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ADMINISTRATIVE SEGREGATION: MANAGING PUNISHMENT THROUGH POLICY

Harshi Mann*

> Reliance on the Rule of Law for the governance of citizens' interactions with each other and with the State has a particular connotation in the general criminal law context. Not only does it reflect ideals of liberty, equality and fairness, but it expresses the fear of arbitrariness in the imposition of punishment. This concept is reflected in an old legal maxim: *nullum crimen sine lege, nulla poena sine lege* – there can be no crime, nor punishment, without law.[1]
>
> The Honourable Louise Arbour

I. INTRODUCTION

In Canadian prisons, solitary confinement is referred to as "administrative segregation", though the name is immaterial.[2] The salient issue concerning administrative segregation is that an inmate can be confined within the same four walls for up to twenty-three hours a day, in solitude, for an indefinite number of days. The adverse psychological consequences stemming from long-term solitary confinement includes panic attacks, difficulties with concentration, paranoia, lack of impulse control, hallucinations, and impulsive self-mutilation.[3]

Administrative segregation is regulated by the federal *Corrections and Conditional Release Act*.[4] The *CCRA* permits the Commissioner of Corrections to make rules for the management of Correctional Service Canada ("CSC"). These rules, or policy directives, are adhered to by correctional staff and officers when making day-to-day decisions in their course of duty. Although this policy-making power is granted under the federal *CCRA*, the content of the

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* Harshi graduated from Queen's University Faculty of Law in 2017. She holds a Bachelor of Arts in Political Science (with distinction) and a Certificate in Urban Studies from Simon Fraser University. Before writing this paper, Harshi was a research assistant to a Toronto-based criminal defence lawyer who was representing an inmate placed in segregation in the Yukon. Harshi is currently articling at Fasken Martineau Dumoulin LLP in Vancouver, BC. This paper was written in 2016 for Sentencing and Imprisonment Law taken with Professor Lisa Kerr.

[1] Canada, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services, 1996) (Louise Arbour) at 99 [*Arbour Report*].

[2] In a Correctional Service of Canada report it was stated that "the term solitary confinement is not accurate or applicable within the Canadian federal correctional system." See Correctional Service Canada, "Response to the Coroner's Inquest Touching the Death of Ashley Smith" (Ottawa: CSC, December 2014) at 6 ["CSC Response to Ashley Smith Inquest"]. However, many prisoners' rights advocates do not identify a difference between the basic principles of "solitary confinement" and what is called "administrative segregation" in Canada. See "Solitary Confinement Backgrounder" (January 2015), *British Columbia Civil Liberties Association*, online: <bccla.org/wp-content/uploads/ 2015/01/Solitary-Confinement- Backgrounder-FINAL1.pdf>.

[3] Craig Haney, "Mental Health Issues in Long-Term Solitary and "Supermax" Confinement" (2003) 49:1 Crime & Delinquency 124 at 130-137; Stuart Grassian, "Psychiatric Effects of Solitary Confinement" (2006) 22 Wash UJL & Pol'y 325 at 335-36.

[4] *Corrections and Conditional Release Act,* SC 1992, c 20 [*CCRA*].

policy guidelines is not prescribed by law. They are a set of minimum standards developed by the Commissioner, as opposed to the democratically elected legislature.

The rule of law—the notion that "laws, not [wo]men, should rule in a well-ordered political community"[5]—is a foundational principle in Canadian law. The rule of law is based on the principle of legality. This principle protects against arbitrary decision-making by imposing effective legal restraints on the exercise of public power.[6] The *CCRA* legally permits the Commissioner to make policy guidelines for the management of prisons. While the use of policy in and of itself is not a violation of the rule of law, the scope of discretion permitted under a policy regime and how that discretion is exercised by a public officer can amount to a violation of this foundational principle. The discretion permitted in the management of administrative segregation is an example of this type of violation.

This paper examines how broad correctional discretion derived from policy, rather than legislation, has failed to uphold the rule of law in Canadian prisons—specifically in the management of administrative segregation. In the bureaucratic context of prisons, an over-reliance on policy has created a dangerous legal gap between the legislative framework and actual decisions made by correctional officers. The regulation of administrative segregation is the most prominent manifestation of the inherent danger in permitting broad discretion within prisons. Consequently, broad discretion is documented as the precise source of abuse in many administrative segregation cases across Canada and in the two examples presented in this paper.

This paper proceeds in four parts. First, this paper examines the importance of upholding the rule of law within prison walls. This principle is the cornerstone for ensuring CSC is meeting the basic human rights of prisoners while exercising its delegated discretion. Second, this paper describes the legislative and policy frameworks for administrative segregation in Canada. Third, a focus on the literature of prominent scholars and prisoners' rights advocates delineates the precise concerns with granting broad correctional discretion through policy rather than legislation. This section outlines how broad correctional discretion has resulted in a lack of transparency in decision-making, a lack of oversight on how decisions are made, and a lack of accountability for when decisions are made poorly.

The fourth section highlights two examples that demonstrates how an over-reliance on policy in the management of administrative segregation has resulted in clear cases of abuse—the case of Ashley Smith and CSC Management Protocol. In the case of Ashley Smith, her death, caused by cutting off her oxygen supply with a ligature, occurred while she was in a segregation unit. The Coroner's Inquest into her death resulted in a verdict of homicide and 104 recommendations for change were proposed to the CSC. The CSC's inadequate response to the Coroner's recommendations will also be examined. The second example traces the problematic development, implementation, and eventual rescission of the Management Protocol. This segregation program, designed entirely by CSC, was implemented to manage high-risk female inmates. The program granted broad discretion to correctional staff that was highly regressive and

[5] Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) 40 at 40.
[6] *Ibid* at 43.

unlawful in nature. Lastly, this paper concludes by providing possible avenues for change in the management of administrative segregation. There is a clear and dire need for the unequivocal protection of inmates from arbitrary decision-making. This protection, however, cannot come from more policy. Thus, the recommendation of this paper is for a stronger legislative framework with independent oversight.

II. THE RULE OF LAW IN PRISON

The importance of the rule of law in administrative decision-making is uncontested in Canada and must guide all uses of public power by a public official. The Supreme Court of Canada's decision in *Roncarelli v Duplessis* still stands for the foundational principle that "there is no such thing as absolute and untrammelled 'discretion'"[7] in public regulation. Discretion designated to a public official must always be exercised in accordance with statutory purpose.[8] As such, the rule of law does not halt at the outer walls of a prison.

In *Martineau v Matsqui Disciplinary Board*, the Supreme Court of Canada stated that the prison disciplinary board had a duty to render decisions in accordance with procedural fairness.[9] The court was clear that this duty existed whenever a public body had the power to decide any matter affecting the rights, interests, property, privileges, or liberty of a person.[10] On the facts of that case, the board's decision had the effect of depriving the complainant of his liberty by committing him to a "prison within a prison" at the Matsqui Institution.[11] The court unequivocally asserted that "elementary justice requires some procedural protection" and "[t]he rule of law must run within penitentiary walls."[12] This decision is heralded as championing the modern theory and practice of judicial review of correctional decisions.[13]

III. ADMINISTRATIVE SEGREGATION IN CANADA

a. The Legal Framework

The *CCRA* governs all federal prisons in Canada and sets out the basic grounds for confining an inmate to segregation. When the *CCRA* came into force in 1992, it was a desired improvement over the *Penitentiary Act* and *Parole Act*.[14] One notable improvement was the transformation of choice guidelines from policy to legally binding provisions, though this was not uniformly implemented.[15]

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[7] *Roncarelli v Duplessis* [1959] SCR 121 at 140, 16 DLR (2d) 689 [*Roncarelli*].
[8] *Ibid*.
[9] *Martineau v Matsqui Disciplinary Board* [1980] 1 SCR 602, 106 DLR (3d) 385.
[10] *Ibid* at 604.
[11] *Ibid* at 622.
[12] *Ibid*.
[13] *May v Ferndale Institutions*, 2005 SCC 82 at para 25, [2005] 3 SCR 809.
[14] *Penitentiary Act*, RSC 1985, c P-5, as repealed by *CCRA*, *supra* note 4; *Parole Act*, RSC 1985, c P-2, as repealed by *CCRA*, *supra* note 4.
[15] Michael Jackson, "The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation" (2006) 48:2 Can J Corr 157 at 165 [Jackson].

Under the *CCRA*, there are two types of segregation: disciplinary and administrative. An inmate may be subjected to disciplinary segregation when he or she is found guilty of a disciplinary offence. Disciplinary offences are enumerated in the legislation. The innocence or guilt of an inmate charged with a disciplinary offence is determined at a hearing before an independent chairperson,[16] defined as a person who is not a staff member of CSC.[17] Furthermore, if the inmate is found guilty of a disciplinary offence, and segregation is determined to be the appropriate sanction, there is a maximum limit of thirty days in segregation.[18] This limit may be increased to a maximum of forty-five days if the inmate is found guilty of multiple disciplinary offences.[19]

Only select *CCRA* policies were converted into binding legislation. As a result, administrative segregation lacks many of the necessary protections that were implemented for disciplinary segregation. The institutional head (the Warden) may order an inmate into administrative segregation on vague grounds: to maintain security of the prison or any person, to prevent interference with an investigation or to protect the inmate's own safety.[20] There is no maximum limit to the duration of administrative segregation in the legislation or the regulations. Ultimately, the Warden may order an inmate into segregation if he or she believes there is no "reasonable alternative".[21] This decision is then subject to an internal review by the Segregation Review Board, who is to release the inmate at the "earliest appropriate time".[22] However, unlike disciplinary segregation, the review board is not independent.[23] As Michael Jackson points out, "under the CCRA, segregation decisions continue to be made and reviewed by correctional administrators, with no element of independent adjudication."[24]

b. The Policy Framework

Pursuant to the federal *CCRA*, the Commissioner of Corrections is permitted to make rules for the management of CSC. The rules may be designated as Commissioner's Directives ("CDs"),[25] policy guidelines that inform correctional officers and administrators when making their day-to-day decisions. As Lisa Kerr points out, while not formal law, "[a]t the very least the CDs constitute a set of standards of fairness to which the [Correctional] Service must adhere."[26]

Commissioner's Directive 709 is the main policy regime regulating administrative segregation for CSC. It was implemented in 2015 after the Coroner's Inquest into the death of Ashley Smith. The specifics and inadequacies of CD 709 are discussed in more detail later in this paper, as is the case study of Ashley Smith. For now, it is important to note that CD 709 does not fill the legislative void regarding the maximum duration of a segregation order. It does not impose

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[16] *CCRA*, *supra* note 4, s 40; *Corrections and Conditional Release Regulations*, SOR/92-620, s 27(2) [*Regulations*].
[17] *Regulations*, *supra* note 16, s 24(1)(a).
[18] *CCRA*, *supra* note 4, s 44(1)(f).
[19] *Regulations*, *supra* note 16, s 40.
[20] *CCRA*, *supra* note 4, s 31(3).
[21] *Ibid*, s 31(3).
[22] *Ibid*, s 31(2).
[23] *Regulations*, *supra* note 16, s 21(1).
[24] Jackson, *supra* note 15 at 166.
[25] *CCRA*, *supra* note 4, ss 97, 98.
[26] Lisa Kerr, "The Origins of Unlawful Prison Policies" (2015) 4:1 Can J Hum Rts 89 at 98 [Kerr, "Origins"].

a maximum limit, nor does it provide more guidance as to how the institutional head should determine what constitutes "the earliest appropriate time" for an inmate to be released.[27]

This type of vague legislation, coupled with an over-reliance on policy guidelines, has produced an illusion of adequate prison procedure. In reality, the employees of CSC are given broad discretion to make decisions that engage an inmate's life, liberty, and security of the person without the essential training or tools. The next section sets out the dangers of this kind of discretion in the prison context.

IV. THE DANGERS OF AN OVER-RELIANCE ON POLICY

Allowing broad discretion in prisons, which, by their very nature exist because of state-imposed liberty deprivation, is nothing short of dangerous. As Debra Parkes and Kim Pate have aptly said, "[p]risons have as their *raison d'être* the deprivation of people's liberty, and thus involve a virtually limitless potential for abuse."[28] For a correctional officer, every act, or omission to act, can result in serious harm to themselves, another officer, or an inmate. Prisons are closed institutions that are managed away from the public eye—a fertile setting for abuse.[29] As Mary Campbell stated, there is a "natural drift" toward callousness and brutality in prisons and the law is what serves as a "crucial counter-weight".[30]

How precisely has broad correctional discretion stemming from policy rather than legislation resulted in the failure to uphold the rule of law in prisons? By manufacturing a lack of transparency in decision-making, a lack of oversight on how decisions are made, and a lack of accountability for when decisions are made poorly. These features, while hallmarks of a democratic society, are notably absent in the day-to-day governance of Canadian prisons.

Efrat Arbel points to a troubling gap between the progressive stance on prisoner rights outlined by the Supreme Court of Canada and the subordination of these rights in the daily regulation of corrections.[31] Arbel argues that the Supreme Court of Canada's analysis in *Sauvé v Canada (Chief Electoral Officer)*[32] outlines normative principles that are applicable outside the prisoner voting rights context—administrative segregation included.[33] In *Sauvé*, the Supreme Court of Canada declared that taking away a prisoner's right to vote was not demonstrably justifiable in a free and democratic society.[34]

Two normative principles from this decision are outlined by Arbel. First, punishment cannot be administered in an "unmodulated manner", as this results in treating inmates like

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[27] *CCRA*, *supra* note 4, s 31(2).
[28] Debra Parkes & Kim Pate, "Time for Accountability: Effective Oversight of Women's Prisons" (2006) 48:2 Can J Corr 251 at 265 [Parkes & Pate].
[29] *Ibid*.
[30] Mary Campbell, "Revolution and Counter-revolution in Canadian Prisoners' Rights" (1997) 2 Can Crim L Rev 285 at 327.
[31] Efrat Arbel, "Contesting Unmodulated Deprivation: *Sauvé v Canada* and the Normative Limits of Punishment" (2015) 4:1 Can J Hum Rts 121 at 140 [Arbel].
[32] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2008] 2 SCR 519 [*Sauvé*].
[33] Arbel, *supra* note 31 at 134.
[34] *Sauvé, supra* note 32 at para 64.

"temporary outcasts" from *Charter*[35] protection.[36] Second, correctional procedures should not be used to increase the marginalization of Aboriginal inmates.[37] Although *Sauvé* was a decision about prisoner voting rights, not solitary confinement, Arbel argues that the court's focus on the "unmodulated" deprivation of prisoner rights provides a useful guideline for evaluating the legality of other correctional practices.[38] Though these underlying principles reflect the contemporary theory on prisoners' rights, there is an excessive gap between what the Supreme Court of Canada has called for and what takes place under the policy-reliant administration of prisons. The failure of this legislative gap is demonstrated in Part V through an analysis of the Ashley Smith case study and the Management Protocol, respectively.

The need for clear legal standards in the administration of segregation is apparent when examining the disparity between the standards proposed by Canadian courts and the systemic abuse frequently documented under the current policy-reliant regime. Although the *CCRA* successfully implemented greater protection for inmates in some key areas, the legislative framework for administrative segregation is inadequate and leaves excessive gaps. These gaps are either inadequately addressed or ignored by CDs because the policy directives rely on inappropriate and broad correctional discretion.

Discretion within the prison bureaucracy is fundamentally different from the discretion designated to other administrative bodies. Under the current framework of prison governance, fairness is dependent on correctional administrators managing both the security of the prison and the institutional liberty of prisoners. According to Jackson, fairness in balancing these competing objectives cannot be achieved where decisions are made by the correctional administrators themselves.[39] This is especially true for decisions made in regard to administrative segregation.

The Honourable Louise Arbour expressed these exact sentiments in 1996 when she published the *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*.[40] She remarked that being placed in segregation for months "is a significant departure from the standard terms and conditions of imprisonment, and is only justifiable if explicitly permitted by law."[41] The decision to forcibly remove a prisoner's residual liberty is left in the hands of correctional administrators who are only trained to maintain the security of the prison and its inmates in compliance with minimum policy standards. They are not trained, however, to interpret highly discretionary policy guidelines in accordance with the statutory purpose of the *CCRA* or with *Charter* rights. Nor are they trained, or incentivized, to interpret policy directives in a way that is least restrictive to the constitutional rights of prisoners.[42]

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[35] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[36] Arbel, *supra* note 31 at 126.
[37] *Ibid*.
[38] *Ibid*. See also *Bacon v Surrey Pretrial Services Centre (Warden),* 2012 BCSC 1453, 292 CCC (3d) 413 for the suggestion that the principles from *Sauvé* may be used outside the prisoner voting rights context.
[39] Jackson, *supra* note 15 at 173.
[40] *Arbour Report*, *supra* note 1.
[41] *Ibid* at 82.
[42] Parkes & Pate, *supra* note 28 at 255.

No amount of operational shortcomings should undermine the basic principles of the rule of law, though this is commonplace within the current framework.[43] In a highly discretionary framework, institutional bias and operational pressures will inevitably factor into every decision. For these reasons, rules that regulate the most intrusive form of prison punishment available must be written in law and not policy.[44]

What further contributes to this problematic framework is that if a decision does not necessarily conform to the legislative purpose of the *CCRA* or to the *Charter*, it is only reviewed internally by CSC. As previously outlined, a decision to place an inmate into segregation are reviewed by the Segregation Review Board, but this is not an independent adjudicator. One of the fundamental tenants of the rule of law is that a public officer who is given a statutory power to act at his or her discretion cannot exercise that discretion without clear limits.[45] This can be achieved through external oversight, accountability, and clear limits outlined in the legal frameworks. Without these constraints, the following sentiment has prevailed amongst correctional decision-makers: whatever is not expressly prohibited in the policy guidelines must be permitted.[46] This laissez-faire philosophy is what led Justice Arbour to reach the conclusion that "there is little hope that the rule of law will implant itself within the correctional culture without assistance and control from Parliament and the courts."[47]

V. EXAMPLES OF POLICY FAILURE IN ADMINISTRATIVE SEGREGATION

The following section analyzes two examples of how over-reliance on policy in the management of administrative segregation can lead to catastrophic consequences. The first example is the death of Ashley Smith and the Coroner's Inquest that followed. The second example is the implementation and rescission of the Management Protocol for female offenders placed in segregation.

a. Ashley Smith

Ashley Smith was nineteen-years-old when she died in the care and custody of CSC. Ashley was an inmate at Grand Valley Institution for Women ("GVI") when she wrapped a ligature around her throat and cut off her own oxygen supply.[48] In the *Coroner's Inquest Touching the Death of Ashley Smith*, the correctional staff's omission in responding to this emergency was deemed a homicide.[49] According to the Correctional Investigator of Canada, the circumstances leading to Ashley's death were disturbing and tragic, but most notably, "preventable".[50]

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[43] Jackson, *supra* note 15 at 189.
[44] Lisa Kerr, "Why rules on solitary confinement must be written in law", *The Globe and Mail* (2 May 2016), online: <https://www.theglobeandmail.com/opinion/why-rules-on-solitary-confinement-must-be-written-in-law/article29809838/> [Kerr, "Why Rules"].
[45] *Roncarelli*, *supra* note 7 at 140.
[46] Parkes & Pate, *supra* note 28 at 254.
[47] *Arbour Report*, *supra* note 1 at 100.
[48] Office of the Correctional Investigator, "A Preventable Death", by Howard Sapers (Ottawa: CSC, 20 June 2008) at 3 [Sapers].
[49] Office of the Chief Coroner of Ontario, "Inquest Touching the Death of Ashley Smith: Jury Verdict and Recommendations" (Ottawa: OCCO, December 2013) [*Ashley Smith Inquest*].
[50] Sapers, *supra* note 48 at para 14.

The story of Ashley Smith is the epitome of policy failure in administrative segregation. It involves systemic failures that eventually lead to her death and ameliorative recommendations that were largely ignored. The CSC's inadequate response is a central reason as to why meaningful reform must come through legislation rather than policy.

Howard Sapers' report as Correctional Investigator of Canada outlined four key systemic failures that lead to the death of Smith. First, the CSC placed her in an overly restrictive form of segregation despite having an awareness of how detrimental isolation would be to her well-being.[51] Smith spent up to twenty-three hours a day in her cell without a book or piece of paper to write on. Her cell often did not have a mattress or blanket, so for the final weeks of her life she was forced to sleep on a tile-less floor.[52] Smith also had very little stimulation and meaningful human contact.[53] The amount of human contact an inmate has in segregation is not specifically prescribed by the legislation. Rather, that decision is left to the discretion of correctional staff.

Second, the *Regulations* prescribe that a regional review of an inmate's segregation status must be conducted at the sixty-day mark.[54] As Sapers points out, the purpose of these reviews are to closely examine whether continued segregation is appropriate for the inmate. However, a sixty-day regional review was not conducted for Smith, even though she remained on segregation status for almost a year.[55] The CSC was able to circumvent the regional reviews by "lifting" Smith's segregation status each time Smith left the prison.[56] This occurred when Smith attended criminal court, was temporarily admitted to a psychiatric facility, or when she was transferred to another prison.[57] Although the sixty-day review is mandated by legislation, the broad discretion provided by the *Regulations* were sufficiently vague enough to allow this type of circumvention.

Third, Smith was an identified as a mentally ill, high risk, high needs inmate.[58] She was transferred seventeen times in a year between three federal penitentiaries, two treatment facilities, two external hospitals, and one provincial correctional facility.[59] In a 2006 Expert Committee Review, Justice Constance Glube outlined the impediments facing CSC in managing the mental health needs of female prisoners. Justice Glube stated that, systemically, offenders with mental health problems only received appropriate treatment when their needs reach "crisis levels".[60] Furthermore, the solution sought by CSC is often to segregate these inmates for protection due to their inability to cope in general population. Despite how problematic this practice is, the case of Smith makes it clear that even when reaching "crisis levels" inmates do not receive appropriate care. In the mere hours preceding her death, Smith had specifically told a Primary Care worker

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[51] *Ibid* at para 39.
[52] *Ibid* at para 5.
[53] *Ibid* at para 38.
[54] *Regulations*, *supra* note 16, s 22.
[55] Sapers, *supra* note 48 at para 42.
[56] *Ibid* at para 43.
[57] *Ibid*.
[58] *Ibid* at para 18.
[59] *Ibid*.
[60] *Ibid* at para 88; Correctional Service of Canada Review Panel, *A Roadmap to Strengthening Public Safety*, by Robert Sampson (Ottawa: Public Works and Government Services Canada, October 2007) at 55.

about her strong desire to end her life.[61] Nevertheless, the correctional officers in charge of monitoring Smith's segregation cell omitted to act when Smith strangled herself—a clear failure of correctional discretion.[62]

Lastly, Sapers supported Justice Arbour's recommendation for independent adjudication of segregation placements. In his report, he observed that had an independent adjudicator reviewed Smith's case, he or she could have required CSC to actively examine alternatives to placing Smith in solitary confinement.[63] This could have saved Smith's life. In the end, "[t]he Correctional Service permitted its administrative needs, its capacity issues, and its perceived security needs to over-ride Ms. Smith's very real human needs."[64]

i. The Recommendations – Ashley Smith Inquest

The *Coroner's Inquest Touching the Death of Ashley Smith* determined that Smith died through "ligature strangulation and positional asphyxia," and the death was deemed a "homicide".[65] The *Ashley Smith Inquest* outlined 104 recommendations for CSC. For the purposes of this paper, three notable recommendations and CSC's subsequent response will be examined.

The first recommendation was to abolish solitary confinement in accordance with the Recommendations of the United Nations Special Rapporteur's 2011 *Interim Report on Solitary Confinement*.[66] Second, until segregation is abolished, all CSC-operated institutions are to restrict the use of segregation to the following guidelines: (a) restrict the use of segregation to fifteen consecutive days; (b) five consecutive days must be spent outside of segregation after any period of segregation; (c) an inmate cannot be placed in segregation for more than sixty days in a calendar year; and (d) if an inmate is transferred to another institution, the calculation of consecutive days of segregation continues and does not constitute a break from segregation.[67] The third recommendation stated that female inmates with serious mental health issues or self-injurious behaviour should serve their imprisonment in a federally-operated treatment facility and not in a prison environment.[68]

ii. The Response – CD 709

Rather than respond to each recommendation, the CSC chose to group its response under five general headings. Jennifer Oades, former CSC's Deputy Commissioner for Women, found

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[61] Sapers, *supra* note 48 at para 5.
[62] Colin Perkel, "Ashley Smith flooded cell, choked herself within hours of arriving at new prison, correctional officer testifies", *The Globe and Mail* (22 January 2013), online: <https://www.theglobeandmail.com/news/national/ashley-smith-flooded-cell-choked-herself-within-hours-of-arriving-at-new-prison-correctional-officer-testifies/article7645319/>.
[63] Sapers, *supra* note 48 at para 93.
[64] *Ibid* at para 84.
[65] *Ashley Smith Inquest*, supra note 49.
[66] *Ibid* at para 27; *Interim Report of the Special Rapporteur of the United Nations Human Rights Council*, UNGAOR, 66th Sess, UN Doc A/66/268 (2011).
[67] *Ashley Smith Inquest*, *supra* note 49 at para 29.
[68] *Ibid* at para 15.

this approach disappointing but not surprising.[69] Some of the key principles expressed by the CSC in their response were unrelenting. CSC rejected the use of the phrase "solitary confinement" by the Coroner's Jury, stating that it was not accurate nor applicable in Canada.[70] Prior to the *Ashley Smith Inquest*, CSC defended its position by describing the use of administrative segregation as being "for the shortest period of time necessary, in limited circumstances, and only when there are no reasonable, safe alternatives."[71] CSC also stated that segregation is not used as a form of punishment,[72] and rejected various proposed recommendations for segregation. Instead, CSC pledged to improve the practice with "review, oversight and support mechanisms."[73]

In October 2015, CSC introduced reforms to administrative segregation through CD 709, which included notable safeguards outlined in the policy guidelines. For example, when an inmate is admitted into segregation, a specific checklist must be completed for suicide risk.[74] Additionally, CSC implemented the recommendation that called for an end to the unreasonable practice of "breaking" the "segregation clock". Now, when an inmate is released from segregation for a temporary absence or transfer and is returned into segregation immediately thereafter, it is now considered a continued stretch of segregation time and is subjected to the regular five-day, thirty-day and sixty-day review.[75]

However, for many academics, the changes made to the policy guidelines are insufficient. For Kerr, meaningful improvement of segregation practices requires legislative change, not "policy tweaking".[76] This becomes apparent when looking closely at the amount of discretion prescribed by CD 709. Prior to segregation admission, the "Administrative Segregation Guidelines" must be completed. These guidelines include a "Segregation Assessment Tool"[77] that contains six parts: (a) purpose; (b) establishing the facts; (c) risk assessment; (d) alternatives considered as viable options; (e) consultation; and (f) procedural safeguards. If properly completed, this tool is useful because it forces the consideration of viable alternatives to segregation. However, CD 709 has not changed a fundamental aspect of admission into administrative segregation: there is still a highly discretionary reliance on the institutional head as the ultimate decision-maker.[78] More importantly, the institutional head is still the ultimate decision-maker as to when an inmate may be admitted or released from segregation, with no minimum/maximum duration identified.[79]

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[69] Josh Wingrove, "Official response to Ashley Smith case sidesteps most prison proposals", *The Globe and Mail* (12 December 2014), online: <https://www.theglobeandmail.com/news/politics/official-response-to-ashley-smith-case-sidesteps-most-prison-proposals/article22074448/> [Wingrove].
[70] CSC Response to Ashley Smith Inquest, *supra* note 2, s 3.2.
[71] *Ibid*.
[72] *Ibid*.
[73] *Ibid*.
[74] Correctional Service of Canada, "Administrative Segregation", Commissioner's Directive No 709 (Ottawa: CSC, 13 October 2015) at para 72 [CD 709].
[75] *Ibid* at para 11.
[76] Patrick White, "Federal prison agency amends solitary confinement policy", *The Globe and Mail* (21 December 2015), online: <https://www.theglobeandmail.com/news/national/federal-prison-agency-makes-changes-to-solitary-confinement-policy/article27900867/> [White].
[77] Correction Service of Canada, "Administrative Segregation Guidelines", Commissioner's Directive No 709-1 (Ottawa: CSC, 2017) at Annex A.
[78] CD 709, *supra* note 74 at para 5(a).
[79] *Ibid*.

The Coroner's Jury was unambiguous when it recommended that CSC permit mentally ill inmates to receive treatment outside of the prison environment. CSC responded by adding a health professional to the Institutional Segregation Review Board.[80] The policy directive also added other procedures that require decision-makers to take the mental health of an inmate into account.[81]

Another implemented procedure states that if an inmate is identified as having an acute or high level of mental health need, the Institutional Segregation Review Board will request a review by the Regional Complex Mental Health Committee to help identify alternatives to segregation.[82] If an alternative is still not identified, an expert, determined by the Regional Complex Mental Health Committee, will conduct an external review.[83] The expert is defined as being "external to the CSC" and his or her recommendations for minimizing the inmate's time spent in segregation will go to the institutional head.[84] The introduction of an "external review" to administrative segregation is new to the CSC. However, CD 709 does not acknowledge the detrimental effects of admitting a mentally ill inmate into segregation—it simply implements more procedures for legitimizing the admission. According to Kerr, this new reform is really an indication that CSC has "doubled down on their commitment to using segregation to house mentally ill inmates."[85] Sapers has advocated for an outright ban on placing mentally ill inmates in segregation.[86] With these new procedures in place, the CSC has deflected the recommendation to abolish placing mentally ill inmates in solitary confinement.

The case study of Ashley Smith is a clear example of how an over-reliance on policy, rather than legislation, to govern segregation is dangerous and sometimes deadly. Unfortunately, Smith is not the only inmate that has lost her life because of the systemic failures of the segregation regime. Between 2003 and 2013, 16.4% of all deaths in federal custody resulted from suicide.[87] In 2014, the Office of the Correctional Investigator released a *Three Year Review of Federal Inmate Suicides (2011-2014)*.[88] In this report, Sapers found that suicide rates were more prevalent in physically isolated cells than in general population.[89] He also found that fourteen out of the thirty suicides reviewed in the report occurred in segregation cells under close monitoring.[90] Further, ten out of these fourteen inmates committed suicide after they had been in segregation for more than fifteen days—five having been in segregation for more than 120 days at the time of their deaths.[91] Like Smith, these inmates often displayed identifiable risk factors for suicide, but were kept in segregation. In one case of suicide, an inmate told a psychologist "he was planning to kill himself

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[80] *Ibid* at para 26.
[81] *Ibid* at paras 9, 17, 20.
[82] *Ibid* at para 40.
[83] *Ibid* at para 59.
[84] *Ibid*, "Definitions".
[85] White, *supra* note 76.
[86] Wingrove, *supra* note 69.
[87] Canada, Office of the Correctional Investigator, *Annual Report 2013-2014 of the Office of the Correctional Investigator* (Ottawa: OCI, 2014) at 28.
[88] Canada, Office of the Correctional Investigator, *A Three Year Review of Federal Inmate Suicides (2011-2014)*, (Ottawa: OCI, 10 September 2014).
[89] *Ibid* at 15.
[90] *Ibid* at 10.
[91] *Ibid* at 17.

in the shower by cutting his jugular vein with a razor."[92] Like Smith, CSC was aware of his self-injurious behaviour. Less than a month later, he was found dead on the floor of his segregation unit after cutting his carotid artery with a razor.[93]

Despite the other reforms in CD 709, CSC has been unwilling to implement an external or independent review of segregation for inmates who are not diagnosed with an acute or high level of mental health need. Similarly, there has not been any acknowledgement of a maximum duration for segregation despite clear recommendations set out by the *Ashley Smith Inquest* and the United Nations Special Rapporteur. The ultimate discretionary decision to admit or release an inmate from segregation still lies with the institutional head. It is evident that the CSC's policy reforms are inadequate, and that the proper remedy must come from clearly stated and transparently enacted legislation.[94]

b. Management Protocol

The Management Protocol ("the Protocol") is another example of how broad correctional discretion in the regulation of administrative segregation results in a clear disregard for the rule of law. The Protocol was developed in 2003 by the CSC for the management of long-term segregation of female inmates. The Ashley Smith case study concerned the dangers of broad correctional discretion in managing an identifiably mentally ill inmate placed in long-term segregation. Although the Protocol was designed for the management of a specific subset of inmates, it mirrors the basic premise of the Ashley Smith case study: CSC's policy initiatives that permit broad correctional discretion for the management of segregation are clearly inconsistent with the rule of law.

