 2018, the Council of Garden River First Nation in Ontario adopted a resolution to banish both a member and also a non-member who was a long-time resident and common-law spouse to another member; it relied on an existing by-law that it described as being meant "to provide for the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes." A month later, council adopted a new by-law to replace the first, authorizing council to banish

[36] See e.g. "Berens River First Nation Membership Code", online: *Exploring Section 10* <https://exploringsection10.com/codes/> at s 15; "Buffalo Point First Nation Membership Code", online: *Exploring Section 10* <https://exploringsection10.com/codes/> at s 16; "Little Black River First Nation Membership Code", online: *Exploring Section 10* <https://exploringsection10.com/codes/> at s 14.

[37] Indian and Northern Affairs Canada, *Indian Band Membership: An Information Booklet Concerning New Indian Band Membership Laws and the Preparation of Indian Band Membership Codes* (Ottawa: Minister of Supply and Services Canada, 1990) at 26.

[38] *Gamblin v Norway House Cree Nation Band*, [2001] 2 CNLR 57, 2000 CanLII 16761 (FC) at para 25 [*Gamblin*], aff'd 2002 FCA 385.

[39] *R v Gingrich* (1958), 122 CCC 279, 1958 CanLII 415 (AB CA). Followed in *R v Bernard*, [1991] NBJ No 201, [1992] 3 CNLR 33; *R v Pinay*, [1990] 4 CNLR 71, 1990 CanLII 7435 (SK QB).

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members and others deemed to be threats to the peace and safety of the Band or residents of the reserve and to declare banished band members and their spouses and children to be trespassers. The council subsequently issued another decision under the new bylaw to banish the same individuals.[40] While the two individuals sought to have much of the second by-law quashed, the Federal Court did not consider the validity of either by-law: the Court ruled only on whether the second banishment decision was fair and ruled that it was not.[41] The question of whether by-laws can define and punish trespass so as to expel members or residents therefore remains open.

### iii. Observance of order and prevention of nuisance

Norway House Cree Nation defended a banishment decision in 2000 based on a band council's power under s. 81(1) of the *Indian Act* to adopt by-laws for purposes such as "(c) the observance of law and order" and "(d) the prevention of disorderly conduct and nuisances." In the event, however, the decision had been reached through a band council resolution ("BCR") and without the existence of a validly adopted by-law. As a result, the Federal Court concluded "the BCR does not wield the authority of the Act" and was "not a lawful and enforceable policy."[42]

If a by-law had been in force, the Court indicated it would have shown deference for "the Band Council's decision to impose a banishment sanction in an attempt to prevent intoxicant abuse on the reserve."[43] Later, Norway House Cree Nation in Manitoba did adopt an Illegal Drug Control Bylaw allowing for expulsions and even loss of band membership.[44] However, a Department of Indian Affairs and Northern Development spokeswoman said the by-law attempted "to regulate activities that are outside the bylaw-making powers of the *Indian Act*," referring specifically to regulation of "criminal activity such as the drug trafficking, gangs and violence within the community."[45]

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[40] *Solomon v Garden River First Nation*, 2019 FC 1505 at paras 7, 40, 44 [*Solomon*]. Before the court, however, Garden River argued the by-law was adopted "pursuant to s. 81(1)(c) and (d) of the *Indian Act* to enact by-laws for the observance of law and order and for the prevention of disorderly conduct" (para 32).

[41] *Ibid* at paras 19, 34.

[42] *Gamblin*, *supra* note 38 at para 58.

[43] *Ibid*.

[44] See "Norway House reserve aims to banish offenders", *CBC News* (26 August 2009), online: <https://www.cbc.ca/news/canada/manitoba/norway-house-reserve-aims-to-banish-offenders-1.837922>.

[45] Lindsey Wiebe, "Get help or get off reserve, bylaw says; But banishment not enforceable: feds", *Winnipeg Free Press* (27 August 2009) online: <https://www.winnipegfreepress.com/breakingnews/2009/08/27/get-help-or-get-off-reserve-bylaw-says>. At the time, the opinion of the Minister of Indian and Northern Affairs was particularly important because he had a power under s 82(2) of the *Indian Act* (since repealed) to disallow a by-law within 40 days under, even though that power was not exercised in the case of Norway House.

The only by-law that refers to banishment and resulted in a reported judgment that was adopted by an Aboriginal community that is a party to a modern treaty or land claims agreement—and therefore not subject to the *Indian Act*—was that of the Chisasibi Eeyouch (Cree). In 2008, their council adopted a by-law prohibiting the sale of alcoholic beverages, with penalties that included permanent banishment for repeat offenders.[46] Chisasibi is one of the Cree communities that entered into the James Bay and Northern Quebec Agreement in 1975, after which its local government was conducted pursuant to the *Cree-Naskapi (of Quebec) Act*. Its alcohol by-law was adopted under a provision of that statute allowing for by-laws respecting "public order and safety" in general—language very similar to the *Indian Act*'s para 81(1)(c) —and "the prohibition of the sale or exchange of alcoholic beverages" in particular.[47] However, no final decision on the validity of Chisasibi's by-law was rendered.

In 2016, the Council of the Atikamekw of Opitciwan in Québec adopted *By-law no. CAO-RA-2016-01 concerning the expulsion of persons found guilty of trafficking certain drugs and other substances*, after a community referendum with 86 per cent of voters in favour. Anyone found guilty of trafficking certain drugs and who resided on the reserve could be expelled by council for a set period of 60 months from conviction; any violation of the by-law constituted a punishable offence, and a court of competent jurisdiction could order that the offence not be repeated. The by-law's preamble relied on most possible sources in the *Indian Act*, even its powers under para. 81(1) to regulate "(b) the regulation of traffic" and "(q) with respect to any matter arising out of or ancillary to the exercise of powers under this section."[48]

Eight months later, the by-law was applied to a member who had been found guilty of drug trafficking but who avoided being served with notices of expulsion by hiding in other people's homes on the reserve. After its attempts at service, Opticiwan obtained an *ex parte* order from the Québec Superior Court authorizing Council to proceed with the offender's expulsion. The Court cited in the grounds for its order that Council had decided by its by-law to ensure "the observance of law and order and the prevention of disorderly conduct and nuisances" and the court's view that drug trafficking was "contrary to the observance of law and order and to orderly conduct."[49]

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[46] *Band (Eeyouch) c Napash*, 2014 QCCQ 10367 at paras 11–12.

[47] *Cree-Naskapi (of Quebec) Act*, SC 1984, c 18, s 45(1)(d)(v). Since 2018, the statute is referred to as the *Naskapi and the Cree-Naskapi Commission Act*, while the same power is now found in the *Agreement on Cree Nation Governance between the Crees of Eeyou Istchee and the Government of Canada*, 2017, enacted by the *Cree Nation of Eeyou Istchee Governance Agreement Act*, SC 2018 c 4, at s 6.2(g)(v) of the Agreement.

[48] *Règlement admistratif numéro CAO-RA-2016-01 concernant l'expulsion des personnes reconnues coupables de trafic de certaines drogues et autres substances du conseil des Atikamekw d'Opitciwan*, CAO-RA-2016-01 (12 December 2016), First Nations Gaz 11, online: <https://partii-partiii.fng.ca/fng-gpn-II-III/pii/en/item/492830/index.do> [*CAO-RA-2016-01*].

[49] *Conseil des Atikamekw d'Opitciwan c Weizineau*, 2018 QCCS 4170 at paras 9, 10 [*Weizineau*].

This would appear to be consistent with criminal courts' description of "community banishment" as "a means of protecting the community as a whole."[50]

The judgment in *Opitciwan c Weizineau* judgment can therefore be taken to endorse at least the power under para. 81(1)(c) and (d) of the *Indian Act* to expel those found guilty of offences that threaten law and order, for fixed periods of time. The fact that the by-law allowed for expulsion based on the same conduct that had been punished as drug trafficking under federal criminal law did not appear to trouble the court, though it appears to have been the federal government's objection to the Norway House by-law. This concern seems groundless given that Canadian law allows different statutes adopted by different levels of government to attach separate consequences to the same conduct: for instance, the *Criminal Code* can punish dangerous driving as criminal negligence while provincial legislation prohibits careless driving as part of the regulation and control of highways.[51]

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### iv. Eviction

While Band Councils have seen their banishment decisions successfully challenged in court, they have had much less trouble defending eviction orders to tenants, despite the severe consequences. In the *Gamblin* case, the tenant and his family were physically removed from the Norway House reserve, while in a later case concerning Curve Lake First Nation, the member's eviction during treatment at a hospital left him homeless and transient.[52] The Norway House Cree Nation member subject to a banishment order was living in Band-allocated housing; even though no residency agreement was produced, the Federal Court held it was "apparent from Gamblin's affidavit that he knew of, and accepted, the implied term that continuing residency was contingent on no illegal activity occurring on the premises."[53]

The Federal Court held that no duty of fairness attached to the Band Council's decision to evict the tenant-member for using illegal drugs on the leased premises: "[a]t the most basic level, the agreement between the Band Council and Mr. Gamblin regarding the allocation of housing is a private law contract" and "a duty of fairness is not owed in a private law matter and, therefore, is not a consideration."[54] More recently, the Nova Scotia Supreme Court held that evicting an on-reserve tenant for allowing a "banished individual" onto the premises, in contravention of the lease, was a "straight forward tenancy matter."[55]

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[50] *Felix*, *supra* note 19 at para 18.

[51] *Mann v The Queen*, [1966] SCR 238 at 250, 1966 CanLII 5 (SCC); *O'Grady v Sparling*, [1960] SCR 804 at 811, 128 CCC 1.

[52] *Gamblin*, *supra* note 38 at para 9; *Cottrell v Chippewas of Rama Mnjikaning First Nation*, 2009 FC 261 at para 2 [*Cottrell*].

[53] *Gamblin*, *supra* note 38 at para 11.

[54] *Ibid* at paras 41, 43. See also *Cottrell*, *supra* note 52 at para 95.

[55] *Membertou Band v Paul*, 2021 NSSC 286 at para 28 [*Paul*].

### b. Statutory and common law limitations on banishment

#### i. Members' right to reside in their communities

It is important to recall that under the *Indian Act*, the first definition of a "band" is "a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart." The definition of a "reserve" is "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band."[56] Similarly, even before Confederation and the *Indian Act*, the Robinson-Huron Treaty signed in Upper Canada (present-day Ontario) for instance provided that "the reservations set forth in the schedule hereunto annexed… shall be held and occupied by the said Chiefs and their Tribes in common, for their own use and benefit."[57]

Without ruling on the merits, the Federal Court considered an application for judicial review by members of the Skidegate Band on Haida Gwaii in British Columbia concerning a BCR that "expressly banishes each of the Moving Parties from entering any Skidegate Reserves, which form part of the territories of the Haida Nation." The Court accepted that the BCR thereby prejudicially affected the members because it contradicted the *Constitution of the Haida Nation* of which Skidegate is a part and that stated: "Every Haida citizen has the freedom to remain in, enter, or leave the territories of the Haida Nation."[58]

Presumptively, band members therefore have a right to reside or frequent the reserve for the simple reason that its lands were set aside for their use and benefit, in common with all the other members. While a band may well have the power under the *Indian Act* to exclude non-members, it is less certain that it has the power to expel members from the reserve permanently because such a decision could conflict with the very definition of a reserve as lands set aside for the use and benefit of the band's members.

Even if banishment were imposed on a member for the welfare of the band as a whole, it seems necessary for the exercise of that power to be justified as a reasonable limit on the member's implicit statutory rights, particularly through limits on its scope in time or geography. If banishment were irreversible, it is difficult to see how the measure could fail to impair the reserve's definition as lands held for all the members in common.

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[56] *Indian Act*, *supra* note 3, s 2(1).

[57] Canada, *Copy of the Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Huron Conveying Certain Lands to the Crown* (Ottawa: Queen's Printer, 1964).

[58] *Russ v Skidegate First Nation*, 2018 CanLII 123505 (FC) at paras 19, 21.

### ii. Duty of fairness

The basic rule is that a public body "is bound by a duty of procedural fairness when it makes an administrative decision affecting individual rights, privileges or interests."[59] The content of that duty will vary with the circumstances but would generally "include the requirement that the interested parties be given prior notice," their right to be heard concerning the proposed decision (either orally or through written submissions) and could include the requirement "that reasons must be given in support of the decision."[60] In addition, a federal body such as a Band Council is probably bound by the *Canadian Bill of Rights*, which explicitly guarantees the right not to be deprived of liberty or property "except by due process of law" and also provides that "every law of Canada" is to be interpreted so that it does not "deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."[61]

The courts have held that banishment decisions impose a heavy duty of procedural fairness on band councils, due the potential consequences. More particularly, the Federal Court noted the harm which banishment of a member could cause due to "the forced separation from her loved ones and the exclusion from her community, with the attendant psychological and emotional stress." In face of serious allegations of unfairness—the member was banished without being heard by the Band Council—the Court granted an injunction and allowed her to stay on the reserve pending a full hearing of her case (which does not seem to have taken place).[62]

In another case, Curve Lake First Nation's Council adopted a BCR to expel a member's common-law husband on 12 hours' notice and after it learned he had pleaded guilty to possession of marijuana for the purpose of trafficking.[63] His lawyers challenged the decision on the grounds he had been given no notice and because no by-law had been adopted allowing for the expulsion.[64] Even before hearing his motion for an interlocutory injunction against the decision, the Federal Court issued an order allowing him to stay on the reserve till the motion was heard.[65] In the event, the Council decided to rescind the expulsion, so that the case did not proceed.[66]

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[59] *May v Ferndale Institution*, 2005 SCC 82 at para 3.

[60] *Société de l'assurance automobile du Québec v Cyr*, 2008 SCC 13 at para 32.

[61] *Canadian Bill of Rights*, SC 1960, c 44, ss 1(a), 2(e). The statute applies to by-laws under the *Indian Act* because it extends to "an Act of the Parliament of Canada" and "any order, rule or regulation thereunder" (*ibid*, s 5(2)).

[62] *Edgar v Kitasoo Band Council*, [2003] 2 CNLR 124, 2003 FCT 166 (CanLII) at paras 35, 41 [*Kitasoo*].

[63] *R v Hayes*, 2007 ONCA 816 at para 7.

[64] *Ibid* at para 3.

[65] *Shilling v Curve Lake First Nation*, 2007 CanLII 51814 (FC) [*Shilling*].

[66] Lindsey Cole, "Curve Lake rescinds eviction of Rick Hayes", *MyKawartha* (6 December 2007) online: <https://www.mykawartha.com/news-story/3695392-curve-lake-rescinds-eviction-of-rick-hayes/>.

### iii. Prohibited discrimination

In 2012, the Council of Sandy Lake First Nation in Ontario relied on legal traditions and customary laws to adopt a BCR that ordered a member's common-law spouse and her child by a previous relationship to leave the reserve. Angele Kamalatisit filed a complaint with the Canadian Human Rights Commission that alleged discrimination based on her "marital/family status, race, national ethnic, origin and/or sex," contrary to the *Canadian Human Rights Act*,[67] which the Commission brought before the Canadian Human Rights Tribunal. The Commission subsequently amended the complaint also to allege denial of occupancy of her residential accommodation based on family status, which is the grounds on which the Tribunal ultimately ruled in Ms. Kamalatisit's favour.[68]

In fact, Ms. Kamalatisit and her son were members of another Cree First Nation in Ontario and she had lived in Sandy Lake with her common-law spouse for a decade, her son for a year. Letters about the BCRs were delivered to her home by a large group, including the Chief, most councillors and a police officer. She was told to leave the remote fly-in community on the next flight and not to return, failing which she would be charged with trespass. The grounds were that Ms. Kamalatisit "continue[d] to cause social unrest by inciting negative remarks and public commentary"; her common-law husband had been an outspoken opponent of the Chief and she was alleged to have joined in the criticism. Ultimately, Ms. Kamalatisit was medically evacuated as a result of complications from the stress caused by the expulsion and never returned.[69]

The Tribunal held it was obvious "the Complainant has been victimized as a result of her relationship with Ringo [her husband] and the Band's request that she leaves [sic] Sandy Lake was based on Ringo's involvement in local politics." It therefore concluded that she had been denied occupancy of a residential accommodation based on grounds of discrimination prohibited under the *Canadian Human Rights Act*, namely, marital and family status.[70]

Ms. Kamalatisit benefitted from the rule under *Canadian Human Rights Act* case law that a complainant need not demonstrate that the discriminatory grounds were the sole reason she was denied goods, services, facilities, or accommodation: it is enough that the discriminatory grounds were a factor in the Respondent's actions.[71] A more complex issue was the definition of "accommodation" but the Tribunal relied on

[67] *Canadian Human Rights Act*, RSC 1985, c H-6 [*Canadian Human Rights Act*].

[68] *Kamalatisit v Sandy Lake First Nation*, 2019 CHRT 20 at paras 3, 4, 31, 65 [*Kamalatisit*].

[69] *Ibid* at paras 15–32.

[70] *Ibid* at paras 67–68.

[71] *Ibid* at para 54.

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one of its earlier decisions that denial of accommodation can include denying someone occupancy of his own house.[72]

While the *Kamalatisit* judgment does not use the term banishment (and even uses the term "eviction" though the First Nation does not seem to have alleged any rights as a landlord), it signals that the *Canadian Human Rights Act* can impose a limit more severe than procedural fairness on the decision-making. Banishment that is motivated even in part by one of the prohibited grounds[73] will constitute illegal discrimination if it deprives the individual of "goods, services, facilities or accommodation customarily available to the general public," including "the provision of commercial premises or residential accommodation," or employment.[74]

The Tribunal not only granted Ms. Kamalatisit financial compensation, but ordered that she "and her children and grandchildren be allowed back to live with [her common-law spouse] Ringo in the house allocated to him on the Sandy Lake First Nation subject to her obeying all of the obligations as a guest."[75] The *Canadian Human Rights Act* therefore gives the Tribunal the power to undo what is effectively a banishment if the grounds constitute prohibited discrimination. On the other hand, expulsion from the community, even if procedurally unfair, will not be reviewed by the Tribunal if the grounds were not discriminatory.[76]

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## 5. The *Charter* as a restraint on banishment generally

### a. Legal context

Limitations on banishment also arise from the Constitution: not just for First Nations, but for all governments, a measure that formally or effectively banished an individual from a given community could be invalidated if it was contrary to the *Canadian Charter of Rights and Freedoms*.

### b. Mobility rights

Section 6 of the *Canadian Charter of Rights and Freedoms* provides that every citizen has "the right to enter, remain in and leave Canada," while "every permanent resident has the right "to move to and take up residence in any province" and "to pursue the gaining of a livelihood in any province." The Supreme Court of Canada has held that

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[72] *Ibid* at para 55, citing *Ledoux v Gambler First Nation*, 2018 CHRT 26 at para 96.

[73] The prohibited grounds are found in *Canadian Human Rights Act*, *supra* note 67, s 3(1) ("race, national or ethnic origin, colour, religion, age, sex [including pregnancy or childbirth], sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted").

[74] *Ibid*, ss 5-7.

[75] *Kamalatisit*, *supra* note 68 at para 90.

[76] *Polhill v Keeseekoowenin First Nation*, 2019 CHRT 42 at para 134.

"the central thrust of s. 6(1) is against exile and banishment, the purpose of which is the exclusion of membership in the national community."[77]

However, the British Columbia Court of Appeal held "that s. 6 does not extend to provide specific rights of movement which would render unconstitutional a sentence that is so nicely gauged for the protection of threatened members of society" that it prohibited the offender from living in the same province as his victims, where needed to ensure their protection.[78] In another case, the Supreme Court held that while the right to enter and remain Canada extends even beyond protection "from being expelled, banished or exiled," nevertheless the extradition of an accused is nevertheless a reasonable limitation on that right and is justified under s. 1 of the *Charter*.[79]

Mobility rights within Canada are therefore a potential limitation on any banishment power, but personal and public safety and the enforcement of criminal law are justifiable infringements of the right.

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### c. The right to liberty and fundamental justice

Section 7 of the *Charter* protects "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." While s. 7 generally applies to prosecution in the criminal and quasi-criminal context, it is concerned with any state action that could have "a serious and profound effect" on a person's psychological or physical integrity. As a result, for instance, removing "an individual's status as a parent" through a child-custody hearing will attract the requirements of fundamental justice because parenthood "is often fundamental to personal identity, [and] the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct."[80] The principles of fundamental justice always require "a fair procedure for making this determination."[81]

In *R v Heywood*, a case involving freedom of movement, the Supreme Court of Canada relied on s. 7 to strike down a *Criminal Code* provision allowing those with earlier convictions for sexual assault involving children to be convicted of vagrancy merely because they were found near playgrounds, school yards or public parks. The high court held the provision was "overly broad to an extent that it violates the right to liberty proclaimed by s. 7 of the *Charter*." More particularly, its geographical scope was too broad for "embracing as it does all public parks and beaches no matter how

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[77] *United States of America v Cotroni*, [1989] 1 SCR 1469 at 1482, 1989 CanLII 106 (SCC) [*Cotroni*].

[78] *Banks*, *supra* note 27, Lambert JA.

[79] *Cotroni*, *supra* note 77 at 1482.

[80] *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, [1999] SCJ No 47 at paras 60–61 [*JG*].

[81] *Ibid* at para 70.

remote and devoid of children they may be," too broad in time because it applied "for life without any process for review" and because "the prohibitions are put in place and may be enforced without any notice to the accused."[82]

On the other hand, the Supreme Court refused to strike down powers under the *Immigration Act* providing for the deportation of a permanent resident on conviction of a serious criminal offence. The high court held in *Chiarelli* that there was no violation of the principles of fundamental justice protected by s. 7 of the *Charter* because: "The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."[83]

The liberty that s. 7 seeks to protect, according to the Supreme Court, includes "freedom of movement" or "the liberty of movement and locomotion to go where other citizens are entitled to go and in the same manner as they are entitled to do."[84] Any banishment measure that limited these rights without notice or possibility of review and without a rational connection to preventing harm could be struck down.

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### d. The guarantee against cruel and unusual punishment

Section 12 of the *Charter* protects against "cruel and unusual treatment or punishment"; the test is "'whether the punishment prescribed is so excessive as to outrage standards of decency.'"[85] In the *Chiarelli* immigration case cited above, the Supreme Court held that deportation did not violate s. 12 because the permanent residents had "deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of five years or more," so that their removal "cannot be said to outrage standards of decency."[86]

### e. International law aspects

#### i. Freedom of movement

The Supreme Court of Canada has held that the principles of fundamental justice protected by the *Charter* are "informed not only by Canadian experience and jurisprudence, but also by international law," including Canada's obligations under international human rights law.[87] International law protects freedom of movement both

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[82] *R v Heywood*, [1994] 3 SCR 761, [1994] SCJ No 101 at 794–96 [*Heywood*].

[83] *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at para 733, [1992] SCJ No 27 [*Chiarelli*].

[84] *Heywood*, *supra* note 82 at 796, citing *R v Graf* (1988), 42 CRR 146 (BC PC) at 150.

[85] *R v Smith*, [1987] 1 SCR 1045, [1987] SCJ No 36 at 1072.

[86] *Chiarelli*, *supra* note 83 at 736.

[87] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 46.

within a state and with respect to the right to leave and return to the country where one is a citizen.

Canada is bound by the *Universal Declaration of Human Rights*, which guarantees "the right to freedom of movement and residence within the borders of each state."[88] It is also bound by the *American Declaration of the Rights and Duties of Man*,[89] which provides at art. 8 that: "Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will."

Finally, Canada is bound by the *International Covenant on Civil and Political Rights* (*ICCPR*), which provides that: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." This is a right that "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant"[90]

The position of the United Nations Human Rights Committee is that "liberty of movement is an indispensable condition for the free development of a person."[91] A citizen of Togo brought a complaint after the government placed him under a prohibition against entering a particular district of the country, which included his native village. The UN Human Rights Committee held that he had suffered a restriction of his freedom of movement and residence in violation of art. 12(1) of the *ICCPR*, was entitled to immediate restoration of his freedom of movement and residence, "as well as appropriate compensation."[92]

### ii. The *United Nations Declaration on the Rights of Indigenous Peoples*

International law recognizes that Indigenous peoples have a right to autonomy and self-government or self-determination according to the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*): to manage "their internal and local affairs," to follow "their own procedures, as well as to maintain and develop their own indigenous decision-making institutions," and "to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions,

[88] *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810, at 71 (1948), art 13(1).

[89] Adopted by the *Ninth International Conference of American States*, 30 April 1948, Bogotá, Colombia,

[90] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) arts 12(1), (3) [*ICCPR*].

[91] United Nations Human Rights Committee, *General Comment No. 27: Freedom of movement (Art. 12)*, UNHCR, 67th Sess, UN Doc CCPR/C/21/ Rev 1/ Add 9, (2 November 1999) at para 1[*General Comment No 27*].

[92] *Kéténguéré Ackla v Togo*, Communication No. 505/1992, UN Doc. CCPR/C/56/D/505/1992 (1996) at paras 10, 13.

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procedures, practices."[93] More particularly, *UNDRIP* provides that Indigenous peoples have both "the right to determine their own identity or membership in accordance with their customs and traditions" and "the right to determine the responsibilities of individuals to their communities."[94]

Nevertheless, *UNDRIP* specifies that the right to self-determination must be exercised "in accordance with international human rights standards." Its provisions are to "be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith." Indigenous peoples therefore have the right both as collectives and as individuals to enjoy "all human rights and fundamental freedoms as recognized in… the *Universal Declaration of Human Rights* and international human rights law."[95]

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These rules suggest that under Indigenous government, banishment has the same limits as under international law generally. If art. 12(1) of the *ICCPR* recognizes the right to choose one's residence, subject only to the reasonable limits set out in art. 12(3), then banishment by Indigenous governments must also be as provided for by law, necessary to protect public order, public health or morals or the rights and freedoms of others, and it must be consistent with the other human rights recognized in by international law.

## 6. Banishment as an Aboriginal right

### a. Introduction

To the extent that a First Nation is exercising an Aboriginal or treaty right recognized and affirmed by s. 35 of the *Constitution Act, 1982*, its imposition of banishment measures would not require a statutory basis, such as the *Indian Act* power to adopt by-laws. Moreover, the measure would be protected against other statutory rules that would infringe upon the First Nation's exercise of that right, subject to the justification test discussed below.

While the test for proving "site specific" Aboriginal rights is set out below, recent case law has held that Aboriginal peoples also have a generic right to self-government that "pertains to Aboriginal peoples as peoples[,] …a right which is intimately tied to the cultural survival of Aboriginal peoples, but is not necessarily based on the practice of distinctive cultural activities in the strict sense."[96] The self-

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[93] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) at arts 4, 18, 34 [*UNDRIP*]. Parliament has affirmed the Declaration "as a source for the interpretation of Canadian law": *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 at preamble.

[94] *Ibid* at arts 33(2), 35.

[95] *Ibid* at arts 1, 34, 46(2)–(3).

[96] *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at para 486 [*Renvoi à la Cour d'appel du*

government right would include an Aboriginal people's right "to enjoy a customary legal system" and "to govern itself under the Crown's protection."[97] If this case law is upheld by the Supreme Court of Canada, it may be that Aboriginal rules allowing for banishment apply simply because a competent authority has adopted them.

### b. The test for proving a constitutionally protected right

The test for proving an Aboriginal right is referred to as the "integral to a distinctive culture" test. As set out by the Supreme Court of Canada, those claiming an Aboriginal right protected by s. 35 must prove: the existence of a practice, custom or tradition that underpins the claimed right; that the practice, custom or tradition was "integral to the distinctive culture" of the claimant's community in the time before contact with European colonists occurred; and finally, continuity between the pre-contact practice and the practice as it exists today.[98]

The test for proving a treaty right is different, but several historic treaties have been held to preserve practices that an Aboriginal people had engaged in before agreeing to relinquish control over its lands.[99] Modern treaties (or land claims agreements) increasingly provide that only the rights referred to in their provisions are modified and allow for an interpretation that any unrelated Aboriginal rights continue to be in force "and enforceable as recognized by the common law."[100] As a result, if banishment by an Aboriginal people meets the test for proving a pre-existing Aboriginal right, it may continue even under a historic or modern treaty, depending on the circumstances.

### c. Evidence in support of the right

Accounts of banishment in pre-contact Aboriginal societies are common.[101] George Harris, an elder of the Stz'uminus First Nation on central Vancouver Island, British Columbia, told a reporter in 2016 that under the traditional law of his people known as Snuy-ulth, men were considered protectors of all women because women were life-

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*Québec*] [emphasis in the original]; appeal as of right pending, Supreme Court of Canada docket no 40061.

[97] Brian Slattery, "A Taxonomy of Aboriginal Rights" in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: University of British Columbia Press, 2007) 111 at 123, as cited in *Renvoi à la Cour d'appel du Québec*, *supra* note 96 at para 488.

[98] *R v Van der Peet*, [1996] 2 SCR 507, [1996] SCJ No 77 at paras 46, 60-65 [*Van der Peet*].

[99] *R v Morris*, 2006 SCC 59 at para 34.

[100] John Helis, "Achieving Certainty in Treaties with Indigenous Peoples: Small Steps Towards Adopting Elements of Recognition" (2019), 28:2 Constitutional Forum constitutionnel 1 at 2.

[101] Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1(Winnipeg: Queen's Printer, 1991), at chapter 2, "Aboriginal Concepts of Justice" footnote 13 [*Aboriginal Justice Inquiry*]. See also *Penosway c R*, 2019 QCCS 4016 at para 41.

givers. As a result, he said: "We have stories of people who were banished for sexually abusing women, and it was an offence even punishable by death."[102]

The following description by Zebedee Nungak of traditional justice among the Inuit of Nunavik (northern Québec) mentions the existence and function of banishment:

> In the pre-contact period, Inuit lived in camps dictated according to seasons and availability of life-sustaining wildlife. Their leadership consisted of elders of the camp, as well as hunters who were the best providers and were followed for their ability to decide for the clan or group where the best areas were to spend the seasons. The overriding concern was the sustenance of the collective. Any dispute among the people was settled by the elders and/or leaders, who always had the respect and high regard of the group....
>
> The bulk of disputes handled by the traditional ways pre-contact mostly involved provision of practical advice and persuasive exhortation for correct and proper behaviour, which was generally accepted and abided by. In more serious cases, offenders were ostracized or banished from the clan or group. In these cases, the ostracized or banished individuals were given no choice except to the leave the security and company of the group which imposed this sentence. The social stigma of having such a sentence imposed was often enough to reform or alter behaviour which was the original cause of this measure, and people who suffered this indignity once often became useful members of society, albeit with another clan in another camp. […][103]

Perhaps more conveniently, the Nunavut Court of Justice has held that a prison sentence can be "consistent with traditional norms of Inuit justice" because those norms provided that: "When a person threatened the traditional group's safety and security, that person could be, and sometimes was, banished. In other words, he was separated from the community. Many were welcomed later back into the group."[104] In a penetrating essay, however, former Justice Murray Sinclair pointed out that after a period of banishment through incarceration, the accused is deemed to have "paid the price" for the offence in Euro-Canadian law but that in most Aboriginal societies, "reconciliation and atonement are issues that still apply when the Aboriginal community banishes someone and decides to let him or her return."[105]

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[102] Wawmeesh G Hamilton, "Aboriginal man found not guilty of sex offence but banished from home: Robert Hopkins hopes to return to his community, despite the obstacles", *CBC News* (21 May 2016), online: <https://www.cbc.ca/news/indigenous/aboriginal-man-found-not-guilty-of-sex-offence-banished-from-home-1.3568057>.

[103] Canada, *Report on Aboriginal People and Criminal Justice in Canada: Bridging the cultural divide* (Ottawa: Minister of Supply and Services Canada 1996) at 22 [*Bridging the Cultural Divide*].

[104] *R v Iqalukjuaq*, 2020 NUCJ 15 at para 39. See also *R v Arnaquq*, 2020 NUCJ 14 at para 55.

[105] Murray Sinclair, "Aboriginal Peoples, Justice and the Law," in Richard Gosse, James Youngblood Henderson & Roger Carter, comp, *Continuing Poundmaker and Riel's Quest: Presentations made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 173 at 179.

Banishment also existed in the Iroquois or Haudenosaunee Confederacy, which included the Mohawk or Kanienkehaka. Its Great Law of Peace could be applied even to a chief who committed murder, as well as to adopted members of a Nation if they caused "disturbance or injury."[106] A scholar in criminology described the practice among the Haudenosaunee before contact as follows:

> For those offenders who continued to engage in anti-social acts or hurtful behaviour, banishment or elimination of their name would be used as a last resort. The point of banishment or elimination of a name was firstly to protect the community, but secondly to attempt to return the offender to a spiritual state of social interconnection. When one attempted to survive alone or was forced to live with other communities in shame, intense personal reflection that often led to a spiritual reawakening was thought to take place. Consequently, the offender would make the character changes necessary to interact positively within their community. Banishment rarely occurred for life, and the individual often returned home after a prescribed period of exile and would be allowed to remain if they had fully embraced the principles of peace and unity. The Great Law decrees that individuals acting in disruptive manners be given three opportunities to change. This dictate also applied to most defined sentences including banishment.[107]

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Evidence exists for post-contact continuity in the practice of this custom. One example is very old and occurred under the guidance of the missionaries and among the Wendat (who are Iroquoian but were not part of the Iroquois Confederacy). Describing life at the Wendat mission near Quebec City in 1672 and 1673, the Jesuits mentioned "a Huron who with his wife was greatly addicted to drunkenness, had caused so much scandal and trouble to the whole village of Nostre Dame de Foy, that they were forced to expel him, and forbid him to make his appearance in future among the Christians." It was the intercession of visiting "Christian Iroquois women" and their gift of three porcelain collars in his name which convinced "the Elders… in Council" to allow the "drunkard" and his wife to return.[108] A much more recent example is from 1988, when three young people from the Mohawk community of Kahnawake near Montreal were charged with arson and other criminal offences; they asked that their case be decided by the Longhouse. The Longhouse was convened and ordered that for the offence of falsely informing the community that the Sûreté du Québec was trying to frame them, the young people were to be given their first of three warnings and that after the third warning, they would be banished from the community.[109]

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[106] David E Wilkins, "Exiling Ones Kin: Banishment and Disenrollment in Indian Country" (2004) 17:2 Western L History 235 at 239–42.

[107] Michael R Cousins, *The Inherent Right of the Haudenosaunee to Criminal Justice* (MA thesis (Criminology), Simon Fraser University, 2004) at 64–65 [emphasis added; footnotes omitted] [unpublished].

[108] Reuben Gold Thwaites, ed, *The Jesuit Relations and Allied Documents*, vol 57, (Cleveland: Burrows Brothers, 1899) at 54–60.

[109] *Bridging the Cultural Divide*, *supra* note 103 at 259. See also *ibid* at 252 ("the Quebec Crown acknowledged that the sentences the young people received in the Longhouse were not only more

Note that it might therefore be possible to base a right to impose banishment on historic treaties that promise the protection of certain lands. For instance, "the quiet & peaceable Possession of the Lands we lived upon" was promised by the British in the Treaty of Swegatchy of 1760[110] to the Seven Nations living in the Saint Lawrence River Valley, who had been allied to the French, including Kahnawake and Wendake.[111] The banishment recorded in Wendake in the 1670s might therefore have formed part of the Wendat right to "quiet & peaceable Possession" of the same lands recognized by the British a century later and the sentence imposed by the Longhouse in Kahnawake could be its modern expression.

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## 7. Justifying an Aboriginal right to banishment or justifying its infringement

### a. Requirements to justify a breach of an Aboriginal right of banishment

#### i. The justification test

Even after an Aboriginal party has proven an unextinguished Aboriginal or treaty right protected by the Constitution, a court is still entitled to conclude that infringement by federal or provincial law is justified, though the burden of proving the justification rests with the Crown. The justification test involves two steps. First, the government will try to show that it was pursuing a valid legislative objective, namely, one that is "compelling and substantial." At the second stage in the justification test, the Crown must demonstrate that the structure of the law is consistent with the fiduciary duty it owes to Aboriginal people. Based on this test, a court will consider, among other things, whether Aboriginal rights were given adequate priority, whether they have been minimally impaired, whether Aboriginal groups have received compensation and whether they have been consulted.[112]

The Supreme Court has held that:

> Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable.[113]

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culturally appropriate, but also tougher than what they might have expected in Quebec courts" yet "nevertheless insisted that the young people be tried in the Quebec courts.…").

[110] *R v Côté*, [1993] RJQ 1350, [1994] 3 CNLR 98 (QC CA) at 113–114, rev'd on other grounds [1996] 3 SCR 139, [1996] SCJ No 93.

[111] They were also referred to as the Eight Nations: *R v Sioui*, [1990] 1 SCR 1025, [1990] SCJ No 48 at 1058–59.

[112] *R v Sparrow*, [1990] 1 SCR 1075, [1990] SCJ No 49 at 1113, 1119 [*Sparrow*].

[113] *R v Gladstone*, [1996] 2 SCR 723, [1996] SCJ No 79 at para 73 [*Gladstone*].

More particularly, "limits placed on those rights…, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole," can be "a necessary part" of "reconciliation of aboriginal societies with the broader political community of which they are part."[114]

### ii. Interaction between Aboriginal rights and the *Charter*

As mentioned above, the *Charter* presumptively applies to an Aboriginal government that exercises authority within the sphere of federal jurisdiction over "Indians" under s. 91(24) of the *Constitution Act, 1867*.[115] Many modern treaties (land claims agreements) in British Columbia specify that the *Charter* will apply to Aboriginal governments,[116] while in other cases courts have assumed that the *Charter* applies to orders of government created under the *Umbrella Final Agreement* in the Yukon[117] or the *James Bay and Northern Québec Agreement*.[118] (Whether the *Charter* would apply equally to a purely traditional Aboriginal order of government remains an open question.[119])

Even if banishment could be shown to be a specific Aboriginal or treaty right protected by s. 35 of the *Constitution Act, 1982*, the severe consequences of banishment might lead a court to conclude that the individual rights protected by the *Charter* constitute limits on the Aboriginal right which "are of sufficient importance to the broader community as a whole" so as to make them "a necessary part" of "reconciliation of aboriginal societies with the broader political community of which they are part."[120] Alternatively, the case law that has found a generic Aboriginal right to self-government also held that when acting as governing bodies, Aboriginal peoples must exercise their authority with "respect [for] the rights of individuals, whether Aboriginal or non-Aboriginal, as Canadian citizens." The application of the *Charter* is a limit on self-government inherent in the constitutional order and not an abrogation or derogation from a generic right, though limits imposed by statute will have to be justified based on the test established by the Supreme Court of Canada pursuant to s. 35 of the *Constitution Act, 1982*.[121]

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[114] *Ibid*.

[115] *Taypotat v Taypotat*, 2013 FCA 192 at para 36.

[116] *Nisqa'a Final Agreement*, 27 April 1999, Ch 2 at para 9; *Tsawwassen First Nation Final Agreement*, 6 December 2007, (entered into force 3 April 2009), Ch 2, clause 9; *Tla'amin Final Agreement*, 11 April 2014 (entered into force 5 April 2016), Ch 2, at para 8.

[117] *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 at para 98 [*Dickson*]; leave to appeal granted, 2022 CanLII 32895.

[118] *Band (Eeyouch) c Napash*, 2014 QCCQ 10367 at para 181.

[119] The court declined to rule on Haudenosaunee traditional governance in a case concerning an assault committed with the aim of removing a member from the Six Nations reserve because in any case, "the traditional means of discerning consensus was not followed": *R v Green*, 2017 ONCJ 705 at para 87.

[120] *Gladstone*, *supra* note 113 at para 73.

[121] *Renvoi à la Cour d'appel du Québec*, *supra* note 96 at paras 527–28.

The burden could therefore shift to an Aboriginal community to justify the infringement of *Charter* caused by banishment. However, it would be possible to argue that no justification for breaching a *Charter* right is needed when adjudicating an Aboriginal right because s. 25 of the *Charter* provides

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada….

Writing as a single judge of the Supreme Court of Canada in a concurring judgment, Bastarache J. held that "s. 25 serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group.".[122] The majority in the *Kapp* decision preferred to leave interpretation of s. 25 of the *Charter* for another day.[123]

The issue will be before the Supreme Court of Canada again in the *Vuntut Gwitchin* case concerning residency restrictions on the right to take up elected office in a First Nation whose powers of self-government stemmed from a land claims agreement recognized as a modern treaty. The Yukon Court of Appeal agreed with Bastarache J. and held that while the *Charter* applies to Vuntut Gwitchin government and the residency requirement breached a member's equality rights under s. 15(1), nevertheless s. 25 is a "shield" for the exercise of their collective rights against the requirement to justify infringement of individual rights.

### b. *Charter* issues in the exercise of the right

#### i. Consequences of banishment

If members or other residents were banished from their First Nation's reserve, they would presumably face no impediment to their right to live elsewhere in Canada or even elsewhere on the Nation's traditional territory, which is rarely if ever subject to the First Nation's exclusive control. Nevertheless, members would be banished from the heart of their community and banishment might therefore be analogous to a national citizen's banishment from his country, in violation of s. 6(1) of the *Charter* or article 12(4) of the *ICCPR*.

Like a banished citizen, banished band members would suffer "exclusion of membership in the national community" and an interference with their "special relationship" to that community.[124] Banishment constitutes, in the words of an American court, "the coerced and peremptory deprivation of the petitioners'

[122] *R v Kapp*, 2008 SCC 41 at para 89 [*Kapp*].

[123] *Ibid* at paras 62–65.

[124] *Cotroni*, *supra* note 77 at 1482; *General Comment No. 27*, *supra* note 92 at para 19.

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membership in the tribe and their social and cultural affiliation."[125] The consequences would be similar to those which Aboriginal legal scholars have noted for the traditional punishment: banishment was a severe punishment because "it involved 'the end of social and cultural life with one's community.'"[126]

The pre-1985 rule in the *Indian Act* that deprived women of status upon marriage to men who were not registered Indians was described by the Supreme Court of Canada as "statutory banishment."[127] The United Nations Human Rights Committee held that when Canada prohibited Sandra Lovelace, a Wolastoqiyik (Maliseet) woman, from returning to the Tobique reserve in New Brunswick where she was raised after her marriage to a non-Indian man ended, Canada had violated the right for members of an ethnic minority "in community with the other members of their group, to enjoy their own culture," as protected by art. 27 of the *ICCPR*.[128] However, her original complaint also alleged violations of the right to freedom of movement protected by article 12, as well as the guarantees against discrimination in articles 2, 3 and 26 of the *Covenant*.

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### ii. Characterization of banishment's consequences under the *Charter*

The right to liberty under s. 7 of the *Charter*, according to the Supreme Court of Canada, includes "freedom of movement."[129] The principles of fundamental justice require "a fair procedure" before taking away a status that is "fundamental to personal identity."[130]

The banishment of members from their First Nation's reserve would:

- combine "stigmatization... and disruption of family life;[131]
- deprive them of the freedom "to go where other [members] are entitled to go and in the same manner as they are entitled to do";[132]
- interfere with their "special relationship" with their own community and its territory;[133]

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[125] *Poodry*, *supra* note 18 at 897.

[126] Mary Ellen Turpel-Lafond & Patricia Monture-Angus, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) 26 UBC L Rev 239 at 248.

[127] *Attorney General of Canada v Lavell*, [1974] SCR 1349, 7 CNLC 236 at 1386.

[128] United Nations Human Rights Committee, *Sandra Lovelace v Canada, Communication No 24/1977*, UN Doc. CCPR/C/13/D/24/1977 (7 July 1981) [*Lovelace*].

[129] *Heywood*, *supra* note 82 at 795.

[130] *JG*, *supra* note 80 at paras 70, 61.

[131] *Ibid* at paras 70, 61.

[132] *Heywood*, *supra* note 82 at 796, citing *R v Graf*, (1988), 42 CRR 146 at 150, [1988] BCJ No 3203 [*Graf*].

[133] *General Comment No. 27*, *supra* note 91 at para 19.

- exclude them from "the social and cultural life" of their community;[134]
- deprive them of access to their "native culture and language 'in community with the other members' of [their] group."[135]

The cumulative effect would, on its face, constitute a violation of members' right to liberty and to freedom of movement under s. 7 of the *Charter*, based on the analogy to their rights under s. 6 of the *Charter* and articles 12 and 27 of the *ICCPR*.

### c. Requirements to justify a breach of the *Charter* right

#### i. Generally

A breach of a *Charter* right does not always invalidate legislation because the *Charter* is subject to "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" under s. 1. The first requirement is that a limitation must actually be "prescribed by law": according to the Supreme Court, this means that it must provide "an intelligible standard according to which the judiciary must do its work" and cannot grant "a plenary discretion to do whatever seems best in a wide set of circumstances."[136]

The Supreme Court of Canada's case law also requires that, in order to justify the infringement of a *Charter* right, the government objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" and that the means chosen must be reasonable and demonstrably justifiable in a free and democratic society.[137] Reasonable and justifiable means must: be carefully designed to achieve the objective in question—that is, not arbitrary or unfair or based on irrational considerations; they must impair as little as possible the right or freedom in question, even if rationally connected to the objective in the first sense; and they must demonstrate a proportionality between the effects of the measures and the objective.

#### ii. The effect of section 25

If banishment measures that did not rely on Aboriginal or treaty rights, such as *Indian Act* by-laws adopted or defended without reference to constitutional rights to self-government, were found to breach an individual's *Charter* rights, the measures would need to be justified under s. 1.

However, as discussed above, the Yukon Court of Appeal held that s. 25 is a "shield" for the exercise of the Vuntut Gwichin's collective rights under their modern treaty (land claims agreement). The First Nation is party to a self-government

[134] Turpel-Lafond & Monture-Angus, *supra* note 126 at 248.

[135] *Lovelace*, *supra* note 128 at para 13.2.

[136] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 983, [1989] SCJ No 36.

[137] *R v Oakes*, [1986] 1 SCR 103 at para 76, [1986] SCJ No 7 [*Oakes*].

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agreement (SGA) entered into pursuant to the treaty and adopted its own constitution pursuant to the SGA, which allowed non-residents to stand for election but prohibited them from remaining in office if they did not reside on the territory within a specified period of time. The Yukon Court of Appeal held that this residency requirement violated the right to equality under s. 15(1) of the *Charter* but that s. 25 shielded the election rules from further review.[138]

The Court of Appeal held that to apply the s. 15(1) equality rights of non-resident members so as to invalidate the residency requirement for election "would indeed derogate from the Vuntut Gwitchin's rights to govern themselves in accordance with their own particular values and traditions *and* in accordance with the 'self-government' arrangements entered into in 1993 with Canada and Yukon."[139] More particularly, the assessment of "the rationality, proportionality and minimal impairment of the Residency Requirement" that would ordinarily be required under s. 1 to justify breach of a *Charter* right need not take place.[140]

However, the categorical interpretation of s. 25 of the *Charter* applied in *Vuntut Gwichin* may not prevail. The Royal Commission on Aboriginal Peoples adopted a more nuanced view "that although section 25 shields the Aboriginal right of self-government from *Charter* review, individuals subject to the actions of Aboriginal governments enjoy the protection of the *Charter*." This would mean that the validity of the self-government measures themselves could not be challenged but the way they operate could be reviewed by the courts if the result violated an individual's rights under the *Charter*. At the same time, the Royal Commission saw s. 25 as additional means for Aboriginal governments to justify "actions that might otherwise run afoul of the *Charter*" on the grounds that those actions were culturally appropriate, taking into account "the distinctive philosophies, traditions and cultural practices that animate the inherent right of self-government."[141]

Under this less categorical approach, the court's task would be to arrive at "[i]nterpretations of the *Charter* which are consistent with Aboriginal cultures and traditions," which might give those legal rights provisions a new interpretation.[142] Another scholar has proposed that s. 25 may require a special proportionality test because it applies where constitutionally-protected *Charter* rights and Aboriginal or treaty rights come into conflict. Rather than applying the s. 1 test that insists on minimal impairment of the *Charter* right, the competing Aboriginal or treaty right would call for an analysis of whether the "salutary effects" of the Aboriginal

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[138] *Dickson*, *supra* note 117 at paras 14–25, 107–12, 143–46.

[139] *Ibid* at para 149 [emphasis in original].

[140] *Ibid* at para 146.

[141] *Bridging the cultural divide*, *supra* note 103 at 265.

[142] Peter W Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74:2 Can Bar Rev 187 at 215.

government's action outweighed the deleterious effects on the individual's *Charter* right.[143]

### iii. The *Charter* test for justifying banishment

Under the *Charter*, decisions that would take away a status that is "fundamental to personal identity" require "a fair procedure for making this determination" before taking.[144] Therefore, restrictions an individual's freedom of movement may not: be excessively broad, either in time or place, apply "without any process for review", nor be "put in place [or] enforced without any notice."[145]

Legislation which interferes with an individual's freedom to "to go where other citizens are entitled to go and in the same manner as they are entitled to do"[146] must: serve an objective sufficiently important to justify overriding a constitutionally-protected right;[147] avoid arbitrariness, for instance, by providing for notice, a hearing and the possibility of review;[148] limit the scope of the restrictions as much as possible, both in time and place, to impair freedom of movement as little as possible and to demonstrate proportionality.[149]

The effect is markedly similar to the requirement that the freedom of movement protected by the *ICCPR* can only be subject to restrictions "which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."[150] The UN Human Rights Committee has interpreted this to mean that limitations on freedom of movement may not be arbitrary and "even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[151]

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[143] David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights in Canada* (Vancouver: UBC Press, 2012) at 70–71.

