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ARE MASCULINE IDEOLOGIES STILL DOMINANT IN TODAY'S CANADIAN JUSTICE SYSTEM?

ERIN HUSTON

Introduction

Looking critically at ideological approaches to justice in Canada reveals that specific traits often framed as either 'masculine' or 'feminine' in society are widely at play. The Canadian legal system has historically reflected masculine ideologies, with an emphasis on punishment and a focus on rational, consistent thought. A number of new approaches to justice have been introduced in Canada, many with new ideological bases. The ideological approach that the Canadian justice system operates under at any given time is important because it affects the way in which everyday citizens are able to navigate the system. The difference between feminine and masculine ideological approaches to justice can be pivotal in experiences with the justice system, especially for minorities, including women, people of colour, as well as those suffering from mental illness. The ideological foundation of a system can mean the difference between an individual further suffering at the hands of the legal system, and the individual being able to experience justice that is more likely to be equitable and unbiased for them. Approaches to justice that are built primarily on a masculine ideological framework often fail to take into account the experiences and knowledge of those marginalized in a masculine system. This paper considers both the masculine and feminine ideological approaches to justice that are at work in the Canadian justice system, looking at the dominance of either one over the other over time. It addresses avenues for achieving justice, revealing the gendered ideologies of each. While the ideologies are labeled as masculine and feminine, it is not only people who identify with traditional corresponding gender categories that adhere to those ideologies. Both men and women can identify with either ideological approach regardless of their gender identity. In essence, gender identity does not dictate the ideological approach to which an individual adheres.

Masculine Identities Defined

Masculine ideologies are built on traditional ideas of being 'a man.' Stereotypes about gender consist of philosophies about psychological and personality traits for men and women, including their interests and preferences (Brannon, 2005, p. 160). Gender stereotypes and roles are social constructs that reflect ideas constantly changing as society does. Masculine norms currently upheld in Canada are similar to male stereotypes. Men are viewed as active, independent, rough, and strong (p. 163), as opposed to women who exist as passive, dependent, pure, refined, and delicate. These traditional stereotypes Connell (as cited in Brannon, 2005) have roots in 16th-century Europe and the changing social and religious climate of the time. Throughout the 16th century, Europe experienced monumental industrial change and lead in world exploration. These activities, in addition to civil wars taking place in Europe during this time period, were associated with men, forming "the basis for modern masculinity" (p. 163).

In 1976, David and Brannon described four themes of a concept they refer to as 'the Male Sex Role' (p. 3). The first of these themes is 'No Sissy Stuff', based on the rejection of all things presumably feminine. 'The Big Wheel' is the second theme and describes the masculine quest for success and status, as well as the desire to be looked up to. 'The Sturdy Oak' is based on the masculine manner of toughness, confidence, and self-reliance. The final of David and Brannon's themes is 'Give Em Hell', which reflects the acceptability of violence and aggression in men's behaviour. Based on these four 'pillars of manhood', the closer that a man conforms to these characteristics the closer that person would be to being socially accepted as a 'real man'. Fitting into these themes leaves little room for creating intimate relationships or exhibiting emotion. These ideas of relentless 'dominance' and 'toughness' are strong components of the masculine ideologies at work in Canada's justice system.

Gender and Morality

Like masculinity, femininity is subject to stereotypes. These stereotypes reveal a strong connection to how femininity ideologies in the legal system. Carol Gilligan offers a closer look in her work regarding gendered ideas surrounding morality. Gilligan (1982) speaks of the feminine voice, describing the moral sensibility of women. She quotes Freud when describing the way that women traditionally differ from men in regards to morality:

> [Women's] superego is never so inexorable, so impersonal, and so independent of its emotional origins as we require it to be in men… Women show less sense of justice than men, they are less ready to submit to the great exigencies of life, they are more often influenced in their judgments by feelings of affection or hostility. (p. 3)

This language is representative of larger assumptions that women are more intuitive and empathetic while men are more deliberate and rational in moral choices (Brabeck, 1983). Gilligan questions what truth Freud's statements hold and looks to previous studies on the differing morality between genders. One of these studies is an article by Mary Brabeck (1983) in which she references a study done by Piaget regarding how girls and boys follow games and rules (p. 275). Piaget found that boys were more attentive to the rules of the games than girls. He also stated that girls were more tolerant and adopted more accepting attitudes with the mindset of 'a rule is good so long as the game repays it' (p. 52). Brabeck critically notes that Piaget focuses on the standard set by the boys and decides that the legal sense is "far less developed in little girls than in boys" (p. 275). By using the findings of the male participants as the default information of human behaviour, Piaget invites bias into this study and the findings that result from it. Gilligan also refers to work by George Eliot who regarded women's 'susceptibility' to the adverse judgments of others as stemming from their "lack of power and consequent inability to do something in the world" (p. 6). She summarizes her overall findings, concluding that the traits that have traditionally defined women as 'good' are the same traits that socially define them as less valuable than men in regard to moral development and judgment. Brabeck expands on this point, writing "this focus is what has led to the devaluing of the roles of women, the ability to achieve intimacy, maintain relationships and act as caretakers has typically been devalued over more masculine roles" (p. 276)

Considering Gilligan's theory regarding the ethics of care can further understandings of masculine ideologies and their foundations in traditional stereotypes. Gilligan and Attanucci (1977) find that "concerns about

both justice and care are represented in people's thinking about real-life moral dilemmas, but people tend to focus on one set of concerns and minimally represent the other" (p. 224); there is an association between "moral orientation and gender such that men and women use both orientations but Care Focus dilemmas are most likely to be presented by women, and Justice Focus dilemmas by men" (p. 233). Nodding's further develops this thinking when she refers to the 'mother's voice' of care and the 'language of the father', which are observable in approaches to justice (White, 2009, p. 460). The differences between the justice-focused moral orientation and the care-focused moral orientation emerge in relation to how moral problems are conceived. For example, Gilligan and Attanucci use the debates on abortion in the 1970s, which are similar to current debates on abortion. They explain that the abortion dilemma is based on a justice orientation of morality, because the philosophy of whether or not abortion is moral "hinges on the question of whether a fetus is a person, and if so, whether its claims take precedence over that of the pregnant woman" (Gilligan & Attanucci, 1977, p. 225). Framing the abortion dilemma through an ethics of care lens would instead focus on the connection between the fetus and the pregnant woman and whether it is morally responsible or irresponsible to extend or end this connection. The ethics of care approach is rarely considered due to the assumption that justice is a single moral perspective.

Within a legal context, much of Canada's abortion law history comes from an ethics of justice standpoint. When Parliament enacted the first Criminal Code in Canada in 1892, abortion was prohibited. This decision was a reflection of the traditional positions regarding abortion widely held at the time, which reflect the ethics of justice. Gatens-Robinson (1992) explains this traditional argument:

> The fetus has a right to life; the woman has a right to decide what shall happen to her body. In the case of a contemplated abortion, these two sets of rights conflict with each other. The right to life, however, is the most basic of all rights and as such is a weightier right than the right to decide what happens to one's body. Thus, in a situation of conflict, the right to life outweighs the right to control one's body and abortion is impermissible on moral grounds. (p. 41)

It was not until 1969 that Canadian Parliament passed amendments to Section 251 of the Criminal Code, which allowed a small percentage of abortions to be legal under extraordinarily restricted conditions. On January 28, 1988, the Supreme Court of Canada ruled that Canada's abortion law was unconstitutional, citing it as a violation of section 7 of the Charter of Rights and Freedoms because it infringed on a woman's right to life, liberty, and security of the person. This change demonstrates a shift from an ethics of justice view to an ethics of care perspective, because the woman and her fetus are not taken as two distinct individuals with competing rights (Gatens-Robinson, 1992, p. 62).

