TMU LAW REVIEW

December 2024 | Volume 2, Issue 1

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December 2024 | Volume 2, Issue 1

2023-2024 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/

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CONTENTS

ORIGINAL RESEARCH ARTICLES

Threatening Reconciliation: The Supreme Court of Canada's Foundational Jurisprudence on Aboriginal Rights and Title, 1990-1997 **1**
Scott Franks

Enforcing National Instrument 51-107 Disclosure of Climate-related Matters **49**
Gina Jihyun Kwon

FEATURES

The Inaccessibility of Justice in Ontario's Adjudicative Tribunals: Symptoms and Diagnosis **84**
Noel Semple

The Case Method after Formalism: A Reflection on Legal Education and the Strangeness of Law **119**
Jessica Eisen

CASE COMMENT

Anti-Carceral Feminism and the Exceptionalism of Intimate Partner Violence: A Comment on *Ahluwalia v Ahluwalia* **146**
Yukiko Kobayashi Lui

ORIGINAL RESEARCH ARTICLE

Threatening Reconciliation: The Supreme Court of Canada's Foundational Jurisprudence on Aboriginal Rights and Title, 1990-1997

Scott Franks*

Keywords: Reconciliation, Section 35 of the *Constitution Act, 1982*, Critical Indigenous Legal Theory, Aboriginal rights, Aboriginal title, legal history

Abstract: In this article, I *enthreaten* the Supreme Court of Canada's foundational jurisprudence on Aboriginal rights and title under section 35 of the *Constitution Act, 1982* by reading it through a lens of threat. I argue that the majority's reasons in *Van der Peet*, *Nikal*, *Lewis*, *Gladstone*, *NTC Smokehouse*, *Pamajewon*, and *Delgamuukw* are a juridical response to the threat that Indigenous peoples' inherent rights pose to the preferential allocation of resources to settlers and the settler state. When viewed through the lens of threat, "reconciliation" takes on an additional – and, I argue, a more accurate – meaning: "reconciliation" as a response to a perceived or actual threat to settler supremacy. Through "reconciliation", the Court resolves the threat of Indigenous peoples' inherent rights, in particular rights to self-government, in favour of the future of the settler state. At the same time, this vision of "reconciliation" threatens Indigenous futures by constraining the terms under which Indigenous peoples' political difference is recognized and respected. In its jurisprudence, the Court must also deny or obfuscate reconciliation as a response to this threat. The settler state cannot cleanly admit either its prioritization of its claims over Indigenous resources nor its fear of Indigenous peoples and their corresponding inherent rights. "Reconciliation" must project balance, a return to equilibrium and stability, an assured and healthy ethic for the settler state, one in which we are "all here to stay" – and preferably for settlers in much the same way. *Threatening* this jurisprudence also menaces it. By making settler supremacy and futurity visible in this jurisprudence, it challenges courts and legal actors to imagine a different vision of reconciliation, one in which settlers are here to stay *in a different way*.

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CONTENTS

INTRODUCTION 2

I. THREATENING RECONCILIATION 10

1. *Sparrow*'s "Halfway House" 12
2. Conflict and Competition in British Columbia's Commercial Fisheries in *Van der Peet*, *Gladstone*, *Nikal*, *Lewis*, and *NTC Smokehouse* 16
3. Indigenous Self-Government and the Threat to Settler Governance in *Pamajewon* 20
4. Aboriginal Title and the Threat to Settler Interests in Land in *Delgamuukw* 24
5. From Constitutional Negotiation to Litigation 26
6. Conclusion 29

II. RESOLVING THREAT IN FAVOUR OF THE SETTLER COLONIAL STATE 31

1. Reconciliation in *Sparrow* and *Van der Peet* 31
2. The First Move: Restricting the Content, Scope and Meaning of Aboriginal Rights 33
3. The Second Move: The Indigenous Perspective and Cognizability within Canada's Constitutional and Legal Order 38
4. The Third Move: Distinguishing Between Inherent and non-Inherently Limited Rights 40
5. The Fourth Move: Expanding the Crown's Arsenal of Valid Legislative Objectives 42

CONCLUSION 45

Introduction

In *Delgamuukw*, Chief Justice Lamer proclaimed "let us face it, we are all here to stay."[1] In this "memetic closing line", the Chief Justice flattened and distanced the challenge that Indigenous peoples' inherent rights poses to the future of the settler state.[2] Coordinated with his vision of "reconciliation" in *Van der Peet* and *Gladstone*, the Chief Justice's framework mitigated the threat that Indigenous peoples' futurities pose to the preferential allocation of resources to settlers and the settler state. This article contextualizes and re-evaluates the Supreme Court of Canada's (SCC) foundational jurisprudence on Aboriginal rights and title during the period of 1990 to 1997. I argue that the reasons of the Court in *R v Sparrow*, *R v Nikal*, *R v Lewis*, *R v NTC Smokehouse*, *R v Van der Peet*, *R v Gladstone*, *R v Pamajewon* and *Delgammukw v British Columbia* may be understood as a juridical response to the threat posed by Indigenous peoples' inherent rights to settler supremacy

1 *Delgamuukw v British Columbia*, 1997 CanLII 302 at para 186 (SCC) [*Delgamuukw*].

2 Scott Franks, "Some Reflections of a Métis Law Student and Assistant Professor on Indigenous Legal Education in Canada" (2022) 48:3 Mitchell Hamline L Rev 745 at 755.

and futurity.[3] To do so, I place this jurisprudence in its social, political and economic context through a critical reading of the jurisprudence, the arguments of parties, and contemporary media during that period.

I argue that the state experiences Indigenous peoples' inherent rights as a threat to its supremacy, a supremacy grounded in a form of sovereignty that is more "alchemical" than legal.[4] Eve Tuck and K Wayne Yang define settler colonialism as "a form of colonization in which outsiders come to land inhabited by Indigenous peoples and claim it as their own new home."[5] All forms of legal authorization other than an intersocietal treaty – that is, conquest, *terra nullius*, and the doctrine of discovery –

3 *R v Sparrow*, 1990 CanLII 104 (SCC) [*Sparrow*]; *R v Nikal*, 1996 CanLII 245 (SCC) [*Nikal*]; *R v Lewis*, 1996 CanLII 243 (SCC) [*Lewis*]; *R v NTC Smokehouse* Ltd, 1996 CanLII 159 (SCC) [*NTC Smokehouse*]; *R v Van der Peet*, 1996 CanLII 216 (SCC) [*Van der Peet*]; *R v Gladstone*, 1996 CanLII 160 (SCC) [*Gladstone*]; *R v Pamajewon*, 1996 CanLII 161 (SCC) [*Pamajewon*]; *Delgamuukw*, *supra* note 1.

4 John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 Osgoode Hall LJ 537at 558–63 [Borrows, "Sovereignty's Alchemy"].

5 Eve Tuck & K Wayne Yang, "Series Editors' Introduction" in Linda Tuhiwai Smith, Eve Tuck & K Wayne Yang, eds, *Indigenous and Decolonizing Studies in Education: Mapping the Long View* (New York: Routledge, 2018) x at xii. Peter Russell characterises Canadian sovereignty claims as a form of "settler sovereignty", one grounded more on a policy of assimilation than legal authorisation for settlement: see Peter H Russell, *Sovereignty: The Biography of a Claim* (Toronto: University of Toronto Press, 2021) at 74. Lorenzo Veracini describes "settler colonial phenomena" as "circumstances where colonisers 'come to stay' and to establish new political orders for themselves, rather than to exploit native labour", as was the case when colonial metropoles exercized power over colonial hinterlands for the purposes of resource extraction: see Lorenzo Veracini, "'Settler Colonialism': Career of a Concept" (2013) 41:2 J Imp Commonwealth Hist 313 at 313. These definitions of settler colonialism are descriptive, though they may also carry normative connotations when articulated within a political programme of decolonization. For an example of the normative implications of settler colonialism, see Daniel Rück's articulation of his argument in Daniel Rück, *The Laws and the Land: the Settler Colonial Invasion of Kahnawà:ke in Nineteenth-Century Canada* (Vancouver: UBC Press, 2021) at 17.

are justifications that uphold settler colonialism.[6] Settler supremacy describes the prioritization of the interests of settlers "over the interests of Indigenous persons and peoples, insofar as those interests derive from [Indigenous peoples'] indigeneity."[7] These "interests" are both tangible and intangible. They include material, immaterial and corporeal "resources", political, social, spiritual, economic, symbolic, and ideological commitments, and positions expressed as values, norms, morals, beliefs, and worldviews.[8] It is within this context that Canadian society experiences Indigenous peoples'

6 See generally Michael Asch, "From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution" (2002) 17:2 CJLS 23 at 23–24 [Asch, "From *Terra Nullius* to Affirmation"] (referring to Brian Slattery's history of the Crown's acquisition of Indigenous peoples' territories). In North America, European powers relied on the legal doctrines of conquest and cession to authorize settlement in Indigenous peoples' territories. The SCC has recognized that Indigenous peoples in Canada were never conquered and that the "doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada": *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 69 [*Tsilhqot'in*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 25 [*Haida*]. In *Thomas and Saik'uz*, Kent J asked, "If the doctrines of discovery and *terra nullius* are indeed 'legally invalid' or simply inapplicable in Canadian law, what then is the legal justification validating the assertion of Crown sovereignty over Indigenous peoples and Indigenous lands?": *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 at para 194. Cession by way of agreement is one possible legal authorization for settlement in Canada. However, treaty, when enacted within an Indigenous legal order, offers an intersocietal legal authorisation for non-Indigenous peoples' presence as relatives in Indigenous territories and for their shared access to the gifts found in these territories: Aimée Craft, "Living Treaties, Breathing Research" (2014) 26:1 CJWL 1 at 12. Canada's jurisprudence on Aboriginal treaties, however, stops short of embracing these treaties as truly intersocietal agreements, instead characterizing them as "sui generis" agreements to the extent that the Indigenous perspective is cognizable within Canadian law. For a summary of the treatment of Indigenous-settler treaties as domestic and *sui generis*, see: *Canada v Jim Shot Both Sides*, 2022 FCA 20 at paras 66–69. On alternatives to the settler colonial and liberal constitutional legal order, see: Aaron James Mills (Waabishki Ma'iingan), *Miinigowiziwin: All That Has Been Given for Living Well Together – One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, University of Victoria, 2019) [unpublished].

7 Mills, *supra* note 6 at 3.

8 A language of "resources" is likely more cognizable to a non-Indigenous audience and is, I argue in this article, the primary lens through which the land, Indigenous legalities, and Indigenous peoples and persons are understood by the Canadian state. This language, however, comes at the risk of flattening the truth of all the things found within it as a definition: it flattens the ontological meaning of the land as spirited, of animals as spirited beings, of human beings as more than "social capital" or demographic data, of the epistemological, cosmological and ontological "rootedness" and lifeworld of Indigenous legal orders (Mills, *supra* note 6). The use of "resources" here, then, also reflects a *claim* made by the Canadian state to all of *this* world as a resource.

inherent rights as a threat, actual or perceived.[9]

On one level, Indigenous peoples' ways of being, that is their epistemologies, cosmologies, and ontologies, are *actual* threats to *settler supremacy*, in the sense that these ways of being challenge the philosophical and ideological commitments that support the prioritization of the interests of settlers and the future of the settler state.[10] In some cases, Indigenous peoples also physically resisted and continue to resist the unauthorized actions and violence of settlers and the historical colonial

9 Here, my argument is influenced by insights drawn from integrated threat theory, a variant of social identity theory. According to social identity theory, individuals receive psychological benefits from identifying with a group or groups: Henri Tajfel & John Turner, "The Social Identity Theory of Intergroup Behaviour" in Stephen Worchel & William G Austin, eds, *Psychology of Intergroup Relations* (Chicago: Nelson-Hall, 1986) at 7. The social identity theory of integrated or intergroup threat proposes that the perception of intergroup threats predict expressions of prejudice. Walter Stephan, Oscar Ybarra and Kimberly Rios explain that "an intergroup threat is experienced when members of one group perceive that another group wishes to, or is in a position to, cause them harm": Walter G Stephan, Oscar Ybarra & Kimberly Rios, "Intergroup Threat Theory" in Todd D Nelson, ed, *Handbook of Prejudice, Stereotyping, and Discrimination* (New York: Psychology Press, 2009) at 256. Threats may be "symbolic", for example, as a threat to a group or individual's values, morals, norms, beliefs, status, worldview, or legal order, or they may be "realistic", as corporeal, political, or economic threats to an individual or group. According to integrated threat theory, a range of individual and group-level behaviours may follow from the perception of threat ranging from avoidance to aggression: *ibid* at 256–57. In an unfortunate move, intergroup threat is circular; the perception of threat may lead to negative affective responses and behaviours, which in turn may predict the perception of threat where there is none: *ibid* at 258–59. In borrowing from integrated threat theory, I am not subscribing to a pathological account of the Court's jurisprudence. Rather, I adopt the general framework found within integrated threat theory because it is useful as a heuristic for reading the Court's jurisprudence. To be clear, I do not see my argument as dependent on the validity or accuracy of integrated threat theory in the Canadian context, though there is some empirical support for its conclusions. For a review of this literature, see Bernard E Whitley Jr & Mary E Kite, *The Psychology of Prejudice and Discrimination*, 3d ed (New York: Routledge, 2016) at 311–25. In the Canadian context, see Jeffrey S Denis, "Contact Theory in a Small-Town Settler-Colonial Context: The Reproduction of Laissez-Faire Racism in Indigenous-White Canadian Relations" (2015) 80:1 Am Sociol Rev 218 [Denis, "Small Town Settler Colonialism"]; Jeffrey S Denis, "Transforming Meanings and Group Positions: Tactics and Framing in Anishinaabe–White Relations in Northwestern Ontario, Canada" (2012) 35:3 Ethn Racial Stud 453; *cf.* Erin Lashta, Loleen Berdahl & Ryan Walker, "Interpersonal Contact and Attitudes Towards Indigenous Peoples in Canada's Prairie Cities" (2016) 39:7 Ethn Racial Stud 1242.

10 On the incommensurability between liberal and rooted (Indigenous) constitutionalisms, see Mills, *supra* note 6 at 13–15. Gina Starblanket & Dallas Hunt argue that "the obstruction that Indigenous people present to the development of settler society is no longer physical, but remains present in the set of alternative sovereignties that Indigenous people represent and assert": Gina Starblanket & Dallas Hunt, *Storying Violence: Unravelling Colonial Narratives in the Stanley Trial* (Toronto: ARP Books, 2020) at 78.

and present settler-colonial state.[11] Indigenous peoples are also perceived as inherently threatening;[12] this prejudice facilitates the dehumanization of Indigenous peoples and, correspondingly, the humanization and legitimization of settler supremacy.[13]

On another level, activities that ameliorate or reduce the harmful effects of settler colonialism on Indigenous persons or that afford constitutional protection to Indigenous peoples' rights may be perceived as a threat to the preferential allocation of resources to settlers.[14] Melanie A Morrison et al identify several stereotypes of Indigenous persons that may be associated with the perception of threat.[15] These include stereotypes that "Aboriginal Canadians seem to use their cultural traditions to secure special rights denied to non-Aboriginal Canadians", that "many of the requests made by Aboriginal people to the Canadian government are excessive", that "Aboriginal people should be satisfied with what the government has given them", that "it is now unnecessary to honour treaties established with Aboriginal people", and that "Aboriginal people should pay taxes just like everyone else."[16] In *Williams*, McLachlin CJ recognized this when she noted that "the potential of racist jurors siding with the Crown as the perceived representative of the majority's interests" may increase as "tensions between Aboriginals and non-Aboriginals" rise over resources.[17] To put it in the language of threat, some of these stereotypes or beliefs are rooted in the perception that Indigenous peoples' rights, or activities that may ameliorate inequality, are a threat to the social dominance of settlers

11 By "authorization", I mean authorized pursuant to Indigenous and intersocietal legal orders. For example, in the early 19th century, the Tsilhqot'in resisted the encroachment of the Hudson's Bay Company onto their lands: Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018) at 50–51. Pondiac's resistance in the 1760s against Britain in the Great Lakes is another example, described in John Borrows, "Wampum at Niagara: The Royal Proclamation, Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) at 170. Historically, the British colonial and settler colonial state responded to the threat of Indigenous militarization by entering into intersocietal treaties and agreements with Indigenous governments.

12 Melanie A Morrison et al, "Old-Fashioned and Modern Prejudice Toward Aboriginals in Canada" in Melanie A Morrison & Todd G Morrison, eds, *The Psychology of Modern Prejudice* (Hauppauge, New York: Nova Science Publishers, 2008) 277; Todd G Morrison, Melanie A Morrison & Tomas Borsa, "A Legacy of Derogation: Prejudice toward Aboriginal Persons in Canada" (2014) 5:9 Psychol 1001 [Morrison, Morrison & Borsa, "A Legacy of Derogation"].

13 Leslie Thielen-Wilson, "Feeling Property: Settler Violence in the Time of Reconciliation" (2018) 30:3 CJWL 494 at 517–18; Starblanket & Hunt, *supra* note 10 at 97–98.

14 See, for example, the *Kapp* case, which was brought by non-Aboriginal fishermen challenging the province's ameliorative program for Aboriginal fisheries on the basis that the Aboriginal fishery discriminated against the non-Aboriginal fishermen on the basis of race: *R v Kapp*, 2008 SCC 41 [*Kapp*]. *Kapp* is discussed later in this article.

15 Morrison et al, *supra* note 12; Morrison, Morrison & Borsa, "A Legacy of Derogation", *supra* note 12.

16 Morrison et al, *supra* note 12 at 24.

17 *R v Williams*, 1998 CanLII 782 at para 58 (SCC) [*Williams*].

and of their access to important social, political, economic, and cultural resources.[18] In the context of settler colonialism, the perception of threat may also be structural and ideological.[19] Whether cast as fear, threat, anxiety, or the perception of risk, these experiences and perspectives carry both affective and intellectual dimensions.[20] The perception of threat conditions responses that have material and affective consequences for Indigenous peoples – and settlers.[21]

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18 Denis, "Small Town Settler Colonialism", supra note 9 at 220–22, 236–37. B Corenblum and Walter G Stephan found that White Canadians perceived Indigenous peoples' advocacy for Indigenous rights and title and Indigenous students access to affirmative action programming as a symbolic (political power and status) and material (economic, land) threat to White people's dominance: B Corenblum & Walter G Stephan, "White Fears and Native Apprehensions: An Integrated Threat Theory Approach to Intergroup Attitudes" (2001) 33:4 Can J Behav Sci 251 at 255, 258. See also Darrell W Donakowski & Victoria M Esses, "Native Canadians, First Nations, or Aboriginals: The Effect of Labels on Attitudes Toward Native Peoples" (1996) 28:2 Can J Behav Sci 86 at 90 (describing how the term "First Nations" evokes perceptions of political threat, as identified in the example of the Assembly of First Nations).

19 In her thematic guide to Canadian literature, Margaret Atwood argues that "every country or culture has a single unifying and informing symbol at its core. [...] The symbol, then – be it word, phrase, idea or image, or all of these – functions like a system of beliefs (it *is* a system of beliefs, though not always a formal one) which holds the country together and helps the people in it to co-operate for common ends." Atwood identifies survival as the unifying theme of Canadian literature. In contrast to the theme of the fort and frontier in American literature, Atwood describes *survival* as not only "a preoccupation with one's survival" but also "a preoccupation with the obstacles to that survival." Survival is an "intolerable anxiety." In early Canadian literature, survival meant "bare survival in the face of 'hostile' elements and/or natives: carving out a place and a way of keeping alive." Margaret Atwood, *Survival: A Thematic Guide to Canadian Literature* (Toronto: Anansi, 1972) at 31–33. Settler survival in the face of Indigenous criminality and illegality recurs as a theme in settler property law: Bhandar, *supra* note 11 at 101.

20 In *Canada's Indigenous Constitution*, John Borrows describes the affective or emotional responses to Indigenous legal orders in a chapter titled "Legitimacy". He relates both the emotional and intellectual responses of those who would reject the recognition of Indigenous legal orders: "we must pay attention to both its emotional and intellectual developments. This is not to suggest for one moment that people discard reason when they make a choice." John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 165. It is noteworthy that Borrows' discussion of the problem of "legitimacy" has little to do with the rationality or authority of Indigenous legal orders, but rather, the affective and cognitive bias against Indigenous legal orders as illegitimate. For a discussion of the connection between the affective terror and cognitive structures underlying settler colonialism in the prairies, see Starblanket & Hunt, *supra* note 10 at 79–80.

21 Starblanket & Hunt describe the affective and material consequences for Indigenous peoples in the prairies, where settler and state violence is asymmetrically legitimized through law: Starblanket & Hunt, *supra* note 10 at 22, 81–83, 93–118. Settler perceptions of Indigenous persons, peoples, their legal orders, and inherent rights as threats also has affective consequences for settlers. Eva Mackey argues that settler "'structures of feeling' pivot on axiomatic assumptions about settler entitlement and certainty in land, property, and settler futures" and that Indigenous peoples' claims to land unsettle these expectations, making them uncertain: Eva Mackey, "Unsettling Expectations: (Un)certainty, Settler States of Feeling, Law, and Decolonization" (2014) 29:2 CJLS 235 at 237. Mackey identified several affective expressions in her interviews with settlers, including anger, resentment, endangerment, and anxiety. The state's response is to naturalize these "fantasies of entitlement", making these expectations into *material certainties*: *ibid* at 243.

In this article, I *enthreaten* the SCC's foundational jurisprudence on section 35 of the *Constitution Act, 1982*[22] by reading it through a lens of threat. I argue that this jurisprudence is a response to the threat that Indigenous peoples' inherent rights poses to the preferential allocation of resources to settlers and the settler state.[23] When viewed through the lens of threat, "reconciliation" takes on an additional – and, I argue, a more accurate – meaning: "reconciliation" as a response to a perceived or actual threat to settler supremacy. Through "reconciliation", the Court resolves the threat of Indigenous peoples' inherent rights, in particular rights to self-government, in favour of the future of the settler state.[24] At the same time, this vision of "reconciliation" *threatens* Indigenous futures by constraining the terms under which Indigenous peoples' political difference is recognized and respected. In its jurisprudence, the Court must also deny or obfuscate *reconciliation as a response*

22 *Constitution Act, 1982*, s 35 being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

23 Other scholars, discussed in this article, have critiqued the Court's jurisprudence as responsive to the societal, economic and political interests of settlers and the settler state. Contemporaneously with the writing of this article, Bruce McIvor argues that "[t]o ensure the stability and legitimacy of the dominant, colonizer society, the Court" constructed legal tests, including those identified in this article, that could answer the threat of Indigenous peoples rights to "non-Indigenous dominance and entitlement": Bruce McIvor, "Aboriginal Rights as a Tool of Colonialism", *First Peoples Law* (29 September 2023), online (blog): <firstpeopleslaw.com/public-education/blog/aboriginal-rights-as-a-tool-of-colonialism>. In a different turn, Kenji Tokawa argues that the Court's jurisprudence frames Aboriginal rights not as a threat to the state's interest over a right (it must avoid such an appearance), but rather as a search for Aboriginal culture: Kenji Tokawa, "*Van der Peet* Turns 20: Revisiting the Rights Equation and Building a New Test for Aboriginal Rights" (2016) 49:2 UBC L Rev 817 at 831 [Tokawa, "*Van der Peet* Turns 20"]. Brian Slattery argues that the Court's "principles of reconciliation" are a response to the assumed interests of the state, its citizens and other third parties: Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85:2 Can Bar Rev 255at 260. In response to the Court's decision in *Sparrow*, Kerry Wilkins argues that Indigenous claimants must be cognizant of the Court's fear that Aboriginal constitutional rights, in particular the right to self-government or rights with commercial dimensions or impacts, may "pose uncontainable threats to basic mainstream institutions or fundamental mainstream values": Kerry Wilkins, "Take Your Time and Do It Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy" (2000) 27:2 Man LJ 241 at 266 [Wilkins, "Take Your Time and Do It Right"].

24 Eve Tuck & KW Yang, "Decolonization is not a Metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1 at 36. Describing "futurism" in settler colonial thought, Patricia Wood and David Rossiter describe how "futuristic thinking ... is also ontological: political entities like states emerge from themselves; they are not products of history. In this place, the future is unfettered by and unaccountable to the past. It is believed that anything is possible, that the future can be invented as one wishes. Moreover, the promise of the future is what is meaningful or gratifying, not the present or the past. This is a mindset that fetishizes the future ...": Patricia Wood & David A Rossiter, *Unstable Properties: Aboriginal Title and the Claim of British Columbia* (Vancouver: UBC Press, 2022) at 10.

to this threat.[25] The settler state cannot cleanly admit either its prioritization of its claims over Indigenous resources nor its fear of Indigenous peoples and their corresponding inherent rights. "Reconciliation" must project balance, a return to equilibrium and stability, an assured and healthy ethic for the settler state, one in which we are "all here to stay" – and preferably for settlers in much the same way.[26] *Threatening* this jurisprudence also menaces it. By making settler supremacy and futurity visible in this jurisprudence, it challenges courts and legal actors to imagine a different vision of reconciliation, one in which settlers are here to stay *in a different way*.

My argument proceeds in two parts. In the first part, I revisit the context surrounding the SCC's foundational jurisprudence on Aboriginal rights within the period between 1990 and 1997, namely *Sparrow*, *Nikal*, *Lewis*, *NTC Smokehouse*, *Van der Peet*, *Gladstone*, *Pamajewon*, and *Delgammukw*.[27] I argue that the claimants' inherent rights – their capacity to sustain themselves into the future through commercial and governance activities on their traditional territories – challenged the future of the settler state and the allocation of resources to settlers. In the second part, I argue that a majority of the justices of the SCC responded to this threat by creating a jurisprudence that asymmetrically preferred the future of the settler state and its control over Indigenous peoples' territories and societies and the preferential allocation of resources to settlers. To this end, the Court marshalled and redeployed a new juridical concept: reconciliation. I argue that "reconciliation" functions as a normative and strategic claim that sustains and legitimizes settler futurity and supremacy and obfuscates the subordination of Indigenous peoples' inherent rights to this settler-centric vision. To accomplish this, a majority of the Court carried out four tactical and asymmetrical moves: its cultural definition of Aboriginal rights as material activities in geographically and temporally defined space; its subordination of the Indigenous perspective to the common law and constitutional legal order; its distinction between inherent or internally limited and non-inherent or non-internally limited Aboriginal rights in the context of the Crown's fiduciary duty; and its expansion of the Crown's arsenal of valid legislative objectives for infringing Aboriginal rights.

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25 Alexandre Kedar argues that settler law creates "[i]ntricate legal tools and conventions [that] serve as central instruments in defining and altering laws concerning natives' rights. These rules, saturated with a heavy dose of professional, technical, and seemingly scientific language and methods, conceal the violent restructuring with an image of inevitability and neutrality. Procedural rules and obstacles, such as time limits, and questions of jurisdiction and standing; rules of evidence, such as admissibility and weight, presumptions and burdens of proof; the manipulation of past precedents and of legal categories, have the effect of dispossessing indigenous populations without even admitting the dispossession": Alexandre (Sandy) Kedar, "On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda" in Jane Holder & Carolyn Harrison, eds, *Law and Geography* (Oxford: Oxford University Press, 2003) 401 at 416.

26 Here, I draw from the comments of Harry LaForme and Chief Felix Thomas of the Saskatoon Tribal Council at the Canadian Institute for the Administration of Justice's conference, "We Are All Here to Stay", reported in Franks, *supra* note 2 at 755.

27 *Sparrow*, *supra* note 3; *Nikal*, *supra* note 3; *Lewis*, *supra* note 3; *NTC Smokehouse*, *supra* note 3; *Van der Peet*, *supra* note 3; *Gladstone*, supra note 3; *Pamajewon*, *supra* note 3; *Delgamuukw*, *supra* note 1.

I. Threatening Reconciliation

In this part, I revisit the context surrounding the SCC's foundational jurisprudence on Aboriginal rights and title under section 35 of the *Constitution Act, 1982*.[28] I argue that, within this context, the claimants' inherent rights – their capacity to sustain themselves into the future through commercial and governance activities on their traditional territories – challenged the future of the settler state and the preferential allocation of resources to settlers. Rather than separate these cases based on the date of the Court's decision (as in the case of what is called the "*Van der Peet* trilogy"),[29] by their focus on Aboriginal title or Aboriginal rights (which may be further defined by the right to fish or the right to self-government), or by treating each individually, I revisit and contextualize these cases based on their shared history and relationships. These cases have shared procedural and substantive histories, including that: five of them (*Van der Peet*, *Gladstone*, *Nikal*, *Lewis*, and *NTC Smokehouse*) share a common lineage as same-day decisions of the British Columbia Court of Appeal (BCCA) (having been decided by the same panel of judges on June 25, 1993) and as coordinated applications for leave to appeal to the SCC (October 1993, with leave granted on March 10, 1994); two of them share a related rights-holder (namely, the Witset First Nation and Wet'suwet'en in *Nikal* and *Delgamuukw*); four share a relationship to commercial fisheries in British Columbia after the SCC's decision in *Sparrow* (*Van der Peet*, *Gladstone*, *Nikal* and *Lewis*); five of them were heard together over two days in late November, 1995 (*Nikal*, *Lewis*, *NTC Smokehouse*, *Van der Peet* and *Gladstone*); six of them would be decided within months of each other (*Nikal* and *Lewis* were decided in April 1996, and *NTC Smokehouse*, *Van der Peet*, *Gladstone* and *Pamajewon* were decided on between August 21 and 22, 1996);[30] and, in each of them, the claimants articulated a theory of reconciliation and section 35 that centred on their capacity to access and use their lands to continue themselves into the future. Together, these cases – all appealed, heard and decided within a few years of each other, many at the same time, and with the same parties intervening across cases – challenged the preferential allocation of resources to the settler state, in particular, the capacity for provincial and

28 *Sparrow*, *supra* note 3; *Nikal*, *supra* note 3; *Lewis*, *supra* note 3; *NTC Smokehouse*, *supra* note 3; *Van der Peet*, *supra* note 3; *Gladstone*, *supra* note 3; *Pamajewon*, *supra* note 3; *Delgamuukw*, *supra* note 1. Two additional cases involving Aboriginal fishing rights, *R v Adams*, 1995 CanLII 56 (SCC) [*Adams*] and *R v Côté* 1996 CanLII 170 (SCC) [*Côté*], would be decided on October 3, 1996. Leave to appeal in *Côté* was granted on March 3, 1994, and the case was heard by the SCC on June 17, 1996. Leave to appeal in *Adams* was granted on December 9, 1993, and the case was heard by the SCC on December 5, 1995. Additionally, the Court heard a case on Aboriginal treaty rights, *R v Badger*, 1996 CanLII 236 (SCC) [*Badger*], in this period. Leave to appeal in *Badger* was granted on December 15, 1993, and the case was heard by the SCC on May 1 and 2, 1995. The Court released its decision in *Badger* on April 3, 1996, just before it released its decisions in *Nikal* and *Lewis*. Although *Adams*, *Côté* and *Badger* are contextually relevant, in particular for the Court's approach to the separation between Aboriginal rights and Aboriginal title, I have limited my analysis of these cases for reasons of length.

29 Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993.

30 *Delgamuukw* would follow in December 1997. However, as noted above, the Court was aware of the relationship between *Delgamuukw* and these other cases, both because almost all of them originated in same-day decisions of BCCA and because the claimants in *Delgamuukw* intervened in the related appeals to the SCC.

federal governments to access resources and exercise governance powers over Indigenous peoples' territories.

In contrast to the usual, incremental development of a jurisprudence, the Court constructed this jurisprudence on Aboriginal rights and title within a short period of time. These cases also occurred within a broader social and political context, of which the Court was almost certainly aware. This period was one of intense conflict and uncertainty over the meaning of section 35 of the *Constitution Act, 1982*. By 1992, constitutional discussions and negotiations over the meaning of section 35 had broken down between First Nations, Inuit and Métis peoples and the federal and provincial governments. The risk of physical conflicts between Indigenous peoples and settlers over access to lands and resources was real. At the heart of these conflicts were two competing visions of section 35, one that envisioned the development of Indigenous societies into the future and one that restricted its purpose to the protection of those practices that make Indigenous societies distinctive compared to Europeans. As I will argue, the latter vision is responsive to the threat that Indigenous peoples' futurity – their capacity to access and use their lands to continue themselves into the future, however they desire – poses to settler futurity. In 1996 and 1997, a majority of the Court entrenched this latter vision. To understand this response, we must place the Court's decisions within their historical context.

As a brief note on method, the review in this part is limited. First, for reasons of focus and length, it is limited to the cases noted above and does not include the Court's treaty jurisprudence nor *R v Adams* and *R v Côté*.[31] Second, I consider the doctrinal arguments of the parties and reasons of the Court only insofar as they relate to my research question, which focuses on competing visions about the meaning, scope and purpose of section 35 of the *Constitution Act, 1982*. Third, I use court records, including hearing transcripts, reported decisions, and written submissions; government reports; media; and secondary literature, to contextualize the cases under review. Due to the temporal scope chosen in this article, I am interested in events at a general level, in contrast to a more focused inquiry into specific events or cases. The purpose of this contextualization is to re-examine the Court's reasons in light of the underlying factual record and surrounding circumstances of the cases that were before the Court. As Leonard Rotman notes, the Court in *Nikal*, *Lewis*, *NTC Smokehouse*, *Van der Peet*, *Gladstone*, *Pamajewon* and *Delgammukw* decontextualized its consideration of the scope and content and Aboriginal rights and title from the surrounding historical context, including the contemporary entrenchment of section 35 and the constitutional conferences that followed.[32] This section attempts, to some degree, to contextualize the Court's reasons.

31 *Adams*; *Côté*, *supra* note 28.

32 Leornard I Rotman, "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada Symposium on Aboriginal Legal Issues" (1997) 36:1 Alta L Rev 1 at 2.

1. *Sparrow*'s "Halfway House"[33]

The facts in *Sparrow* establish an important historical context related to fisheries in British Columbia, one shared with several of the cases on appeal to the Court in 1994 through 1996, notably *Nikal*, *Lewis*, *Van der Peet*, and *Gladstone*.[34] In *Sparrow*, Dickson CJ and La Forest J, writing for the Court, set out a framework for determining whether the Crown's conduct has infringed an Aboriginal right and, if so, whether that infringing conduct is justified.[35] The Court left for another day the question of the scope, content and meaning of Aboriginal rights under section 35. Thus, *Sparrow* is important for our understanding of the Justices' decisions in 1996 and 1997.

In the spring of 1984, Ronald Sparrow, a member of the Musqueam Nation and a licensed commercial fisherman, was charged with fishing with a drift net longer than 25 fathoms in Canoe Pass, a narrow channel located on the southern arm of the Fraser River. At the time of the offence, the Musqueam Nation held an Indian Food Fishing License, issued in March 1983 under section 27 of the *British Columbia Fisheries Regulations*, which permitted its members to fish for food in the Fraser River.[36] However, the 1983 license restricted the length of drift nets used for fishing to 25 fathoms.

Although the Crown charged Sparrow with fishing for food with a drift net longer than 25 fathoms, the commercial dimensions of fishing form part of the surrounding context of the case. In 1982, the Department of Fisheries and Oceans recorded a substantial increase in the catch attributed to the Musqueam Nation under its food fishing license. At trial, the Crown argued that the net length restriction imposed in the 1983 license was intended to conserve the fish stock for other Aboriginal food fisheries and other non-Aboriginal users of the food fishery, and that the drift net length restriction was sufficient to meet the estimated food needs of the Musqueam Nation.[37] On appeal to the BCCA, the Musqueam Nation argued that the net length restriction was a "vindictive" response of the Crown to its failed criminal prosecution of a group of Musqueam fishers who were charged with unlawfully selling fish harvested pursuant to its previous Indian Food Fishing License in 1982.[38] Although the trial judge found that the Crown was not "improperly motivated" by

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33 Robert J Sharpe and Kent Roach describe *Sparrow* as one example of the Chief Justice's tendency to accommodate multiple perspectives within a "halfway house" decision: Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2018) at 178, 451–52.

34 The regulatory offences at issue in *Lewis*, *Nikal*, *NTC Smokehouse*, and *Van der Peet* originated as charges during the 1986 and 1987 summer and fall fishing seasons in British Columbia.

35 Although the Chief Justice and La Forest J wrote together, Wilson J believed the decision should have been written only by the Chief Justice. Both Wilson J and La Forest J contributed significantly to internal discussions, issuing memoranda and comments, but the final decision, according to Wilson J, hewed closer to the Chief Justice's initial position. It is possible that La Forest J joined the Chief Justice in writing for the Court because La Forest J was initially assigned to write the judgement after the hearing. However, as internal deliberations progressed, the Court shifted further from La Forest J's initial draft. See Sharpe & Roach, *supra* note 33 at 448–51.

36 *British Columbia Fishery* (*General*) *Regulations*, SOR/84-248, as repealed by *Pacific Fishery Regulations, 1993*, SOR 93-54.

37 See *R v Sparrow*, 1986 CanLII 172 at 17–18 (BCCA) [*Sparrow* (BCCA)].

38 *Ibid* at 11–12.

its failed prosecutions, the Court of Appeal accepted an inference that some of the increased catch might be attributable to an unlawful commercial harvest.[39] This implication of a connection between Indigenous food fisheries and unlawful commercial fisheries and their impacts on fish stocks would repeat in the historical context surrounding *Van der Peet* and *Gladstone*.

On appeal to the SCC, the issue in *Sparrow* was limited to whether Parliament may regulate activities that are protected under section 35(1) of the *Constitution Act, 1982*. Because of the nature of the trial judge's findings of fact and law, the Court did not decide whether the restriction was constitutionally valid, but rather, set out a framework for the justified infringement of Aboriginal rights under section 35 that could inform a new trial of the offence. Writing for the Court, Dickson CJ and La Forest J explained that the Aboriginal group asserting the right must first demonstrate a *prima facie* infringement of the right. In doing so, trial judges may consider whether the Crown conduct imposes an unreasonable limitation, undue hardship, or denial of preferred means on the exercise of the right.[40] If the Aboriginal group establishes infringement, the onus shifts to the Crown to justify its infringement of the right. In turn, the Crown must demonstrate that its legislative objective is valid and that its conduct is consistent with its fiduciary duties to the group.[41] The Court identified conservation or management of a resource, or the protection of the public or Aboriginal group from harm as valid legislative objectives, but left open the possibility that other "compelling and substantial" objectives might also be found.[42] Furthermore, the Court reasoned that the Crown must demonstrate that its conduct is consistent with its fiduciary duties; to do so, the Crown must demonstrate that its conduct is minimally infringing, that it has provided compensation in a situation of expropriation, that it has consulted with respect to the potential infringement on the right, and that it has allocated priority to the Aboriginal group's right to fish for food.[43]

The Justices largely avoided the commercial dimensions underlying Indigenous and non-Indigenous fishing within the province.[44] At trial, the Judge reasoned that the SCC's judgement in *Calder* held that Aboriginal rights in British Columbia were extinguished.[45] For this reason, the trial judge found that Sparrow could not claim an Aboriginal right to fish as a defence to the regulatory

39 *Ibid* at 12–13.

40 *Sparrow*, *supra* note 3 at 1078. Chief Justice Dickson describes the regulatory infringement at issue as an "adverse" and "unnecessary" restriction on the right.

41 *Ibid* at 1113.

42 *Ibid*.

43 *Ibid* at 1119.

44 Ian Binnie argues that "[t]he fisheries regulation in issue in that case was apparently intended by the government to curtail the commercial dimension of the Musqueam fishery, and counsel for Mr. Sparrow had asked the Supreme Court specifically to address the commercial fishery as an aspect of the Aboriginal right. The Court not only declined the invitation but, it will be suggested [that][...] its reasoning in *Sparrow* and in the important recent treaty rights case of *R. v. Horseman* makes unlikely the future recognition of a significant commercial component to the Aboriginal food fishery": W I C Binnie, "The *Sparrow* Doctrine: Beginning of the End or End of the Beginning" (1990) 15:2 Queen's LJ 217at 218.

45 *Calder et al v Attorney-General of British Columbia*, 1973 CanLII 4 at 328 (SCC) [*Calder*].

charge. The BCCA overturned the trial judge's application of *Calder* and found, based on the evidence and findings of the trial judge, that the Musqueam enjoyed an Aboriginal right to fish for food.[46] The Court assumed this framing of the right, further reasoning that the right should be defined based on the nature of the activity impugned by the fishing regulations – in this case, a net length restriction on a *food* fishing license.[47] However, on appeal to the SCC, counsel for Sparrow submitted that the Musqueam have an Aboriginal right "to fish for any purpose, including the purpose of catching fish to sell."[48] Counsel also submitted that "the Musqueam view their aboriginal rights to fish as critical to their *future*. They are far more than just nostalgic relics of their past."[49] In its reasons, the SCC limited its holding to an Aboriginal right to fish for food, while noting that "no commercial fishery existed prior to the arrival of European settlers."[50] In its reasons, the Court was attentive to the "possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon."[51] This *obiter* suggests that the Court's decision may have been responsive to this potential conflict.

Although *Sparrow* was a unanimous decision, correspondence between the Justices illustrates anxiety with respect to the scope and content of Aboriginal rights under section 35 and of the Crown's capacity to legislate. In their biography of Dickson CJ, Robert J Sharpe and Kent Roach describe how the Chief Justice "mediat[ed] between the strongest poles of his Court."[52] La Forest J, who was assigned to write the first draft, initially intended to uphold Sparrow's conviction and to defer to the government's regulation of the fisheries. La Forest J also expressed concerns that Aboriginal rights with commercial dimensions could have a disruptive effect on non-Indigenous peoples' participation in the underlying resource economy and that Indigenous peoples may not be capable of managing the fisheries themselves.[53] Wilson J, in contrast, would have overturned Sparrow's conviction. In addition, Wilson J would have placed a stronger burden on the Crown to justify its infringement of any Aboriginal right.[54] Sharpe and Roach write that Wilson also "feared that La Forest had interpreted

46 *Sparrow* (BCCA), *supra* note 37 at 19–25, 41.

47 *Sparrow*, *supra* note 3 at 1101.

48 *R v Sparrow*, 1990 CanLII 104 (SCC), (Factum, Appellant at para 67) [Factum of the Appellant (*Sparrow*)].

49 *Ibid* at para 66 (emphasis added).

50 *Sparrow*, *supra* note 3 at 1100. It is likely that the Court's reference to the non-existence of a historical "commercial fishery" is based on the modern form of commercial fisheries. Thus, the Court is only noting that no commercial fishery, in its modern form, existed historically. The Court does not resolve whether "the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes": *ibid* at 1102.

51 *Ibid* at 1101.

52 Sharpe & Roach, *supra* note 33 at 450.

53 *Ibid*.

54 *Ibid* at 449. See also Ellen Anderson, *Judging Bertha Wilson: Law As Large As Life* (Toronto: University of Toronto Press, 2001) at 192–93.

the aboriginal right to fish in a way that did not account for the 'changed lifestyle for Indians in the 20th Century."[55] In the end, La Forest J joined Dickson CJ in writing the Court's judgement in *Sparrow*, though the judgement owed much to Wilson J's memoranda. Although Dickson CJ was able to secure consensus, La Forest J noted in internal correspondence to Dickson CJ that "[although] [t]his time we can avoid our specific views of the nature of aboriginal rights themselves... [w]e should fight that in another context where we do not have an even Court."[56]

Shortly after *Sparrow*, Ian Binnie noted that the Court's decision to permit, yet strictly limit, the Crown's capacity to justifiably infringe Aboriginal rights may have left it with less room to define the scope, content and meaning of Aboriginal rights, particularly to rights with commercial dimensions.[57] If commercial activities were protected under section 35, the *Sparrow* framework could restrict the Crown's regulation of those activities unless it was necessary for the purposes of conservation or the protection of the public from harm. In short, the *Sparrow* framework, on its own, would be generous to Aboriginal peoples' constitutionally protected rights and could limit not only the Crown's *de facto* control over resources but the commercial interests of settlers. Given *Sparrow*'s relatively straightforward test for *prima facie* infringement and onerous test for justified infringement, the Court's role in balancing any "overlapping or conflicting interests" would be limited.[58] In short, *Sparrow* established a framework that was, in retrospect, generously oriented towards the claims of Aboriginal peoples.[59] Thus, having left the specific content of Aboriginal rights open to commercial dimensions, the *Sparrow* framework motivated the Crown to negotiate with First Nations on the scope and content of Aboriginal rights.[60]

55 Sharpe & Roach, *supra* note 33 at 449.

56 *Ibid* at 451.

57 On this point, Binnie suggests that "having erected something of a legal fortress around s. 35 rights, [the Court] will now be cautious and somewhat circumspect in identifying the specific activities that belong within the fortress:" Binnie, *supra* note 44 at 218.

58 *Ibid* at 225.

59 One might respond that it is anything but generous to permit the Crown's infringement of Aboriginal rights, absent any explicit language in section 35.

60 This appears to have been Dickson CJ's intent, see Sharpe & Roach, *supra* note 33 at 453. Stuart Gilby, in his argument for an Aboriginal right to a commercial fishery, shares this assessment of *Sparrow*'s impact: Stuart Gilby, "The Aboriginal Rights to a Commercial Fishery Notes & Comments" (1995) 4 Dal J Leg Stud 231 at 233.

2. Conflict and Competition in British Columbia's Commercial Fisheries in *Van der Peet*, *Gladstone*, *Nikal*, *Lewis*, and *NTC Smokehouse*

Two years after the Musqueam successfully challenged Canada's *British Columbia Fisheries Regulations* in *Sparrow* (1990), Canada responded by establishing an Aboriginal Fisheries Strategy (AFS). The purpose of the AFS was to "expand Aboriginal peoples['] role in the fisheries while at the same time conserving fish stocks and maintaining a stable environment, predictable resource-sharing and profitable fisheries for all parties concerned"[61] as well as to "establish a social contract among the government, aboriginal peoples, and non-aboriginal fishing groups."[62] However, as Allain and Fréchette note in their postmortem of the 1992 fishing season under the AFS, this "social contract... acted more to form a rift between the parties concerned than to bring them closer together."[63] Non-Indigenous commercial fishermen resented the Department of Fisheries and Oceans' (DFO) decision to delegate the management of fisheries to some First Nations and to pilot Indigenous commercial fishing in the Fraser river.[64] The loss of approximately 500,000 salmon from the fishery in 1992, which non-Indigenous commercial fishermen perceived as a consequence of the AFS, stoked this resentment.[65] Speaking to the Standing Committee on Forestry and Fisheries on May 6, 1993, John Crosbie, the Minister of Fisheries and Oceans, expressed concern that without the AFS, "confrontation and possible bloodshed" might occur.[66]

The AFS faced opposition from non-Indigenous commercial fishermen and provincial politicians. In April 1993, Phil Eidsvik, the Executive Director of the BC Fisheries Survival Coalition, solicited support from municipalities to petition the Minister of the Department of Fisheries and Oceans, John Crosbie, to repeal the DFO's AFS on the basis that the strategy would severely impact the viability of the commercial salmon fishery.[67] In 1994, Mike Hunter, head of the Fisheries Council of

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61 Jane Allain & Jean-Denis Fréchette, *The Aboriginal Fisheries and the Sparrow Decision*, BP-341E (Ottawa: Library of Parliament, 1993) at 13.

62 *Ibid*.

63 *Ibid*.

64 *Ibid*. Gilby writes that "[t]he Government's response to Sparrow has resulted in greater open discord between Natives and other fishers on the west coast": Gilby, *supra* note 60 at 239. Gilby also connects this "open discord" on the west coast to non-Indigenous fishermen's opposition to Mi'kmaq fisheries on the east coast: *ibid* at 239–41.

65 Peter H Pearse, *Managing Salmon in the Fraser: Report to the Minister of Fisheries and Oceans on the Fraser River Salmon Investigation* (Vancouver: Department of Fisheries and Oceans, 1992), online (pdf): <waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/140527.pdf>.

66 Cited in *R v Kapp*, 2003 BCPC 279 at para 47 [*Kapp* (*BCPC*)]. In 1991, David Secord, chairman of the Fishermen's Alliance Direct Action, "threatened retaliation" if the federal government permitted First Nations "to legally sell salmon while land claims are being negotiated": "Plan for Native Fishing Meets Stiff Opposition", *Globe & Mail* (15 July 1991), online: <proquest.com/historical-newspapers/plan-native-fishing-meets-stiff-opposition/docview/1148955339/se-2".

67 Scott Simpson, "Fear-Mongering Cited As Fishers Launch Campaign", *The Vancouver Sun* (24 April 1993) B9, online: <vancouversun.newspapers.com/image/495141061/?match=1&terms=Fear-mongering%20cited%20as%20fishers%20launch%20campaign>.

British Columbia, alleged that the AFS "increased the opportunity and incentives for illegal fishing to continue and expand in areas beyond the realm of the pilot sales project."[68] In 1995, Robert Alford initiated a class action on behalf of approximately 280 fishermen against the Ministry of Fisheries and Oceans on the basis that Canada owed the plaintiffs a duty of care and fiduciary duty with respect to the management of fisheries, in particular, the Ministry's AFS.[69] At the heart of the *Alford* case was a challenge to the Minister's "authority to create exclusive or private commercial fishing rights or privileges the licenses for which are not open to and accessible to all Canadians."[70] Speaking on the action in 1995, Robert Alford stated that the plaintiffs "want some accountability. About 10 fisheries around the coast are absolutely out of control and are being plundered. I really think we will lose the salmon because of political correctness."[71] Commercial fishermen Phil Eidsvik, Robert

68 "Federal Plan Helps Sale of Illegal Fish Processors' Head Says (Fisheries Council of BC Says Aboriginal Fishing Strategy Launders Illegally Caught Fish)", *Canadian Press NewsWire* (29 November 1994).

69 The plaintiffs' statement of claim in the class action was filed on June 6, 1995. The plaintiffs also alleged tortious conduct including breach of the constitution, conspiracy, misfeasance of public office, and willful interference with economic relations: *Alford v Canada* (*Attorney General*), 1997 CarswellBC 74 at paras 1–2 (BCSC) [*Alford* 1997]; *Alford v Canada* (*Attorney General*), 1999 CarswellBC 1893 at para 26 (BCSC).

70 *Alford* 1997, *supra* note 69 at para 12.

71 Judith Lavoie, "Fishermen Allege DFO Bungling - Aboriginal Fishing Strategy", *Times - Colonist* (7 June 1995) 1.

Alford and Member of Parliament John Cummins would continue to challenge Canada's jurisdiction to implement the AFS after the SCC's decisions in its 1996 fisheries cases.[72] Phil Eidsvik's advocacy, in which he characterized the AFS as a "race based fishery" and asserted a common law right to access

72 Although these cases may not have informed the SCC's reasoning in its fisheries cases, they illustrate existing opposition among BC commercial fishermen to Canada's decision to regulate Aboriginal commercial fisheries after *Sparrow*. If anything, the SCC's decision in *Gladstone* heightened these concerns. Though these applicants and defendants could not attack Aboriginal fishing rights directly, they could – and did – argue that these cases applied narrowly to the specific First Nations and that the Minister's decision to more broadly permit Aboriginal commercial fisheries was invalid. On June 19, 1996, John Cummins filed a motion for a *quia timet* injunction against the Minister of Fisheries and Oceans. The applicants sought an order limiting the Minister's authority to permit Aboriginal commercial fishing of sockeye salmon in the Fraser River: *Cummins v Canada* (Minister of Fisheries and Oceans) (TD), 1996 CanLII 4075 (FC). On August 25, 1996, John Cummins and twenty-two other fishermen were charged with fishing during a "closed time". In response to the charge, the defendants challenged the Minister's authority to "award fishing rights 'based on residence or ethnic affiliation" and that the Minister has the constitutional authority and duty to manage the fishery for all Canadians: *Cummins v R*, 1997 CanLII 1659 at paras 1–3, 44 (BCSC). Cummins was also charged with similar offences related to fishing during a closed season on or about October 26 and 27, 1996. Thomas J noted that: "The accused has, for some time, held a firmly established view that the opening of the fishery for an aboriginal commercial purpose is an unlawful exercise of the authority of the DFO or the Minister of Fisheries to regulate the Pacific Coast Salmon Fishery. He therefore notified the DFO of his intention to fish contrary to its rules applicable to this limited opening of the fishery on both October 26, 1996 and October 27, 1996 and did so. The DFO has accordingly laid the four charges before me." *R v Cummins*, 1998 CarswellBC 2588, [1998] BCJ No 125 at para 13 (BCPC) [*Cummins (BCPC)*]. Although Thomas J convicted Cummins on the substance of the charges, he also concluded that the Minister's permitting of the Aboriginal commercial fishery was invalid because the First Nations had not established an Aboriginal right to a commercial fishery: *ibid* at paras 14–15, 20. In 1998, Phil Eidsvik and others were charged with fishing during a closed season. Thomas J, based on his decision in *Cummins (BCPC)*, entered a judicial stay of proceedings against the defendants: *R v Houvinen*, [1998] BCJ No 2064 at para 7 [*Houvinen*, 1998]. On appeal to the British Columbia Supreme Court, Curtis JA overturned the reasoning of Thomas J in *Cummins* (1998) and *Houvinen* 1998: *R v Huovinen*, 1999 CanLII 6409 at para 18 (BCSC); *R v Huovinen*, 2000 BCCA 427 (dismissing the defendants' application for leave to appeal the decision of Curtis JA). In 2001, Cummins and others engaged in another protest fishery: *R v Cummins et al*, 2010 BCPC 433. Although Wingham J convicted the defendants, he was "mindful" of the severity of the fines because the offences "occurred during the aboriginal fisheries and created a situation where there was a potential for conflict": *ibid* at para 39. For a summary and analysis of this litigation, as well as *Kapp*, *supra* note 14, see Andre Goldenberg, "Salmon for Peanut Butter: Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights" (2004) 3 Indigenous LJ 61 at 69–70, et passim [Goldenberg, "Salmon for Peanut Butter"].

the fisheries, would become central to the non-Indigenous commercial fishermen-plaintiffs' challenge of the AFS as discriminatory under section 15 of the *Charter of Rights and Freedoms*[73] in *Kapp*.