Kerr documents the implementation of the Protocol in 2003 to its eventual demise in 2011,[95] examining "the relationship between formal legislative or constitutional boundaries and the rules and discretionary judgments developed and exercised within the prison bureaucracy."[96] This section will analyze how the amount of discretion permitted in the creation and maintenance of the Protocol undermines the rule of law.

i. Development and Framework

The Protocol was a policy regime developed and implemented by the CSC without transparency, public consultation, or the legitimacy that comes through legislation. The Protocol was not implemented through the *CCRA* and its *Regulations*, nor was it formalized in a CD.[97] Rather, the Protocol was outlined in a CSC document entitled "the Secure Unit Plan".[98] The

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[92] *Ibid* at 21.
[93] *Ibid*.
[94] Kerr, "Why Rules", *supra* note 44.
[95] Kerr, "Origins", *supra* note 26 at 89.
[96] *Ibid* at 92.
[97] *Ibid* at 99, referencing Office of the Correctional Investigator of Canada, *Annual Report of the Office of the Correctional Investigator 2008-2009* (Ottawa: OCI, 2009).
[98] Office of the Deputy Commissioner for Women, Correctional Service of Canada, *Secure Unit Operational Plan—Intensive Intervention in a Secure Environment* (Ottawa: CSC, September 2003) at Part 8. As indicated in Kerr, "Origins", *supra* note 26, n 30, the relevant part of the Secure Unit Plan has now been removed.

Protocol had the potential to deprive a female inmate of her residual liberty in a more severe manner than administrative segregation. An inmate was placed on the Protocol if she was involved in a "major incident" and is deemed "disruptive and resistant to conventional treatment."[99]

SLN was a maximum security female inmate who was placed on the Protocol in 2005 after assaulting a staff member at the Joliette Institution for Women.[100] A form of administrative segregation, the Protocol had three "stages" or "steps", as well as a disturbing "reward" system whereby the inmate had to "earn" her way through each stage.[101] The general premise of the program was to place a woman into solitary confinement at Stage One—the highest degree of discomfort and deprivation.[102] Stages Two and Three were lesser degrees of deprivation and provided some amenities to the inmate.[103] The only way out of the Protocol program was to comply with institutional rules administered by the CSC and progress from Stage One to Three.[104]

When in operation, there was no timeframe for the program, although CSC stated in the Secure Unit Plan that it would take a minimum of six months to navigate through all the stages.[105] SLN was kept in Stage One continuously for more than two years.[106] A female inmate was only allowed to transition to Stage Three once it was deemed she had maintained "positive participation for a period of 3 months."[107] The CSC retained full discretion to return a woman back to Stage One if her behaviour deteriorated at any time.[108] As Kerr points out, the vague description of the Protocol's terms bestowed a great deal of power in the hands of correctional officers.[109] CSC had broad discretion to make decisions that would adversely impact an inmate's life, liberty, and security of the person.

The questionable consultation process that occurred before the Protocol was implemented is yet another reason why the management of segregation should be enforced through legislation instead of policy. Kerr outlined the basic consultation procedure taken by CSC after obtaining the *Management Protocol: Consultation Comments and Responses—2002* through Access to Information requests.[110] Concerns were raised about the program being "punitive, illegal and discriminatory."[111] There was also an argument made by both the Office of the Correctional Investigator and the Canadian Association of Elizabeth Fry Societies that the Protocol did not comply with the minimal standards regulating administrative segregation in the *CCRA*.[112] Moreover, there were concerns about the serious deleterious effects the program would have on

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[99] *R v SLN*, 2010 BCSC 405, at para 41, 87 WCB (2d) 558 [*SLN*].
[100] *Ibid* at paras 36-37.
[101] *Ibid* at para 42.
[102] *Ibid*.
[103] *Ibid*.
[104] *Ibid*.
[105] Kerr, "Origins", *supra* note 26 at 99.
[106] *SLN*, *supra* note 99 at para 44.
[107] Kerr, "Origins", *supra* note 26 at 99.
[108] *Ibid*.
[109] *Ibid*.
[110] *Ibid* at 101, citing Correctional Service of Canada, *Management Protocol: Consultation Comments and Responses – 2002* (Ottawa: CSC, 2002).
[111] *Ibid*.
[112] *Ibid*.

female inmates suffering from mental health issues.[113] Despite hearing and recording all these concerns, CSC implemented the Protocol with little revision to its final form.[114]

ii. Critique and Rescission

According to Kerr, the Management Protocol directly opposed the *CCRA*, the *Regulations*, and the principles of the *Charter*.[115] The Protocol allowed a woman who was in Stage Two or Three of the program to be placed back into Stage One deprivation for behaviour that would not otherwise warrant such severe segregation. This was effectively a revision of the legislative scheme for administrative segregation through a policy-making power.[116]

The Protocol continued to operate despite the Office of the Correctional Investigator declaring the program to be punitive and counterproductive, calling for its immediate rescission.[117] In fact, the Protocol did not come to an end until the British Columbia Civil Liberties Association ("BCCLA") filed a constitutional challenge against the Management Protocol on behalf of BobbyLee Worm in 2011.[118] Worm was one of the seven women placed on the program. In the "Notice of Civil Claim", the BCCLA explained that the type of "behaviour" that could force a reversion back to Stage One deprivation included swearing or being disrespectful to staff.[119] This behaviour was unrelated to an inmate's level of security risk, and thus, contravened the legislative grounds for admitting an inmate into segregation under the *CCRA*.[120] The standards of the Protocol were "vague, indeterminate and effectively unintelligible."[121] Approximately two months after the Notice of Civil Claim was filed by the BCCLA, the Management Protocol was rescinded and the Government of Canada settled Worm's lawsuit out of court.[122]

This unlawful program was developed and implemented entirely through the CSC's policy-making power, and survived for eight years before it was cancelled by the CSC. In those eight years, however, the CSC was given the broad discretional power to place seven women in and out of three stages of deprivation based on vague and indeterminable guidelines. This is the exact embodiment of the arbitrary decision-making power by public officials the Supreme Court of Canada declared a violation of the rule of law in *Roncarelli v Duplessis*. Although the Protocol is no longer in place, "both the legislative framework and disciplinary ethos that enabled its operation remain in effect, and are ongoing sources of rights violations in Canadian prisons."[123]

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[113] *Ibid* at 102.
[114] *Ibid*.
[115] *Ibid* at 103.
[116] Arbel, *supra* note 31 at 124.
[117] *OCI Annual Report 2008-2009, supra* note 98 at 32-33.
[118] *BobbyLee Worm v Canada (Attorney General)* (4 March 2011), Vancouver, BC Sup Ct S-111463 (Notice of Civil Claim), online: <bccla.org/wp-content/uploads/2012/03/20110303-BCCLA-Legal-Case-BobbyLee-Worm.pdf>.
[119] *Ibid* at para 12.
[120] *Ibid* at para 32.
[121] *Ibid* at para 13.
[122] "Worm v. Canada: Working to End Solitary Confinement" (12 February 2014), *British Columbia Civil Liberties Association*, online: <bccla.org/our_work/worm-v-canada/>.
[123] Arbel, *supra* note 31 at 124.

VI. CONCLUSION

This paper examines how broad correctional discretion that stems from policy rather than legislation has consistently failed to uphold the rule of law in Canadian prisons, specifically in the management of administrative segregation. Although the Government of Canada relies on administrative discretion in all aspects of governance, there is a unique distinction in the context of CSC that must be acknowledged. Correctional staff are faced with high pressure situations and are responsible for the security of the prison. This type of setting deserves transparent and enforceable guidelines derived from legislation.

This paper identifies the key dangers of over-reliance on policy by examining the writings of prominent academics and advocates in the field, as well as two tangible examples. The Ashley Smith case study and the Management Protocol share the same basic premise: an over-reliance on policy to manage decision-making in administrative segregation clearly undermines the rule of law. Justice Arbour was unambiguous when she advised CSC in 1996 "to resist the impulse to further regulate itself by the issuance of even more administrative directions."[124] Nevertheless, this is precisely what CSC attempted to do with CD 709. By looking to the Ashley Smith case or the implementation of the Management Protocol, it is clear that Justice Arbour's skepticism was warranted, as was her call for the importation and integration of the rule of law within corrections through Parliament and the courts.[125] For Parkes and Pate, CSC is in dire need of a solution to its lack of accountability. This solution would require a body or mechanism of review that is truly independent, accessible to prisoners, and has the power to order meaningful remedies.[126] The need for ideological and associational independence cannot be understated. Jackson also calls for independent adjudication of administrative segregation decisions. He argues that principles of fairness require decisions that affect an inmate's liberty be made objectively and away from institutional bias.[127] In 1988, he suggested that having members of the judiciary review segregation decisions would serve two purposes: it would ensure independence by a legally trained individual and would educate members of the judiciary on the realities faced by individuals sentenced to prison.[128]

Ultimately, this would ensure the observance of human rights standards within prisons, benefitting the inmates, correctional staff, and society at large. As Ivan Zinger noted, "[c]ompliance with human rights obligations increases, though it does not guarantee, the odds of releasing a more responsible citizen."[129] This approach is in line with the principles of sentencing in Canada, namely, necessity and rehabilitation.[130]

When determining the next step that needs to be taken in the management of administrative segregation, the Government of Canada should have due regard to past failures when relying on

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[124] *Arbour Report*, *supra* note 1 at 100.
[125] *Ibid*.
[126] Parkes & Pate, *supra* note 28 at 266.
[127] Jackson, *supra* note 15 at 169-70.
[128] Michael Jackson, *Justice Behind the Walls: A Report of the Canadian Bar Association Committee on Imprisonment and Release* (Vancouver: Canadian Bar Association, 1988) at 225.
[129] Ivan Zinger, "Human Rights Compliance and the Role of External Prison Oversight" (2006) 48: 2 Can J Corr 127 at 127.
[130] *Criminal Code*, RSC 1985, c C-46, ss 718(c)-(d).

policy as opposed to legislation. Implementing more policy directives where they have previously failed is not an adequate solution. As Justice Arbour observed, rules are everywhere, but it is the rule of law that is absent within prisons.[131] Thus, a solution must come from democratically implemented legislation that provides meaningful and clear guidance to decision-makers within the complex, dynamic, and difficult prison environment.

[131] *Arbour Report*, *supra* note 1 at 100.

GENDER ID LAW IN CANADA: THE INTRODUCTION OF THE SELF-DETERMINATION PRINCIPLE

Brendan Cooke*

I. INTRODUCTION

Canada has recently undergone a "revolution" of sorts regarding gender markers on birth certificates. The legal effect is clear enough: the vast majority of the Canadian public can now obtain a change to the gender marker on their birth certificate without any medical diagnosis. Trans[1] activists who oppose the medical or pathological model have widely applauded this move.[2] By contrast, developments elsewhere have frustrated them. For example, in Great Britain, a court struck down a requirement to have sex-reassignment surgery in order to change the gender marker on a birth certificate, but the new regime requires a diagnosis of gender dysphoria.[3] This paper investigates the Canadian "revolution" in gender identification with an eye to law reform and trans law concerns. That is, it contributes to a literature that often focuses on the substantive matter of justice and equal citizenship for trans people by exploring institutional questions of how and why law changes. I ask: What has caused the Canadian provinces to universally enact relatively progressive regimes? What is the origin of these regimes? Why have they not imposed alternative medical diagnosis requirements? Finally, what is the relationship between this change and the surrounding culture of human rights values?

In this essay, I suggest that the answer to these questions lies in *XY v Ontario (Government and Consumer Services)*, a Human Rights Tribunal decision which overturned Ontario's "gender ID law", Ontario's legal requirements for obtaining a change to the gender marker on a birth certificate.[4] I begin in Part II by providing a background to gender ID law in Canada. In Part III I

* Brendan Cooke is a recent graduate of the joint common law and civil law program at McGill University's Faculty of Law. He co-founded the Trans Legal Clinic while at law school. Out of Brendan's work at the Clinic came this paper concerning trans law. It was completed as an independent research paper supervised by Professor Robert Leckey.

[1] I use this word to refer to all persons whose gender identity is different from the gender typically associated with the sex assigned to them at birth. Persons not having such a gender identity are "cisgender" persons.

[2] See e.g. "Manitoba no longer requires surgery to change gender on birth documents!" (30 January 2015) *Winnipeg Transgender Support Group*, online: <winnipegtransgendergroup.com/2015/01/30/manitoba-no-longer-requires-surgery-to-change-gender-on-birth-documents/>; Marie-France Bureau & Jean-Sébastien Sauvé, "Changement de la mention du sexe et état civil au Québec: critique d'une arpproche legislative archaïque" (2011) 41:1 RDUS 1 [Bureau & Sauvé].

[3] Sharon Cowan, "'Gender is No Substitute for Sex': A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity" (2005) 13:1 Fem Leg Stud 67 at 67 [Cowan]; Andrew N Sharpe, "Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category" (2007) 15:1 Fem Leg Stud 57 at 70 [Sharpe, "Endless Sex"]. This has not occurred everywhere, and some jurisdictions have enacted much more progressive regimes. For example, "in Argentina, the Gender Identity and Health Comprehensive Care Act 2012 gives people the right to request that their recorded sex, first name, and image are amended to match their self-perceived gender identity." See Open Society Foundation, *License to Be Yourself: Laws and Advocacy for Legal Recognition of Trans People* (New York: Open Society Foundation, May 2014) online: <https://www.opensocietyfoundations.org/reports/license-be-yourself> at 17 [Open Society Foundation].

[4] *XY v Ontario (Government and Consumer Services)*, 2012 HRTO 726, 74 CHRR D/331 [*XY v Ontario*].

argue that *XY v Ontario* was unique in that beyond ordering a change within Ontario, the decision introduced a new narrative into Canadian antidiscrimination law, which fundamentally shifts the basis of transgender truth in law. Instead of relying on medico-scientific theories to confirm the identity of transgender persons, I argue that the novel narrative introduced in the case locates truth in the transgender person's own beliefs and self-identification. In Part IV, I argue that the rudimentary form of this narrative as found in *XY v Ontario* influenced the legislatures in each province to enact a fundamentally similar legal regime.[5] I conclude by suggesting that ultimately the origin of this novel narrative lies within the framework of antidiscrimination law in Canada.

In answering the questions I have posed, I offer an interpretation of the immediately available data which I draw from legal sources and case law. While the paper's questions are empirical, I do not claim to have conclusive empirical responses to the hypotheses set out above. A more complete answer would require access to government policymaking processes, which are generally inaccessible to the public.[6] Hansard transcripts, likewise, gives us little insight into the true workings of governmental policymaking, as parliamentary deliberations do not systematically address the motivations of government.[7] Nor do I claim that the novelty in *XY v Ontario* is any greater than the first *authoritative* recognition of the narrative, as legal scholars and trans activists have been criticizing the transsexual surgery requirement in Canada and elsewhere for some time, using the arguments which were later used in *XY v Ontario*.[8] I suggest that what was determinative for the reform legislation was the recognition of this narrative by a legally authoritative body.

Let me note that I am not neutral with respect to the changes made. I believe that gender ID law ought to grant as much autonomy to trans persons as possible, by allowing them to decide whether and in what way their gender(s) appear on their birth certificates.[9] As a result, I refer to laws as relatively "progressive" or centered upon "gender autonomy" when they grant more power to trans persons to self-determine whether a gender marker change is appropriate for them.[10]

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[5] I do not explicitly take into account the efforts of transgender activists in bringing about change in the Canadian provinces, although the effect of their efforts ought not be minimized. For example, in Québec, activism by the trans community during public consultations convinced the Québec government to modify their proposed regulations in favour of a more progressive regime. Québec, Committee on Institutions, "Special consultations and public hearings on the draft regulation concerning the Regulation respecting change of name and of other particulars of civil status for transsexual and transgender persons" at 3, online: <www.assnat.qc.ca/en/travaux-parlementaires/commissions/ci/mandats/Mandat-32171/index.html> ["Special Consultations"].

[6] At least, they are out of the reach of many provincial access to information laws. See e.g. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s 12.

[7] Although it is useful in some situations, Hansard evidence is not conclusive as to the motivations of government in proposing a piece of legislation. As Justice Scalia says, "can it really be that this case turns, in the Court's view, on whether a freshman Congressman from New Mexico gave a floor speech that only late-night C-SPAN junkies would witness?" Sylvia Costelloe, "The Need for Conditions Limiting the Use of Legislative History in Statutory Interpretation: Lessons from the British Courts" (2015) 29:1 Notre Dame JL Ethics & Pub Pol'y 299 at 310-311.

[8] Of course, these two communities are not mutually exclusive. For an example of trans activists in the law criticizing the transsexual-surgery requirement, see Franklin H Romeo, "Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law" (2004-2005) 36:1 Colum HRL Rev 713 at 730-738 [Romeo].

[9] For more on best practices for progressive policy regimes, see Open Society Foundation, *supra* note 3 at 9, 17-22.

[10] For a discussion of burdens imposed by the "surgical-anatomical" old model, see Viviane K Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (Chicago: University of Chicago Press, 2000) at 284-50.

II. THE BACKGROUND OF THE REFORM LEGISLATION

This Part outlines the history of gender ID laws in Canada. In order to substantiate my claim that Canada has seen a gender ID law "revolution" since 2012, I begin by giving a brief history of gender ID law in Canada, and then move on to describe the legal regimes adopted since 2012. By emphasizing the uniformity across the provinces and the limitations of the progressivity of the "reform legislation",[11] the unique situation in Quebec, and the timeline of the reform, I lay the groundwork for Parts III and IV.

Canadian provinces first began allowing transgender persons to change their gender marker in the 1970s.[12] Inspired by medical theories which proposed that 'transsexualism' was a medical issue best treated by gender-reassignment surgery, the first legislative proposals were seen as a response to a "practical problem" that such persons had undergone transsexual surgery, but were caused "certain embarrassment" in their day-to-day lives.[13] Their response was to allow a change of gender marker upon presentation of proof of gender-reassignment surgery. The Canadian jurisdictions thus repudiated the seminal case *Corbett v Corbett*, which declared that sex in law is determined by anatomy at birth.[14] Under this model the applicant needs to have undergone at least some surgical changes to their anatomy in order to obtain a gender marker change. Applicants were required to produce two documents. The first from the medical practitioner who carried out the operation, which explains the changes that were made and attests that the sex designation of the person should be correspondingly changed. The second from a medical practitioner who can attest that the anatomical sex of the applicant has changed.[15]

More recently, legal orthodoxy in Canada has moved towards a stance of greater sympathy for the discrimination faced by trans persons. The Human Rights Tribunals, which exist in each

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[11] This is a term I use to refer to the gender ID legislation introduced in Canada since 2012, which removes the sex-reassignment surgery requirements.

[12] See e.g. *An Act to Amend the Vital Statistics Act*, SBC 1973, c 160, amending SBC 1962, c 66; *An Act to Amend the Vital Statistics Act*, SS 1974-1975, c 61, amending SS 1971, c 65; *Vital Statistics Amendment Act*, 1978, SO 1978, c 81, amending RSO 1970, c 40.

[13] British Columbia, Legislative Assembly, Official Report of Debates of the Legislative Assembly (Hansard), 30th Parl, 3rd Sess, No 1 (6 November 1973) at 1339 (Hon DG Cocke).

[14] Andrew N Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish Publishing, 2002) at 40-44 [Sharpe, "Transgender Jurisprudence"]. At 3, Sharpe analyzes more broadly the development of legal recognition of transsexuals: "Law's response to reformist calls for the re-sexing of transgender bodies has tended to be confined to the post-surgical body. This has had the effect of delimiting transgender as a category of legal analysis and encouraging a view of the transgender body as an "esoteric subject for legal study"."

[15] In Nunavut, there does not appear to be any procedure for changes to birth certificates. *JusticeTrans*, online: <justicetrans.weebly.com/nunavut.html>; *Vital Statistics Act*, RSBC 1996, c 479, s 27 as it appeared before April 2014 [BC *VSA*]; *Vital Statistics Act*, SA 2007, c V-4.1, s 30 as it appeared before 2014; *The Vital Statistics Act*, 2009, SS 2009, c V-7.21, s 31; *The Vital Statistics Act*, RSM 1987, c V60, CCSM c V60, s 25 as it appeared before February 2015 [MB *VSA*]; *Vital Statistics Act*, RSO 1990, c V.4, s 36 [ON *VSA*]; arts 71-73 CCQ, as it appeared before October 2015; *Vital Statistics Act*, SNB 1979, c V-3, s 34; *Vital Statistics Act*, RSNS 1989, c 494, s 25 as it appeared before 2016 [NS *VSA*]; *Vital Statistics Act*, RSPEI 1988, c V-4.1, s 12 [PEI *VSA*]; *Vital Statistics Act*, 2009, SNL 2009, c V-6.01, s 26 as it appeared before April 2016 [NL *VSA*]; *Vital Statistics Act*, RSY 2002, c 225, s 12; *Vital Statistics Act*, SNWT 2011, c 34, ss 41-42. For more on 20th-century legal engagements with transgender identities, see Sharpe, "Transgender Jurisprudence", *supra* note 14, ch 3-4, where the author first explores the origins of legal engagement with transgender identities through *Corbett v Corbett* and subsequently examines more recent cases that adopt newer, more 'inclusive' narratives.

province and which have accumulated a great deal of legitimacy in settling important matters of human rights, have recently taken up the cause of the defence of trans persons. For example, in 2001 the Canadian Human Rights Tribunal recognized "transsexualism" as an implicitly protected ground in the *Canadian Human Rights Act*.[16] In Canada, trans rights have advanced considerably in the past twenty years, but trans persons remain members of a group beset by structural violence, and face complex, multifaceted problems.[17]

The most recent example of this broader cultural and legal shift is the ongoing "revolution" mentioned earlier; since 2012, eight of the ten provinces but none of the territories have amended their laws on gender marker changes to birth certificates.[18] In the common-law provinces that have amended their laws, the newly enacted requirements are substantially the same. The trans applicant must provide two documents. The first document they must provide is a declaration stating that their gender identity has changed. The second document is a written statement from a medical professional confirming that the sex designation on the applicant's birth certificate no longer corresponds to their assumed gender and that a change of legal mention of sex is appropriate.[19]

The required documents reflect an emphasis on gender self-determination, as well as the assumption that all trans persons consistently maintain one of two genders.[20] In British Columbia, Newfoundland, and Prince Edward Island, the declaration from the trans applicant must state that they "have assumed, identify with and inten[d] to maintain" the gender identity that "corresponds with the [desired gender marker]."[21] In Alberta and Nova Scotia, the declaration must confirm that

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[16] *Kavanagh v Canada (Attorney General)*, [2001] CHRD No 21 at para 134, 41 CHRR D/199. In 1999, the British Columbia Human Rights Tribunal recognized gender identity as an implicitly protected ground: *Ferris v Office and Technical Employees Union, Local 15*, [1999] BCHRTD No 55, 36 CHRR D/329.

[17] On the injustices faced by trans persons in their everyday lives, see Jaime M Grant et al, *Injustice at Every Turn: A report of the National Transgender Discrimination Survey* (Washington: National Gay and Lesbian Task Force and National Center for Transgender Equality, 2011) online: <www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf>.

[18] BC *VSA*, *supra* note 15; *Vital Statistics Information Regulation*, Alta Reg 3/2012, ss 16.1-16.3 [Alta VSI Reg]; MB VSA, *supra* note 15; NS *VSA*, *supra* note 15; NL *VSA*, *supra* note 15; Letter from Sandra Leonetti, Deputy Registrar General, Office of the Registrar General (5 October 2012), online: <queerontario.org/wp-content/uploads/2012/10/English-Registrar-General-Letter-Re-New-Change-of-Sex-Designation-Criteria-in-Ontario.pdf> [Leonetti].

[19] Note the substantial difference in policy mechanisms used to bring the changes into force. The policy change also occurred through different mechanisms. Only five of the eight provinces who have enacted reform legislation did so completely through legislative action. Manitoba, British Columbia, Nova Scotia, Newfoundland, and PEI enacted the new requirements through their provincial legislature. In Alberta and in Québec, the legislature enacted changes enabling the executive to promulgate regulations. The substance of the requirements was then promulgated by orders of the Governor-in-Council. See *Vital Statistics Information Amendment Regulation,* Ministerial Order 41/2015, (2015) A Gaz II 27 [AB Order-in-Council]; *An Act to amend the Civil Code as regards civil status, successions and the publication of rights*, OC 781-2015, (2015) GOQ II, 3238 [QC Order-in-Council]. Finally, Ontario's reform "legislation" was not really legislation at all. The province has not changed its Vital Statistics legislation, which retains the old model. The changes were made purely by fiat of the Registrar General, who announced the changes to the public. Ontario's *Vital Statistics Act* still seems to restrict the power of the Registrar General to only issuing a change to sex designation when presented with proof of transsexual surgery. See Leonetti, *supra* note 18; ON *VSA*, *supra* note 15, s 36(3).

[20] Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law* (Durham: Duke University Press, 2011) at 78-80 [Spade].

[21] *Vital Statistics Act,* RSBC 1996, c 479, s 27(2)(b) [BC *VSA* II]; PEI *VSA*, *supra* note 15; *Vital Statistics Act*, SNL 2009, c V-6.01, s 26(2)(a) [NL *VSA* II].

the person "identifies with and is maintaining" the gender identity that "corresponds" with the requested amendment to the sex on the record of birth.[22] In Manitoba, the analogous declaration must state that the person "is currently living full-time in a manner consistent with the requested sex designation and intends to continue doing so."[23] Ontario requires an identical declaration to Manitoba, with an additional declaration that the person has "assumed" the gender identity that accords with the requested change in sex designation.[24]

Likewise, the requirements for the supporting statement professional consistently relegate the statement to a mere *confirmation* of the trans applicants' declaration, while retaining a certain gatekeeping role for doctors. In British Columbia, Ontario, Nova Scotia, and PEI, the medical professional must confirm only that the "sex designation on the applicant's birth registration does not correspond with the applicant's gender identity."[25] In Alberta, they must declare that the applicant "identifies with *and is maintaining* the gender identity that corresponds with the requested amendment to the sex on the record of birth."[26] Only in Manitoba and Newfoundland, the declaration must state that the medical professional is of the opinion that "the sex designation requested by the applicant is consistent with the sex designation with which the applicant identifies."[27]

In Quebec, the legislature has taken the principle of self-determination much further than elsewhere by dispensing entirely with the required note from a medical professional for the first change of gender marker.[28] However, the applicant must still declare that "the designation of sex requested is the designation that best corresponds to the applicant's sexual identity" and that "the applicant assumes and intends to continue to assume that sexual identity."[29] The only corroboration required is a declaration from a person "of full age who attests to having known the applicant for at least one year and who confirms that the applicant is fully aware of the seriousness of the application."[30]

All of these changes have occurred since *XY v Ontario* was decided on April 11, 2012.[31] The Ontario government announced the reforms to the gender marker change process on October 5, 2012.[32] Quebec was the next jurisdiction to respond, with a statute amending the Civil Code of

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[22] Alta VSI Reg, *supra* note 18, s 16.2(d); *Vital Statistics Act*, RSNS 1989, c 494, s 25(2)(b) [NS *VSA* II].
[23] *The Vital Statistics Act*, RSM 1987, c V60, CCSM, c V60, s 25(7)(2) [MB *VSA* II].
[24] "Statutory Declaration for a Change of Sex Designation on a Birth Registration of an Adult" (2014), *ServiceOntario*, online: <www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/007-11324E~1/$File/11324E.pdf> [ServiceOntario Form].
[25] BC *VSA* II, *supra* note 21, s 27(2)(c); ServiceOntario Form, *ibid*; NS *VSA* II, *supra* note 22, s 25(1)(c)(ii); PEI *VSA*, *supra* note 15, s 12(1)(b).
[26] Alta VSI Reg, *supra* note 18, s 16.2(d) [emphasis added].
[27] MB *VSA* II, *supra* note 23, s 25(8)(2)(c); NL *VSA* II, *supra* note 21, s 26(2)(b).
[28] For subsequent changes to the gender marker, the person must obtain a note from a medical professional. See *Regulation respecting change of name and of other particulars of civil status*, CQLR c CCQ, r 4, s 23.1.
[29] *Ibid*, ss 23.1(1)-(2).
[30] *Ibid*, s 23.2.
[31] *XY v Ontario*, *supra* note 4. Judicial review of Ontario Human Rights Tribunals' decision is limited to "patently unreasonable" decisions: *Human Rights Code*, RSO 1990, c H.19, s 45.8 [*Human Rights Code*]. At s 45.6(7), parties may ask for a reconsideration of a Tribunal decision. There is a general grant of a time extension for judicial review if there are "apparent grounds for relief". See *Judicial Review Procedure Act*, RSO 1990, c J.1, s 5.
[32] Leonetti, *supra* note 18.

Québec in December 2013.[33] However, the new Civil Code of Québec articles required regulations, and the final coming into force of the law did not take place until October 1, 2015.[34] Alberta passed a law amending their Vital Statistics legislation in May 2014, and the ensuing regulations came into force in February 2015.[35] British Columbia followed suit shortly thereafter, with their provisions coming into force on May 29, 2016.[36] Manitoba's reformed legislation came into force in March 2016.[37] Nova Scotia enacted a law amending its gender ID legislation on May 11, 2015, and the provisions came into force in September 2015.[38] Newfoundland and Labrador enacted reform legislation in April 2016.[39] PEI is the most recent province to amend their old laws, with amendments coming into force on June 1st, 2016.[40]

The changes signal a clear "revolution" in transgender rights. Since the decision of *XY v Ontario*, almost all Canadian jurisdictions have independently decided to adopt nearly identical legislative regimes which greatly increase the availability of gender marker changes for trans persons. The question remains: what is behind these changes?