[144] *JG*, *supra* note 80 at paras 61, 70.

[145] *Heywood*, *supra* note 82 at 794–96.

[146] *Ibid* at 796, citing *Graf*, *supra* note 133 at 150.

[147] *Oakes*, *supra* note 137 at para 69.

[148] *Heywood*, *supra* note 82 at 790, 796, 800.

[149] *Ibid* at 794–96; *Oakes*, *supra* note 137 at para 70.

[150] *ICCPR*, *supra* note 90, art 12(3).

[151] *General Comment No. 27*, *supra* note 91 at para 21.

### iv. Banishment as a breach of an individual's ability to exercise collective rights

Significantly for our purposes, in the *Vuntut Gwichin* case, the Yukon Court of Appeal noted that "the 'real conflict' found by the court below was between an individual's *personal* right of equality under s. 15(1) of the *Charter* and a *collective* right—perhaps a "constitutional" one—being exercised by a *self-governing* first nation."[152] However it is not at all clear the same conflict between personal and collective rights would be at issue in a challenge to banishment measures. The plaintiff in *Vuntut Gwitchin* was not deprived of her individual right to run for office but wanted to be able to serve without residing on the First Nation's territory, effectively asking for a right to hold office without living together with the rest of her community. By contrast, if a community banished one of its members, the Aboriginal right claimed would be to deprive an individual of the ability to share in probably the most important benefit of the nation or community's collective rights, namely, the right to live together.

Recognizing the individual's *Charter* rights in a case of banishment might therefore not so much "diminish the distinctive, collective and cultural identity of an aboriginal group" as determine the terms on which individuals could participate in that group and the exercise of its Aboriginal and treaty rights. Expressed another way, banishing a member raises the question of whether the collective right extends even to the point of eliminating an individual member's participation in the group and the exercise of its rights.

Professor David Milward has written that life in Aboriginal societies is a social contract under which harmful behaviour that departs from the terms of that contract "is implicitly an acceptance of collective sanction."[153] On those terms, however, banishment is not a sanction like any other: it implies that individual members may commit such a fundamental breach that they can be deprived of the most important benefit of the social contract, either temporarily or permanently.

### v. The example of the *Lovelace* case

As noted above, the UN Human Rights Committee held that when Sandra Lovelace lost her status under the *Indian Act* due to marriage, she was deprived of the right under s. 27 of the *ICCPR* for members of an ethnic minority "in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." She had lost "access to her native culture and language 'in community with the other members' of her group… because there is no place outside the Tobique Reserve where such a community exists."[154]

[152] *Dickson*, *supra* note 117 at para 144 [emphasis in original].

[153] Milward, *supra* note 143 at 197.

[154] *Lovelace*, *supra* note 128 at paras 13.2, 15.

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The UN Human Rights Committee's decision held that the federal government was entitled to define those entitled to live on reserve with resulting restrictions for the "protection of its resources and preservation of the identity of its people." Nevertheless, those restrictions had to serve "reasonable and objective purposes" and had to do so in a manner consistent with all other rights guaranteed by the *ICCPR*, such as the right to choose one's residence, the rights aimed at protecting family life and children and the provisions against discrimination. The Committee could not conclude that "to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe" and therefore concluded that "to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to."[155]

The example of the *Lovelace* case demonstrates that international law would demand that any limitations a First Nation placed on the right for a member to live on a reserve would have to serve reasonable and objective goals, such as the "protection of its resources and preservation of the identity of its people," and be consistent with other rights, including access to native culture and language, protection from discrimination and preservation of family life. As set out above, this would be consistent with the right to self-determination under *UNDRIP*, which is subject to the right of Indigenous peoples both as collectives and through their individual members to enjoy "all human rights and fundamental freedoms" recognized in international human rights law.[156] These principles could apply by analogy for the purpose of determining whether any infringement of rights protected by the *Charter* would be justified either under s. 1 or s. 25.

## 8. Conclusion

Only one judgment has clearly answered the question posed by the Federal Court over two decades ago as to whether banishment is included when "sections 81 and 85.1 of the [*Indian*] Act grant band councils the authority to make by-laws for the protection of the community."[157] While the position of the Department of Indian and Northern Affairs in 2000 had been that the *Indian Act* did not allow Norway House Cree Nation to adopt a banishment by-law, the Québec Superior Court ruled in 2018 that jurisdiction under para. 81(1)(c) and (d) over "the observance of law and order" and "the prevention of disorderly conduct" did allow the Atikamekw of Opitciwan to banish a convicted drug dealer from the reserve for a period of five years.[158]

Several aspects of the Atikamekw of Opitciwan's by-law probably lent themselves to endorsement by the Court. The first is that the rules for banishment were

[155] *Ibid* at paras 16–17.

[156] *UNDRIP*, *supra* note 93, arts 1, 34, 46(2)–(3).

[157] *Gamblin*, *supra* note 38 at para 53.

[158] *Weizineau*, *supra* note 49 at paras 9, 10.

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clearly set out, recalling the Federal Court's decision in 2000 that only a by-law constitutes an enforceable use of s. 81's authority, rather than a simple Band Council resolution.[159] The second is that the grounds for banishment were a conviction by a criminal court on certain drug-trafficking offences, rather than on subjective grounds. Third, the conviction arguably already gave the person notice but moreover, in the particular case brought before the Superior Court, the offender had been served with a notice of expulsion. Finally, the banishment was for a finite term of five years; in fact, the by-law even allows for a temporary return (not exceeding five days in a calendar year) if an immediate family member dies or upon a decision of the community justice committee.[160]

The Federal Court has not been as generous to Band Councils whose banishment decisions did not show respect for the rules of procedural fairness: several interlocutory decisions have allowed members and resident non-members who were banished without a hearing to stay on the reserve pending a full hearing.[161] In another case, the decision was set aside for breach of procedural fairness without a ruling on the validity of the by-law itself.[162] The Canadian Human Rights Tribunal, though without jurisdiction over the fairness of banishment decisions, has set aside the banishment of a non-member on the grounds that she had been denied occupancy of a residential accommodation based on prohibited grounds of discrimination, namely, marital and family status.[163] The courts have been much kinder to Band Councils that evict tenants on the same grounds they would have relied on for banishment: they have held that no duty of fairness governs the decision to evict a tenant which is a private-law contract matter.[164]

At the same time, banishment has become an exceptional though recognized part of criminal sentencing in parole orders and sometimes release orders (bail) and even peace bonds. Grounds for orders banishing an offender from a specific community include "protecting the victim or assisting with the offender's rehabilitation."[165] The offender's consent is a controversial criterion, but the better view is probably that a real connection "to the objectives of protecting the public or securing the good conduct of the accused" is required.[166]

The courts have distinguished between "community banishment cases" and individualized probation orders: protection of a particular individual is really "a form

[159] *Gamblin*, *supra* note 38 at para 58.

[160] *CAO-RA-2016-01*, *supra* note 48, ss 5-8.

[161] *Kitasoo*, *supra* note 62; *Shilling*, *supra* note 65.

[162] *Solomon*, *supra* note 40.

[163] *Kamalatisit*, *supra* note 68 at paras 67–68.

[164] *Gamblin*, *supra* note 38 at paras 41, 43; *Paul*, *supra* note 45 at para 28.

[165] *Rowe*, *supra* note 23 at para 6.

[166] *R v L*, *supra* note 25 at para 76.

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of restraining order, albeit one which applies to a much larger geographic area than is normally the case."[167] By contrast, community banishment cases "involve an accused who is considered to be a nuisance or an undesirable in the community where he committed his crime" and where "banishment is considered a means of protecting the community as a whole."[168] Such orders are more common with respect to Aboriginal communities, but the results are varied: some courts have declined to take into account the level of policing available as grounds for banishment,[169] while others have used Band Council banishment orders as evidence of the community's views on where the offender should be allowed to reside.[170]

The exercise of purely statutory powers, such as under the *Indian Act* or the *Criminal Code*, is subject to justifiable infringement where government is pursuing a valid legislative objective, namely, one that is "compelling and substantial."[171] Banishment should not be inconsistent with the right to liberty and fundamental justice (s. 7), to protection from cruel and unusual punishment (s. 12) or to protection from discrimination (s. 15). In particular, the right to liberty under s. 7 includes "freedom of movement,"[172] while the principles of fundamental justice require "a fair procedure" before taking away a status that is "fundamental to personal identity."[173]

Whatever the consequences for non-members, banishing members of a First Nation from their reserve would disrupt their family life, deprive them of the freedom to go where other members are entitled to go, and interfere with their special relationship with their community and its territory. The consequences would recall those suffered by registered Indian women before 1985 when they lost their status under the *Indian Act* by marrying non-Indian men and could no longer live on their reserves: the United Nations Human Rights Committee held this deprived a woman of "access to her native culture and language 'in community with the other members' of her group" and therefore violated the right of members of an ethnic minority "in community with the other members of their group, to enjoy their own culture," as protected by art. 27 of the *ICCPR*.[174]

The consequences of banishment for members' participation in community life also seem to contradict the definition of a band and a reserve under the *Indian Act*: "a body of Indians… for whose use and benefit in common, lands… have been set apart" and "a tract of land… that has been set apart by Her Majesty for the use and

[167] *Felix*, *supra* note 19 at para 27.

[168] *Ibid* at para 18.

[169] *Gabriel*, *supra* note 32 at paras 6–7.

[170] *RHGM*, *supra* note 12 at paras 46–48.

[171] *Sparrow*, *supra* note 112 at 1113.

[172] *Heywood*, *supra* note 82 at 795.

[173] *JG*, *supra* note 80 at paras 70, 61.

[174] *Lovelace*, *supra* note 128 at paras 15–17.

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benefit of a band."[175] Presumptively, band members have a right to reside or frequent the reserve for the simple reason that its lands were set aside for their use and benefit, in common with all the others. While a First Nation may well have the power to exclude non-members, it is less certain that it has the power permanently to expel members from the reserve because they would cease to benefit from membership in a band by its very definition.

The deeper question is whether—separately from statutory powers such as under the *Indian Act* or the *Criminal Code*—a banishment power exists as an Aboriginal or treaty right protected by s. 35 of the *Constitution Act, 1982*. There is no doubt that in pre-contact Aboriginal societies, banishment was common[176] and "integral to the distinctive culture" of those communities as a means of social control; the widespread modern resort to banishment among First Nations would appear to show continuity between the pre-contact practice and a modern exercise of the right.[177] Some historic treaties may also have incorporated the right to the extent that they promised protection of a First Nation's lands; a separate question is whether the right to impose banishment is incorporated in modern treaties, also known as land claims agreements. Finally, recent case law has recognized that Aboriginal peoples also have a generic right to self-government that "is not necessarily based on the practice of distinctive cultural activities in the strict sense."[178] If upheld by the Supreme Court of Canada, it may be that Aboriginal rules allowing for banishment apply simply because a competent authority has adopted them.

It is true that s. 25 of the *Charter* provides that it "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada…." This may protect Aboriginal and treaty rights from an application of the *Charter* that would otherwise diminish them.[179] However, in the case a community banishing one of its members, the Aboriginal right claimed would be specifically aimed at depriving an individual of the ability to participate in the exercise of the nation's collective rights, namely, to live together; in other words, the First Nation would claim a right to diminish its member's exercise of an Aboriginal or treaty right and to that extent, s. 25 of the *Charter* would be wielded as a sword, not a shield.

It is therefore difficult to see how a First Nation could avoid having to justify the infringement of the member's rights arising from banishment. Under s. 1 of the *Charter*, justification for "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" would require an Aboriginal government to show that banishment fulfilled objectives "of sufficient importance to

[175] *Indian Act*, *supra* note 3, s 2(1).

[176] *Aboriginal Justice Inquiry*, *supra* note 101, chapter 2, text corresponding to footnote 13.

[177] *Van der Peet*, *supra* note 98 at paras 46, 63.

[178] *Renvoi à la Cour d'appel du Québec*, *supra* note 96 at para 486.

[179] *Kapp*, *supra* note 122, at para 89; *Dickson*, *supra* note 117 at para 146.

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warrant overriding a constitutionally protected right or freedom" and that the means chosen were fair, proportional and impaired the right of its members as little as possible.[180] , In particular, a law banishing members would need to include notice and a process for review and it would need to limit the scope of banishment as much as possible, both in time and place.[181]

Alternatively, as the Royal Commission on Aboriginal Peoples concluded, s. 25 may be an additional means for Aboriginal governments to justify "actions that might otherwise run afoul of the *Charter*" on the grounds that those actions were culturally appropriate, taking into account "the distinctive philosophies, traditions and cultural practices that animate the inherent right of self-government."[182]

The UN Human Rights Committee's decision in the *Lovelace* case based on the *ICCPR* suggests that any limitations an Aboriginal people placed on its members' right for a member to live in their own community would have to serve reasonable and objective goals, such as the "protection of its resources and preservation of the identity of its people," and be consistent with other rights, including access to native culture and language, protection from discrimination and preservation of family life.[183] As set out above, this would be consistent with the right to self-determination under *UNDRIP*, including "to determine the responsibilities of individuals to their communities," which must be exercised "in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith," so that Indigenous peoples have the right both as collectives and through their individual members to enjoy all the human rights and fundamental freedoms recognized in international law.[184]

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[180] *Oakes*, *supra* note 137 at para 76.

[181] *Heywood*, *supra* note 82 at 794–96; *Oakes*, *supra* note 137 at para 70.

[182] *Bridging the Cultural Divide*, *supra* note 103 at 265.

[183] *Lovelace*, *supra* note 128 at paras 15–17.

[184] *UNDRIP*, *supra* note 93, arts 1, 3, 35, 46(2)–(3).

# STEAMPUNK LIABILITY: CONSPIRACY TO HARM AND THE DIVERSITY OF LEGAL TRADITIONS WITHIN THE COMMON LAW OF TORTS

**Greg Bowley***

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**Abstract**

The tort of conspiracy to harm, which assigns liability expressly on the basis of the defendants' malicious motive, continues its anomalous existence, having outlived repeated unsuccessful attempts by senior common law courts to explain and justify its operation. Part I of this paper offers an overview of conspiracy to harm jurisprudence from its modern birth in *Mogul Steamship* to *Lonrho*. Part II argues that, despite efforts to develop justifications for the tort's existence over the last century, conspiracy to harm has been expressly recognized for the last four decades as both unjustifiable and an immovable fixture of Anglo-Canadian tort law. This understanding had, until recently, discouraged extension of the tort's anomalous principles of liability to other areas of English tort law. Part III considers a consequent shift in conspiracy to harm jurisprudence which has extended the tort's anomalous principles to unlawful means conspiracy, a superficially similar, but substantially distinct, tort. Part IV suggests the possibility that, rather than an inexplicable anomaly, conspiracy to harm might more accurately be thought of as a legal anachronism, a contemporary tort powered by a distinct body of normative principles left behind by the common law over a century ago. Recognizing that this category of tort liability is, unlike the balance of Anglo-Canadian tort law (and unlawful means conspiracy in particular), anchored in the distinct legal tradition of a different time highlights, and explains, the conceptual singularity of conspiracy to harm. On this understanding, rather than a source of conceptual entropy within the contemporary Anglo-Canadian law of torts, conspiracy to harm is recognized for what it is: a unique vestige of a distinct understanding of interpersonal liability, now all-but-extinct, but preserved within the broader structure of the common law of torts.

## Introduction

Ordinarily, subjective motive or purpose is understood as playing no role in the assignment of private liability at common law. As one commentator put it, "the law focuses exclusively on what the defendant was doing, either using or touching something belonging to another, or damaging something belonging to another in the

course of doing something else."[1] The tort of conspiracy to harm, together with a small number of other tort doctrines,[2] stands out as exceptional in this context. This marginal component of modern Anglo-Canadian tort law assigns liability to concerted conduct that is intended to harm another on the basis of the wrongful motive of the conspirators and that succeeds in doing so. It is, perhaps, the tort's enduring anomalous status that has prompted the House of Lords to make several distinct efforts to explain its existence since the late 19th century. Since 1981, however, it seems to have stopped trying.[3] The acceptance of conspiracy to harm as anomalous and inexplicable has produced two distinct but equally problematic responses. Both responses result from a failure to recognize the distinction between conspiracy to harm and the superficially similar, but theoretically distinct, tort of unlawful means conspiracy. Unlawful means conspiracy assigns liability to all conspirators who have agreed to undertake a course of action harmful to the defendant which is advanced by unlawful means, regardless of their actual purpose in doing so and regardless of how many (or few) of the conspirators actually employ the agreed-upon unlawful means.[4]

The Supreme Court of Canada, in *Canada Cement LaFarge Ltd v B.C. Lightweight Aggregate Ltd*,[5] recognized conspiracy to harm as a "commercial anachronism"[6] of questionable utility, but nonetheless extended its perplexing reliance on wrongful intention to circumstances previously captured by unlawful means conspiracy. Contrast this with England, where Lord Neuberger suggested in *Revenue and Customs Commissioners v Total Network SL*[7] that unlawful means conspiracy should be developed by analogy to the principles of conspiracy to harm. This paper argues that these decisions, both of which will hinder the future principled development of unlawful means conspiracy through inappropriate linkage to conspiracy to harm, flow from a widespread failure to recognize conspiracy to harm

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[1] Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016) at 159.

[2] This tort is variously labelled lawful means conspiracy, conspiracy to injure, predominant purpose conspiracy, and, in the occasional Canadian case, conspiracy to harm. See *Roman Corp v Hudson's Bay Oil and Gas Co*, [1973] SCR 820, 36 DLR (3d) 413. For conceptual clarity, this paper favours the last of these. Other torts sharing this exceptional corner of the common law of torts include, *inter alia*, malicious falsehood, private nuisance (of the sort described in *Hollywood Silver Fox Farm v Emmett*, [1936] 2 KB 468, 1 AII ER 825, slander to title, and, in the author's view, the defamation torts.

[3] See *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)*, [1982] AC 173, 2 AII ER 456 [*Lonrho*].

[4] *Lonrho Plc v Fayed*, [1992] 1 AC 448 at 465–466, 3 AII ER 303 [*Fayed*].

[5] [1983] 1 SCR 452, 145 DLR (3d) 385 [*LaFarge*].

[6] *Ibid* at 473.

[7] [2008] UKHL 19, 1 AC 1174 [*Total Network*].

for what it is—a doctrinal remnant of a distinct understanding of justifiable interpersonal conduct.

While conspiracy to harm is, at this point, an entrenched anomaly in Anglo-Canadian tort law, this paper argues that it should not be seen as having no intelligible normative content. Rather, conspiracy to harm is, I suggest, a contemporary manifestation of a long-abandoned general principle of liability for the intentional infliction of harm.[8] Judicial attempts to offer substantive explanations for the existence of this doctrine have, on the contrary, ignored legally significant motive as a possible explanation for the tort's existence and operation. On those occasions in which courts have tried to justify the tort's imposition of liability, the focus has been almost exclusively on the fact that, in conspiracy to harm, the wrongfulness of any particular conduct may turn exclusively on the fact that it was undertaken in concert rather than singly. This focus on the role of combination in the tort's assignment of liability has created a circumstance in which combination is considered to be the *only* salient structural aspect of conspiracy to harm, paving the way for the drawing of inappropriate linkages with conspiracy to use unlawful means in *LaFarge* and *Total Network* solely on the basis that both torts impose liability on the basis of concerted conduct.

The argument presented here is advanced as follows: Part I provides an overview of the tort of conspiracy to harm through the House of Lords' "famous trilogy,"[9] *Mogul Steamship Co Ltd v McGregor, Gow, & Co*,[10] *Allen v Flood*,[11] and *Quinn v Leathem*.[12] These decisions have been characterized by the House of Lords as standing, collectively, for the propositions that 1) a combination of two or more persons to wilfully harm another is unlawful and, if it results in harm to that person, is actionable, and 2) if the real purpose of the combination is not to harm another, but to forward or defend the lawful interests of those who enter into it, then no wrong is committed and no action will lie, although harm to another ensues.[13] This section also briefly recounts the treatment of conspiracy to harm by the House of Lords in the milestone decisions in *Sorrell*, *Lonrho*, and *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*.[14] Part II examines the various explanatory efforts of the House of Lords in Part I, and evaluates the explanatory capacity of the two primary justificatory theories advanced in that jurisprudence, both of which flow from the tort's focus on concerted

[8] As the analysis below illustrates, the relationship between motive and intention in conspiracy to harm has been a muddy one. For the most part, it seems, the tort has come to rest on a presumption that intentional harmful conduct springs from an improper motive of some sort, placing the onus upon the defendants to prove that they acted on a proper motive.

[9] *Sorrell v Smith*, [1925] AC 700 at 712 [*Sorrell*].

[10] [1892] AC 25 [*Mogul Steamship*].

[11] [1898] AC 1, 62 JP 595 [*Allen*].

[12] [1901] AC 495, 65 JP 708 [*Quinn*].

[13] *Sorrell*, *supra* note 9.

[14] [1942] AC 435, 1 AII ER 142 [*Crofter*].

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conduct. This analysis suggests that the unanimous decision in *Lonrho* that conspiracy to harm was both inexplicable and immovable paved the way for judicial missteps in both England and Canada. Part III focuses on the Supreme Court of Canada's decision in *LaFarge*, in which Estey J united the two conspiracy torts, the effect of which has been to incorporate an incongruous motive requirement into the tort of conspiracy to use unlawful means. It also explores the House of Lords' decision in *Total Network*, in which Lord Neuberger used conspiracy to harm as the analogical basis for an extension in the scope of the still-independent English tort of unlawful means conspiracy. Part IV responds to the apparent conceptual emptiness of conspiracy to harm, offering an analysis that takes seriously the role played by motive in the assignment of liability for conspiracy to harm in *Mogul Steamship*. This analysis suggests that, at its outset, the tort arose from a now-abandoned understanding of intentionally inflicted harm without just cause or excuse as wrongful in *all* contexts, whether undertaken alone or in concert with others. This position has, of course, been eroded since the House of Lords decided *Mogul Steamship* thirteen decades ago, particularly with the decisions in *The Mayor of Bradford v Pickles*[15] and *Allen*, but there is nonetheless good reason to view conspiracy to harm, on this basis, as a relic of a distinct normative order rather than an inexplicable or arbitrary singularity.

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Conspiracy to harm, on this analysis, remains an abnormal basis of liability in Anglo-Canadian tort law. As a descendant of a distinct understanding of interpersonal liability foreclosed in *Allen* just five years after *Mogul Steamship*, conspiracy to harm is, I suggest, a kind of steampunk liability,[16] a vestige of a distinct form of English private ordering that has, for the most part, disappeared.[17] While difficult to reconcile with contemporary understandings of Anglo-Canadian tort liability, it is nonetheless explicable as a component of a system of private ordering that no longer exists beyond a small collection of obscure tort doctrines. Understanding conspiracy to harm as a vestige of a distinct normative tradition should discourage future efforts to close so-called 'liability gaps' between this anomalous tort and the balance of the contemporary Anglo-Canadian law of torts, the inevitable product of which would be (even more) incoherent, unprincipled, and unjustifiable limitations on interpersonal conduct.

It bears noting, at the outset, that the account below is not an attempt to justify, in a theoretical sense, the continued presence of conspiracy to harm amongst Canadian tort doctrines. Rather, it seeks to explain the tort's existence as a basis of liability in a way that permits, and even demands, such a justification. So long as

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[15] [1895] UKHL 1, [1895] AC 587 [*Pickles*].

[16] "Steampunk," in this context, refers to a contemporary genre of science fiction literature, art, and fashion combining historical and anachronistic technology and aesthetics (typified by, *inter alia*, advanced applications of steam locomotion, clockwork mechanisms, and a ubiquity of goggles, gears, and sprockets) to portray a fictional "future that never was."

[17] Although some have suggested that the time of motive-actuated liability is yet to come. See e.g. GHL Fridman, "Malice in the Law of Torts" (1958) 21 Mod L Rev 484, and Greg Bowley, "Waiting for *Donoghue*: Malice in the Law of Torts, Six Decades On" (2019) 93 SCLR 2 at 203.

conspiracy to harm retains its long-standing categorization as an inexplicable source of tort liability, the necessity of theorizing the liability it imposes is not obvious. Having made the case for conspiracy to harm as, in some way, principled, this paper leaves for the future (or for others) the task of identifying how, precisely, liability for conspiracy to harm can be theoretically reconciled with the balance of the common law of torts.

## I: Nine Decades Later, No Further Ahead

The starting point of this paper is the shifting explanations offered by the House of Lords for the existence of conspiracy to harm over the last century. As illustrated below, these explanations have been derived primarily from the tort's treatment of concerted conduct. This section first reviews the three foundational cases of conspiracy to harm: *Mogul Steamship*, *Allen*, and *Quinn*. It then analyzes three subsequent decisions of the House of Lords: *Sorrell*, *Crofter*, and *Lonrho*. The treatment of each of these cases emphasizes the ways in which these courts have sought to explain and justify conspiracy to harm's anomalous existence. As such, Part I focusses on how each of these decisions treated the roles of the tort's two most salient features, concerted conduct and subjective motive. Part II will provide an integrated analysis of these explanatory efforts.

By 1843, liability for concerted harmful malevolence by otherwise lawful means had been recognized in *Gregory v Duke of Brunswick*,[18] however most conspiracy to harm jurisprudence flows from the 1892 decision of the House of Lords in *Mogul Steamship*. The plaintiff in *Mogul Steamship*, a shipping line, was the victim of a trade protection scheme organized by the defendants, its competitors in the Chinese tea trade. The defendants, through a cartel arrangement, offered price incentives to those making exclusive use of their freight services from two Chinese tea ports, and leveraged their pooled freight capacity to ensure that no competing vessel calling at either port could obtain profitable freights. The intended effect of the cartel's combined action was to make any competing service so financially unattractive as to compel a choice between carrying tea to Europe at a loss and transporting no cargo at all.

Although the House of Lords unanimously concluded that concerted conduct undertaken for the purpose of causing harm to another would be wrong even if the conduct through which that harm was inflicted would ordinarily be lawful, no liability was found on the facts. The decision of the House of Lords closely tracked Bowen

[18] [1844] 134 ER 1178 [*Gregory*]. The appropriateness of tracing the lineage of conspiracy to harm to *Gregory* has been challenged by Newark, but his objection to this treatment was simply that conspiracy played no role in making the conduct of the conspirators wrongful – "[t]o hoot as an expression of malevolence towards an actor for reasons unconnected with the performance is actionable. For two or more to conspire to hoot is clear evidence that the subsequent hooting is not a spontaneous expression of a judgment but the result of a pre-arranged demonstration of malevolence. Each conspirator is liable, not because he conspired, but because he has proved his malice." See FH Newark, "*Gregory v Duke of Brunswick* Re-Examined" (1959) 1 U Mal L Rev 111 at 119.

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LJ's opinion in the Court of Appeal, which was expressly approved by Lords Watson, Morris, and Field, and stipulated that "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."[19] This was the primary distinction between the facts in *Mogul Steamship* and earlier decisions such as *Gregory*; while the defendants in *Gregory* had acted for no reason other than to cause the plaintiff harm, the defendants in *Mogul Steamship* were found to have acted exclusively to advance their own commercial interests. A commercial motive such as that which motivated the cartel's conduct was sufficient, in Bowen LJ's mind, to justify their intentional infliction of harm upon the plaintiff.[20]

Only five years after the House of Lords' decision in *Mogul Steamship*, the decision in *Allen* rendered conspiracy to harm the conceptual oddity it now is. In *Allen*, the defendant, a trade union representative, was found by the jury to have maliciously and intentionally caused harm to the plaintiffs by communicating to the plaintiffs' employer that union members employed at the same location would decline work unless the plaintiffs, members of a different trade union who had previously performed work reserved for the defendant's trade union, were dismissed. Importantly, none of the employees in *Allen* worked pursuant to ongoing contracts; all were retained on a day-to-day basis, and, as such, could rightfully depart, or be dismissed from, their positions at the conclusion of any workday without any breach of contract. The action in *Allen* arose when the plaintiffs were dismissed in response to the demands communicated by the defendant.

Lord Watson, whose opinion in *Allen* was later described as representing "the views of the majority better far than any other single judgment delivered in the case,"[21] stated that "the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due."[22] Therefore, the defendant's communication of his members' resolve to their employer could not become wrongful merely because it was done for the sole purpose of causing harm to the plaintiffs. While this was certainly the crux of the position taken by the majority in *Allen*, it also stands in sharp contrast to the basis of liability previously outlined by a unanimous panel of the House of Lords in *Mogul Steamship*, the majority of whom (including Lord Watson) later heard the appeal in *Allen*. Importantly, several members of the majority in *Allen* expressly excluded circumstances of concerted conduct from their opinions, leaving some doubt as to the status of the tort previously considered by the House of Lords in *Mogul Steamship*.

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[19] *Mogul Steamship Co v McGregor, Gow, & Co*, [1889] 23 QBD 598, 53 JP 709 at 613 [*Mogul Steamship 1889*]. Bowen LJ's reasons in *Mogul Steamship* have gone on to form the basis of the so-called "prima facie tort" in American law, which has been characterized as a tort that "acknowledges a general right not to be intentionally harmed." See Geri Shapiro, "The Prima Facie Tort Doctrine: Acknowledging the Need for Judicial Scrutiny of Malice" (1983) 63:4 BUL Rev 1101 at 1114.

[20] *Mogul Steamship 1889*, *supra* note 19 at 614–15.

[21] *Quinn*, *supra* note 12 at 509.

[22] *Allen*, *supra* note 11 at 92.

Just over three years after the decision in *Allen*, the third case of "the famous trilogy"[23] came before the House of Lords. Unlike *Allen*, where the defendant trade union representative had acted alone, the defendants in *Quinn* were found to have acted in combination solely to cause harm to the plaintiff.[24] Notwithstanding the *Quinn* panel's extensive familiarity with the decisions in *Mogul Steamship* and *Allen*,[25] the meaning of *Quinn* is difficult to discern.[26] Of the six members of the *Quinn* panel, three (Lords Macnaghten, Robertson, and Lindley) thought the Court of Appeal's decision in *Temperton v Russell*[27] had determined that liability would arise from conspiracies to cause harm by lawful means, while the other three (Lords Shand and Brampton and Lord Halsbury LC) did not mention that decision. In fact, the Lord Chancellor had mentioned only one authority, *Allen*, and only to say that it did not apply to the facts in *Quinn*.[28] Lord Shand mentioned only *Allen*, which he distinguished, and *Mogul Steamship*, which he thought expressed the applicable law.[29] Lord Brampton seems to have found liability on two distinct bases: the first, derived from *Mogul Steamship*, involved interference with a general right of all to "trade upon what terms they will," while the second consisted of harms arising from unlawful conspiracies.[30] Suffice it to say, *Quinn* is probably authority for the continued existence of the tort discussed in *Mogul Steamship* after the decision in *Allen*, but not for more.

The House of Lords' first effort to distil the jurisprudential meaning of the trilogy came in *Sorrell*. The most interesting aspect of *Sorrell*, for the purpose of this paper, is the disagreement among the members of the panel as to the respective roles of motive and combination in conspiracy to harm. Viscount Cave LC and Lord Atkinson, for example, acknowledged that liability for conspiracy to harm arose from the wilful and knowing infliction of harm, but denied that either subjective spite or the

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[23] *Sorrell*, *supra* note 9 at 712.

[24] *Quinn*, *supra* note 12 at 521-22.

[25] The overlap among the judges who decided the trilogy is noteworthy. The nine-member *Allen* panel included four of the seven members of the *Mogul Steamship* panel. The *Quinn* panel of six judges included three members of the *Allen* panel, two of whom had also heard *Mogul Steamship*. Another member of the *Quinn* panel, Lord Brampton, had been (as Hawkins J) one of the eight High Court Justices summoned to assist the House of Lords in *Allen*. Lord Davey, who read three of the opinions in *Quinn* (without, apparently, rendering one of his own [See *Total Network*, *supra* note 7 at para 72]), had both been a member of the *Allen* panel and represented the defendants in *Mogul Steamship* at the House of Lords. Lord James, another member of the *Allen* panel, had represented the plaintiff in *Mogul Steamship* at the House of Lords.

[26] Lord Walker, in his opinion in *Total Network*, *supra* note 7 at para 73, felt justified in suggesting that "[t]he House [of Lord]s' anxiety to explain why *Allen v Flood* was not in point makes it quite difficult to discern what *Quinn v Leathem* did decide."

[27] [1893] 1 QB 715, 57 JP 676 [*Temperton*].

[28] *Quinn*, *supra* note 12 at 506.

[29] *Ibid* at 513.

[30] *Ibid* at 525 and 531.

fact of combined conduct were prerequisites of this kind of liability.[31] Lord Dunedin, with whom Lord Buckmaster broadly agreed, thought concerted conduct to be an essential element of the tort, as civil liability of this sort arose, in his mind, from the criminal prohibition of conspiracies. Motive was, on this analysis, relevant to the assignment of liability to the extent that *mens rea* would be an essential component of a criminal conspiracy.[32] Lord Buckmaster's preferred approach would, he noted, shift the burden of proof from the defendants to the plaintiff, such that concerted harmful conduct would give rise to liability only where the plaintiff could prove it to have been spiteful and maliciously inflicted, rather than requiring defendants to make out a defence of self-interest.[33] In Lord Sumner's view, the only possible explanation for how a defence of self-interest (of the sort that had been determinative in *Mogul Steamship*) could prevent imposition of the kind of liability found in *Quinn* was that the intentional infliction of harm was, in a legally significant sense, unavoidably the product of malice or selfishness.[34] The only way that self-interest could justify the intentional infliction of harm, Lord Sumner suggested, would be if the malicious infliction of harm was unjustifiable. Lord Sumner concluded that motive, in this sense, played an obviously crucial role, but the role of combination was not as obvious: "[w]hatever part combination may really play in the decision of *Quinn v Leathem*, I hesitate to say that this element alone would have sustained the verdict in the absence of evidence of actual illwill."[35]

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By the time the House of Lords decided *Crofter* in 1941, England's most senior jurists were evidently becoming comfortable with conspiracy to harm as an inexplicable fixture in English tort law. While each of Viscount Simon LC,[36] Viscount Maugham, Lord Wright, and Lord Porter[37] thought that there was something uniquely wrongful about harm intentionally inflicted through concerted conduct, none offered a clear explanation of the nature of that unique wrongfulness. Each of Lord Wright, Lord Porter, and the Lord Chancellor referred to the same two competing explanations of the wrongfulness of combinations, being the oppressive potential of concerted conduct and the historical criminality of conspiracies, but none took a definitive stance on the issue. Viscount Maugham also alluded to combinations as potentially oppressive, but similarly refrained from offering a definitive justification for the tort's existence. Remarkably, Lord Wright found himself able to confidently state that "it is

[31] *Sorrell*, *supra* note 9 at 714.

[32] *Ibid* at 725–26.

[33] *Ibid* at 748. It is, however, worth noting that Lord Buckmaster thought such a shift in onus would nonetheless reach "the same goal" as did the reverse onus, albeit by "another path."

[34] Or, as Lord Sumner noted derisively, "mere irresponsible wantonness" (*ibid* at 739).

[35] *Ibid* at 741.

[36] Who had, together with Viscount Maugham, represented the appellant in *Quinn.*

[37] The rather cursory reasons provided by Lord Thankerton, the fifth member of the panel in *Crofter* (and whose father, Lord Watson, had been a member of the panels in both *Mogul Steamship* and *Allen*), made no effort to explain or justify conspiracy to harm as a basis of tort liability.

in the fact of the conspiracy that the unlawfulness [of a conspiracy to harm] resides,"[38] but was unable to specify the nature of that unlawfulness, accepting that "[w]hatever the moral or logical or sociological justification, the rule is as well established in English law as I here take to be the rule that motive is immaterial in regard to the lawful act of an individual."[39]

By 1981, it seems, no appetite remained for suggestions that the tort of conspiracy to harm must rest on some principled basis. In *Lonrho*, the House of Lords was asked to determine whether a combination to perform an unlawful, but not tortious, act harmful to the plaintiff could give rise to liability in conspiracy to harm in the absence of a shared intention to cause harm to the plaintiff. In other words, could the *unlawfulness* of conduct not intended to cause harm to the plaintiff stand in for the traditional requirement of an intention to cause harm? Speaking for a unanimous panel, Lord Diplock identified the fact of concerted conduct as the single aspect of conspiracy to harm requiring explanation, wondering "[w]hy should an act which causes economic loss to A but is not actionable at his suit if done by B alone become actionable because B did it pursuant to an agreement between B and C?"[40] Despite the express invitation to opine on the role of motive in the tort's assignment of liability, Lord Diplock demurred, preferring to frame his reasons around another consideration: coherence.

Identifying conspiracy to harm as a "highly anomalous cause of action,"[41] that was "too well-established to be discarded however anomalous it may seem today,"[42] Lord Diplock indicated that he viewed his choice as between the extension of an anomalous principle of liability to novel circumstance and confining it "to the narrow field to which alone it has an established claim."[43] Following the decisions of the Court of Appeal and Parker J, Lord Diplock "unhesitatingly" opted for the latter course, refraining from extending "this already anomalous tort beyond those narrow limits that are all that common sense and the application of legal logic of the decided cases require."[44] In doing so, Lord Diplock recognized that, while he could not excise the anomalous principles of liability embedded in conspiracy to harm from the common law, he need not be the catalyst of its extension.

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[38] *Crofter*, *supra* note 14 at 462.

[39] *Ibid* at 468. Lord Porter found himself in a similar position; after an inconclusive review of several potential explanations for the existence of conspiracy to harm, he simply noted at 489 that "[i]n any case it is undoubted law."

[40] *Lonrho*, *supra* note 3 at 188.

[41] *Ibid*.

[42] *Ibid* at 189.

[43] *Ibid*.

[44] *Ibid*.

It should be noted at this point that, while the decision in *Lonrho* dealt exclusively with the tort of conspiracy to harm, and not unlawful means conspiracy, Lord Diplock's reasons reflect a regrettable looseness in language, the result of which was a decade of confusion as to whether the latter tort existed at all. The decision in *Lonrho* has been described as appearing to eliminate the possibility of such liability for the concerted use of unlawful means by requiring *all* civil liability for conspiracy to flow exclusively from an intent to inflict harm upon the plaintiff. [45] While this state of confusion seems to require a very strict (and, with respect, non-contextual) reading of Lord Diplock's declaration of opposition to "extending the scope of civil tort of conspiracy [*sic*] beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff,"[46] the immediate post-*Lonrho* environment seemed to be one in which the existence of two distinct conspiracy torts was, for the first time since *Allen*, in doubt. And, although the place of unlawful means conspiracy in English law would subsequently be confirmed by the House of Lords in *Lonrho plc v Fayed*,[47] it was in the conceptual haze of the period immediately after *Lonrho* that the Supreme Court of Canada took up the issue in *LaFarge*.

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## II: Conspiracy Theories

As Part I above illustrates, most efforts to explain and justify the existence of conspiracy to harm as a basis of private liability have focussed on concerted conduct as the source of the tort's anomalous character. The most striking feature of conspiracy to harm, in this respect, is typically identified as the fact that it renders wrongful concerted conduct which, if undertaken by a single actor, would be rightful. Broadly put, the efforts to explain this phenomenon have focused on two putative justifications, the "oppressive combination" justification and the "criminal conspiracy" justification. *Mogul Steamship* seems to be the anchor point for what is referred to here as the "oppressive combination" justification for conspiracy to harm. Lord Hannen's reasons in *Mogul Steamship*, for example, suggested that there were "some forms of injury which can only be effected by the combination of many."[48] Lord Bramwell also made reference to this explanation, indicating that "a man may encounter the acts of a single person, yet not be fairly matched against several."[49] The oppressive combination justification was later echoed, *inter alia*, in the reasons of Lord Macnaghten in *Allen*[50]

[45] Trevor Guy & Daniel Del Gobbo, "Understanding the Anomalous: The Law of Civil Conspiracy" (2013) 42:1-2 Adv Q 143 at 148.

[46] *Lonrho*, *supra* note 3 at 189.

[47] *Fayed*, *supra* note 4.

[48] *Mogul Steamship*, *supra* note 10 at 60.

[49] *Ibid* at 45.

[50] *Allen*, *supra* note 11 at 153.

and *Quinn*,[51] Lords Brampton[52] and Lindley[53] in *Quinn*, Lord Dunedin in *Sorrell*,[54] and Viscount Maugham[55] in *Crofter*.

The oppressive combination justification for the tort of conspiracy to harm seems to suggest that the tort is grounded in a unique (from a private law perspective) kind of wrongfulness made possible only by concerted conduct. It attempts to look behind the mere existence of the cause of action to one of its distinguishing elements—combination—and proposes a justification for the assignment of liability on that basis. According to this explanation, combined conduct attracts liability where individual conduct does not because the concerted efforts of a multitude cannot be met on an equal footing by their solitary target. It is not, in other words, a fair fight, and those who act in combination against another do not merely compete with their target. By force of numbers, rather than by skill, ability, or merit, they seek to dominate, compel, and overwhelm. Bluntly, they cheat, and, through the assignment of liability in conspiracy to harm, they are held responsible.

Liability arising from unlawful combination is characterized, on this view, as reflective of the defendants' misconduct in their treatment of the plaintiff. This characterization is not, however, without shortcomings. Most obviously, it presents concerted conduct as wrongful without ever truly explaining the private law right of the plaintiff that it is understood to interfere with, that, by necessity, can *only* be interfered with by multiple actors working in concert. The closest the House of Lords has ever come to identifying the private law right interfered with by an oppressive combination was in *Crofter*, where Lord Wright unhelpfully characterized the right in issue in an action for conspiracy to harm as "that [the plaintiff] should not be damnified by a conspiracy to injure him."[56]

Notwithstanding the fact that the oppressive combination justification received sustained and consistent jurisprudential support at the House of Lords, it has proven inadequate in the context of broader trends in the industrialized world towards domination by corporate behemoths which, though single legal persons, wield private economic clout of a kind almost unimaginable at the turn of the 20th century. By the time *Crofter* was decided in 1941, the oppressive combination justification had

[51] *Quinn*, *supra* note 12 at 511.

[52] *Ibid* at 530-31.

[53] *Ibid* at 538.

[54] *Sorrell*, *supra* note 9 at 717.

[55] *Crofter*, *supra* note 14 at 448.

[56] *Ibid* at 462.

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attracted serious doubts; each of Viscount Simon LC[57] and Lords Wright[58] and Porter[59] considered it unsatisfactory. Four decades later in *Lonrho*, Lord Diplock, on behalf of a unanimous panel, dismissed it as entirely incompatible with contemporary economic patterns and relations.[60]

The other explanatory effort advanced in relation to the existence of the tort of conspiracy to harm also had its roots in *Mogul Steamship*. In contrast to the oppressive combination justification, this second explanation took a more formal approach, asserting that concerted conduct produced liability because the common law had always viewed conspiracies as criminal. The civil liability produced by conspiracy to harm, on this "criminal conspiracy" analysis, is parasitic upon the unlawfulness inherent in criminal prohibition, rather than a product of purely private law considerations. Lord Bramwell, for example, suggested that acts could be lawful if performed by an individual but unlawful if performed by several because "the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes […]; while if done by several it is sufficiently important to be treated as a crime."[61] In the years after *Mogul Steamship*, the criminal conspiracy explanation of conspiracy to harm found support in Lord Brampton's reasons in *Quinn*[62] and Lord Dunedin's reasons in *Sorrell*.[63] In *Crofter*, Viscount Simon LC suggested the possibility that liability of this sort had originated in the criminal prohibition of conspiracies which had taken root in the common law after the abolition of the Court of Star Chamber.[64]

In contrast to oppressive combination, the criminal conspiracy justification simply identifies the existence of precedent (the common law's criminal jurisprudence on conspiracy) that supports the doctrine in issue (that criminal conspiracies produce private liability for any losses they cause) and justifies the existence of the private law rule through the existence of that precedent. No serious efforts are made to look behind the jurisprudence upon which the rule relies for its existence to determine the reason for *its* existence, or to evaluate whether its application to the facts of any particular case would be in keeping with the underlying rationale of the rule. In the specific context of conspiracy to harm, this understanding of the criminal conspiracy justification is borne out; each judge in the decisions described in Part I who relied on

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[57] *Ibid* at 443.

[58] *Ibid* at 467-68.

[59] *Ibid* at 487–88.

[60] *Lonrho*, *supra* note 3 at 189.

[61] *Mogul Steamship*, *supra* note 10 at 45.

[62] *Quinn*, *supra* note 12 at 530.

[63] *Sorrell*, *supra* note 9 at 725.

[64] *Crofter*, *supra* note 14 at 443–44. Lord Porter, on the other hand, considered that there was good reason to doubt whether conspiracies to injure had ever constituted criminal conspiracies at common law (*ibid* at 488).

the existence of a common law criminal prohibition of conspiracy to justify the existence of tort liability arising from conspiracies to harm simply offered that fact, and precedents to that effect, as sufficient justification for the imposition of civil liability on the same basis. At no point did any inquire into the reasons for the common law criminal prohibition of concerted conduct.

By the time *Lonrho* was decided in 1981, enthusiasm for attempts to explain or justify the continued existence of conspiracy to harm seems to have waned. In *Lonrho*, Lord Diplock accepted the existence of conspiracy to harm not only as an anomalous ground of liability, but as an expressly *inexplicable* anomalous ground of liability:

> The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today.[65]

As noted above, Lord Diplock recognized conspiracy to harm as an unjustifiable and anomalous ground of liability in the context of contemporary tort law, and rejected any invitation to extend its principles into new areas.[66] Lord Diplock's concession that no sound justification existed for liability for conspiracy to harm marked a transition to a period in which any pretence to substantively justifying the tort's continued existence and application to the conduct of those subject to it was abandoned. Lord Diplock's decision in *Lonrho* to abandon efforts to explain the tort's existence is, on this analysis, a shift away from those earlier bases of justification into a third approach, in which the tort's continued existence is justified by precedent alone. For Lord Diplock, the tort of conspiracy to harm constituted a valid tort and incorporated the elements that it did simply because prior courts had said so. This strictly formal approach to the tort, I suggest, has discouraged subsequent efforts to understand conspiracy to harm, and has had the effect of downplaying conceptual problems posed by its anomalous nature.

If, as I suggest above, the decision in *Lonrho* represents the beginning of a distinct and regrettable approach to the struggle to explain conspiracy to harm, Estey J's decision in *LaFarge* and Lord Neuberger's reasons in *Total Network*, considered below, can be viewed as the logical product of that approach. While Lord Diplock may have accepted the unjustifiable existence of conspiracy to harm in *Lonrho*, he at least recognized the significance of doing so: conspiracy to harm assigned liability to conduct in circumstances in which doing so could not be justified. On this basis, Lord Diplock refused to extend that unjustifiable form of liability to any factual context beyond the strict requirements of existing jurisprudence. As Part III below demonstrates, Canadian and English law have extracted very different conclusions

[65] *Lonrho*, *supra* note 3 at 189.

[66] *Ibid.*

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from Lord Diplock's reasons in *Lonrho*, yet have ended up in remarkably similar (and equally concerning) positions.

## III: Diverging Treatment, Dubious Outcomes

Parts I and II of this paper have, respectively, outlined the jurisprudential treatment of conspiracy to harm from *Mogul Steamship* to *Lonrho*, and analyzed the legal reasons provided therein for the existence of this singular kind of liability. This part examines the decisions of the Supreme Court of Canada in *LaFarge* and the House of Lords in *Total Network*, and the diverging paths taken by those courts as a result of Lord Diplock's conclusion that conspiracy to harm, in 1981, was entrenched anomalous liability.

Both *LaFarge* and *Total Network* presented opportunities to confuse the torts of conspiracy to harm and conspiracy to use unlawful means. Unlawful means conspiracy assigns liability to all conspirators who have agreed to undertake a course of action harmful to the defendant which is advanced by unlawful means, regardless of their purpose in doing so and regardless of how many (or few) of the conspirators actually employ the unlawful means. As noted in Part I above, Lord Diplock's reasons in *Lonrho* had set the stage for a period of uncertainty as to whether or not the latter tort existed at all, leaving some[67] under the impression that a predominant purpose to cause harm to the defendant was an essential prerequisite of all civil liability flowing from concerted conduct. In both *LaFarge* and *Total Network*, the challenge of differentiating between two torts focussing on concerted conduct proved to be insurmountable.

