TMU LAW REVIEW

August 2023 | Volume 1, Issue 1

Toronto Metropolitan University

Lincoln Alexander School of Law

TMU LAW REVIEW

August 2023 | Volume 1, Issue 1

2022-2023 Masthead

TMU Law Review
c/o Lincoln Alexander School of Law
350 Victoria Street
Toronto, ON M5B 2K3
Email: tmulawrev@torontomu.ca
Website: https://www.tmulawreview.com/

The Toronto Metropolitan University Law Review (TMU Law Review) is a peer-reviewed academic journal published annually through the Lincoln Alexander School of Law at Toronto Metropolitan University. Currently operating as a faculty-led model with the support of a student editorial and operations team, the TMU Law Review is dedicated to publishing high-quality and cutting-edge scholarly and creative work that speaks to some of the most important issues affecting the contemporary legal and social landscape, both in Canada and beyond.

The views expressed in the contents of the TMU Law Review are those of the individual authors alone, and are not necessarily representative of the view of the TMU Law Review, the Lincoln Alexander School of Law, or Toronto Metropolitan University. The TMU Law Review is not responsible for any of the opinions expressed therein.

Submissions: The TMU Law Review welcomes the submission of material for possible publication. For more information about our submission requirements, or to submit your work online, please visit our website at: https://www.tmulawreview.com/submissions

CONTENTS

INTRODUCTION

Changing the Subject: Redefining Access to Justice

Dean Donna E Young*

This inaugural edition of the Toronto Metropolitan University Law Review (TMU Law Review) represents a milestone for the Lincoln Alexander School of Law. With a mission to diversify legal scholarship, the law journal expands the law school's reach beyond its core academic program and furthers its commitment to diversity, equity and inclusion. By disseminating cutting edge articles on a variety of legal topics, the journal aims to increase the depth and breadth of scholarly discourse and enhance an already rich body of legal literature within Canada and beyond. Authors are members of the legal academy and profession whose perspectives on contemporary legal and social issues merit broader exposure. Indeed, providing an outlet to those whose perspectives have been underrepresented in legal publications will be a primary goal of the journal, which will go some way towards changing the subjects of legal analysis.

Celebration of this inaugural edition warrants some reflections about the institution that made this publication possible. Beginning as an abstract idea more than a decade ago, the Lincoln Alexander School of Law welcomed its first students, faculty and staff members in the summer and fall of 2020, and graduated its first cohort of students in summer 2023. In just three years, the law school has become one of the most diverse in Canada, having attracted a faculty, staff and student body who support its mission to increase diversity in the legal profession, provide more robust legal services to the underrepresented, and approach the study of law with a critical lens. There seems to be an appetite for what the school has to offer. Since opening, it has attracted among the highest number of student applications in Ontario relative to the number of seats available and has made a name for itself in moot court competitions, for the diversity and activity of its student organizations, and for the excellence of its teaching and scholarship. Applications for teaching positions both on the tenure track and practitioner track have numbered in the hundreds. Moreover, the law school will soon open its first in-house community legal clinic that will serve its neighbours in various areas of legal practice.

* Donna E Young is the founding Dean of the Lincoln Alexander School of Law at Toronto Metropolitan University.

Over the course of its first three years, the law school has launched an ambitious Integrated Practice Curriculum featuring scholars and practitioners working together to provide a rigorous educational program. Students are exposed to doctrinal and theoretical courses, courses focusing on Indigenous laws, courses analyzing the relationship between technology and justice, and courses taking a critical approach to a legal system that has been designed to support those in power more than those in need. Student programming centres on student well-being and academic enrichment and is staffed by a talented and creative group of professionals. The law school's events, conferences, and workshops have attracted thousands of audience members in an impressive array of venues. And our faculty members are making an outsized impact in the legal academy and profession.

These accomplishments are made all the more impressive considering that the law school opened during a global lockdown caused by the COVID-19 pandemic, and for two years operated almost entirely remotely. During this time, a caring and cohesive community was being established all the while navigating changing public health protocols, distance learning, and the mental health effects of prolonged isolation.

My deanship began in January 2020, just two months before the COVID-19 pandemic forced the world indoors. When the pandemic struck, the law school had only just begun the process of hiring its first group of faculty members and had only a handful of staff. Even without the pandemic, the task of embedding a new faculty into an existing university and of introducing a new law school to the legal community would have been challenging. But with the support of senior leadership at Toronto Metropolitan University, dedicated professionals from the central university, and a small number of cross appointed faculty members at the law school, planning for the law school continued briskly despite being done entirely remotely. We assembled a rigorous curriculum, established essential relationships both in and outside the university, drafted new policies and procedures, and put in place student support services all without the benefit of face-to-face contact, spontaneous discussions, or in person interactions that would facilitate community building. Nothing was easy or straightforward during these first three years, and yet the law school managed to attract an extremely talented faculty and staff, a student body to be proud of, and created a rich and thriving intellectual environment.

We faced enormous challenges in launching an institution with no history, no alumni base, and staffed by individuals who had never met before under conditions of isolation, facing personal challenges brought on by COVID-19, and under immense pressure to assemble a complex and ambitious program of legal education within a short period of time. An early task was to define and refine the mission of the law school—one that would prioritize critical approaches to law by infusing them into discussions of the promise and perils of Canadian legal education and would emphasize providing access to students from underrepresented groups. It would highlight for students the importance of serving underrepresented and underserved communities and encourage students to appreciate but be wary of new technologies and the laws that regulate them.

As most law schools do, the Lincoln Alexander School of Law takes seriously its role in assisting students to understand the law and their role in the legal system. Educating future legal professionals to serve the public good requires it to provide instruction about the ways in which the practice of law and laws themselves have perpetuated and indeed were designed to perpetuate some of

the worst injustices imaginable. Without an antiracist, anti-oppression, and anti-colonial lens, the legal education provided at the Lincoln Alexander School of Law would be offering students only a partial account of legal doctrine and history, and one that has been fundamentally exclusionary and oppressive. Consequently, part of the law school's mission is to nurture a learning environment that encourages critical thinking and scepticism about any claim of law's neutrality.

In addition, the Lincoln Alexander School of Law was designed to answer a decades-long debate concerning the most effective ways for law schools to prepare students for the practice of law. Much of the debate is presented as a binary contest between theory and practice. A common argument is that law schools focus unduly on doctrinal analysis, legal history and philosophy and critical theories, and not enough on the practical skills required to efficiently enter conventional law practice as competent professionals. Though well intentioned, this critique does not fully acknowledge the important role that law schools play in mapping important fields of study within higher education. Law schools are not simply trade schools that are tasked with teaching a predetermined set of competencies. Nor are law schools merely ivory towers of arcane legal thought with no current or practical application, as the pages of this law journal will surely demonstrate. Law schools train students to be public citizens and dedicated legal professionals, which involves teaching historical and current political context, legal methodology, theory, doctrine, critical thinking, and the practical skills and professionalism required to practice law. Though still only three years old, the Lincoln Alexander School of Law is doing the hard work of designing a curriculum dedicated to getting the balance right. Because we are building the law school from scratch, challenges of institutional inertia are not barriers to our progress.

This mission of the law school was particularly compelling to me personally and an important reason I joined the law school at its inception. But clearly this interest is not mine alone. Many students, staff and faculty have been attracted to the law school because its curriculum is fashioned to reflect critical understanding of law and legal practice. As a racialized woman with an understanding of the legal systems in both Canada and the United States, I have come to believe that the legal status quo is almost always worth disrupting. But my interest in being dean of the Lincoln Alexander School of Law has less to do with disrupting legal education in Canada than with preserving what legal education is meant to do—to dismantle oppressive systems embedded in law and legal practice; to support and maintain an intellectual environment in which academic freedom is promoted in research, scholarship and teaching; and principles of collegial governance are embedded in the operation of the institution.

Early in my deanship I received a lovely note congratulating me on my appointment that has served as a guide. The author wrote:

> Working in education is, for so many reasons, more of a blessing and a reward than a career; your contributions are multiplied by the understanding and courage of your students. Moreover, working in the justice system, with the possibility of contributing to change, is a privilege.... *You will shape the learning and future of so many young people and contribute to the changes we all live for.*

This letter captured the essence of legal education—teaching students and learning from them in the pursuit of making the law better for all of us.

Not everyone saw my appointment as something to celebrate, however. Only four weeks after I arrived on campus in my new role, I was made aware of a letter that had been sent to the members of the committee that had hired me, the provost and president of Toronto Metropolitan University, the Minister of Education for the Province of Ontario, and the Premier of Ontario. The author objected to language in the public advertisement for the position of founding dean, which encouraged applications "from members of groups that have been historically disadvantaged and marginalized, including First Nations, Metis and Inuit peoples, Indigenous peoples of North America, racialized persons, persons with disabilities, and those who identify as women and/or 2SLGBTQ+". But the author, noting that a Black woman had been appointed dean, suggested that my appointment was illegitimate as I could not possibly have had the credentials required for such a role. He wrote,

> [O]ne is left to wonder if it would not have been easier, not to mention far more honest, for [Toronto Metropolitan University] to have come right out and said that applications from able-bodied heterosexual white men were not needed. By its/your despicable behaviour... You have discriminated against a very large segment of Canadian society...something that is utterly unacceptable in Canada...There can only ever be one acceptable hiring criterion: merit. You have forever tarnished the reputation of Ms. Young. There is at least a possibility, however remote, that Ms. Young was appointed on the basis of merit. However, in view of your blatant, utterly unacceptable discrimination, this can never be known, and, for the rest of her life, Ms. Young will be viewed as a fifth-rater who was appointed entirely because she is black and because she is a woman.

I didn't take this letter personally and it did not undermine my confidence in myself or in the institution I had enthusiastically joined. Nonetheless, the letter had the potential, and probably was designed, to do all of that and more. It must not be dismissed as the musings of a disgruntled individual. Rather, it reflects an undercurrent of intolerance in Canada, including within the legal profession—an undercurrent that has sought to keep some of us in our place, to define our successes as failures, our gains as ill-gotten, our achievements as undeserved, and our very identities as disqualifying.

I mention this letter to help explain what drives me and many of those who have joined the Lincoln Alexander School of Law as faculty, staff, and students. The letter was meant to send a message to those of us who enter spaces not designed to include us. Law schools have not historically been welcoming environments for faculty, staff, or students who are Indigenous, racialized, new to Canada, members of the 2SLGBTQ+ communities, or to those who are the first in their families to attend university. Though the author of the letter was willing to voice his concerns to a great number of people, many others are not. Their anger and resentment is communicated to us in other ways. The legal profession is not immune to this kind of intolerance. There have been troubling signs—pressure on law schools to engage in only certain kinds of research, attempts to ban certain theories from the curriculum, and targeting faculty members for the courses they teach. These pressures must be resisted.

Those of us engaged in legal education know that law schools have to respond to critical questions about the role we play in preparing students for the practice of law, while at the same time attending to other fundamental responsibilities that have remained fairly constant over time—providing faculty with the resources and freedom to explore complex socio-legal questions and

supporting them in their roles as teachers and researchers. With the advent of new laws, new ways of breaking the law, and new technologies that both help and hinder the practice of law, analytical nimbleness is a necessity. And in the end, law schools must protect the academic mission designed to serve the public good.

I learned this lesson all too well in my role as a law professor and as a faculty advocate at the American Association of University Professors (AAUP) in the United States. I came to the deanship at Toronto Metropolitan University not as an administrator, but as a critic of bad administrations. My experience in the United States and my involvement in faculty advocacy makes me attuned to threats to the academy. In Canada, we see worrying developments: some openly questioning the value of higher education; some lawyers calling for changes to law school curriculum to further their own agenda; appeals to remove law schools from provincial licensing requirements; incivility and hate expressed online and in person; tuition increases; crippling lack of resources for public education; and unfair levels of student debt.

Despite our strong faculty associations, we cannot ignore these signs and allow ourselves to think that what is unfolding in the United States could not happen here. For years we have witnessed high levels of anti-Asian discrimination, violence, and terrorism. Anti-Black racism is manifest in housing, education, employment, and provision of services. Islamophobia is manifested in laws, rules, and regulations, surveillance, and in deadly attacks on places of worship. There has been a steady stream of anti-Semitic attacks and street harassment against young children and elders, and defacement of synagogues and cemeteries. We've been witness to evidence of what Indigenous communities have always known—violence and death within residential schools, over-policing of Indigenous communities and criminalization of Indigenous culture, language, practices, and huge discrepancies in public services for First Nations children and communities. As a society, we are complacent about the persistent discrimination against people with disabilities in failures of accommodation, and overt discrimination in employment, housing, and public services.

Despite lofty legal doctrine and our professed national identity as a caring and fair-minded people, we Canadians and we lawyers remain too tolerant of inequality, inequity, and injustice. But still there is reason for optimism. Law professors are better preparing students for critical thinking and challenging systems that are not working for the majority of people. Canadian law schools are committed to innovative curricula that mainstream social justice values. And after the brutal murders of George Floyd, Breanna Taylor and others, and the international protests that followed, we have seen an unprecedented growth in the number of multiracial movements throughout Canada, the United States, and around the world that remind us of the importance of activism, civil disobedience, and collective action.

Critical approaches to law are necessary for uncovering the role of the law in systems of oppression but also for reimagining a more just system. Law schools have a solemn responsibility to teach our students and learn from them; to model creativity and innovation; to acknowledge that what we teach is partial and that we need to hear all voices to round out our knowledge and understanding; and that the voices that have been absent from law's stories must be heard.

Introducing counter-narratives into legal analysis and turning on its head mainstream storytelling found in case law and legal advocacy gives students the tools necessary for normative critique of law. If some stories are never heard, they cannot influence outcomes.

Critical analysis of the law must begin with the premise that oppression is a systemic part of our societal norms: that it permeates our lives, that it is embedded within systems and institutions, like the legal systems that replicate and promote inequities; and that even though overt intentional acts of discrimination are to be found scattered throughout workplaces, educational institutions, health care, housing and public services, systemic inequities are more pernicious and almost completely resistant to attempts at redress through human rights laws and processes.

And so law schools must dedicate themselves to telling the stories that have not been told in the law. Persistent social and economic inequities are reflected in law and are only reinforced when some perspectives are suppressed and some lives don't matter. Black lives, Indigenous lives, Asian lives don't matter, for example, under political, educational, and legal systems that are designed and instituted with the purpose or effect of maintaining a racial status quo.

The Lincoln Alexander School of Law has gotten off to an auspicious start. But there is much left to do. I have great faith in the next generation of lawyers. They are learning new techniques and embracing creativity. They are using critical thinking to address complex problems. I see a strong commitment to access to justice in this generation of students. Though the legal system is full of contradictions, confusing doctrine, and archaic language and ideas, it is fascinating to study, and to do so repays one's efforts. Law is only one tool to address inequities, but an important one. Our knowledge is partial and we need others to help fill in the pictures, but that cannot happen if the message to others is that they will not be heard.

I want to thank the group of law students and faculty who have worked so hard to launch this journal, and particularly Dr. Angela Lee, for this significant accomplishment on behalf of all of us at the Lincoln Alexander School of Law. The TMU Law Review is dedicated to publishing scholarship that exposes where our legal system falls short and suggests ways to move forward in addressing vexing legal problems. In this way, it not only reflects the social justice mission of the law school, but in fact will help to lead the law school in a direction that ensures that it stays true to this mission. With this inaugural edition of the TMU Law Review, we see a small but important step toward revealing law's untold stories, to making concrete the pledge of our law school to hold law to account for its shortcomings and true to its pledge to improve the world.

ORIGINAL RESEARCH ARTICLE

"The Legal Billy Club": First Nations, Injunctions, and the Public Interest

Shiri Pasternak & Irina Ceric*

Abstract: This article centers on the profound discrepancy between efforts by First Nations to obtain injunctions against industry and the state versus the far more successful record of corporations and governments seeking to obtain injunctions against First Nations. We examine how the common law test for injunctions in struggles over lands and resources leads to these results. We begin by tracking the history of injunctions in the Aboriginal law context, especially the development of s 35(1) jurisprudence, which ironically deprived First Nations of access to injunctions, despite an earlier period of successful defence of Indigenous land rights using this legal tool. We then focus on the doctrinal and political function of the "public interest" consideration in injunction cases, positioning this concept within a broader political economy framework. Finally, we turn to the origins of the injunction as an equitable remedy and argue that the current imbalance in injunction success rates ought to be understood through a re-examination of equity within a broader historical trajectory of settler-colonial legality. We conclude that the heavy lifting done by notions of 'public interest' both relies on and obscures the circumvention and exclusion of Aboriginal treaty and constitutional rights from the law of injunctions and constitutes a de facto resolution of Aboriginal land rights in Canada. Finally, we ask what place, if any, exists in injunction jurisprudence for Indigenous law and governance.

* Associate Professor, Toronto Metropolitan University, Department of Criminology, and Assistant Professor, University of Windsor, Faculty of Law. The authors would like to thank Joshua Sealy-Harrington for valuing this work and inviting us to submit it here.

CONTENTS

> "At the end of our acts of defiance, we are often met with the business end of the police truncheon. But the process of attacking us usually begins weeks and even months earlier when the state takes in hand its legal billy club: the court injunction."
>
> - Arthur Manuel, *The Reconciliation Manifesto: Recovering the Land, Rebuilding the Economy*.[1]

Introduction

This article begins with a simple question: what accounts for the profound discrepancy between the efforts by First Nations to obtain injunctions against corporations and governments versus the efforts by corporations and governments to obtain injunctions against First Nations? In 2019, a national study of over 100 injunctions was led by the Yellowhead Institute at Toronto Metropolitan University (Yellowhead) in Toronto.[2] It found that from the years 1973-2019, 76 per cent of injunctions filed against First Nations by corporations were granted, while First Nations were successful against corporations only 19 per cent of the time. This research was updated by Yellowhead in 2020 and the gap had widened in that single year.[3] The percentage of injunctions successfully sought by corporations against First Nations climbed from 76 per cent to 81 per cent. The study also examined rates of government-filed injunctions against First Nations. In 2020, governments were successful

1. Arthur Manuel with Grand Chief Ronald Derrickson, *The Reconciliation Manifesto: Recovering the Land, Rebuilding the Economy* (Toronto: James Lorimer & Company, 2017) at 215.
2. Yellowhead Institute, *Land Back: A Yellowhead Institute Red Paper* (October 2019), online (pdf): <redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf> at 29-30 [*Land Back*].
3. Yellowhead Institute, "A review of over 100 injunction cases involving First Nations across Canada found that:" (August 2020), online (pdf): <redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/injunction-stat-land-back.pdf>.

at obtaining orders 90 per cent of the time. Just one year earlier, that figure had been 86 per cent. Meanwhile, by 2020 First Nations were only successful at obtaining injunctions against governments 18 per cent of the time. In this article, we ask: what is it about the common law test for injunctions that leads to these results and, given this evidence, what makes injunctions such an effective tool in the hands of industry and the state against First Nations?

Our research here builds on the original Yellowhead research and dataset, which we led and contributed to,[4] by recoding the cases initially examined and refining the methodology to focus specifically on the grounds of adjudication in each case. Central to our methodology is an examination of the application of the tripartite test set out by the Supreme Court of Canada (SCC) in *RJR-MacDonald Inc v Canada (Attorney General)*[5] to injunction[6] cases involving First Nations. Scholars have noted the significant and disproportionate protections the *RJR-MacDonald* test provides to businesses and property owners over First Nation "protestors" and labour "picketers".[7] But the implications of these protections as they pertain to First Nation assertions of jurisdiction require further examination. De facto resolutions of First Nation land rights are currently being mediated through a discretionary, equitable remedy that is insulated from the reach of Aboriginal rights and title entitlements.

This article undertakes a close reading of the way the courts interpret the *RJR-MacDonald* factors of "irreparable harm" and "balance of convenience" in injunction cases involving First Nations—most of which have unfolded in contestations over land, water, and resources—to reveal the ways colonization has been organized around a false distinction between public and private interests. We suggest that to understand what accounts for corporate success in the courts against First Nations when seeking to develop and pursue extraction on Indigenous territories, we must understand how

4. Shiri Pasternak led the research on injunctions published in the Land Back report, *supra* note 2, and Irina Ceric contributed to the research design and final peer-review of the findings. The research team that compiled and analyzed the first dataset included Mark Kruse and Carrie Robinson, with technical support from Azada Rahi. Data visualization was done by Yumi Numata. This research was supported by SSHRC Partnership Development Grant #890-2015-0020.

5. *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 at 334 [*RJR-MacDonald*].

6. Injunctions are an equitable remedy (see Part III); most often a court orders "a party to proceedings to refrain from doing specified acts": AWR Carrothers, "The Labour Injunction in Canada" (1958) 13:1 Relations industrielles/Industrial Relations 2. Most injunction cases are heard in provincial Superior Courts due to their "inherent" jurisdiction to control their own procedures, dating back to English antiquity and enshrined in the *British North American Act*, 1867: Jeffrey Berryman, *The Law of Equitable Remedies*, 1st ed (Toronto: Irwin Law, 2000) at 15-16 [*Equitable Remedies*]. Injunctions may also be issued by the Federal Court of Canada: *Federal Courts Rules*, SOR/98-106, r 373.

7. See Bora Laskin, "The Labour Injunction in Canada: A Caveat" (1937) 15:4 Can Bar Rev 270; Naiomi Metallic, *Injunctions against Pickets and Protests in the 21st Century: It's Time to Stop Applying the Three-Part RJR-MacDonald Test* (LLM Thesis, York University, Osgoode Hall Law School, 2015) [unpublished].

"public interest" arguments that are critical to applying the injunction test are weighed towards a specific understanding of the "status quo" in Canada that is rooted in a political economy of resource extraction. We argue that to understand the judicial reasoning that supports the "maintenance of the status quo" that is so critical to the "balance of convenience" test, we must revisit the equitable roots of the injunction remedy that lie at the heart of Canadian property law—the juridical underpinning of settler-colonialism.

The methodology for this injunction research originally involved searches within two legal databases for all injunction cases involving First Nations in Canada. We did not code cases where injunctions involved community members obtaining injunctions against other community members, and we focused our research on First Nations rather than all Indigenous people, therefore excluding cases involving Inuit and Métis peoples. We returned to Yellowhead's original dataset for this research, but we narrowed our analysis to focus on the role of "public interest" arguments in applications for injunctions under the *RJR-MacDonald* test.[8] Each case was coded for the following criteria: the parties involved (i.e., corporations vs First Nations, or First Nations vs corporations), whether a blockade was involved, the type of injunction at play, the trigger for the conflict, the legal issues raised, and the key arguments made by the parties with respect to the tripartite injunction test (i.e., serious issue to be tried, irreparable harm, and balance of convenience). In total, we coded 70 cases, more than a quarter (19 decisions) of which contained detailed considerations of the "public interest." By highlighting specific cases from this dataset to show this and other tendencies we found on a national scale, we hope that this research marks a focal point in a study of injunctions and First Nations, rather than being interpreted as the authoritative end of this inquiry.

Our article is organized as follows: in Part I, we track the history of injunctions in the Aboriginal law context, paying particular attention to how the development of s 35(1) jurisprudence, which interpreted Aboriginal constitutional rights enshrined in the 1982 *Constitution Act*,[9] ironically deprived First Nations of access to injunctions, despite a prior period of successful defence of Indigenous land rights using this legal tool. In Part II, we focus on the doctrinal and political function of the "public interest" consideration in injunction cases, positioning this concept within a broader political economy framework. In Part III, we turn to the origins of the injunction as an equitable remedy and argue that understanding its discretionary application requires understanding equity's role within a broader historical trajectory of settler-colonial property relations. We conclude that the injunction playing field is inherently uneven because the common law test currently leaves no room for assertions of Indigenous law or governance. This imbalance is now baked into *RJR-MacDonald* and a juridical shift (as opposed to a political or policy fix) requires a different legal framework.

8. Requests for stays of proceedings under the *RJR-MacDonald* test were excluded from this dataset.

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

I. The Strange Power of Uncertainty and the Impact of s 35(1) on Injunctions

In the early 2000s, John Hunter analyzed the trajectory in the use of injunctions by First Nations in British Columbia (BC).[10] Interlocutory injunctions had been "the primary remedy in Aboriginal rights litigation" in the province between 1985 and 1990, and Hunter demonstrated how they were obtained or fought by First Nations relatively successfully to defend their lands, as courts found against private interests in their favour.[11] He argued, however, that when the SCC issued its landmark ruling in *R v Sparrow*,[12] things began to shift.

Sparrow was the first SCC case to interpret s 35(1) of the new *Constitution Act*, which "recognized and affirmed" Indigenous peoples' "aboriginal and treaty rights."[13] *Sparrow* and the cases that followed began to lay out the tests that define the scope and meaning of Aboriginal rights. Hunter argued that it was precisely the evolution of this new constitutional landscape that led judges to shift their understanding of what constituted a "balance of convenience" away from First Nations and in favour of companies, arresting the short winning streak Indigenous claimants had enjoyed in the late 1980s. How is it possible that when it came to injunctions, an ostensible expansion of Aboriginal rights jurisprudence swayed courts *against* First Nations?

The answer to this question lies in the specific test judges must apply to determine whether to grant injunctive relief. The prevailing test for nearly a century was laid out by William Williamson Kerr in 1888,[14] establishing that injunctions ought to be granted where a prima facie case suggested a strong possibility of success at trial. The "strong possibility" threshold for granting injunctive relief was modified by the House of Lords in *American Cyanamid Co* in 1974, which decided that courts should only engage in a limited analysis of merits since the strength of a claim could not be determined at the stage of interlocutory relief.[15] A three-pronged test developed, where after the lower threshold of whether the case constituted *a serious issue to be tried* was reached, two additional tests followed: whether the matter will cause "irreparable harm" to the party seeking relief; and whether an injunction is the most equitable way to protect the rights of the party, pending trial,

10. John Hunter, "Advancing Aboriginal Title Claims After Delgamuukw – The Role of the Injunction" in *Litigating Aboriginal Title* (Vancouver: Continuing Legal Education Society of British Columbia, 2000). In 2009, Hunter updated his article, but the core arguments remain unchanged: see John Hunter, "Aboriginal Rights Litigation" in Derek A Brindle & Joy Tataryn, *Injunctions: British Columbia Law and Practice*, 2d ed (Vancouver: Continuing Legal Education Society of British Columbia, 2009) 1.3-1.3.24.
11. See *MacMillan Bloedel Ltd v Mullin* (1985), 61 BCLR 145, 1985 CanLII 154 (BCCA) [*MacMillan*]; *Pasco v Canadian National Railway Company* (1985), 69 BCLR 76, 1985 CanLII 320 (BCSC); *Hunt v Halcan Log Services Ltd* (1986), 15 BCLR (2d) 165, 34 DLR (4th) 504.
12. *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].
13. *Constitution Act, 1982*, *supra* note 9.
14. William Williamson Kerr, *A Treatise on the Law and Practice of Injunctions*, 3d ed (Philadelphia: Blackstone, 1889) at 13, cited in Jean-Philippe Groleau, "Interlocutory Injunctions: Revisiting the Three-Pronged Test" (2008) 53:2 McGill LJ 272 at 272-73.
15. *American Cyanamid Co (No 1) v Ethicon Ltd*, [1975] AC 396 (HL(Eng)), [1975] 1 All ER 504 [*Cyanamid*].

without unfairly disadvantaging another's rights (i.e., the "balance of convenience" test). Throughout the 1980s, judges in Canada relied on cases like *Yule*,[16] *Wale*,[17] and *Cyanamid* when exercising their discretion at each stage of the tripartite test.

With the incorporation of Aboriginal rights in the constitution, the declining success of First Nations in obtaining or fighting injunctions appears to be a contradictory outcome at a key moment of recognition. At first glance, this recognition should have strengthened Aboriginal claims of "irreparable harm," as such harms could now constitute a breach of constitutional rights. But Hunter argued that these new constitutional protections greatly complicated—and therefore lengthened—the duration of time necessary to determine the merits of a case, giving priority to other elements of the injunction test. First Nations were asserting rights and title to land in ways that disrupted, for example, provincial regulatory regimes; a growing jurisprudence established tests to challenge the application of provincial jurisdiction to First Nations.[18] But how would these Aboriginal rights tests weigh within the tripartite test?

First, the lengthening of trials specifically increased the *inconvenience* to business operations, therefore favouring their interests in the "balance of convenience" test.[19] For a time, the uncertainty of title and rights claims had constituted sufficient cause to delay the interests of private companies; post-*Sparrow*, the uncertainty had a legal framework for determination that was lengthy, complicated, and lay outside the jurisdiction of the court hearing the injunction application. Compounding the issue of the *time* it would take to adjudicate the merits of injunction cases was the gradual emptying out of the s 35(1) "box" of rights, once expected to secure Aboriginal rights to land, water, and resources. The s 35(1) case law demonstrated that there were pathways around these rights and that state legislation could override Aboriginal claims.[20] The uncertainty that once favoured First Nations asserting constitutional rights in injunction cases[21] was now taken up by courts that pointed to the ambivalence of rights that were yet to be proven in costly title and rights litigation.

16. *Yule Inc v Atlantic Pizza Delight Franchise (1968) Ltd* (1977), 80 DLR (3d) 725 (ONSC), 1977 CanLII 1198 (ONSC).

17. *British Columbia (Attorney General) v Wale* (1986), 9 BCLR (2d) 333 (BCCA), 1986 CanLII 171 (BCCA).

18. On Aboriginal rights, see e.g. *Sparrow, supra* note 12, and on Aboriginal title, *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw* (SCC)].

19. The traditional injunction test in Canada relies on a redefinition of *Cyanamid, supra* note 15, as we will see. The SCC adopted *Cyanamid* and the three-pronged test in *RJR-MacDonald* and *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, 38 DLR (4th) 321 [*Metropolitan Stores*].

20. See Hunter, "Advancing Aboriginal Title Claims After Delgamuukw", *supra* note 10. See also Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation" (2005) 23:1 Windsor YB Access Just 17; Ardith Walkem & Halie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton, BC: Theytus Books, 2003) (an anthology debating the nature of s 35 rights).

21. See e.g. *MacMillan*, *supra* note 11.

A 1995 Gitskan injunction case—technically, a leave to appeal their denial of ongoing injunctive relief—is emblematic of this transition period. The landmark *Delgamuukw v British Columbia*[22] case brought by the Wet'suwet'en and Gitskan Nations that first tested s 35(1) rights on Aboriginal title was a factor in the judge's decision *against* two Gitskan houses[23]. The houses sought relief against Skeena Cellulose to restrain bridge construction that the company required for logging access.[24] Proudfoot JA agreed with a lower court decision to discharge an injunction granted in 1988 to the Houses of Gwoimt and Tsabux. She held that the injunction had been founded on outstanding questions of Aboriginal title, but that the legal terrain had changed after the 1993 BC Court of Appeal decision in *Delgamuukw*[25] that found that no ownership or jurisdiction rights had been established by the Gitskan. A few years later, in 1997, the SCC held that the Wet'suwet'en and Gitskan[26] Nations might in fact hold Aboriginal title to their territory, defined for the first time as an underlying, collective, and *sui generis* proprietary interest. The SCC instructed the nations to return to court to assert this title over specific tracts of land.[27] But while the Gitskan were undertaking this monumental, lengthy title case, lower court decisions had cost them interim protections, raising serious questions about the implications of injunctions on First Nations' constitutional rights.

One solution to this problem of reconciling rights and title cases with injunctions came in the form of another s 35(1) precedent conceived to protect Aboriginal rights even in the pre-proof stage of assertion: the Crown's duty to consult and accommodate. In the post-*Sparrow* case of *Haida Nation*, the SCC advised that First Nations should rely on their s 35(1) protected rights to consultation, rather than pursuing injunctions, because the duty to consult would better safeguard their interests.[28] Reasoning the need for this legal shift, the Court laid out four limitations of injunctions: first, they may not capture the full range of government obligations; second, the duty to consult necessarily entails balancing interests and thus could go further towards reconciliation; third, the Court cited Hunter's argument that the balance of convenience test favours industry and jobs, prejudicing the courts against First Nations before the merits can be determined; and fourth, stopgap measures like injunctions should not be used for complex matters, which must be given adequate time in courts to resolve.[29]

---

22. *Delgamuukw* (SCC), *supra* note 18.
23. As Indigenous legal scholar Val Napoleon writes, "The basic conceptual political, social, economic, and legal unit in Gitksan society is the House (*wilp*)": *Ayook: Gitskan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, Faculty of Law, 2009) at 4 [unpublished].
24. *Houses of Gwoimt & Tsabux v Skeena Cellulose Ltd* (1995), 17 BCLR (3d) 389 (BCCA), 1995 CanLII 1496 (BCCA) [*Houses of Gwoimt & Tsabux*].
25. *Delgamuukw v British Columbia*, 104 DLR (4th) 470 (BCCA), 1993 CanLII 4516 (BCCA) [*Delgamuukw* (BCCA)].
26. *Houses of Gwoimt & Tsabux, supra* note 24 at paras 5-6. *Delgamuukw* (BCCA), *supra* note 25, was brought by the hereditary governments of the Wet'suwet'en and Gitskan Nations and sought a similar declaration covering some of the lands subject to the injunction case. The BC Court of Appeal found that the Gitskan held "unextinguished, non-exclusive aboriginal rights" (at para 263).
27. *Delgamuukw* (SCC), *supra* note 18.
28. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 14.
29. *Ibid.*

Since *Haida Nation* came down, however, it has not reduced the number of injunctions involving First Nations, nor protected them any better in proceedings. It may be the case that First Nations have had more success pursuing judicial reviews of regulatory decisions or lawsuits for failures of the Crown to engage in meaningful consultation. Although these legal avenues are beyond the scope of this article, such a comparison would undoubtedly shed light on this important question. Here, however, we seek to uncover whether *Haida Nation* and the s 35(1) protected rights to consultation created more opportunities for First Nations to assert and protect their rights in injunction cases. In particular, did the courts consider breaches of the Crown's duty to consult an "irreparable harm"?