It is within this context that we might understand the SCC's responses in 1996 and 1997. *Nikal*, *Lewis*, *NTC Smokehouse*, *Van der Peet*, and *Gladstone* each implicitly challenged the Crown's control over fisheries and the status quo allocation of those fisheries to, in most cases, non-Indigenous commercial fishermen.[74] In *Van der Peet*, *NTC Smokehouse*, and *Gladstone*, the plaintiffs claimed either the right to sell fish or to fish commercially.[75] In *Nikal*, the Witset First Nation (then Moricetown) claimed an Aboriginal right to regulate fisheries on waters within the reserve while, in *Lewis*, the Squamish Nation asserted the authority to regulate fisheries on waters within and adjacent to the reserve under the *Indian Act*.[76] The Aboriginal right to fish or to regulate or engage in their fisheries appeared to challenge the livelihoods of non-Indigenous commercial fishermen and the viability of the fishery. For the claimants, Aboriginal rights related to the fisheries were essential to their survival as a people. On appeal, Louis Mandell, counsel for Dorothy Van der Peet, argued that "the only possible basis on which the relationship to their land can survive and [sic] cultural continuity is if they

73 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15. Some of the plaintiffs in *Kapp* were also applicants in the *Alford* case and all acted "under the auspices" of Eidsvik's BC Fisheries Survival Coalition (I compared the writ of summons in the *Alford* file, VLC-S-L-A951927 to the parties in *Kapp*; see also *Kapp*, *supra* note 14 at para 9). The plaintiffs in *Kapp* were successful at trial: *Kapp (BCPC)*, *supra* note 66. Kitchen J's judgement is notable for its extensive quoting of the plaintiffs. Broadly, the plaintiffs' arguments reflect a fear that the AFS would upset their access to the commercial fishery. In 2008, the SCC held that the AFS was an ameliorative program under section 15(2) of the *Charter* and dismissed the plaintiff's action: *Kapp*, *supra* note 14. For a review of media responses before and after *Kapp*, see Diana Majury, "Equality Kapped; Media Unleashed" (2009) 27:1 Windsor YB Access Just 1. Majury reports how "editorials, commentaries and letters in response to the Kapp arguments and decision are almost all extremely negative, some even vitriolic." *Ibid* at 13. These media responses are generally supportive of the plaintiffs' position in *Kapp* that the AFS was racially discriminatory towards non-Indigenous commercial fishermen. For an analysis of the construction of gender and race in *Kapp*, see Caroline Hodes, "Colonial Legacies and Competing Masculinities: The Supreme Court of Canada's Return to Reason in *R. v. Kapp*" (2017) 34:2 Windsor YB Access Just 129. See also Goldenberg, "Salmon for Peanut Butter", *supra* note 72.

74 Developments in Ontario may have also been relevant to the fisheries litigation in British Columbia. In 1993, the Ontario Superior Court held in *Jones*; *Nadjiwon* that the Saugeen Ojibway Nation, which included the Chippewas of Nawash Unceded First Nation, held an Aboriginal right to a commercial fishery in the Georgian Bay and Lake Huron: *R v Jones*, 1993 CanLII 8684 (ONSC) [*Jones; Nadjiwon*]. The *Jones*; *Nadjiwon* case established a precedent for the existence of commercial rights under section 35 of the *Constitution Act, 1982*. See Gilby, *supra* note 60 at 247–48.

75 *Van der Peet*, *supra* note 3 at para 6; *NTC Smokehouse*, *supra* note 3 at para 7; *Gladstone*, *supra* note 3 at para 22. For a procedural history of *Van der Peet*, see David W Elliott, "Fifty Dollars of Fish: A Comment on *R. v. Van Der Peet*" (1996) 35:3 Alta L Rev 759 at 761, n 11.

76 *Regina v Nikal*, 1993 CanLII 4523 at paras 19–20 (BCCA); *Regina v Lewis*, 1993 CanLII 4522 at paras 7, 23–24 (BCCA).

are able to use the land for the sake of their own development and for their own survival and for their own economy, that they are marginalized and there has to be a way for them to escape that."[77]

The framing of this conflict, of Aboriginal rights impeding on non-Indigenous commercial fisheries, obfuscated the nature of the status quo up until *Sparrow*: the preferential allocation of commercial fisheries by the Crown to, in most cases, non-Indigenous fishermen. The DFO's response to *Sparrow* had upset this status quo. Thus, the SCC would have to resolve the tension between *Sparrow*'s limitation of the Crown's conduct and its protection of Aboriginal peoples' rights with the reality that settlers and the settler colonial state had benefited, up to that point, from almost unlimited access to resources in Indigenous peoples' territories, resources that were important for the future of the settler state. As David Elliott describes, these competing claims occurred within a "larger drama", of "international quota disputes, habitat degradation, complaints of government mismanagement, federal provincial bickering, high unemployment, and declining fish stocks."[78] However, the importance of the First Nations' claims extended beyond the fisheries, to the exercise of the inherent right of self-government and to their relationship with their traditional territories.

3. Indigenous Self-Government and the Threat to Settler Governance in *Pamajewon*

The existence of a First Nations commercial fishery also engaged questions related to the exercise of self-government. If section 35 protected Aboriginal rights with commercial dimensions, then British Columbia would have been strongly incentivized to negotiate commercial fisheries under modern treaties.[79] Moreover, if section 35 constitutionally protected an Aboriginal right to self-government, exercised either through the bylaw-making powers set out under the *Indian Act*,[80] (as in *Nikal* and *Lewis*), or law making powers under a modern treaty, or through First Nations' own legal orders, provincial and federal jurisdiction over the fisheries – and other aspects of Crown jurisdiction – might

77 *R v Van der Peet*, 1996 CanLII 216 (SCC) (Transcript of Hearing, at 49—50) [*Van der Peet* transcript].

78 Elliott, *supra* note 75 at 760.

79 Although news editorials are not representative of public opinion, they do disclose the circulation of ideas within the public forum. On November 15, 1995, Brian Kieran quoted Phil Eidsvik for the opinion that British Columbia and Canada should not enter into a modern treaty with the Nisga'a Nation before the SCC's decisions in its upcoming fisheries docket. Kieran and Eidsvik suggest that if s 35 does not protect an Aboriginal right to commercial fishing, then neither the province nor Canada should negotiate commercial fishing rights under the Nisga'a Agreement. See Brian Kieran, "Wait for Supreme Court ruling: [Final Edition]", *The Province* (15 November 1995) A14.

80 RSC 1985, s I-5.

be limited under the *Sparrow* framework.[81] These issues arose in the context of fisheries but were especially pronounced in the context of criminal prosecutions for illegal gaming under the *Criminal Code*,[82] in particular in *Pamajewon*. Although *Pamajewon* might appear as a red herring in a sea of fisheries cases, it shares with those cases an argument for First Nations' capacity and jurisdiction to regulate, manage, control, or govern their territories or the resources located within their territories for the benefit and continuance of their societies.

In 1985 Canada entered into an agreement with the provinces to amend, and then subsequently amended, the *Criminal Code* to permit the provincial regulation of gaming. In *Furtney*, the SCC upheld the constitutionality of this scheme, reasoning that Parliament had the jurisdiction to define the criminal prohibition on gaming in such a way as to exclude activities carried out under a validly enacted provincial licensing scheme.[83] In this way, the scheme enabled provinces to generate substantial revenue from licensed gaming activities. Although the Agreement between Canada and the provinces was entered into after the enactment of section 35 of the *Constitution Act, 1982*, First Nations were not consulted on how this Agreement or Canada's amendments to the *Criminal Code* might impact their Aboriginal rights.

81 About four months after the SCC's decision in *Delgamuukw*, Gordon Campbell, then leader of the opposition Liberal party in the British Columbia provincial legislature, argued against a "third order of government" under modern treaties in a series of public editorials. Campbell proposed that First Nations must surrender their rights and title under a modern treaty. First Nations, for their part, argued against such a surrender. In response, Campbell proposed that the province hold a provincial referendum on any proposed agreement, thus, all but ensuring the rejection of any agreement that did not include a surrender. Campbell's editorial discloses a concern that modern treaties may limit the authority or capacity of the legislature to regulate lands within the province by establishing a third order of government. See Gordon Campbell, "Indians Must 'Surrender' Rights in Treaties, Liberal Leader Writes: Gordon Campbell Believes that Certainty and Equality Will Be Attained in the Settlements Through Extinguishment and the Exclusion of 'Third-order-of-government' Arrangements. [Final Edition]", *The Vancouver Sun* (9 April 1998) A23. In 2000, Campbell, Michael de Jong, and P Geoffrey Plant unsuccessfully challenged the constitutionality of the settlement legislation enacting the Nisga'a Treaty: *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123.

82 RSC 1985, c C-46, s 45 [*Code*].

83 *R v Furtney*, 1991 CanLII 30 (SCC).

In the 1990s, First Nations in Ontario and British Columbia attempted to regulate gaming activities on reserve to generate revenue for public services.[84] In Ontario, the Shawanaga and Eagle Lake First Nations asserted an Aboriginal right to self-government in the trials of Howard Pamajewon, Roger

84 In British Columbia, the Kamloops Indian Band and the Moricetown (Witset) First Nation also claimed Aboriginal rights related to gaming activities on reserve (if we recall that the Witset First Nation in *Victor Jim* was also the claimant in *Nikal*, we can better observe the connection between the right to self-government in *Pamajewon* and the fisheries cases: *R v Jim*, 1995 CanLII 1522 (BCCA) [*Victor Jim*]). In both cases, the defendants were convicted at trial. In *Gottfriedson*, Shane Willey Gottfriedson, a Councillor and member of the Kamloops Indian Band, was charged with illegal gaming activities on December 4, 1993. On November 23, 1993, the Kamloops Indian Band purported to enact a bylaw regulating bingo on the reserve. On December 4, 1993, the Band purported to license Gottfriendson's bingo on reserve. However, on December 15, 1993, the Minister disallowed the Band's bylaw. At trial, the defendant and Band asserted an Aboriginal right to self-government. As in *Pamajewon*, the Band regulated gaming to earn revenue that could be expended on public services. The trial judge rejected the band's assertion of an Aboriginal right to self-government as "amorphous", "nebulous", "vague and unspecific" and convicted the defendant: *R v Gottfriedson*, 1995 CarswellBC 2570 (BCPC), [1995] BCJ No 1791 at para 57. The defendant in *Victor Jim*, a member of Moricetown (Witset) First Nation and a translator for Chief John(ny) David in the *Delgamuukw* case, was charged on July 30, 1988 with conducting illegal gaming activities on reserve. He was convicted at trial on July 6, 1993. On appeal to the BCCA, the defendant and the Wet'suwet'en Chiefs of Hagwilget and Moricetown asserted an Aboriginal right to engage in and regulate gaming under s 35 of the *Constitution Act, 1982*. Applying the "integral to" test of the majority of the BCCA in *Van der Peet* (*BCCA*), the trial judge found that the practice of gaming was not integral to the distinctive culture of the Wet'suwet'en. The trial judge and Court of Appeal found that it was unnecessary to determine whether there was an Aboriginal right to regulate gaming since the underlying practice of engaging in gaming was not an Aboriginal right. As a result, the Court of Appeal upheld Jim's conviction on March 17, 1995, a few months before the SCC's hearings in *Van der Peet*, *Nikal*, *Lewis*, *Gladstone*, and *NTC Smokehouse*: *Victor Jim*, *supra* note 84. For more on First Nations gaming in Canada, see generally Yale Deron Belanger, ed, *First Nations Gaming in Canada* (Winnipeg: University of Manitoba Press, 2011). First Nations gaming activities were not limited to Ontario and British Columbia. In Manitoba, First Nations proposed to the Manitoba legislature the striking of a commission to investigate gaming opportunities on reserve, in part responsive to raids undertaken by the RCMP at on-reserve gaming establishments: David Roberts, "Five Manitoba Reserves Raided Police Seize Gaming Devices", *The Globe and Mail* (20 January 1993) A5. In Quebec, the Mohawk Council of Kahnawake asserted its jurisdiction to regulate and manage gaming in 1996, later extending its on-reserve activities to online gaming in 1999: Yale D Belanger, "Legislating and Regulating First Nations Internet Gaming: The Mohawk Council of Kahnawá:ke's Experience, 1999-2013" (2014) 18:4 Gaming L Rev Econs 369.

Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner.[85] In response to chronic underfunding of services on reserve, the Shawanaga and Eagle Lake First Nations attempted to exercise their inherent right to self-government to generate revenues through the regulation of gaming on lands set aside as reserve.[86] The Shawanaga and Eagle Lake First Nations referred to the Royal Proclamation of 1763 in support of their position that the Crown had always recognized the Aboriginal right to self-government and the relationship between governance and the capacity for Indigenous societies to sustain themselves economically.[87] In this way, the arguments of the Shawanaga and Eagle Lake First Nations resonated with the positions of other Indigenous peoples in Canada, namely, that Indigenous jurisdiction and self-government, including over economic activities, was essential to the continued survival of Indigenous societies into the future in ways that were not necessarily or always tied to traditional activities before European contact or the Crown's assertion of sovereignty. The First Nations' claims in *Pamajewon*, however, threatened the province's monopoly over gaming revenue[88] and, it was alleged, Parliament's criminal law powers. The *Pamajewon* case would wind its way through the courts alongside the fisheries litigation and the Gitxsan and Wet'suwet'en's claims to Aboriginal title in British Columbia.

85 Pamajewon, Jones, Pitchenese, and the Gardners were charged with unlawfully keeping a common gaming house contrary to s 201(1) of the *Code*, *supra* note 82. The SCC was likely aware that First Nations in Ontario and British Columbia were asserting Aboriginal rights to self-government in the context of gaming on reserve. The charges at issue in Pamajewon were the subject of a previous appeal to the SCC, on whether the defendants Roger Jones and Howard Pamajewon could raise a defence of mistake of fact or colour of right: *R v Jones*, 1991 CanLII 31 (SCC). Furthermore, at the SCC, counsel for Canada also referred the Court to litigation related to gaming in British Columbia: *Van der Peet* transcript, *supra* note 77 at paras 82–84. For a history of the *Pamajewon* case and the surrounding context, see Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1996) 42:4 McGill LJ 1011 at 1018–24.

86 *R v Pamajewon*, 1996 CanLII 161 (SCC) (Factum, Appellant at para 5) [Factum of the Appellant (*Pamajewon*)]. In 1993, Howard Pamajewon stated that "we want our own future", connecting gaming on reserve with self-determination and self-governance": Stewart Brown, "Native bands, province after same pot of gold", *Northern Ontario Business* (1 August 1993) 1.

87 Factum of the Appellant (*Pamajewon*), *supra* note 86 at paras 13–17, 81–90.

88 In response to budget deficits and revenue shortfalls, several provinces turned to the regulation of gaming as a means to generate revenue: Anne Swardson, "Canada's Provinces Gamble on Casinos", *The Washington Post* (22 July 1993) A28.

4. Aboriginal Title and the Threat to Settler Interests in Land in *Delgamuukw*

The existence of Aboriginal title also formed part of the background context in the fisheries litigation in British Columbia and self-government litigation in Ontario.[89] In *Nikal* and *Lewis*, the First Nations asserted jurisdiction over the waters on and adjacent to the reserve.[90] The Musqueam (*Sparrow*), Sto:lo (*Van der Peet*) and Heiltsuk (*Gladstone*) each asserted, but did not claim in the courts, Aboriginal title, having not surrendered their title to the Crown by way of any historical or modern treaty.[91] In *Pamajewon*, the Eagle Lake and Shawanaga First Nations asserted their rights based on their interests in reserve land. Aboriginal title promised a potentially broader scope and content than Aboriginal rights under section 35 or Aboriginal interests in lands set aside as reserves under the *Indian Act*, and thus offered the strongest protection for the use, management, development and regulation of lands. It also offered the potential for a land base that might sustain these Indigenous societies into the future. Commercial rights and self-government rights were aspects of this vision; their full expression, however, was contingent on the existence and protection of a land base that was greater than the territory and jurisdiction afforded to Indian Bands on reserve under the *Indian Act*.

The perceived threat of Aboriginal title was strongest in British Columbia, where the colonial and provincial governments opposed First Nations territorial and jurisdictional claims. After an early period of land purchases and treaties under the governorship of Sir James Douglas, the colony of British Columbia shifted its policies towards a rejection of First Nations' territoriality, including First Nations jurisdiction over their lands. As Patricia Wood and David Rossiter note, the province of British Columbia continued this position even after a majority of the SCC acknowledged the existence of Aboriginal title in *Calder*. In response, First Nations turned to legal and extra-legal means to assert their territorial claims. After *Calder*, First Nations in British Columbia used blockades, protests and other forms of political action to oppose development in their territories, particularly in the hinterlands where the province sought to develop its resource industries.[92] These strategies were responsive to the province's refusal to engage meaningfully in political negotiations on Aboriginal

89 *Jones*; *Nadjiwon*, *supra* note 74. In *Jones*; *Nadjiwon*, the defendants asserted Aboriginal title to the waters surrounding Georgian Bay and Lake Huron, a claim that would be advanced almost two decades later in *Saugeen First Nation v The Attorney General of Canada*, 2021 ONSC 4181.

90 The *Nikal*, *Victor Jim* and *Delgamuukw* cases were related by the fact that the defendants and claimants in those cases were either members or councillors of the Moricetown First Nation, which was organized as a band under the *Indian Act*, or they were associated with the hereditary governance of the Gitxan and Wet'su'weten, which claimed title to lands that were inclusive of Moricetown.

91 Factum of the Appellant (*Sparrow*), *supra* note 48 at para 2. For an overview of the history of the Sto:lo Nation's assertions of Aboriginal title, see Sto:lo Nation, "Our History" (last visited 18 August 2024), online: <stolonation.bc.ca/history>. On April 2, 1997, the Heiltsuk Nation signed a treaty negotiation framework with Canada and British Columbia that asserted its Aboriginal title: *Heiltsuk Nation Treaty Negotiation Framework Agreement*, Heiltsuk Nation, Her Majesty the Queen in Right of Canada, and Her Majesty the Queen in Right of British Columbia, 2 April 1997.

92 Wood & Rossiter, *supra* note 24 at 71, 73–74, 78–81.

title and self-government. British Columbia did not engage in negotiations on modern treaties until 1990, and even then, expressed a reluctance to concede its jurisdiction.[93]

This brief history helps to us to better understand the stakes in *Delgamuukw*. Although British Columbia pivoted towards global financial integration,[94] the province's hinterland economy, in particular forestry and the commercial fisheries, remained economically and socially important.[95] Aboriginal title presented a threat to the province's preferential allocation of and control over these resources. As noted in the case of the AFS in British Columbia, the perceived threat of Indigenous violence loomed in the background for some settlers. Leslie Hall Pinder, counsel for the plaintiffs in *Delgamuukw*, recalls warning a community member, who had come to hear about McEachern CJ's trial decision in *Delgamuukw*, to step back from the courthouse because a sniper had been placed on the roof.[96] Pinder's story suggests that the Court perceived there to be a risk that Indigenous peoples would respond negatively to McEachern CJ's decision, which rejected the Wet'su'weten and Gitxsan Houses claims to Aboriginal title in their traditional territories. It also discloses the true stakes underlying claims to Aboriginal title: the state's access to Indigenous peoples' territories and its capacity to secure this access through force.[97]

93 *Ibid* at 113.

94 *Ibid* at 72.

95 *Ibid* at 94–97.

96 Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver, BC: Lazara Press, 1991) at 3, online (pdf): <lazarapress.ca/wp-content/uploads/2010/05/The-Carriers-of-No-After-the-Lands-Claims-Trial.pdf.pdf>. Conduct during the *Delgamuukw* trial discloses a general animosity towards Indigenous peoples. At trial in *Delgamuukw*, McEachern CJ dismissed Antugulilibix's (Mary Johnston) presentation of Gitxsan *adaawk* (law) through song, reportedly opining, "It's not going to do any good to sing to me ... I have a tin ear." Reported in Karen Drake, "Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishinaabe Pedagogy, and Academic Freedom" (2017) 95:1 Can Bar Rev 9 at 16.

97 For the Wet'su'weten and Gitxsan Houses, the state's use of force to secure access to Indigenous territories continues to be a reality. In 2010, the Wet'su'weten and Gitxsan Houses established camps within their territories to oppose the Enbridge Northern Gateway pipeline project, and later, the Coastal GasLink pipeline project. From 2019 to the time of writing, the Royal Canadian Mounted Police have enforced injunctions against and arrested Wet'su'weten and Gitxsan land defenders.

5. From Constitutional Negotiation to Litigation

The responses of the Court must also be placed within the context of Indigenous political advocacy and negotiations with the federal and provincial governments. In 1969, the Trudeau Government's *White Paper*, which "proposed the termination of special status for Indians and the devolution of services and programs to the provinces", catalyzed Indigenous peoples' political and legal advocacy towards the protection of their inherent rights, including self-government.[98] After the *Calder* decision in 1973, Canada initiated negotiations with First Nations in the Yukon and Northwest Territories towards comprehensive claims.[99] In 1977, Berger J's Final Report into the MacKenzie Valley Pipeline project expanded public awareness of First Nations' aspirations to self-government and self-determination in the Northwest Territories.[100] When the Trudeau Government contemplated repatriating the *British North America Act, 1867*[101] from Great Britain to Canada, Indigenous political organizations and advocates advanced their claims to Aboriginal self-government in Ottawa and London, England.[102] Canada's response was the constitutionalization of the "existing aboriginal and treaty rights of the aboriginal peoples in Canada" in section 35 of the *Constitution Act, 1982*. Although section 35 "recognized and affirmed" these rights, provincial and federal governments took the position that it was unclear whether section 35 included the inherent right to self-government and how these rights were to be made effectual. First Ministers' Conferences in 1983, 1984, 1985 and 1987 failed to provide any further clarity on whether section 35 included the inherent right to self-government.[103]

98 Jill Wherrett, *Aboriginal Self-Government*, Political and Social Affairs Division, 96–2E (Ottawa: Library of Parliament, 1999). See Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre, 1999).

99 Wood & Rossiter, *supra* note 24 at 98–100.

100 Thomas Berger, *Northern Frontier, Northern Homeland: the Report of the Mackenzie Valley Pipeline Inquiry, Volume One*, CP32-25/1977-1E-PDF (Ottawa: Supply and Services Canada, 1977). For a history of the Mackenzie Valley Pipeline Inquiry and Thomas Berger, see Kim Stanton, *Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies* (SJD Thesis, University of Toronto, 2010) [unpublished] at 127–208, online (pdf): <tspace.library.utoronto.ca/bitstream/1807/24886/1/Stanton_Kim_P_201006_SJD_thesis.pdf>.

101 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (renamed the *Constitution Act, 1982*, *supra* note 22, s 53(2)) [*BNA Act*].

102 For a history of the Constitution Express, see the edited collection, Emma Feltes & Glen S Coulthard, eds, "Introduction: The Constitution Express Revisited" (2021) 212 BC Stud 13.

Shortly after the failed First Ministers' Conference in 1987, the Mulroney Government entered into an accord with Quebec, known as the Meech Lake Accord, to recognize Quebec as a distinct society. However, in June 1990, the Meech Lake Accord failed when Elijah Harper, a member of the Manitoba Legislature, withheld his vote, which was required for the Legislature to consider a resolution for the Accord. Harper's refusal reflected the opposition of First Nations to the Accord, based on the Accord's exclusion of any consideration of Indigenous self-government.[104] One month later, in July 1990, Kanehsatà:ke resisted the town of Oka's proposal to expand its golf course and develop condominiums on Kanehsatà:ke's burial site, the Pines. Although Berger J had called attention to the potential for Indigenous peoples' resistance to the developmental aspirations of non-Indigenous Canadians in 1977, Kanehsatà:ke's resistance in 1990 to Oka's development made this a reality for southern Canadians.

In 1991, the Mulroney Government, learning from its mistakes with the Meech Lake Accord in 1990, initiated discussions with Indigenous political organizations to gain consensus on constitutional amendments, known as the Charlottetown Accord, and struck a Royal Commission on Aboriginal Peoples. Prime Minister Mulroney appointed then-retired Dickson CJ to consult with Indigenous peoples on the Commission's mandate and composition.[105] Dickson "sent letters to 1,682 aboriginal people" and "met with the leaders of six different aboriginal groups and all seven aboriginal parliamentarians" before creating his mandate.[106] Sharpe and Roach explain that "[b]y the end of the

103 For an overview of the history of s 35 of the *Constitution Act, 1982* and the constitutional conferences, see Kent McNeil, "Has Constitutionalizing Aboriginal and Treaty Rights Made a Difference?" (2021) 212 BC Stud 137 at 137–38. Although the Conference was successful in securing an accord for amendments to the *BNA Act*, those amendments did not include the right to self-government. In his opening statement on March 8, 1984 to the Conference of First Ministers on Aboriginal Constitutional Matters, Prime Minister Pierre Elliott Trudeau connected the right to self-government with socio-economic capacity and the continuation of Indigenous peoples distinct societies. See Pierre Elliott Trudeau, "Statement by the Prime Minister of Canada to the Conference of First Ministers on Aboriginal Constitutional Matters" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 154–55. Similarly, at the Conference of First Ministers on Aboriginal Constitutional Matters in 1984, Prime Minister Brian Mulroney expressed that "[c]onstitutional protection for the principle of self-government is an overriding objective because it is the constitutional manifestation of a relationship, an unbreakable social contract between aboriginal peoples and their governments". See Brian Mulroney, "Notes for an Opening Statement to the Conference of First Ministers on Aboriginal Constitutional Matters" in Menno Boldt, J Anthony Long & Leroy Little Bear, eds, *supra* note 103 at 161.

104 Ian Peach notes that First Nations leaders were particularly aggrieved at their exclusion from the Meech Lake Accord, which Quebec's National Assembly approved on June 23, 1987 only three months after the First Ministers Conference on Aboriginal Constitutional Matters had failed: Ian Peach, "The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada" (2011) 16:1 Rev Const Stud at 16–18.

105 Sharpe & Roach, *supra* note 33 at 454.

106 *Ibid* at 456.

summer Dickson had proposed a massive mandate for the royal commission", including a focus on Indigenous self-government, an issue that had come to significantly inform Dickson's understanding of the relationship between Indigenous peoples and the Crown.[107] Then-retired Wilson J was among one of three women appointed as commissioners; the other two were Indigenous women. In total, four of the seven commissioners were Indigenous persons.[108] Although Indigenous leaders were initially skeptical of Mulroney's decision to strike a Commission, the appointment of the former Chief Justice, and his efforts to consult, helped to ensure strong support and participation from Indigenous peoples. The Final Report, released three months after the SCC's decision in *Gladstone*, would ultimately emphasize a progressive approach to the implementation of Indigenous self-government in Canada through multiparty negotiations.[109]

While the former Chief Justice established the terms of the Commission, consultations on the Charlottetown Accord proceeded apace. In response to the Government of Canada's pamphlet on a constitutional accord, *Shaping Canada's Future Together*, Georges Erasmus and René Dussault, co-chairs of the Royal Commission on Aboriginal Peoples, released their own statement on the source, scope and status of the Aboriginal right to self-government.[110] The Charlottetown Accord showed, in principle, that an Aboriginal right to self-government could be harmonized with the existing division of powers.[111] When the Charlottetown Accord failed, Indigenous claimants turned to the courts to litigate what they understood to be central to Indigenous self-determination: self-government, jurisdiction, and a land base.[112]

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107 *Ibid* at 457. For a description of the mandate by the Rt Hon Brian Dickson, see Brian Dickson & Royal Commission on Aboriginal Peoples, *Remarks of the Rt. Hon Brian Dickson on the Royal Commission of Aboriginal Peoples, Transcriptions of Public Hearings and Round Table Discussions, 1992-1993, Part of Volume 1* (Royal Commission on Aboriginal Peoples, 1992).

108 Sharpe & Roach, *supra* note 33 at 457–58.

109 *Ibid* at 460.

110 *Shaping Canada's Future Together* (Ottawa: Minister of Supply and Services Canada, 1990); René Dussault & Georges Erasmus, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: Minister of Supply and Services Canada, 1992) at 16–17.

111 For commentary, see Thomas Isaac, "The 1992 Charlottetown Accord and First Nations Peoples: Guiding the Future" (1993) 8:2 Native Stud Rev 109–14.

112 Former Prime Minister Pierre Trudeau famously opposed the Charlottetown Accord, including on its consensus related to the Aboriginal right to self-government: Pierre Elliott Trudeau, *"A Mess that Deserves a Big NO!": Pierre Elliott Trudeau's Historic Speech at the Eleventh Cité Libre Dinner* (Toronto: Robert Davies, 1992) at 15, 18, 23, 72. In response to the failure of the Charlottetown Accord, the Royal Commission on Aboriginal Peoples released a report arguing for the existence of the Aboriginal right to self-government under s 35 of the *Constitution Act, 1982*, a right that courts could recognize without a constitutional amendment: René Dussault & Georges Erasmus, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993) at v–vi, 31–36.

6. Conclusion

In this context, we can imagine the claimants in *Nikal* and *Lewis*, *Van der Peet*, *Gladstone*, *NTC Smokehouse*, *Pamajewon*, and *Delgamuukw* as pursuing different strategies for a similar objective: the continuation and survival of their societies into the future through litigation. In *Nikal*, the Witset First Nation asserted jurisdiction over waters on and adjacent to reserve under and outside the *Indian Act*, whereas in *Sparrow*, *Van der Peet*, *Gladstone*, and *NTC Smokehouse*, the Musqueam, Sto:lo, Heiltsuk, and Sheshaht and Opetchesaht First Nations, respectively, asserted Aboriginal rights to fish, sell or trade fish, or engage in commercial fisheries. In *Delgamuukw*, the Gitxsan and Wet'suwet'en asserted an Aboriginal right to self-government and Aboriginal title over their territories. In *Pamajewon*, the Eagle Lake and Shawanaga First Nations asserted an Aboriginal right to self-government or a right to regulate economic activities. In each case, claimants asserted these rights to ensure the continued survival of their societies. The problem was that settlers were already here to stay; these claims challenged the ability for settlers to stay in the same way. Although comprehensive claims negotiations were proceeding in the Northwest Territories, the Yukon territory, and British Columbia during this period, both settlers and First Nations parties looked to the Court to set the field for these negotiations.

This placed the Court in a difficult position. *Sparrow* retained the Crown's jurisdiction to act, reasoning that "rights that are 'recognized and affirmed' are not absolute",[113] but the decision also limited the scope of the Crown's authority to conduct that is consistent with its fiduciary relationship to Aboriginal peoples. Leaving the scope, meaning and content of Aboriginal rights unanswered, but with a restrained field of justified movement for the Crown, *Sparrow* could have strongly motivated the Crown to come to some agreement with Aboriginal groups on the meaning of section 35, as Canada had unilaterally done with the AFS for commercial fishing licenses in 1992. But rather than maintain this pressure, a majority of the Court in *Nikal*, *Lewis*, *NTC Smokehouse*, *Van der Peet*, *Gladstone*, *Pamajewon*, and *Delgamuukw* not only relieved it but also fundamentally and asymmetrically restructured the field of negotiation in favour of the preferential allocation of resources to settlers and the settler state.[114] To this end, the Court marshalled a new concept in its

113 *Sparrow*, *supra* note 3 at 1109.

114 For example, Jonathan Rudin suggests that "*Van der Peet* is best understood as a reaction to the federal government's rejection of the Court's invitation to enter into substantive negotiations with Aboriginal people contained in *Sparrow*": Jonathan Rudin, "One Step Forward, Two Steps Back: The Political and Institutional Dynamics behind the Supreme Court of Canada's Decisions in *R. v. Sparrow*, *R v. Van der Peet* and *Delgamuukw v. British Columbia*" (1998) 13 JL Soc Pol'y 67 at 68. Rudin explains the logic of the interaction between court judgements and negotiation for First Nations and the Crown in the following terms:

> From the perspective of Aboriginal litigants [...] the role of the Supreme Court is to provide them with some better cards to take to the table, not to determine who wins or loses the particular game. At the same time, if the Court sees that the government will not even come to the table after they have managed to deal the Aboriginal players a bigger hand, then the pressure rises on the Court to retrench when the Aboriginal litigants return for even better cards. An understanding of this process helps explain the Court's decisions in both *Sparrow* and *Van der Peet*. *Ibid* at 85-86

Aboriginal law jurisprudence: reconciliation. It also did four things that fortified asymmetries in this constitutional framework: it developed a cultural definition of Aboriginal rights as material activities in geographically and temporally defined space; it subordinated the Indigenous perspective to the common law and constitutional legal order; it distinguished between inherent or internally limited and non-inherent or non-internally limited Aboriginal rights in the context of the Crown's fiduciary duty; and it expanded the Crown's arsenal of valid legislative objectives for infringing those rights.[115] These aspects of the Court's jurisprudence are well-considered by other scholars, so I limit my analysis to the asymmetrical dimensions of these moves.[116]

115 I identify only these four, but there are other asymmetries within the legal framework, including the Court's requirement that the practices, customs and traditions be present prior to contact; the test for Aboriginal rights is more restrictive than the test for many *Charter* rights; and the test for Aboriginal rights cannot readily accommodate modern exercises of governance rights or rights with commercial dimensions: see *R v White and Montour*, 2023 QCCS 4154 at paras 1246–69 [*White and Montour*]. In addition, others have argued that the *Van der Peet* test freezes Aboriginal *rights*, even if it permits *practices* to evolve in method: Anna Zalewski, "From *Sparrow* to *Van der Peet*: The Evolution of a Definition of Aboriginal Rights" (1997) 55:2 UT Fac L Rev 435 at 449. On this point, see also John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 Am Indian L Rev 37 [Borrows, "Frozen Rights in Canada"]. Michael Asch and Patrick Macklem, as well as John Borrows, have identified an asymmetry in the Court's assumption of the Crown sovereignty vis-à-vis Aboriginal rights such as self-government and Aboriginal title: Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29:2 Alta L Rev 498 at 507 [Asch & Macklem, "Aboriginal Rights"]; Borrows, "Sovereignty's Alchemy", *supra* note 4 at 544. Borrows also argues that court procedures related to proceedings ("centralizing control of access to justice"), judicial deference to findings of fact at trial, the inherent subjectivity in the fact-finding process itself, and onus and burdens of proof on Aboriginal claimants places the Crown in a "superordinate position relative to Aboriginal peoples": *ibid* at 549, 551.

116 For a summary of the SCC's decision in *Van der Peet*, see Elliott, *supra* note 75. For a summary of the contrasting approaches at the Court of Appeal in *Van der Peet*, *Gladstone*, *NTC Smokehouse*, *Nikal* and *Lewis* see Gilby, *supra* note 60 at 241–46. For a summary of the SCC's decision in *Pamajewon*, see Morse, *supra* note 85. For a commentary on the SCC's reasons in *Van der Peet*, *Gladstone* and *NTC Smokehouse*, see Rosanne Kyle, "Aboriginal Fishing Rights: The Supreme Court of Canada in the Post-*Sparrow* Era" (1997) 31:2 UBC L Rev 293. For commentary on the cases of *Nikal* and *Lewis*, see Peggy J Blair, "Settling the Fisheries: Pre-Confederation Crown Policy in Upper Canada and the Supreme Court's Decisions in *R. v. NIKAL* and *LEWIS*" (2001) 31:1 Rev Gen 87–172; Peggy J Blair, "No Middle Ground: *Ad Medium Filum Aquae*, Aboriginal Fishing Rights, and the Supreme Court of Canada's Decisions in *Nikal* and *Lewis*" (2001) 31:3 Rev Gen 87 [Blair, "No Middle Ground"]. For a history and commentary of *Delgamuukw*, see Borrows, "Sovereignty's Alchemy", *supra* note 4. For a comparison of the treatment of Aboriginal title by the Royal Commission on Aboriginal Peoples and the Court in *Delgamuukw*, see John Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2000) 46:3 McGill LJ 615.

II. Resolving Threat in Favour of the Settler Colonial State

1. Reconciliation in *Sparrow* and *Van der Peet*

Sparrow's framework for the justified infringement of Aboriginal rights was intended to provide a "solid constitutional base upon which subsequent negotiations can take place."[117] As noted above, the Court did so by affirming the Crown's legislative authority, while also limiting this authority to conduct that could be justified. Within this framework, "reconciliation" meant reconciling the Crown's federal power or jurisdiction with its fiduciary duty to Aboriginal peoples and their constitutionally protected rights under section 35.[118] With the scope, content and meaning of Aboriginal rights and title still uncertain and the Crown's field of movement constrained, *Sparrow* motivated the Crown to negotiate its constitutional relationship with Aboriginal peoples.[119]

In *Van der Peet*, Lamer CJ redeployed *Sparrow*'s language of "reconciliation".[120] In doing so, he identified the political challenge underlying the constitutionalization of Aboriginal rights in section 35: the pre-existing interests of the Crown and Canadian society.[121] Section 35, the Chief Justice explained, offers a constitutional framework "through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, *is acknowledged and reconciled with the sovereignty of the Crown*."[122] Whereas, in *Sparrow*, federal power is reconciled with federal *duty* at the stage of justification, in *Van der Peet* the directionality of that reconciliation is reversed and its subjects redefined and exchanged: the distinctive *cultures* of Aboriginal peoples

117 *Sparrow*, *supra* note 3 at 1077.

118 *Ibid*.

119 This is not to say that *Sparrow* was universally positive in its characterisation of the Crown's constitutional relationship with Indigenous peoples. For their part, Asch & Macklem argue that the Court accepted a contingent, rather than inherent, rights approach to s 35, grounded in the Court's acceptance of the "settlement thesis": Asch & Macklem, "Aboriginal Rights", *supra* note 115 at 507.

120 Kim Stanton, "Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission" (2017) 26:1 J L & Soc Pol'y 21 at 25, 29 [Stanton, "Reconciling Reconciliation"].

121 Brian Slattery describes how the Court's principles of "reconciliation" eclipsed its earlier jurisprudence, which was based on "principles of recognition". The constitutionalization of Aboriginal peoples' rights, title and treaty rights continued this *recognition* but also introduced an important limit in s 35's language of *affirmation*: Slattery, *supra* note 23 at 260. This affirmation functioned as an adaption of the common law to the fact that settlement had proceeded without legal authorization. In short, private interests – particularly in land – were assumed and acted upon as if permitted by law. As Slattery argues, "this gave rise to common law Principles of Reconciliation", which "take into account a range of other factors", including "third party and public interests": *ibid* at 260, 262. Slattery's distinction between the historical Principles of Recognition and the contemporary Principles of Reconciliation helps us to better understand the dilemma that the s 35 jurisprudence must resolve – the fact that settlement occurred in some cases without legal authorization and that Indigenous peoples' rights continued within those same territories. Simply put, the Court's "principles of reconciliation" are an expression of settler pragmatism.

122 *Van der Peet*, *supra* note 3 at para 31 [emphasis added].

are to be reconciled with the *sovereignty* of the Crown.[123] Further reversing the directionality of reconciliation in *Sparrow*, in *Gladstone*, Lamer CJ describes how limitations placed on Aboriginal rights, when they are "of sufficient importance to the broader community as a whole, [are] *equally* a necessary part of that reconciliation."[124] It is not the federal *power* that is to be reconciled with federal *duty*, but rather Aboriginal rights that must be reconciled with the interests of "the broader community as a whole." Anna Zalewski suggests that "[w]hat drives the Court's enunciation of the principle of reconciliation is not only the marriage of two conflicting systems of law, but the foreclosure of the possibility that the granting of Aboriginal rights will eliminate the rights of other Canadians."[125] Gordon Christie argues that Lamer CJ "re-packaged [reconciliation in *Sparrow*] as a matter of working out the appropriate place of Aboriginal peoples within the Canadian state."[126] Thus, "reconciliation" became a means to relieve the conflict between the fact that "when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries,"[127] with the reality that settlers are "*here to stay*,"[128] arguably in much the same way.[129] Lamer CJ's vision of "reconciliation" is central to understanding the four moves and how they are coordinated to resolve the tensions between the constitutionalization of the relationship between Aboriginal peoples and the Crown with the status quo of settler supremacy.

123 Although McLachlin CJ's reasons in *Haida*, *supra* note 6, and *Taku River Tlingit First Nation v British Columbia* (*Project Assessment Director*), 2004 SCC 74 describe "reconciliation" as a process, Kim Stanton notes that the Court's jurisprudence nevertheless maintains the inherent legitimacy of Crown sovereignty: Stanton, "Reconciling Reconciliation", *supra* note 120.

124 *Gladstone*, *supra* note 3 at para 73. Kent McNeil argues that "[i]n this context, reconciliation appears to relate more to the maintenance of established economic interests than to the protection of constitutional rights": Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLaughlin" (2003) 2:1 Indigenous LJ at 9 [McNeil, "Reconciliation and the Supreme Court"].

125 Zalewski, *supra* note 115 at 442.

126 Gordon Christie, "Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17:2 Can JL & Soc 4 at 56 [Christie, "Judicial Justification"].

127 *Van der Peet*, *supra* note 3 at para 30 [emphasis added].

128 *Delgamuukw*, *supra* note 1 at para 186 [emphasis added]. The Court's use of "we" in the phrase "we are all here to stay" is a rhetorical move that situates Indigenous peoples as partners or co-actors within this process of reconciliation and establishes, incorrectly, the legal claims of Indigenous peoples and settlers to the land as mutual and symmetrical.

129 Lamer CJ's definition of reconciliation hews closer to what Mark Walters has identified as "reconciliation as resignation": Mark Walters, "The Jurisprudence of Reconciliation" in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165 at 168. What is notable about "reconciliation as resignation" is its inherent asymmetry, and with that asymmetry, the supremacy or hierarchy of the state.

2. The First Move: Restricting the Content, Scope and Meaning of Aboriginal Rights

In its first move towards "reconciliation", the majority in *Van der Peet* limited the scope, content and meaning of Aboriginal rights under section 35. Aboriginal rights, the majority reasoned, are limited to those practices, customs, or traditions that are integral to the distinctive culture of the Aboriginal group in question before contact.[130] In doing so, the majority identified a tension between Aboriginal peoples' rights and the interests of non-Aboriginal persons in Canada. Thus, the majority's framing of Aboriginal rights as *cultural* establishes both the terms of the apparent conflict between those rights and the non-constitutionally protected interests of Canadian society and an asymmetrical framework through which this conflict can be resolved in favour of settler society.

Starting from "first principles", Lamer CJ locates the source of Aboriginal rights in the fact that "when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in *distinctive cultures*, as they had done for centuries."[131] He further explains that Aboriginal rights "arise from the fact that aboriginal people are aboriginal."[132] Although the Chief Justice does not define or explain what he means by "aboriginality," his reasons disclose a focus on *cultural* difference.[133] Aboriginal rights, the Chief Justice reasons, cannot encompass those practices, customs or traditions that are "true of every human society." Nor can practices, customs or traditions that are "primarily the result of European influences" form the basis for Aboriginal rights.[134] Elevating *Sparrow*'s oblique reference to "integrality" to the status of legal principle, the

130 In *R v Powley*, 2003 SCC 43, the Court would clarify that the benchmark date for Métis peoples is the date of the imposition of "effective European control", not contact: at paras 17-18. For an examination of the "distinctive" test in *Van der Peet*, see Elliott, *supra* note 75 at 769–75.

131 *Van der Peet*, *supra* note 3 at para 30 [emphasis added]. Although the Chief Justice also refers to Aboriginal peoples' societies, the relevance of Indigenous peoples' legal orders and societal organization is less pronounced or significant in his articulation and application of the test for Aboriginal rights. His reliance on a cultural framing becomes clear when contrasted with the dissenting reasons of L'Heureux Dubé and McLachlin JJ.

132 *Ibid* at 19 [emphasis in original].

133 The Chief Justice further distinguishes Aboriginal rights from a liberal conception of rights arising from the Enlightenment period: *ibid* at paras 18–19. Christie argues that the *cultural* framing of Aboriginal rights assists in relieving the tension between individual interests as understood within liberalism and the political dimensions of collective rights: Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 83. As Christie argues, the framing of these rights as specific *cultural activities*, rather than "the autonomy of the community whose culture grounds the activity", means that the exercise of the right "does not directly threaten the ability of non-Aboriginals to exercise their ability to choose to engage in projects they deem valuable": *ibid* at 8384.

134 In her dissent, L'Heureux Dubé J critiques this approach for its overstatement of the impact of European encounters on the practices, customs and traditions of Indigenous peoples: *Van der Peet*, *supra* note 3 at para 186.

Chief Justice explains that Aboriginal rights are those practices, customs or traditions that are "integral to the distinctive culture" of the group in question.[135]

Although the Chief Justice purports to start from a "historical fact", his representation of this fact is laden in a Eurocentric perspective, one that essentializes Indigenous peoples' difference as primarily cultural rather than political or legal (in the sense of Indigenous peoples' governance and legal orders, or the simple fact of their prior occupation of land as organized societies).[136] These distinctions are illustrated by the different ways in which this historical fact has been represented by the Court in its past jurisprudence. In *Calder*, Judson J, writing for Martland and Ritchie JJ, recognized the fact that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[137] Unlike Judson J, who confined his reasons to whether Aboriginal title had been extinguished in British Columbia, Hall J, dissenting and writing for Spence and Laskin JJ, considered whether the Nisga'a held title to the claimed territories.[138] For this reason, Hall cites American and British colonial jurisprudence for the principle that Aboriginal title is grounded in Aboriginal peoples' prior occupation of their territories *in accordance with their own customs and legal orders*.[139] It is within this context that Hall J reviews the testimony of Frank Calder (then-president of the Nisga'a Tribal Council), James Gosnell (then-Chief Councillor of the Gitlakdamix band), and Wilson Duff, an anthropologist, on how the Nisga'a

135 In her dissent, McLachlin J argues that "[t]he governing concept of integrality comes from a description in the *Sparrow* case where the extent of the aboriginal right (to fish for food) was not seriously in issue. It was never intended to serve as a test for determining the extent of disputed exercises of aboriginal rights." *Ibid* at para 255. At the hearing in *Van der Peet*, LaForest J expresses a similar observation: *Van der Peet* transcript, *supra* note 77 at 86–87.

136 As Michael Asch argues, Indigenous peoples' political difference – that is, their prior legal claims to their territories and their political status as self-determining and self-governing societies – is ignored and instead read through a lens of *cultural* difference: Michael Asch, "The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*" (1999) 5:2 Rev Const Stud 119. Asch suggests that the Court "has moved to rely on culture to determine the content of Aboriginal rights in order to avoid exploration in another area: political relations. The Court is determined not to confront the issue of how legitimate sovereignty was acquired by the Crown": *ibid* at 133.

137 *Calder*, *supra* note 45.

138 When Judson J refers to the fact of Aboriginal peoples' prior occupation of their territories, he does so to relate Aboriginal title to the Crown's underlying title and to define the Crown's capacity to lawfully extinguish Aboriginal title: *ibid*.

139 *Ibid* at 383–84, 387. At 3083–84, Hall J quotes Marshall J in *Worcester v State of Georgia*, 31 US 515 (1832) for the proposition that "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws*" [emphasis added]. On a similar point at 387, Hall J quotes Lord Sumner in *Re Southern Rhodesia*, [1919] AC 211 at 234 that "there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law."

understood their possession and occupation of their territories.[140] In *Van der Peet*, the reasons of the majority and dissenting justices similarly illustrate two very different interpretations of the fact of Aboriginal peoples' prior occupation of their territories. For the Chief Justice, Aboriginal peoples' prior occupation of their territories is read through their *cultural distinctiveness*, relying on Judson J's statement for support. In contrast, McLachlin J locates the source of Aboriginal peoples' rights "in the traditional laws and customs of the aboriginal people in question."[141] In short, the Chief Justice's representation of this "historical fact" is far from self-evident. Although the Court has generally recognized *something* before European colonization and settlement, it has alternatively represented this *something* as Indigenous peoples' prior occupation, land-based activities, societal organization, governance, culture, or Indigenous legal orders. The Chief Justice's characterization of this *something* focuses on culture.[142]

Kenji Tokawa argues that the Court in *Van der Peet* substituted a framework that defined rights based on their (threatening) relationship to state power (an approach evident in *Sparrow*'s focus on the Crown's fiduciary relationship) with a framework that defined rights based on cultural difference.[143] In this way, the majority's focus on cultural difference distances its theory of Aboriginal rights from the historical circumstances that give rise to the fundamental conflict between Indigenous peoples' inherent rights and the interests of the settler state: the Crown's unilateral assertion of sovereignty and the prior existence of Indigenous peoples' societies, including their legal orders. By substituting a framework that defines rights vis-à-vis their threat to state interests with one focused on culture, the Court obfuscates the reality of that threat. Along a similar stream, John Borrows argues that the Chief Justice's "capture" of the *Aboriginality* of Aboriginal rights is an attempt to stem the flood presaged by his recognition of Indigenous peoples' prior occupation of their territories.[144] The majority's reliance on "centrality" and "integrality" are problematic for their inherent subjectivity and for the underlying assumption that a practice can be separated from its broader cultural, political and legal context.[145] These moves avoid any necessity for the Court – or the federal or provincial

140 *Ibid* at 354–75. For a recent biography of Wilson Duff, in which his evidence in *Calder* is discussed, see Robin Fisher, *Wilson Duff: Coming Back, A Life* (Madeira Park, BC: Harbour Publishing, 2022) at 184.

141 *Van der Peet*, *supra* note 3 at para 247. McLachlin J's interpretation of this essential fact in *Calder* leads her to a very different understanding of the purpose of s 35: to provide the "basis for a just and lasting settlement of aboriginal claims": *ibid* at para 230. Such a settlement must reconcile "the different legal cultures of aboriginal and non-aboriginal peoples": *ibid* at para 310.

142 At times, the Chief Justice refers to Aboriginal peoples' societal organization, and at one point, their legal orders. He does so, however, inconsistently. See, for example, *Van der Peet*, *supra* note 3 at para 74 [emphasis added]. The Chief Justice, for example, explicitly rejects the "societal" approach of L'Heureux Dubé J, dissenting, as well as a focus on Indigenous legal orders as proposed by McLachlin J, dissenting. When the Chief Justice refers to Indigenous peoples' legal orders, he does so in reference to the "Aboriginal perspective", discussed below.

143 Tokawa, "*Van der Peet* Turns 20", *supra* note 23 at 827. Tokawa's argument is notable for his theory of Aboriginal rights, which he defines as the protection of Aboriginal interests from the threat of the state's exercise of its powers: *ibid* at 821–22.

144 Borrows, "Frozen Rights in Canada", *supra* note 115 at 44.

145 Barsh & Henderson, *supra* note 29 at 1000–02.

governments or Canadian society – to resolve the uncertainty underlying the Crown's assertion of sovereignty over Indigenous peoples' territories and its *de facto* control over Indigenous peoples and their distinct societies.[146] Nor does the Court have to trace the evolution of the common law doctrine of Aboriginal rights through to its constitutionalization in section 35 of the *Constitution Act, 1982*.[147] Aboriginal rights are rendered through a "museum-diorama" of the past, restricting the recognition of rights that make sense within modern society.[148] The Court's language of "practices, customs and traditions" restricts claims of self-government to sufficiently particular – and material – manifestations.[149] Rather than resolve any these challenges, the Chief Justice elevates a "historical fact", one interpreted through a distinctly Eurocentric perspective, to the status of first principle.

With respect to Aboriginal title, the majority's definition of Aboriginal title similarly constrains its scope, content and meaning. In *Delgamuukw*, Lamer CJ defined the content of Aboriginal title as "the right to use land for a variety of activities, not all of which need be aspects of practices, customs, and traditions which are integral to the distinctive cultures of aboriginal societies."[150] Aboriginal title includes the rights "to exclusive use and occupation of land" and "to choose to what uses land can be put", as well as an "inescapable economic component."[151] However, having delinked its definition

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146 Christie argues the Court's approach to s 35 assumes Indigenous peoples' status as a special type of minority group within the public law of Canada, with the Crown's sovereignty uncontested. Thus, at the structural level, Indigenous peoples are assumed to be part of the public; this assumption forecloses questions about the assertion of Crown sovereignty or Indigenous peoples' inherent rights. See Christie, "Judicial Justification", *supra* note 126 at 64–67.

147 At the hearing in *Van der Peet*, counsel for the appellant argued that the majority's approach at the Court of Appeal, which adopted an "integral to the distinctive culture test" and focused on specific practices, was inconsistent with the common law doctrine of Aboriginal rights: *Van der Peet* transcript, *supra* note 77 at 29–30, 36–37. A majority of the Court in *Van der Peet* affirmed the "integral to the distinctive culture test." In response to the argument that s 35 is a constitutional entrenchment of the common law doctrine of Aboriginal rights, the Chief Justice stated:

> The fact that aboriginal rights pre-date the enactment of s. 35(1) could lead to the suggestion that the purposive analysis of s. 35(1) should be limited to an analysis of why a pre-existing legal doctrine was elevated to constitutional status. This suggestion must be resisted. The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the constitutionalization of those rights and sheds light on the reasons for protecting those rights; however, the interests protected by s. 35(1) must be identified through an explanation of the basis for the legal doctrine of aboriginal rights, not through an explanation of why that legal doctrine now has constitutional status. *Van der Peet*, *supra* note 3 at para 29.

148 Bradford Morse argues that *Pamajewon* "articulated legal standards replete with subjective elements for judges to weigh, lacking in clear enduring principles to guide the effort, and based upon a museum-diorama vision of Aboriginal rights, if not Aboriginal peoples as well": Morse, *supra* note 85 at 1030.

149 *Pamajewon*, *supra* note 3 at para 27. See also Zalewski, *supra* note 115 at 446–47.

150 *Delgamuukw*, *supra* note 1 at para 111.

151 *Ibid* at para 166 [emphasis in original].

of Aboriginal title from the constraints of *Van der Peet*'s "integral to the distinctive culture" test, the majority in *Delgamuukw* turns to the concept of "inherent" or "internal" limits to restrain the economic impact of the right on the settler state and settlers' access to the resources underlying that right. Aboriginal title, the Chief Justice explains, cannot be used in a manner that is "irreconcilable with the nature of the [group's] attachment to the land".[152] In a roundabout way, the content of a specific group's Aboriginal title becomes constrained or restricted by the practices, customs or traditions on that land that the Aboriginal group relies on to establish exclusive and sufficient occupation.[153] In this way, the majority imports *Van der Peet*'s cultural definition of Aboriginal rights as an inherent or internal limit on the content of Aboriginal title, thus potentially limiting the economic scope of title.[154]

The tests for Aboriginal rights in *Van der Peet* and Aboriginal title in *Delgamuukw* set up definitional – and in the case of *Delgamuukw*, inherent or internal – limits on what is protected under section 35. These are *substantive* moves, which force Indigenous peoples to articulate their inherent rights within a *cultural* framing of Aboriginal rights and title. The Court also has certain procedural moves available to it, which work in tandem with its substantive moves. In *Pamajewon*, the Court recharacterized the defendants' claim from a broad Aboriginal right to self-government to an Aboriginal right to regulate high-stakes gambling on reserve, and, once recharacterized, found that the evidence was insufficient.[155] The Court's reliance on *Van der Peet* to recharacterize the right concealed its response to the perceived threat of a broad right of Aboriginal self-government to the provincial Crown's monopoly over gaming revenue and the federal Crown's monopoly over the criminalization of unregulated gaming activities. Had the Court accepted both the characterisation of and evidence for non-inherently limited Aboriginal rights, such as those with commercial dimensions, it would have had to justify the government's infringement of those rights under the framework set out in *Sparrow*. Although the test in *Sparrow* is also advantageous for justifying infringements of

152 *Ibid* at para 111.