While abortion is still legal throughout Canada, there have been a number of attempts to enact legislation that undermines abortion as a medical procedure, and attempts to give rights to a fetus separate from the rights of a mother. In 1990, the federal government, led by Progressive Conservative Prime Minister Brian Mulroney, introduced Bill C-43. This Bill would sentence doctors to two years in prison for performing abortions when a woman's health was not at risk. Bill C-43 was passed by the House of Commons, but failed in the Senate after a tie vote (CBC News, 2014) More recently, in 2007, Bill C-484, the "Unborn Victims of Crime Act" passed its Second Reading in Parliament after being introduced by Conservative backbencher Ken Epp (CBC News, 2014). This Bill

called for the slaying of a fetus to be considered as a separate offence from the slaying of a pregnant woman, therefore simultaneously creating fetal personhood and endangering abortion rights. After a national pro-choice campaign against Bill C-484, the Conservative government withdrew its support for the bill, which then failed when a federal election was called in October of that year. The changes regarding abortion law demonstrate that the Canadian justice system, even in shifts toward the implementation of feminine ideologies, reverts back to its historical predisposition of working from an ethics of justice basis and upholding masculine ideologies of morality.

Masculinity and Femininity in Relation to Political Ideologies

Ideologies of political parties within Canada play a significant role in the gendered ideology promoted by Canadian justice system at any given time. Throughout Canadian history, changes in the extent to which approaches are masculine or feminine often reflects the political party in power at that time, as the case of abortion law reveals. While there have been a significant number of political parties registered in Canada, the ideologies of these parties are commonly simplified into categories of liberal or conservative (Elections Canada, 2017). Both liberalism and conservatism are political ideologies with strong core beliefs that reflect ideologies of binary gender. As a result, they have an effect on the Canadian justice system's ideologies and outcomes. In relation to U.S. politics, Nicolas Winter (2010) gives an illustration, stating:

> These connections between party images and gender stereotypes have been forged at the explicit level of traits that Americans associate with each party and also at the implicit level of unconscious cognitive connections gender and party stereotypes. This means that in Americans' minds, the Democrats are not simply the party of women's rights and compassion but are in essence the "female" party. Conversely, the Republican Party is not simply strong, aggressive and opposed to feminism, but also intrinsically "male" in a deeper psychological sense. (p. 1)

Liberalism is a political ideology that, at its core, denounces economic and social inequality (Saylor Foundation, p. 2). What is essential to liberalism is equality of opportunity for all, which is thought to be achieved primarily through the elimination of discriminatory practice. Liberals tend to believe that it is the government's responsibility to ensure that all citizens have access to equal opportunities (p.2). These beliefs revolve around communal or interpersonal traits; beliefs that tend to align with feminine stereotypes (Zemore, Fiske, & Kim, 2000; Bem, 1974 as cited in Winter, 2010, p. 5). Conservatism emphasizes a preference for the existing order of society, and opposing most efforts that involve rapid changes within society (Saylor Foundation, p. 3), this is a result of conservative ideologies having a base in teachings of religion and traditional morality. Conservatives strive to enhance individual liberty by maintaining strict moral codes. The traits of conservative ideology align with masculine stereotypes that emphasize individual agency and achievement more than relationships (Zemore, Fiske, & Kim, 2000; Bem, 1974 as cited in Winter, 2010, p. 5).

Research further illustrates how liberalism connects with femininity, and conservatism's connection to masculinity, finding that female political candidates in North America are viewed as more liberal than their male counterparts. Experimental studies have found that individuals tend to think of female candidates as more liberal than male candidates (Huddy & Terkildsen, 1993, p. 120). These studies also found that individuals perceive female

candidates as more adept at handling social issues and programs like welfare, healthcare, education, and environmental protection issues, as well as programs that generally involve caring for the neediest sectors of society (pp.122-123). A study by Koch (2000) to determine if they perceived female candidates to be more liberal than male candidates; it found that citizens often use gender to infer candidates' positions on issues, their personality traits and competencies, and their ideological orientation (pp. 417-418).

Masculine Ideology and Legal Development

The manifestation of masculine ideologies in law is evident within a number of legal theories. Even legal theories that claim to be 'gender blind', such as legal positivism, are categorized as a part of masculine ideologies, because they fail to take into consideration the experiences of socially marginalized groups, such as the experiences of women or people of colour (Wacks, 2015). Its claim of objectivity is built on ideas of morality held by those who have historically been in power, which are white males (Becker, 1999, p. 21). Additionally, the notion of prioritizing the black letter of the law over personal experiences or emotions has its basis in masculine ideology. Feminist legal theory builds on this idea, adding that because masculine ideologies work on the assumption that the male norm is equivalent to the social norm. In doing so, they create a sense of the 'Other', which is ascribed to non-males. Masculine ideologies of this form carry implicit bias in that they are considered to be the only worthy ideologies. Legal developments can devalue the experiences of individuals who fall outside of its white North American, middle-class, able-bodied, cisgender, heterosexual male norm, which means that the outcomes of that legal system are built on the needs of those it considers valuable. Thus, a system that does not judge feminine ideologies to be worthy of consideration occurs from a failure to value differing individuals as human beings that may require other legal approaches than depart from the white male norm (p. 23). Within studies regarding constitutional law, criminal law, family law, welfare law, and commercial law, there are often few mentions of masculinity, despite the fact that these subjects have been constructed from a masculine vantage point (Collier, 1995, p. 3).

Law is often viewed similarly to a science; both assert the idea that there is one truth to be discovered and there can be a formula to discover that truth. There is the assumption that law should be "divorced from politics, morals, and systems of belief, the law's task is to discern the 'facts' and find the truth on any given matter placed before it" (Naffine, 1990, p. 57). Feminist legal theorists take into consideration the dualisms of legal thought (Wacks, 2015, p. 304). One of the dualisms involves concepts such as rationality, thought, reason, power, objective, and abstraction, which are considered masculine. The opposite concepts of irrationality, feeling, emotion, nature, sensitivity, and contextualized are attributed to the femininity. This binary divide in the understanding of law and how the legal system should be constructed illustrates the way in which masculine ideologies have been dominant in the development of Canada's legal system: "law has developed over time in the context of theories and institutions which are controlled by men and reflect their concerns" (Collier, 1995, p. 35). The premise that contextualized reasoning would create unjust outcomes often goes unquestioned. This presumption can be seen in the role of legal decision makers being expected to make decisions based on reason as opposed to emotion, and not allowing the outcome of a legal process be contaminated or influenced by any personal opinion.

Gender Ideology and the Criminal Justice System

The dichotomy of the masculine and feminine approaches to justice is well illustrated in Canada's criminal justice system. The main part of this divide comes from how differing approaches to justice conceptualize human nature, which ties into beliefs about how punishment should work. Views of punishment are really questions of moral justifications, which ideals of masculinity and femininity reflect differently (Wacks, 2015, p. 313). Masculine ideology supports the belief that a delinquent deserves to be chastised for their crimes and justice can be upheld through proper sentencing and punishment. A feminine ideological view rationalizes punishment as focusing on the relationships between the offender and the victim, as well as the offender and society. "Those of a benevolent disposition generally tend to support to proposition that even the most malevolent offender is capable of reform or rehabilitation and hence the rationale for punishment should be forward looking" (Wacks, 2015, p. 308).