If anything, we could conclude that failures on the part of governments to comply with the duty to consult have not been seen by the courts to constitute "irreparable harm". Irreparable harm is at the core of injunctive relief since it is precisely what entitles litigants to "equity's extraordinary and discretionary relief".[30] The plaintiff must show immediate harm that cannot await resolution at trial or be addressed any other way, especially through damages. For example, a 2008 Federal Court of Appeal decision in *Canada v Musqueam First Nation* held that the government's failure to consult did not give rise to "a veto" on the basis of disputed territory alone, despite the fact that lands in the Musqueam First Nations' traditional territory were being alienated by the Crown to third parties.[31] In other words, the potential loss of lands was not considered an irreparable harm, the justice reasoned, unless it was coupled with "possible degradation" or a specific use claim to the territory. The prerequisite for injunctive relief was only damage in a narrow sense, not the historical, cumulative state dispossession that the Musqueam sought to prevent.[32] This reasoning and the resultant outcome is disappointing, since injunctions could potentially provide a strong interim measure to prevent damage as more broadly construed, while other rights litigation moves through the courts. However, a long line of injunction cases rejects this logic.

The duty to consult was also undermined in *Behn v Moulton Contracting Ltd*[33] in 2013, when members of the Fort Nelson First Nation were chided for blockading their lands threatened by logging. Writing for a unanimous SCC, LeBel J concluded that "[t]o 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

30. Jeff Berryman, "The Centrality of Irreparable Harm in Interlocutory Injunctions" (2015) 27 IPJ 299 at 302.

31. *Canada (Public Works and Government Services) v Musqueam First Nation*, 2008 FCA 214 at para 4, leave to appeal to SCC refused: *Musqueam Indian Band v Minister of Public Works and Government Services and Squamish Nation AND BETWEEN Squamish Nation v Minister of Public Works and Government Services*, 2008 CanLII 63487 (SCC). See also *Siska Indian Band v British Columbia (Minister of Forests)* (1998), 62 BCLR (3d) 133, 1998 CanLII 3904 (BCSC).

32. Recent precedent on the cumulative impact of violations of Aboriginal and treaty rights may impact such analyses in the future: see e.g. *Yahey v British Columbia*, 2021 BCSC 1287.

33. *Behn v Moulton Contracting Ltd*, 2013 SCC 26 [Behn].

disrepute."[34] In one of the few injunction cases ever brought to the SCC, the decision on the duty to consult set an unfortunate precedent that the applicants—as individuals, rather than as the Band—did not have standing to assert these rights, despite s 35(1) jurisprudence that has been successfully brought to protect individuals within communities.[35] Moreover, the Behn family's resort to blockades was rendered unlawful despite the uncertainty over proper title to the land in question.

Behn has proven extraordinarily influential. Indeed, in *Enbridge Pipelines Inc v Williams*, a 2017 case involving representatives of the Haudenosaunee Development Institute, Broad J cited *Behn* and decided that the question of "whether the Crown has made efforts to comply with its duty to consult and accommodate is not relevant to the exercise of the court's decision to deny an injunction sought by a private party such as Enbridge with an interest in land on discretionary grounds." [36] The injunction was granted to Enbridge partially on the basis of the defendant's resort to blockades, and the matter of treaty rights was deferred to proceedings in other courts.[37]

In *Williams*, the court went to great lengths to distinguish an earlier Ontario decision calling for judges to prioritize the duty to consult. In *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*,[38] the Ontario Court of Appeal had made every effort to encourage consultation when Aboriginal treaty rights to hunt were impacted. As Macpherson JA instructed, citing *Haida* directly: "The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it. Good faith on both sides is required in this process".[39] Relying on *Behn* (and a key 2014 decision from the Newfoundland and Labrador Appeal Court[40]), Broad J instead framed the Haudenosaunee defendants' invocation of the duty to consult in *Williams* as the imposition of a "precondition involving the exhaustion of efforts to consult", dismissing their attempt to require the Crown to consult with respect to treaty rights as an illegitimate resort to self-help.[41]

34. *Ibid* at para 42.

35. Kent McNeil, "Aboriginal Rights and Indigenous Governance: Identifying the Holders of Rights and Authority" (2021) 57:1 Osgoode Hall LJ 127.

36. *Enbridge Pipelines Inc v Williams*, 2017 ONSC 1642 at para 33 [*Williams*].

37. See also *John Voortman & Associates Limited v Haudenosaunee Confederacy Chiefs Council*, [2009] 3 CNLR 117 (ONSC), 2009 CanLII 14797, where the Ontario Superior Court granted a property owner an interlocutory injunction to restrain interference by the Haudenosaunee Confederacy on the grounds that their title claim was weak and therefore the duty to consult was not violated.

38. *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534 at paras 45-46.

39. *Ibid* at para 48.

40. *Nalcor Energy v Nunatukavut Community Council Inc*, 2012 NLTD(G) 149 at paras 2-5. After "several hours" of consultation, the judge cited the importance of keeping workers safe by granting an injunction against Indigenous blockaders contesting the construction of the Muskrat Falls dam.

41. *Williams, supra* note 36 at paras 34, 37.

These cases demonstrate the failure of injunctive relief for First Nations when s 35(1) consultation rights are brought to bear. On the one hand, in *Haida Nation*, the SCC tried to steer land claims out of the injunction arena, wisely counselling on its inherent limitations and the dangers of bias embedded in the tripartite test. But this warning backfired when—out of necessity—First Nations sought urgent relief or were faced with plaintiffs seeking to remove them from their lands. Judges can then interpret *Haida Nation* to reason that First Nation cases should be heard in different proceedings, as litigation for rights and title, or else attempt to adjudicate their rights and title on the merits based on scant evidence. The paradox that results is that the denial of injunctive relief to First Nations and the success of corporations and governments seeking injunctive relief against them practically constitutes a de facto resolution of disputed land claims. Put simply, the s 35(1) duty to consult, alongside the long delays and evidentiary hurdles standing in the way of establishing Aboriginal rights and title more generally, as demonstrated by *Sparrow* and *Delgamuukw*, has proven to mostly work against First Nations seeking injunctive relief.[42]

II. The Public Interest as Colonial Status Quo

Section 35(1) rights do not fit easily into the tripartite injunction test because they require lengthy and careful litigation or negotiation. Yet, the use of injunctions has by no means been discontinued on this basis. Of the 70 cases we coded, 42 (or 60 per cent) referred to Aboriginal rights, treaties, and/or title in motions brought by First Nations or as defences against injunctions. Almost a third of these cases address the legal question of consultation. Many of these legal arguments are countered in the courts by public interest-based counter-arguments and reasoning.

The explicit consideration of public interest arguments, in fact, emerged concurrently with the emergence of s 35(1) case law discussed above, after the SCC made two critical decisions that emphasized the importance of public interest when balancing "convenience" in interlocutory injunctions. While *Metropolitan Stores*[43] and *RJR-MacDonald*[44] did not involve Indigenous people, these *Charter* cases became central to the shift away from injunctive relief for First Nations. Their importance was due to the presumption baked into the "public interest" that an equitable balance can exist between protecting the interests of distinct groups in society and the "concerns of society generally."[45]

For First Nations already struggling to assert their inherent jurisdiction against the non-justiciable nature of Crown sovereignty, the paramountcy of the public interest further prejudices courts hearing injunction applications against them. In *Metropolitan Stores*, cited in *RJR-MacDonald*, the SCC made

42. See Sonia Lawrence & Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79:1 Can Bar Rev 252 at 275 (arguing that the duty to consult should outweigh the availability of injunctions against First Nations).

43. *Metropolitan Stores*, *supra* note 19.

44. *RJR-MacDonald, supra* note 5.

45. *Ibid* at 344.

foundational comments defining the public interest, stating that "in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies, and which must be 'given the weight it should carry'."[46] As the court decided:

> It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest... [E]ither the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.[47]

The public interest is further closely tied to the expectation that injunctions maintain or preserve the status quo.[48] The status quo is considered critical to guiding judges' decisions on what constitutes the public interest.

For Indigenous claims litigation, however, the "status quo" or the "existing legal regime or the state of affairs on the ground" may include active mining or logging,[49] preserving at minimum a circumstance of disputed land, and at most, maintaining a destructive or violent occupation.[50] As detailed in this Part, the uneven pattern in injunction cases also persists through the courts' interpretation of this "status quo" imperative. An interpretation that favours statutory regimes and private capital contradicts SCC decisions on the interplay of the duty to consult and the role of regulatory agencies and tribunals, which call for recognizing that the "duty to consult, being a constitutional imperative, gives rise to a *special public interest* that supersedes other concerns typically considered by tribunals tasked with assessing the public interest."[51] Thus, the post-*Sparrow* shift away from success for First Nations obtaining injunctions is not only due to the s 35(1) jurisprudence and a diversion towards constitutional litigation. It is also due to a public interest defined by market rationale and the demand for Indigenous lands.

---

46. *Metropolitan Stores, supra* note 19 at 149.
47. *RJR-MacDonald, supra* note 5 at 344.
48. Hunter, "Advancing Aboriginal Title Claims After Delgamuukw", *supra* note 10 at 1.3.04. See also *Cyanamid, supra* note 15 and *Pacific Northwest Enterprises Inc v Ian Downs & Associates Ltd* (1982), 42 BCLR 126 (BCCA), 1982 CanLII 519 (BCCA).
49. See e.g. *McLeod Lake Indian Band Chief v BC* (1983), 33 BCLR (2d) 378 (BCSC), 1988 CanLII 3107 (BCSC).
50. Hunter, "Advancing Aboriginal Title Claims After Delgamuukw," *supra* note 10 at 1.3.04. As one reviewer noted, "public interest" as colonial status quo also connects to other universal doctrines that have been legally challenged, such as "best interests of the child" in *Racine v Woods*, [1983] 2 SCR 173, 1 DLR (4th) 193. For an excellent discussion of the racism underpinning this construction of the "public interest," see Raven Sinclair, "The Indigenous Child Removal System in Canada: An Examination of Legal Decision-Making and Racial Bias" (2016) 11:2 First Peoples Child & Family Rev 8.
51. *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 40, citing *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 70 [emphasis added].

Reconciling the public interest of Canada's resource economy with Indigenous rights lies at the heart of these cases. Less examined, though, is the way the courts manage, and often shield, private interests from exposure to counter-legal claims. For example, Hunter demonstrates that early injunctions involving First Nations were open to considering the interests of First Nations in the land, reflecting a time of relative calm within the cycles of capitalist crisis. As a case in point, the Ahousat and Clayoquot arguments for title to Meares Island led the judge to reject the public interest argument made by the forestry company to protect private investment.[52] Though he admitted that the case was a "frontline" precedent for Nations across the province disrupting extraction on their land by asserting title, the fear expressed by the province and companies was not deemed a sufficient public interest argument, for this uncertainty would be up to each court in every circumstance to consider. But critically, the judge also did not find the importance of logging for the company to be a matter of "irreparable harm," since "the timber will still be there" if MacMillan Bloedel were found to hold the right at trial, whereas "[t]he position of the Indians is quite different", since logging may extinguish their food sources and ways of life.[53]

By 1989, Esson JA challenged this position in *Westar Timber Ltd v Ryan et al.*[54] This case involved the Gitksan Nation's conflict with a forestry company that sought to log and expand operations into a region over which the Nation was asserting title as part of the *Delgamuukw*[55] case. The judge quoted Macfarlane JA's dissenting reasons from *MacMillan Bloedel* at length, emphasizing the heading "Provincial concern about sovereignty over resources", where Macfarlane JA wrote that Meares Island was a unique case because it was a small, isolated area.[56] However, "[i]f an injunction were being sought with respect to the whole area the economic consequences of granting an injunction would probably weigh heavily against making the order."[57] Esson JA picked up this line of the thinking, and citing the importance of "public interest" in *Metropolitan Stores*, found that "the court should not grant an injunction if the economic consequences of doing so would have a serious impact upon the economic health of the province, the region or the logging company."[58] Thus, the public interest argument here smothers the possibility of challenging provincial regulation that may constitute irreparable harm to Indigenous rights. As Esson JA argued:

> ...injunctions restraining the exercise of rights granted under the Forest Act could *sterilize the working of that statutory scheme* just as effectively as injunctions restraining the granting of licenses and other rights, that being so, the public interest must be considered in applications of this kind.[59]

52. *MacMillan, supra* note 11 at 20.
53. *Ibid*.
54. *Westar Timber Ltd v Gitksan Wet'suwet'en Tribal Council* (1989), 37 BCLR (2d) 352 (BC CA), 60 DLR (4th) 453 at para 54 [*Westar*].
55. *Delgamuukw* (SCC), *supra* note 18.
56. *Westar, supra* note 54 at para 52.
57. *Ibid* at para 54.
58. *Ibid* at para 55.
59. *Ibid* at para 47.

The statutory scheme itself is framed here as a matter of public interest. But who does it protect? When it is enacted to defend the interests of non-Indigenous industry and workers against First Nation assertions of rights, the public interest here reveals the contrived division between public power and the economy. In other words, the "public" sphere of interest is the hidden background condition for the private accumulation of capital. Statutory power here "enforces its constitutive norms" through legal frameworks.[60] When the impact of First Nation challenges to provincial regulation leads to financial loss and harm to non-Indigenous workers, the impact of "public interest" arguments doubles: it can be used to defend state regulatory powers, but also the state's role in protecting the certainty of investment and employment in regional non-Indigenous economies.

Another example of how the public interest argument works by presuming this division is when it was invoked to dismiss a Gitskan logging injunction in 1990. The judge considered a disruption to non-Indigenous logging by First Nations asserting rights, stating that, "[t]he 'ripple down' effect of the consequences will be immeasurable. It is simply not possible to measure the damages of failed businesses, closed mills and people migrating from the area."[61] Here, the court views the public interest as a means to protect private capital, since the economic livelihood of non-Aboriginal citizens will be impacted. The court does not recognize a public interest role in protecting Indigenous livelihood.

This interpretation of the conjoined meanings of status quo and public interest can be found as far back as our research extends, to 1973—the earliest record we have of an injunction involving First Nations—and it is closely tied to resource extraction and development. Though the language of "public interest" was not yet been codified in law, the idea was already evident. The court told the James Bay Cree at the time:

> It is important to note at the start that hydroelectricity is the only primary energy resource possessed by the province of Quebec. With the petroleum crisis which exists actually in the world, *this resource has become of a capital importance to ensure the economic future and the well-being of the citizens.*[62]

The economic well-being and future of the Cree, Innu, and Inuit Nations are not included in this consideration of the project, set to enter a catastrophic phase of hydrological transformation to their territory with the largest dam project in North America.[63] This definition of the "interest" of

60. Nancy Fraser, "Behind Marx's Hidden Abode: For an Expanded Conception of Capitalism" (2014) 86 New Left Rev 55 at 64.

61. *Wiigyet v District Manager* (1990), 51 BCLR (2d) 73 (BCSC), 1990 CanLII 2314 (BCSC) at 16, cited in Hunter, "Advancing Aboriginal Title Claims After Delgamuukw," *supra* note 10 at 1.3.15.

62. *Simard-Beaudry Inc v Kanatewat* (1974), 5 CELN 2 (QCCA), 1974 CarswellQue 245 at 7 [emphasis added].

63. See Sean McCutcheon, *Electric Rivers: The Story of the James Bay Project* (Montreal: Black Rose Books, 1991); Zebedee Nungak, *Wrestling with Colonialism on Steroids: Quebec Inuit Fight for Their Homeland* (Montreal: Véhicule Press, 2017).

"the Quebec population" represents not only a majoritarian stance regarding the principle,[64] but also an explicitly colonial one, since none of these lands had ever been subject to treaty or surrendered. The Quebec public is prioritized as the beneficiary of extraction, while the interests of Indigenous Nations must be sacrificed.

The natural resource economy is of central importance to Canada's political economy and therefore to colonization. Its idiosyncrasies have also determined "public interest" arguments in relation to First Nation rights. The backdrop to many of the BC cases that Hunter studies, for example, demonstrate the boom-and-bust cycle of a resource sector deeply impacted by global forces.[65] Thus, the precarity of the global commodity market is critical to the injunction story too. Following high prices and production in the late 1970s, a devastating recession in BC in the early 1980s was only temporarily corrected with a sharp boom in the late 1980s, followed by another deep recession in the late 1990s.[66] Rather than adapt technologically to yo-yoing demand, rapacious harvesting devastated the province's interior, triggering environmental and Indigenous movements for protection through a spate of occupations, blockades, and of course, injunctions.[67] The global price fluctuations for timber put private interests on a razor's edge of financial survival, sharpening corporate and state arguments of "irreparable harm" when production was disrupted. Meanwhile, the province had to balance private interests with increasingly powerful movements demanding to protect these lands.

In other words, capitalism in Canada has two crises: first, its internal contradictions and boom and bust cycles of production, coupled with the natural limits of supply; and second, insecure land tenure for investment in resources on lands where Indigenous peoples challenge the Crown's claim to underlying title and rights. In injunction cases, the courts only tend to deal with the former crisis because it fits a temporal and racial understanding of economic duress. The failures of the courts to recognize the razor's edge of Indigenous survival after a century or more of apocalyptic changes wrought by colonization (e.g., fisheries re-routed and dammed, areas stripped bare of trees and life, animals harvested to near extinction) indicates that these harms are not legible as "economic" factors in these decisions. We cannot be too fancy about the reasoning here: this is settler-colonialism in action, in the form of willful denial.

---

64. For interesting discussions of a similar "cutting out" of certain publics in "public interest" discussions regarding minority rights and national security in Canada, see (respectively): Colin Feasby, "*Charter* Injunctions, Public Interest Presumption, and the Tyranny of the Majority" (2020) 29:1 Const Forum Const 20; Yavar Hameed, "Unmasking the Public Interest in Discretionary National Security Decisions in Canada" (2013) 92:1 Can Bar Rev 31; Gary Kinsman, Dieter K Buse & Mercedes Steedman, eds, *Whose National Security? Canadian State Surveillance and the Creation of Enemies* (Toronto: Between the Lines, 2000).

65. Roger Hayter, "'The War in the Woods': Post-Fordist Restructuring, Globalization, and the Contested Remapping of British Columbia's Forest Economy" (2003) 93:3 Ann Am Assoc Geogr 706.

66. *Ibid* at 714.

67. Nicholas Blomley, "'Shut the Province Down': First Nations Blockades in British Columbia, 1984-1995" (1996) 111 BC Studies 5.

We can see this dynamic play out through a 1996 injunction case in Manitoba where, despite concerns regarding logging traplines, Mathias Colomb First Nation lost their bid for an injunction because, according to the court, "[i]f Repap is hindered in its activities, the consequences will be the forced closure of its plant in the Pas, Manitoba, with the consequent loss of jobs for employees and loss of revenues for Repap."[68] These financial losses were deemed "unrecoverable", as opposed to the First Nation's land claims, which Repap successfully argued were merely "speculative".[69] These lands being logged were precisely where Mathias Colomb was negotiating an extension of their reserve boundaries to compensate for "lost lands" during the negotiation of Treaty 6.[70] While land restitution to the First Nation would provide valuable opportunities to the community, formerly and wrongfully denied by Canadian state policy, these financial losses were not deemed unrecoverable by the court.

Time and time again, this colonial dynamic plays out in injunction proceedings in the public interest reasoning behind determining "irreparable harm". In a logging dispute that dragged on for many years, the Okanagan First Nation consistently lost injunction cases, despite their assertions of Aboriginal title to the land. For instance, when a motion was served against the Okanagan to stop logging without provincial authorization, the province sought a work order to preserve the status quo, stating: "when a public authority is prevented from exercising its statutory powers, the public interest suffers irreparable harm."[71] A few years earlier, the First Nation had been unable to convince the judge that the Pine Marten and their traplines would suffer from clear-cut logging on their territory. The court found the harm to be worse to Riverside and Weyerhauser contractors, and to logging company employees who would suffer substantial losses, "which would be difficult, although not impossible to calculate."[72] Another logging case in BC involved the Nlha7kapmx Nation, specifically the Siska Indian Band. Here, the courts decided that since the mill is a "sunset operation"—a business that might close without access to a specific stand of trees—the injunction should be granted in their favour. In contrast, the spiritual, cultural, and economic sustenance of the community of 250 people who depended on the land was not deemed to be at immediate risk.[73]

Likewise, the Klabona Keepers of the Tahltan Nation attempted to stop a mine on their territory to protect the salmon runs that their nation and downstream nations have depended on for centuries for sustenance and kinship. Yet, this assertion of harm did not count as dearly as "the emotional and psychological effects of long-term unemployment," which are harms "that cannot be compensated

68. *Repap Manitoba Inc v Mathias Colomb Indian Band*, [1996] 110 Man R (2d), 1996 Can LII 18341 (MBCA) at para 13.

69. *Ibid* at para 11.

70. Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 173-207.

71. *British Columbia* (*Minister of Forests*) *v Okanagan Indian Band*, [1999] BCJ No 2545, 37 CPC 4th 224 at para 9.

72. *Derickson v R*, 1996 CanLII 2440 (BCSC) at para 33.

73. *Siska Indian Band v British Columbia* (*Minister of Forests*), 1999 CanLII 2736 (BCSC) at para 8 (the court also decided that the Band delayed too long to have their motion for an injunction considered).

through damages."[74] Salmon are a keystone species that maintain the functional integrity of riparian systems and many at risk species depend on the salmons' aquatic and terrestrial ecology through the province; it is difficult to imagine a greater impact to the region or to the people who have lived in reciprocal relation with the species for hundreds of generations.[75] Punnett J of the BC Supreme Court nonetheless stated that,

> In this case there is a public interest in upholding the rule of law and enjoining illegal behaviour, protecting gainful employment of members of the public, allowing the project to proceed to benefit the public, and protection of the right of the public to access on Crown roads. Accordingly, it would run contrary to the public interest to allow the defendants to persist in their blockade of the plaintiff.[76]

Ten years earlier, the Lax Kw'Alaams Indian Band of the Tsimshian Nation heard the same message when they sought an order prohibiting the harvesting of culturally modified trees that have been integral to the culture for hundreds of years. They were told the economic health of the region was paramount: "An injunction here would create uncertainty, not only for West Fraser but also for the logging contractor who has been engaged to perform this work, the employees hired for the work, and their families."

Occasionally, courts will recognize that the impact of resource-based economies on First Nations' rights requires a more nuanced treatment of the public interest. In a 2011 case involving dueling applications for injunctions by Taseko Mines Ltd. and members of the Tsilhqot'in Nation, the BC Supreme Court held that it is "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."[78] This process "is a cost and condition of doing business mandated by the historical and constitutional imperatives that are at once the glory and the burden of our nation"—one that would be at risk should the First Nation's injunction application be denied and thus "weighs heavily in the balance of convenience."[79] Yet even in this decision, where the public interest in reconciliation played a key role in denying the mining company an injunction, a brief but unlawful interference in Taseko's operation via a blockade by members of the Tsilhqot'in Nation that appeared to the judge to "be more moral than physical" led the court to award Taseko partial costs.[80]

---

74. *Red Chris Development Co v Quock*, 2014 BCSC 2399 at para 68 [*Red Chris*].
75. KD Hyatt & L Godbout, "A Review of Salmon as Keystone Species and Their Utility as Critical Indicators of Regional Biodiversity and Ecosystem Integrity" in Laura M Darling, ed, *At Risk: Proceedings of a Conference on the Biology and Management of Species and Habitats at Risk, February 15-19, 1999*, vol 2 (Kamloops: BC Ministry of Environment, Lands and Parks, Victoria, BC and University College of the Cariboo, 2000).
76. *Red Chris*, *supra* note 74 at para 77.
77. *Lax Kw'alaams Indian Band v British Columbia* (*Minister of Forests*), 2004 BCCA 306 at para 23.
78. *Taseko Mines Ltd v Phillips*, 2011 BCSC 1675 at para 60.
79. *Ibid*.
80. *Ibid* at para 10.

First Nation blockades similarly shaped the 2019 *Coastal GasLink Pipeline Ltd v Huson* decision that led to the Royal Canadian Mounted Police (RCMP) raid on Wet'suwet'en territory in early 2020 and catalyzed the #ShutDownCanada solidarity movement.[81] Church J found that "interference by the defendants with valid and subsisting rights to construct a project that has been found to be in the public interest" was a form of irreparable harm that would be suffered by the plaintiff pipeline company.[82] This finding also determined the court's resolution of the public interest claims made by both parties. The Indigenous defendants argued that an interlocutory injunction would generally harm the governance of Dark House and the Wet'suwet'en legal order.[83] Coastal GasLink (CGL) submitted that the public interest should be understood more broadly because the pipeline project would bring substantial benefits to Indigenous people, local communities, the province, and the Canadian economy.[84] They argued that $20 billion could be lost if the pipeline could not be built.[85] Church J cited these factors favourably in her decision.

Another element of the public interest further tipped the balance in favour of the corporate injunction claimants in *Huson*: the idea that the practice of Indigenous law is a "self-help" remedy. In a variation on the project-centered irreparable harm analysis, Church J held that there is "a public interest in upholding the rule of law and restraining illegal behaviour and protecting the right of the public, including the plaintiff, to access Crown roads."[86] This conclusion rests on a long line of cases, particularly the SCC's 2013 decision in *Behn*, rejecting so-called self-help remedies such as blockades, occupations, and other land-based resistance strategies.[87]

As discussed in Part I, *Behn* was not an injunction case but rather addressed the ability of Indigenous defendants in a tort action to assert treaty rights and the duty to consult in their defence after being sued by a logging company for blocking access to the company's work sites. In *Huson*, CGL relied on *Behn* to suggest that it was the Wet'suwet'en "defendants who have moved to *alter the status quo* in this case by engaging in self-help remedies rather than challenging the validity of the permits and authorizations through legal means."[88] The "remedies" in question were a healing centre, on which construction began in 2010, cabins and other living quarters, as well as gates intended to control access to the Unist'ot'en Camp, a small village, all of which are located on Wet'suwet'en territories on or near the pipeline route. At the interlocutory injunction hearing, CGL's counsel, Kevin O'Callaghan, asserted that, "A blockade can never be seen to be the status quo."[89] The

81. *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264 [*Huson*].

82. *Ibid* at para 197.

83. *Ibid* at para 216.

84. *Ibid* at para 217.

85. *Ibid* at para 204.

86. *Ibid* at para 220.

87. *Behn*, *supra* note 33.

88. *Huson*, *supra* note 81 at para 213 [emphasis added].

89. *Ibid* (Court Transcript at 10).

court agreed, reducing long-standing assertions of jurisdiction made material via occupation and land-based practices to a mere blockade and concluding that "[u]se of self-help remedies is contrary to the rule of law and is an abuse of process."[90]

But which rule of law? As the defendants' legal counsel, Michael Ross, argued on their behalf,

> It is their primary defense, the defendants say, that Coastal GasLink was attempting to enter Dark House territory in violation of Wet'suwet'en law and authority and within their efforts to prevent – that is the defendants' efforts to prevent – this violation of Wet'suwet'en law and authority, they were at all times acting in accord with Wet'suwet'en law with proper authority.[91]

While the segments of the *RJR-MacDonald* test often overlap, the invocation of "self-help" allows the judicial treatment of the public interest to reinforce—or even replicate—the "maintenance of the status quo" factor also considered under the heading of the balance of convenience. "Self-help" then is a practice that necessarily violates the status quo. *Behn*, in other words, allows factors like Indigenous legal orders to serve a similar function to the roles played by time and uncertainty in the aftermath of *Sparrow*, insulating injunctions from the reach of s 35(1).

The cases canvassed above shed light on this doctrinal ordering of interests, in which the broad concerns and interests of Canadian society generally—or at least the alleged concerns—will almost invariably trump the more particular public interest of First Nations. This hierarchy is especially evident in cases where the "public interest" has been opposed by First Nations and has led to the assertion of Aboriginal or treaty rights in opposition to the maintenance of the status quo. In the case of *Huson*, and so many others we examined, the public interest refers to the completion or continued operation of an approved or licensed project—never to the inception or maintenance of the Indigenous legal order or governance system.

III. Origin of an Injunction: Equity, Property, and Settler-Colonial Legality

That the "public interest" functions as a fixed nexus of exclusion within injunction law points to a more foundational problem: along with other elements of the balance of convenience test, public interest operates the way it does due at least in part to the inherently discretionary character of equitable remedies. Much as s 35(1) rights were pushed outside of the scope of the tripartite test, and the guiding principle of "public interest" preserved a colonial dynamic rooted in a resource economy, the discretionary basis of equitable remedies also carries an opportunity for bias and discrimination against First Nations that is buried in the "silent compulsion" of land struggle in Canada.

It may seem contradictory to attribute the cause of a persistent pattern of judicial reasoning to the notion of discretion, but locating the equitable roots of injunctions within a broader settler-colonial framework suggests that this discretion is distinctly and historically bounded. The power

90. *Ibid* at para 220.

91. *Ibid* (Court Transcript at 27).

to grant an injunction derives from an old and subsumed system of English law called the Court of Equity. Although injunctions eventually came under the jurisdiction of the combined courts of law and equity,[92] the origin of injunctions can inform us about the meaning of its remedies. Since the Court of Equity could only grant specific relief where damages (i.e., awards of money) were deemed insufficient, injunctive relief required "irreparable harm"—of a kind which could *not* be compensated monetarily—to be granted.[93] Irreparable harm, then, had jurisdictional importance for which court would hear the case and, therefore, what remedies would be available.

The Court of Equity itself emerged from the dissatisfaction of English people with the rigidity of the common law system. This led to many complaints to the King, who delegated these matters to the Chancellor to resolve through a new legal venue.[94] Since Chancellors tended to draw from ecclesiastic classes, they resolved matters in the new courts of equity largely by drawing on canon law principles of good conscience.[95] No less discretionary than the common law, but less bound to strict rules, procedures, and established legal precedents, injunctions were included among the equitable remedies the court provided. Eventually, this looser system of law could not withstand the pressure exerted by commercial markets and land privatization for the more procedural and substantive rules of doctrines in the common law.

As a result, the significance of the injunction as an equitable remedy must be understood in relation to the common law. Remedies have "distinct structure, justifications, and goals",[96] which are not integrated in a hierarchical way into the common law.[97] There is much debate in Canada on where and how these discretionary lines are drawn. As Jeffrey Berryman explains:

92. The Judicature Acts of 1873-75 fused these legal systems and courts, and in 1854 the *Common Law Procedure Act, 1854, 17-18 Vict, c 125*, ss 79 and 82 empowered common law courts to award injunctions: Robert J Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1983). Today, most provinces in Canada have a statute carrying forward the fusion of law and equity from old Judicature Acts, granting courts authority to award interlocutory injunctive relief wherever it is "just and convenient": Berryman, *Equitable Remedies*, supra note 6 at 15. Sharpe clarifies that this justification was augmented by the fusion of legal systems and must be qualified by a substantive right at stake (at 1.1140). See e.g. *Courts of Justice Act*, RSO 1990, c C.43, s 101(1): "In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so."

93. David A Crerar, "'The Death of the Irreparable Injury Rule' in Canada" (1998) 36:4 Alta L Rev 957.

94. Berryman, *Equitable Remedies*, *supra* note 6 at 2.

95. Alastair Hudson, "Conscience as the Organising Concept of Equity" (2016) 2:1 CJCCL 261; PV Baker & PSJ Langan, *Snell's Principles of Equity*, 28th ed (London: Sweet and Maxwell, 1982) at 8-9.

96. Berryman, *Equitable Remedies*, *supra* note 6 at 9.

97. *Ibid* at 10.

> It is up to the defendant to refute the plaintiff's remedy of choice. But for judges, who traditionally conceive of their role as the top of an adjudicative apex, it is difficult to escape from the position that the "discretion", in that equitable remedies are said to be discretionary, is for the judge alone to exercise.[98]

Complicating this issue, though, is that these lines are not entirely clear, especially in Canada. Equitable remedies shape substantive rights and vice versa. We can see quite clearly, for example, in the case of injunctions and First Nations, how equitable remedies are shaping Indigenous peoples' substantive rights.