153 Borrows, "Sovereignty's Alchemy", *supra* note 4 at 570–72.

154 Other alternatives were open to the Court. In *Pamajewon*, counsel for the defendants argued that an Aboriginal group must justify its exercise of its Aboriginal right of self-government: *R v Pamajewon*, 1996 CanLII 161 (SCC) (Transcript of Hearing, Appellant at 15, 59). To do so, the group must show a valid purpose, in that case, revenue generation for social benefit, and a rational connection between the regulation of the activity, in that case gaming, and the objective. Although this might appear to inquire into the "societal importance" of the activity in question, an approach rejected by the majority in *Van der Peet*, it is more properly described as the type of analysis that courts are familiar with when reviewing the constitutionality of legislation. In *Van der Peet*, McLachlin J, dissenting, appeared to accept the premise that an Aboriginal group's legal order can act as an inherent limit on the exercise of the right. However, there is a key difference between what the defendants' counsel are advancing in *Pamajewon* and what McLachlin J suggests in *Van der Peet*: in the former, the Aboriginal group would have the *onus* of justifying its exercise of the right, whereas in the latter, the Court would determine, based on the evidence, whether the exercise of the right is consistent with the Indigenous legal order. What is particularly interesting in the defendants' counsel's submissions in *Pamajewon* is the premise that the First Nation must justify its exercise of its right, implying that Aboriginal groups also engage in a process of reconciliation with the activities of provincial and federal governments.

155 *Pamajewon*, *supra* note 3 at 29.

non-inherently limited rights, in the sense that the fiduciary relationship does not require the Crown to prioritize the Aboriginal right, it would still require the Court to *justify* the actions of the state. I suggest that the Court is reluctant, for pragmatic reasons owing to the perception this would create, to justify infringements of Aboriginal rights with non-inherent, specifically commercial, dimensions. Instead, by both recharacterizing the right and finding insufficient evidence for that recharacterized right, the Court feints.

3. The Second Move: The Indigenous Perspective and Cognizability within Canada's Constitutional and Legal Order

Indigenous peoples' *political* difference, their inherent rights to self-determination, self-government, and sovereignty, challenges the supremacy of Crown sovereignty. One way in which the Court resolves this threat in favour of the state is to ensure that Indigenous peoples' perspectives on their rights are compatible or commensurable with existing common law and constitutional legal principles and the Crown's assertion of sovereignty. In *Sparrow*, the Court explained that it is "crucial... to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake."[156] However, in *Van der Peet*, the majority qualified that the Aboriginal perspective "must be framed in terms cognizable to the Canadian legal and constitutional structure."[157] In *Delgamuukw*, a majority of the Court put the task more strictly: the Indigenous perspective must be "accommodated", but such an accommodation "must be done in a manner that does not strain 'the Canadian legal and constitutional structure'".[158] Although Indigenous peoples' perspectives on their legal rights must be considered in determining the meaning of those rights and in adjudicating their specific content based on the evidence, the common law and constitutional law of Canada structures the Court's reception and interpretation of those perspectives.[159] In her comment on *Van der Peet*, Anna Zalewski argues that the majority of the Court failed to consider the Indigenous perspective in the definition of Aboriginal rights.[160] Instead, the majority set out a three-part framework for the characterization of the right that emphasizes the interaction between the contemporary activity and the impugned legislation.[161] In short, the majority establishes an asymmetrical framework for the inclusion of Indigenous perspectives, one that assumes the superordinate position of Crown sovereignty.[162]

156 *Sparrow*, *supra* note 3 at 1112.

157 *Van der Peet*, *supra* note 3 at para 49.

158 *Delgamuukw*, *supra* note 1 at para 82.

159 As do the rules of evidence related to oral history. See generally Bruce Granville Miller, *Oral History on Trial: Recognizing Aboriginal Narratives in the Courts* (Vancouver: UBC Press, 2011).

160 Zalewski, *supra* note 115 at 446. Peggy Blair argues similarly that the Court considered only the common law in its reasons in *Nikal* and *Lewis*: Blair, "No Middle Ground", *supra* note 116 at 592.

161 Zalewski, *supra* note 115 at 446.

162 Borrows, "Sovereignty's Alchemy", *supra* note 4 at 556–58.

As an example of how far this asymmetry extends, in *Delgamuukw*, Lamer CJ quotes Mark Walters, a settler legal scholar, for the principle that "true reconciliation will, equally, place weight on" both the Indigenous and common law perspective.[163] Ironically, however, the Court failed to attribute this proposition accurately, as Walters had to Patricia Monture, a Mohawk legal scholar. Writing shortly after *Sparrow*, Monture critiqued the Eurocentric views embedded in education and law, arguing that "a fair, just and peaceable" relationship was contingent on mutual respect between Aboriginal and Canadian perspectives:

> A doctrinal framework which holds these two valid theoretical perspectives, the First Nations view and the established Canadian view, on Aboriginal Rights must be constructed. This new legal doctrine which will enhance the validity of both perspectives, is essential to establishing fair, just, and peaceable relations in this country. Both of the equally valid legal traditions of this country must be willing to participate to each others mutual satisfaction and agreement. This agreement cannot be reached by negotiation, it can be developed only through processes of mutual respect. The current state of affairs is that one view trumps the other by default; that is, the collective memory loss. Nothing is gained by or for First Nations, or Canadians for that matter, in this adversarial, "my way wins," dichotomy to which our legal rights have been reduced. The only result of the "my way wins" process will be a stand-off.[164]

In his article on the BCCA decision in *Delgamuukw*, Mark Walters suggested that "[t]he challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently, there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined."[165] Rather than adopt a Eurocentric perspective, as McEachern CJ had at the Court of Appeal in *Delgamuukw*, Walters pointed to Monture's position, quoted above, as offering an alternative view. Applying Monture's argument, Walters reasoned that a "morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives."[166] In *Delgamuukw*, a majority of the Court quoted Walters at length on the importance of the Indigenous perspective on Aboriginal rights without citing Monture, a Mohawk woman and legal scholar, for that proposition.

Other scholars have critiqued the Court's approach to the Indigenous perspective as restricting the value and relevance of Indigenous legal orders to evidence of practices, customs and traditions;[167] and as forcing Indigenous perspectives – in particular, Indigenous legal orders – to be rendered in terms that are commensurable with liberal constitutionalism.[168] The restriction of Indigenous peoples' claims, interests, and ambitions to those that are cognizable with a liberal, constitutional legal order

163 *Delgamuukw*, *supra* note 1 at para 81; Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17:2 Queen's LJ 350.

164 Patricia A Monture, "Now That the Door Is Open: First Nations and the Law School Experience" (1990) 15:2 Queen's LJ 179 at 191.

165 Walters, *supra* note 163 at 412.

166 *Ibid* at 413.

167 Fraser Harland, "Taking the Aboriginal Perspective Seriously" (2018) 16 Indigenous LJ 21.

168 Mills, *supra* note 6.

neutralizes the perceived threat of Indigenous self-determination. John Borrows suggests that "[s]ome people may fear for their safety if Indigenous peoples exercise greater law making power" because they "worry that [interpersonal violence in Indigenous communities] will spill over into other communities if Indigenous peoples are unable to properly administer the law."[169] I would add that some may fear that Indigenous legal orders and self-government might be articulated in ways that are incommensurable with a liberal legal order that focuses on the inherent dignity and human rights of the individual.[170] In this way, illiberalism, actual or perceived, within Indigenous law and governance poses a threat and challenge to the moral legitimacy of Canada's liberal legal order.[171] Ultimately, to the extent that the Court's recognition of the Indigenous perspective asymmetrically favours the existing constitutional and legal order, as understood from a European perspective, this may limit the transformative potential of an intersocietal interpretation of the *Constitution Act, 1982*.

4. The Third Move: Distinguishing Between Inherent and non-Inherently Limited Rights

In its third move towards "reconciliation", the majority of the Court in *Van der Peet*, *Gladstone* and *NTC Smokehouse* distinguished between inherent or internally limited and non-inherent or non-internally limited Aboriginal rights in the context of the Crown's fiduciary duty. In *Sparrow*, the Court set out a two-stage test for the Crown's justified infringement of an Aboriginal right. At the first stage of the test, the Crown must demonstrate that its conduct is consistent with the Crown's fiduciary relationship to Aboriginal peoples. As part of this fiduciary relationship, the Crown must prioritize the Aboriginal right in its allocation of the underlying resource. In *Gladstone*, the Chief Justice cautioned that "where the aboriginal right has no internal limitation, the notion of priority, as articulated in *Sparrow*, would mean that where an aboriginal right is recognized and affirmed that right would become an exclusive one."[172]

Distinguishing the right asserted in *Sparrow*, "the right to fish for food, social and ceremonial purposes", from the right "to sell herring spawn on kelp commercially" in *Gladstone*,[173] the Chief Justice held that the doctrine of priority set out in *Sparrow* requires "that the government demonstrate that, in allocating the resource, it has *taken account* of the existence of aboriginal rights and allocated the resource *in a manner respectful of the fact* that those rights have priority over the exploitation of the fishery by other users."[174] Drawing an analogy with the minimal impairment test in

169 Borrows, *Canada's Indigenous Constitution*, *supra* note 21 at 166.

170 Wilkins, "Take your Time and Do It Right", *supra* note 23 at 254–58.

171 On the topic of illiberalism in Indigenous membership law and governance, see Kirsty Gover, "When Tribalism Meets Liberalism: Human Rights and Indigenous Boundary Problems in Canada" (2014) 64:2 UTLJ 206. The limits of Indigenous self-government in the context of the *Charter* have recently been considered by the SCC in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson*]. See also *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 220.

172 *Gladstone*, *supra* note 3 at para 59.

173 *Ibid* at para 57.

174 *Ibid* at para 62.

Oakes[175] under section 1 of the *Charter*, the Chief Justice further explained that courts should "assess the government's actions not to see whether the government has given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and important of such rights."[176] In doing so, courts may consider several factors, including:

> ...whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food *versus* commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users.[177]

In *Delgamuukw*, the Chief Justice extended his reasoning in *Gladstone* to the test for the justified infringement of Aboriginal title. Drawing an analogy with commercial Aboriginal rights, the Chief Justice reasoned that the Crown is not required to absolutely prioritize Aboriginal title in its allocation of any underlying resource. Rather, a court must consider whether the Crown has accommodated "the participation of aboriginal peoples in the development" of the resource, whether the "conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of Aboriginal title lands" or whether "economic barriers to aboriginal uses of their lands (e.g., licensing fees)" are "somewhat reduced."[178]

The majority's decisions in *Gladstone* and *Delgamuukw* import into *Sparrow*'s justified infringement framework the consideration of non-constitutionally protected proprietary interests in the context of the Crown's fiduciary relationship to Aboriginal peoples.[179] Moreover, the majority, perhaps drawing from concerns similar to those shared by La Forest J in his memoranda in *Sparrow*, imports the deferential standard towards Crown conduct in the context of the *Charter* into the section 35 context. The effect of this distinction has been to reduce the likelihood that any recognized Aboriginal right with commercial dimensions might impact the existing allocation of a resource to non-Indigenous rights holders. In her assessment of *Gladstone*, Roseanne Kyle concludes that "[c]ourts continue to be reluctant to overly threaten non-Aboriginal interests"; she suggests that "by modifying the priority requirement the Court was at least able to recognize a commercial right, however unclear its parameters might be. If it had been unable to make those modifications, it is likely that it would not have recognized the right at all."[180] At the same time, the cumulative effect

175 *R v Oakes*, 1986 CanLII 46 (SCC) [*Oakes*].

176 *Gladstone*, *supra* note 3 at para 63.

177 *Ibid* at para 64.

178 *Delgamuukw*, *supra* note 1 at para 167.

179 See, generally, McNeil, "Reconciliation and the Supreme Court", *supra* note 124 at 17–19.

180 Kyle, *supra* note 116 at 309.

of these "modifications" has been to restrict the recognition of Indigenous peoples' inherent rights, in particular the right to self-government and the exercise of rights with commercial dimensions or impacts. As Russel Lawrence Barsh and James Youngblood Henderson argue, "[i]f all the hurdles announced by *Sparrow*, *Van der Peet*, and *Gladstone* are assembled, they form a formidable and intimidating barrier" to the recognition of Aboriginal rights with commercial dimensions.[181]

5. The Fourth Move: Expanding the Crown's Arsenal of Valid Legislative Objectives

In its fourth move towards "reconciliation", the majority of the Court in *Gladstone* and *Delgamuukw* expanded the Crown's arsenal of valid legislative objectives. In *Sparrow*, the Court reasoned that the Crown could justifiably infringe Aboriginal rights if it was in furtherance of a valid legislative objective. The Court identified two such objectives, conservation and the protection of the public from harm, while leaving it open as to whether other compelling and substantial objectives may be found. In *Gladstone*, Lamer CJ , for the Court, expanded the list of compelling and substantial objectives to include not only limits that were "fundamental conditions of the responsible exercise of the right",[182] but also those that reflected the broader constitutional and non-constitutional, including private, interests of Canadian society as a whole, such as "the pursuit of economic and regional fairness,... the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups."[183] In *Delgamuukw*, Lamer CJ identified additional legislative objectives that could justify the Crown's infringement of Aboriginal title, including "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of [the province], protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations."[184] As Christie argues, these two moves help to ensure that Aboriginal rights or title that "threatens the continued use of a resource by others with deemed-legitimate interests" can be justifiably infringed in furtherance of those other interests.[185] Borrows succinctly explains how "[w]ords, as bare assertions, are pulled out of the air to justify a basic tenet of colonialism: the settlement of foreign populations to support the expansion of non-Indigenous societies."[186] These objectives, and the means taken to achieve them, the Chief Justice explained in *Gladstone*, were to be reviewed on a standard of reasonableness, akin to the Court's approach in *Oakes* to the review of governmental action under section 1 of the *Charter*, and consistent with the position expressed by La Forest J in his correspondence with Dickson during the Court's deliberations in *Sparrow*.[187]

181 Barsh & Henderson, *supra* note 29 at 1004.

182 *Van der Peet*, *supra* note 3 at para 305, McLachlin J, dissenting.

183 *Gladstone*, *supra* note 3 at para 75.

184 *Delgamuukw*, *supra* note 1 at para 165.

185 Christie, "Law, Theory and Aboriginal Peoples", *supra* note 133 at 87–88.

186 Borrows, "Sovereignty's Alchemy", *supra* note 4 at 568.

187 *Gladstone*, *supra* note 3 at para 63.

The majority's expansion of the list of valid legislative objectives in *Gladstone* went some way towards relieving the threat of Aboriginal rights, particularly commercial and self-government rights, and Aboriginal title, to the status quo allocation of resources to the Crown and settlers. Indeed, in her dissent, McLachlin J critiques the Chief Justice's expansion of the list of justified objectives as an "unconstitutional" and "political" attempt at achieving "social harmony."[188] As Kyle argues, the expansion of the list of valid legislative objectives "effectively neutralizes the entrenchment of Aboriginal rights in the Constitution by elevating other interests in Canada to the same level as constitutional Aboriginal rights."[189] In *Gladstone*, the claimant's proven right to a commercial fishery in herring spawn on kelp challenged the existing allocation of the herring fishery to Indigenous and non-Indigenous fishermen. In *Delgamuukw*, the claimant's assertion of Aboriginal title challenged the legislative and administrative jurisdiction of the province and its control over resources located within the province as well as the private property interests of settlers. Along with *Pamajewon*, which challenged Canada's criminal law jurisdiction and the province's jurisdiction over property and civil rights, as well the province's ability to generate revenues from gaming, these cases illustrate the unresolved promise of section 35, a promise that the *Constitution Act, 1982* intended, in part, to be resolved through political negotiation, and the threat that this promise posed to settler supremacy.

In *Van der Peet*, *Gladstone*, *Pamajewon*, and *Delgamuukw*, a majority of the Court established a vision of reconciliation that could reconcile Aboriginal peoples' rights with the interests of Canadian society as a whole. In a riposte to *Sparrow*'s approach to reconciliation as the reconciliation of federal power and federal duty, the Chief Justice set out a framework that could account for the broader interests of Canadian society through a constrained definition of Aboriginal rights as *cultural* rights; through the subordination of the Indigenous perspective to Canada's constitutional and legal order; through a distinction between inherent or internally limited and non-inherent or non-internally limited Aboriginal rights in the context of the Crown's prioritization of the right in relation to other interests; and through an expansion of the kinds of compelling and substantial objectives that the Crown can rely on to justifiably infringe Aboriginal rights and title. These four moves limited the potential for Indigenous peoples to sustain their societies into the future and alleviated the threat of Indigenous peoples' inherent rights to the preferential allocation of resources to settlers and the settler state. That is not to say that this foundational jurisprudence did not result in *some* transfer of resources – including political legitimacy – to Indigenous peoples; however, it maintained an overarching structure of settler supremacy, one in which settler futurity is prioritized over alternative relationships.

The effects of this framework can be seen in the holdings of this jurisprudence. In *Van der Peet*, the majority accepted the trial judge's findings that the claimant's impugned sale of salmon was incidental and not integral to the distinctive culture of the Sto:lo.[190] In *Gladstone*, although the majority accepted that the claimant enjoyed an Aboriginal right to commercial trade in herring-spawn-on-kelp, they also explained that the Crown could justifiably infringe that right without prioritizing the exercise of that right vis-à-vis others.[191] In *Pamajewon*, a majority of the Court recharacterized the

188 *Van der Peet*, *supra* note 3 at paras 302, 314.

189 Kyle, *supra* note 116 at 310.

190 *Van der Peet*, *supra* note 3 at paras 85–91.

191 *Gladstone*, *supra* note 3 at paras 28–19, 57–75.

claimants' assertion of a right to self-government to a right to regulate high-stakes gambling on reserve, and found that the evidence did not support the practice of modern commercial lotteries.[192] The effects of this framework can also be found in subsequent jurisprudence. In *Mitchell v MNR*, the Court found that there was insufficient evidence to demonstrate an Aboriginal right to engage in North-South trade, a finding that also implicitly recharacterized the plaintiff's claim to include an inherent spatial limit.[193] In *Sappier*; *Gray*, the Court recharacterized the right from an Aboriginal right to harvest timber for personal use, which could have engaged small-scale commercial uses, to a right to harvest timber for domestic uses, where domestic uses are understood to be inherently limited.[194] Even in *Tsilhqot'in*, the Court retained principles set out in *Delgamuukw* that could limit the exercise of Aboriginal title to uses that are consistent with the evidence of pre-sovereignty occupation and use.[195]

192 *Pamajewon*, *supra* note 3 at para 30.

193 *Mitchell v MNR*, 2001 SCC 33 at paras 25, 54–60 [*Mitchell*].

194 *R v Sappier*; *R v Gray*, 2006 SCC 54 at paras 2, 24–25 [*Sappier; Gray*].

195 *Supra* note 6 at para 67.

Conclusion

One might respond that the allocation of resources between Indigenous and non-Indigenous peoples is not a response to threat but rather a practical response to a material conflict that must be resolved through some sort of legal framework. This is also true,[196] however, this framing obfuscates both the nature of *how* this conflict is resolved in favour of the non-constitutional, private interests of settlers or the wide-ranging objectives of the state,[197] as well as alternative visions grounded in Indigenous thought and law.[198] The assumption or assertion of Cown sovereignty goes unquestioned within this vision of "reconciliation". This tends to place the onus on Indigenous peoples to reassure the state and settlers, in some cases by taking primary responsibility for countering anti-Indigenous prejudice, that these alternative visions are achievable.[199] Nor does this framing offer any reason why these practical concerns play such a significant role in the Court's jurisprudence, except to say, more or less, "[l]et us face it, we are all here to stay."[200] The Court appears to be responding to a practical and material, as much as a theoretical or philosophical, conflict, between Indigenous peoples' constitutional and political difference – their inherent rights – and the fact that settlers are here to stay.[201] Even if we cannot locate an affect of threat in the written reasons of the Court or the behaviours of parties, counsel, and the justices, I have demonstrated how we can *read* the Court's jurisprudence through the lens of threat, just like any of the other framings of reconciliation, to better understand how this jurisprudence sustains settler supremacy into the future.

196 See, for example, Slattery's characterisation of the post-s. 35 jurisprudence as emanating from "principles of reconciliation": Slattery, *supra* note 23 at 260, 262. With respect to the inherent right to self-government, it may be that the Court is reluctant to find such a right absent sufficient assurance that Indigenous peoples have the current capacity to exercise it, and that their exercise of that right will respect the rights of vulnerable persons and accommodate provincial and federal jurisdiction: Wilkins, "Take your Time and Do It Right", *supra* note 23 at 252–59. Christie argues that the Court was motivated to avoid the introduction of "absolute rights" for Aboriginal peoples: Christie, "Judicial Justification", *supra* note 126 at 60.

197 Christie suggests that "[i]n conceptualizing the problem as one about the fair allocation of resources, so that parties may get on with the business of pursuing value-generating projects, the law has attempted to envelop the situation in liberal garb": Christie, "Law, Theory and Aboriginal Peoples" *supra* note 133 at 90.

198 See, generally, John Borrows' argument for Indigenous legal orders and self-government as part of the rule of law and governance in Canada in Borrows, *Canada's Indigenous Constitution*, *supra* note 21.

199 See, for example, Wilkins' recommendation to "dispel mainstream perception—and the predisposition to believe—that power in Aboriginal communities is being used arbitrarily and irresponsibly": Wilkins, "Take your Time and Do It Right", *supra* note 23 at 268. Recall earlier commentary on anti-Indigenous prejudice and the perception that Indigenous peoples receive undue advantage or are inherently lazy: Morrison et al, *supra* note 13. See also Borrows, *Canada's Indigenous Constitution*, *supra* note 21 at 166.

200 *Delgamuukw*, *supra* note 1 at para 186.

201 Christie, however, argues that liberalism both establishes the problem and its resolution by framing s 35 as a process of accommodating Aboriginal rights alongside other interests: Christie, "Law, Theory and Aboriginal Peoples", *supra* note 133 at 89.

While the state benefits from the constitutionalization of Indigenous peoples' rights as "Aboriginal rights," gaining moral legitimacy and, from it, state authority, it cannot admit or recognize the full scope of those rights without threatening its prioritization of resources to settlers and of the interests of the settler state. The Court's Aboriginal law jurisprudence responds to this threat through the creation of an asymmetrical constitutional framework, one in which Indigenous peoples' rights are translated into a set of "Aboriginal rights" that do not challenge the fundamental prioritization of resources to settlers and the settler state. At the same time, the Court cannot cleanly admit this asymmetry without also undermining the moral legitimacy that is claimed through its processes of reconciliation. The Court's vision of reconciliation cannot *appear* as a response to *threat*, it cannot appear asymmetrical or unprincipled, because even the looming acknowledgement of threat discloses the underlying challenge that Indigenous peoples' rights present to the future of the settler state (as it currently constitutes itself). I argue that the management, or de-escalation, of this threat, finding a way for us all to be "here to stay" in much the same way, is the objective of the Court's reconciliation jurisprudence.[202]

As I have argued, the Aboriginal law jurisprudence, as it is employed by the Court, functions to obscure the perceived threat of non-inherently limited rights to the allocation of resources to settlers. There is a sense, found within the Court's more recent jurisprudence, that the balance struck in 1996 and 1997 was just and appropriate. The Court's foundational jurisprudence has become fortified through the recursive practices of litigation and precedent. A jurisprudence functionally created in a discrete historical moment has become the nearly uncontested framework through which Aboriginal rights and title are litigated and negotiated.

My argument in this article is not one-sided: the Court has explained at length the philosophical and legal basis for its vision of reconciliation. For example, the Court in *Gladstone* reasons that the prioritization of non-inherently limited rights over non-Indigenous users of a resource would be akin to creating an exclusive right for the Aboriginal group vis-à-vis those who do not have a constitutionally-protected right but who may have a private interest in the underlying resource; this, the Court explains, is not the purpose of the constitutional protection of section 35. But by *threatening* reconciliation – by making threat visible – we can observe how this jurisprudence minimizes the perceived or actual threat of Indigenous peoples' political and legal differences and secures the continued access of resources – material and symbolic – for the settler state.

The Court's foundational jurisprudence has significantly muted the perceived threat of Indigenous peoples' inherent rights to the preferential allocation of resources to settlers and the state. Without ever having to go so far as to apply a sovereign incompatibility analysis,[203] the SCC has effectively

202 *Delgamuukw*, *supra* note 1 at para 186. As I argue elsewhere, "no more apt statement of settler futurity may ever be spoken": Franks, *supra* note 2 at 755.

203 In his dissenting reasons in *Mitchell v MNR*, Binnie J reasoned that Akwesasn'e's right to international trade or mobility across borders was incompatible with the Crown's sovereign jurisdiction over international borders: *Mitchell*, *supra* note 193 at paras 155–64.

limited Indigenous rights and title from encroaching on key state and private property interests through a series of internal or inherent limits; an essentialist interpretation of Indigenous culture;[204] a framework for justified infringement; an interpretation of Canada's legislative and executive branches that excludes Indigenous peoples from being consulted on legislation that may affect their Indigenous rights;[205] the principle that the Indigenous perspective "must be framed in terms cognizable to the Canadian legal and constitutional structure";[206] through framing the observance of Indigenous protocols as an "abuse of process";[207] and in one case, "clarifying" its reasons after settler violence in Atlantic Canada.[208] Canadian law's adversarial stance – not necessarily lost within a duty to consult and accommodate framework that privileges the Crown as decision-maker[209] – further structures the perception of threat in legal issues related to Indigenous peoples and their rights and laws. In each of these cases, "reconciliation" is deployed to resolve the threat of Indigenous self-government and sovereignty to the settler state and its interests. In the end, what is legally cognizable is limited to what is tolerable to settler futurity.

In *Sparrow*, Dickson CJ established a vision for reconciliation that motivated the Crown to negotiate the content of section 35 outside of the courts. In *Van der Peet*, *Gladstone*, *Pamajewon* and *Delgamuukw*, a majority of the Court set out a framework that asymmetrically preferred the allocation of resources

204 The SCC's harvesting decisions seem to place an inherent limit on the ability of First Nations to exercise Aboriginal rights in ways that would appear to be commercial, or in short, that would compete with non-Aboriginal commercial interests. The Court's reasoning in these cases is often based on its interpretation of the anthropological and historical evidence of the First Nations' harvesting practices, and an implicit comparison with European market economies. In *Sappier*, a majority of the SCC found that the Woodstock First Nation had an Aboriginal right to harvest logs for "domestic use"; the majority explains, "[t]he word 'domestic' qualifies the uses to which the harvested timber can be put. The right so characterized has no commercial dimension": *Sappier*; *Gray*, *supra* note 194 at para 25. In *Marshall*; *Bernard*, the SCC explicitly rejected the Mi'kmaq's asserted right to harvest logs for commercial purposes: *R v Marshall*; *R v Bernard*, 2005 SCC 43 at para 6. Furthermore, in *Lax'Kwallams*, the SCC reasoned that the First Nation's trade in eulachon grease was historically limited by their seasonal harvesting and that such a practice could not establish either a commercial right to trade in eulachon grease or other fisheries products. In this way, the Court imposed an inherent limit on the nature of the Aboriginal right, limiting it to its historical form: *Lax Kw'alaams Indian Band v Canada* (*Attorney General*), 2011 SCC 56 at paras 48–59.

205 *Mikisew Cree First Nation v Canada* (*Governor General in Council*), 2018 SCC 40 at paras 50–53.

206 *Van der Peet*, *supra* note 3 at para 49.

207 *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 36.

208 *R v Marshall*, 1999 CanLII 665 (SCC); *R v Marshall*, 1999 CanLII 666 (SCC). McNeil wonders "whether the Supreme Court was spooked by the sometimes violent reaction to Marshall [No. 1] in the Maritime Provinces and so made concessions to elements of the non-Aboriginal populace." McNeil, "Reconciliation and the Supreme Court", *supra* note 124 at 22.

209 *Haida*, *supra* note 6 at paras 60–63.

to settlers and the settler state. Combined with the costs of Aboriginal rights and title litigation, the majority's asymmetrical framework motivated Indigenous peoples to negotiate with the Crown – on uneven terms. As Bradford Morse predicted, the majority's framework has become "thoroughly unattractive" as a means to secure a judicial resolution for Indigenous claimants, particularly as it relates to claims to self-government.[210] The framework established by the majority in 1996 and 1997 is now beginning to buckle under its own restrictiveness, as Parliament turns to legislation[211] and the courts turn to the *United Nations Declaration on the Rights of Indigenous Peoples*[212] as an alternative vision for the future.[213] Much like how the Court encountered a set of cases that challenged the existing status quo in 1994 through to 1997, the SCC is now similarly having to grapple with cases that go to the heart of the perceived threat of Indigenous self-government to Canada's existing constitutional and legal order.[214] Time will tell whether we will remain here to stay in much the same way.[215]

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210 Morse, *supra* note 85 at 1011.

211 See *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, SC 2019, c 24; *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants*, QCCA 2022 185, affirmed in large part in *Reference re An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, 2024 SCC 5 [*C-92 Reference*].

212 UNGA, 61st Sess, UN Doc A/61 (2007) GA Res 295 (II).

213 *White and Montour*, *supra* note 115 at paras 1233–37, 1291–339; Brenda Gunn, "Beyond *Van der Peet*: Bringing Together International, Indigenous and Constitutional Law" in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Waterloo: Centre for International Governance Innovation, 2017) at 29, online (pdf): <https://www.cigionline.org/static/documents/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf>.

214 *Dickson*, *supra* note 171; *C-92 Reference*, *supra* note 211.

215 Two months after this article was finalized and accepted, the SCC released its judgements in the *C-92 Reference*, *supra* note 211, and *Dickson*, *supra* note 171. Although these cases have been represented as upholding the inherent right to Indigenous self-government, I would argue that these cases do not fundamentally alter the analysis presented in this article. The *C-92 Reference* affirms federal jurisdiction over "Indians, and lands reserved for the Indians" without delving into the controversies surrounding *Pamajewon*, *supra* note 3. The Court split, quite strongly, in *Dickson* on the relationship between Indigenous self-government, the federal and provincial governments, and the application of the *Charter*. The majority, written by Kasirer and Jamal JJ, offers a "halfway house", to borrow Sharpe and Roach's (*supra* note 33) characterization of Dickson CJ's approach, that extends the *Charter* to some exercises of Indigenous self-government, while inviting a potentially greater and welcomed recognition of "Indigenous difference" as more than cultural difference. Rowe J, dissenting in part, and Martin and O'Bonsawin JJ, dissenting jointly in part, represent the two alternative poles, with Rowe J holding that the *Charter* does not apply to exercises of Indigenous self-government where the Indigenous government is not an emanation or delegate of a federal or provincial government, and Martin and O'Bonsawin JJ writing to ensure that there are not "*Charter*-free" zones in Canada. I would hesitate, however, to apply my thesis to the reasons of O'Bonsawin J and I intend to explore this hesitation further in future work.

ORIGINAL RESEARCH ARTICLE

Enforcing National Instrument 51-107 Disclosure of Climate-related Matters

Gina Jihyun Kwon*

Abstract: This contribution analyzes the Canadian Securities Administrators' Proposed National Instrument 51-107—Disclosure of Climate-Related Matters (NI 51-107), which introduces climate-related disclosure (CRD) rules for reporting issuers in Canada. These disclosure rules are intended to provide consistent, comparable, and decision-useful information to market participants. NI 51-107 was published in October 2021, and its comment period ended in February 2022. This article comes during the waiting period before the Canadian Securities Administrators finalize their CRD rules and after the United States Securities and Exchange Commission adopted their CRD rules.

This article aims to highlight the legal tools available to Canadian securities regulators and stakeholders to allow NI 51-107 to live up to its regulatory purpose. After NI 51-107 comes into force, it is likely that securities regulators will continue to rely heavily on existing regulatory, civil, and criminal liability regimes to ensure compliance, while building on past scholarship advocating for a balance between public and private enforcement of Canadian security regulatory norms. As climate risks materialize through business costs, and stakeholders and regulators increasingly demand CRD, Canadian issuers ought to know the regulatory disclosure rules that apply to them, along with the legal risks of improper disclosure. Consequently, Canadian issuers conducting transnational business should familiarize themselves with the global trend toward CRD and the pressure to link capital markets with comparable disclosures using select reporting standards.

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* BA (UToronto), MPhil (Cantab), JD (UToronto). Special thanks to Mr. Kenneth Jull (LLB, LLM) and Mr. Glen R Johnson (BA, LLB), adjunct professors at the University of Toronto Faculty of Law, for all their guidance and support. Additionally, many thanks to the anonymous reviewers and members of the Toronto Metropolitan University Law Review at the Lincoln Alexander School of Law for their invaluable comments and review of the article.

CONTENTS

INTRODUCTION 50

I. THE WILD WEST OF CLIMATE RISK 53

1. Climate-Related Risk is Material 54
2. Climate Change and Securities Regulation 57
3. The Need for Regulating Climate-Related Disclosure 60

II. MAPPING CLIMATE-RELATED DISCLOSURES 64

1. NI 51-107: Canada's New Mandatory Climate-Related Disclosure Rules 65
2. NI 51-107 across the Canada-US Border 69
3. NI 51-107 within Canadian Borders 70

III. ENFORCING NI 51-107 71

1. Regulatory and Civil Enforcement (*OSA*, sections 122(1)(c), 127, and 138.3) 72
2. Criminal Enforcement (*Olan, Théroux,* and *Zlatic*) 76
3. Is Canada too provincial? 78
4. The Future of NI 51-107 and its Alternatives 81

CONCLUSION 83

Introduction

Anthropogenic climate change has caused hotter temperatures, more severe storms, increased drought, melting glaciers and ice sheets, warming and rising sea levels, and intensified extreme weather events that cannot be explained by natural processes alone.[1] The cumulative effect of these impacts, which increase the likelihood of more potent and frequent wildfires, floods, and tropical storms, has generated unprecedented consequences. For example, in August 2023, for the first time ever, the National Hurricane Center issued a tropical storm watch for large parts of Southern California, where tropical rainfall is not common during the region's dry season.[2] Halfway into 2023, Canadian wildfire officials said that the 2023 wildfire season was "easily the worst ever recorded", with many international firefighters being mobilized to Canada to help address the monumental fires

1 United Nations, "Causes and Effects of Climate Change" (last visited 2 April 2024), online: <un.org/en/climatechange/science/causes-effects-climate-change>.

2 Haley Thiem, "Former Hurricane Hilary Brought Southern California its First-ever Tropical Storm Watch" (21 August 2023), online: <climate.gov/news-features/event-tracker/former-hurricane-hilary-brought-southern-california-its-first-ever>.

raging across the country.[3] Climate change disrupts almost every aspect of life, including human health, welfare, biodiversity, and the economy.

Larry Fink, CEO of BlackRock, the world's largest asset manager, addressed BlackRock's longstanding view that climate risk poses an investment risk in his 2023 annual letter to investors, which provides insight on BlackRock's investor stewardship:

> For years now, we have viewed climate risk as an investment risk. That's still the case. Anyone can see the impact of climate change in the natural disasters in California or Florida, in Pakistan, across Europe and Australia, and in many other places around the world. There's more flooding, more wildfires, and more intense storms. In fact, it's hard to find a part of our ecology – or our economy – that's not affected. Finance is not immune to these changes. We're already seeing rising insurance costs in response to shifting weather patterns.[4]

Given BlackRock's approximately USD $9 trillion in assets managed, Fink's annual letters have a wide reach among public companies, market participants, and other stakeholders.[5] Fink's 2023 letter emphasizes changes in corporate governance in light of mounting environmental, social, and governance (ESG) concerns, as well as growing shareholder demands for public companies to focus on long-term growth and corporate social responsibility.

At the same time, wealth is transferring to a younger generation, who are more engaged in "ethical investing" and "conscious capitalism" than their predecessors.[6] In turn, fiduciaries, including BlackRock, are responding to wider stakeholder values. Many retail and institutional investors are demanding more information about company vulnerabilities to climate change and its multi-faceted disruptions when making investment decisions.[7]

In the Global North, securities regulators recognize that climate-related risks can pose significant financial risks to companies. In December 2021, the United Kingdom (UK) Financial Conduct Authority found that "[c]limate change is a relevant consideration for all companies and likely to

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3 John Paul Tasker, "Canada Reports Worst Wildfire Season on Record—and There's More to Come This Fall", *CBC News* (11 August 2023), online: <cbc.ca/news/politics/Canada-wildfire-season-worst-ever-more-to-come-1.6934284>.

4 Larry Fink, "Larry Fink's Annual Chairman's Letter to Investors", *Harvard Law School Forum on Corporate Governance* (17 March 2023), online (blog): <corpgov.law.harvard.edu/2023/03/17/larry-finks-annual-chairmans-letter-to-investors/>.

5 Betty Moy Huber & Paula H Simpkins, "BlackRock's 2021 CEO Letter", *Harvard Law School Forum on Corporate Governance* (14 February 2021), online (blog): <corpgov.law.harvard.edu/2021/02/14/blackrocks-2021-ceo-letter/>.

6 Mirjana Perkovic, "How Can Ethical Investing Drive Positive Change?", *Forbes* (2 June 2023), online: <forbes.com/sites/forbesbusinesscouncil/2023/06/02/how-can-ethical-investing-drive-positive-change/>.

7 Commissioner Allison Herren Lee, "A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC", *US Securities and Exchange Commission* (15 March 2021), online: <sec.gov/news/speech/lee-climate-change>.

be material for most".[8] The Canadian Securities Administrators (CSA), the umbrella organization for all provincial and territorial securities regulators, acknowledged that "disclosure of material climate change-related risks is important for investors to make informed investment decisions".[9] The United States' Securities and Exchange Commission (SEC) has recognized that "investors need reliable information about climate-related risk to make informed investment decisions."[10] According to the United Nations' Principles for Responsible Investment, climate change is currently the highest priority ESG-related issue facing investors.[11]

Capital markets in the Global North have been responsive to investor needs for climate-related disclosure (CRD). In the last five years, global standards and frameworks for greenhouse gas (GHG) reporting have helped inform CRD rules proposed by securities regulators across various jurisdictions, including Canada, the European Union (EU), New Zealand, Singapore, the UK, and the United States (US). Notably, the Task Force on Climate-Related Financial Disclosures (TCFD) framework, along with the Sustainability Accounting Standards Board and International Sustainability Standards Board standards, guide the creation of these emerging CRD rules.[12]

This article comes during the waiting period before the CSA finalizes their CRD rules and after the SEC adopted their CRD rules.[13] More specifically, this article focuses on the CSA's proposed CRD rules under National Instrument 51-107 *Disclosure of Climate-related Matters* (NI 51-107).[14] Taking a forward look at NI 51-107, I start with a general prescriptive argument before exploring specifics

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8 United Kingdom, Financial Conduct Authority, *Enhancing Climate-Related Disclosures by Standard Listed Companies*, Policy Statement PS21/23 (London, UK: Financial Conduct Authority, 2021) at 4, online (pdf): <fca.org.uk/publication/policy/ps21-23.pdf>.

9 Canadian Securities Administrators, *CSA Staff Notice: 51-358 Reporting of Climate Change-related Risks* OSC SN 51-358 (1 August 2019) 42 OSCB 6617 at 1, online (pdf): <osc.ca/sites/default/files/pdfs/irps/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf> [CSA Staff Notice, August 2019].

10 US Securities and Exchange Commission, Press Release, 2022-46, "SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors" (21 March 2022), online: <sec.gov/news/press-release/2022-46> [SEC Proposes Rules to Enhance CRD].

11 Principles for Responsible Investment, "Climate Change" (last visited 25 April 2024), online: <unpri.org/sustainability-issues/climate-change>.

12 Canadian Securities Administrators, News Release, "Canadian Securities Regulators Consider Impact of International Developments on Proposed Climate-Related Disclosure Rule" (12 October 2022), online: <securities-administrators.ca/news/canadian-securities-regulators-consider-impact-of-international-developments-on-proposed-climate-related-disclosure-rule/> [CSA, Regulators Consider Impact of International Developments].

13 US Securities and Exchange Commission, Press Release, 2024-31, "SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors" (6 March 2024), online: <sec.gov/news/press-release/2024-31>.

14 Canadian Securities Administrators, *Consultation: Climate-Related Disclosure Update and CSA Notice and Request for Comment Proposed National Instrument 51-107* Disclosure of Climate-Related Matters (18 October 2021) at 2, online (pdf): <osc.ca/sites/default/files/2021-10/csa_20211018_51-107_disclosure-update.pdf> [CSA Consultation on NI 51-107].

regarding enforcing NI 51-107 through three concurrent liability regimes. Broadly, I anticipate NI 51-107 to serve as the Canadian yardstick for determining improper CRD. I argue that NI 51-107, by clarifying climate disclosure rules, will bring about increased scrutiny of CRD and detection of climate-related securities misrepresentation or fraud in Canada.

The enforcement of NI 51-107 will be supported by existing regulatory, civil, and criminal liability regimes. This article discusses the regulatory, civil, and criminal enforcement mechanisms that are available to bolster NI 51-107. First, I illustrate how sections 127 and 138.3 of Ontario's *Securities Act*[15] (*OSA*), which are related to public interest orders and statutory civil liability respectively, are conducive to addressing *ex ante* and *ex post* damages for climate-related misrepresentation. In turn, I foresee one of two behaviours from issuers: issuers will either enhance CRD to meet the applicable standards of materiality,[16] or depending on the type of offering and timing, face public interest orders by securities tribunals or class actions for misrepresentation by activist shareholders. Then, I discuss how section 380 of the *Criminal Code*[17] and the cases of *Olan, Théroux,* and *Zlatic* inform criminal liability related to fraudulent CRD.[18] As a result of NI 51-107, Canadian issuers should know, or reasonably ought to know, CRD rules that should be disclosed to stakeholders.

This article is organized in three parts: Part I, looking at the past, sets out the preliminaries, defines climate change risks, reviews the literature on climate change and securities law, and describes the CRD practices and ESG ratings that were in effect before the CSA CRD rules were drafted. Part II, looking at the present, focuses on NI 51-107, explaining its CRD rules and comparing the CSA and SEC CRD rules. Part III, looking to the future, considers how NI 51-107 can be enforced under existing regulatory, civil, and criminal laws, and whether improvements can be made to NI 51-107 as it currently stands.

I. The Wild West of Climate Risk

Part I of this article establishes the context for NI 51-107. Part I(1) outlines the materiality of climate-related risk, then highlights the costs of climate change events. Part I(2) situates this article within the extant literature, and summarizes climate-related reporting and securities regulation discourse from the early 2000s. Against this backdrop, Part I(3) details the current need for CRD regulation. Essentially, while early scholars saw CRD's potential to democratize investments and curtail climate litigation, new problems have emerged, partly due to disparate reporting practices. Consequently, securities regulators are attempting to harmonize leading disclosure frameworks to standardize CRD between issuers and across capital markets.

15 *Securities Act*, RSO 1990, c S.5, ss 127, 138.8 [*OSA*].

16 See Part III(1) of this article. Periodic disclosure obligations for material facts are triggered by one of two materiality standards: (1) "move-the-market" or "market impact", and (2) "reasonable investor". When an issuer fails to meet either one of the two materiality standards, then the issuer may face liability in various forms set out in the *OSA*.

17 *Criminal Code*, RSC 1985, c C-46, s 380.

18 See *R v Olan et al*, 1978 CanLII 9 (SCC) [*Olan*]; *R v Théroux*, 1993 CanLII 134 (SCC) [*Théroux*]; *R v Zlatic*, 1993 CanLII 135 (SCC) [*Zlatic*]. These cases are addressed in Part III.

1. Climate-Related Risk is Material

One essential function of financial markets is to price risk to support informed and efficient capital-allocation decisions.[19] As stated by the Bank of Canada, "increases in the frequency and severity of extreme weather events and the transition to a low-carbon net zero economy pose significant risks to the financial system."[20] It is incumbent on regulatory authorities to manage the risks that climate change poses on the macroeconomy and price stability with the broad goal of promoting economic and financial welfare.

The TCFD divides climate-related risks to financial stability into two categories: "(1) risks related to the *transition* to a lower-carbon economy and (2) risks related to the *physical* impacts of climate change."[21] (see Figure 1)

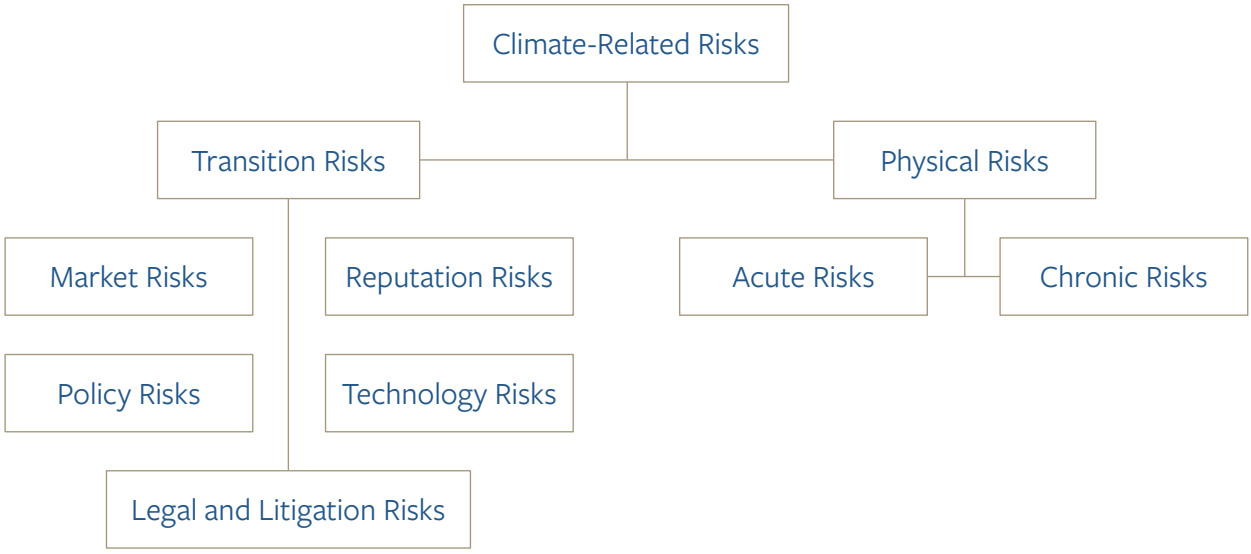

Figure 1: *Climate-related risks that impact financial stability as understood by the Bank of Canada,[22] the US Federal Reserve System,[23] and the Task Force on Climate-Related Financial Disclosures.[24]*

19 CSA Consultation on NI 51-107, *supra* note 14 at ii, 61.

20 Bank of Canada, Press Release, "Bank of Canada Announces Climate Change Commitments for COP26" (3 November 2021), online: <bankofcanada.ca/2021/11/bank-canada-announces-climate-change-commitments-for-cop26/>.

21 Task Force on Climate-related Financial Disclosures, *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (Basel: Task Force on Climate-related Financial Disclosure, 2017) at 5, online (pdf): <assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf> [TCFD].

22 Bank of Canada, *Annual Report 2020* (Ottawa: Bank of Canada, 2021) at 58, online (pdf): <bankofcanada.ca/wp-content/uploads/2021/04/Annual-Report-2020-Bank-of-Canada.pdf>.

23 Celso Brunetti et al, "Climate Change and Financial Stability", FEDS Notes (19 March 2021), online: <federalreserve.gov/econres/notes/feds-notes/climate-change-and-financial-stability-20210319.html>.

24 TCFD, *supra* note 21 at 5–6.

Transition risks arise as the economy moves from reliance on carbon-based energy toward using net zero carbon.[25] These risks include increased costs to keep up with the policy, legal, technology, and market changes related to mitigating and adapting to climate change.[26] Such transitions can result in some sectors facing shifts in asset values or higher costs of doing business.[27] Depending on the nature, speed, and focus of these changes, transition risks pose varying levels of financial and reputational risks to businesses because of the following factors, as stated by the TCFD:

- *Policy actions* that either attempt to constrain actions that contribute to the adverse effects of climate change or promote adaptation of climate change.[28]
- *Litigation* claims initiated by property owners, municipalities, states, insurers, shareholders, and public interest organizations, related to organizational failure to adapt to or mitigate against climate change impacts and insufficient disclosure around material financial risks.[29]
- *Technology improvements or innovations* that support the transition to a lower-carbon, energy-efficient economic system. As new technology displaces old systems, "creative destruction" changes competition and delineates winners and losers in the market.[30]
- *Market shifts* in supply and demand for certain commodities, products, and services as climate-related risk and opportunities are increasingly considered by consumers.[31]
- *Reputation risks* tied to changing customer or community perceptions of an organization's contribution to or detraction from the transition to a lower-carbon economy.[32]

Physical risks arise when certain environmental tipping points are crossed, leading to catastrophic outcomes for the climate and economy, and possibly irreversible harm.[33] Physical risks refer to those that are event-driven ("acute"), which include increased severity of extreme weather events, or to longer-term climate pattern shifts ("chronic"), which include sustained higher temperatures that

25 *Ibid*.

26 *Ibid* at ii–iii.

27 *Ibid*.

28 *Ibid* at 5.

29 *Ibid*. Some international guidance on climate-related disclosure may identify this risk as "liability risk", entailing risks that come from legal persons seeking compensation for losses suffered from physical or transition risks: see e.g. Bank of England, "Climate Change: What are the Risks to Financial Stability?" (last modified 10 January 2019), online: <bankofengland.co.uk/knowledgebank/climate-change-what-are-the-risks-to-financial-stability>.

30 TCFD, *supra* note 21 at 6. Coined by economist Joseph Schumpeter, "creative destruction" refers to the incessant product and process innovation mechanism by which new production units replace outdated ones: see generally Thomas K McCraw, *Prophet of Innovation: Joseph Schumpeter and Creative Destruction* (Cambridge, MA: Harvard University Press, 2007).

31 TCFD, *supra* note 21 at 6.

32 *Ibid*.

33 Heather Boushey, Noah Kaufman & Jeffery Zhang, "New Tools Needed to Assess Climate-Related Financial Risk" (3 November 2021), online: <whitehouse.gov/cea/written-materials/2021/11/03/new-tools-needed-to-assess-climate-related-financial-risk-2/>.

may have environmental impacts.[34] Physical risks may have financial implications for corporations, including damage to assets and corporate premises, lower value of stranded assets, and supply chain disruption leading to indirect impacts.[35]

Indeed, McKinsey & Company have found that physical and transition risks increase corporations' vulnerability "to value erosion that could undermine their credit status", as well as compromise their capital and competitiveness.[36] As the effects of climate change continue to materialize, companies potentially face an increased default risk of loan portfolios, litigation, energy prices, business disruptions, and lower corporate profits, property value, asset values, and growth and productivity.[37] Without appropriate analysis and planning, climate-related risks can have profound financial implications for companies, including direct damage to assets, strains on insurance, creation of stranded assets, destruction of company premises, and disruptions to supply chains.[38]

Climate change alters the value of investments, as recent events in the US illustrate. In October 2018, California's largest utility, Pacific Gas and Electric (PG&E), was valued at US $25 billion.[39] Amid the fallout from the 2019 California wildfires, PG&E filed for Chapter 11 bankruptcy protection. The company faced 750 lawsuits with an estimated USD $30 billion in liabilities from wildfires purportedly caused by its power lines.[40] According to *The Wall Street Journal*, PG&E's bankruptcy marks a business milestone: "the first major corporate casualty of climate change".[41] PG&E's "climate-change bankruptcy" should serve as a case study for companies evaluating the financial risks of climate change.[42] Further, the case of PG&E highlights the corporate credit portfolio risks caused by the effects of climate change.[43]

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34 TCFD, *supra* note 21 at 6.

35 *Ibid*.

36 Joseba Eceiza et al, "Banking Imperatives for Managing Climate Risk" (1 June 2020), online: <mckinsey.com/business-functions/risk-and-resilience/our-insights/banking-imperatives-for-managing-climate-risk>.

37 Pierpaolo Grippa, Jochen Schmittmann & Felix Suntheim, "Climate Change and Financial Risk", *Finance & Development* (December 2019) at 27, online (pdf): <imf.org/external/pubs/ft/fandd/2019/12/pdf/climate-change-central-banks-and-financial-risk-grippa.pdf>.

38 TCFD, *supra* note 21 at 5–6.

39 Russell Gold, "PG&E: The First Climate-Change Bankruptcy, Probably Not the Last", *The Wall Street Journal* (18 January 2019), online: <wsj.com/articles/pg-e-wildfires-and-the-first-climate-change-bankruptcy-11547820006>.

40 *Ibid*.

41 *Ibid*.

42 *Ibid*; Grippa, Schmittmann & Suntheim, *supra* note 37 at 26.

43 The increased size of wildfires occurring across California in the last 50 years is attributable to climate change. Between 1972–2018, California experienced a fivefold increase in its annual burned area, mainly due to more than an eightfold increase in the extent of summer forest fires. The increase in summer forest fire area was likely caused by an increase in atmospheric aridity caused by warming. See A Park Williams et al, "Observed Impacts of Anthropogenic Climate Change on Wildfire in California" (2019) 7:8 Earth's Future 892 at 892, DOI: <10.1029/2019EF001210>.

In 2022, Munich Re, a leading global insurance provider, had to cover an astonishing USD $120 billion for natural catastrophes as the frequency, intensity, and impacts extreme weather worsened.[44] Natural catastrophes will drive up insurance prices and will have a huge impact on homeowners and businessowners, whose assets become too unaffordable to insure. As of 2022, "[i]ncluding uninsured losses, the total cost of storms, droughts, earthquakes, and fires ... was [USD] $270 billion."[45] If this trajectory continues, the US housing market may see significant changes if people relocate to areas less affected by changing weather patterns.

To prevent an exodus from coastal zones and areas affected by extreme weather events, some local governments in the US have subsidized or replaced private insurance, like Munich Re.[46] Most flood insurance policies are underwritten by the US government's National Flood Insurance Program, which has had to borrow funds from the US Treasury and is currently USD $20.5 billion in debt.[47] Thus, strong economic growth is closely linked with appropriately managing and mitigating the risks of climate change while seizing the economic opportunities that come with transitioning to a carbon-neutral economy.[48] CRD rules aim to detail the methods for robust assessment and disclosure of climate-related risks to companies, which may inform future management and shareholder actions.

2. Climate Change and Securities Regulation

The 2015 United Nations Climate Change Conference (COP 21) led to the adoption of the *Paris Agreement*, currently the leading international climate change treaty.[49] Importantly, the private sector was more visible and active at COP 21 than at any previous COP.[50] The *Paris Agreement* was

44 Stephan Kahl, "Insured Losses Hit $120 Billion as Extreme Weather Spreads", *Bloomberg Law* (10 January 2023), online: <news.bloomberglaw.com/insurance/insured-losses-hit-120-billion-as-extreme-weather-upends-norms>.

45 *Ibid*.