Unlike the decision in *Lonrho*, which focused on the scope of liability for conspiracy to harm, the Supreme Court expressly considered a somewhat broader question. In *LaFarge*, the plaintiff sought damages for business losses suffered as a result of the defendant's participation in a conspiracy to coordinate the British Columbia market for lightweight concrete aggregate. The defendant had previously pleaded guilty to a conspiracy charge brought pursuant to s. 32(1)(c) of the *Combines Investigation Act*.[68] Rather than determining only whether a combination to perform this unlawful (but not tortious) act harmful to the plaintiff could give rise to liability in conspiracy to harm in the absence of a shared intention to cause harm to the plaintiff, Estey J's decision in *LaFarge* also considered "whether there is a second tort of conspiracy 'to perform an unlawful act', in addition to the long-existing tort of conspiracy to injure."[69] Having reviewed the jurisprudence, Estey J found himself, on one hand, persuaded by Lord Diplock's reasons in *Lonrho*, including the apparent stipulation of an intent to cause harm as a prerequisite for liability in civil conspiracy,

[67] See e.g. *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*, [1990] 1 QB 391, [1989] 3 AII ER 14.

[68] RSC 1970, c C-23.

[69] *LaFarge*, *supra* note 5 at 456.

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while, on the other, persuaded by substantial jurisprudential and scholarly authorities to the effect that civil liability could, in fact, arise in the context of a conspiracy to use unlawful means. Attempting to reconcile these competing positions, Estey J determined *LaFarge* on the basis of the following oft-quoted statement of law:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> 1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
> 2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.[70]

Estey J stipulated that, in the context of the second branch of what he described as the "tort of conspiracy," the knowledge requirement amounted to what he described as "constructive intent" on the part of the combiners to cause harm to the plaintiff.[71] Therefore, rather than recognize a "second tort" of conspiracy to use unlawful means (the existence of which has been repeatedly confirmed in English law[72]), the Supreme Court in *LaFarge* expressly recognized *all* civil liability in conspiracy as flowing from the intention, either actual or constructive, of the conspirators to cause harm, expanding the scope of what had previously been the tort of conspiracy to harm to capture both the previously-independent tort of unlawful means conspiracy as well as concerted unlawful conduct undertaken without an express intention to cause harm to the plaintiff.[73]

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[70] *Ibid* at 471–72.

[71] *Ibid* at 472.

[72] See *Rookes v Barnard*, [1964] AC 1129, [1964] 1 AII ER 367 [*Rookes*]; *Fayed*, *supra* note 4; *Total Network*, *supra* note 7.

[73] The formula set out by Estey J in *LaFarge* was subsequently confirmed as the basis of the "current state of the law in Canada with respect to the tort of conspiracy" in *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 986, 74 DLR (4th) 321 [*Hunt*]. As *Hunt* considered a motion to strike, Wilson J indicated, at 986, that she did not consider it "appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy." That said, Estey J's formulation has undoubtedly contributed to a novel approach to unlawful means conspiracies amongst Canadian judges. See e.g. *Agribrands Purina Canada Inc v Kasamekas*, 2011 ONCA 460 [*Agribrands*], where Goudge JA characterized the second branch of Estey J's "tort of conspiracy" as "the tort of unlawful conduct conspiracy", a label which ignores the fact that unlawful means are also captured by the first branch of Estey J's formulation. Goudge JA also characterized "unlawful conduct conspiracy" as requiring for the assignment of liability "unlawful conduct by each conspirator." Goudge JA went on to say that "[t]here is no basis for finding an individual liable for unlawful conduct conspiracy if his or her conduct is lawful or, alternatively, if he or she is the only one of those acting in concert to act unlawfully. The tort is designed to catch unlawful conduct done in concert, not to turn lawful conduct into tortious conduct." (*ibid* at para 28, relying on *Bank of Montreal v Tortora*, 2010 BCCA 139). This characterization is impossible to

The first branch of Estey J's "tort of conspiracy" has come to be labelled "predominant purpose conspiracy, and implicitly recognizes intention as a core aspect of conspiracy to harm liability but does not analyze this recognition in any depth. The expansion of the scope of liability for conspiracy to harm in *LaFarge* should not, however, be taken as an endorsement of its continued place in Canada's law of torts. Like Lord Diplock, Estey J doubted both the utility and justifiability of civil conspiracy liability in the contemporary environment, but nonetheless considered it "too late in the day to uproot the tort of conspiracy to injure from the common law."[74] As such, after the decisions in *Lonrho* and *LaFarge*, the scope of conspiracy to harm liability in England and Canada seems to have been very different, but the continued existence of the tort in both jurisdictions, in which a combination of actors could be held liable for intentionally harmful conduct for which no action would lie against a single actor, was definitively recognized as an unjustifiable and inexplicable anachronism.

Perhaps the most notable aspect of *Total Network*, in this respect, is that it is not a case in which conspiracy to harm was in issue. The significance of *Total Network*, for the purposes of this paper, is that, almost three decades after *Lonrho*, Lord Diplock's caution in handling an anomalous principle of liability had, evidently, fallen out of fashion.

In *Total Network*, the respondent had been the beneficiary of thirteen "carousel" transactions fraudulently targeting the British Value Added Tax (VAT) system. The effect of these complex transactions, put simply, was that Total Network was refunded VAT in relation to transactions in which no VAT had been paid. The Revenue and Customs Commissioners claimed that each of the carousel transactions had constituted an unlawful means conspiracy and sought recovery of the VAT amounts that had been remitted to Total Network. At issue in the House of Lords was whether liability in unlawful means conspiracy could arise in relation to conduct which would not have been independently actionable against any of the conspirators, but which was nevertheless fraudulent in its combined effect. In the course of this determination, four of the five members of the panel discussed conspiracy to harm in their consideration of the proper scope of unlawful means conspiracy, but none offered a justification for its existence.

Lord Hope, in *Total Network*, seems to have agreed with Lord Wright's characterization in *Crofter* that "it is in the fact of the conspiracy that the unlawfulness resides,"[75] but, like Lord Wright, offered no explanation of the nature of that wrongfulness. Lord Scott expressly denied that conspiracy to harm was anomalous at all, crediting its existence, like every other action on the case, to a creeping expansion in English law of factual circumstances recognized as "sufficiently reprehensible" to

reconcile with the decisions of the House of Lords in both *Rookes*, *supra* note 75 and *Total Network*, *supra* note 7, both of which imposed liability on parties in unlawful means conspiracy solely for their participation in conspiracies advanced by the unlawful acts of their co-conspirators, but not their own.

[74] *LaFarge*, *supra* note 5 at 473.

[75] *Total Network*, *supra* note 7 at para 41; *Crofter*, *supra* note 14 at 462.

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justify the imposition of liability.[76] Lord Scott did not, however, explain what it was about concerted conduct intended to cause harm that made it, but not individual conduct of the same sort, "sufficiently reprehensible" to attract liability. Lord Walker, though expressly recognizing the tort as anomalous and noting prior justificatory efforts employing the oppressive combination and criminal conspiracy explanations did not adopt either approach.[77]

Lord Neuberger's reasons in *Total Network* stand apart in their treatment of conspiracy to harm. In the course of discussing whether criminal, non-tortious acts could, when committed in furtherance of a concerted course of conduct, constitute "unlawful means" for the purpose of an allegation of unlawful means conspiracy, Lord Neuberger drew an analogy between the two conspiracy torts:

> […] it appears that the law of tort takes a particularly censorious view where conspiracy is involved. Thus, a claim based on conspiracy to injure can be established even where no unlawful means, let alone any other actionable tort, is involved. That tort is therefore frequently described as anomalous; yet its existence is very well established. Its centrally important feature is that the conspiracy must have as its primary purpose injury to the claimant. my [*sic*] judgment, given the existence of that tort, it would be anomalous if an unlawful means conspiracy could not found a cause of action where, as here, the means "merely" involved a crime, where the loss to the claimant was the obvious and inevitable, indeed in many ways the intended, result of the sole purpose of the conspiracy, and where the crime involved, cheating the revenue, has as its purpose the protection of the victim of the conspiracy.[78]

Dissecting this remarkable passage, the first point of note is that Lord Neuberger clearly acknowledged the fact that conspiracy to harm is "frequently described as anomalous", but this acknowledgement was followed immediately by a recognition that its "existence is very well established."[79] To this point, Lord Neuberger's opinion had not deviated from that given by Lord Diplock over three decades earlier: the tort is anomalous, but law nonetheless, having been recognized as such in binding precedent.[80]

The point of departure between the two was their response to the recognition of the tort's anomalous nature. Recall that Lord Diplock refused to extend anomalous principles beyond the narrowest context compatible with precedent.[81] Lord Neuberger, on the contrary, adopted this anomalous tort as his conceptual anchor, pointing out that

[76] *Total Network*, *supra* note 7 at para 56.

[77] *Ibid* at paras 66 and 77.

[78] *Ibid* at para 221.

[79] *Ibid*.

[80] *Ibid* at para 222.

[81] *Lonrho*, *supra* note 3 at 189.

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it assigned liability for entirely lawful conduct undertaken for the purpose of causing harm.[82] With this conceptual anchor in mind, Lord Neuberger observed that, if another tort arising exclusively from concerted conduct (unlawful means conspiracy) could not produce liability where the means employed constituted "merely"[83] criminal conduct the "obvious and inevitable" result of which would be loss suffered by the plaintiff, it would itself be an anomaly in light of the existence of liability for conspiracy to harm. In other words, having acknowledged the unshakable existence at law of an inexplicable basis of liability, Lord Neuberger thought any 'liability gaps' identified around it could not be tolerated, treating those gaps themselves as problems to be remedied rather than as the product of the existence of the anomalous basis of liability.[84]

It is worth noting in this context that the question at issue in *Total Network*—whether unlawful but individually non-tortious conduct was sufficient to give rise to liability in unlawful means conspiracy—is the precise parallel to that at issue in *Lonrho* in relation to conspiracy to harm. In the earlier decision, Lord Diplock specifically refused to recognize concerted conduct contrary to law, but undertaken without an intent to cause harm, as sufficient to give rise to liability in conspiracy to harm.[85] That Lord Neuberger, in analogizing unlawful means conspiracy to conspiracy to harm, failed to take note of the latter doctrine's own treatment of non-tortious conduct contrary to law is itself remarkable.

It is also worth noting that Canadian courts have, for the most part, followed Estey J's guidance in *LaFarge* as to the potential future role of the tort of conspiracy

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[82] *Total Network*, *supra* note 7 at para 221.

[83] The suggestion being that conduct criminally prohibited is inherently wrongful in all possible senses, a dubious assertion given the sort of morally innocuous conduct presently subject to criminal prohibition. Consider, in the Canadian context, *Criminal Code*, RSC 1985, c C-46, s 250(2), which imposes a criminal prohibition on the facilitation of water skiing by night.

[84] It should be obvious, from Lord Neuberger's comments, that he views conspiracy to harm and conspiracy to use unlawful means as distinct bases of tort liability, rather than two elements of a single "tort of civil conspiracy", a position shared by the author. While this seems to be a point of some dispute, both among the judiciary and the academy, there is no obvious reason to prefer a "single tort" approach to the conspiracy torts over the traditional "two tort" understanding – particularly if one takes the position, as I do, that combination is a normatively insignificant component of both bases of liability. If this is the case, identifying the conspiracy torts as diverging branches of a single tort becomes as nonsensical as grouping all torts which may be accomplished by a person acting alone as "branches" of a single tort – the "battery branch" of the "single actor" tort, for example. As Birks put it, "a classification is flawed if any term at any one level is part of an answer to an alien question, as where 'herbivorous' appears in the division by habitat." To classify tort doctrines by how many actors are required to engage in any particular type of tortious conduct is, in my view, as flawed as including a dietary descriptor in a classification of habitat. See Peter Birks, *Unjust Enrichment*, 2nd ed, (Oxford: Oxford University Press, 2005) at 20.

[85] *Lonrho*, *supra* note 3 at 189.

to harm in Canadian tort law.[86] In *Frame v Smith*,[87] for example, the Supreme Court of Canada considered a motion to strike out a claim in "the tort of conspiracy"[88] in the context of a family dispute. Drawing on *LaFarge*, Wilson J noted that "the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context."[89] Interestingly, Wilson J, with whom the balance of the court agreed on this point,[90] remarked that an extension of liability of this sort into the child custody and access context "would not be consistent with the rationale expressed in *Mogul* [*Steamship*] namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination."[91] This clear appeal to the oppressive combination justification seems out of step with the justificatory evolution noted above, but, for what it is worth, Wilson J herself only seemed to have accepted the validity of this justification for liability in civil conspiracy on a contingent basis. Immediately after the above excerpt, Wilson J noted that the outcome of such a combination (that "[t]he alleged conspiracy by the defendants would be actionable but the same conduct done by the spouse alone would not be actionable"[92]) constituted "differing treatment [of concerted conduct] for no principled reason," leading her "to conclude that this tort should not be extended to the family law context."[93] Despite some confusion, therefore, it seems that, in *Frame*, the Supreme Court was able to follow Estey J's guidance regarding the future expansion of liability for civil conspiracy, recognizing in its anomalous principles something to be limited rather than propagated.

In the English context, however, in light of the opinions in *Total Network*, and Lord Neuberger's in particular, it seems possible that, having failed to offer a compelling combination-oriented explanation for liability arising from the tort of conspiracy to harm, the best that English jurisprudence can offer is a figurative shrugging of shoulders. This conceptual impasse is, it seems, predicated on a collective acceptance that the significance of *Mogul Steamship*, *Allen*, and *Quinn* was that conspiracy to harm exists as a valid ground of liability, but that motive is otherwise irrelevant in tort law. In this vein, Part IV asks, in a limited fashion, whether there might be another way of explaining the existence of this anomalous liability, an

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[86] See *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57; *HMB Holdings Ltd v Replay Resorts Inc*, 2021 BCCA 142; *Reisinger v JC Akin Architect Ltd*, 2017 SKCA 11; *Laboratoires Servier v Apotex Inc*, 2007 FCA 350; *Skybridge Investments Ltd v Metro Motors Ltd*, 2006 BCCA 500; *Sauvé v Canada*, 2011 FCA 141.

[87] *Frame v Smith*, [1987] 2 SCR 99, 42 DLR (4th) 81 [*Frame*].

[88] *Ibid* at 123.

[89] *Ibid* at 124.

[90] *Ibid* at 109.

[91] *Ibid* at 125.

[92] *Ibid.*

[93] *Ibid*.

understanding that would justify maintaining the independent existence, and theoretical segregation, of the two conspiracy torts.

## IV: Modern Malice: Steampunk Liability?

The identification of conspiracy to harm by Lord Diplock as an inexplicable anomaly seems to have permitted the tort to be viewed as conceptually empty: it exists, but its essence and operation need not be given too much thought. In *LaFarge*, as an effort to save liability for conspiracy to use unlawful means from the post-*Lonrho* haze, Estey J grafted it onto conspiracy to harm despite his recognition, in the same decision, that he could not explain why the latter doctrine even *was* a tort. In the context of Lord Neuberger's reasons in *Total Network*, the tort of conspiracy to harm appears assumed to be an unprincipled basis of liability, and therefore available for comparison to other bases of liability on a purely superficial, structural basis. If a tort deals with concerted conduct, on this analysis, it must be relatable somehow to any other tort which addresses similar kinds of conduct.

The purpose here is to suggest another possibility. What if, rather than merely an inexplicable and conceptually empty node of entropy anchored in the common law by precedent alone, the tort today known as conspiracy to harm was recognized as something else, a principled and reasoned articulation of a distinct understanding of liability left behind by the common law over a century ago? What if conspiracy to harm is the private law equivalent of a steam-powered aircraft or a clockwork microprocessor—the technology of over a century ago at work in a contemporary context?

Although the analysis that follows in support of this hypothesis hews closely to the reasons of the judges who decided *Mogul Steamship* at various levels of court, there is some basis upon which to think that the malicious infliction of harm was more broadly viewed as giving rise to liability before the turn of the 20th century. Newark certainly considered this to have been the case.[94] In 1843, Coltman J, in his reasons in *Gregory*, alluded to the possibility that an intent to cause harm could give rise to liability even in the context of a lawful act undertaken singly.[95] Addison, a commentator on common law interpersonal obligations, wrote in 1864 that "every malicious act is wrongful in itself in the eye of the law, and if it causes hurt or damage to another, it is a tort, and may be made the foundation of an action."[96] Similarly, when the House of Lords considered the normative significance of subjective motive in *Allen*, a majority of the eight judges of the High Court summoned to assist seem to

[94] Newark, *supra* note 18.

[95] "It is to be borne in mind that the act of hissing in a public theatre is, *primâ facie*, a lawful act; and even if it should be conceded that such an act, though done without concert with others, if done from a malicious motive, might furnish a ground of action, yet it would be very difficult to infer such a motive from the insulated acts of one person unconnected with others." *Gregory*, *supra* note 18 at 1181.

[96] CG Addison, *Wrongs and their Remedies*, 2nd ed (London: V and R Stevens, Sons, and Haynes, 1864) at 23.

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have shared Addison's view.[97] Although bound by the prior decisions of the House of Lords in *Mogul Steamship* and *Pickles*, each of Hawkins,[98] Cave,[99] North,[100] Wills,[101] Grantham,[102] and Lawrance[103] JJ considered the intentional infliction of harm without just cause or excuse to constitute an actionable wrong. *Mogul Steamship* and *Pickles*, on this analysis, were cases of intentional harm in which just cause or excuse was held to exist in relation to, respectively, conduct in support of one's own self-interest and the exploitation of one's own real property.

Useful insight into the pre-*Allen* state of affairs can be extracted from the opinions of the House of Lords in *Mogul Steamship* itself, wherein, as the analysis below illustrates, numerous members of the panel clearly evaluated the defendants' concerted conduct in two distinct ways. First, they considered whether any of the acts undertaken by members of the cartel had been independently actionable on the basis of their individual conduct, an analysis which points at the tort today identified as unlawful means conspiracy. Second, they considered whether the cartel, in carrying out conduct harmful to the plaintiff, had acted for the purpose of inflicting that harm, the familiar analysis germane to conspiracy to harm. The significance of this two-stage evaluation is that each of these judges considered motive at *each* of these two stages. In other words, each inquired as to whether malicious and harmful *individual* conduct had taken place for the purpose of his unlawful means conspiracy analysis. Such an inquiry could only indicate that the judges in question considered malicious harm to be wrongful and actionable, as Addison and Coltman J evidently had several decades before, whether undertaken singly or in concert.[104]

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[97] As such, *Allen* stands as one of the rare occasions upon which the House of Lords, having summoned the judges of the High Court, disagreed with their opinion. See Van Vechten Veeder, "Advisory Opinions of the Judges of England" (1900) 13 Harv L Rev 358 at 360.

[98] *Allen*, *supra* note 11 at 14. As noted in the text accompanying note 25, Hawkins J was a future member of the *Quinn* panel as Lord Brampton.

[99] *Allen*, *supra* note 11 at 36.

[100] *Ibid* at 42.

[101] *Ibid* at 47.

[102] *Ibid* at 57.

[103] *Ibid* at 58.

[104] Note should be taken, in this context, of John Murphy's recent contention to the effect that the tort of conspiracy to harm in its final, post-*Quinn* form, was in fact the product of a decades-long effort on the part of the English judiciary to "develop tort law so as to moderate the effect of removing criminal responsibility for conspiracy [in the trade union context]." This account stops just short of identifying the recognition of conspiracy to harm in *Mogul Steamship* as instrumental *dicta* intended for subsequent use against trade union activity. The subsequent treatment of *Mogul Steamship* in *Allen* and *Quinn*, Murphy argues, reflects, as much as anything else, "judicial ideological commitments," suggesting that Lord Halsbury LC had undertaken extraordinary efforts to impose liability on the trade unionist defendants in *Allen* and *Quinn*. See John Murphy, "Contemporary Tort Theory and Tort Law's Evolution" (2019) 32:2 Can JL & Jur 413 at 420-22. Harry Arthurs briefly advances a similar position, suggesting that "[t]ort doctrines, such as conspiracy to injure, inducing breach of contract and wrongful interference with economic rights were developed with the transparent purpose of curbing union power." See Harry W Arthurs, "Labour and the "Real" Constitution" (2007) 48:1-2 C de D 43 at 58. Both Murphy and Arthurs,

While Lord Halsbury LC and Lord Watson were ambiguous in their view on the role of motive in assigning liability, others, such as Lords Morris, Bramwell, Field, and Hannen took clearer positions. Lord Morris adopted the reasons of Bowen LJ in their entirety,[105] indicating in his brief opinion that both the object of the cartel and their means of obtaining it had been lawful.[106] With specific reference to the means, Lord Morris first ruled out the occurrence of any acts to disturb existing contracts or inducements to breach them, following which he indicated that the defendants' "action was aimed at making it unlikely that that any one would enter into contracts with the plaintiffs," and that the "use of rhetorical phrases in the correspondence cannot affect the real substance and meaning of [the action in question]."[107] Lord Morris, therefore, was at pains to specifically note that the motive for the means selected by the cartel to achieve their object had been a legitimate one.

Lord Bramwell, at the outset, stipulated that the plaintiffs had not alleged any of what can only be read as a series of bases upon which liability might have arisen, but which were not alleged:

> My Lords, the plaintiffs in this case do not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them.[108]

It seems unlikely that Lord Bramwell intended this passage as an introduction to liability attaching exclusively to concerted conduct, as none of trespass, violence, force, fraud, breach of contract, direct tort or violation of right requires concerted conduct as a prerequisite to liability, and no reference is made in the context of "malice or ill-will" to conduct in combination. Indeed, there is nothing to suggest that Lord Bramwell thought "any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will" was in any way distinct from the other enumerated bases of liability. As such, this passage can be read as a review of possible grounds of *individual* liability which did not arise on the facts in issue, and which could not, as a result, constitute unlawful means employed by the cartel in pursuing their objective. Neither did Lord Bramwell take issue with the accuracy of the authority upon which Lord Esher MR had relied in the Court of Appeal, Erle J's work on *Trade Unions*; rather, he simply disputed whether the cause of action discussed by both Lord Esher MR and Erle J was made out in *Mogul Steamship*:

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therefore, consider conspiracy to harm to be a judicial response to the expanding influence of trade unions, but neither offer an explanation for the appearance of the doctrine well before *Quinn* in the non-trade union context of *Mogul Steamship* (or *Gregory*, for that matter).

[105] *Mogul Steamship*, *supra* note 10 at 51.

[106] *Ibid* at 49-50.

[107] *Ibid* at 50.

[108] *Ibid* at 44.

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> But it is clear that the Master of the Rolls means conduct which would give a cause of action against an individual. He cites Sir William Erle in support of his proposition, who clearly is speaking of acts which would be actionable in an individual, and there is no such act here.[109]

Insomuch as his analysis systematically rejected the possibility that any of the means employed by the cartel could have been considered tortious when undertaken by an individual member of the cartel, and therefore unlawful means for the advancement of its interests, it seems likely that Lord Bramwell thought that a cause of action related to "acts which would be actionable in an individual" of the sort referred to by Lord Esher MR and Erle J existed, but concluded that, as he had stipulated at the outset of his reasons, there was "no such act here."

Lord Field considered the issues in *Mogul Steamship* to have been entirely within the rule set down by Holt CJ in *Keeble v Hickeringill*,[110] which was characterized as standing for the proposition

> … not only that it is not every act causing damage to another in his trade, nor even every intentional act of such damage, which is actionable, but also that acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action.
>
> Of course it is otherwise, as pointed out by Lord Holt, if the acts complained of, although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, and not the pursuit of lawful rights.[111]

Stipulating the law as such, Lord Field then reviewed the evidence, or lack thereof, alleged by the plaintiff, indicating that

> They do not allege that the respondents have been guilty of any act of fraud or violence, or of any physical obstruction to the appellants' business, or have acted from any personal malice or ill-will, but they say that the respondents acted with the calculated intention and purpose of driving the appellants out of the [Hankou] season carrying trade by a course of conduct which, although not amounting to violence, was equally effective, and so being in fact productive of injury to them was wrongful and presumably malicious.[112]

[109] *Ibid* at 48 [emphasis added].

[110] (1707), 103 ER 1127, 90 ER 906 [*Keeble*].

[111] *Mogul Steamship*, *supra* note 10 at 52.

[112] *Ibid* at 53.

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Having spent the bulk of his reasons working out whether the conduct of the cartel members had violated the principle set out in *Keeble*, which clearly imposes liability for malicious harmful conduct undertaken by individuals, Lord Field concluded by stating that

> Everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was *bona fide* so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm. All the acts complained of were in themselves lawful, and if they caused loss to the appellants, that was one of the necessary results of competition.[113]

His consideration of the lawfulness of the acts undertaken singly by the members of the cartel concluded, Lord Field then turned to consider whether the cartel's conduct "even if lawful in themselves if done by an individual"[114] could be made unlawful by their use as the means of achieving the only unlawful object he thought had been alleged, restraint of trade.[115] As such, Lord Field's opinion clearly reflects a sequential consideration of the lawfulness of the means selected by the members of the cartel to achieve their objective, followed by consideration of whether those means, if lawful, were rendered unlawful in aggregate if shown to have been undertaken for the purpose of achieving an unlawful object. Having found neither the means nor the object unlawful, Lord Field determined that no liability arose on the facts.

Finally, Lord Hannen, having reviewed both the object of the defendants in combining and the means agreed upon to achieve it, concluded that neither the object sought, nor the means employed by the defendants, had been unlawful. Their object, Lord Hannen observed, had been "to secure to themselves the benefit of the carrying trade from certain ports."[116] The means selected to achieve this object had been, in essence, nothing more than "offering goods or services at a cheaper rate than their rivals."[117] Neither object nor means exceeded the limits of allowable trade competition, Lord Hannen concluded, but he did observe that

> … a different case would have arisen if the evidence had shewn that the object of the defendants was a malicious one, namely, to injure the plaintiffs whether they, the defendants, should be benefitted or not. This is a question

[113] *Ibid* at 56–57.

[114] *Ibid* at 57.

[115] *Ibid*.

[116] *Ibid* at 58.

[117] *Ibid* at 59.

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> on which it is unnecessary to express an opinion, as it appears to be clear that the defendants had no malicious or sinister intent as against the plaintiffs, and that the sole motive of their conduct was to secure certain advantages for themselves.[118]

Significantly, only after making this observation did Lord Hannen turn to the argument that the effect of concerted conduct might render an act lawful when performed by an individual wrongful when performed in concert.[119] This is clearly the effect of what is today described as a conspiracy to harm, indicating that his prior analysis had, in fact, related solely to the question of whether the means used by the cartel members would have been lawful if undertaken by an individual. This understanding is supported by Lord Hannen's subsequent consideration in this context of "what was the motive of the combination, whether it was for the purpose of injuring others, or merely in order to benefit those combining,"[120] providing further support for the conclusion that his earlier treatment of motive had been for the purpose of determining the status of the individual conduct undertaken in furtherance of the cartel's objective—an analysis pertinent to a conspiracy to use unlawful means, not a conspiracy to harm.

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Despite the apparent dissimilarity of the reasons offered, and the vague manner in which some of the members of the panel addressed the relationship of illegitimate motive to unlawful means, it seems plausible that much of the panel in *Mogul Steamship* agreed among themselves that the intentional infliction of harm without just cause or excuse could give rise to liability at the level of the individual, and as such would constitute unlawful means by which to obtain a combination's otherwise lawful object. It is significant, in this regard, that Lord Macnaghten, who read Lord Bramwell's reasons but prepared none of his own, did not seem to consider any great disparity to exist among the other members of the panel as to the basis on which it had decided *Mogul Steamship*. Having delivered Lord Bramwell's opinion, Lord Macnaghten noted:

> My Lords, for myself I agree entirely in the motion which has been proposed, and in the reasons assigned for it in the judgments which have been delivered and in those which are yet to be delivered; and I do not think I can usefully add anything of my own.[121]

It is obviously impossible to conclude with any kind of certainty what long-dead judges were thinking when their opinions in *Mogul Steamship* were read to the House of Lords almost thirteen decades ago. However, the argument advanced here seeks to trouble the narratives that have surrounded the tort of conspiracy to harm for much of the last century, and has, hopefully, illustrated the possibility of an alternative

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[118] *Ibid*.

[119] *Ibid*.

[120] *Ibid* at 60.

[121] *Ibid* at 49.

explanation for the tort's existence aside from the oppressive combination and criminal conspiracy justifications that were abandoned by Lord Diplock in *Lonrho*. It is possible, I suggest, that the entirety of the jurisprudence of conspiracy to harm, from *Mogul Steamship* to the present, is a product of a conviction that the intentional infliction of harm motivated by malice justifies the imposition of liability, both at the level of the individual and at the level of combination. If this were the case, as seems plausible on the basis of the reasons in *Mogul Steamship* set out above (not to mention the court in *Gregory*, a majority of the High Court judges summoned to assist the House of Lords in *Allen*, and three members of the House of Lords in that case), this explanation of conspiracy to harm liability would resolve much of the confusion relating to the apparent "magic of plurality"[122] at work in that tort. Rather than anything specific to concerted conduct, liability for conspiracy to harm is revealed as nothing more than the post-*Allen* remains of a broader motive-oriented basis of private liability.

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It would be neither good nor bad, from a legal perspective, if conspiracy to harm were understood as founded upon an understanding of maliciously-inflicted harm as wrongful. It is simply a different basis of liability from any other significant component of contemporary tort law, flowing from a distinct conception of justifiable interpersonal conduct. It is no more, and no less, than a different understanding of what constitutes interpersonal wrongdoing than those now accepted by judges (and most tort theorists) as common sense after a century of repetition.

**Conclusion**

This paper has demonstrated that the anomalous nature of liability for conspiracy to harm has allowed an understanding to take hold that it is inexplicable and conceptually empty. That the tort came to be understood in this way should not be surprising—considered exclusively against the backdrop of the post-*Allen* common law of torts, conspiracy to harm seems to lack much of what one might consider to be essential in the assignment of tort liability. As a conceptually empty anomaly, conspiracy to harm posed little danger to the justifiability and coherence of the balance of private law so long as courts exercised due caution in the application of the tort's anomalous principles to novel circumstances. However, as the subject of more cavalier approaches, such as Lord Neuberger's in *Total Network* and Estey J's in *LaFarge*, the understanding of conspiracy to harm as conceptually empty poses a real threat to whatever coherence the private law (and tort law in particular) has, as courts eschew substantive analyses in favour of trite comparisons of form. *Total Network* represents the beginning of an age in which unlawful means conspiracy will be shaped to look more like the inexplicable conspiracy to harm. Canadian conspiracy jurisprudence, on the other hand, remains mired in the post-*Lonrho* haze, in which judicial inability to distinguish form from substance has rendered all conspiracy liability dependant on the presence of intent, and unlawful means conspiracy has withered to the point of irrelevance. Treating like cases alike is one of the defining features of common law

[122] See Guy & Del Gobbo, *supra* note 45 at 150.

reasoning, and the rule of law in general. It is not, however, sufficient to rely on superficial structural coincidences, such as the presence of concerted conduct as a component of two distinct causes of action, as a heuristic for their normative likeness and compatibility. Such a system of classification has no more value than one which organizes books according to the colour of their spines: it may appear to be coherent in form, but in reality it is devoid of pertinent substance.

With the demise of individual liability for malicious harm in *Allen*, motive no longer plays a role in rendering combinations unlawful by virtue of the *means* by which they are advanced, as many of the judges in *Mogul Steamship* seem to have thought possible; rather, it can only impact the lawfulness of the combination's *object*. If, as I have argued, conspiracy to harm is recognized as an echo of an understanding of malicious interpersonal conduct as wrongful, the fact that both conspiracy to harm and unlawful means conspiracy address conduct undertaken in concert with others will be recognized for the normatively insignificant coincidence that it is. The problem this paper has identified is that lawyers are, for the most part, accustomed to thinking of principles of private liability as fungible, particularly in the context of torts which employ similar structural elements, as both of the conspiracy torts do. In other words, we see a familiar mechanism, a tort doctrine, without imagining the possibility of it being animated by the distinctive norms of justifiable interpersonal conduct of a different era, rather than those of our own time. It should not, then, be surprising that, when violation of these norms in contemporary society results in liability, it is not easily recognized for what it is: steampunk liability.

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# SILENT ALL THESE YEARS: PUBLIC POLICY, EXPRESSIVE HARM, AND THE LEGACY OF *CHRISTIE V YORK CORPORATION*

**Jane Thomson* and Ashleigh Keall****

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## 1. Introduction

Twenty years ago, Chief Justice Beverly McLachlin (as she then was) wrote of the vital role played by judges in preventing discrimination and building a society rooted in dignity and respect for all.[1] She sketched out three phases in the evolution of law's relationship to racism in Canada. In the first phase, from the start of colonialism to the mid-twentieth century, Canadian law actively supported and enabled the subordination of non-white racialized social groups, and the courts applying those laws largely followed suit. As a case in point from this era she cited *Christie v York Corporation*,[2] in which the Supreme Court of Canada upheld the right of business owners to engage in race discrimination on the grounds of freedom of commerce. The next two eras she identified (of equal opportunity and then substantive equality) sought to undo the legacy of decisions like *Christie* by developing an increasingly muscular approach to race discrimination, one that saw a closer link between *de jure* and *de facto* equality.[3] Notably, these eras saw the introduction of robust public law measures such as provincial, territorial, and federal human rights legislation and the entrenchment of Canada's *Charter of Rights and Freedoms*.[4] Her account explains how the Supreme Court was instrumental in not only applying these tools but interpreting them in a fashion that encouraged substantive rather than formal equality in Canada.

Chief Justice McLachlin's account of public law's evolution and the Supreme Court of Canada's role in dismantling systemic inequality is heartening, but it tells only half of the story. It fails to account for the very different trajectory—one of failure, avoidance, and silence—that the Supreme Court has followed when faced with

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[1] The Right Honourable Beverley McLachlin, "Racism and the Law: The Canadian Experience" (2002) 1:1 JL & Equality 7.

[2] [1940] SCR 139, [1940] 1 DLR 81 [*Christie* SCC 1940].

[3] McLachlin, *supra* note 1 at 15.

[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*The Charter*].

instances of discrimination in the private law. Indeed, an early and egregious example of its failure to recognize and uphold basic principles of equality through the application of private law doctrine occurred in *Christie*. While this case was referenced by Justice McLachlin as a relic of a bygone time that preceded the *Charter* and human rights legislation, the fact remains that even in 1937 the Supreme Court of Canada possessed the necessary legal tools to censure the discrimination at issue. A central argument advanced by Fred Christie's legal team was that race discrimination was contrary to Quebec's "good morals or public order," the province's codified version of the common law doctrine of public policy. The Supreme Court held that it was not.

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Remarkably, *Christie* represents the last time the Supreme Court of Canada considered the issue of public policy and discrimination within the private law, despite several opportunities to do so over the 80+ years since the decision was handed down. While lower courts in Canada have since used the doctrine as a means of voiding discriminatory provisions in wills, trusts, and restrictive covenants, the Supreme Court, when presented with the opportunity to rule on this area of law, has remained silent.

The substantive harms of *Christie* have been well documented by other scholars. The primary focus of this paper is on the *expressive* harm caused by that decision and by the Supreme Court of Canada's subsequent avoidance of the question of public policy's application to discrimination in the private law. "Expressive harm" is the injury stemming from the expression of a negative or inappropriate attitude that is distinct from its subsequent, material consequences.[5] The harm lies in the expression itself and the message it sends. Canadian courts have implicitly recognised the concept of expressive harm before. For instance, the Supreme Court has been willing to limit state action on the grounds that it sends a harmful message impairing the status of vulnerable groups in society, without requiring evidence of further material harms.[6]

This paper begins with a brief overview of the doctrine of public policy and its role in curbing discriminatory private law arrangements in Canada. We then provide a counter-narrative of sorts to that proposed by the former Chief Justice. We adopt her same starting point: the era of judicially sanctioned racism, marked by the

[5] See Elizabeth S Anderson & Richard H Pildes, "Expressive Theories of Law: A General Restatement" (2000) 148:5 U Pa L Rev 1503; Richard H Pildes, "Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism" (1998) 27:2 J Leg Stud 725.

[6] See e.g. *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend*]. Holding that the province could not lawfully exclude sexual orientation from the list of prohibited grounds of discrimination in its human rights code, the Supreme Court of Canada pointed to the "strong and sinister message" sent by that exclusion. It held that even if the omission of sexual orientation did not lead to an increased incidence of overt discrimination against LGBTQ+ people, it would still constitute a violation of the Charter's equality guarantee because of its implicit statement that LGBTQ+ people do not deserve the same level of legal protection as others. For a discussion on how section 15 *Charter* decisions implicating human dignity reflect concerns about expressive harm, see Ron Levy, "Expressive Harms and the Strands of Charter Equality: Drawing out Parallel Coherent Approaches to Discrimination" (2002) 40:2 Alta L Rev 393; Tarunabh Khaitan, "Dignity as an Expressive Norm: Neither Vacuous nor a Panacea" (2012) 32:1 Oxford J Leg Stud 1 at 7–8.

*Christie* decision in 1939. We review *Christie* in detail, explaining how and why the Court could and should have found that the discrimination at issue contravened public policy. We then discuss the expressive harm of the decision, contrasting the messages conveyed by both the majority and dissenting reasons in *Christie* with contemporaneous judgments condemning discrimination.

Next, we consider "the era of avoidance," characterized by the case of *Noble and Wolf v Alley* in 1950[7] and later *Seneca College v Bhadauria*[8] in 1981, in which the Supreme Court of Canada avoided any pronouncement on the doctrine of public policy's application to discrimination. We explain that although these cases are separated by over 30 years, they both represent a missed opportunity to overturn the Court's decision in *Christie.* We highlight the expressive dimension of the judgments and the somewhat ironic coincidence of Chief Justice Bora Laskin's involvement in both cases.

In the final part of this paper, we examine the post-*Charter* "era of silence", in which the Supreme Court has declined to grant leave in cases involving the application of public policy to instances of discrimination in private law.[9] We argue that its decision not to hear the cases in this area at all fosters a harmful silence on the propriety or legitimacy of discrimination in the private law.

Through this counter-narrative we demonstrate that the expressive harm from the Supreme Court's judgment in *Christie*, which condoned and legitimized racist behaviour by private establishments in Canada, is rivalled by the Court's subsequent failures to overturn that decision or to directly address the issue of public policy's application to discrimination in the private law. Of course, not every instance of discrimination in the private law will, if challenged, be voided for reasons of public policy.[10] However, when faced with future cases concerning discriminatory wills, scholarships, and trusts, the Court must take the opportunity to acknowledge that the discrimination faced by Fred Christie in 1937 was contrary to public policy then, just as it is today. We maintain that the reversal of *Christie* is not simply about redressing the harms of that decision; it is about the Supreme Court acknowledging and engaging with the problem of discrimination in both public and private law and, in doing so, upholding the values of Chief Justice McLachlin's era of substantive equality in Canada.

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[7] [1951] SCR 64, 1950 CarswellOnt 127, rev'g [1949] 4 DLR 375 (ONCA), aff'g [1948] 4 DLR 123 (ONSC) [*Noble* SCC cited to CarswellOnt].

[8] [1981] 2 SCR 181, 124 DLR (3d) 193, rev'g 105 DLR (3d) 707 (ONCA) [*Bhadauria* SCC].

[9] *Canadian Association for Free Expression v Streed et al*, 2015 NBCA 50, leave to appeal to SCC refused, 36658 (9 June 2016) [*McCorkill* CA leave]; *Spence v BMO Trust Company*, 2016 ONCA 196, leave to appeal to SCC refused, 36904 (9 June 2016) [*Spence* CA leave].

[10] There will always be instances of discrimination that are tolerated, whatever the mechanism for review. What is important is that no area of the law, private or public, should be immune from such review.

## 2. The Doctrine of Public Policy and Discrimination in the Private Law

The practice of voiding otherwise legal operations of the common law that contravene public policy dates back centuries.[11] Some of the doctrine's earliest applications involved the voiding of contracts that sought to restrain trade,[12] or clauses in wills that contained restrictive conditions concerning a beneficiary's ability to marry.[13] In the 18th century jurists began to refer to it as a doctrine of public policy aimed at ensuring the common good of the community, its power rendering void that which is against the public good.[14]

Judicial determination of what constitutes "the public good" is a contextual exercise without clear or consistent legal parameters.[15] As a result, most courts treat the doctrine as something to be used sparingly and cautiously.[16] Indeed, there have been some historical attempts to limit the development of the doctrine or even eradicate it completely.[17] Nevertheless, the doctrine has endured and evolved, and has been applied by all levels of court in Canada.[18]

What is considered in keeping with public policy is informed by a variety of sources including, chiefly, other existing laws and policies of a given jurisdiction. As Bruce Ziff has noted, "[c]ourts look to legislation in *pari materia* for guidance as to the current state of public policy. It operates to complement extant statutory and other provisions: to fill gaps where necessary."[19] Public policy decisions by Canadian courts have been informed by Canada's Constitution[20] and its democratic system of

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[11] The earliest cases were reported in the 15th century; see WSM Knight, "Public Policy in English Law" (1922) 38:1 Law Q Rev 207.

[12] *Dyer's Case* (1414), YB Anon 2 Hen V, pl 26, fol 5.

[13] *Baker v White*, [1690] 2 Vern 215, 23 ER 740 (Ch).

[14] Jane Thomson, "Discrimination and the Private Law in Canada: Reflections on *Spence v BMO Trust Co*." (2019) 36:2 Windsor YB Access Just 138 at 143. For an early example of the doctrine's recognition by courts of common law see *Mitchel v Reynolds*, [1711] Fortes Rep 296, 24 ER 347 (KB).

[15] As Justice McCardie best put it in *Naylor, Benzon and Co, Limited v Krainische Industrie Gesellschaft*: "The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time… The principles of public policy remain the same, though the application of them may be applied in novel ways. The ground does not vary." *Naylor, Benzon and Co, Limited v Krainische Industrie Gesellschaft*, [1918] 1 KB 331 at 342–43, aff'd [1918] 2 KB 486 (CA).

[16] See *In Re Estate of Charles Millar, Deceased*, [1938] SCR 1, [1938] 1 DLR 65 [*Re Millar*].

[17] See *Egerton v Earl Brownlow*, (1853) 4 HL Cas 1, 10 ER 359, *Janson v Driefontein Consolidated Mines Ltd*, [1902] AC 484, [1900-3] All ER Rep 426 (HL Eng).

[18] See Thomson, *supra* note 14 at 160–62. For the most recent applications of the doctrine by the Supreme Court of Canada see *Uber Technologies Inc v Heller*, 2020 SCC 16 at paras 101–46, Brown J [*Uber Technologies*]; *Chandos Construction Ltd v Deloitte*, 2020 SCC 25.

[19] Bruce Ziff, "Welcome the Newest Unworthy Heir" 1 ETR (4th) 76 at 87.

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

government,[21] federal and provincial statutes,[22] principles of the common law and previously established heads of public policy, [23] political speeches,[24] and, after its adoption in 1982, Canada's *Charter of Rights and Freedoms.*[25]

One of the doctrine's contemporary and for many years uniquely Canadian applications[26] is its use to censure discrimination within private law. Over the past half century, Canadian lower courts have invoked the common law doctrine in the areas of estate law, the law of trusts, and property law to void conditions on a testamentary gift, a trust, or a land covenant that discriminated on grounds such as race, religion, or ethnicity.[27] Absent from the jurisprudence, however, is any contemporary Supreme Court of Canada ruling on how the doctrine of public policy should be applied to discrimination in the private law. Indeed, the last time the Court opined on the subject at all was to hold that the policy of a Montreal tavern not to serve Black patrons was in keeping with public policy.

### 3. The Era of Judicially Sanctioned Racism: *Christie v York Corporation*

While the Supreme Court of Canada had heard and pronounced on challenges to other racist laws both before and after 1940,[28] the majority decision in *Christie* has become emblematic of judicially sanctioned racism against Black Canadians.

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[21] See e.g. *Brassard v Langevin*, (1877) 1 SCR 145 at 218, 1877 CarswellQue 6 (WL Can).

[22] See e.g. *Re Drummond Wren*, [1945] OR 778, 1945 CarswellOnt 62 (WL Can) at para 13 (Ont H Ct J) [*Wren* cited to CarswellOnt]; *Walkerville Brewing Co v Mayrand*, [1929] 2 DLR 945 at 949-50, 63 OLR 573 (ONCA) [*Walkerville Brewing*]; *McCorkill v McCorkill Estate*, 2014 NBQB 148 at para 62 [*McCorkill* QB].

[23] See e.g. *Brissette v Westbury Life Insurance Co*, [1992] 3 SCR 87, 96 DLR (4th) 609; *Uber Technologies*, *supra* note 18 at para 110; *Re Millar*, *supra* note 16 at 4–6.

[24] See e.g. *Canada Trust Co v Ontario Human Rights Commission*, [1990] OJ No 615 (QL) at para 91, 74 OR (2d) 481 [*Canada Trust Co*].

[25] See e.g. *Canada Trust Co*, *supra* note 24 at paras 93, 97; Sheena Grattan & Heather Conway, "Testamentary Conditions in Restraint of Religion in the Twenty-First Century: An Anglo-Canadian Perspective" (2005) 50 McGill LJ 511.

[26] Until 2006, the application of public policy to instances of discrimination in the common law was exclusively Canadian. In *Minister of Education v Syfrets Trust Ltd NO*, [2006] ZAWCHC 65, [2006] 10 B Const LR 1214, 4 All SA 205, the High Court of South Africa expressly adopted Canadian authority to void discriminatory conditions on a scholarship established by way of testamentary trust (at para 38).

[27] For a detailed discussion on this area of the law see: Thomson, *supra* note 14; Ziff, *supra* note 19; Adam Parachin, "Discrimination in Wills and Trusts" (20 September 2015), online: *SSRN* <ssrn.com/abstract=2579844> [perma.cc/ZQJ8-TBTT].

[28] See e.g. *R v Quong-Wing*, [1914] 49 SCR 440, 18 DLR 121 (Saskatchewan law that forbade Chinese Canadians from employing White women or girls in their places of business was challenged on the basis that it was *ultra vires*; the Supreme Court of Canada held that it was not). For a fascinating historical review of the Canadian judicial treatment of race see Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada 1900–1950* (Toronto: University of Toronto Press, 1999).

Fred Christie was a Black resident of Montreal who was refused service by the York Tavern in 1936 because of his race. On the night in question Christie was accompanied by two of his friends, one White and the other Black. After being refused service by their waiter, a bartender, and an assistant manager, Christie called the police. Nothing came of this and Christie and his colleagues eventually left the bar.[29] Christie sued the York Tavern on multiple grounds including tort, breach of contract, and on the basis that taverns in Quebec were forbidden by statute from arbitrarily discriminating between members of the public.[30] An additional ground, most forcefully argued by Christie's counsel at the Supreme Court, was that the tavern's policy of not serving Black patrons was a rule contrary to the "good morals or public order" of the province. This term, good morals or public order, was Quebec's codified version of the common law doctrine of public policy as found in earlier decisions of the Supreme Court of Canada.[31]

Christie was successful at trial on one of his grounds of claim. Justice Demers found that because the York Tavern held itself out as a public establishment, it was bound by the laws that governed hotels and restaurants. Those laws, enumerated under then sections 19 and 33 of Quebec's *Licence Act*,[32] precluded the owner of a hotel or restaurant from discriminating between guests ("travellers") based on arbitrary reasons such as skin colour.[33] Christie was awarded 25 dollars in damages and 200 dollars in costs.[34] The York Tavern appealed.

The appeal was heard by a panel of five at the Court of King's Bench. Four justices allowed the appeal, three of whom departed from the lower court by finding that the relevant provisions of the *Licence Act* did not apply to taverns, and that Christie was not a "traveller" within the terms of that Act.[35] Absent express inclusion of taverns into sections 19 and 33, the only way the policy could be invalidated was if it were contrary to public policy. Those in the majority who bothered to opine on the issue[36] held, in separate judgments, that nothing about the tavern's policy offended the good morals or public order of Quebec. They held, variously, that as the tavern was not a monopoly, Black patrons could still be served elsewhere,[37] and that even if the

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[29] For an in-depth account of the incident see Eric M Adams, "Errors of Fact and Law: Race, Space, and Hockey in *Christie v York*" (2012) 62:4 UTLJ 463.

[30] These arguments were addressed in detail at the appeal before Quebec's Court of King's Bench: *York v Christie* (1938), 65 Que KB 104, 1938 CarswellQue 60 (WL Can) [*Christie* KB].

[31] See e.g. *Renaud v Lamothe* (1902), 32 SCR 357, 1902 CarswellQue 17 (WL Can) at para 6.

[32] RSQ 1925, c–25, ss 19, 33.

[33] *York v Christie* (1937), 75 Que SC 136, 1937 CarswellQue 204 (WL Can) at paras 4–6.

[34] *Ibid* at para 9.

[35] *Christie* KB, *supra* note 30 at paras 32–51.

[36] Justice Bond, for example, focused mainly on the definition of the word "hotel" and refused to engage with the question of public policy at all (*ibid* at paras 42–43).