Retributive Justice

Traditional judicial systems are "masculine in nature and masculine in practice" as based on their methods of punishment and hierarchical structure, which does not work on a collaborative level (Hopkins, 2005, p. 699). Retributive justice is based primarily on punishment and considers aspects of crime, including severity of the harm done, age of the offender, and the previous behaviour of the offender (Van Prooijen, 2005). The justice system's approach to penalty itself can be considered a masculine ideology; punishment allows for control over the outcomes and the lives of those involved. Retribution often exists alongside revenge: when someone does something bad, human beings typically want something bad to happen to that person in return. The desire is that the punishment fit the crime that was committed. This sense of justice comes from proportionality, which pursues the following reasoning: that you have caused X amount of pain and suffering, so it's only fair that you suffer X pain yourself. There is also the consideration of deterrence: if there is to be a society with limited crime, then it outwardly punishes crime to demonstrate that bad things happen to those that do bad. Punishing a person who commits a crime or wrongful act is meant to impress upon the offender that the action was wrong and will not be tolerated. Punishment is also meant to promote those same ideas to other members of society in hopes of deterring them from committing similar crimes.

These penalties are carried out by those in power and are often imposed on those with none. These practices connect back to Brannon's four themes of the Male Sex Role and the masculine longing to be looked up to, or perhaps have someone to look down on. Policing adheres to masculine ideologies through a "hidden curriculum about masculinity" (Prokos & Padavic, 2002, p. 439). Prokos and Padavic (2002) discuss the requirement of masculinity in police training in a number of ways, stating that the low representation of women in the police force is not a result of masculinity being required for the job, but a result of masculinity being "taught in police academics as a subtext of professional socialization" (p. 439). A part of masculine ideology includes the rejection of femininity, so any feminine traits that men or women bring into policing are perceived as a threat to the dominance that the position and title give to those who hold them. For example, in a 1971 case a man spent 11 years in prison for a crime he did not commit (Carrigan, p. 385). Much of the evidence against the man came from two eyewitnesses who claimed, eleven years later when the case was reopened, that they had lied in their original testimony because of

police pressure. These pressures are a result of the emphasis that is put on punishment within the legal system; players within the legal system want to see justice in the form of punishment for wrongdoings, sometimes doing so at the expense of individuals.

Restorative Justice

Restorative justice is an approach to justice that is grounded in the belief systems of many indigenous peoples around the world. Those that practice restorative justice view harm as a violation of people's rights and relationships rather than as a violation of rules or policies (Roland et al., 2012). Many believe that "the legal process itself causes harm to victims" and that restorative justice offers a alternative (Hopkins, 2005, p. 695). Restorative justice has been defined as an approach that focuses on repairing the harm caused by the offending behaviour, while holding the offender accountable for his/her actions (Roland et al., 2012). Restorative justice is built on promoting victim recovery rather than interfering with it, which the traditional judicial system is capable of doing. For victims of crimes such as sexual violence, the criminal trial process can cause further harm and re-victimization. Restorative justice aims to focus on rehabilitation of the offender over enforcing a penalty. This focus on relationships over rules reflects the dichotomy of feminine and masculine ideologies Restorative justice is a fairly new approach to justice in Canada and is slowly becoming more widely credited and used. In 2000, the Ontario Ministry of Education introduced the Safe Schools Act (Bill 81) in an attempt to "increase respect and responsibility… and set standards for safe learning and safe teaching in schools" (Roland et al., p. 436). With the implementation of this act, schools began to use a 'zero-tolerance' policy when it came to issues like bullying. Using zero-tolerance policies, the schools enacted an approach similar to retributive justice, focusing on punishment of the offender. It assumes punishment is comforting to the victim. In response to criticisms equating 'zero-tolerance to 'zero-thinking', the ministry amended the Safe Schools Act (Bill 212) in 2007 in an attempt to challenge school boards to improve their disciplinary practices. Schools have adopted restorative justice practices as teachers move from enforcing a zero-tolerance policy to concentrating on the relationships between students and rebuilding relationships that have been affected negatively by harm. One study looked at the effect of restorative justice approaches being used in schools and found that participants reported an "improved moral tone within the school" (p. 437). The study also reported a high degree of sensitivity for culture and equity among students, providing statistical evidence of a reduction in safety issues (e.g., physical violence, bullying) and in subordination issues (e.g., harassment, racial slurs and language) (p. 437). It showed restorative justice is an effective option in approaches to conflict and harm.

Canada's Youth Criminal Justice System

Canada's youth criminal justice system offers a unique view of the shift from the dominance of masculine ideologies in the justice system to more feminine approaches to law. Over the last 100 years, the youth justice system has undergone major changes as a result of different ideologies becoming influential over time. The Juvenile Delinquent Act was introduced in 1908; this Act was based primarily on the welfare model. Under this model, it was expected that "every juvenile delinquent shall be treated not as a criminal but as a misdirected and misguided child" (Bell, 2014, p. 63). The youth justice system mainly used informal processes and provided minimal legal protection,

with courts acting more as a child protection hearing than as a criminal trial. The focus was heavily on reforming young offenders, often giving them the benefit of the doubt when it came to imposing harsh punishments (p. 65).

In 1984, the Young Offenders Act (YOA) was introduced. The Act was based on a number of models, including the welfare model (primarily feminine in ideology) and the crime control model (primarily masculine in ideology). The YOA saw an increase in formal court procedures for young offenders, with the government being responsible to provide lawyers for young persons who could not afford one. Aspects of the YOA included the acknowledgement of "special needs" of youth and how they should be treated in the justice system, including limiting the accountability of the young person due to their immaturity. Due to criticisms, this Act was subject to a number of amendments that moved it further toward a crime control model. In 1986, 1991, and 1995 revisions allowed raising maximum sentences, weakened identity protection rules, and facilitated charges for breaches of probation (Bell, 2014) The Youth Criminal Justice Act (YCJA) was introduced in 2003. Similar to the YOA, it worked under a combination of justice, crime control, and welfare models; however, the YCJA also introduced restorative justice models. Under the YCJA, the purpose of the youth justice system became "the protection of the public though crime prevention, rehabilitation, and meaningful consequences" (Bell, p. 64). Like the YOA, there were many criticisms of the YCJA. They mainly came from crime control supporters who advocated for laws to be tougher on young offenders. Advocates for crime control believed that the YCJA was insufficiently punitive. The Conservative Prime Minister Stephen Harper referred to the YCJA as "an unmitigated failure" because it was unable to hold young people accountable for the harm the inflicted upon society (p. 64). In response to these criticisms, a number of amendments to the YCJA were implemented, all of which were intended to toughen the sentencing process. The Conservative government introduced Bill C-25 in 2007, but it ultimately did not pass. This Bill would have initiated facilitated pre-trial detention for young people accused of crimes and added deterrence and denunciation to sentencing principles. Bill C-10, referred to as the "Safe Streets and Communities Act," was passed in 2012. This Bill involved some changes to pre-trial detention rules, as well as a widening of the definition of 'violent offence' for the purpose of pre-trial detention. The changes made under this bill have been referred to as "relatively modest and nuanced… [The objective] seems as much political or symbolic as legal" (p. 64).

Attitudes Towards Women

An area of law in which gendered ideologies are often evident is the treatment of women within the justice system. The study of women's relation to law is often considered important because women, resulting in gaps of equality where differences between men and women exist, did not create most law. There are a number of avenues within law that illustrate differing ideologies when it comes to the treatment of women. Commonly these avenues involve what are frequently referred to as 'women's issues', including things like sexual assault, abortion, and equal pay for equal work.

Sexual Assault Law

Women have struggled to have their voices heard and respected for centuries. While progress has certainly been made, there are particular narratives regarding women that remain permanent despite advancements of gender

equality. One such narrative is that of the 'ideal' rape victim in legal settings. Many women who have won sexual assault cases were the women who were seen to be responsible, cautious, and dependent on men. Larcombe (2002) draws on comments from Australian judges regarding cases in which victims won. In one instance, the judge describes the case as involving "a happily married woman living in a flat in the absence of her husband when the miscreant breaks in and commits rape on her" (p. 133). In such cases, the victims are seen to be blameless; these women were doing nothing to provoke the men who attacked them. In fact, it seems they never interacted with their offender whatsoever. As a result, the women are deemed worth of legal protection (Randall, 2010, p. 408).