III. THE NEW NARRATIVE INTRODUCED BY *XY v ONTARIO*

In this Part, I show that *XY v Ontario* introduced into Canadian jurisprudence a novel legal narrative which defines a "true" transgender person as one who identifies as such, without qualification. I argue this in order to support the broader thesis of this paper, that the "source" of the legal changes in recent legislation is ultimately found in *XY v Ontario*.

I consider two cases preceding *XY v Ontario—Nixon v Vancouver Rape Relief Society* and *MacDonald v Downtown Health Club for Women*—and compare them with *XY v Ontario*.[41] I suggest that *Nixon* locates 'truth' in medical theories about transsexuality. In this way, I argue it is fundamentally distinct from *XY v Ontario*, where truth in trans is located purely in the claims of the trans person. I also refute past scholars who have taken the opposite position on the proper characterization of *XY v Ontario*. I then turn to more recent cases, especially *MacDonald*, and suggest that while this case embraces more trans-friendly language, they are still epistemologically mired in medical theories in a way that *XY v Ontario* is not.

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[33] Bill 35, *An Act to amend the Civil Code as regards civil status, successions and the publication of rights*, 1st Sess, 40th Leg, Québec, 2013 (assented to 6 December 2013) SQ 2013 c 27.
[34] QC Order-in-Council, *supra* note 19.
[35] Bill 12, *Statutes Amendment Act 2014*, 2nd Sess, 28th Leg, Alberta, 2014 (assented to 14 May 2014) SA 2014, c 13; AB Order-in-Council, *supra* note 19.
[36] Bill 17, *Miscellaneous Statutes Amendment Act*, 2014, 2nd Sess, 40th Leg, British Columbia, 2014 (assented to 29 May 2014) SBC 2014, c 14.
[37] Bill 56, *The Vital Statistics Amendment Act*, 3rd Sess, 40th Leg, Manitoba, 2014 (coming into force 28 January 2015) SM 2014, c 22.
[38] Bill 82, *An Act to Amend Chapter 66 of the Revised Statutes, 1989, the Change of Name Act, and Chapter 494 of the Revised Statutes, 1989, the Vital Statistics Act*, 2nd Sess, 62nd Leg, Nova Scotia, 2015 (assented to 11 May 2015), SNS 2015, c 13.
[39]Bill 7, *An Act to Amend the Vital Statistics Act, 2009*, 1st Sess, 48th Leg, Newfoundland and Labrador, 2016 (assented to 13 April 2016) SNL 2016, c 44.
[40] Bill 19, *An Act to Amend the Vital Statistics Act*, 2nd Sess, 65th Leg, Prince Edward Island, 2016 (assented to 13 May 2016) SPEI 2016, c 29.
[41] *Nixon v Vancouver Rape Relief Society*, 2002 BCHRT 1, 42 CHRR D/20 [*Nixon*]; *MacDonald v Downtown Health Club for Women*, 2009 HRTO 1043, T-0499-08 [*MacDonald*].

I begin with *Nixon*, which is representative of much earlier trans jurisprudence.[42] *Nixon* concerns a trans woman, Kimberley Nixon, who wished to volunteer with a peer counselling and victim support organization, but was refused a position as a volunteer when a cisgender female organizer recognized her as trans. Nixon complained to the Human Rights Commission of British Columbia. Before the Human Rights Tribunal, the organization argued that their exclusion of trans women, and corresponding inclusion of only cisgender women, was required by the nature of their organization and was therefore justified.[43]

The reasoning and language surrounding the transgender persons' identity in *Nixon* gives us a good sense of the effect of medical theories in trans law. In *Nixon*, the trans applicants' identity is medicalized: the adjudicator accepts her as trans, but makes clear that the acceptance is based on Nixon's story's consistency with medical definitions of a 'true' trans person. The judgment opens by identifying the complainant as a *post-operative* male-to-female transsexual, and immediately adds that her "birth certificate has been amended … and records her gender as female" almost as to provide to the reader a reason for agreeing her gender should be understood as female.[44] The adjudicator then references medical theories, implicitly comparing Nixon's story with the dictates of the medical theories. Under the subject heading "What is Gender Identity Disorder and Transsexualism?", the adjudicator describes "Gender Identity Disorder" and goes on to suggest that "transsexual individuals are at the highest intensity of Gender Identity Disorder … [a] transsexual feels, unambivalently, that their brain sex, 'who they are', is different from their anatomical body ... it is not a matter of wanting or choosing."[45] The ultimate aim of this exercise is to establish the complainants' trans identity—and it is done primarily by confirming that her story fits the profile set out in medical theories of transsexuality.[46]

This use of medical theories of trans does not ignore completely the self-reported experiences of the trans person. Rather, it seeks to compare them with medical theories, to cast trans as a scientific phenomenon best understood through the lens of science. As the adjudicator reports, trans is attributable "[possibly to] a fluctuation of hormones *in utero*."[47] From there, expert

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[42] *Commission des droits de la personne et des droits de la jeunesse c Maison des jeunes*, [1998] RJQ 2549 at para 47, 33 CHRR D/263 ("Ni les chartes canadienne et québécoise… ne définissent le transsexualisme et il n'appartient sûrement pas au Tribunal d'en retenir l'une ou l'autre des definitions psychologiques ou médicales.").

[43] *Nixon, supra* note 41 at para 1. Nixon made waves at a case which directly calls into question the relation between feminism and the trans community. See e.g. Lori Chambers, "Unprincipled Exclusions: Feminist Theory, Transgender Jurisprudence and Kimberley Nixon" (2007) 19:2 CJWL 305.

[44] *Nixon, supra* note 41 at para 1. The story told in *Nixon* corresponds precisely to Sharpe's description of the "transsexual discovery narrative", a classic mechanism used by law to "verify" trans identity. See Sharpe, "Transgender Jurisprudence", *supra* note 14 at 75-80.

[45] *Nixon, supra* note 41 at paras 15-16. This is a classical example of the deployment of the "wrong body" narrative. Where the notion of "wrong body" transsexualism is explained as originating in medicine, the "sexual invert" gradually turning into a medical theory of "transsexualism". See Sharpe, "Transgender Jurisprudence", *supra* note 14, ch 2-3. Medicine has historically been one of the places where law has looked to interpret and construct transgender identities. *Nixon* is just an example of such a use of medical theories.

[46] As McGill and Kirkup claim, "legal discourse establishes trans status through an understanding of gender as a static, immutable identity trait that ought to correspond to one of the two binary sex categories." Jena McGill & Kyle Kirkup, "Locating the Trans Legal Subject in Canadian Law: XY v Ontario" (2013) 33:1 Windsor Rev Legal Soc Issues 96 [McGill & Kirkup].

[47] *Ibid* at para 14. This is a central theme that Sharpe argues is central to the last century of trans jurisprudence. See Sharpe, "Transgender Jurisprudence", *supra* note 14, ch 3.

medical testimony interprets the experiences of trans persons via scientific theories, with the aim of confirming the claims of a trans person through corroboration with the dictates of the theory. The 'true' trans person in *Nixon* is one who can support their claim to a new gender identity via medical theories. The ultimate effect of such reasoning is to ultimately exclude those whose stories do not fit into the "trans medical theory", especially those who do not wish to change their anatomy through transsexual surgery.[48]

Contrast this with *XY v Ontario*, which found the transsexual-surgery requirement in Ontario's *Vital Statistics Act* to be contrary to the *Human Rights Code*. In this case, the complainant was a transgender woman who alleged that the requirement had functionally forced her to obtain transsexual surgery, discriminating against her based on her status as trans. The Human Rights Tribunal of Ontario agreed and ordered the Ontario Department of Government Services to cease obeying Ontario's gender ID law.

In this case, a novel epistemology of trans is deployed in which the entire discussion of the nature of the complainant's gender identity in *XY v Ontario* occurs in a single sentence: "The applicant identifies herself as a male-to-female transgendered person, a transgendered woman."[49] This is the only justification offered for the adjudicator's acceptance of the applicant's trans status. This highlights the shift in the definition of a 'true' trans person, between *XY v Ontario* and *Nixon*. As I mentioned before, what is important is not that the transgender person's self-reported experiences are being taken into account. This has been done in the past, and to widely varying results, since the conclusion hinges on the medicalized narrative imposed upon those experiences. In *XY v Ontario*, the narrative being imposed upon the experiences is a more recent advance in identity politics which locates trans truth in the claims of the trans person themselves. To a certain extent there is no equivalent "point of comparison" which medical theory supplies under the *Nixon* reasoning. This new location of trans truth leads to the "self-determination" principle—that trans persons should have the right to decide for themselves the terms of their own gender identity.[50]

Language used elsewhere in the decision supports this interpretation of *XY v Ontario*. The key terms "gender identity" and "transgender" are used throughout. For example, "other than through s. 36 of the VSA, a transgendered person cannot obtain an Ontario birth certificate bearing a sex designation that accords with his or her gender identity."[51] "Transgender" and "gender identity" are more recent articulations of trans identity, and fall into a political lineage which has sought to recognize all trans identities beyond those which correspond to a post-surgical body.[52]

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[48] This is the "second form of discourse" on the trans identity based on a medical model, as suggested by Romeo, *supra* note 8 at 718.

[49] *XY v Ontario*, *supra* note 4 at para 3.

[50] There are assumptions, as well as preconceived narratives, which are implicit even in this more "recent" narrative present in *XY v Ontario* and elsewhere. But even then, the logic of the narrative itself militates against using such assumptions to exclude some trans persons due to transgression of those assumptions.

[51] *XY v Ontario*, *supra* note 4 at para 2. Remember that it is not obvious or natural that progression away from the vestiges of "transsexualism" will lead towards greater gender autonomy. This transformation will easily be replaced with medical requirements, such as based on "gender dysphoria", as was done in the *Gender Recognition Act 2004*. See Sharpe, "Endless Sex", *supra* note 3 at 70.

[52] Sharpe, "Transgender Jurisprudence", *supra* note 14 at 1-2.

The term "transgender" itself represents a counter-discourse and implicitly recognizes those who have not underwent, and who may not wish to undergo, gender-reassignment surgery.[53]

Previous scholars, however, have characterized *XY v Ontario* in a totally different way. Jena McGill and Kyle Kirkup have argued that support of a corroboration scheme, such as the one eventually enacted in the reform legislation, constructs a trans subject who lacks the autonomy to "define personal gender in a legally meaningful way."[54]

Such an argument conflates the notion of constructing a trans subject, versus policy analysis of such a trans subject. It is unfortunately true that the adjudicator in *XY v Ontario* ends up supporting a gender marker scheme which requires transgender persons to secure corroboration from a medical professional; past instances suggest that even reform moments can have transphobic elements.[55] However, the decision makes a clear distinction between "legal gender" and the idea of a trans person which the decision imbues with agency. Indeed, the entire premise of *XY v Ontario* is that a person may be legitimately trans *before* having obtained the legal change in gender marker, and thus may suffer discrimination in the eyes of the law based on being trans.[56] The claim in *XY v Ontario* succeeds specifically because being 'genuinely' transgender, and the legal requirements for gender ID laws, are distinct.[57] The adjudicator in *XY v Ontario* supports a policy scheme involving medical corroboration due to a recognition of competing concerns, but gives an unqualified endorsement to trans self-identification. Therein lies the distinction between constructing a trans subject who requires verification, which this decision does not do, and predicating legal gender upon medical corroboration, which this decision does endorse but which hardly constitutes a "construction of a trans subject". We ought not minimize this achievement, as McGill and Kirkup do, by assimilating *XY v Ontario* to prior cases.[58]

More recent case law, the *MacDonald* case, shows the direction antidiscrimination law in Canada was moving subsequent to *Nixon*—that the self-determination principle of gender identity was coexisting with preoccupations with anatomy. In *MacDonald*, the Human Rights Tribunal of Ontario considered a motion ancillary to a dispute over change rooms in a private gym.[59] The Tribunal had to decide whether the medical history of the complainant, or more specifically the

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[53] *Ibid*. For more on the origins of the word "transgender" see David Valentine, *Imagining Transgender: An Ethnography of a Category* (Durham: Duke University Press, 2007).
[54] McGill & Kirkup, *supra* note 46 at 130-132.
[55] *XY v Ontario*, *supra* note 4 at para 297. Sharpe has likewise argued that the *Gender Recognition Act, 2004*, is transphobic. Alex Sharpe, "Transgender Marriage and the Legal Obligation to Disclose Gender History" 75:1 Modern L Rev 33 at 34.
[56] This is the basis on which the adjudicator makes her decision. *XY v Ontario,* supra note 4 at paras 147-49.
[57] This is not to say that the two phenomena are unrelated. Indeed, it is clear from past cases that judicial "interpretation" of the nature of transgender identities had an impact upon the eventual judicial decision made, in cases concerned with whether transgender marriages were valid. See Sharpe, "Transgender Jurisprudence", *supra* note 14, ch 4.
[58] I respectfully disagree with McGill and Kirkup's assessment with the specific meaning of *XY v Ontario* as a case, but not with their general charge that legal discourse and *XY v Ontario* in particular "conceptualizes essential trans identity as based on an inherent, longstanding disconnect between sex and gender" and thus is still rooted in the vestiges of essentialist notions of "transsexualism" originally theorized by doctors starting in the 1950s. See McGill & Kirkup, *supra* note 46 at 128; Sharpe, "Transgender Jurisprudence", *ibid*, ch 1-2.
[59] Such motions are possible via the *Human Rights Code, supra* note 31, s 43(3)(f).

status of their anatomy, is relevant to the complaint such that it should be released to the respondents.[60]

On the one hand, the passage which introduces the complainant reads as follows: "The applicant self-identifies as a transgendered person."[61] I repeat here for the purposes of comparison the corresponding passage in *Nixon*: "Ms. Nixon is a post-operative male-to-female transsexual woman."[62] The change in emphasis is startling. The term "transgender" in *MacDonald* itself signals a shift from a medico-scientific lens to an affirmation of the self-determination principle. Compare the justification offered for recognizing a trans person in the two cases: in *MacDonald* there is self-identification, whereas in *Nixon* there is anatomy and medical terminology.[63]

The preoccupation with anatomy which characterizes much twentieth century trans jurisprudence resurfaces here. Despite the resistance of the applicant, the adjudicator in *MacDonald* is still willing to accept that the trans person's medical records are relevant enough to the case to be handed over to the respondents.[64] The Tribunal decided that since the applicant had asserted that she had undergone gender-reassignment surgery, but that this assertion had never been substantiated by medical records (although the complainant had submitted an affidavit from a doctor), it was indeed "arguably relevant" to the case whether or not the applicant had in fact undergone surgical operations.[65] In other words, the Tribunal was prepared to tacitly accept that a trans complainants' genitalia was relevant to antidiscrimination law. Contrary to the self-determination principle, such an argument relies upon the notion that a trans persons' rights are determined by surgical status, and somehow trans bodies ought to be subject to differential scrutiny. To highlight my point, imagine a sex-discrimination case where an adjudicator requires a cis person to medically prove their genitalia. *MacDonald*, a case coming after *Nixon* but before the reform legislation, gives us the sense that the direction of antidiscrimination case law on the issue of recognition of transgender persons was shifting between *Nixon* and the reform legislation, and that the reform legislation represented a significant shift away from the framework previously used to understand the claims of trans persons.

Elsewhere in case law subsequent to *Nixon,* we see a similar juxtaposition of the competing impulses of trans law. While in some cases, there seems to be an acceptance of a claimant's self-determined claims to being transgender, it is generally premised on the identification of a "transsexual" and is usually accompanied by an allusion to a medical lens though which to interpret and verify trans claims.[66] For example, the *Montreuil v National Bank of Canada* decision makes frequent use of the word transgender instead of transsexual. This use is supported by a deployment of the "wrong body" narrative that "with respect to transsexuals, there can exist a complete dissociation between their physical sex and their subjective experience of their masculinity."[67]

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[60] *MacDonald*, *supra* note 41 at paras 1-5.
[61] *Ibid* at para 5.
[62] *Nixon*, supra note 41 at para 1.
[63] This is precisely what is advocated for in Romeo, *supra* note 8.
[64] *MacDonald, supra* note 41 at para 25.
[65] *Ibid*.
[66] Which harkens back to the "second level of discourse" known as medical discourse, as detailed by Romeo, *supra* note 8.
[67] *Montreuil v National Bank of Canada*, 2004 CHRT 7 at para 5, 48 CHRR D/436. Outside of Canada, there has been a similar movement away from transsexual surgery as the basis for medical verification of the trans subject, but

This amounts to a clear vector towards a more progressive epistemological framework for trans in the twenty-first century, specifically a move towards the self-determination principle. As well, we have seen that *XY v Ontario* deploys this progressive framework more fully than others before it. My original question, however, is only partly answered by the above. In order to give a sense of the origin of the reform legislation, it is necessary to both give a point of origin (*XY v Ontario*) as well as show that it is indeed the point of origin of the reform legislation. I take this up in the Part IV.

IV. *XY v ONTARIO* AND THE REFORM LEGISLATION

In this Part, I argue that the new narrative introduced by *XY v Ontario* influenced reform legislation introduced by the provinces, even beyond Ontario itself. I suggest that the Human Rights Tribunal of Ontario's decision had a ripple effect: it set a new standard for discrimination law, to which each of the provinces reacted in essentially the same way when formulating comparable policies. I both suggest that the provinces were provoked into a reaction by the case itself, but more importantly, that when crafting a policy response, the precise contours of *XY v Ontario* were taken into account.[68] In other words, *XY v Ontario* acted both as a political trigger, as well as a policy guideline, for the reform legislation.

To support this claim, I first consider the close relationship between the *XY v Ontario* decision and the reform legislation. I point to a number of elements which intimately connect the two; a shared definition of the trans identity, a similar rationale for medical corroboration, and the limited scope of both in addressing the harms of gender ID law. I then propose a political explanation for why the provinces were likely influenced by *XY v Ontario* and argue that the decision amounted to political "cover". Reform of gender ID law was likely not opposed in principle by Canadian politicians, but it may not have succeeded absent a strong political justification, which the *XY v Ontario* decision provided.

a) The Connections Between XY v Ontario

The primary connection between the reform legislation and *XY v Ontario* is the shared commitment to the self-determination principle as the guiding epistemological consideration for determining 'true' gender identity. I argued earlier that *XY v Ontario* locates 'truth' in trans identity in the claims of the trans person themselves, rather than in medical theories. This same structure is also present in the reform legislation. As previously discussed, the new requirements primarily consist of a trans person autonomously declaring that their gender identity corresponds to the desired sex designation. This is a clear expression of the same epistemology. If 'true' trans persons are those who identify as such, the key determination to make for law ought to be whether the

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it has moved instead in some places towards other medical markers, like gender dysphoria. For more on developments of the law of trans people elsewhere in the world, see Bureau & Sauvé, *supra* note 2.

[68] There is a legacy of literature stemming from Hogg's "dialogue" thesis which speaks to the interaction between the legislatures and the courts over rights issues. For Hogg's original argument see, Peter W Hogg & Allison A Bushnell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75. For a quantitative response which refutes some of Hogg's conclusions, see Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights" (2013) 34:1 Intl Political Sci Rev 39.

person identifies as trans. Otherwise stated, the requirement seems to independently institutionalize the centrality of the self-determination principle for legal gender.[69]

Of course, this is not the only requirement in the reform legislation. However, I argue that the medical corroboration requirement flows from competing policy concerns which are admitted as relevant in *XY v Ontario*, but which do not weaken the reform legislation's theoretical commitment to self-determination. I argued earlier that *XY v Ontario*, despite the fact that it endorses medical corroboration as a requirement which would not violate the human rights of transgender persons, is nonetheless quite progressive in that it essentially locates truth in the self-determined claims of the transgender persons. The compromise runs as follows: transgender persons have a right to have access to gender marker changes to their birth certificates without having to undergo surgery or medical treatments, but the government has good reason to want to ensure that only very serious applicants will actually apply.[70] Thus, it is appropriate to have doctors examine applicants to make sure they are serious about applying for their gender marker change.[71]

This exact rationale is repeated more or less verbatim in legislative debates on the provincial reforms. For example, in British Columbia, the Health Minister stated, in response to a member's comments that the reform legislation would encourage transgender persons to misunderstand their identity, that "essentially, we are not talking about the sex of a person: we are talking about the gender of a person, the way in which they see themselves and the way in which they present themselves to the world, based on an application with supporting documentation from a psychologist."[72] According to the Health Minister, the law primarily intends to grant autonomy to transgender persons to define themselves, but asks that they provide extra evidence of their self-definition. Likewise, the reform legislation in British Columbia asks that the doctor confirm the gender identity of the applicant corresponds to the desired gender marker. Note the preclusion of any genuine medical assessment by this formulation. The medical professional is doing no more than extending their support to a claim by the transgender person concerning their own gender identity.[73] As I stress elsewhere, the medical corroboration requirement is harmful to some trans persons and ought be removed; but my point is to maintain that its presence does not denature the character of the reform legislation.

The situation in Quebec also gives us good reason to believe this is the case. In the assessment document released by the Quebec government on the consultation process after having

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[69] See *XY v Ontario, supra* note 4 at para 155.

[70] This is revealed both by the huge amount of testimony from the Vital Statistics representative included in the *XY v Ontario* decision, as well as the adjudicator's own admission that corroboration was a worthy independent goal. See *XY v Ontario*, *supra* note 4 at paras 31-40, 240.

[71] Of course, such "compromises" in the past have indeed "compromised" the ability of transgender persons to obtain justice in their court claims, often coming from competing "concerns" in family law over marriage. See Sharpe, "Transgender Jurisprudence", *supra* note 14, ch 6.

[72] British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard)*, 40th Parl, 2nd Sess, Vol 11 No 2 (28 April 2014) at 3190-91.

[73] Of course, and as I stress elsewhere, while this medical corroboration requirement is based in a competing concern, administrative law is such that it may exact harms upon populations differentially based on the structure of the administrative program. Those without access to health-care, or without sufficient funds or literacy to navigate a long and detailed form, are left out of the reform legislation's formulation. For more on administrative injustice. See Spade, *supra* note 20, ch 4.

produced the first version of the regulations,[74] the language used was very similar to that of *XY v Ontario*. Here, the sole reliance on the notion of gender identity to refer to the persons is at issue. Quebec politicians rightly concluded, based on testimony from trans legal scholars and activists, that once properly understood, gender identity precluded the notion of medical corroboration altogether.[75] In Quebec, then, we have proof that a legislative proposal identical to those tabled elsewhere, given extra criticism and publicity, led to the conclusion that the medical corroboration requirements were unnecessary, and that the self-determination principle requires its removal.

On the other hand, the limitations on the narrative in *XY v Ontario* is also visible in the reform legislation. In *XY v Ontario* the complainant claims that the old requirements were discriminatory because they did not allow transgender people who had "fully transitioned",[76] but who had not yet undergone surgery, to change their documents.[77] The claimant clearly had access to medical professionals, was a citizen who had a lot at stake by her gender marker on her certificate, and was not seeking to flout the gender binary; the harm alleged related to being outed by her documents.[78] The reform legislation reflects an approach circumscribed by these harms. Ignored are the possibilities that a person might not be able to live "full-time in the other gender" at all, or indeed that a person might not feel comfortable transitioning from male to female or vice-versa without legal documents to support them. Accordingly, in some provinces the person must be living "full-time" in the other gender, while other provinces require that the person swear that they have already "assumed" the desired gender identity.[79]

Further, the breakthrough represented by the reform legislation is curbed by assumptions about the nature of trans identities which are present both in *Nixon* and in *XY v Ontario*. Stability of gender in time, and in particular the reliance on a subtler variation of the "transsexual discovery narrative" is unfortunately present in both the jurisprudence and the reform legislation. In *Nixon* it is quite clear: the adjudicator states that the trans complainant was born physically male but, at four of five years of age, "realized that her physical maleness did not accord with her sense of self as female."[80] The assumption relied on in order to support this narrative is directly articulated a little later in the decision: "Gender identity is innate, present at the earliest opportunity that someone is able to communicate their gender, not chosen, and lifelong."[81] *XY v Ontario* likewise relies on a trans discovery story, establishing the complainant as having "from an early age" known that she was "different".[82]

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[74] Special Consultations, *supra* note 5.
[75] *Ibid*.
[76] The concept of a "full" transition relies on the categories of sex to denote the ideals to which individuals undergoing gender transition supposedly aspire.
[77] "…it seems logical to conclude that possessing a birth certificate that could expose one as transgendered, if it were required to be produced, could be a source of anxiety, even if it never ends up being produced." See *XY v Ontario*, *supra* note 4 at para 175.
[78] *Ibid* at para 57.
[79] There is here, therefore, a continuation in another form of the historical process of "definition" of the transgender person, which casts lines of inclusion and exclusion based on whether the person's story is consistent with that definition. Sharpe, *Transgender Jurisprudence*, *supra* note 14 at 31.
[80] *Nixon*, *supra* note 41 at para 10.
[81] *Ibid*. See also Sharpe, "Transgender Jurisprudence", *supra* note 14, ch 2-3.
[82] X*Y v Ontario*, *supra* note 4 at paras 41-55.

Gender binarism also curbs the reform moments in the reform legislation. This phrase refers to the assumption that only two gender identities are possible: male and female. In *Nixon,* it is implicit in the medical testimony presented: "transsexuals are not men wanting to be women or women wanting to be men … the person is of the *other* gender."[83] Likewise in *XY v Ontario,* the complainant is framed as passing from one gender to the other gender, implicitly establishing a framework of just two possible genders.

These two ideas constitute assumptions about trans persons which carry through relatively unperturbed in the reform legislation. In Manitoba an applicant for a gender marker change must be currently living "full-time in a manner consistent with the requested sex designation."[84] This requirement seems natural if we assume that a person will only want to express themselves in only one of two genders, so that a gender change would only be desired given that the person is living "consistently with the requested sex designation."[85] Further, the idea of a bigendered person is incompatible with the assumption that gender is fixed for life and through time; the idea of living "full time in a manner consistent with a sex designation" follows clearly from the constrained view of gender identity present in *XY v Ontario* and *Nixon*.

At the root of the phenomenon is the nature of case-based human rights jurisprudence; that the harms exposed and addressed will strongly depend on the cases that are actually brought forward. The *XY v Ontario* case reflects particular harms that some trans persons suffer, and which ought to be addressed; but they are not the *only* type of harm suffered. The reform legislation reflects an approach which casts lines of inclusion and exclusion such that only certain harms are addressed. As McGill and Kirkup note, "those with fluid or changing gender identities or expressions including genderqueer, intersex and cross-dressing individuals and others who fall outside the two-category models of sex and gender, do not fall neatly into the model of trans subjectivity evident in *XY*."[86]

All of the above points to continuity between the narrative of *XY v Ontario,* as well as the limited scope of the harms there addressed, and the reform legislation which followed it. Regardless, how do we know that *XY v Ontario* really motivated the legislative drafters? While we are not privy to meetings or other sessions where bills are drafted, we do have a sense of the general political environment in which Human Rights Tribunals operate, which I address next.

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[83] *Nixon*, *supra* note 41 at para 15. Thus, by relying on medical theories to interpret Nixon's gender, the *Nixon* decision becomes committed to bigenderism; "like the Biological Model, the medical model assumes that two genders exist and enforces the norms typically associated with those genders." Romeo, *supra* note 8 at 724-725. Furthermore, as Sharpe argues: "from its inception reform jurisprudence has been animated by the twin desires of reproducing the [binary] gender order, and insulating marriage from the stain of homosexuality." Sharpe, "Endless Sex", *supra* note 3 at 60.

[84] MB *VSA* II, *supra* note 23, s 25(7)(2).

[85] This is another instance of how, as McGill and Kirkup argue, "creating a trans legal subject who necessarily seeks to reconcile an inherent disconnect between sex and gender reflects only one model of trans life; that most often associated with the label transsexuality." McGill and Kirkup, *supra* note 46 at 129.

[86] *Ibid*.

b) The Politics of XY v Ontario

Here, I address an important question. Aside from the important substantive connections between the reform legislation and *XY v Ontario* outlined above, is there any other indication that *XY v Ontario* was the cause of the reform legislation, in a political and historical sense?

I argue that Canada's unique legal culture of human rights values suggests precisely this. My theory of the politics behind this decision is that *XY v Ontario* was a case where political "cover" was needed in order to make the reform legislation politically viable. As Julie Jai argues, sometimes governments may wait for a court ruling to force them to do something that they are not "opposed to doing in principle, but may not voluntarily initiate because of its political sensitivity or unpopularity."[87] I suggest that this is what occurred between *XY v Ontario* and the provincial legislatures outside Ontario. Two related phenomena support this theory.

First, *XY v Ontario* likely generated a specific, concrete connection between a group and a human right. Since the passing of the *Charter*, there generally appears to be an increased political weight of *Charter* values and policy issues which are linked to them.[88] In a 1993 study of post-*Charter* government policymaking, Patrick Monohan and Marie Finkelstein suggest that the *Charter* has created a new "political commodity", the successful linking of a right to a *Charter* value. Essentially, within the political realm, *Charter* values function to selectively sanction and give weight to certain types of claims over others. Monohan and Finkelstein report that political credibility of a particular claim to protection by the *Charter* can be established by Human Rights Commissions, for example.[89]

Since the *Charter* came into force, the Ministry of the Attorney General lawyers have had more important input in the policy process. Scholars have reported, based on interviews with government officials, that the *Charter* has introduced a new variable in the policymaking process: the likelihood of court reversal of a given policy project.[90] The prospect of a court challenge on *Charter* grounds has meant that government lawyers who assess legislation for *Charter* vulnerability are present at every step of the policy process and consequently, government lawyers have accumulated a great deal of authority and influence in the legislative process.[91]

I suggest that these trends give us more reason to believe that the reform legislation was a political response to *XY v Ontario*. The decision might have sent a clear political message, bolstered by decisions in other provinces, that the sex-reassignment surgery requirement violates

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[87] Julie Jai, "Policy, Politics and Law: Changing Relationships in Light of the Charter" (1997-1998) 9:1 NJCL 1 at 3.
[88] See generally *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[89] Patrick J Monohan & Marie Finklestein, "The Charter of Rights and Public Policy in Canada" (1992) 30:3 Osgoode Hall LJ 501 at 542-43 [Monohan & Finklestein].
[90] Jai, *supra* note 87 at 11-13; Monohan & Finklestein, *supra* note 89 at 42-43.
[91] As Hiebert notes, this is a consequence of bills of rights; "even 'weak' bills of rights can lead to cautious executives who refrain from bringing forward legislation that might be considered inconsistent with judicial decisions … It is as if judges were in the corridors of power at the time legislation is being developed." Janel L Hiebert, "Governing like Judges?" in Tom Campbell, KD Ewing & Adam Tomkins, eds, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011).

human rights principles.[92] The increased influence given to government lawyers since the *Charter,* as well as the increased political importance of *Charter*-related policy issues, created an impetus within government to substantively respond to *XY v Ontario*—to modify their legislation in the way that *XY v Ontario* dictated that they should. In this case, the "linkage" to a *Charter* value created by *XY v Ontario* with a specific right, the "right" to gender marker changes for trans people, enhanced political pressure to respond to the decision, while the increased internal pressure from Attorney Generals sensitive to human rights values further encouraged government to respond to the legal decision itself.