[37] *Ibid* at para 62.

issue were "a matter of public concern" (which it was not), it would fall to be examined by the legislature and not the courts.[38] One judge simply stated:

> The fact that a tavern-keeper decides in his own business interests that it would harm his establishment if he catered to people of colour cannot be said to be an action which is against public morals or good order.[39]

The odd man out was Justice Galipeault. Not only did he disagree with the majority on its interpretation of the statutory prohibition on discrimination in the *Licence Act*, but he also found the tavern's policy to be in contravention of public policy.[40] In his view, the York Tavern's policy threatened the public order and good morals of Quebec. He queried where one would draw the line on discrimination if tavern owners were permitted to refuse to serve Black patrons. Listing the many minority racialized, religious, and linguistic groups present in 1930s Montreal, he wondered which social group would be next to suffer the same treatment as Black Montrealers like Fred Christie.[41]

Leave to appeal was refused by the Court of King's Bench. Accordingly, Christie's legal team applied for special leave under section 41 of the *Supreme Court Act*.[42] In granting leave, the Supreme Court held:

> We think that the matter in controversy in this appeal will involve "matters by which rights in future of the parties may be affected" within the meaning of section 41 of the *Supreme Court Act.* We also think the matter in controversy is of such general importance that leave to appeal ought to be granted.[43]

By the time the case reached the Supreme Court, public policy had moved to the forefront as one of Christie's leading grounds of appeal. The public policy argument advanced by Christie's team was very much in the vein of Justice Galipeault's dissent. They argued that the policy of the York Tavern contravened public order and the good morals of Quebec because of the multicultural nature of the province and of Canada:

> Quebec law is against any discrimination against a citizen on the ground of religion, language or colour. Bilingualism exists by law in Canada. All religions are free to practice their faiths, without control. All citizens are subject to taxation, without discrimination as to colour. The common law

[38] *Ibid* at para 78.

[39] *Ibid*.

[40] *Ibid* at para 147.

[41] *Ibid* at para 141.

[42] *Ibid*; RSC 1927, c 35, s 41.

[43] *Christie v York Corp*, [1939] SCR 50, 1939 CarswellQue 36 (WL Can) at para 1 [*Christie* SCC 1939].

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> of Quebec is the free enjoyment by all its citizens of the facilities for education, nourishment and happiness which are available.[44]

This, Christie's lawyers argued, was demonstrated by the fact that the Government of Quebec had specifically legislated a duty on hotels and restaurants to accommodate all patrons. Its failure to do so with respect to taverns was not intentional, due to the obvious presumption that they too fell under this obligation. Certainly, the significance of the case with respect to what was happening overseas in 1939 was not lost on Christie's lawyers; as they argued in their factum, "[i]f this ridiculous exclusion is sanctioned by law, it could be extended without limitation… until this country bristled with racial, religious and colour discriminations, like certain European countries."[45]

Although special leave to appeal had been granted, the Supreme Court of Canada's decision in *Christie* was brief and categorical. The majority judgment started with a recitation of the facts, in which Rinfret J painted a picture of the tavern employees acting "quietly" and "politely" in refusing service to Christie. Justice Rinfret suggested that in fact it was Christie who was out of order, as he had "persisted in demanding beer after he had been so refused" and had dared to call the police, "which was entirely unwarranted by the circumstances."[46]

The Court then summarily rejected the argument that the tavern's practice of refusing service to Black patrons was contrary to public policy. First, Rinfret J made it clear that the "law of Quebec" was one of "complete freedom of commerce."[47] While any regulations made in accordance with such freedom were subject to good morals and public order, nothing, he believed, suggested that public policy was at issue in the present case. He cited a passage from a French case that explained how monopolies were restrained from complete freedom of trade due to notions of "public order."[48] The York Tavern, he later concluded, held no such monopoly over the sale of beer in Quebec.[49]

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[44] James W St G Walker, *"Race", Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Waterloo, Ontario: The Osgoode Society for Canadian Legal History and Wilfrid Laurier University Press, 1997) at 159, citing *Christie* SCC 1940, *supra* note 2 (Factum of the Appellant).

[45] *Ibid*.

[46] *Christie* SCC 1940, *supra* note 2 at 141.

[47] *Ibid* at 142.

[48] "Cependant la liberté du commerçant ou de l'industriel de n'entrer en rapport qu'avec des personnes de son choix comporte certaines restrictions, basées sur des raisons d'ordre public. Il en est de la sorte, par exemple, lorsque le commerçant ou l'industriel jouit, ainsi que les compagnies de chemin de fer, d'un monopole de droit ou même de fait" (*ibid*).

[49] *Ibid* at 144.

In further support of his public policy finding, Rinfret J cited the case of *Loew's Montréal Theatres Ltd v Reynolds.*[50] In that case the Quebec Court of King's Bench reversed a judgment awarding damages for breach of contract between Mr Reynolds, a Black citizen of Montreal, and Loew's Theatre. Reynolds had sued after being refused admission to the "whites only" orchestra section of the theatre.[51] While *Loew's* was decided on the grounds that there was no breach of contract, the Court also found that nothing about the seating policy offended good morals or public order in Quebec. Forcing Black patrons to sit in the balcony was merely a business decision. Writing for the majority in *Christie*, Rinfret J reproduced the analogy of Quebec's Chief Justice who had compared the theatre's racist seating policy to a requirement that attendees wear evening dress. While both might be arbitrary in nature, he wrote, neither were contrary to the good morals or public order of Quebec so as to make them illegal.[52]

Justice Rinfret concluded that "in this case, either under the law or upon the record, it cannot be argued that the rule adopted by the respondent in the conduct of its establishment was contrary to good morals or public order."[53] Rinfret J then went on to agree with the Court of King's Bench with respect to the finding that taverns were not implicitly included in section 33 of Quebec's *Licence Act*, which forbade arbitrary discrimination by hotels and restaurants in providing food to travellers.[54] In the remaining eleven paragraphs of the majority's decision, Rinfret J exhaustively defined the term "traveller" and explored the pressing questions of whether a tavern that served sandwiches could be considered a restaurant, and whether or not beer was food.[55]

Justice Davis, dissenting, would have found the York Tavern liable on the grounds that it was part of a licensed monopoly of liquor providers tightly regulated by the province and subject to a statute stipulating those persons who could legitimately be refused service of alcohol.[56] As "non-White" persons were not included on this list, liquor licence holders were not permitted to discriminate among prospective clientele on the grounds of colour.[57] However, on the specific topic of

[50] (1919), 30 BR 459, 1919 CarswellQue 61 (WL Can) [*Loew's* cited to CarswellQue].

[51] For a detailed account of the facts of this suit and the companion suit brought by Mr Norris Dobson, Mr Reynolds' companion who was present with him at Loew's Theatre, see Walker, *supra* note 44 at 147–48.

[52] *Christie* SCC 1940, *supra* note 2 at 142-43, citing *Loew's*, *supra* note 50.

[53] *Ibid* at 142.

[54] *Ibid* at 144–46.

[55] *Ibid* at 144–45.

[56] *Alcoholic Liquor Act*, RSQ 1925, c 37, s 43. This provision stipulated that alcohol shall not be served to anyone under the age of 18, any 'interdicted person', any 'keeper or inmate of a disorderly house', anyone previously convicted of offences concerning drunkenness, or anyone barred from the purchase of alcohol by the Quebec Liquor Commission on the grounds of habitually drinking alcohol to excess. The majority of the Court did not consider the application of this statute.

[57] *Christie* SCC 1940, *supra* note 2 at 152–53.

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public policy, Justice Davis made no comment at all. Indeed, Davis J noted that the freedom of commerce argument was still applicable to "an ordinary merchant",[58] just not to one so heavily regulated and controlled by the state. As Justice Bertha Wilson would observe four decades later, "none of the members of the Court appear to have found anything reprehensible *per se* about the defendant's conduct."[59]

### *Christie v York Corporation* and the Doctrine of Public Policy

The academic commentary on *Christie* has been suitably scathing, even dating back to the time of its release in 1939. In his comprehensive historical account of the case, James Walker documents some of these scholarly reactions, including one by a young Bora Laskin in 1940.[60] Some lauded the dissent of Justice Davis, while others argued that the "inkeeper's law"—the common law version of sections 19 and 33 of Quebec's *Licence Act*—applied to taverns and should have led to success for Christie.

Curiously, none of these authors focused on the question of public policy.

While some might dismiss the decision in *Christie* as a product of its time, the facts, the legal arguments, and legal precedent all supported a finding—even in 1939—that the York Tavern's refusal to serve Fred Christie because he was Black was contrary to public policy.

The primary purpose of the doctrine of public policy has been, for at least the past 500 years, to ensure that an otherwise legal operation of the common law does not cause harm to the public good. As noted above, the argument that racial discrimination contravenes public policy was expressed in the dissent of Justice Galipeault and, likewise, put to the Supreme Court by Christie's counsel. Moreover, it was articulated in previous reported judgments of Quebec. Prior to the Supreme Court's decision in *Christie*, at least two court challenges were mounted by Black citizens against racist policies of public establishments in Quebec. Although only one was ultimately successful, judges in both cases publicly denounced the racism at issue, finding such policies contravened the public policy of Quebec.

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[58] *Ibid* at 152.

[59] *Bhadauria v Board of Governors of Seneca College of Applied Arts and Technology* (1979), 27 OR (2d) 142, 1979 CarswellOnt 173 at para 8 (ON CA) [*Bhadauria* CA].

[60] Walker, *supra* note 44 at 164–65. These include: Bora Laskin, "Tavern Refusing to Serve Negro – Discrimination" (1940) 18:4 Can Bar Rev 314 [Laskin, "Tavern Refusing"]; Douglas A Schmeiser, *Civil Liberties in Canada*, (London: Oxford University Press, 1964) 269 at 274; Henry L Molot, "The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation" (1968) 46:4 Can Bar Rev 612 at 612, 641; W S Tarnopolsky, "The Supreme Court and Civil Liberties" (1976) 14:1 Alta L Rev 58; Ian A Hunter, "The Origin, Development and Interpretation of Human Rights Legislation" in Ronald St J MacDonald & John P Humphrey, eds, *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworths, 1979) 79; F R Scott, *The Canadian Constitution and Human Rights* (Toronto: Canadian Broadcasting Corp, 1959) at 37; F R Scott, *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959) at 36. Bora Laskin would go on to play his own role in the *Christie* saga, which we come to in the next part of this paper.

The first was the 1899 case of *Johnson v Sparrow*.[61] In that case Mr Frederick Johnson, a Black Montrealer, sued the manager of the Academy of Music for refusing him and his companion admittance to its "whites only" orchestra section.[62] Archibald J held that the theatre had breached its contract with Johnson as the racist condition it sought to rely on was not officially advertised or consistently enforced.[63] More interestingly, after making this finding in relation to contract, Justice Archibald raised (on his own motion[64]) the question of race discrimination in public establishments of Quebec.[65] He expressed the belief that theatres were equivalent to hotels (which clearly fell under the *Licence Act*) when it came to their roles and representations to the public, as both were public places licensed by the province. This, he held, constituted "a privilege granted to the licensees by the public, and naturally the public ought to receive a corresponding benefit."[66] Both, he believed, should be subject to the same laws when it came to unlawful discrimination.[67] While he could find "… no French decisions affirming categorically the obligation of the theatre to admit all decently behaved and dressed persons", he thought "the whole law upon the subject seems to assume that obligation."[68] Referencing the legacy of slavery, its abolishment in Quebec, and Canada's status as a constitutional democracy, Justice Archibald held that "any regulation which deprived negroes as a class of privileges which all other members of the community had a right to demand, was not only unreasonable but entirely incompatible with our free democratic institutions."[69]

The second case, referenced above in the majority's decision in *Christie*, was *Loew's Theatres*.[70] The plaintiff in that case was unsuccessful. Apart from the Chief Justice of Quebec's dehumanizing analogy of evening dress to the colour of one's skin, *Loew's* is also notable for the dissenting judgment of Justice Carroll. His reasoning focused on the fact that the revocation clause on the back of Reynold's theatre ticket, relied upon by the theatre in its arguments related to breach of contract, could only be

[61] (1899), 15 Que SC 104, 1899 CarswellQue 310 (WL Can) [*Sparrow* cited to CarswellQue].

[62] *Ibid*. Johnson testified that when he had exchanged the voucher for tickets at the Academy, he made no representations that they were for anyone but himself. Johnson then sued for breach of contract and won (*ibid*).

[63] Ibid at paras 25–26. At trial, Mr Johnson called "nearly a dozen coloured persons" to testify claiming that they had been seated in the orchestra of the Academy of Music on occasion (*ibid* at para 7).

[64] "I find that the issue … is clearly raised in the written pleadings, and I do not feel justified in avoiding its discussion" (*ibid* at para 10).

[65] *Ibid* at paras 19–27.

[66] *Ibid* at para 22.

[67] *Ibid* at para 16.

[68] *Ibid* at para 24.

[69] *Ibid* at para 14. The judgment was affirmed on appeal by the Court of King's Bench. The Court distanced itself from any of the trial judge's opinions on the evils of racism, agreeing only with its ruling on breach of contract: *Sparrow c Johnson* (1899), 8 Que QB 379, 1899 CarswellQue 48.

[70] *Loew's*, *supra* note 50.

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exercised by the theatre for a valid reason. He held that the fact that Reynolds was Black did not qualify as a valid reason. He noted that since 1789 no such policy would be legal in France,[71] nor should it be recognized as such in Canada where "tous les citoyens de ce pays, blancs et noirs, sont soumis à la même loi et tenus aux mêmes obligations."[72]

In *Christie*, Rinfret J also cited the Ontario decision of *Franklin v Evans*[73] to support his finding that the Tavern's policy was not contrary to public policy. That case involved the refusal of service to a Black customer by a restaurant in London, Ontario. The trial judge, though sympathetic to "the pathetic eloquence of [the plaintiff's] appeal for recognition as a human being, of common origin with ourselves",[74] had ruled that the common law "innkeepers' law" did not apply in the context of a restaurant. Ironically, that decision concludes with this statement: "[Plaintiff's counsel] referred me to *Egerton v. Earl Brownlow* (1853), 4 H.L.C, 1, at pp. 195… The Brownlow case -- about a will -- covers 256 pages. I have not time to read it carefully."[75]

*Egerton v Brownlow* is indeed about a will; it is also the decision that preserved and justified the use of public policy in voiding operations of the common law that offend the common good.[76] Who knows what conclusions the judge in *Franklin* might have reached had he found the time to read *Brownlow* carefully. Such was the observation of Justice O'Halloran in his dissent in *Rogers v Clarence Hotel*,[77] in which he refused to follow the majority in applying *Christie*'s precedent to an identical scenario at a Vancouver tavern a year after the Supreme Court judgment in *Christie* was released.[78]

Finally, as noted above, the doctrine of public policy had long been interpreted and applied *in pari materia* with pre-existing common law and other statutes.[79] The effort taken by both the Supreme Court of Canada and Quebec Court of King's Bench to explain why the relevant Quebec statutes did not apply to the particular scenario in *Christie* was an obtuse avoidance, rather than a careful

[71] *Ibid at* paras 8–10.

[72] *Ibid* at para 8.

[73] (1924), 55 OLR 349 (Ont HC), [1924] OJ No 33 (QL) [*Franklin*, cited to QL].

[74] *Ibid* at para 6.

[75] *Ibid* at para 15.

[76] See Thomson, *supra* note 14 at 160; Knight, *supra* note 11 at 211–12; Percy H Winfield "Public Policy in the English Common Law" (1928) 42:1 Harv L Rev 76 at 88–90.

[77] [1940] 3 DLR 583, [1940] 2 WWR 545 [*Rogers* cited to DLR].

[78] O'Halloran J held that refusal to serve a customer based only on their race was contrary to the common law, writing that "All British subjects have the same rights and privileges under the common law—it makes no difference whether white or coloured; or of what class, race or religion" (*ibid* at 588).

[79] See e.g. *Walkerville Brewing*, *supra* note 22.

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application, of the law. Instead of producing a technical interpretation of the law to condone the tavern's racism, the Supreme Court of Canada could and should have viewed those Quebec statutes that forbade arbitrary discrimination in public places as informing the application of Quebec's public policy to the York Tavern's racist actions. This was clear enough to Justice Archibald at the turn of the century in *Johnson v Sparrow*, and it should have been clear to the Supreme Court of Canada 40 years later when it granted special leave to hear *Christie* as "the matter in controversy" was "of such general importance."[80] By focusing with ardour on the minutiae of the law and the question of whether beer was in fact a food,[81] the larger picture of what Quebec's public policy dictated was lost.

It is true that in 1939 Canada was very much beset by both informal and institutionalized racism.[82] *Christie* was handed down at a time when racial segregation and discrimination were commonplace and considered acceptable by a large number of Canadians.[83] However, Canada was also a multicultural democracy that required a certain level of freedom from discrimination in everyday public life in order to properly function.[84] Moreover, the nation was not uniformly or monolithically racist.[85] The Court would not have had to look far to find strong, vocal pockets of resistance to racist ideology and practice: in public discourse, politics, and, as noted above, in the cases themselves. As Constance Backhouse argues, the judges hearing these cases were not, as so many of them implied, bound by clear legal precedents. These disputes lacked legal certainty and the judges therefore had a choice as to whether to apply those precedents favouring freedom of commerce or the equally persuasive precedents affirming principles of equality and freedom from discrimination.[86] Justices Archibald, Carroll, and Galipeault chose the latter. It was entirely possible for the justices of the Supreme Court of Canada in *Christie* to have also exercised their considerable discretion in this area differently and to take a strong stance against race discrimination. The doctrine of public policy was perfectly suited to this task and clearly provided the Court with the legal grounds for such a stance. But the Court's

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[80] *Christie* SCC 1939, *supra* note 43 at para 1.

[81] *Christie* SCC 1940, *supra* note 2 at 144–45.

[82] Racial barriers to equal participation in Canadian society existed in all areas of public life including education, employment, recreation, military service, suffrage, housing, public services, and criminal justice. See e.g. Backhouse, *supra* note 28; Walker, *supra* note 44 at 315; Timothy J Stanley, *Contesting White Supremacy: School Segregation, Anti-Racism, and the Making of Chinese Canadians* (Vancouver: UBC Press, 2011); Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958* (Toronto: University of Toronto Press, 2010).

[83] See e.g. Walker, *supra* note 44.

[84] As alluded to by Justice Galipeault, dissenting in *Christie* KB, *supra* note 30 at paras 141–42; by Justice Archibald in the lower court decision of *Sparrow*, *supra* note 61 at para 14; and by Justice Carroll, dissenting in *Loew's*, *supra* note 50 at paras 8–10.

[85] See e.g. Walker, *supra* note 44 at 321; Backhouse, *supra* note 28 at 260, 275–78. Backhouse writes that, although racism in the first half of the 20th century was systemic, it "did not entirely envelop white Canadian society in an unrelieved manner" (*ibid* at 277).

[86] Backhouse, *supra* note 28 at 256. See also Walker, *supra* note 44 at 167.

decision in *Christie* instead reflected, as Walker argues, the pervasive "legal sensibility" of the time,[87] preferring a narrow, formalist solution that pushed questions of race and justice outside the bounds of legal inquiry.

**The Harms of Christie**

The harm that emanated from *Christie* was both material and expressive in nature. We need not point out the serious material effects of the Supreme Court of Canada ruling that discrimination in public bars or taverns was legal. State-sanctioned segregation denied Black individuals the freedom to fully participate as equals in Canadian society, inflicted humiliation, shame, and psychological injury on racialized people, and served to entrench other racist segregation policies and practices. Notably, the decision's impact was not limited to the province of Quebec. At the time of *Christie*'s release, the editor of the Dominion Law Reports wrote that the case served as authoritative precedent that "socially enforced" racism was not contrary to public policy, with respect to both the civil and common law of Canada.[88] This prediction was borne out, with several similar decisions in British Columbia and Ontario following the precedent set in *Christie*.[89] Even the federal deputy Minister of Justice, in response to a Black constituent who complained that he had been refused service at a restaurant due to his race, wrote:

> …to adopt a law requiring a merchant or restaurant keeper to transact business with every member of the public who presented himself, since it would be entirely one-sided, might operate to the serious detriment of business. The principle of freedom of contract which I have mentioned has been recognized and accepted by the Supreme Court of Canada in a decision rendered as recently as 1939. This was on an appeal from the Court of Appeal of the Province of Quebec.[90]

Compounding the clear material or tangible harm of the case is the expressive harm it caused. It is now widely accepted that law has an important expressive dimension, sending messages about what society values and believes in. Legislation, court decisions, and regulatory measures all communicate and build up law's normative character. They create a set of public meanings that influence how people understand their relationship to the state and to one another.[91] Even unenforced laws can have an expressive effect, the law "on the books" signalling society's disapproval of the underlying conduct.[92]

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[87] Walker, *supra* note 44 at 314-19.

[88] *Ibid* at 164.

[89] See e.g. *Rogers*, *supra* note 77; *King v Barclay* (1960), 24 DLR (2d) 418, 31 WWR (ns) 451 (AB QB).

[90] Walker, *supra* note 44 at 176.

[91] See Anderson & Pildes, *supra* note 5; Wibren van der Burg, "The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues" (2001) 20:1 Law & Phil 31.

[92] See Cass R Sunstein, "On the Expressive Function of Law" (1996) 144:5 U Pa L Rev 2021 at 2032; Richard D Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* (New York: Columbia University

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The concept of "expressive harm" builds on this foundation. Expressive harm is the harm inhering in the public or social meaning of an action, rather than in its tangible effects.[93] In other words, the harm lies in what a law, judgment, or state practice *says* as opposed to what it *does*. Race segregation, for instance, constrained and threatened the lives of Black individuals in obvious measurable ways. However, the expressive wrong would persist even in the absence of material consequences like denied opportunities and emotional harm. The attitude of contempt, disrespect, or disgust at racialized persons expressed through race segregation is harmful in and of itself.[94] The harm lies in how race segregation alters social relationships and positions one class of persons as inferior to others. It is a status harm, and it affects all members of society. In the words of Richard Pildes and Richard Niemi,

> Expressive harms are therefore, in general, social rather than individual. Their primary effect is not as much the tangible burdens they impose on particular individuals, but the way in which they undermine collective understandings.[95]

The judiciary can play a key role in perpetuating expressive harm. A court—particularly a nation's highest court—is a speaker with authority and its pronouncements are thought to articulate a nation's core values,[96] even where they elicit disagreement or resistance. Judgments send powerful messages about social norms and values, and shape "how we understand our shared political community."[97] What a court says, how it says it, and even what it fails to say can be as important as the functional consequences of its ruling.[98]

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Press, 1998) at 60; *Norris v Ireland* (App no 10581/83) [1988] ECHR 10581/83 at paras 46–47 (unenforced ban on consensual gay sex declared in violation of article 8 of the European Convention on Human Rights). Conversely, systemic failures to enforce existing laws can signal that those acts are less deserving of censure, *viz*. failures to punish the murders of Black or Indigenous victims by white killers.

[93] Anderson & Pildes, *supra* note 5. Deontological expressivists such as Anderson and Pildes maintain that expressive harm *precedes* the realisation of adverse consequences, while instrumental or consequentialist expressivists focus on how the state's expressive acts go on to influence social norms and behaviour. See e.g. Sunstein, *supra* note 92; Lawrence Lessig, "The Regulation of Social Meaning" (1995) 62:3 U Chicago L Rev 943; Richard H McAdams, *The Expressive Powers of Law: Theories and Limits* (Cambridge, Massachusetts: Harvard University Press, 2015).

[94] See Anderson & Pildes, *supra* note 5 at 1528, 1542–43; Charles L Black Jr, "The Lawfulness of the Segregation Decisions" (1960) 69:3 Yale LJ 421 at 427; Andrew Koppelman, "Commentary: On the Moral Foundations of Legal Expressivism" (2001) 60:3 Md L Rev 777 at 781–84; Deborah Hellman, "The Expressive Dimension of Equal Protection" (2000) 85:1 Minn L Rev 1 at 3, 8–13.

[95] Richard H Pildes & Richard G Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*" (1993) 92:3 Mich L Rev 483 at 507.

[96] Sunstein, *supra* note 92 at 2028.

[97] See Margot Young, "Social Justice and the Charter: Comparison and Choice" (2013) 50:3 Osgoode Hall LJ 669 at 670–71; Jason Mazzone, "When Courts Speak: Social Capital and Law's Expressive Function" (1999) 49:3 Syracuse L Rev 1039 at 1039–43.

[98] Sunstein, *supra* note 92 at 2028. See also Kyle C Velte, "*Obergefell*'s Expressive Promise" (2015) 6:1 HLRe: Off the Record 157.

The Supreme Court of Canada's decision in *Christie* served to proclaim the lesser status of Black Canadians like Fred Christie. Even if no Black person were barred entry from a tavern as a result of the judgment, its expressive effect was to declare their second-class citizenship loud and clear. Indeed, while the social meaning of state action can admittedly be difficult to pin down with certainty,[99] the expressive meaning of state-sanctioned racial segregation is "as clear a sign of disrespect as one might find, and about as hard as a social fact can be."[100] When segregation as social practice receives the backing of the law, it assumes a legitimacy it did not have before. This is one of the gravest harms of *Christie*. By refusing to find that race segregation was contrary to public policy, by characterizing Christie as the party who acted unreasonably, and by focusing on the nutritive qualities of beer as opposed to the violation of Christie's dignity, the Court sent a "strong and sinister message"[101] legitimizing racism. The decision put the Court's stamp of approval on discrimination and served to reify racist hierarchies and divisions in Canadian society.

What, then, does one make of Justice Davis's dissent? In his reasons, Justice Davis distinguished himself from the majority by humanizing Fred Christie, painting him as a respectable gentleman with a suitably Canadian interest in hockey.[102] However, like the majority, Davis J refrained from denouncing the discrimination perpetrated by the tavern as contrary to public policy and did not explore the scope of Christie's right to be treated with equality and dignity, despite the Court having granted special leave under section 41 of the *Supreme Court Act* on the grounds that it was "of such general importance that leave to appeal ought to be granted."[103] It is true that Justice Davis would have found for Christie as the York Tavern had to abide strictly by the terms of the *Alcoholic Liquor Act*, which listed certain permissible grounds for refusing a customer service of alcohol.[104] However, he also held that an "ordinary merchant", not so tightly regulated by the state, would have been free to discriminate on any grounds not listed.[105] The contrast between his dissenting

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[99] The difficulty in identifying an expressive act's meaning is commonly targeted by critics of legal expressivism. See e.g. Matthew D Adler, "Expressive Theories of Law: A Skeptical Overview" (2000) 148:5 U Pa L Rev 1363; Heidi M Hurd, "Expressing Doubts about Expressivism" (2005) 2005 U Chicago Legal F 405 at 418–428; Steven D Smith, "Expressivist Jurisprudence and the Depletion of Meaning" (2001) 60:3 Md L Rev 506. Some take issue with the very concept of social meaning as morally significant. Richard Ekins, for example, describes social meaning as "an exercise in make believe": Richard Ekins, "Equal Protection and Social Meaning" (2012) 57 Am J Juris 21 at 34.

[100] Leslie Green, "Two Worries about Respect for Persons" (2010) 120:2 Ethics 212 at 228; see also Black Jr, *supra* note 94; Charles R Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39:2 Stan L Rev 317 at 361–64.

[101] This phrase is from *Vriend*, *supra* note 6 at 550, used by the Court to describe the message sent by the exclusion of sexual orientation grounds from Alberta's anti-discrimination legislation.

[102] See Adams, *supra* note 29 (on the mischaracterization of why Christie and his friends were at the Tavern to begin with: they were attending a boxing match, not a hockey game).

[103] *Christie* SCC 1939, *supra* note 43 at para 1.

[104] *Christie* SCC 1940, *supra* note 2 at 150, 153.

[105] *Ibid* at 152.

judgment and the clear condemnation of race discrimination from lower court judges like Justices Archibald, Carroll, and Galipeault is striking.

The expressive failures in *Christie* can also be contrasted with another race discrimination case of that era, *The King v Desmond*.[106] Viola Desmond is now well known as the Black Nova Scotian businesswoman who was arrested for seating herself in the "whites only" section of a New Glasgow movie theatre and who challenged her arrest and conviction at trial. The Nova Scotia Court of Appeal delivered a disappointing ruling in her case. The judges maintained that they were unable to rule in her favour because of the legal strategy adopted by her lawyer, who had sought a writ of *certiorari* rather than pursuing an appeal of her conviction on the merits.[107] However, in a brief concurring judgment, Mr Justice Hall (despite also finding his hands tied) expressed regret at this outcome, writing:

> Had the matter reached the Court by some method other than *certiorari*, there might have been opportunity to right the wrong done this unfortunate woman.
>
> One wonders if the manager of the theatre who laid the complaint was so zealous because of a *bona fide* belief there had been an attempt to defraud the Province of Nova Scotia of the sum of one cent, or was it a surreptitious endeavour to enforce a Jim Crow rule by misuse of a public statute.[108]

Halifax's Black newspaper, *The Clarion*, seized upon this concurrence and wrote in response to Hall's statements:

> The Court did not hesitate to place the blame for the whole sordid affair where it belonged. […] It is gratifying to know that such a shoddy attempt to hide behind the law has been recognized as such by the highest Court in our Province. We feel that owners and managers of places of amusement will now realize that such practices are recognized by those in authority for what they are, – cowardly devices to persecute innocent people because of their outmoded racial biases.[109]

This comment demonstrates the expressive power of court decisions. Even though Mr Justice Hall did not rule in Ms Desmond's favour, *The Clarion* saw in his reasons a much-needed judicial acknowledgement of the harms of racism. Such an acknowledgement would have been even more powerful had it emanated from the

[106] [1947] 4 DLR 81, 1947 CarswellNS 1 (NS SC) [*Desmond* cited to CarswellNS].

[107] Constance Backhouse describes the NSCA judges as "sanctimoniously concluding that it was a pity that she didn't choose the proper legal avenue for redress": Backhouse, *supra* note 28 at 281. For a thorough review of the case, see *ibid* at 226–271.

[108] *Desmond*, *supra* note 106 at para 26.

[109] Backhouse, *supra* note 28 at 268, citing "The Desmond case", *The Clarion* (April 1947) at 2.

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Supreme Court of Canada, the "power centre" of legal authority,[110] and yet not one of the justices in *Christie* could bring themselves to declare race segregation as a wrong.

Subsequent cases failed to take up the Supreme Court's missed opportunity to produce, at a minimum, a decision based on public policy. With few exceptions,[111] the courts continued to cite *Christie* for its ratio on freedom of commerce without denouncing the court-endorsed racism in the case.[112] In 1972, for instance, long after Canada had passed its *Bill of Rights*,[113] Justice Léon Laland of the Quebec Superior Court referenced *Christie* on freedom of commerce uncritically, describing it simply as "the case of a tavern refusing to serve beer to a negro."[114] As we explain below, the Supreme Court began to take a more uncompromising position on discrimination in the decades after *Christie* but continued to circumvent the question of whether discrimination in private law was contrary to public policy by deciding the cases on other grounds, leaving the ratio in *Christie* intact.

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## 4. The Era of Avoidance: *Noble and Wolf v Alley* & *Bhadauria v Seneca College*

The era of avoidance spanned forty years. It began with a decision on a discriminatory restrictive covenant in 1949 and ended with the Supreme Court of Canada's refusal to acknowledge a common law tort of discrimination in 1981. In both decisions the issue of public policy and discrimination was raised by the parties, and in both the Supreme Court avoided addressing the question altogether, declining to overturn *Christie* or to denounce any form of race discrimination as contrary to public policy.

### *Noble* and *Wolf v Alley*

In 1948 Bernard Wolf entered into an agreement for the purchase and sale of cottage property near Lake Huron. The property was part of a summer resort subject to a restrictive covenant entered into by the original purchasers fifteen years earlier and due to expire in 1962. The terms of the covenant included a promise to never sell the land to "any person of the Jewish, Hebrew, Semitic, Negro or coloured race or

[110] A nod to Michel Foucault: Walker, *supra* note 44 at 318.

[111] Over 35 years later, Justice Nadeau of the Quebec Superior Court described the actions of the Tavern as "reprehensible": *Philippe Beaubien & Cie c Canadian General Electric Co*, [1976] CS 1459, 1976 CarswellQue 97 at para 169. Notably, Justice Nadeau (without citing *Christie*) found the breach of an oral contract based on racism contrary to public policy in 1965: *Gooding v Edlow Investment Corp*, [1966] CS 436, 1965 Carswell Que 139.

[112] See e.g. *Laporte v Wawanesa Mutual Ins Co*, [1946] 4 DLR 433, 1946 CarswellQue 278 at para 29.

[113] *Canadian Bill of Rights*, SC 1960, c 44.

[114] *Turcotte c Blue Bonnets Raceway Inc*, [1972] CS 753 at 756, 1972 CarswellQue 142.

blood."[115] Jewish himself, Wolf sought a court order that the conditions on the covenant were null and void.[116]

The history of court challenges to discriminatory restrictive covenants in Canada dates back to 1911. In an unreported in-chambers decision, Chief Justice Hunter of the British Columbia Supreme Court voided a condition of a restrictive covenant that forbade the sale of certain land to persons "of Chinese or Japanese origin." According to one authority,[117] Hunter CJ's judgment dulled the use of discriminatory restrictive covenants at a key period of rapid development in British Columbia's lower mainland.[118] The story of racism and real property was different in Ontario. Until 1950, restrictive covenants containing bans on the sale or occupation of land to persons based on their race, religion, or ethnicity remained legal and enforced by decisions of the Ontario Superior Court.[119]

Bernard Wolf's motion in *Noble* was opposed by the Beach O'Pines Protective Association, a private group that initially consisted of the original 35 purchasers of the land. They claimed that the current owners of the land were "congenial" with one another and that, without the impugned terms of the covenant, the character of the community would be altered to such an extent that the value of the land would decrease.[120] In response, Wolf challenged the covenant on the grounds of restraint of alienation, uncertainty, and public policy.[121]

Predating *Noble* by less than a year was the case of *Re Drummond Wren.*[122] In that decision, Justice Mackay of the Ontario High Court of Justice voided a restrictive covenant that prohibited the sale of land to anyone of the Jewish faith or

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[115] *Noble v Alley*, [1948] 4 DLR 123, 1948 CarswellOnt 58 at para 6 (H Ct J) [*Noble* H Ct J cited to CarswellOnt].

[116] *Ibid* at para 10.

[117] The only account of the case was provided by HS Robinson, Registrar of Titles for the City of Vancouver, who published a short article in the *Vancouver Advocate* on racist land covenants 40 years later. The unreported decision is reproduced in HS Robinson, "Limited Restraints on Alienation" (1950) 8 Advocate 250 at 251, referenced as Ref Chamber applications VR 111/Fol 65 Jany 11th 1911.

[118] To the best of Robinson's knowledge, even where such covenants had been successfully registered with the Land Titles Office in Vancouver, any conditions that limited the sale of the property to persons of a certain race or religion were considered void by city officials. Robinson claimed that as of 1950, there had never been a case where a Registrar of Titles had requested evidence of a grantee's race or religion prior to perfecting a conveyance of property (*ibid*).

[119] See *Essex Real Estate Co Ltd v Holmes*, [1930] OJ No 296, 37 OWN 392 (H Ct J); *Re Bryers & Morris*, [1931] OJ No 229, 40 OWN 572 (H Ct J); *McDougall v Waddel*, [1945] 2 DLR 244, [1945] OJ No 82 (H Ct J).

[120] *Noble* H Ct J, *supra* note 115 at para 7.

[121] *Ibid* at para 11.

[122] *Wren*, *supra* note 22.

other "persons of objectionable nationality" for reasons of public policy.[123] While it was not appealed, the judgment in *Wren* was a landmark decision at the time and is still considered as such by adjudicators and scholars.[124] *Wren*'s importance was both symbolic and functional. It symbolized an express rejection of antisemitism and discrimination following on the heels of the Second World War[125] and was also the first common law judgment (the earlier Quebec decision of *Johnson v Sparrow* being one of civil law) that expressly found discrimination of any kind contrary to public policy.

Justice Mackay's reasoning in *Wren* echoed the arguments of Fred Christie's counsel and Justice Galipeault's dissent six years earlier in *Christie*. Noting that it was "a well-recognized rule that courts may look at various Dominion and Provincial Acts and public law as an aid in determining principles relative to public policy",[126] Mackay J looked to all such legislation in effect in 1945 that prohibited the type of discrimination at issue. In addition, he referenced international covenants and treaties to which Canada was either a signatory or subscribed.[127] He held that all of these sources pointed to a growing intolerance for discrimination based on race, religion, or similar factors within a democratic society that comprised multiple ethnicities, cultures, and religions. This was because of the harm such discrimination posed to these societies. Nothing, he reasoned, could "be more calculated to create or deepen divisions between existing religious and ethnic groups."[128] To allow discrimination in property law would serve only to segregate and isolate certain groups of persons from residential and business areas alike, leading to the fragmentation of society. Such fragmentation was a threat to national unity and injurious to the Canadian public, and

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[123] *Ibid* at paras 6, 23. Justice Mackay also found the covenant void for being an invalid restraint on alienation, for being uncertain, and for contravening Ontario's *Racial Discrimination Act* (*ibid* at paras 30–35).

[124] See *Bekele v Cierpich*, 2008 HRTO 7 at para 88; D A L Smout, "An Inquiry into the Law on Racial and Religious Restraints on Alienation" (1952) 30:9 Can Bar Rev 863 at 868; C B Bourne, "Case and Comment" (1951) 29:9 Can Bar Rev 969 at 974. See also the arguments of JR Cartwright, lawyer for appellants in *Noble and Wolf*, [1949] OR 503, 1949 CarswellOnt 47 [*Noble* CA, cited to CarswellOnt], who spoke of the "very wide publicity" received by the case and its corresponding absence of "legislative disapproval." Cartwright also noted that it was also applied in an unreported decision by Barlow J.

[125] The decision was noted in Time Magazine and cited by American Courts; see Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005) at 251.

[126] *Wren*, *supra* note 22 at para 13.

[127] These included the *San Francisco Charter*, 2 January 1942, Can TS 1942 No 1 to which Canada was a signatory; the *Atlantic Charter*, RSO 1937, c 284 to which Canada had subscribed; Ontario's *Racial Discrimination Act*, RSO 1944, c 51, s 1; regulations pursuant to *The Community Halls Act*, RSO 1937, c 284; and even an anti-discriminatory provision found in Ontario's *Insurance Act*, RSO 1937 c 256, s 99 (*ibid* at paras 14–19). Doctrinally, this decision departed from precedents from the Ontario Court of Appeal which sought to restrict the application of the doctrine: see *Re Millar*, *supra* note 16. Justice Mackay believed the doctrine of public policy applied "whenever the facts demanded its application," and that violations of public policy were caused by "whatever is injurious to the interests of the public": *Wren*, *supra* note 22 at para 12.

[128] *Wren*, *supra* note 22 at para 20.

hence contrary to the public policy of Ontario and Canada.[129] If any judge were to sanction such a covenant, Mackay J reasoned, the effect on a multicultural society such as Ontario's would be severely damaging.[130]

The motion judge in *Noble,* however, held that he was neither bound by *Wren* with respect to its public policy findings, nor was he in agreement with them.[131] In Schroeder J's opinion, Mackay J had placed too much weight on international treaties and the policies of other countries that did not bind Canadian legislators.[132] Looking instead to domestic laws that influenced public policy on this issue, Justice Schroeder believed that Justice Mackay had engaged in an "arbitrary extension" of the doctrine[133] and had created "a novel head of public policy."[134] Citing UK jurisprudence with the most restrictive dicta on public policy, Justice Schroeder expressed his disdain for judicial interference with freedom of contract.[135] He characterized Justice Mackay's belief that these types of covenants were dangerous to Canadian society as "fanciful and unreal."[136] At best, this was a matter to be resolved by the legislature, not the courts.[137]

The Ontario Court of Appeal unanimously upheld Justice Schroeder's decision on all grounds.[138] Four of the five justices specifically addressed the public policy ground, explaining why they believed the clause to be valid in this respect. Chief Justice Robertson, in accepting Justice Schroeder's grounds for distinguishing *Wren*, held that the covenant was a private agreement between a small group of people that affected "property of their own in which no one else has an interest."[139] Given that the summer colony in question involved "much intermingling" in shared spaces such as the beach, the clause was simply an "innocent and modest effort" to ensure that residents were "of a class" who would "get along well together."[140] He held that to

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[129] *Ibid* at paras 20–21.

[130] *Ibid* at para 20.

[131] *Noble* H Ct J, *supra* note 115 at para 36. The trial judge also rejected Wolf's arguments that the covenant constituted an impermissible restraint on alienation and that it was uncertain (*ibid* at paras 12–16, 21–23).

[132] *Ibid* at paras 38–43.

[133] *Ibid* at para 51.

[134] *Ibid* at para 44.

[135] *Ibid* at paras 45–52.

[136] *Ibid* at para 52.

[137] *Ibid* at para 53.

[138] *Noble* CA, *supra* note 124. For a detailed account of the hostility and overt racism expressed by sitting judges at both levels of court before the case was heard by the Supreme Court of Canada, see Walker, *supra* note 44 at 207–18.

[139] *Noble* CA, *supra* note 124 at para 28.

[140] *Ibid*.

consider such an effort as offensive to public policy "requires a stronger imagination than I possess."[141] In his concluding paragraph, Robertson CJ noted that although "goodwill and esteem among the people of the numerous races that inhabit Canada" was a laudable goal, to legislate such tolerance would be meaningless if the populace did not genuinely share such a view.[142] This, in the Chief Justice's opinion, was why there had been no legislative action in this area and, furthermore, why the courts should not become involved.[143] Henderson JA stated that the judgment in *Wren* was "wrong in law and should not be followed."[144] In his opinion, the true principle of public policy to which courts should adhere was sanctity of contract.[145] Hope JA believed that voiding such a clause would amount to undue restriction of the parties' right to freedom of association.[146] Finally, Hogg JA provided pages of history on the doctrine of public policy and cited the usual cases containing the most conservative of dicta, including the test set out in *Re Millar*,[147] which he held was not met in the case at bar. In *Re Millar*, decided two years before *Christie*, the Supreme Court of Canada held that in order for something to be found contrary to public policy the harm it posed to the public had to be "substantially incontestable."[148] Curiously, no mention of *Millar* was made in the *Christie* decision, even though the panel of judges was nearly identical in both cases.

The Ontario Court of Appeal's decision in *Noble* received widespread public condemnation, not just by civil liberty associations but also by the mainstream media.[149] The decision was appealed and leave granted by the Supreme Court of Canada. The appeal was funded and spearheaded by the Canadian Jewish Congress,

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[141] *Ibid*.

[142] *Ibid* at para 29. The bizarre nature of this statement was not lost on legal commentators of the time, particularly given that anti-discrimination legislation already existed in Ontario at the time of the ONCA's decision. As Smout noted, if government waited for general acceptance of a law prior to its passage this would result in "precious little" of it: Smout, *supra* note 124 at 871–72.

[143] *Noble* CA, *supra* note 124 at para 29.

[144] *Ibid* at para 32.

[145] *Ibid* at para 33.

[146] *Ibid* at para 42.

[147] *Ibid* at para 64.

[148] *Re Millar*, *supra* note 16 at 2. *Re Millar* concerned another attempt to categorize a clause in a will as contrary to public policy. In that case, the will provided a large amount of money to the woman in Toronto who had the most children within a 10-year period following the testator's death. The testator's relatives challenged the provision but lost, the Supreme Court of Canada finding that for the doctrine to be invoked, the issue had to involve "the safety of the state, or the economic or social well-being of the state and its people as a whole" and that "harm to the public [had to be] substantially incontestable" (*ibid*). In the context of discrimination and public policy, this test has been cited only four times and applied only once, in *Canada Trust Co*, *supra* note 24. See Thomson, *supra* note 14 at 150. The test has been applied in only twelve reported decisions outside the context of discrimination.

[149] Walker, *supra* note 44 at 218–20.

which expressed "full confidence that the court would confirm the full civil rights of all citizens, irrespective of race or religion."[150]

Accounts of the judges' demeanour during the Supreme Court of Canada hearing in *Noble* suggest that the majority of the bench was openly hostile to antisemitic arguments,[151] but none of this concern translated into the written decision. The Supreme Court overturned the Court of Appeal on grounds other than public policy. On that issue it remained conspicuously silent, except for one dissenting judge who found the practice to be in keeping with public policy, endorsing the findings of the Ontario Court of Appeal.[152]

Majority Justices Kerwin and Taschereau invalidated the racist, antisemitic covenant for technical reasons. They found that the condition of the covenant did not run with the land and thereby violated the rule in *Tulk v Moxhay*.[153] They reasoned that this rule ought to have been considered by the Ontario Court of Appeal, and they allowed the appeal on this ground alone.[154] Rand, Kellock, and Fauteux JJ found the clause void not only for not running with the land, but also for creating an impermissible restraint on alienation and for uncertainty.[155] Estey J found the clause void only for reasons of uncertainty.[156]

The only portion of the Supreme Court's judgment containing the words "public policy" is Locke J's dissent, which implicitly found that the terms of the covenant did *not* contravene public policy. The bulk of Justice Locke's dissent focused on a procedural issue.[157] With respect to the public policy question and "all remaining issues," Justice Locke stated his agreement with "the learned Chief Justice of Ontario."[158]

It may appear that the majority's silence in *Noble* with respect to public policy was influenced by the fact that, while the case was winding through the courts, the

[150] *Ibid* at 220.

[151] "The judges appeared sympathetic to Robinette and Denison, and this time it was Morden who was subjected to interruptions. For example, when he suggested that his clients' property would depreciate in value if Jews were allowed, Justice Ivan Rand interjected that if Albert Einstein and Arthur Rubinstein purchased cottages there the property values would increase, and the Association 'should be honoured to have them as neighbours'" (*ibid* at 229).

[152] *Noble* SCC, *supra* note 7.

[153] *Tulk v Moxhay*, (1848) 2 Ph 774, 41 ER 1143; *Noble* SCC, *supra* note 7 at paras 7, 12–13.

[154] *Noble* SCC, *supra* note 7 at para 14.

[155] *Ibid* at paras 15–21.

[156] *Ibid* at para 36.

[157] This concerned the Supreme Court's deciding the appeal on a question that the lower court had refused to consider (*ibid* at para 44). Indeed, public policy is only mentioned by Locke J when it is listed as a ground that was considered by the Ontario Court of Appeal.

[158] *Ibid* at para 46.

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government of Ontario had amended its conveyancing legislation to make restrictive covenants based on the personal attributes of a purchaser illegal.[159] However, this amendment did not prevent the Court from considering the legality of the covenant with respect to alternative property law rules such as uncertainty, impermissible restraints on alienation, or the rule in *Tulk v Moxhay*.

In all material respects, the decision in *Noble* arguably left the parties in the same position as in *Wren*. The covenants in both cases were declared invalid and the racist conditions voided accordingly. However, the decision in *Noble* stands out as a colossal failure in its expressive dimension. As noted by Walter Tarnopolsky prior to his appointment to the Ontario Court of Appeal, the Supreme Court failed in *Noble* to take seriously its role of providing guidance to the public and the legislature on how to "achieve an egalitarian society."[160] This stands in marked contrast to Justice Mackay's overt refusal to sanction race discrimination in private property arrangements and his explicit commitment to law's egalitarian function. Though the result in *Noble* was certainly more favourable than that in cases of the prior era, such as *Christie*, the *Noble* Court's failure to condemn racism and to find it contrary to public policy signaled an unacceptable ambiguity about the propriety of racist private law arrangements. Tarnopolsky was quite right to note that *Noble* would "not go down in the annals of judicial history as one of the more inspiring judgments of our Supreme Court."[161]

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### *Seneca College of Applied Arts & Technology v Bhadauria*

The era of avoidance concluded with *Seneca College v Bhadauria*,[162] which marks the last time the Supreme Court of Canada granted leave to hear a case that concerned public policy and discrimination in the private law. The case involved the lawsuit of Dr Pushpa Bhadauria, in which she alleged that Seneca College refused to hire her because of her ethnic background. One of the grounds of action was that Seneca College "was in breach of its common law duty not to discriminate against her."[163]

In her affirmation of a common law tort of discrimination, Wilson JA (as she then was), writing for the Court of Appeal, held:

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[159] "Every covenant made after the 24th day of March 1950, which but for this section would be annexed to and run with land and which restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place of origin of any person shall be void and of no effect": *The Conveyancing and Law of Property Act*, RSO 1950, c 68, s 21. As the legislation was enacted after the Ontario Court of Appeal decision in *Noble* had been handed down, it did not form any part of Noble and Wolf's litigation strategy and was not considered by the Court. For insight into the development of this legislative provision and its role in the litigation, see Walker, *supra* note 44 at 222–26.

[160] Tarnopolsky, *supra* note 60 at 76.

[161] *Ibid* at 77.

[162] *Bhadauria* SCC, *supra* note 8.

[163] *Bhadauria CA*, *supra* note 59 at para 7.

> I regard the preamble to [Ontario's Human Rights] Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights. If we accept that "every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin", as we do, then it is appropriate that these rights receive the full protection of the common law.[164]

Justice Wilson's conclusion relied on judgments where discrimination had been found to contravene the common law, including Justice Mackay's decision in *Wren.* She noted in particular that Mackay J had had the option of invalidating the restrictive covenant based on the breach of Ontario's then *Racial Discrimination Act* but had instead found its discriminatory conditions contrary to public policy.[165] She concluded that the common law was fully capable of grounding Dr Bhadauria's claim of discrimination.