The ambiguity of the relationship between these remedies and the common law is complicated by the colonial relationship between Canadian courts and Indigenous peoples. Much of this ambiguity can be found in property law, which the courts ultimately seek to protect when they are tasked with maintaining the status quo in injunction proceedings. Brenna Bhandar's exploration of racial regimes of ownership and, more specifically, her examination of the "development of the specific legal forms of private property relations"[99] in settler-colonial sites points to a framework for understanding how our modern concept of "public interest" has evolved out of this process of development. As Bhandar writes, this property law system emerged from "political ideologies, economic rationales, and colonial imaginaries that gave life to juridical forms of property and a concept of human subjectivity that are embedded in a racial order."[100] She examines, for example, the titling registration regimes of the 19th century in the British colonies that relied on a new racial science to deny Indigenous peoples' own tenure system through hierarchies of racial entitlement. Drawing on the work of geographer Nicholas Blomley, she also theorizes the process of racial property-making as "enactments" that must be repeated regularly and reproduced through legal techniques of denial.[101] What does it mean, then, to reconsider equitable remedies as part of these "colonial modes of appropriation" that constitute the public interest?

The public interest protected by injunctions is indelibly shaped by private property interests that underpin statutory schemes and common law constructs. Here, we need to dig a bit deeper into the relationship between colonialism, capitalism, and property law in Canada. In his examination of settler colonialism in British settlements, Robert Nichols' work in *Theft is Property!* offers a critical reformulation of Karl Marx's important concept of "dispossession" or "expropriation" to the process of capital accumulation. Like many others, Nichols rethinks Marx's theorization of a stadial view of violent dispossession as an essential condition for the next stage of development, a "silent

98. *Ibid*.

99. Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018) at 7.

100. *Ibid* at 22.

101. *Ibid* at 184, citing Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (London: Routledge, 2003) at 114.

compulsion of economic relations."[102] Rather, Nichols writes that "[t]here was no historical transition from extra-economic violence to silent compulsion, only a geographical displacement of the former to the imperial periphery."[103] Nichols' reformulation avoids the common move that often follows this point, which is to prolong Marx's theory of early "primitive accumulation" into the present in order to account for an ongoing, violent removal of Indigenous peoples from their lands. Instead, he rethinks the category of "dispossession" itself to produce an important insight into property relations in the settler colony. Ongoing dispossession is not only required to transform nature into commodities, but is part of the silent compulsion of capitalism where land is both "a conceptual and legal category that serves to relate humans to 'nature' and to each other in a particular, proprietary manner."[104] It is intrinsic to the culture of settler-colonialism.

Nichols traces the emergence of what he calls a "hybrid private/public form" of juridical dispossession during the settlement of Canada and other settler-colonial states in ways that are helpful in working to connect the contemporary legal tool of injunctions and the concept of "public interest" to more foundational property relations.[105] Dispossession, Nichols argues, "did not proceed through macro assertions of sovereignty but through microlevel practices that worked to dismantle one infrastructure of life and replace it with another."[106] We can apply Nichols' observation to Canada, where the transformation of land into property proceeded through mechanisms like the *Dominion Lands Act* of 1872,[107] which also privatized the theft of territory from Indigenous peoples. This federal legislation facilitated massive land redistribution of Indigenous lands to the Hudson's Bay Company (HBC), Canadian Pacific Railway, and other "colonization companies."[108] Prior to this redistribution, "Rupert's Land" was acquired through a "Deed of Surrender" in 1869 between Canada and the HBC to the lands of the Anishinaabe, Cree, Ojicree, Inuit, Innu, Dene, Gwich'in, Métis, and more, who had lived on and governed these lands for thousands of years.[109] These "Company lands" sold to Canada were then privatized again through the distribution of acreage to private companies and to European settlers.

102. Robert Nichols, *Theft is Property! Dispossession and Critical Theory* (Durham: Duke University Press, 2020) at 64.

103. *Ibid* at 65.

104. *Ibid* at 83.

105. *Ibid* at 45.

106. *Ibid* at 45.

107. *Ibid* at 44-45.

108. Peggy Martin-McGuire, *First Nation Land Surrenders on the Prairies, 1896-1911* (Ottawa: Indian Claims Commission, 1998) at 37; see also Yellowhead Institute, "Corporate Colonialism" (2021), online (pdf): <cashback.yellowheadinstitute.org/wp-content/uploads/2021/05/Corporate-Colonialism-Factsheet-Cash-Back.pdf>.

109. See e.g. Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: Native Law Centre, University of Saskatchewan, 1982).

It is this hybrid public/private form of property that we see protected in injunction cases. The discretion of the equitable remedy, coupled with the racial subjectivity embedded in the colonial property right—designed to usurp Indigenous territorial authority—naturalizes a violent process of dispossession. The implementation of the injunction on Wet'suwet'en territory, for example, was secured through the provincial authorization of permits, licenses and right of ways to the pipeline company, CGL, despite BC's legal uncertainty of the Crown's underlying title to the land.[110] The *Delgamuukw* decision led to over a decade of failed negotiations over the territory at the modern treaty table, so the province reverted to a position of denial rather than accommodation of Aboriginal title. With state regulatory approvals, the company was able to obtain an injunction, which was accompanied by an enforcement order so that public police forces could use their powers to remove Indigenous peoples from their lands. Extra-legal "exclusion zones" were created that blocked the Wet'suwet'en from accessing their territory, ever expanding the discretionary powers of injunctive relief into new domains of dispossession.[111]

Writing on the reconciliation of private property rights and Aboriginal title in the courts, Inupiat/Inuvialuit legal scholar Gordon Christie points out: "There is no such thing as a mechanical process that pushes out beyond current case law in such a way as to not implicate the invocation (however hidden and subtle it may be) of values and norms."[112] He suggests that the principles of reconciliation will be determined by forces of power that "infect" the courts, like the presumption that Canadian courts may decide the extent of power invested in First Nations' governance and law or that courts possess an "all-encompassing and overpowering set of predeterminations."[113] Pessimistically, he predicts that "[t]he most likely extrapolation, carrying with it as it will a larger background of presumptions and hidden values and principles, follows a trajectory furthering goals and objects of colonial law and policy."[114] Anishinaabe legal scholar John Borrows has also addressed the uneasy reaction of the courts to pitting third party interests directly against Aboriginal title. Yet, he is clear that the usual bias must be mitigated:

> Constitutionalized Aboriginal title rights should obviously trump non-constitutionalized property interests. As I have argued, to hold otherwise would privilege non-Aboriginal interests over rights constitutionally protected within the country's highest law. This would be discriminatory.[115]

110. The RCMP, in turn, relied on Coastal GasLink's claims with respect to the absence of legally established Aboriginal title: see Irina Ceric, "Beyond Contempt: Injunctions, Land Defence, and the Criminalization of Indigenous Resistance" (2020) 119:2 South Atl Q 353 at 366.

111. British Columbia Civil Liberties Association, "Policy Complaint Concerning RCMP Checkpoint on Morice West Forest Service Road" (29 January 2020), online (pdf): <bccla.org/wp-content/uploads/2020/01/RCMP-Complaint-Public.pdf>.

112. Gordon Christie, "Aboriginal Title and Private Property" in Maria A Morellato, ed, *Aboriginal Law Since Delgamuukw* (Aurora, ON: Canada Law Book, 2009) 177 at 180.

113. *Ibid* at 196.

114. *Ibid* at 181.

115. John Borrows, "Aboriginal Title and Private Property" (2015) 71 Sup Ct L Rev (2d) 91 at 117.

The governments cannot hide behind the courts here. Patricia Owens writes that there is really no such thing as public or private violence: "There is only violence that is made 'public' and violence that is made 'private.'"[116] Here, she is referring to the dynamics of international war, but this sentiment can readily be applied to Canada. Injunctions involving First Nations are often fought on the terrain of competing and contested sovereignties and counter-dispossession struggles by Indigenous peoples to maintain territorial authority over their lands. The veil of Crown protection for private property interests over Indigenous rights and title must be brought to account.

Conclusion: Disarming the Legal Billy Club

Two related conclusions emerge from the analysis set out above. First, at least part of the answer to the question of why the *RJR-MacDonald* test delivers such imbalanced results in conflicts over resource extraction and Indigenous rights in the present day lies in the past, and is illuminated through a re-examination of equity through the lens of settler-colonial legality. The same historical lens reminds us that the present-day political economy of injunctions cannot be divorced from the resource-based economy that continues to rest on the dispossession of Indigenous lands and jurisdiction.

Second, we show that the heavy lifting done by notions of "public interest" both relies on and obscures the circumvention—if not outright exclusion—of Aboriginal treaty and constitutional rights from the common law's calculus. Although beyond the scope of this article, the enforcement stage of injunctions, marked by broad police discretion and the further blurring of public and private, similarly relies on notions of "public interest" focused squarely on the administration of justice and the reputation and authority of the superior courts.[117] Both of these themes point to the need to limit the wallop of the interlocutory injunction in the short term while aiming for a more foundational reconfiguration in the long term. Accordingly, we conclude by asking what, if any, place exists in injunction law and practice for Indigenous law and governance.

Our research makes it clear that injunctions are a symptom of upstream failure to address the exercise of Indigenous rights properly, lawfully, and politically in Canada. The focus on "self-help" remedies in *Behn*, discussed in Parts I and II, has proliferated in the case law as a response to the fact that injunctions have become the default response to attempts by First Nations to enact and administer Aboriginal rights, attempts that often—in 41 per cent of coded cases—involve blockades or other on-the-ground assertions of jurisdiction. The "*Behn* effect", which presumptively delegitimizes such extralegal tactics even in the absence of viable alternatives, is exacerbated by a jurisprudential framework that doles out interim and interlocutory injunctions[118] with a tacit understanding that

116. Patricia Owens, "Distinctions, Distinctions: 'Public' and 'Private' Force" (2008) 84:5 Int Aff 977 at 979.

117. See e.g. *Canadian National Railway Co v Jane Doe*, 2021 BCSC 2469 at para 62.

118. Only 9 per cent of the applications we coded sought permanent injunctions. Following the conclusion of our research, in December 2022, an Ontario court issued an additional significant ruling, granting a permanent injunction in relation to the 1492 Land Back Lane reclamation on Haudenosaunee territory: *Foxgate Developments Inc v Jane Doe*, 2022 ONSC 7035 (appeal pending).

the matter will not proceed to trial—the injunction is the point. Underlying this pattern is one fundamental factor—the denial by the Crown and industry of Indigenous rights—a factor that cannot be overcome given the direction embedded into the injunction as an equitable remedy.

Understood this way, injunctions serve as an admission of the Crown title fiction at the heart of private property relations. A recent decision of the BC Supreme Court, *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*,[119] suggests that this fiction is slowly being unearthed. In a discussion of the *Delgamuukw* decision, Kent J notes the SCC's holding that "Aboriginal title 'crystallized' at the same time sovereignty was asserted, hence presumably permitting the layering/burdening of radical title", but goes on to write that, "the logic of this is perplexing. Some argue, in my view correctly, that the whole construct is simply a legal fiction to justify the de facto seizure and control of the land and resources formerly owned by the original inhabitants of what is now Canada."[120]

Two "harsh realities" stand in the way of undoing Crown sovereignty, however: its "undeniable" existence and "certain" continuation and the doctrine of precedent.[121] Taken together, the reconciliation of sovereignty and the pre-existence of Indigenous societies will "not likely entail wholesale evisceration of common-law concepts"—including those making up the law of injunctions. Nonetheless, we argue that a reckoning lies in store for *RJR-MacDonald* and *Behn*: one that builds on the promise of *Haida Nation* but exceeds it, shifting the juridical basis by which Canadian states and industry can intervene in struggles over lands, resources, and rights.

One such route would be subjecting the *RJR-MacDonald* framework to the standards set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*),[122] especially in BC, which is both the epicentre of injunctions involving First Nations and the first province to enact a statute incorporating *UNDRIP* into domestic law. The *Declaration on the Rights of Indigenous Peoples Act* (*DRIPA*) requires that the government of BC "take all measures necessary to ensure the laws of British Columbia are consistent with [*DRIPA*]".[123] Given that *UNDRIP* requires states to obtain the free, prior, and informed consent of Indigenous peoples "prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources",[124] *DRIPA* can and should be used to examine every facet of the legal framework of injunctions: the common law,[125] rules of civil

119. *Thomas v Rio Tinto Alcan Inc*, 2022 BCSC 15.

120. *Ibid* at para 198.

121. *Ibid* at paras 201-204.

122. *United Nations Declaration on the Rights of Indigenous Peoples*, being Schedule, Annex to *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, art 32(2) [*UNDRIP*].

123. *Declaration on the Rights of Indigenous Peoples Act*, *supra* note 122, s 3. See also *Canadian National Railway Co v Jane Doe*, supra note 117 at para 212.

124. *UNDRIP*, *supra* note 122.

125. Darcy Lindberg argues that "fulsome adoption of the commitments in *UNDRIP* would address the challenges involving the use of Indigenous legal orders within common law problems": "*UNDRIP* and the Renewed Application of Indigenous Laws in the Common Law" (2022) 55:1 UBC L Rev 51 at 56.

procedure, legislation such as BC's anti-SLAPP statute,[126] and Crown and police policies. While other provinces have not yet passed *DRIPA*-like statutes, similar incremental fixes are available, and to some degree inevitable, given the resurgence of Indigenous legal orders and the persistence of movements calling for a fundamental reordering of Crown-First Nations relations. Injunctions currently stand as an impediment to getting #landback, but the ground has shifted before, and it will again.

126. The province's anti-SLAPP [Strategic Lawsuits Against Public Participation] legislation allows applications for injunctions to proceed while a motion to dismiss the underlying lawsuit as a SLAPP is pending: *Protection of Public Participation Act*, SBC 2019, c 3, s 5(2). Similarly, BC's "Directives on Civil Litigation involving Indigenous Peoples" (22 April 2022), online: Province of British Columbia <news.gov.bc.ca/files/CivilLitigationDirectives.pdf>, issued pursuant to *DRIPA* in 2022, do not include any mention of injunctions.

ORIGINAL RESEARCH ARTICLE

Navigating the Interplay Amongst Public Interest Standing, Prematurity, Abuse of Process, and Facts and Evidence

Anna Lund*

Abstract: This article considers how the public interest standing test should be applied when a litigant challenges legislation that has not yet been invoked, on the basis that the mere existence of the legislation chills *Charter* rights and freedoms. The Supreme Court of Canada has directed that the public interest standing test should be applied generously and liberally, to ensure robust protection for *Charter* rights and freedoms. The recent Alberta Court of Appeal decision of *Alberta Union of Public Employees v Alberta* illustrates that in cases involving legislative chill, the breadth of the public interest standing test can be restricted by interweaving concepts of prematurity, abuse of process, and facts and evidence. *Alberta Union of Public Employees* is a problematic precedent, but it also provides a rich opportunity for considering how litigants and courts should approach public interest standing in cases involving *Charter* claims based on legislative chill. This article teases out how the Alberta Court of Appeal narrowed the test for public interest standing by combining the concepts of prematurity, abuse of process, and facts and evidence, and provides guidance on how these concepts can be navigated to ensure litigants can turn to courts for relief when legislatures enact statutes that threaten democratic practices and institutions.

* Associate Professor, University of Alberta, Faculty of Law. Special thanks to Jessica Eisen, Holly McEwan, Avnish Nanda, Gerard Kennedy, Scott Matheson, and the two anonymous reviewers, who generously provided helpful feedback on earlier iterations of this article.

CONTENTS

Introduction

Standing is a legal determination as to whether "*this* plaintiff, in *these* circumstances [can] have *this* issue adjudicated."[1] In some areas of law, such as public nuisance law, special rules regarding standing have been developed by the courts.[2] In others, such as corporate oppression and derivative remedies, legislators have implemented standing rules through statute.[3] Many administrative

1. Thomas A Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell Co Ltd, 1986) at 210 [emphasis added].
2. *See Ryan v Victoria (City)*, 1999 CanLII 706 (SCC) at para 52; *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 66; Shaun Fluker, "The Right to Public Participation in Resources and Environmental Decision-Making in Alberta" (2015) 52:3 Alta L Rev 567 at 573-74.
3. See e.g. *Canada Business Corporations Act*, RSC 1985, c C-44, ss 238-39, 241, 247, discussed in Cromwell, *supra* note 1 at 27-42.

tribunals and decision-makers have their standing rules set out in their enabling legislation.[4] In civil cases, standing often goes uncontested because it is evident that the plaintiff is directly affected by a dispute, for example, when an injured party sues for compensation following a car accident or when a spouse seeks relief following the breakdown of a relationship. In public interest litigation, including constitutional litigation, a party may have standing on the basis that they are directly impacted by the impugned legislation, such as when someone accused of a criminal offence challenges the constitutionality of the provision under which they have been charged. Alternatively, a party may be granted public interest standing to challenge the constitutionality of legislation despite not being directly impacted by it.[5]

Arguments over standing in public interest litigation engage with fundamental questions about the role of the judiciary, access to justice, and the scope of the *Charter*. Writing in 1987, WA Bogart observed that one question animating the doctrine of standing is: "[W]hat interests should be recognized and protected and how is it that we make such decisions?"[6] He worried that if courts adopted a narrow approach to standing, it would reinforce a narrow interpretation of the *Charter*, focused on conventional notions of harm to individual persons and property.[7] Similarly, in 2011, Jane Bailey warned that an overly narrow approach to public interest standing would result in individualized litigation and individualized remedies, undermining the ability of *Charter* litigation to achieve systemic reform.[8] The Supreme Court of Canada (SCC) has directed that, to avoid "shackl[ing]" the *Charter*, "a generous and liberal approach should be taken to the issue of standing."[9] This generous and liberal approach promotes robust *Charter* rights and freedoms for all Canadians.

Cases in which legislative chill is an aspect of an alleged rights violation sharpen the importance of generous and liberal approaches to public interest standing. Legislative chill occurs when there is "uncertainty surrounding the scope or application of a law", and thus people avoid engaging in

4. See e.g. *Water Act*, RSA 2000 c W-3, s 109, discussed in Fluker, "The Right to Public Participation in Resources and Environmental Decision-Making in Alberta", *supra* note 2 at 579; *Municipal Government Act*, RSA 2000, c M-26, s 685.
5. Although the test for public interest standing was developed in constitutional litigation, it has been used to grant parties standing in other areas of law: see *Finlay v Canada* (*Minister of Finance*), 1986 CanLII 6 (SCC) [*Finlay*].
6. WA Bogart, "Standing and the Charter of Rights and Identity" in Robert J Sharp, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 1-26 at 2.
7. *Ibid* at 7, 23.
8. Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44:2 UBC L Rev 255 at 265.
9. *Canadian Council of Churches v Canada* (*Minister of Employment and Immigration*), 1992 CanLII 116 (SCC) at 250.

Charter-protected activities "for fear of violating the relevant law."[10] Cases involving legislative chill call on courts to assess threats to democratic practices and institutions; where judicial reasoning on standing is stingy, critically important legal issues may be shielded from review.[11]

In December 2021, the Alberta Court of Appeal released a decision on public interest standing in a case involving legislative chill, *Alberta Union of Public Employees v Alberta*.[12] A union and three individual union members challenged the constitutionality of a new provincial statute on the basis that it impermissibly restricted their *Charter* freedoms of expression, association, and assembly, as well as on other grounds. Their challenge was commenced before anyone had been charged under the legislation, and the plaintiffs argued that the mere existence of the legislation created a "chill" that impermissibly prevented people from exercising their *Charter* freedoms.

The Alberta Court of Appeal struck the plaintiffs' claim as an abuse of process, holding that the plaintiffs lacked standing to challenge the statute because their application was premature and not supported by a sufficient factual setting and evidentiary record. The plaintiffs sought leave to appeal the matter to the SCC, but their application was denied.

A month after the *Alberta Union of Public Employees* decision was released, the SCC heard arguments in another public interest standing case, *British Columbia* (*Attorney General*) *v Council of Canadians with Disabilities*.[13] In *Alberta Union of Public Employees*, one of the Alberta government's arguments for why leave should *not* be granted was that the issues raised by the plaintiffs would be resolved in *Council of Canadians with Disabilities*.[14] The *Council of Canadians with Disabilities* case does provide direction on how courts should assess the sufficiency of an applicant's factual setting and evidentiary record when deciding whether to grant them public interest standing. However, the SCC decision in *Council of Canadians with Disabilities* does not answer the questions raised by *Alberta Union of Public Employees* about when standing is appropriate for litigants to pursue *Charter* claims based on legislative chill.

The *Alberta Union of Public Employees* case stands as a problematic precedent and has already been relied on by at least one government party arguing against granting public interest standing to a litigant.[15] But, the case also provides a rich opportunity for considering how litigants and courts *should* approach public interest standing in cases involving *Charter* claims based on legislative chill.

---

10. *Hansman v Neufeld*, 2023 SCC 14 at para 75 (describing "chill" in freedom of expression cases).
11. With special thanks to Jessica Eisen for helping me to clarify my thinking on this point.
12. 2021 ABCA 416 [*Alberta Union of Public Employees* (ABCA)], rev'g 2021 ABQB 371 [*Alberta Union of Public Employees* (ABQB)], leave to appeal to SCC refused, 2022 CanLII 69784 (SCC) [*Alberta Union of Public Employees* (SCC leave)].
13. 2022 SCC 27 [*Council of Canadians with Disabilities* (SCC)], aff'g 2020 BCCA 241 [*Council of Canadians with Disabilities* (BCCA)], rev'g *MacLaren v British Columbia* (*Attorney General*), 2018 BCSC 1753 [*MacLaren*].
14. *Alberta Union of Public Employees* (SCC leave), *supra* note 12 (Response to Application for Leave to Appeal at paras 40-44).
15. *Single Mothers' Alliance of BC Society v British Columbia*, 2022 BCSC 2193 at paras 48, 76.

This article teases out how the Alberta Court of Appeal narrowed the test for public interest standing in *Alberta Union of Public Employees* by combining the concepts of prematurity, abuse of process, and facts and evidence, and provides guidance on how these concepts can be navigated to ensure litigants can turn to courts for relief when legislatures enact statutes that threaten democratic practices and institutions.

The article starts, in Part I, with an overview of *Alberta Union of Public Employees* and *Council of Canadians with Disabilities*. It then turns to the three threads that the Alberta Court of Appeal wove together in *Alberta Union of Public Employees* to create a restrictive approach to standing: prematurity, abuse of process, and facts and evidence. Part II examines prematurity, which is the concept that a court can decline to decide issues before they are ripe. A premature claim is non-justiciable, and a party cannot be granted public interest standing to litigate a non-justiciable claim. Part III takes up the concept of abuse of process, arguing that the Alberta Court of Appeal in *Alberta Union of Public Employees* was wrong to hold that pursuing litigation where one does not have standing is, *without more*, an abuse of process. Part IV considers what types of facts and evidence are necessary for sustaining a claim to public interest standing in constitutional litigation. The article concludes with suggestions for how future courts and litigants can approach the overlapping concepts of standing, prematurity, abuse of process, and facts and evidence.

I. A Brief Introduction to *Alberta Union of Public Employees* and *Council of Canadians with Disabilities*

Alberta Union of Public Employees and *Council of Canadians with Disabilities* centre on the test for when a party will be granted public interest standing. The SCC developed the test through a trilogy of cases, starting with *Thorson v Canada* in 1974, followed the next year by *Nova Scotia Board of Censors v McNeil*.[16] In the 1981 case of *Canada v Borowski* ("*Borowski #1*"), the third case in the trilogy, the Court articulated a three-part test, indicating that a grant of public interest standing was appropriate: (i) "if there is a serious issue" as to the constitutional validity of legislation; (ii) if the litigant is directly affected or "has a genuine interest as a citizen"; and (iii) if "there is no

16. *Thorson v Attorney General of Canada* (1974), 1974 CanLII 6 [*Thorson*]; *Nova Scotia Board of Censors v McNeil*, 1975 CanLII 14 (SCC) [*McNeil*]. For a history of the development of the public interest standing test, see generally Cromwell, *supra* note 1 at 74-95; Peter Hogg & Wade K Wright, *Constitutional Law of Canada, Vol 2*, 5th ed (Toronto: Carswell, 2021) (loose-leaf updated 2022, release 1, supp) at 59-7-12; and Bailey, *supra* note 8 at 260-64.

other reasonable and effective manner in which the issue may be brought before the Court."[17] The SCC subsequently confirmed that the test could be used to grant public interest standing in non-constitutional cases as well.[18]

In the 2012 case of *Downtown Eastside Sex Workers United Against Violence Society v Canada*, a unanimous SCC refined the test in two important ways.[19] First, the court recharacterized the three-part test, directing that the three parts should not be treated as a "rigid checklist", but rather as a set of "considerations to be taken into account and weighed in exercising judicial discretion."[20] Second, the Court restated the third part of the test. Instead of asking if there was "no other reasonable and effective manner" to bring the issue before the court, it asked if the proposed litigation was a reasonable and effective manner of bringing the issue before the court.[21] Although not identified as a change to the test, the Court also reworded the first part to ask whether the litigant had articulated a "serious justiciable issue."[22] The courts in *Alberta Union of Public Employees* and *Council of Canadians with Disabilities* applied this revised version of the test.

1. *Alberta Union of Public Employees v Alberta*

In *Alberta Union of Public Employees v Alberta*, the Alberta Court of Appeal overturned a lower court decision to grant a union, and three of its members, public interest standing. The plaintiffs had challenged a new statute, the *Critical Infrastructure Defence Act* (*CIDA*).[23] *CIDA* imposed penalties and imprisonment on people and organizations for a range of activities, including "entering" onto

17. *Minister of Justice (Can.) v Borowski*, 1981 CanLII 34 (SCC) at 598 [*Borowski #1*], rev'g on other grounds *Borowski v Minister of Justice of Canada and Minister of Finance of Canada*, 1980 CanLII 2279 (SKCA), rev'g in part 1980 CanLII 2238 (SKKB).
18. *Finlay*, *supra* note 5.
19. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside Sex Workers*].
20. *Ibid* at paras 3, 36.
21. *Ibid* at para 44 [emphasis added]; see discussion of this change in Lisa Kerr & Elin Sigurdson, "'They Want In': Sex Workers and Legitimacy Debates In the Law of Public Interest Standing" (2017) 80 SCLR (2d) 145 (QL) at para 61.
22. *Ibid* at para 2. On justiciability, see Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed (Toronto: Thomson Reuters Canada, 2012) at 32. See also the text accompanying note 42.
23. *Alberta Union of Public Employees* (ABCA), *supra* note 12, challenging *Critical Infrastructure Defence Act*, SA 2020, c C-32.7 [*CIDA*].

essential infrastructure "without lawful right, justification or excuse."[24] According to one member of the Alberta Legislative Assembly, *CIDA* was "introduced primarily in response to blockades by 'green zealots and eco radical thugs'", and scholars have noted that it formed part of a larger legislative agenda seemingly targeting progressive activism.[25]

The plaintiffs were concerned with how *CIDA* interfered with the union and its members' ability to picket and leaflet during collective bargaining. They challenged the constitutionality of the law on a number of grounds, including that it infringed their *Charter*-protected freedoms of expression, assembly, and association; that section 7 of the *Charter* was infringed by the statute's "vague and overbroad language" as well as its "disproportionate and arbitrary penalties"; and that the statute was *ultra vires* the province as it infringed on the federal government's powers over criminal law and interprovincial pipelines.[26] The plaintiffs sought a declaration that *CIDA* was unconstitutional and of no force and effect.[27] They launched their challenge six days after the statute was passed and before anyone had been charged under it.[28]

After the plaintiffs filed their Statement of Claim, and before any further steps were taken in the litigation, the Government of Alberta applied to strike or dismiss the claim on the following grounds:

> The Statement of Claim discloses no reasonable claim, is irrelevant or improper, and has no merit. The remedies sought in the Claim are premature; and are purely speculative and hypothetical. Further or in the alternative, the Plaintiffs have no standing to bring this Claim.[29]

---

24. *Ibid*, ss 2-3.

25. Jodi Lazare, "Ag-Gag Laws, Animal Rights Activism, and the Constitution: What is Protected Speech?" (2020) 58:1 Alta L Rev 83 at 89, citing Alberta, Legislative Assembly, *Alberta Hansard*, 30-2 (26 February 2020) at 12 (Michaela Glasgo) online: <docs.assembly.ab.ca/LADDAR_files/docs/hansards/han/legislature_30/session_2/20200226_0900_01_han.pdf>. Lazare likens *CIDA* to another statute passed by the same government in 2019, the *Trespass Statutes (Protecting Law-Abiding Property Owners) Amendment Act*, 2019, SA 2019, c 23, which Lazare indicates was targeted at farm-based animal rights protestors. See also Jennifer Koshan, Lisa Silver & Jonnette Watson Hamilton, "Protests Matter: A *Charter* Critique of Alberta's Bill 1" (9 June 2020), online (blog): *ABlawg* <ablawg.ca/wp-content/uploads/2020/06/Blog_JK_LAS_JWH_Bill1.pdf>. Legislation like *CIDA* is not unique to Alberta. Writing in 2022, Nick Crockett noted that 18 American states had enacted similar legislation: Nick Crockett, "The Rise of Critical Infrastructure Protest Legislation and Its Implications for Radical Climate Activism" (2022) 33:2 Colo Envtl LJ 407 at 420.

26. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Statement of Claim at para 8).

27. *Ibid* (Statement of Claim at para 42).

28. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 2. They argued that the statute also ran afoul of provisions in Alberta's Bill of Rights and international labour law instruments (*ibid* at paras 37-39).

29. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Application to Strike, Respondent at paras 4-5).

A Justice of the Court of Queen's Bench of Alberta (as it was then known) dismissed the Government's application, finding that the Court should exercise its discretion to grant the plaintiffs public interest standing. The Government appealed and the Alberta Court of Appeal reversed the lower court's decision, finding that the lower court erred in granting public interest standing to the applicants. The Alberta Court of Appeal held that claim lacked a "factual platform established by evidence" and thus the litigation was not a reasonable and effective way to challenge the legislation.[30] It also held that bringing a claim without standing amounted to an abuse of process.[31]

2. *British Columbia (Attorney General) v Council of Canadians with Disabilities*

In the case of *British Columbia (Attorney General) v Council of Canadians with Disabilities*, the SCC granted public interest standing to a not-for-profit.[32] The not-for-profit sought to challenge the constitutionality of British Columbia legislation that allowed patients with mental disabilities to be subjected to involuntary treatment on the basis of sections 7 and 15 of the *Charter*.

Initially, the not-for-profit and two individual plaintiffs, both of whom had been subject to involuntary treatment, brought the litigation. The two individual plaintiffs discontinued their litigation, and the not-for-profit amended its notice of civil claim to plead that it was entitled to public interest standing.[33] The Attorney General of British Columbia applied to dismiss the claim on the basis that the not-for-profit lacked standing.

The British Columbia Supreme Court granted the Attorney General's application and dismissed the not-for-profit's claim, finding that it had failed the first and third parts of the test for public interest standing and only "weakly" met the requirement of a genuine interest.[34] It held that the plaintiff's factual basis was insufficient and that the constitutional issues could be raised by directly impacted individuals.[35] The British Columbia Court of Appeal found that the lower court had erred on the question of whether there was a serious justiciable issue, and remitted the matter to the lower court for reconsideration.[36] The SCC held that both lower courts erred: the British Columbia

30. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at paras 1, 82.
31. *Ibid* at para 18.
32. *Council of Canadians with Disabilities* (SCC), *supra* note 13.
33. *Ibid* at para 10.
34. *MacLaren*, *supra* note 13 at paras 40 (no serious justiciable issue), 53 ("weakly" meets the genuine interest criteria), 96 (not a reasonable and effective means), 98-99 (claim dismissed).
35. *Ibid* at paras 37, 95.
36. *Council of Canadians with Disabilities* (BCCA), *supra* note 13 at paras 114 (error), 124 (remit for reconsideration).

Supreme Court in denying standing and the British Columbia Court of Appeal in remitting the matter back to the lower court. It granted public interest standing to the not-for-profit, noting that there were serious limitations to individuals with mental disabilities pursuing *Charter* litigation, and that the organization could call individuals to provide evidence about their experiences without joining them as litigants.

II. Prematurity and Public Interest Standing

An important difference between *Alberta Union of Public Employees* and *Council of Canadians with Disabilities* is that in the latter case, there was substantial evidence available on how the challenged law was operating. People were being subjected to involuntary treatment under the impugned legislation. In contrast, in the former case, the plaintiffs launched their challenge of *CIDA* six days after the legislation had come into force.[37] Nobody had been charged under it by the time the challenge was launched, and 18 months later, when the Alberta Court of Appeal released its reasons, it noted that the statute still had not been "invoked against anyone."[38] Thus, the applicants could not provide evidence of how individuals were affected when subjected to the statute's punitive provisions. However, the union's argument was not merely that the law *might* be invoked against a person in a manner that was unconstitutional but that the very existence of vaguely worded and punitive legislation inhibited people from exercising their constitutionally protected freedoms of expression, assembly, and association.