There is one major difference between the literature cited above and the *XY v Ontario* case. The literature cited above primarily discusses the impacts of challenges based on the *Charter*, while *XY v Ontario* was a reversal based on the *Human Rights Code*. There are strong parallels between the *Charter* and the *Human Rights Code*, especially when considering their potential effects on government policy, and hence their political, rather than strictly legal effects. Both of the documents depend on an appeal to egalitarian values, for example, and both are products of the Canadian "human rights revolution".[93] Moreover, this is an area where the substantive protections of the Human Rights Codes and the *Charter* overlap perfectly; the old model requiring surgery for a gender marker change has been struck down both under the *Human Rights Code* and under s. 15(1) of the *Charter*.[94] Here, the functions of the *Charter* and the *Human Rights Code* is the same: they enhance the political importance of certain human rights policy issues and arm government lawyers with additional authority to insist that those human rights policy issues are addressed by government.

Thus, the legal culture of human rights in Canada gives us reason to believe that the *XY v Ontario* decision elicited a response from lawmakers—that the form of the reform legislation was influenced by the narrative introduced by *XY v Ontario* into Canadian law.

V. CONCLUSION

In this paper, I have mapped out the origins of the transgender law revolution which has occurred in Canadian jurisdictions over the past several years. I began by examining the emergence of a new narrative around transgender persons in Canadian gender ID law in *XY v Ontario*. I then considered the contours of the reform legislation and showed a particularly striking connection between its legal norms and the adjudicator's analysis in *XY v Ontario*. I also considered the broader political environment in which such policymaking operations take place and argued that ultimately, *XY v Ontario* brought force behind the claims of transgender people for justice in gender ID law.

However, if the reform legislation originated in *XY v Ontario*, to what can we attribute *XY v Ontario*? I do not intend to propose a full answer to this question, but I would point to the nature of discrimination analysis as a starting point for understanding why the law was so receptive to this novel way of understanding trans persons, especially in Canada. Human rights values—and

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[92] See e.g. *CF v Alberta (Vital Statistics)*, 2014 ABQB 237, 587 AR 332 [*CF v Alberta (Vital Statistics)*], which largely consists of a summary of the reasoning in *XY v Ontario*.
[93] McGill & Kirkup, *supra* note 46 at 104-05.
[94] *XY v Ontario*, *supra* note 4; *CF v Alberta (Vital Statistics)*, *supra* note 92; *Charter*, *supra* note 88.

the legal culture of human rights in Canada—has grown up around a framework which relates individuals and the law in a very different way than does marriage law or judicial review of administrative action. Discrimination law puts the victim at the centre of the analysis, rather than the law itself. The starting point is always: what is the status of the victim? How have they been harmed by the law?[95] We may also point to reforms elsewhere in the law. Andrew Sharpe has also argued that homophobia has historically determined the rights of transgender persons.[96] Their recognition has always been limited by a fear of the law condoning homosexuality. It might be that the widespread legal recognition of the legal equality of gays and lesbians has freed discrimination law from an awkward position vis-à-vis trans persons.

My paper suggests that human rights tribunals might sometimes wield informal influence beyond their formal legal power. I argued that *XY v Ontario* sets out a legal regime to replace the one that it invalidated, at one point explicitly but implicitly as well. The data I have considered suggests that this regime was implemented more or less as is in Ontario, where the Ontario Human Rights Tribunal has legal powers. However, the suggestions made in *XY v Ontario* as to how a discriminatory regime should be fixed might have been influential beyond the borders of Ontario. British Columbia, Alberta, Nova Scotia, Manitoba, and Newfoundland have adopted generally similar regimes, all of which bear close resemblance to the suggestions made in *XY v Ontario*. The consequences of *XY v Ontario* suggest that the branding of an issue as concerning "human rights" can change its political importance.

Finally, we ought to look at the reform legislation and *XY v Ontario* and be generally optimistic about the future of the law's understanding of trans persons. While I have emphasized that the reform legislation enacted in most provinces is "blind" to the needs of many members of the trans community, it is nonetheless the case that *XY v Ontario,* even when compared to the reasoning in *Nixon*, represents an enormous step forward. Such step would certainly not have been possible fifteen years ago.

[95] Also noted by Cowan, *supra* note 3, n 29.
[96] Sharpe, "Transgender Jurisprudence", *supra* note 14 at 5.

AFTER SASKATCHEWAN FEDERATION OF LABOUR: SOUNDING A DEATH KNELL FOR BACK-TO-WORK LEGISLATION?

Alex Treiber*

I. INTRODUCTION

Back-to-work legislation is a powerful governmental tool in the industrial relations regime to end work stoppages for workers who otherwise hold the right to strike.[1] In the Wagner model of labour relations, the right to strike is considered the only substantial economic weapon available to employees. Generally, back-to-work legislation is invoked by governments after a protracted work stoppage, requiring the employer and union to submit to interest arbitration.[2] Unlike free collective bargaining, interest arbitration involves an arbitrator deciding what will be included in the parties' collective bargaining agreement. Since its inception in Canada, it has been used nearly forty times by the federal government and over one hundred times by provincial governments across the country in a wide spectrum of industries.[3]

As evidenced by the above figures, governments across Canada have used this tool on a regular basis in times of industrial strife, with little constitutional scrutiny. In *Reference Re Public Service Employee Relations Act*, the Supreme Court of Canada dismissed all doubt whether the *Charter* afforded constitutional protections to the collective bargaining process by declaring that "s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike."[4] Despite this unambiguous holding, nearly thirty years later, the Supreme Court of Canada in a majority decision written by Abella J in *Saskatchewan Federation of Labour v Saskatchewan* declared that the right to strike is a fundamental freedom protected by the freedom of association, s. 2(d) of the *Charter*.[5] The court noted that a blanket prohibition on the right to strike, with no alternative mechanisms for employees who provide essential services, is unconstitutional.[6] In expanding the scope of the right to strike, the court held that s. 2(d) will be violated where the "legislative interference with the right to strike … amounts to a substantial interference with collective bargaining."[7] In one

* Alex Treiber graduated from the Dual JD program at the University of Windsor and the University of Detroit Mercy in 2016. He is currently a labour and employment lawyer at McCarthy Tetrault LLP, representing clients in a variety of labour and employment issues including employment standards, wrongful dismissal, labour arbitrations, occupational health and safety, human rights, and labour and employment issues arising in corporate transactions. This paper was written in 2016 for a Supervised Research Project with Professor Claire Mummé.

[1] Claire Mummé, "Trends in Back-to-Work Legislation: Everything Old is New Again" (n.d.) [unpublished, on file with author] at 1.
[2] *Ibid*.
[3] *Ibid* at 2.
[4] *Reference Re Public Services Employee Relations Act*, [1987] 1 SCR 313 at 390, 38 DLR (4th) 161 [*Alberta Reference*]; *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 2(d) [*Charter*].
[5] *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 1–4, [2015] 1 SCR 245 [*SFL*]; *Charter*, *supra* note 4.
[6] *Ibid*.
[7] *Ibid* at para 78.

decision, the Supreme Court of Canada overturned nearly thirty years of precedent and called into question the constitutional validity of a variety of common legislative tools used by governments to end labour unrest and, in particular, back-to-work legislation.

This paper will explore the impact of *SFL* on the government's use of back-to-work legislation. Part II of this paper will survey the jurisprudence between the *Alberta Reference* and *SFL* and examine the analytical reasoning that began at Beetz J's firm dismissal of a constitutional right to collectively bargain and strike to Abella J's constitutional recognition. Part III of this paper will explore five individual case studies of both federal uses (*Postal Services Continuation Act, 1997*; *Restoring Mail Delivery for Canadians Act, 2011*; *Protecting Air Service Act, 2012*) and provincial uses (*Putting Students First Act, 2012* and *York University Labour Disputes Resolution Act, 2009*) of back-to-work legislation.[8] Lastly, Part IV of this paper will determine whether the outcomes in these case studies would be permissible in light of today's constitutional framework and provide overall recommendations for future governments seeking to use back-to-work legislation to end labour unrest.

II. GETTING TO THE CONSTITUTIONAL RIGHT TO STRIKE: FROM THE *ALBERTA REFERENCE* TO *SFL*

a) Reference Re Public Services Employees Act (1987)

In the *Alberta Reference*, the Supreme Court of Canada reconsidered central questions referred to the Court of Appeal of Alberta concerning the constitutional validity of the *Alberta Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act*.[9] Three questions were before the court: (1) whether specific legislative provisions prohibiting lockouts and strikes in the public service and imposing compulsory arbitration in that service were inconsistent with the *Charter*; (2) whether the legislation, which required an arbitrator acting under the legislation to consider certain factors in making the arbitration award, was inconsistent with the *Charter*; and (3) whether the *Charter* limited the right of the Crown to exclude specified classes of its employees from collective bargaining units.[10] The Court of Appeal answered the first question in the negative and declined to answer the subsequent questions.

Upon review of the Court of Appeal of Alberta's decision, the Supreme Court of Canada held that "the constitutional guarantee of freedom of association in s. 2(d) of the *Charter* does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike."[11] McIntyre J explained that the freedom of association guaranteed a range of organizations, political, religious or social, the right to associate and pursue their objectives, but not a specific right to collectively bargain or strike.[12] The *Charter* right was established to protect

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[8] *Postal Services Continuation Act*, SC 1997, c 34; *Restoring Mail Delivery for Canadians Act*, SC 2011, c 17; *Protecting Air Service Act*, SC 2012, c 2; *Putting Students First Act*, SO 2012, c 11; *York University Labour Disputes Resolution Act*, SO 2009, c 1 [*YULDRA*].

[9] *Alberta Reference*, *supra* note 4; *Public Service Employee Relations Act*, RSA 2000, c P-43; *Labour Relations Act*, RSA 1980, c L-1.1; *Police Officers Collective Bargaining Act*, RSA 2000, c P-18.

[10] *Alberta Reference*, *supra* note 4 at 326; *Charter*, *supra* note 4.

[11] *Alberta Reference*, *supra* note 4.

[12] *Ibid* at 390.

an individual's rights to associate in these varied organizations, a right many totalitarian regimes have targeted and suppressed.[13] The modern rights of collective bargaining and the right to strike were best left regulated by the legislature and were not fundamental rights or freedoms.[14] To permit a judicial interpretation of s. 2(d) including these modern labour relation rights would result in significant judicial overreach.[15]

i. Dickson's Dissent

Although the majority dismissed a constitutional right to collectively bargain and strike, Dickson CJ, wrote a lengthy 140-paragraph dissent holding that s. 2(d) of the *Charter* encompassed both a constitutional right to collectively bargain and a right to strike.[16] This dissent would have an enduring impact, forming the foundation for Abella J's majority in *SFL*.

Dickson CJ noted that the "freedom of association is the cornerstone of modern labour relations."[17] The inherent inequality of bargaining power in the employment context required workers to band together to bargain for rights and protect themselves from exploitative practices.[18] Reviewing the case law, Dickson CJ noted that while some courts have dismissed a constitutional right to collectively bargain or strike relying on a decision of the Privy Council in *Collymore*, other courts were unanimous in rejecting the holding. Citing the decision of the Ontario Divisional Court:

> I cannot imagine that the Charter was ever intended to guarantee the freedom of association without also guaranteeing the freedom to do that for which the association is intended. I have no hesitation in concluding that in guaranteeing workers' freedom of association the Charter also guarantees at the very least their freedom to organize, to choose their own union, to bargain and to strike … To take away an employee's ability to strike so seriously detracts from the benefits of the right to organize and bargain collectively as to make those rights virtually meaningless.[19]

Dickson CJ also turned to Canada's international obligations and sources of international human rights law. Noting that the *Charter* conforms to the spirit of these commitments and as a signatory to the *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, Dickson CJ found these documents to be relevant and persuasive for an expansive interpretation of s. 2(d).[20]

In recognizing a constitutional right to collectively bargain and strike, even Dickson CJ noted that the right to strike might be regulated, particularly for those employees who deliver

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[13] *Ibid* at 391.
[14] *Ibid*.
[15] *Ibid* at 391–92.
[16] *Ibid* at 326-90.
[17] *Ibid* at 334.
[18] *Ibid*.
[19] *Ibid* at 341–42.
[20] *Ibid*; *Charter*, *supra* note 4; *Freedom of Association and Protection of the Right to Organise Convention*, No 87, 9 Jul 1948, 68 UNTS 17 (entered into force 4 July 1950), online: International Labour Organization <www.ilo.org>.

essential services.[21] He noted that the Freedom of Association Committee of the International Labour Organization ("ILO") has consistently defined an essential service as:

> A service whose interruption "would endanger the life, personal safety or health of the whole or part of the population" … In my view, and without attempting an exhaustive list, persons essential to the maintenance and administration of the rule of law and national security would also be included within the ambit of essential services. *Mere inconvenience to members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike* … [i]t is necessary for the respondent to demonstrate proportionality between the measures adopted and the objective.[22]

b) Health Services and Support – Subsector Bargaining Association v BC (2007)

In *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, the Supreme Court of Canada considered the *Health and Social Services Delivery Improvement Act* introduced by the British Columbia government to address significant challenges facing the province's health care system.[23] The legislation—passed quickly and without union consultation—unilaterally modified the multi-work assignment rights, contracting out rights, the status of contracted out employees, job security programs, layoffs, and bumping rights of the members of the unions representing the nurses, facilities, or community subsectors.[24] The government argued that the legislation was critically necessary to respond to an imminent health care crisis and the well-being of British Columbians. Conversely, the union argued that the legislation was an affront to the *Charter*, which guaranteed the fundamental rights of employees to pursue workplace goals through collective bargaining in respect of their terms of employment.

Up until *BC Health Services*, the Supreme Court of Canada continuously upheld the reasoning of *Reference re Public Services Employee Relations Act (Alta)* that the *Charter* did not provide for a constitutional right to collectively bargain.[25] Although, in *Dunmore v Ontario (Attorney General)*, six years prior to the decision, the Supreme Court of Canada recognized an evolution in the constitutional protection of association in its relation to trade union activities. In that case, the Court held that the *Labour Relations and Employment Statute Law Amendment Act, 1995* ("*LRESLAA*"), which repealed legislation that afforded agricultural workers access to the collective bargaining regime, was unconstitutional.[26] The court reasoned that the previous jurisprudence had not captured the full range of activities protected by s. 2(d), and that the law should recognize the centrality of certain union activities to the freedom of association.[27] The decision stopped short of requiring the government to include, for agricultural workers, a full collective bargaining regime provided by the *Labour Relations Act*; but rather, necessitated that

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[21] *Alberta Reference*, *supra* note 4 at 374–75.
[22] *Ibid* at 375 [emphasis added, footnotes omitted].
[23] *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health Services*]; *Health and Social Services Delivery Improvement Act*, SBC 2002, c 2.
[24] *BC Health Services*, *supra* note 23 at para 10.
[25] *Reference re Public Services Employee Relations Act*, [1987] 1 SCR 313 at para 183, 51 Alta LR (2d) 97; *Charter*, *supra* note 4.
[26] *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016.
[27] *Ibid* at para 37.

the provincial government provide a meaningful avenue to bargain for collective rights.[28] *Dunmore* opened the door for the Supreme Court of Canada to reconsider whether the freedom of association extended to collective bargaining.

Dunmore set a precedent that allowed the Supreme Court of Canada to overrule *Alberta Reference* and find that s. 2(d) of the *Charter* constitutionally protected collective bargaining. The majority, penned by McLachlin CJ and Lebel J, addressed the five principle arguments led by McIntyre J which had denied a constitutional right over the previous three decades. First, while the right to strike and to bargain collectively were modern rights, this characterization failed to acknowledge the long history of labour relations in Canada.[29] Second, arguments for judicial restraint fail to recognize the worker's historic right to bargain collectively outside statutory regimes.[30] Third, after *Dunmore*, s. 2(d) no longer "protects only those activities performable by an individual."[31] Fourth, although s. 2(d) does not protect the goals of an association, collective bargaining is a procedural right, distinguishable from any guarantees of outcomes.[32] Finally, the majority noted that the court's decontextualized approach to s. 2(d) stood "in contrast to the purposive approach taken to other *Charter* guarantees."[33]

Ultimately, the court struck down provisions of the *Health and Social Services Delivery Improvement Act* as unconstitutional.[34] In recognizing a constitutional right to collective bargaining, the court held that "the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducting in accordance with the duty to bargain in good faith."[35] To constitute a "substantial interference", the state's intent or effect must "seriously undercut or undermine … the common goals of negotiating workplace conditions and terms of employment with their employer."[36] The court held that unilateral alterations to the collective agreements that modified rights regularly negotiated for at the bargaining table—such as elimination of consultation prior to contracting out and reduced protections over layoff and bumping rights—are unconstitutional.[37]

c) Saskatchewan Federation of Labour v Saskatchewan (2015)

As the court noted in *BC Health Services*, the application of the decision's holding applied only to whether s. 2(d) recognized a constitutional right to collectively bargain.[38] *SFL* provided the court the ability to address and reconsider the final piece of *Alberta Reference*: whether or not s. 2(d) recognized a constitutional right to strike.[39] In *SFL*, the Supreme Court of Canada considered

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[28] *Ibid* at para 67.
[29] *BC Health Services,* supra note 23 at para 25.
[30] *Ibid* at para 26.
[31] *Ibid* at para 27.
[32] *Ibid* at para 29.
[33] *Ibid* at para 30.
[34] *Ibid* at para 252.
[35] *Ibid* at para 90
[36] *Ibid* at para 92.
[37] *Ibid* at para 249.
[38] *Ibid* at para 252.
[39] *Alberta Reference*, *supra* note 4; *SFL*, *supra* note 5.

whether an Act that imposed limitations on the right to strike substantially interfered with the now-protected constitutional right to collectively bargain.

The government of Saskatchewan introduced *The Public Service Essential Services Act* ("*PSESA*"), which limited the ability of public sector employees who perform essential services to strike.[40] It also unilaterally designated "essential services employees" without any negotiation as to what constituted an essential service.[41] Further, it provided no alternative meaningful process to resolve disputes. In assessing the constitutionality of the *PSESA*, the court held that the "the test … is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining."[42] Ultimately, the court determined that the *PSESA* violated this test as it prevented designated employees from engaging in any work stoppage as part of the bargaining process.[43]

While accepting that prohibitions on strikes for essential services employees was acceptable in its relation to the risk to the health and safety of others, the court cited Dickson CJ's dissent in *Alberta Reference* as authority where he noted that:

> [The ILO has] consistently defined an essential service as a service "whose interruption would endanger the life, personal safety or health of the whole or part of the population" … Mere inconvenience to members of the public does not fall within the ambit of the essential services justification or abrogating the freedom to strike.[44]

With reference to this definition, the court questioned the credibility of the argument that all employees from every governmental ministry could be characterized as "so essential that their discontinuance would jeopardize the health and safety of the community."[45] Further, the court asked whether it could really be said "that the community would be at risk if employees at casinos and liquor stores in Saskatchewan decided to withdraw their services in support of higher wages?"[46] Without an ability to negotiate what constitutes an essential service, the legislation undercut the ability of workers to participate in meaningful and influential processes of pursuing collective workplace goals. Without access to an alternative mechanism to resolve bargaining impasses, the legislation undermined collective bargaining rights. Noting the importance of a meaningful alternative mechanism, the court cited Dickson CJ's dissent:

> The purpose of such a mechanism is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers.[47]

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[40] *The Public Service Essential Services Act*, SS 2008, c P-42.2, as repealed by *The Saskatchewan Employment Amendment Act, 2014*, SS 2014, c 27, s 9.
[41] *SFL*, *supra* note 5 at paras 5–9.
[42] *Ibid* at para 78.
[43] *SFL*, *supra* note 5.
[44] *Ibid* at para 84 [emphasis in original, footnote omitted].
[45] *Ibid* at para 85, citing and aff'g in part Ball J, 2012 SKQB 62 at para 96, [2012] 7 WWR 743.
[46] *Ibid*.
[47] *Alberta Reference*, *supra* note 4 at 380 (Dickson CJ), cited in *SFL*, *supra* note 5 at para 94 [emphasis added in *SFL*].

III. CASE STUDIES OF GOVERNMENTAL USES OF BACK-TO-WORK LEGISLATION

a) Postal Services Continuation Act, 1997 ("Postal Strike #1")

On December 5, 1997, Minister of Labour Lawrence MacAulay introduced the *Postal Services Continuation Act* ("*PSCA*") "to provide for the resumption and continuation of postal services."[48] The *PSCA* was introduced after over two weeks of strikes by the Canadian Union of Postal Workers ("CUPW").[49] The legislation provided for the appointment of a mediator-arbitrator to mediate all matters in dispute between the parties in relation to the conclusion of a new collective agreement.[50] The mediator-arbitrator was required to come to a solution within ninety days, with the possibility of extension granted by the Minister.[51] The guiding principle of the legislation required the mediator-arbitrator to take into consideration the viability and financial stability of Canada Post—without recourse to significant increases in postal rates—while also considering the importance of good labour-management relations between the employer and union.[52]

At issue between the union and employer were proposals by the union that would have converted more part-time positions into full-time positions, while the employer sought to cut $200 million from its overhead costs.[53] The union proposal sought the conversion of 2,000 part-time positions into full-time positions, while the employer's cuts sought the reduction of the workforce by nearly 4,000 jobs.[54] After seven months of failed negotiations, clearly at an impasse, the union moved to strike on November 19, 1997. Despite the strike, Canada Post and CUPW made a deal to ensure the delivery of pension and social-welfare cheques.[55]

In the House of Commons, Minister MacAulay rose to explain the government's position in introducing back-to-work legislation.[56] Despite the government's hesitation to intervene in the "democratic concept of free collective bargaining", the government expressed its concern with the "economic harm which the work stoppage has had on Canadian businesses and charities."[57] Indeed, an examination of newspaper headlines during the strike indicates the significant pressure the business community placed on the government to end the strike. For example, the front page of the Globe and Mail exclaimed "Mail strike 'economic disaster': from big business to small operations, dispute means woe."[58] Others highlighted the proximity to the holiday season and the potential for a ruined Christmas holiday season. Despite the severity of the economic situation and calls by members of the Progressive Conservative Party and the Reform Party to declare postal

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[48] *Postal Services Continuation Act*, *supra* note 8.
[49] *Ibid*.
[50] *Ibid*, s 8(1).
[51] *Ibid*, s 8(5).
[52] *Ibid*, s 9.
[53] Erin Anderssen & Gayle MacDonald, "Canada Post, Union Miles Apart in Talks: Mediator says Stoppage Threats are Needed", *The Globe and Mail* (11 November 1997) A1.
[54] *Ibid*.
[55] Sean Fine, "Mail Stops but Talks Resume: Canada-Wide Walkout Caps Day of Acrimony", *The Globe and Mail* (20 November 1997) A1.
[56] *House of Commons Debates*, 36th Parl, 1st Sess, No 42 (2 December 1997) at 2542 (Hon Lawrence MacAuley).
[57] *Ibid*.
[58] Carolyn Leitch & Gayle MacDonald, "Mail Strike 'Economic Disaster': from Big Business to Small Operations, Dispute Means Woe", *The Globe and Mail* (28 November 1997) A1.

service as an essential service, the government refused. Later estimates would show that the two-week strike cost Canada Post $100-million in lost earnings.[59]

While the Conservative caucus took issue with the government's late introduction of legislation, the New Democratic Party ("NDP"), however, criticized it as a premature infringement of the collective bargaining process. First, the NDP took issue with the guiding principle that originally stated that Canada Post must perform "financially in a commercially acceptable range."[60] Although this was later amended and removed, its original draft clearly favoured the employer's viability and therefore the employer's interests. Finally, the NDP took issue with the legislated wage increases, which were 0.1% less than the final offer of the employer.[61] The government, however, justified these rates from a comparative standpoint to other public-sector employees. Ultimately, on December 7, 1997, the bill was passed and postal workers returned to work the following day.

b) York University Labour Disputes Resolution Act, 2009 ("York University Dispute")

On January 24, 2009, the Ontario government introduced the *York University Labour Disputes Resolution Act* ("*YULDRA*") to end the eighty-five day strike by the union representing contract professors, teaching assistants, and graduate assistants at York University.[62] The strike action was the longest in history of the University, with approximately 50,000 students out of school for nearly three months. Following the lengthy dispute, the preamble of the *YULDRA* noted that "the public interest requires an exceptional and temporary solution to address the matters in dispute so that new collective agreements may be concluded through a fair process of mediation-arbitration."[63] The *YULDRA* appointed a mediator-arbitrator to consider several employer-oriented criteria in their award: the employer's ability to pay in light of its fiscal situation, the economic situation in Ontario and the Greater Toronto Area, a comparison between the employees and comparable employees in the public and private sectors, the nature of the work performed and of the terms and conditions of employment, and the employer's ability to attract and retain qualified employees.[64]

At the core of the dispute were wage increases, graduate and teaching assistant wages, and job security for contract professors. The university had offered a 9.25% wage increase over three years, while the union sought an 11% increase over two years.[65] Teaching and graduate assistants sought livable wages, with many living on $1,000 per month.[66] Contract professors, who conducted nearly half of all teaching at the university, sought job security as administrative policies required

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[59] Casey Mahood, "Canada Post sees $30-Million Profit: Two-Week Strike Cost the Crown Corporation $100-Million in Lost Earnings, CEO Says", *The Globe and Mail* (11 Mar 1998) B7.
[60] *Supra* note 56 at 2553 (Pat Martin).
[61] *Ibid* at 2552 (Pat Martin).
[62] *YULDRA*, *supra* note 8.
[63] *Ibid*.
[64] *Ibid*, s 15(2).
[65] Caroline Alphonso & Elizabeth Church, "York University Braces for Prolonged Strike", *The Globe and Mail* (7 November 2008) A13, online: <https://www.theglobeandmail.com/news/national/york-university-braces-for-prolonged-strike/article662935/>.
[66] *Ibid*.

professors to reapply for the same jobs every semester.[67] In total, nearly 11% of all Ontario university students were affected by the strike.[68]

In the Ontario Legislature, the government attempted to explain both its inaction over the three months and justify its eventual action to legislate. Minister of Training, Colleges and Universities John Milloy noted that the "government took every action to allow the collective bargaining process to proceed," including holding a vote, providing the assistance of a mediator, and finally a top mediator, before invoking the legislature.[69] After it became apparent that a deadlock was certain, the government moved to impose the legislation. The Progressive Conservative Party lambasted the government for inaction and for allowing the union to hold 50,000 students hostage.[70] Meanwhile, the NDP noted that the parties had moved closer to reaching agreement and that government interference pre-emptively ended this progress. Further, the NDP Labour Critic noted that the government is only permitted to "interfere with the collective bargaining process on an exceptional and … temporary basis, in situations … involving essential services."[71] Ultimately on January 29, 2009, the legislation received Royal Assent and professors, teaching, and graduate assistants were back to school the following Monday.

c) Restoring Mail Delivery for Canadians Act, 2011 ("Postal Strike #2")

On June 20, 2011, Minister of Labour Lisa Raitt introduced Bill C-6, *Restoring Mail Delivery for Canadians Act* ("*RMDCA*"), "to provide for the continuation and resumption of postal services."[72] The *RMDCA* was introduced after two weeks of rotating strikes and a lockout imposed by Canada Post. The legislation ordered Canada Post and CUPW to enter into final offer solution ("FOS"), where the arbitrator was required to choose the position submitted by management or by the union without alteration.[73] The dispute revolved around compensation and pension benefits for new hires and proposed changes to replace the postal workers sick-leave plan with a short-term disability plan.[74] Canada Post based its demands for major concessions on the basis that advancements in modern technology made the corporation's current business model unsustainable.[75] In the guiding principles of the legislation, the government required the arbitrator to consider conditions of employment in comparable postal industries and to ensure that the agreement would maintain the short- and long-term economic viability and competitiveness of Canada Post.[76] Further, the solvency ratio of the pension plan was not to decline and required the

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[67] *Ibid*.
[68] *Ibid*.
[69] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39th Parl, 1st Sess, No 104 (25 January 2009) at 4689 (Hon John Milloy).
[70] *Ibid* at 4706 (Peter Shurman).
[71] *Ibid* (Michael Prue).
[72] *Restoring Mail Delivery for Canadians Act*, *supra* note 8.
[73] *Ibid*, s 10. "Final offer solution (FOS) has rarely been used in Canada and is more of a creature of the American labour relations system. A major criticism of FOS is that it prevents arbitrators from fashioning a solution that considers both management and employee interests. FOS is an all or nothing game, either the arbitrator chooses management's proposal or it chooses the union's proposal." The Labour Employment Casebook Group, *Labour and Employment Law: Cases, Materials, and Commentary*, 8th ed (Toronto: Irwin Law, 2011) at 490.
[74] *CUPW* v *Canada Post* (9 September 2015), Toronto, ON Sup Ct CV-11-436848 (Reply Factum of the Applicants at 1-5) [*CUPW v Canada Post* Factum].
[75] *Ibid*.
[76] *Restoring Mail Delivery for Canadians Act*, *supra* note 8, s 11(2).

agreement to provide for greater productivity and acceptable standards of service without increases in postal rates.[77] Most controversially, the government imposed wage rate increases that were less than the final offer provided for before the back-to-work legislation.[78]

In the House of Commons, Minister Raitt justified the government's use of back-to-work legislation because of the breakdown of collective bargaining.[79] The parties had failed to come to an agreement for nearly eight months and rolling strikes coupled with a recent lockout was pushing the economy to the brink. Minister Raitt noted that the mail was an essential service fundamental to "doing business in Canada and the economic risks of no longer having that service are significant."[80] In addition to the economic impact of the strike, Minister Raitt noted that the work stoppage was also hurting "people with disabilities, the elderly and people who live in remote communities."[81] In its justification of its use of FOS, the government cited the exorbitant costs of interest arbitration after the 1997 postal strike and the length of delay to conclude an agreement.[82] With respect to the government providing a lower wage rate than the final offer from the employer, Minister Raitt described the wages as "appropriate and fair wages" in comparison to other wage rates set with other unions such as the Public Service Alliance of Canada.[83]

Members of the Opposition decried the legislation as "a direct attack on the rights of working people in this country."[84] Citing the definition of an essential service, they noted that the government's definition fell short of the Canada Labour Code, which notes that an essential service requires the "operation of facilities or production" to prevent an "immediate or serious danger to the safety or health of the public."[85] Although pensioners and others who rely on the mail for government cheques are certainly in need, the Opposition noted that the postal workers had agreed to deliver goods that were deemed essential.[86] Finally, members from all parties expressed outrage that the government would impose wages below those that had been bargained for, essentially "telling employers across this country that they can get a better deal through the government and that they do not have to bargain with the union."[87] Ultimately, on June 26, 2011, the *RMDCA* was passed and Canada Post workers returned to work the following day.[88]

d) Putting Students First Act, 2012 ("Teachers Dispute")

On August 28, 2012, the Ontario Government led by Minister of Education Laurel Broten introduced the *Putting Students First Act* ("*PSFA*"), which imposed two-year contracts between Ontario's education unions and the school boards until August 2014.[89] The *PSFA* removed the right to strike, reduced sick days by half and eliminated banked sick days for soon-to-be retirees,

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[77] *Ibid*, s 11(2)(a).
[78] *CUPW v Canada Post* Factum, *supra* note 74.
[79] *House of Commons Debates*, 41st Parl, 1st Sess, No 146 (23 June 2011) at 674 (Hon Lisa Raitt).
[80] *Ibid*.
[81] *Ibid* at 737 (Devinder Shory).
[82] *Ibid* at 712–13 (Pat Martin).
[83] *Ibid* at 665 (Hon Lisa Raitt).
[84] *Ibid* at 671 (Robert Chisholm).
[85] *Ibid* at 1014 (Mike Sullivan).
[86] *Ibid*.
[87] *Ibid* at 827 (Peggy Nash).
[88] *Restoring Mail Delivery for Canadians Act*, *supra* note 8.
[89] *Putting Students First Act*, *supra* note 8.

gave the Ontario government the power to impose any collective agreement, and removed the duty to consult with any of the parties before imposing terms.[90]

At dispute between the parties was the provincial government's desire to grapple with a soaring deficit while also maintaining services. The unions representing education sector employees, however, argued that significant concessions had already been made at the negotiating table. After nearly six months of negotiations, the government moved to impose terms. In an op-ed, then-Premier Dalton McGuinty noted that the government was facing a "new challenge … to protect public services while eliminating our deficit."[91] He noted that an automatic September 1 rollover of teacher contracts would "increase pay and grant more bankable sick days at a cost of $473-million."[92] The Premier argued that the *PSFA* would establish $2-billion in savings, ensuring the roll-out of full-day kindergarten, and allow the province to keep class sizes down.[93]

The union argued that the government had "manufactur[ed] a crisis" to impose terms.[94] At the bargaining table, the union had been prepared to accept a zero-percent wage increase, with the exception of younger teachers who would accumulate experience-based pay raises in their initial ten years as teachers.[95] In the Ontario Legislature, NDP Education Critic Peter Tabuns characterized the use of back-to-work legislation as going "well beyond any prior attempt by the provincial government to constrain collective bargaining."[96] Tabuns took significant issue with the power and authority instilled in the Minister and cabinet to "control both the process of bargaining and the results of bargaining, including the right to strike … and impose collective agreements … without any accountability to the Legislature."[97] Tabuns questioned the constitutionality of the *PSFA* and compared the legislation to the decision of *BC Health Services*.[98] Paul Miller, another NDP MPP, lamented his fear of the broadening of the scope of "essential services" as the government moved to eliminate the union's right to strike.[99] Ultimately, on September 11, 2012 the bill received Royal Assent and became law.

e) Protecting Air Service Act, 2012 ("Air Canada Dispute")

Less than a year after the federal government used back-to-work legislation to end the Canada Post work stoppage, on March 12, 2012, Minister Raitt introduced Bill C-33, *Protecting Air Service Act* ("*PASA*"), "to provide for the continuation and resumption of air service operations."[100] *PASA* was introduced to pre-emptively prevent Air Canada employees from

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[90] *Ibid*.
[91] Dalton McGuinty, "Dalton McGuinty; We are Putting Ontario Students First", *The Globe and Mail* (4 September 2012) A17, online: <https://www.theglobeandmail.com/opinion/dalton-mcguinty-we-are-putting-ontario-students-first/article4513249/>.
[92] *Ibid*.
[93] *Ibid*.
[94] Kate Hammer, "Teachers' Unions Threatening Court Action", *The Globe and Mail* (24 August 2012) A8.
[95] *Ibid*.
[96] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 40th Parl, 1st Sess, No 70 (28 August 2012) at 3161 (Peter Tabuns).
[97] *Ibid*.
[98] *Ibid*.
[99] *Ibid* at 3159 (Paul Miller).
[100] *Protecting Air Service Act*, *supra* note 8.

striking.[101] The legislation ordered Air Canada and the respective unions to enter into FOS. Prior to the introduction of the legislation, Air Canada's ground crews, flight attendants, and pilots rejected the tentative agreements that their unions had negotiated and voted overwhelmingly in favour of strike action.[102] At the heart of the dispute was re-establishing union concessions in pension benefits and entitlements that were vastly undercut during Air Canada's bankruptcy and restructuring in 2004.[103] Management argued that it was unable to provide for previous entitlements as they threatened the economic viability of the company.[104] In the guiding principle of the legislation, the government required the arbitrator to take into account not only the tentative agreement rejected by the union membership but also the terms and conditions of employment at other airlines to ensure the "short and long-term economic viability and competitiveness of the employer; and the sustainability of the employers pension plan."[105] These guiding principles suggested that the government was requiring the arbitrator to give greater consideration to the employer's interests.