The Supreme Court allowed Seneca College's appeal. Writing for a unanimous court, Laskin CJ relied primarily on the existence of the province's *Human Rights Code*,[166] holding that it provided an exhaustive recourse for discrimination. Contrary to Wilson JA and Mackay J before her, Laskin CJ held that the statutory scheme foreclosed any role for the doctrine of public policy in the matter at hand. The Chief Justice then turned to Wilson JA's reliance on *Wren*:

> I do not myself quarrel with the approach taken in *Re Drummond Wren*, but it is necessary to point out that a different view on public policy was taken by the Ontario Court of Appeal in *Re Noble and Wolf*, a case not mentioned by Wilson J.A. Moreover, when this last-mentioned case came to this Court as *Noble and Wolf v. Alley*, the obnoxious covenant in that case, similar to the one in *Re Drummond Wren*, was held unenforceable for uncertainty and as a restraint on alienation, property law grounds, and the Court made no pronouncement on public policy, although the Court of Appeal had done so, disagreeing therein with *Re Drummond Wren*.[167]

The exact point Laskin CJ wished to make in this passage is unclear. While indicating lukewarm approval of Justice Mackay's reasoning in *Wren* ("I do not myself quarrel with [it]"), he also drew attention to the Ontario Court of Appeal's rejection of those same reasons in *Noble* and the Supreme Court of Canada's avoidance of the issue altogether. He then followed suit by failing to say anything more about whether discrimination offended against public policy.

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[164] *Bhadauria* SCC, *supra* note 8 at 193.

[165] *Ibid* at 192.

[166] RSO 1990, c H 19.

[167] *Bhadauria* SCC, *supra* note 8 at 192.

However, what is clear is the irony of this judgment, given the previous position Laskin CJ had publicly taken on these specific cases.[168] Prior to and during his time as law professor at the University of Toronto, Laskin CJ was heavily involved in legal activism in the areas of organized labour and human rights.[169] While not a lawyer on record for either case, Professor Laskin (as he then was) was a key member of the legal team for both Drummond Wren and Bernard Wolf. He wrote the brief that inspired and informed Justice Mackay's reasons in *Wren* on why the discrimination at issue offended public policy.[170] He also chaired the committee struck by the Canadian Jewish Congress to craft the appellate arguments in *Noble*.[171] Much like the approach taken by Fred Christie's lawyers, the core argument in both of those cases was that the discrimination at issue contravened public policy.[172] And yet here was Bora Laskin, now Chief Justice of Canada, tacitly endorsing the Court's refusal to express in writing the condemnation that its majority conveyed during oral arguments of the overt discrimination towards Jewish Canadians.

Equally puzzling to those aware of this history is how, in that same judgment, Laskin CJ declined to condemn or even address the Court's decision in *Christie*.[173] Recall that Laskin had published a highly critical academic paper on the *Christie* decision when it was released.[174] But in his later role as Chief Justice of the Supreme Court of Canada, when given an opportunity to redress the decision, Laskin CJ said nothing about *Christie* except that it was irrelevant to the argument at bar given that it did not relate "to a refusal to recruit or to employ."[175]

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[168] See Girard, *supra* note 125 at 249; Bob Aaron, "Honouring the end of real-estate racism in Canada", *Toronto Star* (20 April 2015), online: <www.thestar.com/life/homes/2015/04/17/honouring-the-end-of-real-estate-racism-in-canada.html> [perma.cc/NQ2Y-JVFK].

[169] For a detailed account of Bora Laskin's activism and early career see Girard, *supra* note 125.

[170] *Ibid* at 250.

[171] Walker, *supra* note 44 at 213–14.

[172] Girard, *supra* note 125 at 249–57.

[173] Quoting from an interview with the Hon Mr Justice Allen Linden in her biography of Justice Wilson, Ellen Anderson writes that the Chief Justice's approach in *Bhadauria* might be explained by Laskin CJ's belief that administrative tribunals such as the Ontario Human Rights Commission were best placed to protect civil liberties and human rights. Laskin CJ was "no great friend of the common law of torts" but felt, rather, that the court "had a duty to see that statutes if at all possible are given an operative effect": Ellen Anderson, *Judging Bertha Wilson: Law As Large As Life*, 2nd ed (Toronto: University of Toronto Press, 2002) at 124. See also Walker, *supra* note 44 at 240.

[174] Laskin, "Tavern Refusing", *supra* note 60.

[175] *Bhadauria* SCC, *supra* note 8 at 190. This can be contrasted with Wilson JA's treatment of *Christie* in her judgment below, which she considered in her decision to affirm the existence of the tort of discrimination, her disdain at the attitudes of the presiding judges in *Christie* only thinly veiled: *Bhadauria* CA, *supra* note 59 at para 8.

**The Harms of the Era of Avoidance**

Chief Justice Laskin was correct to find that Ontario's human rights legislation addressed the harm at issue in *Bhadauria*; however, this fact should not have barred the recognition of additional actions and remedies for rights-seeking litigants facing discrimination.[176] Public policy actions can exist in tandem with statute-based discrimination claims. A chief example is discriminatory bursaries and scholarships, an issue addressed by the Ontario Court of Appeal ten years after its decision in *Bhadauria* when it finally adopted Justice Mackay's findings in *Wren* and, unlike the Supreme Court of Canada, reversed its earlier stance on the doctrine of public policy taken in *Noble*.[177] Indeed, at no point in *Bhadauria* did Laskin CJ acknowledge those areas of the private law that lie outside the ambit of human rights legislation, such as wills, private trusts, and certain contracts, leaving the question of whether discrimination in those instances could contravene public policy unanswered.[178] As we will see in the final "era" outlined in this paper, this is precisely where the doctrine of public policy is still called upon to provide redress for discrimination and to ensure that certain areas of the private law do not become breeding grounds for harmful discrimination in Canadian law.

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On top of the material failures of *Noble* and *Bhadauria* to address the proper scope of public policy, the tactic of avoidance in these cases also carries the risk of expressive harm. As noted earlier in this paper, the existence of expressive harm does not depend on the realization of particular adverse consequences.[179] The harmful message expressed by state action can land immediately, without the necessary occurrence of consequent material or tangible harms. This distinction is important. The fact that the outcome in *Noble* was favourable to the plaintiffs, with the offending

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[176] For a fulsome discussion on this point see Harry Kopyto, "The Bhadauria Case: The Denial of the Right to Sue for Discrimination" (1981) 7:1 Queen's LJ 144.

[177] *Canada Trust Co*, *supra* note 24. In that case the Ontario Court of Appeal declined to determine whether or not the scholarship at issue was subject to Ontario's human rights scheme. Instead, it held that the Superior Court was the preferred venue for hearing such matters because of its inherent jurisdiction and access to the cy-près doctrine (*ibid* at para 74). We discuss the Ontario Court of Appeal decision in *Canada Trust Co* in greater detail in the final part of this paper. Notably, the Ontario Human Rights Commission released a comprehensive memo in 1997 explaining how the province's *Human Rights Code* applied to discriminatory scholarships: Ontario, Human Rights Commission, *Policy on Scholarships and Awards*, December 2009 update (Toronto: Ontario Human Rights Commission, 1997), online: <www.ohrc.on.ca/en/policy-scholarships-and-awards> [perma.cc/64WM-SY85]. Despite this, as recently as 2016 the Ontario Superior Court held that a scholarship that discriminated on the grounds of sex, sexual orientation, race and other characteristics was contrary to public policy: *Royal Trust Corp of Canada v University of Western Ontario*, 2016 ONSC 1143. See also *Peach Estate (Re)*, 2009 NSSC 383 [*Peach Estate*] (in this decision a condition in a private will was struck down on the basis of public policy before it could cause a contravention of the province's human rights legislation).

[178] For similar observations see: Tamar Witelson, "Retort: Revisiting *Bhadauria* and the Supreme Court's Rejection of a Tort of Discrimination" (1999) 10 NJCL 149 at 156.

[179] Anderson & Pildes, *supra* note 5 at 1530–31. Simon Blackburn usefully writes of Anderson and Pildes' deontological approach: "we might say that the harm occurs at the time and place of the expressive act, not in virtue of anything that happens at later times or places," in Simon Blackburn, "Group Minds and Expressive Harm" (2001) 60:3 Md L Rev 467 at 470.

covenant struck down by the Court, does not obviate the expressive harm. By failing to find the provision contrary to public policy, the Supreme Court in *Noble* created ambiguity around the wrongfulness of race discrimination and signalled that Canadian society was not yet ready to eradicate discrimination of this kind, an observation shared by legal commentators at the time of its release.[180] Over thirty years later, the Court had the chance to right this wrong in *Bhadauria* but it failed to do so. Rather, *Bhadauria* has been described by some scholars as representing an implicit affirmation of *Christie*[181] and "a sharp break from, if not a full repudiation of"[182] the progressive, antiracist approach to private law discrimination in *Wren*.

One might retort that the Court in *Bhadauria* was simply showing deference to administrative tribunals as the appropriate bodies to determine human rights claims, and that its decision to do so cannot implicate the Court in any harmful messaging around discrimination. But the fact that Chief Justice Laskin may have had a benign reason for failing to break with *Noble* does not mean his judgment cannot be a source of expressive harm. A speaker's intention does not necessarily determine the meaning of their expressive acts.[183] Further, deference of this sort has historically been used as a means of preserving the *status quo* and blocking attempts to make the law more just and more responsive to racism and xenophobia. It is important to look behind claims of deference and to examine not only the practical effects of deference but also its expressive effect. The point is that by affirming its own troubling position in *Noble,* the Court in *Bhadauria* signalled a problematic ambivalence around the role of law in remedying discrimination and an indifference to the lasting legacy of the Court's prior pronouncement on public policy in *Christie*.

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### 5. The Era of Silence: *McCorkill v McCorkill Estate* & *Spence v BMO Trust Corp*

A year after the Supreme Court's decision in *Bhadauria*, Canada repatriated its Constitution and formally adopted the *Charter of Rights and Freedoms*,[184] cementing the notion of equality and anti-discrimination in actions between citizens and the state. This development, along with the prior introduction of human rights legislation in all the provinces, ushered in a new era of anti-discrimination law in the public sphere. It also heavily influenced the evolution of the public policy doctrine's application to discrimination in the private law.[185] In particular, as noted above, the Ontario Court of

[180] See Allan Goldstein, "Racial Restrictive Covenants" (1951) 9 UT Fac L Rev 30; Smout, *supra* note 124 at 877, 880; Walker, *supra* note 44 at 231–33.

[181] See Walker, *supra* note 44 at 238.

[182] Kopyto, *supra* note 176 at 146.

[183] See Anderson & Pildes, *supra* note 5 at 1525; Alan Strudler, "The Power of Expressive Theories of Law" (2001) 60 Md L Rev 492 at 498–502; *cf* Ekins, *supra* note 100 (it is the purpose and intent of state action that determines its meaning).

[184] *The Charter*, supra note 4.

[185] Grattan & Conway, *supra* note 25.

Appeal in *Canada Trust Co v Ontario (Human Rights Commission)*[186] finally reversed its position on public policy and discrimination from *Noble* in favour of Justice Mackay's ruling in *Wren*.

In the 1990 decision of *Canada Trust Co*, the Ontario Court of Appeal voided discriminatory conditions in a bursary.[187] The majority found the terms contrary to public policy, writing: "[t]o say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious."[188] The majority held that notions of white supremacy were "patently at variance" with the pluralistic society of Canada, as evidenced by the rejection of the scholarship *en masse* by universities and its criticism by "human rights bodies, the press, the clergy," and the community in general.[189]

In concurring reasons, Justice Tarnopolsky provided a longer explanation for why the discrimination at issue offended public policy, which he believed was informed by "provincial and federal statutes, official declarations of government policy and the Constitution" and "the anti- discrimination laws of every jurisdiction in Canada."[190] He quoted Justice Mackay's reasons in *Wren* verbatim, writing that he could "think of no better way" to convey the point that "the promotion of racial harmony, tolerance and equality is clearly and unquestionably part of the public policy of modern-day Ontario."[191] *Canada Trust* was not appealed to the Supreme Court of Canada, but at least eight reported lower court decisions followed in which the doctrine of public policy was applied to discriminatory wills, private trusts, and scholarships.[192] The last two of these decisions involved challenges to private wills and were ultimately appealed to the Supreme Court of Canada, giving it yet another opportunity to reverse its holding on public policy from *Christie*.

### *McCorkill v McCorkill Estate*

One such appeal was *McCorkill v McCorkill Estate*,[193] heard in 2014 by the New Brunswick Court of Queen's Bench. The case concerned a challenge to the validity of a testamentary gift left by Harry Robert McCorkill to National Alliance, a white

[186] *Canada Trust Co, supra* note 24.

[187] These terms limited recipients to students who were "White," "Protestant," and "British or of British parentage." Further, on any given year, no more than 25% of the available income of the trust could be used to fund female recipients of the scholarship: *Canada Trust Co, supra* note 24.

[188] *Ibid* at para 37.

[189] *Ibid*.

[190] *Ibid* at para 92.

[191] *Ibid* at para 89.

[192] Thomson, *supra* note 14.

[193] *McCorkill* QB, *supra* note 22.

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supremacist organization based in Virginia, USA.[194] McCorkill's sister applied to have the gift rendered void for reasons of public policy and/or illegality.[195]

The evidence in *McCorkill* overwhelmingly established that the purpose of the National Alliance was to promote racism and violence towards racialized persons.[196] Citing Justice Tarnopolsky's sources that informed the doctrine of public policy in *Canada Trust*, Justice Grant added that it could also be determined by reference to Canada's hate speech laws.[197] He held that the publications of the National Alliance would be considered under Canadian criminal law as hate speech,[198] a form of expression characterized by the Supreme Court as deeply harmful to Canadian society.[199]

Additionally, Justice Grant held that the National Alliance's "communications and activities" contravened the values enshrined in Canada's constitution, human rights legislation, and international commitments. In his opinion, these findings of fact rendered its activities contrary to public policy.

Justice Grant's decision, though in many ways informed by precedent, resulted in a novel finding concerning the doctrine of public policy and private wills. Prior to this decision, only *conditional* testamentary gifts had been voided for contravening the doctrine. McCorkill's gift to the National Alliance was unconditional; it was the nature of the beneficiary itself that Justice Grant believed offended public policy. This, as Professor Bruce Ziff noted, created a new kind of "unworthy heir"—a beneficiary who, by virtue of their nature or something they have done, is deemed ineligible to inherit from the testator.[200] Justice Grant attempted to dampen the significance of this aspect of his decision, reasoning that the gift had been made to the National Alliance as an organization, not to its leader or any individual associated with it. Coupled with this observation was the fact that the organization had "foundational documents" that explained what it stood for, including "anti-semitism, eugenics, discrimination, racism and white supremacy, [which] violates numerous statutes and conventions that have been passed by Parliament and the Legislatures and endorsed by the Government of Canada, including the *Criminal Code*."[201] For Justice

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[194] *Ibid* at para 2.

[195] *Ibid* at para 5.

[196] *Ibid* at paras 48, 54–56.

[197] *Criminal Code*, RSC 1985, c C-46, s 319.

[198] *McCorkill* QB, *supra* note 22 at paras 30, 48, 63.

[199] *Ibid* at para 53.

[200] Ziff, *supra* note 19.

[201] *McCorkill* QB, *supra* note 22 at paras 73–75.

Grant this was akin to placing a condition on the gift, one which required it to be used to advance the purposes of the National Alliance.[202]

Justice Grant's decision in *McCorkill* was affirmed by the New Brunswick Court of Appeal in brief reasons.[203]

***Spence v BMO Trust***

While the scope of public policy's application to discriminatory wills was expanded in *McCorkill*, it was restricted one year later by the Ontario Court of Appeal in the 2016 decision of *Spence v BMO Trust Co*.[204] In that decision, the Court of Appeal overturned an Ontario Superior Court judge's decision to void an entire will based on a finding that the motivations of the testator contravened public policy.[205] The uncontested evidence indicated that the testator left everything to one daughter and excluded the other from his will entirely because the second daughter had conceived a child with a man of a different race.[206] Notably, the evidence of the testator's motivations for excluding the second daughter from his will was extrinsic in nature, admitted by way of affidavits. The will itself said nothing about the testator's motive, only that he left nothing to his daughter as she "has shown no interest in me as a father."[207]

The Superior Court held that although the will was not discriminatory on its face, the clear evidence that the will was motivated by racism was sufficient to void the will on the grounds that it offended "not only human sensibilities but also public policy."[208] Once the will was void, the resulting intestacy divided the father's estate equally between his two surviving daughters. The Ontario Court of Appeal overturned this finding. Writing for the majority, Justice Cronk held that the clause at issue in this case did not attract public policy scrutiny. Although the provision excluding his daughter from the estate "may reflect the sentiments of a disgruntled or bitter father," it was "not the language of racial discrimination."[209]

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[202] *Ibid* at para 77.

[203] *Canadian Assn for Free Expression v McCorkill Estate*, 2015 NBCA 50.

[204] 2016 ONCA 196 [*Spence* CA].

[205] *Spence v BMO Trust Co*, 2015 ONSC 615.

[206] *Ibid* at paras 44–45.

[207] *Ibid* at para 22.

[208] *Ibid* at para 49.

[209] *Spence* CA, *supra* note 204 at para 53.

This decision could have been reached on long-established rules of evidence that govern estates law.[210] However, Justice Cronk went further in her decision, finding that the type of clause at issue in *Spence* could *never* attract the application of the public policy doctrine.[211] She held that, with the exception of the recent *McCorkill* decision, the doctrine of public policy had only been applied to conditions on testamentary gifts.[212] *Spence* involved a testamentary clause that was unconditional and held no corresponding entitlement or disentitlement. Importantly, Cronk JA held that even if the testator had expressly disinherited his daughter on racist grounds, rendering the will discriminatory on its face, voiding such a clause would constitute "a material and unwarranted expansion of the public policy doctrine in estates law."[213] In her opinion, such an intrusion would unnecessarily compromise testamentary freedom and would run counter to "established judicial restraint" in voiding private property arrangements that violate public policy.[214]

In so finding, Cronk JA recognized that an openly discriminatory, unconditional bequest would thus be immune from review not only under the *Charter* and the provincial *Human Rights Code* but also under the doctrine of public policy.[215] In concurring reasons, Lauwers JA agreed with the judgment of Cronk JA but emphasized the dangers of litigation floodgates, the risk of uncertainty in estates law, and the threat to the separation of powers should the doctrine of public policy be expanded in the manner suggested by the respondents.

Both *McCorkill* and *Spence* were appealed to the Supreme Court of Canada. While leave to appeal in *McCorkill* was sought nearly a year before *Spence*, the leave decisions in both cases were released concurrently.[216] The delay in the leave decision in *McCorkill* suggested that the Court anticipated an appeal of *Spence*, and that the two cases would be heard together as companion cases.[217] Instead, leave was refused in both. The long period of anticipation and the eventual refusal of leave in both of these cases echoes the sense of betrayal from *Christie*, when special leave was granted to the appellants only for the Court to uphold the right of the Tavern to discriminate against prospective Black customers.

[210] *Ibid* at paras 88–112 (Justice Cronk concluded that the evidentiary rules that pertained to courts of construction also applied to public policy motions. That is, extrinsic evidence admitted to prove the intention of the testator is only admissible in circumstances of latent ambiguity).

[211] *Ibid* at para 75.

[212] *Ibid* at paras 84–85.

[213] *Ibid* at para 85.

[214] *Ibid* at paras 75, 85.

[215] *Ibid* at paras 73–74.

[216] *McCorkill* CA leave, *supra* note 9; *Spence* CA leave, *supra* note 9.

[217] See e.g., *Kerr v Baranow* and *Vanasse v Seguin*, 2011 SCC 10.

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**The Harms of the Era of Silence**

The decision to refuse leave in *McCorkill* and *Spence* had layered consequences. The immediate and most obvious was the Court's failure to account for the different directions in which the NBCA and ONCA pushed the scope of public policy in its application to discriminatory wills. Justice Cronk's reasons in *Spence* treated Justice Grant's approach in *McCorkill* as exceptional and even problematic,[218] leaving the law in this area unclear. These conflicting appellate decisions remain the last time a court at that level has opined on this issue.

Moreover, the refusal of leave ensured that other legal issues concerning public policy and discrimination in wills and trusts remained unresolved. A significant example is the split in *Canada Trust* between the majority judgment and Justice Tarnopolsky's concurring decision concerning the scope of the doctrine. In his reasons, Tarnopolsky JA held that public policy, when applied in the context of discrimination, was only applicable to quasi-public areas of private law, such as public bursaries established through trusts. He expressly held that the doctrine of public policy could not serve to invalidate private trusts or wills.[219] The majority, to the contrary, made no comment on this issue, finding only that the terms of the scholarship in question contravened public policy. While Justice Tarnopolsky's reasoning on this point has largely not been adopted by lower courts,[220] as recently as 2015 a court had cited this specific part of his reasons with approval.[221]

On top of this doctrinal confusion, the decision in *Spence* risks causing harm of an expressive nature. Justice Cronk confirmed that a court must decline to hear a public policy argument with respect to discriminatory unconditional bequests in a will. To be clear, this means that if a court is tasked with adjudicating the validity of a will that explicitly discriminates on the basis of race, religion or another immutable characteristic it may not be open to the court to invalidate it for contravening public policy. By carving out a zone in private law that is immune from the reach of public policy, the Ontario Court of Appeal has effectively sanctioned the perpetuation of discrimination in some quiet corners of the private law. This puts judges in an uncomfortable position. They may be forced to ignore explicit forms of discrimination and to enforce wills that contain discriminatory clauses, in a move that is strikingly inconsistent with the shift to the horizontal application of human rights and anti-

[218] *Spence* CA, *supra* note 204 at paras 64–65.

[219] *Canada Trust Co*, *supra* note 24 at para 107.

[220] Apart from *McCorkill Estate* see *Murley Estate Re* (1995), 130 Nfld & PEIR 271, 405 APR 271 (NL SC); *Fox v Fox Estate* (1996), 28 OR (3d) 496, 10 ETR (2d) 229 (ON CA); *Peach Estate*, *supra* note 177; *Spence* CA, *supra* note 204 at para 55 (the acknowledgement that it can be applied to private wills by Justice Cronk).

[221] *Grams v Babiarz*, 2015 SKQB 374 at para 20.

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discrimination norms.[222] Moreover, they would have to refuse to answer the question of whether such discriminatory provisions are inconsistent with public policy, even when asked to do so by parties before the court. This would implicate the court in denying the harms of discrimination and would send a damning message about the legitimacy of discriminatory private property arrangements. By making the court complicit in sanctioning discrimination of this kind, the ruling in *Spence* effectively brings us back full circle to the first era considered in this paper, of judicially sanctioned discrimination.

The expressive harm of the *Spence* decision is compounded by the Supreme Court of Canada's refusal of leave in both cases. Certainly, a refusal to grant leave can be made for any number of reasons and should not be taken as categorical endorsement of a lower court judgment. The message sent by a decision like this is, admittedly, not easy to parse. However, the identification of an act's social meaning is helped by consideration of a community's background norms, history, and shared understandings.[223] We contend that when the Court's refusal to hear these cases is viewed within the specific historical context of public policy and discrimination in Canada that we have outlined in this paper, it can reasonably be understood to situate the Court as ambivalent as to the existence of discrimination in the outer reaches of private law.

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The Supreme Court of Canada's decision not to hear the appeals in *Spence* and *McCorkill* represents, once again, a missed opportunity to correct its own precedent on public policy in *Christie* and denounce this shameful chapter in the history of racism in Canadian law.

## 6. Conclusion

In the Quebec Court of King's Bench judgment in *Christie*, Justice Bond wrote: "I am not called upon to express any opinion upon the abstract philosophical concept that all men are born equal. All I am called upon to decide is, whether there has been a breach of contract on the part of the appellant, or a wrong committed by it under the laws of this Province."[224] The fact that Justice Bond felt the need to state this at all was evidence enough that those involved in the case were looking to the court for precisely such an expression. Bond J's acknowledgement and then rejection of this task was harmful, a harm which was then magnified by the Supreme Court's subsequent treatment of the issue.

This paper has detailed the expressive harm stemming from the Supreme Court of Canada's treatment of the public policy argument in *Christie.* It has also

[222] See e.g. Lorraine E Weinrib & Ernest J Weinrib, "Constitutional Values and Private Law in Canada" in Daniel Friedmann & Daphne Barak-Erez, eds, *Human Rights in Private Law* (Oxford, UK: Hart Publishing, 2003) at 43.

[223] See Lessig, *supra* note 93 at 958; Anderson & Pildes, *supra* note 5 at 1524; Levy, *supra* note 6 at 410.

[224] *Christie* KB, *supra* note 30 at para 42.

explained the harm caused by the Court's subsequent failures to reverse that decision and to address the issue of public policy as applied to discrimination in the private law. The Court's actions in this area send, at best, a message of ambivalence as to the unfettered ability of individuals to use the private law to perpetuate discrimination and, at worst, a message of endorsement.

Some have argued that a "black letter law" approach to highly politicized issues can be a tool for those seeking to advance the rights of marginalized persons. By relying on seemingly apolitical legal doctrine and precedents, progressive, equality-orientated judgments can be insulated from reactionary accusations of judicial activism.[225] Chief Justice Laskin's acknowledgement in *Bhadauria* of the Supreme Court's approach in *Noble* may well have been a reflection of this tactic, as it seems doubtful that he approved of the Court's silence on the issue of antisemitism in that decision.[226]

However, we maintain that such an approach comes at a tremendous cost. Muting the harms of discrimination and racism or transfiguring them into technical, legal questions perpetuates a false sense of colour-blindness and entrenches the "pervasive mythology of Canadian 'racelessness'."[227] It expresses a harmful ambivalence about race discrimination that is inappropriate for our highest Court. Indeed, the silencing of race in legal discourse *writ large* is endemic; it occurs across all areas of law and serves to prop up and justify existing structures of white supremacy.[228]

Contrary to Justice Bond's assertion in *Christie*, we suggest that the Court *was* "called upon" to address the question of racial equality then, just as it is called upon now to explicitly condemn its reasoning in that case and to confirm that the discrimination at issue in *Christie* is and was contrary to public policy.

To be clear, an acknowledgement by the Supreme Court of Canada that the discrimination at issue in *Christie* contravened public policy and should have been voided under Quebec law at the time does not mean that every instance of discrimination in a will, private trust, scholarship, or contract will henceforth attract a successful application of the doctrine. Much like the *Charter* or human rights laws which contain a system for balancing competing interests, the application of public

[225] See Christopher Essert, "The Office of Ownership" (2013) 63:3 UTLJ 418; Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992) at 307–10.

[226] See Walker, *supra* note 44 at 230. See also Girard, *supra* note 125 at 248 (Girard describes Laskin's participation in these cases as "a brief and unsatisfactory experience").

[227] Backhouse, *supra* note 28 at 281.

[228] Margaret E Montoya, "Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse" (2000) 33:3 Mich J Race & L 847 at 892. On the elision of race in *Christie*, see Walker, *supra* note 44 at 310–12; on its erasure in Viola Desmond's case see Backhouse, *supra* note 28 at 267.

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policy to discriminatory private law arrangements will not always result in a voided condition or clause.[229] A court may ultimately decide that the offending clause does not violate public policy; what is vital is that the court engage with the issue to start with. The Court has a responsibility to address hard questions of this nature and uphold the values of what McLachlin CJ called the era of substantive equality, in the spheres of both public and private Canadian law. There is still work to be done by our highest court in undoing the legacy of *Christie* and it is our hope that the next time such an opportunity is presented, it is taken.

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[229] *Thomson*, *supra* note 14. See also *Canada Trust Co*, *supra* note 24; *Lysaght, Re*, [1966] Ch 191, [1965] 2 All ER 888; *Ramsden Estate (Re)* (1995), 145 Nfld & PEIR 156, 139 DLR (4th) 746 (PE SC); *Estate of F.G. McConnell*, 2000 BCSC 445.

# LAST AMONG EQUALS: WOMEN'S EQUALITY, *R V BROWN*, AND THE EXTREME INTOXICATION DEFENCE

**Kerri A Froc and Elizabeth Sheehy**[1]

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## Introduction

The ss 7, 15 and 28 *Charter* rights of women and girls to physical, psychological and sexual integrity are directly at issue when their perpetrators stand trial for crimes of violence against them. However, these constitutional protections have never been given much purchase in the Supreme Court of Canada's sexual violence jurisprudence on s 7 *Charter* fair trial rights and criminal fault standards.[2] At best, courts have paid lip service to women's s 7 "interests" in privacy and equality and in encouraging their reporting of crimes, but have failed to incorporate them into the historically venerated principles of fundamental justice that protect accused persons.[3]

Yet a trilogy of recent cases on the defence of extreme intoxication, *R v Brown*,[4] *R v Sullivan*, and *R v Chan*,[5] jettisoned even this superficial consideration of women's rights in the context of accused men's s 7 constitutional challenge. In *Brown*, the Court considered the constitutionality of *Criminal Code* s 33.1, enacted in 1995 in response to the Supreme Court's 1994 decision in *R v Daviault*.[6] Section 33.1 sought to curtail the defence in cases of self-induced extreme intoxication for crimes of violence, in the interests of protecting the security of the person and equality rights of women and children, and ensuring men's accountability for violence.

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[2] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[3] *R v Mills*, [1999] 3 SCR 668, 29 DLR (4th) 161.

[4] *R v Brown*, 2022 SCC 18 [*Brown* 2022].

[5] *R v Sullivan*, 2022 SCC 19.

[6] [1994] 3 SCR 63, 118 DLR (4th) 469 [*Daviault*].

Penning a unanimous decision striking down the law as allowing the conviction of the "morally innocent," Justice Kasirer found s 33.1 violated ss 7 and 11(d). He declared that women's countervailing rights could not even be considered in the s 7 analysis because women's equality and human dignity "interests" were not compromised by state action, but rather by individual accused men.[7] Women's equal rights to trial fairness, equality and personal security, were to be treated as "societal interests" under s 1. But, consistent with prior s 7 jurisprudence, the Court found that the s 7 violation posed by s 33.1 could not be justified under s 1.

In resiling from even the modest recognition that women who have experienced men's violence have relevant rights worth considering as part of the core principles that lie at the heart of the criminal justice system under s 7, the Court has truly placed women last among equals. This development would be anathema to the women who fought tirelessly to entrench *Charter* s 28, which guarantees rights equally to "male and female persons" "notwithstanding" anything else in the *Charter*. One of s 28's most important purposes was protective: to ensure that women's rights are not devalued or sacrificed for the newly entrenched constitutional rights bestowed primarily for the benefit of men, who are the vast majority of criminal accused.

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In this article, we first summarize *Brown* and its companion cases of *Chan* and *Sullivan*. Here we also provide context for this trilogy of cases by describing the 1994 decision in *Daviault* that was the impetus for s 33.1. Second, we analyze *Brown*, criticizing it for its likely impact on crimes of violence against women, for its assertion that no state action is involved when men invoke the extreme intoxication defence and the consequent devaluation of women's constitutional rights, and for the failure to account for the role of s 28 in the interpretive process. Third, we describe Parliament's response to the *Brown* decision: the rushed passage of Bill C-28, which amended *Criminal Code* s 33.1 one month after *Brown*, the refusal to consult feminist lawyers and organizations in a meaningful way, and the flawed legislation it produced. Fourth, the article turns to a discussion of what the Court and Parliament missed: an opportunity to consider a broader, equality-infused understanding of the principles of fundamental justice in s 7 and the justification analysis under s 1 using s 28 as an interpretive guide. Fifth and finally, we argue that this constitutional re-grounding could have supported a stronger version of s 33.1, in contrast to that found in Bill C-28. It is our hope that the perspective we offer may be of assistance to Parliament, when it engages in the review of the revised version of s 33.1 promised by the government at the time of Bill C-28's passage, and to judges, as an illustration of what an equality-infused approach to s 7 might look like.

## Part I: *R v Brown, R v Sullivan,* and *R v Chan*

At issue in all three cases before the Supreme Court was the constitutionality of s 33.1 of the *Criminal Code*. This section was enacted in 1995 in response to *R v Daviault*, wherein the Supreme Court of Canada decided that a defence of extreme intoxication

[7] *Brown* 2022, *supra* note 4 at para 70.

must, as a matter of the rights guaranteed in ss 7 and 11(d) of the *Charter*, be available to a man accused of a brutal rape of a woman in her own home. The Court relied on the expert evidence accepted by the lower court finding that Henri Daviault, a chronic alcoholic, was in a state akin to automatism when he lifted a 65-year-old family friend from her wheelchair and sexually assaulted her on her bed, after he had consumed several beers and most of a bottle of brandy.[8]

The Court found that the common law rule that precluded Daviault from relying on his own intoxication to raise a reasonable doubt about whether he had the necessary intent and voluntariness to be found guilty of sexual assault, a "general intent" offence, was in violation of ss 7 and 11(d) and therefore unconstitutional. The overturning of his conviction caused a *Globe and Mail* journalist to accuse the Court of "having lost touch with reality".[9] The scientific community at large also criticized the decision, rejecting the contention that consumption of alcohol alone could lead to an automatistic state, as that term was understood medically.[10]

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Given the public outrage spurred by the decision and its commitment to women's equality,[11] the federal government added s 33.1 to the *Code*, with the support and advice of the Canadian women's movement. Section 33.1's purpose was to promote the "equal participation of women and children in society" and their entitlement to "full protection of the rights guaranteed under ss 7, 11, 15 and 28".[12] Section 33.1 excluded the defence of extreme intoxication from being advanced in relation to general intent crimes of violence. It stated that self-induced intoxication resulting in the inability to form the general intent or voluntariness for a crime was not a defence where the accused "departed markedly" from the reasonable standard of care because their state of self-induced intoxication rendered "the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person."

Minister of Justice Allan Rock testified before the Standing Committee of Justice and Legal Affairs, when Bill C-72, amending the *Criminal Code* to add s 33.1, was at Committee stage. He denied that the bill was a "contradiction or reversal of *Daviault*":

> The bill responds to the court's invitation by *creating* a basis of criminal fault in the context of intoxication, and *for the first time* it would set out a

[8] *Daviault*, *supra* note 6.

[9] Sean Fine, "Has the Highest Court Lost Touch With Reality?" *The Globe and Mail* (8 October 1994) D2.

[10] See Bill C-72, *An Act to amend the Criminal Code (self-induced intoxication)*, 1st Sess, 35th Parl, 1995, Preamble (assented to 13 July 1995) (passed within a year of *Daviault*) [Preamble to Bill C-72]. See also Harold Kalant, "Intoxicated Automatism: Legal Concept vs. Scientific Evidence" (1996) 23:4 Contemporary Drug Problems 631 (the article was a submission to the Commons Committee examining Bill C-72 on 13 June 1995).

[11] Isabel Grant, "Second Chances: Bill C-72 and the Charter" (1995) 33:2 Osgoode Hall LJ 379 at 381.

[12] Preamble to Bill C-72, *supra* note 10.

> standard of care in the field of self-induced intoxication. People who voluntarily become so intoxicated they lose control of their behaviour…breach the standard of care generally recognized in Canadian society.
>
> The bill defines this breach as criminal fault sufficient for criminal liability. The fault would prevent the intoxication defence from being applicable, since the intoxication itself would be the basis of criminal fault for the offence.[13]

Thus, s 33.1 was intended to articulate a standard of criminal fault regarding extremely intoxicated offending, but to limit criminal liability to those cases involving violence or a threat of violence.

The Court heard *Brown*, *Chan* and *Sullivan* together to resolve a conflict in the jurisprudence regarding the constitutionality of s 33.1. *Brown* emanated from the Court of Appeal for Alberta, which had upheld the constitutionality of s 33.1, quashed Brown's trial acquittal, and substituted convictions for break and enter and aggravated assault. *Sullivan* and *Chan* emanated from the Court of Appeal for Ontario, which had struck down s 33.1 as unconstitutional and overturned their convictions, acquitting Sullivan of aggravated assault and assault with a weapon, and sending Chan back for re-trial on charges of manslaughter and aggravated assault.

The facts of *Brown* were that the accused had attended a house party and "snacked" on magic mushrooms from a shared sandwich bag throughout the evening; he also consumed between 6-7 mixed drinks and a number of beers, bringing his total consumption to 14-18 alcoholic drinks.[14] As a result, he entered a state of "substance intoxication delirium", removed all of his clothing, left his friend's house and broke into the home of a neighbour, a female university professor. When she came out of her bedroom to investigate the disturbance, Brown attacked her with a broom handle, leaving her with a broken hand and other injuries requiring surgery and intensive physiotherapy, an ongoing disability, and post-traumatic stress disorder. He was apprehended after breaking into another residence.[15] Despite Brown's consumption of copious amounts of alcohol, his trial judge accepted that the cause of his delirium was the mushrooms and acquitted him based on the extreme intoxication defence.[16]

In Chan's case, he attended a bar with a group of friends to drink beer and watch a hockey game. Some of the group, including Chan, retired to a friend's basement and acquired some magic mushrooms. The Crown's expert testified that Chan told him that he consumed four times the amount of magic mushrooms he had

[13] House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, 35-1, No 98 (6 April 1995) at 98:4 [emphasis added].

[14] *R v Brown*, 2020 ABQB 166 at paras 38 and 74 [*Brown* 2020].

[15] *Ibid* at para 90.

[16] *Ibid* at para 87.

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previously eaten[17] —two "doses"— and twice as many as his companions. He began hallucinating that he was God, with a plan to carry out. He left the party, broke into his father's home, and repeatedly stabbed his father with a butcher knife, causing his death. Then he attacked his father's female partner with the knife, stabbing her in the abdomen, the chest, the back and arms, and the eye, causing her the loss of her right eye as well as multiple injuries.

Sullivan was abusing a prescription anti-depressant—Wellbutrin. He had already experienced hallucinations on a prior occasion and maintained a belief that aliens had invaded Earth. He had a previous psychiatric and substance abuse history, and had tried to break into his mother's home several years earlier and threatened her; the trial judge also referred to a report that he had assaulted his mother eight months before the knife attack, although the report did not indicate that it was drug-related.[18] He swallowed 30-80 tablets in what he described as a suicide attempt,[19] then attacked his mother, stabbing her six times with a knife, and leaving her with serious injuries. She died more than two years later of what were said to be unrelated causes.

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The Supreme Court delivered its substantive decision on s 33.1's constitutionality in *Brown*. It rejected former Justice Minister Rock's Committee testimony that s 33.1 established a new definition of criminal fault for extremely intoxicated violence, instead casting s 33.1 as establishing "conditions of liability." It began its constitutional analysis by deciding that women's constitutional rights could not be considered at the stage of determining whether the accused's s 7 rights were violated by s 33.1 because there was no state action that trenched upon women's rights—it was male individuals, not the state, who had done so.[20] Instead, women's "interests" could only be considered in the s 1 justification analysis.

The Court insisted that limiting consideration of women's ss 7, 15 and 28 rights to the s 1 analysis "does not 'relegate' the equality, security and dignity interests of women and children to second order importance."[21] It expressed agreement with the position that "s 1 should be seized upon by this Court to reinforce the accountability and protective objectives of s. 33.1 from the perspective of the particular vulnerability of women and children to the intoxicated violence."[22]

The Court found that s 33.1 violated s 7 by attaching criminal liability to violence or threats of violence committed while the accused was in a state of self-induced extreme intoxication, because the Crown need not prove *mens rea* for the

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[17] *R v Chan*, 2018 ONSC 7158 at para 119 [*Chan* 2018].

[18] *R v Sullivan*, [2016] OJ No 6847 (QL) (ON SCJ) at para 43, 2016 CarswellOnt 21197 [*Sullivan* 2016].

[19] *Ibid* at paras 25, 60–62. The trial judge, however, found that there were "considerable problems with Mr. Sullivan's credibility and reliability" (*ibid* at para 68).

[20] *Brown* 2022, *supra* note 4 at para 70.

[21] *Ibid* at para 71.

[22] *Ibid*.

charged offence or the voluntariness of the underlying *actus reus*. According to the Court, s 33.1 failed to require proof of some minimum fault element on which to ground criminal liability: self-induced extreme intoxication is not itself a criminal offence and so could not provide the fault element. The Court also rejected the proposition that an extremely intoxicated person who becomes an automaton necessarily displays sufficient fault for criminal responsibility because someone could find themselves in such a state if they experienced an entirely unforeseeable reaction to a drug taken by prescription or in moderation. The Court concluded that, "On its face, not only does the text of s 33.1 fail to provide a constitutionally compliant fault for the underlying offence set out in its third paragraph, it creates what amounts to a crime of absolute liability."[23] Absolute liability combined with the possibility of imprisonment has long been held to violate s 7 of the *Charter*.[24]

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The Court also ruled that s 33.1 violated the presumption of innocence in s 11(d) by relieving the Crown of the burden of proof beyond a reasonable doubt of the *actus reus* and *mens rea* elements of a given offence. The section improperly substituted the fact of self-induced intoxication leading to violence for these elements:

> While an accused who loses conscious control and assaults another person after a night of substance abuse is undoubtedly morally blameworthy, s. 33.1 faces obvious difficulties. It does not discern, for example, between the accused and morally blameless individuals who voluntarily consume legal intoxicants for personal or medical purposes. It therefore cannot be said that, "in all cases" under s. 33.1, the intention to become intoxicated can be substituted for the intention to commit a violent offence. Moreover, even in the case of the accused who voluntarily ingested an illegal drug like magic mushrooms, proof of self-induced intoxication does not lead inexorably to the conclusion that the accused intended to or voluntarily committed aggravated assault in all cases.[25]

Turning to the s 1 justification analysis, the Court's professed enthusiasm for using this section to reinforce women's rights faltered. The Court ruled that s 33.1's legislative objectives of protecting victims of violent crime, particularly vulnerable victims like women and children, and ensuring that those who commit violence while extremely intoxicated are held accountable for their actions were sufficiently pressing and substantial that they could justify over-riding important constitutional rights. It also found a rational connection between s 33.1 and the goals of protecting victims by deterring extremely intoxicated violence and holding offenders accountable for their actions.

Yet, s 33.1 did not impair the accused's rights minimally in pursuit of the legislative objectives. Justice Kasirer stated that there were alternate legislative

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[23] *Ibid* at para 9.

[24] *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536.

[25] *Brown* 2022, *supra* note 4 at para 104.

responses that impaired rights to a lesser degree, namely a stand-alone offence of criminal intoxication or a new version of s 33.1 that incorporated a criminal negligence standard of fault requiring proof of foreseeability of loss of control by reason of the intoxicant ingested and proof of foreseeability of risk of non-trivial, non-transient harm to another. The Court noted that the first option could not fulfill Parliament's objective of accountability for offenders because the accused would not face the stigma of conviction for the violence committed or full liability in terms of sentence because such an offence would inevitably include a "drunkenness discount."[26] It suggested that a reformed s 33.1 that incorporated foreseeability of both loss of control and harm to another would meet the legislative objectives, while stating repeatedly that Parliament was entitled to deference in its response to the ruling.[27] The Court proposed that "Parliament may also wish to study and regulate according to the nature and properties of the intoxicant",[28] in order to create a legislative regime for a criminal law response to extremely intoxicated violence.

The Court also found that s 33.1 failed the proportionality test. Although the Court could identify multiple salutary effects of s 33.1, including the affirmation of women's equality rights, the denunciation of extremely intoxicated violence, and increasing public confidence in the criminal justice system, it also listed what it regarded as extremely serious deleterious effects: the risk of wrongful conviction where the accused does not have the requisite *mens rea* or *actus reus* for the crime charged, and the risk that the accused would be denied the presumption of innocence. The Court described these effects as violative of "sacrosanct" constitutional principles,[29] and added to the list of negative effects the potential for imposition of punishment that is disproportionate to the blameworthiness of the accused's act.

Weighing the salutary and deleterious effects against each other, the Court concluded that, "The limits imposed on the most fundamental *Charter* rights in our system of criminal justice outweigh societal benefits that are already in part realized, and which Parliament can advance through other means. The weight to be accorded to the principles of fundamental justice and the presumption of innocence cannot be ignored here."[30] The Court, therefore, reinstated Brown's acquittal, relieving him of all criminal consequences for his attack on the victim. In doing so, the Court declined to rule on whether alcohol alone could ever support an extreme intoxication defence, leaving that issue to be determined on the facts and evidentiary record in individual cases.[31] It affirmed both Sullivan's acquittal entered by the Court of Appeal for Ontario and that court's order to send Chan back for re-trial. Ultimately, the Crown declined

[26] *Ibid* at para 125.

[27] *Ibid* at paras 140, 142.

[28] *Ibid* at para 140.

[29] *Ibid* at para 159.

[30] *Ibid* at para 166.

[31] *Ibid* at paras 61–62.

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to pursue Chan's prosecution based on the availability of the extreme intoxication defence.[32]

## Part II: The Implications of *Brown*

### A. Disproportionate impact on crimes of violence against women

Section 33.1 was in large part a legislative response to the concern that the extreme intoxication defence would be used by men for crimes of violence against women. The Court in *Brown* acknowledged, in its s 1 analysis, that "The evidence [before Parliament] highlighted the strong correlation between alcohol and drug use and violent offences, in particular against women, and brought to the fore of Parliament's attention the equality, dignity, and security rights of all victims of intoxicated violence with particular attention given to vulnerable groups, including women and children."[33]

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An immediate consequence of *Brown* will likely be increased resort to the extreme intoxication defence by men accused of crimes of violence against women, with further effects on the reporting, investigation and prosecution of these crimes. The relationship between substance abuse and violence against women is documented in the literature, but we acknowledge that none of the data speaks directly to the question of "extreme intoxication," because this concept was created by judges, not medical experts. Although the incidence of alcohol abuse and violence against women has been studied extensively, studying the effects of the ingestion of countless other drugs that can produce a state akin to automatism is a complex proposition.[34]

From the evidence available, it appears that drug-induced psychosis presents at least a risk of violence to others because the symptoms can include delusions, anxiety, fear, hallucinations and paranoia, among others. For example, one study reporting on drug-induced psychosis and hospital admissions found that 77% of those admitted were men, and 43% of these admissions involved violence.[35] Some studies suggest that between 30 and 75% of sexual assault perpetrators had consumed alcohol at the time of the offence,[36] and others report that perpetrators mixed alcohol and other

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[32] Betsy Powell, "He was found guilty in 2018 of fatally stabbing his father while on magic mushrooms. On Thursday, the charges were dropped" *The Toronto Star* (4 August 2022), online: <https://www.thestar.com/news/gta/2022/08/04/he-was-found-guilty-in-2018-of-fatally-stabbing-his-father-while-on-magic-mushrooms-on-thursday-the-charges-were-dropped.html>.

[33] *Brown* 2022, *supra* note 4 at para 111.

[34] Kathleen Crebbin et al, "First episode drug-induced psychosis: A medium term follow up study reveals a high-risk group" (2009) 44:9 Social Psychiatry and Psychiatric Epidemiology 710 at 711–12. See also Sharon M Boles & Karen Miotto, "Substance abuse and violence: A review of the literature" (2003) 8 Aggression and Violent Behaviour 155.

[35] Crebbin et al, *supra* note 34.

[36] Antonia Abbey, "Alcohol and Sexual Violence Perpetration" (December 2008, online (pdf): *National Online Resource Center on Violence Against Women*

drugs.[37] Men who abuse their intimate partners show similarly high consumption patterns of alcohol and drugs. One study found that 86% of men who battered women consumed alcohol and 14% consumed cocaine on the day of the incident,[38] and that 45% of family members disclosed that the batterer was intoxicated by drugs or alcohol on a daily basis.[39]

Judges, too, have acknowledged that intoxicated violence against women is pervasive. For example, one judge considering the constitutionality of s 33.1 stated, "The statistical data showing the extent to which women (and more particularly Aboriginal women) suffer from intoxicated violence is stunning."[40] "In Nunavut… the judges of this Court rarely see a case of violence against a woman… —where the offender is not intoxicated."[41]

The perpetration of violence by accused men in the state of extreme intoxication follows similar patterns to other intoxicated violence. Men offend primarily against women, and primarily against those whom they know or with whom they are in a relationship, as the prior assaults by Sullivan against his mother illustrate.[42] Aileen McColgan concludes, upon her review of UK automatism cases:

> [W]hat is striking about many of the cases in which (male) defendants plead the defences under discussion is precisely that their victims have been women intimates. Whether acting in an apparently motiveless manner while unconscious, asleep or otherwise impaired, the attacks perpetrated by these appellants appear consistent with the typical pattern of male violence against women.[43]

It should not be surprising, therefore, that the *Daviault* decision was quickly taken up by lawyers defending men accused of violence against women in the brief opening the case created between 1994 and 1995. While we acknowledge that reported decisions

<https://vawnet.org/sites/default/files/materials/files/2016-09/AR_AlcPerp.pdf> at 1 (citing multiple studies).

[37] Crebbin et al, *supra* note 34.

[38] Roger A Roffman et al, "The Men's Domestic Abuse Check-In. A Protocol for Reaching the Nonadjudicated and Untreated Man Who Batters and Who Abuses Substances" (2008) 14:5 Violence Against Women 589 at 590. See also William Fals-Stewart, James Golden & Julie A Schumacher, "Intimate partner violence and substance use: A longitudinal day-to-day examination" (2003) 28 Addictive Behaviours 1555.