46 Diane P Horn, "A Brief Introduction to the National Flood Insurance Program", *Congressional Research Service: In Focus* (last modified 29 March 2024) at 2, online (pdf): <sgp.fas.org/crs/homesec/IF10988.pdf>; Executive Office of the President of the United States, Office of Management and Budget, White Paper, *Climate Risk Exposure: An Assessment of the Federal Government's Financial Risks to Climate Change* (April 2022) at 9–10, 15, online (pdf): <whitehouse.gov/wp-content/uploads/2022/04/OMB_Climate_Risk_Exposure_2022.pdf>; Munich Reinsurance America, Inc, "Munich Re Continues its Flood Mitigation Work with Resilience Risk Transfer Solutions" (2020), online (pdf): <munichre.com/content/dam/munichre/mram/content-pieces/pdfs/Resilience-Risk-Transfer.pdf/_jcr_content/renditions/original./Resilience-Risk-Transfer.pdf>.

47 Horn, *supra* note 46 at 2.

48 Boushey, Kaufman & Zhang, *supra* note 33.

49 World Bank Group, "Private Sector - An Integral Part of Climate Action Post-Paris" (30 December 2015), online: <worldbank.org/en/news/feature/2015/12/30/private-sector-an-integral-part-of-climate-action-post-paris>; *Paris Agreement to the United Nations Framework Convention on Climate Change*, 12 December 2015, UN Doc FCCC/CP/2015/L.9/Rev/1 [*Paris Agreement*].

50 World Bank Group, *supra* note 49.

one of the first international legal instruments explicitly calling on private sector participation.[51] While the signatories of the *Paris Agreement* were sovereign nations, stakeholders acknowledged that translating the agreement into action would require the ingenuity, cooperation, and finance of the private sector.[52]

In 2015, the Financial Stability Board, an international body that monitors and makes recommendations about the global financial system, created the TCFD to support the goals of the *Paris Agreement*.[53] The TCFD was mandated to develop a framework (the TCFD Framework) to help public companies improve and increase reporting of climate-related financial information.[54] In 2017, the TCFD recommendations were released to "solicit decision-useful, forward-looking information" that could be included in mainstream financial filings, importable to various jurisdictions.[55]

GHG emissions and climate-related financial disclosures would provide investors information necessary to assess a company's exposure to and management of climate-related risks,[56] including both the physical risks from more frequent or severe weather events on businesses and the transition risks from moving to a low-carbon economy.[57] Currently, many developed market jurisdictions, including the UK, the US, the EU, Canada, and Australia, have specific climate-related disclosure rules or proposed rules that are designed with the TCFD recommendations in mind.[58]

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51 *Paris Agreement*, *supra* note 49. Article 6(8)(b) of the *Paris Agreement* reads: "Parties recognize the importance of integrated, holistic and balanced non-market approaches being available to Parties to assist in the implementation of their nationally determined contributions, in the context of sustainable development and poverty eradication, in a coordinated and effective manner, including through, inter alia, mitigation, adaptation, finance, technology transfer and capacity building, as appropriate. These approaches shall aim to: ... Enhance public and private sector participation in the implementation of nationally determined contributions".

52 World Bank Group, *supra* note 49.

53 MSCI, "Task Force on Climate-related Financial Disclosures (TCFD)" (last visited 2 March 2024), online: <msci.com/tcfd>.

54 Task Force on Climate-related Financial Disclosures, "About" (last visited 2 March 2024), online: <fsb-tcfd.org/about/>. The TCFD disbanded on December 15, 2023, after the International Sustainability Standards Board's inaugural standards—IFRS S1 *General Requirements for Disclosure of Sustainability-Related Financial Information and IFRS S2 Climate-related Disclosures*—were released, marking the fulfillment of the TCFD's remit. The Financial Stability Board requested that the International Sustainability Standards Board assume responsibility for monitoring progress on the state of climate-related financial disclosures by companies as of 2024. However, the TCFD disbandment does not change the mandatory requirements with respect to the TCFD recommendations.

55 TCFD, *supra* note 21 at iii.

56 *Ibid* at iv.

57 *Ibid* at 5–6.

58 Lois Guthrie & Luke Blower, "Corporate Climate Disclosure Schemes in G20 Countries after COP 21" (Climate Disclosure Standards Board, 2017) at 18–21, online (pdf): <jstor.org/stable/pdf/resrep15540.pdf?refreqid=fastly-default%3A755063e8cdc5f704cde96b827aa4a290&ab_segments=&origin=&initiator=&acceptTC=1>.

Recent years have seen more and more ESG investing.[59] In Canada, as in other developed market jurisdictions, securities regulators have long recognized the need for companies to provide environmental disclosures that would be material to investor decision making.[60] A robust body of literature exists articulating the various factors for companies to consider in making CRD.

First, climate change and GHG emissions disclosures are covered by rules requiring public companies to publish information about the risks they face.[61] The disclosures relate to materiality. As outlined in Part I(1), climate change risks have material costs that inform investment decisions. Materiality is the bedrock of securities law and regulation in developed market economies.[62] A fact passes the materiality threshold and must be disclosed if "there is a substantial likelihood that a reasonable person would consider it important".[63] Increasingly, almost half of the investor community believe that tackling climate change should be a top five priority for business.[64]

Second, companies may avoid climate litigation by disclosing material risks to investors.[65] Climate change securities litigation involves investors or regulators suing public companies for failing to properly disclose risks and liabilities they face from climate change.[66]

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59 Lauren Foster, "ESG Fund Assets Soared in 2021. They Still Have Room to Run.", *Barron's* (30 March 2022), online: <barrons.com/articles/esg-fund-assets-soared-in-2021-they-still-have-room-to-run-51648590122>.

60 See e.g. Sylvie Berthelot & Anne-Marie Robert, "Climate Change Disclosures: An Examination of Canadian Oil and Gas Firms" (2011) 5:2 Issues Soc & Envtl Account 106 at 107, DOI: <10.22164/isea.v5i2.61>.

61 *Ibid*. National Instrument 51-102 *Continuous Disclosure Obligations* (adopted by the OSC in 2004, as well as counterparts in other Canadian provinces) requires public companies to dedicate a portion of their MD&A to a description of the risks that can materially affect their future performance. See also *OSA*, *supra* note 15, s 75(1).

62 See e.g. David A Katz & Laura A McIntosh, "Corporate Governance Update: 'Materiality' in America and Abroad", *Harvard Law School Forum on Corporate Governance* (1 May 2021), online (blog): <corpgov.law.harvard.edu/2021/05/01/corporate-governance-update-materiality-in-america-and-abroad/>.

63 *Ibid*. See also US Securities and Exchange Commission, *SEC Staff Accounting Bulletin: No. 99 – Materiality*, 17 CFR Part 211, (12 August 1999) Release No SAB 99, 64 FR 45150 at 45151, online: <sec.gov/interps/account/sab99.htm>; Ontario Securities Commission, *National Policy 51-201 Disclosure Standards* (12 July 2002) 25 OSCB 4492 at 4499–4501, online (pdf): <osc.ca/sites/default/files/pdfs/irps/pol_20020712_51-201.pdf>.

64 PWC, Press Release, "Investors Continue to Prioritise Climate Action Despite Lacking Trusted Information" (6 December 2022), online: <pwc.com/gx/en/news-room/press-releases/2022/investors-continue-to-prioritise-climate-action-despite-lacking-trusted-information.html>.

65 Mary Condon, "Rethinking Enforcement and Litigation in Ontario Securities Regulation" (2006) 32:1 Queen's LJ 1 at 38.

66 Graham Erion, "The Stock Market to the Rescue? Carbon Disclosure and the Future of Securities-Related Climate Change Litigation" (2009) 18:2 RECIEL 164 at 164, DOI: <10.1111/j.1467-9388.2009.00638.x>.

Third, even in the absence of a legal rule to do so, firms have incentives to adopt a good corporate governance practice like voluntary CRD. Applying Anita Anand's earlier work on companies adopting governance practices voluntarily, early movers of good corporate governance practices have flexibility in designing their own disclosure reports.[67] Furthermore, firms respond to investors' desires for information to remain competitive.[68]

Securities regulatory norms have been enforced through both public and private actions. Scholars have debated whether it is necessary to have a public enforcer of securities law in the form of an administrative agency, or whether it is best to rely on private parties to enforce their claims against market participants in court.[69] Ultimately, both mechanisms need to exist to achieve effective securities regulation: public enforcement is aimed at deterring violations and creating incentives for compliance, whereas private enforcement is aimed at compensating stakeholders.[70] Achieving the proper balance between public and private securities enforcement is critical for promoting investor confidence and robust capital markets.[71]

Little to no literature exists on how NI 51-107 will be enforced due its ripeness. This article therefore builds on past theories of Canadian climate law and securities regulation to consider this question through a CRD lens.

3. The Need for Regulating Climate-Related Disclosure

Currently, "[s]ecurities legislation in Canada requires reporting issuers to disclose the material risks affecting their business and, where practicable, the financial impacts of such risks."[72] However, without clear guidance on what constitutes material climate change risks, and in the absence of robust enforcement of accurate reporting, issuers operate in a regulatory grey area that enables greenwashing.[73]

67 Anita Indira Anand, "An Analysis of Enabling vs. Mandatory Corporate Governance: Structures Post-Sarbanes-Oxley" (2006) 31:1 Del J Corp L 229 at 239.

68 *Ibid* at 241.

69 Condon, *supra* note 65 at 38; Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, "What Works in Securities Law?" (2006) 61:1 J Finance 1 at 1; Poonam Puri, "Securities Litigation and Enforcement: The Canadian Perspective" (2012) 37:3 Brook J Intl L 967 at 967.

70 Condon, *supra* note 65 at 1.

71 Puri, *supra* note 69 at 967.

72 CSA Staff Notice, August 2019, *supra* note 9 at 1.

73 As Canadians grow increasingly concerned about the environment and climate change, there is a higher demand for "green" products and services. However, there has also been a rise in "greenwashing," which is the use of false or deceptive marketing strategies and statements about environmental benefits. "This practice harms competition and innovation because consumers are being mislead and are therefore unable to make an informed purchasing decision": Competition Bureau Canada, "Environmental Claims and Greenwashing" (last modified 27 June 2024), online: <ised-isde.canada.ca/site/competition-bureau-canada/en/environmental-claims-and-greenwashing>.

Greenwashing undercuts the goal of ESG investing: to bolster the pace and scale of capital allocation needed to achieve tangible, long-term value, and transition to low-carbon economies.[74]

In this area, issuers' behaviours can range from innocent misunderstanding to intentionally misrepresenting climate-related risks. This results in variations in disclosure practices, with some issuers providing no disclosure at all, omitting necessary information, conveying misleading information, and/or leveraging boilerplate terms.[75] Indifference to climate change matters is potentially harmful to investors, who may be trading inaccurately priced securities that fail to account for climate change risks, which undermines confidence in capital markets and investor interests.[76]

Accurate and timely disclosures of current and past operating financial results and the corporate governance and risk management practices through which financial results are achieved are fundamental to assessing climate-related risks.[77] Thus, the current strategy around managing climate-related risks focuses on reducing information gaps to enable financial markets to price these risks.[78] This requires a two-step process: first, companies need to disclose material climate-related risks; second, the disclosure needs to be relevant, consistent, and comparable.

The number of companies reporting sustainability data has increased over the past decade amid the rise of socially conscious investing. By year-end 2019, 90 percent of companies in the S&P 500 index issued sustainability reports, an increase from about 20 percent in 2011.[79] In a September 2021 study prepared for the Toronto Stock Exchange (TSX), the percentage of Canadian corporate issuers listed on the S&P/TSX with dedicated ESG reports grew from 58 percent in 2019 to 71 percent in 2020.[80] The proportion of corporate issuers who released a dedicated ESG report was higher amongst the

74 OECD, *ESG Investing and Climate Transition: Market Practices, Issues and Policy Considerations* (Paris, France: OECD, 2021) at 3, online (pdf): <oecd.org/content/dam/oecd/en/publications/reports/2021/10/esg-investing-and-climate-transition_711f702e/7b321b7a-en.pdf>.

75 *Ibid* at 2–3.

76 Concerns over financial stability and market integrity "arise when asset prices adjust rapidly to reflect unexpected realizations of transition or physical risks." Additionally, while "markets are partly pricing in climate change risks... asset prices may not fully reflect the extent of potential damage and policy action required to limit global warming to 2°C or less." Without proper attention to climate change matters, some investors will have little to guard themselves from unexpected shocks in the capital markets: Grippa, Schmittmann & Suntheim, *supra* note 37 at 27–28.

77 TCFD, *supra* note 21 at ii.

78 Hugues Chenet, Josh Ryan-Collins & Frank van Lerven, "Finance, Climate-Change and Radical Uncertainty: Towards a Precautionary Approach to Financial Policy" (2021) 183:1 Ecol Econ 1 at 1, DOI: <10.1016/j.ecolecon.2021.106957>; CSA Consultation on NI 51-107, *supra* note 14 at 51–52.

79 Kristin Broughton & Mark Maurer, "Companies Could Face Pressure to Disclosure More ESG Data", *The Wall Street Journal* (6 December 2020), online: <wsj.com/articles/companies-could-face-pressure-to-disclose-more-esg-data-11607263201>.

80 Millani, *Millani's 5th Annual ESG Disclosure Study: A Canadian Perspective* (9 September 2021) at 2, online (pdf): <tsx.com/resource/en/2722>.

S&P/TSX60, growing from 73 percent in 2019 to 92 percent in 2020.[81] Most recently, the COVID-19 pandemic and Black Lives Matter (BLM) movement have spotlighted public companies' management of ESG issues in the US and Canada.[82] COVID-19 and BLM accentuated the importance of workforce, community, and customer relationships to a company's bottom line, increasing acknowledgement of the 'S' factor in assessing whether companies are prepared for future crises and unexpected events.

However, quantity is not the same as quality. In spring 2021, the CSA conducted a targeted review of current public disclosure practices of large Canadian issuers (Disclosure Review) from a diverse range of industries, primarily from the S&P/TSX, with respect to climate-related information.[83] The Disclosure Review revealed that only 59 percent of climate-related risks provided in issuers' continuous disclosures were "relevant, detailed, and entity specific, while the remaining risks were boilerplate, vague or incomplete".[84] The same review showed that while 68 percent of the risk disclosures provided a qualitative discussion of the related financial impacts, 25 percent did not address the financial impact at all, and no issuers quantified the financial impact of the identified risks.[85]

Further, the CSA notes a number of concerns about current CRDs, including that they may not be "complete, consistent, and comparable;" that "quantitative information is often limited and not necessarily consistent;" that "issuers may 'cherry pick' by reporting selectively against a particular voluntary standard and/or frameworks;" and that "sustainability reporting can be siloed and is not necessarily integrated into companies' periodic reporting structures."[86] These concerns underscore the fact that, without clear CRD rules, companies can strategically choose their reporting framework to produce a distorted picture.

Influential institutional investors like BlackRock and Vanguard publicly endorse Sustainability Accounting Standards Board (SASB) standards and TCFD recommendations to help standardize reporting made by the companies in which they invest.[87] However, information on climate reporting frameworks and standards exist from various other organizations, including the Global Reporting Initiative (GRI), the International Integrated Reporting Council, the Workforce Disclosure Initiative, the Carbon Disclosure Project, and the UN's Sustainable Development Goals.

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81 *Ibid*. The S&P/TSX60 consists of the 60 largest corporations by market capitalization in the S&P/TSX Composite Index.

82 Maia Gez et al, "ESG Disclosure Trends in SEC Filings" (13 August 2020), online: <whitecase.com/publications/alert/esg-disclosure-trends-sec-filings>.

83 CSA Consultation on NI 51-107, *supra* note 14 at 3–4.

84 *Ibid* at 4.

85 *Ibid*.

86 *Ibid* at 2.

87 BlackRock, "Our Fiduciary Approach to Sustainability and the Low-Carbon Transition" (last visited 2 March 2024), online: <blackrock.com/corporate/sustainability/our-approach-to-sustainability>; Vanguard, "Vanguard's Approach to Climate Risk" (last visited 25 April 2024), online: <corporate.vanguard.com/content/corporatesite/us/en/corp/climate-change.html>.

This multiplicity of information results in some issuers not knowing which frameworks and standards to follow or what to disclose.[88] Additionally, issuers are less constrained in their ability to greenwash reports to appeal to investors, secure reputational advantage, improve credit ratings, invoke business confidence, or inflate share prices. On average, large Canadian issuers reference nearly three third-party frameworks in their voluntary reports, with the GRI framework being the most common, followed by the SASB and TCFD recommendations.[89] In turn, stakeholders are challenged with assessing credit and market risks under frameworks that are often not directly comparable.[90]

Some stakeholders turn to ESG ratings as an alternative means for assessing companies' climate-related risks, but ESG ratings do not provide a complete picture.[91] CRD is no doubt inextricably linked with ESG investing.[92] Essentially, CRD often provide the inputs for ESG ratings. Third-party ESG raters use indices to produce ESG scores to rank public companies based on their ESG risks.[93] However, different indices use different inputs, resulting in ESG raters providing different rankings across firms and emphasizing different aspects of the companies' behaviours.[94]

For example, among leading ESG raters, Thomson Reuters has 186 metrics and sub-metrics, Morgan Stanley Capital International (MSCI) has 34, and Bloomberg over 120. Consequently, correlation of a company's scores across ESG providers is relatively low.[95] As a case in point, Refinitiv ranked Wells Fargo & Company in the top 10 percent of all 917 tracked banking services companies, while MSCI gave the bank an average rating, and Sustainalytics ranked them poorly.[96] The methodology used

88 World Economic Forum, *Toward Common Metrics and Consistent Reporting of Sustainable Value Creation* (Geneva: World Economic Forum, 2020) at 6, online: <www3.weforum.org/docs/WEF_IBC_ESG_Metrics_Discussion_Paper.pdf>; KPMG, *Frontiers in Finance* (May 2020) at 48, online (pdf): <assets.kpmg.com/content/dam/kpmg/lk/pdf/2020/06/frontiers-in-finance-issue-62-may-2020.pdf>.

89 CSA Consultation on NI 51-107, *supra* note 14 at 3–4.

90 KPMG, *supra* note 88 at 48.

91 David F Larcker et al, "ESG Ratings: A Compass without Direction" (2022) Rock Center for Corporate Governance at Stanford University, Working Paper, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=4179647>; Brian Tayan, "ESG Ratings: A Compass without Direction", *Harvard Law School Forum on Corporate Governance* (24 August 2022), online (blog): <corpgov.law.harvard.edu/2022/08/24/esg-ratings-a-compass-without-direction/>.

92 Tayan, *supra* note 91.

93 *Ibid*.

94 Jack M Mintz, "Jack M. Mintz: ESG Rankings are a Mug's Game", *Financial Post* (8 July 2021), online: <financialpost.com/opinion/jack-m-mintz-esg-rankings-are-a-mugs-game>.

95 Riccardo Boffo & Robert Patalano, *ESG Investing: Practices, Progress and Challenges* (Paris, France: OECD, 2020) at 27–28, online (pdf): <oecd-ilibrary.org/finance-and-investment/esg-investing_5504598c-en>.

96 Shane Shifflett, "How ESG Stocks Perform Depends on Who Ranks Them", *The Wall Street Journal* (11 June 2021), online: <wsj.com/articles/how-esg-stocks-perform-depends-on-who-ranks-them-11623403803>.

by some ESG raters assigns scores relative to competitors in the same industry, while others assess absolute risk based on a company's material exposure to ESG issues.[97]

The underlying reason for disparate outcomes is because while ESG ratings are intended to measure "ESG quality", ESG quality itself does not have a single agreed-upon definition.[98] Similar to the pitfall of there being no CRD rules, ESG ratings also follow no standardized methodology. Different index compositions lead to different results. A triangulation of ratings may paint a more robust picture, but that process may undermine the neatness of a rating. Overall, reliance on voluntary CRDs and ESG rankings ought to be temporary, as the information can be piecemeal, variable, and incommensurable.

II. Mapping Climate-Related Disclosures

The concerns outlined in the CSA's Disclosure Review regarding incommensurable reporting between issuers and, more broadly, across capital markets, are not necessarily unique to Canada. Many securities regulators in the Global North, including the UK, the EU, and the US, are attempting to harmonize reporting frameworks across capital markets.[99] Securities regulators are proposing CRD rules to improve the comparability of information, aligning their domestic markets with the global movement towards consistent and comparable standards.[100] Harmonization intends to "address costs associated with reporting across multiple disclosure frameworks, improve access to global markets, and facilitate an equal playing field for issuers."[101]

Currently, the TCFD recommendations (which provides the Disclosure Framework) and the International Sustainability Standards Board guidance (which provides baselines for sustainability disclosure by incorporating industry-based disclosure rules derived from the Sustainability Accounting Standards Board Standards) act as the benchmark for this Global North movement. Canada's NI 51-107 is also largely based on these disclosure standards.[102]

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97 *Ibid*. For an overview on leading ESG report and rating providers and their methodologies, see Betty Moy Huber & Michael Comstock, "ESG Reports and Ratings: What They Are, Why They Matter", *Harvard Law School Forum on Corporate Governance* (27 July 2017), online (blog): <corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/>.

98 Tayan, *supra* note 91.

99 Huw Jones, "UK Adopts International Climate Disclosures to Bolster Global Investor Appeal", *Reuters* (2 August 2023), online: <reuters.com/world/uk/uk-adopts-international-climate-disclosures-bolster-global-investor-appeal-2023-08-02/>.

100 Canadian Securities Administrators, News Release, "Canadian Securities Regulators Seek Comment on Climate-Related Disclosure Requirements" (18 October 2021), online: <securities-administrators.ca/news/canadian-securities-regulators-seek-comment-on-climate-related-disclosure-requirements/>.

101 *Ibid*.

102 *Ibid*.

1. NI 51-107: Canada's New Mandatory Climate-Related Disclosure Rules

The CSA recognizes the prevailing demand for mandatory CRD that provides "consistent, comparable, and decision-useful information to market participants".[103] Following the CSA's Disclosure Review, the CSA proposed Canadian CRD rules (CSA CRD Rules) in October 2021, through NI 51-107 and its companion policy.[104] The CSA CRD rules require reporting issuers to disclose material information that investors can use to inform their investments and voting decisions.[105] Specifically, the disclosure rules intend to:

- Improve issuer access to global capital markets by aligning Canadian disclosure standards with the expectations of international investors;
- Assist investors in making better informed investment decisions by enhancing CRD;
- Facilitate an "equal playing field" for all issuers through comparable and consistent disclosure; and
- Remove the costs associated with navigating and reporting to multiple disclosure frameworks and reduce market fragmentation that demands different levels of disclosures.[106]

The specific rules regarding the nature and form of disclosure are provided in Form 51?107A concerning governance, and in Form 51-107B with respect to strategy, risk management, metrics and targets, and GHG emissions. The CSA CRD Rules applying to all reporting issuers in Canada, with limited exceptions, are outlined in Table 1.[107]

103 CSA Consultation on NI 51-107, *supra* note 14 at 2.

104 The CSA requested feedback on NI 51-107 by January 17, 2022. For the proposed Companion Policy 51-107CP, see Annex B of NI 51-107.

105 CSA Consultation on NI 51-107, *supra* note 14 at 2.

106 *Ibid*.

107 NI 51-107 would apply to all reporting issuers, other than investment funds, issuers of asset-backed securities, designated foreign issuers, SEC foreign issuers, certain exchangeable security issuers and certain credit support issuers: CSA Consultation on NI 51-107, *supra* note 14 at 6.

Table 1: *High-Level Summary of the CSA CRD Rules*[108]

	Form 51 107A	Form 51 107B			
	Governance	**Strategy**	**Risk Management**	**Metrics & Targets**	**GHG Emissions**
When to disclose	Mandatory	Only if material	Only if material	Only if material	Comply or explain
What to disclose	The board's oversight of climate-related risks and opportunities. Management's role in assessing and managing climate-related risks and opportunities.	The climate-related risks and opportunities the issuer has identified over the short, medium, and long term. The impact of climate-related risks and opportunities on the issuer's businesses, strategy, and financial planning.	The issuer's processes for identifying and assessing climate-related risks. The issuer's processes for managing climate-related risks. How processes for identifying, assessing, and managing climate-related risks are integrated into the issuer's overall risk management.	The metrics used by the issuer to assess climate-related risks and opportunities in line with its strategy and risk management process, where such information is material. The targets used by the issuer to manage climate-related risks and opportunities and performance against targets, where such information is material.	Scope 1, Scope 2, and Scope 3 GHG emissions,* and the related risks or the issuer's reasons for not disclosing this information.
Where to disclose	Proxy Soliciting Management Information Circulars. If the issuer does not send circulars, then disclose in Annual Information Form (AIF). If issuer does not file an AIF, then disclose in the Management Discussion and Analysis (MD&A) section of the issuer's annual report.	AIF. If the issuer does not file an AIF, then in its annual MD&A.	AIF. If the issuer does not file an AIF, then in its annual MD&A.	AIF. If the issuer does not file an AIF, then in its annual MD&A.	AIF. If the issuer does not file an AIF, then in its annual MD&A.

108 CSA Consultation on NI 51-107, *supra* note 14 at 7–9, 21.

* The CSA is also consulting on an alternative approach requiring issuers to disclose only Scope 1 GHG emissions, with disclosure of Scope 2 and Scope 3 GHG emissions not being mandatory. Issuers would have to disclose either their Scope 2 and 3 GHG emissions and the related risks, or the issuer's reasons for not disclosing this information.

The CSA and SEC join the likes of securities regulators in the EU, Singapore, Japan, New Zealand/Aotearoa, and the UK by incorporating TCFD recommendations within their proposed CRD rules.[109] The TCFD recommendations provide a framework to evaluate material climate-related risks and opportunities by assessing their projected short-, medium-, and long-term financial impacts on issuers.[110] This framework is based on four core elements, with each element offering two to three recommendations to provide a structure for the assessment, management, and disclosure of climate-related financial risk.[111] A summary of the four core elements, as provided by the TCFD, is as follows:

1. **Governance:** Disclose the organization's governance around climate-related risks and opportunities.

2. **Strategy:** Disclose the actual and potential impacts of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning, where such information is material.

3. **Risk Management:** Disclose how the organization identifies, assesses, and manages climate-related risks.

4. **Metrics and Targets:** Disclose the metrics and targets used to assess and manage relevant climate-related risks and opportunities, where such information is material.[112]

The CSA CRD Rules align neatly with the TCFD elements and vary in only two of the TCFD's eleven recommendations. First, under "Strategy", the CSA CRD Rules do not require issuers to describe the resilience of the organization's strategy, considering different climate-related scenarios, including a 2 degrees Celsius or lower global warming scenario.[113] Second, under "Metrics and Targets", unlike the TCFD recommendations, the CSA CRD Rules do not mandate the disclosure of Scope 1, Scope 2, and, *if appropriate*, Scope 3 GHG emissions and related risk. Instead, the CSA CRD Rules require issuers to disclose their GHG emissions and related risks for Scopes 1, 2, *and* 3 or, in the alternative, explain the reasons for not disclosing this information.

109 Bruno Caron & Annafaye Dunbar, "Hey Canadian Issuers, Your Neighbour is Up to Something: Disclosure of Climate-Related Matters" (3 May 2022), online (blog): <millerthomson.com/en/insights/securities-practice-notes/disclosure-climate-related-matters/>.

110 US Securities and Exchange Commission, "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (March 2022) at 35, online (pdf): <sec.gov/rules/proposed/2022/33-11042.pdf> [SEC, Climate-Related Disclosures].

111 *Ibid*.

112 Task Force on Climate-related Financial Disclosures, "TCFD Recommendations" (last visited 23 April 2024), online: <fsb-tcfd.org/recommendations/>.

113 CSA Consultation on NI 51-107, *supra* note 14 at 7.

The CSA initially specified December 31, 2022, as the earliest date the CRD Rules would come into force, with the comment period ending early in 2022. However, given international developments in CRD and the vast volume of comment letters received, timelines for the final CSA CRD Rules have been pushed back.[114] In March 2022, the SEC proposed its own CRD rules (SEC CRD Rules) through "The Enhancement and Standardization of Climate-Related Disclosures for Investors".[115] In June 2023, the International Sustainability Standards Board (ISSB), which the International Financial Reporting Standards established, released general standards for the disclosure of sustainability-related financial information.[116]

Given the CSA's emphasis on the role of "international consensus" in its decision-making process, it will likely collaborate with other securities regulators, including the SEC and ISSB, to reconcile the CSA CRD Rules and support a "comprehensive global baseline of sustainability disclosures".[117] This collaboration ensures that, relative to the SEC CRD Rules, the CSA CRD Rules are neither too weak nor costly, facilitating efficient trading across capital markets.

Timelines for the publication of the final rules were also pushed back in the US. Previously, the SEC addressed debates about the definition and application of Scope 3 emissions disclosures and dealt with the fallout from the US Supreme Court's June 2022 decision in *West Virginia v EPA* that limited federal regulation of power plant emissions.[118] In a 6-3 decision, the Supreme Court held that the Clean Air Act did not give the EPA the authority to set emissions limits for existing power plants. The case limited the EPA's options for regulating GHG emissions in the power sector and, in retrospect, was a precursor to the flurry of litigation sparked by the finalization of the SEC CRD Rules.

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114 CSA, Regulators Consider Impact of International Developments, *supra* note 12.

115 SEC, Climate-Related Disclosures, *supra* note 110.

116 International Financial Reporting Standards, "General Sustainability-related Disclosures (last visited 12 March 2024), online: <ifrs.org/projects/completed-projects/2023/general-sustainability-related-disclosures/>. The December 2023 disbandment of the TCFD did not change the mandatory requirements with respect to the TCFD recommendations. At the time of writing, the Financial Stability Board had stated its intention to update the TCFD recommendations to reference the ISSB standards once the ISSB standards are available for use in the UK. This will likely result in the finalized CSA CRD and SEC CRD rules citing to the ISSB standard-equivalents of the original TCFD recommendations.

117 CSA, Regulators Consider Impact of International Developments, *supra* note 12, quoting Stan Magidson, CSA Chair and Chair and CEO of the Alberta Securities Commission ("Climate-related disclosure standards that elicit consistent and comparable disclosure for investors and that support a comprehensive global baseline of sustainability disclosures are a priority for the CSA. We are working towards disclosure requirements that support the assessment of sustainability-related risks, reduce market fragmentation and contribute to efficient capital markets while considering the needs and capabilities of issuers of different sizes.").

118 *West Virginia et al v Environmental Protection Agency et al*, 597 US 697 (2022); see also Zach Warren, "Upcoming SEC Climate Disclosure Rules Bring Urgency to ESG Data Strategy Planning", *Reuters* (30 January 2023), online: <reuters.com/legal/legalindustry/upcoming-sec-climate-disclosure-rules-bring-urgency-esg-data-strategy-planning-2023-01-30>.

2. NI 51-107 across the Canada-US Border

Unsurprisingly, the CSA CRD Rules must be cognizant of the SEC CRD Rules given the closeness of Canadian and US capital markets and the colossal volume of cross-border business and partnerships.[119] As previously mentioned, developed market jurisdictions broadly converge on the TCFD recommendations to provide their baseline reporting frameworks. This convergence means that reporting costs will be reduced when issuers disclose across developed market jurisdictions, and stakeholders will be better able to make cross-market comparisons.

Despite general acceptance of the TCFD recommendations, granular differences exist where the TCFD recommendations allow for discretion. The main differences between the proposed regulations in Canada and the US are the Scope 3 GHG emissions reporting and identification of reporting companies. However, these differences will not impact most Canadian public companies because the SEC CRD Rules apply only to domestic US and foreign private issuers that do not report through the multijurisdictional disclosure system.[120] Instead, these differences are more impactful for foreign companies looking in.

First, the TCFD recommends that companies "should provide their Scope 1 and Scope 2 GHG emissions independent of a materiality assessment, and, *if appropriate*, Scope 3 GHG emissions and the related risks."[121] The language of "if appropriate" allows policymakers to exercise discretion on reporting Scope 3 GHG emissions. Further, "organizations" is not specifically defined by the TCFD. With this guidance in mind, Canada's proposed rules require reporting issuers "to disclose Scope 1, Scope 2, *and* Scope 3 GHG emissions, and the related risks or the issuer's reasons for not disclosing this information."[122]

Currently, the proposed SEC CRD Rules require listed companies to not only disclose risks that are "reasonably likely to have a material impact on their business, results of operations, or financial condition," but also "to disclose information about its direct greenhouse gas (GHG) emissions (Scope 1) and indirect emissions from purchased electricity or other forms of energy (Scope 2)", as well as certain types of GHG emissions "from upstream and downstream activities in its value chain (Scope 3), *if material or if the registrant has set a GHG emissions target or goal* that includes Scope 3 emissions." [123] This rule is slightly different from the CSA CRD Rules, which require issuers to disclose their Scope 1, 2, and 3 emissions and related risks or explain their reasoning for not making such disclosures.

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119 Puri, *supra* note 69 at 969.

120 Jeff Bakker et al, "CSA Provides Update on Proposed Climate-Related Disclosure Rules" (24 October 2022), online: <blakes.com/insights/acvm-mise-a-jour-des-obligations-d-information-l>.

121 Task Force on Climate-related Financial Disclosures, "Metrics and Targets" (last visited 12 March 2024), online: <tcfdhub.org/metrics-and-targets/> [emphasis added].

122 CSA Consultation on NI 51-107, *supra* note 14 at 7–8 [emphasis added].

123 SEC, Climate-Related Disclosures, *supra* note 110 at 41–43 [emphasis added].

In addition to subtle differences in Scope 3 disclosures, the two countries differ on who is subject to reporting rules. Canada's proposed rules will "apply to all reporting issuers, other than investment funds, issuers of asset-backed securities, designated foreign issuers, SEC foreign issuers, certain exchangeable security issuers and certain credit support issuers."[124] Meanwhile, the US's proposed rules will apply to all registrants with existing reporting obligations, which, unlike the Canadian rules, will include some foreign issuers that do not already report through a disclosure system.[125] This provision will likely help address foreign companies that engage in jurisdiction shopping to reduce their reporting obligations and business costs, among other conveniences.

Overall, given that most investors support the core tenets of the new disclosure rules, many expect the CSA and SEC CRD Rules to be finalized and published by early 2024.[126] On March 6, 2024, the SEC adopted their proposed CRD Rules. Shortly thereafter, on March 15, 2024, a US appellate court granted an administrative stay of the SEC CRD Rules while the court considered one of many lawsuits challenging the Rules.[127] On April 4, 2024, the SEC announced that it would voluntarily stay the SEC CRD Rules pending judicial review.[128] For its part, the CSA continues to analyze the slight differences between NI 51-107, the TCFD recommendations, the SEC CRD Rules, and the ISSB Drafts.[129] Thus, both the CSA and SEC CRD Rules are in a holding pattern at present.

3. NI 51-107 within Canadian Borders

Reporting material climate risks is not novel when it comes to securities regulation in Canada. In April 2018, CSA Staff Notice 51-354 put publicly traded issuers on alert when the CSA found climate change-related risks to be a conventional business issue affecting issuers in a wide range of industries and not solely a sustainability or environmental issue.[130] Subsequently, some issuers already began to track their GHG emissions, including financed emissions, using the GHG Protocol Corporate Standard, a GHG emissions reporting standard explicitly endorsed by NI 51-107. This information is then disclosed in periodic filings as per NI 51-102 *Continuous Disclosure Obligations*. Further, some climate-related

124 CSA Consultation on NI 51-107, *supra* note 14 at 6.

125 SEC, Climate-Related Disclosures, *supra* note 110 at 276.

126 US Securities and Exchange Commission, "Climate Change Disclosure", RIN 3235-AM87 (Fall 2023), online: <reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=3235-AM87>.

127 Clark Mindock, "US Appeals Court Temporarily Pauses SEC Climate Disclosure Rules", *Reuters* (15 March 2024), online: <reuters.com/sustainability/us-appeals-court-temporarily-pauses-sec-climate-disclosure-rules-2024-03-15/>.

128 US Securities and Exchange Commission, "Order Issuing Stay: In the Matter of the Enhancement and Standardization of Climate-Related Disclosures for Investors" (4 April 2024), online (pdf): <sec.gov/files/rules/other/2024/33-11280.pdf>; Matthew Bultman, "SEC Climate Rule Pause Creates Path for Faster Court Decision", *Bloomberg Law* (8 April 2024), online: <news.bloomberglaw.com/securities-law/sec-climate-rule-pause-creates-path-for-faster-court-decision>.

129 Bakker et al, *supra* note 120.

130 Canadian Securities Administrators, *CSA Staff Notice 51-354: Report on Climate Change-related Disclosure Project*, OSC SN 51-354 (5 April 2018) 41 OSCB 2759 at 16, online (pdf): <osc.ca/sites/default/files/pdfs/irps/csa_20180405_climate-change-related-disclosure-project.pdf>.

information is already required in other securities regulations, including National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, National Instrument 52-110 *Audit Committees*, National Instrument 58-101 *Disclosure of Corporate Governance Practices*.[131]

More than ever before, NI 51-107 will likely make CRD part of many issuers' business-as-usual reporting if they do not already have a business case for CRD, since NI 51-107 integrates with current disclosure systems and practices. For example, CRD can consist of financial and non-financial information relevant to a company's periodic filings, including management's information circular, proxy-related material, and annual information forms. Therefore, with NI 51-107, an issuer can incorporate its GHG emissions data by referencing another document if the issuer clearly identifies the reference document or its excerpt and such information is filed on the System for Electronic Document Analysis and Retrieval (SEDAR) prior to or concurrently with NI 51-107 disclosure.

Importantly, NI 51-107 does not modify any of the aforementioned rules.[132] Instead, the CSA believes that the CRD rules contained in NI 51-107 will provide clarity to issuers on required disclosures alluded to by earlier instruments.[133]

III. Enforcing NI 51-107

The Ontario Securities Commission (OSC) previously described securities fraud as "one of the most egregious securities regulatory violations", and stated that "fraudulent activity causes direct and immediate harm to its victims, many of whom entrust a substantial portion of their savings to those who abuse that trust."[134] Arguably, the harm is magnified in the case of CRD-related fraud because it undermines the urgent need to take collective action to address the climate crisis. Issuers who commit fraud in their disclosure are not only abusing victims' trust but are doing so when the window to prevent irreversible damage from climate change is continuously shrinking, hence the global emphasis on 2030 and 2050 targets, as discussed further below.

It remains to be seen how NI 51-107 will be enforced by provincial securities regulators, or how the relevant legal provisions that provide NI 51-107 more bite may be treated. Part III(1) explores the regulatory and civil avenues provincial securities regulators can use to enforce NI 51-107 through sections 122(1)(c), 127, and 138.3 of Ontario's *Securities Act*. Part III(2) explores the criminal avenues for enforcement, namely through section 380 of the *Criminal Code*, and through the Supreme Court trilogy of *Olan*, *Théroux*, and *Zlatic*.[135] Part III(3) raises the potential issue of provincial securities regulators coordinating efforts to enforce NI 51-107, as opposed to federal securities regulation. Part III(4) reflects on whether NI 51-107 is the best disclosure framework.

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131 CSA Consultation on NI 51-107, *supra* note 14 at 3.

132 *Ibid*.

133 *Ibid* at 2.

134 *Meharchand* (*Re*), 2019 ONSEC 7 at para 51 [*Meharchand*]. In *Meharchand*, the Ontario Securities Commission found that "fraud is 'one of the most egregious securities regulatory violations'" because of these harms (at para 51).

135 *Olan*, *supra* note 18; *Théroux*, *supra* note 18; *Zlatic*, *supra* note 18.

Securities regulation falls within provincial or territorial jurisdiction.[136] Consequently, I examine Ontario's regulatory and civil avenues to enforce NI 51-107. The focus on Ontario is because it is home to a majority share of Canadian market participants, Canada's major stock exchange (the TSX), and Canada's largest capital markets regulator (the OSC).[137] Therefore, focusing on Ontario will set an important example of enforcement mechanisms for other provinces and territories.

1. Regulatory and Civil Enforcement

I anticipate section 127 of the *OSA* (related to public interest orders) and section 138.3 (related to statutory civil liability) will be the main provisions used to address *ex ante* and *ex post* damages for climate-related misrepresentation. As demand for climate action heightens, one of two behaviours from issuers is foreseeable—issuers will either enhance CRD to meet the "reasonable investor" and "market impact" standards of materiality, or issuers, depending on the type of offering and timing, will face public interest orders by securities tribunals or class actions for misrepresentation by activist shareholders.

As NI 51-107 is couched in existing securities rules and regulatory frameworks, enforcement will likely be through existing regulatory and civil enforcement mechanisms. Once a company becomes a reporting issuer, it is subject to continuous disclosure obligations, which fall into two categories: periodic disclosure of material facts and timely disclosure of material changes.[138] The periodic disclosure obligations for material facts are triggered by one of two materiality standards: "move-the-market" or "market impact", and "reasonable investor". Periodic disclosure must be made at regular intervals, typically through the regular provisions of documents such as proxy circulars, financial statements, and insider trading reports. In these regularly issued documents, companies must disclose all material facts.

Meanwhile, timely disclosure obligations are imposed only when there has been a material change in the issuer's affairs.[139] Since NI 51-107 contemplates disclosures in Annual Information Forms (AIFs) and Management Discussion and Analysis (MD&A) sections within a company's annual report, climate-related risks likely qualify as material facts, not necessarily material changes. Under section 1(1) of the *OSA*, "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities" is considered to be material.[140]

When an issuer fails to make the required disclosure of material facts or misstates them, then the issuer may face liability in various forms set out in the *OSA*.[141] I will not address the possibility of quasi-criminal liability for misrepresentation, mainly because there have been no instances of the

136 *Reference re Securities Act*, 2011 SCC 66.

137 Government of Ontario, Ministry of Finance, "Ontario's Capital Markets" (last modified 22 April 2022), online: <ontario.ca/page/ontarios-capital-markets>.

138 *Theratechnologies Inc v 121851 Canada Inc*, 2015 SCC 18 [*Theratechnologies*].

139 *Ibid*.

140 *OSA*, *supra* note 15, s 1(1).

141 *Ibid*, ss 127 (regulatory liability), 122(1)(c) (quasi-criminal liability), 138.3 (statutory civil liability).

OSC commencing an action for that purpose. The OSC has historically refrained from exercising its quasi-criminal powers, with only seven instances reported in 2022, each resulting in fraud charges.[142] In the last three years, only two quasi-criminal proceedings resulted in jail terms.[143] Though section 122(1)(c) is a possible avenue to bring an action against a company for climate-related fraud; the OSC will more likely turn to section 127 public interest orders, or shareholders will resort to class action lawsuits under section 138.3 for improper CRD.

Regulatory liability can arise from a failure to meet the reasonable investor standard. The reasonable standard asks if a reasonable investor's decision to buy, sell, or hold securities of the issuer would likely be influenced or changed if the information in question was omitted or misstated.[144] If so, then the information is likely material. The regulatory liability under the reasonable investor standard is founded on *OSA*, section 127(1) public interest jurisdiction. The OSC's public interest jurisdiction is animated in its purposes, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair, efficient and competitive capital markets and confidence in capital markets".[145]

Civil liability can arise from a failure to meet the move-the-market standard. The move-the-market standard asks if the information would be reasonably likely to affect the market price or value of the security.[146] Civil liability for misrepresentation in continuous disclosure documents can be established through section 138.3 of the *OSA*, which provides a statutory cause of action to claim damages, based on the common law tort of negligent misrepresentation, concerning shares trading in the secondary market.

Securities regulators impose these two standards because they serve different purposes. Section 127(1) is a regulatory provision, where the orders or sanctions are preventive in nature and prospective in orientation, rather than punitive. Thus, as the Supreme Court of Canada (SCC) found in *Asbestos*, "s. 127(1) cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals."[147] Civil liability is appropriately based on

142 Ontario Securities Commission, *Annual Report 2021-2022: Responding to Change, Preparing for the Future* (Toronto: Ontario Securities Commission, 2023) at 37, online (pdf): <osc.ca/sites/default/files/2023-07/Publications_rpt_2022_osc-annual-rpt_0.pdf>.

143 Lawrence E Ritchie, Hannah Davis & James Smith, "Tools of the Trade: OSC Criminal and Quasi-criminal Charges Result in Jail Terms for Convicted Securities Fraudsters" (20 December 2021), online (blog): <osler.com/en/blogs/risk/december-2021/tools-of-the-trade-osc-criminal-and-quasi-criminal-charges-result-in-jail-terms-for-convicted-secur>.

144 *Ontario Securities Commission v Biovail Corporation et al* (30 January 2009), 32 OSCB 1094 (settlement hearing), online (pdf): <osc.ca/sites/default/files/pdfs/proceedings/rad_20090126_biovail.pdf>.

145 *OSA*, *supra* note 15, s 1.1.

146 *Re Rex Diamond Mining Corporation et al* (2 December 2009), online (pdf): <osc.ca/sites/default/files/pdfs/proceedings/rad_20091202_rexdiamond.pdf>.

147 *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 45 [*Asbestos*].

the move-the-market standard, since only a market impact can cause damages. In *Danier*, the SCC discussed that a failure to disclose under sections 56 to 58 of the *OSA* imposes civil liability under section 130(1), if the omission amounts to a material change.[148]

Similar to section 130, sections 138.1 to 138.14 establish a presumption that investors relied upon a misrepresentation if they bought or sold their shares between its publication and when it was publicly corrected.[149] If liability is found based on this misrepresentation in the secondary market, then damages are calculated pursuant to sections 138.5 to 138.7, which considers the lesser of "the difference between the average price paid for those securities ... and the price received upon the disposition of those securities"; versus "the number of securities that the person disposed of, multiplied by the difference between the average price per security paid for those securities."[150]

The OSC is more concerned with good disclosure by a particular issuer and fostering improved disclosure practices across issuers annually, not merely with disclosure that causes damages. Thus, the reasonable investor standard of materiality supplements the move-the-market standard and establishes a lower threshold for materiality. The OSC acknowledged that it is up to the courts, not securities regulators, to punish past conduct. Meanwhile, securities regulators target, to the best of their abilities, "future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient."[151] This role was affirmed in *Asbestos*, where the SCC held that securities regulators "should consider the protection of investors and the efficiency of, and the public confidence in, capital markets generally."[152] The SCC further stated that "[t]he permissive language of s. 127(1) expresses an intent to leave it for the OSC to determine whether and how to intervene in a particular case" with this purpose in mind.[153]

The reasonable investor standard is broader and captures more information than the move-the-market standard. A statement important to an investor in making an investment decision may not necessarily significantly affect the market price or value of a security. Consequently, section 127(1) can be used for actions that do not amount to breaches of the statutory misrepresentation standard for disclosure but that are contrary to public interest.[154] This distinction is fundamental for CRD

148 *Kerr v Danier Leather Inc*, 2007 SCC 44 at paras 38, 41.

149 *OSA*, *supra* note 15, ss 138.1–138.14.

150 *Ibid*, s 138.5(1).

151 *Re Mithras Management Ltd* (1990), 13 OSCB 1600 at 1610–11 [*Mithras*].

152 *Asbestos*, *supra* note 147 at para 45.

153 *Ibid* at para 39.

154 *Mithras*, *supra* note 151 at 1610–11. The Commission states that "the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all."

proponents because failure to disclose or misstate climate-related targets under Form 51-107B, such as interim goals at 2030 on route to net-zero by 2050, might not yet move the market because 2030 and 2050 are so far away.

Relying more heavily on the reasonable investor standard is not necessarily a shortcoming, because the move-the-market standard is likely not a good fit for enforcing CSA CRD Rules for four reasons. First, the decades-long time lag between GHG emissions causing climate change effects may make accounting for damages impossible. A climate-related statement made today by an issuer may have a market impact forty years later when the statement is found to be untrue and climate-related damages driving investor losses transpire. In this hypothetical, it is unclear how to calculate damages across forty years while controlling for confounding variables. Second, there are difficulties in knowing what gains were made from the marketing and reputational benefits of going "green", unlike comparing the profit margins for a drug company before and after regulatory approval of a new drug. Third, some climate-related damages are incommensurable. Contrary to the efficient market hypothesis, the depreciation of an issuer's securities might not reflect all value-relevant information available to the market after the untrue statement is brought to light. In turn, what shareholders will be getting for damages might not accurately reflect the value of the securities in terms of environmental costs. Fourth, the shareholders who will be rewarded damages are likely not the original shareholders who made investment decisions based on the statement that was made forty years ago.

While the reporting issuer may not face a class action lawsuit for failing to disclose or misstating their Form 51-107B rules, the OSC may pursue the issuer for a section 127(1) proceeding based on the disclosure not meeting the reasonable investor standard. Regulatory enforcement can promote compliance with the CRD Rules, prevent harms from occurring, and avoid the problem of quantifying damages from diffuse harms. With a lower threshold for liability, I envision regulatory enforcement of NI 51-107 to come before public interest enforcement.

Where CRD does not meet the reasonable investor standard, the OSC can still make one or more orders listed under section 127(1), including an order that a release, report, informational circular, or any other document be provided by a market participant to a person or company or be amended, an order to pay an administrative penalty of not more than CAD $1 million, and an order to disgorge to the OSC any amounts obtained as a result of non-compliance. The flexibility in choosing to intervene and make orders with terms in the public interest makes section 127(1) a powerful enforcement tool, allowing the OSC to regulate markets by signalling a regulatory position on certain market practices without any rule or express legislative prohibition.[155] With so many tools, the OSC must proactively enforce NI 51-107 for the CRD Rules to be meaningful.

155 See e.g. *Ontario Securities Commission v Richard Bruce Moore* (8 April 2013) (settlement agreement) at paras 30–31, online (pdf): <osc.ca/sites/default/files/pdfs/proceedings/set_20130408_moorerb.pdf>.

2. Criminal Enforcement (*Olan*, *Théroux*, and *Zlatic*)

Criminal enforcement of NI 51-107 will likely be less frequent than civil enforcement, largely due to criminal law's higher burden of proof and the limitations in criminal penalties. Nevertheless, dishonest acts of selectively framing, reporting, and omitting climate risks and deprivation of material information may give rise to criminal liabilities. Investigating and litigating alleged securities fraud "represent[s] an attempt to ensure that investors have access to critical information about the true value of their holdings."[156]

In Canada, fraud can be prosecuted under the *Criminal Code* or under provincial *mens rea* offences. Fraud is defined in section 380 of the *Criminal Code*.[157] The legal test for fraud in criminal law is outlined in the SCC trilogy of *Olan*, *Théroux*, and *Zlatic*. Fraud is also defined in section 126.1 of the *Securities Act*.[158]

To establish fraud, the prosecution must prove the existence of a dishonest act and deprivation, or risk of deprivation, and that the defendant knew about the prohibited act and the risk of, or actual deprivation.[159] In *Olan*, Dickson J clarified that the *actus reus* of the offence has two elements: "dishonesty" and "deprivation".[160] Subsequently, *Théroux* recognized that *Olan* broadened the law of fraud by overruling previous authority that characterized deceit as an essential element of fraud and clarifying that economic loss was not essential to the offence:[161] "the imperilling of an economic interest is sufficient even though no actual loss has been suffered."[162]

The dishonest act is established by proof of deceit, falsehood, or other fraudulent means. In contrast, deprivation is shown by "proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim" caused by the dishonest act.[163] Dishonesty connotes "an underhanded design which has the effect, or which engenders the risk, of depriving others of what is theirs."[164] Dishonest conduct is that "which ordinary, decent people would feel was discreditable as being clearly at

156 Roshaan Wasim, "Corporate (Non)Disclosure of Climate Change Information" (2019) 119:5 Colum L Rev 1311 at 1311.

157 See *Criminal Code*, *supra* note 17, s 380(1): "Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service".

158 See *OSA*, *supra* note 15, s 126.1(1): "A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know, (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security, derivative or underlying interest of a derivative; or (b) perpetrates a fraud on any person or company".

159 *Olan*, *supra* note 18 at 1182.

160 *Ibid* at 1182–88.

161 *Théroux*, *supra* note 18 at para 14.

162 *Ibid*.

163 *Théroux*, *supra* note 18 at para 13.

164 *Zlatic*, *supra* note 18 at para 19.

variance with straightforward or honourable dealings".[165] Deceit and falsehood can consist of either positive acts or omissions. Dishonest acts perpetrated through other fraudulent means encompass a wide range of dishonest commercial dealings, including "non-disclosure of important facts".[166] In other areas of law, nondisclosure of important facts can include silence, omissions, half-truths, and lies.[167]

NI 51-107 outlines what information is required for disclosure, such that depriving stakeholders of relevant GHG emissions data may amount to fraud. NI 51-107 allows securities regulators to scrutinize the CRD from reporting issuers. In turn, issuers actively greenwashing their reports to appeal to investors and other stakeholders, omitting material climate-related risks, or mislabelling such risks with boilerplate language can be found to have committed dishonest acts.

Deprivation can also arise from investors having lost money from undisclosed or misstated climate-related risks by relying on the issuer's misrepresentations, or having lost the opportunity to invest in a climate-conscious corporation. This line of thinking follows *Théroux*, which recognized that an investor who is falsely promised profits is also the victim of deprivation. The creation of a false certainty as to attainable profits results in deprivation because the victim gives up property in vain, which they could have invested elsewhere.[168]

The *mens rea* of fraud is established by "proof of subjective knowledge of the prohibited act, and by proof of subjective knowledge that the performance of the prohibited act could have as a consequence the deprivation of another".[169] Deprivation may consist of knowing that the victim's pecuniary interests are at risk.[170] Where the conduct and knowledge are established, the accused is guilty whether they intended the prohibited consequence or was reckless as to whether it would occur.[171]

As the doctrine of wilful blindness imputes knowledge,[172] once NI 51-107 is in force, issuers can no longer claim ignorance over what to include in their CRD and what reporting frameworks to use. NI 51-107 stipulates CRD obligations for reporting issuers in Canada. Further, its phased-in implementation gives issuers sufficient notice to know or reasonably ought to know about the new reporting rules. For instance, had the CSA CRD Rules come into force before the end of 2023, based on the original published guidance, non-venture issuers would have provided their initial disclosures

165 *Ibid*.

166 *Théroux*, *supra* note 18 at para 15.

167 For discussions on nondisclosure of important facts concerning contract law and the duty of honest performance, see *CM Callow Inc v Zollinger*, 2020 SCC 45; for discussions on nondisclosure of important facts concerning professionalism and ethics, see *Ahuja (Re)*, 2017 LSBC 26.

168 *Théroux*, *supra* note 18 at para 21.

169 *Ibid* at para 24.

170 *Ibid*.

171 *Ibid* at para 25.

172 *R v Briscoe*, 2010 SCC 13 at para 21.

under the rules in respect of the year ending December 31, 2024, in 2025.[173] Over time, NI 51-107 allows Canadian securities regulators to detect and crackdown on climate-related misreporting by providing a yardstick for proper CRD.