In the House of Commons, Minister Raitt laid out three principal justifications for introducing the pre-emptive back-to-work legislation.[106] First, the legislation was intended to "protect the Canadian economy;" second, it was intended to "protect the public interest, [with] March Break [being] one of the busiest travel times of the year;" and finally, "to protect all those additional employees who would be protected by a work stoppage at Air Canada."[107] The government estimated that the impact of a work stoppage on the Canadian economy could be as high as $22.4 million per week.[108] The government stressed that access to these transportation services was an essential service, particularly for the elderly and those in rural and Aboriginal communities who might be cut off from goods and services that are integral to their health and safety.[109]

Members of the Opposition decried the legislation as an "episode of Groundhog Day", lambasting the government's propensity to use back-to-work legislation repeatedly over the course of the previous twelve months.[110] Members challenged the government's definition of essential services and noted that inconvenienced passengers would be readily able to book flights on other private airlines or access other modes of transportation.[111] Further, they alleged that government intervention in the negotiations sent a direct message to employers. The perception was that if employers are unable to get what they want at the bargaining table, the government can be relied upon to enhance the employer's bargaining power.[112] Ultimately, on March 15, 2012, *PASA*

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[101] *Ibid*.
[102] Andrew Stevens & Doug Nesbitt, "An Era of Wildcats and Sick-Outs in Canada? The Continued Decline of Industrial Pluralism and the Case of Air Canada" (2014) 39:2 Lab Stud J 118 at 133.
[103] *Ibid* at 119.
[104] *Ibid* at 128.
[105] *Restoring Mail Delivery for Canadians Act*, *supra* note 8, s 14(2).
[106] *House of Commons Debates*, 41st Parl, 1st Sess, No 94 (12 March 2012) at 6058 (Hon Lisa Raitt).
[107] *Ibid*.
[108] *Ibid*.
[109] *Ibid* at 1067 (Cathy McLeod).
[110] *Ibid* at 6065 (Rodger Cuzner).
[111] *Ibid* at 6066 (Rodger Cuzner).
[112] *Ibid*.

received Royal Assent.[113] Two months later, on June 17, 2012, the arbitrator in FOS awarded the employer their final plan.

IV. CASES STUDIES IN LIGHT OF *SASKATCHEWAN FEDERATION OF LABOUR*

The above case studies highlight federal and provincial uses of back-to-work legislation in a variety of industries to either end strikes or pre-emptively eradicate the right to strike. From the postal industry to the education sector to the airline industry, governments from different parties have intervened in the collective bargaining process and imposed terms on their respective unions. Four of these instances of back-to-work legislation were imposed after *BC Health Services*, while all were imposed before *SFL*. This section will explore the constitutionality of these case studies in light of this new constitutional framework and provide overall recommendations for future governments seeking to use back-to-work legislation to end labour unrest.

a) Guiding Principles of Back-to-Work Legislation

Guiding principles in back-to-work legislation that only consider employer interests are likely unconstitutional. In *BC Health Services*, the court noted that "the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining."[114] In *SFL*, the court proposes that the "ultimate question to be determined is whether the measures disrupt the balance between employees and employer … so as to substantially interfere with meaningful collective bargaining."[115] By including criteria that considers only the interests of employers, the government significantly undermines the union's ability to exert influence over their collective bargaining process by binding a mediator-arbitrator to employer-oriented terms. Further, by halting a strike or pre-emptively removing the right to strike, the union loses its sole economic weapon to exert influence on the bargaining process. If an employer is aware that the legislation will be passed that takes into account its interests, it makes any concessions to the union irrational and permits employers to stand idly by until the government intervenes with terms that are favourable to their interests.

Each piece of back-to-work legislation incorporated several guiding principles for the mediator-arbitrator to consider upon determining a final resolution. In the York University Dispute, five of the six criteria the government required the mediator-arbitrator to consider were employer-oriented. These included the employer's ability to pay in light of its fiscal solution, the employer's ability to attract qualified employees, other employer's contracts with comparable types of employees, and the economic situation in Ontario. In the Postal Strike #2, the guiding principles required the mediator-arbitrator to consider comparable types of employees in other postal industries, the economic viability of Canada Post, and prohibited the solvency ratio of the pension plan to decline. Further, any concessions by the employer were not to occur by increases in postal rates. In the Teacher's Dispute, there were no guiding principles, however, the legislation provided cabinet with broad powers to impose any terms of the collective agreement. These terms would be dictated by the government's desire to deal with Ontario's ballooning deficit. In the Air

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[113] *Protecting Air Services Act*, *supra* note 8.
[114] *BC Health Services*, *supra* note 23 at para 90.
[115] *Mounted Police Association of Ontario v Canada (AG)*, 2015 SCC 1 at para 72, [2015] 1 SCR 3, cited in *SFL*, *supra* note 5 at para 77 [emphasis added in *SFL*].

Canada Dispute, the mediator-arbitrator was required to consider the last rejected offer by the union and consider the economic viability of the employer. In laying out his award, Arbitrator Picher noted that he was constrained by the provisions of the bill to take the company's best interest into consideration.[116]

Contrast the previous examples with that of Postal Strike #1. The guiding principle of the legislation required the mediator-arbitrator to not only take into consideration the financial stability of Canada Post without "significant" increases in postal rates but also the importance of good labour-management relations between the employer and union.[117] This guiding principle clearly balanced both the interests of Canada Post and the corporation's viability while also recognizing that some postal rate increases may be required to resolve the dispute. The broad language of "the importance of good labour-management relations" also signalled that the arbitrator was not to take a winner-takes-all approach to its award.[118] This is in stark contrast to Postal Strike #2, where a prohibition on any increases in postal rates was included in the arbitrator's award.[119] Postal Strike #1 is an important example of where back-to-work legislation was used to end a strike without imposing employer-oriented terms on the arbitration process. Guiding principles that only take into account employer interests are likely to be deemed as a substantial interference in the collective bargaining process and significantly undermine the union's economic weapon to withdraw services to bargain for favourable terms. Although *BC Health Services* cautions that s. 2(d) does not protect outcomes, if the outcomes are essentially pre-determined, there can be no meaningful exercise of collective bargaining and therefore no meaningful exercise of the union's constitutional right to strike.[120]

b) Back-to-Work Legislation in Non-Essential Services

The use of back-to-work legislation on employees not performing essential services is likely unconstitutional. Citing to Dickson J's dissent, the majority in *SFL* held the ILO's definition of essential services as an authoritative source.[121] The ILO defines essential services as "those the interruption of which would endanger the life, personal safety or health of the whole or part of the population."[122] The definition also takes into account that certain services may be more essential in some countries rather than others. For example, port or maritime transport services are likely to be considered essential on an island nation that is heavily dependent on these services for basic supplies.[123] *SFL* also emphasized that "mere inconvenience to members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike."[124]

In each of the case studies, none of the unions were engaged in the performance of essential services whose interruption would endanger lives, personal safety, or health. However, only the

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[116] Stevens & Nesbitt, *supra* note 102 at 132.
[117] *Postal Services Continuation Act*, *supra* note 8, s 9.
[118] *Ibid*.
[119] *Ibid*.
[120] *BC Health Services*, *supra* note 23 at para 29.
[121] *SFL*, supra note 5 at para 84.
[122] "Substantive Provisions of Labour Legislation: The Right to Strike" (10 December 2001), *Industrial and Employment Relations Department*, online: <www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch5.htm#6>.
[123] *Ibid*.
[124] *Alberta Reference*, *supra* note 4 at 374–75, cited in *SFL*, *supra* note 5 at para 84 [emphasis added in *SFL*].

federal government in the cases of the Air Canada Dispute and Postal Strike #2 attempted to argue that the duties performed by the union were essential services. In both cases, the government argued that the elderly, people with disabilities, and those in rural communities would suffer severe hardship without access to the mail or transportation services. In Postal Strike #1, the government explicitly refused to characterize postal services as an essential service, while the Ontario government in the York University Dispute argued the *YULDRA* was introduced for the sake of the "public interest."[125] Interestingly, in both Postal Strike #1 and Postal Strike #2, the union offered to deliver "essential" pieces of mail, such as government entitlements.[126] In all cases, the economy was cited as the preeminent factor in the legislation's introduction.

If the economy is a valid reason for uses of back-to-work legislation, the argument will have to be balanced in a s. 1 analysis of the infringement of s. 2(d).[127] The *Oakes* test requires the government to show a pressing and substantial purpose of the legislation, whether the government used means that minimally impaired the right and the proportionality of the response.[128] In all of the case studies, a pressing and substantial purpose is likely to have been satisfied, although it could be argued that the government had little purpose in intervening in the Air Canada Dispute, as Air Canada is a private employer. With respect to minimal impairment, pre-emptive use of back-to-work legislation, which prevents any exercise of the right, is clearly an excessive impairment of the right. It is unclear, however, if strikes that end after two weeks would constitute excessive impairment. In the case of Postal Strike #1, it was estimated that the two-week strike cost the corporation $100 million—although this was the cost to the employer and not to the general economy.[129] Proportionality will likely be assessed by factoring in the haste in which the government used to introduce the legislation and on the terms imposed by the legislation. Pre-emptively removing the right to strike *and* imposing terms worse than the last offer of the employer, like in Postal Strike #2, is clearly disproportionate. It is unclear, however, whether ending a strike after three months and providing employer-friendly criteria violates this proportionality. On the one hand, the union was able to lay significant economic pressure on the employer, while the legislation seemed to render these efforts as futile. Ultimately, any future uses of back-to-work legislation for non-essential services will require the government to satisfy the *Oakes* test.

c) Pre-Emptive Use of Back-to-Work Legislation

Any pre-emptive use of back-to-work legislation that prohibits strikes is unconstitutional, save for its use in industries that perform essential services. By removing the right of the collective to withdraw services, what *SFL* characterized as "at the heart of the industrial relations system", the government substantially interferes with the ability of unions to engage in a meaningful process

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[125] *Postal Services Continuation Act*, *supra* note 8.
[126] *Ibid*.
[127] *Charter*, *supra* note 4.
[128] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.
[129] Adrian Morrow, "Canada Post Locks Out Striking Workers Across the Country" *The Globe and Mail* (15 June 2011), online: <https://www.theglobeandmail.com/news/national/canada-post-locks-out-striking-workers-across-the-country/article583279/>.

of collective bargaining.[130] Destroying the one economic weapon that employees have, before it has even been wielded, is clearly unconstitutional.

The Air Canada Case was an unconstitutional exercise of back-to-work legislation. The employees had yet to engage in strike action and they were not engaged in performing essential services, despite the inconvenience to March Break travellers. By removing the economic weapon of the union, the government removed the one tool available to the union to demand concessions. Further, the guiding principles of the arbitration required the arbitrator to first consider the company's interest in any award.

The Teacher's Dispute was an unconstitutional exercise of back-to-work legislation. The government's pre-emptive use of legislation to prohibit strikes also prevents rollover benefits to teachers and imposes collective agreements that cut significant elements of compensation and undermined any meaningful collective bargaining process. Furthermore, removing the government's duty to consult with the parties before implementation of a new collective agreement substantially interferes with the union's right to achieve workplace objectives.[131]

Pre-emptive uses of back-to-work legislation in the context of *BC Health Services* and *SFL* indicate that any introduction of such legislation must be related to the delivery of essential services. The test is clear: substantial interference in the collective bargaining process, and by relation the right to strike, is not permitted.

d) Final Offer Solution and Interest Arbitration

Final offer solution and interest arbitration are likely to be found as unconstitutional. While *BC Health Services* notes that a constitutional right to collective bargaining is a procedural right distinguishable from its final outcomes, back-to-work legislation can create procedures that foster unfair outcomes.[132] Final offer solutions have been described as the "one armed bandit of labour relations", as it removes the arbitrator's decision to fashion fair awards that take into account a range of issues and positions that are not amenable to win-or-lose solutions.[133] In the Air Canada Dispute and Postal Strike #2, the government mandated the arbitrator to use a FOS, choosing either the employer or the union's proposal without revision. It did not permit the arbitrator to take a compromise position that took into account the arguments of both parties. Further, this mandate was coupled with a guiding principle that was heavily favoured in both employer's interests. While

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[130] Gilles Trudeau, "La Grève au Canada et aux États-Unis: D'un Passé Glorieux à un Avenir Incertainat" (2004) 38:1 La Revue Juridique Thémis 1 at 5, cited in *SFL*, *supra* note 5 at para 49.

[131] Kristin Rushowy, Rob Ferguson & Robert Benzie, "'Remedy' for Ruling on Bill 115 Could be Costly", *The Toronto Star* (21 April 2016) online: <www.thestar.com/yourtoronto/education/2016/04/21/remedy-for-ruling-on-bill-115-could-be-costly.html>. On April 20, 2016, the Ontario Superior Court found the *Putting Students First Act* unconstitutional. At time of publication, the decision by Justice Lederer was not available publicly. Several newspapers quoted the decision, which noted that: "[w]hen reviewed in the context of the *Charter* and the rights it provides, it becomes apparent that the process engaged was fundamentally flawed. It could not, by its design, provide meaningful collective bargaining. Ontario, on its own, devised a process. It set the parameters which would allow it to meet fiscal restraints it determined and then set a program which limited the ability of the [other] parties to take part in a meaningful way." *OPSEU v Ontario*, 2016 ONSC 2197 at para 135, 267 ACWS (3d) 587.

[132] *BC Health Services*, *supra* note 23 at para 29.

[133] *CUPW v Canada Post* Factum, *supra* note 74.

not all governmental limitations on the right to strike are necessarily unconstitutional, in these two cases the government ended or pre-empted the strike, imposed wages worse than the employer's last offer, provided the arbitrator with guiding principles that were heavily favoured for the employer, and required the arbitrator to either take the employer or the union's position. Such a process significantly undermines the union's ability to engage in a meaningful collective bargaining processes.

Mandatory interest arbitration can have a detrimental effect on meaningful collective bargaining. The CD Howe Institute notes that "emergency back-to-work legislation has a chilling effect on negotiations in subsequent bargaining rounds."[134] There is competing evidence as to whether interest arbitration decreases or increases wages, however, one study showed that "contracts settled with provincial orders have real wage settlements that are 1.7 percentage points below otherwise similar contracts."[135] If an employer is aware of these types of outcomes, it reduces their incentive to negotiate if they can rely on the government to intervene in a protracted conflict. Irrespective of whether wages increase or decrease, back-to-work legislation reduces the probability of reaching future agreements. Any government that chooses to exercise back-to-work legislation must be cautious that it could substantially interfere with meaningful collective bargaining in future negotiations. Whether this constitutional right extends to future collective bargaining processes remains to be seen.

V. CONCLUSION

The framework of *SFL* has called into question the constitutionality of some elements used by the government in back-to-work legislation. The pre-emptive use of the legislation, the imposition of worse terms than those offered at the bargaining table, one-sided guiding principles, and the use of the legislation on non-essential industries are all presumptively unconstitutional. While governments still have the right to limit strikes, it must do so in an evenly handed manner, taking careful account of the *Oakes* test. Governments must be careful to jump too quickly to use back-to-work legislation.

[134] Benjamin Dachis & Robert Hebdon, "The Law of Unintended Consequence: The Effects of Labour Legislation on Wages and Strikes" (2010) 304:1 CD Howe Institute Commentary: Economic Growth & Innovation 1 at 2.
[135] *Ibid* at 17.

CULTIVATING PUBLIC HEALTH: URBAN FARMING AS AN ESSENTIAL MUNICIPAL TOOL TO ADDRESS UNBALANCED FOOD ENVIRONMENTS AND HOUSEHOLD FOOD INSECURITY IN THE HALIFAX PENINSULA

Jessica Rose*

I. INTRODUCTION

This paper explores the likely benefits of introducing urban farming as a permissible use in the Halifax Peninsula Land Use By-Law ("*HPLUB*"). Despite Canada's status as a wealthy nation, many Canadians and residents experience significant barriers in accessing high-quality foods that support health. Of the ten provinces, Nova Scotia has the poorest record of adequate food access. One aspect of food access is geographical: living within easy access to nutritious food. Research emerging from various nations demonstrates that neighbourhoods with less access to grocery stores than to unhealthy fast food and processed food—referred to as "unbalanced food environments"—tend to experience poorer health outcomes.

This paper contends that municipalities should make use of their land use planning powers to zone for farming in urban areas, thereby facilitating access to healthy foods, reducing the incidence of unbalanced food environments and supporting food access equity across the country. The paper will focus on the Halifax Peninsula, but is pertinent to all municipalities in Canada. Part II is an introduction to unbalanced food environments; Part III considers the relationship between unbalanced food environments and public health outcomes; Part IV explores jurisdiction over food in the Canadian context; Part V describes the origin and consequences of municipal land use planning powers; Part VI examines urban farms as a tool to improve public health; Part VII proposes changes to the Halifax Peninsula by-laws and associated public health rationales; and Part IX discusses potential drawbacks and future considerations.

II. INTRODUCTION TO UNBALANCED FOOD ENVIRONMENTS

a. Summary of Key Terms

The United States Department of Agriculture ("USDA") defines an urban food desert with low access to healthy food as a low-income census tract "where a significant number (at least 500 people) or share (at least 33 percent) of the population is greater than 1.0 mile from the nearest supermarket, supercenter, or large grocery store."[1] Some research methods approach food deserts from a multi-factoral approach, juxtaposing neighbourhoods' social deprivation score with

* Jessica Rose graduated from the Schulich School of Law, Dalhousie University in 2017. Before studying law, Jessica completed her undergraduate studies in psychology at the University at British Columbia. Jessica is particularly interested in food justice, criminal and prison law, and off-grid living. This paper was written for a Public Health Law course in which the project required students to write about any public health issue and its interaction with law.

[1] United States Department of Agriculture, "USDA Food Access Research Atlas: Documentation" (6 July 2012), online: <www.ers.usda.gov/data-products/food-access-research-atlas/documentation/>.

accessibility to high-quality food.[2] Factors such as household income, percentage of single-parent families, and unemployment rate inform the deprivation score assigned to a community, assisting food desert researchers to identify high-need communities. High-need communities with limited access to supermarkets are then designated as food deserts.[3]

The term "food desert" is becoming increasingly common parlance in the research literature, however related concepts such as "fringe food venue", "food swamp", and "balanced food environment" assist researchers and policy makers to understand the nuances of food access issues. Fringe food venues are those retailers that offer food but "for whom fresh and healthy food is not the primary line of business."[4] Examples include convenience stores, fast food restaurants, pharmacies, and gas stations. Food swamps are areas either lacking access to healthy foods or where healthy food options are inundated by fringe food venues.[5] Balanced food environments are those neighbourhoods where "a mainstream grocer is roughly the same distance as a fringe food venue."[6] All three terms are rooted in a conception of adequate food access as relative as well as absolute. In support of these theoretical frameworks, recent research demonstrates that having greater access to healthy, rather than unhealthy food—in other words, a balanced food environment—is a superior predictor of purchasing and consumption behaviours compared to absolute availability of healthy food options.[7] For simplicity, the paper will utilize the term "unbalanced food environments" in reference to both food deserts and food swamps.

Finally, household food insecurity measures whether "one or more members [of the household] do not have access to sufficient variety and quantity of food due to lack of money."[8] By contrast, food security exists when "all people, at all times, have physical and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life."[9]

b. Unbalanced Food Environments in Canada

Compared to the United States,[10] Canadian federal and provincial governments have been slow to systematically investigate unbalanced food environments and food insecurity more generally. A 2005 position paper published by Dieticians of Canada alleges that "Canada lacks a

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[2] Karen E Smoyer-Tomic, John C Spence & Carl Amrhein, "Food Deserts in the Prairies? Supermarket Accessibility and Neighborhood Need in Edmonton, Canada" (2006) 58:3 Professional Geographer 307.
[3] Wei Lu & Feng Qiu, "Do Food Deserts Exist in Calgary, Canada?" (2015) 59:3 Can Geographer 267 at 267.
[4] Mari Gallagher Research & Consulting Group, "Food Desert & Food Balance" (September 2014), online: <www.marigallagher.com/site_media/dynamic/project_files/Food-Desert-and-Food-Balance-Fact-Sheet.pdf> at 3 [Mari Gallagher].
[5] Hui Luan, Jane Law & Matthew Quick, "Identifying Food Deserts and Swamps Based on Relative Healthy Food Access: A Spatio-Temporal Bayesian Approach" (2015) 14:37 Intl J Health Geography 1 at 2 [Luan et al].
[6] Mari Gallagher, *supra* note 4 at 4.
[7] Luan et al, *supra* note 5 at 2.
[8] Shirin Roshanafshar & Emma Hawkins, *Food Insecurity in Canada*, Report No 86-624-X (Ottawa: Statistics Canada, 2015) at 3 [Roshanafshar & Hawkins].
[9] *Rome Declaration on World Food Security and World Food Summit Plan of Action*, 13 November 1996, online: <www.fao.org/docrep/003/w3613e/w3613e00.htm> at 13-17.
[10] The Obama administration launched the $400 million *Healthy Food Financing Initiative* in 2009. Among its central stated goals is the elimination of food deserts. See United States Treasury Department, Office of Public Affairs, Press Release, "Obama Administration Details Healthy Food Financing Initiative" (19 February 2010), online: <www.cdc.gov/chronicdisease/recovery/pdf/healthy_food_financing_release.pdf>.

coordinated, systematic plan for monitoring food insecurity, either nationally or provincially."[11] Data collection has historically focused on household food insecurity,[12] an important measurement tool that shares many characteristics with unbalanced food environments: both are significantly more likely to affect low-income families, people on social assistance, and single-parent households.[13] Preliminary research indicates that "[l]imited availability of food in one's local environment has been identified as a cause of food insecurity in Canada."[14] In sum, incidence of household food insecurity is related to incidence of unbalanced food environments but the nature of this relationship in Canada is unclear.

Despite a sluggish start, a 2016 scoping review by Leia Minaker and colleagues indicates that the last decade has seen a dramatic increase in Canadian research on retail food environments.[15] Researchers have reached uncertain conclusions on the existence of various types of unbalanced food environments—sometimes even concerning the same city.[16] Studies tended to confirm the existence of food swamps in Canadian cities but findings of food deserts were mixed.[17] With respect to amelioration of food swamps, the authors contend that the number of healthy and unhealthy food options is less determinative of healthy eating than their relative proportional balance.[18] In other words, to remedy unbalanced food environments, increasing the number of healthy food options in a neighbourhood's food retail environment may have just as powerful an impact as decreasing the number of unhealthy food options.[19]

The authors of the review find that a number of research gaps hinder attempts to obtain a complete picture of food access. In part due to the novelty of this research field in Canada, the present body of research offers little in the way of longitudinal and intervention studies and suffers from significant measurement inconsistencies.[20]

c. Unbalanced Food Environments in Nova Scotia

To date, there is no research on the incidence of food deserts in Nova Scotia. However, household food insecurity rates in the province are staggering—and worsening over time. According to a comprehensive study of food security across Canada, Nova Scotia's household food

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[11] Elaine Power, "Individual and Household Food Insecurity in Canada: Position of Dieticians of Canada" (2005) 66:1 Can J Dietetic Prac Res 43 at 44.
[12] Roshanafshar & Hawkins, *supra* note 8.
[13] *Ibid*.
[14] Rachel Loopstra, *Household Food Insecurity in Canada: Towards an Understanding of Effective Interventions* (PhD thesis, University of Toronto Faculty of Nutritional Sciences, 2014) [unpublished] at 26.
[15] Leia M Minaker et al, "Retail Food Environments Research in Canada: A Scoping Review" (2016) 107:1 Can J Pub Health 4 at 6 [Minaker et al].
[16] Some research confirms the existence of food deserts while other studies refute it. See Philippe Apparicio, Marie-Soleil Cloutier & Richard Shearmur, "The Case of Montréal's Missing Food Deserts: Evaluation of Accessibility to Food Supermarkets" (2007) 6:4 Intl J Health Geography 1; Antonio Páez et al, "Relative Accessibility Deprivation Indicators for Urban Settings: Definitions and Application to Food Deserts in Montreal" (2010) 47:7 Urb Stud 1415.
[17] Minaker et al, *supra* note 15 at 10.
[18] *Ibid* at 10.
[19] Paula Tarnapol Whitacre, Peggy Tsai & Janet Mulligan, *The Public Health Effects of Food Deserts: Workshop Summary* (Washington: National Academy of Sciences, 2009) at 15 [Whitacre et al].
[20] Minaker et al, *supra* note 15 at 4.

insecurity rate rose to 17.3% from 14% between 2007 and 2012.[21] Halifax is reported to experience the highest rates of food insecurity of thirty-four major Canadian cities: 20% of Haligonians are food insecure. Further research is needed to identify the relationship between unbalanced food environments in Halifax and incidence of food insecurity.

d. Limitations and Challenges

From the outset, I wish to acknowledge the complexities of researching unbalanced food environments. Even primary research terms, such as "healthy food", are difficult to define. For example, Reuters reported in 2015 that low-income communities have limited access to skim milk. The article suggests that the scarcity increases whole milk consumption and places population health at risk; the USDA recommends that individuals consume two to three cups of low-fat milk daily.[22] Less than one year later, a Time Magazine headline read "The Case Against Low-fat Milk is Stronger Than Ever", citing studies that skim milk consumption is linked with diabetes and obesity.[23] It is eminently difficult for researchers and laypeople to agree on what constitutes "healthy" or "unhealthy" food.

Another flawed criterion of unbalanced food environments is the distance between a household and a large supermarket. Supermarket proximity is frequently employed as a proxy for healthy food access, to promote consistency in research outcomes,[24] and because large grocers typically offer lower-priced and higher-quality foods than fringe food venues.[25] However, small food stores are not uniformly alike. Many Latino communities in the United States are served by small general stores—commonly referred to as tiendas—that offer a broad variety of fruits and vegetables, meat, and ready-to-eat foods.[26] Research conducted in those neighbourhoods may unfairly discount tiendas' contributions to household food security.

These are just samples of the numerous challenges in understanding the relationships between a population's environment, eating patterns, and health. A thoroughgoing analysis of these challenges is beyond the scope of this paper but limitations should be considered. Further impediments to understanding food access and public health will be raised in the "Discussion" section.

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[21] Urshila Sriram & Valerie Tarasuk, "Changes in Household Food Insecurity Rates in Canadian Metropolitan Areas from 2007 to 2012" (2015) 106:5 Can J Pub Health 322 at 324.
[22] Lisa Rapaport, "Low-fat Milk is Scarce in Poor Neighbourhoods" *Reuters* (15 June 2015), online: <www.reuters.com/article/us-health-milk-access-disparities-idUSKBN0OV2LK20150615>.
[23] Alice Park, "The Case Against Low-fat Milk is Stronger Than Ever" *Time Magazine* (4 April 2016), online: <time.com/4279538/low-fat-milk-vs-whole-milk/>.
[24] Junfeng Jiao et al, "How to Identify Food Deserts: Measuring Physical and Economic Access to Supermarkets in King County, Washington" (2012) 102:10 Am J Pub Health 32 at 32.
[25] United States Department of Agriculture, "Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences" (June 2009), online: <www.ers.usda.gov/webdocs/publications/ap036/12698_ap036fm_1_.pdf> at iv.
[26] Whitacre et al, *supra* note 19 at 50.