[39] Roffman et al, *supra* note 38 at 590.

[40] *R v SN*, 2012 NUCJ 2 at para 48.

[41] *Ibid* at para 49. We recognize the social and economic factors that contribute to men committing intoxicated violence against Indigenous women in this context, including poverty, sexism, racism and colonization.

[42] *Sullivan* 2016, *supra* note 18.

[43] Aileen McColgan, "General Defences" in *Feminist Perspectives on Criminal Law*, Lois Bibbings & Donald Nicolson, eds (London: Routledge-Cavendish, 2000) 137 at 139–40 [case citations omitted].

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and those described in the media cannot represent a complete account of all cases in the criminal courts because the vast majority are unreported, these decisions likely represent the tip of the iceberg—the visible part of a much bigger phenomenon. But even if not fully representative of the larger context of unreported cases, these reported decisions have particular precedential value for judges and inform defence lawyers' legal arguments.

Significantly, in the 12 months between the release of the *Daviault* decision and the coming into force of s 33.1, the defence was advanced at least 29 times in reported decisions. Twelve of these cases involved clear violence against women: six sexual assaults; five spousal assaults; and the murder of a woman in the sex trade. Another two involved attacks on women: one man brutally beat his mother; another attacked a woman in a nightclub. The majority of these claims were rejected for want of proof,[44] but of the six cases where the extreme intoxication defence ultimately succeeded, four were cases of violence against women, all spousal assaults.[45] Advocates on behalf of women who experience men's violence readily understood that extreme intoxication as a defence seamlessly colludes with narratives around violence against women that suggest that it is never men's fault, but rather women's fault or an agentless crime that is an inevitable feature of life.

A review of the reported cases after s 33.1 came into force in 1995 to 2021 further supports the prediction that extreme intoxication will be invoked

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[44] *R v Belmore*, [1994] OJ No 2868 (Ont Ct J (Gen Div)); *R v Bjordal*, [1996] BCJ NO 2574 (CA), 1996 CanLII 8408 (BCCA) (sexual assault); *R v Broderick* (1995), 130 Nfld & PEIR 55, 1995 CanLII 3422 (PE SCAD); *R v Byers* (1995), 103 CCC (3d) 204, 1995 CanLII 10825 (SK PC); *R v DCP*, [1995] BCJ No 2108 (BC Youth Ct); *R v Compton* (unreported), cited in Gary Dimmock, "Drunk excuse works" *The Telegraph Journal* (10 November 1994) at A1 (sexual assault) (conviction substituted on appeal (19 November 1994) Doc. GSC 13982 (PEITD): Martha Drassinower & Don Stuart, "Nine Months of Judicial Application of The Daviault Defence" (1995) 39 CR (4th) 280); *R v Feeney*, 1995 CanLII 1016 (BC CA), [1995] BCJ No 208 (QL); *R v Frechette*, [1999] BCJ No 131 (CA) (convicted again in re-trial: Roger Stonebanks, "Killer guilty of murder", *Victoria Times Colonist* (16 February 2000) at B3); *R v GJI* (1995), 160 NBR (2d) 248, 1995 CanLII 6560 (NB CA) (sexual assault, strangulation, and serious assault on intimate partner); *R v Jacober* (unreported), cited in Bob Beaty, "Drunk defence used in local trial" *Calgary Herald* (6 October 1994) at B1; *R v Johnston* (1995), 171 NBR (2d) 294, 1995 CanLII 16933 (NB KB) (spousal assault); *R v JPL*, [1994] OJ No 2548 (CA) (sexual assault); *R v Judd*, 1995 CanLII 1358 (BC SC); *R v Kuntz* (discussed in *R v Misquadis*, *infra*) (Ont Ct Gen Div) (Feb 16, 1995 unreported) (attack on woman in a nightclub); *R v Levy*, [1996] NSJ No 1, 1996 CanLII 5558 (accused attacked his mother); *R v O'Flaherty,* [1995] OJ No 1005 (Prov Div)) (forcible entry of a woman's house); *R v Page* (unreported), cited in "Military court rejects drunkenness defence" *The Globe and Mail* (11 November 1994) A6 (sexual assault); *R v Stanford* now *HS*, [1995] OJ No 1428 (Prov Div)) (sexual assault); *R v Stark*, [1995] AJ No 152 (CA) (convicted at trial in 1993); *R c Thompson*, [1995] JQ No 2768 (QC); *R v Tom*, [1998] BCJ No 2215, 1998 CanLII 14996 (BC CA) (manslaughter of woman in sex trade); *R v Watt*, [1995] AJ No 455 (Prov Ct); *R v Wickstrom*, [1995] 64 BCAC 134, 1995 CanLII 2543 (BC CA).

[45] *R v Blair*, [1994] AJ No 807, new trial ordered on appeal [1995] AWLD 1043 (AB CA) (spousal assault); *R c Cadot*, [1995] JQ No 2760 (QC CQ); *R v Catcheway* (unreported), cited in "Court allows drunk defence" *The Windsor Star* (27 October 1995) A4 (man stabbed and choked his wife); *R v McShane*, [1996] OJ No 361 (QL) (Prov Div) (criminal harassment); *R v Misquadis*, [1995] OJ No 882 (QL) (Prov Div); *R v Theriault* (unreported), cited in Mike Shahin, "Cocaine high lets man beat assault charge" *The Ottawa Citizen* (18 November 1994) A1-A2 (assault on girlfriend).

disproportionately as a defence for men's violence against women. We searched the Lexis-Nexis and CanLII electronic databases using "s 33.1" & "*Criminal Code*," or "*Code criminel*." We excluded those cases where intoxicated persons who committed acts of violence avoided the application of s 33.1 because their offence was a specific intent offence or their extreme intoxication was not self-induced, making s 33.1 inapplicable,[46] or because they suffered a mental disorder within the meaning of s 16.[47] Although the Supreme Court of Canada[48] ruled that a s 16 defence is precluded where drugs are the sole cause of the accused's psychosis, the courts have yet to rule definitively on which defences the accused will have access to in cases where there may be multiple contributing factors such as mental disorders or brain injuries and the ingestion of intoxicants.

Within these parameters, we found 86 cases where s 33.1 was mentioned, either to consider its constitutionality, or as at least one reason for rejecting an intoxication defence. While very likely an undercount, since our numbers rely exclusively on electronic databases, it seems that extreme intoxication is raised with some regularity in cases involving intoxicated violence. Some of these cases involved detailed consideration of s 33.1 pursuant to constitutional challenge to its validity. In others, the court invoked s 33.1 to preclude the accused's intoxication defence, sometimes while also stating that the accused's evidence did not rise to the level of extreme intoxication required by *Daviault*. While one author reports that only four of these cases could have succeeded because most failed the *Daviault* proof standard,[49] this assertion does not account for the fact that under the s 33.1 legislative regime, defence lawyers could hardly be expected to invest in the resources required to substantiate the defence.

It is notable that most of the constitutional challenges to s 33.1 have been litigated at the expense of female victims. Sixteen of the 86 cases addressed the ss 7 and 11(d) constitutional challenges to s 33.1: seven were sexual assault cases, all committed by men (six against women and one against another man); five others involved attacks on female victims; two involved attacks on male victims; and in two constitutional challenges the accused had attacked both male and female victims.[50]

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[46] *R v McKay*, 2011 ONCJ 318 (strangulation of wife); *R v Hallahan*, 2021 ONCJ 156.

[47] See for example *R c Tremblay*, [2013] QJ No 2605 (QC CQ) (attack on a woman in an institution using a pen to stab her head and neck).

[48] *R v Bouchard-Lebrun*, 2011 SCC 58.

[49] Florence Ashley, "Nuancing Feminist Perspectives on the Voluntary Intoxication Defence" (2020) 43:5 Manitoba LJ 65 at 76.

[50] *R v BJT*, 2000 SKQB 572 (sexual assault); *R v Brenton*, [1999] NWTJ No 113, 180 DLR (4th) 314 (sexual assault); *Brown* 2020, *supra* note 14 (attack on a woman in her home); *Chan* 2018, *supra* note 17 (homicide of father and attack on step-mother); *R v Cedeno*, 2005 ONCJ 91 (sexual assault); *R v Decaire*, [1998] OJ No 6339 (QL) (Ct Just Gen Div) (stabbing of young woman sleeping in her bed) (convicted of aggravated assault: CA No C31015 (Oct 29 1999)); *R v Dow*, 2010 QCCS 4276 (attacks on multiple victims, including his wife); *R v Dunn*, [1999] OJ No 5452 (QL); *R v Fleming*, [2010] OJ No 5988 (QL) (sexual assault); *R v Jensen*, [2000] OJ No 4870 (SC) (QL) (murder of female friend); *R v McCaw*, 2018 ONSC 3464 (sexual assault); *R v Robb*, 2019 SKQB 295 (sexual assault) [*Robb*]; *SN*, *supra* note 40

This gendered pattern replicates Supreme Court litigation on the specific intent/general intent dichotomy, used to determine whether a crime affords a defence of intoxication.[51]

This pattern holds true in the UK as well, where McColgan reports that almost all the appellate cases on the intoxication defence have involved violence against women.[52] It is unclear whether these patterns of appellate litigation and constitutional challenge are simply coincidence, whether they are a reflection of the pervasiveness of sexual assault and other forms of male violence against women, or whether there is something about these crimes that dovetails more readily with lawyers' preconceptions of unjust convictions and constitutional understandings of "moral innocence".

Of the 86 cases where extreme intoxication was raised despite s 33.1, 35 cases involved sexual assault.[53] Another five cases involved men who attacked their current or former partners. Beyond these 40 cases of what is understood as violence against women—where women are attacked because they are women—are 23 additional cases where women were victimized by intoxicated men's violence, possibly randomly, either as the sole target or as another victim in addition to male victims.[54] Altogether,

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(sexual assault); *R v Sullivan* 2016, *supra* note 18 (attack on his mother); *R v Vickberg*, [1998] BCJ No 10034 [*Vickberg*]; *R v Yag*, 2021 ABQB 90 (attack on woman in a park).

[51] The decisions all centered on rape and sexual assault: *R v Leary*, [1978] 1 SCR 29, 74 DLR (3d) 103; *R v Bernard*, [1988] 2 SCR 833, 1988 CanLII 22 (SCC); *R v Daviault*, *supra* note 6.

[52] McColgan, *supra* note 43 at 142.

[53] *R v Abdulkadir*, 2019 ABPC 244; *R v Allard*, 2011 BCSC 859; *R v AO*, 2011 QCCQ 13290; *R c Barkley*, JCPC 2001-12 (QCCQ); *BJT*, *supra* note 50; *Brenton*, *supra* note 50; *Cedeno*, *supra* note 50; *R v CGW*, 2011 BCSC 197; *R v Chciuk*, [1999] OJ No 3 (CA); *R v Cortes Rivera*, 2017 ABQB 593; *R c Denis*, 1997 CanLII 9152 (QCCQ); *R v Desjarlais*, 2010 BCPC 95; *R v DM*, 2013 ONCJ 589; *Fleming*, *supra* note 50; *R v Fornal*, 2010 ONCJ 64; *R c Gagnon*, 1997 CanLII 6604 (QCCQ); *R c Giammario*, [2011] JQ No 19831 (QCCQ); *R c GL*, [2003] JQ No 16107 (QCCQ); *R c Gonthier*, JCPC 2001-86 (QCCQ); *R v Gonzalez-Hernandez*, 2011 BCSC 392; *R c Hébert-Ledoux*, [2020] JQ No 1600 (QCCQ); *R v Huppie*, 2008 ABQB 539; *R v LGH*, 2017 BCPC 433; *R v Macklin*, 2000 ABCA 293; *McCaw*, *supra* note 50; *R v McRae*, 2010 BCSC 558; *R v Poslowsky*, [1997] BCJ No 2585 (SC); *Robb*, *supra* note 50; *R v Sechan*, 2004 ONCJ 147; *R v SH*, [2006] YJ No 89; *R v SJB*, [2002] AJ No 726 (CA); *SN*, *supra* note 40; *R v Teepell*, [2009] OJ No 3988 (CJ); *R v Toutsaint*, (2001) 20 TLWD 2036-017 Sask QB 550/99; *R v Zimmerlee*, [1997] BCJ No 3038 (PC).

[54] *R v Blaser*, 2015 SKPC 85 (assault on female police officer); *Brown* 2020, *supra* note 14 (aggravated assault on woman living alone); *Chan* 2018, *supra* note 17 (homicide of father and wounding of father's partner); *R c Charron*, [2021] QCCQ 7791 (aggravated assault of female neighbour); *R v Chaulk*, 2007 NSCA 84 (assaults on female and male neighbours); *R v Côté*, 2010 NBPC 20 (assault on woman living alone); *Decaire*, *supra* note 50 (attempt murder of young woman asleep in her bed); *R c Desjarlais*, 2016 ABPC 182 (assault of female neighbour); *R v Diba*, 2020 ONSC 6407 (stabbing of girlfriend in the middle of the night); *Dow*, *supra* note 50 (assault on wife followed by homicide and assaults on others); *R v Eddison*, 2021 BCCA 168 (assault on male and female police officers); *R c Faucher*, [2013] JQ No 4653 (QCCQ) (threats against former spouse); *R c Gaudreault*, [2007] JQ No 13568 (QCCQ) (threats against daughter and her boyfriend); *R v Goard*, 2014 ONSC 2215 (assault of male taxi driver and woman at bus stop); *R v JAW*, 2006 ABPC 178 (assault on nurse at hospital); *Jensen*, *supra* note 50 (homicide of female friend); *R c Lauzon*, [2018] JQ No 2062 (QCCQ) (aggravated assault of female partner); *R v McLeod*, 2008 QCCQ 5726 (uttering death threats against male and female police officers); *R v Peters*, 2014 BCSC 983 (murder of common law wife); *Sullivan*, *supra* note 47 (attack on mother); *R v Tilley*, [2012] NJ No

63 of 86 cases included female victims. Eighty of the 86 perpetrators were men and six were women.

These cases suggest that the claim that reliance on the defence of extreme intoxication will be rare after the *Brown* decision should be approached with caution. They demonstrate that the extreme intoxication defence is gendered: it is often relied upon by men to challenge their culpability for violence against women. It is reasonable to anticipate increased reliance on the extreme intoxication defence, with some violent men being fully exonerated and crimes of violence against women becoming even more difficult to prosecute.[55] Indeed, the three cases before the Supreme Court all resulted in the acquittal of men for very violent crimes against three women and one male victim.

The harms to women are not only posed by those accused persons who succeed with the defence, but also by the many who attempt the defence at the expense of complainants, prosecutorial resources, and the reputation of the justice system. There is a serious risk that women will be deterred from reporting male violence where the perpetrator was intoxicated, because women will not be in the position to assess the accused's potential defence. Further, the trauma caused to complainants by lengthened trials based on extreme intoxication defences being advanced (and potentially succeeding in error, necessitating appeals), the resulting diminished confidence of women in the justice system, as well as the wasted judicial and Crown resources, all must be considered as negative implications of the decision in *Brown*.

### B. Devaluation of women's rights by refusing to acknowledge state action in how law responds to violence against women

Justice Kasirer refused to consider women's rights in adjudicating the s 7 claim in *Brown* because there was no "conflict" between men's rights as accused persons and women's rights as victims of gendered violence:

> Section 33.1 affects the substantive rights of the accused subject to prosecution by the state. The equality and dignity interests of women and children are certainly engaged as potential victims of crime — but in this context, by virtue of the accused's actions, not of some state action against them. … nothing in [s 33.1] limits, by the state's action, the rights of victims including the ss. 7, 15 and 28 *Charter* rights of women and children. These interests are appropriately understood as justification for the infringement by the state.[56]

414 (Prov Ct) (assault on former partner); *R c Wells*, 2013 CanLII 2932 (NLPC) (assault of female neighbour); *Yag*, *supra* note 50 (attack on woman in park).

[55] See also McColgan, who states that if intoxication were available as a defence for general intent crimes, it "would operate so as to render domestic violence unprosecutable in many cases" (*supra* note 43 at 143).

[56] *Brown* 2022, *supra* note 4 at para 70.

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In light of his finding that women's rights lacked relevance in the s 7 analysis, Justice Kasirer focused solely on the accused in determining that s 33.1 violated the principles of fundamental justice.[57]

We begin by noting that the effects of sexual assault and intimate partner violence are serious enough to engage s 7.[58] Although there is no universal experience of sexual or intimate partner assault, courts and psychologists have recognized these crimes as, short of homicide, some of the most serious that can be committed. Women who have been sexually assaulted experience an "increased lifetime rate of attempted suicide",[59] as well as high rates of Post-Traumatic Stress Disorder (PTSD) ranging from 35-57%.[60] PTSD for women who have been raped may include persistent nightmares and sleep disturbances, intrusive thoughts and flashbacks, high rates of depression,[61] and mood or anxiety disorders.[62] Women also experience health impacts including bodily injury, reproductive health consequences, unwanted pregnancy, pelvic pain, alcohol and drug dependencies, and sexually transmitted diseases; financial losses including job loss, missed educational opportunities, medical and counselling costs; and social costs, such as lost relationships, isolation, and avoidance of public places and social interactions.[63] While the political costs of systemic men's violence are harder to quantify, men's use of trolling and online threats to rape and kill women, including journalists, public figures and politicians, hinder women's ability to participate in civil society and their freedom to express themselves.

We contend that the state is deeply implicated in men's violence against women, in turn making this form of violence particularly intractable. Men's violence against women, in addition to racist and colonial violence against all members of racialized and Indigenous communities,[64] is systemic in origin and effect. This violence against women is both rooted in women's experience of political, social and

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[57] *Ibid* at para 11.

[58] *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.

[59] JR Davidson et al, "The association of sexual assault and attempted suicide within the community" (1996) 53:6 Arch Gen Psychiatry 550. See also Emily R Dworkin, Christopher R DeCou & Skye Fitzpatrick, "Associations between sexual assault and suicidal thoughts and behaviour: A meta-analysis" (2020) 23:10 Psychology Trauma 1037.

[60] H Littleton & CR Breitkopf, "Coping with the experience of rape" (2006) 30 Psychology of Women Quarterly 106.

[61] *Ibid*.

[62] *Ibid*.

[63] Cameron Boyd, "The impacts of sexual assault on women" *Resource Sheet* (Australian Centre for the Study of Sexual Assault, 2011).

[64] We recognize other forms of systemic violence, such as police violence against members of Black and Indigenous communities in Canada. We also recognize the complexities of violence against women in communities that are subject to such state violence: Anne McGillivray & Brenda Comaskey, *Black Eyes All the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999); Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stanford L Rev 1241.

economic inequality and a cause of that inequality, on an individual and societal level. As James Ptacek argues: "Individual women are assaulted by individual men, but the ability of so many men to repeatedly assault, terrorize, and control so many women draws on institutional collusion and gender inequality."[65]

Historically, violence against women was a "private" matter both descriptively and normatively: it was assumed that not only was the state uninvolved in male violence occurring in intimate relationships, but that it *should not be* to avoid interfering in the personal and private sphere. Examples of the ways in which judge-made laws were complicit in male violence include the common law doctrine of "coverture", in which husband and wife were merged into one legal entity, such that, among other implications, a man was allowed to commit marital rape without criminal intervention until 1983, when the *Criminal Code* was amended; the rule of chastisement that granted men a right to beat their wives with "moderation"[66]; the "recent complaint" and corroboration requirements for the successful prosecution of sexual assault; and the use of sexual history to undermine the credibility of sexual assault complainants. Whereas men's fatal violence against their wives was treated as accidental killing through an excess of chastisement, women who killed their husbands were subjected to prosecution for "petit treason", a crime so heinous that its punishment was burning at the stake.[67]

Decades of feminist criticism has put the lie to both the descriptive and the normative perspective on the public/private dichotomy.[68] However, the criminal justice system remains deeply gendered; it absolves men of their violence as long as it is not so extreme as to stand out from the "norm." Men in the roles of police, prison guards, prosecutors and judges, for example, have used their power as state actors to illegally dominate women in sexual and physical ways,[69] to over-charge women who kill men,[70] and to minimize the impact of male violence in women's culpability and in

[65] James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Boston: Northeastern University Press, 1999) at 9.

[66] *Hawley v Ham*, unreported, heard in the Midland District Assizes in September 1826, according to the *Kingston Chronicle* (15 September 1826); Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Women's Press, 1991) at 167–81.

[67] Shelley Gavigan, "Petit Treason in Eighteenth Century England: Women's Inequality before the Law" (1989) 3:2 CJWL 335.

[68] In the Canadian context, see e.g. Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997); Elizabeth Sheehy & Christine Boyle, "Justice L'Heureux-Dubé and Canadian Sexual Assault Law: Resisting the Privatization of Rape" in Elizabeth Sheehy, ed, *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004) 247.

[69] Tracey Lindberg, Priscilla Campeau & Maria Campbell, "Indigenous Women and Sexual Assault in Canada" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practices and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 87; Elizabeth Sheehy & Michelle Psutka, "Strip-searching of women: Rights and wrongs" (2016) 94:2 Can Bar Rev 241.

[70] Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons from the transcripts* (Vancouver: UBC Press, 2014) at 118.

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sentencing when they respond with violence.[71] There is an overwhelming record of state malfeasance when it comes to responding to men's violence against women at every level of state (in)action in the criminal justice system, from the widespread unfounding of sexual assault complaints by police,[72] to probation officers' failures to enforce conditions imposed on violent men,[73] to judges who continue to deploy old and new discriminatory beliefs about women and sexual assault to absolve men of criminal responsibility.[74]

The state is thus implicated in increasing women's susceptibility to gendered violence and limiting their means to exit violent relationships. For example, a web of government policy, regulation and law enforcement practices undergirds the problem of male violence against women, from a lack of adequate shelter spaces for women and children,[75] to inadequate civil legal aid,[76] to refusals in provinces outside Quebec to extend pay equity to the private sector and to provide guaranteed basic income, thereby limiting financial resources supporting women's escape from violent men.[77]

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[71] See e.g. *R v Naslund*, 2022 ABCA 6.

[72] Jodie Murphy-Oikonen et al, "Unfounded Sexual Assault: Women's Experiences of Not Being Believed by the Police" (2022) 37: 11-12 Journal of Interpersonal Violence NP8916.

[73] Aidan Macnab, "Judge decries futility of no-contact orders in preventing recurrence of domestic violence" (24 June 2020), online: *Canadian Lawyer* <https://www.canadianlawyermag.com/practice-areas/family/judge-decries-futility-of-no-contact-orders-in-preventing-recurrence-of-domestic-violence/330810>. In relation to Basil Borutski, who killed three former intimate partners, see Molly Hayes, "Killer had never been reprimanded by probation officer despite flouting court orders, inquest hears" *The Globe and Mail* (22 June 2022), online: <https://www.theglobeandmail.com/canada/article-basil-borutski-was-a-high-risk-offender-had-decades-long-history-of/>.

[74] For several examples see Kate Puddister & Danielle McNabb, "#MeToo: In Canada, rape myths continue to prevent justice for sexual assault survivors" *The Conversation* (5 March 2019), online: <https://theconversation.com/metoo-in-canada-rape-myths-continue-to-prevent-justice-for-sexual-assault-survivors-110568>.

[75] See the literature in Krystle Maki, PhD, "Housing, Homelessness and Violence Against Women: A Discussion Paper" (Ottawa: Women's Shelters Canada, 2017), online: <http://endvaw.ca/wp-content/uploads/2017/09/Housing-Homelessness-and-VAW-Discussion-Paper-Aug-2017.pdf>.

[76] See e.g. David P Ball, "Single mothers' lawsuit against province's legal aid system heads to B.C. Supreme Court" (23 August 2022) *CBC News*, online: <https://www.cbc.ca/news/canada/british-columbia/single-mothers-alliance-case-against-bc-legal-aid-system-hearings-1.6556695>; Report of the Standing Committee on Justice and Human Rights, Access To Justice Part 2: Legal Aid" (October 2017), 42nd Parl, 2nd Sess; United Nations Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada* (25 November 2016), paras 14–15.

[77] Anna Cameron & Lindsay M Tedds, "Gender-Based Violence, Economic Security, and the Potential of Basic Income: A Discussion Paper" (30 April 2021), online: <https://mpra.ub.uni-muenchen.de/107478/1/MPRA_paper_107478.pdf>. See also Janet Mosher et al, *Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System* (Toronto: Ontario Association of Interval and Transition Houses, 2004), online: <https://ssrn.com/abstract=1616106>.

The claim that the state is merely inattentive to or inefficient in remedying male violence is an ideological—rather than legal—position.[78] For example, European human rights law has recognized a state obligation to protect women from systemic intimate violence. International law makes no distinction between failure to act and action in determining state responsibility to prevent, protect citizens from, or punish recurring and systemic, non-state actor violence.[79] To suggest that acquittals of extremely intoxicated men accused of violence against women does not engage "state action" stands to heighten the risks posed to all women's liberty, security and equality rights.[80]

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### C. Failure to consider the role of Charter s 28

The Court failed to engage with s 28 in assessing the constitutional attack on s 33.1 pursuant to s 7. Section 28 of the *Charter* compels courts to engage a "sex equality lens" in *Charter* interpretation. As the Supreme Court has elsewhere stated, "principles of equality, guaranteed by both ss 15 and 28, are a significant influence on interpreting the scope of protection offered by s. 7."[81] Both ss 28 and 15 demand that courts eschew a formal equality approach and instead assess the impact of laws on women's substantive equality.[82] Despite no party raising s 28 substantively in the *Brown* case, courts are presumed to know the law.[83]

Froc has written extensively on the history behind s 28's entrenchment, demonstrating that its framers were a group of women led by those representing the National Association of Women and the Law and the Ad Hoc Committee of Canadian Women on the Constitution.[84] Rather than repeating that history here, we highlight the historical context most relevant to the issue of violence against women, and what that history demonstrates about s 28's role in relation to constitutional challenges to legislation that enhances women's equality.

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[78] See Katie Keays, *Disqualification by design: Strategic inefficiencies in Canada's legal response to sexual assault* (Masters of Arts, Brock University, 2021) [unpublished] (employing Sara Ahmed's concept of "strategic inefficiency").

[79] Ronagh JA McQuigg, "The European Court of Human Rights and Domestic Violence: Volodina v. Russia" (2021) 10 Intl Human Rights L Rev 155; Bonita Meyersfeld, *Domestic Violence and International Law* (Oxford: Hart Publishing, 2010) at 205–07.

[80] Grant, *supra* note 11 at para 41.

[81] *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 112, 177 DLR (4th) 124.

[82] Beverley Baines, "Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation" (2005) 17 CJWL 45.

[83] *Ibid* at 57.

[84] Kerri A Froc, "The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms" (PhD Thesis, Faculty of Law, Queen's University, 2015) [unpublished] [Froc, "Untapped Power"]; Kerri A Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (2018) 38:1 NJCL 35; Kerri A Froc "Is Originalism Bad for Women? The Curious Case of Canada's 'Equal Rights Amendment'" (2015) 19:2 Rev Const Stud 237.

Section 28 was a late addition to the draft *Charter*, included in amendments made at third reading in April 1981 as a result of a focused and intense lobbying effort by the Ad Hoc women.[85] At the time, women's rights advocates were well aware of the role of the criminal justice system in the state's inadequate and gendered response to violence against women. At a February 14, 1981 conference convened to debate potential constitutional amendments, one of the Ad Hoc women's preoccupations was to foreclose risks that the new *Charter* rights could have the rebound effect of undermining rather than enhancing women's equality in criminal law, including in the context of rape trials and wife battering.[86] Among other potential problems they discussed was the prospect that s 7 might enable men to evade accountability for spousal violence.[87]

Part of s 28's purpose was interpretive, to clarify "any ambiguities" in s 15 or other provisions that might lead to women's being rights being undermined,[88] and to ensure "no matter what else was in the *Charter*, it would have a film over it of equality for men and women so that the legal rights, the voting rights, the fundamental freedoms, would all have to apply equally to men and women."[89] The text of s 28 also supports its function as an interpretative lens by referring to "rights and freedoms" (plural) in the text, denoting that s 28 was not meant simply to emphasize the right to sex equality in s 15, but to extend to all rights in the *Charter*. The gender equality lens of s 28, therefore, requires courts to ascertain whether, as interpreted or applied, purportedly universal rights and freedoms nevertheless embody gendered norms that contribute to the structuring of gender hierarchy, for instance, by ignoring women as civil rights holders, assuming a male norm, perpetuating women's devalued status, or privileging relations that conform to hierarchical gender difference.

Viewing the *Charter* through a "sex equality lens" requires courts to shift their conceptualization of gender as exclusively a matter of identity upon which neutral

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[85] Hereinafter "Ad Hoc women".

[86] Micheline Carrier, "Women's Rights and 'National Interests" in Audrey Doerr & Micheline Carrier, eds, *Women and the Constitution* (Ottawa: Canadian Advisory Council on the Status of Women, 1981) 181 at 197–99. Linda Palmer Nye, an Ad Hoc woman, in her interview with Froc, also referenced the difficulty in obtaining rape convictions as one of the motivating factors behind s 28.

[87] See e.g. the audio recording of the Ad Hoc Conference, "Cassette #7, Track 3" (copies on file with the author from Beth Atcheson's personal files; copies also available at the University of Ottawa Archives and Special Collections, Ottawa, File No. CD-X-10-38) [audio recording of the Conference]. This particular excerpt concerned a debate over a resolution to add the right to privacy to s 7, something that was excluded from their proposed amendments because it could be perceived as protecting violence in the home from state intervention as a matter of a husband's privacy and family life.

[88] National Association of Women and the Law, "Women's Human Right to Equality: A Promise Unfulfilled" (Ottawa: National Association of Women and the Law, 1980) at 7.

[89] Interview of Tamra Thomson (December 11, 2013). See also Baines, *supra* note 82. Minister Responsible for the Status of Women, Judy Erola, *House of Commons Debates*, 32nd Parl 1st Sess No 11 (November 16, 1981) at 12777) (explaining s 15 as pertaining to "the specific definition of sexual discrimination for a very specific act," whereas s 28 is a "broad principle").

legal rules apply,[90] to understanding "gender" as a hierarchical structure[91] or a relationship of power.[92] It means considering how constitutional doctrine is gendered, that is, examining how "gender acts upon [constitutional] law: how it functions in the context of conferring [constitutional] meanings; how it informs the content, organization and apprehension of [constitutional and] legal knowledge; and how it serves to legitimate [constitutional] law and reinforce particular…outcomes," even as it operates to obscure its own role and make such outcomes seem natural or common sensical.[93]

Further, s 28 has an independent, protective function in terms of ensuring women's rights are equally valued, recognized and respected in relation to men's rights. This function is derived from s 28's opening clause, "notwithstanding anything else in this *Charter*." Section 28 was meant to ensure that other *Charter* provisions did not become a new source of women's inequality,[94] by requiring that women receive their full entitlement to equal rights without "anything" else in the *Charter* limiting or constraining this guarantee. The full force of s 28 is underlined by the fact that government is precluded from seeking to justify violations of s 28 under s 1 or using the s 33 "notwithstanding clause" to permit legislation violating women's equal rights to continue operating. For these reasons, s 28 was thought to be one of the strongest guarantees in the *Charter*.[95] Given this background, it is striking that the Supreme Court of Canada has yet to directly consider s 28's legal effect.[96]

If s 28 were given its due, sex equality and equal rights between the sexes would emerge as pre-eminent *Charter* values to be considered in constitutional cases involving gendered violence because how the state responds to men's violence perpetrated against women has a direct impact on women's equality, security and full participation in Canadian society. The Court's failure in *Brown* to draw upon s 28 to acknowledge the rights of complainants as engaged in the criminal proceedings has

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[90] Joanne Conaghan in *Law and Gender* (Oxford: Oxford University Press, 2013) at 82, remarks that "a truly gendered analysis turns out to require a layer of investigation not generally considered to be part of the legal enquiry," thus demonstrating why the mandate of s 28 is critical to such an exercise as channelling interpretation in this direction.

[91] Iris Marion Young, *On Female Body Experience: "Throwing Like a Girl" and Other Essay*s (New York: Oxford University Press, 2005) at 22.

[92] Joan Wallach Scott, *Gender and the Politics of History*, revised ed (New York: Columbia University Press, 1999) at 48 ("[G]ender [is] a primary way of signifying relations of power…Hierarchical structures rely on generalized understandings of the so-called natural relationships between male and female").

[93] Conaghan, *supra* note 90 at 25.

[94] Andrew Szende, "Canadian Women Win the Fight for Equality" *The Toronto Star* (22 April 1981) A18 (quoting Ad Hocker Deborah Acheson).

[95] *Ibid* at 389 (citing testimony at the Special Joint Committee on the 1987 Constitutional Accord, concerning the draft Meech Lake Accord).

[96] Section 28 was ignored in two cases in which the Court justified s 15 sex equality violations under s 1: *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66; *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18.

further entrenched the effects of this state action by relieving perpetrators of the consequences of the harms they have caused, leaving women to bear these burdens exclusively.

## Part III: Parliament's Legislative Response

The Court in *Brown* emphasized the need for Parliament to respond to its decision, remarking on the threat posed by the extreme intoxication defence to women and other vulnerable groups and repeating that the Court would defer to Parliament's wisdom in doing so. It provided two suggestions as to directions that response might take, as noted earlier.

The first was a new offence of criminal intoxication. Although the Court failed to discuss the mechanics of such an offence, this task is complex. It could be cast as an included offence for all crimes of violence, making conviction certain where the Crown has otherwise proven the offence but is unable to prove the *mens rea* or *actus reus* due to the accused's successful use of the extreme intoxication defence. Or it could be a stand-alone offence, which the Crown would have to charge in any case where a defence of extreme intoxication is likely to be raised. In the former case, it would be legislatively cumbersome; in the latter case, the legislators would need to determine what the elements are that the Crown would have to prove and whether such a crime would be feasible to prosecute.[97]

The difficulty, as noted by the Court, is that conviction for "criminal intoxication" would mask the crime actually committed and would be subject to a lesser sentence suggestive of a "drunkenness discount". A generic criminal intoxication offence would focus exclusively on intoxication as the criminal act, obscuring violence against women and failing to name and condemn the gendered wrong as experienced by women. The "rhetorical impact of terms used [in relation to sexual assault]… should not be ignored or discounted."[98]

A criminal intoxication offence would make it challenging to track the criminal law processing of sexual assault allegations, statistics that have informed various criminal law amendments aimed at eradicating sex discrimination and rape myths since the 1980s. A new included or lesser offence, as proposed by some authors,[99] may affect plea bargaining and charge filtering. The availability of such an included offence will encourage perpetrators who are intoxicated but not "extremely

[97] For a discussion of the difficulties posed by legislative models aimed at capturing extremely intoxicated offending, see Murdoch Watney, "Voluntary intoxication as a criminal defence: Legal principle or public policy?" (2017) 3 J S African L 547.

[98] Lucinda Vandervort, "Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault" (2004) 42:4 Osgoode Hall LJ 625 at 629.

[99] For discussions of this proposal, see Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 30, vol 1 (1986); Gerry Ferguson, "The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation" (2012) 57 SCLR (2d) 111.

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intoxicated" to plead guilty to that offence rather than go to trial for sexual assault, resulting in cases with intoxicated accused being "filtered out by police officers or prosecutors."[100]

A final problem is that constitutional challenges would inevitably be levelled at either form of this new crime, on the basis that it targets those with substance abuse disorders, or that it contains an inadequate *mens rea* element.[101] Even if one of these alternatives could ultimately survive the constitutional challenge, the burden of this litigation, and the uncertainty in the interim, will continue to be borne disproportionately by women.

The second option mentioned by the Court was that of creating a new standard for criminal fault for extremely intoxicated violence. The Court, having previously rejected the argument that this was precisely what Parliament had done through enactment of s 33.1, suggested that Parliament could enact a fault standard based on whether a reasonable person ought to have foreseen that the intoxicant could have led to loss of self-control (i.e. a state akin to automatism) and whether harm to another that is neither trivial nor transitory was thereby foreseeable.

Again, however, the Court proposed this alternative without serious consideration of the technicalities or the implications. Requiring Crown proof of the foreseeability of both loss of voluntary control and the infliction of non-trivial, non-transitory harm poses intractable problems, as we discuss further below.

Despite the Court's repeated statements that it would defer to Parliament's legislative response to the declaration of invalidity of s 33.1, the Minister of Justice introduced an amendment to s 33.1 that adopted the language of the Court's decision,[102] arguably perpetuating the state's role in men's violence against women. It reads:

> 33.1 (1) A person who, by reason of self-induced extreme intoxication, lacks the general intent or voluntariness ordinarily required to commit an offence referred to in subsection (3), nonetheless commits the offence if
>
> (a) all the other elements of the offence are present; and

[100] Martha Shaffer, "*R v Daviault:* A Principled Approach to Drunkenness or a Lapse of Common Sense?" (1996) 3:2 Rev Const Stud 311 at 325–26; Morris Manning, QC & Peter Sankoff, *Manning, Mewett & Sankoff, Criminal Law*, 5th ed (Markham: LexisNexis, 2015) at 498 (which calls Shaffer's argument in this regard "convincing").

[101] *Ibid* at 499 ("it is unclear that this would be a panacea, and it might possess constitutional weaknesses of its own"). See also *Brown* 2020, *supra* note 14 at para 136.

[102] By contrast, the Supreme Court found constitutional, Parliament's legislative deviation from decisions striking down the "rape shield" law and establishing common law rules regarding third party record production in sexual assault in *R v Darrach*, 2000 SCC 46 and *R v Mills*, *supra* note 3.

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> (b) before they were in a state of extreme intoxication, they departed markedly from the standard of care expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances
>
> (2) For the purposes of determining whether the person departed markedly from the standard of care, the court must consider the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the person did to avoid the risk.[103]

The extreme intoxication defence will only be precluded if the Crown can prove, beyond a reasonable doubt, that the accused departed markedly from the behaviour of a reasonable person in their consumption, having regard to the foreseeability of both the state of extreme intoxication and the risk of causing non-trivial, non-transitory harm to another.

The federal government rushed this amendment through the legislative process in eight days, eschewing meaningful public consultation. This slipshod process stands in contrast to the consultations that led to major sexual assault reforms on two prior occasions, as well as the consultations that culminated in the original version of s 33.1.[104] In these instances, women's groups were brought together to discuss and debate alternatives with their trusted feminist lawyers to help translate their demands into legislative proposals. The women's groups were accountable to their membership for any positions adopted, and the feminist lawyers were accountable to the larger group. They were given time to study the options and the space in which to propose alternatives to the Department of Justice.

Compared to these earlier consultations, the 2022 process was a sham. It is true that the Department of Justice spoke to ten individuals and eighteen groups (seven of whom were listed as "victim services" or "women's rights advocates"). But the women's groups were not invited together so that they could hear each other's concerns and analyses, nor were they given any opportunity to view the government's chosen course of action ahead of the meetings or to consult with feminist lawyers about the ways forward. Some consultations appeared to be an afterthought, taking place only days before the final bill was introduced when it would have been too late to make

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[103] *Criminal Code of Can*ada, SC 2022, c 11, s 33.1.

[104] The Department of Justice conducted extensive consultations with women's groups on Bill C- 49 (sexual assault, 1991), Bill C-72 (extreme intoxication, 1994-95), and Bill C-46 (private records, 1997). For description of several of these processes see Sheila McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C-49" in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293; Department of Justice, *Bill C-46: Records Applications Post-Mills, a Caselaw Review*, online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p2.html#sec2.1> (documenting the research and consultations undertaken over a two year period).

any substantive changes. And certainly, the government produced no public record of groups consulted nor any record of what these consultations actually yielded in terms of comments.[105]

Women's groups raised concerns about whether the amendment could ever result in convictions where the extreme intoxication defence can be proven, and pointed out that the lack of a preamble that would articulate the legislative objective as being women's equality, which would be critical to the s 1 analysis in any future challenge, but such was dismissed as superfluous.[106] The Women's Legal Education and Action Fund was the only women's organization to appear with Ministers Lametti and Ien at the press conference to support Bill C-28 when it was introduced publicly.[107]

The government then fought off challenges and questions about the wisdom or effectiveness of the bill, closing down debate on the amendment in both the House of Commons and the Senate. The government asked for and received unanimous consent for the regular process for the passage of bills to be bypassed in the House of Commons. After the National Association of Women and the Law wrote an open letter to all Senators expressing concern about the Bill's limitations,[108] the Government Leader in the Senate, Marc Gold, adopted a different process than the one used in the Commons: he gave 24 hours notice of a motion to dispense with the ordinary procedural rules and allowing only one day's debate on the Bill after it passed in the Commons.[109] This motion passed, permitting a mere majority vote to pass Bill C-28, which the Senate ultimately did (67-8).[110] The law was thus passed without committee hearings, which commenced in the Commons Standing Committee on Justice and Human Rights in October 2022, months *after* the law was declared in force.

Not only was the consultation process a sham, but it failed to lead to well-crafted legislation fit for the purpose of responding to the rights of women to be free

[105] A copy of the consultation list of groups and individuals is on file with the authors, received from a source within the Senate. The list was composed in evident haste, as NAWL was listed as a "General Legal/Defence Bar" organization whereas women's groups are described as "Women's Rights Advocates." Including NAWL in the latter group would bring the number of women's organizations consulted to eight.

[106] See the question by Senator Dennis Glen Patterson and the response by Senator Marc Gold in *Debates of the Senate* Vol 153 No 58 (22 June 2022) at 1796. Such a concern was raised by women's representatives during a meeting Kerri Froc attended with a Department of Justice official on June 21, 2022.

[107] Dale Smith, "Hurried passage: Extreme intoxication bill passes with little scrutiny or debate" *CBA/ABC National* (27 June 2022), online: <https://www.nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2022/hurried-passage>.

[108] Bill C-28: Letter to All Senators" (21 June 2022), online: *NAWL ANFD* <https://nawl.ca/bill-c-28-letter-to-senators/>.

[109] Senate of Canada, "Order and Notice Paper" Issue 59 (23 June 2022), online: <https://sencanada.ca/en/content/sen/chamber/441/orderpaper/059op_2022-06-23-e>.

[110] "Vote Details: Bill C-28" (23 June 2022), 44th Parl, 1st Sess, online: <https://sencanada.ca/en/in-the-chamber/votes/details/583006/44-1>.

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from extremely intoxicated male violence. It is instructive that defence lawyers raised no concerns about the bill, a clear indication that it is toothless. In fact, Brown's own defence lawyer was candid, stating publicly that Bill C-28 will be "entirely ineffective".[111] The amended s 33.1 is highly unlikely to result in any accused being denied access to the extreme intoxication defence, except perhaps where an accused previously committed acts of violence while using or abusing the particular intoxicant in the same circumstances, but even then if there are other factors that the defence can use to differentiate (such as the fact that the combination of intoxicants may have been slightly different on that prior occasion), the foreseeability criteria in s 33.1 could still exclude its application.

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## Part IV: Using s 28 to Breathe New Life Into ss 7 and 1

Properly applied, s 28 would have required the Court to re-think its analysis in four ways in *Brown*. First, s 28 demands a re-interpretation of s 7's principles of fundamental justice so as to incorporate sex equality and women's equal rights to security of the person[112] and to fair trials into the principles of fundamental justice. Second, s 28 requires the Court to interpret "moral innocence" by considering whether it is compatible with violent acts committed in a state of self-induced extreme intoxication, that, individually and systemically, compromise women's liberty and security of the person. Section 7's scope must exclude *de facto* protection against state sanction for behaviours that deprive women of their equal right not to be deprived of liberty and security of the person.[113] Third, s 28 would have precluded the Court's characterization in *Brown* of women's rights as mere "societal interests" to be considered only under s 1. And fourth, s 28 would have demanded great deference in any s 1 analysis, even if a violation were found.

### A. Equality and the principles of fundamental justice

Contrary to the demands of s 28, the Court's jurisprudence deploying what it calls a "balancing" approach to interpreting s 7 rights has produced a masculine construction of fundamental justice that embeds women's unequal access to it.[114] The Court's

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[111] Sean Fine, "Liberals table bill responding to Supreme Court decision on extreme intoxication" *The Globe and Mail* (17 June 2022), online: <https://www.theglobeandmail.com/canada/article-supreme-court-extreme-intoxication/>.

[112] Kerri A Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2010-2011) 42 Ottawa L Rev 411 [Froc, "Constitutional Coalescence"].

[113] See *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1 (majority finding that state interference with parental behaviour that harms children is fundamentally unjust; concurring decision finding that such behaviour is outside the scope of the s 7 liberty interest).

[114] Froc maintains in Froc, "Untapped Power", *supra* note 84 that the "balancing" analysis between the rights of accused persons and those of complainants in *Darrach*, *supra* note 102 and *Mills*, *supra* note 3, meant that while the Court upheld the legislation, it essentially "read it down" in its guidance to lower courts in applying it. See also Steve Coughlan, "Complainants' Records After Mills: Same As it Ever Was" (2000) 33:5 Const Rev 300; Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the

version of balancing treats sex equality as discrete and separate from s 7 rights within the analysis of whether the deprivation of security of the person was in accordance with the principles of fundamental justice, rather than as a fundamental value that infuses all *Charter* rights.[115] This jurisprudence results in hierarchical interpretation, with men's fair trial rights constructed as foundational to Canadian society, juxtaposed against women's rights (or "interests") to equality, personal security, and privacy, which thereby recede into the background.

Thus, the right to a fair trial protected by the principles of fundamental justice has been interpreted almost exclusively from the perspective of male accused persons, which should alert the Court to pay particularly close attention to women's rights to equality, security of the person and trial fairness.[116] Section 28 requires that respect for human dignity and self-worth animating the principles of fundamental justice apply equally to women. Principles of fundamental justice thus require that fairness be assessed "with sensitivity to the context of the situation",[117] not exclusively from the accused's perspective. The *Daviault* defence, used overwhelmingly by men to excuse violence against women, has a disproportionate impact upon women's enjoyment of their equality right to be free from gendered violence and thus demands a gender-informed interpretation and application of the principles of fundamental justice.

Justice L'Heureux-Dubé (dissenting) deployed an inclusive "sex equality lens" in *R v Seaboyer* when she wrote that "section [28] would appear to mandate a constitutional inquiry that recognizes and accounts for the impact upon women of the narrow construction of ss 7 and 11 (d) advocated by the appellants."[118] She found that this mandate inhered in the very notion of "fundamental justice":

> [E]nsuring that trials and thus verdicts are based on fact and not on stereotype and myth, is not one belonging solely to any group or community but rather is an interest which adheres to the system itself; it maintains the integrity and legitimacy of the trial process.[119]

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Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall LJ 251.

[115] Substantive equality has never been accepted as a principle of fundamental justice, though it would qualify: see Froc, "Constitutional Coalescence", *supra* note 112.

[116] See Terese Henning & Jill Hunter, "Finessing the Fair Trial for Complainants and the Accused: Mansions of Justice or Castles in the Air?" in Paul Roberts & Jill Hunter, eds, *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, 2012) 347.

[117] *Ibid*; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9; *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at para 57.

[118] *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 para 254, 83 DLR (4th) 193.

[119] *Ibid* at para 265. See also *Mills*, *supra* note 3 at para 21, and Justice L'Heureux-Dubé's dissent in *R v O'Connor*, [1995] 4 SCR 411 at para 129, 130 DLR (4th) 235 ("The eradication of discriminatory beliefs and practices in the conduct of [sexual assault] trials will enhance rather than detract from the fairness of such trials. Conversely, sexual assault trials that are fair will promote the equality of women and children").

More jurisprudential support for the inclusion of women's equal rights under the principles of fundamental justice is provided by *Doe v Metropolitan Toronto Municipality) Commissioners of Police*,[120] a case where the court found that police had violated a woman's s 7 right to security of the person by using her as "bait" to catch a serial rapist rather than protecting or warning her. Because the police exercised their discretion in a "*discriminatory* and negligent way",[121] their actions violated the principles of fundamental justice.

### B. Re-reading "moral innocence"

What results from applying s 28's sex equality lens to the principle of fundamental justice that the "morally innocent shall not be punished"? Rosemary Cairns Way[122] maintains that an "equality-promoting" determination of culpability as constitutionally required under s 7's principles of fundamental justice is supported by Justice L'Heureux-Dubé's decision in *R v Martineau*.[123] Her dissenting opinion, which would have upheld the constructive murder provisions of the *Criminal Code*, recognized an "offence-specific, holistic, and contextualized assessment of fault"[124] and the role of collective rights, including equality, in assessing the degree of fault necessary for compliance with s 7.

Given that s 33.1 is predicated upon self-induced extreme intoxication, wherein an individual takes a risk in consuming or mixing intoxicants to the point where they lose voluntary control over their behaviour, we question whether the Court's assessment of s 33.1 as requiring the conviction of the "morally innocent" was accurate. We agree with Martha Shaffer, who argues that "the *Daviault* case raises questions about whether these concepts [of *mens rea* and *actus reus*] as we currently interpret them are synonymous with the norms of moral responsibility that should animate our criminal law."[125] Courts should consider the gendered context of who is asked—overwhelmingly women—to bear the consequences of the risks posed by these accused persons—overwhelmingly men. The characterization of such behaviour causing grave harm to women as "morally innocent" devalues women's rights to equality, security of the person and fair trials, and thus does not conform to the s 28 imperative.