In *Alberta Union of Public Employees*, the Alberta Court of Appeal characterized the plaintiffs' claim as premature because they were attempting to litigate a constitutional question on the basis of "hypothetical scenarios".[39] Lorne Sossin has characterized hypothetical questions as one element of the doctrine of ripeness. Ripeness refers to the principle "that a person's interests must be affected by an action or law prior to their challenging it."[40] A claim that is not sufficiently ripe is called premature.[41] The ripeness principle is part of the larger doctrine of justiciability, and gives courts discretion to decline to hear a case if it determines that the matter is premature.[42]

37. *Alberta Union of Provincial Employees* (ABCA), *supra* note 12 at para 2. *CIDA* came into force on June 17, 2020.

38. *Ibid* at para 5. The statute was eventually used to charge Arthur Pawlowski, a controversial pastor involved in an anti-lockdown blockade in Coutts, Alberta: see Meghan Grant, "Calgary preacher guilty of mischief for urging truckers to continue Coutts border protest", *CBC News* (2 May 2023), online: <cbc.ca/news/canada/calgary/calgary-preacher-artur-pawlowski-coutts-charges-1.6828385>.

39. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 1.

40. Sossin, *supra* note 22 at 40.

41. Hogg & Wright, *supra* note 16 at 59-24.

42. Sossin, *supra* note 22 at 32.

Justiciability is a separate concept from standing, concerned with the question of what issues a court should hear as opposed to *who* is able to bring the claim;[43] however, the concepts are intimately connected. The first part of the test for public interest standing requires an applicant to satisfy the court that the issue they wish to argue is both *serious* and *justiciable*.[44] In *Canadian Bar Association v British Columbia*, a case about the (in)sufficiency of civil legal aid, the British Columbia Court of Appeal analyzed the question of whether the issue was justiciable before considering the question of standing. It reasoned that a litigant pursuing a non-justiciable claim could not satisfy the first part of the public interest standing test.[45]

Not all claims based on hypothetical examples are non-justiciable; the analysis is complicated.[46] The SCC has repeatedly endorsed the use of hypothetical examples to assess the constitutionality of legislation that is alleged to violate section 12 of the *Charter*'s prohibition on cruel and unusual punishment.[47] The SCC recently reaffirmed this practice in *R v Hills*, a case decided after both *Alberta Union of Public Employees* and *Council of Canadians with Disabilities*.[48] Both the SCC and Sossin note that the use of hypothetical examples is not limited to section 12 cases, and cite *Big M Drug Mart* to illustrate how a case can rely on hypothetical examples to determine that legislation infringed the *Charter*.[49] In *Big M Drug Mart*, the majority reasoned that a Sunday closing law was unconstitutional as against a corporation based on the following hypothetical involving the *Charter* rights of an individual:

43. Hogg & Wright, *supra* note 16 at 59-3.

44. *Downtown Eastside Sex Workers*, *supra* note 19 at para 2; and see Sossin, *supra* note 22 at 258.

45. 2008 BCCA 92 [*Canadian Bar Association* (BCCA)] at para 11, aff'g on different grounds 2006 BCSC 1342, leave to appeal to SCC refused, 2008 CanLII 39172 (SCC), as discussed in Lorne Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid" (2007) 40:2 UBC L Rev 727; and Bailey, *supra* note 8 at 271. The interlocking questions of justiciability and public interest standing have more recently arisen in youth-led climate change litigation: see e.g. *Mathur v Ontario*, 2020 ONSC 6918 at paras 103-140, 238-253 and discussed in Nathalie J Chalifour, Jessica Earle & Laura Macintyre, "Coming of Age in a Warming World: The *Charter*'s Section 15(1) Equality Guarantee and Youth-Led Climate Litigation" (2021) 17:1 JL & Equality 1 at 37-40, 61-62.

46. Sossin, *supra* note 22 at 48-83.

47. *Ibid* at 49.

48. 2023 SCC 2 at paras 67-93 [*Hills*].

49. *Ibid* at paras 70, 72; Sossin, *supra* note 22 at 52; see also Sossin, "The Justice of Access", *supra* note 45 at 736, citing additional examples, including *R v Oakes*, 1986 CanLII 46 (SCC) and *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 [*Chaoulli*]; see also *R v Heywood*, 1994 CanLII 34 (SCC) at 799.

> If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish. It seems to me that any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.[50]

Consider also the SCC's 1989 decision in *Edmonton Journal v Alberta*.[51] A newspaper challenged legislation that restricted it from publishing information about family and civil claims on the basis that the legislation infringed the newspaper's freedom of expression. The case turned on section 1 of the *Charter*, and the majority and dissent both relied on hypotheticals to analyze whether the legislation was a reasonable limit of freedom of expression protections under section 2(b). The main disagreement between the majority and the dissent had to do with what types of information the legislation prohibited the newspaper from publishing. For example, Cory J expressed concern that the newspaper could be subject to enforcement proceedings "if... [it] discussed in general terms the kinds of evidence introduced" in a lawsuit without identifying the litigants or "if... [it] chose to comment on the conduct or remarks of a judge or counsel."[52] In dissent, La Forest J rejected the contention that either of these hypotheticals entitled the Attorney General to take enforcement proceedings under the legislation.[53]

Sossin distinguishes between the permissible use of *hypothetical examples* and *hypothetical claims*, which are problematically premature because they lack a "live dispute" involving "real people in real situations."[54] A litigant's invocation of hypothetical examples may indicate that their claim is problematically hypothetical, but not in every case. Problematically hypothetical claims fall into two categories: speculative or contingent questions, and abstract or academic questions.[55] In the former category, Sossin includes situations where people have challenged legislation under which they could be prosecuted, but have not yet been.[56] In the latter category, he includes cases where litigants lack a live interest and cases where there is an insufficient factual foundation.[57] The following three subsections examine each of these three subcategories of hypothetical cases, consider if the *Alberta Union of Public Employees* case falls into any of them, and conclude that it does not.

---

50. *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC) at para 100 [*Big M Drug Mart*]. There is complexity around when a corporation can challenge the constitutionality of legislation based on a breach of a hypothetical individual's *Charter* rights: see Hogg & Wright, *supra* note 16 at 59-12-19; Howard Kislowicz, "Business Corporations as Religious Freedom Claimants in Canada" (2017) 51 RJTUM 337 at 346-47; however, this issue was not raised in *Alberta Union of Public Employees* (ABCA), *supra* note 12, and likely would not need to be, given that three of the plaintiffs were individuals.
51. June Ross, "Standing in *Charter* Declaratory Actions" (1995) 33:1 Osgoode Hall LJ 151 at 168, citing *Edmonton Journal v Alberta* (*Attorney General*), 1989 CanLII 20 (SCC) [*Edmonton Journal* (SCC)], rev'g 1987 ABCA 147 (CanLII) [*Edmonton Journal* (SCC)], aff'g 1985 CanLII 1233 (ABKB) [*Edmonton Journal* (ABKB)].
52. *Edmonton Journal* (SCC), *supra* note 51 at 1346. Wilson J concurred on this point (*ibid* at 1357).
53. *Ibid* at 1375.
54. Sossin, *supra* note 22 at 48-49.
55. *Ibid* at 53.
56. *Ibid* at 53-54.
57. *Ibid* at 71-76.

1. Speculative or Contingent Questions

A speculative case is "contingent on future events."[58] Sossin cites the 1964 SCC decision in *Saumur v Canada* as an example of a speculative case, and it is a useful case to spend some time with because it bears many similarities to *Alberta Union of Public Employees*.[59] In *Saumur*, a member of the Jehovah's Witness religious community challenged a Québec statute the day after it came into force on the basis that it was *ultra vires* the province. The legislation prohibited people from making "outrageous or injurious" attacks on other religions and provided that people who breached the act could be fined or made subject to a court injunction.[60] The plaintiff had not been charged or enjoined under the legislation. The speculative aspect of the case was that someone might be charged under the legislation at some future point, and such a charge would be unconstitutional because it would amount to a provincial exercise of the federal criminal power. The SCC described the plaintiff's claim as: "asking us to prevent the troubles that this legislation might cause him and protect him from inconvenience that he has not suffered yet."[61] The SCC declined to decide the constitutional question, finding that the plaintiff lacked a sufficient interest in the matter.

Some of the claims advanced by the plaintiffs in *Alberta Union for Public Employees* were speculative, and some of them were not. The plaintiffs argued that *CIDA* might deprive individuals of their liberty under section 7 of the *Charter*. This was a speculative claim because it was based on the possibility that a person might be arrested under the law. But the plaintiffs also argued that the existence of broadly worded, punitive legislation had cast a chill that prevented the union and its members from exercising their freedoms of expression, association, and assembly. The chill was not speculative, but a fact capable of proof from the moment the legislation was enacted.

This division between the speculative and non-speculative claims in *Alberta Union for Public Employees* is evident in the Court of Queen's Bench of Alberta's analysis. The Justice accepted, for the purposes of the motion to strike, that there was a chill.[62] She then went on to develop a number of hypothetical examples of situations that may give rise to charges upon which the constitutionality of the legislation could also be tested.[63] These hypothetical examples were relevant to analyzing the claims based on potential invocations of the law, but not those based on chill.

58. *Ibid* at 53.

59. *Saumur et al c Procureur général du Québec*, 1964 CanLII 67 (SCC) [*Saumur*]. Additionally, Sossin, *supra* note 22 at 53 cites *Smith v The Attorney General of Ontario*, 1924 CanLII 3 (SCC) [*Smith*], discussed in Part II(3).

60. *An Act Respecting Freedom of Worship and the Maintenance of Good Order*, 2-3 Eliz II, c 15 (SQ, 1953-4), ss 2, 10.

61. *Saumur*, *supra* note 59 at 256 [translated by author].

62. *Alberta Union of Public Employees* (ABQB), *supra* note 12 at para 17.

63. *Ibid* at paras 38-39.

The Court of Queen's Bench of Alberta was not prohibited from using hypothetical examples to evaluate the plaintiffs' speculative claims. As set out above, the SCC has employed hypothetical examples in its analysis of *Charter* claims and has recently endorsed this practice in strong terms. But, even if this case was not an appropriate one for the use of hypothetical examples, they were unnecessary to analyze whether the legislative chill constituted an infringement on *Charter* rights. The claim about chill was not speculative.

2. Abstract or Academic Questions – No Live Interest

An abstract case can be one where litigants lack a "live interest."[64] Sossin cites the 1989 SCC decision in *Borowski #2* as an example of a case that is hypothetical because the plaintiff lacked a live interest.[65] Mr. Borowski, an anti-abortion activist, appeared twice before the SCC on the issue of standing.

In its first decision, *Borowski #1*, the SCC granted public interest standing to Mr. Borowski to challenge the provisions of the *Criminal Code* that allowed doctors to perform therapeutic abortions.[66] At the time, performing an abortion was a criminal offence unless it was covered by the exculpatory provision.[67] The applicant alleged that the exculpatory provisions violated the *Charter* rights of feotuses.

After being granted public interest standing in *Borowski #1*, Mr. Borowski's claim returned to the trial level for an argument on the merits. He received unfavourable decisions at the Court of Queen's Bench for Saskatchewan (as it was then known) and the Saskatchewan Court of Appeal; both levels of court held that *Charter* protections did not apply to foetuses.[68] Mr. Borowski appealed to the SCC, but before his matter was heard, the *Criminal Code* provisions that he was challenging were struck down as unconstitutional in *R v Morgentaler*.[69] The SCC then declined to decide the substantive merits of Mr. Borowski's claim, holding instead that the claim was moot and Mr. Borowski did not have standing to pursue it. Mr. Borowski was no longer challenging the constitutional validity of legislation, but rather was asking the Court to rule on an abstract question, namely the scope of the protections contained in sections 7 and 15 of the *Charter*.[70]

---

64. Sossin, *supra* note 22 at 71.
65. *Ibid*.
66. *Borowski #1*, *supra* note 17.
67. *Criminal Code*, RSC 1970, c C-34, s 251.
68. *Borowski v Attorney General of Canada and Minister of Finance of Canada*, 1983 CanLII 2157 (SKKB), aff'd 1987 CanLII 4890 (SKCA) [*Borowski #2* (SKCA)], aff'd on other grounds 1989 CanLII 123 (SCC) [*Borowski #2* (SCC)]. Both levels of court found section 7 did not apply to foetuses. The Saskatchewan Court of Appeal held that section 15 also did not apply; this argument had not been "seriously pursued" before the Court of Queen's Bench for Saskatchewan because that section of the *Charter* was not in force at the time: *Borowski #2* (SKCA) (*ibid* at para 11).
69. *R v Morgentaler*, 1988 CanLII 90 (SCC).
70. *Borowski #2* (SCC), *supra* note 68 at 352, 366-67.

The claim in *Alberta Union of Public Employees* was not abstract in the sense contemplated in *Borowski #2*. The plaintiffs were not asking the court to opine, in the abstract, on the scope of the freedoms of expression, assembly, or association, but rather, to consider if an existing, in-force statute infringed on those freedoms.

3. Abstract or Academic Questions – Cases Lacking a Factual Foundation

Sossin cites two cases as exemplars of claims that are hypothetical because they lack a factual foundation: *Danson v Ontario*[71] and *MacKay v Manitoba*.[72] These cases involved litigants who were unsuccessful because they failed to plead sufficient facts about the legislation's real-world impact and tried instead to rely on facts about the legislation's background or social context.

It will be helpful, in thinking about these cases, to distinguish between facts and evidence. Facts are assertions that are capable of proof. Adequate pleadings must set out the facts that, if proven, will entitle litigants to the relief they seek. Often, litigants will have competing accounts of the facts. Evidence is the material that parties put before the court to support their account of the facts, and can include documents, oral or written testimony, and expert opinions.

In *Danson v Ontario*, a lawyer brought a constitutional challenge without facts or evidence.[73] A new procedural rule allowed courts to make lawyers personally liable for costs awards, and the lawyer alleged that the rule infringed the independence of the legal profession, was *ultra vires* the province's powers over the administration of justice, and violated sections 7 and 15 of the *Charter*.[74] His challenge was brought under a provision of Ontario's *Rules of Civil Procedure* that allowed for a litigant to bring a proceeding by way of application where "it is unlikely that there will be any material facts in dispute."[75]

The SCC quashed Danson's application, holding that the claim could not be decided in the abstract because the challenge was based on the effect of the law on the legal profession in Ontario.[76] To decide the constitutional issue, the court would require two types of facts: adjudicative *and* legislative facts.[77] It described the distinction between these two facts as follows:

---

71. *Danson v Ontario* (*Attorney General*), 1990 CanLII 93 (SCC) [*Danson*].
72. 1989 CanLII 26 (SCC) [*Mackay*].
73. *Danson*, *supra* note 71 at 1091. Eventually, on appeal to the SCC, he did make an application to adduce fresh evidence, but the SCC decided his appeal on the basis of whether he could challenge the rule without a factual underpinning (*ibid* at 1098). However, it is unclear how additional evidence would assist his position if his pleadings did not contain the necessary facts, and perhaps he should have instead applied to amend his pleadings.
74. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 57.07 [*Rules of Civil Procedure* (ON)].
75. *Ibid*, r 14.05(3)(h).
76. *Danson, supra* note 71 at 1101.
77. *Ibid*.

> Adjudicative facts are those that concern the immediate parties: in Davis' [sic] words, "who did what, where, when, how, and with what motive or intent ..." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements.[78]

The applicant had indicated he would put legislative facts before the court in his argument, but the Court held that, in this case, the applicant's factual foundation was insufficient. The Court struck the claim, likening it to the case it decided a year earlier: *Mackay*.

In *Mackay*, a taxpayer challenged Manitoba legislation that allowed provincial election candidates to have up to 50 per cent of their expenses reimbursed by the provincial government if they received more than 10 per cent of the vote.[79] The taxpayer alleged that the legislation violated their freedom of expression, but their application was dismissed by the SCC.[80] At different points in the Court's analysis, it describes the defect in the plaintiff's case as a "factual vacuum" or an insufficient evidentiary record, but these are, as set out above, distinct defects.[81] Counsel for the applicant did appear to have provided some evidence of *legislative* facts to the court: they cited statistics about the popularity of neo-Nazi political parties in Canada and made representations about how more money in campaigns negatively impacted the quality of discourse.[82] The SCC noted: "It may well be that one could take judicial notice of some of the broad social facts referred to by the appellants, but here there is a total absence of a factual foundation to support their case."[83] From this, one can surmise that it was the combined absence of *adjudicative* facts, and evidence to establish them, which was fatal to the applicant's case.

Below, Part IV(1) will outline that there are exceptional cases in which courts are prepared to decide matters solely on the basis of legislative facts, and thus *Danson* and *Mackay* should not be read as a complete bar on this practice.

The question in *Alberta Union of Public Employees* was not put before the court based solely on legislative facts. Rather, the plaintiffs' pleadings set out adjudicative facts that help particularize the impact of the chill. These facts included a description of the employees represented by the union, some of the collective agreements for which the union was the exclusive bargaining agent, and that

78. *Ibid* at 1099, citing Kenneth Culp Davis, *Administrative Law Treatise*, Vol 2 (St Paul, Minn: West Publishing, 1958) at para 15.03.

79. *The Elections Finances Act*, SM 1982-83-84, c 45.

80. *Mackay*, *supra* note 72 at 360.

81. Compare *ibid* at 361 ("*Charter* decisions should not and must not be made in a factual vacuum.") and at 363 ("In this case there has been not one particle of evidence put before the Court.").

82. *Ibid* at 363-66.

83. *Ibid* at 366.

the collective agreements for at least two of the bargaining units had expired in March 2020 (three months before the Statement of Claim was filed) and were being renegotiated.[84] According to the Statement of Claim, "an inability, or perceived inability to engage in leafletting, or lawful picketing will substantially hinder AUPE's ability to meaningfully engage in the collective bargaining process."[85]

The claim that *CIDA* was so vague and punitive that it prevented Albertans from exercising their *Charter*-protected rights is not hypothetical in any of the senses considered by Sossin. The chilling effect of *CIDA* became a fact, capable of proof, the moment that the legislation came into force, or at the very latest when people in Alberta circumscribed their activities because they feared repercussions under *CIDA*. The key question before the Court was whether the magnitude of the threat posed by the legislation, even without being invoked against anyone, was sufficiently oppressive to constitute an unconstitutional infringement of *Charter*-protected rights, including those of expression, assembly, and association.

The 1924 SCC case of *Smith v Ontario* is often cited as illustrating the restrictive approach to public interest standing taken by Canadian courts prior to *Thorson, McNeil*, and *Borowski #1*.[86] And yet, even in this case, the Court indicated that a statute might be so oppressive that it will be appropriate to grant a party standing to bring a pre-emptory challenge. *Smith v Ontario* involved an individual challenging the validity of temperance legislation, despite not been charged under it.[87] In three sets of concurring reasons, the SCC held that the plaintiff did not have standing. Duff J (on behalf of himself and Maclean J) acknowledged that this put the litigant in a difficult position:

84. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Statement of Claim, paras 7-20).

85. *Ibid* (Statement of Claim, para 20); suggesting additional factual details that the plaintiffs could have included in their pleadings see: Jennifer Koshan, Lisa Silver & Jonnette Watson Hamilton, "Frost on the Constitutional Windshield: Challenge to *Critical Infrastructure Defence Act* Struck by Alberta Court of Appeal" (8 February 2022), online (blog): *ABlawg* <ablawg.ca/wp-content/uploads/2022/02/Blog_JK_LS_JWH_CIDA_ABCA.pdf>.

86. *Smith, supra* note 59, and see discussion of *Thorson, supra* note 16, *McNeil, supra* note 16 and *Borowski #1*, *supra* note 17. Citing *Smith* (*ibid*) as an exemplar of a historically restrictive approach to standing, see e.g. *Cabana v Newfoundland and Labrador*, 2015 NLTD(G) 158 at paras 7-12, and the initial decision in *Downtown Eastside Sex Workers United Against Violence Society v Attorney General* (*Canada*), 2008 BCSC 1726 at paras 53-57.

87. *Smith, supra* note 59.

> Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the question of the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are unauthorized and illegal.[88]

However, Duff J went on to worry that if the court granted standing to this litigant, it "would involve the consequence that virtually every resident of Ontario could maintain a similar action".[89] In his concurring reasons, Mignault J expressed a similar concern that granting standing to the litigant would open the doors for every Ontarian to challenge the temperance legislation in court. He added important nuance, noting that on a different set of facts, it may be important for a court to allow a party to challenge a law pre-emptively, "[t]here might conceivably be such a situation of oppression, by reason of drastic and arbitrary legislation, that would entitle this argument to very serious consideration."[90] The Court in *Smith* did not consider a prohibition on purchasing alcohol to be sufficiently drastic and arbitrary to warrant a grant of standing, but allowed that the outcome might be different in other circumstances.

If one accepts the possibility that *CIDA* infringed the *Charter* freedoms of the plaintiffs and other Albertans from the moment it came into force, then the question becomes how long people should be required to suffer such infringements before turning to the courts for relief. The plaintiffs launched their challenge within days of the legislation being passed, but 18 months later, when the Alberta Court of Appeal released its decision, still no one had been charged under *CIDA*. If the existence of the legislation is alleged to chill *Charter* rights, but a direct challenge is not possible because no one has been charged under it, at some point the courts *must* be willing to grant a litigant public interest standing, or else the legislation will be immunized from judicial oversight.

The magnitude of the alleged infringement should shape how quickly parties can turn to the courts for relief. Sossin notes that when deciding whether to hear a claim where ripeness has been raised as an issue, courts must "strik[e] a balance between the requirements of an adversarial system (e.g., the necessity of a sufficient factual record) and the potential hardship to litigants if their day

88. *Ibid* at 337. Compare this reasoning with Binnie and LeBel's reasons on standing in *Chaoulli*, *supra* note 49 at para 189, where they held that public interest standing should be granted to the litigants because *as residents of Québec* they were directly affected by the prohibition on private insurance, though not to a greater or lesser extent than any other resident of Québec. Carissima Mathen, "Access to Charter Justice and the Rule of Law" (2009) 25 NJCL 191 at 195-96, and Bailey, *supra* note 8 at 278-79, point to *Chaoulli* (*ibid*) as an example of the SCC taking a liberal and generous approach to standing.

89. *Smith, supra* note 59 at 337. Idington J's reasons were brief and did not engage with this point (*ibid* at 332-34).

90. *Ibid* at 347; see also Bogart, *supra* note 6 at 13 (arguing that standing may be appropriate in cases where all people are equally affected if the governmental act or legislation is of sufficient import).

in court is denied or deferred."[91] The plaintiffs in *Alberta Union of Public Employees* alleged that *CIDA* impaired key associational activities of workers involved in collective bargaining. These key democratic activities warrant greater protection than one's ability to purchase alcohol, which was the practice constrained by the legislation in *Smith*. But that leaves open the question of whether *CIDA*'s chill was of a *sufficient* magnitude to warrant a grant of public interest standing.

The Alberta Court of Appeal in *Alberta Union of Public Employees* engaged with the question of whether *CIDA* was so oppressive that a litigant should be allowed to challenge it before being charged under it. It asked: "how much 'chilling' does it take to breach the *Charter*? ...how much additional chill is demonstrably justified in a free and democratic society?"[92] It determined that it could not answer these questions "without an evidentiary record."[93] But, the Court should have accepted the facts, as pled by the plaintiffs, as true. This was the approach taken by the court below and how the matter was argued by the parties on appeal. Instead, the Alberta Court of Appeal created an unfair expectation of evidence because it analyzed the question of standing *as* an abuse of process. Part III examines why the Court was wrong to conflate standing with abuse of process. Part IV explains the repercussion of this conflation on how the Court evaluated the absence of evidence.

III. Abuse of Process

In *Alberta Union of Public Employees*, the Alberta Court of Appeal analyzed the question of standing through the lens of abuse of process.[94] The Alberta Court of Appeal's decision could be read as saying that *any* challenge to standing should be framed as an abuse of process, but if that is what the Court intended to say, it got the law wrong. Where a party decides to litigate without having a strong claim to public interest standing, that might amount to an abuse of process; but not in all cases. Absent evidence of serious unfairness in a party's decision to litigate, standing and abuse of process should be treated as analytically separate grounds for dismissing a claim.

Serious unfairness is a vital component of abuse of process. The SCC describes abuse of process as "engag[ing] the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute."[95] Superior courts have inherent jurisdiction to stay or dismiss a claim for abuse of process, and this power has been bolstered by provincial procedural

91. Sossin, *supra* note 22 at 103.

92. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 40.

93. *Ibid* at para 42.

94. *Ibid* at para 18: "When standing is challenged, that is most appropriately seen as an application for a stay under R. 3.68(1), because the action is an abuse of process under R. 3.68(2)(d)."

95. *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 40 [*Behn*], citing *Canam Enterprises Inc v Coles*, 2000 CanLII 8514 (ONCA) at para 55, as discussed in Gerard J Kennedy, "The Alberta Court of Appeal's Vexatious Litigant Order Trilogy: Respecting Legislative Supremacy, Preserving Access to the Courts, and Hopefully Not to a Fault" (2021) 58:3 Alta L Rev 739 at 740.

rules.[96] The "primary focus [of the doctrine] is the integrity of courts' adjudicative functions, and less on the interests of parties."[97] It is a "compendious principle" that can be applied in a range of different situations, including both criminal and civil proceedings.[98] It is also a standalone tort.[99] In the civil context, abuse of process is commonly used to prevent parties from relitigating a matter when the strict requirements of issue estoppel are not established.[100] It has also been used to address unfairness caused by a delay in proceedings and where litigants try to use the civil court process to hold litigants liable under penal and regulatory statutes.[101]

The SCC has indicated that standing and abuse of process are separate concepts. In *Downtown Eastside Sex Workers*, the SCC identified abuse of process as an alternative to public interest standing that could be used to address similar policy concerns.[102] In its 2013 decision of *Behn v Moulton Contracting Ltd*, the Court was prepared to strike the defendants' defences on the basis they constituted an abuse of process and thus the Court did not need to decide whether the defendants had standing to raise them.[103]

96. Paul M Perell, "A Survey of Abuse of Process" in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation 2007* (Toronto: Thomson Carswell, 2007) 243-69 at 244; and see e.g. *Alberta Rules of Court*, Alta Reg 124/2010, rr 1.4(2)(b)(ii), 3.68(2)(d) [*Alberta Rules of Court*]; *Rules of Civil Procedure* (ON), *supra* note 74, rr 2.1.01, 21.01(3)(d), 25.11; *Supreme Court Civil Rules*, BC Reg 168/2009, r 9-5(1)(d) [*Supreme Court Civil Rules* (BC)].

97. *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 36 [*Abrametz*].

98. *Reece v Edmonton (City)*, 2011 ABCA 238 at para 16 [*Reece* (ABCA)], aff'g 2010 ABQB 538 [*Reece* (ABQB)], leave to appeal to SCC refused, 2012 CanLII 22074 (SCC); on abuse of process in criminal proceedings, see e.g. *R v Jewitt*, 1985 CanLII 47 (SCC).

99. Perell, *supra* note 96 at 263; John Irvine, "The Resurrection of Tortious Abuse of Process" (1989) 47 Can Cases L Torts 217; see also *Grenon v Canada Revenue Agency*, 2016 ABQB 260 at paras 99-125, varied in part but not on this point, 2017 ABCA 96 at paras 31-33, leave to appeal to SCC refused, 2017 CanLII 61800 (SCC).

100. Garry D Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990) 69:4 Can Bar Rev 623; Perell, *supra* note 96 at 254.

101. *Reece* (ABCA), *supra* note 98 at paras 16, 20.

102. *Downtown Eastside Sex Workers*, *supra* note 19 at para 28. Other alternative means the court identified were striking a claim for lack of merit and costs awards.

103. *Behn, supra* note 95. For critical analysis of the *Behn* decision, see Shiri Pasternak & Irina Ceric, "'The Legal Billy Club': First Nations, Injunctions, and the Public Interest" (2023) 1:1 TMU L Rev 7; Sarah Dalton, "Our Land, Our Way: The Rule of Law, Injunctions, and Indigenous Self-Governance" (2022) 73 UNBLJ 312 at 328; Bruce McIvor, "The Duty to Consult—A Roadblock to Direct Action" (21 May 2013), online (blog): *First Peoples Law* <firstpeopleslaw.com/public-education/blog/the-duty-to-consulta-roadblock-to-direct-action>.

Despite standing and abuse of process being separate concepts, government litigants in Alberta have frequently challenged litigation on both grounds. Writing in 2019, Shaun Fluker described this trend as "a troublesome conflation of abuse of process and public interest standing developing in the Alberta law."[104] He referenced three cases as evidence of the trend: a pair of lawsuits involving Lucy the Elephant, a longtime resident of the Edmonton Valley Zoo, and *Alberta's Free Roaming Horses Society v Alberta*.[105]

Yet, even in the cases identified by Fluker, where the government litigants seemed to be conflating two doctrines, the Alberta courts analyzed them separately. Both Lucy lawsuits turned on a party raising a claim through a channel that the respondents alleged was inappropriate. In the first Lucy case, as in *Behn*, the Court held it was unnecessary to decide the question of standing *because* there was an abuse of process, and thus dismissed the case on that basis.[106] Then Chief Justice Catherine Fraser wrote a lengthy dissent, finding that the litigation was not an abuse of process and that the applicants should have been granted public interest standing. In the second Lucy lawsuit, the Alberta Court of Appeal again dismissed the case. This time it found no abuse of process, but held it was reasonable for the lower court to deny the plaintiff standing.[107] In *Alberta's Free Roaming Horses Society*, the Court dealt with the abuse of process allegation after finding that the three parts of the public interest standing test were satisfied.[108] The Alberta government argued that the litigation was an abuse of process because the applicants had an improper or collateral purpose.[109] The Court found no evidence before it of a collateral or improper purpose and no abuse of process. It granted the applicant public interest standing, but granted summary dismissal in favour of the government on the basis of a limitations defence.[110]

104. Shaun Fluker, "Public Interesting Standing and Wild Horses in Alberta" (22 November 2019), online (blog): *ABlawg* <ablawg.ca/wp-content/uploads/2019/11/Blog_SF_FreeRoamingHorses.pdf>; see also Environmental Law Centre, *Standing in Environmental Matters* (Edmonton: Environmental Law Centre, 2014), online: <elc.ab.ca/media/98894/Report-on-standing-Final.pdf> at 21, noting that courts have evidenced a "new concern with 'abuse of process'" in matters involving public interest standing.

105. *Reece* (ABCA), *supra* note 98; *Zoocheck Canada Inc v Alberta* (*Agriculture and Forestry*), 2017 ABQB 764 at [*Zoocheck* (ABQB)], aff'd in part 2019 ABCA 208, leave to appeal to SCC refused, 2019 CanLII 120705 (SCC); 2019 ABQB 714 [*Alberta's Free Roaming Horses Society*].

106. *Reece* (ABCA), *supra* note 98 at paras 36-37. See discussions of this case in Tyler Totten, "Should Elephants Have Standing?" (2015) 6:1 West J Leg Stud 623; Maneesha Deckha, "Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability Under a Property Paradigm" (2013) 50:4 Alta L Rev 783; Peter Sankoff, "Opportunity Lost: The Supreme Court Misses a Historic Chance to Consider Question of Public Interest Standing for Animal Interests" (2012) 30:2 Windsor YB Access Just 129; Katie Sykes & Vaughan Black, "Don't Think About Elephants: Reece v City of Edmonton" (2012) 63 UNBLJ 145.

107. *Zoocheck* (ABQB), *supra* note 105 at paras 48-49.

108. *Alberta's Free Roaming Horses Society*, *supra* note 105 at paras 16-21.

109. *Ibid*.

110. *Ibid* at paras 21, 57.

Although courts analyze abuse of process and public interest standing separately, they are connected concepts.[111] Abuse of process is broad and can be used to challenge many different aspects of a litigant's claim (or defence, as seen in *Behn*). The facts that make the litigation abusive may also be relevant to each of the three parts of the public interest standing test. Where a party seeks to relitigate an issue that has already been decided, that might be relevant to the first part of the standing test, i.e., whether they have a serious, justiciable issue. If a respondent shows that a party has an improper motive in bringing the litigation, that might be relevant to the second part of the standing test, i.e., whether they have a genuine interest in the issue being litigated.[112] The availability of a different procedure for enforcing a right can be important to the abuse of process analysis, but also to the third part of the public interest standing test, i.e., whether the litigation is a reasonable and effective way to bring the issue before the court.[113]

It is difficult to conceive of a scenario where the facts relevant to the abuse of process analysis are not also relevant to a court's discretionary decision to grant public interest standing. If a court found that litigation was an abuse of process, that would seem to preclude a finding that a litigant should be granted public interest standing, but the converse is not true.