III. RELATIONSHIP BETWEEN UNBALANCED FOOD ENVIRONMENTS AND PUBLIC HEALTH OUTCOMES

Lack of access to healthy foods is correlated with increased likelihood of chronic health conditions and poorer public health outcomes.[27] Incidence of food deserts has been linked to a variety of chronic physical and mental illnesses such as obesity,[28] some cancers,[29] major depression,[30] and even migraine headaches.[31] Children with inadequate access to healthy foods are at greater risk of experiencing nutritional deficiencies, which may lead to significant health problems such as developmental abnormalities[32] and compromised immune function.[33]

Despite uncontroversial findings that food deserts result in poorer health for residents, identifying the exact nature of the association is a challenge. Limited access to healthy foods often relates to distance, price and/or time cost associated with procurement[34] resulting in challenges identifying causation. Further confounding dimensions of food choices are many, and may include shelf placement of products,[35] addictive qualities of unhealthy foods,[36] and cultural significance of food choices.[37] Glanz's "Model of Community Nutrition Environments" depicts numerous variables that impact eating patterns.[38]

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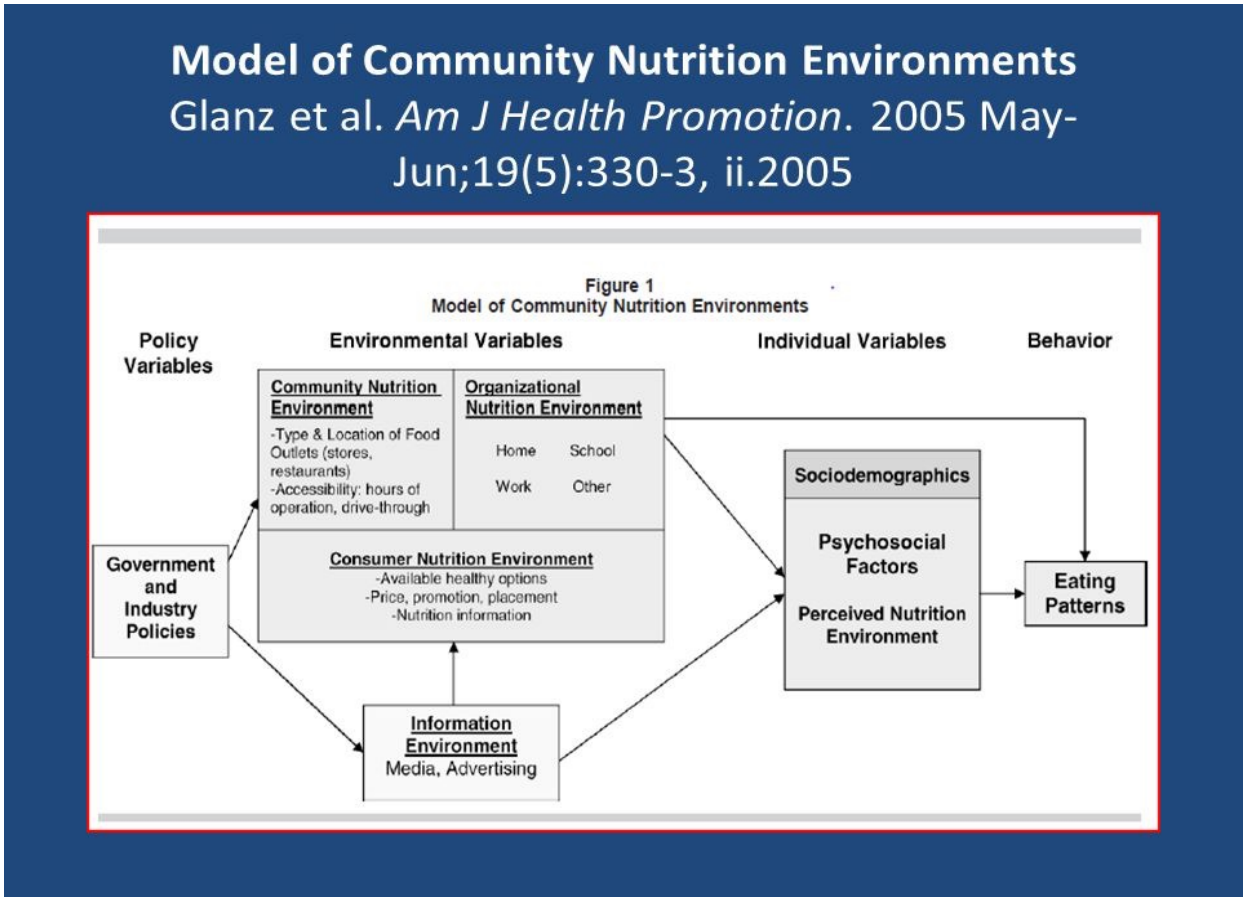
[27] Elizabeth G Berg, "Bringing Food Back Home: Revitalizing the Postindustrial American City Through State and Local Policies Promoting Urban Agriculture" (2014) 92 Or L Rev 783 at 789 [Berg].
[28] Whitacre et al, *supra* note 19 at 14.
[29] *Ibid* at 2.
[30] Roshanafshar & Hawkins, *supra* note 8 at 3.
[31] Joseph M Dooley, Kevin E Gordon & Stefan Kuhle, "Food Insecurity and Migraine" (2016) 36:10 Cephalalgia 936 at 939.
[32] Lynn McIntyre, Sarah K Connor & James Warren,"Child Hunger in Canada: Results of the 1994 National Longitudinal Survey of Children and Youth" (2000) 163:8 Can Med Assoc J 961.
[33] Sharon I Kirkpatrick & Valerie Tarasuk, "Food insecurity is Associated with Nutrient Inadequacies among Canadian Adults and Adolescents" (2008) 138:3 J Nutrition 604.
[34] Whitacre et al, *supra* note 19 at 7.
[35] Donald Rose et al, "The Importance of a Multi-Dimensional Approach for Studying the Links Between Food Access and Consumption" (2010) 140:6 J Nutrition 1170 at 1171 [Rose et al].
[36] Robert H Lustig, "Fructose: It's "Alcohol Without the Buzz"" (2013) 4:2 Advances in Nutrition 226.
[37] Brenda L Beagan & Gwen E Chapman, "Meanings of Food, Eating and Health Among African Nova Scotians: 'Certain Things Aren't Meant for Black Folk'" (2012) 17:5 Ethnicity & Health 513 at 515 [Beagan & Chapman].
[38] Karen Glanz et al, "Health Nutrition Environments: Concepts and Measures" (2005) 19:5 Am J Health Promotion 330.



However, the dilemma of establishing causation should not paralyze development of food policies that aim to ameliorate unbalanced food environments. Research indicates that communities with food deserts experience statistically higher rates of premature death, even when variables such as income, education, and race are controlled.[39] Moreover, food access policy can and should build on decisive predictors of improved health outcomes. Gardening in urban environments has been linked with increased vegetable consumption,[40] improved self-reported social well-being,[41] and increased physical activity[42]—all of which are predictors of health. Adequate fruit and vegetable consumption is correlated with healthier body mass index,[43] increased bone mass,[44] and decreased risk of coronary heart disease.[45] Worryingly, in the past year, 26% of Canadians report consuming

[39] Whitacre et al, *supra* note 19 at 15.
[40] Ishwarbhai C Patel, "Gardening's Socioeconomic Impacts: Community Gardening in an Urban Setting" (1991) 29 J Extension 7.
[41] *Ibid* at 8.
[42] Sarah Wakefield et al, "Growing Urban Health: Community Gardening in Southeast Toronto" (2007) 22:2 Health Promotion Intl 92 at 97.
[43] Biing-Hwan Lin & Rosanna Mentzer Morrison, "Higher Fruit Consumption Linked With Lower Body Mass Index" (2002) 25:3 FoodReview 28.
[44] Susan A New et al, "Dietary Influences on Bone Mass and Bone Metabolism: Further Evidence of a Positive Link Between Fruit and Vegetable Consumption and Bone Health?" (2000) 71:1 Am J Clinical Nutrition 142.
[45] Luc Dauchet et al, "Fruit and Vegetable Consumption and Risk of Coronary Heart Disease: A Meta-Analysis of Cohort Studies" (2006) 136:10 J Nutrition 2588.

fewer vegetables than in previous years due to a 2.0-4.0% increase in cost[46]—a food inflation rate surpassing all other industrialized nations.[47]

In addition to concerns of equity and well-being among the Canadian populace, economic considerations should motivate research undertakings. A 2015 study reports that a household's health care costs inflate exponentially as its level of food insecurity increases. In comparison to food-secure households, marginally food-insecure households' annual health care costs were 16% greater, while health expenditures for severely food-insecure households rose by 76%.[48] According to the study, household food insecurity was a robust predictor of health independent of other social determinants of health.[49]

In sum, the relationship between food access and health outcomes is complex and multi-dimensional, and calls for nuanced and careful research methods.[50] As recommended by the Minaker review, future public health research should aim to discern precise causative relationships between inadequate food access and health, while recognizing that "[t]he evidence linking diet to health outcomes … points to the reality of the complex relationships between interventions and health outcomes, therefore there is no magic bullet for improving health."[51]

IV. JURISDICTION OVER FOOD SECURITY

a. Federal and Provincial Powers to Impact Food Security

Food insecurity is a fractured jurisdictional issue, implicating federal and provincial heads of power. Federally, food access may be impacted by way of taxation schemes,[52] negotiation of international instruments such as the *1996 Rome Declaration on World Food Security*,[53] and the criminal law power.[54] Provincial responsibility for municipalities,[55] property and civil rights,[56] and matters of a local or private nature[57] cumulatively confer authority over health care, education, and services. All have a bearing on Canadians' ability to access healthy food.

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[46] "High Produce Prices Affecting Buying, Eating Habits: Survey" *University of Guelph* (6 June 2016), online: <news.uoguelph.ca/2016/06/high-produce-prices-affecting-buying-eating-habits-survey/>.
[47] "7 foods that will cost you more in 2016 and why" *CBC News* (10 December 2015), online: <www.cbc.ca/news/business/food-prices-2016-1.3358980>.
[48] Valerie Tarasuk et al, "Association Between Household Food Insecurity and Annual Health Care Costs" (2015) 187:14 CMAJ E429 at E432.
[49] *Ibid* at E434.
[50] Rose et al, *supra* note 35 at 1171.
[51] Whitacre et al, *supra* note 19 at 2.
[52] *Constitution Act, 1982*, s 91(2), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*].
[53] Although the authority to negotiate with other sovereign states is not explicitly conferred on the federal branch of government, it is broadly recognized to possess this power. See Peter W Hogg, *Constitutional Law of Canada*, 4th ed (Toronto: Thomson Reuters, 1997) (loose-leaf 2016 supplement), ch 11.
[54] *Constitution Act*, *supra* note 52, s 91(27).
[55] *Ibid*, s 92(8).
[56] *Ibid*, s 92(13).
[57] *Ibid*, s 92(16).

Despite the splintered jurisdictional nature of food in our federal state, there is not, and never has been, a national food policy to unify food security initiatives across the country.[58] This has resulted in ineffective government action. Between 1995 and 2012, only ten legislative bills were tabled with the explicit purpose of ameliorating food insecurity, and a mere four bills were passed.[59] A thorough review of the Hansard debates over the relevant time period suggest that legislators are alive to the fact that incidence of household food insecurity is interwoven with complex social issues such as inadequate income. Still, proposed policy instruments fail to reflect this awareness. Instead, the majority of tabled legislation attempted to strengthen the charitable food sector by, for example, indemnifying food donors or providing free meals.[60]

The data is consistent with a trend that sees Canadian governments increasingly relying on charitable services such as food banks to replace vanishing social safety nets.[61] Critics contend that "the rapid emergence and institutionalization of food banks as a critical player in the field of charitable and emergency food relief is at the same time a significant indicator of the prevalence of food poverty and the failure of the welfare state and the public safety net."[62] In sum, federal and provincial powers to legislate for food security are largely under-utilized and poorly coordinated.

b. Municipal Powers to Impact Food Security

The bases for the municipal power to legislate for food security can primarily be found in s 92 of the *Constitution Act* in combination with enabling provincial legislation. Collectively, these provisions designate authority over health and land use planning to provinces, which may in turn be statutorily delegated to municipalities. In Nova Scotia, this delegation is mostly accomplished by the *Municipal Government Act*).[63] Most provinces and territories have an analogous statutory instrument.

Theoretically, as a municipality is a statutory corporation created by a province,[64] the powers exercised by municipalities must be derived from enabling provincial statutes to be deemed *intra vires*.[65] In practice, the combined effect of enabling legislation and common law is such that municipalities "can exercise: 1) powers expressly given by statute; 2) those necessarily or fairly implied in or incident to the express powers; and 3) those essential to the effectuation of the purposes of the [municipal] corporation not simply convenient but indispensable."[66] It is trite law

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[58] Note that the Federal Minister of Agriculture and Agri-food was directed to create a food policy by his mandate letter. See Mandate Letter to Hon Lawrence MacAulay, Minister of Agriculture and Agri-Food (12 November 2015), online: <https://pm.gc.ca/eng/minister-agriculture-and-agri-food-mandate-letter>.
[59] Lynn McIntyre et al, "Legislation Debated as Responses to Household Food Insecurity in Canada, 1995-2012" (2016) 11:4 J Hunger & Envtl Nutrition 441 at 446.
[60] *Ibid* at 451.
[61] Graham Riches, "Food Banks and Food Security: Welfare Reform, Human Rights and Social Policy. Lessons from Canada?" (2002) 36:6 Soc Pol'y & Admin 648 at 652.
[62] *Ibid* at 652.
[63] *Municipal Government Act*, SNS 1998, c 18 [*MGA*].
[64] Ian Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed (Toronto: Thomson Reuters, 2017) (loose-leaf revision 9) at 2 [Rogers]. Note that the legislature uses "municipal corporation" and "municipality" as interchangeable terms.
[65] *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231, 110 DLR (4th) 1.
[66] Rogers, *supra* note 64 at 309.

that in a federal state, provincial and municipal powers may operate parallel to, but must not trench on, federal powers.[67]

The *MGA* downloads a plethora of duties and responsibilities onto municipalities that are implicated in food security and public health. Municipal legislation usually takes the form of by-laws or resolutions which regulate or express the municipal council's decision on a particular matter.[68] For example, s 190 enables "municipalities to assume the primary authority for planning within their respective jurisdictions."[69] Municipalities have a dominant role in controlling agricultural land use through the implementation of planning strategies and zoning by-laws.[70] Associated powers bolster the case for municipal authority over urban agriculture, such as the power to make by-laws for the purposes of health and well-being of persons,[71] and the power to regulate and license businesses.[72]

V. MUNICIPAL LAND USE PLANNING AND PUBLIC HEALTH

a. Introduction to Land Use Planning

Though a comprehensive chronicle of land use planning is beyond the scope of this paper, a brief history of urban land use law may illuminate how farming in urban areas came to be understood as anathema to residents' well-being and public health. Land use by-laws are particularly relevant to urban agriculture because they focus on regulating the appropriate uses of a municipality's land.[73] Zoning governs which land uses are permissible in any given area of a municipality, in addition to regulating building features such as height restrictions, aesthetic design, and minimum setback distances.[74] Taken together, these factors determine the legality of urban farming initiatives in any particular municipality.[75]

According to Juliana Maantay, "zoning began as an attempt to control land use in order to protect the health, lives, safety, morals, properties, and welfare of the population within an existing constitutional framework of the state's police powers."[76] Current zoning trends can be traced to the early 20th century, when the first North American court recognized the municipal power to zone for the public good, despite its potential for diminishing real estate value.[77] Planning scholarship asserts that, at that time, single-family homes were viewed by the court as the highest and best use

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[67] *Ibid* at 312.1.
[68] *Ibid* at 406.16.
[69] *MGA*, *supra* note 63, s 190.
[70] Rogers, *supra* note 64 at 802.
[71] *MGA*, *supra* note 63, s 172(1)(a).
[72] Rogers, *supra* note 64 at 685.
[73] Nina Mukherji & Alfonso Morales, "Zoning for Urban Agriculture" (2010) 3 Zoning Prac 2 at 2, online: <https://www-static.bouldercolorado.gov/docs/mar-1-201304100938.pdf>.
[74] For example, regulations mandate minimum separation distances between livestock operations and residential dwellings. See Chris Dickinson et al, *Planting the Seeds for Farm Innovation: Achieving Flexible Land Use Policy in Greater Golden Horseshoe* (Toronto: Ryerson University, 2010), online: <www.ryerson.ca/content/dam/foodsecurity/projects/urbandesign/FoodandFarmInnovationGuideRyerson.pdf> at 16 [Dickinson et al].
[75] Kate A Voigt, "Pigs in the Backyard or the Barnyard: Removing Zoning Impediments to Urban Agriculture" (2011) 38:2 Boston College Envtl Aff L Rev 537 at 540.
[76] Juliana Maantay, "Zoning, Equity, and Public Health" (2001) 91:7 Am J Pub Health 1033 at 1035.
[77] *Village of Euclid v Ambler Realty Co* (1926), 272 US 365, 47 S Ct 144.

of property and should thus be separated from "less-civilized, potentially nuisance-causing uses, including agriculture."[78] Since then, the so-called Euclidean style of zoning—that is, separating different land uses, such as agricultural and residential, into discrete geographical areas—has predominated.[79]

b. The Persistence of Euclidean Zoning

Numerous grounds are cited for the stubborn endurance of Euclidean zoning models that exclude agriculture from cities. Three of the most common explanations are: 1) economic considerations; 2) technological advancement; and 3) public health.

As mentioned above, classical economic models of land use appraise market value of land according to its "highest and best use", or the "use that offers the greatest current income."[80] In cities, greater monetary profit can typically be extracted from constructing buildings on land rather than using it for agricultural purposes. In this way, urban development pressures diminish availability of urban and peri-urban agricultural land.[81]

Related to economic rationales, farming policies and technologies that encourage large-scale production are another contributor to the putative incompatibility between farming and urban environments. In 2011, the average size of a Canadian farm was 778 acres, rising from 728 acres in 2006.[82] Urban environments are unsuitable for this type of scale, as "modern industrial agriculture, which has been the dominant food regime led by the global North … has focused on producing commodity crops for international trade rather than food production for local consumption."[83]

Finally, public health concerns have animated the exclusion of farming from urban areas with respect to two aspects of agriculture: a farm's negative outputs into the surrounding environment and pollution of the farm's produce resulting from its urban location. If farms are managed poorly, untreated waste, pesticides, and other pollutants could be discharged into waterways, onto land, or into the air.[84] Contamination of soil, water, and air may result in elevated toxin levels in produce grown in urban areas.[85] Remarkably, public health considerations have also formed the basis for introducing zoning amendments that promote urban agriculture.

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[78] Sarah B Schindler, "Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavore" (2012) 87:2 Tul L Rev 231 at 251 [Schindler].
[79] *Ibid*.
[80] Brian L Bentick, "The Impact of Taxation and Valuation Practices on the Timing and Efficiency of Land Use" (1979) 87:4 J Pol Econ 859 at 859.
[81] Tammara Soma & Sarah Wakefield, "The Emerging Role of a Food System Planner: Integrating Food Considerations Into Planning" (2011) 2:1 J Agric Food Systems & Comm Develop 53 at 54 [Soma & Wakefield].
[82] Statistics Canada, "Snapshot of Canadian Agriculture: Chapter 1" in *2011 Census of Agriculture*, Catalogue No 95-640-X (Ottawa: Statistics Canada, 2011), online: <www.statcan.gc.ca/pub/95-640-x/2011001/p1/p1-01-eng.htm>.
[83] Soma & Wakefield, *supra* note 81 at 54.
[84] Brody Lee, Tony Binns & Alan B Dixon, "The Dynamics of Urban Agriculture in Hanoi, Vietnam" (2010) Spec Issue 1 Field Actions Sci Rep at 2.
[85] *Ibid*.

The trajectory of Canadian by-law development is such that commercial, industrial, and agricultural uses of land are now generally excluded from residential areas.[86] According to many experts, this has resulted in an inflexible and overly prescriptive style of planning that contravenes the planning needs of today.[87]

VI. URBAN FARMS AND PUBLIC HEALTH

a. Introduction to Urban Farms

Urban farming is the practice of cultivating, processing, and distributing food within a town or city.[88] It can be differentiated from other types of urban agriculture, such as community gardens and home gardens, in that food is grown primarily for sale, or food produced is primarily consumed by someone other than the growers.[89] Urban farming is similar to other forms of urban agriculture in its capacity to "green" city landscapes, improve biodiversity, produce local food (thereby improving community and household food security), and make use of under-utilized urban spaces.[90] Urban farms may be operated for profit, or with a nonprofit and/or social enterprise model.[91] Though variable across cities, urban farms are often situated in residential areas (rather than commercial or industrial zones), where farmers use their own (or others') leased or purchased private property.[92]

b. Urban Farming and the Current Zoning of Halifax Peninsula

There are four different types of mechanisms by which urban farming activities—such as growing fruits and vegetables, and keeping livestock—may be prohibited by municipal land use by-laws: 1) an express ban on farm activities in certain zones; 2) allowing only permitted uses, which do not include farming; 3) prohibiting gardens or animals in certain locations, such as the front yard; and 4) ordinances that prohibit the sale of farm outputs such as vegetables and eggs.[93] The latter form of prohibition relates to business, not to the production of food in an urban setting. However, scholarship identifies the ability to sell one's produce as a critical component of urban farming operations, as it encourages stability for growers and allows neighbouring households to benefit from increased access to fresh produce.[94] Some jurisdictions only permit growers to sell their produce on site upon obtaining a "conditional use permit", which is a discretionary and often expensive process. Therefore, even where such permits are available, they may serve as a barrier to entry.[95]

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[86] Dickinson et al, *supra* note 74 at 11.
[87] *Ibid*.
[88] Martin Bailkey & Joe Nasr, "From Brownfields to Greenfields: Producing Food In North American Cities" *Community Food Security News* (Fall 1999) 6 at 6.
[89] City of Vancouver Office of Community Services, "Amendments to Zoning and Development By-law and Business License By-law Regarding Urban Farming—RTS 11150" (9 February 2016), online: <council.vancouver.ca/20160223/documents/p1.pdf> at 3 [City of Vancouver Policy Report].
[90] *Ibid*.
[91] *Ibid*.
[92] *Ibid* at 4.
[93] Schindler, *supra* note 78 at 239.
[94] *Ibid* at 243.
[95] *Ibid* at 244.

The *HPLUB* mainly precludes urban farming operations by way of the second and fourth mechanisms. The second mechanism appears in s 34(J)(2) of the *HPLUB*: "No person shall carry out, or cause or permit to be carried out, any development for any purpose other than one or more of the uses set out in subsection (1)."[96] Subsection (1) allows a number of uses, none of which would be applicable to urban farming except perhaps subsection (c), which permits a "home occupation".[97]

Any promise offered by the allowance of a home occupation is limited by a series of restrictions which effectively prevent urban farming from qualifying as a home occupation. This can be understood as an expression of the fourth mechanism described above. The definition of "home occupation" expressly excludes "the preparation and sale of food [and] the keeping of animals."[98] Additional restrictions fortify the prohibition on urban farming as a home occupation, such as the requirement that the "home occupation shall be conducted in such a way that it shall not be apparent from the outside of the dwelling that it is used for anything other than a residence, and the home occupation shall be conducted entirely within the dwelling unit."[99] Further, the home occupation "shall not create any noise, dust, vibration, smell … or any such similar nuisance not normally associated with a dwelling."[100]

Looking beyond residential zones, commercially zoned buildings are typically subject to height requirements,[101] limiting the potential for rooftop greenhouses and accessory buildings. Buildings located in some business zones are bound by the requirement that "front yards shall be maintained as landscaped open areas,"[102] which may or may not be construed as a prohibition on front yard gardens in commercial areas.

The patchwork of zoning regulations that govern urban agricultural activities appear, at a minimum, to allow residents to produce food for their own use. However, even this is debatable. To cite a contemporaneous example, Halifax is embroiled in a protracted dispute concerning the legality of backyard chickens. Attempting to clear up the matter in 2009, the municipality issued a report stating that even though keeping of fowl in residential zones is not listed as a prohibited activity, the *HPLUB* did not enable that specific land use, rendering it prohibited.[103] The municipality then issued a public statement in 2013 that the "bylaw … is silent on chickens, so the position is there's nothing to enforce."[104] However, as recently as 2016, a Peninsula resident

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[96] City of Halifax, revised by-law 218, *Land Use By-law for Halifax Peninsula* (21 May 2016), s 34J(2) [*HPLUB*].
[97] *Ibid*.
[98] *Ibid*, s 16B(11).
[99] *Ibid*, s 16B(6).
[100] *Ibid*, s 16B(10).
[101] See e.g. *ibid*, s 48BB(1).
[102] See e.g., *ibid*, s 59R(6)(c).
[103] Halifax Regional Municipality, Peninsula Community Council, "Keeping of Fowl (Chickens)", Report No 4.1.6 (Halifax: Peninsula Community Council, 9 February 2009) at 2, online: <www.region.halifax.ca/Commcoun/pcc/documents/Chickens415.pdf>.
[104] "Urban Chickens Allowed on Halifax Peninsula" *CBC News* (18 July 2013), online: <www.cbc.ca/news/canada/nova-scotia/urban-chickens-allowed-on-halifax-peninsula-1.1405474>.

reported to the CBC that, with respect to keeping backyard chickens, "Animal Control told her it's OK, but municipal officials said it's not."[105]

A fluctuating public stance suggests that the municipality is unclear on how to interpret its own zoning regulations, leaving residents in a state of uncertainty on what is permissible. This legal precariousness may stifle other urban agriculture initiatives—such as the front yard gardening mentioned above—with resultant public health drawbacks.

c. Public Health Rationales for Reforming By-laws

Just as public health concerns once fortified efforts to zone agricultural activities out of cities, they may be employed to justify re-integration of farming and urban living. The following section outlines five public health rationales for the proposed zoning amendments: 1) re-balance unbalanced food environments; 2) decrease household food insecurity; 3) increase community food security; 4) green spaces have positive public health impacts; and 5) remaining public health challenges can be tackled with prescriptive legislation and private nuisance law.

i. Re-Balance Unbalanced Food Environments

Some food desert scholars argue for the "trifecta" approach to improve community eating habits and nutritional environments: "increase availability, reduce price and promote healthier choices."[106] Closer geographical access to fruits and vegetables is a critical aspect of increased availability, while lower transportation costs can reduce the price of produce.[107] Food grown close to its point of sale may have higher vitamin and mineral content, so local residents get the most nutritional content for their dollar.[108]

To ensure that urban farms serve the needs of low-income households, municipalities should ensure that the amended legislation names this purpose as a guiding principle. For example, in its progressive re-zoning efforts that paved the way for urban farms, Cleveland claimed that a principal motivation is to address "inner city 'food deserts' that contribute to poor nutrition."[109] When coherent land use policy attends to the diverse needs of various neighbourhoods, urban farming "is a proven method of addressing the health problems that plague residents of fresh food deserts."[110]

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[105] Jon Tattrie & Kathleen Napier, "Chicken Rules Still Murky in Halifax, Chicken Lovers Say" *CBC News* (23 May 2016), online: <www.cbc.ca/news/canada/nova-scotia/halifax-chicken-rental-rules-still-confusing-bylaw-1.3596304>.

[106] Whitacre et al, *supra* note 19 at 46.

[107] Alexandra Dapolito Dunn, "Siting Green Infrastructure: Legal and Policy Solution to Alleviate Urban Poverty and Promote Healthy Communities" (2010) 37:1 BC Envtl Aff L Rev 41 at 52.

[108] Susan A Schneider, "A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability" (2010) 34 Wm & Mary Envtl L & Pol'y Rev 935 at 954.

[109] Catherine J LaCroix, "Urban Agriculture and Other Green Uses: Remaking the Shrinking City" (2010) 42:2 Urb Lawyer 225 at 236.

[110] Jim Smith, "Encouraging the Growth of Urban Agriculture in Trenton and Newark through Amendments to the Zoning Codes: A Proven Approach to Addressing the Persistence of Food Deserts" (2012) 14:1 VJEL 71 at 81 [Smith].

ii. Decrease Household Food Insecurity

As previously discussed, incidence of household food insecurity and residing in an unbalanced food environment can be closely related. Further, inadequate incomes and employment security are a common risk factor for both. Therefore, the negative public health impacts of household food insecurity and un(der)employment may both be addressed by urban farming initiatives. For example, the Vancouver business Sole Food Street Farm began as a social enterprise aimed at providing employment and educational opportunities for residents of the Downtown East Side,[111] a much-needed asset in a district where 53% of residents are in poverty.[112] In 2012, twenty-five employees were hired from the neighbourhood, with incomes provided by farm profits.[113]

Sole Food Street Farm is not alone in its aim to improve social conditions for low-income people. Recent amendments to Vancouver's zoning and development by-laws add urban farming as a permissible use in all zones. Commentary in the associated report finds that existing urban farms operating in the city are "often community orientated, e.g. youth/community education."[114] Other research is consistent, finding that urban farms not only increase access to fresh foods, but provide entrepreneurship opportunities and build community capacity by serving as "educational hubs for growing and eating healthy food."[115]

iii. Increase Community Food Security

As urban farming increases, the city's need for importing fresh produce will naturally decrease, resulting in a multitude of human and environmental benefits and a general increase in community food security. While household food insecurity has a more immediate temporal definition, community food security can be understood as contemplating the long-term environmental viability and stability of a community's food supply. In brief, community food security "promotes stewardship of land, air, and water through sustainable, community-based food systems and food production methods that reduce pollution and do not compromise the physical environment for future generations."[116]

A 2010 report by the Ecology Action Centre found that an average weekly food basket for one person in Halifax now travels a total distance of 30,666 kilometres,[117] representing huge emissions of greenhouse gases. Retailers estimate that major cities only have about three days' worth of fresh produce at any given time. As a result, over-reliance on distant food sources is not

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[111] EcoDesign Resource Society, "The Urban Farming Guidebook: Planning for the Business of Growing Food in BC's Towns & Cities" (2013), online: <www.refbc.com/sites/default/files/Urban-Farming-Guidebook-2013.pdf> at 39 [EcoDesign].

[112] City of Vancouver Community Services and City of Vancouver Planning and Development Services, "Downtown Eastside: Local Area Profile 2013" (Vancouver: City of Vancouver, 2013), online: <vancouver.ca/files/cov/profile-dtes-local-area-2013.pdf> at 2.

[113] EcoDesign, *supra* note 111 at 7.

[114] City of Vancouver Policy Report, *supra* note 89 at 4.

[115] EcoDesign, *supra* note 111 at 4.