To this end, the question of "moral innocence" must focus on whether it would violate our sense of justice that the accused bear the consequences of his violent

[120] (1998) 126 CCC (3d) 12 (ON SC), 160 DLR (4th) 697.

[121] *Ibid* at para 158 [emphasis added].

[122] Rosemary Cairns Way, "Culpability and the Equality Value: The Legacy of the *Martineau* Dissent" (2003) 15 CJWL 53.

[123] [1990] 2 SCR 633, 58 CCC (3d) 353.

[124] Way, *supra* note 122 at 69.

[125] Way, *supra* note 100 at 328.

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actions, in a society that understands sex equality as a fundamental value. Gendering the underlying principles of dignity and the "rule of law" means that "innocence" should be critically interrogated against the backdrop of men's presumed moral innocence and women's presumed responsibility for violence (and especially, sexual violence) to ensure that its interpretation is not tainted by these embedded discriminatory tropes.[126] A contextualized understanding of moral fault surely includes recognizing intoxication is often implicated and indeed a catalyst or excuse for gendered violence, understood as a practice of inequality. At the very least, only a person in the accused's position who could not have foreseen that his consumption of intoxicants could lead to loss of voluntary control of his body should be cast as "morally innocent."

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### C. Avoiding the relegation of women's rights to s 1

Deeming women's rights to be mere "societal interests" under s 1, as the Supreme Court did in *Brown*, is premised on the idea that the violence men do to women is a matter of the private sphere: individual, not structural; erratic, unpredictable, unstoppable. Yet as we argued above, the state has always been and continues to be an actor in this violence, by authorizing certain forms of violence against women, by exempting from criminal law other forms, by blocking women from seeking remedies for male violence, by protecting men from accountability, or by creating toxic, hyper-masculine organs of the state whereby police, prison guards, and probation officers have authority over other men and women.

Whether through the legislature or the judiciary, a state that allows men to commit violent acts against women with impunity when they are in a state of self-induced extreme intoxication akin to automatism, abdicates its role in denouncing and deterring violent crime and reinforces men's impunity for violence against women. One court spelled out the discriminatory message sent by the extreme intoxication defence: "Canada will not excuse violence against women and children, except where perpetrators of violence have chosen to become extremely intoxicated."[127]

### D. Deference is imperative

The Court has said that the criteria for s 1 justification require attention to the fact that "[t]he framers of the *Charter* signaled the special importance of [a] right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause."[128] Although the Court was referring to s 3 voting rights, this applies equally to s 28, which was intentionally excluded from the ambit

[126] Lynne Henderson, "Getting to Know: Honoring Women in Law and in Fact" (1993) 2 Texas J Women & L 41.

[127] *Robb*, *supra* note 50 at para 49.

[128] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 11.

of s 33, and is possibly the most "untrammeled" of the rights by virtue of its "notwithstanding anything" opening phrase.

Section 28's influence in the interpretation of justification under s 1 was acknowledged in *R v Red Hot Video*. The Court of Appeal for British Columbia cited s 28 as a factor to be considered in finding the *Criminal Code's* obscenity provisions as a justifiable s 2(b) violation: "If true equality between male and female persons is to be achieved it would be quite wrong in my opinion to ignore the threat to equality resulting from the exposure to male audiences of the violent and degrading material described above."[129] Several years later, Justice Sopinka for the Supreme Court cited *Red Hot Video* in *R v Butler*[130] to highlight the importance of the sex equality objective in justifying encroachment on other *Charter* rights. The *Charter* infringement was justified in *Butler* due to the "the importance of avoiding indifference to violence in so far as women are concerned"[131] via cultural messaging.

Where a law facilitates women's enjoyment of equal rights and furthers sex equality as a pre-eminent Canadian value (as expressed in s 28), courts should tread carefully in substituting its own view of alternatives that might impair rights less. Parliament had good reason, in light of the data and the case law patterns, to assess intoxicated and extremely intoxicated violence against women as a pressing social problem requiring a particular legislative response.

## Part V: Parliament's Way Forward

What should Parliament have done, by way of response to the Court's decision in *Brown*, and drawing upon the previously neglected authority of s 28? First, it should have undertaken careful study and public consultation before drafting its legislation. Second, it should have taken seriously the information available that suggests that the Crown will be unable to prove the kind of criminal negligence offence envisioned by the Court, and created a public record regarding the impracticality of its options, including the futility of creating a government panel to study various intoxicants and their safe levels of ingestion (as suggested by the Court). Third, it would have rejected the Court's two options, and instead relied on judicial deference for amendments to s 33.1 that focused only on the foreseeability of loss of control, not violence, and that placed a burden of proof on the accused to demonstrate that their over-consumption of intoxicants did not fail, to a marked degree, the standard of care that a reasonable person would have exercised.

First, the government should have slowed down its process to draft what may be its last legislative effort to respond to extremely intoxicated violence. It needed to

[129] *R v Red Hot Video Ltd* (1985), 18 CCC (3d) 1 (BC CA), leave to appeal to the SCC refused (1985) 4 CR (3d) xxv at paras 31, 32.

[130] [1992] 1 SCR 452, 89 DLR (4th) 449.

[131] *Ibid* at para 23.

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engage in a review of the scientific literature as well as consultation with experts who study the effects of various drugs and their combinations, whether with other drugs or alcohol. It needed to consult women's groups in a manner that would have allowed thoughtful and informed responses, without the pressure of a bill already drafted and rushed through both the House of Commons and the Senate. It also needed to survey alternate legislative models, whether suggested by academics or enacted in other jurisdictions, and it needed to consult with Crown prosecutors in order to develop a complete picture of the feasibility of various options.

Second, had it done so, it would have been confronted with evidence that shows, indisputably, that the Court's recommendations for law reform were completely ineffectual. An accused who consumes intoxicants to the extent of loss of control will not be able to verify with any exactitude which drugs or alcohol and the amounts in fact ingested. Rarely is there evidence in the body that can confirm the amounts of drugs consumed and rule out other possible drugs. Blood alcohol readings may be accurate, but determining their level at the time of the charged offence depends on the reliability of evidence from the accused about the time of consumption and from an expert toxicologist about metabolic rates of elimination as it relates to the time of the charged offence.[132]

The expert evidence and findings in the three cases before the Court illustrate the kinds of difficulties any Crown prosecutor would face under the Court's foreseeability standards. Even the first test, whether a reasonable person could foresee loss of voluntary control as a result of ingesting the substances, may be challenging. For example, the Crown in *Brown* could not prove that loss of control was foreseeable even though the accused had ingested 14-17 drinks and "snacked" on unspecified amounts of magic mushrooms over the course of an evening.[133]

This is because, when it comes to street drugs, unless a verified sample is available, it will be impossible for any expert to reliably report its potency and therefore its effects. Taking the example of magic mushrooms, which were at issue in both *Brown* and *Chan*, the expert evidence was that there are approximately 200 kinds of magic mushrooms[134] and, because they grow in the wild, "the amount of active ingredient [of psilocybin] can vary widely between samples." [135] In neither case was there evidence of the specific kind of mushroom at issue, its psilocybin concentration, or the dosage consumed.

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[132] *R v St-Onge Lamoureux*, 2012 SCC 57.

[133] *Brown* 2022, *supra* note 4 at para 157. The Court extracted from the trial court decision the [unstated] proposition that, "While Mr. Brown ingested an illicit drug, the trial judge found, based on expert evidence, that his reaction to the drug was not reasonably foreseeable."

[134] *Chan* 2018, *supra* note 17 at para 120.

[135] *Brown* 2020, *supra* note 14 at para 58.

Even if those variables are known in a given case, the evidence was also that the effects will vary between individuals because psilocybin acts on the serotonin receptors. Other factors, such as an individual's personality, their expectations, and the stimuli they are confronted with, will also have a variable effect.[136] There are apparently no scientific studies to indicate "what dose of psilocybin tends to trigger toxic psychosis in the normal population"[137] or "what percentage of normal individuals would become psychotic after consuming them."[138] This difficulty in assessing the foreseeable impact of consumption will hold true for all street drugs, not just magic mushrooms, whether consumed alone or in combination with alcohol or other drugs: absent a verified sample of what the accused consumed and the amounts, it will not be possible to predict even loss of control.

The prospect of meeting the Court's proposed foreseeability standards may be easier for the Crown when drugs are prescribed and thus their composition verifiable. For example, Sullivan's behaviour might have met the first foreseeability test because the trial judge found that the possibility of psychosis as a result of overconsumption of the drug was a known side-effect and that Sullivan himself had previously experienced a psychotic episode while abusing Wellbutrin. On the other hand, a court may find that abuse of a prescription drug was not so excessive as to constitute a marked departure from the standard of care of the reasonable person.[139]

The further foreseeability hurdle, that the intoxicants present a risk of the accused causing non-trivial, non-transitory harm to another, seems formidable for street drugs given the variables involved in their composition. There appear to be no widescale studies on the impact of particular drugs and their role in producing violent behaviour, and such studies might present ethical challenges. It may even be difficult to prove that abuse of a prescription drug foreseeably produces violent behaviour resulting in bodily harm to another. The expert evidence in Sullivan's case, for example, noted only that "it is *possible* that Wellbutrin use could cause a normal person to develop similar conditions, including psychosis, hallucinations, delusions, homicidal ideation, hostility, agitation, and violence."[140]

Moreover, the Court's suggestion that Parliament study the effects of multiple drugs and their association with violent behaviour is fraught with ethical and practical challenges given the proliferation of drugs, their many altered forms and their varied impacts upon individuals. Even if, in the years ahead, the government were able to quantify safe uses for various drugs, we are still left with the proof problems

[136] *Chan* 2018, *supra* note 17 at para 120.

[137] *Ibid* at para 118.

[138] *Ibid* at para 114.

[139] *Vickberg*, *supra* note 50. The court would have found in this case that the accused's over-consumption was not so excessive as to amount to a "marked departure" for the purpose of a criminal negligence standard.

[140] *Sullivan* 2016, *supra* note 18 at para 58 [emphasis added].

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catalogued above. For all of these reasons, Parliament should have rejected the Court's proffered solutions in *Brown* and carved its own path.

Third, armed with the evidence that foreseeability of violence causing bodily harm will be impossible to prove in the vast majority of cases, Parliament should have jettisoned this aspect of a criminal negligence test and focused solely on whether a reasonable person could have foreseen loss of voluntary control as the fault element, in combination with actually causing harm to another. Even then, given the proof dilemmas described above, the legislation ought to put some burden of proof on the accused, at least evidential or possibly persuasive, to show that a reasonable person could not have foreseen any possibility of loss of voluntary control in light of the accused's consumption of intoxicants.

We argue that a persuasive burden would have been justified because any lesser burden would make it difficult if not impossible for the Crown to prove that the manner or extent of the accused's consumption of intoxicants resulted in a foreseeable loss of self control, given the dire lack of clear evidence, lay or expert, on this issue, and the fact that it is evidence possessed exclusively by the accused or at least tainted by his own actions. In the case of other *Criminal Code* offences, persuasive burdens on accused persons to disprove criminal fault have been upheld under s 1. For example, in *R v Whyte*[141] a burden of proof on the accused to show that s/he did not intend to assume care and control of a vehicle when found drunk behind the wheel of a car, was upheld by the Court. The Court focused on the compelling public policy objective of preventing and deterring drunk driving[142] and the difficulty for the prosecutor in proving that a drunk person discovered passed out at the wheel of a car intended to have care and control of the vehicle.[143] Even more relevant is that a persuasive burden of proof on an accused wishing to assert "extreme intoxication" was upheld by the Court under s 1 in the *Daviault* decision because knowledge of what was consumed or ingested lies with the accused. Even an evidentiary presumption, whereby the accused would have to provide some evidence that he did not depart markedly from the conduct of a reasonable person in his consumption of intoxicants, would be preferable to the current wording.

Placing a burden of proof on an accused who has voluntarily abused alcohol, drugs or some combination to the point that he cannot account for his consumption, has lost voluntary control of himself and has either assaulted or threatened another person, is the only way to ensure that prosecution of the accused's crimes is not thwarted by proof requirements that cannot be met owing to the accused's own behaviour.

[141] [1988] 2 SCR 3, 51 DLR (4th) 481.

[142] *Ibid* at para 37.

[143] *Ibid* at para 47.

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**Conclusion**

At the time of the entrenchment of the *Charter,* it could scarcely have been contemplated that the Supreme Court would change the long-standing common law rule forbidding men from relying on their self-induced intoxication as a defence to their violence against women. Given the power that was to be given to judges with the advent of the *Charter,* the women who fought for s 28's entrenchment sent a clear message to judges that there must be equality in the substance of the law.[144]

In light of the strong association between the abuse of intoxicants and violence against women, and the frequency with which men claim intoxication when they harm women, it is difficult to overstate the potential effects of an unleashed extreme intoxication defence. Not only may men's sexual assaults and spousal assaults become untouchable by the criminal justice system when they can show they were extremely intoxicated, but the killings of women will potentially be de-criminalized such that even manslaughter convictions for the slaying of women will be precluded if this defence can be proven.

Moreover, even if the defence is infrequently made out at the end of the day after relevant appeals, its availability will undermine women's equality. Women already curtail their liberties in relation to the potential for violence.[145] As complainants, they will be required to endure more prolonged trials concerning violence committed against them and potentially more acquittals at trial, with the resulting chilling effect on the reporting of sexual assault when men are intoxicated. Police and prosecutors will need to account for the extreme intoxication defence in their charging and prosecutorial decisions, such that it will be impossible to assess the full effects of this defence on holding men accountable in criminal law for violence against women.

Women have a right to live in free from the threat of extremely intoxicated male violence. Their lives and their ability to participate fully in public life—socially, economically, and politically—are restricted in demonstrable and material ways by men's violence, including their extremely intoxicated violence. Until women's constitutionally guaranteed equal rights not to be deprived of security of the person except in accordance with the principles of fundamental justice, to fair trials, and to equality are recognized as warranting *Charter* protection on a level equal with the rights of the men who abuse them, the goals of ss 28 and 15 will never be attained. Parliament is not only entitled, but mandated by s 28 to act so that these gendered burdens cease to be imposed on women and girls in Canada. What a pity that the Supreme Court of Canada failed to heed the message sent by the women of Canada

[144] Froc, "Untapped Power", *supra* note 84, citing NDP MP Pauline Jewett's speech to the Ad Hoc Conference of Canadian Women on the Constitution.

[145] Carl Keane, "Evaluating the Influence of Fear of Crime as an Environmental Mobility Restrictor on Women's Routine Activities" (1998) 30:1 Environment and Behavior 60.

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years ago that it must protect—and not interfere with—Parliament's sex equality mandate.

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# PRIVATIVE CLAUSES: HISTORICAL ANOMALIES THAT THREATEN ACCESS TO JUSTICE

**Jason Tree**

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## Introduction

Privative clauses are legislative provisions that purport to protect administrative actions from judicial scrutiny. On their face, privative clauses often appear to be unassailable, featuring language that the decision of an administrator is final and conclusive, and not subject to appeal to, or review by, any court. Such language is likely to convince all but the most persistent layperson that they have no further remedy in the face of an unfavourable decision by an administrator.

This paper will argue that privative clauses are not only legally questionable, but that they threaten access to justice by misleading the layperson (or even the occasional lawyer). When it comes to privative clauses, the law as written is not the law as applied in practice. This poses a serious threat to the rule of law principle.

Privative clauses are nearly ubiquitous throughout Canadian legislation that empowers administrators to make decisions. They can be found in legislation as varied as the *Plant Protection Act*,[1] the *Health of Animals Act*,[2] the *Canada Labour Code*,[3] and the *Royal Canadian Mounted Police Act*,[4] to name but a few.[5] Where power or discretion has been delegated to an administrator, a privative clause often follows.

Legal practitioners and scholars know that privative clauses do not provide much of a shield at all, no matter how clear or strong the language may be. While they may have originally provided the intended effect, over the years these clauses have lost any meaning. The rationale for ignoring the literal words of the legislator has

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[1] *Plant Protection Act*, SC 1990, c 22.

[2] *Health of Animals Act*, SC 1990, c 21.

[3] *Canada Labour Code*, RSC 1985, c L-2.

[4] *Royal Canadian Mounted Police Act*, RSC 1985, c R-10.

[5] Even recent emergency orders related to the COVID-19 pandemic have included such provisions. See e.g. *Revised Mandatory Order COVID-19*, Ministerial Order issued under s 12 of the *Emergency Measures Act*, RSNB 2011, c 147, 20 January 2022: ". . . their decisions are hereby shielded from judicial review and from civil liability".

ranged from jurisdictional reasons[6] to preserving the rule of law.[7] Regardless of the reason, the effect has been the same: privative clauses have not ousted the modern court's ability to review the actions of a government administrator.

This dissonance between the legislator's words and their legal effect creates a barrier for access to justice. Only those who know to look beyond the words of the statute (or those who can afford legal counsel) are even aware of a judicial remedy to a contested administrative decision.

The late Bora Laskin, writing on the effect of privative clauses in 1952 (although it should be noted that he was an ardent supporter of such clauses), remarked: "It is worth repeating that, if judicial review is desirable, it should be openly conceded and openly established."[8] Yet 70 years later, identical privative clauses continue to be inserted into federal and provincial legislation, obfuscating the true availability of judicial scrutiny.

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**Privative Clauses No Longer Have Any Practical Legal Effect**

Privative clauses have had a varied effect over the years. In Canada's early history, privative clauses appeared to have been generally respected by the courts. In an 1877 Supreme Court of Canada case, the Court faced a strong privative clause, to which then Chief Justice William Richards opined:

I think that the declared intentions of the Legislature ought to be respected, and the parties should be left to assert their rights in some other way than by asking the Court, on an application such as this is, to declare the award invalid and void, when the Legislature has said it shall be binding, final and conclusive on all parties, unless inquired into in the manner prescribed by the Act, and shall not be inquired into by any Court on *certiorari*.[9]

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[6] See e.g. *Crevier v AG (Québec) et al*, [1981] 2 SCR 220 at 237-38, 127 DLR (3d) 1. "There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary matters or other matters. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. However, given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review."

[7] See e.g. *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 52 [*Dunsmuir*]: "The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected."

[8] Bora Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952) 30:10 Can Bar Rev 986.

[9] *Kelly v Sulivan*, [1877] 1 SCR 3 [*Kelly*].

Similarly, the British Columbia Court of Appeal considered the application of a privative clause in the face of a *habeas corpus* application on an immigration matter in 1914. If one can look past the overtly racist comments on the merits of the case (which is admittedly difficult), one can observe a similar conclusion on the complete barrier to judicial intervention that a privative clause achieved:

> In my opinion *The Immigration Act* and the orders-in-council referred to constitute full and justifiable warrant for the detention of the appellant by the immigration authorities, and for his deportation, the deportation order being good and sufficient in law even were the decision of the Board of Inquiry reviewable, and no grounds are made out for the appellant's discharge. But in so holding I am not to be understood as holding that there is any power of review or the right to invoke *habeas corpus* proceedings to effect the discharge of the appellant, as my opinion is that s. 23 is an absolute inhibition up on the court, and there is no jurisdiction in the court to grant a writ of *habeas corpus* and thereupon discharge the appellant from custody.[10]

Yet as the 20th century progressed, the approach of the courts began to shift. Courts first gently probed jurisdictional questions that might affect the outcome of an administrator's decision but tried to avoid the merits of the decision. For instance, in 1938 the Alberta Court of Queen's Bench (relying on an earlier Privy Council decision[11]) carved out space to examine an administrative decision as follows:

> The question involved here is not as to the merits but is a collateral matter upon which the jurisdiction of the tribunal depends and there is nothing in the Act which gives finality to a decision of the Board on such a matter.
>
> In the result, I am of opinion that the finding of the Board, with reference to the debt due to the applicant, is open to review upon *certiorari*.[12]

This gentle probing quickly developed into a much more robust examination of administrator's decisions, often couched in broad jurisdictional language. For instance, an Ontario court framed modern-day elements of procedural fairness as jurisdictional questions in a 1945 decision:

> Every person has an inherent right to an opportunity of being heard before he is condemned, by any tribunal. Over one hundred years ago Lord Denman C.J. in *Innes v. Wylie et al.* (1844), l Car. & Kir. 257, 174 E.R. 800, in discussing the maxim *audi alteram parte*m, said:
>
> > "No proceedings in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called on to

[10] *Munshi Singh (Re)*, [1914] 20 BCR 243 (BC CA), 29 WLR 45.

[11] *Colonial Bank of Australasia v Willan*, [1874] LR 5 PC 417.

[12] *Hudson's Bay Company (Re) (No. 2)*, [1938] 3 DLR 791 (AB QB), [1938] 2 WWR 412.

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> answer the charge, and is warned of the consequences of refusing to do so."
>
> That principle extends to every case in which substantive rights are affected or put in jeopardy in a judicial proceeding, and is not limited to judicial proceedings in criminal matters.
>
> . . .
>
> The result of the English decisions to which I have referred is that the giving of notice and an opportunity to be heard in a judicial proceeding affecting substantive rights, even where notice is not specifically required by statute, is a condition precedent to any tribunal exercising jurisdiction which it would otherwise have.[13]

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By the early 1950s, courts had recognized their collective encroachment on the privative clause, as demonstrated by this apt observation by the Ontario Superior Court of Justice:

> That language [a privative clause] appears to give recognition to the force of no-*certiorari* clauses except where it can be shown that the inferior tribunal was manifestly without jurisdiction or has been the victim of fraud. However, upon a closer study of that judgment, and upon looking into the other authorities which have since been decided upon the subject, it becomes apparent that the phase "want of jurisdiction" is extremely flexible and has been extended to include imperfections which ordinarily might not be regarded as pertaining to jurisdiction at all.

It is shortly after this that Laskin wrote: “With few exceptions in Anglo-Canadian experience, the courts have found it expedient to exercise the same supervisory role over these administrative agencies as they would in the absence of any privative clause.”[14]

By the late 20th century, privative clauses had morphed into something else altogether. Instead of ousting judicial scrutiny, privative clauses affected the deference that courts imputed to a particular administrator. The more deference that was owed, the lower the standard of review applied by the courts to the decision in question. This was a somewhat novel application of privative clauses, which had otherwise been treated as an obstacle to reason around by the earlier courts. It could be argued that the difficulty in finding a satisfactory doctrinal approach led—or at least contributed—to the advancement of this approach.

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[13] *Re Brown and Brock and the Rentals Administrator*, [1945] 3 DLR 324 (ON CA), [1945] OR 554.

[14] Laskin, *supra* note 8.

However, the Supreme Court of Canada's decision in *Dunsmuir*[15] firmly entrenched the role of the privative clause for a brief period in Canadian law. The court remarked that "a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized."[16] Under *Dunsmuir*, privative clauses guided the courts towards a reasonableness standard of review.

This historical curiosity came to an end just 11 years later with the *Vavilov* case.[17] By adopting a reasonableness review as a starting proposition, there is no longer a need to be searching for legislative hints as to the appropriate standard of review. In essence, nearly all administrative actions (but for a short list of exceptions identified by the court) are now treated as if they were subject to a privative clause under the *Dunsmuir* framework.

The majority in *Vavilov* summed up its approach by noting that "…in such a framework that is based on a presumption of reasonableness review, contextual factors that courts once looked to as signalling deferential review, such as privative clauses, serve no independent or additional function in identifying the standard of review."[18] Therefore, what remains of the purpose of the privative clause?

The dissent did not ignore this question, observing that "the majority's claim that legislatures 'd[o] not speak in vain' is irreconcilable with its treatment of privative clauses, which play no role in its standard of review framework."[19] The dissent seems to struggle with the same issues that have plagued all courts trying to reconcile the clear and unambiguous words of the legislator with the refusal of the courts to surrender their supervisory role.

However, the dissent may have missed an opportunity to extricate themselves from the conundrum by observing that the *Dunsmuir* court (and lower courts in the preceding years) essentially invited legislators to insert a privative clause in order to shield their administrators with a reasonableness standard of review. A privative clause became, in essence, a magical incantation to bring about a desired level of deference. With the *Vavilov* court setting reasonableness as the *de facto* standard of review, these magical incantations are no longer necessary. They simply appear to have become legal surplusage.

Of course, such an approach raises its own concerns. This is not the first-time legislatures enacted court-derived language. Pre-*Dunsmuir*, there were three levels of deference considered by the courts: correctness, reasonableness simpliciter, and patent

[15] *Dunsmuir*, *supra* note 7.

[16] *Ibid* at para 52.

[17] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[18] *Ibid* at para 45.

[19] *Ibid* at para 248.

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unreasonableness.[20] In that era, legislators sometimes inserted this language into statutes to expressly inform the courts of the level of intended deference in a particular statute, presumably in an attempt to avoid the courts making that determination themselves. Although *Dunsmuir* merged reasonableness simpliciter with patent unreasonableness into a single common law reasonableness standard in 2008, some statutes continue to use the "patent unreasonableness" standard.[21] Should such terminology also be considered legal surplusage?

Of course, the interpretative presumption against surplusage and the Supreme Court of Canada's "modern" approach to statutory interpretation[22] do not favour complete ignorance of the legislator's words. Indeed, the current approach of ignoring privative clauses is not consistent with Driedger's maxim, "[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[23]

Alternatively, and more appealing from a doctrinal perspective, the Supreme Court of Canada could have applied modern constitutional interpretive principles to strike out privative clauses. Interpreting section 96 of the Canadian *Constitution*[24] along with the rule of law principle[25] in the manner set out in *Toronto (City)*[26] could suggest that privative clauses on their face offend the rule of law by expressly ousting the supervisory role of the superior courts over the executive branch. This argument is also in line with Fuller's view of the rule of law; specifically, that there should be congruence between what written statutes declare and how officials enforce those statutes.[27] The current practice of saying one thing in statute and doing another in practice would not conform to Fuller's view of the rule of law.

The argument against privative clauses strengthens as the size of the Canadian administrative state grows. Topics that once fell within the primary jurisdictions of courts are slowly moving to specialized administrative tribunals. For instance, most residential tenancy disputes, once a matter for the courts, are now heard in specialized residential tenancy boards. Moreover, even in cases where concurrent jurisdiction exists, the remedies available in tribunals have sometimes surpassed those generally available in courts.

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[20] *Dunsmuir*, *supra* note 7 at 34.

[21] See e.g. *Health Facilities Act*, RSA 2000, c H-2.7, s 23(2): "A decision of the Minister may be challenged on judicial review for jurisdictional error or patent unreasonableness…"

[22] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193.

[23] Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

[24] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 s 96, reprinted in RSC 1985, Appendix II, No 5.

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

[26] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34.

[27] Lon L Fuller, *The Morality of Law*, rev ed (New Haven, UK: Yale University Press, 1969).

Consider for instance that the Ontario Human Rights Tribunal has no cap on damages[28] and can award damages for injuries to dignity, feelings, and self-respect.[29] Additionally, the tribunal can order parties to the proceeding to do "anything" to promote compliance with the Act.[30] These are very broad powers and surpass those of the courts in many instances.[31] Many other government administrators have broad powers, including powers to detain[32] or deprive parties of their livelihoods.[33]

**Judicial Review is a Necessary Power of the Judicial Branch**

The powers delegated to administrators can often exceed those available through court proceedings, and negative outcomes can rival—or even surpass in some cases—the criminal law.[34] Powers such as these must be subject to judicial oversight.

If the power of government to create specialized tribunals to adjudicate certain disputes included the power to shield them from judicial oversight, then the judicial branch would become subservient to the executive and legislative branches. Such an approach, and by extension privative clauses, are not consistent with a rule of law state.[35]

The common law has adapted case-by-case to the growth of the administrative state by imposing restrictions on the exercise of administrators. Administrators do not have untrammelled discretion to make unreasonable decisions or to make them for an improper purpose.[36] Everyone whose rights, interests, or privileges are affected by an administrative decision are owed a sliding scale of

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[28] *Human Rights Code*, RSO 1990, c H.19, s 45.2.

[29] *Ibid* at s 45.2(1).

[30] *Ibid* at ss 45.2(1)–45.2(2).

[31] For instance, courts have not generally held that they may award damages for injuries to dignity, feelings, and self-respect. Moreover, most "self-help" remedies, such as small claims court have relatively low caps on damages. In Ontario, the cap on small claims damages is $35,000: *Courts of Justice Act*, RSO 1990, c C.43, s 23(1)(a); *Small Claims Court Jurisdiction and Appeal Limit*, O Reg 626/00, s 1(1).

[32] For example, in the immigration context: *Immigration and Refugee Protection Act*, SC 2001, c 27, s 54.

[33] Such as the regulation of professionals: see e.g. *Law Society Act*, RSO 1990, c L.8, s 49.26; *Ontario College of Teachers Act, 1996*, SO 1996, c 12, s 30(4).

[34] See e.g. the low cap of $5,000 for fines for summary conviction offences: *Criminal Code*, RSC 1985, c C-46, s 787(1).

[35] This is a point also made by Liston in explaining that privative clauses pose a challenge to the rule of law: Mary Liston, *Governments in Miniature: The Rule of Law in the Administrative State* in Lorne Sossin & Colleen M Flood eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2013) at 39.

[36] *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689.

procedural fairness rights.[37] Administrators must be not only free from bias, but also the appearance of bias.[38]

These common law rules, made despite the presence of privative clauses, are essential to maintaining the proper balance between the branches of government.

**Privative Clauses Obstruct Access to Justice**

These basic underpinnings of administrative law are known to every law student but remain out of reach to the layperson. Although some modern statutes attempt to codify aspects of these common law principles,[39] the vast majority of administrative decisions float along an ocean of common law, with only the legally trained being able to fish out the applicable principles.[40]

Greater access to judicial review serves to strengthen governmental institutions because it ensures that the rule of law is respected by administrators, which in turn leads to a fairer application of the law. Swift judicial intervention in cases of administrative overreach helps ensure fair and impartial justice for not only the applicant, but for future parties appearing before the administrator. In short, judicial oversight is needed to ensure administrators follow the rules.

Unfortunately, the continued existence of privative clauses inevitably deters the layperson from even seeking legal advice, since a plain reading of a law seems to exempt an administrator's decision from any judicial oversight. In this era, where greater access to justice is demanded by the highest levels,[41] privative clauses must be repealed. It is not much to ask that the law be intelligible and consistent. This means that the legal meaning of words must reasonably resemble their everyday meaning. Furthermore, legislation must reflect the actual operation of the law in practice. These are essential components of Fuller's rule of law.[42]

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[37] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193.

[38] *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369, 68 DLR (3d) 716.

[39] See e.g *Statutory Powers Procedure Act*, RSO 1990, c S 22.

[40] There is also the problem discussed earlier of legislatures that try to mimic the common law in statutes. The common law is by definition subject to change, yet statutes may not be amended for years on end, leading to incongruence between fairness rules in statute and at common law.

[41] See e.g. The Right Honourable Richard Wagner, P.C., Chief Justice of Canada, "Access to Justice: A Societal Imperative" (Remarks delivered at the 7th Annual Pro Bono Conference, Vancouver, 4 October 2018), online: <https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx> [perma.cc/K8UJ-8HJ5] ("A third barrier to access to justice is lack of access to legal information. How many problems could be avoided if the public had a higher level of legal knowledge, or at the very least quick and affordable access to basic advice?).

[42] Fuller, *supra* note 27.

Beyond the repeal of these problematic clauses, when creating administrative agencies, governments should plainly set out the basic administrative law principles that apply to administrator decisions and clearly explain the process to seek judicial review.[43] Administrators too should not shy away from explaining how the law applies to their specific field of expertise. Transparency can only serve to increase public confidence in our government.

For their part, courts should strive to simplify judicial review proceedings. These proceedings remain arcane and access is mostly limited to the legal profession. Creating a "small claims court" version of judicial review could be one option. Such an approach would allow self-represented litigants to seek judicial review in a simplified fashion. Moreover, judicial review for many cases would be best achieved through the more inquisitorial approach taken in less formal venues. Although this paper is not canvassing these alternatives in detail, there are undoubtedly other options which could further the important goals of increasing access to judicial oversight.

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**Judicial Review is Not a Novel Approach**

While Canadian courts have debated the degree of deference owed on judicial review and even occasionally questioned whether they had such a power, it is informative to examine how other legal systems handle the same issue. An interesting, albeit unusual, comparator is Mexico.

Mexico shares an analogous history to Canada: Mexico enjoyed a rich history of advanced Indigenous nations, with complex legal systems and traditions, before being colonized by a European power.[44] Spanish forces eliminated Indigenous governance and replaced it with a European model.[45] Instead of a common law legal system, Spain naturally imposed a civil law system, mirroring its domestic legal system.[46] Over the years, the Mexican legal system has been seemingly influenced by Indigenous remnants of the past as well as by its proximity and interconnectivity with a common law neighbour to the North.[47] How then, does Mexico rein in errant administrators?

While Mexico does suffer from high levels of corruption and challenges in maintaining the rule of law,[48] it nonetheless has a robust and modern legal system. The

[43] This information is best left out of statutes, for the reasons previously discussed, and instead explained to parties through guides, websites, or other educational material.

[44] Juan Miralles, *Hernán Cortés Inventor de México*, (Planeta, 2020).

[45] *Ibid.*

[46] Francisco A Avalos, *The Mexican Legal System: A Comprehensive Research Guide*, (William S Hein & Company, 2013)

[47] By virtue of the adoption of mechanisms such as the *amparo* and *jurisprudencia.*

[48] United Nations Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders on his mission to Mexico*, 12 February 2018 at 6-7, 18 ("The low level of independence of the judiciary, corruption among public officials and the exploitation of the justice system by companies

concept of judicial supervision of the executive is not new to Mexico. In the mid-19th century, the Mexican state of Yucatán was in the midst of a secessionist movement.[49] Tired of centralized control from the government in Mexico City, the 1841 state Constitution provided the judicial branch the power to review government decisions in an effort to protect the rights of state citizens from federal overreach.[50] This mechanism was named the *amparo*, and quickly became popular. By 1847, it was included in the national *Acta de Reformas*, and by 1857, this right was inserted into the national Constitution.[51] Various subsidiary laws, such as the *Ley de Amparo*, of 1869, codified the details of this right.[52]

Notably, the Supreme Court of Mexico provides interpretation to the *amparo*'s application and maintains a common law-like ability to establish binding precedent, or *jurisprudencia*.[53] This precedent is even compiled by the Mexican Supreme Court into easily consulted volumes.[54] The effect of a codified and easily accessed mechanism of judicial review allows Mexicans to challenge government actions that are unlawful. The success of this system is evidenced by its export to most Latin American countries and its use as a foundation[55] for certain protections in the United Nations *Universal Declaration of Human Rights*.[56] The *amparo* even goes beyond the powers of judicial review that we see in our common law system and permits pre-emptive reviews of actions not yet taken by government (essentially a form of injunction).[57]

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and other parties, who make criminal complaints against human rights defenders, all contribute to the criminalization of human rights work"; "Meanwhile, success in the fight against impunity will depend on overcoming the challenges of corruption, organized crime and continued militarization of public security").

[49] Eduardo Ferrer MacGregor & Luis Fernando Rentería Barragán, *El Amparo Directo en México: Origen, Evolución y Desafíos* (Universidad Nacional Autónoma de México, 2021).

[50] *Constitución Politica de Yucatán de 1841*, online, pdf: <http://www.internet2.scjn.gob.mx/red/marco/PDF/B.%201835-1846/d)%20CP%20Yucatán%20(31%20marzo%201841).pdf> [perma.cc/VMA9-QKVV].

[51] *Constitución Federal de Los Estados-Unidos Méxicanos*, 1857, online, pdf: <http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf> [perma.cc/H78Q-MVWW].

[52] For a detailed examination of the history and practice of the *amparo*, see MacGregor et al, *supra* note 49.

[53] The power for Mexican courts to create binding precedent is provided for in the Mexican constitution: *Constitución Política de los Estados-Unidos Méxicanos*, 1917, arts 94,107.

[54] Suprema Corte de la Nación, *Jurisprudencia histórica*, online, pdf: <https://sjf2.scjn.gob.mx/documentos-interes> [perma.cc/769H-4NCX].

[55] Pedro Pablo Camargo, *The Right to Judicial Protection: "Amparo'" and Other Latin American Remedies for the Protection of Human Rights*, (1971) 3:2 Lawyer Americas 191.

[56] *Universal Declaration of Human Rights*, 10 December 1948, A/RES/217 (III), art 8.

[57] Camargo, *supra* note 55.

The purpose of highlighting Mexico's experience is to demonstrate that Canada need not be afraid of expanded awareness or access to judicial review. Judicial supervision of the executive and promotion of the rule of law is essential and common to a modern state. There is no need to be hiding powers of judicial review behind a cloak of privative clauses.

## Conclusion

The continued existence of privative clauses in Canadian legislation is a significant barrier for access to justice. The role of courts in maintaining the rule of law transcends legal traditions and should be understood as a constitutional imperative. Privative clauses should be repealed, and all branches of government should move to ensure simplified access to, and awareness of, judicial oversight.

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# OUR LAND, OUR WAY: THE RULE OF LAW, INJUNCTIONS, AND INDIGENOUS SELF-GOVERNANCE

**Sarah Dalton***

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## Introduction

European settlement swept across Canada, ignoring Indigenous peoples' existing laws and institutions. Today, two parallel systems of law exist: settler legal systems, which assert Crown sovereignty to all of Canada, and Indigenous legal systems, which assert sovereignty over their resources and peoples. Although dormant, due to policies such as section 91(24) of the *Constitution Act*[1] and the *Indian Act*,[2] Indigenous legal traditions persist today and are developing into a third order of government in Canadian federalism. Yet, the differing legal systems have not reconciled. One area where this tension arises is during resource development and extraction. How these projects proceed and are managed are frequently contested, which often leads to injunctions.

Indigenous communities sometimes erect blockades as a form of protest. Under Canadian laws, blockades as a form of protest are seen as civil disobedience. Although Canadians have a right to peacefully assemble, the siting of disruption is key to gain legal tolerance. Civil disobedience seeks to create change by illegal means or interference with the lawful interests of other citizens. In the context of Indigenous protestors and resource development, the peaceful assembly interferes with a developer's economic interests. As such, blockades are a form of civil disobedience, not lawfully protected peaceful assembly. The current judicial sentiment is that allowing Indigenous peoples to erect blockades, but stopping others, would create two different applications of the Canadian rule of law.

In this context, injunctions are frequently implemented to stop communities from erecting blockades used to "defend disputed land from development by private

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[1] *Constitution Act, 1982*, s 91(24), being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (section 91(24) allows the Canadian government to assert power over "Indians, and Lands reserved for the Indians").

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

third parties."[3] In 1982, section 35 of the *Constitution*[4] entrenched the protection of existing Aboriginal and Treaty rights in Canadian law. Since then, Indigenous people have used injunctions to protect their ancestral lands. However, there is a growing trend of the courts' reluctance to grant injunctions to Indigenous people[5] and an increased frequency of companies obtaining injunctions against Indigenous people.[6] Rather than undermining the rule of law, Indigenous peoples' efforts to prevent unwanted development on their lands should be viewed as an expression of self-governance.

Colonialism is apparent in legislated actions, such as the imposition of band councils or residential schools, but it is also demonstrated through the Canadian common law and court actions that dispossess Indigenous people.[7] John Borrows posits that the Canadian common law favours non-Aboriginal legal sources over Indigenous sources. He says the

> overreliance on non-Aboriginal legal sources has resulted in very little protection for Indigenous peoples. Aboriginal land rights were obstructed, treaty rights repressed, and governmental rights constricted. This judicial discourse narrowed First Nations' social, economic, and political power.[8]

Building on this reasoning, this paper addresses favouritism in the injunction process. The rule of law has been discussed in the context of post-injunction sentencing and contempt of court power. However, few papers analyze the injunction process, the rule of law and the effect on Indigenous self-governance.

This paper argues that the trend of granting injunctions to corporations prevents Indigenous people from protecting and preserving their lands and goes against the rule of law as it inhibits the Indigenous communities' ability to self-govern. This will be accomplished by assessing the Canadian versus the Indigenous rule of law, evaluating the "balance of convenience" step in the test for granting an injunction, and viewing protesting as a method of enforcing Indigenous laws.

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[3] Ryan Newell, "Only One Law: Indigenous Land Disputes and the Contested Nature of the Rule of Law" (2012) 11:1 Indigenous LJ 41.

[4] *Constitution Act*, *supra* note 1, s 35.

[5] See Yellowhead Institute, "Land Back" (October 2019) at 10, online (pdf): <redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf> [perma.cc/H5L2-X5PE]; Kate Gunn, "Injunctions as a Tool of Colonialism" (30 July 2020), online (blog): *First Peoples Law* <www.firstpeopleslaw.com/public-education/blog/injunctions-as-a-tool-of-colonialism> [perma.cc/NW8A-4KDQ]

[6] *Ibid.*

[7] Newell, *supra* note 3 at 43-44.

[8] John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 8.

## I. Background

### A) Indigenous Peoples' Unique Relationship to Land

> *Water is a sacred thing. This is reflected in many traditional beliefs, values and practices.* — Ann Wilson, Anishnaabe Elder, Rainy River First Nation

Understanding the interconnectedness between land and Indigenous language, culture, laws, medicine, and food sources is imperative to understanding the impacts of granting injunctions against Indigenous peoples in Canada. When the sources of connection are affected by resource development, it is detrimental to an Indigenous community. According to the Royal Commission on Aboriginal Peoples, land is fundamental to Indigenous identity, and is reflected in the language, culture and spiritual values of all Indigenous peoples.[9] For example, the Gitksan tribe told a story of a thunderous noise coming from the mountain beside the lake interrupting party festivities; it was a grizzly bear coming down the side of the mountain. The warriors tried to confront the animal, but it crossed the lake and trampled them to death.[10] The elders used the story to warn young people to take just enough food to eat and leave the rest for others; if they took more, a tragedy like the grizzly bear attack will happen.[11] If development destroys the mountain, the story dies, and with it a piece of culture. Stories used to relay societal practices are told across Indigenous cultures.

In addition to providing sustenance, land is the basis for Indigenous creation stories that connect Indigenous people to the Creator, Mother Earth, as well as support Indigenous laws. A healthy environment is intrinsic to Indigenous peoples' governance systems: the land, plants, animals, and people all have spirit and must be shown respect. This respect forms the basis of Indigenous laws.[12] The Seven Generation Principle is an important aspect of governance within Indigenous law, dictating that it is their responsibility to preserve and better the land for the next seven generations.[13] The unique connection between Indigenous peoples and the land is woven into essentially every aspect of their lives, and, as such, when the land is impacted through resource extraction Indigenous lives are impacted in multiple ways.

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[9] Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, (Report), vol 1 (Ottawa: Supply and Services Canada, October 1996).

[10] Jean Leclair, "Of Grizzlies and Landslides: the use of archaeological and anthropological evidence in Canadian aboriginal rights cases" (2005) 4 Public Archaeology 109 at 113.

[11] *Ibid*.

[12] The Spirit in the Land: The Opening Statement of the Gitksan and Wefsuwefen Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987, by Gisday Wa and Delgam Uukw. Gabriola, B.C.: Reflections, 1990 at 1.

[13] Beverly Jacobs, "Environmental Racism on Indigenous Lands and Territories" (2010) Can Political Science Assoc at 1 [Jacobs].

### B) Sources of Indigenous Laws

Prior to the European invasion, Indigenous people lived in distinct, sustained, and identifiable communities for generations. This is evidence of effective governing systems.[14] Indigenous communities are numerous and extremely diverse across Canada. Amongst differing communities, there are differing laws. For some Indigenous communities, the natural world—land, plants, animals, seasons, and cycles of nature—was a "central tenet of their lives and worldviews since the dawn of time."[15] This understanding is sophisticated and comprehensive wherein the natural world is seen as one interconnected entity. Traditional concepts of respect and sharing "that form the foundation of the Aboriginal way of life,"[16] create the Seven Sacred Teachings. These teachings are built around the seven natural laws, which are embodied by an animal:

> Love – Eagle
> Respect – Buffalo
> Courage – Bear
> Honesty – Bigfoot
> Wisdom – Beaver
> Humility – Wolf
> Truth – Turtle[17]

These seven laws explain that "the animal world taught man how to live close to the earth."[18] Therefore, some Indigenous laws arise from animals and animal spirits.

To provide a specific example, Wet'suet'en governance reflects both human relations and relations of humans to the land, animals, and the spirit world. Antonia Mills, a professor of First Nations studies at the University of Northern British Columbia, wrote,

> [t]he expression the Witsuwit'en use most commonly for law is *yinkadinii' ha ba aten* ('the ways of the people on the surface of the earth') … The principles of Witsuwit'en law define both how the people own and use the surface of the earth when they are dispersed on the territories and how they

[14] Stephen Cornell, "Wolves Have a Constitution: Continuities in Indigenous Self-Government" (2015) 6:1 Intl Indigenous Policy J Article 8 at 4.

[15] Bob Joseph, "What is the relationship between Indigenous Peoples and Animals" (4 April 2016), online (blog): *Working Effectively With Indigenous* Peoples <www.ictinc.ca/blog/what-is-the-relationship-between-indigenous-peoples-and-animals#> [perma.cc/D7W4-5QWM].

[16] *Ibid*.

[17] *Ibid*.

[18] "Seven Sacred Teachings", online: *Empowering the Spirit* <https://empoweringthespirit.ca/cultures-of-belonging/seven-grandfathers-teachings/> [perma.cc/X57J-BS8P].

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> govern themselves and settle disputes when they are gathered together in the feast.[19]

These principles govern the Wet'suwet'en and shape their personal behaviours. Indigenous nations in Canada's Pacific Northwest depend on sets of Indigenously generated rules that govern territory, exchange, and the behaviour of leaders.[20] Additionally, across Canada, Beverly Jacobs describes Haudenosaunee religion, education, and ceremonies, as "intertwined, intermingled, and holistic"[21] with Haudenosaunee law. As such, even if a nation's laws are not connected to the land, other aspects are, and if that practice is harmed by land destruction, their laws are harmed as a spill-over effect.

Intercommunity treaties reflected lawful interactions between signatories and rules that would govern both societies and their governments.[22] Europeans recognized Indigenous communities as their own nations when they entered into intergovernmental treaty relationships "first symbolized by the *Gus Wen Tah* or Two-Row Wampum."[23] Treaties require the signatories to "acknowledge their shared humanity and to act upon a set of constitutional values reflecting the unity of interests generated by their agreement."[24] Whether a treaty was signed between Indigenous communities or between an Indigenous community and a European, the treaty acknowledges shared constitutional values. These shared constitutional values are evidence of two systems of government. Despite evidence of Indigenous systems of governance such as trade, warfare, treaty signing, and other activities, early colonizers often concluded that no such systems existed.[25] Although this conclusion is now understood to be wrong, reconciling Indigenous legal systems with Canadian legal systems continues to be a problem.

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[19] Antonia Mills, *Eagle Down is our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UNB Press, 1994) at 141.

[20] Cornell, *supra* note 14 at 10.

[21] Beverly Jacobs "John Borrows Canada's Indigenous Constitution. Toronto: University of Toronto Press, 2010 – Drawing Out Law. A Spirit's Guide. Toronto: University of Toronto Press, 2010" (2014) 29:3 CJLS 420.

[22] For example, the Dish with One Spoon Wampum, made in 1701 between the Haudenosaunee Confederacy and the Anishinaabe Three Fires Confederacy, represents a peaceful resource sharing agreement: "Two Row and Dish With One Spoon Wampum Covenants, online (pdf): *Future Cities Canada* <futurecitiescanada.ca/portal/wp-content/uploads/sites/2/2022/02/fcc-civic-indigenous-tool3-teaching-twodishonespoon.pdf> at 3 [perma.cc/73V8-U889].

[23] Newell, *supra* note 3 at 49.

[24] Robert A Williams Jr, *Linking arms together: American Indian treaty visions of law and peace, 1600-1800* (New York: Oxford University Press, 1997) at 99.

[25] Cornell, *supra* note 14 at 4.

In *Canada's Indigenous Constitution*,[26] John Borrows purports that Canada should be a multi-jurisdictional country embracing the common law, civil law, and Indigenous legal traditions. He argues that Indigenous legal traditions are not stuck in the past, rather they have "modern relevance" that "can be developed through contemporary practices."[27] This three-pronged legal system should not have any hierarchy. Between the many Indigenous nations in Canada, there exists a diverse set of legal traditions, but five sources are commonplace: sacred law (creation stories, treaty relationships), natural law (relationships with the natural world), deliberate law (talking circles, feasts, council meetings, and debates), positivistic laws (proclamations, rules, regulations, codes, teachings, Wampum readings), and customary law (marriages, family relationships, recent land claim agreements).[28] Understanding these sources is imperative to understanding the Indigenous rule of law because general consensus to accept the rule of law is needed. Although diverse, these common sources create a base of general consensus to support an Indigenous rule of law that can be applied across Canada.