The 'ideal' victim used to be characterized only by her sexual history and attachment to a man. Now women who appear a certain way in court tend to fit a new mould of a 'real' rape victim. The masculine characteristics of law come back into play, with the need for victims to be consistent and rational in order to be believed in court (Gotell, 2002, p. 260). Gotell (2002) states:

> One must assume the standpoint of the rational liberal legal subject: one must articulate a straightforward and consistent account capable of meeting the test of historical truth, and one must squeeze the ambiguities and complexities of coercive heterosexual into the binary logic of the consent/coercion dichotomy. (p. 281)

Larcombe (2002) discusses a number of sexual assault cases that succeeded in trial despite deviating from the 'ideal' rape victim norm. She believes these cases succeeded because of actions in the courtroom, not in the act of sexual violence itself. One case involved a young woman who spent the evening drinking at a hotel with the offender. She then invited him back to her home for more drinks, and consensually danced with and kissed him before the rape took place (p. 139). She came out of these cases successfully because she was able to withstand that which goes on in the courtroom. A concept dubbed 'whacking' the sexual assault complainant in court centers around finding the truth of the case by confusing or humiliating the victim into making them appear less credible, a masculine approach. One defense attorney describes the process, "Generally, if you destroy the complainant in the prosecution, absent massive corroborating evidence or eyewitness, you destroy the head. You cut off the head of the Crown's case and the case is dead" (Schmitz, 1988, p. 507). This concept of 'whacking' demonstrates the treatment of women as victims of crime within the justice system. Only women who are able to withstand the violence that goes on in the courtroom are able to access the justice that the Canadian justice system offers.

Women's Bodily Autonomy

How women's bodies are regarded within a legal setting is a result of the existing gendered ideologies that inform the legal system. This is illustrated in the treatment of women's breasts within law and politics. Women's breasts are often sexualized in Western culture. Giving birth and breastfeeding are natural bodily functions that are not inherently sexual. Sexualized views towards breasts are "shaped by larger cultural values and assumptions" that view women's bodies as only valuable when they exist for male consumption (Ward, 2006, p. 704). Two legal decisions in Canada reflect a shift in perspective regarding women's bodies. The exposure of female breasts in public has largely been viewed in a sexualized manner, but the following two cases embrace the notion that women's breasts can be viewed in non-sexual ways, challenging masculine ideology.

In 1991, a woman named Gwen Jacobs was arrested and charged with wilfully engaging in "an indecent act

in a public space in the presence of one of more persons" under Section 173(1) of the Criminal Code while she was sitting topless on the porch of her friend's home (Arneil, 2000, p. 347). Her trial judge convicted her of the crime, determining that her actions were indecent in that they exceeded the community standard of tolerance. The judge stated, "It is clear to me that the female breast constitutes a very personal and responsive part of the female autonomy and is part of the female body that is sexually stimulating to me, both in sight and touch, and is not therefore a part of the body that ought to be flagrantly exposed to public view" (pp. 347-348). In 1996, Jacobs appealed the decision to the Ontario Court of Appeal, which overturned her conviction on the grounds that the trial judge needed to find evidence of harm to the community. In this case, the majority concluded that the exposure of Jacob's breasts could be constructed in non-sexual ways that the trial judge did not address (p. 349). The effect of this decision was a legal step towards to desexualisation of female breasts. In 1997, the British Columbia Human Rights Tribunal found the BC Ministry of Municipal Affairs had discriminated against Michelle Poirier because of her sex when the Ministry refused to allow her to breastfeed her child in her workplace (Arneil, 2000, p. 360). The decision to allow women to breastfeed their children in public is a case that displays the shift of perspectives towards the female body. Women's bodies fulfilling any need that is not of a sexual nature is widely deemed inappropriate, as though the sexual fulfillment of men is the purpose of female breasts. In her research, Samuel (1997) states,

> In North America it is entirely possible that a child will grow into adulthood without ever having seen a baby breastfed, and yet will see, on numerous occasions breasts displayed in a sexually provocative fashion on television, in print media, and at the corner store on magazine racks. (p. 47)

The full acceptance of public breastfeeding remains elusive in Canada, as there are still many roadblocks placed both by men and women when it comes to the exposure of female breasts.

Conclusion

The Canadian legal system has begun to accept approaches based in feminine ideology despite the history of the justice system being based in masculine ideology. Practices centered on feminine ideology have begun in Canadian schools, prisons, and social services. For example, restorative justice is an approach to justice that adheres to a feminine ideology of morality, focusing on relationships and individual emotion. Restorative justice continues to become a more mainstream practice for the resolution of conflicts both publicly and privately. Similar consideration of perspectives that differ from traditional masculine views has reached the legal system in new ways, as seen with *R v. Jacobs* and *Poirier v. British Columbia*. These approaches and new perspectives allow for the appreciation of experiences and knowledge that are not rooted in the patriarchal norms that still influence Canada.

Despite these advances within the legal system, norms continue to be upheld in ways that suggest laws, legal structures, policies, and governmental structures all need to apply the same rules and approaches consistently and predictably in order to uphold the necessary moral standard of law. Alternate ways of achieving justice are not yet acceptable to accomplish the outcome that the legal system requires. For the most part, all things considered feminine continue to be undervalued and overlooked. They emerge as much less more efficient or better, options for Canadian society. Currently, the Canadian legal system continues to work in line with masculine ideological

approaches to justice, though developments show that the justice system is open to other ideologies. For the Canadian justice system work on a foundation of both masculine and feminine ideologies, there needs to be a major shift in the patriarchal structure of society, one that ends the systematic neglect toward femininity as a worthy lens for achieving justice.

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THE BENEFITS OF AN INTERSECTIONAL APPROACH TO VIOLENCE AGAINST WOMEN IN INDIGENOUS COMMUNITIES

TEARNEY JOHNSTON-JONES

Introduction: The Intersectional Approach to Violence Against Women (VAW)

The branches of the Canadian criminal justice system have failed to acknowledge the longstanding systemic issues associated with violence against women (VAW). With particular attention to the leniency of legal response in cases of domestic violence, the historical failures of the judiciary and government have perpetuated the distinct concerns surrounding violence against Canadian Indigenous women. As reported by the Native Women's Association of Canada (NWAC), Indigenous women experience violence at far greater rates than any other group of women in Canada. More specifically, the NWAC stated that Indigenous women are three times more likely to be killed by a stranger than non-Indigenous women (Native Women's Association of Canada, 2010). Despite the fact that the national clearance rate for homicide sits at 84%, nearly half of the cases reported by the NWAC's database remain unresolved (Native Women's Association of Canada, 2010). As such, the inability of Canada's legal structure to protect Indigenous women is clear.

Within the Canadian environment, concern for intersectionality in the context of gender violence against Indigenous women is illustrated by the various cases of missing and murdered Indigenous women (Dean, 2015). Upon evaluating these issues, the proposed transformative solution seeks to adopt the principles of feminist legal reformers to serve the interests of these victims. Following the key insights of feminist legal theorists, I argue that the contemporary crisis of the 1200 cases of missing Indigenous women is indicative of a larger systemic problem facing this marginalized population. I seek to support this notion by demonstrating that violence against Indigenous women cannot be alleviated by means of legal and policy reform alone. Rather, prospective solutions require transformative structural reforms and the alleviation of the social, political and economic conditions that currently marginalize Indigenous women.