3. Is Canada too provincial?

Canada is unique in having provincial securities regulators. While the US has the SEC, the UK has the Financial Conduct Authority, and Australia has the Australian Securities and Investments Commission, the CSA is the body closest to a federal securities agency in Canada. Yet, the CSA is not analogous to the SEC.[174] The CSA is the umbrella organization for all ten provincial and three territorial securities regulators, and is primarily responsible for developing a nationwide harmonized approach to securities regulation.[175]

Provincial and territorial securities regulators operate independently. Each province has its own *Securities Act*, conducts its own investigations, and answers to its own tribunal. The analysis in Part III(1) focused on Ontario, the OSC, and the *OSA*, but similar agency and regulatory configurations exist in each province, such as the British Columbia Securities Commission and its *Securities Act*,[176] and Quebec's Autorité des marchés financiers and its *Securities Act*.[177]

Unlike our developed market counterparts, enforcement of CRD rules must be undertaken through the shared efforts of provincial and territorial securities regulators. The CSA can certainly continue to play a facilitating and coordinating role, bringing provincial and territorial securities regulators together to operationalize consistent regulations across Canada.[178] Yet, each region's regulators and stakeholders are ultimately responsible for demanding compliance with NI 51-107. How regional enforcement of NI 51-107 compares to federal enforcement is unclear. Arguably, Canadian securities regulators generally do not have the same bite as the SEC.[179]

In *Reference re Securities Act*,[180] the SCC dealt with the issue of whether the power to legislate securities lies with the federal government. The Court considered the argument that a single national regulator "provides for a single set of laws and rules designed to permit uniform regulation and

173 CSA Consultation on NI 51-107, *supra* note 14 at 30.

174 Puri, *supra* note 69 at 967.

175 Canadian Securities Administrators, "Who We Are" (last visited 12 March 2023), online: <securities-administrators.ca/about/who-we-are/>

176 *Securities Act*, RSBC 1996, c 418.

177 *Securities Act*, RSQ 1982, c 48.

178 Canadian Securities Administrators, "Who We Are", *supra* note 175.

179 Tara Gray & Andrew Kitching, *Reforming Canadian Securities Regulation*, PRB 05-28E (Ottawa: Library of Parliament, 2005) at 16, online (pdf): <publications.gc.ca/Collection-R/LoPBdP/PRB-e/PRB0528-e.pdf>; Tyler Hamilton, "Why the OSC So Rarely Gets Its Man", *Toronto Star* (1 December 2007), online: <thestar.com/business/why-the-osc-so-rarely-gets-its-man/article_0049fb79-af85-51b3-ac78-3711db377886.html/>.

180 *Reference re Securities Act*, 2011 SCC 66.

enforcement on a national basis, thus fostering the integrity and stability of Canada's capital markets at a national level."[181] On the other hand, the Court also recognized that "local regulation manifests itself most prominently in areas of local enforcement and policy."[182] Ultimately, the SCC did not decide the issue based on the best option from a policy perspective.[183] Instead, it focused on the text of the constitutional powers under sections 91 and 92 of the *Constitution Act, 1867*.[184] The Court ruled that the federal government's proposed national security regulator was unconstitutional, explaining Canada's current set up of regional securities regulators.[185]

Following the decision in *Reference re Securities Act*, some scholars doubted the effectiveness of provincial enforcement. A key concern is a province's power to leave an interprovincial regime at any time, undermining the regime's ability to address collective concerns.[186] For example, the possibility that the OSC or the Alberta Securities Commission fails to enforce NI 51-107, dropping below the level of support shown by the CSA, can undermine the effectiveness and purpose of CRD rules.

Another fundamental concern is that provincial regulators lack credibility in enforcement.[187] In one comparative study looking at SEC and the OSC enforcement data, the authors concluded that "the enforcement in Ontario was pathetic."[188] Professor Poonam Puri describes Canadian securities regulators as "assum[ing] a low profile in their securities enforcement activities and emphasize deterrence over punitive sanctions... foster[ing] a belief that Canada is lax in comparison to the United States".[189] Where securities regulators have begun to rely heavily on deterrence as the guiding principle for public interest-based orders, scholars have noted concerns about bias in enforcement decisions and in the severity of punishments.[190] Therefore, while there are legal avenues to enforce NI 51-107 and probe into CRD, there is reason to be concerned about whether provincial securities regulators will go far enough. Amid our climate crisis, Canadian securities regulators cannot delay giving teeth to NI 51-107.

181 *Ibid* at para 30.

182 *Ibid* at para 52.

183 *Ibid* at para 90.

184 *Ibid*.

185 *Ibid* at paras 128–29.

186 See e.g. Dee Pham, "*Reference re Securities Act*: What are the Remaining Options for a National Securities Regime?" (2013) 44:3 Ottawa L Rev 561.

187 Keith Marquis, "'Responsive' Securities Regulation: An Assessment of the Enforcement Practices of the Ontario Securities Commission", Regulatory Governance Initiative, Regulation Papers (1 October 2009) at 17, online: <ssrn.com/abstract=1532366>.

188 Utpal Bhattacharya, "Enforcement and its Impact on Cost of Equity and Liquidity of the Market" (1 May 2006) at 22, online: <ssrn.com/abstract=952698>; Hamilton, *supra* note 179.

189 Puri, *supra* note 69 at 979.

190 Condon, *supra* note 65 at 22.

One way to address the potential weakness of public or OSC enforcement is to promote private or stakeholder-led enforcement mechanisms.[191] Legal scholar Mary Condon finds that public and private mechanisms may be interdependent and can together achieve robust securities regulation.[192] Condon advocates for both because their aims differ: public enforcement is about punishing market actors or producing markets that operate with integrity, while private enforcement is about compensating the investors.[193] Puri also sees the greatest value in a regulatory system that allows public and private enforcement to work together with an ultimate common objective.[194] Thus, all regulatory, civil, and criminal enforcement options should be explored over time to bolster the effectiveness of NI 51-107.

As mentioned in Part I(1), transition risks include reputational risks and legal and litigation risks, each associated with some business costs. Businesses often use cost-benefit analysis to compare the projected or estimated costs and benefits associated with the decision.[195] In other words, business costs must rise to a certain threshold for an action to make "business sense". The Honourable Anita Anand, legal scholar and current Member of Parliament and President of the Treasury Board, previously noted this rational behaviour in discussing voluntary good corporate governance practices:

> [F]irms may see proposed regulation as a fait accompli and move to implement the proposed rules ... however ... firms would be unlikely to implement standards voluntarily if the costs of doing so exceed the net benefits. So simply attempting to comply with impending regulation seems a plausible but insufficient explanation of firms' voluntary behaviour.[196]

Part of why enforcement of NI 51-107 is important is because enforcement increases the transitional risk costs for reporting issuers. Enforcement needs to be sufficient for compliance to make business sense.

After NI 51-107 comes into effect, a study should examine how securities regulators manage NI 51-107 across the country. This article leaves unanswered the question of whether the costs associated with the various risks flowing from possible regulatory, civil, and criminal enforcement actions will be high enough to nudge companies into good faith CRD and overall compliance with NI 51-107.

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191 *Ibid* at 4.

192 *Ibid* at 44.

193 *Ibid* at 4.

194 Puri, *supra* note 69 at 1010.

195 Tim Stobierski, "How To Do a Cost-Benefit Analysis & Why It's Important", *Harvard Business School* (5 September 2019), online (blog): <online.hbs.edu/blog/post/cost-benefit-analysis>.

196 Anand, *supra* note 67 at 239.

4. The Future of NI 51-107 and its Alternatives

Getting GHG to net zero by 2050 is an increasingly common corporate goal.[197] Many prominent reporting issuers in Canada have pledged net zero emissions between 2030 and 2050. In 2021, six of Canada's largest banks joined the Net-Zero Banking Alliance. Also in 2021, Air Canada announced its "Leave Less" climate action plan for net zero by 2050, with the interim goals of "30 percent GHG net reductions from ground operations compared to … [the] 2019 baseline" and "20 percent GHG net reductions from air operations by 2030".[198] As the interim dates approach and companies' targets come to the limelight, there will be a stronger case for stakeholders to claim misrepresentations under the move-the-market standard. This is because those future stakeholders will be closer to the market-moving issues and living more intimately with the exacerbated environmental effects related to the misrepresentation.

Essentially, to keep global warming to no more than 1.5 degrees Celsius and curb climate catastrophe, as called for in the *Paris Agreement*, emissions need to be reduced by 45 percent by 2030 and reach net zero by 2050. With 2030 often cited by the United Nations as the year when climate changes become irreversible, shareholders will increasingly demand CRD and base their investment decisions on a company's climate risk mitigation or adaption strategies as the benchmark approaches.

However, making net zero pledges and disclosing Scope 1, 2, and 3 emissions is not a universal corporate practice. Many less prominent issuers are overwhelmed by CRD rules and do not necessarily have the internal infrastructure to report efficiently or effectively.[199] At the end of 2022, only 41.6 percent of S&P/TSX Composite Index companies provided any Scope 3 disclosures.[200] This reality raises the question of whether the rules under NI 51-107 are appropriate.

By having NI 51-107 apply to all reporting issuers with some exceptions, the OSC will be triggering a plethora of CRD. This raises the risk that shareholders will be buried "in an avalanche of trivial information," the import of which may not be clear to many, and the presentation and content of which will be novel—"a result that is hardly conducive to informed decisionmaking."[201] Worries about burdening smaller issuers and generating excessive disclosure may be remedied by limiting the scope of reporting issuers by company size, or to GHG-intensive industries.

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197 Jeffrey Jones, "Which Canadian Companies Have Pledged Net Zero Carbon Emissions, and By When?", *The Globe and Mail* (10 April 2021), online: <theglobeandmail.com/business/article-net-zero-emissions-pledges-by-canadian-companies/>.

198 Air Canada, *Citizens of the World: 2021 Corporate Sustainability Report* (Air Canada, 2021) at 73, online (pdf): <aircanada.com/content/dam/aircanada/portal/documents/PDF/en/corporate-sustainability/2021-cs-report.pdf>.

199 Warren, *supra* note 118.

200 Sean Cleary & Shuyi Hui, *An Update on Canadian Corporate Performance on GHG Emissions Disclosures and Target Setting* (Queen's University, Institute for Sustainable Finance: May 2022) at 9, online (pdf): <smith.queensu.ca/centres/isf/pdfs/tsx-emitters-report-2022.pdf>.

201 *Theratechnologies*, *supra* note 138 at para 55.

To deal with the potential issue of information overload, the UK requires mandatory TCFD-aligned CRD only for its largest companies and financial institutions. From April 2022, over 1,300 of the largest UK-registered companies and financial institutions must disclose climate-related financial information on a mandatory basis.[202] While this number of reporting registrants seems quite high, it is narrow in scope, considering that the Financial Conduct Authority sets specific standards for around 17,000 registrants.[203] CRD rules only apply to UK-registered companies with securities admitted to trading on a UK-regulated market with more than 500 employees and/or a turnover of more than £500 million.[204] In comparison, the OSC oversees 2,954 public companies.[205] A narrower scope of reporting issuers under NI 51-107 can reduce the volume of CRD for the OSC, making it easier for the OSC to investigate filings and stakeholders to compare meaningful CRD, access decision-useful information, and engage with companies generating the greatest climate-related risk. This targeted approach may also reduce the compliance burden for smaller companies.

Another method for streamlining reporting under NI 51-107 is to target reporting by industry. Having NI 51-107 apply only to large GHG emitting industries or requiring additional disclosures from carbon-intensive issuers, such as mining and fossil fuel businesses, could mitigate overall compliance burdens and promote a greater sense of fairness. The OSC already imposes additional industry-specific disclosure rules on the mining, oil and gas, and cannabis industries through National Instrument 43-101 *Standards of Disclosure for Mineral Projects*,[206] National Instrument 51-101 *Standards of Disclosure for Oil & Gas Activities*,[207] CSA Staff Notice 51-357 Staff Review of Reporting Issuers in the Cannabis Industry,[208] and CSA Staff Notice 51-352 (Revised) Issuers with US Marijuana-Related Activities.[209]

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202 United Kingdom, Department for Business, Energy & Industrial Strategy, *Mandatory Climate-related Financial Disclosures by Publicly Quoted Companies, Large Private Companies and LLPs* (February 2022), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056085/mandatory-climate-related-financial-disclosures-publicly-quoted-private-cos-llps.pdf>.

203 United Kingdom, Financial Conduct Authority, "About the FCA" (last modified 26 April 2024), online: <fca.org.uk/about/what-we-do/the-fca>.

204 United Kingdom, Department for Business, Energy & Industrial Strategy, *supra* note 202 at 7.

205 Ontario Securities Commission, "About Us" (last visited 31 March 2024), online: <osc.ca/en/about-us>.

206 *Standards of Disclosure for Mineral Project*s, OSC NI 43-101, (2011) 34 OSCB 7043, online (pdf): <osc.ca/sites/default/files/pdfs/irps/ni_20160509_43-101_mineral-projects.pdf>.

207 *Standards of Disclosure for Oil and Gas Activities*, OSC NI 51-101, (2003) 26 OSCB 6615, online (pdf): <osc.ca/sites/default/files/pdfs/irps/rule_20030926_51-101_rule.pdf>.

208 Canadian Security Administrators, *CSA Staff Notice 51-357: Staff Review of Reporting Issuers in the Cannabis Industry*, OSC SN 51-357, (10 October 2018) 41 OSCB 7877, online (pdf): <osc.ca/sites/default/files/pdfs/irps/ csa_20181010_51-357_staff-review-reporting-issuers-cannabis-industry.pdf>.

209 Canadian Security Administrators, *CSA Staff Notice 51-352 (Revised): Issuers with U.S. Marijuana-Related Activities*, OSC SN 51-352, (8 February 2018) 41 OSCB 1273, online (pdf): <osc.ca/sites/default/files/pdfs/irps/ csa_20180208_51-352_marijuana-related-activities.pdf>..

If the purpose of securities regulation is indeed to protect investors from unfair, improper, or fraudulent practices and contribute to reducing systemic risks, disclosure rules must be manageable to support those ends. NI 51-107's scope may be too wide and not calibrated to target the most significant issuers. Worryingly, the colossal amount of CRD may not all be useful to stakeholders, and small- to medium-sized issuers may be overburdened.

Conclusion

As of July 2021, Canada beat the US and the EU as the world's fastest growing market for ESG assets.[210] Climate-related securities fraud will concern global ESG assets that are tracked to exceed USD $53 trillion by 2025, representing more than a third of the USD $140.5 trillion in projected total assets under management.[211] In Canada, ESG assets grew from CAD $2.1 trillion at the end of 2017 to CAD $3.2 trillion at the end of 2019, representing a 48 percent increase.[212] During the same two-year period, the US saw a 42 percent increase in ESG assets.[213] Therefore, getting CRD right in Canada is consequential for stabilizing capital markets, maintaining investor confidence, achieving net zero by 2050, and supporting the transition economy. The CSA's NI 51-107 will likely serve as the Canadian yardstick in determining improper CRD.

This article primarily argued that after NI 51-107 is implemented, securities regulators will rely on existing regulatory, civil, and criminal liability regimes to ensure compliance. Importantly, this article showed how *OSA* section 127 (public interest order) and section 138.3 (statutory civil liability) could address misrepresentations in CRD. To avoid both regulatory and civil liabilities, issuers should make disclosures that meet both the reasonable investor and move-the-market standards. To do so, many issuers ought to enhance their CRD practices.

The environmental and financial repercussions of climate-related securities fraud will be titanic, given the boom in sustainable finance. NI 51-107 provides a legal instrument that can help promote climate-friendly corporate behaviour before the 2050 tipping point. With climate change delineating irreparable environmental harms, any possibility of getting ahead warrants our attention.

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210 Financial Post, "Canada Beats U.S. and Europe to Emerge as World's Fastest Growing Market for ESG Assets", *Financial Post* (18 July 2021), online: <financialpost.com/pmn/business-pmn/sustainable-investments-account-for-more-than-a-third-of-global-assets>.

211 Adeline Diab & Gina Martin Adams, "ESG Assets May Hit $53 Trillion by 2025, a Third of Global AUM" (23 February 2021), online: <bloomberg.com/professional/insights/markets/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum//>.

212 Financial Post, *supra* note 210.

213 *Ibid.*

FEATURE

The Inaccessibility of Justice in Ontario's Adjudicative Tribunals: Symptoms and Diagnosis

Noel Semple*

Abstract: Why did four of Ontario's highest-volume adjudicative tribunals became so seriously dysfunctional starting in late 2018? Systemic delays of months or years arose, basic procedural rights were abandoned, and substantive miscarriages of justice became common in the fields of residential tenancy, human rights, and entitlement to benefits. This feature describes these symptoms, before seeking to diagnose the underlying problem. The proximate cause of the dysfunction was the approach to tribunal appointments taken by the executive branch of Ontario's government. Members appointed by the previous government were "de-appointed" en masse, and meritorious replacements were not found promptly. Some of these problems began prior to 2018. Shortcomings in the other two branches of Ontario's government also contributed to the dysfunctionality. The Ontario statute governing adjudicative tribunals, and the legislative committee overseeing appointments, lacked the powers and resources necessary to safeguard them from executive de-appointment. Meanwhile, Ontario's courts are not an accessible and proportionate forum to backstop adjudicative tribunals. Moreover, a review of the case law shows that they lack doctrinal tools to hold the Government responsible for systemic delay and counterproductive appointment practices.

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CONTENTS

INTRODUCTION 85
1. Adjudicative Tribunals 86
I. SYMPTOMS: DELAY AND INJUSTICE 88
1. Systemic Delay 88
2. Procedural Injustice 91
3. Substantive Injustice 97
II. DIAGNOSIS: LACK OF SUPPORT FROM THE THREE BRANCHES OF GOVERNMENT 101
1. The Executive Branch: Dysfunctional Appointment Practices 101
2. The Legislative Branch: A Good Start but not Good Enough 111
3. The Judicial Branch: Little Help 113
CONCLUSION 118

Introduction

The human body has 79 organs. If one is dysfunctional, there are two possible causes. There might be something wrong with the organ itself. Often, however, the problem is that it is not receiving the sustenance and support it needs from *other* organs or systems. The same is true of the state, which is like the human body insofar as it contains numerous organs and systems that interact in complex ways.

When healthy, the state's organs ought to produce good government, which can, in turn, improve people's lives. To contribute to the shared goal of good government, each entity within the state requires support from the others. In addition to funding, public sector entities require powerful people in other parts of the state to take supportive actions and refrain from counterproductive ones. When an organ of the state is starved by the others it depends on, it quickly becomes dysfunctional. This feature argues that, since 2018, four of Ontario's highest-volume adjudicative tribunals—the Landlord and Tenant Board (LTB), the Human Rights Tribunal of Ontario (HRTO), the Licence Appeal Tribunal's Automobile Accident Benefits Service (LAT-AABS), and the Social Benefits Tribunal (SBT)—have become dysfunctional due to a lack of support from other parts of the state.

Part I describes the symptoms of the problem. In particular, systemic delay makes people wait years for resolutions that previously came in weeks to months. Procedural fairness—the right to be heard by an impartial decision-maker—has been undermined both by delay itself and by the tribunals' efforts to address delays. Substantive justice—the ability of tribunals to identify and implement outcomes in line with the law—is suffering because delay prevents efficient fact-finding, and because people increasingly abandon their rights instead of asserting them in these tribunals.

Part II identifies the roots of this malady in Ontario's adjudicative tribunals, which involves failures in all three branches of the provincial government. The executive branch's appointment practices are the immediate cause. Too many competent tribunal members and Chairs were "de-appointed" (denied reappointment) between 2018 and 2020, and competent replacements were not identified and appointed quickly enough.[1] Recruitment and retention have become increasingly difficult, and leadership and culture have been gravely undermined.[2] The Ontario legislature, which is responsible for ensuring that delegated executive powers are used in the public interest, has created a helpful statute and an oversight committee meant to structure and guide the executive branch's appointments to adjudicative tribunals.[3] Still, these measures have proved insufficient to safeguard adjudicative tribunal function. Finally, the judicial branch has been unable to offer much assistance to tribunal users due to its inaccessibility, logical deference to tribunal decisions, and unwillingness (thus far) to hold the executive branch directly responsible for its problematic appointment and de-appointment practices. This feature concludes by showing how the atrophy in adjudicative tribunals is attributable to a lack of support from the executive, legislative, and judicial branches.

1. Adjudicative Tribunals

An adjudicative tribunal can be defined as any public sector entity, other than a court, whose primary or sole task is to resolve disputes according to the law, under jurisdiction conferred by a statute.[4] Adjudicative tribunals exist at the federal, provincial, and municipal levels. Multiple spheres of modern life have generated enough disputes to require specialized areas of law and dedicated decision-making bodies to resolve the inevitable disputes.

A regulation to Ontario's *Adjudicative Tribunals Accountability, Governance, and Appointments Act* (*ATAGAA*) identifies 27 adjudicative tribunals.[5] Each has authority, conferred by one or more provincial statutes, to resolve disputes arising from those statutes. Adjudicative tribunal members are appointed by Cabinet to adjudicate and sometimes mediate cases. Members designated as Chairs

1 Tribunal Watch Ontario, "Statement of Concern About Tribunals Ontario" (May 14, 2020), online: <tribunalwatch.ca/2020/statement-of-concern-about-tribunals-ontario/> [Tribunal Watch Ontario, "Statement of Concern, 2020"]; Tribunal Watch Ontario, "LTB Statement of Concern: The Numbers Speak for Themselves" (February 16, 2024), online: <tribunalwatch.ca/2024/ltb-statement-of-concern-the-numbers-speak-for-themselves/>.

2 Tribunal Watch Ontario, "Inexcusable: The Absence of Permanent, Competent Associate Chairs at Tribunals Ontario" (June 14, 2024), online: <tribunalwatch.ca/2024/inexcusable-the-absence-of-permanent-competent-associate-chairs-at-tribunals-ontario/>.

3 See Part II(2), below.

4 Ron Ellis, "An Administrative Justice Fix: A Model Act" (2022) 35:1 Can J Admin L & Prac 53 at 54; Lorne Sossin, "Access to Administrative Justice and Other Worries" in Colleen M Flood & Lorne Sossin, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) at 41–42.

5 *Adjudicative Tribunals Accountability, Governance and Appointments Act*, SO 2009, c 33, Schedule 5, s 23(a) [*ATAGAA*]; O Reg 126/10, Schedule 1. Other provincial bodies essentially function as adjudicative tribunals even though they are not named in this schedule (e.g., the Capital Markets Tribunal, which hears disputes about financial securities and investor protection).

provide management in addition to handling a caseload.[6] Adjudicative tribunals are supported by permanent staff who are employed by the province.

Legislators and scholars look to adjudicative tribunals to provide procedurally and substantively just dispute resolution while being quicker, cheaper, and more accessible to self-represented litigants than courts.[7] Many Canadian adjudicative tribunals, including some in Ontario today, have delivered on this promise. Some hear only a handful of matters per year and apparently do so unproblematically. For example, the *Farming and Food Production Protection Act* established the Normal Farm Practices Protection Board to resolve disputes about agricultural operations.[8] It issues approximately one decision per month.[9] Some adjudicative tribunals, such as the Civilian Police Commission or the Capital Markets Tribunal, deal almost exclusively with parties represented by lawyers. Many of Ontario's low-volume tribunals, and those whose parties are generally represented by lawyers, appear to be functioning relatively well.

Unfortunately, the situation is very different at the high-volume adjudicative tribunals in Ontario dealing with residential tenancies, individual entitlement to monetary benefits, and claims under human rights statutes. Every year, over 100,000 disputes are lodged with these four tribunals, including roughly 80,000 at the LTB alone.[10] Many of these disputes involve at least one self-represented litigant.[11] The collective caseload of these four tribunals exceeds the number of civil actions commenced in the province's Superior Court of Justice (SCJ), and is comparable to the combined total of family law cases in the SCJ and the Ontario Court of Justice.[12] The stakes are high in terms of the number of people affected by adjudicative tribunal dysfunction, and also—as we

6 There are multiple ranks of Chairs, including Associate Chairs, Vice Chairs, and one Executive Chair for all the tribunals clustered in Tribunals Ontario.

7 See Noel Semple, "Tribunals for Access to Justice in Canada", Can Bar Rev [forthcoming in 2024].

8 *Farming and Food Production Protection Act*, SO 1998, c 1, ss 1, 3(1), 4(2).

9 CanLII, "Decisions of Normal Farm Practices Protection Board - Ontario" (last modified August 5, 2024), online: <canlii.org/en/on/onnfppb>.

10 Tribunals Ontario, *Tribunals Ontario 2021-22 Annual Report* (Queen's Printer for Ontario, 2022), online: <tribunalsontario.ca/documents/TO/Tribunals_Ontario_2021-2022_Annual_Report.html> [Tribunals Ontario, *2021-22 Annual Report*].

11 For example, around 80 per cent of applicants to the HRTO are self-represented: Tribunals Ontario "HRTO - Intake report: Applications Received - Applicant representation", online: <tribunalsontario.ca/en/open/data-inventory-reports/?x=0&n=7>; Annabel Oromoni, "Tribunal Watch Ontario Raises Concerns About the Operation of the Human Rights Tribunal", *Law Times News* (23 May 2022), online: <lawtimesnews.com/practice-areas/human-rights/tribunal-watch-ontario-raises-concerns-about-the-operation-of-the-human-rights-tribunal/366854>.

12 In 2023, the Superior Court of Justice received 38,137 family proceedings as well as 66,212 civil proceedings; the Ontario Court of Justice received 8,308 family law cases: Ontario Courts, "Ontario Superior Court of Justice: Modernizing the Justice System 2019 – 2023 Report", online <ontariocourts.ca/scj/files/annualreport/2019-2023-EN.pdf > at 65; Ontario Courts, "Court Statistics", online: <ontariocourts.ca/ocj/statistics/>.

will see—regarding the implications of tribunal decisions for people's lives. Tribunal Watch Ontario, a non-profit group, has undertaken essential and timely research on Ontario's adjudicative tribunals. Their findings are relied upon extensively in this feature, along with other sources.[13]

I. Symptoms: Delay and Injustice

1. Systemic Delay

The most readily apparent problem in Ontario's adjudicative tribunals is systemic delay. The LTB has jurisdiction over all disputes arising from residential tenancies in the province, and its 80,000 applications in a typical year (involving over 160,000 parties) make it the highest-volume tribunal in the province.[14] The LTB's service standard aims to schedule matters for a first hearing within 25 to 30 days.[15] There are good reasons why these disputes should be heard and resolved within days or weeks. A breach of the *Residential Tenancies Act*[16] (which the LTB administers) often means that a tenant is going without a safe and habitable home, or a small landlord is going without income upon which they depend to make mortgage payments.

Yet, as of 2023, it took an average of six to nine months to get a first hearing at the LTB.[17] The LTB's service standard for timeliness in scheduling hearings was met in just over two per cent of its cases.[18] In early 2024, landlords waited an average of 342 days to get eviction orders based on unpaid rent, and tenants waited an average of 427 days to get LTB orders for maintenance and other legal rights.[19] Its performance was only slightly better before the COVID-19 pandemic, with 16 percent success in meeting the target in 2019–20.[20] For people with legal problems arising from residential tenancies, there is no alternative to the LTB. The *Residential Tenancies Act* prevents recourse to the

13 Tribunal Watch Ontario, "About Us", online: <tribunalwatch.ca/about_us/>.

14 Tribunals Ontario, *2021-22 Annual Report, supra* note 10.

15 Tribunals Ontario, "New LTB Service Standards Give People a Better Idea of How Long it Will Take to Resolve their Case" (19 January 2018), online: <tribunalsontario.ca/ltb-january-19-2018-new-ltb-service-standards-give-people-better-idea-long-will-take-resolve-case/>.

16 SO 2006, c 17 [*RTA*].

17 Paul Dubé, *Administrative Justice Delayed, Fairness Denied: Investigation into Whether the Ministry of the Attorney General, Tribunals Ontario and the Landlord and Tenant Board are Taking Adequate Steps to Address Delays and Case Backlogs at the Landlord and Tenant Board* (Toronto: Office of the Ombudsman of Ontario, 2023) at para 6, online (pdf): <ombudsman.on.ca/Media/ombudsman/ombudsman/resources/Reports-on-Investigations/Ombudsman-Ontario-Administrative-Justice-Delayed-May-2023-report-accessible.pdf>.

18 Tribunals Ontario, *2021-22 Annual Report, supra* note 10. This statistic excludes landlord applications to above-guideline rent increases, and applications to vary the amount of a rent reduction.

19 Kathy Laird & Voy Stelmaszynski, "Ontario Landlord and Tenant Board Numbers Speak for Themselves", *Law360 Canada* (February 20, 2024), online: <law360.ca/ca/articles/1804409/ontario-landlord-and-tenant-board-numbers-speak-for-themselves-kathy-laird-and-voy-stelmaszynski>.

20 *Ibid.*

courts.[21] Engaging in "self-help" activities such as evicting or withholding rent is illegal without an LTB order.[22] In 2023, following a three-year investigation, the Ombudsman of Ontario's conclusion was that the LTB was "fundamentally failing".[23]

The LAT-AABS hears disputes about motor vehicle accident benefits, typically involving an accident victim on one side and an insurance company on the other. The LAT-AABS scheduled first hearings within its target period only four per cent of the time in 2021–22.[24] The average time application and decision was 854 days in late 2023.[25] During that time, a claimant might receive nothing in the way of rehabilitation or income replacement benefits, despite an eventual finding that they were entitled to them from the outset.

The HRTO, which has jurisdiction over all disputes arising under Ontario's *Human Rights Code* (the *Code*), did not meet its timeliness target for scheduling first hearings in any of its cases during 2021.[26] The release of HRTO decisions was also seriously delayed after hearings. In some cases, parties waited between three and seven years to get a final decision on the merits of their matter.[27] Matters have gone unscheduled because no members were available to hear them, or because scheduled dates were cancelled.[28] At other times, hearings proceeded but months or years passed before decisions were released. For example, *Cybulsky v Hamilton Health Sciences* began with an application to the HRTO in 2016; the final decision was released in March 2023.[29] The member responsible for the matter changed three times. After the hearing to determine whether the respondents were liable, it took 16 months for the decision on that question to be released.[30] It took another 19 months to commence the hearing to determine the appropriate remedy, after which it took five months for the decision on remedies to be released.

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21 *RTA, supra* note 16, s 168(2) (setting out that the LTB "has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act").

22 *Ibid*, s 39.

23 Dubé, *supra* note 17 at para 306.

24 Tribunals Ontario, *2021-22 Annual Report, supra* note 10.

25 Duncan Macgillivray, "Another Year of the LAT: Is Time Standing Still?" (November 30, 2023), online (blog): Ontario Trial Lawyers Association Blog <otlablog.com/another-year-of-the-lat-is-time-standing-still/>.

26 *Human Rights Code*, RSO 1990, c H19 [*Code*]; Tribunal Watch Ontario, "Justice Denied: The Access to Justice Crisis at *Tribunals Ontario*" (December 14, 2022) at 5, online (pdf): <tribunalwatch.ca/wp-content/uploads/2022/12/Dec-14-2022-Statement-PDF.pdf> [Tribunal Watch Ontario, "Justice Denied"].

27 Tribunal Watch Ontario, "Statement of Concern: The Human Rights Tribunal of Ontario" (May 25, 2022), online <tribunalwatch.ca/2022/the-human-rights-tribunal-of-ontario/>.

28 Tribunal Watch Ontario, "Access to Justice in Crisis: Tribunals Ontario in 2022" (March 10, 2022), online <tribunalwatch.ca/2022/access-to-justice-in-crisis-tribunals-ontario-in-2022/>.

29 *Cybulsky v Hamilton Health Sciences*, 2023 HRTO 346 [*Cybulsky*].

30 *Cybulsky v Hamilton Health Sciences*, 2021 HRTO 213.

Finally, there is the SBT, which hears disputes about eligibility for Ontario Disability Support Program (ODSP) benefits. In 2021, the SBT reported 18-month wait times, which increased to up to two years in 2022.[31] During the up to two-year waiting period, ODSP claimants had to live on the baseline Ontario Works rate of $733 per month, even though—in the majority of the cases before it—the SBT found that the government was wrong to deny ODSP benefits and ordered retroactive payments.[32]

Consider, for example, *Re 2205-01974*, an SBT decision issued in December 2022.[33] In 2012, the appellant was found to be entitled to ODSP benefits due to degenerative disc disease and fibromyalgia. A decade later, in March of 2022, ODSP program staff concluded that she was no longer eligible because her condition had improved. She immediately appealed to the SBT, which heard the matter nine months later on December 1, 2022, and issued its decision on December 11 that year. The SBT granted the appeal and restored the appellant's ODSP eligibility, finding that she "had not experienced any clinically significant improvement in the impairments and restrictions which were found to be 'substantial' in 2012."[34] The appellant would have received back payments for the ODSP benefits she missed during the nine months before her matter was heard. The psychological toll imposed by a nine month wait should be clearly understood. During this time, the appellant's income likely fell from $1,228 (the ODSP rate) to $733 per month (the Ontario Works rate). Losing 40 per cent of one's income would be a stressful ordeal for anyone. It would be much worse for a person whose income—on either ODSP or Ontario Works—is already well below the poverty line. Added to this indignity is the feeling of having one's medical condition officially rejected. Stress is inevitable when the legitimate need of people with disabilities for income comes into conflict with the legitimate need of the government to ensure that social assistance programs are not abused. However, delay compounds this problem unnecessarily and unjustly, especially when the ultimate legal conclusion is that the government was mistaken to deny the benefits.

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31 Brendan Kennedy, "Delays at the Social Benefits Tribunal Have Tripled, Leaving ODSP Claimants in Extended Limbo", *The Toronto Star* (February 16, 2021), online: <thestar.com/news/gta/delays-at-the-social-benefits-tribunal-have-tripled-leaving-odsp-claimants-in-extended-limbo/article_e68a5593-c583-50e2-90d3-3afc041dc4c9.html>; Tribunal Watch Ontario, "Justice Denied", *supra* note 26. See also Laura Hunter & Michael Ollier, Letter from the Hamilton Community Legal Clinic, "Alarmed For the Future of the Social Benefits Tribunal and Appeals Process" (December 8, 2020), online: <hamiltonjustice.ca/en/2020/12/10/alarmed-for-the-future-of-the-social-benefits-tribunal-and-appeals-process/>. The letter, addressed to The Honourable Doug Downey, Attorney General of Ontario, and The Honourable Todd Smith, Minister of Children, Community & Social Services, advocated for better resourcing of adjudicators at the SBT. It stated that, at the time of writing the letter in late 2020, some of the Hamilton Community Legal Clinic's clients faced wait times into 2022 to have their appeals heard.

32 Regarding OW and ODSP rates, see Income Security Advocacy Centre, "OW & ODSP Rates and the Ontario Child Benefit" (July 2023), online (pdf): <incomesecurity.org/wp-content/uploads/2023/07/July-2023-ODSP-and-OW-rates-and-OCB.pdf>. Regarding the proportion of cases in which the SBT reverses the denial of benefits, see Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 8.

33 *Re 2205-01974*, 2022 ONSBT 4349.

34 *Ibid* at para 20.

2. Procedural Injustice

Procedural justice is the idea that everyone is entitled to a fair hearing by a neutral decision-maker before their rights are adjudicated.[35] Procedural justice helps adjudicators reach substantively just outcomes and manifests respect for the inherent human dignity of disputants. Canadian law requires adjudicative tribunals to treat parties in a procedurally fair manner, although the thoroughness of the required hearing and the rigorousness of institutional protections for the decision-maker's impartiality depend on the context and the statute.[36] Unfortunately, systemic delay and tribunals' efforts to address it have generated grave procedural injustices in Ontario's high-volume tribunals.

The first principle of procedural justice is *audi alteram partem*—the decision-maker must hear both sides.[37] This principle requires, among other things, that parties have sufficient time to present their cases. The LTB, for example, is required by statute to "affor[d] to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter."[38] Unfortunately, as criticism of systemic delays has mounted, the government's efforts to address that criticism undermined the right to be heard. For example, to clear its backlog in 2022 and 2023, the SBT was scheduling most matters for 90 minutes, even when the appellant would almost certainly need longer to present their evidence.[39] The SBT and the LTB also sought to tackle their backlogs by scheduling matters on very short notice and without regard to the availability of the parties' counsel.[40]

a. Dismissal without Hearings at the HRTO

The *Code* requires that the HRTO uphold the principle of *audi alteram partem*. Section 43 of the *Code* states that applications within the HRTO's jurisdiction are not to be finally disposed of unless the parties have had an opportunity to make oral submissions.[41] This is important because human rights applicants are usually self-represented, and their matters involve sensitive allegations of

35 *Duke v The Queen*, 1972 CanLII 16 at 923 (SCC). Procedural justice is also known as "procedural fairness" and "natural justice". In some cases, it includes the right to reasons from the decision-maker: *Baker v Canada* (*Minister of Citizenship and Immigration*), 1999 CanLII 699 (SCC) [*Baker*]. See also David J Mullan, *Administrative Law*, 3rd ed (Toronto: Carswell, 1996) at para 104.

36 *Baker, supra* note 35; *Canada* (*Minister of Citizenship and Immigration*) *v Vavilov*, 2019 SCC 65 at para 77 [*Vavilov*].

37 *Kane v Bd of Governors of UBC*, 1980 CanLII 10 at 1113–14 (SCC).

38 RTA, *supra* note 16, s 183.

39 The same is true of the LTB: Dubé, *supra* note 17 at para 149.

40 Advocacy Centre for Tenants Ontario, "Ontario Legal Clinics' Concerns: Landlord and Tenant Board's Operations During the COVID-19 Pandemic" (October 13, 2020) at 7, online (pdf): <acto.ca/production/wp-content/uploads/2020/10/REPORT-ON-Legal-Clinics-Concerns-LTB-Operations-During-Pandemic.pdf> [ACTO, "Ontario Legal Clinics' Concerns"]; Tribunal Watch Ontario, "Justice Denied", *supra* note 26.

41 *Code, supra* note 26, s 43(2)1.

discrimination based on disability, race, or other prohibited grounds.[42] The principle behind section 43 is that an applicant with a plausible case should have the opportunity to tell their story and make their case orally in a supportive environment.[43] However, when a matter appears to be outside the Tribunal's jurisdiction, Rule 13 in the HRTO's Rules of Procedure allows the Tribunal to seek dismissal of the application by sending a written Notice of Intent to Dismiss (NOID) to the applicant, without providing the application to the respondent.[44] This may be a necessary alternative to oral hearings when applications are obviously unconnected to the HRTO's mandate, but it can also create serious procedural injustice if abused. In the ten years before 2018, the number of NOIDs issued never exceeded 8.4 per cent of the total number of applications to the HRTO.[45] In 2021, a full quarter of the applications were subject to NOIDs.[46] While the HRTO formerly conducted over 110 full merits hearings in an average year, it held only 16 in 2021–22.[47]

When opening a NOID letter, a self-represented applicant will see a legal argument written in complex language, with case law and statute citations, and arguments for why that person should never have a chance to state their case.[48] The person is given 30 days to respond in writing.[49] This is a much less meaningful opportunity to be heard than the oral hearing contemplated by the legislation. Matters can be dismissed on the basis of boilerplate, generic reasons stated in the NOID, contrary to the spirit of the *Code*'s requirement that applications not be finally disposed of without written reasons.[50] The giving of reasons is itself an aspect of procedural fairness.[51] Although reasons need not be given for all administrative decisions, where the legislature has clearly indicated that they should be—as in the *Code*—the denial of them is a breach of procedural fairness.

b. "Digital First" and Access to Justice Second

Serious *audi alteram* problems have also been created by Tribunals Ontario's "digital first" policy. Almost all hearings at the four high-volume tribunals must now occur via videoconference or phone

42 Amira Elghawaby, "Ontarians' Human Rights Are at Risk Because the System Designed to Protect Them is Broken", *The Toronto Star* (January 11, 2023), online: <thestar.com/opinion/contributors/ontarians-human-rights-are-at-risk-because-the-system-designed-to-protect-them-is-broken/article_53dbd20a-efc6-5272-a21b-80feb9748of4.html>.

43 Tribunal Watch Ontario, "Justice Denied", *supra* note 26.

44 After reviewing the applicant's reply to the Notice of Intent to Dismiss (if any), the Tribunal can decide whether to dismiss or allow the matter to continue: see Human Rights Tribunal of Ontario, *Rules of Procedure*, r 13 [HRTO Rules].

45 Frank Nasca, "Jurisdiction and Access to Justice: An Analysis of Human Rights Tribunal of Ontario-Issued Notices of Intent to Dismiss" (2022) 35:3 Can J Admin L & Prac 253 at 267.

46 *Ibid*.

47 Tribunal Watch Ontario, "Justice Denied", *supra* note 26.

48 Nasca, *supra* note 45 at 255.

49 HRTO Rules, *supra* note 44, r 13.2(c).

50 Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 7; *Code, supra* note 26, s 43(2)2.

51 *Vavilov, supra* note 36 at para 77.

call, rather than in person.[52] In some cases, video or phone calls offer superior procedural justice, insofar as parties who are comfortable with and have access to the requisite technology can easily participate from their homes.[53] Unfortunately, many Ontarians are simply unable to do so and have no one to help them.[54]

Lorraine Peever, for example, is a 78-year-old tenant in North Bay, Ontario whose treatment by the LTB was the subject of an application to the HRTO.[55] Peever's apartment building had persistent bedbug problems, leading to the loss of her personal property after unsuccessful efforts to control the pests. Assisted by the Advocacy Centre for Tenants Ontario (ACTO), Peever brought an application under the *Residential Tenancies Act* for compensation from the landlord. It took nearly three years for her matter to be scheduled for a substantive hearing. Peever, who had no experience with computers or mobile phones, asked to be heard face-to-face and in person. The request was denied, as are 90 per cent of requests for in-person hearings at the LTB.[56] Tribunals Ontario's practice direction states that "[a] party's unfamiliarity with a new technology ... is not sufficient, in and of itself, to necessitate an in-person hearing."[57] In-person hearings are allowed only if the party can demonstrate that it is an accommodation required for a *Code*-related need, or that proceeding online and/or in writing would result in an unfair hearing.[58] This approach contrasts with that adopted by tribunals in other jurisdictions, such as the Social Security Tribunal of Canada, which allow applicants to tick a box to select an in-person hearing if they prefer.

52 Tribunals Ontario, "Operational Updates" (last modified June 28, 2024), online: <tribunalsontario.ca/en/operational-updates/>.

53 Jennifer Leitch, Dayna Cornwall & David Lundgren, *Virtual Justice: A Complex Portrait of Canadian Self-represented Litigant Experiences with Virtual Hearings* (Windsor: National Self-Represented Litigants Project, 2024), online (pdf): <representingyourselfcanada.com/wp-content/uploads/2024/05/Virtual-Hearings-Report-2024.pdf>.

54 Patricia Hughes, "Advancing Access to Justice through Generic Solutions: The Risk of Perpetuating Exclusion" (2013) 31:1 Windsor YB Access Just 1, DOI: <10.22329/wyaj.v31i1.4308>.

55 Shane Dingman, "Group takes Landlord and Tenant board to Human Rights Tribunal over 'digital first' system", *The Globe and Mail* (June 28, 2022), online: <theglobeandmail.com/real-estate/article-group-takes-landlord-and-tenant-board-to-human-rights-tribunal-over/>; *Lorraine Peever v The Landlord and Tenant Board and Tribunals Ontario* (*Schedule "A"*) [on file with the author].

56 Dubé, *supra* note 17 at para 195. A survey of the legal aid clinics representing clinics identified only *one* in-person hearing at the LTB between March 2020 and December of 2022: Martin Regg Cohn, "Doug Ford Appointed Unqualified Party Loyalists to Fill Key Tribunal Spots. Now Ontarians Are Paying the Price as Wait Lists Swell", *The Toronto Star* (December 14, 2022), online: <thestar.com/politics/political-opinion/doug-ford-appointed-unqualified-party-loyalists-to-fill-key-tribunal-spots-now-ontarians-are-paying/article_84bb3116-e38c-5f67-aa5b-bf29e99dd0e8.html>. See also Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 3.

57 Tribunals Ontario, "Updated Practice Direction on Hearing Formats" (November 30, 2020), online: <tribunalsontario.ca/documents/TO/Practice-Direction-on-Hearing-Formats-EN.html>.

58 *Ibid.*

Online hearings can easily place parties with weaker devices, weaker data plans, or weaker technological skills at a grave disadvantage relative to their adversaries. Many tribunal litigants—especially tenants at the LTB, and ODSP claimants at the SBT—have low incomes, and technology and data are expensive.[59] Legal aid clinics can provide technology and a private space to some of their clients, but capacity does not allow them to meet the needs of all tribunal litigants who need these services. A person phoning into a "Zoom room" that others are attending via videoconference will generally be less able to understand what is going on, especially if the stressful and high-stakes experience of a legal hearing is being undertaken for the first time in one's life. The submissions of an audio-only party may be less persuasive than their adversary's,[60] and an audio-only party will not be able to present visual evidence such as a document or a photograph of a maintenance problem.[61] A recent ACTO report provides an example:

> [A] tenant who called in by phone struggled to understand what was happening during the hearing, and unlike his landlord who appeared by videoconference, could not respond to the member's cues or see that the member was becoming visibly frustrated with him. He was left apologizing repeatedly for having a difficult time in hearing instructions and following the proceeding. In those circumstances, how could a tenant be expected to focus on understanding the landlord's evidence and presenting their own case in response?[62]

These issues are compounded for the tribunal users who do not speak English or French as their first language and must therefore rely on translators.

As a matter of procedural justice, a party with counsel has the right to have that individual appear on their behalf. For landlord-tenant matters, in the pre-2020 system of in-person hearings, publicly-funded duty counsel from the ACTO were available to everyone on their hearing day.[63] Duty counsel would be physically present in or outside the hearing rooms and litigants could meet them there (usually for the first time).[64] They were often able to multi-task in order to help many tenants quickly. As Kathy Laird explained, the switch to online hearings was not accompanied by any

59 Advocacy Centre for Tenants Ontario, "Landlord and Tenant Board: Frequently Asked Questions" (February 2023) at 4, online (pdf): <acto.ca/production/wp-content/uploads/2023/02/LTBFAQ_2023_ACTO_FINAL.pdf> [ACTO, "LTB FAQ"].

60 ACTO, "Ontario Legal Clinics' Concerns", *supra* note 40 at 8.

61 *Ibid*.

62 *Ibid*. In another example from the report, the ACTO stated that they "have overheard a tenant struggling to take part in a hearing from a payphone in the rain on a cold day before ultimately giving up and dropping the call": *ibid* at 7.

63 ACTO, "LTB FAQ", *supra* note 59.

64 Emily Paradis, *Access to Justice: The Case for Ontario Tenants - Final Report of the Tenant Duty Counsel Review* (Toronto: Advocacy Centre for Tenants Ontario, 2016), online (pdf): <acto.ca/production/wp-content/uploads/2017/07/TDCP_Report_2016.pdf>; David Wiseman, "Paralegals and Access to Justice for Tenants: A Case Study" in Trevor CW Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 173 at 186.

practical alternative to let duty counsel effectively connect with tenants.[65] Tenants who phone in to "block" hearings, where multiple parties queue to have their matters heard, have difficulty finding and speaking privately with the lawyer there to help them.

At the same time, LTB hearings have also been moved to pan-provincial "superblocks" instead of regional hearings. LTB members no longer benefit from tacit and informal knowledge about the regions whose matters they hear. The result, as Ontario Ombudsman Paul Dubé found, is an exacerbation of systemic delay.[66] The backlog of unresolved LTB cases started growing in 2018, increasing from 14,726 cases in March 2019 to 32,800 cases in March 2022.[67]

c. Reasonable Apprehension of Bias

Procedural justice also requires that there be no reasonable apprehension that the decision-maker is biased or partial to either side.[68] While the author is unaware of any evidence that members at Tribunals Ontario are biased or partial, their highly insecure conditions of employment are problematic in this regard.[69] As explained below, every time the government has a completely discretionary opportunity to decide whether or not a certain member will keep their job—and the Ontario government has many such opportunities—that member's ability to impartially decide cases in which the interests of the government or its allies are affected comes under threat. While tribunal members are appointed for fixed terms, there is no minimum term length, and they have in some cases been as short as six months.[70] Regardless of performance, tribunal members appointed prior to 2018 (before the new Progressive Conservative government took office) were "de-appointed" *en masse* at the end of their terms.[71]

To see why short appointment terms and discretionary, non-meritocratic reappointment practices can create a reasonable apprehension of bias, it is important to understand why governments would care about the substantive outcomes of matters before these tribunals. This is most obvious at

65 Kathy Laird, "The 'Digital Transformation' at Tribunals Ontario: The Impact on Access to Justice" (2021) 34:2 Can J Admin L & Prac 141 at 150–51, n 36.

66 Dubé, *supra* note 17.

67 ACTO, "LTB FAQ", *supra* note 59 at 3.

68 *Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36 at para 17.

69 Regarding the potential for the insecurity of adjudicator employment to give rise to bias or the reasonable apprehension thereof, see *R v Lippé*, 1990 CanLII 18 (SCC).

70 Brian Cook, "Tribunal Watch Ontario Commentary on McAnsh v. Ontario", *Law360 Canada* (22 June 2023), online: <law360.ca/articles/48010/tribunal-watch-ontario-commentary-on-mcansh-v-ontario-brian-cook>. Regarding the trend to short-term appointments at the HRTO, see Stephen Flaherty, "Does the Ontario Human Rights Tribunal have a Reasonable Prospect of Success?" (2022) 35:2 Can J Admin L & Prac 231 at 247.

71 Raj Anand, Kathy Laird & Ron Ellis, "Opinion: Justice Delayed: The Decline of the Ontario Human Rights Tribunal Under the Ford Government," *The Globe and Mail* (January 29, 2021), online: <theglobeandmail.com/opinion/article-justice-delayed-the-decline-of-the-ontario-human-rights-tribunal-under/>.

tribunals with responsibility for disputes over government benefits. The state is a party and must pay benefits or pensions to the applicants who succeed, and so its pecuniary interests are served if adjudicators deny appeals.[72] The government is also often a party at the HRTO, either as an employer or as the originator of regulations or rules being challenged on human rights grounds.

The government is not usually a party at residential tenancy or insurance benefits tribunals (e.g., the LTB and LAT-AABS). Still, governments are often sympathetic to a constituency that appears repeatedly in these tribunals, whether for ideological, political, or policy reasons. At the LTB, tenants confront landlords; at the HRTO, employees confront employers; and at the LAT-AABS, motor vehicle accident victims confront insurance companies. Governments, meanwhile, have often been elected on platform commitments to help tenants, reduce burdens on employers, or reduce auto insurance premiums (which are connected to the level of insurers' liability for benefits). Governments, in short, have reasons to care about tribunal outcomes. Meanwhile, the current constitutional arrangement gives them absolute power to deny the renewal of terms, and to appoint members for very short terms.[73] This creates at least a reasonable apprehension of bias, if not actual bias, contrary to the requirements of procedural justice.[74]

Judith McCormack, former Chair of the Ontario Labour Relations Board, eloquently explains how the fear of losing one's job can be reasonably apprehended to affect one's impartiality. McCormack wrote:

> The prospect of job loss, the Board has said, can mean an employee is contemplating a loss of economic security, the loss of the social milieu of the workplace, a concomitant loss of self-esteem, identity or social standing, the uncertainty of finding another job and the possibility of a slide on to social benefits. The mere possibility of this bleak picture coming to pass may exert a powerful impact on employee choices. As a result, an employee is 'peculiarly vulnerable' to the influences of the employer. ... it is reasonable to think that the prospect of job loss as an adjudicator approaches the end of his term will probably create a good deal of concern. In most cases, it is likely to generate at least the passing thought of what might be done to secure reappointment.[75]

In other words, there is a "chill factor" at play.[76] When a competent member's appointment goes unrenewed, their colleagues will likely wonder "what can be done to prevent the same thing from

72 Administrative Justice Working Group, "Future of Administrative Justice Symposium Report" (2008) 21 Can J Admin L & Prac 193 at 216.

73 Cook, *supra* note 70.

74 Katrina Miriam Wyman, "Appointments to Adjudicative Tribunals: Politics and the Courts" (1999) 57:2 UT Fac L Rev 101 at 104.

75 Judith McCormack, "The Price of Administrative Justice" (1998) 6 CLELJ 1 at 2223. McCormack's article references, as an example, the decision in *Roytec Vinyl Co*, [1990] OLRB Rep 727.

76 See generally Brian Cook & Gary Yee, "Case Comment: *McAnsh v. Ontario*, 2023 ONSC 3537. Another Misstep on the Road of Tribunal Independence" (2023) 36:3 Can J Admin L & Prac 221 at 226 (advocating for the establishment of an independent oversight body for the tribunal justice system to better protect the independence of tribunal adjudicators).

happening to them?"[77] After Tribunals Ontario adjudicators started to notice in 2018 that their colleagues were being systematically de-appointed, it is not hard to imagine that those still employed asked themselves what they might do to prove their loyalty to the new government and keep their jobs.

Finally, it might be reasonable to apprehend that, in some tribunals, systemic delay is intentionally created or tolerated by the government to help respondents. If a respondent is eventually required to compensate an applicant, systemic delay allows them to keep their money longer. More importantly, systemic delay in benefits tribunals (e.g. the LAT-AABS) puts low-income claimants under financial pressure to "sell" their claims for much less than they are worth by settling for an immediate cheque.[78] Suppose a government is more sympathetic to employers and insurers than it is to employees and motor vehicle benefit claimants. In that case, it is not unreasonable to suspect that systemic delay in those tribunals would not be overly concerning for the government.

3. Substantive Injustice

Adjudicative tribunals should generate substantively just outcomes, in addition to affording procedural justice to their users. When adjudicating, tribunals should identify the correct applicable law, find the true facts of the case, and make orders that align with the law's promises.[79] When mediating, tribunals should try to achieve resolutions that reflect the parties' legal rights, and not just the balance of power between them. And yet, substantive justice is suffering greatly in the high-volume parts of Tribunals Ontario due to delay and procedural injustice.

a. Delay and Substantive Injustice

When months or years pass after the events giving rise to a dispute, determining what happened often becomes much more difficult. The unavailability of witnesses, the disappearance of documents, and the fading of memories mean that more facts will go unfound.[80] In the SBT, adjudicators have the unenviable task of assessing the credibility of appellants' testimony regarding alleged disabilities from up to two years before the date of the hearing.[81]

Substantive injustice results when parties with clear legal rights abandon them because of delay or procedural injustice. A tenant's legal right to a pest-free home becomes meaningless if they walk

77 McCormack, *supra* note 75.

78 Regarding the pressure on shallower-pocketed litigants to settle for less than they are owed to end proceedings quickly, see Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88:5 Yale LJ 950 at 966–73.

79 Noel Semple, "Better Access to Better Justice: The Potential of Procedural Reform" (2022) 100:2 Can Bar Rev 124 [Semple, "Better Access"].