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## II. The Rule of Law

The concept of the rule of law has existed for millennia. Historically, Aristotle (c. 350 BC) purported generally applicable rules and John Locke emphasized well-known, established laws.[29] These interpretations desire laws that are generally applicable and known to all. Formatting laws this way creates a system where everyone knows how they should behave, and everyone behaves in accordance with the same rules. Pre-1836, the rule of law in Canada was based on freedom and respecting the conditions of freedom.[30] This is because the agreements entered into by colonizers and Indigenous people created laws for the purpose of maintaining two separate nations. However, it has evolved to exclude Indigenous people, as one rule of law eclipsed the other.

Post-1836, rather than supporting freedom, settlers used the law to disenfranchise Indigenous people. When the rule of law was grounded in the legitimacy of the Wampum and treaties, it was in its purest form.[31] Consequently, a reversion of the rule of law is "the best if not the only instrument for the Crown to maintain a democratic and honourable relationship with First Nations."[32] The differing

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[26] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [Borrows, "Indigenous Constitution"].

[27] *Ibid* at 10.

[28] *Ibid* at 23–58.

[29] "The Rule of Law" (22 June 2016), online: *Stanford Encyclopedia of Philosophy* <plato.stanford.edu/entries/rule-of-law/#HistRuleLaw> [perma.cc/T9K7-H5C9].

[30] Bruce Morito, "The Rule of Law and Aboriginal Rights: The Case of the Chippewas and Nawash" (1999) 19:2 Can J Native Studies 263 at 276.

[31] *Ibid*.

[32] *Ibid* at 277.

interpretations of Indigenous and Canadian rules of law must be understood before their potential recovery is discussed.

### A) The Indigenous Rule of Law

Constitutionalism is "the idea that the process of governing is itself *governed* by a set of known, foundational laws or rules."[33] Although laws differ, constitutionalism occurs within Indigenous legal traditions thereby creating a set of laws and rules that apply uniformly across Indigenous communities in Canada. Laws and rules have power because a "community hath agreed to be governed"[34] by them. For example, the Iroquois Confederacy was an alliance of five nations living around the eastern Great Lakes. This alliance was formulated on an "elaborate, multi-level political system that operated according to guidelines given in the Great Law of Peace" and recorded in wampum belts.[35] These guidelines had power, allotting authority to specific people and procedures for decision-making.[36]

The Haudenosaunee (signatories of the Iroquois Confederacy) argued that the Great Law of Peace permitted their use of direct action against Henco Industries Ltd.[37] The Great Law of Peace required them to stop industrial encroachment on the Douglas Creek Estates, which they were trying to preserve for future generations.[38] The Haudenosaunee Confederacy Council maintains that protestor actions were grounded in their own laws. The Council described the legal foundations as follows:

> The Haudenosaunee, and its governing authority, have inherited the rights to land from time immemorial. Land is a birthright, essential to the expression of our culture. With these land rights come specific responsibilities that have been defined by our law, from our Creation Story, the Original Instructions, the Kaianeren:kowa (Great Law of Peace) and Kariwiio (Good Message) .... [A]ccording to our law, the land is not private property that can be owned by any individual. In our worldview, land is a collective right. It is held in common, for the benefit of all. The land is actually a sacred trust, placed in our care, for the sake of the coming generations. We must protect the land. We must draw strength and healing from the land. If an individual, family or clan has the exclusive right to use and occupy land, they also have a stewardship responsibility to respect and join in the community's right to protect the land from abuse. We have a

[33] Cornell, *supra* note 14 at 2.

[34] Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithica, New York: Cornell University Press, 1947) at 5, quoting Lord Bolingbroke.

[35] Cornell, *supra* note 14 at 6.

[36] *Ibid*.

[37] Newell, *supra* note 3 at 60–61.

[38] *Ibid*.

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> duty to utilize the land in certain ways that advance our Original Instructions. All must take responsibility for the health of our Mother.[39]

The land gives rise to a community right. Beverly Jacobs, a Haudenosaunee law professor, said the "Indigenous rule of law, [is] our relationship to mother earth. We're talking about our ceremonies. We're talking about our governance systems. We're talking about our respect of mother earth and natural law – and it's a whole different worldview about our understanding of our relationship."[40] The Indigenous rule of law is grounded in the land, which creates a duty to protect the land. This duty is what supports the Haudenosaunee's direct actions.

The Ardoch Algonquin First Nation (AAFN) lists "the protection of the environment both locally and globally in keeping with the sacred responsibility to the earth"[41] as a guiding principle. They emphasize that "Algonquin people should regard the land as a living creature and should interfere as little as possible with its expressions."[42] Mr. Lovelace, a member of the AAFN, purported that Ontario laws conflicted with Algonquin law by allowing development prohibited under Algonquin law and criminalizing Algonquin protestors.[43] The Canadian legal system failed to deliver justice that included priorities articulated in Algonquin laws.[44] Thus, the AAFN protestors lost faith in the Canadian legal system.

Although these are just two specific examples of Indigenous legal orders, the idea of land giving rise to a legal duty of protection is widely applicable. Coupled with the five sources of Indigenous laws, this notion forms an Indigenous constitution. Since all Indigenous people comply with this constitution, it gives rise to a set of foundational laws or rules. These laws support an Indigenous rule of law that is separate and distinct from the Canadian rule of law.

### B) The Canadian Rule of Law

In Canada, we are constitutionally bound by the rule of law.[45] The concept of the Canadian rule of law is stated in *Roncarelli v Duplessis* as a "fundamental postulate

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[39] "Land Rights Statement", online: *Protect The Tract* <www.protectthetract.com/land-rights-statement> [perma.cc/9KEH-7FF7].

[40] Patricia Hughes, "Two Tales About the Rule of Law", *Slaw* (25 February 2020), online: <www.slaw.ca/2020/02/25/two-tales-about-the-rule-of-law/> [perma.cc/B9XY-UVKW].

[41] Ardoch Algonquin First Nation, "Guiding Principles of the Ardoch Algonquin First Nation" cited in Newell, *supra* note 3 at 61.

[42] Ardoch Algonquin First Nation, "Principles of Development" cited in *Newell*, *supra* note 3 at 61.

[43] Newell, *supra* note 3 at 61–62.

[44] *Ibid* at 62.

[45] *Canadian Charter of Rights and Freedoms* at preamble, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law...").

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of our constitutional structure".[46] This version requires that power is applied uniformly, not arbitrarily. In *Frontenac Ventures Corp v Ardoch Algonquin First Nation*, the motion judge, Justice Cunningham said,

> Mr. Lovelace says that while he respects the rule of law, he cannot comply because his Algonquin law is supreme. He says he finds himself in a dilemma. Sadly, it is a dilemma of his own making.
>
> His apparent frustration with the Ontario government is no excuse for breaking the law. There can only be one law, and that is the law of Canada, expressed through this court.[47]

In this passage, Cunningham J suggests that there is a singular rule of law in Canada. This is not the case.

Injunctions offer a unique opportunity to look at the dispute between Canadian laws and the Indigenous legal perspectives. The crux of the issue is the previously irreconcilable rule of law debate. Although sentiments similar to Justice Cunningham's are still prevalent in Canada, under Canada's commitment to Truth and Reconciliation, section 35 promises can be upheld by reconciling the two rules of law that exist in Canada. The Aboriginal right to self-governance is constitutionally protected.[48] This right can be realized through adopting the Indigenous rule of law.

In *Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council*,[49] Justice Marshall discussed the rule of law in the context of injunctions. He stated,

> This case deals with an issue that is arguably the pre-eminent condition of freedom and peace in a democratic society. It is upheld wherever in the world there is liberty. The Rule of Law is a principle not well known to people, but this case shows its importance, not just to the communities involved here but also the rule of law should be appreciated by all Canadians. The rule of law for our purposes can be simply stated. It is the rule that every citizen from the prime minister to the poorest of our people is equally subject to and must obey the law. It is a rule of general application. Whenever it is broken -- even in a small way, we say there is injustice. We see the unfairness. It is a rule that is woven into every part of our social contract to live peacefully together. Even a small tear in the cloth of our justice system spoils the whole fabric of society.[50]

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[46] *Roncarelli v Duplessis*, [1959] SCR 121 at 142 16 DLR (2d) 689.

[47] *Frontenac Ventures Corp v Ardoch Algonquin First Nation*, 2008 ONCA 534 at para 40 [*Frontenac Ventures*].

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

[49] *Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council* (2006), 82 OR (3d) 347, 2006 CanLII 63728 (ON SC).

[50] *Ibid* at paras 2–5.

Marshall J is clearly discussing the Canadian rule of law. It is unjust to continue thinking of the rule of law as solely a component of the Canadian legal system. In situations dealing with Indigenous people, dual conceptions of the rule of law are possible.

In *Manitoba (A. G.) v Metropolitan Stores Ltd*[51] and *RJR-MacDonald Inc v Canada (Attorney General)*[52] the Supreme Court of Canada created the three-part test for granting an injunction. At the first stage, the application judge determines whether the applicant has a "serious question to be tried", ensuring that the application is neither frivolous nor vexatious.[53] At the second stage, the applicant must show the court that they will suffer irreparable harm if an injunction is refused.[54] Finally, an assessment of the balance of convenience to identify which party would suffer greater harm from the granting or refusal of the injunction.[55]

Self-help remedies are direct actions wherein protestors form blockades or occupy a disputed parcel of land after an injunction is granted. The Canadian rule of law bans such remedies since they are an abuse of process.[56] Court power "began as a natural vehicle for assuring the efficiency and dignity of, and respect for the governing sovereign",[57] however, it is now simply respect for the court and its procedures. Such respect is "essential to the administration of justice",[58] and ensures a consistent judicial process. Within the injunction test, the Canadian rule of law maintains a monopoly on the interpretation of "self-help remedies." Canadian courts continue to discount arguments that the Indigenous rule of law supports self-help remedies,[59] resulting in segregated views of the rule of law.

The rule of law is multi-dimensional. As Laskin JA states in the *Henco* appeal, it includes "respect for minority rights" and "reconciliation of Aboriginal and non-Aboriginal interests through negotiations."[60] When negotiations fall apart, Indigenous people often feel direct action, such as erecting blockades, is necessary to

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[51] *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, 38 DLR (4th) 321 [*Manitoba*].

[52] *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald*].

[53] *Manitoba*, *supra* note 51 at 127–28.

[54] *Ibid* at 128–29.

[55] *Ibid* at 129.

[56] See *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 42 [*Behn*].

[57] Ronald L Goldfarb, *The Contempt of Power* (New York: Columbia University Press, 1963) at 9–10.

[58] Newell, *supra* note 3 at 46.

[59] See e.g. *Behn*, *supra* note 56; *British Columbia and Power Authority v Boon*, 2016 BCSC 355 (which saw self-help remedies as an abuse of process); *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264 [*Coastal GasLink*] (Justice Church did not accept the defendant's argument that Wet'suwet'en law and authority allows blockades until specific authorization is given by Chief Knedebeas).

[60] *Henco Industries Limited v Haudenosaunee Six Nations Confederacy Council*, 277 DLR (4th) 274, 2006 CanLII41649 (ON CA) at para 142 [*Henco*].

protect their lands.[61] If these actions are litigated, the court typically favours private corporations' economic interests over Indigenous interests. However, reconciliation of the two rules of law could import the multi-dimensional approach into negotiations.

Legal pluralism is the "simultaneous existence within a single legal order of different rules."[62] In Canada, colonial laws and traditional Indigenous laws can function together in the context of the rule of law and land protection. The rule of law can form the basis for democratic cross-cultural agreements because it creates principles of honour and integrity for those in power that can apply externally between cultures.[63] The similarities between the rules of law—a repulsion from arbitrary rule and the use of rules to uphold cultural, community, and other conditions of freedom (e.g. honour)—create the ability for a simultaneous existence.

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## III. The Balance of Convenience Step in the Injuction Test

Blockades are often used when private parties and Indigenous communities have a dispute.[64] Courts order interlocutory injunctions to force a party to do something or refrain from doing something before the matter can be brought to trial. Injunctions should only be granted when every effort to reconcile, negotiate, accommodate, and consult is exhausted.[65] The underlying motivation is to ensure an "effective relief can be rendered at the final trial."[66] The objective is to prevent harms from occurring before the case is heard, potentially too late to stop damage.[67] As stated above, to obtain an injunction, an applicant must prove three conditions: (1) there is a serious issue to be tried; (2) there would be irreparable harm caused if an injunction was not issued; and (3) the balance of convenience favours the granting of an injunction.[68]

The third step is where courts have run awry. The Canadian judicial system favours business interests over those of Indigenous people in the "balance of convenience" step in the injunction test. In *Haida Nation v British Columbia (Minister of Forests)* the Supreme Court of Canada acknowledged that

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[61] Newell, *supra* note 3 at 44.

[62] Andre-Jean Arnaud, "Legal Pluralism and the Building of Europe" cited in Borrows, "Indigenous Constitution", *supra* note 26 at 8.

[63] Morito, *supra* note 30 at 278.

[64] Examples of other blockades include the 1974 Ojibwa occupation of Anishinabe Park in Kenora, the 1990 Mohawk occupation in Oka, and the 2001 Secwepemc blockade of Sun Peak ski resort's road.

[65] *Frontenac Ventures*, supra note 47 at para 46.

[66] Jeffery Berryman, *The Law of Equitable Remedies* (Toronto: Irwin Law, 2000) at 14.

[67] *Platinex Inc v Kitchenumaykoosib Inninuwug First Nation*, [2007] 3 CNLR 181, [2007] OJ No. 1841 at para 156 [*Plantinex*].

[68] *Manitoba*, *supra* note 51 at 127–29.

> the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns.[69]

In her *Land Back* report, Dr Shiri Pasternak reviewed more than 100 Canadian injunction cases. She found that 76% of injunctions filed by corporations were granted whereas 82% of injunctions filed against corporations were denied.[70] This injunctive trend is evidence of what the Supreme Court of Canada acknowledged in *Haida Nation*. If balancing is not done appropriately, it suppresses Indigenous interests and goes against the rule of law because adjudication is not done impartially. Contrasting examples of Indigenous blockades and their resulting injunctions highlight the courts' differing applications of the injunction test.

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### A) Injunctions for Indigenous Communities

In *Canadian Forest Products Inc v Sam*, Justice Dillon suggested that when private parties seek injunctions that could negatively impact Indigenous communities, "a careful and sensitive balancing of many important interests should occur and terms carefully considered."[71] Initially, Canadian Forest Products Inc. ("Canfor") sought injunctive relief against Wet'suwet'en blockaders who protested logging on lands they asserted Aboriginal title over. The Wet'suwet'en nation countersued for an injunction preventing logging activity. The British Columbia Supreme Court (BCSC) granted the Wet'suwet'en their injunction because the logging would cause irreparable harm.[72]

Canfor submitted that the Wet'suwet'en blockaders "deliberately used unlawful means."[73] Canfor claimed the blockade created irreparable harm because it interfered with their ongoing business.[74] However, in *Zeo-Tech Enviro Corp v Maynard*, the BCSC confirmed that mere interference is insufficient—the loss must cause a business closure or loss of a market position.[75] To protect Wet'suwet'en cultural ties, Canfor said they would preserve culturally modified trees and the trapline trail.[76] However, the area in question is the last untouched piece of forest in the Kelah's (a Wet'suwet'en house) traditional territory. Preserving two culturally significant

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[69] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 23 at para 14.

[70] Yellowhead Institute, *supra* note 5 at 10.

[71] *Canadian Forest Products Inc v Sam*, 2011 BCSC 676 at para 75 [*Canfor*].

[72] *Ibid* at paras 129, 137.

[73] *Ibid* at para 101.

[74] *Ibid* at para 119.

[75] *Zeo-Tech Enviro Corp v Maynard*, 2005 BCCA 392 at para 43. For an example of closure/market loss, see *Tlowitisis-Mumtagila Band v MacMillan Bloedel Ltd*, [1991] 4 WWR 83, 53 BCLR (2d) 69 (BC CA) (many jobs would be lost, and no alternative logging sites were available).

[76] *Canfor*, supra note 71 at 124.

things out of an entire sacred area equates to sifting an archaeological site for artefacts then destroying the rest. Without the land, the area loses its cultural significance.

Preserving pristine areas for traditional Indigenous uses frequently clashes with economic interests related to resource development. In *MacMillan Bloedel Ltd v Mullin*, the British Columbia Court of Appeal recognized the unique nature of land in relation to traditional culture as an irreplaceable resource,[77] quoting Justice Muirhead in *Foster v Mountford and Rigby Ltd* (1976), where the court said, "monetary damages cannot alleviate any wrong to the plaintiffs that may be established and perhaps, there can be no greater threat to any of us than a threat to one's family and social structure."[78] In Wet'suwet'en culture, feasts are central to society and government.[79] They are used to demonstrate who will succeed to chiefdom and confirm relationships of people with their territory.[80] Moreover, various Wet'suwet'en houses and clans interact at an official level at the feasts.[81] As such, feasts enable and uphold Wet'suwet'en law. Damage to Kelah's, a Wet'suwet'en chief, traditional territory would inhibit Wet'suwet'en governance. Wet'suwet'en hereditary chiefs have jurisdiction over Wet'suwet'en territories, so if chiefs cannot be appointed, governance will fall apart. Since this was the last pristine area in Kelah's territory, the BCSC held that the requisite cultural depth was met. This is because the disputed area is the sole remaining location where Kelah could host a feast.[82] As such, an injunction was granted to Kelah.

In *Platinex v Kitchenuhmaykoosib Inninuwug First Nation (KI)*, the court granted an injunction to the KI.[83] Justice Smith decided the KI would suffer irreparable harm if Platinex's mining plans proceeded. This decision created the potential for using the rule of law to protect Aboriginal rights at the "balance of convenience step."[84] This is because Justice Smith placed weight on consultation, negotiation, accommodation, and reconciliation of Aboriginal rights. Injunctions are an equitable remedy, which, according to the Supreme Court of Canada, should account for the "social fabric" if it is to produce just results.[85] When looking at granting an injunction against a project that might have an adverse impact upon asserted Aboriginal rights, a careful and sensitive balancing of many important interests should occur, and terms

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[77] *MacMillan Bloedel Ltd v Mullin*, [1985] 3 WWR 557, 61 BCLR 145 (BC CA) at 21 [*Mullin*].

[78] *Foster v Mountford and Rigby Ltd (1976)*, 14 ALR 71 at 586.

[79] *Canfor*, supra note 71 at para 16 citing *Delgamuukw v British Columbia*, [1993] 5 WWR 97, 104 DLR (4th) 470 (BC CA) at 608.

[80] *Ibid*.

[81] *Ibid.*

[82] *Canfor*, supra note 71 at paras 18–20.

[83] *Plantinex*, *supra* note 67 at para 115.

[84] Newell, *supra* note 3 at 65.

[85] Graham Mayeda, "Access to Justice: The Impact of Injunctions, Contempt of Court Proceedings and Coasts Awards on Environmental Protestors and First Nations" (2009) 6:2 J Sustainable Development L & Policy 143 at 154.

should be carefully considered.[86] This "social fabric" accounting imports a careful and sensitive approach to the Indigenous perspective at the third step.

Irreparable harm refers to "the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[87] A harm that cannot be quantified in monetary terms is the permanent loss of natural resources. It must be clear and not speculative,[88] and it must arise between the date of the grievance and the trial.[89] Additionally, the injury must be material, and parties could not be placed in the position in which they formerly stood if the activity progressed.[90] Irreparable harm influences the third balancing step.[91] As such, considerations of the nature of harm, and an unquantifiable, clear, material loss should influence the court at the balance of convenience stage.

Harm to the land is, in actuality, harm to Indigenous self-governance. Such harm cannot be cured by any amount of money. For example, when the Grassy Narrows' water became contaminated with mercury, the Nation's lawyer, John Olthuis, stated, "they realize that no amount of money can possibly compensate for the horror that they have gone through."[92] Anthropologist Anastasia M Shkilnyk who spent six months on the reserve agrees with this assessment, writing, "it is also probable that no amount of money will solve the problems of the Grassy Narrows people."[93] These observations demonstrate the unquantifiable nature of harm to a communities' land. Based on the Indigenous rule of law, such harm is extremely clear. Since it is unquantifiable, Indigenous applicants cannot be placed in the position they formerly stood if development continues without proper consultation and accommodation.

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[86] *Frontenac Ventures*, supra note 47 at para 43.

[87] *RJR-MacDonald*, supra note 52 at 341.

[88] *RJ Sharpe, Injunctions and Specific Performance* (Aurora, Ontario: Canada Law Book, 1992) at 2–26.

[89] See e.g. *Lake Petitocodiac Preservation Association Inc v Canada (Minister of the Environment)* (1998), 81 ACWS (3d) 88, 1998 CanLII 8003 (FC) at para 23.

[90] *Mullin*, supra note 77 at para 19–20.

[91] *BC (AG) v Wale* (1986), [1987] WWR 331, 9 BCLR (2d) 333 (BC CA), aff'd [1991] 1 SCR 62, [1991] 2 WWR 568. This case applied a two-step injunction test wherein the second and third steps were combined. This test has been applied elsewhere in Canada. Although the three-step test prevails and is the correct test, courts have held that between the two and three step tests there is no practical difference. As such, the second and third steps influence each other.

[92] "Compensation and "shame" for Grassy Narrows" (1985) at 00h:01m:25s, online (video): *CBC Archives* <https://www.cbc.ca/player/play/1747665575> [perma.cc/WL3M-MZGY].

[93] Anastasia M Shkilnyk, *A Poison Stronger Than Love: The Destruction of an Ojibwa Community* (New Haven, New York: Yale University Press, 1985) at 240.

The honour of the Crown requires that "it act as a committed participant in the undoubtedly complex process of consultation and reconciliation."[94] In *Frontenac Ventures*, the Ontario Court of Appeal endorsed the multidimensional approach to the rule of law taken in *Henco*.[95] In *Henco*, Laskin JA concluded that injunctive relief was not appropriate for private parties based on the rule of law because it involves respecting the rights of minorities and reconciling Aboriginal and non-Aboriginal interests.[96] In *Re: Resolution to amend the Constitution*, the Supreme Court of Canada used similar language, calling the rule of law "highly textured."[97] This approach ameliorates Indigenous interests in the third step. Accounting for the "social fabric" would entail considering the unique Indigenous perspective on the environment during the third step. Since the environment is inextricably linked to the Indigenous constitution that gives rise to the Indigenous rule of law, these systems of government should be included during the balance of convenience step.

The Supreme Court of Canada created "a clear line of Supreme Court jurisprudence, from Sparrow to Mikisew" that when constitutionally protected Aboriginal rights are asserted, injunctions sought by private parties should only be granted as the last possible resort.[98] However, an issue arising out of the case law is that injunctions are granted for Indigenous applicants mostly when the territory claimed is small or it is the only remaining area in their traditional lands. It is unfair to put such a dire threshold on Indigenous applicants.

### B) Injunctions for Private Parties

Some commercial litigators have opined that the "criminal justice system will generally not intervene to prohibit civil disobedience" and therefore "an injunction has emerged as the only practical remedy available to project proponents who may be impacted by civil disobedience."[99] This conclusion is opposed to that of Laskin JA in *Henco*, but it is supported by recent jurisprudence and the injunctive trend. The judiciary widely accepts using civil injunctions as redress for parties impacted by civil disobedience.[100] Previously, courts favoured negotiation, reconciliation, and other solutions. For example, in *Platinex* Justice Smith ordered two rounds of negotiation before ultimately implementing a consultation protocol.[101]

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[94] *Frontenac Ventures*, supra note 47 at para 45.

[95] *Ibid* at paras 45–48.

[96] *Henco*, supra note 60 at 140–42.

[97] *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1 at 805.

[98] *Frontenac Ventures*, supra note 47 at para 46.

[99] Rick Williams et al, "The New Normal? Natural Resource Development, Civil Disobedience, and Injunctive relief" (2017) 55:2 Alb L Rev 285 at 286.

[100] *Ibid* at 293.

[101] *Platinex, supra* note 67.

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During the injunction test, irreparable harm carries weight at the balance of convenience step. Courts routinely find that proof of ongoing interference with a business is sufficient to establish irreparable harm. In *Hudson Bay Mining & Smelting Co v Dumas*, the Manitoba Court of Appeal said "[i]t is well settled that a finding of a complete blockade of a lawful business strongly suggests irreparable harm for the purposes of an injunction."[102] Such blockades are presumed to be against the public interest because they exemplify public disobedience. Therefore, they import the presumption that a court will grant an injunction as a method of compelling compliance with the law.

The balance of convenience analysis requires that an injunction is just or convenient. However, "[t]he elements usually considered include: examination of the status quo; the strength of the plaintiff's case; the relative magnitude of the harm; and whether the public interest is engaged."[103] The status quo used to be maintaining the land in its natural state, but now the status quo is accepting that project delays amount to a collateral attack on the permits and authorizations for the development activity.[104]

While Indigenous blockaders normally argue that protecting the environment is in the public interest, courts have viewed the fact that a government authority permitted a project as an indication that it is in the public interest to allow construction.[105] Although, in *Taseko Mines Ltd v Phillips* Justice Grauer said,

> The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners. Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished.[106]

Justice Grauer further stated that "it is also very much in the public interest to ensure that … reconciliation of the competing interests is achieved through the only process available, being appropriate consultation and accommodation … [which] weighs heavily in the balance of convenience."[107] However, this reasoning is often rebutted in the context of injunctions because injunctive relief proceedings are not the appropriate arena to evaluate whether the government's level of consultation was sufficient.[108] Boiling public interest down to consultation is not an appropriate evaluation of public interest.

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[102] *Hudson Bay Mining & Smelting Co v Dumas*, 2014 MBCA 6 at para 86.

[103] *British Columbia Hydro and Power Authority v Boon*, 2016 BCSC 355 at para 69.

[104] Williams et al, *supra* note 99 at 299. See also *Trans Mountain Pipeline ULC v Gold*, 2014 BCSC 2133.

[105] Williams et al, *supra* note 99 at 299.

[106] *Taseko Mines Ltd v Phillips*, 2011 BCSC 1675 at para 66.

[107] *Ibid* at para 59–60.

[108] Williams et al, *supra* note 99 at 301.

Public interest encompasses much more than consultation. While there is not a separate test or unique preconditions for granting an injunction to applicants raising Aboriginal or treaty rights, there are aspects of development that impact Indigenous applicants in distinct ways. Courts pigeonhole Indigenous applicants in the balance of convenience stage when assessing what is in the public interest. In *Behn v Moultan Contracting Ltd*, the Supreme Court of Canada declared that

> To allow the Behns to raise their defence based on **treaty rights** and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. **The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights** and of the duty to consult as a defence.[109]

While *Behn* is not an injunction case, it addressed the ability of Indigenous defendants to assert treaty rights as a defence in civil suits. Disallowing a defence of a breach of treaty rights effectively excludes the unique Indigenous perspective from carrying any weight during the balancing process. In this sense, the court is favouring private parties in the third step.

In *Coastal GasLink Ltd v Hudson*, the court granted an injunction to Coastal GasLink Ltd. against Wet'suwet'en hereditary leaders and land defenders. [110] The defendants, members of the Dark House of the Wet'suwet'en, argued that Wet'suwet'en laws supported their actions. Their responsibility to the land, which is deep-seated in their laws, does create a right to protect the land under the Indigenous rule of law. However, the BCSC, in line with *Behn*, concluded that the blockade undermined the Canadian rule of law amounting to "a repudiation of the mutual obligation of Aboriginal groups and the Crown to consult in good faith."[111] *Coastal GasLink Ltd* and an earlier case, *Red Chris Development Company Ltd v Quock*,[112] both held that the Indigenous defendants could not use their laws as a defence. Part of the reasoning for these decisions was the fact that Indigenous laws are communally held, and individuals do not have standing to assert collective rights on behalf of an Indigenous community.[113]

Within the five sources of law discussed by John Borrows, there are both communal and individual rights.[114] Consequently, by lumping all Indigenous laws into

[109] *Behn*, *supra* note 56 at para 42 [emphasis added].

[110] *Coastal GasLink*, *supra* note 59.

[111] *Ibid* at para 157.

[112] *Red Chris Company Ltd v Quock*, 2014 BCSC 2399.

[113] *Ibid* at para 39; *Coastal GasLink*, *supra* note 59 at para 159.

[114] Borrows, "Indigenous Constitution", *supra* note 26.

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a singular understanding, rather than a nuanced interpretation that allows for a holistic view of Indigenous laws, courts weaken an Indigenous defendants' position. A singular understanding, where Indigenous laws are viewed as only giving rise to collective rights, means that Indigenous people cannot use treaty rights, including governance, as a defence. In turn, this strengthens the applicant's position, which is a component in the balance of convenience step.

Disallowing this defence perpetuates judicial favouritism of private parties at the balance of convenience step in the injunction test. This injunctive trend thus inhibits Indigenous people from practicing their inherent right of self-governance that arises, in part, from the land. Part of reconciliation is ensuring this right is recognized in Canada. Reconciliation is in the public interest; therefore, Indigenous self-governance is within the purview of public interest.

Private parties using injunctions against peaceful protestors converts the conflict into one between the courts and the protestors, which could bring the administration of justice into disrepute.[115] Kent Roach purports that "Aboriginal rights cannot be truly justiciable rights unless courts become comfortable with remedies for their violation."[116] One such remedy is negotiation.[117] The injunctive trend, as it stands now, circumvents negotiations. In this sense, it prevents Indigenous people from protecting and preserving their lands. As argued above, damage to Indigenous lands contravenes the Indigenous rule of laws. Negotiation is flexible and is well-suited for recognizing both Indigenous and Canadian rules of law. If the Indigenous rule of law comprised a third pillar in Canadian federalism, it would be in the public interest to protect the land, and thus the third step in the injunction test would be recalibrated.

### C) Institutional Trust and Injunctions

In *MacMillan Bloedel Ltd v Simpson*, the British Columbia Court of Appeal held that necessity is not a defence for contempt since it can never "operate to avoid a peril that is lawfully authorized by the law."[118] This decision was affirmed by the Supreme Court of Canada. An argument could be made that, in granting an injunction, the court impairs Indigenous self-governance by allowing activities that harm traditional lands, which form the foundation of Indigenous laws. Following this reasoning, necessity may be a defence to direct actions. Moreover, the Canadian government supports implementing the TRC's Calls to Action,[119] one of which focuses on Indigenous self-

[115] Mayeda, *supra* note 85 at 158.

[116] Kent Roach, "Remedies for Violations of Aboriginal Rights" (1992) 21:3 Man LJ 498.

[117] *Ibid*.

[118] *MacMillan Bloedel Ltd v Simpson* (1994), 90 BCLR (2d) 24, 89 CCC (3d) 217 (CA) at para 46, aff'd [1995] 4 SCR 725.

[119] For example, between 2007 and 2015 the Government of Canada provided about $72 million to support the TRC's work: "Truth and Reconciliation Commission of Canada" (last modified 19 September 2022),

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governance. Specifically, TRC Call to Action 45.iv asks the federal government to "reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions."[120] This support needs to translate into the legal system since "the legitimacy of Indigenous governance solutions depends substantially on "a process of Indigenous choice"."[121] The injunctive trend prevents Indigenous choice by bullying protestors into silence. A solution for long-standing and difficult socioeconomic problems, such as resource development, is including Indigenous people and their governing systems in the process. This solution avoids top-down policy solutions, thereby increasing negotiation and cooperation.

Social and political institutions function more effectively when people trust each other. Trust facilitates cooperation, which increases growth in societies by creating efficient economic activities.[122] Many Indigenous people distrust both the Canadian legal system and governmental institutions.[123] Both Indigenous and Canadian rules of law protect the basic values of their respective societies and they share values that shape governance. To reconcile these rules of law, the original sentiment contained in the rule of law—freedom—must be recovered. This recovery is intimately tied to restoring trust relations. General trust exists between an individual and the population. Low levels of general trust "do not deliver enough positive outcomes to constituents—which then entrenches mistrust and institutional failure."[124] Failures in the Canadian resource context look like injunctions.

According to Francis Fukuyama, a political economist, trust "arises when a community shares a set of moral values in such a way as to create expectations of regular and honest behaviour."[125] The injunctive trend eroded Indigenous trust in the Canadian legal system. Trust is predictive of economic and social success, [126] and as such, rebuilding Indigenous governance systems is a potential solution. If Indigenous governance systems increase, and interact with Canadian governance, then trust can re-enter the relationship. Call to Action 46.ii calls for the "repudiation of concepts used

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online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525> [perma.cc/S3QX-ZPSN].

[120] Trust and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action" (2015) at 5, online (pdf): <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf> [perma.cc/H39G-S5WF].

[121] Cornell, *supra* note 14 at 13.

[122] William Nikolakis & Harry Nelson, "Trust, Institutions, and Indigenous self-governance: An exploratory study" (2018) 32 Wiley Governance 331.

[123] Royal Commission on Aboriginal Peoples, *supra* note 9 at Chapter 14.

[124] Nikolakis & Nelson, *supra* note 122 at 332.

[125] Francis Fukuyama, *Trust: The social virtues and creation of prosperity* (New York: Free Press, 1995) at 153.

[126] *Ibid*.

to justify European sovereignty over Indigenous lands and peoples…and the reformation of laws, governance structures, and policies within their respective institutions that continue to rely on such concepts."[127] The Canadian judiciary's favouritism of economic interests over Indigenous interests affects the "balance of convenience" step. In this way, Canadian courts rely on concepts that justify European sovereignty over Indigenous lands.

William Nikolakis and Harry Nelson, resource development professors at UBC, studied three First Nation communities who chose different pathways to rebuild their governing bodies. Their research explored whether trust created more robust institutions. During an interview in the study, an Indigenous elected councillor discussed the challenges of working under the *Indian Act*. They stated "[a] really big windstorm at our village blew all these trees down. We couldn't even move the trees until we got permission from the Minister in Ottawa."[128] Another councillor described the effect of outside control on political trust, saying "[p]eople that don't feel involved in the decisions of their government don't trust their government, no matter the quality of the decisions they make."[129] These testimonies demonstrate that trust in governance under the *Indian Act* is low. This relates to the injunctive trend because low institutional trust translates to low expectations of regular and honest behaviour between Indigenous people, the Canadian legal system, and government. Society cannot function properly without trust in law and governance.

Widely adopting Indigenous governance systems could have two impacts. First, it would improve the quality and effectiveness of resource development negotiations because Indigenous perspectives would be represented through government officials rather than through the consultation process. This form of negotiation could avoid the need for injunctions while simultaneously ameliorating Indigenous self-governance. Second, it would improve trust in the Canadian legal system because Indigenous laws would be promoted by Indigenous governance systems. Since the Supreme Court favours negotiation over litigation in the context of Aboriginal treaty and rights,[130] wide adoption would likely be supported.

In *R v Sparrow*, the Supreme Court of Canada stated that "the relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."[131] Based on this relationship, adopting the Indigenous rule of law is legitimate and would facilitate the operation of Indigenous systems of governance in Canada. If Canadian and Indigenous laws ran in tandem, injunctions may not occur. At the very least, the injunctive trend would improve because the two

[127] Truth and Reconciliation Commission of Canada, *supra* note 120 at 5.

[128] Nikolakis & Nelson, *supra* note 122 at 343.

[129] *Ibid*.

[130] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 19 at para 207 [*Delgamuukw*].

[131] *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 at 1108.

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systems would work together on resource development occurring on traditional lands. This cooperation would increase trust, thereby increasing the effectiveness of both systems of governance. Increasing trustworthiness creates cross-cultural freedom thereby repairing the divergence of the rule of law.[132]

## IV. Self-Governance, Protesting, and Promoting Indigneous Laws

### A) Elected vs Hereditary Chiefs

The *Indian Act* is an ongoing act of colonialism. The Act created "status Indians"[133] who are members of a Band,[134] and prescribed Band Councils to govern these Bands on reserves.[135] John Borrows critiqued the *Indian Act*, writing

> The federal government benefits from legislating over Indians because it allows them to set the parameters of our lives. This frees them from the harder work of engaging real participation and consent. The *Indian Act* makes it easier to control us: where we live, how we choose leaders, how we live under those leaders, how we learn, how we trade, and what happens to our possessions and relations when we die.[136]

Band councils are particularly challenging as they tell Indigenous communities how to organize and exercise authority.[137] As a by-product of this imposition, many community members do not accept this governing structure as their own.[138] An elected chief and council comprise band councils, which typically have two-year terms. Council power is constrained by the federal government; therefore, they conform to Canada's legal system.[139]

Hereditary chiefs must manage and conserve the resources on their territory.[140] Hereditary chieftaincies are passed down intergenerationally and are

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[132] Morito, *supra* note 30 at 280-81.

[133] *Indian Act*, *supra* note 2, ss 5-6.

[134] *Ibid*, s 2(1).

[135] *Ibid*, s 74.

[136] John Borrows, "Seven Generations, Seven Teachings: Ending the Indian Act" (2008) at 5, online (pdf): *National Centre for Indigenous First Nations Governance* <https://fngovernance.org/wp-content/uploads/2020/05/john_borrows.pdf> [perma.cc/JM6B-DVY8].

[137] *Indian Act*, *supra* note 2, ss 74–83.

[138] Cornell, *supra* note 14 at 9.

[139] Nikolakis & Nelson, *supra* note 122 at 334.

[140] Mills, *supra* note 19 at 135.

rooted in traditional forms of Indigenous governance.[141] Although band chiefs are recognized by and accountable to the Canadian government, hereditary chiefs "inherit the title and responsibilities according to the history and cultural values of their community."[142] Consequently, hereditary chiefs have cultural authority that elected chiefs do not. Such authority allows hereditary chiefs to make decisions on behalf of their nations. Hereditary chiefs uphold a nation's traditional customs, legal systems, and cultural practices. Therefore, the Canadian government must recognize hereditary chiefs' inherent power for the Indigenous rule of law to be adopted in Canada.

Internal conflict often occurs in a nation between hereditary chiefs and band councils.[143] This tension grows because the written laws imposed by the *Indian Act* and traditional laws are often incongruous. Consequently, reform is happening, in many different forms and degrees. One example of reform is moderate institutional building, which maintains current elected governance with increased freedom. The *First Nations Land Management Act*[144] facilitates institutional reform, which provides greater management powers over on-reserve land use. A second example is a hybrid between elected and traditional governance wherein traditional practices are integrated into "Western" styled governance under the *Indian Act*. Adopting custom election codes that allow communities to have greater autonomy over their elections and the duration of political terms or creating permanent roles for hereditary leaders and elders.[145] A third example is intensive reforms, such as declaring title or negotiating self-governance agreements, discard elected Band Councils, leading to the establishment of Indigenous constitutions, legislatures, executives, and judiciaries that work in harmony with Canadian laws.[146]

Political trust is the trust people have in their governments. As discussed in the previous section, the injunctive trend decreases Indigenous trust in the Canadian legal system. Rectifying this mistrust will take time and solutions will differ across Indigenous nations and communities. The mode—moderate, hybrid, or intensive—of self-governance implementation is in part informed by the level of disenfranchisement in each community. One community member from Nikolakis and Nelson's study discussed the restrictive *Indian Act*. They said, "INAC [Indian and Northern Affairs

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[141] Bob Joseph, "Hereditary Chief definition and 5 FAQs" (1 March 2016), online (blog): *Indigenous Corporate Training Inc* <www.ictinc.ca/blog/hereditary-chief-definition-and-5-faqs> [perma.cc/LVL3-RLFP].

[142] *Ibid*.

[143] For example, the Coastal GasLink pipeline that passes through Wet'suwet'en territory. See The Canadian Press, "Wet'suwet'en hereditary chiefs rally in Vancouver against BC natural gas pipeline", *Vancouver Sun*, (15 August 2022), online: <https://vancouversun.com/news/local-news/wetsuweten-hereditary-chiefs-rally-in-vancouver-against-b-c-natural-gas-pipeline> [perma.cc/5FC6-5TYW] ("Wet'suwet'en hereditary chiefs have opposed the pipeline for years, while 20 elected First Nations band councils along the route have signed off on the project").

[144] *First Nations Land Management Act*, SC 1999, c 24.

[145] Nikolakis & Nelson, *supra* note 122 at 335.

[146] *Ibid* at 336.

Canada] and the *Indian Act* has done nothing for our native people. ... Our vision is that we are going to be a self-sustaining village of people."[147] However, to transition outside the *Indian Act* through treaty, their community would only get 5% of their land back.[148] As such, their vision departs from what is practical, which influences what method of reform is available to their community.

Another tension in selecting governance reform arises between elected councils and hereditary chiefs. In some communities, the distrust of their elected council is high and thus decreases trust in moderate or hybrid legal system reform. Different patterns of institution building have different outcomes. As such, different nations will have different systems. Any reform is better than maintaining the status quo since "rules that are freely chosen—even if borrowed—generally work better than rules that are imposed from outside. Constitutions gain strength through the free consent of the governed."[149] An Indigenous constitution, therefore, gains strength through any amount of governance system reform. This would increase trust within communities where the trustworthiness of current elect governance is an issue.

The issue for resource extraction is knowing who to consult and work with. This issue is apparent in both the Coastal GasLink and Trans Mountain pipeline projects wherein elected councils approved the project, but hereditary chiefs did not.[150] Rather than getting approval from both levels of government, the Canadian government and private developers circumvented the hereditary level of governance[151] which, as discussed above, is the national level of government in Indigenous nations. Hereditary chiefs maintain and uphold traditional laws. By ignoring their approval during consultation, the consultation was not done in good faith. Circumventing the Indigenous legal system in this way is a continuation of colonialism. When Coastal GasLink Ltd. obtained an injunction against Wet'suwet'en land defenders, the court denied the defence of improper consultation during injunction in addition to disallowing Wet'suwet'en laws.

### B) Protesting

Following injunctions, land defenders have continued their presence at blockades.[152] Their ongoing presence indicates that, regardless of the injunctive trend and denial of

[147] *Ibid* at 339.

[148] *Ibid* at 340.

[149] Cornell, *supra* note 14 at 12.

[150] The Canadian Press, *supra* note 143; Matt Simmons "The Complicated Truth About Pipelines Crossing Wet'suwet'en Territory", *The Narwal* (5 October 2022), online: <thenarwhal.ca/coastal-gaslink-map-wetsuweten> [perma.cc/74KF-V52].

[151] *Ibid*.

[152] In 2020, a year after the injunction, the Unist'ot'en Camp was still in place. See Leyland Cecco, "Canada: Wet'suwet'en Activists Vow to Continue Pipeline Fight After Arrests", *The Guardian* (10

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their legal systems, the Wet'suwet'en are not giving up. Following the *Coastal GasLink Ltd* decision, Wet'suwet'en leaders and supporters took part in solidarity actions across Canada.[153] The Wet'suwet'en hereditary chiefs opposed the pipeline proposals.[154] Pursuant to *Delgamuukw*, the court recognized that Wet'suwet'en houses and clans uphold the authority of the hereditary system in traditional territories.[155] Each house group has a house chief and supporting chiefs who assist in decision making. Wet'suwet'en decision-making requires the collective house group, comprised of all the house chiefs, to discuss important matters and come to a consensus. These decisions are ratified in the feast hall.[156]

The Gidimt'en checkpoint was erected in Gidimt'en territory (a Wet'suwet'en house) after unanimous ratification by the house chiefs.[157] This checkpoint is evidence of Wet'suwet'en self-governance in action. As such, protesting injunctions is an example of implementing the Indigenous rule of law. These direct actions are informed by the general Indigenous rule of law that arises from the land and specific Wet'suwet'en laws. The court previously recognized the hereditary governance system in *Delgamuukw*, yet the court denied it as a defence during the *Coastal GasLink Ltd* injunction.[158] This further erodes trust between Indigenous nations and Canada which, as previously discussed, negatively impacts social and economic outcomes for everyone.

Canada might disagree that denying Wet'suwet'en hereditary chiefs' jurisdiction brings the Canadian judicial system into disrepute, because Coastal GasLink Ltd. received approval for the pipeline from the elected chiefs. Yet, the Wet'suwet'en hereditary chiefs argue that the elected chiefs only retain jurisdiction over their respective band's reserve.[159] In this sense, elected chiefs have local authority

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February 2020), online: <www.theguardian.com/world/2020/feb/10/canada-protest-indigenous-wetsuweten-pipeline> [perma.cc/FA7H-CP83].

[153] "The Wet'suwet'en Conflict Disrupting Canada's Rail System", *BBC News* (20 February 2020), online: <www.bbc.com/news/world-us-canada-51550821> [perma.cc/5SVW-WJ6F].

[154] The Canadian Press, *supra* note 143.

[155] *Delgamuukw*, *supra* note 130 at para 188.

[156] Mills, *supra* note 19 at 43.

[157] On December 16, 2018 the House Chiefs made the decision to support the checkpoint: Gidimt'en, Press Release, "Wet'suwet'en Hereditary Chiefs erect new checkpoint on Gidimt'en (Cas Yikh) Territory" (17 December 2018), online (pdf): <https://static1.squarespace.com/static/5c51ebf73e2d0957ca117eb5/t/61664eec879be543a232b02a/1634094829043/PR+DEC+17+2018.pdf> [perma.cc/6P48-TBD4].

[158] *Coastal GasLink*, *supra* note 59 at para 155 ("There is no evidence before me of any Wet'suwet'en law or legal tradition that would allow blockades of bridges and roads or permit violations of provincial forestry regulations or other legislation. There is also no evidence that blockades of this kind are a recognized mechanism of dealing with breaches of Wet'suwet'en law).

[159] *Ibid* at para 67. See also Bob Joseph, "Hereditary Chiefs vs. Elected Chiefs: What's the difference (and why it's important)" (17 May 2021), online (blog): <www.ictinc.ca/blog/the-difference-between-hereditary-chiefs-and-elected-chiefs> [perma.cc/6HDL-2H3T].

whereas hereditary chiefs have national and regional authority. Coastal GasLink Ltd.'s approval, and the Canadian government's free, prior, and informed consent from the consultation process, was not ratified at the national level of governance. Post-injunction protesting is evidence of the need to reconcile the Canadian government's recognition of hereditary and elected chief jurisdiction.

Another notable action is that of the Tiny House Warriors. The warriors assert Secwepemc law provides jurisdiction over land in the pipeline's path. However, the elected Chiefs state that they gave their nation's free, prior, and informed consent to build the pipeline.[160] Kanahus Mannuel, one of the Tiny House Warriors, rejects their authority because, in her opinion, their power is limited to their reserves, not the whole of the traditional territory.[161] The Tiny House Warriors are in a similar position to the Gidimt'en checkpoint.

If elected Chiefs are the point of consultation and hereditary chiefs are excluded, the duty to consult is not being done in good faith. Under Indigenous self-governance, hereditary chiefs have superior powers of jurisdiction. As such, post-injunction protesting is an assertion of specific Indigenous nation's laws and the general Indigenous rule of law.

### C) Promoting Indigenous laws through self-governance and the rule of law

A promising example of rebuilding an Indigenous governance system is the Ktunaxa Nation in southeastern British Columbia. The Ktunaxa utilized the treaty process to reorganize its governing systems.[162] Four Ktunaxa bands, previously treated as separate communities by Canada, linked together, thereby reconstituting themselves. The new governing system allows the four bands to specify and divide authority between the Nation as a whole and its communities pursuant to their own ideas. This process sheds the fragmented administrative structure imposed by Canada, replacing it with the Ktunaxa vision. The Nation's elders "often refer to the past hundred and fifty or so years as a time when the Nation 'went to sleep' … The process of building a modern Ktunaxa government is likened to 'waking up'"[163] The Nation is free to pursue their own vision under their own laws, which empowers the Ktunaxa as a community. As a result, the ability to self-govern ameliorates self-determination.

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[160] "Chiefs Urge Tiny House Warriors to end pipeline protest camp in BC's central Interior", *CBC News* (2 July 2020), online: <www.cbc.ca/news/canada/british-columbia/tmx-pipeline-protest-tiny-house-loring-blue-river-1.5635691> [perma.cc/5HRK-BU8D].

[161] *Ibid*.

[162] See "Ktunaxa Nation Rights Recognition & Core Treaty Memorandum of Understanding" online (pdf): <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/ktunaxa_rights_recognition__core_treaty_mou_-_dec_2018.pdf>.

[163] Cornell, *supra* note 14 at 11.

**Conclusion**

While negotiations and land claims often move slowly, private corporations stake resource development claims quickly. This disproportionate speed jeopardizes Indigenous peoples' relationship to the land. Such a relationship is essential for Indigenous laws and, therefore, Indigenous self-governance. If development continues to destroy land by bulldozing through Indigenous protestors, it will fundamentally harm Indigenous peoples' ability to self-govern. The Canadian legal system's injunctive solution is not functioning as it should and as a result, injunctions inherently harm Indigenous self-governance.

Under the Indigenous rule of law, Indigenous people are required to protect the land. Courts continually argue that self-help remedies are outside Indigenous legal traditions. However, if blockades were interpreted as an Indigenous person exercising the rights of the land under their rule of law rather than a person acting in civil disobedience, injunctions would be decided differently. This understanding strengthens defences against the "strength of the plaintiffs' case" during the balance of convenience step.

When a legal system does not function for all its members equally, distrust in the system grows. Moreover, Indigenous people have their own governance systems in which they trust. Despite colonialism's attempt to assimilate Indigenous people, both Canadian and Indigenous laws exist. These should be reconciled to include both system's interpretation of the rule of law. In the meantime, the rule of law should, at the least, become more nuanced and inclusive given the land's precious nature.

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