There will be cases, likely many of them, where a court decides that it should not exercise its discretion to grant public interest standing to a litigant, and yet nothing about the litigation is so unfair as to rise to the level of an abuse of process. Abuse of process is governed by a different—and more demanding—legal standard than public interest standing. The central question under the abuse of process doctrine is whether the litigation violates "the community's sense of fair play and decency" seriously enough that it would reflect badly on the legal system to allow the litigation to continue.[114] There must be something *especially unfair* about the litigation to ground a finding of abuse of process.[115] Under the public interest standing doctrine, the central question is whether the court should exercise its discretion to allow the party to pursue the litigation, having regard for the

111. The connection between abuse of process and public interest standing was raised in a novel way in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348 at para 56, rev'd on other grounds 2022 BCCA 163, where the court held that it was *not* an abuse of process for the government to challenge the organization's claim to public interest standing, even though the organization had previously been granted public interest standing to litigate a similar topic.

112. *Alberta's Free Roaming Horses Society, supra* note 105 at para 17.

113. *Reece* (ABQB), *supra* note 98 at para 9(c).

114. *Abrametz, supra* note 97 at para 33, citing *Regina v Young*, 1984 CanLII 2145 (ONCA) at 329.

115. See e.g. *Yashcheshen v Government of Saskatchewan and EHealth Saskatchewan*, 2022 SKQB 1 at paras 33, 36 [*Yashcheshen*], where the plaintiff, a vexatious litigant, was found not to have public interest standing and to have abused the court's process by submitting "seriously deficient" pleadings that were "rambling and sweeping"; see also *Humphries v Ontario (Attorney General)*, 2020 ONSC 4460.

competing purposes that weigh against and in favour of allowing parties to litigate a matter when they are not directly affected by it.[116] Courts should analyze these questions separately; conflating them muddies the doctrinal analysis and risks unfairly stigmatizing litigants who lack standing but have not abused the courts' processes.

The standard for finding an abuse of process has not always been so high, and this has led to some confusion when the doctrine is applied in contemporary settings.[117] Earlier in the history of English and Canadian common law, abuse of process was used to stay or dismiss cases where there was no reasonable claim.[118] However, provincial rules of courts now recognize that lack of a reasonable claim and abuse of process are two separate grounds for striking or staying a lawsuit. Striking for lack of a reasonable claim is now better understood as a "separate independent part" of the rules of civil procedure, rather than a "sub-set of the doctrine of abuse of process."[119] Moreover, as discussed below in Part V(2), the evidentiary rules for striking for lack of a reasonable claim differ from the rules applicable to striking for abuse of process. Thus, it is vital that litigants and courts carefully restrict their use of abuse of process to its modern meaning, as a tool to address serious unfairness.

Abuse of process and the public interest standing test require separate analyses, but are related, and the question arises of whether there is a preferable order for carrying out these analyses. In her dissent in the first Lucy lawsuit, Fraser CJ argued that the Court should have analyzed the question of standing first, rationalizing that if the applicants had standing, then their claim could not be an abuse of process.[120] Her rationale is correct: as discussed above, it is unlikely that a grant of public interest standing would ever be appropriate if there were grounds for finding an abuse of process. However, the conclusion she draws about the correct order in which to analyze abuse of process and standing is open to debate. Courts have varied in their approaches, with some analyzing abuse of process first and others starting with public interest standing.[121]

116. *Council of Canadians with Disabilities* (SCC), *supra* note 13 at paras 29-31.

117. With thanks to Gerard Kennedy for drawing this aspect of the doctrine to my attention.

118. *Hunt v Carey Canada Inc*, 1990 CanLII 90 (SCC) at 972 [*Hunt*], citing *Dyson v Attorney-General (No.1)*, [1911] 1 KB 410, [1910] 12 WLUK 60 at 418-19; and see discussion of the history of this use of the doctrine of abuse of process in English law in *Hunt, ibid* at 968-75.

119. Stephen GA Pitel & Matthew B Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014) 43:3 Adv Q 344 at 349.

120. *Reece* (ABCA), *supra* note 98 at paras 140-41.

121. Examples of cases where abuse of process is dealt with first: *MK v British Columbia* (*Attorney General*), 2020 BCCA 261; *New Directions for Children, Youth, Adults and Families Inc et al v Rural Municipality of Springfield*, 2013 MBQB 243; *Grenon v Canada* (*Attorney General*), 2007 ABQB 403. Examples of cases where public interest standing is dealt with first: *Yashcheshen, supra* note 115; *Forum des Maires de la Péninsule Acadienne Inc c Minister of Justice and Public Safety et al*, 2022 NBKB 174; *Watts v Canada* (*Attorney General*), 2021 ONSC 4611; *Broda v Alberta*, 2020 ABQB 221; *Schnurr et al v Canadian Tire Corporation Limited et al*, 2019 ONSC 5781; *Democracy Watch v Canada* (*Attorney General*), 2021 FC 613 [*Democracy Watch*]; *Strickland v Canada* (*Attorney General*), 2013 FC 475.

It may be expedient for courts to consider the question of abuse of process first. For example, if there was evidence of a litigant having an improper motive that rose to the level of "abuse of process", a court could dismiss the case on that basis. Such a litigant might also lack a "genuine interest" in the issue, thus making it inappropriate for a court to grant them public interest standing. By disposing of the case on the basis of abuse of process, the court would not be required to analyze and weigh the other two parts of the public interest standing test. This approach would accord with the British Columbia Court of Appeal's approach in *Canadian Bar Association*, described above, of assessing justiciability first and moving on to the balance of the standing analysis *only if* a justiciable claim exists.[122]

If a court considers standing first, it will start by weighing all three parts in the public interest standing test. If it decides to deny the litigant standing, the court then needs to consider if there is sufficient unfairness to engage the abuse of process doctrine. There may be situations where there is some benefit to this approach. For example, in the 2021 decision of *Democracy Watch v Canada*, the Court determined that the litigant had public interest standing to pursue some, but not all its claims.[123] The litigant was not allowed to relitigate claims that had previously been decided. The Court then determined that, with the repetitious claims struck, the litigant could proceed *without* abusing process.[124] A court may prefer such an approach because it allows it to address the problematic aspects of the litigation without making a finding of abuse of process, which can be stigmatizing for litigants.

Regardless of the order in which the court analyzes the issues, it is vital that the party alleging abuse of process, and the court applying it, both identify precisely what aspect of the litigation is abusive. Or, in other words, where is the unfairness that threatens the repute of the legal system? Is this relitigation of an issue decided elsewhere? Is this a party motivated by an improper desire to vex the adverse party? Given the breadth of issues that have been considered abuses of process, if a party merely alleges that litigation is abusive, without providing further particulars, the party against whom the allegations are made will have insufficient notice of the case to be met.

The *Alberta Union of Public Employees* case illustrates the unfairness that flows when a party is not given sufficient notice of the particulars of an allegation of abuse of process. Alberta's application did not mention abuse of process as a ground for striking the claim. It generally cited the procedural rules empowering courts to strike or stay a claim on a variety of grounds, but without specifying which of the grounds it would be relying upon.[125] In its memorandum, Alberta alleged that the claim

122. *Canadian Bar Association* (BCCA), *supra* note 45 at para 11. In *Democracy Watch*, *supra* note 121, the court analyzed the issues in this order: (i) justiciability, (ii) public interest standing, and (iii) abuse of process.

123. *Democracy Watch*, *supra* note 121.

124. *Ibid* at para 75.

125. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Application, Her Majesty the Queen in Right of Alberta at para 7).

was an abuse of process "because the Plaintiffs have no standing and the pleadings disclose no cause of action".[126] This framing conflates separate legal tests, but fails to identify what about the litigation was so unfair, oppressive, or vexatious as to bring the administration of justice into disrepute. Alberta's notice of appeal from the Queen's Bench decision did not mention "abuse of process", and its factum argued that the claim should be struck because the parties lacked standing and the claim was premature: it advanced no arguments about any aspect of the litigation amounting to an abuse of process.[127]

Given how the case had proceeded up to the hearing of the matter before the Alberta Court of Appeal, that Court's decision to analyze the claim as an abuse of process seems to have taken the plaintiffs by surprise. In their application for leave to appeal to the SCC, the plaintiffs argued that they should be granted leave, in part, because the Court of Appeal had improperly decided the case on the basis of abuse of process, despite this not having been raised on appeal or by the Court during argument. The plaintiffs describe the resulting unfairness as follows:

> If AUPE was provided notice that the Court of Appeal wished to consider the issue of abuse of process, AUPE would have addressed whether this was the appropriate framework through which to strike the Claim and whether the Claim amounted to an abuse of process at all. AUPE could have provided evidence to establish it had public interest standing as well as to demonstrate the chilling effect Bill 1 has on public demonstrations.[128]

The Court of Appeal's decision to frame the standing issue as a matter of abuse of process impacted how it evaluated the lack of evidence, and this is the point on which the *Council of Canadians with Disabilities* case provides the clearest direction. The following Part examines how to evaluate facts and evidence when applying the public interest standing test.

IV. Facts, Evidence, and the Possibility of Future Evidence

It will be helpful in this section to recall the distinction set out in Part II(3) between facts and evidence. Facts are assertions, made in the litigants' pleadings, that are capable of proof. Evidence is the material that litigants put before the court to support their account of the facts.

In the *Alberta Union of Public Employees* case, the plaintiffs asserted in their statement of claim that *CIDA* would have a "chilling effect on legitimate and peaceful protests, demonstrations, strikes and leafleting."[129] This was a fact capable of proof. To support this account of the effect of *CIDA*, the plaintiffs could have provided testimonials from people who intended to engage in these activities, but then opted not to for fear that they could be arrested for violating *CIDA*. Alternatively, the plaintiffs

126. *Ibid* (Memorandum of Argument, Her Majesty the Queen in Right of Alberta at para 7).

127. "Abuse of process" is mentioned only once in the factum, when Alberta recites the grounds upon which it initially applied to strike the claim: *Alberta Union of Public Employees* (ABCA), *supra* note 12 (Factum, Appellant at para 7).

128. *Alberta Union of Public Employees* (SCC leave), *supra* note 12 (Memorandum of Argument, Appellant at paras 41-42).

129. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Statement of Claim at para 7).

might have provided evidence of a more systemic nature. For example, they could have hired an expert social scientist to survey members of their union about whether they were less willing to engage in protests, demonstrations, strikes, and leafleting because of the risk of punishment posed by *CIDA*. The government could have provided its own evidence to demonstrate a lack of chill. They gestured towards the type of evidence they might present in their written arguments before the Court of Queen's Bench. The government argued that the allegation of a chill was "belied by the fact that AUPE members engaged in an illegal strike and illegal picketing in front of the Royal Alexandra Hospital on October 26, 2020."[130]

None of the applicant's evidence of chill was before the court at the time the Alberta Court of Appeal decided the *Alberta Union of Public Employees* case. The Court decided against the plaintiffs because they had not (yet) produced evidence to support their claims, but this was an unfair expectation. The government applied to strike the claim early in the process: three months after the plaintiffs filed their Statement of Claim and before the government had filed a Statement of Defence.[131] No discovery had taken place yet. The SCC in *Council of Canadians with Disabilities* notes that: "When standing is challenged at a preliminary stage, the plaintiff should not be required to provide trial evidence. That would be procedurally unfair, as it would permit the defendant to obtain evidence before discovery."[132]

Litigants are not required to provide *trial* evidence when their standing is challenged on a preliminary basis, but sometimes they will need to provide some evidence to avoid an adverse decision. Whether evidence is before the court will depend on the substance of the underlying claim, the manner in which the litigation is commenced, and the manner in which standing is challenged. For example, in *Alberta's Free Roaming Horses Society*, the applicant applied for judicial review of the government decision, supported by affidavit evidence. The government applied for summary dismissal of the applicant's claim, and the court relied on the applicant's affidavit evidence when analyzing the question of standing.[133] In *Council of Canadians with Disabilities*, the not-for-profit started its claim with a Notice of Civil Claim, which is not issued with accompanying evidence. However, the government challenged the not-for-profit's standing under a rule that allowed the Court to assess evidence, the not-for-profit filed affidavit evidence, and the Court relied on this evidence in its reasons.[134]

130. *Ibid* (Memorandum of Argument, Her Majesty the Queen in Right of Alberta at paras 6, 24). The government cited newspaper articles about the strike in support of this claim.

131. The Statement of Claim was filed on June 23, 2020, and the Application to Strike was filed September 16, 2020.

132. *Council of Canadians with Disabilities* (SCC), *supra* note 13 at para 72.

133. *Alberta's Free Roaming Horses Society*, *supra* note 105 at paras 3, 15.

134. *Supreme Court Civil Rules* (BC), *supra* note 96, r 9-7; *Council of Canadians with Disabilities* (SCC), *supra* note 13 at para 4; see also *Williams v London Police Services Board*, 2019 ONSC 227 at paras 24, 63-64.

In other scenarios, a court will not have any evidence before it on which to assess a litigant's claim to public interest standing. The following section will consider two of these scenarios: where the legislation is so obviously unconstitutional that evidence—and even adjudicative facts—are unnecessary, and where the court proceeds on the basis that the facts alleged in the pleadings are true. Although evidence may not be tendered in either of these scenarios, in the latter one courts will need to assess the plaintiff's capacity to produce a sufficient evidentiary record. The last section in this Part turns to this topic.

1. Evidence is Unnecessary Because the Legislation is Obviously Unconstitutional

In *Council of Canadians with Disabilities*, the SCC indicated that there will be "exceptional" constitutional cases where evidence and adjudicative facts ("who did what, where, when, how, and with what motive or intent")[135] are not required because "a claim may be proven on the face of the legislation at issue as a question of law alone."[136] It then went on to hold that the case before it was such a case:

> Much of the case can be argued on the basis that the legislation is unconstitutional on its face because it authorizes, under certain circumstances, forced psychiatric treatment without the consent of the patient or of a substitute decision-maker. Expert evidence regarding how health care providers treat involuntary patients and evidence with respect to particular patients may provide helpful insight into how the legislation is applied. At this early stage of the litigation, however, information about individual plaintiffs would not add much value.[137]

The SCC cited two cases in support of the principle that adjudicative facts would not always be necessary for a *Charter* challenge: *Danson*, the case discussed above about a rule change imposing the potential of personal liability for costs on lawyers, and *Manitoba (AG) v Metropolitan Stores Ltd*.[138] The latter case dealt with when a court should stay legislation pending a decision on its constitutionality and provides little insight into when adjudicative facts are unnecessary.[139] *Danson*, on the other hand, provides some guidance in this respect.

The Court in *Danson* suggested that the legislative facts may be sufficient if the purpose of the statute renders it unconstitutional.[140] This invocation of purpose can be taken as a refence to the SCC's 1985 decision in *R v Big M Drug Mart*, discussed in Part II, where the Court held a Sunday closing law

135. *Danson*, *supra* note 71.

136. *Council of Canadians with Disabilities* (SCC), *supra* note 13 at para 70.

137. *Ibid* at para 106.

138. *Danson*, *supra* note 71; 1987 CanLII 79 (SCC) [*Metropolitan Stores*].

139. The case *is* important for the SCC's clear statement of law on this topic: see *Metropolitan Stores*, *supra* note 138 at 133, as cited in *Danson*, *supra* note 71 at 1100-01.

140. *Danson*, *supra* note 71.

to be unconstitutional because its purpose infringed the *Charter*.[141] In that case, the Court reviewed the long legislative history of Sunday closing laws, all the way back to the 1448 English statute, The *Sunday Fairs Act*, along with how Canadian and American courts characterized Sunday closing laws in previous decisions.[142] Based on this review of case law and legislative facts, the majority determined that the purpose of the law was to compel everyone to observe the Christian Sabbath, that this purpose infringed the religious freedom of individuals, and thus the law was unconstitutional.[143]

A challenge to legislation may also be possible without adjudicative facts on grounds *other than* an allegation of an unconstitutional purpose. In an article written in 1995, June Ross pointed to the case of *Edmonton Journal*, also discussed in Part II, as an example of a *Charter* challenge against legislation that was unconstitutional on its face, and thus required little evidence.[144] Unlike in *Big M Drug Mart*, the case turned not on the purpose of the legislation or even its effect, but whether it was a "reasonable limit" under section 1.[145] The SCC split 4:3 on the issue, with the majority of justices finding that the legislation could not be justified as a reasonable limit. Neither facts nor evidence played a significant role in the decision. Justice Cory cited some statistics but the balance of the majority, concurring, and dissenting reasons relied on hypothetical examples about the types of conduct that would be penalized under the statute.

Big M Drug Mart and Edmonton Journal reveal the overlap between cases that can be decided on their face, without adjudicative facts, and those that can be decided using hypothetical examples. Recall that in *Alberta Union of Public Employees*, the Court of Queen's Bench of Alberta was prepared to analyze some of the plaintiffs' claims using hypothetical examples. The Alberta Court of Appeal took issue with this approach but then, in one particularly puzzling passage, appears to have employed it. The Court identified a series of hypothetical situations where it determined that the government would be justified in protecting essential infrastructure.[146] Based on this analysis, it concluded that *CIDA* was not unconstitutional on its face.[147] This conclusion about the constitutionality of *CIDA* should

141. *Big M Drug Mart*, *supra* note 50.

142. *The Sunday Fairs Act*, 1448, 27 Hen 6, c 5; *Big M Drug Mart*, *supra* note 50 at paras 51-77.

143. *Big M Drug Mart*, *ibid* at paras 93, 100, 143.

144. Ross, "Standing in *Charter* Declaratory Actions", *supra* note 51 at 168, citing *Edmonton Journal* (SCC), *supra* note 51. Ross was an academic at the time this article was written and is now a Justice of the Alberta Court of King's Bench.

145. Compare *Edmonton Journal* (ABKB), *supra* note 51 at para 5, with *Edmonton Journal* (SCC), *ibid* at 1342.

146. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at paras 65-66. For example, the Court indicated that the legislature would be justified in "preventing access to a public utility, like an electrical substation, which is securely fenced and clearly marked as being accessible by authorized personnel only" (*ibid*).

147. *Alberta Union of Public Employees* (ABCA), *ibid* at para 66.

be approached with caution because it was reached without the benefit of either party's arguments on the merits of the constitutional challenge. But, at the same time, it further demonstrates that, in some cases, substantive *Charter* analysis can be performed without adjudicative facts.

2. Evidence is Unnecessary Because the Court Assumes the Facts Pled are True

Even in cases where a court requires adjudicative facts, it may not require evidence proving those facts. When standing is challenged on a preliminary basis, courts may proceed on the assumption that all the facts pled in the commencement document are true.[148] This presumption is required by some, but not all, of the civil procedure rules an adverse party can use to challenge a litigant's standing. For example, Rule 3.68 of the *Alberta Rules of Court* (*Alberta Rules*) provides that a matter may be struck or stayed if a statement of claim discloses "no reasonable claim", is "frivolous, irrelevant, or improper", or is "an abuse of process."[149] The *Alberta Rules* stipulate that where a matter is challenged on the first ground (i.e., that it discloses no reasonable claim), "no evidence may be submitted."[150] The court is to assume the facts pled are true unless they are incapable of being proven.[151]

In *Alberta Union of Public Employees*, the government's application cited five rules, including Rule 3.68.[152] It did not specify on which subpart of Rule 3.68 it was relying. It submitted no evidence in support of its claim. The plaintiffs proceeded on the basis that the facts in their pleadings would be presumed true, as did the Court of Queen's Bench of Alberta.[153] The Alberta Court of Appeal did not.

The Alberta Court of Appeal analyzed the motion as an abuse of process. It reasoned that: "a challenge to standing is not an assertion that the claim does not disclose a reasonable claim or that the claim is without merit."[154] But the absence of a *reasonable claim* is precisely the ground upon which the government challenged the plaintiffs' lawsuit. The government argued that the plaintiffs' claims were premature, which is another way of saying they were insufficiently ripe. Recall that ripeness is a subset of justiciability.[155] Thus, when the government challenged the plaintiff's claim

148. *Thorson*, *supra* note 16 at 145; *Finlay*, *supra* note 5 at 625.

149. *Alberta Rules of Court*, *supra* note 96, r 3.28(2)(b)-(d). Similar rules are found in other jurisdictions, see e.g. *Rules of Civil Procedure* (ON), *supra* note 74, r 21.01(2); *Supreme Court Civil Rules* (BC), *supra* note 96, r 9-5(2).

150. *Alberta Rules of Court*, *ibid*, r 3.28(3).

151. *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 64, citing *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 22; *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC) at 455.

152. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Statement of Claim).

153. *Alberta Union of Public Employees* (ABQB), *supra* note 12 at para 17; Brief of the Plaintiffs at para 20. The plaintiffs also noted that the Government had appeared to abandon its claim for summary dismissal, noting: "The Government's submissions do not reference R 7.3, nor has the Government provided the requisite affidavit evidence to bring an application for summary dismissal" (*ibid* at para 15).

154. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 18.

155. See *supra* notes 41-42 and accompanying in-text discussion.

on the basis of prematurity, it was arguing that there was "no reasonable claim", because the claim advanced was non-justiciable. Whether a party has a justiciable claim is relevant to standing because the first part of the test articulated in *Downtown Eastside Sex Workers* requires the party seeking standing to show that there is a serious, *justiciable* issue.

Historically, a challenge based on a lack of a reasonable claim *could* have been addressed using the abuse of process doctrine, but these are now two discrete grounds under Rule 3.68 for challenging a lawsuit.[156] Distinguishing between these two grounds is vitally important because they have different evidentiary rules.

If the Alberta Court of Appeal in *Alberta Union of Public Employees* analyzed the government's application as alleging the plaintiffs had "no reasonable claim", it would have proceeded on the basis that the facts as pled were true. On the basis of the facts as pled, the Court would need to have determined if there was enough of a "live dispute" involving "real people in real situations" for the Court to hear the matter.[157] It would have been open to the Court to make one of three findings: (i) *assuming the facts to be true*, the claim was sufficiently ripe to be justiciable; or (ii) *assuming the facts to be true*, the claim was not sufficiently ripe to be justiciable and should be struck or stayed; or (iii) *there were insufficient facts in the pleadings to assess the ripeness of the claim*, in which case the matter should either have been struck or the plaintiffs should have been given an opportunity to amend their pleadings. If the Court had found that the claim was sufficiently ripe to survive a preliminary challenge on the basis of justiciability, it could then have proceeded to determine whether the other components of the test for public interest standing were satisfied: was the justiciable claim serious, did the plaintiffs have a genuine interest, and was this a reasonable and effective way to advance the claim?[158]

But the Alberta Court of Appeal did not evaluate the sufficiency of the facts as pled. Instead, it asked if there was a sufficient "factual platform *established by evidence*".[159] It assessed the sufficiency of the evidence because it analyzed the question of standing under the rubric of abuse of process, and thus was not bound by the requirement to assume that the facts pled were true. The decision to analyze the claim as an abuse of process lead the Court down an erroneous line of reasoning: because there was no evidence, there were no facts *established by evidence*. Because there were no facts *established by evidence*, the claim was hypothetical and too premature to be heard.

The Court compounded this error with a further, questionable holding. It determined that the applicant's invocation of hypothetical examples "implicitly meant that there would be no further actual or evidentiary record."[160] This logic is faulty: there was no evidence yet, so there would never be any evidence.

---

156. See *supra* notes 118-119; *Alberta Rules of Court*, *supra* note 96, r 3.68.
157. See *supra* note 54 and accompanying in-text discussion.
158. *Canadian Bar Association* (BCCA), *supra* note 45.
159. *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 1.
160. *Ibid* at para 21.

The Alberta Court of Appeal's unexpected approach to analyzing the standing question—as an abuse of process—led it to look for evidence where none had been submitted and draw negative conclusions from its absence. As outlined above, this twist created unfairness for the plaintiffs because of how the litigants and the courts had approached *this* case. *Council of Canadians with Disabilities* suggests that on *any* preliminary challenge to standing, the focus of the court should be less on the evidence produced and more on a litigant's capacity to produce evidence.

3. Capacity to Produce Evidence

In *Council of Canadians with Disabilitie*s, the SCC indicated how future courts could assess a litigant's capacity to produce evidence when public interest standing is raised as an issue early in a lawsuit. The Court set out a non-exhaustive list of criteria that courts should consider: the stage of the proceedings, the pleadings, the nature of the public interest litigant, undertakings, and evidence already produced.[161] As the lawsuit progresses, a court should focus less on the party's capacity to produce evidence and instead shift to considering whether sufficient evidence has actually been produced. After discovery, failure to produce a sufficient evidentiary record would be a basis for denying standing, unless the nature of the claim does not require evidence.[162] A decision to grant standing on a preliminary basis may be revisited later in the lawsuit. This power to revisit standing should be used sparingly, but is appropriately used when there has been a material change, such as an applicant breaching an undertaking they had provided to produce evidence, or the legal issue in question becoming moot, like in *Borowski #2*.[163]

Had the Alberta Court of Appeal in *Alberta Union of Public Employees* applied the framework articulated in *Council of Canadians with Disabilities*, there would have been a strong basis for finding that the plaintiffs had the capacity to produce a sufficient evidentiary record. The lack of evidence could have been explained in part by the early challenge to standing. The Court would have looked at the facts, as pled, in the plaintiffs' statement of claim. One of the plaintiffs was a union, which represents many people who might personally experience the chilling effect of *CIDA*. The Court could have inferred that the plaintiffs would be able to elicit affidavit evidence from directly affected individuals. The lawyers for the plaintiffs could have bolstered their case by providing undertakings to the Court about the record they would be producing or submitting affidavit evidence from affected parties. Of course, the SCC did not set out this framework until after the Alberta Court of Appeal released its decision in *Alberta Union of Public Employees*. It could not be employed in that case, but it provides useful guidance to future courts assessing facts and evidence in the context of the public interest standing test.

161. *Council of Canadians with Disabilities* (SCC), *supra* note 13 at para 72.

162. *Ibid* at paras 70-72.

163. *Ibid* at paras 74-77, and citing *Borowski #2* (SCC), *supra* note 68, as an example of a case where standing was denied because a claim became moot.

Conclusion

Constitutional litigation, where questions of public interest standing arise, involves debates over "fundamental legal and political values."[164] The legislation being challenged in *Alberta Union of Public Employees* allegedly impaired key associational activities of unionized workers in Alberta (as well as other democratic activities, like political protests), yet the litigants were denied the opportunity to challenge these impairments to their rights because they were denied standing. The Alberta Court of Appeal decision in *Alberta Union of Public Employees* is out of step with the SCC's generous and liberal approach to public interest standing and weakens the ability of courts to safeguard fundamental democratic practices. It is not merely an instance of a court exercising its discretion restrictively. It creates a troubling precedent because of how the Alberta Court of Appeal connected the ideas of public interest standing, prematurity, abuse of process, and facts and evidence. This article has disentangled these ideas with the aim of assisting future litigants and courts to navigate these intersecting concepts.

A challenge to legislation that has yet to be invoked will not always be premature. Courts must consider the magnitude of the chill before deciding whether to entertain the challenge when a statute is alleged to chill *Charter* rights and freedoms. The court may also wish to consider the target of the chill. It may be especially important for courts to grant public interest standing when legislation chills the *Charter* rights of marginalized communities, who lack the political clout to seek redress through legislative channels. In *Alberta Union of Public Employees*, the legislation in question constrained the ability of all Albertans to protest, and could be expected to have a disproportionate impact on marginalized communities. Koshan, Silver, and Watson Hamilton note that while *CIDA* was facially neutral, "it is often marginalized 'others' without access to legislative or corporate halls of power who demonstrate against government or corporate interests."[165] Members of these communities have been silenced twice over: by having their right to protest statutorily restricted, and by being denied standing to challenge those restrictions in court.

The *Alberta Union of Public Employees* decision could be cited for propositions about the weakness of a *Charter* claim based on legislative chill, but the Alberta Court of Appeal's conclusions should be approached with caution. Gerard Kennedy and Lorne Sossin have warned courts that, when they decide constitutional litigation summarily, they should take care so as to not thwart the opportunity to develop *Charter* rights, especially as there is a risk that a summary decision may be cited for broad propositions that foreclose future litigation.[166] Legislative chill is a topic that warrants a more careful analysis, carried out on the basis of full argument and a robust evidentiary record.

---

164. Mathen, *supra* note 88.

165. Koshan, Silver & Watson Hamilton, *supra* note 25.

166. Gerard J Kennedy & Lorne Sossin, "Justiciability, Access to Justice, Summary Procedures in Public Interest Litigation" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis Canada, 2019) 119-45 at 134-34. Kennedy and Sossin made this observation in respect of the Ontario Court of Appeal's decision to strike the claims in *Tanudjaja v Canada* (*Attorney General*), 2014 ONCA 852, on the basis of justiciability. They observe that *Tanudjaja* set the precedent that "such general issues as a right to housing are not within the realm of the courts".

Where abuse of process is alleged, the party raising the issue and the court deciding it should specify what aspect of the litigation is unfair. The meaning of abuse of process has evolved over the history of English and Canadian law, but recent pronouncements from the SCC clarify that the contemporary abuse of process doctrine is used to address serious unfairness. Courts should ensure to employ this contemporary version of the doctrine. Commencing a claim where one is eventually held to lack public interest standing is not, without more, an abuse of process.

Litigants who are bringing a claim on the basis of public interest standing should ensure that their pleadings set out legislative and adjudicative facts to show their legal entitlement to relief. In *Charter* litigation, this will necessitate showing that government conduct or legislation infringes a *Charter*-protected right or freedom. Additionally, they should plead facts that relate to the test for standing. For example, an organization might plead that it has many individual members who can provide evidence as to the impact of impugned legislation on them. However, in drafting these pleadings, lawyers should be careful to avoid running afoul of the rule that pleadings should be limited to facts and not evidence.[167] If their standing is challenged, litigants should confirm the procedural rules by which it is being challenged. If there is a possibility that the court will be expecting evidence proving the facts, plaintiffs would be wise to submit some such evidence, especially to bolster the assertion that they will be able to produce more evidence later in the proceedings.

Courts also need to be careful about how they analyze the sufficiency of the facts and evidence relevant to standing. Most, but not all, cases will require the parties to set out adjudicative facts in their pleadings. Some cases can be decided on the basis of legislative facts or hypothetical examples. A court's analysis of evidence changes as the litigants move through their case from preliminary stages to a hearing on the merits. The court should focus on pleadings and other indications of a litigant's capacity to produce evidence early in a case, whereas following discovery, this focus shifts to the evidence actually produced.

This article has focused on *public* interest standing. In *Alberta Union of Public Employees*, the plaintiffs also argued that they were entitled to private interest standing because of the direct impact that the legislation had on them.[168] Both levels of court in Alberta rejected this argument, finding that private interest standing was limited to instances where a plaintiff has been engaged in a court process, for example, by being charged under the legislation.[169] There is reason to suspect that private interest standing is not so narrowly restricted. Ross examined this question in detail in her 1995 article on the topic, but much has changed in the law of standing since, and a scholarly reconsideration of this concept would be welcome.[170]

167. *Alberta Rules of Court*, *supra* note 96, r 13.6(2)(a); *Rules of Civil Procedure* (ON), *supra* note 74, r 25.06(1); *Supreme Court Civil Rules* (BC), *supra* note 96, r 3-7(1).

168. *Alberta Union of Public Employees* (ABQB), *supra* note 12 (Brief of the Plaintiffs at para 29).

169. *Ibid* at para 18; *Alberta Union of Public Employees* (ABCA), *supra* note 12 at para 26.

170. Ross, *supra* note 51 at 175-200.

Restrictive approaches to standing prematurely shut down important debates and weaken protection for *Charter* rights and freedoms. In cases where legislation is challenged because of its chilling effect on *Charter* rights, a restrictive approach can immunize that legislation from review. The Alberta Court of Appeal's approach to public interest standing in *Alberta Union of Public Employees* was unduly restrictive, but not straightforwardly so. Rather, the restrictions emerged from the Court's interweaving of prematurity, abuse of process, and facts and evidence into the public interest standing test. This case reveals that to maintain a generous and liberal approach to standing, and thus robust protection for *Charter* rights and freedoms, litigants and courts must pay careful attention when navigating these overlapping concepts.

ORIGINAL RESEARCH ARTICLE

Police Investigations in Smart Cities: Personal Information and Policy Implications

Étienne F Lacombe*

Abstract: Smart cities have the potential to disrupt the relationship between privacy and policing by providing police officers with new sources of personal information. This article challenges recent literature that suggests this risk should be mitigated through judicial oversight. Viewed holistically, the varying severity of privacy intrusions in smart cities, the technical workings of information collection and processing, and fading logistical limits on public surveillance make reliance on judicial oversight untenable. Instead, this article suggests ways of reshaping extrajudicial safeguards to prevent arbitrary or abusive interference with privacy in the context of smart cities. Building on examples from England and Wales, the author draws on a version of privacy protection that often escapes North American commentators. Ultimately, the author calls on provincial legislatures to develop statutory parameters for the exercise of police discretion that are tailored to various smart city technologies and suggests how oversight should be embedded within policing bodies, both at the structural and individual decision-making level.