80 Tribunal Watch Ontario, "The Human Rights Tribunal of Ontario: What Needs to Happen" (January 2023), online (pdf): <tribunalwatch.ca/wp-content/uploads/2023/01/The-Human-Rights-Tribunal-What-Needs-to-Happpen.pdf> [Tribunal Watch Ontario, "HRTO"].

81 Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 7–8.

away from an infested apartment while spending years waiting for an LTB order to fix it.[82] Their right to reasonably enjoy the unit they are paying for is also meaningless if they are wrongfully evicted and cannot get to the LTB to restore their access.[83] Likewise, a landlord's right to evict a non-paying tenant becomes meaningless if they are forced to sell the property because they cannot afford to carry the mortgage payments while waiting for the LTB. In 2021–22, parties withdrew some 12,000 applications to that tribunal, amounting to one in every five applications.[84] Although some of these were settled by the parties on a mutually acceptable basis, the 12,000 applications in this category do not include the ones resolved through LTB-sponsored mediation. Likely, many of these 12,000 were simply abandoned because people could not wait any longer.

The SBT rules in favour of people with disabilities almost 60 per cent of the time. In many other SBT cases, filing an appeal causes the Ministry to reverse the denial of benefits before a hearing date.[85] Yet, Tribunal Watch reports that in 2021–22, the number of appeals to the SBT fell to 6,022 from an average of 9,334 per year over the previous five years.[86] While increasing delay may not have caused this entire decline, it was likely a contributing factor. Meanwhile, plaintiff-side employment lawyers representing terminated employees, who previously filed human rights complaints on behalf of their clients at the HRTO, now avoid it due to the lack of reasonable prospect of a timely hearing.[87]

Adjudicative tribunals that award monetary remedies can, in principle, do so even if months or years have passed due to systemic delay. But they can only do so in cases where the applicant has persisted, even though giving up one's legal rights and getting on with life may be a more logical and psychologically healthy response after years of waiting. The *Code* provides for non-monetary remedies, such as a letter of reference for an applicant or remedial efforts within an employer organization to improve practices going forward.[88] Such remedies are unlikely to be valuable to parties or contribute to substantive justice after months or years have passed.

b. From Procedural Injustice to Substantive Injustice

As previously noted, Ontario's tribunals have started cutting procedural justice corners to catch up on their backlogs. This, in turn, undermines their substantive justice performance. A substantively just outcome is most likely to be reached after a full hearing on the merits, but these are increasingly

82 Marion Overholt, "Tribunal Independence and Impartiality - Tribunal Users' Perspective" (May 25, 2021), online (blog): Law, Disability & Social Change <lawdisabilitysocialchange.com/tribunal-independence-and-impartiality>.

83 Regarding wrongful evictions, see ACTO, "Ontario Legal Clinics' Concerns", *supra* note 40.

84 Tribunals Ontario, 2021-22 *Annual Report, supra* note 10.

85 Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 8.

86 *Ibid*.

87 "Lawyers Frustrated by Vacancies at Human Rights Tribunal", *Law Times* (14 May 2019), online: <lawtimesnews.com/practice-areas/human-rights/lawyers-frustrated-by-vacancies-at-human-rights-tribunal/263549>.

88 *Code, supra* note 26, ss 45.2–45.3.

rare at the HRTO.[89] Thus, it seems very probable that more substantive mistakes are now being made. Frank Nasca evaluated a random sample of 50 HRTO applicants who had received a written NOID from the tribunal.[90] In Nasca's view, 14 of these cases presented a clear prima facie case, which under applicable law means they should not have been dismissed with a NOID letter.[91] Studies from several jurisdictions, cited by Kathy Laird in a recent paper, demonstrate that oral hearings tend to produce different results than written or online alternatives.[92] A person like Lorraine Peever, the 78-year-old bedbug-afflicted tenant in North Bay, is more readily able to bring photographic evidence of maintenance problems to an in-person hearing. Without help, she may struggle greatly to do so in an online format.

c. Adjudicator Competence

A final threat to substantive justice arises from issues of member competence and expertise. There is no hard evidence regarding the quality (as opposed to the quantity) of the substantive decisions emerging from Tribunals Ontario. However, current appointment practices leave the government free to refuse reappointment to experienced members, regardless of merit, because they were originally appointed by a different government. In recent years, the Ontario government has availed itself of this opportunity.[93] Meanwhile, according to veterans in this field, most new appointees lack prior experience either in adjudication or in the subject matter of the tribunals to which they are being appointed. Given the legal complexity of the underlying law, it is unlikely that mass terminations of experienced people, and their replacement by others who have not previously worked in the area, favours substantively correct rulings.[94]

d. The Consequences of Dysfunction

It is not hyperbole to say that tribunal dysfunction can ruin people's lives. Elsie Kalu, operator of a small immigration consultancy, purchased a modest Ottawa townhouse in April 2022. She intended to move in with her five-year-old daughter, who has autism spectrum disorder. Unfortunately, the tenant of the previous owner refused to leave or pay rent, according to Kalu's statement of claim. Kalu brought an eviction application to the LTB on May 10, 2022, but her matter was not heard by late December 2022. During that time, Kalu had to pay the mortgage on her uninhabitable house as well as rent for herself and her daughter in a different home. The claim in Kalu's civil action against

89 Semple, "Better Access", *supra* note 79 at 146.

90 Nasca, *supra* note 45 at 269.

91 *Ibid* at 276.

92 Laird, *supra* note 65 at 144, n 7.

93 Kathy Laird & Voy Stelmaszynski, "Factors Contributing to the LTB Crisis at Tribunals Ontario", *Law360 Canada* (February 22, 2024), online: <law360.ca/ca/articles/1805219/factors-contributing-to-the-ltb-crisis-at-tribunals-ontario-kathy-laird-and-voy-stelmaszynski>.

94 Tribunal Watch Ontario, "HRTO", *supra* note 80 at 1–2.

the Government of Ontario states that the resulting personal debt led to her failing a credit check, which, in turn, led to the loss of a job she had been offered as a financial advisor with a major firm.[95]

In housing matters, there is a mounting temptation to "self-help". Tenants are tempted to withhold rent when they cannot get enforceable maintenance orders, and landlords are tempted to evict illegally when they cannot access the LTB to do so legally. This opens the door to violence, illegality, and an erosion of the rule of law. LTB dysfunction also discourages people from becoming tenants or landlords at all. Tenants are always at risk of living with maintenance problems that the landlord will not fix, and/or having violent or disruptive neighbours, whom the landlord should evict but cannot or will not. Tenants are given reason to believe that piling into Ontario's highly unaffordable homeownership market is the only way to have a secure home.

The supply of long-term rental units may also suffer when residential tenancy agreements cannot be enforced. Homeowners who could make basement or laneway suites available to tenants may well be deterred by the risk of being stuck with a non-paying or law-breaking tenant for 11 months or more, and no legal ability to evict.[96] Short-term rental through platforms such as AirBnb, which are exempt from the *Residential Tenancies Act*, is a much less risky alternative.[97] There is a serious shortage of affordable purpose-built rental housing in Ontario, but multi-unit developers always have the option to sell new units as condominiums instead.[98] The risk of having to carry non-paying or law-flouting tenants for many months due to LTB delays encourages developers to take the condo route, because once condo units are sold, the developer faces no further risks of that nature. Additionally, to evict for non-payment also encourages landlords to more aggressively screen out prospective tenants based on factors thought to increase the risk of non-payment, such as low income or poor credit history. In sum, the rule of law means, among other things, that people can make bargains, and hold each other to them. We all pay a price when this fails, as it has at the LTB.[99]

95 *Kalu v Ontario* (*Attorney General*), Sup Ct J, No CV-22-00000074-00CP (Statement of Claim, Plaintiff, issued December 22, 2022). This statement of claim was struck without leave to amend: *Kalu v His Majesty the King*, 2023 ONSC 6623.

96 On the hardship imposed on small landlords by LTB delays, see Tribunal Watch Ontario, "Justice Denied", *supra* note 26.

97 *RTA, supra* note 16, s 5(a).

98 Matti Siemiatycki & Karen Chapple, *Perspective on the Rental Housing Roundtable*, Attachment 2 (March 2023), online: <toronto.ca/legdocs/mmis/2023/ex/bgrd/backgroundfile-234818.pdf>.

99 Lisa Moore & Trevor CW Farrow, *Investing in Justice: A Literature Review in Support of the Case for Improved Access* (Toronto: Canadian Forum on Civil Justice, 2019), online (pdf): <cfcj-fcjc.org/wp-content/uploads/Investing-in-Justice-A-Literature-Review-in-Support-of-the-Case-for-Improved-Access-by-Lisa-Moore-and-Trevor-C-W-Farrow.pdf>.

II. Diagnosis: Lack of Support From the Three Branches of Government

Casual observers might suspect that underfunding and the COVID-19 pandemic are to blame for the dysfunction in Ontario's highest-volume adjudicative tribunals in the period between 2018 and 2022. Tribunals certainly are not the only parts of the state that fall below expectations: delays, waiting lists, and other shortcomings are found in public services of all kinds. Yet, funding for Ontario's adjudicative tribunals has not been cut; indeed, additional funding was provided to the LTB in 2021 and 2022.[100] As the ACTO observed in early 2023, the LTB had more adjudicators than it did in 2011 and received *fewer* applications than before. Somehow, though, it resolved fewer applications yearly, and each one took longer.[101] This trend toward the LTB doing less work with more resources has continued into 2024.[102]

Moreover, the symptoms of tribunal dysfunction predated the arrival of COVID-19, and persisted long after most other public services have shaken off the pandemic's effects.[103] In many adjudicative tribunals, COVID-19 caused a significant reduction in caseload, but the backlogs and delays continued to climb.[104] As this Part explains, the immediate cause of the dysfunction was the approach of the executive branch of government to appointments, though weaknesses in the legislation and jurisprudence have also contributed to making adjudicative tribunals vulnerable to executive neglect.

1. The Executive Branch: Dysfunctional Appointment Practices

Ontario statutes establish that the "Lieutenant Governor in Council" shall appoint members to adjudicative tribunals. By constitutional convention, the Lieutenant Governor acts on the advice of Cabinet, which is led by the Premier and elected Ministers, but also has a staff of permanent civil servants and political appointees.[105] The Public Appointments Secretariat (PAS) is the part of the Cabinet Office meant to take the lead in keeping tribunals appropriately staffed. However, as noted below, PAS's work is only one small part of a complex chain of events that must transpire before a new member can be appointed.

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100 Attorney General of Ontario, News Release, "Ontario Providing More Support to the Landlord and Tenant Board" (November 24, 2022), online: <news.ontario.ca/en/release/1002515/ontario-providing-more-support-to-the-landlord-and-tenant-board>; Attorney General of Ontario, News Release, "Ontario Invests $19M to Help Tackle Housing Crisis" (April 1, 2022), online: <news.ontario.ca/en/release/1001918/ontario-invests-19m-to-help-tackle-housing-crisis>.

101 ACTO, "LTB FAQ", *supra* note 59 at 3.

102 See Laird & Stelmaszynski, *supra* note 19.

103 Muriel Draaisma, "Backlogged Tribunals Creating 'Distress' for Ontarians Waiting Months or Years to be Heard", *CBC News* (March 11, 2023), online: <cbc.ca/news/canada/toronto/tribunal-backlogs-ontario-justice-1.6766594>.

104 ACTO, "LTB FAQ", *supra* note 59 at 6.

105 Patrick F Baud, "The Crown's Prerogatives and the Constitution of Canada" (2021) 3 J Commonwealth L 219.

The four high-volume adjudicative tribunals first became dysfunctional because they were short of members, and especially short of experienced leaders and adjudicators. The LTB, SBT, and HRTO collectively had 148 members in March 2018, but only 83 by spring 2020.[106] Losing 25 per cent of the complement of members generated large backlogs and drove up systemic delay at the LTB.[107] Similarly, the HRTO previously released an average of over 100 full decisions per year, but due to a lack of competent adjudicators, it rendered only 16 in the 2021–22 year. Of these, 12 were the result of applications that were filed before 2018, meaning they had been in the system for at least three years.[108]

Although the short-staffing problem worsened after 2018, it did not begin that year. Between 2012 and 2016, it took an average of over 15 months to fill tribunal vacancies in Ontario, which caused 33 agencies to drop below their minimum number of members.[109] Staffing levels have recovered somewhat since early 2022, but the period of short-staffing generated a backlog that has continued to cause systemic delay. Even though the LTB had more funding and members than it did in 2018 by early 2024,[110] issues related to culture and competence have made it impossible to reduce the backlog and begin meeting service standards again.[111]

Two shortcomings in the executive branch, in turn, caused the shortage of members. First, since 2018, the Ontario government has systematically refused to reappoint those initially appointed by the previous government, regardless of merit. Second, neither the current government nor previous ones have managed to quickly replace tribunal adjudicators who left.

De-Appointment

Decision-makers in Ontario's adjudicative tribunals are appointed for fixed terms, and not dismissed during those terms except in cases of serious misconduct.[112] Fixed term appointments support adjudicator impartiality because the government cannot *immediately* punish a member by firing them (although, as noted above, the protection is flimsy if the term is short and reappointment is completely discretionary). At the same time, fixed terms mean that once a member's term ends, if the executive takes no action, that individual leaves the public service.

106 Tribunal Watch Ontario, "Statement of Concern, 2020", *supra* note 1.

107 *Ibid*; Dubé, *supra* note 17 at para 47.

108 Tribunal Watch Ontario, "Justice Denied", *supra* note 26 at 5.

109 Mark P Mancini, "The Political Problem with the Administrative State" (2020) 2:1 J Commonwealth L 55 at 96. See also Ian Mackenzie, "Delay in Adjudicator Appointments: Crisis, What Crisis?", Slaw (December 27, 2016), online: <slaw.ca/2016/12/27/delay-in-adjudicator-appointments-crisis-what-crisis/>.

110 Laird & Stelmaczynski, *supra* note 19.

111 Dubé, *supra* note 17 at para 66.

112 See e.g. Government of Ontario, "Agencies and Appointments Directive" (last modified October 2024), online: <ontario.ca/page/agencies-and-appointments-directive>; Tribunals Ontario, "2022/23 – 2024/25 Tribunals Ontario Business Plan", online: <tribunalsontario.ca/documents/TO/TO_2022.23%20%E2%80%93%202024.25_Business_Plan_EN.html>.

Most members are willing to be reappointed after their terms end. Typically, the Chair or Vice-Chair in charge of a tribunal, who has the best opportunity to observe and evaluate the work of the members, will make a recommendation to the executive about whether the individual should be reappointed.[113] In the past, such recommendations were routinely followed by the executive—but not in the years after 2018. Reappointments of holdover appointees were generally denied with no reasons given and no concerns stated regarding performance or merit.[114] To borrow Ron Ellis's phrase, experienced members were "de-appointed", *en masse*.[115]

Self-Inflicted Recruitment Woes

Mass de-appointment is highly problematic, as adjudication requires a combination of advanced and relatively rare legal and interpersonal skills. Consider, for example, the LAT-AABS, which resolves disputes between motor vehicle insurance companies and injured people about entitlement to accident benefits. The cases often involve complex medical and actuarial evidence from competing experts. There are six different Ontario statutes, and numerous regulations, that must be applied in resolving disputes arising in this context.[116]

It takes skill and experience to conduct hearings in a manner that is procedurally fair, likely to produce substantively just outcomes, and expeditious. Less skilled and experienced members are likely to make sacrifices in one or more of these three areas. For example, parties sometimes unexpectedly put forward new documents that they wish to have considered in hearings. A new member might choose to immediately include such a document (depriving the other side of the right to challenge its admissibility), choose to exclude it (risking an erroneous outcome if the document was relevant), or decide to adjourn the hearing to consider and receive submissions about the document's admissibility (causing months of delay). An experienced and skilled member will be aware of other options, such as reserving judgment on the admissibility of the document, to see if the dispute can be resolved without having to refer to it.[117] Because most cases at the high-volume tribunals involve at least one self-represented litigant, mastering the techniques of active adjudication (instead of the more passive adversarial model of adjudication) is often very valuable.[118] Experienced members in many tribunals can also bring about fair, consensual resolutions, either in formal mediation sessions or informally during hearings.

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113 Cook, *supra* note 70.

114 *Ibid*.

115 Ron Ellis, "Judicial Tribunals - Ontario's Appointment and Reappointment Policies - Drilling Down" (July 25, 2020), online (blog): <administrativejusticereform.ca/judicial-tribunals-ontarios-appointment-and-reappointment-policies-drilling-down/> [Ellis, "Judicial Tribunals"].

116 Tribunals Ontario, "AABS: Legislation and Rules" (last visited 6 May 2024), online: <tribunalsontario.ca/lat/automobile-accident-benefits-service/legislation-and-rules/>.

117 Knowing when and how to ask questions of witnesses (active adjudication) or curtail repetitive questioning are other hearing-management skills that require experience and self-confidence.

118 Michelle A Alton, "Rethinking Fairness in Tribunal Adjudication to Best Promote Access to Justice" (2019) 32:3 Can J Admin L & Prac 151 at 161.

As Ellis has explained, current appointment practices in Ontario make it difficult to attract the people who can do this work well.[119] While a member has security during their term, the average term length is slightly over two years, and recently some terms in Ontario have been as short as six months.[120] The prospect of being de-appointed (effectively, fired) for reasons unrelated to one's job performance or demand for one's work makes any job much less appealing than it would otherwise be.

Short-staffing and politicization led to demoralization, which led to resignations and thus more short-staffing, in a vicious circle. They also contributed to high turnover among the Tribunals' permanent staff, making members' work less appealing. The people with the skills and attributes to be strong adjudicators generally have other career opportunities, especially in a tight labour market like Ontario's during the period in question.[121] The executive considers de-appointees to be ineligible for appointment to any other provincial adjudicative tribunal.[122] They have few opportunities to continue their careers in a way that uses their experience.

The unattractiveness of Ontario tribunal adjudicator positions is exacerbated by the fact that, under current law, they are not employees, but rather appointees pursuant to an exercise of Crown prerogative authorized by statute.[123] The practical consequence is that de-appointees, unlike most employees fired without just cause, receive no pay in lieu of notice.[124] De-appointment is likely to be perceived by a subsequent reader of one's resumé as a red flag, unless that reader happens to understand the idiosyncratic world of Ontario tribunal human resource practices. Most public sector jobs offer strong job security, and so people who have been let go from a public sector job may be falsely presumed to have done something seriously bad.

The problems created by de-appointment are exacerbated by how it has been done in Ontario in recent years. The end date of each adjudicator's term is known from its outset. Nonetheless, decisions about reappointment are often made very close to the last minute.[125] The policy of Ontario's Public Appointments Secretariat is that no term can be renewed more than six months before it is to end, and in recent Ontario practice the recommendation to reappoint or de-appoint is not made until three or four months before the termination date.[126] A prudent person of modest means, who thinks they might lose their job without notice in a few months, starts looking for another job. If they find one, they are unlikely to stick around to see if they were going to be fired after all. *Cybulsky*,

119 Ellis, "Judicial Tribunals", *supra* note 115.

120 Cook, *supra* note 70.

121 Financial Accountability Office of Ontario, *Ontario's Labour Market in 2020* (Ontario: Financial Accountability Office of Ontario, 2021).

122 Ellis, "Judicial Tribunals", *supra* note 115.

123 *McAnsh v Ontario*, 2023 ONSC 3537 at para 27 [*McAnsh*].

124 Ellis, "Judicial Tribunals", *supra* note 115; Ron Ellis, "Appointments Policies in the Administrative Justice System Lessons From Ontario Four Speeches" (1998) 11 Can J Admin L & Prac 205 at 210.

125 Dubé, *supra* note 17 at para 76.

126 *Ibid* at para 75.

described above, took seven years to reach a final decision at the HRTO.[127] Many months of delay in this matter were caused by the resignation of the first adjudicator, who anticipated de-appointment and therefore found another job, and then by the de-appointment of the second adjudicator assigned to the case.

Adjudicators are assigned new cases in the hope that they will be able to complete the hearing and issue decisions. When this proves not to be the case, because of systemic delay and/or an unexpected de-appointment, serious problems result.[128] If the decision is not rendered very quickly after the end of the member's term, then the work done in the hearing is thrown away and the parties must go through the expense and inconvenience of preparing for and holding another hearing.[129] The new hearing will often be many months in the future, due to systemic delay.[130]

Getting Up to Speed

There is a clear disjunction between, on the one hand, short appointment terms and the possibility of de-appointment for no good reason, and on the other, a demanding job that takes time and training to master. As of July 2023, the average term length of all appointees in the four high-volume tribunals is only two years and three months, although some of these were serving their second or third term.[131] Yet, one experienced tribunal chair wrote that it often takes one or two years for a new adjudicator to "fully hit their stride in terms of adjudication skills".[132] Because the work is complex, significant on-the-job training is required. Ombudsman Dubé noted that there were 72 LTB adjudicators in August 2021, but 20 of these were still being trained and not hearing any matters, while another 20 were trained to hear some but not all matters, leaving only 32 who were fully trained and deemed fully capable.[133] The HRTO had 22 adjudicators when the government changed in 2018, but only three of these remained by February 2021.[134]

Experience is the best teacher in any type of work. Full-time employees acquire mastery more quickly than part-timers, because they have more experience from which to learn. Yet, perhaps because the prospect of switching to such an insecure career on a full-time basis is not appealing,

127 *Cybulsky, supra* note 29 and accompanying text.

128 An adjudicator's appointment is deemed to continue beyond its end date for the purpose of issuing decisions in matters which the adjudicator has heard (see *Statutory Powers Procedure Act*, RSO 1990, c S.22, s 4.3); however, in the case of the LTB, this extension only lasts for four weeks: see *RTA, supra* note 16, s 173.

129 See e.g. *Faruk v The Landlord and Tenant Board*, 2023 ONSC 2191.

130 Dubé, *supra* note 17 at paras 69–70, and the case study examples at paras 37, 267.

131 This is based on the author's analysis of Public Appointments Secretariat records, online: <pas.gov.on.ca/Home/Agencies-list?SelectedMinistryId=&q=tribunal>.

132 McCormack, *supra* note 75 at 28–29.

133 Dubé, *supra* note 17 at para 100.

134 Anand, Laird, & Ellis, *supra* note 71.

the adjudicative tribunals have increasingly had to rely on part-timers. In 2011, the LTB had more than four full-time adjudicators for every part-timer; in 2022, it had more part-timers than full-time employees.[135]

a. Long-Standing Problems

While Ontario's executive appointment practices went downhill after 2018, problems were visible before that point. One structural problem in the executive branch, predating the current government, is the highly complex appointments process, which contributes to delays. Ombudsman Dubé's report counted five major government entities, 11 high-level stages, and 122 distinct steps involved in appointing an adjudicator.[136] Two longstanding policies are particularly problematic for tribunal function: the caretaker convention, and the ten-year rule.

i. The Caretaker Convention

The "caretaker convention" holds that, during an election period and potentially for some months beforehand, appointments to some government agencies are either not made at all or are made with terms set to end shortly after the election.[137] The idea is to allow incoming governments to establish a new policy direction, including through appointments to policy-making agencies. However, the application of the caretaker convention to Ontario's adjudicative tribunals has contributed to short-staffing, job insecurity, and therefore dysfunction.[138] The actual work of these four high-volume adjudicative tribunals is almost entirely dispute resolution and not the creation of new substantive law or the implementation of extralegal government "policy".[139] Thus, the author's view is that they should not be subjected to the caretaker convention. They should instead be treated like hospitals, schools, and police stations—permanent and essentially apolitical parts of the state that should benefit from the human resources policies most likely to foster their healthy function.

ii. The 10 Year Rule

Since 2006, Ontario's executive branch has had a rule stating that the cumulative total time that an adjudicator can spend at a certain tribunal is ten years, unless exceptional circumstances are demonstrated.[140] Although it might be possible to continue thereafter with a promotion (e.g., from

135 ACTO, "LTB FAQ", *supra* note 59.

136 Dubé, *supra* note 17 at para 69.

137 John Wilson, "The Status of the Caretaker Convention in Canada" (1995) 18:4 Can Parl Rev 12 at 14.

138 Dubé, *supra* note 17 at paras 85–88.

139 For an argument that dispute-resolving tribunals should be clearly distinguished from administrative decision-makers doing other kinds of work, and given fundamentally different relationships to the elected branches of government, see Noel Semple, "Tribunals in Canada: A Coming of Age", Can J Admin L & Prac [forthcoming in 2024] [Semple, "Tribunals in Canada"].

140 Ontario Treasury Board Secretariat, "Agencies and Appointments Directive" (December 13, 2022), online: <ontario.ca/page/agencies-and-appointments-directive>, s 3.2.2; Ron Ellis, *Unjust By Design: Canada's Administrative Justice System* (Vancouver: UBC Press, 2013) at 11 [Ellis, *Unjust by Design*].

member to Vice-Chair), or a transfer to a different tribunal, this rule undoubtedly leads to the departure of experienced members. Ellis reports that, at least under the current government, those who have served for ten years would be considered ineligible for appointment to any other tribunal in Ontario.[141]

Most employers seek to retain good people, so it is striking to see one taking the view that they should leave after a time regardless of performance. Some Tribunal Chairs do support the ten-year rule, or something like it, on the basis that it promotes "renewal" or facilitates the departure of underperforming members.[142] However, given that such career caps are basically unprecedented in any other organization, it seems likely that there are better ways to obtain a meritorious, innovative, high-performing workforce. In the federal tribunals, there has been nothing akin to a ten-year-rule in place since 2015—if not earlier.[143]

b. Leadership and Culture

Recruitment and termination practices do not only determine who is doing the tasks in a workplace. They also determine leadership and culture, which in turn have profound effects on collective performance. An adjudicative tribunal is more than just a collection of individuals handling cases that have been assigned to them. With the right leadership and culture, it can outperform the sum of its individual members' efforts. Unfortunately, appointment and de-appointment practices in the adjudicative tribunals make pro-functional leadership and culture very difficult to achieve.

i. Adjudicative Tribunal Leadership

Tribunals are led by members who have been appointed as Vice-Chairs, Associate Chairs, or full Chairs.[144] In Ontario, there is a single Executive Chair for all 13 tribunals clustered under the aegis of Tribunals Ontario, including the four that are the focus of this feature.[145] Chairs are responsible for the performance of their tribunals, including the assignment of adjudicators to hearings, and for the design of its procedure and interface with the public.[146] There are dozens of systemic and procedural decisions to be made in this role, about everything from the design of the website to the

141 Ellis, "Judicial Tribunals", *supra* note 115.

142 SOAR Advocacy and Innovation Committee, "Study of the Impact of the Government Directive on Term Limits for OIC Appointments" (February 2015) at 5–6, online (pdf): <soar.on.ca/sites/default/files/article/SOAR%20Report%20on%20the%20Study%20of%20the%20impact%20of%20the%20Government%20Directive%20on%20Term%20Limits%20for%20OIC%20Appointments_0.pdf>. See also Ian Mackenzie, "Adjudicators and Term Limits", *Slaw* (August 27, 2015), online: <slaw.ca/2015/08/27/adjudicators-and-term-limits/>.

143 Private personal communication (July 24, 2023) via email [communicated to author].

144 *ATAGAA*, supra note 5, ss 16(2), (4).

145 *Ibid*, s 16(1).

146 *Ibid*, s 20(1).

process for a party seeking to postpone a hearing.[147] The cumulative effect of such decisions on the tribunal's accessibility and performance is large. Chairs are also responsible for consultations with stakeholders, including repeat parties and their representatives (such as legal clinics and automobile insurers). This role is essential, especially when new circumstances such as a pandemic arise, or major changes are contemplated for the tribunal's work.

The collaborative nature of adjudicative tribunal decision-making arguably makes leadership and internal culture even more important than they would be in a court. Each adjudicative tribunal is responsible *as an entity* for delivering timely and accessible justice within its sphere.[148] In order to treat like cases alike, and to apply the collective experience of the tribunal, members are permitted to have internal consultations about the law applicable to a case involving adjudicators who did not hear it. This allows a level of internal collaboration that, in a court, would impinge upon the independence of the adjudicator(s) assigned to the case.[149] Another difference from courts is that many tribunals have adjudicators with diverse professional backgrounds (e.g., in health and social work in addition to law), and they can learn from each other through internal consultations. Over time, they can each develop expertise in all fields of knowledge required by the caseload.[150]

Current appointment and de-appointment practices in Ontario's adjudicative tribunals are not at all favourable to leadership and culture. The Executive Chair of Tribunals Ontario and at least two other senior leaders appointed since 2018 are individuals with strong connections to the governing party, but no apparent prior experience in adjudicative tribunals.[151] They are expected to lead adjudicators afflicted by arbitrary de-appointments, precarious working conditions, and a lack of experienced veterans.

Crises like the COVID-19 pandemic are crucibles that reveal the strength of organizations. An adjudicative tribunal with strong leadership and culture can adjust and innovate. It might call on its people to do a bit more than they would normally do, or work in different ways, to continue functioning at or near normal levels. Instead, pandemic response was in the hands of tribunals that had lost almost all their leaders and most experienced members, with results that were predictable in hindsight.[152]

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147 Emily Farrimond & Paul Aterman, "Five Steps to User-centred Tribunal Design" (2023) 36:1 Can J Admin L & Prac 5; Lorne Sossin & Jamie Baxter, "Ontario's Administrative Tribunal Clusters: A Glass Half-Full or Half-Empty for Administrative Justice" (2012) 12:1 OUCLJ 157 at 162, DOI: <10.5235/147293412803188829>.

148 Ellis, *Unjust by Design, supra* note 140 at 201.

149 *Iwa v Consolidated-Bathurst Packaging Ltd*, 1990 CanLII 132 (SCC); *Shuttleworth v Ontario (Safety, Licensing Appeals and Standards Tribunals*), 2019 ONCA 518.

150 Ellis, *Unjust by Design, supra* note 140 at 199.

151 Regg Cohn, *supra* note 56.

152 Cook, *supra* note 70; Tribunal Watch Ontario, "Statement on the Ombudsman's Report on the Landlord and Tenant Board" (May 2023), online (pdf): <tribunalwatch.ca/wp-content/uploads/2023/05/Statement-on-the-Ombudsmans-investigation-of-the-Landlord-and-Tenant-Board.pdf>.

ii. Digital First: Shortcomings of Leadership and Design

The Digital First policy at Tribunals Ontario is an object lesson in what happens when leadership and culture fail. As noted in Part I, forcing almost all matters online has been the source of major procedural and substantive injustices. How did it come about? What is known is that Tribunals Ontario imposed its Digital First strategy on September 17, 2020,[153] a moment when an improving public health situation had allowed the provincial courts to move in the other direction, resuming in-person proceedings.[154] No stakeholder input was solicited beforehand.[155]

One cannot know with certainty where the idea of Digital First came from, but an educated guess is possible. During the first pandemic lock-down in the spring of 2020, members of the managerial and professional classes generally found that videoconferencing worked well for meetings among themselves. It is an easy and convenient way to stay in one's home and avoid arduous commutes to downtown offices. Why not, someone probably said, move all the adjudicative tribunals onto Zoom? This perhaps seemed a chance to extend the convenience benefits to everyone involved, while also saving the government some money. The case was bolstered by the apparent success of British Columbia's (BC's) Civil Resolution Tribunal (CRT), which was dealing with thousands of condominium disputes at the time, almost all online, with few apparent problems.[156]

The new leaders of Tribunals Ontario lacked experience, and apparently made no effort to inform themselves of crucial facts about the context in which the technology was to be deployed. First, tribunal hearings are adversarial in nature, which greatly exacerbates the consequences if a party has no internet connection, a weak connection, or no camera on their device. The adversary will not assist, and the adjudicator might not do so either given the time pressure they are experiencing and the danger of being seen to assist a party. Second, the high-volume tribunals serve tens of thousands of people who lack access to technology, and/or data, and/or command of either official language of Canada. It is simply not the same population of more affluent condo owners and boards that was using the CRT in BC.

153 Tribunals Ontario, News Release, "Tribunals Ontario Implementing Digital-First Services for Ontarians" (September 17, 2020), online: <tribunalsontario.ca/2020/09/17/to-september-17-2020-tribunals-ontario-implementing-digital-first-services-for-ontarians/>; see also Tribunals Ontario, News Release, "Tribunals Ontario Launches 'Tribunals Ontario Portal'" (December 8, 2021), online: <tribunalsontario.ca/2021/12/08/to-december-8-2021-tribunals-ontario-launches-tribunals-ontario-portal/>.

154 Attorney General of Ontario, News Release, "Ontario Courts Gradually Resuming In-Person Proceedings" (June 30, 2020), online: <news.ontario.ca/en/release/57443/ontario-courts-gradually-resuming-in-person-proceedings>.

155 Laird, *supra* note 65 at 15.

156 Suzanne E Chiodo, "Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?" (2021) 57:3 Osgoode Hall LJ 801.

Successful adjudicative tribunal function depends on quick but effective human connections being formed between parties (for settlement discussions, for instance), duty counsel, translators, and tribunal counter staff. The bricks-and-mortar tribunal building is a technology that allows all these connections to be formed—at the service desk, in the hall, and in hearing rooms where people can see each other face to face. Videoconference platforms have not yet developed functional equivalents.

This is not to deny the access to justice advantages of videoconferences, or that a primarily digital adjudicative tribunal can succeed. The federal Social Security Tribunal, and BC's CRT, seem to be succeeding with video- and teleconference as the primary modality for hearings.[157] The devil is in the details, though, and the system must be designed and supported for success in its own context.[158]

There might have been a way to make Digital First a success for Tribunals Ontario. For example, legal clinics could have been funded to provide private spaces in their offices for their clients, with computers and reliable internet connections, along with legal advice and representation. This was in fact the SBT's practice in northern Ontario prior to Digital First. Clinics could have been funded to send lawyers or paralegals, with laptop computers and strong mobile internet plans, to the homes of clients prior to their hearing times where necessary. This might even have reduced the number of tenants who abandon their legal rights because they do not appear for their hearings.

There might have been other ways to make Digital First a success. Tribunals Ontario has started to offer public access terminals and "loaner" cell phones, upon application, to some users who lack the necessary technology to connect.[159] But to avoid the serious dysfunction described above, someone who knew the context and was genuinely interested in helping adjudicative tribunals create access to justice would have had to turn their mind to the question. A crucial source of knowledge about whether and how to go digital could have been adjudicators who had worked in-person and then online. Regrettably, mass de-appointment eliminated this source of institutional knowledge. Delivering access to justice, within the complex context in which a certain class of disputes arises, requires experienced and consultative leadership as well as a strong internal culture. Current appointment and de-appointment practices make their emergence just as unlikely as it would be in a school, or a police station, where everyone is fired and replaced by inexperienced newcomers every time there is a change in government.

157 Importantly, both tribunals offer participants the choice of having an in-person hearing if they prefer.

158 Hughes, *supra* note 54 at 21–22. On the importance of design principles in justice systems, see Nicole Aylwin, "Human-Centered Design and the Justice System: Lessons from the Field", *Slaw* (June 6, 2016), online: <slaw.ca/2016/06/06/human-centered-design-and-the-justice-system-lessons-from-the-field/>; Lorne Sossin, "Designing Administrative Justice" (2017) 34:1 Windsor YB of Access J 87.

159 Tribunals Ontario, "Common Requests for Accommodation", online: <tribunalsontario.ca/en/request-an-accommodation/#sec4>.

2. The Legislative Branch: A Good Start but not Good Enough

Ontario's largest adjudicative tribunals have proved highly vulnerable to executive branch neglect. This may be surprising because Ontario, compared to other Canadian jurisdictions, has a relatively strong legislative foundation for tribunal justice. The *ATAGAA*[160] clearly sets out the legislature's intention that adjudicative tribunals be efficient and accountable, with members and leaders selected based on merit. The *ATAGAA*, unlike legislation in most other provinces or at the federal level, establishes a distinct class of *adjudicative* tribunals that are listed in a regulation, setting them apart from the hundreds of provincial agencies that implement policy, make rules, or manage public assets. The *ATAGAA*'s stated purpose is to "ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making."[161] To this end, it mandates them to develop service standards and performance measures for timely and accessible service.[162]

The *ATAGAA* also creates rules for adjudicative tribunal appointments. These must be made through a "competitive, merit-based process".[163] Candidates must be assessed on whether they have "experience, knowledge, or training in the subject matter" of the tribunal, and whether they have aptitude for impartial adjudication.[164] Recognizing the importance of leadership, Chairs of the adjudicative tribunals have key roles under the *ATAGAA*. No one can be appointed to a tribunal without the Chair's recommendation.[165] Chairs are made "responsible for ensuring that the tribunal performs the duties and functions required of it."[166]

Reading the *ATAGAA* and comparing it to analogous statutes in other common law provinces and at the federal level, one might think that Ontario's adjudicative tribunals have a secure foundation to do their essential work. However, its good intentions have been foiled due to certain shortcomings. First, while adjudicative tribunal Chairs must approve of appointments, the *ATAGAA* does not require them to approve of *de-appointments*, and so they cannot prevent adjudicators in their tribunals from being removed no matter how meritorious they are or how urgently their services are needed.[167]

Second, while the *ATAGAA* arguably equips the executive branch to prevent and correct internal problems within the adjudicative tribunals, it does not equip the legislative branch (or anyone else) to correct tribunal dysfunction caused by executive branch neglect.[168] A likely candidate for this

160 *Supra* note 5.

161 *Ibid*, s 1.

162 *Ibid*, ss 5, 7(2); O Reg 89/11.

163 *ATAGAA*, *supra* note 5, s 14.

164 *Ibid*, s 14(1).

165 *Ibid*, s 14(4).

166 *Ibid*, s 20.

167 *McAnsh, supra* note 123.

168 Each tribunal is given a responsible minister who is to oversee and review the tribunal's accountability documents and enter into a memorandum of understanding with it regarding operational responsibilities: see e.g. *ATAGAA, supra* note 5, s 3(3).

role would be the Ontario Legislature's Standing Committee on Government Agencies, which is mandated to review the operation of adjudicative tribunals, among other provincial agencies.[169] Committee members review the credentials of proposed appointees, and call a small sample of them as witnesses. Opposition members of this Committee have the opportunity to question approximately 20 of the Government's proposed appointees per year, and ask questions designed to expose potential shortcomings.[170] Members can also ask critical questions of intended appointees selected by the government to appear before the Committee.

However, the *ATAGAA* does not give the Committee, or the legislature as a whole, any formal role or the resources to discharge such a role when it comes to identifying meritorious appointees or holding the executive branch accountable for doing so. The Committee cannot veto any proposed appointments, nor can it compel the appearance of the Chairs who are responsible for the overall management of the adjudicative tribunals. The Executive Chair responsible for all of Tribunals Ontario was initially appointed for less than one year and was then reappointed, which exempted him from Committee oversight.[171] Under the current government, prospective appointees who are called to the committee are allowed to decline the invitation on the basis that they are unavailable, without any need to give reasons, to find an alternative date, or even to answer the Committee's questions in writing.[172] It cannot therefore ensure that the government undertakes the competitive appointment process required by section 14 of the *ATAGAA*. In the words of Professor Paul Daly, this has rendered this promising legislative commitment to competitive and merit-based appointments little more than a "paper tiger".[173] When the government lost interest in giving adjudicative tribunals what they need to function, the *ATAGAA* was of no assistance.

169 Legislative Assembly of Ontario, "Mandate of the Standing Committee on Government Agencies (Legislative Assembly of Ontario)" (last visited March 17, 2024), online: <ola.org/en/legislative-business/committees/government-agencies/parliament-43/mandate> [Legislative Assembly of Ontario, "Mandate"].

170 Legislative Assembly of Ontario, "Standing Committee on Government Agencies - Transcripts" (last visited July 17, 2024), online: <ola.org/en/legislative-business/committees/government-agencies/parliament-43/transcripts>.

171 See Legislative Assembly of Ontario, "Mandate", *supra* note 169, Preamble.

172 Tribunal Watch Ontario, "Submission to the Standing Committee on Government Agencies" (2023) [on file with author].

173 Paul Daly, "Administrative Tribunals: Structural Variability" (July 12, 2023), online (blog): <administrativelawmatters.com/blog/2023/07/12/administrative-tribunals-structural-variability/>.

3. The Judicial Branch: Little Help

People who have fallen victim to tribunal dysfunction often look to the courts for relief. In our system of government, courts are responsible for overseeing the use of powers granted by the legislature to the executive branch, including the work of the adjudicative tribunals.[174] To this end, there are statutory rights of appeal from the decisions of most adjudicative tribunals; these are heard in Ontario by the Divisional Court.[175] Even when statutory appeal is unavailable, courts may conduct judicial review of tribunal action, tribunal *inaction*, appointments, and de-appointments.

From a functional point of view, appeal and judicial review might improve the system's operation by correcting executive agents who have erred. They might work like one of the human body's many backup systems, which can ensure the necessary work gets done even if the frontline system fails.[176] If courts were to consistently remedy and correct defects in the adjudicative tribunals' work, and in the executive's appointment practices, then the symptoms identified in Part I would clear up. This has not happened, at least not in Ontario. Thus, our effort at diagnosis must ask why not. This section will review judicial responses to three specific forms of adjudicative tribunal dysfunction discussed in this feature: procedural injustice, systemic delay, and de-appointment of meritorious adjudicators and chairs.

a. Correcting Procedural Injustice

In a few cases, Ontario's Divisional Court has corrected procedural injustice in the four high-volume tribunals. In *Abara v Hall and Lee*,[177] the Divisional Court overturned an LTB decision in which an oral hearing was scheduled for 15 minutes, and actually lasted only three to five minutes. The landlord was given no reasonable chance to be heard on a legally significant point and was repeatedly interrupted by the adjudicator.[178] The decision was overturned.[179]

In *Manikam v Toronto Community Housing Corporation*,[180] the respondent landlord alleged that the appellant tenant, Manikam, had thrown a rabbit to its death from her balcony. An illegal act of this nature would have justified evicting her under the terms of the lease. Manikam claimed that the animal had jumped of its own volition. A key piece of evidence, relied upon by the landlord and then by the

174 Mary Liston, "Bringing the Mixed Constitution Back In" (2021) 30:4 Const Forum Const 9 at 23, DOI: <10.21991/cf29426>. Adjudicative tribunals are considered to be part of the executive branch of government: see *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, at para 32 [*Ocean Port*].

175 An exception is the HRTO, whose governing statute states that its decisions are not subject to appeal (*Code, supra* note 26, ss 45.7, 45.8).

176 For example, in collateral circulation, small arteries will deploy to permit blood to flow around a blockage in a larger artery.

177 *Abara v Hall and Lee*, 2022 ONSC 7093 [*Abara*].

178 *Ibid* at paras 33–37.

179 For a similar example from Saskatchewan, see *Fiddler v Provost*, 2022 SKKB 263.

180 *Manikam v Toronto Community Housing Corporation*, 2019 ONSC 2083 [*Manikam*].

LTB in granting the eviction, was a statement taken by a police officer who arrived after the rabbit's plunge. Manikam's boyfriend at the time—who owned the rabbit—stated that Manikam had told him she had thrown it. He signed a statement in the police officer's notebook to that effect. However, the boyfriend was not called as a witness at the LTB hearing, making his evidence hearsay and depriving Manikam of the opportunity to cross-examine him. The Divisional Court overturned the eviction on the basis that relying on hearsay evidence was unacceptable given the serious interests at stake (i.e., the loss of the tenant's rent-subsidized home, with no reasonable prospect that she would find another at a comparable rate).

The Divisional Court's ability to correct procedural injustice is sharply limited by the inaccessibility and disproportionality of litigation for most users of the LTB, SBT, HRTO, and LAT-AABS. Very few individuals are willing and able to self-represent in the Divisional Court. Thus, retaining counsel is a practical necessity for most who wish to take this path. Legal Aid Ontario-funded clinics can take on a small amount of Divisional Court work and, in so doing, have established important precedents in the fields of landlord-tenant disputes, human rights, and social benefits law. However, clinics' resources are almost entirely consumed by helping people before the tribunals themselves, leaving little for appeal or judicial review work. For the typical victim of procedural injustice, getting before the Divisional Court therefore means finding a cash retainer of $5,000 or more to retain a private lawyer, and assuming the risk of losing and being ordered to pay costs to the respondent.

A very small proportion of Ontarians can afford to go this route. Even if one has the money, spending $5,000 in this way is often unadvisable. Going to the Divisional Court might be feasible and sensible for those who have lost their livelihoods as a result of tribunal decisions—for example, those deprived of business licenses, or professional certifications.[181] However, the nature of the decisions made by LTB, SBT, HRTO, and LAT-AABS is such that few victims of their dysfunction find it feasible or sensible to take this path. Their cases are not worth much in monetary terms (which is also the reason why few if any lawyers will accept these matters on a contingency basis). They are often better advised to just pick up the pieces and move on with life, especially when factoring in the psychological and temporal costs of litigation along with the monetary ones.[182] The court system is not generally proportionate or practical for the resolution of residential tenancy matters or entitlement to financial benefits, even as a backup to adjudicative tribunals.

Judicial deference is another reason why courts are of limited help in correcting instances of alleged procedural injustice. Reviewing courts are required to defer to administrative decision-makers, both because the legislature chose to empower the latter to make these decisions and also because tribunals are presumed to have greater expertise in both the procedure and the law that

181 See e.g. *Connor Homes v Director*, 2021 ONSC 3195; *Kastner v Health Professions Appeal and Review Board*, 2023 ONSC 629.

182 Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2016) 93:3 Can Bar Rev 639. There are extensive systemic and party-generated delays in the court system: see Chiodo, *supra* note 156. In both *Abara*, *supra* note 177, and *Manikam, supra* note 180, the Divisional Court decisions were released over a year after the original LTB decision.

they deploy.[183] Although the standard of review for breaches of procedural fairness is correctness, finding that a tribunal adjudicator violated the principles of procedural justice often means second-guessing a decision made by a person with contextual knowledge superior to that of the judge.[184] Reviewing courts are well aware that most Ontario tribunal adjudicators are doing the best they can in a difficult situation. If a procedural corner is cut in a way that speeds up the process and lets the tribunal get to the other urgent cases piling up in the queue, judges will be understandably reluctant to interfere, except in the most clear-cut cases.

b. Correcting Systemic Delay

As Part I demonstrated, systemic delay is the most obvious and damaging manifestation of adjudicative tribunal dysfunction in Ontario today, and a prime cause of the other miscarriages of procedural and substantive justice. How helpful are courts for people like small landlord Elsie Kalu, who was stuck with a non-paying tenant during eight months of LTB delay that consumed almost all her financial resources?[185] A victim of systemic delay confronts the same practical impediments to Divisional Court litigation that a victim of procedural justice does. Here, however, there is an additional hurdle in that the substantive law is also unhelpful.

A lawyer representing Kalu might first consider an application for mandamus. Such an order can compel an administrative tribunal to expedite the hearing of a particular matter, or to hear it within a certain time frame.[186] However, mandamus is very difficult to obtain in Canadian law, for understandable reasons.[187] It requires a bold judge to second-guess the tribunal's choice of how to allocate its scarce resources among the many cases demanding its attention. Mandamus means compelling an adjudicative tribunal to move one person to the front of the line, which will increase delay for all the others, who might differ from the applicant only in their lack of funds to get to the Divisional Court. There is no evidence that a mandamus order for expedited hearing has *ever* been granted for the LTB, SBT, HRTO, or LTB-AABS.

What about other possible judge-made remedies for systemic delay in adjudicative tribunals? The Supreme Court of Canada's (SCC's) 2016 decision in *R v Jordan* required the Crown to bring most criminal matters to trial within 18 months, or else they would be dismissed.[188] *Jordan* was an

183 *Vavilov, supra* note 36 at paras 26–27. There is an even stronger legal basis for deference to Human Rights Tribunal decisions, which are subject to a privative clause: see *Code, supra* note 26, ss 45.7, 45.8.

184 *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 129 [*Abrametz*]. See also France Houle, "Constructing the Fourth Branch of Government for Administrative Tribunals" (2007) 37 SCLR 1 at 39.

185 See Part I(3)(d), above.

186 See e.g. *Liang v Canada* (*Citizenship and Immigration*), 2012 FC 758.

187 Paul Daly, "Remedies for Delay After Law Society of Saskatchewan v. Abrametz, 2022 SCC 29" (7 September 2022), online (blog): <administrativelawmatters.com/blog/2022/09/07/remedies-for-delay-after-law-society-of-saskatchewan-v-abrametz-2022-scc-29/>.

188 *R v Jordan*, 2016 SCC 27.

application under section 11(b) of the *Canadian Charter of Rights and Freedoms*,[189] which protects the right to trial within a reasonable time. The result in *Jordan* created hope in some quarters that appellate courts were about to start cracking down on systemic delay in other parts of the justice system, but this has not yet happened.

Abuse of process is a common law doctrine that has provided remedies for some Canadians subjected to lengthy delays within administrative procedures. Courts will correct behaviour that abuses legal process by delaying its progress unreasonably. However, abuse of process is a remedy for party-caused delay, not systemic delay. The typical remedy, when a plaintiff or applicant is found to have abused process, is for their matter to be dismissed or stayed.[190] When the defendant/responding party is at fault, or when the abuse is less severe, the courts can use cost awards or reduce the penalty as remedies for abuse of process.[191] None of this is useful for the type of systemic delay found at Ontario's high-volume provincial tribunals. The government is not usually a party in these tribunals (except at the SBT where it is the respondent), and dismissing matters would only punish innocent applicants.

The SCC's recent decision in *Abrametz v Law Society of Saskatchewan*,[192] which restated the law of abuse of process, did show an understanding of how devastating extensive delay can be for parties and for the system. In addition to rendering a hearing unfair for evidentiary reasons, the SCC noted that delay can cause psychological harm and bring the administration of justice into disrepute. The fact that delay is systemic rather than party-generated does not make it any less devastating, but it does require the law to find a remedy other than abuse of process.

c. Correcting Arbitrary and Political De-Appointments

Courts have so far been unable or unwilling to consistently remedy procedural injustice and systemic delay in cases brought by tribunal users. However, these are merely the *symptoms* of adjudicative tribunal dysfunction. Perhaps courts could treat its *cause?* To reiterate, the most important cause of the dysfunction of Ontario's adjudicative tribunals is that experienced and meritorious adjudicators were shown the door *en masse*. What have the courts had to say about de-appointment of meritorious adjudicators?

If an appointment specifies a fixed term, courts will not allow the government to terminate it before the specified end date, in the absence of clear statutory authority to do so or serious misconduct by the appointee. This has been clear since *Hewat v Ontario*,[193] a 1996 decision of the

189 *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 11(b).

190 Daly, *supra* note 187 citing Gerald P Heckman, "Remedies for Delay in Administrative Decision-Making: Where Are We After *Blencoe*?" (2011) 24:2 Can J Admin L & Prac 177 at 199.

191 *Abrametz, supra* note 184 at para 100.

192 *Ibid* at paras 43, 69.

193 *Hewat v Ontario*, 1998 CanLII 3393 (ONCA).

Ontario Court of Appeal. A newly elected Ontario government terminated three Vice-Chairs of the Ontario Labour Relations Board, all three of whom had been appointed to fixed terms that had not yet ended. The Court found that when the government included a fixed end date in the original appointment, it "exhausted" its power to dismiss the adjudicator prior to that date.[194]

The current problems in Ontario arise not from mid-term terminations, though, but rather from arbitrary de-appointments after terms end. The *ATAGAA* does not explicitly constrain the government's power to de-appoint adjudicators. The legality of de-appointment regardless of merit seems to have been established by the 2023 decision in *McAnsh v Ontario*.[195] Scott McAnsh was a member of the Assessment Review Board, an adjudicative tribunal that hears appeals of property valuations for taxation purposes. He was appointed in 2013, reappointed twice, but then received no offer of reappointment after his final term ended in June 2019. He alleged that he had been informally promised continuing reappointments based on merit, and that the government's refusal to do so in 2019 constituted a breach of contract. The practice until 2018 was for adjudicators endorsed by tribunal chairs, like McAnsh, to be routinely reappointed for a total of ten years.[196] The SCJ dismissed McAnsh's claim, finding that there was no continuing contract between the parties after the end of the term. The Court found that appointees like McAnsh are not employees of the government, but rather "entirely independent of government in both form and function".[197] No weight could be given to whatever informal assurances had been provided to the plaintiff by previous Chairs of this tribunal.

A lawsuit filed in 2020 by a non-profit group Democracy Watch alleged that de-appointment absent merit concerns is inconsistent with the *ATAGAA*'s requirement for a "competitive, merit-based" approach to appointments.[198] It was also alleged, in both the *McAnsh* and Democracy Watch statements of claim, that the independence of adjudicative tribunals is a common law or constitutional principle, which the current appointment practices contravene in an impermissible way. Although there might be scope for such an argument, the SCC's 2001 decision in *Ocean Port* remains a serious impediment. There, the SCC found that, in tribunals that do not deal with constitutional rights, guarantees of procedural justice and adjudicator independence are to be determined by statute.[199]

194 See also *McKenzie v Minister of Public Safety and Solicitor General et al*, 2006 BCSC 1372, appeal dismissed for mootness, 2007 BCCA 507.

195 *McAnsh*, *supra* note 123.

196 *Ibid*; Cook, *supra* note 70.

197 McAnsh, supra note 123 at para 32.

198 Democracy Watch, "Final Notice of Application - CV-20-00643637000" (8 July 2020), online (pdf): <democracywatch.ca/wp-content/uploads/FinalNoticeOfApplicOntTribunalConstCaseJuly082020.pdf>. This lawsuit appears to have been abandoned.

199 *Ocean Port*, *supra* note 174.

Conclusion

Access to justice has become little more than a mirage for tens of thousands of Ontarians whose legal rights are within the jurisdiction of the province's adjudicative tribunals. The LTB, the SBT, the HRTO, and the LAT-AABS are afflicted by egregious delays, breaches of basic procedural rights, and miscarriages of substantive justice. The proximate cause of this debacle was the mass de-appointment of competent and experienced adjudicators, with no functioning system to replace them. However, the fact that adjudicative tribunal functioning was left dependent on the goodwill of the executive branch highlights shortcomings in the legislative branch. Meanwhile, the courts are insufficiently accessible to act as robust backups for adjudicative tribunals; even if this were not the case, Canadian administrative law does not yet offer suitable tools to deal with systemic delay and dysfunctional appointment practices.

Laying out a course of treatment to address this malady, in any detail, is beyond the scope of this piece.[200] One prescription, relying on the appellate courts, would be to establish an enforceable duty on the government to make appointments and reappointments in a manner conducive to tribunal excellence and true access to true justice. An alternative remedy, working through the legislature, would be to amend the *ATAGAA* and strengthen legislative oversight, to ensure that tribunal appointees are selected and consistently reappointed based on merit.[201]

Public sector entities such as tribunals, cabinets, and legislatures do not exist for their own sakes. Unlike individual human beings, they do not have interests that are inherently worth protecting. They only exist because people need them to exist, to make human lives better than they would otherwise be. Human needs are complex, and so the modern state has developed organs and systems that are almost as variegated and complex as those of the human body itself. And yet they cannot do their work unless they support each other. As Professor Adam Dodek put it, the key question is "how do we do great things together?"[202] A more permanent and stable legal order surrounding adjudicative tribunals is essential, if they are to return to doing great things for the people of Ontario.