Crenshaw's Evaluation of Intersectionality, Race, and Gender in Cases of VAW

In 1991, Kimberle Crenshaw determined that the criminal justice system does not adequately capture the realities of poor and racialized women when using the legal framework to respond to gender violence (p. 1241). Her analysis considered how the women of minority groups face increased hardship as victims of both racism and sexism, and yet, their combined marginalization is not considered when looking to remedy their experiences (Crenshaw, 1991, p. 1243). As poor and racialized women are caught amongst the intersections of racism, sexism, and classicism, it is inevitable that they will face different and greater adversities due to the multiplicity of their oppressive experiences. Nonetheless, the intersections of these factors are ignored within the traditional boundaries of separate discussions of racism, poverty, and sexism. In her findings, Crenshaw argued that "[her] focus on the

intersections of race and gender only highlight[ed] the need to account for multiple grounds of identity when considering how the social world is constructed" (1991, p. 1245). Thus, in order to effectively remedy systemic patterns of violence against poor and racialized women, Crenshaw's concept of intersectionality is needed to address the interconnectedness of victims' various oppressions. By successfully integrating considerations for intersectionality, the legal framework would be better equipped to remedy the underlying causes that enable these women to experience gender violence more severely.

While considering the impacts of race and gender on women's experiences within the law, an important distinction must be made to recognize how combined oppressions influence a woman's experience of gender violence. When coining the term *intersectionality*, Crenshaw considered the multiple aspects of a woman's identity, which are influenced by her structural, political, cultural and social associations. In doing so, Crenshaw was able to analyze the differential effects of legal remedies (like policies and legal reforms) on victims of domestic violence (Crenshaw, 1991, p. 1245). Furthermore, she employed this theoretical tool to examine the representation of cases of violence against women in the media, with particular attention to cases involving racialized offenders and victims (Crenshaw, 1991, p. 1245). Finally, her theoretical perspective draws attention to the unresolved conflicts sustained between anti-racism and feminist movements to better address domestic violence (Crenshaw, 1991, p. 1248-50).

Using the framework of intersectionality, feminist legal scholars have since drawn attention to the existence of a "white woman norm" within the law, which is perceived to be all encompassing of the female experience (Crenshaw, 19991, p. 1271). The effect of this norm is the erasure of the experiences of women who fall into the multiplicity of other categories, and breach different classes and other structural positions that cannot be represented by the generic "white woman" standard. The perspective of intersectionality professes that women of visible minorities cannot be compared to the "white female standard", as they face greater social constraints. While women fall into numerous categories of race, religion, socio-economic class, ethnicity, and various other attributable identities, a singular female perspective cannot encapsulate the realities of all women (Crenshaw, 1991, p. 1277). Rather, a singular view of a woman's experience of gender violence threatens the understanding of the interconnectedness of victims' oppressions, which are impressionable from the multifaceted characteristics of a woman's race or class.

The Inability for Indigenous Women to Achieve Equality

With respect to the analyses of intersectionality and the differentiating experiences faced by Indigenous women, it is clear that a unified woman's experience does not exist. By virtue of the individual adversities that each woman faces, female victims of violence cannot all be held to the same standards. This is due to the varying economic, religious, political, social class, or historical constraints that may be at play.

Despite having equal civil rights as citizens subjected to the jurisdiction of Canadian legislation, Indigenous women are unable to achieve true equality before the law when seeking legal remedies for gender violence. While it is no longer permissible for Canada's democratic structure to be overtly discriminatory towards any one segment of the population, not all groups have yet established equitable treatment when exposed to Canada's legal system. Therefore, it is essential for the legal framework to consider that proper legal reform requires more than granting all

citizens equal rights within written legislation. So long as legislation and government policies on violence against women continue to be devised without the input of advocates from minority groups, the law will continue to uphold the status quo of those in power. As a result, the inherent effects of colonialism will be overlooked and Indigenous women will continue to experience gender violence more severely. It is evident then that the criminal justice system must instead consider the enduring effects of colonialism, and allow for the differentiating oppressions and realities of Indigenous women to be addressed. Without acknowledging the diverse oppressions faced by racialized women, the social change that is necessary to address their circumstances cannot achieve true equality.

By encouraging the legal system to acknowledge the multiplicity of Indigenous women's oppressions, their life experiences would be validated through the law's willingness to balance their distinguishable identities as intersectional minorities. In order to address the personal circumstances of Indigenous women who are victims of gender violence, actors of the legal system must be given the authority to evoke context-specific judgements within the criminal justice system; rather than limiting their judgements to regulated minimum sentences and precedent rulings. This amendment to the criminal justice system would ensure that legal remedies addressed each victim's unique vulnerabilities. Thereby, the judicial branch would be equipped to obstruct the patterns of systemic violence that are prevalent in cases which are impacted by the oppressions facing impoverished and racialized women.

The Benefits of Including Indigenous Women in the Conversation of VAW

The key to understanding the ways in which intersectionality influences the social assessments of violence against Indigenous women, is to recognize the significance of the patterned violence amongst poor and racialized groups. In order to resolve the social concern, policy analysts must begin to include racialized women in discussions of reform. This is a necessity, as women of minority groups are the best advocates for understanding their own realities and limitations when interacting with the law. By utilizing the insights of racialized women, legal reformers can adapt policies to address solutions that will best rectify the vulnerabilities of poor and racialized female victims of violence.

Historically, Indigenous Canadians have been neglected in feminist discourse, which has perpetuated an environment that cannot possibly cultivate discussion to better the experiences of these women. Without their input, others cannot gain sufficient knowledge of the necessary solutions because they lack the invaluable perspectives of those who have experienced multifaceted oppression. The way in which feminist reformers should honour the variances between minority women was well exemplified by the author of *Remembering Vancouver's Disappearing Women*, in the analysis of the exhibit "The Forgotten", which will be detailed below (Dean, 2015, p. 3).

Case Study: "The Forgotten", Vancouver's Disappearing Women

By 2007, it was reported that 65 women of Vancouver's Indigenous community had gone "missing" and many more were reported as unaccounted for, but were not investigated by police (Dean, 2015, xxiii). At this time, a disproportionate number of the missing women were Indigenous and this discrepancy called to question the federal government's efforts to protect this ostracized group. Predating the Constitution that bound this nation together, the Indigenous people of Canada have felt the negative repercussions of colonialization. The violence stemming from

colonial ideals precedes the present violence towards Indigenous women. It was felt by Canada's Indigenous populations over centuries through the oppressions imposed by structural institutions like the residential schools and forced foster care (Government of Canada, 2014). Since the 2014 national inquiry began, investigative personnel estimate that there are over 3000 cases of missing or murdered women in Canada, of which include 824 unfound Indigenous women (Dean, 2015, xxiv). In light of this national crisis, artist Pamela Masik created a display of 69 portraits to memorialize the Indigenous women presumed to be dead (Dean, 2015, p. 3). As a white female artist, who was from a wealthy socio-economic class, Masik was unfit to portray herself as a spokesperson for these women's lives whom she cannot relate to. Despite the issue being partially based on gender, it is prudent to recognize that these missing women were victims of both a sexist crime and injustice founded by the historical and ongoing conflicts facing the Indigenous community. As such, Masik could not possibly relate to the experiences of the Indigenous women and Dean's analysis states this very clearly in saying,

> "Disregarding these differences by imagining that their stories could have just as easily been my story is another method for avoiding grappling with how I am implicated in the unjust social conditions and arrangements of ongoing settler colonialism, the conditions…that leave some people more vulnerable to violence" (Dean, 2015, xvii).