* BCL, LLB, LLM.

CONTENTS

Introduction

By 2041, the municipality of Techtown had proudly branded itself a "smart city". It invested heavily in technological initiatives, outfitting its neighbourhoods with sensors and equipping its citizens with data-gathering devices. Techtown's streets are embedded with technologies that capture residents' movements, and residents use their devices to report what they see around them. Collectively, this arrangement exposes information that was always in plain sight, but that was never comprehensively collected or analyzed. It allows for more information on what occurs in public to be captured, and for more facts that may individually reveal very little to be recorded and combined so as to paint a clearer picture of the city as a whole. Among its many uses, the information can be harnessed to complement traditional intelligence-gathering. Faced with this prospect, one question that leaders in Techtown and beyond must address is how to regulate police access to the smart city's valuable, yet potentially intrusive, information collected in the smart city.

By focusing on smart cities, this article presents an evocative example of a wider privacy protection issue. Many technologies already generate retrievable data about individuals, such as their online activity and physical movements. Focusing on smart cities shows that the amount of data being recorded in urban environments will only increase, and accentuates the need to review how modern privacy-infringing investigations are regulated.

This article complements recent literature that suggests the privacy issues smart city policing raises can be addressed through judicial oversight. It emphasizes the need to reshape proactive nonjudicial safeguards within policing bodies and calls on provincial legislatures to lead this reform. Although the label "smart city" could be applied to some contemporary urban environments, this article's focus is forward-looking and contemplates a horizon of about 20 years. A 20-year timeframe exposes the increasing strain under which existing police oversight might be placed as emerging technologies become mainstream. It also avoids looking so far ahead as to speculate about the future of sensor integration and technological development.

Building on examples from the fictional city of Techtown, this article proceeds in three parts. Part I situates the concept of privacy in relation to policing and outlines why the law has long sought to reconcile the protection of personal information with policing powers. It argues that smart cities disrupt the relation between policing and privacy by providing police with a new source of personal information. Part II addresses the promotion by some authors of judicial interpretation and court-based oversight to regulate smart city policing. The severity of privacy infringements caused by information collection and processing in smart cities will vary considerably. Expanding current privacy protections through judicial interpretation would not be responsive to this reality, and greater technical specialization than that which judicial oversight can offer will be required. These concerns, combined with fading logistical limits on the monitoring of public spaces, underscore the need for new forms of oversight, particularly in cases where police behaviour is neither subject to prior judicial authorization nor to post-hoc scrutiny. Part III sketches how some of those reforms may look by drawing on the influence European privacy protections have had in England and Wales. Ultimately, it calls on provincial legislatures to develop statutory parameters for the exercise of police discretion that are tailored to various smart city technologies, and suggests how oversight should be embedded within policing bodies, both at the structural and individual decision-making levels.

I. Situating Smart Cities and Their Privacy Implications

Considered in the abstract, "privacy" and "smart city" are elusive concepts. Both serve as shorthand in such disparate settings as to deprive them of a shared, universal meaning. Referring to privacy, Thomas McCarthy explains, is akin to invoking freedom: "it means so many different things to

so many different people that it has lost any precise legal connotation."[1] The expression "smart city" is similarly dynamic. Its intended meaning varies between authors and disciplines, generating inconsistencies across the literature.[2]

Accordingly, there is value in approaching privacy and smart cities contextually. Situating them within the context to which they are being applied—here, policing—is instrumental to elucidating each concept's meaning and significance. Beyond narrowing what is understood by each term, juxtaposing privacy, smart cities and policing sheds light on their interconnectedness. Explained differently, approaching privacy, smart cities, and policing relationally reveals how developments in one field often provoke changes in the others.

1. Privacy in the Policing Context

Turning first to privacy, this concept can be contextualized by identifying specific interferences with daily life. In his influential work on privacy contextualization, Daniel Solove explains that privacy "enables people to engage in worthwhile activities in ways they would otherwise find difficult or impossible."[3] As a consequence, privacy concerns arise when certain practices—"activities, customs, norms and traditions"—are disrupted.[4] The nature of these disruptions and the means of addressing them vary from one setting to another. Situating privacy in relation to a given context therefore entails "focusing on the specific types of disruption and the specific practices disrupted."[5]

In the policing context, focusing on specific disruptions and practices invites attention to the functions police perform and the civilian practices those functions disrupt. Of the many functions in which police engage, the theme of this article centres on investigations. Police investigations involve "the process of discovering, collecting, preparing, identifying and presenting evidence to determine what happened and who is responsible."[6] Returning to the language proposed by Solove, and as

1. J Thomas McCarthy, *The Rights of Publicity and Privacy*, 2d ed (New York: Clark Boardman Callaghan, 2015) at § 5.59. See also Julie C Inness, *Privacy, Intimacy, and Isolation* (Oxford: Oxford University Press, 1996) at 3 (describing the search for privacy's meaning as chaotic).
2. Victoria Fernandez-Anez, "Stakeholders Approach to Smart Cities: A Survey on Smart City Definitions" in Enrique Alba, Francisco Chicano & Gabriel Luque, eds, *Smart Cities: Proceedings of the First International Conference, Smart-CT 2016, Málaga, Spain, June 15-17, 2016* (Cham, Switzerland: Springer, 2016) 157-168; Arkalgud Ramaprasad, Aurora Sánchez-Ortiz & Thant Syn, "A Unified Definition of a Smart City" in Marijn Janssen et al, eds, *Electronic Government: Proceedings of the 16th IFIP WG 8.5 International Conference, EGOV 2017, St. Petersburg, Russia, September 4-7, 2017* (Cham, Switzerland: Springer, 2017) 13 at 15, 21; Vito Albino, Umberto Berardi, & Rosa Maria Dangelico, "Smart Cities: Definitions, Dimensions, Performance, and Initiatives" (2015) 22:1 J Urban Technology 3 at 4.
3. Daniel J Solove, "A Taxonomy of Privacy" (2006) 154 U Pa L Rev 477 at 484.
4. Daniel J Solove, "Contextualizing Privacy" (2002) 90 Cal L Rev 1087 at 1129.
5. *Ibid* at 1130.
6. Kären M Hess, Christine Hess Orthmann & Henry Lim Cho, *Criminal Investigation*, 11th ed (Boston: Nelson Education, 2017) at 8.

the following pages will explain, investigating may produce at least two types of disruption. Police may disrupt civilian practices through *information collection*, which includes conducting surveillance and acquiring records, and through *information processing*, such as the retention and aggregation of data.[7]

The first type of police disruption, information collection, can interfere with a number of practices. Given this article's focus on establishing responsive safeguards, it is noteworthy that many such disruptions are not overseen by courts as they do not require prior judicial authorization and, unless they result in a charge or a complaint, they are not reviewed after the fact. Street checks are a contemporary example of how police information collection can interfere with civilian practices. A street check occurs when police record personal information about a civilian in public so that it can be stored in a law enforcement database.[8] Officers complete a check to gather information of intelligence value, such as suspicious behaviour, or a known offender's location or association. While often associated with stopping individuals in public, street checks include logging information from visual observations of civilians without direct contact.[9] Regardless of whether charges ensue from a street check, this type of information collection by police raises important privacy considerations.

Broadly speaking, knowing that one may be observed, or that personal information may be retrieved, produces a chilling effect. It pushes the person to act in accordance with how their behaviour will be perceived.[10] While this controlling effect may be beneficial—perhaps even desirable—for law enforcement, it jeopardizes certain societal norms and activities. Most evidently, information collection interferes with individuals' interest in being left alone.[11] As Julie Cohen explains, "respite from visual scrutiny affords individuals an important measure of psychological repose [since] we are accustomed to physical spaces within which we can be unobserved, and intrusion into those spaces is experienced as violating the boundaries of self."[12] At a minimum, information collection by police may disturb our sense of wellbeing.

Aside from interfering with an interest in being left alone, information collection by police also poses a threat to personal and interpersonal development. Because surveillance acts as a form of control by discouraging unconventional behaviour, the amount of surveillance that a person experiences influences whether and how they express their identity. When surveillance becomes

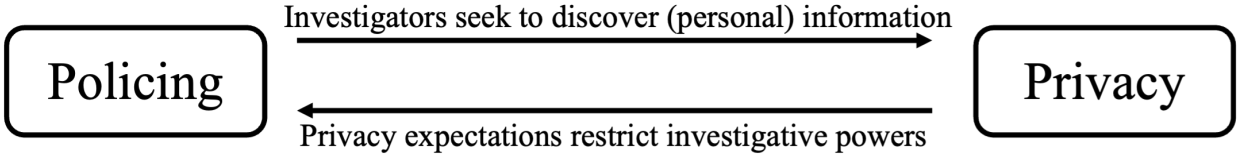
7. Solove, "A Taxonomy of Privacy", *supra* note 3 at 489.
8. Ruth Montgomery et al, *Vancouver Police Board Street Check Review* (Vancouver: Vancouver Police Board, 2019), online (pdf): BCCLA <bccla.org/wp-content/uploads/2020/02/VPD-Street-Checks-Final-Report-17-Dec-2019.pdf> at 127.
9. Scot Wortley, *Halifax, Nova Scotia: Street Checks Report* (Halifax: Nova Scotia Human Rights Commission, 2019), online (pdf): <humanrights.novascotia.ca/sites/default/files/editor-uploads/halifax_street_checks_report_march_2019_0.pdf> at 101-102.
10. Robert S Gerstein, "Intimacy and Privacy" (1978) 89:1 Ethics 76 at 78.
11. Samuel D Warren & Louis D Brandeis, "The Right to Privacy" (1890) 4:5 Harv L Rev 193 at 193.
12. Julie E Cohen, "Examined Lives: Informational Privacy and the Subject as Object" (2000) 52:5 Stan L Rev 1373 at 1425.

perpetual, it risks "corrupting" a person's choices about which aspects of their identity they develop.[13] Similarly, pervasive surveillance may disrupt interpersonal development. Intimate relationships, which involve exclusive sharing between participants, simply cannot exist when information is susceptible to interception.[14] Ordinary social relationships also cannot be formed or maintained absent a level of concealment and discretion.[15] Beyond a certain threshold, information collection limits personal and social development.

The second type of police disruption, information processing, is a more novel form of interference. It can be traced to the proliferation of computers, which record and store an ever-greater assortment of information. The availability of these records, combined with the computing power to process them, has enabled law enforcement to move investigations beyond the simple observation and acquisition of information, and toward the creation of new data.[16] Increasingly, police have the means to combine and analyze seemingly trivial data to discover information that the data, individually, did not reveal. This ability interferes with the structural norms of society by upsetting the balance of power between citizens and the authorities and granting additional power over individuals.[17]

This overview of police functions, and the civilian practices they disrupt, helps shed light on the meaning of privacy in the policing context, as well as the effect of privacy on policing itself. Privacy, in relation to policing, is concerned with interferences at the individual and societal levels. In addition to disrupting personal freedom and individuals' interest in being left alone, police investigations may impact the way members of society build bonds with one another. Owing to the gravity of these possible disruptions, the desirability of controlling certain police practices has long been recognized. Figure 1 begins to explain how policing and privacy influence one another.

Figure 1



Because police investigations serve an important purpose but also risk interfering with valuable privacy interests, there has long been a need to reconcile this tension. This need is etched into the law itself. For instance, the right to be secure against unreasonable search or seizure under s 8

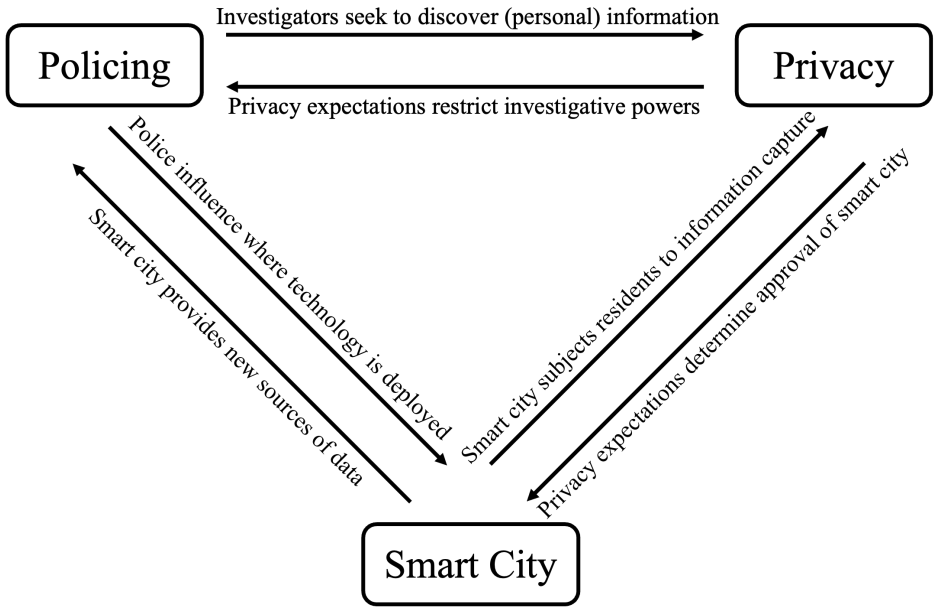
13. Paul M Schwartz, "Privacy and Democracy in Cyberspace" (1999) 52:6 Vand L Rev 1607 at 1657, 1665.
14. Gerstein, *supra* note 10 at 76.
15. Debbie VS Kasper, "Privacy as a Social Good" (2007) 28 Social Thought & Research 165 at 175.
16. Orin S Kerr, "Use Restrictions and the Future of Surveillance Law", *The Future of the Constitution* (19 April 2011), online (pdf): The Brookings Institution <brookings.edu/wp-content/uploads/2016/06/0419_surveillance_law_kerr.pdf> at 3-4.
17. Solove, "A Taxonomy of Privacy", *supra* note 3 at 507-08.

of the *Charter of Rights and Freedoms*[18] reflects the interrelation depicted in Figure 1. It restricts investigative powers by controlling disruptive police practices, and it permits such disruptions when the investigation offers a sufficiently compelling reason to tolerate them.[19]

2. Smart Cities as a Disruptive Force

Given the law's concern for reconciling policing and privacy, it must remain attuned to developments in either field. When technology changes the nature of policing or of privacy concerns, how the law manages the interaction between these two concepts must be reassessed. As Figure 2 illustrates, smart cities trigger the need for such a reassessment by affecting both how investigations may be conducted and how privacy may be engaged.

Figure 2



In terms of their effect on investigations, smart cities have the potential to supply police with unprecedented amounts of information. Because they feature large networks of interconnected technologies with sensing capabilities, the extent to which smart cities monitor and record urban environments is without parallel. Added to these sensor networks are means of harnessing insights at the grassroots level by tasking citizens with data collection responsibilities.[20]

18. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 8.

19. By its very wording, s 8 of the *Charter* guards against privacy intrusions by prohibiting unreasonable searches, thus tolerating *reasonable* police searches, be they disruptive or not.

20. Oliver Gassmann, Jonas Böhm & Maximilian Palmié, *Smart Cities: Introducing Digital Innovation to Cities* (Bingley, UK: Emerald Publishing, 2019) at 28.

As regards sensing technologies, smart cities will likely feature devices that exist in a more or less developed form today. Concretely, these might include closed-circuit television (CCTV) with facial recognition capabilities, automating recognition of individuals as they move about the city.[21] Increased smart card integration through the deployment of card readers—a common feature of smart cities—may serve as a further source of information. By logging data such as cashless transactions and public transport use, smart cards and their networks will record details of users' mobility and habits and may reveal links between users when this data is correlated.[22] Even the growth of public Wi-Fi infrastructure holds the potential to make information on individuals' movements available, by logging which devices enter a given coverage area and when.[23] While much of this equipment is not entirely novel, privacy concerns will be amplified once such technologies are thoroughly interconnected.[24]

Smart city networks are also likely to capture information from technology that is currently in its infancy. Intelligent vehicles are an example of devices whose widescale deployment could generate new forms of data. In order to facilitate autonomous driving, intelligent vehicles must transmit their location to nearby cars and to traffic lights and other nodes making up the smart city infrastructure.[25] The vehicle's identifier, location, direction and speed must be broadcast in unencrypted form to be intelligible to others in the area.[26] With the right equipment, these unencrypted broadcasts create an opportunity to record vehicular movement within a smart city with great precision.[27] It is even conceivable that as autonomous vehicles become mainstream, governments will require that they report their location to a central oversight body to ensure road safety.[28]

21. Lisbet van Zoonen, "Privacy Concerns in Smart Cities" (2016) 33:3 Gov Inf Q 472 at 475.
22. Gassmann, Böhm & Palmié, *supra* note 20 at 43; David Eckhoff & Isabel Wagner, "Privacy in the Smart City—Applications, Technologies, Challenges and Solutions" (2017) 20:1 IEEE Communications Surveys & Tutorials 489 at 492, 502; Daniel Belanche-Gracia, Luis V Casaló-Ariño & Alfredo Pérez-Rueda, "Determinants of Multi-Service Smartcard Success for Smart Cities Development: A Study Based on Citizens' Privacy and Security Perceptions" (2015) 32:2 Gov Inf Q 154 at 154.
23. Maša Galič, *Surveillance and Privacy in Smart Cities and Living Labs: Conceptualising Privacy for Public Space* (PhD Dissertation, Tilburg University, 2019) at 80 [unpublished].
24. Trevor Braun et al, "Security and Privacy Challenges in Smart Cities" (2018) 39 Sustainable Cities and Society 499 at 500.
25. Eckhoff & Wagner, *supra* note 22 at 493, 507.
26. *Ibid* at 507.
27. For a contemporary example of traffic management technology being repurposed to record movement, consider reports of New York City E-ZPasses being read throughout the city instead of only at toll booths: Kelsey Finch & Omer Tene, "Welcome to the Metropticon: Protecting Privacy in a Hyperconnected Town" (2016) 41:5 Fordham Urb LJ 1581 at 1598.
28. Ric Simmons, "The Mirage of Use Restrictions" (2017) 96 NCL Rev 133 at 144.

As for examples of information generated through citizen participation, smart cities encourage residents to download data-gathering applications on their mobile devices. Applications enable residents to report street litter or road defects by uploading pictures of issues they discover.[29] Potholes, for example, can be detected by retrieving a phone's GPS and accelerometer data.[30] The data generated by this mode of citizen participation, however, often contains personal information in the form of metadata that users may not intend to share or even be aware is being transmitted.[31] Left unchecked, this source of data, independently or in combination with the sensor technologies mentioned above, is capable of providing police with new forms of information.[32]

While most of these smart city technologies are not geared toward crime detection or surveillance, the data they collect may serve that purpose. This is because policing, like operating a smart city, relies on the collection and analysis of information. Kaja Prislan and Boštjan Slak identify a "natural symbiosis" between smart cities and criminal investigations owing to the shared goals of gathering facts, reconstructing what has occurred, and acting accordingly.[33] Based on these overlapping functions, Elizabeth Joh goes so far as to conclude that policing is embedded into smart city infrastructure and therefore inherent to smart cities.[34] In some cases, there can even be a form of feedback between policing and smart cities given that police may influence which smart city technologies are deployed and where.[35]

As with policing, privacy is at once impacted by, and influential on, smart cities. Notably, smart cities accentuate the loss of "privacy in public" by reducing the possibility of finding reprieve from observation in communal spaces.[36] Traditionally, being observable in public entailed little risk of being observed, at least in an intrusive fashion. If an individual was noticed at all, the person making the observation could only see and retain disparate fragments of information. As Jeffrey Reiman summarized before the turn of the century, "privacy results not only from locked doors and closed

29. Sunil Choenni et al, "Privacy and Security in Smart Data Collection by Citizens" in J Ramon Gil-Garcia, Theresa A Pardo & Taewoo Nam, eds, *Smarter as the New Urban Agenda: A Comprehensive View of the 21st Century City* (Cham, Switzerland: Springer, 2016) 349 at 350; Finch & Tene, *supra* note 27 at 1597.
30. Finch & Tene, *supra* note 27 at 1604.
31. Choenni et al, *supra* note 29 at 354-55; Finch & Tene, *supra* note 27 at 1597.
32. Finch & Tene, *supra* note 27 at 1607, fn 147.
33. Kaja Prislan & Boštjan Slak, "Analysis of the Relationship Between Smart Cities, Policing and Criminal Investigation" (2018) 2:4 Varstvoslovje 389 at 398.
34. Elizabeth E Joh, "Policing the Smart City" (2019) 15:2 Int'l JL in Context 177 at 178.
35. Prislan & Slak, *supra* note 33 at 399-400.
36. Helen Nissenbaum, "Protecting Privacy in an Information Age: The Problem of Privacy in Public" (1998) 17 Law & Phil 559 at 560.

curtains, but also from the way our publicly observable activities are dispersed over space and time."[37] The increasing accessibility of data, a trend that smart cities will perpetuate, leads to previously "scattered and transient" information being "ordered, systematized, and made permanent."[38]

The erosion of privacy in public aggravates the disruptions outlined above by undermining wellbeing and autonomy. Recall that police observation can impede psychological repose when it does not allow reprieve from visual scrutiny. By extension, importing the risk of being systematically observed in public compromises the sense of freedom and relaxation that open spaces are intended to afford.[39] The decline of privacy in public is far from academic. Jurisprudence from the United States (US), in a quote most prominently reproduced by Sotomayor J, evocatively reminds us that data on public movements can reveal such intrusive information as "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on."[40]

Indeed, Canadian law has recognized the importance of privacy in public for some time. More than 30 years ago, the Supreme Court of Canada (SCC) found in *R v Wise* that persistently monitoring the whereabouts of a suspect's vehicle—even though it was being driven in public such that anyone could observe it—violated the suspect's reasonable expectation of privacy.[41] Almost ten years ago, the SCC reiterated that "[t]he mere fact that someone leaves the privacy of their home and enters a public space does not mean that the person abandons all of his or her privacy rights, despite the fact that, as a practical matter, such a person may not be able to control who observes him or her in public."[42]

As mentioned, and as Figure 2 depicts, the relation between privacy and smart cities is a two-way street. In fact, privacy bears directly on the feasibility of smart city projects because smart city proposals are unlikely to attract sufficient public support without adequate privacy safeguards.[43] Each of the smart city features identified above—sensor network interconnectivity and grassroots data gathering—depends on citizens holding a positive view of their privacy implications. In a recent empirical study, Abdulrahman Habib and others mapped the factors determining whether members

37. Jeffrey H Reiman, "Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future" (1995) 11:1 Santa Clara Comp & High Tech LJ 27 at 29.

38. Nissenbaum, *supra* note 36 at 577.

39. Alan F Westin, *Privacy and Freedom* (New York: Atheneum, 1967) at 31.

40. *United States v Jones*, (2012) 132 S Ct 945 at 955 (Sotomayor J, concurring), quoting *People v Weaver*, (2009) 909 NE 2d 1195 at 1199.

41. *R v Wise*, [1992] 1 SCR 527, (1992) 133 NR 161 (SCC).

42. *R v Spencer*, 2014 SCC 43 at para 44.

43. See Braun et al, *supra* note 24 at 500, contending that privacy protections "are paramount to the success of a smart city."

of the public are willing to accept smart city technologies and found that perceived privacy (the belief that personal information will be protected) is a strong determinant of trust in smart city technology.[44] The authors conclude that "residents are willing to use smart-city technologies, provided they are assured their information is safe and their right to privacy guaranteed."[45]

As for grassroots information gathering, Sunil Choenni and others' research on the security and privacy implications of data collection by citizens points in the same direction.[46] Their findings suggest that citizens' willingness to act as data collectors is also tied to addressing privacy concerns.[47] The very prospect of developing smart cities, therefore, depends on residents feeling that their personal information is protected. If privacy concerns are not adequately addressed, including those relating to policing, they may have a chilling effect on the public's approval of smart cities and, in turn, on the feasibility of smart city projects.

3. An Emerging Legal Problem

Smart cities' effects on policing and privacy call for external safeguards. Designing smart city technology with built-in privacy protections and promoting responsible data collection have a role to play, but they cannot offer a complete solution. In light of these limitations, the gap forming at the intersection of privacy, policing and smart cities is, in part, a legal one.

While the most secure way to protect privacy is to avoid collecting personal information altogether, not all data generated in smart cities can be dissociated from personal identifiers. To complement technical means of anonymizing data at the source, additional privacy safeguards are required for data that cannot be anonymized. For instance, recall that intelligent vehicles must broadcast unencrypted details of their movements to facilitate autonomous driving. Consequently, by technical necessity, anyone within range of the vehicle's transmission, including police, is capable of intercepting this information.[48] The same inability to anonymize information at the source arises with respect to data collected by smart city residents. Choenni and others report that, practically speaking, it is not possible to predict how data sourced from residents' devices may reveal personal information when combined with other data.[49]

44. Abdulrahman Habib, Duha Alsmadi & Victor R Prybutok, "Factors that Determine Residents' Acceptance of Smart City Technologies" (2020) 39:6 Behaviour & Information Technology 610.
45. *Ibid* at 619.
46. Choenni et al, *supra* note 29.
47. *Ibid* at 350-51. For studies suggesting that a smart city's success is predicated on the public holding a positive view of its privacy implications more broadly, see van Zoonen, *supra* note 21 at 474; Eckhoff & Wagner, *supra* note 22 at 490.
48. Eckhoff & Wagner, *supra* note 22 at 507.
49. Choenni et al, *supra* note 29 at 355.

When data cannot be reliably anonymized, trusting that personal information will only be collected and used to benefit residents may be short-sighted. Smart cities are intended to enhance quality of life, improve resource management, and promote economic growth.[50] It follows that the host of public and private entities collecting data in smart cities should be expected to act for diverse but beneficial purposes, without intending to unnecessarily compromise privacy.[51] However, relying on responsible frontline data collection does not guard against police repurposing data. Absent oversight mechanisms, data collected by private entities and other branches of government with the intention of benefitting a given individual risks being repurposed to that individual's detriment. The potential repurposing of smart city data speaks to the importance of implementing legal privacy controls to guard against abuses after collection.

Naturally, specific legal initiatives that complement responsible data collection and processing may vary from one city to the next. Municipalities can choose to entrust different entities with fulfilling smart city functions, including various forms of public and private organizations. Depending on their nature, these entities may be subject to distinct legislative or contractual obligations concerning privacy. Differences in smart city governance will be relevant to promoting privacy interests in individual municipalities, but the choices each city might make are difficult to predict and lessons for general application are difficult to draw. Thus, the balance of this article focuses on the role existing Canadian oversight structures can play in anticipating smart cities' disruptive forces on privacy and policing.

Lastly, while some intrusive policing techniques pose a more immediate threat to privacy than repurposing information from smart cities, the need for external safeguards should not be discounted. Much could be learned about a person of interest in a criminal investigation by monitoring their personal devices or tracking their wearable accessories rather than sifting through smart city data.[52] Yet, if recourse to smart city data for investigatory purposes is not comprehensively regulated, it risks becoming a convenient alternative to investigatory techniques that do involve robust oversight.

50. Eckhoff & Wagner, *supra* note 22 at 490; Martina Fromhold-Eisebith, "Cyber-Physical Systems in Smart Cities – Mastering Technological, Economic, and Social Change" in Houbing Song et al, eds, *Smart Cities: Foundations, Principles, and Applications* (New York: Wiley, 2017) 1 at 2.

51. See, however, Braun, *supra* note 24 at 500, arguing that many businesses collecting smart city data are hesitant to offer greater privacy protection than what external forces require of them.

52. Prislan & Slak, *supra* note 33 at 404.

II. Complementing Calls for Enhanced Judicial Oversight

Part I outlined the importance of reconciling the tension between the need for police investigations and the need to protect privacy. Recognizing that police will sometimes be justified in infringing individuals' privacy requires officers to discern cases where interference is warranted from those where it is not. Properly regulating this exercise of discretion mitigates the chances that officers will choose to interfere with privacy arbitrarily or on improper grounds.[53]

Court-based and nonjudicial safeguards are complementary ways of regulating investigatory discretion. Court-based controls are premised on judicial review of police action. By measuring police action against statutory and common law thresholds, judicial decisionmakers make binding determinations on the legality of policing decisions. As part of this process, they also interpret existing constraints on police discretion and determine their applicability to novel situations. Nonjudicial safeguards can regulate discretion through means such as officer training, internal policies, and command structures.

Court-based solutions have proven adaptable to new information-driven investigations, and a growing body of literature suggests addressing the privacy issues that smart city policing raise through judicial oversight. As this Part contends, when the issues raised by smart city policing are considered holistically, the limits of court-based controls become more apparent. Accordingly, nonjudicial safeguards can, and in fact, must evolve to regulate smart city policing.

1. Invitations to Rely on Judicial Oversight in Smart Cities

Section 8 of the *Charter* is a pillar of court-based privacy safeguards. Behind its modest wording, which provides that "[e]veryone has the right to be secure against unreasonable search or seizure," lies an adaptable tool in the regulation of intrusive investigative conduct. The provision makes no mention of privacy, and yet, through successive judicial interpretations, s 8 has been used to regulate new information-gathering practices as they emerge.

The SCC recognized and even encouraged s 8's expansion from as early as *Hunter v Southam*.[54] Distancing itself from past formulations of privacy premised solely on protecting property, the Court found that s 8 protects "people, not places"[55] and, later, that s 8 is concerned with safeguarding individuals' dignity, integrity, and autonomy.[56] Anticipating the need to apply s 8 in unforeseen future situations, the unanimous *Hunter* Court ruled the provision "capable of growth and development over time to meet new social, political and historical realities."[57]

---

53. See Loraine Gelsthorpe & Nicola Padfield, "Introduction" in Loraine Gelsthorpe & Nicola Padfield, eds, *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (Uffculme Cullompton: Willan Publishing, 2003) 1 at 4 (suggesting that legal systems that provide little guidance on how to exercise discretion increase the risk that discrimination will creep into decision-making).

54. *Hunter et al v Southam Inc*, [1984] 2 SCR 145, (1984) 55 AR 291 (SCC) [*Hunter*].

55. *Ibid* at 159.

56. *R v Plant*, [1993] 3 SCR 281 at 292-93, (1993) 157 NR 321 (SCC).

57. *Hunter, supra* note 54 at 155.

Following *Hunter*, any activities conducted by the state can qualify as a "search" so long as they interfere with a reasonable expectation of privacy.[58] As courts began adjudicating claims based on informational rather than territorial privacy, the "totality of circumstances" that suggest whether claimants have a reasonable expectation of privacy grew from a list centred on ownership to one weighing factors wholly removed from property considerations.[59] Most notably, perhaps, the nature of the information revealed (i.e., whether the search exposes intimate details of the claimant's lifestyle or biographical information) is now a factor influencing the reasonable expectation of privacy assessment.[60]

Section 8 claims divorced from property considerations have already begun to regulate technologically assisted investigations. In particular, the SCC has shown an openness to recognizing that claimants may have a reasonable expectation of privacy over surveillance conducted in public and data gathered or held by third parties. With respect to surveillance, the SCC recently distinguished visual recordings in public from mere observation. Recordings, it found, have a greater potential to interfere with privacy expectations because of their permanency and the level of detail that can be gleaned from their subsequent study.[61] As for data held by others, the past decade spawned a string of cases recognizing that claimants may have a reasonable expectation of privacy with respect to data stored by third parties, over which the claimants have no control.[62]

Some authors propose continuing to develop s 8 jurisprudence in a direction that would recognize the privacy concerns that smart city policing raises.[63] The scholarship at this stage is not concerned with smart cities specifically, but its focus on privacy concerns in the digital age touches on the same broad themes. In particular, proposed reforms include strengthening the recognition that public surveillance engages important privacy considerations and recognizing that information processing should be subject to oversight as well. These proposals identify important areas for reform but, as the remainder of this article contends, their attempts to situate those reforms within s 8 need to be accompanied by other novel solutions to policing in smart cities and similar environments.

Some proposals invite courts to address modern privacy issues by continuing to move beyond property safeguards and toward weighing the effects of police conduct on individuals. George Dolhai argues that the totality of circumstances list has become so unworkable that courts should recentre

58. *Ibid* at 160.

59. *R v Edwards*, [1996] 1 SCR 128 at paras 45, 31, (1996) 192 NR 81 (SCC).

60. *R v Patrick*, 2009 SCC 17 at para 27 [*Patrick*].

61. *R v Jarvis*, 2019 SCC 10 at para 62.

62. See e.g. *R v Cole*, 2012 SCC 53 (child pornography stored on a work-issued laptop); *R v Marakah*, 2017 SCC 59 (text messages from the sender stored on the recipient's cellphone); *R v Jones*, 2017 SCC 60 (text message conversation held by telecommunications service provider).