200 Semple, "Tribunals in Canada", *supra* note 140.

201 This is the goal of a Private Member's Bill introduced by MPP Ted Hsu in the Ontario Legislative Assembly in April 2024: Bill 179, *Fewer Backlogs and Less Partisan Tribunals Act*, 1st Sess, 43rd Leg, Ontario, 2024 (first reading 25 March 2024).

202 Administrative Justice Working Group, *supra* note 72.

FEATURE

The Case Method after Formalism: A Reflection on Legal Education and the Strangeness of Law

Jessica Eisen*

Abstract: This reflection considers the persistence of the case method in legal education, even as the legal philosophy animating its inception (legal formalism) has lost much of its hold on the instructors employing the method. I propose that the case method has a number of important benefits that explain its prevalence, but that, alongside these benefits, the case method carries the risk of creating an environment in which the language and culture of common law lawyering are treated as better than other languages and cultures relied upon to structure collective relationships and resolve disputes. The risks posed by this kind of learning environment are clear and interconnected: it degrades and diminishes those students whose languages and cultures of collective life are furthest from those commonly found within the judiciary, and it leaves students ill-equipped to understand and participate in many important forms of legal critique and client communication. To assuage these risks, I advocate here an approach to legal education that strives to keep in view the strangeness of law. The aim of the approach and techniques sketched here is to create a learning environment anchored in the shared project of learning a language and culture that is distinct from but not unrelated to other ways of thinking and knowing: to acknowledge that students must continue to respect their own knowledges and values—and those of others—even as they develop a deeper relationship with the knowledges and values that animate judicial reasoning.

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* Associate Professor, University of Alberta, Faculty of Law. My sincerest thanks to Angela Lee—an exceptional teacher from whom I always have something new to learn—for encouraging me to write this piece. Thanks also to Sina Akbari for helpful discussions of formalist legal theory in connection with this article, Audrey Fried for prompting my thinking on this topic, and to Rachel Weary for her always-excellent research assistance.

CONTENTS

INTRODUCTION 120

I. FEMINISM AND THE CASE OF THE FLYING CRICKET BALLS 122

II. THE CASE METHOD AND THE "SCIENCE" OF LAW 125

III. WE ARE ALL REALISTS NOW ... 127

IV. ... YET THE CASE METHOD LIVES ON 128

V. HAUNTED BY THE GHOST OF LAW'S SUPPOSED NEUTRALITY 131

VI. TEACHING THE STRANGENESS OF LAW 133

1. Teach With Ambitious Intervener Factums 133
2. Acknowledge And Name Diverse Reactions To Materials 136
3. Brief Comparative Interludes 138
4. "Teaching To The Test": Working With Practice Problems 140
5. Be Ready To Resituate "Off-Track" Questions And Comments 142

CONCLUSION 144

Introduction

The case method continues to dominate legal education in Canada, at least in the first-year curriculum.[1] It has persisted even as the legal philosophy animating its inception (legal formalism) has lost much of its hold on the instructors employing the method. For some law professors, this has meant that our teaching practices and our scholarly analyses have felt discordant, with some professors feeling "embarrassed" or "apologetic" about the persistence of case-based doctrinal teaching in their classrooms.[2] How can we explain the persistence of the case method in legal education given the waning influence of formalism in the scholarship produced by law professors? Should we, as

1 *Cf* David Garner, "The Continuing Vitality of the Case Method in the Twenty-First Century" (2000) 2000:2 BYU Educ & LJ 307. The case method sees students taught, across doctrinal areas, to learn the law by reading a series of leading cases. Their instructors guide them in their reading of these cases to develop an appreciation of the interplay between fact and principle in order to, ultimately, predict how a court would likely use existing case law to resolve novel, often hypothetical, fact scenarios.

2 Dan Priel, "The Myth of Legal Realist Skepticism" (2022) Osgoode Hall Law School, Working Paper, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1351&context=all_papers> at 76-77 [Priel, "Legal Realist Skepticism"].

law professors, continue using the case method even if we don't accept a formalist account of law (or if we don't intend to impose a formalist vision on our students)? Why and how?

In this reflection, I propose that the case method has a number of important benefits that explain its prevalence, and I offer a decidedly non-formalist defence of its continued use in first-year law school: that it offers a foundation for crucial professional skills, and that it helps students to understand the language and culture of lawyering. I then go on to suggest that, alongside these benefits, the case method also poses risks that are particularly heightened when paired with a formalist view of law: the creation of an environment in which these skills, and the language and culture of common law lawyering, are treated as *better than* other languages and cultures that people rely upon to structure their collective relationships and resolve disputes. The risks posed by this kind of learning environment are clear and interconnected: it degrades and diminishes those students whose languages and cultures of collective life are furthest from those commonly found within the judiciary, and it leaves students ill-equipped to understand and participate in many important forms of legal critique and client communication. Together, these risks have materialized into a significant corpus of legal writing (including by now-celebrated legal scholars) describing the law school experience as isolating, alienating, and undermining.[3]

To assuage these risks associated with the case method, I advocate here an approach to legal education that strives, always, to keep in view the *strangeness of law*. This approach seeks to help students understand the skills of reading cases, presenting legal arguments grounded in precedent, and analyzing novel scenarios in predictive fashion *without* creating an environment that treats this skill set as the best or only way of approaching relationships and conflicts, including those emerging as legal cases. The aim is to create a learning environment anchored in a shared project of learning a language and culture that is *distinct* but not *unrelated* to other ways of thinking and knowing: to acknowledge that students must continue to respect their own knowledges and values—and those of others—even as they develop a deeper relationship with the knowledges and values that animate judicial reasoning.[4]

On this view, law does have its own internal logics and interpretive resources (as formalists have long insisted)—and it is indeed an important skill of a legal professional to work competently with these. But this view also insists that legal professionals can and should bring to this work an understanding that these logics and resources are strange: they are particular, sometimes unsettling, and can be quite distant from other ways of thinking and knowing. In other words, to retain the value of the case method while blunting its alienating effects, students must be encouraged to perpetually move between an "internal" and an "external" view of law—to use legal tools expertly without losing sight of them as tools designed to work best within a particular type of machine. This commentary offers some proposals and strategies toward this end.

3 See Part V, *below*, for examples and discussion of some of this work.

4 For a thoughtful exploration of a specific pedagogical exercise with similar aims, see Joy Twemlow, "Let me Introduce my Friend, Law: A Pedagogical Tool for Supporting Diversity and Critical Thinking in the Legal Classroom" (2023) 57:3 The Law Teacher 239.

I. Feminism and the Case of the Flying Cricket Balls

During my first weeks as a law student, I was assigned to read the classic torts case, *Miller v Jackson*.[5] The case concerned a number of homes built alongside a cricket pitch. The residents of these homes complained of cricket balls smashing through their windows, damaging their homes, and threatening injury.[6] Lord Justices Geoffrey Lane and Cumming-Bruce concluded that the cricket club was liable for the damage caused. In dissent, Denning LJ emphasized that the cricket pitch had been established before the homes were built, and concluded that the residents must therefore either bear with the cricket or move.

I did not (and still do not) have a strong intuition as to which party ought to have prevailed in this case, legally or morally. But I do vividly recall my experience of reading Denning LJ's dissenting reasons, which seemed to me to be positively dripping with sexism.[7] His allegiance with the cricket players was proclaimed in the case's opening sentence: "In summertime village cricket is the delight of everyone."[8] The next sentence revealed a narrow conception of who this "everyone" included: "Nearly every village has its own cricket field where the young men play and the old men watch."[9] The threat to the delight of "everyone" (composed, apparently, of men both young and old[10]) was cast as coming from those who threaten the "public interest", as Denning LJ saw it.[11] Among this group of selfish spoilsports, particular disdain was expressed for Mrs. Miller, "a very sensitive lady who has worked herself up into such a state" that she expressed fears of death or injury from flying cricket balls.[12] Were the cricket field to move, Denning LJ averred, the village would be "much the poorer" and "the young men will turn to other things instead of cricket."[13] (Was there a hint of threat there, I wondered, that these young men must be kept happy or otherwise not be responsible for their actions?)

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5 *Miller v Jackson*, [1977] EWCA Civ 6.

6 Lord Denning does note that there were no individuals who had sustained injuries, but the presence of smashed windows and cricket balls damaging homes is suggestive of a threat of serious injury (*ibid* at 25). See also Reuters' rundown of deaths and injuries from stray cricket balls: Reuters, "FACTBOX – Cricket – Deaths caused from on-field incidents" (27 November 2014), online: <reuters.com/article/cricket-australia-hughes-deaths-idUKL3N0TH1XW20141127/>).

7 It turns out that I was not the only reader to have this reaction. See e.g. Denise G Réaume, "What's Distinctive about Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law" (1996) 2:4 Leg Theory 265 at 286.

8 *Miller v Jackson*, *supra* note 5.

9 *Ibid*.

10 On this point, see also Greig Henderson, *Creating Legal Worlds: Story and Style in a Culture of Argument* (Toronto: University of Toronto Press, 2018) at 54; David Fraser, *Cricket and the Law: The Man in White is Always Right* (London: Routledge, 2005) at 21.

11 *Miller v Jackson*, *supra* note 5.

12 Again, this does not seem to be a baseless fear. See Reuters, *supra* note 6. For a discussion of Denning LJ's characterization of Mrs. Miller as reliant on "traditional female stereotypes of hysteria and irrationality," see Réaume, *supra* note 7 at 286.

13 *Miller v Jackson*, *supra* note 5.

I came to class eager and excited to engage with this (I thought) fascinating case of judicial gender bias. When our discussion turned to this case, I raised my hand and shared my observations. The professor, a renowned torts scholar, looked at me quite blankly as though I had raised my hand to share what I'd eaten for breakfast that morning, then drew the conversation back to what he viewed as the question of the day (probably foreseeability, though I confess, with apologies to my renowned professor, that I don't really remember). The professor was not cruel or unkind, but it was clear to me that my comments were received as a digression, not as a helpful engagement in our shared enterprise of case analysis. I quickly came to the realization that any reflections I may have on the social biases underlying judicial decision-making would not be seen as useful or important.[14]

Only years later did I come to understand that I had naively offered this analysis to one of the legal academy's most celebrated formalists: Ernest Weinrib. It was not that my remarks were inapt as feminist theory, or even as an entry point to determining a socially desirable result or mode of adjudication. It was, rather, that feminist or other "desirable" social outcomes were entirely beside the point of legal reasoning in my professor's view.[15] Unbeknownst to me, my professor held a well-considered and well-defended commitment *not* to view the issues I was raising as part of the work of legal reasoning. My concern with the status of women, in society and before Denning LJ, was just another instance of a doubtlessly tiring-to-the-formalist invocation of "some goal that is independent of the conceptual structure of the legal arrangement in question."[16] For Weinrib and other formalists, "law" and "politics" are separable and separate.[17] And "political" or "instrumental" approaches are not only "imperfect," but "superfluous".[18] My effort to identify gender bias in judicial reasoning was a mere "means to some ulterior end"[19] (the ulterior and superfluous end being the achievement of greater gender equality in society). My sophomoric efforts were "excluded", in Weinrib's view, because they were unrelated to the more "fundamental" project of legal analysis: to understand "juridical relations ... in terms of themselves".[20]

Weinrib's formalist view of law as distinct from politics, I came to learn, was no longer pervasively held in the legal academy. At the time of this classroom exchange, Weinrib was already

14 Interestingly, this very example is raised (in hypothetical form) in Geoffrey Samuel's discussion of the limits of doctrinal analysis of law: "If [a law student] discusses carefully, and on the basis of a solid feminist academic literature, the misogyny in play in the judgments in the case of *Miller v Jackson* (1977) ... she might well fail. This is not 'legal science', she might be told": Geoffrey Samuel, "What is the Role of a Legal Academic? A Response to Lord Burrows" (2022) 3:2 Amicus Curiae 305 at 312–13.

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

16 *Ibid* at 965.

17 *Ibid*.

18 *Ibid* at 966.

19 *Ibid* at 965.

20 *Ibid*.

well known (except, apparently, by me) for his impassioned defence of a particular brand of Kantian legal formalism, and he had encountered and responded to his critics many times over.[21] Weinrib understood and situated his defence of formalism as quite against-the-grain in a world of legal scholarship that increasingly advocated social and political understandings of law.[22] And yet, despite Weinrib's arguably iconoclastic legal theoretical views, his mode of legal instruction was quite in line with those of his colleagues.

Across the first-year curriculum, a mode of teaching inspired by legal formalism prevailed: the case method. Even those professors who I would later learn shared a more social view of law took the same basic approach: read the cases, identify rules shaped by analogies and disanalogies between the cases, and learn to argue from precedent. While some professors were more welcoming of political or "instrumental" analysis in the classroom, the course of instruction and the form of examination (i.e., issue spotter exams)[23] were decidedly focused on what has been described as an "internal" view of law:[24] one that presupposes and seeks to discern a logically coherent and (generally) apolitical explanation for decided cases, which can then be applied predictively to foresee outcomes in future or hypothetical cases or, critically, to determine whether past cases were "wrongly decided".

I now find myself as a law professor whose scholarship falls within Weinrib's identified "mainstream" of legal academics who view law as reflective of social and political forces rather than as expressive of a logical or apolitical schema.[25] And yet, I too teach with the case method, as do many of my

21 See e.g. Allan C Hutchinson's cheekily named "The Importance of Not Being Ernest" (1989) 34:2 McGill LJ 233; and Weinrib's also cheekily named "Professor Brudner's Crisis" (1990) 11:3 Cardozo L Rev 549, in reply to Alan Brudner, "Hegel and the Crisis of Private Law" 10:5-6 Cardozo L Rev 949. For influential critiques of legal formalism, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1986); Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89:8 Harv L Rev 1685; Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22:2 Harv CR-CLL Rev 401. Weinrib has continued to defend and develop his view of legal formalism in, e.g. *The Idea of Private Law*, revised ed (Oxford, UK: Oxford University Press, 2012). But see Alan Brudner's argument that Weinrib's more recent work seems, "without acknowledging" the shift, to accept aspects of "the functionalist's orientation of private law towards welfare goals specified as valuable external to private law." Alan Brudner, "The Rise and Fall of Private Law", Book Review of *Reciprocal Freedom: Private Law and Public Right* by Ernest J Weinrib, (2023) 37:1 Can JL & Juris 323 at 336-338. See also Stéphane Sérafin, Book Review of *Reciprocal Freedom: Private Law and Public Right* (2024) 49:2 Queen's LJ 127 at 138.

22 See e.g. Weinrib, "Legal Formalism", *supra* note 15 at 952 (contrasting his position against that of "mainstream scholarship" that "allows itself to see the law as a plurality of competing or unintegrated purposes").

23 See Barry Friedman & John CP Goldberg, *Open Book: The Inside Track to Law School Success*, 2nd ed (New York: Wolters Kluwer, 2016).

24 On the "internal" and "external" views of law, and their relation to realism and formalism, see e.g., Hamish Stewart, "Contingency and Coherence: The Interdependence of Realism and Formalism in Legal Theory" (1995) 30:1 Val U L Rev 1 at 3–4.

25 See *supra* note 22.

non-formalist colleagues.[26] Given the widespread ascendance of social conceptions of law amongst law teachers, how can we explain our continued allegiance to the case method? How can and should we be using the case method if we hope to impart an understanding of law that is attentive to its social and ethical dimensions? The remainder of this reflection examines these questions and offers some proposals for infusing the case method with non-formalist views of law.

II. The Case Method and the "Science" of Law

Christopher Columbus Langdell, widely credited with developing the case method,[27] was an avowed formalist. Law was not, in his view, a product of an imperfect battlefield of messy human priorities, political arrangements, or aesthetics.[28] Instead, Langdell famously cast law as a "science, consist[ing] of certain principles or doctrines" that law students should aspire to "master[]" such that they might be applied "with constant facility and certainty to the ever-tangled skein of human affairs."[29] Over a century later, Richard Posner observed the formalists' continued self-understanding as engaging in scientific or mathematical inquiry: "[f]ormalism enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect."[30] To this day, the highest academic degree in law is often termed the "Doctor of Juridical Sciences."[31]

The data from which these scientific and mathematical exercises are to proceed, according to legal formalists, is to be found in existing case law. And so the case method of legal education was developed and popularized by Langdell and others who saw the primary skill of lawyering to lie

26 See Priel, "Legal Realist Skepticism", *supra* note 2 at 76.

27 See generally Bruce A Kimball, *The Inception of Modern Professional Education: C.C. Langdell, 1826–1906* (Chapel Hill, NC: University of North Carolina Press, 2009).

28 See Juan Javier del Granado & MC Mirow, "The Future of Economic Analysis in Latin America: A Proposal for Model Codes" (2008) 83:1 Chicago-Kent L Rev 293 at 296 (observing a North-American tendency, prior to the ascendance of the Langdellian case method, to view law as "an art" rather than a "science").

29 CC Langdell, *A Selection of Cases on the Law of Contracts: With References and Citations* (Boston, MA: Little, Brown & Co, 1871) at vi.

30 Richard A Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution" (1986) 37:2 Case W Res L Rev 179 at 181. Posner distinguishes his own definition of formalism from that of Langdell and other early formalists, on the basis that Posner understands formalism to require some underlying policy choices (giving rise to legal principles), while classical formalists "liked to give the impression that the premises were self-evident": *ibid* at 182. But *cf* Stewart, *supra* note 24 at 4 (identifying Posner as "an exemplary realist", in contrast to Weinrib, the "exemplary formalist").

31 See e.g. Harvard Law School, "S.J.D. Program" (last visited 30 August 2024), online: <hls.harvard.edu/graduate-program/sjd-program/>.

in working with this raw data set (cases) to arrive at logically determined results in future cases. To help his students develop the skills of legal science, Langdell developed a mode of instruction requiring students to prepare for class not by reading treatises or commentaries, but by reading judicial decisions to the exclusion of all other materials.[32] The use of case law as the core instructional material was, and often remains, associated with large class sizes and a Socratic teaching method by which instructors guide students to a deeper understanding of legal doctrine through "dialogue" with students.[33] (Dialogue is, perhaps, too kind a word for this teaching practice, which is often experienced by students as more inquisitorial and humiliating than dialogic.[34])

Even as class sizes may now vary, and even as the Socratic method has evolved and receded,[35] the case method continues to call the tune in first-year law school classrooms in Canada and the United States. Despite the occasional "sprinkling of non-legal sources",[36] and the increasing presence of applied or clinical learning,[37] the Langdellian case method continues to shape the first-year law school experience: students prepare for class by reading primarily (if not exclusively) case law, then work with their instructors to derive patterns and principles that will help them predict how courts would likely approach a future, novel case. The primary mode of assessment, the "issue spotter" exam, tests precisely this skill: it presents students with a set of (usually hypothetical) facts, then asks them to predict, based on precedent, how a court might react.[38] Landgell's flagship teaching method has thus reigned in the classroom long after its intellectual progenitor, legal formalism, lost its hold on the majority of law professors.

32 See Steve Sheppard, "Casebooks, Commentaries and Curmudgeons: An Introductory History of Law in the Lecture Hall" (1997) 82:2 Iowa L Rev 547 at 596.

33 Jamie R Abrams, "Reframing the Socratic Method" (2015) 64:4 J Leg Educ 562 at 565.

34 David D Garner, "Socratic Misogyny? – Analyzing Feminist Criticisms of Socratic Teaching in Legal Education" (2000) 2000:4 BYU L Rev 1597 at 1597–98.

35 See generally Orin S Kerr, "The Decline of the Socratic Method at Harvard" (1999) 78:1 Neb L Rev 113.

36 Jack M Balkin & Sanford Levinson, "Law and the Humanities: An Uneasy Relationship" (2006) 18:2 Yale JL & Human 155 at 159–60. See also Gary D Finley, "Langdell and the Leviathan: Improving the First-Year Law School Curriculum by Incorporating *Moby-Dick*" (2011) 97:1 Cornell L Rev 159.

37 See Richard Jochelson, James Gacek & David Ireland, "Reconsidering Legal Pedagogy: Assessing Trigger Warnings, Evaluative Instruments, and Articling Integration in Canada's Modern Law School Curricula" (2021) 44:2 MLJ 87 at 95-96 (identifying a "clinical shift" in Canadian legal education, while accepting as "persuasive[]" that "legal education and law" generally "remain pedagogically conservative," including through its continued fealty to the case method).

38 See generally Friedman & Goldberg, *supra* note 23.

III. We Are All Realists Now ...

The ascendance and persistence of the case method in legal education sharply contrasts with the decline and near disappearance of Langdellian formalism in legal theory. The legal realists of the 1920s and thereafter have, so the common narrative goes, won the hearts and minds of legal academics. For realists, law is not best defined as an expression of immanent, coherent principles, but rather as "a vehicle for achieving purposes external to the law."[39] The influence of sexism or xenophobia (or, more commonly for classical legal realists, classism[40]), or other socially "variable" forces on judicial reasoning, have come to be seen as "not just permissible" but "central" to understanding law following the rise of legal realism.[41]

This view of law as deeply and invariably bound up in social dynamics marks realism, on many accounts, as the intellectual forerunner to several strands of contemporary jurisprudence, including critical legal studies, feminist legal theory, critical race theory, critical disability studies, economic analysis of law, and others.[42] While these approaches differ in emphasis, political valence, and method, they share an anti-formalist emphasis on the social inputs and outcomes of law. This is perhaps why it has become the definitive jurisprudential cliché to observe that "[w]e are all legal realists now."[43] As Jack Balkin and Sanford Levinson report, "only the most foolhardy academic today would describe doctrinal analysis as 'scientific.'"[44] Most of us (i.e., legal scholars and professionals)

39 Stewart, *supra* note 24 at 3.

40 See e.g. Karl Llewellyn's discussion of the role that laissez-faire economic policy preference and anxieties about socialism may have played in the Due Process jurisprudence of the Supreme Court of the US: KN Llewellyn, "On the Good, the True, the Beautiful, in Law" (1942) 9:2 U Chi L Rev 224 at 240. But see also Dan Priel's argument that commentators frequently overstate the centrality of economic and class critiques to realist legal theory: Dan Priel, "The Legal Realists on Political Economy" (2024) L & Soc Inquiry 1 [Priel, "Political Economy"]. See also Priel's observation that the writings of classical realists are nearly silent on questions of racial or gender oppression: "Legal Realist Skepticism", *supra* note 2 at 11.

41 Stewart, *supra* note 24 at 3.

42 See *ibid* at 5 (remarking that "[e]conomic analysis of law is perhaps the most influential modern form of realism"); Gregory Scott Parks, "Toward a Critical Race Realism" (2008) 17 Cornell JL & Pub Pol'y 683 at 704 ("Just as Realism was the precursor to the Law and Society movement, itself a precursor to Critical Legal Studies, Critical Legal Studies was a precursor to Critical Race Theory"); Carrie Menkel-Meadow, "Feminist Legal Theory, Critical Legal Studies, and Legal Education or 'The Fem-Crits Go to Law School'" (1988) 38:1 J Leg Educ 61; Derrick Bell, "Racial Realism" (1992) 24:2 Conn L Rev 363. For a critique that the standard story of the realists' impact improperly emphasizes "bloodlines running to the male-only traditional account," see Mae C Quinn, "Feminist Legal Realism" (2012) 35:1 Harv JL & Gender 1 at 18.

43 See e.g. Joseph William Singer, "Legal Realism Now" (1988) 76:2 Cal L Rev 465 at 467; Michael Steven Green, "Legal Realism as Theory of Law" (2005) 46:6 Wm & Mary L Rev 1915 at 1917 (describing the phrase as "cliché").

44 Balkin & Levinson, *supra* note 36 at 160, but *cf* Priel, "Political Economy", *supra* note 40 at 67–68 (identifying some renowned realist legal scholars as "scientific" in their inspiration and methodological approach).

have accepted to some degree that law is a social enterprise and that legal and social processes are often interconnected if not co-constituted.

Shifting cultural representations of legal education suggest that this social conception of law has left a wider cultural imprint as well (including, it is fair to assume, on incoming first-year law students). The classic cinematic representation of first-year law school—*The Paper Chase*[45]—presents an increasingly outdated view of the function and focus of legal education. The film famously depicts the fictional Professor Charles W Kingsfield, Jr, telling a room full of ambitious first-year law students: "You come in here with a skull full of mush; you leave thinking like a lawyer." But this binaristic view of thinking (as either lawyer-like or mush-like) has been increasingly displaced by pop cultural portraits of legal learning that emphasize the intermingling of legal expertise with other ways of knowing. *Legally Blonde*,[46] the heir apparent to *The Paper Chase* as the definitive fictionalization of first-year law school, features a young woman whose success at every turn is tied to her ability to master legal concepts and marry them to her knowledge of such would-be mush as hair care, aerobics stardom, and gay men's supposed awareness of shoe designers (a stereotype that, in the world of the film, is represented as a reliable form of street smarts).[47] Moving to the small screen, we see even more pronounced versions of this shift away from "law in books" as the sole relevant feature of legal education.[48] In *How to Get Away with Murder*,[49] the law school's most acclaimed professor is a practicing lawyer who deploys the Socratic method to interrogate her students on questions of strategy and persuasion, not doctrine or case law.[50] This shift in representation of extra-doctrinal competencies—from "mush" to the 'secret sauce' of exceptional law students—suggests that public perception has moved away from a formalist understanding of law and legal education as a field of unspoiled and apolitical logic.

IV. ... Yet the Case Method Lives On

Despite the shift away from formalism on the part of both professors and publics, the case method maintains its centrality in legal education. As law teachers, whatever we may believe about the social construction of law, we generally share a sense that we are doing a disservice to our students if we do not teach them "legal reasoning" as it has been constructed within the formalist tradition. In order to engage as legal professionals, our students must be able to read cases, draw conclusions as to how these cases cohere into a body of law, offer informed predictions as to how new cases may be decided, and argue by analogy to decided cases. Some of us may also emphasize that doctrinal analysis is not all that matters: that access to justice considerations shape who gets to court in the

45 *The Paper Chase* (Los Angeles: 20th Century Fox, 1973).

46 *Legally Blonde* (Beverly Hills: MGM, 2001).

47 *Ibid*.

48 Roscoe Pound, "Law in Books and Law in Action" (1910) 44:1 Am L Rev 12.

49 *How to Get Away with Murder* (Burbank: ABC Studios, 2014).

50 See also *Suits* (Universal City, California: Universal Content Productions, 2011), in which attendance at law school is generally represented as a formality (one with which the protagonist has dispensed), with excellence in lawyering attributed primarily to moxie, swagger, and ability to bluff.

first place; that unstated biases may shape legal actors' actions and decisions; that the legal system predictably serves the interests of well-resourced parties; that emotional appeals are key to success as a litigator; or any other number of non-formalist insights relevant to legal practice and analysis. But we generally share a sense that without a focus on doctrine in the first-year law school curriculum, we risk leaving our students without the distinctive tools of legal analysis: the ability to interpret, apply, and assess legal doctrine as expressed through judicial decisions.[51] Even if, for example, I want my students to understand that the Constitution of Canada expresses political compromises, power relationships, and imperfect and shifting social agreements, I also feel that I will not have done my job if they leave my first-year Constitutional Law course without an understanding that the federal government has authority over general trade affecting the country as a whole, that the provinces have authority over local matters of contract, and how to use a particular body of cases to assess the difference.[52] The less-and-less formalist pop cultural representations of legal education seem to share this view. Even Elle Woods of *Legally Blonde* needed to hit the books and learn the case law in order to succeed in law school.[53]

51 See Priel, "Legal Realist Skepticism", *supra* note 2 at 76: "A century after the realists ... legal doctrine is still very much alive. Walk into most first-year classrooms and what you will observe is students learning legal concepts like "due care," "expectation damages," "adverse possession," along with numerous multiple-prong tests. Learning to think like a lawyer is, apparently, still learning legal doctrine and legal reasoning."

52 See e.g. *Labatt Breweries of Canada Ltd v Attorney General of Canada* (1979), 1979 CanLII 190 (SCC); *General Motors of Canada Ltd v City National Leasing*, 1989 CanLII 133 (SCC).

53 *Supra* note 46 (see especially her early eviction from class after failing to prepare a brief of *Gordon v Steele*, 376 F Supp 575 (WD Pa 1974), and subsequent study montage featuring Elle immersing herself in casebooks before emerging as a star student and advocate); see also *Suits*, *supra* note 50, in which the protagonist's lack of formal legal training is offset through the plot device of a photographic memory, which allows him to meet and surpass other lawyers' knowledge of statutes and case law. *How to Get Away with Murder*, *supra* note 49, seems to be the exception, with case law being completely irrelevant to the legal training depicted, and the star professor specifically telling her students that she "will not be teaching [them] how to analyze the law or theorize about it". But this aspect of the show has been identified by commentators as something the show "gets wrong" about legal education—a classic Shondaland "laugh in the face of reality". See Clover Hope, "Objection: A Real Lawyer Fact Checks *How to Get Away with Murder*", *Jezebel* (10 October 2014), online: <jezebel.com/objection-a-real-lawyer-fact-checks-how-to-get-away-wi-1644750449>.

The formalists, then, were onto something that remains important to legal education: law does have a force, a language, an internal logic, even if, *contra* some formalists, that force, that language, that internal logic, exists in contingent relation to social factors.[54] It is the ability to work with and within this force, this language, and this logic that constitutes, in substantial part, the professional training of lawyers. This remains true even as many of the best legal professionals also learn to deploy this training in relation to other competencies: as trauma-informed lawyers, as negotiators, as advocates, as legislators, as scholars, as journalists, and more.

The case method seems to have survived formalism because it works as a way to learn legal language and culture *even if* legal language and culture are understood in non-formalist terms as specific sites of social engagement, not as products of "immanent rationality".[55] Learning specific cases, how they fit together, and how to argue from precedent can be taught not as matters of pure logic, but as a cultural and linguistic practice in which our students can strive to achieve fluency.[56] It need not be, as Langdell supposed, that there are determinate scientific outcomes to the infinite legal problems that might arise from the "ever-tangled skein of human affairs."[57] Instead, our students may be taught that there is a grammar and vocabulary that they must learn to make themselves and their causes legible in the specific and contingent cultural spaces of law. Indeed, even the work of expanding or revising the language and culture of lawyering can be served by fluency in doctrinal law.[58] Law does not need to be presented as *better* than other modes of social engagement; it can rather be presented as *distinctive* in ways that can be better appreciated through legal professional training.

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54 Note that some formalists are attentive to local and temporal context. See e.g. Paul Troop, "Why Legal Formalism Is Not a Stupid Thing" (2018) 31:4 Ratio Juris 428 at 429-430, 434 (identifying "doctrinal formalism" as a strand of formalist thinking responsive to particularities of time and place and "rule formalism" as a strand that "sits uncomfortably with...the changing nature of the doctrine"). In Troop's view, realism and formalism are supplemented by a third category of "natural lawyers" who "believ[e] that values are always consistent through time and regardless of society." For Troop, natural lawyers sit at the extreme end of a "spectrum" of objectivist thinking, followed by formalists, then realists (who reject objectivist accounts of law, and are highly attentive to local and even individual variation): *ibid* at 437. It seems to me that it is quite possible to view law as both scientific (per the formalist) and grounded in an objective account of natural law that resists attention to local conditions. *Cf* George Brencher, IV, "Formalism, Positivism, and Natural Law in Ernest Weinrib's Tort Theory: Will the Real Earnest Weinrib Please Come Forward" (1992) 42:3 UTLJ 318 (identifying both formalist and natural law commitments in Weinrib's work, but proposing that there is a tension between them).

55 Weinrib, "Legal Formalism", *supra* note 15.

56 See Elizabeth Mertz, *The Language of Law School: Learning to 'Think Like a Lawyer'* (2007) at 3–4: "[s]ome would associate thinking like a lawyer with superior analytic skills in a neutral sense; I would instead characterize the acquisition of 'lawyerly thinking' as an initiation into a particular linguistic and textual tradition found in our society."

57 Langdell, *supra* note 29 at vi.

58 Consider, for example, the role that legal professionals have played in expanding the courts' ability to receive and understand law and evidence relied upon by Indigenous litigants. See e.g. Val Napoleon, "*Delgamuukw*: A Legal Straightjacket for Oral Histories" (2005) 20:2 Can JL & Soc 123.

V. Haunted by the Ghost of Law's Supposed Neutrality

The trouble is that this presentation of law—as distinctive but not better—can be very difficult to achieve in the law school classroom. It is not always easy to convey to students that a primary aim of the course is to learn a particular mode of thinking and a particular body of knowledge without also imparting the sense that this is the best or only meaningful way of thinking and knowing. The suggestion, even obliquely made, that an observation is irrelevant *to doctrinal analysis* often feels to students like a suggestion that the observation is irrelevant *tout court*. Professor Kingsfield's implication that non-doctrinal thinking is "mush" thus continues to haunt our classrooms, even when expressed in the only slightly less value-laden terms of the formalist: that such thinking is "superfluous" to legal analysis.[59]

The consequences of this haunting are well-documented, especially in the scholarship of "outsider" scholars reflecting on the law school experience.[60] Perhaps the definitive account was offered by Mari Matsuda in a 1987 speech delivered at the Yale Law School Conference on Women of Color and the Law, subsequently reprinted as a four-page article that has become iconic despite its brevity.[61] In vivid detail, Matsuda portrays the experience of a first-year law student with "women-of-color consciousness", sitting in a classroom listening to a professor who "sees his job—and I use the male pronoun deliberately—as training the students out of the muddleheaded world where everything is relevant and into the lawyer's world where the few critical facts prevail."[62] Matsuda describes the student's experience in class, learning about a *Miranda* warning issue in a sexual assault case,[63] thinking about myriad questions deemed "extraneous to standard legal discourse": questions about the race of the victim, the accused, and the arresting officer; about police violence in the city where the events unfolded; about how this moment in class feels to those in the room who had experienced sexual violence themselves.[64] The student, Matsuda explains, develops a "multiple consciousness", able to view the law from within and from without, "tapping...a consciousness from beyond and bringing it back to the place where most people stand."[65] Matsuda observes that any skilled legal advocate must be able to "detach law and to see it as a system that makes sense only from a particular viewpoint"—to "operate within that view, and then shift out of it for purposes of critique, analysis, and strategy."[66] But outsider perspectives, Matsuda insists, offer something more.

59 Weinrib, "Legal Formalism", *supra* note 15 at 965.

60 The term "outsider" in reference to legal education, scholarship, and practice, is developed by Mari J Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22:2 Harv CR-CLL Rev 323; Mari J Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87:8 Mich L Rev 2320.

61 Mari J Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11:1 Women's Rts L Rep 7 [Matsuda, "When the First Quail Calls"].

62 *Ibid* at 7.

63 *Miranda v Arizona*, 384 US 436 (1966).

64 Matsuda, "When the First Quail Calls", *supra* note 61 at 7–8.

65 *Ibid* at 8.

66 *Ibid* at 9.

They can not only move in and out of law's internal perspective, but bring to bear insights that stand to "assist in the fundamental inquiries of jurisprudence: what is justice and what does law have to do with it?"[67]

The process is not easy on the outsider in Matsuda's telling. Students engaged in this kind of "constant shifting of consciousness" risk feeling "mad" or "crazy", finding stability through engagement with supportive communities who see the world as they do.[68] While Matsuda's discussion draws on a hypothetical or composite student perspective, the agonized experience she attributes to students with multiple consciousness is a recurrent theme in the first-person accounts of law students who might fit Matsuda's "outsider" label. Accounts of such students persistently describe feelings of alienation—a sense that who they are and what they experience had no place in their law school classrooms. Leading critical race theorist Patricia Williams, for example, describes her experience as a law student as characterized by "a sense of being invisible", adding that "[t]he school created a dense atmosphere that muted my voice to inaudibility."[69] Kim Brooks and Debra Parkes explain that queer law students often feel compelled "to hang their personal skins on hooks outside the door of the law school to be collected (if remembered at all) on the way out."[70] And Aaron Mills reports that, as an Anishinaabe law student, he felt that "my legal education presumed a common, foundational set of understandings between it and I that proved absent"—in part because Canadian liberal legalism was conveyed by his teachers as universal and presumed rather than as particular and contested.[71] Mills' insight dovetails with a recurrent theme in outsider scholarship: that representations of law as neutral, universal, or valueless often serve to alienate students—particularly those students whose value orientations diverge from those of the courts.[72] The risk posed by the case method, when presented as universal or based on uncontested values, is that many students will feel "abandoned or forgotten" in our classrooms.[73]

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67 *Ibid* at 8.

68 *Ibid.*

69 Patricia J Williams, *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991) at 55.

70 Kim Brooks & Debra Parkes, "Queering Legal Education: A Project of Theoretical Discovery" (2004) 27 Harv Women's LJ 89 at 90.

71 Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 853: "Across all my first-year courses there was a disconnect in context never breached, and that couldn't have been breached, for I wasn't taught 'this is the law *within Canada's liberal constitutional context*.' I was taught 'this is the law in Canada.' I didn't even understand that the Canadian law I was learning *had* a world beneath it, much less a liberal world." [emphasis in original]

72 See e.g. Kimberlé Williams Crenshaw, "Toward a Race-Conscious Pedagogy in Legal Education" (1988) 11:1 Nat'l Black LJ 1 at 2–3; Brooks & Parkes, *supra* note 70 at 108–9 (under heading "Rejecting the Myth of Neutrality"); see also Mertz, *supra* note 56 at 6.

73 Brooks & Parkes, *supra* note 70 at 133.

VI. Teaching the Strangeness of Law

Almost all law students enter law school with a sense that there is something *strange* about law—that they have somehow landed in a new place, in which they are not yet fluent in the local dialect or customs. (Of course, this sense of law's strangeness varies dramatically among students depending on their personal, familial, and educational experiences.) As first year progresses, however, and the pressure to learn and inhabit the logic of legal doctrine grows, students often come to feel that this sense of law's strangeness is a sign of their own inadequacy, or the incompleteness of their transformation into "legal professionals". Instead of viewing their sense of law's strangeness as an *additional competency*, they come to perceive it as a *failure to become* what law schools want them to be.

A key challenge for law professors is, I think, to teach the internal aspects of law (case law and precedential reasoning) as a distinct skill set, without dismissing our students' other skills and competencies as "mush". The challenge is to teach law fully, completely, and immersively, while maintaining our students' initial understanding that there is, in fact, something strange about it – and that awareness of this strangeness is not something to be stamped out. Teaching law as strange gives students the space to be engaged without being consumed, to ask questions about foundational assumptions, and to hold on to their own lives and experiences as relevant parts of the legal professionals they might become.[74]

I propose here a handful of techniques that I believe can be used to help students feel that they are learning to *do* something new in law school, not to kill off other parts of themselves or the ways they see the world. To accomplish this, I suggest that instructors can employ educational techniques that help students develop fluency in legal doctrine and culture while maintaining the sense that, when they do so, they inhabit a specific, limited, and idiosyncratic world. My focus here is on pedagogy in the first year where, I suggest, these lessons sit in uneasy relationship with the imperative to help our students gain fluency in legal language and culture through the case method. In short: the tension is to ensure that they absorb it, but that it does not threaten to absorb *them*.

1. Teach with Ambitious Intervener Factums

One way to impress upon students the contingent and debated nature of legal principles is to include ambitious intervener factums alongside the leading cases for which they were submitted.[75] By "ambitious", I mean factums that seek to bridge the form and content of existing doctrine to objectives, communicative modes, and value orientations that lie far from those prevailing in the

74 I developed this framework for teaching "law as strange" while serving as an interview subject for Audrey Fried in connection with her own research on legal pedagogy. My thanks to Audrey for the thoughtful questions that prompted my thinking on this point. See Audrey Fried, "Shifting Perspectives: The Potential of Rich, Ill-Structured Problems in Legal Education" (2024) The Law Teacher 1.

75 This particular strategy may be best suited to constitutional law, where intervenors are more common. My thanks to Angela Lee for raising this point.

Supreme Court of Canada (SCC). Engaging with these materials can help students to view existing legal doctrine as a particular discursive site that can be expanded and reoriented using its own internal grammar.

For example, I begin my Constitutional Law course with both the classically-assigned introductory case, *Reference re Secession of Quebec*,[76] and the less-often assigned intervention of the Grand Council of the Crees (Eeyou Estchee).[77] The *Secession Reference* is generally assigned early in the Constitutional Law course curriculum because it includes a brief account of the enactment histories of key Canadian constitutional texts and an overview of the SCC's understanding of the values and principles animating Canada's constitutional order.[78] Assigned on its own, students might easily be left with the impression that the SCC's articulation of the values animating the constitutional order is definitive and that critiques of the SCC's self-image are unwelcome. To be sure, the decision acknowledges that the reference question gave rise to different views as to what result these constitutional values and histories might demand; but the SCC's portrait of the legal order as founded on a widely agreed canon of good and just principles might appear uncontested to students assigned the Court's reasons alone.[79]

Assigning this reference case together with the intervention of the Grand Council of the Crees disrupts this value narrative, identifying deeply rooted disagreements as to the nature of the Canadian state, the meaning of its underlying principles, and the history giving rise to the *Secession Reference*. For example, the intervention contests the Court's implication that Indigenous peoples are objects of Canada's commitment to "protection of minorities"[80] rather than jurisdictional partners for whom federalism is the appropriate lens through which to understand constitutional

76 1998 CanLII 793 (SCC) [*Secession Reference*].

77 *Ibid* (Factum, Grand Council of the Crees (Eeyou Estchee) – Reply to Factum of *Amicus Curiae*) [Grand Council of the Crees Factum].

78 This case also represents a major moment of constitutional crisis and redefinition within the living memory of many constitutional law professors. See Ronalda Murphy, "Same-Sex Marriage and the Same Old Constitution" (2005) 14:3 Const Forum Const 21 at 26 (discussing her reasons for starting her Constitutional Law course with the *Secession Reference*, describing the case as "evocative and stirring" and "the Court at its most passionate, elegant, and elaborate", as demonstrating the impact of good lawyering, and as furnishing helpful metaphors upon which students can build their understanding of key concepts).

79 For an extended argument that the Canadian constitution includes "ignominious" unwritten constitutional principles, see Jessica Eisen, "Unwritten Constitutional Principles and the More-Than-Human World", Review of Constitutional Studies [forthcoming in 2025].

80 *Secession Reference*, *supra* note 76 at paras 79–82.

relationships.[81] Moreover, the intervener factum provides a contrast to the SCC's historical narrative of the Canadian state as a fundamentally good and just enterprise, working itself ever-purer over time.[82] For the Grand Council of the Crees, the history of Quebec's place in confederation is one of unjust disregard for and dispossession of Indigenous peoples and governance.[83] Instead of viewing Canada's constitutional history as furnishing a glorious tradition of hallowed principles that might guide the Court in the current moment, the Grand Council of the Crees presents Canada's history as evincing a "colonial approach" that "must not be repeated" in the instant case.[84]

Notably, these arguments are not offered "outside the courtroom door",[85] but in the form of a legal submission, adopting the form, language, and principles valued by the Court itself. Reading this submission, students can appreciate at the beginning of their legal studies that an understanding of the Court's own language and narrative can support even deep critique and engagement from perspectives that view the Court's approach as strange, alien, or misguided. This particular example of an ambitious factum has an additional benefit in conveying the flexibility and social contingency of law: the Grand Council of the Crees' view of Indigenous peoples as partners in federalism has gained significant traction within Canadian state law.[86] This reality means that instructors may present this

81 Grand Council of the Crees Factum, *supra* note 77 at paras 39–40: "Aboriginal peoples are constituent elements of the 'federal principle' which the Constitution of Canada enshrines.... Consequently, any act of unilateral secession by Quebec authorities ... would be a clear contravention of the federal principle. In particular, the balance of powers among federal, provincial and Aboriginal governments and peoples would be significantly upended without authority or consent." For a criticism that the SCC's reasons in the *Secession Reference* "present [Indigenous peoples] ... as a minority without explanation," see Robert Hamilton & Joshua Nichols, "Reconciliation and the Straitjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*" (2021) 52:2 Ottawa L Rev 403 at 433.

82 On the more general trope that law "works itself pure", see Christoph Bezemek, "'The Law Works Itself Pure': Reflections on a Cherished Trope" in Nicoletta Bersier, Christoph Bezemek & Frederick Schauer, eds, *Common Law – Civil Law: The Great Divide?* (Cham, Switzerland: Springer, 2022) 17.

83 See e.g. Grand Council of the Crees Factum, *supra* note 77 at para 31: "The northern two-thirds of the province of Quebec were added through the 1898 and 1912 boundaries extension acts, without the knowledge or consent of the Crees, Inuit and other Aboriginal peoples in these territories ..."

84 *Ibid*.

85 See Matsuda, "When the First Quail Calls", *supra* note 61 at 8: "There are times to stand outside the courtroom door and say 'this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.' There are times to stand inside the courtroom and say 'this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood.' Sometimes, as Angela Davis did, there is a need to make both speeches in one day."

86 See e.g. *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 262 (affirming that "Indigenous governments...are a foundational piece of Canada's constitutional fabric"); Canada, Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (Ottawa: Department of Justice, 2018) at 9, online: <justice.gc.ca/eng/csj-sjc/principles.pdf> ("Recognition of the inherent jurisdiction and legal orders of Indigenous nations is...the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws"). See also recent literature on Treaty Federalism, e.g. Michael Asch, "*UNDRIP*, Treaty Federalism, and Self-Determination" (2019) 24:1 Rev Const Stud 1.

material not merely as an irredeemably "off-the-wall" interpretation of Canadian law, but as a creative and ambitious use of legal language and principle that has, over time, materially impacted the Court's own understanding of the contexts and principles with which it is working.[87]

When presenting the Grand Council of the Crees intervention alongside the SCC's decision in the *Secession Reference*, this dynamic can be flagged for students. In teaching this material at the beginning of my Constitutional Law course, I note for students that the *Secession Reference* was decided in 1998, and that the divergent views expressed by the Court and the Grand Council of the Crees have continued to be sites of engagement and transformation in Canadian state law. I then explain that by the end of the course the students should be in a position to assess these divergent views in legal terms—first by deepening our understanding of federalism (unit 1), then by deepening our understanding of rights protections (unit 2), and finally by deepening our understanding of the place of Indigenous peoples in Canadian constitutionalism (unit 3). We return to this question throughout the year as we progress through the course material, with students encouraged at the end of the course to reflect on the extent to which the Court today would still describe the constitutional place of Indigenous peoples the way they did in the 1998 *Secession Reference*, and whether and how any changes since then might matter for meaningful exercise of Indigenous peoples' jurisdiction. The inclusion of this ambitious intervener factum at the beginning of the course, and its use as a touchstone throughout the year, allows students to read and understand the SCC's description of Canada's legal order as merely one angle of vision on the polity described. To be sure, it is an important and complex angle of vision that the class will spend the year trying to understand and predict, but not at the expense of attention to its partiality.

2. Acknowledge and Name Diverse Reactions to Materials

As instructors, it is crucial to keep in mind that the materials we are working with will hit our students in many different ways. It is also important for us to help our students to locate their own reactions and to have some sense of the ways that others may be reacting as well. This skill set – rendering both one's own reactions and those of others recognizable and articulable – is supported by teaching approaches that underscore the strangeness of law.

By locating doctrinal law as a way of thinking and knowing that can be experienced as strange, instructors authorize a wide array of reactions to the cases studied. Sometimes, the students' different experiences with the assigned cases will come out organically through class discussion. Other times, it is incumbent upon us as teachers to identify for the class moments in which materials discussed are likely to give rise to a range of reactions in the classroom. This can dovetail with "trigger warnings" or "content warnings" when material is expected to be painful or traumatic for some students.[88] In order to maintain an eye on the strangeness of law, though, these warnings should not

87 For a discussion of how "off-the-wall" legal interpretations may come to be "on-the-wall" with changing social and political conditions, see Jack M Balkin, "Agreements with Hell and Other Objects of Our Faith" (1997) 65 Fordham L Rev 1703.

88 See e.g. Kim D Chanbonpin, "Crisis and Trigger Warnings: Reflections on Legal Education and the Social Value of the Law" (2015) 90 Chi-Kent L Rev 615 at 627 (arguing that "[t]rigger warnings … directly challenge myths of neutrality and objectivity").

only serve to warn students who might find the material challenging, but also to help *all* students to maintain an awareness of the many ways in which legal materials are perceived. The aim should be to suggest that it is the law that is strange and particular: a contrast to the Kingsfieldian implication that it is the impacted students who are unusual or out-of-place or still-too-mush-like when their intuitions, affective responses, or intellectual instincts differ from those expressed in the case law.[89]

Cases concerning sex work, sexual violence, and reproductive rights are paradigmatic examples of legal materials that risk making our students feel alienated from their learning environment in law school.[90] In teaching these cases, instructors can take time in class to acknowledge the breadth of reactions students may have had reading the assigned materials. When teaching *Bedford*,[91] for example, an instructor might take a moment to note that, for some students, this case will provoke thinking about when and why courts may depart from *stare decisis*, while others will find that it feels alienating to hear discussion of such doctrinal questions in a case that, to them, can only be understood as concerning sex and violence. When teaching *Morgentaler*, an instructor might draw their students into a discussion about the strangeness of a majority decision on the issue of abortion restrictions that sidesteps discussions of either sex equality or fetal rights—terms which seem to dominate popular understandings of the issues raised by such restrictions.[92] In both cases, the instructor might add that some students will approach these materials from the perspective that the criminal law tends to make activities safer, while others perceive the presence of law enforcement as dangerous or frightening.[93]

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89 The inclusion of materials that might feel threatening to some, and the acknowledgment of that threat, arguably resonates with calls to build classrooms that are "brave spaces" rather than "safe spaces". See e.g. Brian Arao & Kristi Clemens, "From Safe Spaces to Brave Spaces: A New Way to Frame Dialogue Around Diversity and Social Justice" in Lisa M Landreman, ed, *The Art of Effective Facilitation* (Sterling, VA: Stylus Publishing, 2013) 135. My thanks to Angela Lee for raising this connection.

90 See e.g. *supra* notes 60–68 and accompanying text. See also Chanbonpin, *supra* note 88 at 628–29.

91 *Canada (Attorney General) v Bedford*, 2013 SCC 72.

92 See *R v Morgentaler*, [1988] 1 SCR 30 at 74-76, Dickson CJ, observing that the impugned abortion restriction had the constitutionally relevant effect of requiring women to carry pregnancies to term irrespective of their own "priorities and aspirations", but not linking this observation to histories or conditions of sex inequality, and offering only glancing references to the interests of fetuses while "expressly refrain[ing] from any assessment of "foetal rights". Notably, the concurring reasons of Wilson J focus squarely on questions of sex equality: "women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being." *Ibid* per Wilson J at 172. See also Sheilah L Martin, "Morgentaler v. The Queen in the Supreme Court of Canada" (1987) 2:2 Can J Women & L 422 at 428.

93 I have observed my colleague Hadley Friedland deploying an excellent technique in this vein. In a large class setting, she has asked students, without raising their hands or identifying themselves, to reflect on whether they grew up thinking that police were safe and trusted, or whether they were raised to see police as dangerous and threatening. Even without students raising their hands, all are made aware of a deep division in visceral reaction to law enforcement that likely shapes diverse understandings of policing in the cases studied.

The key to centering the strangeness of law is to emphasize that each of these perspectives might be articulable in doctrinal terms, or alternatively that doctrine may be criticized for its structural omission of these kinds of knowledges and perspectives. Mastery of legal doctrine does not foreclose these points of view, but gives students the skills needed to make their perspectives legible within a particular discursive space. After identifying some anticipated reactions to the material, the instructor might put to the students: "As you encounter the Supreme Court of Canada's treatment of this case, think about what *you* think is important in this context, and whether the Court's framework is making room (or making enough room) for what you think needs to be included in this conversation. This will help you not only to think through whether you approve of the Court's approach, but will also help you test your understanding of the structure of the governing doctrine, where its points of flexibility might be, and what it excludes or minimizes." For students able to take up this invitation, their doctrinal competence will deepen. For those whose facility with doctrine is not yet at a level to fully engage the inquiry, the message may still be received that doctrine should not be taken as an exhaustive expression of the values and interests relevant to questions raised within legal proceedings. For all students, the prompt conveys that doctrinal learning can ultimately be linked to other forms of knowledge to generate critical insights about the law.

3. Brief Comparative Interludes

First-year law students are often eager to focus on the rules and cases that will be tested on their issue spotter exams. They often view discussion of any other topic as a distraction or a waste of time.[94] And yet, brief comparative interludes can not only support student recall of the materials in the jurisdiction of instruction, but can also help to affirm that law is, at least in part, driven by local social and political dynamics. Some law school programs include comparative, multijural, or transsystemic approaches as part of their core curriculum. Where a course's core aims include building basic fluency in the methods of both common law and civil law,[95] or both Canadian state and Anishinaabe constitutional law,[96] the risk of students absorbing a monolithic or hegemonic view of law are considerably lessened. For those of us teaching in most Canadian common law schools, however, this risk remains, and comparative interludes can help to remind our students that they can aspire to fluency in Canadian law without presuming its contours to be a universal or logical inevitability.

These comparative notes will likely be kept necessarily brief in a first-year course, or otherwise risk losing student attention and focus on the lesson. But it does not take long to note, when introducing federalism, that there are such things as "unitary" states where all final authority is held in the central government, and that both the United Kingdom and France (home to Canada's most widely-recognized

94 On the time pressures facing law students, see *below* note 112.

95 See Julie Bédard, "Transsystemic Teaching of Law at McGill: 'Radical Changes, Old and New Hats'" (2001) 27:1 Queen's LJ 237.