[116] Joyce Slater, "Community Food Security: Position of Dietitians of Canada" (2007), online: <https://www.dietitians.ca/Downloads/Public/cfs-position-paper.aspx> at 3.

[117] Jennifer Scott & Marla MacLeod, "Is Nova Scotia Eating Local? And If Not … Where is Our Food Coming From?" (Halifax: Ecology Action Centre, 2010), online: <https://foodsecurecanada.org/sites/foodsecurecanada.org/files/fm-july4-_final_long_report.pdf> at 18.

only environmentally destructive but also leaves communities vulnerable to emergencies that could close supply lines, such as trade embargoes and natural disasters.[118] As municipalities contemplate solutions to unbalanced food environments, they should, whenever possible, seek to concurrently address longer-term issues of community food security. This method of planning will protect the staying power of gains made in public health.

iv. Green Spaces and Gardening Have Positive Public Health Implications

Growing food and residing close to gardens improves health in myriad ways beyond merely increasing vegetable consumption. A growing body of research suggests that "gardening can be a key element in successful health intervention programs because it addresses simultaneously the physical, mental, spiritual and social health of individuals and their communities."[119] Participation in gardening activities is associated with reduced risk of physical ailments such as obesity,[120] coronary heart disease,[121] and diabetes.[122] Mental health benefits may be significant for general and vulnerable populations with potential to alleviate depression in elderly individuals,[123] promote higher self-esteem in children,[124] and decrease cortisol levels and stress in veterans.[125]

The "greening" effect of farming in urban areas may engender health benefits even for those who do not actively partake, stimulating equitable public health impacts across the community. Research on European community gardens suggests that "people who live proximate to areas of greenery are three times more likely to engage in physical activity and 40% less likely to be overweight."[126] Other studies show that "exposure to vegetation reduces fear and has positive effects on individuals, such as increased affection and elation."[127] Finally, social cohesion appears to increase in communities with gardens, even where gardeners are driven by non-social motivations.[128]

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[118] Soma & Wakefield, *supra* note 81 at 2.
[119] Anne C Bellows, Katherine Brown & Jac Smit, "Health Benefits of Urban Agriculture" (Portland: Community Food Security Coalition's North American Initiative on Urban Agriculture, 2003), online: <https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-bellows-brown-smit.pdf> at 6.
[120] *Ibid*.
[121] *Ibid*.
[122] *Ibid*.
[123] April Temple et al, "The Effects of Therapeutic Gardening on Depression and Resilience in a Skilled Nursing Facility" (2015) 55:Supp_2 Gerontologist 457.
[124] Jacqueline M Swank & Sang Min Shin, "Garden Counseling Groups and Self-Esteem: A Mixed Methods Study with Children with Emotional and Behavioural Problems" (2015) 40:3 J Specialists Group Work 315 at 317.
[125] Mark B Detweiler et al, "Horticultural Therapy: A Pilot Study on Modulating Cortisol Levels and Indices of Substance Craving, Posttraumatic Stress Disorder, Depression, and Quality of Life in Veterans" (2015) 21:4 Alt Ther in Health Med 36.
[126] Duika L Burges Watson & Helen J Moore, "Community Gardening and Obesity" (2011) 131:4 Perspectives in Pub Health 163 at 163.
[127] Jonathan 'Yotti' Kingsley, Mardie Townsend & Claire Henderson-Wilson, "Cultivating Health and Wellbeing: Members' Perceptions of the Health Benefits of a Port Melbourne Community Garden" (2009) 28:2 Leisure Stud 207 at 208.
[128] Esther J Veen et al, "Community Gardening and Social Cohesion: Different Designs, Different Motivations" (2016) 21:10 Local Envt 1271.

v. Public Health Challenges Can be Addressed with Public and Private Law

Concerns about pollution, noise, contamination, and other hazards can be mitigated with prescriptive legislation where necessary, and private nuisance law. As will be described in Part VII, a well-crafted land use by-law can prevent the development of public health risks that initially served to drive agricultural activities from the city. Legislative requirements may include prohibitions on pesticides,[129] limits to the number of chickens on a lot,[130] and soil testing for contaminants.[131] Where municipalities fail to enforce such restrictions, neighbours may bring a nuisance suit against an urban farmer who does not comply with the provisions of an ordinance. Some research suggests that urban farmers can successfully negotiate neighbourly conflicts even with legislation that lacks strict regulations on nuisance-causing activities. Robert Ellickson finds that "neighbours who live in an area that adopts a permissive urban agriculture ordinance will find ways to coordinate with each other—through informal social norms and good manners."[132]

VII. RECOMMENDED ZONING AMENDMENTS TO THE HALIFAX PENINSULA LAND USE BY-LAW

This paper has made numerous observations and suggestions throughout, on amendments to the *HPLUB* that could result in positive public health effects. This section addresses two additional points but is in no way intended to serve as a comprehensive guide to overhauling the *HPLUB*. These considerations are: 1) whether to introduce urban farming as a use or a district; and 2) how to prioritize underserved communities in the development of zoning amendments.

a. Zoning as a Use or District

The first decision to make when introducing urban farming into the *HPLUB* is to designate it either as a use or a district. Urban farming districts may be appropriate in a sprawling metropolis, where an abundance of open space may be singularly used for agricultural purposes. Urban farming as a use is more appropriate for the character of the Peninsula, which is a relatively small land mass. Anecdotal observations of Halifax maps by population density and income suggests that lower-income areas tend to have greater density than high-income areas, as well as fewer healthy food outlets.[133] To ensure that urban farming is accessible in unbalanced food environments, it should be designated a use and added to the list of uses currently permitted in residential, commercial, and industrial zones. This would be the most efficient method of revising the by-law, and would not require re-zoning existing neighbourhoods to accommodate for farming activities.

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[129] See e.g. City of Vancouver, by-law No 3575, *Zoning and Development Bylaw* (20 September 2017), s 11.29.5, 11.30.3, which bans the use of pesticides and herbicides in urban farms.
[130] See e.g. Seattle, Washington, Municipal Code § 23.42.052(C), online: <clerk.ci.seattle.wa.us/~legislativeItems/Ordinances/Ord_123378.pdf>, s 23.42.052(C), which allows up to eight domestic fowl per lot but bans roosters.
[131] Smith, *supra* note 110 at 84.
[132] Schindler, *supra* note 78 at 293-94, citing Robert C Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1994).
[133] "exploreHRM", *Halifax Regionality Municipality*, online: <maps.halifax.ca/website/ExploreHRM/viewer.htm>.

To best enable the development of urban farms, the use should be permitted as-of-right rather than conditionally, as long as farms do not exceed a certain size.[134] However, if concerns arise over the prospect of minimal oversight, the Peninsula may elect to impose a permitting process. The recently passed Vancouver amendments introduce two classes of urban farms, and are a good example of flexible licensing strategies. "Class A" farms, subject to a $10 annual business licensing fee, are permitted in all residential areas, have a smaller maximum size, and are not authorized to sell produce on site.[135] "Class B" farms, subject to a $136 annual business licensing fee, have a much larger maximum size, are permitted in commercial and industrial zones, and may partake in onsite sales.[136] Licensing schemes may be preferred by the Peninsula to monitor the number and locations of farms and may also help farmers to secure financing,[137] insurance coverage,[138] and land lease tenure.[139]

b. Prioritizing Underserved Neighbourhoods

In developing a new *HPLUB*, the Peninsula may take advantage of its ability to grant land as well as its powers to regulate land use. Though most of this paper illustrates the powers of the municipality as a regulator and legislator, the municipality should exercise its function as a provider of underused public land and/or government aid to achieve the most equitable public health impact. To ensure that urban farming initiatives serve the needs of low-income residents, especially those living in unbalanced food environments, Peninsula planners should identify areas that are "underserved by open space and healthy eating opportunities" and legislate accordingly.[140]

To name a pair of examples, the municipality could offer vacant city-owned and under-utilized green spaces to low-income urban farmers to offset the disadvantage experienced by those without yard space. A Detroit study contends that 76% of the city's vegetable supply could feasibly be grown on vacant city-owned property.[141] Seattle allows residents to sell crops cultivated on unused plots,[142] and Edmonton recently introduced new land use regulations to encourage farming on vacant lots in conjunction with an interactive mapping tool to help potential farmers locate suitable tracts in the city.[143] In addition to offering lands on which to farm, municipalities could

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[134] Schindler, *supra* note 78 at 287.
[135] City of Vancouver Land Use and Development Policies and Guidelines, "Urban Farm Guidelines" (adopted 8 March 2016), online: <guidelines.vancouver.ca/U0003.pdf>.
[136] City of Vancouver Policy Report, *supra* note 89 at Appendix B-1.
[137] *Ibid* at 7.
[138] *Ibid*.
[139] *Ibid* at 2.
[140] Heather Wooten & Amy Ackerman, "Seeding the City: Land Use Policies to Promote Urban Agriculture", (Oakland: ChangeLab Solutions, 2011), online: <www.changelabsolutions.org/sites/default/files/Urban_Ag_SeedingTheCity_FINAL_%28CLS_20120530%29_20111021_0.pdf> at 18.
[141] Kathryn Colasanti, Charlotte Litjens & Michael Hamm, "Growing Food in the City: The Production Potential of Detroit's Vacant Land" (Detroit: CS Mott Group for Sustainable Food Systems, 2010) at 5, online: <www.fairfoodnetwork.org/wp-content/image_archive/growing_food_in_the_city.pdf>.
[142] Megan Horst, "Growing Green: An Inventory of Public Lands Suitable for Community Gardens in Seattle, Washington" (Seattle: Seattle Department of Neighbourhoods, 2008) at 21, online: <www.seattle.gov/Documents/Departments/Neighborhoods/PPatch/Growing-Green.pdf>.
[143] "Vacant Lot Inventory for Urban Agriculture", *City of Edmonton*, online: <https://www.edmonton.ca/city_government/initiatives_innovation/food_and_agriculture/vacant-lot-inventory-urban-agriculture.aspx>.

supply small grants to kick start farms in unbalanced food environments. Cleveland's "Gardening for Greenbacks" program provides up to $5,000 to individuals who have completed state-provided farm training programs for purchase of tools, rain barrels, soil, and other farming essentials.[144]

Legislation should consider how best to engage and include residents experiencing multiple barriers to healthy food access. Within and beyond unbalanced food environments, residents with disabilities and other mobility issues may experience exceptional difficulties acquiring adequate food.[145] Legislation and grant programs may work in conjunction, mandating that farms on city-owned land must include accessible raised beds and promote inclusion of persons with disabilities.[146] In sum, the Peninsula must craft operating standards that best promote compatibility with neighbours, longevity of projects, and inclusion of marginalized residents. The Halifax Peninsula should pioneer flexible solutions, using its powers as both regulator and as contributor of land to address unbalanced food environments.

VIII. DISCUSSION

This final section will canvas a number of questions and challenges that may arise from using zoning for urban farming as a remedy for unbalanced food environments: 1) the complexity of legislating on food issues; 2) the suburbanization of poverty in Halifax; and 3) the wisdom of "downloading" responsibility for food access onto municipal governments.

a. Complexity of Food Issues: Access, Price, Race

The constellation of factors that dictate food choices are manifold and often subconscious,[147] making changes in food choices difficult to monitor and interpret. For this reason, a recent comprehensive study on the public health effects of food deserts called for "longitudinal research to track the same population over time as changes in their food environment occur [with] a focus on multiple outcome measures given the complexity of the food environment."[148] For example, improved access and improved price frequently occur together,[149] resulting in challenges for policy-makers in isolating the operative trigger for healthy diet choices.

Cultural norms and food politics are also poorly understood aspects of food choices. Rachel Slocum asserts that "[w]hile the ideals of healthy food, people and land are not intrinsically white, the objectives, tendencies, strategies, the emphases and absences and the things overlooked in community food make them so … How this food is produced, packaged, promoted and sold—

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[144] "Gardening for Greenbacks", *City of Cleveland*, online: <rethinkcleveland.org/Strategic-Advantages/Our-Programs/Gardening-for-Greenbacks.aspx>.
[145] John Coveney & Lisel A O'Dwyer, "Effects of Mobility and Location on Food Access" (2009) 15:1 Health & Place 45.
[146] For example, the municipality of Cambridge, Massachusetts requires all new community gardens to include a minimum of five percent raised beds. See "City of Cambridge Community Garden Program Policy for City-Owned Property" (March 2013), *Cambridge Department of Public Works*, online: <https://www.cambridgema.gov/~/media/Files/conservationcommission/garden_policyrevised2013REV.pdf?la=en>
[147] Benjamin Scheibehenne, Linda Miesler & Peter Todd, "Fast and Frugal Food Choices: Uncovering Individual Decision Heuristics" (2007) 49:3 Appetite 578.
[148] Whitacre et al, *supra* note 19 at 2.
[149] *Ibid* at 54.

engages with a white middle class consumer base that tends to be interested in personal health and perhaps in environmental integrity."[150]

Peninsula planners should be alive to cultural norms around food as they contemplate the impact of unbalanced food environments on African Nova Scotians, Mi'kmaq individuals, and other non-white residents. This is especially material in Halifax's north end, which is likely a food desert[151] and home to a significant and long-established Black community, with above-average incidence of poverty and poor health.[152] According to some African Nova Scotian research participants, dietary recommendations depict "white ways of eating", such that resisting healthy eating guidelines may be a "form of resistance of cultural dominance or assimilation."[153]

Zoning authorities in Halifax should investigate urban farming interest in non-white communities, involve diverse stakeholders in the amendment process, and explore the potential for strategic partnerships to bridge cultural gaps. To be truly effective, planners and city officials should commit to an anti-oppressive and inclusive decision-making process around zoning for urban farming—including questioning the notion of food deserts altogether. One scholar reflects that "'food desert' has emerged as a term to describe a condition, which often leads food activists to lend charitable support to manage the symptoms of the condition, whereas a term such as 'food apartheid' lends itself to an analysis of the structural causes behind the condition."[154]

b. Suburbanization of Poverty in Halifax

Future research should examine healthy food access in other regions of the municipality beyond the Peninsula. For the sake of specificity and clarity, this paper focuses on the potential for urban farming in the Halifax Peninsula, but research indicates that other areas of the Halifax Regional Municipality are likely to experience comparable—or worse—rates of household food insecurity. Steep downtown housing prices, planning initiatives, and gentrification are resulting in a "suburbanization of poverty", as low-income residents are priced out of the Peninsula.[155]

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[150] Rachel Slocum, "Whiteness, Space and Alternative Food Practice" (2007) 38:3 Geoforum 520 at 526.

[151] The Chronicle Herald reported in 2012 that Gottingen Street hasn't seen a grocery store since Sobeys closed in the 1980s. Other than a brief appearance by a cooperative grocery store, this is still the case. See: Hilary Beaumont, "Everyday Life's A Challenge in a 'Food Desert'", *The Chronicle Herald* (4 November 2012), online: <thechronicleherald.ca/thenovascotian/161761-everyday-life-s-a-challenge-in-a-food-desert>.

[152] Ingrid Waldron, Sheri Price & Jill Grant, "North End Matters: Using the People Assessing their Health Process (PATH) to Explore the Social Determinants of Health in the Black Community in the North End" (Halifax: Dalhousie School of Planning, 2015), online: <https://www.dal.ca/content/dam/dalhousie/pdf/healthprofessions/School%20of%20Nursing/Final_PATH_Report_2015.pdf> at 19.

[153] Beagan & Chapman, *supra* note 37 at 524.

[154] Joshua Sbicca, "Growing Food Justice by Planting an Anti-Oppression Foundation: Opportunities and Obstacles for a Budding Social Movement" (2012) 29:4 Agric Hum Values 455 at 461.

[155] Jamy-Ellen Klenavic, *Income Distribution in Halifax, Nova Scotia: Is There Increasing Suburbanization of Poverty?* (Major Masters Project, Dalhousie School of Planning, 2013) [unpublished], online: <theoryandpractice.planning.dal.ca/_pdf/neighbourhood_change/mplan_projects/jklenavic_thesis_2013.pdf> at 63.

c. Downloading Responsibility for Food Access onto Municipalities

This paper frames municipalities as critical contributors to food security efforts in Canada, but critics suggest that municipal-level initiatives do little to address household food insecurity over the long-term and may take pressure off federal and provincial governments to take action. Patricia Collins and colleagues suggest that food-based enterprises are misguided band-aid solutions, as food security can only be achieved with adequate incomes and/or social assistance.[156] Put differently, only federal and provincial governments can exercise policy levers that confront income security and long-term solutions.

In my view, income support programs are essential to address household food insecurity and unbalanced food environments but this does not preclude municipalities from harnessing zoning powers to facilitate and support food security for residents. The municipal advantage is flexibility: each city and town can respond to distinctive local needs to craft "comprehensive, multidisciplinary policies that address local food systems."[157] Thus, municipalities must work in concert with federal and provincial governments, non-governmental organizations, and private actors to attain balanced food environments in the Peninsula and across Nova Scotia and Canada.

IX. CONCLUSION

Urban farming bears the potential of improving unbalanced food environments in the Halifax Peninsula, thereby improving household food insecurity and public health. Happily, planning experts are not charged with reinventing the wheel. Many urban areas across the world boast a thriving farming culture, serving as inspirations as we reimagine zoning in the Halifax Peninsula. For instance, urban farmers in Hanoi, Vietnam produce 80% of the vegetables and fruits consumed by city residents, as well as 50% of the fish and meat, and 40% of the eggs.[158]

Closer to home, "victory gardens" exemplify the power of coordinated efforts to grow food in urban areas. During both world wars, prolific fruit and vegetable plots were planted on private and public lands by civilians in the United States, Canada, and other nations in an emergency effort to conserve resources for the war effort. In 1943, twenty million urban gardens produced eight million tons of food in cities across the United States.[159]

At the present moment, Halifax is facing a crisis situation, but of a different character. Unbalanced food environments are a predictor for household food insecurity, which is resulting in adverse public health impacts for a troubling proportion of our neighbours. Addressing this problem will require harmonized efforts from all levels of government and strategic partnerships with private and public institutions. The Halifax Peninsula should make the most of its unique and flexible zoning tools to facilitate access to healthy food, and set an example for all municipalities in the Atlantic region

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[156] Patricia A Collins, Elaine M Power & Margaret H Little, "Municipal-level Responses to Household Food Insecurity in Canada: A Call for Critical, Evaluative Research" (2014) 105:2 Can J Pub Health 138 at 139.
[157] Berg, *supra* note 27 at 795.
[158] Patrick J Bohlen & Gar House, eds, *Sustainable Agroecosystem Management: Integrating Ecology, Economics, and Society* (New York: CRC Press, 2009) at 284.
[159] Kameshwari Pothukuchi & Jerome L Kaufman, "Placing the Food System on the Urban Agenda: The Role of Municipal Institutions in Food Systems Planning" (1999) 16:2 Agric Hum Values 213 at 216.

A PLEA FOR PRIVACY: A CALL TO PRESERVE ONTARIO'S PROTECTION AGAINST REVENGE PORN

Francesca D'Aquila-Kelly*

I. INTRODUCTION

For well over a century, technological change has motivated the legal protection of the individual's right to privacy.[1] The accelerated pace of information sharing, brought on by the emergence of the internet and social media, has made the preservation of privacy a steadily growing concern. This need has been influenced by the increase in intimate image sharing, an activity that seldom existed before the ubiquity of personal electronic devices and computers. This type of behaviour has caused increasing concern for privacy protection advocates since individuals are being exploited by having their images distributed without consent. This activity, commonly referred to as "revenge porn", is a relatively new phenomenon whereby an individual, while in possession of sexually explicit video footage or visual material (i.e. photographs), subsequently uploads that content onto a public website or otherwise shares that information with the public.[2] Once posted online or publicly disseminated via alternative means, the material is accessible for viewing or downloading by other individuals.[3] Revenge porn most frequently occurs when a romantic relationship ends and one party publicizes the material in order to shame, humiliate, or destroy the other party. A key element of this conduct is that it is done without the consent of the person(s) featured in the image or video.

In 2015, the Ontario Privacy Commission designated *Reputation and Privacy* as one of their mandates over a five-year period. The office chose to focus "its attention on the reputational risks stemming from the vast amount of personal information posted online and on the existing and potential mechanisms for managing these risks."[4] This concern is a result of a new culture of online humiliation, whereby perpetrators, once restricted to in-person interactions, have gained greater access to their victims through cyberspace. The deleterious effect of revenge porn on a victim's reputation is difficult to quantify because it is impossible to predict how many times a photo or video has been viewed, shared, copied, or downloaded. As stated in *R v T(CN)*, "once an intimate image is transmitted, even if to one recipient only, its digital footprint is embedded in binary cement."[5] Furthermore, search engine algorithms typically surface the most popular

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* Francesca D'Aquila-Kelly graduated from the JD program at the University of Windsor in 2017. She is currently completing her articles with Beard Winter LLP and hopes to pursue a career in Privacy Law in the future. This paper was completed as a final assignment for the Privacy Law course taken with Professor Samara Starkman.

[1] *Jones v Tsige,* 2012 ONCA 32 at para 67, 108 OR (3d) 241 [*Jones*].
[2] Danielle Keats Citron & Mary Anne Franks, "Criminalizing Revenge Porn" (2014) 49 Wake Forest L Rev 345 at 346.
[3] *Ibid*.
[4] Office of the Privacy Commissioner of Canada, "Online Reputation: What are they saying about me?", by Policy and Research Group (Ottawa: OPC, 21 January 2016) at 1, online: <https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/or_201601/> [OPCC].
[5] *R v T (CN)*, 2015 NSCA 58 at para 11, 123 WCB (2d) 15.

information regardless of its content, meaning an image that has gone viral will inadvertently be promoted in favour of more representative information about the individual.[6]

Canada has made a noticeable effort in attempting to deter individuals from engaging in this type of behaviour, particularly in 2014 when it became a federal offence to engage in the non-consensual distribution of intimate images. In January 2016, the Ontario Superior Court of Justice gave a landmark judgment in *Doe 464533 v ND* ("*Doe v ND*") where Justice Stinson ordered the defendant to pay damages for posting an intimate video of his ex-girlfriend online without her permission. The judgment also introduced Ontario's second privacy tort, "public disclosure of embarrassing private facts", which gives victims the right to sue tortfeasors for the harm they have endured. The tort's introduction has received praise from those who view it as a necessary addition to the law and skepticism from others who are concerned about its implications, specifically the impact on the individual's right to freedom of expression.

Exploring the implications of Ontario's newest privacy tort shows that the individual's right to privacy is a fundamental right worthy of protection in civil disputes, particularly when the wrongful act is the non-consensual distribution of intimate images—revenge porn. The devastating consequences of the tort entitle victims to a legal remedy so they can regain their sense of autonomy. The criticisms expressed by the tort's opponents will be analyzed and salient recommendations will be made to address them. A discussion of the laws in place to protect privacy in other Canadian jurisdictions will demonstrate the importance of legal recourse against this type of privacy invasion in Ontario.

II. ONTARIO'S NEWEST COMMON LAW PRIVACY TORT: "PUBLIC DISCLOSURE OF EMBARRASSING PRIVATE FACTS"

In his seminal judgment in the case of *Doe v ND,* Justice Stinson unveiled Ontario's second common law privacy tort, public disclosure of embarrassing private facts.[7] The judgment, given on January 21, 2016, offered victims of revenge porn the right to sue for damages. In this case, the plaintiff was an eighteen-year-old woman who sent an intimate video of herself to her ex-boyfriend.[8] This occurred after several months of the defendant adamantly begging her to do so. He would send intimate images of himself and say that she owed him a video of herself in return.[9] After her consistent refusal and expressed uncertainty, he reassured her that he would be the only one who would see it.[10] She finally conceded and sent a video to the defendant, who subsequently uploaded it to the internet that same day with the title, "college girl pleasures herself for ex boyfriends [sic] delight."[11] Three weeks later, the plaintiff was made aware of what the defendant had done and was devastated.[12] She was forced to defer her first set of university exams, was unable to sleep, and would go all day without eating.[13] Due to concern over the plaintiff's mental health,

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[6] OPCC, *supra* note 4 at 2.
[7] *Doe 464533 v ND*, 2016 ONSC 541 at para 46, 128 OR (3d) 352 Stinson J [*Doe v ND*].
[8] *Ibid* at para 7.
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid* at para 8.
[12] *Ibid*.
[13] *Ibid* at para 11.

her mother felt it necessary to contact a crisis intervention centre. She received counseling for a year and a half to deal with the emotional fallout.[14] The plaintiff recalled feeling like a "cold person" and felt as though everything in her life, including her beliefs and morals, had been stolen from her.[15] On the occasions that she encountered the plaintiff, she became so distraught that she would sometimes collapse and exhibit behavior that resembled panic attacks.[16] The plaintiff stated that the defendant showed no remorse and would have "an insolent look on his face, as if he was proud of himself."[17] At the centre of her continued distress was the uncertainty as to whether the image would resurface and put her future career plans in jeopardy.[18]

The case was decided by default judgment because the defendant, listed as ND, chose not to appear and defend himself. Justice Stinson held the defendant liable for such conduct under two well-established torts: breach of confidence and intentional infliction of mental distress. Relying on the seminal legal article written by William Prosser, later adopted by the *US Restatement (Second) of Torts (2010)*, the judge found that the facts fell closely in line with the tort, "public disclosure of embarrassing private facts".[19] Justice Stinson adopted the elements of the cause of action but with a slight modification: "one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of the other's privacy, if the matter publicized *or the act of the publication* (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."[20] The comment section featured in the *Restatement* reinforces the idea that a sexual relationship is an entirely private matter and that there is an invasion of privacy action available should this become publicized.[21] Justice Stinson correctly decided that this cause of action was worthy of a new tort because to allow someone entrusted with intimate details "to intentionally reveal them to the world via the internet, without legal recourse, would be to leave a gap in our system of remedies."[22]

The judgment in this case confirms the court's willingness to amend the common law to punish and deter reprehensible behaviour that exists as a result of a modern networked society. Lack of resources on the part of the plaintiff necessitated the need to proceed under Simplified Procedure, which limited the amount of damages receivable to $100,000.[23] Originally, plaintiff's counsel thought the case was worth $25,000 because there was no law at that time deeming the act of revenge porn illegal.[24] In awarding the maximum amount of damages available and the full indemnity of costs, the court confirmed the seriousness of the harm and the need for duly owed compensation. Justice Stinson based his findings on cases involving claims arising from physical sexual battery, with his attentiveness to its psychological impact and consequences.[25] Counsel

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[14] *Ibid* at para 13.
[15] *Ibid* at para 12.
[16] *Ibid* at para 13.
[17] *Ibid*.
[18] *Ibid* at para 15.
[19] *Ibid* at para 36.
[20] *Ibid* at para 46 [emphasis added].
[21] *Ibid* at para 42.
[22] *Ibid* at para 45.
[23] *Ibid* at para 50.
[24] Interview of Donna Wilson by Sam Pfeifle (11 May 2016) at IAPP Canada Privacy Symposium 2016, Toronto at 00h:07m:07s, online: <https://iapp.org/news/video/a-conversation-wilson-pfeifle-talk-canadas-privacy-tort-revenge-porn/> [Wilson].
[25] *Doe v ND*, *supra* note 7 at para 51.

submitted that in many ways the case was worse than sexual battery since not only the plaintiff's personal and sexual integrity were violated through the posting of the video, but also the violation was ongoing since there was no way of knowing how many times it had been viewed, copied, or downloaded.[26] General damages of $50,000 were awarded because the privacy breach was shown to be analogous to sexual assault and because it was much more serious than *Jones v Tsige*, where the court first awarded damages for an invasion of privacy by another individual.[27] Due to the fact that the defendant's behaviour was an affront to their relationship, it made the impact of his action even more hurtful and worthy of aggravated damages in the amount of $25,000.[28] Since the defendant's conduct was intentional and showed no evidence of remorse, an additional $25,000 was granted in punitive damages.[29] In making his decision, Justice Stinson considered blameworthiness, the degree of vulnerability, the harm directed at the plaintiff, and the need to dissuade others from engaging in similarly harmful conduct.[30] By doing so, he shed light on the true nature of revenge porn, which is that it is an intentional act that takes advantage of a trusting relationship and disproportionality targets members of a vulnerable group to publicly degrade them for the personal satisfaction of the victimizer.

In July 2016, ND retained a lawyer who had submitted a factum to the court to have the judgment set aside under rule 19.08 of the *Rules of Civil Procedure*.[31] Dhiren Chohan, the defendant's lawyer, argued in his factum that "his client was denied access to justice because he couldn't afford a lawyer and that the precedent-setting nature of the case requires a full defence."[32] He went on to state that the six-figure award was too high for several reasons including that the plaintiff shares some responsibility for the video's existence because she provided the video on her own accord.[33]

Justice Dow set the judgment aside on September 26, 2016, allowing the case to proceed to trial so that a decision could be rendered having heard evidence from both parties, including the defendant.[34] The plaintiff's lawyers, Sheila Block, Molly Reynolds and Lara Guest, brought a motion for leave to appeal from that decision, pursuant to Rule 62.02(4)(b), which was dismissed by Justice Kiteley on January 9, 2017.[35] Although the decision and legal framework devised by Justice Dickson is still considered good law, with the defendant having an opportunity to submit a defence, the existence of the public disclosure of embarrassing private facts tort could be in jeopardy. This paper intends to demonstrate that the reasoning advanced in the defendant's factum highlights the typical nature of the issues plaguing women who have been victims of sexual violence, specifically the issues of victim blaming and "slut-shaming". The law preventing the

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[26] *Ibid*.
[27] *Ibid* at para 58.
[28] *Ibid* at para 59.
[29] *Ibid* at para 60.
[30] *Ibid* at paras 61-62.
[31] *Rules of Civil Procedure,* RRO 1990, Reg 194, under *Courts of Justice Act,* RSO 1990, c C.43, s 19.08, online: <https://www.ontario.ca/laws/regulation/900194>.
[32] Ashley Csanady, "Man who lost landmark revenge porn case seeks new trial because he couldn't afford lawyer" *National Post* (26 July 2016), online: <news.nationalpost.com/news/canada/man-who-lost-landmark-revenge-porn-case-seeks-new-trial-because-he-couldnt-afford-lawyer> [Csanady].
[33] *Ibid*.
[34] *Doe 464533 v ND,* 2017 ONSC 127 at para 2, 276 ACWS (3d) 271 Kiteley J.
[35] *Ibid* at para 60.

public disclosure of embarrassing private facts fosters the ability of women to regain control over their sexual identity, right to privacy, and individual autonomy.

III. THE DEVASTATING CONSEQUENCES OF REVENGE PORN ENTITLE VICTIMS TO A LEGAL REMEDY IN ORDER TO REGAIN THEIR SENSE OF INDIVIDUAL AUTONOMY

The facts in *Doe v ND* highlight the typical make-up of revenge porn victims and the damaging consequences that follow. The majority of revenge porn victims are young women that attend university with a lack of resources and financial independence.[36] The acts perpetrated against these women are done with the intent to shame, humiliate, and destroy their reputations.[37] For many victims, the unconsented public exposure manifests as psychological trauma that is not only foreseeable but also intended.[38] It is the tropes on display in the defendant's factum previously mentioned that cause victims of sexual violence to have distrust in the justice system and to fear re-victimization during cross-examination. The shame and the fear of publicizing what happened operates as a further deterrent in seeking a legal remedy. Providing victims with the opportunity to sue for damages allows them to regain control and pursue the justice to which they are entitled.