63. See *infra* notes 64-74 and accompanying text.

the analysis on the notions of dignity, integrity, and autonomy.[64] Specifically, Dolhai asserts that protection under s 8 should focus on how best to serve the personhood of an individual by engaging with how a given attempt to collect information impairs their dignity, integrity, and autonomy.[65]

Complementary proposals would see the s 8 framework expand to recognize that information processing can engage reasonable expectations of privacy. Legal scholar Jane Bailey argues that the "nature of the information revealed" factor in the totality of circumstances assessment ought not to be framed so narrowly.[66] Currently, the nature of the information revealed militates in favour of recognizing a reasonable expectation of privacy, therefore triggering s 8 if a given search exposes intimate personal details.[67] This attention to how an individual search may expose personal information stops short of acknowledging that aggregating less intrusive non-biographical data may also reveal intimate lifestyle information.[68]

Although writing from an American perspective, the broad strokes of Emily Berman's argument align with ideas found in the Canadian literature.[69] Berman's proposal seeks to address a narrower issue than Bailey's: that of combining information in databases to which police already have access. Berman suggests that if this form of data processing reveals information that engages a reasonable expectation of privacy, it ought to be protected under search and seizure rights. Concretely, aggregation would be considered a "search" if the nature of the intrusive information it reveals could only otherwise have been obtained through information collection.[70]

Mathew Johnson proposes a greater departure from how the SCC has applied s 8 to novel search technologies. In Johnson's view, the dictionary definition of the word "search" should determine whether s 8 is engaged.[71] His proposal would shift the focus of the analysis from the subject matter of the search and the information revealed to the nature of the police action. In other words, a "search" within the meaning of s 8 would be triggered when police look through or examine something to find information.[72] Johnson notes that his approach would facilitate the recognition of privacy infringements in public, since conducting surveillance amounts to examining something to find information and therefore meets the definition of a search.[73]

64. George Dolhai, "Why a New Approach to Privacy Rights and Section 8 of the Chapter [*sic*] is Required in the Cyber Age and What It Could Look Like" (2020) 68:1 Crim LQ 29 at 44.
65. *Ibid* at 30.
66. Jane Bailey, "Framed by Section 8: Constitutional Protection of Privacy in Canada" (2008) 50:3 Can J Corr 279.
67. *Patrick*, *supra* note 60 at para 27.
68. Bailey, *supra* note 66 at 295.
69. Emily Berman, "When Database Queries Are Fourth Amendment Searches" (2017) 102:2 Minn L Rev 577.
70. *Ibid* at 612.
71. Mathew Johnson, "Privacy in the Balance – Novel Search Technologies, Reasonable Expectations, and Recalibrating Section 8" (2012) 58:3&4 Crim LQ 442 at 487.
72. *Ibid* at 488.
73. *Ibid* at 489-90.

Turning to the US again, Rebecca Lipman proposes a similar approach, also aimed at overseeing the manipulation of data in databases to which police already have access. For Lipman, general acts that do not involve aggregation, including merely accessing these ever-expanding databases, ought to be considered a "search" based on the plain meaning of that word.[74] According to her construction, simply retrieving personal information that is already accessible would suffice to trigger constitutional search and seizure rights.

The above proposals attest to a movement in the literature that relies on judicial interpretation and court-based controls to address smart city policing issues, namely, information collection in public and information processing. As important as these emerging privacy concerns are, the remainder of this Part will outline why they can only be addressed if court-based controls are accompanied by developments in the area of nonjudicial safeguards as well.

2. Inadequacies of Judicial Oversight in Smart Cities

As smart city technology becomes mainstream, the ability of court-based controls to prevent unjustified privacy intrusions will likely diminish. Upfront judicial oversight is already limited to instances where a warrant is required to access information. The oversight of warrantless searches and submissions by the affected party of any search only occurs after the fact, if the matter proceeds to court at all. While the need to obtain a warrant before accessing certain information acts as an upfront check, this check is undermined when the person or entity holding the information shares it voluntarily.[75] As smart cities develop and relevant information is increasingly held by government partners, instances where judicial approval mechanisms operate may decline. Early smart card integration on the Greater Toronto Area's public transit networks illustrates this point. Over the past years, officers have obtained a warrant in fewer than 20 per cent of cases where fare card data was disclosed to facilitate or further a police investigation.[76]

---

74. Rebecca Lipman, "Protecting Privacy with Fourth Amendment Use Restrictions" (2018) 25:2 Geo Mason L Rev 412 at 456-57.

75. For a discussion of third parties voluntarily turning over data to police, see *R v Cole*, 2012 SCC 53, where school authorities turned over the computer that a teacher used to store nude photographs of a student. While the Court held that police could not access the personal information without a warrant in this case, it added that "[t]he school board was, of course, legally entitled to inform the police of its discovery of contraband on the laptop. This would doubtless have permitted the police to obtain a warrant to search the computer for the contraband." (at para 73)

76. See memorandum from Sara Azargive, Senior Privacy Officer, to Metrolinx Board of Directors, "2018 PRESTO Law Enforcement Requests Data Transparency Report" (7 February 2018), online (pdf): Metrolinx <assets.metrolinx.com/image/upload/Documents/Metrolinx/20190207_BoardMtg_PRESTOLawEnforcementRequests_EN.pdf> at 4, reporting that 22 of the 26 disclosures to law enforcement for investigatory purposes were provided without a court order; Memorandum from Fawad Ebraemi, Chief of PRESTO (Acting), to Metrolinx Board of Directors, "PRESTO Report" (25 March 2021), online (pdf): Metrolinx <assets.metrolinx.com/image/upload/Documents/Metrolinx/20210325_BoardMtg_PRESTO_Quarterly.pdf> at 5, reporting that 44 of the 54 disclosures were provided without a court order.

Where court-based controls do continue to operate, judicial officers' lack of specialization risks undermining their effectiveness. On the one hand, judicial oversight is ill-suited to the complexity and pervasiveness of sensing technologies in smart cities. It is conceivable that judges, like most generalists, will find the workings and privacy ramifications of information processing technologies difficult to appreciate. Orin Kerr fleshes out this concern by contrasting courts' ability to regulate dynamic technologies with traditional technologies that do not change significantly over time, such as automobile stops, which judges can readily comprehend and therefore regulate.[77] Even if monitoring information processing were brought into the fold of court-based controls, as some of the literature described here suggests, judicial officers may be at pains to appreciate the effects of practices like data manipulation and aggregation on privacy.

On the other hand, an important component of overseeing information collection and processing in smart cities will be foreign to the courts. As legal scholar Craig Forcese explains, settings where the government itself collects and stores a large share of intrusive information may be a poor fit for traditional judicial oversight.[78] In such environments, "there is a less pronounced adversarial relationship between information-seeker and information-possessor."[79] Determining whether law enforcement interests are strong enough to justify accessing the information is only one part of providing oversight. Oversight is also concerned with leakage between different government branches, which courts can do little to prevent or control.[80]

Lastly, the idea of developing judicial oversight by adopting a broader interpretation of s 8 in particular is problematic. If novel forms of privacy intrusion qualify as searches, the framework through which courts assess their legality in a given case would likely lack context. Whereas some smart city policing decisions will have far graver impacts on privacy than others, s 8's justificatory framework has crystallized in a way that takes few contextual factors into account. To find that a search is justified, courts require that officers either have a reasonable belief or a reasonable suspicion that their search will uncover evidence of an offence. That is, courts perform a balancing of law enforcement and privacy interests based largely on how confident officers are that a search will reveal evidence of an offence.[81] This weighing exercise places strong emphasis on how likely it is

77. Orin S Kerr, "The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution" (2004) 102:5 Mich L Rev 801 at 863.

78. Craig Forcese, "The Limits of Reasonableness: The Failures of the Conventional Search and Seizure Paradigm in Information-Rich Environments" (Paper delivered to the Privacy Commissioner of Canada, 1 July 2011), online (pdf): Social Science Research Network <ssrn.com/abstract=1945269> at 11.

79. *Ibid*.

80. *Ibid*.

81. For an argument that framing privacy and security as a balance oversimplifies the relationship between both concepts, see Bernadette Somody, Máté Dániel Szabó & Iván Székely, "Moving Away from the Security-privacy Trade-off: The Use of the Test of Proportionality in Decision Support" in Michael Friedewald et al, eds, *Surveillance, Privacy and Security: Citizens' Perspectives* (New York: Routledge, 2017) 155-176. The argument is compelling but, in order to track the language and methodology that courts have developed in Canada, this article refers to weighing privacy and law enforcement interests as a "balancing" exercise.

that an intrusive investigative technique will uncover evidence, with comparatively little regard for other fact-specific considerations such as necessity and proportionality. In smart cities, the severity of privacy intrusions will greatly vary and require a more flexible approach to justifying breaches than s 8 can offer. An example may help clarify this concern.

Returning to the fictional city of Techtown with which this article opened, one can imagine a situation where local police have come to learn of a mid-level drug dealer whom they suspect traffics prohibited substances around town. Before making an arrest, police want to find out whether their suspect works with an accomplice and, if so, learn the accomplice's identity. Smart city technology would enable police to investigate with relative ease. Subject to any legal requirements, by correlating data from facial recognition, licence plate readers, or Wi-Fi logs, they could establish which individuals frequently attend the same events as their suspect or who can often be seen with him.

Many variations that bear on whether the state's law enforcement interest supersedes the public's privacy interest are possible within this scenario. By way of example, the nature of events where attendance may be revealed influences privacy considerations. If processing the data would engage scores of individuals' privacy interests because it identifies a large number of people, or if it would reveal people's repeated attendance at a medical facility, for instance, the impetus to restrain the state's action increases. Conversely, if the data is sourced from one location or from a limited period of time, the effect on privacy interests may be relatively weak. Once police have correlated attendance at different events, whether they will retain data and how they will restrict access to it also informs the gravity of privacy intrusions.

All of these variations impact privacy interests in a way that requires guarding against abuses. Even recording individuals' attendance outside an underground party and later deleting the data is detrimental to privacy interests. Experience shows that surveillance technology often becomes a form of control over marginalized groups by monitoring behaviour that is unconventional, but not criminal.[82] Discouraging participation in non-mainstream movements through the controlling force of surveillance can have a chilling effect on personal and social development. Returning to Solove's terminology, discouraging attendance by recording identifiers is a policing action that disrupts worthwhile practices.

That is not to say that recording attendance at public or semi-public events should be disallowed altogether. Society is willing to accept a level of public information collection and processing that compromises privacy to enable police investigations. Officers can choose to engage in public information collection and processing so long as that behaviour fits within the constraints privacy interests place on policing. In less intrusive scenarios such as this one, where the privacy concern

82. Gérard La Forest, "Opinion by Justice Gérard La Forest" (writing extrajudicially to Privacy Commissioner of Canada George Radwanski, 5 April 2002), online: Office of the Privacy Commissioner of Canada <priv.gc.ca/en/opc-news/news-and-announcements/2002/opinion_020410>.

involves recording attendance at public events, s 8 cannot be the privacy framework that guides police discretion when its justificatory mechanism will not tolerate any police actions without at least a reasonable prospect of uncovering evidence of an offence. The levels of privacy infringements that smart city technology will enable require a more contextual approach.

Section 8's justificatory mechanism is unlikely to undergo the necessary change. Recent case law rejects the adoption of a different threshold in public, where privacy interests are lower, to say nothing of a contextual or proportionality threshold. In *R v Kang-Brown* and *R v A.M.*, the SCC discussed the possibility of a *Charter*-compliant "generalized suspicion" standard[83] that would have permitted officers to use invasive investigative techniques if they suspected criminality in certain locations or at certain events.[84] A generalized suspicion standard would have established a more permissive threshold for tolerable police conduct by allowing "random, generalized searches" in situations where individuals have a lesser expectation of privacy, such as travelling through a public transportation hub.[85] The SCC firmly rejected the more permissive standard, recognizing that a generalized search power would give insufficient regard to individuals' privacy interests.

Leaving aside the likelihood of change, any solution that imports more flexibility into the test would risk compromising existing collection restrictions.[86] Section 8 currently provides a simple and robust mechanism for protecting individuals' homes, communications, and data that independently discloses intimate personal details. Those interests should continue to benefit from the strictest protection and only be infringed when state intrusion is likely to produce evidence of an offence. Creating a parallel flexible privacy framework outside of s 8 ensures that existing privacy protections will not be compromised.

3. Renewed Importance of Nonjudicial Oversight in Smart Cities

Nonjudicial controls are often the only safeguards that apply to police decisions. Intrusive investigatory decisions that do not result in criminal charges and discriminatory decisions where no complaint is brought are never litigated, and are therefore only subject to out-of-court controls. These controls take many forms. They include the guidance officers receive through training and policies as well as internal approval processes before conducting certain actions.

Recent studies on the use of street checks in Canada, such as those examining practices in Ontario,[87] Halifax,[88] and Vancouver,[89] exemplify the importance of responsive nonjudicial controls. As mentioned, officers perform a street check by gathering information of intelligence value about

83. *R v Kang-Brown*, 2008 SCC 18 [*Kang-Brown*]; *R v AM*, 2008 SCC 19.

84. *Kang-Brown*, *supra* note 83 at para 245.

85. *Ibid* at paras 246, 253.

86. Simmons, *supra* note 28 at 184.

87. Michael H Tulloch, *Report of the Independent Street Checks Review* (Toronto: Ministry of Community Safety and Correctional Services, 2018).

88. Wortley, *supra* note 9.

89. Montgomery et al, *supra* note 8.

civilians and storing it in a law enforcement database. Street checks often involve stopping individuals in public, but they can occur from logging information about civilians without direct contact. Importantly, street checks do not permit police to collect information randomly.[90]

Without proper oversight, intrusive investigative practices like street checks yield discriminatory results. Reviewing the relationship between race and street checks in Halifax, Scot Wortley found considerable disparities in the collection of information on Black and White residents. Halifax's policing policies provide "a strong theoretical foundation for the delivery of fair, unbiased and impartial police services,"[91] Wortley concludes. Yet, based on 2016 census data, he found that Black Haligonians were five times more likely to undergo a street check than their proportion of the population would suggest, and were 5.7 times more likely to undergo a street check than White residents.[92] Adjusting for newer population estimates, Wortley found Black residents' share of street checks may be closer to 5.33 times greater than their share of the population and 6.1 times greater than the White rate.[93]

The recent findings on street checks serve as a starting point for thinking about nonjudicial controls in smart cities. Despite differences between the application of street check policies and the investigatory use of smart city technologies, we can identify important parallels. The misapplication of street check policies results in unjustified physical stops and differential treatment of racialized residents. Smart city policing is less likely to reproduce these issues. Like street checks, however, investigations based on smart city technology are potentially intrusive practices affecting large portions of the population. They need responsive safeguards so that decisions to use the powers conferred on police officers are properly supported.

Beyond this universal observation that all police powers need responsive out-of-court controls, technological integration will further increase the importance of nonjudicial safeguards. Currently, when investigations involve more than an interaction or stop, such as aggregating several sources of information, police are incentivized to dedicate resources to instances of serious criminality and to deploy them no more widely than necessary. In smart cities, the pervasive monitoring of public spaces will afford access to more information with less effort.[94] The city's sensor network will provide extensive coverage at all hours, collecting information for public safety purposes and for other applications from which the data can be repurposed to investigate crime. Subject to restrictions on their discretion, officers could choose to investigate an offence using greater or lesser amounts of data without encountering logistical obstacles like deploying surveillance teams or setting up additional monitoring equipment.

90. Tulloch, *supra* note 87 at 35-36.

91. Wortley, *supra* note 9 at 166.

92. *Ibid* at 104.

93. *Ibid* at 105.

94. Joh, *supra* note 34 at 180.

Returning to the Techtown drug trafficking example, where police sought to identify a suspect's accomplice, helps illustrate this point. In correlating attendance outside events where drug trafficking is suspected, police could process CCTV footage with facial recognition technology and aggregate licence plate scans, or Wi-Fi hotspot use, to identify who has often been in the same area as their main suspect or who can often be seen with him. In using those techniques, police would need to make choices that impact the severity of privacy infringements. Facial recognition and analysis of the Wi-Fi logs might be applied to a small public area or a large one, over a short or a long period of time by using a database containing few or many faces and mobile device identifiers. Another choice could be what police will do with the data after its initial use. They may choose to delete the information, if it does not prove immediately relevant, or retain it, expecting that it will become useful or not even knowing whether it will ever be of use. With smart city technology already in place and increasingly affordable storage, neither broadening the search nor retaining the data would require significant cost or effort, but each variation would influence how much the investigation impacts privacy.

Absent traditional logistical constraints, how much to infringe upon privacy will depend on the leeway privacy safeguards afford. Nonjudicial safeguards will therefore need to play an even greater role in deciding the level of intrusion that should be tolerated in a given police investigation.

III. Implementing Responsive Safeguards

The final Part of this article suggests avenues for reflection and further research. It does so by building on the conclusion that front-end out-of-court controls will take on a renewed importance in addressing the privacy issues raised by smart city policing. As those issues are part of a broader trend, the following suggestions may also be adapted to other instances where data collection and processing by police raise privacy concerns. This Part begins by drawing on examples from England and Wales, a common law jurisdiction that is different but comparable to Canada, which places less emphasis on court-based controls to regulate the increasing public information collection and processing by police. Using initiatives in that jurisdiction as a starting point, the following pages suggest how provinces could play a greater role in crafting statutory oversight mechanisms and how day-to-day oversight might be embedded within the investigative process itself.

1. Comparative Outlook

Those well versed in Canadian criminal law will recognize *Charter* rights as being flexible and expansive provisions capable of regulating an array of privacy-engaging police conduct. Familiarity with this flexibility and expansiveness encourages creative proposals around how judicial safeguards may one day address the sorts of privacy issues that arise in smart cities, but it also diverts attention from nonjudicial solutions that have emerged in other jurisdictions.

Naturally, applying rights like security against unreasonable search or seizure to the digital age is not the only way of confronting privacy concerns posed by technological change. The laws of England and Wales provide a useful counterpoint. While English and Welsh law has long applied a set of requirements similar to Canada's before physical searches can be authorized[95]—indeed, it has done so for far longer[96]—the interpretation of those protections has not expanded to include intangible information. Obtaining and processing data are governed by a wholly separate, often front-end set of rules developed to safeguard personal information in the digital age.

The balance of this article draws on certain initiatives adopted in England and Wales to suggest nonjudicial safeguards that would benefit smart city policing and how they may apply in Canada. Before exploring these proposals, England and Wales's uneasy relationship with privacy rights bears unpacking. There is a certain irony to holding English and Welsh law out as an example of privacy protection. Over the past four decades, the United Kingdom (UK) has embraced public surveillance technology to become, by some estimates, the country with the most CCTV cameras per capita in the world.[97] As the UK Supreme Court recently explained, the right to privacy "fell on stony ground in England" and developed domestically in response to the European Convention on Human Rights' (ECHR) incorporation at the turn of the century.[98] More than 20 years later, the ECHR's future role in domestic law remains uncertain.[99]

Despite England and Wales's uneasiness with the right to privacy and the considerable European influence on its development, English and Welsh law serves as a useful building block. It illustrates how a version of privacy protection that often escapes North American commentators has developed in the very common law system from which Canadian criminal law originated. Based on that model, lessons can be drawn about developing detailed legislative responses and embedding oversight within the investigative process itself.

---

95. See e.g. *Police and Criminal Evidence Act 1984* (UK), c 60, s 8.

96. *Entick v Carrington* (1765) 19 St Tr 1029, 1 Wils KB 275.

97. Benjamin J Goold, *CCTV and Policing: Public Area Surveillance and Police Practices in Britain* (Oxford: Oxford University Press, 2004) at 1-2.

98. *R (Catt) v Commissioner of Police of the Metropolis*, [2015] UKSC 9 at para 2. See also Dimitrios Giannoulopoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Oxford: Hart, 2019) at 88, arguing that the right to privacy was either inexistant or unimportant in England and Wales's legal culture until the *Human Rights Act 1998*.

99. After Brexit, the UK government launched a review of the *Human Rights Act* to make recommendations on the European Court of Human Rights' influence over domestic courts and on how domestic courts' oversight role under the *Act* impacts legislative and executive power. Reviewers were not tasked with recommending changes to substantive rights, but the review signalled a discomfort with how European human rights law and judicial oversight have constrained domestic state action. See Independent Human Rights Act Review, *The Independent Human Rights Act Review 2021* (December 2021), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf>.

2. Addressing a Legislative Deficit

In Canada, some privacy-infringing police practices are already framed by statute, including aspects of technologically assisted investigations. For example, the *Criminal Code* provides that intercepting private communications is an offence and, in carving out an exception for police, codifies the steps and thresholds required to obtain authorization.[100] Some aspects of data management by police also benefit from codified boundaries. Returning to the street checks example, Ontario has codified approval processes and limits on accessing the data collected through street checks.[101] These safeguards are distinct from warrant obligations: they outline when an officer may exercise their discretion to collect personal information, govern the retention of that data, and provide for ongoing internal audits within the police service.

While detailed limits to police discretion exist in some areas, there is room to expand the coverage that federal and provincial privacy statutes afford. At the federal level, and in each of the provinces, there are general privacy statutes that regulate information collection and processing by most government entities, including law enforcement bodies.[102] However, as it stands, the provisions that apply to policing tend to create exemptions from privacy restrictions. For instance, many privacy statutes prohibit collecting personal information about an individual from third parties without that individual's consent, but create a blanket exemption for police.[103] Kate Robertson and others posit that police exemptions may have seemed appropriate decades ago, when legislative drafters only had traditional policing activities in mind.[104]

The result is a legislative deficit. To comprehensively regulate smart city investigations, legislatures will need to develop detailed oversight schemes that are responsive to the variety of smart city privacy concerns. As will be discussed, the responsibility for developing these schemes currently falls largely to the provinces.

Using legislation to regulate criminal investigations that involve rapidly changing technologies holds many advantages, especially compared to legislating broadly worded protections and relying on judicial interpretation. Legislatures can enact statutes with an eye to a technology's evolution and wider application by seeking submissions from a broad group of experts and stakeholders, such as

100. *Criminal Code*, RSC 1985, c C-46, ss 184(1), 185-186.

101. O Reg 58/16, s 9.

102. The federal government's legislation is the *Privacy Act*, RSC 1985, c P-21. For an example of similar provincial legislation, see Ontario's *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 [*FIPPA*].

103. See e.g. *FIPPA, supra* note 102, s 39(1)(g); *Privacy Act, supra* note 102, s 5(3)(b).

104. Kate Robertson, Cynthia Khoo & Yolanda Song, "To Surveil and Predict: A Human Rights Analysis of Algorithmic Policing in Canada" (2020), online (pdf): Citizen Lab <citizenlab.ca/wp-content/uploads/2020/09/To-Surveil-and-Predict.pdf>.

"law enforcement, industry, advocacy groups, academics, technical experts and the general public."[105] Moreover, legislatures can act with flexibility, while new technologies are emerging. Unbound by *stare decisis*, they can adapt regulations quickly, to try out different rules and to amend those rules frequently as technology changes.[106]

Pursuing smart city policing restrictions through legislative reform would enable the adoption of tailored and specific rules. In regulating new technologies, legislatures could set clear guidelines on the use of different investigative techniques as new technologies become available or the use of existing technologies becomes more extensive. Concretely, legislation regulating novel search technology could set its own standards of reasonableness for different technologies in the form of a Police Powers Act, similarly to how England and Wales submit their officers to a more detailed set of procedural rules.[107] Such legislation could also apply varying thresholds to justify data processing based on the nature of the information being examined. For example, the *Data Protection Act 2018* establishes distinct justificatory requirements for processing data that would reveal any individual's sexual orientation or religious beliefs.[108] Since this legislative framework would operate outside the protections developed through judicial interpretation, it would not be bound by the strictures of existing justificatory mechanisms. Privacy and policing incentives could be reconciled based on considerations that are tailored to the gravity and context of different infringements.

Further discretionary guidance is possible through the use of police codes. In England and Wales, the Home Secretary develops codes of practice in consultation with police and judicial stakeholders, and must obtain Parliamentary approval before bringing them into operation.[109] Once the codes are in force, they provide guidance for which officers must have regard. Such documents help address the difficulty that those without legal training may face in understanding statutes. They assist by providing a government-sanctioned resource that expands on key definitions and concepts using

105. Steven Penney, "The Digitization of Section 8 of the Charter: Reform or Revolution?" (2014) 67 SCLR 505 at 531.

106. Kerr, *supra* note 77 at 871.

107. Johnson, *supra* note 71 at 507. Johnson cites the *Police and Criminal Evidence Act 1984* as an example of legislation detailing police powers, to which one could add the *Investigatory Powers Act 2016* and Part 3 of the *Data Protection Act 2018*.

108. *Data Protection Act 2018* (UK), c 12, s 35.

109. *Police and Criminal Evidence Act 1984* (UK), c 48, s 67. The *Police and Criminal Evidence Act 1984* codes of practice govern core police powers. For equivalent provisions on the development of practice codes in other legislation, see e.g. *Police Act 1996* (UK), c 16, s 39A; *Investigatory Powers Act 2016* (UK), c 25, sched 7.

simple terms and practical examples. Importantly for smart cities, codes of practice can apply to specific areas and, conceivably, to particular technologically assisted investigative techniques. Existing codes in England and Wales such as those governing the acquisition of data from third parties or the retention and deletion of data by police serve as starting points for developing guidance that is responsive to smart city policing.[110]

Adopting police codes or a similar form of government-sanctioned guidance is particularly advisable in complex and dynamic investigatory environments. In his review of Ontario's street check regulation, Justice Michael Tulloch (as he then was) recommended implementing a UK-inspired code of practice. The recommendation rests on the "somewhat confusing and convoluted" rules governing street checks.[111] In smart cities, the interaction between privacy statutes, jurisprudence, and technological developments will present a similarly difficult set of considerations to navigate. Perhaps the main benefit motivating Justice Tulloch's recommendation is to enhance police officers' understanding through aids that do not feature in legislation, such as practical examples and diagrams. Moreover, as with street check practices, smart city data collection and processing is a source of public apprehension. As Justice Tulloch notes in his report, the online availability of a police code would help the public develop an understanding of what is in fact allowed and what is not.[112]

3. Integrating Upfront Oversight

Aside from establishing detailed guidance and justificatory schemes tailored to different technologies, promoting a legislative response to smart city policing facilitates the creation of proactive oversight mechanisms. These mechanisms should include novel monitoring structures as well as checks and guidance for individual investigators.

First, by developing measures to promote compliance with privacy standards at the systemic level, legislatures can reduce the chance of individual infringements. One measure could involve creating a proactive oversight body like the Inspectorate of Constabulary in England and Wales. Among other oversight responsibilities, the Inspectorate monitors compliance with the *Code of Practice on the Management of Police Information* and its associated guidance and standards.[113] The province of Ontario recently announced the creation of an Inspectorate of Policing to monitor police compliance with statutory obligations.[114] If detailed legislative guidance develops as smart cities grow,

110. See e.g. UK Home Office, "Communications Data: Code of Practice" (November 2018), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/757850/Communications_Data_Code_of_Practice.pdf>; National Centre for Policing Excellence, "Code of Practice on the Management of Police Information" (July 2005), online (pdf): <library.college.police.uk/docs/APPref/Management-of-Police-Information.pdf>.

111. Tulloch, *supra* note 87 at 176.

112. *Ibid* at 179.

113. "Code of Practice on the Management of Police Information", *supra* note 110 at § 1.3.1.

114. Solicitor General of Ontario, News Release, "Ontario's First Inspector General of Policing Appointed" (2 October 2020), online: <news.ontario.ca/en/release/58643/ontarios-first-inspector-general-of-policing-appointed>.

legislatures could task arms-length nonjudicial bodies like Ontario's new Inspectorate with upholding privacy standards at an organizational level. Individual police officers would then benefit from structured controls on their discretion through legislated guidance on specific technologies and from active on-the-ground monitoring of how privacy-infringing decisions are being made within their organization.

Second, to compensate for the inadequacies of judicial oversight in smart cities, nonjudicial actors should be integrated into investigations from the outset to provide monitoring and advice. So long as they are sufficiently independent, such actors could offer the expertise and guidance on decision-making that court-based initiatives cannot provide.

In England and Wales, the *Data Protection Act 2018* governs the processing of personal data and serves as an example. This Act establishes that independent experts in data protection, known as data protection officers, must monitor compliance with the legislation's law enforcement provisions.[115] Data protection officers must be knowledgeable in the legal and practical dimensions of data protection,[116] operate without interference,[117] and report to the policing authority's highest management level.[118] Their compliance monitoring does not depend on a case proceeding to court. As applied to smart cities, data protection officers would have the technical expertise to assess risks that others may not foresee, such as the impact of unintended metadata acquisition on privacy interests. Moreover, unlike the judges, who provide oversight in a framework like Canada's search and seizure model, data protection officers give guidance. In addition to monitoring compliance, they advise policing authorities and their employees on how to exercise their discretion within the legislative restrictions.[119]

Guidance from independent data protection specialists would encourage police to minimize privacy disruptions even where greater interference may be legally permissible. Under the *Data Protection Act 2018*, data protection officers must advise on and monitor the use of data protection impact assessments. These assessments are carried out before information is processed to identify, inter alia, the risks to rights and freedoms, the measures through which those risks will be addressed, and the safeguards, security measures, and mechanisms that will ensure the protection of personal data for all those concerned.[120] That is, data protection officers' guidance encourages individual investigations to limit privacy disruptions beyond the minimum legal requirement where possible, and foregrounds the interests of third parties who are not being investigated but whose information may nonetheless be revealed.

115. *Data Protection Act 2018* (UK), *supra* note 108, s 69(1).

116. *Ibid*, s 69(2)(a).

117. *Ibid*, s 70(3).

118. *Ibid*, s 70(5).

119. *Ibid*, s 71(1).

120. *Ibid*, s 64.

The *Investigatory Powers Act 2016* provides another example of how arms-length specialists could be embedded within policing bodies. In regulating police access to communications data, this Act establishes a single point of contact (SPoC) requirement.[121] To make an application for retained communications data from a service provider, police must consult a SPoC who has specialist training and who is able to provide advice as well as monitor the legality of applications to acquire communications data.[122]

Early monitoring and advice from embedded specialists would complement existing sources of guidance. In Canada, courts have shown an openness to setting guidelines for police practices that are not comprehensively regulated. For instance, in *R v Rogers Communications Partnership*, the Court developed a series of non-binding guidelines regarding "tower dumps."[123] Tower dumps occur when police obtain an order for records of all cellular traffic through a specified tower at a given time. Before crafting its guidelines, the Court remarked that although privacy legislation was being developed in other areas, there was none addressing the retention of tower dump records.[124] The Court's guidelines were intended not as conditions precedent for obtaining a production order—that procedure being established by the *Criminal Code*—but as a way of promoting incrementalism and minimal intrusion.[125] Therefore, the Court recommended police practices, such as providing details that would enable the production order recipient to produce fewer records by conducting a narrower search, and confirming that the quantity and the type of data being requested can be meaningfully reviewed.[126]

A combination of upfront specialist advice and detailed legislative guidance on police practices would complement the role courts have played in cases like *Rogers*. As mentioned, legislative limits on police discretion can be developed based on submissions from a host of experts and stakeholders. In *Rogers*, guidelines were established in response to submissions from Crown prosecutors and counsel for the telecommunications companies. Furthermore, safeguards developed by legislatures and advice from embedded experts may influence privacy-engaging investigations as new technologies and practices emerge, rather than once an intrusive investigative technique is sufficiently commonplace to be disputed in court.

In essence, there are many ways of addressing privacy issues in smart cities without unduly relying on court-based safeguards. On the one hand, legislatures should assume a greater role in tailoring police powers and in issuing accessible guidance to account for the range of privacy infringing actions that can be expected from smart city policing. On the other hand, the limited role that courts can play in monitoring smart city investigations, particularly at the front end, militates in favour of embedding arms-length specialists in the investigative process.

121. *Investigatory Powers Act 2016* (UK), c 25, s 76.

122. UK Home Office, *supra* note 110 at § 4.4, 4.6.

123. *R v Rogers Communications Partnership*, 2016 ONSC 70.

124. *Ibid* at para 60.

125. *Ibid* at para 63.

126. *Ibid* at para 65.

Making the sorts of changes that smart city policing requires will largely fall to provincial legislatures. There is room for the federal government to further specify investigative processes through statutes such as the *Criminal Code*. In particular, the federal government can act by legislating authorization schemes for police practices that would otherwise be criminal offences or unreasonable searches.[127] However, as discussed, much of what is required by way of legislation is the regulation of practices that engage privacy without rising to the level of a criminal offence or a *Charter* breach. That sort of legislative response falls to the provinces, given their responsibility over policing. The same is true of proposals to embed specialists within policing bodies. Aside from the relatively narrow fields in which policing is a federal responsibly, and despite the inconsistent initiatives this may spawn between jurisdictions, it will be for the provinces to craft laws and oversight structures that are responsive to smart city policing. Absent initiative by provincial lawmakers to fill the current legislative gap and supplement judicial oversight, privacy interests risk being subsumed by smart city policing practices.