96 University of Victoria, "JD/JID Joint Degree Program Admissions FAQ" (last visited 30 August 2024), online: <uvic.ca/law/admissions/jidadmissions/jidadmissionfaqs/index.php>; see also University of Victoria, "Joint Degree Program in Canadian Common Law and Indigenous Legal Orders (JD/JID)" (last visited 4 November 2024), online: <uvic.ca/law/admissions/jidadmissions/index.php>.

successor constitutions) are constitutionally unitary states where all devolution of power to regional authorities has taken place further to formal direction from the central government.[97] Similarly, when introducing the Canadian federal government's authority over the criminal law, instructors may briefly observe that this is not a necessary arrangement and that in the US (another influential jurisdiction in Canadian law and politics), a different choice was made to put most criminal law in the hands of the states.[98] When teaching the Rights of the Aboriginal Peoples of Canada under section 35 of the *Constitution Act, 1982*[99] and when teaching the structure of the Canadian court system, we can tell our students that Bolivia has chosen to explicitly recognize Indigenous justice systems operative alongside state courts.[100] And in the context of teaching Canada's equality protection, we might mention that section 15(2) of the *Canadian Charter of Rights and Freedoms*[101] was included specifically to exclude an interpretation of equality rights that prevails in the US, whereby affirmative action programs are subject to strict judicial scrutiny.[102]

Studied comparativists may bristle at this suggestion of using scattered and unconnected references as points of interjurisdictional comparison. As a research methodology, or even as an approach to legal argument, this type of comparative "cherry-picking" has been roundly criticized.[103] Professors of Canadian law have spent years developing the expertise necessary to speak authoritatively about their own legal context, and few of us have any similar claim to expertise in even one other jurisdiction.[104] Moreover, simple comparisons risk omitting key aspects of the structure,

97 European Committee of the Regions, "Division of Powers - United Kingdom" (last visited 30 August 2024), online: <portal.cor.europa.eu/divisionpowers/Pages/UK-intro.aspx>; European Committee of the Regions, "Division of Powers - France" (last visited 30 August 2024), online: <portal.cor.europa.eu/divisionpowers/Pages/France-Introduction.aspx>.

98 US Const amend X.

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

100 *Constitution of the Plurinational State of Bolivia*, Art 192(III). See also Benjamen Franklen Gussen, "A Comparative Analysis of Constitutional Recognition of Aboriginal Peoples" (2017) 40:3 Melbourne U L Rev 867 at 898.

101 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

102 See David Lepofsky & Jerome Bickenbach, "Equality Rights and the Physically Handicapped" in Anne F Bayefsky & Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Agincourt, ON: Carswell, 1985) 323 at 354. For a contemporary example of the US jurisprudence on this point (further restricting possibilities for affirmative action even beyond those emerging in the US jurisprudence at the time of the enactment of the Canadian *Charter*), see *Students for Fair Admissions v Harvard*, 600 US 181 (2023).

103 For an extended discussion of comparative methods, see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford, UK: Oxford University Press, 2014) at ch 6.

104 A related concern is the fact that available constitutional materials tend to come from a handful of "prestigious" and/or English-speaking jurisdictions. See generally Philipp Dann, Michael Riegner & Maxim Bönnemann, "The Southern Turn in Comparative Constitutional Law: An Introduction" in Philipp Dann, Michael Riegner & Maxim Bönnemann, eds, *The Global South and Comparative Constitutional Law* (Oxford, UK: Oxford University Press, 2020) 1. Instructors employing comparative fragments should be mindful to ensure that they do not reproduce the bias of inattention to most Global South jurisdictions in comparative constitutional literature.

values, and history of other jurisdictions that might be necessary to fully understand or evaluate the comparison suggested.[105] In this case, however, the suggested use of comparative fragments is "non-normative," in the sense that it does not aim to use other jurisdictions' (partial, selective) experience as precedent or exemplar of what Canadian courts ought to do.[106] Instead, the objective is to keep in students' view the reality that the legal doctrines they are learning are chosen, provisional, and particular.[107] Provided that the instructor notes the limitations of superficial comparisons, this kind of brief comparative interlude can help stave off the sense that legal doctrine is universal or determinate in a way that makes it somehow "better" than other intellectual processes.

4. "Teaching to the Test": Working with Practice Problems

Another way to affirm that doctrinal law represents a strange or distinct way of thinking through problems is to explicitly describe the examination as a skills-assessment, focus student learning on the development of the particular set of skills to be tested, and provide opportunities for practice. Some readers will find these suggestions so obvious that they are not worth stating, let alone reframing as an aspect of teaching law as strange: conveying course objectives to students, aligning course assessment with those objectives, and providing opportunities for formative assessment are basic pedagogical mainstays.[108] And yet, law school classrooms are still too-often characterized by "sage on the stage" (or "transmittal model")[109] approaches, with instructors focusing class time on conveying content to students rather than engaging students in active skills development.[110]

The phrase "teaching to the test" has earned a strong negative connotation, particularly insofar as it has been deployed in American K-12 education in respect of standardized tests over which

105 See Otto Kahn-Freund, "On Uses and Misuses of Comparative Law" (1974) 37:1 Mod L Rev 1.

106 Han-Ru Zhou, "A Contextual Defence of 'Comparative Constitutional Common Law'" (2014) 12:4 ICON 1034 at 1038.

107 See e.g. Günther Frankenberg's proposed use of "distancing/differencing" in comparative work in order to "decenter" one's own "worldview and to consciously establish subjectivity and context" and take into account "the observer's perspective": Günther Frankenberg, *Comparative Law as Critique* (Cheltenham, UK: Edward Elgar Publishing, 2016) at 42.

108 See e.g. Queen's University Centre for Teaching and Learning, "Essential Principles of Assessment" in "Assignments and Exams" (last visited 21 November 2024), online: <queensu.ca/ctl/resources/graduate-student-post-doctoral-and-ta/teaching-assistant-toolkit/assignments-and-exams#TA-Toolkit-Essential-Principles-of-Assessment> ("Assessments should, above all, be designed with intended learning outcomes in mind, and should be linked with clear guidance and communication to students about learning and expectations.")

109 Alison King, "From Sage on the Stage to Guide on the Side" (1993) 41:1 College Teaching 30.

110 See Debra Moss Vollweiler, "Return of the Sage (on the Stage)?" Southwestern U L Rev [forthcoming], online <ssrn.com/abstract=4541855> at 3 (observing that "[t]here is no question that traditionally, the sage has been the focus point in legal education for a long time, particularly in doctrinal classes" and arguing that this traditional orientation may be shifting in view of the COVID-19 pandemic and attendant temporary shift to all-online learning.)

teachers have little or no control.[111] In the law school context, however, instructors generally author their own exam materials. Given that our students are under tremendous pressure to use their time efficiently while in law school,[112] it is reasonable that they will focus their attention on materials that they see as necessary to successful performance on their assignments and exams. Many law teachers express frustration when their students ask, "will this be on the test?", or ask granular questions about how they will be examined on the materials in class. I do not think it is fair to our students to be annoyed by these questions. Instead, we should craft examinations that *actually test the skills we want our students to acquire*, and *then teach to the test* that we will be employing.

In my first few years as a law teacher, I included an "essay" question on my constitutional law examinations, requiring students to reflect on course themes. I included this question precisely because I did not want my students to believe that the sorts of doctrinal questions that arise on issue-spotter examinations are all that matters.[113] I wanted my students to reflect more deeply on the assumptions and implications of the legal doctrine. Ultimately, however, I came to view this exam question as somewhat unfair. Given the breadth of doctrinal content covered in the course, I did not believe that I was actually teaching my students how to write a thoughtful essay answer. In the result, students succeeded or struggled in their essay answers based on skills in essay-writing that they had when entering the course.

My first-year Constitutional Law course now only examines students on issue-spotter questions. This approach to law school examination has been criticized as giving undue attention to doctrine, failing to reward students who have strong non-doctrinal analyses to offer, and generally falling into the formalist trap of dividing the world of thinking into *doctrinal vs mush*.[114] But I have come to the view that, properly framed, doctrinal examinations paired with "teaching to the test" can create a "growth mindset" in the classroom without falling into this formalist trap.[115] Conveying a "growth mindset", as distinguished from a "fixed" mindset, encourages students to view skills as developed through work and practice, rather than as "innate gifts".[116] Where legal thinking is presented as a

111 See e.g. "What Do School Tests Measure?", *The New York Times* (3 August 2009), online: <archive.nytimes.com/roomfordebate.blogs.nytimes.com/2009/08/03/what-do-school-tests-measure/>.

112 The time pressures faced by first-year law students are well documented and often identified as serious obstacles to both learning and wellbeing. Daniel N McIntosh et al, "Stress and Health in First-Year Law Students: Women Fare Worse" (1994) 24:16 J Applied Social Psychology 1474; Leslie G Espinoza, "Constructing a Professional Ethic: Law School Lessons and Lesions" (1989) 4:2 Berkeley Women's LJ 215 at 218; Stephen C Halpern, "On the Politics and Pathology of Legal Education (Or Whatever Happened to That Blindfolded Lady with the Scales)" (1982) 32:3 J Leg Educ 383 at 388. These time pressures and their associated impacts deserve attention and reform. In addition, they presently constitute a reality which instructors must keep in mind as they make pedagogical choices.

113 Friedman & Goldberg, *supra* note 23.

114 See Philip C Kissam, "Law School Examinations" (1989) 42:2 Van L Rev 433.

115 Carol S Dweck, *Mindset: The New Psychology of Success* (New York: Ballantine Books, 2007).

116 Carol Dweck, "What Having a 'Growth Mindset' Actually Means", *Harvard Business Review* (13 January 2016), online: <hbr.org/2016/01/what-having-a-growth-mindset-actually-means>.

"strange" and distinct form of thinking, students can interpret their own distance from the Court's language and values as a separate matter from the skills development that they must undertake as law students.

To instill this growth mindset, it is critical that students encounter practice problems and exam-style issue spotter questions *before* they are tested on the material for credit.[117] Transparent discussion of the issue spotter format, the type of questions students may encounter, and the elements of a successful answer provide opportunities for instructors to reinforce that what students are learning together in class is a specific and discrete skill set. Rather than conveying a formalist vision of legal rules as logical or universal—with some students understanding their distance from this logic or universality as a durable failing—work with practice problems can help students to see these questions as representing a particular and partial skill set.

5. Be Ready to Resituate "Off-Track" Questions and Comments

To return to Professor Weinrib's torts class and my unsolicited classroom remarks on *Miller v Jackson*: what, as professors committed to nourishing our students' doctrinal competency, are we to do with remarks like these from our students? Professor Weinrib had entered the classroom that day ready to help his students understand a particular line of cases in tort law, and to help us inch toward the particular competencies of internal legal analysis: how to read cases, understand their internal logic in relation to each other, and project how they might be used in future cases. And here I was, not understanding his aims for the class, certainly not yet having the legal analytic skills in question, and offering a remark that didn't really serve these ends. I believe as instructors we have all had moments like this—where a comment offered in class feels 'off-track' with respect to our lesson plans, even if the comment expresses insights that are useful or important in some broader sense.

I call these comments off-track not because they are confused or uninteresting, but because they merely call the listener down a different path than that which might have been set by a lesson plan aimed at doctrinal instruction. One reaction might be to suggest that any instruction in case law should make room for social analysis of the law: that this should be part of the lesson's track, and it is the instructor's failure if they have neglected to create space for—and reward—student inquiry along these lines. I think that this is persuasive as a way of thinking about the course and its instructional aims *as a whole*. However, I think that even a socially engaged and critical approach to 1L instruction must also have some (lots) of time dedicated to doctrinal work: reading cases, connecting them to each other, and developing the skills of applying them to a future case. It is in the context of this doctrinal instruction, and its associated lesson plans, that a reflection on the social or political questions germane to a case might (depending on their framing) appear off-track. This is not a failing of the student, who is still learning the contours of doctrinal thinking; nor is it a failing of the instructor, who can and should include substantial, dedicated instructional time to doctrinal learning. And yet, these moments carry a serious risk of students experiencing them through the mind-of-mush framework—a risk that our efforts to redirect to doctrinal lessons will land on their

117 See Jamie R Abrams, *Inclusive Socratic Teaching: Why Law Schools Need It and How to Achieve It* (Oakland: University of California Press, 2024) at 117.

ears as a signal that they must "hang their personal skins on hooks outside the door of the law school to be collected (if remembered at all) on the way out."[118]

How we deal with off-track questions makes a huge difference to the way students experience the classroom under the case method: as a space in which only one way of thinking and knowing matters, or as a space in which doctrinal skills are developed in necessary relation to other skills. I suggest a three-step technique for resituating off-track questions or remarks that can assist instructors in many such cases: 1) connect the students' observations to existing scholarship (affirming that they are valid and important ways of thinking about law); 2) explain how the doctrinal skills being developed in class can help to deepen the analysis offered; and 3) encourage students to make a specific plan for how they are going to bridge their doctrinal learning with deeper insights, for example, by keeping notes on paper topics they might pursue in upper-year courses. Drawing on my own classroom experience with *Miller v Jackson*, I sketch an example of how this might be executed. The brief "scripts" offered for these steps are to be taken as guidance and inspiration, not as a definitive approach.[119]

1) Connect remarks to existing scholarship:

This insight is an example of "critical" or "feminist" legal theory.[120] *The concern expressed is that the judge's reasons show gender bias—that the judge's analysis is informed by the identities of the parties, or by stereotypes. Some of you will have training and experience in identifying bias of this kind from your previous degrees or life experience. For others, this analysis might feel new, or even inaccurate. Whatever your instincts on this point, it is incredibly helpful, as you develop your skills in doctrinal approaches to law, to remember that many scholars and others interacting with legal reasoning detect these kinds of forces operating within and alongside doctrinal rules.*

118 Brooks & Parkes, *supra* note 70 at 90.

119 My use of scripts here is, no doubt, influenced by the prevalent use of scripts in contemporary parenting advice, on which I sometimes rely in the course of my other main "teaching role" as the mother of a three-year old. This reliance on scripts has been recently popularized (and criticized) in the work of Dr Becky Kennedy, but is also evident in earlier celebrated parenting texts. See e.g. Becky Kennedy, *Good Inside: A Guide to Becoming the Parent You Want to Be* (New York: Harper Wave, 2022); Adele Faber & Elaine Mazlish, *How to Talk So Kids Will Listen & Listen So Kids Will Talk*, revised ed (New York: Scribner, 2012). In both teaching and parenting contexts, scripts can be helpful in concretizing advice and providing fodder for reflection, but should not be taken as prescribing the best or only words for navigating a situation. See Kate Shannon Jenkins, "You Don't Need a Script to Speak to Your Child", *The Nation* (9 May 2023), online: <thenation.com/article/culture/you-dont-need-a-script/>.

120 If the instructor happens to be familiar with specific scholarly arguments analogous or connected to those suggested by the student, naming them can be particularly helpful. In this case, Denise Réaume's work might be a helpful reference to share with students. See Réaume, *supra* note 7.

2) Discuss the relationship between doctrinal learning and further development of the student's analysis:

In the first year of law school, we often focus in class and on exams on the mechanics of legal doctrine. Once fluent in doctrinal skills, there are many things you can do with them besides using them to serve clients as a lawyer. One thing you can do is to take insights and reactions, like the one you have offered about gender bias, and develop an analysis of whether and how these biases find their ways into legal rules and their implementation. Insights along these lines have had meaningful impacts on the development of the law, as we'll continue to see in our course. As you build your skills in legal analysis (reading cases, discovering the connections between them, and using them to predict future outcomes), keep your eyes on these questions.

3) Flag potential upper-year paper topics:

In fact, this kind of insight can make for a terrific paper topic in your upper-year seminar courses. As soon as next year you'll be asked to write essays that bridge doctrinal skills with the kinds of analysis suggested here. I recommend that each of you keep a running list of insights about the values and impacts of judicial decisions you encounter in your first year and use this as a starting point for developing paper topics in your upper years.

Notice that the approach sketched here does not require going far down the track suggested by the student before returning to the planned lesson. But nor does it merely dismiss the student's proposed track as irrelevant to the doctrinal learning pursued in class. Instead, the technique aims to map the student's track in relation to the doctrinal track set for the lesson, thus serving doctrinal pedagogical goals while affirming the value of the alternative track not fully taken in class.

Conclusion

First-year law school can be an incredibly challenging experience. Students are comprehensively immersed in a new vocabulary, mode of reasoning, and academic assessment that is unlike what most have encountered in their previous education. The case method remains a helpful (and in any case dominant) mode of conveying these skills and competencies. But the case method always carries within it a risk arising from its formalist forebearers: that students will believe that other ways of thinking and knowing are useless or worse in the law school environment. This risk can be mitigated by approaches to law teaching that help students to see development of their own skills in the language and logic of doctrinal law as a distinct competency that might sit in tension with other valuable forms of knowledge and conflict resolution: that doctrinal law can be strange, but still available for mastery even to those who experience its commitments and self-image as alien or even threatening.

In one way, this emphasis on the strangeness of law is simply the flip-side of a common refrain in writing on outsider legal pedagogy: that law *not* be treated as neutral, and that the impact and experiences of diverse communities of meaning should be represented in the law school

classroom.[121] But I think that this affirmation of law as *strange*, rather than merely *not-neutral*, invites a particular curiosity in our students that is supportive of a less alienating form of doctrinal learning. This reflection has offered some gestures toward this goal, in the hopes of maintaining the value of the case method even for those who do not share a formalist view of law.

Doctrinal learning need not descend on our students like a vampire, sucking all other life out of a student once bitten. Legal doctrine can, instead, be like a place you learn to visit, feel comfortable (at least enough to find your way around), and then return home to tell the tale. There are, of course, power relationships that can make the journey dangerous, and a certainty that many of the locals will not understand or respect where you have come from. (Many locals of doctrinal law believe, after all, that their own approach is the best and only way of thinking—that other ways are "mush" or worse.) But students can and should be encouraged to hold on to themselves and their values while they learn to speak fluently in the local language of law.[122] As I have frequently put it to my incoming students: the challenge is to find out how you are going to be yourself *and* be a legal professional—not how to replace the former with the latter.

121 See e.g. Brooks & Parkes, *supra* note 70 at 132 (Brooks and Parkes's identification of "Uncovering Perspectives" as a key principle of queer legal pedagogy).

122 See also Angela Lee & Nayha Acharya, "Telling Tales About School: Reflections on Care, Holism, and Marginality in Law Teaching" (2022) 2:2 Holistic Education Review 1.

CASE COMMENT

Anti-Carceral Feminism and the Exceptionalism of Intimate Partner Violence: A Comment on *Ahluwalia v Ahluwalia*

Yukiko Kobayashi Lui*

CONTENTS

INTRODUCTION 147

I. FACTS 148

II. FEMINISM AGAINST EXCEPTIONALISM 150

III. FAULT AND PUNISHMENT 154

IV. A FEMINIST EXPERIMENT IN DISTRIBUTIVE ANALYSIS 157

CONCLUSION 159

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Introduction

In recent years, there has been increasing interest in critiquing what Elizabeth Bernstein has called "carceral feminism", or a feminism that seeks to appropriate the vast power of the state to punish and incarcerate for its own feminist ends.[1] Critiques of carceral feminism, concerned with how carceral solutions to gendered harms also subordinate and oppress based on race, gender, sexuality and class, abound across many different disciplines, fields of interest, and levels of intensity.[2] Yet comparatively little attention has been paid to the outer reaches of what we normally think of as constituting the carceral state. One notable exception is the work of Dorothy Roberts, who has described how nominally non-punitive systems like child welfare come to take on punitive characteristics.[3] Following Roberts's expansive approach, this comment considers recent judicial experiments in addressing intimate partner violence (IPV) outside of the criminal law system, how fault in family law proceedings might take on punitive characteristics, and what feminist theorists should do about it.

In *Ahluwalia v Ahluwalia*, courts have had occasion to decide on one possible civil remedy for IPV: a tort of family violence (TFV). At trial, Mandhane J recognized the existence of a tort of family violence.[4] She found that this tort was made out on the facts of the case, and awarded $150,000 in damages, $50,000 of which were punitive.[5] On appeal to the Ontario Court of Appeal (ONCA), Benotto JA reversed Mandhane J's finding of liability based on TFV—finding instead that the husband was liable under the existing torts of battery, assault, and intentional infliction of emotional distress (IIED)—and reversed the award of punitive damages ($50,000).[6] On May 16, 2024, the Supreme Court of Canada granted leave to appeal and their decision is forthcoming.[7]

Analyses of the *Ahluwalia* decisions so far tell only one kind of story about IPV: one which is concerned with the exceptional (or not) character of IPV and the understanding of fault and punishment as a path to solutions for that exceptional violence.[8] I argue that there is another story

1 Elizabeth Bernstein, "The Sexual Politics of the 'New Abolitionism'" (2007) 18:3 differences 128; Elizabeth Bernstein, "Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns" (2010) 36:1 Signs 45.

2 See Mimi E Kim, "From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration" (2018) 27:3 J Ethnic & Cultural Diversity Soc Work 219; Brenda Cossman, *The New Sex Wars: Sexual Harm in the #MeToo Era* (New York: New York University Press, 2021); Beth E Richie & Kayla M Martensen, "Resisting Carcerality, Embracing Abolition: Implications for Feminist Social Work Practice" (2020) 35:1 Affilia 12.

3 Dorothy E Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families – And How Abolition Can Build a Safer World* (New York: Basic Books, 2022).

4 *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 at para 48 [*Ahluwalia* (ONSC)].

5 *Ibid* at paras 112-20.

6 *Ahluwalia v Ahluwalia*, 2023 ONCA 476 at paras 63, 68, 71 and 133 [*Ahluwalia* (ONCA)].

7 *Ibid*, leave to appeal to SCC granted, 41061 (16 May 2024).

8 Mary-Jo Maur, "The Ontario Court of Appeal's Decision in *Ahluwalia v. Ahluwalia* – Prudence? Or Opportunity Missed?" (2023) 42 CFLQ 107; Deanne Sowter & Jennifer Koshan, "Torts and Family Violence: Ahluwalia v Ahluwalia", (15 September 2023), online: <slaw.ca/2023/09/15/torts-and-family-violence-ahluwalia-v-ahluwalia/>.

to be told: the dire inadequacy of material supports for survivors of IPV and family violence, which negatively impacts their ability to continue their lives after violence. This version of the story crafts an anti-carceral feminist argument against exceptionalizing IPV, paying attention to the risks that fault (and punishment more generally) carry for marginalized and "imperfect" victims; and it proposes an alternative distributive framework for understanding the wrongness of IPV in the context of the gendered political economy.

The application of a distributive lens to the problem of IPV clarifies many aspects of the debate over the existence of a TFV or other tort of IPV. It explains the feminist attachment to torts as a remedy for IPV and other forms of family violence because,[9] unlike the criminal law, in which the primary remedy is incarceration of the perpetrator, the remedies afforded in tort can help meet a survivor's material needs. It also explains the ambivalence that anti-carceral[10] feminists might feel when reading the *Ahluwalia* decisions: that they do not tackle the fraught relationship between the civil and criminal remedies for such violence and assumes that more punishment will result in better outcomes for victims' material needs. Applying a distributional analysis to *Ahluwalia* unsettles a slippage we can observe in the decisions: the elision between fault and/or punishment and the adequacy of remedies for IPV.

I. Facts

The facts of *Ahluwalia* are tragic. Over the course of their 16-year marriage, the husband Amrit was coercive and controlling toward Kuldeep, in what the trial judge described as an "extreme breach of trust" by him.[11] Since the separation, both children of the marriage have been estranged from their father. Their relationship was characterized by Amrit's immense psychological control over Kuldeep and punctuated by acts of physical violence. He closely monitored her spending and her communications, restricting who she could talk to and how much money she could spend. Although she maintained some relations with her local Punjabi community, as an immigrant woman Kuldeep was isolated from the familial support networks she might otherwise have had. She lived in fear of Amrit. She was diagnosed with depression and anxiety disorders. There was physical violence on three occasions, one of which involved Amrit strangling Kuldeep. Separately, Amrit is also facing outstanding criminal charges (two counts of assault against Kuldeep, and one count of uttering threats to cause death).[12]

9 See e.g. Camille Carey, "Domestic Violence Torts: Righting a Civil Wrong" (2014) 62 Kan L Rev 695; Sowter & Koshan, *supra* note 8; Pamela Laufer-Ukeles, "Reconstructing Fault: The Case for Spousal Torts" (2010) 79 U Cin L Rev 207.

10 I use "anti-carceral" in an expansive way, including a focus on distributive solutions rather than only what Anna Terwiel calls the "binary choice" of solutions between incarceration and non-incarceration: Anna Terwiel, "What Is Carceral Feminism?" (2020) 48:4 Political Theory 421.

11 *Ahluwalia* (ONSC), *supra* note 4 at para 5.

12 *Ibid* at para 19.

On these facts, Mandhane J "recognized[d] a common law tort of family violence", for which Amrit was liable.[13] Justice Mandhane adapted the definition of "family violence" in the *Divorce Act* to establish the new tort.[14] To establish liability for TFV, the conduct must have been in a family relationship and either: (i) violent or threatening; (ii) constitutive of a pattern of coercive and controlling behaviour; or (iii) caused the plaintiff to fear for their own safety or that of another person.[15]

As a remedy, Mandhane J ordered the payment of significant damages of $150,000 to Kuldeep, $100,000 of which comprised compensatory and aggravated damages, and a further $50,000 in punitive damages.[16] This extremely high award of damages was justified, according to Mandhane J, because of the "extreme" nature of the breach of trust by Amrit.[17] For such a breach, Mandhane J found existing torts remedially inadequate in two ways: first, the recognition of a pattern, rather than simply discrete incidents of violence, is likely to better capture the true (and larger) extent of liability, resulting in higher damage awards;[18] in addition, finding new heads of damage in tort law will supplement the inadequacy of the compensatory awards made in spousal support.[19]

While evidence was accepted of incidences of emotional abuse, financial control, and physical violence, Mandhane J pointed to the *pattern* of such behaviour as distinguishing the proposed TFV from existing torts which can cover much of the same ground, like assault, battery, or IIED. It is not the mere fact of these individual incidents (which might each be tortious on their own) that is important, but rather how these incidents contribute to a longer, ongoing pattern of violence and abuse, both physical and psychological: "In the context of damage assessment for family violence, it is the pattern of violence that must be compensated, not the individual incidents."[20] Nevertheless, in proving the existence of a pattern, "specific examples" of incidents will be required.[21]

The TFV was, however, short-lived. On appeal to the ONCA, Benotto JA reversed the finding of a new TFV, holding that the abuse and violence Kuldeep suffered was already adequately covered by the existing torts of battery, assault, and IIED.[22]

Additionally, on appeal, the respondent survivor Kuldeep proposed the recognition of a tort of coercive control (TCC), rather than the TFV recognised at trial.[23] Still, Benotto JA found there was

13 *Ibid* at para 48.

14 *Ibid* at para 52; *Divorce Act*, RSC 1985 c 3, s 2.

15 *Ahluwalia* (ONSC), *supra* note 4 at para 52.

16 *Ibid* at paras 112, 119-20.

17 *Ibid* at para 5.

18 *Ibid* at para 62.

19 *Ibid* at para 66.

20 *Ibid* at para 54.

21 *Ibid* at para 56.

22 *Ahluwalia* (ONCA), *supra* note 6 at paras 63, 68, and 71.

23 *Ibid* at para 103.

no need for a new TCC, distinct in its recognition of patterns rather than discrete incidents, because existing torts already account for patterns of such abusive conduct, within and without the context of an intimate partner relationship.[24] Existing torts also cover the situation where numerous acts cumulatively constitute a tort.[25] Additionally, the inadequacy of remedies for existing torts does not by itself justify the finding of a new tort.[26]

Justice of Appeal Benotto also rejected Kuldeep's submission that the TCC would be made out without any proof of actual harm caused; all that would be needed was that the conduct "cumulatively, was reasonably calculated to induce compliance, create conditions of fear and helplessness, or otherwise cause harm".[27] Going further, Benotto JA cautioned that removing the requirement to show proof of injury would make tort claims easier to bring, which would undermine the efforts made to shift family law away from adversarial, fault-based proceedings to resolution-based ones.[28]

Although no new tort was found to exist, Amrit remained liable under the existing torts of battery, assault, and IIED, though Benotto JA reversed the order for punitive damages ($50,000) because of the lack of reasons given for their award at trial, reducing damages overall to $100,000.[29] However, Benotto JA did not reject the possibility of future awards for punitive damages in similar cases.[30]

II. Feminism Against Exceptionalism

The trial decision in *Ahluwalia* evinces a view of IPV as an exceptional form of violence. The appellate decision does not. For Mandhane J, IPV is exceptional because it is an entirely different kind of violence than similar conduct which takes place outside of the context of an intimate relationship. It is of course not objectionable that, just as the dynamic between intimate partners is *sui generis*, so is the violence and abuse that one partner might inflict on another. Yet it is another thing to argue that because of the intimate context of such violence, it must be separated from other forms of violence and treated differently. The claim I make here is only narrow and cautionary: I seek to point to a few unintended consequences which might arise from accepting the exceptionalism of IPV.

Justice Mandhane argued that because IPV is exceptional, this justifies different remedies (i.e. higher damages awards). In her Honour's view, "the no-fault nature of family law must give way where there are serious allegations of family violence that create independent, and actionable

24 *Ibid* at paras 73-75 (citing *NC v WRB*, [1999] OJ No 3633; *CSF v JF*, [2002] OJ No 1350; *OOE v AOE*, 2019 SKQB 48), and at para 91.

25 *Ahluwalia* (ONCA), *supra* note 6 at para 87 citing *Warman v Grosvenor*, (2008), 92 OR (3d) 663 (Sup Ct).

26 *Ahluwalia* (ONCA), *supra* note 6 at para 52 citing *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24.

27 *Ahluwalia* (ONCA), *supra* note 6 at paras 104-5.

28 *Ibid* at paras 120-22.

29 *Ibid* at para 133.

30 *Ibid*.

harms that cannot be compensated through an award of spousal support".[31] Yet it is not strictly necessary to insist on the exceptionalism of a certain kind of violence to justify higher damages. It does not necessarily follow that reintroducing fault, and its punitive shadow, will enable better material provision for survivors.

Justice Mandhane writes that her proposed TFV would fill a gap in the remedies available under the *Divorce Act*, which otherwise prohibits investigation into fault for the purposes of deciding on spousal support quantum.[32] Yet the assertion that no-fault in family law means a lack of a remedy does not hold much water. IPV can be, and in this case is, dealt with by existing torts and indeed, by the criminal law as well.[33]

This frustration about no-fault is, I believe, misplaced. Instead, what Mandhane J is pointing to is not the lack of a remedy under the *Divorce Act*, but the inappropriateness or inadequacy of the remedies under federal and provincial laws—spousal support[34] and property division[35]—that exist. For Mandhane J, these remedies are inadequate in two senses: first, that they yield insufficient money awards for survivors; and second, that they are not punitive. But these two modes of inadequacy are distinct, such that it is not necessary to have punishment to justify a higher damages award which displaces default equalization principles. Nor does it follow that a new tort must be created to make the remedial armoury available to survivors materially adequate. It is significant that on appeal, Benotto JA did not reverse the compensatory and aggravated damages order despite finding there was no TFV or other IPV-specific tort. Her Honour only reversed the order for punitive damages, which, in any event, was mishandled by the trial judge, who neglected to apply the second part of the two-part test in *Whiten v Pilot Insurance*.[36] There is no suggestion in either decision that a specific tort for IPV would change or displace any of the normal rules for awarding damages for existing torts.[37]

Justice of Appeal Benotto's non-exceptional approach to IPV (the prior misapplication of the *Whiten* test notwithstanding) does not logically need to yield a lower quantum of damages than if the tort for which damages were being claimed was an IPV-specific one.[38] The existing tort of IIED already covers patterns of behaviour and is able to take into account the "context of the relationship

31 *Ahluwalia* (ONSC), *supra* note 4 at para 46.

32 *Ibid* at paras 47-48.

33 Of course, anti-carceral feminists will object to the prioritization of criminal or carceral remedies over other more distributive ones.

34 *Divorce Act*, *supra* note 14, s 15.2.

35 See e.g. *Family Law Act*, RSO 1990, c F.3, s 5(1).

36 2002 SCC 18 [*Whiten*]; *Ahluwalia* (ONCA), *supra* note 6 at para 133.

37 Justice Mandhane specifically noted that the facts in *Ahluwalia* (ONSC), *supra* note 4, satisfied the criteria for the torts of assault and IIED: at paras 103 and 111.

38 *Ahluwalia* (ONCA), *supra* note 6 at para 111. See also at para 86 discussing *McLean v Danicic* (2009) 95 OR (3d) 570 (SC).

and the patterns of controlling behaviour causing harm".[39] It is not necessary to exceptionalize IPV through the finding of a new tort such as TFV in order to justify a higher award of damages: as Benotto JA observed, the quantum of damages under existing torts can be adjusted upwards to reflect "society's abhorrence toward [IPV]".[40]

So, if we accept that exceptionalism was instrumentalized in *Ahluwalia* (ONSC) to justify the award of higher damages, then we can begin to tell a different, distributive story. This distributive approach is preferable for a number of interlocking reasons which are of concern to feminist legal theorists: first, that it does not exceptionalize IPV; second, because of that approach, it does not act as a back door through which fault can re-emerge; and finally, because the insistence on maintaining a no-fault approach to family cases opens up a policy space to explore and experiment with alternative solutions to violence, especially ones that address survivors' material conditions.

Justice Mandhane's decision, sensitive though it was to the profound suffering of survivors of IPV, elides two related but distinct concepts: fault and redistribution. On Mandhane J's account, fault is needed so that redistribution, in the form of higher damages orders, may occur. But this is not necessarily the case. Instead of exceptionalism (and fault), we can reach for a *distributive* perspective to justify higher damages: a greater sensitivity to the real material consequences of leaving abusive relationships, as well as the derived economic dependency[41] of the partner who does not work in the formal labour market (often the wife) on the partner who earns a wage in the market (often the husband), gets us to the same destination, while avoiding exceptionalism's pitfalls.

Mary-Jo Maur argues that if the ONCA had correctly appraised the facts of *Ahluwalia*, they would have found the existence of a tort of coercive control. On her view, this tort is needed to fully capture the distinctiveness of the taking of one partner's autonomy—which is part and parcel of what is wrong about IPV.[42] For Maur, the expressive function of tort law demands the recognition of the exceptionalism of coercive control.[43] It is not that, as some have argued,[44] the use of tort law as an expressive tool is in itself objectionable. It is a source of outrage and horror that IPV is as prevalent in our society as it is. And yet, the risks of insisting on IPV's exceptionalism are too poorly appreciated.

I suggest that feminists should not allow the expressive and condemnatory functions of tort law to occupy the field of concerns about law's response to IPV, especially where this might result in unintended consequences. As Pamela Laufer-Ukeles explains, allowing claims for intentional tortious conduct to be heard at the same time as family law matters might act as a back door through

39 *Ahluwalia* (ONCA), *supra* note 6 at para 107.

40 *Ibid* at para 128.

41 Libby Adler et al, "Gender and Political Economy: Revisiting Distributive Analysis" (2024) 49:4 Signs 701; see also Heidi Hartmann, "The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union" (1979) 8:8 Capital & Class 1.

42 Maur, *supra* note 8.

43 *Ibid* at 125.

44 Kerry Sun & Stephane Serafin, "The Nominalism of the New Nominate Torts" , Ottawa Faculty of Law Working Paper No 2024-16, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=4676558#>.

which discussions of fault can return, bringing with it the acrimony that used to characterize family law proceedings in the period before no-fault divorce.[45] Even more than simply a return to more acrimonious proceedings, an emphasis on exceptionalism can serve to introduce punitive logics into family proceedings, an endeavour which brings with it other risks for racialized, Indigenous and sexual minority claimants whose dealings with the legal and carceral systems might already be fraught.

Refusing to exceptionalize IPV does not mean that IPV is not a serious and condemnable form of violence, nor does it negate the fact that it is a type of violence that is done predominantly to women by men, or that its harms have been and continue to be underappreciated.[46] Instead, this feminist refusal is based on different grounds: it is concerned with the co-optation of feminist aims in service of the "domination of a masculinist punitive state".[47]

As Aya Gruber has argued, treating certain harmful conduct as exceptional simply because it involves sex is a slippery slope. Sex exceptionalism instrumentalizes heteronormative, patriarchal ideas of sex in service of a punitive end: a system of mass incarceration which disproportionately affects poor and racialized people.[48] In Canada, this system of incarceration disproportionately affects Indigenous and Black people.[49]

There are other dangers of exceptionalism too. Although on one hand, it is arguable that a specific tort to cover IPV may result in more IPV tort claims being accepted, the reverse is also true. Martha Chamallas cautions that insisting on the exceptionalism of gendered violence, such as IPV, risks singling these claims out for greater scrutiny than other torts, potentially leading to a patriarchal backlash which might result in fewer such claims being accepted.[50] Pinning hope for the end of IPV solely on tailored legal remedies ignores the possibility that such remedies might just as easily be weaponised against survivors of IPV, just as negative myths and stereotypes about the credibility of survivors of IPV have proliferated in courts.[51] More troublingly, exceptional torts might work to reify certain kinds of victims as good and others as bad or undeserving of remedy.

It may be that a TFV or TCC does not bring with it the baggage that sex exceptionalism carries

45 Laufer-Ukeles, *supra* note 9.

46 Statistics Canada, *Family violence in Canada: A statistical profile, 2018*, Section 2. Police-reported intimate partner violence in Canada, 2018, by Marta Burczycka, Catalogue No 85-002-X (Ottawa: Statistics Canada, 12 December 2019).

47 Mimi E Kim, "The Carceral Creep: Gender-Based Violence, Rape, and the Expansion of the Punitive State, 1973-1983" (2020) 67 Soc Problems 251 at 256.

48 Aya Gruber, "Sex Exceptionalism in Criminal Law" (2023) 75 Stan L Rev 755; Aya Gruber, "Rape, Feminism, and the War on Crime" (2009) 84 Wash L Rev 581.

49 Statistics Canada, *Over-representation of Indigenous persons in adult provincial custody, 2019/2020 and 2020/2021*, by Paul Robinson et al, Catalogue No 85-002-Z (Ottawa: Statistics Canada, 12 July 2023); Vicki Chartrand, "The quotidian violence of incarcerating Indigenous people in the Canadian state" in Chris Cunneen et al, eds, *The Routledge international handbook on decolonizing justice* (New York: Routledge, 2023).

50 Martha Chamallas, "Will Tort Law Have Its #Me Too Moment?" (2018) 11:1 J Tort L 39.

51 Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases" (2023) 35 CJFL 33.

in the criminal context—this remains to be seen. Yet despite the considerable boost for tort's expressive function in *Ahluwalia* (ONSC),[52] I want to disarticulate the argument for a new tort from the argument about remedial (in)adequacy. Note, for example, that Mandhane J's original decision (which emphasized how the tort, through recognizing patterns and a lower threshold of harm, would yield higher damages) has little purchase when the reason for the difference in damages between the trial and appellate decisions was due to an error in applying the test for punitive damages, rather than the decision to find the respondent liable under existing torts.[53] I submit that, for feminists skeptical about the expansion of the punitive state, the double-edged sword that is exceptionalism might be better avoided.

III. Fault and Punishment

The feminist argument against exceptionalism outlined above pays attention to the risks associated with punishment. Fault's slide into punishment is worrying for feminist legal theorists for reasons similar to those which plague exceptionalism: first, that the morphing of fault into punishment carries unintended consequences for victims of IPV and people subordinated because of their gender and/or sexuality; and secondly, that fault and punishment have a tendency to dominate, to the detriment of other kinds of feminist responses—namely attention to distribution.

One notable feature of academic commentary surrounding *Ahluwalia* has been a frustration with the no-fault nature of family law proceedings in situations of IPV. Such frustration is evident in Mandhane J's decision (quoted above)[54] and in Maur's assessment of the ONCA decision: a resolution-based system is "largely a good thing, but it is not always just, especially in abuse cases".[55] (On appeal, however, Benotto JA reaffirmed the no-fault principle and the move towards a resolution-based system in family law proceedings, in order to reduce conflict and enable cooperation between ex-partners.[56])

A recourse to punitive logics abounds in the trial decision. Justice Mandhane drew upon the language of accountability and responsibility to describe some of the justifications for the new tort: "the Mother is entitled to a remedy in tort that properly accounts for the extreme breach of trust occasioned by the Father's violence, and that brings some degree of *personal accountability* to his conduct".[57] Elsewhere, Mandhane J, citing *R v Lavallee*,[58] the leading criminal law decision concerning a battered

52 As noted by scholars like Maur, *supra* note 8. See also Sowter & Koshan, *supra* note 8.

53 *Ahluwalia* (ONCA), *supra* note 6 at para 133.

54 *Ahluwalia* (ONSC), *supra* note 4 at para 46.

55 Maur, *supra* note 8 at 116.

56 *Ahluwalia* (ONCA), *supra* note 6 at paras 120-22. Perhaps unsurprisingly, Benotto JA also affirmed the centrality of the court system in dealing with IPV. See also Deanne M Sowter, "Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code" (2018) 35 Windsor YB Access Just 401; Forrest S Mosten & Lara Traum, "The Family Lawyer's Role in Preventive Legal and Conflict Wellness" (2017) 55:1 Fam Ct Rev 26; Robert E Emery et al, "Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution" (2001) 69:2 J Consulting and Clinical Psychology 323.

57 *Ahluwalia* (ONSC), *supra* note 4 at para 5 [emphasis added].

woman's use of self-defence, explains that the TFV is needed to reflect the "normative standard of personal responsibility in our society".[59] In light of these references, and Mandhane J's reference to the *Criminal Code*'s recognition of the harms of IPV in sentencing,[60] we can observe the creep of discourses of punishment into family proceedings.

Feminists should be wary of this shift. Laura Buckingham's 2007 analysis of 25 tort cases involving spousal violence found that the phenomenon of bringing tort claims for spousal violence coincided with the removal of fault-based grounds for divorce.[61] For Buckingham, the emergence of a tort law remedy filled a gap left by no-fault family law and "offers an important psychological benefit to victims of violence that would be otherwise unavailable".[62]

Yet fault can be used to subordinate based on gender and sexuality just as much as it might be used to alleviate gendered harms. Take, for example, the historic treatment of lesbian women in divorce proceedings. Homosexual conduct remained a ground of divorce even after the introduction of no-fault divorce in the *Divorce Act, 1968*.[63] Despite the confusion of judges who found it difficult to understand homosexual sex between two women, the existence of that ground fed into a sexual politics of respectability which disadvantages and endangers women who engage in non-heteronormative sexual behaviour.[64] Just as with exceptionalism, fault and its resulting blame game can encourage the construction of some survivors as deserving and others as undeserving of relief. The criminal context provides a sample of how this might manifest in family proceedings: Leigh Goodmark found that "imperfect" victims—women who fight back—are criminalized by the same laws which were meant to protect them.[65] Eden Hoffer and C Nadine Wathen also note that further criminalization of IPV carries special risks for racialized women, who might be doubly victimized by the carceral system because of their race.[66]

Feminists do not need to flirt with punishment to achieve an adequate remedy for victims of IPV; it is possible to disarticulate fault from remedial inadequacy. Indeed, the strategy of turning to torts is itself a method of softly questioning why carceral punishment is the remedy of choice for IPV.

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58 [1990] 1 SCR 852.

59 *Ahluwalia* (ONSC), *supra* note 4 at para 70 citing *R v Lavallee*, *supra* note 58 at 872-73.

60 *Ahluwalia* (ONSC), *supra* note 4 at para 70 citing *Criminal Code*, RSC 1985, c C-46, s 718.2.

61 Laura Buckingham, "Striking Back: The Tort Action for Spousal Violence" (2007) 23 Can J Fam L 273 at 304-05.

62 *Ibid* at 310.

63 SC 1968, c 24.

64 Karen Pearlston, "Avoiding the Vulva: Judicial Interpretations of Lesbian Sex Under the *Divorce Act*, 1968" (2017) 32:1 CJLS 37; Ruthann Robson, *Sappho goes to law school: fragments in lesbian legal theory* (New York: Columbia University Press, 1998) at 24.

65 Leigh Goodmark, *Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism* (Berkeley: University of California Press, 2023).

66 Eden Hoffer & C Nadine Wathen, "Criminalizing coercive control may seem like a good idea, but could it further victimize women?", (11 July 2024), online: <theconversation.com/criminalizing-coercive-control-may-seem-like-a-good-idea-but-could-it-further-victimize-women-233407>.

As Camille Carey writes, dealing with IPV as a tort opens new avenues of redress for survivors beyond (although not necessarily in lieu of) incarceration. Dealing with IPV as a tort provides remedies which the criminal system does not: notably, the possibility of monetary damages, which can aid in a survivor's long-term financial security.[67] This approach is better served by setting fault aside and focusing instead on the economic and material challenges survivors face because of IPV.

There will be, no doubt, those who object to this argument because they think that there is something important and necessary about fault *qua* punishment. Yet, as I have argued above, punishment carries unforeseen risks for a feminist political project. The search for who is at fault can subordinate through gender, race or sexuality by allowing for the crystallization of a normative "perfect" victim, just as much as it distracts from survivors' forward-looking material concerns. Following Goodmark, we could pose the question differently: why, when so far punishment has not worked to end IPV, should we support implementing more kinds of punishment?[68]

The focus on fault *qua* punishment often involves foreclosing the possibility of other solutions. Joan Pennell, writing about her work with Indigenous women in Newfoundland and Labrador, has given us one example of a different path not (yet) taken: procedures of restorative justice among kinship networks as a way to address family violence as a community without compelling a reconciliation between partners.[69]

The further question for feminists seeking to resist carcerality is whether an IPV tort is actually a viable anti-carceral strategy. There is no evidence to suggest that *Ahluwalia* should be read as a move to replace criminal law with tort law as the main or sole legal remedy for IPV. Indeed, there are separate and ongoing criminal proceedings against Amrit; and Benotto JA herself stipulated that her decision was not calling into question the continued usefulness of legal remedies for IPV—only that she doubted the necessity of a specific tort for IPV.[70]

Optimistically, torts, whether they are specific to IPV or general, might be understood as a pressure-release valve for an otherwise onward march into further criminalization of IPV. Still, strategies to eliminate IPV must be wary of what Mimi Kim calls "carceral creep", the co-optation and modification of feminist movements against family violence into ones which bolster the "masculinist arm of the state" through mass incarceration, which serves only to continue the subordination of those movements.[71] Indeed, one does not need to be an anti-carceral feminist to note the ability of a patriarchal state to co-opt once-feminist reforms for its own ends, thereby undercutting the original feminist goals.[72] Here, I understand the movement toward reintroducing

67 Carey, *supra* note 9.

68 Leigh Goodmark, *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence* (Berkeley: University of California Press, 2018).

69 Joan Pennell, *A Restorative Approach to Family Violence: Feminist Kin-Making* (London: Routledge, 2022).

70 *Ahluwalia* (ONCA), *supra* note 6 at para 122.

71 Kim, *supra* note 47.

fault into family law as a distraction which serves to jeopardize feminist aims to secure material support for survivors of gendered violence.

IV. A Feminist Experiment in Distributive Analysis

Accepting that exceptionalism and punishment can both carry negative consequences, I want to suggest an alternative experiment for feminists concerned with IPV. This experiment takes a distributive analysis as its centre.[73] In the most basic sense, finding abusers civilly liable for IPV results in a redistribution (i.e. damages) from abuser to survivor. Yet a proper distributive analysis would also call on us to look further afield, to political-economic trends which negatively affect the ability of IPV survivors to live their lives after violence. This is a lens which takes seriously the constraints that money and resources have on the ability of survivors of IPV to leave their abusers and to heal, recover, and flourish.[74]

This approach is distinct, yet not unrelated to the anti-carceral feminist moves described above. A focus on the distribution of resources as an alternative framework to the consequences of violence is downstream of the rejection of carceral solutions to that violence.[75] As Bernstein explains, carceral feminism's danger lies in how it "seeks social remedies through criminal justice interventions rather than through a redistributive welfare state, and that it advocates for the beneficence of the privileged rather than the empowerment of the oppressed".[76]

A different story about *Ahluwalia* could foreground the distributional questions and the feminization of poverty, especially but not limited to survivors of IPV. Scholars who have cited Mandhane J's decision approvingly note that the creation of a new tort, which purports to lessen the proof required and allow for larger damages awards, would help survivors of IPV to support

72 Lise Gotell, "Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-inspired Law Reforms" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (Abingdon: Routledge, 2010).

73 Adler et al, *supra* note 41.

74 Survivors of IPV routinely face difficulty securing safe housing and good employment: see Premila Chellapermal, *Intersections Between Employment and Safety Among Racialized Women* (Toronto: WomanACT, 2022); WomanACT, *Successful Tenancies: Exploring Survivor's Experiences in the Private Rental Market in Toronto* (Toronto: WomanACT); Nihaya Daoud et al, "Pathways and Trajectories Linking Housing Instability and Poor Health Among Low-income Women Experiencing Intimate Partner Violence (IPV): Toward a Conceptual Framework" (2016) 56:2 Women & Health 208.

75 Jamie R Abrams, "Is Domestic Violence Politicized Too Narrowly?" in Jane K Stoever, ed, *The Politicization of Safety: Critical Perspectives on Domestic Violence Responses* (New York: New York University Press, 2019); Maria Silva D'Avolio, Roxana Pessoa Cavalcanti & Deanna Dadusc, "Anti-Carceral Feminism: Abolitionist Conversations on Gender-Based Violence" in Sohini Chatterjee & Po-Han Lee, eds, *Plural Feminisms: Navigating Resistance as Everyday Praxis* (London: Bloomsbury Academic, 2023); Lola Olufemi, *Feminism, Interrupted: Disrupting Power* (London: Pluto Press, 2020).

76 Bernstein, *supra* note 1 at 137.

themselves materially and financially, allowing them to thrive after the violence inflicted upon them.[77] This is, undoubtedly, something to be celebrated. And yet, as I have argued above, this outcome would be much better achieved without looking back to fault, as Mandhane J's decision seemed to do.

Using a distributive analysis to widen our gaze further allows us to see how the tragedy of *Ahluwalia* takes place against the backdrop of the receding public provision of social goods. Survivors of IPV are but one constituency hurt by the conscription of the "private" realm to provide goods that used to be publicly provided. Neoliberal austerity politics and the ideology of individual responsibility in Ontario have resulted in the withering away of income supports like social assistance which are of high importance to survivors of IPV, many of whom have spent years outside of the formal labour market.[78] Through the operation of clawbacks, spousal support awards reduce, rather than supplement, social assistance payments.[79] The inadequacy of these rates has the effect of encouraging (and perhaps coercing) recipients to seek alternative sources of income, such as a former conjugal partner or poorly paid, precarious work. Troublingly, Janet Mosher has found that the inadequacy of social assistance leads some survivors of domestic violence to return to their abusers for financial support.[80]

These conditions constitute the background against which tragedies like Kuldeep's play out. The path dependency of our current gendered political-economic order means that we do not often ask questions like: why should a survivor of IPV have to sue her abuser to have money in her pocket so that she can buy groceries or pay her rent? Yet this question, and others like it, are critical in the search for a holistic remedy for IPV.

The distributive analysis of IPV does not need to displace other frames—exceptionalism and punishment are but two—through which we can understand IPV. But by placing IPV in the context of the political economy, and particularly a miserly welfare state, we can better address a different set of dire needs faced by survivors of IPV: their material ones. Indeed, Maur is correct when she says that we must be careful to separate claims in family law, which are bounded by the ability of the parties to pay, and damages in tort, which are not subject to that ceiling.[81] Yet even accepting the importance of the condemnatory and denunciatory functions of an extremely large damages award (which is, in any event, only viable when the perpetrator can pay), I would argue that this should not be the only solution we explore.

We might canvass a few other solutions. This is the question taken up by Craig Brown and Melanie Randall, who argue for a publicly funded compensation scheme for victims of IPV and family violence.[82]

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77 Sowter & Koshan, *supra* note 8. On feminized poverty and the politics of distribution, see Margot Young, "Women's Work and a Guaranteed Income" in Shelley AM Gavigan & Dorothy E Chunn, eds, *The Legal Tender of Gender: Welfare, Law and the Regulation of Women's Poverty* (Oxford: Hart, 2010).

78 Peter Graefe, "Social Assistance in Ontario" in Daniel Béland & Pierre-Marc Daigneault, eds, *Welfare Reform in Canada: Provincial Social Assistance in Comparative Perspective* (Toronto: University of Toronto Press, 2015).

79 Ontario, Ontario Disability Support Program Directive 5.15 (December 2021); Ontario, Ontario Works Directive 5.5 (December 2021). See also *Smith v Smith*, 2008 CarswellOnt 1921.

80 Janet E Mosher, "Intimate Intrusions" in Gavigan & Chunn, *supra* note 77; Goodmark, *supra* note 68 at 41.

81 Maur, *supra* note 8 at 127.

Making analogies to traffic accident victims and homeowner's insurance, Brown and Randall put forward a non-exceptional understanding of family violence which properly locates responsibility for IPV in the social realm, as well as in the individual or private relations. Treating the issue of IPV as a public, social one is imperative to ensure fair remedies for all, regardless of their socio-economic position or that of their abuser. Beyond explicit, publicly funded redistributions like the one Brown and Randall suggest, a feminist distributive analysis of IPV might wonder if a reordering of priorities between legal remedies, both civil and criminal, and redistributive solutions such as social assistance, job training, improved access to healthcare and improved access to housing might serve survivors better.

This time of heightened judicial interest in IPV may also be an apt moment for feminist legal theorists to consider the limits of legal activism and law reform. Such a moment of reconsideration and experimentation is not limited to legal scholarship. In social scientific research, scholars have pointed to a relative lack of inquiry into the effectiveness of solutions and remedies for IPV.[83] Torts and civil legal remedies surely number among them. Following Amna Akbar's suggestion to be sensitive to law's limits in effecting real, radical social change, perhaps it is time for feminist legal theorists to conduct different experiments.[84] One small step in that direction would be to leave fault in family law firmly in the past.

Conclusion

Ahluwalia is a microcosm of the changing landscape of feminist thought on questions of violence, punishment and the political economy. I have argued that feminists should be wary of the movement to reintroduce fault into family law proceedings not only because, as Benotto JA says, it risks putting in jeopardy the gains a less adversarial, more cooperative family dispute resolution system has made, but also because it flirts with a punitive, carceral state. The punitive logic of such an approach, even in family proceedings, holds many dangers for those of us critical of the overreaches of the carceral state.

In a similar vein, the exceptionalism underlying the trial decision and some academic commentary surrounding it must be handled with caution. This is not to say that IPV is less grave or a less serious kind of violence than others. Instead, it is to disturb and unsettle the link many make between the adequacy of legal remedies for IPV, including civil and criminal ones, and the exceptionalism of IPV as a form of gendered violence against women. I suggest what might be a generative reorientation: feminists can understand *Ahluwalia* to also be about an anxiety to secure the fulfilment of IPV survivors' material needs. These needs can and should be disarticulated from a desire to reinstate fault and punishment in family proceedings. A distributive analysis of IPV holds promise as a feminist approach which takes seriously the needs of survivors while refusing to bolster a punitive state apparatus which can revictimize survivors of IPV just as easily as it can protect them.

82 Craig Brown & Melanie Randall, "Compensating the Harms of Sexual and Domestic Violence: Tort Law, Insurance and the Role of the State" (2004) 30:1 Queen's LJ 311.

83 C Nadine Wathen et al, "A Scoping Review of Intimate Partner Violence Research in Canada" (2024) Trauma, Violence, & Abuse 15248380.

84 Amna A Akbar, "Non-Reformist Reforms and Struggles over Life, Death, and Democracy" (2023) 132 Yale LJ 2497.