While it is possible for Masik and others to be empathetic towards the loss of these women, the situational differences of these victims are relevant for why Masik cannot embody their loss. It is the intrinsic qualities of Indigenous women that help to identify the issue as being larger than a sexist crime. The fact that these women belonged to one segment of Canada's cultural mosaic, and were members of the Indigenous community, cannot be masked as just another gender issue. Instead, it must bring rise to larger systemic problems that have perpetuated violence against Indigenous women. Without acknowledging this discrepancy, society will not be able to implement reformative measures that resolve the fundamental concern.

Empirical Studies of Systemic Violence Against Indigenous Women

In addition to the case study on "The Forgotten" display, many Canadian studies have been performed to review the causes of systemic violence against Indigenous women. Based on the data from a Canadian General Social Survey in 2004, Indigenous women reported experiencing more consistent and severe forms of violence (whether it be forced sexual activity, battery, or personal threats) at 54% higher rates than their female counterparts (Pederson, Malcoe, & Pulkingham, 2013, p. 1034). While empirical evidence continues to exemplify how Indigenous women face more counts of verbalized threats and physical acts of violence, there is also a more substantial presence of coercive control by these victims' partners than present amongst non-Indigenous women (Pederson, et al., 2013, p. 1037). These findings call to question the potential social indicators that promote domestic violence, which in turn, could point to the indicators for the heinous violence imposed on the missing and murdered Indigenous women. Overall, it was found that educational achievements amongst the majority of Indigenous people were lower than the average Canadian; and low education levels have been linked to an increased likelihood of violent tendencies (Brownridge, 2003, p. 68). Furthermore, nuisance behaviours like alcoholism and possession of

weapons have been shown to propagate violence on Indigenous reserves (Brownridge, 2003, p. 69-72). The final identified causes supporting the increased rates of violence against Indigenous females, were statistically shown as concurrent with the rates of perpetual unemployment and the trends of living in rural communities (Brownridge, 2003, p. 73-75). The presence of these five patterned explanations may not be surprising, but it is concerning to validate that the typical living conditions of Indigenous peoples are those that are cultivate the perpetuated issue of female violence.

Thus, in order to combat this problem, reform measures will need to resolve the social dynamics of most Indigenous communities. This will ensure: both male and female community members have better access to education, more control over patterns of alcoholism and possession of weapons, less seclusion between the community and society, and more opportunity for gainful employment. It is suggested that by resolving these social factors and considering the complexities of intersectionality, those that target the issues relevant to Indigenous women will mitigate current patchwork solutions.

Adapting Legal Strategies to Support the Indigenous Woman's Experience

During 1991, a study conducted by the Canadian Council on Social Development and the Native Women's Association of Canada found that, "it is an exception rather than the rule to know of an Indigenous woman who has not experienced some form of family violence throughout her life" (Brownridge, 2003, p. 65). In pursuance of using the law to address marginalized populations, like Canada's Indigenous women, the required remedies will benefit from adopting the principles held by feminist legal reformers. Feminist legal analysis embraces four unique concepts that assist with developing a framework to allow for the benefits of the law. Even though people do not share identical experiences, we must first refrain from having the law perpetuate a status quo that discounts the varying realities of marginalized groups and maintains many of the forms of structural oppression. As such, feminist legal reformers question whether the law can adequately address these harms in an environment where legal reasoning will inevitably perpetuate a "one size fits all" approach to justice. This objective approach raises the upmost concern for using the law as a tool to establish social equality, wherein the legal framework will undoubtedly overlook context-specific approaches to legal remedies that would better incorporate the unique experiences of marginalized victims. Proponents of feminist legal analysis also reject the use of objectivity within the law, in favour of intersectional approaches, which allow legal actors to evoke discretionary legal remedies that are based on the interconnectedness of victims' oppressions. Lastly, there must be a sustained commitment to an intersectional approach for solving the disadvantages faced by the oppressed. Thus to support the specificities of the Indigenous female experience, we must be sceptical about using the law to resolve the systemic social inequalities that are perpetuated by a "one size fits all" approach to the criminal justice system. With any success in reforming the justice system, the legal framework and its actors will be able to consider the broader social context of victims which will make legal remedies more accessible to all citizens.

Working with Indigenous Communities to Modify the Legal Environment

Based on the substantial number of violently abused and missing Indigenous women, the Ministry of Indigenous and Northern Affairs implemented an Economic Action Plan in response to an investigation conducted by the Royal Canadian Mountain Police (RCMP) (Government of Canada, 2014). Following the nation-wide inquiry in 2014, the Canadian federal government continued to build off of its previous economic investment by allocating an additional $25 million to address crimes against Indigenous people (Government of Canada, 2014). The hope was that this money would be used to help protect against family violence and violent crimes against Indigenous women. Yet, many of the law's criminal justice solutions continue to be too short-sighted and focused on individual issues, rather than the systemic problems embedded within the overall organization (Pederson, et al., 2013, p. 1054).

While formal laws provide citizens with the structural grounds to address what actions will be accepted by society, simple policy reform does not adequately resolve the basis of violent crimes against women. By using the rule of law to serve justice, once a deed has been committed, methods of deterrence do not serve to prevent the underlying instigators of the crime itself. As we continue to see the perpetuation of violence against racialized women, the legal system's current structure cannot offer solutions to address the problem because of its retroactive methods. In order to resolve the issues of general violence against Indigenous Canadians, which is systemically embedded within the history of Canadian culture, we must remove the concepts of legal objectivity and the "status quo". If these two concepts are removed from the legal framework, there will be room for legal actors to serve the interests of those involved in the incident and employ subjective discretion to their decision-making. Furthermore, a discretionary approach to legal resolves will provide the opportunity to address the instigating factors that initiate violence against Indigenous women. Solutions could then target issues of unemployment, insufficient education, lack of proper housing and community, and improved social services to prevent alcohol consumption, which will look to *proactively* apprehend this type of violence. With greater transparency in collaborative efforts to work alongside Indigenous groups, the policy initiatives tackling these contributing factors would allow self-governance amongst members of Indigenous communities. Thereby encouraging Indigenous women and men to provide their input on the legal resolves for violence against this marginalized group.

Conclusion: Discounting the "Unified Woman's Experience" to Embrace Intersectionality

To adhere to the spirit of the law, it is imperative for all citizens to feel represented by the legal institution and protected by its concern for equality. In analyzing the contemporary crisis of the missing and murdered Indigenous women, it is clear that the manifestation of this issue stems from a much greater systemic problem embedded within Canadian society. Marginalized Indigenous women have been done a disservice because of the existing deficiencies of the Canadian legal framework. By virtue of having to find justness for these violently abused women after the fact, the law and its policies are not deterring the continuation of these crimes. In fact, by ignoring the insights of feminist legal reformers, which say to disparage legal objectivity in favour of considering the unique experiences of victims, the issues up for discussion cannot be effectively addressed. However, utilizing context-specific legal reforms to embrace an approach that considers the intersectionality of victims' oppressions when facing legal remedies would provide legal actors the opportunity to consider the benefits of taking into consideration

the combined effects of a victim's race and gender. By evoking the theory of intersectionality, which highlights the critical importance of considering all forms of structural oppression, the judiciary and government would welcome itself to the opinions of those who are affected by violence against Indigenous women directly. What is now needed is for the legal system to not treat all women uniformly, as there is no such thing as a universal "woman's experience". Input from minority groups could instead allow legal reformers and policy analysts to incorporate the views of Indigenous women, who can best advocate for their own realities and the necessary reforms that will resolve the repercussions of gender violence against racialized women. As such, the judiciary and government could gain a better understanding of the oppressions and experiences that instigate the habitual presence of violence against Indigenous women in Canadian society.