Conclusion

Technological developments can disrupt the relationship between privacy and policing by providing police officers with new sources of personal information. The focus of this article has been on smart cities as one example of disruptive technological change that requires regulation to guard against arbitrary or abusive interferences with privacy.

Given the novel settings in which courts have applied existing privacy schemes, the push in the North American literature to rely on these protections is understandable. Viewed holistically, however, the changes in police practices that smart cities will facilitate create a renewed need for proactive nonjudicial safeguards. With some smart city policing decisions likely to have far graver impacts on privacy than others, the means that have developed through judicial interpretation to distinguishing between reasonable and unreasonable infringements will be insufficiently contextual. Moreover, compared to traditional surveillance, acquiring smart city data will involve fewer resource considerations because a permanent monitoring infrastructure will already be in place. Greater specialized oversight in the early stages of investigations would help counterbalance this development in a manner court-based oversight cannot.

Responsive smart city policing regulation can be achieved by supplementing existing privacy legislation and by embedding additional oversight within policing bodies. In terms of legislation, an opportunity exists for lawmakers to develop statutory parameters and accessible guidance on the exercise of police discretion that are tailored to various smart city technologies. As regards embedded oversight, specialists, if they are sufficiently independent, have the potential to not only promote compliance through monitoring but to educate police officers as smart city technology evolves. While all governments have a role to play in regulating smart cities, provincial legislatures, given their responsibility over most policing activities, will need to be particularly active in ensuring the law develops in line with smart city technology.

127. See e.g. *Criminal Code, supra* note 100, s 184 (exception to criminal liability for intercepting a private communication where a police officer conducts a wiretap to prevent imminent harm, subject to certain conditions).

SPECIAL FEATURE

Appellate Review: Criminal Law

The Honourable Justice Malcolm H Rowe & Michael Collins*

Abstract: Most provinces and territories in Canada have provided for a single flexible right of appeal in civil appeals. By contrast, the *Criminal Code* defines different rights of appeal for different kinds of decisions. This special feature provides an overview of appeals from convictions, acquittals, stays of proceedings, and sentences. It discusses which courts have the power to hear appeals, the approach to leave to appeal, and the applicable standards of review.

A version of this article was first published as "Appellate Review: Criminal Law" (2020) 39:3 The Advocates' Journal 24.

* The Honourable Justice Malcolm H Rowe graduated with a BA and a BSc from Memorial University of New-foundland in 1975. He received his law degree from Osgoode Hall Law School in 1978. In 1996, he became Secre-tary to Cabinet and head of the public service in Newfoundland and Labrador. In 1999, he was appointed to the Su-perior Court of that province, then in 2001 to the Court of Appeal. Justice Rowe served as Chair of the Advisory Committee on Federal Judicial Appointments (Newfoundland and Labrador) from 2006–2012. He was appointed to the Supreme Court of Canada in October 2016.

Michael Collins is a civil litigator practicing with Tupman & Bloom LLP in St. John's, NL. He has previously served as a law clerk at the Supreme Court of Canada, a research lawyer at the Newfoundland and Labrador Court of Appeal, and Associate Counsel at the Muskrat Falls Inquiry.

CONTENTS

Introduction: Criminal Appeals in Canada

There is no single Canadian criminal appeal jurisdiction. Rather, there are many separate rights of appeal, each of which has its own scope and principles. This special feature aims to provide an overview of the standards of review applicable to appeals from convictions, acquittals, stays of proceedings, and sentences.

Appeals in respect of indictable offences are dealt with by the provincial and territorial appellate courts.[1] Appeals from summary conviction offences are heard by a single judge of the provincial superior courts.[2] A further appeal to the Court of Appeal is available with leave.[3] While the test

1. *Criminal Code*, RSC, 1985, c C-46, Part XXI.
2. *Ibid*, ss 812(1), 829(1). The exception is Nunavut, where a single judge of the Nunavut Court of Appeal hears summary conviction appeals: ss 812(2), 829(2).
3. *Ibid*, s 839. In Nunavut, this appeal lies from a single judge of the Nunavut Court of Appeal to a panel of three: s 839(1.1).

for leave to appeal has been formulated differently in different jurisdictions, the main elements are generally merit and public importance.[4] When summary conviction and indictable matters are tried together, a single appeal to the Court of Appeal can be available, with leave.[5]

A final appeal to the Supreme Court of Canada is available in three situations. First, either the prosecution or the defendant has a right to appeal to the Supreme Court of Canada if there is a dissent in the Court of Appeal on a question of law in an appeal from an indictable conviction, acquittal or verdict of not criminally responsible or unfit to stand trial.[6] Second, the defendant has a right to appeal to the Supreme Court of Canada if the Court of Appeal sets aside an acquittal or of not criminally responsible and enters a verdict of guilty.[7] Third, in the absence of a dissent in the Court of Appeal, either the prosecution or the defendant can seek the Court's leave to appeal.[8] Leave is usually granted only if the case raises an issue of public importance.

4. Ontario, Quebec, Nova Scotia, and the Northwest Territories follow the formulation in *R v R(R)*, 2008 ONCA 497 at para 37, in which leave will be granted if there is a question of law that is significant to the general administra-tion of justice or if there is a clear error of law. Newfoundland and Labrador requires a question of law that either has a reasonable possibility of success or which has significance to the administration of justice: *Newfoundland Recycling Ltd v Newfoundland and Labrador (Attorney General)*, 2009 NLCA 28 at para 9, cited in *R v Kennedy*, 2020 NLCA 11 at para 5. Prince Edward Island applies a threshold similar to Newfoundland and Labrador's: *Dorgan and Gavin v R*, 2009 PECA 23 at para 12, cited in *R v Gavin*, 2018 PECA 6 at para 7. New Brunswick has not formulated a test, but has refused leave when there was no error of law (*Delorey v R*, 2018 NBCA 50 at para 10; *Matchett v R*, 2018 NBCA 32 at para 5) or when the appeal would not have a reasonable chance of success (*Hébert v R*, 2018 NBCA 18 at para 4). Manitoba requires a question of law alone that sets out an arguable case of substance and of sufficient importance to merit the full court's attention: *R v McCorriston (GJ)*, 2010 MBCA 3 at para 16, cited in *R v Jorowski*, 2020 MBCA 43 at para 12. Saskatchewan requires a question of law that is either significant to the administration of law generally or compellingly meritorious: *R v Bray*, 2017 SKCA 17 at para 2, cited in *R v Grover*, 2020 SKCA 40 at para 17. Alberta requires a question of law alone that is of public importance: *R v Caswell*, 2015 ABCA 97 at para 17; for more detail, see *R v Pawlowski*, 2011 ABCA 267 at para 11, cited in *R v Fournier*, 2017 ABCA 424 at para 23. British Columbia and Yukon require a question of law alone, of public importance, and with sufficient merit to have a reasonable possibility of success: *R v Winfield*, 2009 YKCA 9 at para 13, cited in *R v Heltman*, 2019 BCCA 224 at para 24. Nunavut does not appear to have addressed this issue.
5. *Criminal Code, supra* note 1, ss 675(1.1), 676(1.1).
6. *Ibid*, ss 691(1)(a), 691(2)(a), 692(3)(a).
7. *Ibid*, s 691(2)(b).
8. *Ibid*, s 691(1)(b), 691(2)(c), 692(3)(c), 693(1)(b).

1. Sources of Standards of Review

There is no inherent right to appeal at common law.[9] All appeals are statutory. Canadian criminal appeals are governed by the *Criminal Code*, a statute that codified and displaced the older judge-made common law of criminal law and procedure. In this respect, Canada has departed markedly from the English source of its criminal law.

Rather than containing a single flexible right of appeal, as all common law provinces and territories have done for most civil litigation,[10] the *Criminal Code* establishes different rights of appeal from different kinds of decision. These rights have remained fairly consistent for many years, and a large jurisprudence has built up interpreting them. As a result, Canadian criminal standards of review are mostly found in judicial decisions interpreting the *Criminal Code*. This stability incorporates some complexity.

2. Outline

Canadian criminal law includes several possible verdicts. By far the most common are conviction or acquittal. An accused who suffers from a mental disorder can also be found not criminally responsible on account of a mental disorder,[11] or unfit to stand trial on account of a mental disorder.[12] An accused can also receive the special verdicts of autrefois acquit (previously acquitted), autrefois convict (previously convicted), pardon, and expungement.[13]

9. *R v W(G)*, [1999] 3 SCR 597, 1999 CanLII 668 (SCC). However, the common law courts had internal tools for fulfilling the functions of modern appeal courts: see e.g. James Oldham, "Informal Law-Making in England by the Twelve Judges in the Late 18th and Early 19th Centuries" (2011) 27 Law & Hist Rev 181.

10. See *Judicature Act*, RSA 2000, c J-2, s 3; *Court of Appeal Act*, RSBC 1996, c 77, s 6; *The Court of Appeal Act*, CCSM c C240, s 25; *Judicature Act*, RSNB 1973, c J-2, s 8; *Court of Appeal Act*, SNL 2017, c C-37.002, s 6; *Judicature Act*, RSNS 1989, c 240, s 38; *Courts of Justice Act*, RSO 1990, c C.43, s 2; *Judicature Act*, RSPEI 1988, c J-2.1, s 3; *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, s 7; *Court of Appeal Act*, RSY 2002, c 47, s 2.

11. *Criminal Code, supra* note 1, s 672.34.

12. *Ibid*, ss 672.27, 672.31.

13. *Ibid*, s 607. In a defamatory libel case, the special plea of justification is also available: see ss 611-612.

Judges make many decisions before a trial reaches a verdict, including procedural decisions but also substantive decisions on constitutional issues or the admissibility of evidence. The *Criminal Code* does not ordinarily allow an immediate appeal from most of these decisions[14] (though some errors by a provincial court judge can be set aside by an extraordinary remedy such as *certiorari*[15]). Rather, such issues can be raised as part of an appeal from the final disposition.

In some cases, a judge's decision brings the trial to an end before a verdict. Most notably, a judge may quash the charges (for example, where the evidence regarding a necessary element of the offence is deficient[16]), or enter a stay of proceedings.[17] A stay of proceedings can be imposed as a remedy for state misconduct, or if the accused is found guilty of multiple offences for essentially a single wrong.[18] An order that stays proceedings or quashes an indictment is a final disposition and can be immediately appealed.

This special feature describes the main standards of review for convictions, acquittals, stays of proceedings, and sentences, which represent the great majority of criminal appeals. We will focus on the procedures for indictable offences under the *Criminal Code*. These procedures are followed, with slight differences, for summary conviction offences, youth offences, and some regulatory offences, which can be created by provincial legislatures to give effect to their areas of jurisdiction, such as motor vehicle regulation.

In the description that follows, the term "appellate courts" is used to include the Courts of Appeal and the Supreme Court of Canada. With very few exceptions, the standards of review and the role undertaken by the Courts of Appeal and the Supreme Court of Canada are similar, save that the Supreme Court of Canada can overrule the Courts of Appeal.

I. Appeals from Conviction

An accused can be convicted in three ways: after a guilty plea, after trial before a judge alone, or after a trial before a judge and jury.[19] Jury trials are available for more serious offences.[20]

14. See *R v Awashish*, 2018 SCC 45 at paras 10-12 [*Awashish*], explaining the policy against fragmenting trials or deciding issues on an incomplete record.
15. *Criminal Code, supra* note 1, Part XXVI. The Crown or defence can only obtain *certiorari* if the provincial court judge made a jurisdictional error, though a third party can also challenge an error on the face of the record relating to a decision that has a final and conclusive effect on the third party: *Awashish*, *ibid* at para 20. Applications for extraordinary remedies are heard by the superior court, with a further appeal to the court of appeal: *Criminal Code*, *supra* note 1, s 784.
16. *Ibid*, s 601.
17. See e.g. *R v Jewitt*, [1985] 2 SCR 128, 1985 CanLII 47 (SCC).
18. To paraphrase the test from *Kienapple v R*, [1975] 1 SCR 729, 1974 CanLII 14 (SCC); see also *R v Prince*, [1986] 2 SCR 480, 1986 CanLII 40 (SCC).
19. See *Criminal Code, supra* note 1, ss 570, 606, 660-62, 801.
20. See *ibid*, s 560. See also *ibid*, s 785 for a definition of "summary conviction court".

Appeals from a guilty plea are possible, but they raise special considerations. The accused must show that the guilty plea was not voluntary, not unequivocal, or not informed.[21]

A conviction after trial can be appealed for three reasons: unreasonable verdict, a wrong decision on a question of law, or a miscarriage of justice.[22] A ground of appeal on a question of fact or of mixed fact and law requires leave to appeal; however, this is rarely necessary.[23]

1. Unreasonable Verdict

To argue that a conviction was an unreasonable verdict, the accused must show that no properly instructed jury, acting judicially, could reasonably have entered the conviction based on the evidence.[24] This requires the appellate court to consider the evidence in light of judicial experience, reweighing it to a limited extent to ensure that the outcome is reasonable.[25] In so doing, it must consider that the judge or jury under appeal had the advantage of being present throughout the trial as the evidence was presented.[26]

While the verdict is a decision of fact, whether a verdict is unreasonable is a question of law.[27] A jury's verdict of guilt is the main form of unreasonable verdict. However, if a verdict was entered by a judge alone, an appellate court can also find it to be unreasonable if the judge's reasons for conviction rely on inferences or findings of fact that are (1) plainly contradicted by the evidence that the trial judge relied on, or (2) incompatible with evidence that the trial judge did not reject.[28]

2. Error of Law

On appeal, the accused may also place in issue any of the judge's legal decisions. For example, the accused may challenge the judge's decision to admit or exclude evidence. The standard of review for decisions of law is correctness. This means the appellate court can substitute its own view for the trial judge's view. The standard of review for factual findings is palpable and overriding error.[29] This means that appellate courts show considerable deference to the trial judge's findings of fact. Thus, appeals at either the Court of Appeal or the Supreme Court are *not* a re-trial on the record.

---

21. See e.g. *R v Wong*, 2018 SCC 25 at para 3.
22. *Criminal Code, supra* note 1, s 686(1)(a).
23. *Ibid*, s 675(1)(a)(ii). A certificate from the trial judge can substitute for leave. Leave to appeal is also required if a ground of appeal does not raise a question of law, fact, or mixed fact and law: s 675(1)(a)(iii). Because unreasonable verdicts and misapprehension of evidence are treated as questions of law alone, resort to these provisions is rarely needed.
24. *R v Yebes*, [1987] 2 SCR 168, 1987 CanLII 17 (SCC) at para 25; see also *R v RP*, 2012 SCC 22 at para 9 [RP].
25. *R v Biniaris*, 2000 SCC 15 at paras 36-41 [*Biniaris*].
26. *R v WH*, 2013 SCC 22 at para 27.
27. *Biniaris, supra* note 25 at para 27.
28. *RP, supra* note 24 at para 9.
29. See e.g. *R v Babos*, 2014 SCC 16.

In an appeal from a jury trial, the accused can challenge the judge's instructions to the jury. In such instances, the applicable standard of review is "whether the charge as a whole enabled the trier of fact to decide the case according to the law and the evidence."[30]

In a trial before a judge alone, the accused can argue that the judge misapprehended the evidence. The standard of review here is whether the judge was mistaken about the substance of material parts of the evidence and whether the errors play an essential part in the reasoning process.[31]

The appellate court can affirm a conviction notwithstanding a wrong decision on a question of law. This is authorized by the "curative proviso" of the *Criminal Code* in two situations: (1) where the error is harmless or trivial, or (2) where the evidence is so overwhelming that the trier of fact would inevitably convict.[32] The curative proviso tends to be used sparingly by appellate courts.

3. Miscarriage of Justice

The third basis for appeal from a conviction is a miscarriage of justice. The jurisprudence has divided miscarriages of justice into two general categories: (1) an unfair trial, and (2) anything that would shake public confidence in the administration of justice.[33] The flexibility inherent in the concept of miscarriage of justice helps ensure that appellate courts can respond to a wide variety of circumstances that warrant appellate intervention.

An error of law that leads to an unfair trial or that would shake public confidence in the administration of justice can lead to a miscarriage of justice.[34] If so, the curative proviso is not available.

One example of a miscarriage of justice that does not involve an error of law involves fresh evidence. A conviction can be overturned based on evidence that was not presented at trial, if the evidence: (1) could not have been found by due diligence, (2) bears on a decisive or potentially decisive issue, (3) is credible, and (4) if believed, could reasonably have affected the result.[35]

Another example of a miscarriage of justice is ineffective representation by counsel. A conviction can be overturned if counsel's acts or omissions were incompetent, resulting in a trial that was fundamentally unfair.[36]

30. *R v Calnen*, 2019 SCC 6 at para 8.
31. *R v Lohrer*, 2004 SCC 80 at para 6.
32. *R v Sekhon*, 2014 SCC 15 at para 53.
33. *R v Davey*, 2012 SCC 75 at para 51.
34. *R v Arradi*, 2003 SCC 23 at paras 38-39.
35. *R v GDB*, 2000 SCC 22 at para 16.
36. *Ibid* at para 26.

4. Remedies for Appeals from Convictions

If an appellate court finds an unreasonable verdict, error of law, or a miscarriage of justice, it can enter an acquittal, order a new trial, or substitute a conviction for a lesser included offence. It can also find the accused unfit to stand trial on account of a medical disorder, or not criminally responsible on account of a medical disorder.[37]

II. Appeals from Acquittals and Stays

The Crown has the right to appeal from an acquittal, a verdict of not criminally responsible by reason of a mental disorder, a stay of proceedings, or a quashed indictment (the document charging the accused and authorizing prosecution).[38]

The Crown's right to appeal an acquittal is narrower than an accused's right to appeal a conviction. The Crown may only appeal an acquittal on "any ground of appeal that involves a question of law alone".[39]

However, what constitutes a "question of law alone" has been interpreted broadly:

- It is an error of law to make a finding of fact for which there is no evidence — however, a conclusion that the trier of fact has a reasonable doubt is not a finding of fact for the purposes of this rule.[40]
- The legal effect of findings of fact or of undisputed facts raises a question of law.[41]
- An assessment of the evidence based on a wrong legal principle is an error of law.[42]
- The trial judge's failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence is an error of law.[43]

An error of law may even be found if the trial judge articulates the right test, if the judge's reasoning and application of the test demonstrate an error.[44]

Once a "question of law alone" is identified, the standard of review is correctness. If an error of law is found, the court will only grant a remedy if the error might reasonably be thought to have had a material bearing on the outcome.[45]

---

37. *Criminal Code, supra* note 1, ss 686(1)-(3).
38. *Ibid*, ss 676(1)-(2).
39. *Ibid*, s 676(1)(a).
40. *R v JMH*, 2011 SCC 45 at paras 25-27.
41. *Ibid* at para 28.
42. *Ibid* at paras 29-30.
43. *Ibid* at paras 31-32.
44. *R v Chung*, 2020 SCC 8 at para 13.
45. *R v Graveline*, 2006 SCC 16 at para 15.

1. Remedies

If the appellate court finds an error of law, it can order a new trial.[46] This is the only remedy available where a jury has acquitted an accused.[47] However, if the appeal is from a decision by a judge alone, the court can also substitute a conviction[48] if the trial judge made, implicitly or explicitly, all the findings of fact that would be necessary for a conviction.[49]

III. Appeals from Sentences

Sentencing judges are accorded considerable discretion. They are required to exercise this discretion in accordance with principles and objectives of sentencing codified in the *Criminal Code* and developed in case law. Within these guidelines, and constrained by maximum sentences and, in some cases, minimum sentences, the process of sentencing is highly individualized. In recognition of this fact, the decisions of sentencing judges are accorded a high degree of deference by appellate courts.[50]

Both the Crown and the offender can, with leave, appeal from a sentence.[51] The standard of review is similar for the Crown and the offender. The appellate court can intervene in circumstances where the sentence is demonstrably unfit, or if the sentencing judge made an error in principle that had an impact on the sentence.[52]

1. Demonstrably Unfit Sentence

A sentence will be demonstrably unfit if it is "clearly unreasonable": clearly too high or clearly too low.[53] The sentencing judge does not need to have made any specific error; the focus is on the outcome, not the reasons.[54]

In considering whether a sentence is demonstrably unfit, an appellate court will often consider the principle of *parity*: "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".[55] To assess whether parity has been achieved, an appellate court may consider the sentences imposed in other similar cases.

46. *Criminal Code, supra* note 1, s 686(4)(b)(i).
47. *Ibid*, s 686(4)(b).
48. *Ibid*, s 686(4)(b)(ii).
49. *R v Cassidy*, [1989] 2 SCR 345, 1989 CanLII 25 (SCC); *R v Lutoslawski*, 2010 SCC 49.
50. *R v Friesen*, 2020 SCC 9 at para 38 [*Friesen*].
51. *Criminal Code, supra* note 1, ss 675(1)(b), 676(1)(d).
52. *R v Lacasse*, 2015 SCC 64 at paras 41, 44 [*Lacasse*]; *Friesen, supra* note 50 at para 26.
53. *Lacasse, supra* note 52 at para 52.
54. *Ibid*.
55. *Criminal Code, supra* note 1, s 718.2(b); *Friesen, supra* note 50 at para 31.

A sentence can also be demonstrably unfit even if the accused cannot show it is a marked departure from previous sentences. The fundamental principle of sentencing in Canadian law is proportionality: sentences must be "proportionate to the gravity of the offence and the degree of responsibility of the offender".[56] A sentence that unreasonably departs from this principle is demonstrably unfit.[57]

2. Material Error in Principle

An appellate court can also vary a sentence if the sentence was affected by a material error in principle. An error in principle is any error in applying the principles of sentencing. An error in principle arises, for example, if the sentencing judge errs in law, fails to consider a relevant factor in sentencing, or considers an irrelevant factor. Weighing or balancing factors can also form an error in principle, if by emphasizing one factor or not giving enough weight to another, the trial judge exercises discretion unreasonably.[58]

An error in principle will only allow an appellate court to vary the sentence if the error in principle had an impact on the sentence.[59]

3. Remedy

If a sentence is demonstrably unfit or affected by an error in principle, the appellate court will apply the principles of sentencing afresh to the facts, without deference to the existing sentence. It can then vary the original sentence, replacing it with a fit one.[61] The appellate court has no power to order a new trial or hearing.[62]

In some cases, the court's new sentence may require reincarcerating an offender who has served a full sentence and been released, though the appellate court may consider this factor when imposing a fit sentence.[63] On occasion, an offender whose sentence was found to have been too low, but who has completed the sentence and been released, will not be re-incarcerated.[64] This decision is highly contextual.[65]

---

56. *Criminal Code, supra* note 1, s 718.1; *Friesen*, *supra* note 50 at para 30.
57. *Lacasse, supra* note 52 at para 54.
58. *Friesen, supra* note 50 at para 26.
59. *Lacasse, supra* note 52 at para 44.
60. *Friesen, supra* note 50 at para 27.
61. *Ibid* at para 29.
62. *Criminal Code, supra* note 1, s 687(1).
63. *R v Suter*, 2018 SCC 34 [*Suter*].
64. See e.g. *Suter, ibid* at para 103; *R v Proulx*, 2000 SCC 5 at para 132.
65. See e.g. *R v Taylor*, 2013 NLCA 42 at paras 65 (*per* White JA) and 133 (*per* Green CJNL, concurring); *R v Veysey*, 2006 NBCA 55 at paras 31-33; *R v JED*, 2018 MBCA 123 at paras 113-115.

Conclusion

Knowing only the broad and flexible standards of review that have been developed for civil appeals in Canada, it would be easy to assume that these same standards apply in criminal appeals. But Canadian criminal law has taken a different path, with limited rights of appeal for specific contexts, each with its own principles and jurisprudence. This special feature provides a practical overview of the main features of this surprisingly intricate field: the rights of appeal and standards of review for appeals from convictions, acquittals, stays of proceedings, and sentences.

SPECIAL FEATURE

Call to National Security, Privacy, and Surveillance Studies Scholars, Researchers, Journalists, and Activists

Greg McMullen*

CONTENTS

* Greg McMullen is a lawyer at Segev LLP in Vancouver, British Columbia. He served as a consulting expert in the BCCLA's litigation against CSE and is a former BCCLA board member.

Introduction

The Communications Security Establishment (CSE) is Canada's "national signals intelligence agency for foreign intelligence and the technical authority for cyber security and information assurance."[1] Its mandate is established by the *Communications Security Establishment Act*, and relates to five aspects: (1) cyber security and information assurance, (2) foreign intelligence, (3) defensive cyber operations, (4) active cyber operations, and (5) technical and operational assistance.[2] The CSE's mission is "to defend Canada's national security", including by keeping government information secure and "protect[ing] Canadians from cyber threats."[3]

Despite ostensible commitments to openness, transparency, and accountability,[4] there is still much that remains unknown to the public about how the CSE operates. The British Columbia Civil Liberties Association (BCCLA) has recently released 284 individual documents comprising over 4,900 pages detailing the inner workings of the CSE. The BCCLA has made these documents available to provide academics, journalists, researchers, and activists greater insight into the activities of this secretive agency, and invites interested parties to download and analyze them.

I. Background

In 2013, following Edward Snowden's release of documents detailing the US National Security Agency's (NSA) bulk surveillance programs, the BCCLA brought claims against the CSE alleging that the CSE had bulk metadata surveillance programs of its own.[5]

The government, citing national security concerns, asked the court to conduct the litigation in closed court. The court granted the government's request. Much of the court file was sealed and the documents produced at discovery were subject to an implied undertaking of confidentiality.[6]

1. *Communications Security Establishment Act*, SC 2019, c 13, s 76, s 15(1).
2. *Ibid*, ss 15(2), 16-20.
3. Communications Security Establishment, "Mission", online: <cse-cst.gc.ca/en/mission> (last modified 6 April 2023).
4. Communications Security Establishment, "Accountability", online: <cse-cst.gc.ca/en/accountability> (last modified 13 July 2022).
5. *British Columbia Civil Liberties Association v Attorney General (Canada)*, 2021 FC 766 (CanLII) (Plaintiff's Statement of Claim, Federal Court File T-2210-14, filed October 27, 2014), online: <bccla.org/wp-content/uploads/2014/12/20141027-CSEC-Statement-of-Claim.pdf>.
6. British Columbia Civil Liberties Association, Media Release, "Civil Liberties Watchdog Fights in Federal Court for Release of Documents on Illegal Spying On Canadians" (2 June 2016), online: <bccla.org/news/2016/06/media-release-civil-liberties-watchdog-fights-in-federal-court-for-release-of-documents-on-illegal-spying-on-canadians/>.

In 2017, the government introduced Bill C-59, which created a new statutory regime for national security intelligence in Canada, including the CSE's activities.[7] These changes made the BCCLA's litigation moot, and the action was discontinued in 2019.[8] Although the litigation was concluded, the documents produced in discovery remained subject to an implied undertaking of confidentiality.

This changed later in 2019, after independent researcher Bill Robinson made a request for the documents under the *Access to Information Act*.[9] The CSE initially refused to release the documents, claiming litigation privilege. Robinson made a formal complaint to the Information Commissioner, which the Commissioner upheld. Finally, the CSE agreed to release the documents with no additional redactions, and the government agreed to lift the implied undertaking of confidentiality, allowing the BCCLA to share these critical documents with the public.[10]

II. Preliminary Findings

The documents were reviewed for the BCCLA by Greg McMullen and Bill Robinson. McMullen outlined preliminary findings in a blog post for the BCCLA,[11] where links to all of the documents can be found. Notably, these findings outline that during the period covered by the BCCLA litigation, the CSE:

1. Had expansive and expanding metadata surveillance programs in place.
2. Had the authority, under its cybersecurity mandate, to access Canadians' personal information that had been collected and stored by other government agencies.
3. Shared information relating to Canadians with other Canadian government agencies and foreign intelligence agencies, and developed a system to share bulk metadata collected by CSE with its Five Eyes partners – the signals intelligence agencies of the United States, United Kingdom, Australia, and New Zealand.
4. Exceeded its authority to collect and share metadata by failing to minimize Canadian information shared with Five Eyes partners between 2009 and 2014.[12]

7. *National Security Act*, 2017, SC 2019, c 13.
8. *British Columbia Civil Liberties Association v Canada* (*Attorney General*), 2021 FC 766 (CanLII).
9. *Access to Information Act*, RSC, 1985, c A-1.
10. Bill Robinson, "BCCLA posts CSE documents" (17 March 2023), online (blog): *Lex Ex Umbra* <luxexumbra.blogspot.com/2023/03/bccla-posts-cse-documents.html>.
11. Greg McMullen, "Pulling Back the Curtain on Canada's Mass Surveillance Programs – Part Two: The CSE Secret Spying Archive" (16 March 2023), online (blog): *BCCLA* <bccla.org/2023/03/pulling-back-the-curtain-on-canadas-mass-surveillance-programs-part-two-the-cse-secret-spying-archive/>.
12. AGC0278 in AGC 0261_0294, *infra* note 14 at 31.

5. Asked foreign intelligence agencies to provide the CSE with monthly reports on measures taken to protect the privacy of Canadians whose information was shared with them, but did not stop or limit information sharing with those foreign intelligence agencies for failing to report on or comply with those safeguards, because doing so would "have a significant negative effect on [the CSE]".[13]

III. Document Contents

The documents are available from the BCCLA in PDF format, collected into seven bundles based on the numbers assigned to them in the litigation (AGC####).[14]

The documents fall into three broad categories:

1. Ministerial Authorizations, Ministerial Directives, and Memoranda of Understanding

Ministerial Authorizations and Ministerial Directives are documents signed by the Minister of National Defence. Under the *National Defence Act* regime that was in place during the period covered by the documents, Ministerial Authorizations granted the CSE authority to conduct various classes of surveillance activities, while Ministerial Directives provided instruction on how to exercise those authorities.[15] The documents include:

- Ministerial Authorizations from 2010–2015;
- Ministerial Directives relating to:
  - the collection and use of metadata [AGC0017];
  - measures necessary to protect the privacy of Canadians [AGC0021]; and
  - sharing information with other governments that creates a "substantial risk of mistreatment" [AGC0081];
- Memoranda from the CSE Chief requesting the Ministerial Authorizations and Directives and providing rationales for granting them; and
- Memoranda of Understanding ("MOUs") between the CSE and various government departments and agencies allowing the CSE to provide assistance with various matters, including computer network security, and often allowing the CSE to intercept that agency or body's communications. MOUs were signed with:

13. AGC0166 in AGC0151_0182, *infra* note 14 at 12, fn 16.

14. AGC0001_0035, online: <bccla.org/wp-content/uploads/2023/02/AGC-0001_0035.pdf>; AGC0036_0100, online: <bccla.org/wp-content/uploads/2023/02/AGC-0036_0100.pdf>; AGC0101_0150, online: <bccla.org/wp-content/uploads/2023/02/AGC-0101_0150.pdf>; AGC0151_0182, online: <bccla.org/wp-content/uploads/2023/02/AGC-0151_0182.pdf>; AGC0183_0225, online: <bccla.org/wp-content/uploads/2023/02/AGC-0183_0225.pdf>; AGC0226_0260, online: <bccla.org/wp-content/uploads/2023/02/AGC-0226_0260.pdf>; AGC0261_0294, online: <bccla.org/wp-content/uploads/2023/02/AGC-0261_0294.pdf>.

15. *National Defence Act*, RSC 1985, c N-5, ss 273.62, 273.65.

- Canada Revenue Agency [AGC0148];
- Canadian Forces [AGC0116];
- Canadian Nuclear Safety Commission [AGC0149];
- Canadian Security Intelligence Service [AGC0165];
- Department of Foreign Affairs and International Trade [AGC0120 and AGC0150];
- Health Canada [AGC0147];
- Public Works and Government Services Canada [AGC0177];
- Natural Resources Canada [AGC0156];
- Royal Canadian Mounted Police [AGC0164]; and
- Shared Services Canada [AGC0128]

2. Policy and Operations Manuals

These documents include policy and operations manuals that guide the activities of the CSE and its various programs. These include multiple documents from the following series:

- Operational Policy Series (OPS);
- Canadian SIGINT Operations Instructions (CSOI);
- IT Security Operational Instructions (ITSOI);
- Canadian SIGINT Security Standards (CSSS);
- Policy and Communication Instructions (PCI); and
- SIGINT Programs Instructions (SPI).

3. Reports and Reviews

These documents cover a wide range of subjects, including:

- Annual reports from the CSE Commissioner [AGC0001-10, AGC0013-4, AGC0027, AGC0038, AGC0158, and AGC0282];
- CSE reports to the Minister of National Defence [AGC0070, AGC0194, and AGC0236-7];
- Documents detailing failures by the CSE to follow its own procedures intended to protect Canadians' information [AGC0261]; and
- Documents detailing the CSE's transfer of information about Canadians to its Five Eyes partners without properly removing identifying information [AGC0166 and AGC0278].

Conclusion

The BCCLA hopes these documents will provide researchers, academics, journalists, and civil society with greater insight into the activities of the CSE, and looks forward to seeing what others can learn from these important materials.