In her interview with the International Association of Privacy Professionals and The Lawyers Weekly, Donna Wilson, counsel for the plaintiff in the 2016 summary judgment decision, details the victim's attempt to obtain a lawyer. She states that, "everyone kept telling her it was her own fault and [she] had no case … It's 100-per cent victim blaming."[39] "Everyone" is intended to include lawyers that were offered the case but refused. One may assume, at least in part, that the victim blaming from those members of the bar resulted from a general unfamiliarity with the concept of "sexting" (i.e., sending sexually explicit photographs by mobile phone) and the increasing rate of intimate images being sent over the internet. Cara Zwibel, lawyer and Program Director for the Canadian Civil Liberties Association, stated in an interview with McGill Law Journal that there is a systemic problem within the justice system due to a lack of familiarity with social media and online vocabulary.[40] Simply put, image-sharing applications were only introduced less than ten years ago, so this phenomenon remains unknown to many people.[41] With the evolution of applications like Snapchat, Whatsapp, Instagram and the like, a new temptation exists for individuals to explore their sexuality over the internet with a partner they trust. This, however, has created an opportunity for bitter ex-lovers to exploit the other using an intimate image that was intended to be private. In order to end this kind of victim blaming, society as a whole must collectively accept the fact that intimate image sharing is normal behaviour in today's

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[36] Wilson, *supra* note 24 at 00h:08m:30s.
[37] Jill Filipovic, "'Revenge porn' is about degrading women sexually and professionally", *The Guardian* (28 January 2013), online: <www.theguardian.com/commentisfree/2013/jan/28/revenge-porn-degrades-women> [Filipovic].
[38] Amar Khoday, "Resisting Revenge Pornography: When Victims Strike Back" (2016) 25 CCLT (4th) 45 at 46 [Khoday].
[39] Cristin Schmitz, "Landmark tort creation worries some", *The Lawyer's Daily* (12 February 2016), online: <https://www.thelawyersdaily.ca/articles/2159/landmark-tort-creation-worries-some> [Schmitz].
[40] Yuan Stevens & Sammy Cheaib, "Revenge Porn, Tort Law and the Protection of Privacy in Canada" (11 May 2016), *The McGill Law Journal Podcast* (podcast), online: <mljpodcast.libsyn.com/revenge-porn-tort-law-and-the-protection-of-privacy-in-canada>.
[41] Apple, Press Release, "iPhone App Store Downloads Top 10 Million in First Weekend" (14 July 2018), online: <https://www.apple.com/newsroom/2008/07/14iPhone-App-Store-Downloads-Top-10-Million-in-First-Weekend/>.

digitally connected world for both men and women to explore their sexuality and develop relationships. Lawmakers and judges must pay particular mind to the consequences that face women when victim blaming is coupled with the double standard surrounding sexual conduct, as discussed below, placing women in a less powerful position when there has been an invasion of privacy on a public stage.

When two people have engaged in a sexual relationship, they have engaged in acts that involve nudity and the sharing of the most private parts of their body. Once this level of closeness with someone has been reached, sending an intimate picture or video can be viewed as an extension of that intimacy. Tangible items are often exchanged between two individuals in a relationship, and they are sent knowing that they may be incredibly embarrassing if publicly revealed. The public has proven to be overly harsh on women when this occurs.[42] This can be seen by examining how society would view a male exposed in his boxers versus a woman exposed in her lingerie. These two individuals would not endure the same criticism because society does not sexualize the male body to the extent that it does a woman's. This is not to say that a man would not feel serious harm if he had an intimate image of himself publicized, but considering the prevailing double standard surrounding women's sexuality, one has to question whether the repercussions on a man's reputation and career would be the same.

The case of the former Justice Lori Douglas highlights the potential consequences of revenge porn on a victim's career. While acting as Associate Chief Justice of the Court of Queen's Bench in Manitoba, her husband uploaded pictures of her on a pornographic website partaking in consensual sex. The Canadian Judicial Council made an inquiry asking whether Douglas' failure to disclose that her husband had victimized her is "relevant to her appointment, and whether engaging in consensual, lawful, kinky sex [with her husband] disqualifies her from the bench."[43] According to Sebastein Grammon, former Dean of Civil Law and current professor at the University of Ottawa, "if pictures of you naked end up on an internet site, it's quite difficult to say you have the credibility to be a judge."[44]

In 2014, Douglas announced her early retirement, which put an end to the humiliating inquiry. She made this announcement after the appointment of a new three-member panel to reopen the original inquiry and after finding out that federal courts would not become involved until the following year.[45] One can conclude that her retirement was forced considering that Justice Douglas would have received her judicial pension the following year, approximately $130,000 annually for the rest of her life, which is close to half of her annual salary of $315,000.[46] Allan Hutchinson, Osgoode Hall Law Professor and member of the Canadian Association for Legal Ethics argued that she left the bench because "this whole thing about women's sexual activity—well they don't

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[42] Filipovic, *supra* note 37.
[43] Jasmine Akbarali & Gillian Hnatiw, "Victim-blaming couched as legitimate judicial inquiry", *Canadian Lawyer* (17 November 2014), online: <www.canadianlawyermag.com/5360/Victim-blaming-couched-as-legitimate-judicial-inquiry.html>.
[44] "Nude photos of judge contained in complaint", *CBC News* (31 August 2010), online: <www.cbc.ca/news/canada/manitoba/nude-photos-of-judge-contained-in-complaint-1.900235>.
[45] Georgialee Lang, "4 Reasons Why Judge Lori Douglas Finally Resigned", *Canada.com* (25 November 2014), online: <o.canada.com/news/4-reasons-why-judge-lori-douglas-finally-resigned>.
[46] *Ibid*.

deal with that well, to put it mildly."[47] If you compare the case of Lori Douglas to the denouncement of American politician Anthony Weiner, the double standard becomes even more evident.

In May 2011, Weiner was involved in a sexting scandal where he admitted to posting intimate images of his genitals online to other women while he was married. After extensive media attention surrounding his infidelity, he announced his resignation from Congress for the sake of his political party and so that he and his wife could heal from the damage that he caused.[48]

There are clear distinctions between Douglas and Weiner, specifically the content contained in the images, the fact that Weiner was responsible for uploading his pictures online, and the reasons for resignation. The most obvious distinction is found in the repercussions facing their respective careers, Douglas' forced retirement and Weiner having the chance to run for Mayor of New York City two years later.

The difference in career consequences for Lori Douglas versus Anthony Weiner sheds light on the double standard surrounding sexual conduct, and the potentially devastating career consequences facing women when their intimate images are made public. Concerns regarding future career plans for victims are, at least for some, the root of their anxiety and depression. The fear that the image will forever plague their reputation is long lasting because victims have no guarantee that the image will be eliminated from the internet or erased by anyone who may have received the downloaded material. The sustained distress and continued exposure to public victimization over the internet has even led young women to feel forced to resort to suicide.

In recent years, Canadians have mourned the deaths of Amanda Todd and Rehtaeh Parson who were targets of cyberbullying after they had intimate images of themselves posted online. Amanda Todd committed suicide at the age of fifteen, as a result of being bullied relentlessly by her peers after an image of her breasts appeared online. In a video posted by Todd on YouTube, she documents her anxiety, depression, self-harm, drugs, and alcohol use, along with the sentiment that "she can never get that photo back … it is out there forever."[49] Rehtaeh Parsons, another young adolescent woman, decided that suicide was the only permanent solution to the continuous re-victimization that she suffered after a photo was distributed online of an alleged gang rape that occurred while she was intoxicated.[50]

Considering the importance that individuals tend to place on "fitting in" and being accepted by one's peers, the impact of relentless cyberbullying is severe.[51] Most victims of online bullying do not resort to suicide as a response, however there are extensive negative results such as the loss of self-esteem, anxiety, fear, diminished academic performance, eating disorders, psychological

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[47] David Dias, "Girouard stays. Douglas goes. Double standard?" *Canadian Lawyer* (21 April 2016), online: <www.canadianlawyermag.com/legalfeeds/girouard-stays-douglas-goes-double-standard-6865/>.
[48] "Anthony Weiner Biography.com" (7 November 2016), *Biography,* online: <www.biography.com/people/anthony-weiner-20993229>.
[49] TheSomebodytoknow, "My story: Struggling, bullying, suicide, self harm" (7 September 2012), online: YouTube <https://www.youtube.com/watch?feature=player_embedded&v=vOHXGNx-E7E> at 00h:03m:15s.
[50] *No Place to Hide. The Rehtaeh Parsons Story*, DVD (Toronto: TriNetra Productions, 2015).
[51] A Wayne MacKay, "Law as an Ally or Enemy in the War on Cyberbullying: Exploring the Contested Terrain of Privacy and Other Legal Concepts in the Age of Technology and Social Media" (2015) 66 UNBLJ 3 at 5 [MacKay].

problems, and acts of self-harm.[52] Although an intimate image may be "out there forever", the tort of public disclosure of embarrassing private facts will provide victims like Todd with another solution, one that empowers them and provides them with an opportunity to regain their sense of individual autonomy.

While the court in *Doe v ND* did not go so far as to expressly use the terms "resister" or "agent" when referring to the plaintiff, by highlighting her course to pursue remedies, the judge implicitly recognizes her agency in resisting power against the oppression she endured.[53] Suing a revenge pornographer is a legal action that resists the imposition of a victimizer's dominance.[54] Legal action demonstrates that those who have been victimized by the unconsented sharing of private material are willing to publicly target the wrongdoer for having engaged in unjustified and unlawful behaviour that violates not only human dignity but also human autonomy.[55] As Justice Allen Linden stated, to sue tortfeasors using tort law may be seen as a form of empowerment as it "enables a plaintiff to secure compensation, to foster compliance with the law, to educate others, and to seek psychological satisfaction."[56] In these cases, the victim's agency comes out, even if understated and implied, by deciding to take action and establish precedents, which others may seek to employ.[57] This is evident in the final paragraph of the *Doe v ND* judgment where Justice Stinson asserts the following:

> I wish to commend the plaintiff for her courage and resolve in pursuing the remedies to which she is entitled. She has experienced considerable psychological pain arising from the events in question, and has been called upon to relive and recount these events in the course of this litigation, thereby reviving painful memories. Given the lack of precedent in Canadian law for such a claim, she has no assurance of the outcome. Quite apart from the personal result for her, her efforts have established such a precedent that will enable others who endure the same experiences to seek similar recourse.[58]

In deciding whether or not to uphold the creation of the public disclosure of embarrassing private facts tort, courts should remind themselves that the Supreme Court of Canada ("SCC") has characterized privacy as rooted in individual autonomy and dignity, and has identified privacy as being at the very core of liberty in Canadian society.[59] Since the SCC has explicitly stated that privacy is essential for the well-being of the individual, Ontario courts must continue to recognize that this level of invasion on one's privacy warrants the right to be compensated.[60]

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[52] *Ibid* at 7.
[53] Khoday, *supra* note 38 at 66.
[54] *Ibid* at 62.
[55] *Ibid*.
[56] Allen M Linden, "Empowering the Injured" in NJ Mullany and Allen M Linden, eds, *Torts Tomorrow: A Tribute to John G Fleming* (Sydney: La Company Information Services, 1998) reprinted in Allen M Linden et al, *Canadian Tort Law: Cases, Notes & Materials*, 14th ed (Toronto: LexisNexis, 2014) at 42.
[57] Khoday, s*upra* note 38 at 65.
[58] *Doe v ND*, *supra* note 7 at para 71.
[59] *R v Dyment,* [1988] 2 SCR 417 at para 22, 55 DLR (4th) 503 [*Dyment*].
[60] *Ibid*.

IV. THE CRITICISMS MADE AGAINST THE CREATION OF PUBLIC DISCLOSURE OF PRIVATE EMBARRASSING FACTS SHOULD NOT IMPACT ITS PLACE IN ONTARIO LAW

This US-style privacy tort does more than provide civil recourse for people whose intimate images are distributed without their consent. It provides redress for those whose "private lives" are publicized without permission when it "would be highly offensive to a reasonable person and is not of legitimate concern to the public."[61] The disclosure of the private facts must be a public disclosure—meaning the disclosure may be to the general public as opposed to a private disclosure to a small group. The facts released must be private—meaning facts that are not generally known.[62] Private matters protected by the tort could include sexual relationships, intimate personal letters, family quarrels, and disgraceful illnesses.[63]

Due to the tort's novel existence, some question what the true implications will be in the future. The argument has been made that the future of this tort is uncertain because Justice Stinson failed to give meaning to certain elements of the tort, particularly how to define "highly offensive to the reasonable person" and "not of public interest."[64] The tort has also received criticism from individuals who believe a decision of this magnitude should not be based on a one-sided look at the case, without the participation of all parties.[65] What seems to be of larger concern is the potential limit on one's right to freedom of expression as outlined in s. 2(b) of the *Charter of Rights and Freedoms*.[66] An examination of the criticisms and potential concern surrounding the tort against public disclosure of embarrassing private facts is important as a means of providing a balanced perspective to the overall issue, and also to help tease out its strengths. Rebutting the criticisms of the tort is essential to understanding the very role it plays in the prevention and deterrence against revenge porn and similar misconduct.

In *Doe v ND,* Justice Stinson offers insight into why he believed the actions of the defendant fit the criteria of Prosser's "Public Disclosure of Embarrassing Private Facts":

> In the present case the defendant posted on the internet a privately-shared and highly personal intimate video recording of the plaintiff. I find that in doing so he made public an aspect of the plaintiff's private life. I further find that a reasonable person would find such activity, involving unauthorized public disclosure of such a video, to be highly offensive. It is readily apparent that there was no legitimate public concern in him doing so.[67]

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[61] Schmitz, *supra* note 39.
[62] Ryder Gilliland & Thomas Lipton, "Ontario Court Recognizes New Privacy Tort Publication of Embarrassing Private Facts" (28 January 2016) *Blakes Bulletin*, online: <www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=2267>.
[63] *Doe v ND*, *supra* note 7 at para 42.
[64] Schmitz, *supra* note 39.
[65] *Ibid*.
[66] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[67] *Doe v ND*, *supra* note 7 at para 47.

As mentioned above, skeptics have criticized his reasoning for not including more to help define the elements of the tort. One can argue that Justice Stinson left the arena open for interpretation purposely in order to allow the tort to develop in accordance with a society that is adapting to unprecedented technological and social change. "Highly offensive to a reasonable person", and "public interest" are not uncommon terms in law. As such, the absence of an explicit definition for this wording should not hinder one's understanding of the kinds of activity the tort is meant to capture. While jurisprudence can be helpful in this respect, lawyers are also advised to look to Prosser and the factors developed in *Jones v Tsige*, which determine whether an "intrusion upon seclusion" tort qualifies as highly offensive to a reasonable person. He stated that, in determining whether a particular intrusion is highly offensive, one should look at the degree, context, conduct, circumstances of the intrusion, the tortfeasor's motives and objectives, and the expectations of those whose privacy is invaded.[68] These factors can aid lawyers in developing arguments as to why the publication, or the act of publication, of particular private facts would be highly offensive or not.

In terms of defining "public interest", lawyers would be advised to rely on Chief Justice McLachlin's definition in *Grant v Torstar Corp*, where she states that in order to be considered "of public interest", the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached."[69] She added that the public interest "may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have genuine stake in knowing about the matter published."[70]

Since *Doe v ND* was decided on a default judgment, ND's new lawyer makes the argument that a decision of this magnitude ought not to be made without a full defence.[71] Canada's justice system is not without its flaws, but allowing defendants the right to a full answer and defence is something that Canadians should be proud of. There indeed exists defences to the public disclosure of embarrassing private facts tort, which are worth exploring. In doing so, it is important to highlight the possible justifications for this type of privacy invasion and more specifically the tension created in balancing the rights of all parties.

Section 4 of Saskatchewan's *Privacy Act* outlines defences to be used to prove that an act, conduct, or publication is not a violation of privacy. Section 4(1)(a) reads:

> 4(1) An act, conduct or publication is not a violation of privacy where:
>
> (a) it is consented to, either expressly or impliedly by some person entitled to consent thereto[72]

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[68] JD Lee & Barry A Lindahl, *Modern Tort Law: Liability & Litigation*, 2nd ed (Eagan: West Group, 2002) (loose-leaf revision 48:6) at 48-9.
[69] *Grant v Torstar Corp,* 2009 SCC 61 at para 105, [2009] 3 SCR 640.
[70] *Ibid*.
[71] Csanady, *supra* note 32.
[72] *The Privacy Act,* RSS 1978, c P-24 [*Privacy Act*].

The defence of "implied consent" raises the issue of whether a privacy expectation is itself reasonable in the given circumstances. This would require an assessment of the circumstances in which a private object has been compromised, and thereby identifying the factors to be weighed in the "reasonableness" balance.[73] Factors that would be considered relevant would be the objective of the defendant, the severity of the invasion, and where the invasion of privacy occurred.[74] The analysis further focuses on whether, based on the plaintiff's behaviour and the context of which the invasion occurred, it is reasonable to allow one to assert a lower expectation of privacy.[75] If a reasonable person should expect to be secure against an invasion of privacy, then the plaintiff's consent to the invasion cannot be implied.[76]

The concept of "implied consent" is rife with difficulties, especially when discussing an invasion of privacy in the context of a society influenced by the pervasiveness of communication technology. Courts must avoid implying a plaintiff's consent when it can be inferred that they were being less-than-cautious in protecting themselves. Defendants should not be freed of liability just because the plaintiff provided them with an opportunity to invade their privacy.[77] In the context of revenge porn, victims should not be faulted when unintended individuals are given access to an intimate space meant for one intended person.

In order to protect the balance between the rights of the victim and the liability of the defendant, consent to embarrassing private facts being circulated on a public stage must be explicit and informed. In this instance, a defence of consent can be fairly relied upon. Otherwise, the risk of victim blaming, and holding the victim accountable for a breach of their privacy, would be too dangerous and inconsistent with what the tort is meant to accomplish.

Another possible justification to the public disclose of embarrassing private facts is the public interest defence. Saskatchewan's *Privacy Act* states this defence as follows:

> 4(2) A publication of any matter is not a violation of privacy where:
>
> (a) there were reasonable grounds for belief that the matter published was of public interest or was fair comment on a matter or public interest; or
>
> (b) the publication was, in accordance with the rules of law relating to defamation, privileged;
>
> but this subsection does not extend to any other act or conduct whereby the matter published was obtained if such other act or conduct was itself a violation of privacy[78]

To assess whether or not the disclosure of embarrassing private facts is in the public interest, one must again consider whether a privacy expectation was reasonable given the particular set of circumstances. When the public interest defence is invoked, the court will decide if there is

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[73] John DR Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42 McGill LJ 355 at 390 [Craig].
[74] *Ibid* at 397.
[75] *Ibid*.
[76] *Ibid*.
[77] *Ibid* at 398-99.
[78] *Privacy Act, supra* note 72.

a societal interest supporting the defendant's invasion that outweighs the plaintiff's individual interest. The question to be considered: is it reasonable to allow the plaintiff to rely on an expectation of privacy despite the countervailing societal interest?[79] Prosser described the public interest justification as follows: "the privilege of giving publicity to news, and other matters of public interest, arises out of the desire and the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell them."[80] He described "news" as including all events and items of information that are out of the ordinary and which have that indefinable quality of information which arouses public attention.[81] From a journalism perspective, how public interest is defined may prove worrisome where a narrow definition serves to restrict freedom of expression. The question must be, who bears the greater cost?

As outlined in s. 2(b) of the *Charter*, "everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[82] Threats of constitutional infringements may affect an individual's willingness to fully express themselves. At the same time, however, there is also a strong public interest in preventing the publication of personal information that is damaging to one's reputation.[83] Canadian constitutional jurisprudence does not recognize a hierarchy of rights, therefore, freedom of expression has no greater status in our law than other constitutional rights, such as the right to privacy protected under s. 8.[84] Should there be a point in time where the tort potentially infringes on freedom of expression, with the aim to protect one's privacy rights, the court will use a balancing approach to determine if the infringement of s. 2(b) rights is sufficiently justified.[85] In the case of civil disputes between two private litigants, the courts would be wise to develop a similar balancing approach when asked to weigh the interests of free speech against the reputational interests of the plaintiff. In *Hill v Church of Scientology of Toronto*, Justice Cory related reputational interests to the right of privacy and determined that the value of freedom of expression could be justifiability limited by the common law for the purposes of protecting an individual's reputation and privacy interests.[86] As Ontario continues to develop a civil recourse for revenge porn, lawmakers should look to the law in other Canadian provinces in an attempt to balance these competing interests and avoid overly stringent laws in its pursuit to protect victims.

V. THE FIGHT TO END REVENGE PORN IN OTHER CANADIAN JURISDICTIONS

Other provinces in Canada have reacted to the evolving concern surrounding privacy invasion. Four provinces have created a statutory tort for the invasion of privacy: British

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[79] Craig, *supra* note 73 at 390.
[80] *Ibid*.
[81] *Ibid*.
[82] *Charter, supra* note 66.
[83] OPCC, *supra* note 4 at 8.
[84] Craig, *supra* note 73 at 391.
[85] *Ibid*.
[86] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 121, 126 DLR (4th) 129.

Columbia,[87] Manitoba,[88] Newfoundland,[89] and Saskatchewan.[90] The four privacy acts are similar in that liability is established when the defendant acts wilfully (except in Manitoba) and without a claim of right. The nature and degree of the plaintiff's privacy entitlement is confined to what is reasonable in the circumstances.[91] Invasion of privacy has not been given a precise definition in any of the above-mentioned legislation, so although a right to privacy is inherently the goal of each of these laws, they have left courts with the task of defining the contours of that right.[92]

Quebec first recognized invasion of privacy as a civil wrong consisting of an intentional breach within article 1053 of the *Civil Code of Lower Canada* in *Robbins v CBC*.[93] This view has subsequently been codified, with privacy being elevated to the status of a right. Section 5 of Quebec's *Charter of Human Rights and Freedoms* guarantees to everyone the "right to respect for his private life."[94] Article 3 of Quebec's *Civil Code* declares that: "every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy. These rights are inalienable."[95] These provisions have been applied in cases where non-consensual video recordings or photographs of a sexual nature were shared with third parties.[96]

The provinces mentioned above have dealt with balancing the right to privacy with the right to freedom of expression through a proportionality analysis. In applying a proportionality analysis in cases involving the public exposure of a person's image, the reasonableness balance tips in favour of the defendant if they can point to some legitimate educational or political rationale underlying the impugned publication versus the market value of the image's characteristics. Furthermore, the social status of the plaintiff should be a relevant consideration because such public figures tend to benefit from publicity and often have a significantly lower reasonable expectation of privacy than that of ordinary citizens.[97] In the instance of public disclosure where the plaintiff and the defendant are relying on fundamental values of equal constitutional weight, privacy and freedom of expression, respectively, it is necessary to identify the relevant interests and circumstances that support each side's position.[98] Ontario would be wise to adopt a similar analysis for resolving the tension between the interests of the media and those of an individual who claims their freedom of expression has been infringed. The proportionality analysis will assist Ontario courts in limiting the scope of the tort and punishing only those who have committed the intended wrong.

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[87] *Privacy Act*, RSBC 1979, c 336.
[88] *The Privacy Act*, RSM 1987, c P125.
[89] *Privacy Act*, RSN 1990, c P-22.
[90] *Privacy Act*, *supra* note 72.
[91] *Jones, supra* note 1 at para 52.
[92] *Ibid*.
[93] *Robbins v Canadian Broadcasting Corporation* (1957), 12 DLR (2d) 35, [1958] CS 152.
[94] *Charter of Human Rights and Freedoms*, CQLR c C-12, s 5.
[95] art 1260 CCQ, art 3.
[96] Khoday, *supra* note 38 at 45.
[97] Craig, *supra* note 73 at 392-93.
[98] *Ibid* at 395.

Manitoba has been the most progressive province in Canada in reacting to the non-consensual distribution of intimate images through the creation of *The Intimate Image Protection Act* ("*IIPA*"), which came into force on January 15, 2016.[99] The *IIPA* states:

> 11(1) A person who distributes an intimate image of another person knowing that the person depicted in the image did not consent to the distribution, or being reckless as to whether or not that person consented to the distribution, committed a tort against that other person.[100]

The *IIPA* provides that a plaintiff does not lose their reasonable expectation of privacy when they consent to another person recording their image or when they provide their image to another person "in circumstances where that other person knew or ought to reasonable have known that the image was not to be distributed to any other person."[101] Although Manitoba has yet to see a case in which the *IIPA* is relied on, what makes the law particularly effective is that it invalidates two defences that defendants might otherwise attempt to use in court—ownership and consent.[102] No defendant will be able to argue that because the images were shared with the defendant voluntarily, that no harm was committed by sharing them with others. This is a large step in the right direction from the province that Lori Douglas called home. The resulting implications on Justice Douglas' career may have been profoundly different if the *IIPA* had been created only two years earlier.

Manitoba is the first of the Canadian provinces to move towards creating a law in harmony with the amendments made to the *Criminal Code* in 2014. These amendments were made after a federal and provincial committee inquired as to whether the *Code* was meeting the challenges of cybercrimes.[103] While this committee concluded that most of the *Code* provisions were flexible enough to adapt to the challenges of a high tech world, they concluded that there was a notable void with respect to the distribution of intimate images without consent.[104] The federal government introduced Bill C-13, the *Protecting Canadians from Online Crime Act*, which addresses the non-consensual sharing of intimate images and harassing communication.[105] The amendment is as follows:

> 162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

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[99] *Doe v ND*, *supra* note 7 at para 18.
[100] *Intimate Image Protection Act*, SM 2015, c 42, CCSM, c 187, s 11(1) [*IIPA*].
[101] Khoday, *supra* note 38 at 47.
[102] Tamara Khandaker, "Canadian Revenge Porn Victims Can Now Sue – But Only in One Province", *Vice News* (19 January 2016), online: <https://news.vice.com/article/canadian-revenge-porn-victims-can-now-sue-but-only-in-one-province>.
[103] Department of Justice, *Cyberbullying and the Non-consensual Distribution of Intimate Images* (Ottawa: CCSO Cybercrime Working Group, June 2013), online: <www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/p6.html> [Department of Justice].
[104] MacKay, *supra* note 51 at 16.
[105] OPCC, *supra* note 4 at 8.

> (a) of an indictable offence and liable to imprisonment for a term of not more than five years; or
> (b) of an offence punishable on summary conviction.
>
> (2) In this section, *intimate image* means a visual recording of a person made by any means including a photographic, film or video recording,
>
> (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
> (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
> (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.
>
> (3) No person shall be convicted of an offence under this section if the conduct that forms the subject-matter of the charge serves the public good and does not extend beyond what serves the public good.
>
> (4) For the purposes of subsection (3),
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> (a) it is a question of law whether the conduct serves the public good and whether there is evidence that the conduct alleged goes beyond what serves the public good, but it is a question of fact whether the conduct does or does not extend beyond what serves the public good; and
> (b) the motives of an accused are irrelevant.[106]

As stated by the Department of Justice:

> Young people are increasingly consensually exchanging intimate images … Often these images are originally intended for an individual or only a small number of other people but are disseminated more widely than the originator consented to or anticipated. The effect of this distribution is a violation of the depicted person's privacy in relation to images, the distribution of which is likely to be embarrassing, humiliating, harassing, and degrading or to otherwise harm that person.[107]

The amendments provide affirmation to the public that the government is willing to recognize novel harms and adapt accordingly in order to punish victimizers.

Since the federal government has stepped in to make the non-consensual distribution of intimate images a federal offence, it is time for Ontario to establish legislation that would allow victims to seek compensation. Without legislation in place directly targeting the misuse of intimate images, Ontario courts will have to rely solely on common law to provide justice for victims of revenge porn and other privacy invasions that take place on a public stage.

FINAL REMARKS

Although the existence of Ontario's newest privacy tort may be in jeopardy, it is hard to imagine that it would be rejected by the same legal system that characterized privacy as essential to the well-being of the individual and something that is profoundly significant to public order.[108]

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[106] *Protecting Canadians from Online Crime Act,* SC 2014, c 31, amending *Criminal Code,* RSC 1985, c C-46.
[107] Department of Justice, *supra* note 103.
[108] *Dyment, supra* note 59 at para 17.

Regardless of the original decision being set aside, Ontario courts have demonstrated the flexibility to keep pace with a society adapting to technological advancements in communication by fashioning legal remedies for novel kinds of harm.[109] In an age of sexting and cyberbullying, *Doe v ND* provides a useful precedent and will hopefully deter the misuse of intimate images in the future.[110] One of the limitations of a legal reaction (either criminal or civil) to a problem is that it is normally a *post facto* response. While deterrence plays a preventative role, it must be combined with education on the harmful consequences of cyberbullying.[111] Individuals are urged to reflect on the small steps that can be taken as a society to diminish this kind of activity. A starting point for eliminating revenge porn is for individuals to recognize the harmful effects of sexually shaming women, which comes from the pervasive view that sexually active women are disgraceful.[112] In this regard, legislatures must make a change by supporting the women who speak up against these privacy violations.

As Ontario works to provide a beneficial and legitimate means of recourse, it is important to recognize the problems that occur in order to understand the magnitude of the issue at hand. The biggest issue facing advocates for the protection against revenge porn is that Ontario would not be able to assert jurisdiction over a revenge porn website featuring a Canadian located outside of Canada. In this instance, there may not always be a connection to Canada, which is required in order for a foreign-based organization to be subject to *The Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"). In order for *PIPEDA* to apply, the website needs to be engaged in commercial activity. Unfortunately, many of these websites are strictly for personal use and have no commercial purpose.[113] As such, more work must be done to resolve cross-jurisdictional dilemmas in this area of law.

In the modern world of communication and technology, how do we protect a reasonable expectation of privacy? Some commentators have suggested that privacy is dead while others have suggested that privacy is a concept that needs to be updated and re-conceptualized. Professor Karen Eltis of the University of Ottawa Faculty of Law argues that privacy should be viewed as an extension of personality and classified as a human right grounded in dignity.[114] She asserts that "there is a deeper underlying change needed—one to our understanding of privacy, and its relationship to access to justice and the exercise of judicial discretion."[115] As a response to the prevalence of revenge porn, it is the court's responsibility to promote privacy as a fundamental right worthy of protection by penalizing wrongdoers and compensating victims. It is only then that a society can be certain that privacy will continue to be viewed as integral to an individual's well-being and worthy of protection.

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[109] Michelle McQuigge, "Experts applaud ruling against man who posted ex's explicit video online", *CBC News* (27 January 2016), online: <www.cbc.ca/news/canada/toronto/explicit-video-ruling-1.3422694>.
[110] Csanady, *supra* note 32.
[111] MacKay, *supra* note 51 at 18.
[112] Filipovic, *supra* note 37.
[113] OPCC, *supra* note 4 at 6.
[114] Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011) 56:2 McGill LJ 289 at 314.
[115] *Ibid*.