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AUTHORITY OF LAW: AN ANALYSIS OF THE ROLE OF POLICE

VERONIKA KEIR

With technology in the hands of every Canadian citizen, police conduct has come under severe scrutiny. Citizens have begun publishing online recordings of officers aggressively detaining and shooting suspects, calling police legitimacy and accountability into question. The majority of these videos are from incidents in the United States, but Canada is not immune. The role of the police is complex and dynamic and, as the law changes, so do the roles of police. This analysis intends to examine the role of police, and will focus on police authority, community perceptions of police legitimacy, discretion, accountability, and the emergence of community policing.

Jeannine Bell describes police as "individuals authorized by the group of which they are members to use physical force in order to regulate relations among group members" (Bell, 2004, p. 131). Canada has a multi-system police force. There are varying police agencies at different levels of government. For example, in Kitchener-Waterloo, locally there is the Waterloo-Regional Police Service (WRPS); provincially there is the Ontario Provincial Police (OPP); federally there is the Royal Canadian Mounted Police (RCMP). The United States also has police agencies at varying levels of government. Each of these levels, in both Canada and the United States, has varying levels of authority. Authority is what provides police with power; as their level of government varies, so too does their level of power. Therefore, the role of the police is deeply affected by the creation of new laws and amendments to old laws. Law's authority and significance are contingent upon society, or as Habermas describes it, the lifeworld. The lifeworld consists of everyday social experience, pertaining to morals, ideas, cultures, etc. (Cotterrell, 2004, p. 24). Throughout the course of history, we have had laws introduced, changed, and abolished, all of which have been heavily influenced through changes within society and culture. For example, the prohibition of alcohol was implemented, and later abolished. Therefore, as a society's morals and values change, so do laws as well, and this creates implications for the role of police authority in the grand scheme of that society.

Police officers have authority imbued upon them as enforcers of the law. Their power is highly dependent upon legitimacy provided by the communities that they govern (Antrobus, Bradford, Murphy, &, Sargeant, 2015, p. 152). An officer's primary duty is to maintain order, and how they maintain this order may affect their legitimacy. Police legitimacy can be understood by examining two models: the instrumental model, and the normative model (Antrobus et al., 2015, p. 152). The instrumental model pertains to crime and order. It measures police legitimacy in terms of crime deterrence, apprehension of offenders, and the equal distribution of community services (Antrobus et al., 2015, p. 152). In contrast, the normative model focuses more on police conduct. It measures legitimacy in terms of fair and respectful treatment of citizens by police (Antrobus et al., 2015, p. 152). It can be argued that the normative model is most ideal, as it promotes unity between police and communities, which is one of the most important features required for police legitimacy. However, the contrasting nature of these models illustrates the

differences in the conceptions of what is important within police work and what is not. These contrasting models leave communities divided. Some support the crime focused instrumental model, while others support the normative model and its focus on conduct and legitimacy. With citizen scrutiny at an all-time high, citizen encounters with the police become the ultimate determinate of police legitimacy (Antrobus et al., 2015, p. 153).

Discretion is arguably the most powerful instrument used by police. It is a legal action where officers engage in analytical thinking to establish multiple methods they may use to restore order (Schulenberg, 2015, p. 2). Discretion provides police with the ability to selectively enforce the law, and this decision is informed by both situational and attitudinal factors (Bell, 2004, p. 133). Situational factors pertain to the characteristics of the situation in progress: the seriousness of the crime, presence of or use of a weapon, characteristics of the offenders, characteristics of the victim, and the relationship between them. Situational aspects that are currently of utmost importance are whether suspects are under the influence of drugs or alcohol, and if they disrespect an officer (Schulenberg, 2015, p. 15). Attitudinal factors pertain to the beliefs and attitudes of the officer. Police have the ability to choose whether or not they will arrest or charge offenders, and are also able to charge them for lesser offences when they commit a serious offence. This choice is influenced by the officer's subjectivity; one officer may view a specific law to be a moral requirement, whereas another may not (Balkin, 1993, p. 4).

In the United States, officer's responses to spousal abuse calls are partly determined by whether or not they consider the incidents to be a severe violation of the law (Bell, 2004, p. 134). Therefore, attitudinal factors become reliant on the subjectivity of the officer, allowing that subjectivity to affect police discretion. In the role of a police officer, officers are required to understand and apply the laws they are enforcing. In this process, officers become legal subjects who attempt to understand "law, legal doctrine, and the legal system" (Balkin, 1993, p. 2). Each officer brings their own purpose of understanding to the law, and this is reliant upon their subjectivity (Balkin, 1993, p. 9). No two officers are exactly alike; they have differing classes, gender, economic status, life experiences, etc. Therefore, no two officers will have the exact same subjectivity. However, officers often have somewhat similar understandings and this results in a shared ideology that can be dangerous (Balkin, 1993, p. 5).

Accountability in relation to use of force has become a focal point for many media outlets. This has stemmed from the numerous on-duty shootings of unarmed African Americans, as well as officers' overly aggressive detainment strategies. One example is the famous case of Rodney King in 1991; a group of officers committed exceedingly high levels of violence towards an unarmed African-American, Rodney King, and deemed it to be "basic stuff" (Williams, 2007, p. 4). Of the twenty-three officers who were present for the brutal attack, only four were indicted, and all charges were acquitted (Williams, 2007, p. 5). Police attempt to justify their overly violent methods by exaggerating the dangers they face on the job; they validate their actions through the use of their authority. Within a twenty-two-year span in the United States, "1,820 officers were killed, contrasting to 8,578 people killed by police" (Williams, 2007, p. 22).

In these violent scenarios, even if officers are found guilty of misconduct, they are rarely charged, and if they are, the charges are almost always dropped (Williams, 2007, p. 22). This is influenced by the perceptions that officers are operating within the scope of their authority. By contrast, violence towards police officers is abhorred, often resulting in extremely harsh sentencing, or even capital punishment where it is still practiced (Ross, 2015).

When police officers engage in violence, the violence is frequently denied, minimized, and justified by referring to officers as heroes (Williams, 2007, p. 16). An officer's ability to use force is necessary, but dangerous. It leads to instances where officers use too much force, and when this occurs, there is the battle between communities and the police force of whether that force was justified. It is because of these instances that communities cry out for increased accountability and transparency from police forces. These communities want to have evidence that being police officers does not allow you to have free reign of the law. They want officers to be held to the same level of accountability as any other citizen. They also want the investigations to be open and honest, not shrouded in mystery with the potential to be tampered. These issues of accountability and transparency are increasingly important as they have an adverse impact on perceptions of police legitimacy, most commonly related to incidents where an officer has seemingly racial motives.

Racial profiling has resulted in the disproportionate victimization of visible minorities. Racial profiling occurs when police target specific individuals to investigate or detain due to the belief that their race increases the likelihood that they will engage in criminal behaviour or already have (Bell, 2004, p. 136). When officers initiate this practice, whether explicitly or implicitly, it begins to breed distrust of the police. Individuals who are targeted develop the opinion that all police are out to get them and that they will do anything to put them behind bars. Racial profiling is not a new issue in our society and culture, and the distrust it generates disintegrates the relationships between police and specific communities. For example, when white people acknowledge the harsher actions towards visible minorities they view it to be justified, and when minorities acknowledge it they view it to be discriminatory (Bell, 2004, p. 136). The distrust between police and communities has become a serious issue that needs attention, and the emergence of community policing programs aim to provide just that.

Community policing is an initiative designed to enable and emphasize the community's cooperation with the police. The program attempts to have citizens and police work together in the production of public order (Bell, 2004, p. 137). The principal goal of this program is to strengthen the bonds between communities and police. By having citizens of the community work alongside police, there is the opportunity for new relationships to begin and grow. Police want to decrease any distrust that citizens may hold against them, and encourage them to feel confident and safe to report any incidents. However, communities who have severely fractured relationships with police require more proof that the police are actually there to help and maintain order (Bell, 2004, p. 138). These communities are often those that are ravaged by over-policing and racial profiling.

One of the ways that police are able to overcome this obstacle is through the use of liaison officers. Liaison officers are typically reflective of communities at odds with police - ethnic or racial minorities, or sexual minorities, such as homosexuals (Bell, 2004, p. 138). The use of liaison officers is effective because these communities often feel they cannot relate to the police, and with liaison officers being reflective of the communities they serve, it increases the possibility that relationships will form. In this process of fostering relationships, police departments seek to regain trust and acquire knowledge of the community's specific needs (Bell, 2004, p. 138). An alternative method implemented by police to regain trust from communities is observation programs. These programs provide the public with the opportunity to see that police are acting legitimately and have the public's best interests in mind. Both of these programs are good ideas in theory, however the implementation is the real obstacle. Many police

officers are reluctant to participate in community policing programs, and their reluctance can be understood by examining two main reasons.

First, in order for community policing to be properly implemented, police departments need to adopt new methods of crime control (Bell, 2004, p. 138). Most police departments in the United States and Canada adopt a reactive approach; patrols are dispatched in response to a call. Community policing adopts a proactive model, it embodies the idea of police officers becoming more involved within the community they serve. This involvement is meant to build stronger relationships, and also to help officers know what is going on within the communities they serve. The reasoning behind this is that citizens will no longer have to wait around for the police to respond to a call, instead police officers will be active within the communities and be more readily able to be attentive and responsive to citizens needs (Bell, 2004, p. 138). In order for community policing to thrive, officers need to accept the shift away from their current style of reactive policing and be willing to embrace a more proactive model.

Second, officers' animosity lies in the changes they will endure in terms of job functionality. Many police officers assert that police are supposed to enforce order and fight crime. Under this community-policing model, they feel that their title as a police officer is undercut and that they are performing the duties of other social servants. There is the dominant belief that community policing is in opposition to the preferred emergency response role of policing. These non-emergency duties are viewed as something social workers should be doing, not police officers (Bell, 2004, p. 138). If community policing is to be successful, officers must realize the importance of strong bonds with citizens within their communities.

Police are meant to keep order and peace within their respective communities. However, the legitimacy of their role comes into question through their use of authority and discretion. The role of police should entail the proper use of authority and discretion, use that upholds the rule of law, but does not cause communities to question their legitimacy. Police officers need to have a better understanding of the communities that they police in order to foster proper relationships and build trust. With the proper implementation and support of community policing initiatives, as well as accountability and transparency, these relationships and trust have an opportunity to be forged and maintained.

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THE DIFFICULT PROGRESSION OF THE RIGHTS OF CANADA'S INDIGENOUS PEOPLES AND THE OBLIGATION OF FIDUCIARY DUTY: INDIGENOUS RIGHTS IN THE CANADIAN LEGAL CONTEXT

SUKHRAAJ SINGH SHERGILL

Introduction

Law adapts and changes in response to rulings and gradual shifts in public opinion. Law also has deep roots within the history of a nation. Canadian law specifically is grounded in not only Canadian history, but also the traditions of the British and with respect to Quebec, the traditions of the French. Throughout Canada however, one will find that Indigenous rights are entwined within the fabric of Canadian jurisprudence just as much as these other histories. These rights are clearly apparent within Canadian jurisprudence[1] as related to Section 25 of the *Canadian Charter of Rights and Freedoms* (1982) (*Canadian Charter of Rights and Freedoms*, Part I) and Section 35 of the *Constitution Act* (1982) (*The Constitution Act*, *1982*). Canada carries a longstanding obligation to Indigenous Peoples in specially recognizing their rights.

This longstanding obligation extends to cover the concept of fiduciary duty; a legal principle that the Crown must act within the best interests of those it interacts with and is usually bound to treaties or contracts between the State and individual parties (Litman, 2006). In terms of treaties, whether domestic or international, a pseudo-contractual obligation is provided upon the State to remain true to the intent of the treaty and act in the best interest of those it deals with. In terms of Canada, it is bound by the various Treaties that the Crown has signed with Indigenous groups. This pseudo-contractual obligation raises the principle of the honour of the Crown, which essentially underlines that the Treaties in question do not have an expiry date. The absence of an expiry date results in a continuous and evolving relationship with Indigenous groups where Canada must continue to act consistently with their fiduciary duty and obligation. This ideal of protecting the legal principle of the honour of the Crown with respect to fiduciary duty has been specified in multiple judgements by the justice system.

Understanding that Indigenous rights, such as sole economic use of the land, recognition of traditional lands as well as cultures and practices relating to the preservation of fishing, hunting and trapping rights among a plethora of others, are prevalent within both Canadian criminal law and civil law and a knowledge of these is vitally important to policy creation in the future. To rebuild the nation-to-nation relationship between Canada and the various Indigenous groups that Canada has agreements with, Canada must uphold the legal concepts of fiduciary duty and the honour of the Crown. This is grounded in an understanding that a legal entity such as the Government of Canada must act as the fiduciary that provides loyalty, transparency, full disclosure and due diligence when

[1] **Note:** Cases of Canadian jurisprudence that are relevant and analyzed within this paper include the following: *R. v. Gladue*, [1999] 1 S.C.R. 688; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; and *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256.

dealing with the party to whom the fiduciary duty is owed; in this case, to Canada's Indigenous Peoples. The foundational structure and findings of the precedent cases discussed within this paper highlight the need to understand that Indigenous rights are broadly intertwined with Canada's history. The fiduciary obligation that Canada carries towards the Indigenous Peoples is grounded in a constantly developing and changing understanding that is best viewed through judicial decisions that analyze and define the legal obligations created by the *Canadian Charter of Rights and Freedoms* (1982) with respect to Indigenous rights in Canada. In this article, two broad examples illustrate how Indigenous rights influence the application and interpretation of the law: first, the use of *Gladue* Reports that impact sentencing and restorative justice in criminal courts, and second, Aboriginal[2] Title rights that impact land claims in civil courts. Finally, armed with various reports and legal tests, one must also be aware of the limitations that are inherent to Indigenous rights to build a knowledge base from which effective, efficient and legally sound policy can be created.

Canada's *Charter* and Constitutional Obligations to Indigenous Rights

Domestically, Canada carries the obligation towards respecting the rights of Indigenous Peoples within both the realms of criminal law and civil law. The primal document of reference with regards to the legal entrenchment of Indigenous rights in Canada is the *Canadian Charter of Rights and Freedoms* (1982) (*Canadian Charter of Rights and Freedoms*, Part I). Section 25 of the *Canadian Charter of Rights and Freedoms* (1982) and Section 35 of the encircling *Constitution Act* (1982) essentially guarantee the protection of the rights of Indigenous Peoples in the past, present and future tenses.

Section 25 of the *Canadian Charter of Rights and Freedoms* (1982)

Section 25 of the *Canadian Charter of Rights and Freedoms* (1982) professes a guarantee. It states that

> [t]he guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any [Indigenous], treaty or other rights or freedoms that pertain to the [Indigenous] Peoples of Canada including: (*a*) any rights or freedoms that have been recognized by the *Royal Proclamation* of October 7, 1763; and (*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. (*Canadian Charter of Rights and Freedoms*, Part I, Section 25)

This guarantee provides the basis of entrenching the rights and freedoms that are specifically due to the Indigenous Peoples of Canada under the *Royal Proclamation* of October 7, 1763 (Greene, 2014, pp. 81-82). However, it can be built upon to clarify the concepts related to the sovereignty and self-government of Indigenous Peoples. Section 25 is an interpretive clause that the judiciary must take into account when making rulings; but that does not guarantee more than an acknowledgement of the Crown's fiduciary duty to protect the Indigenous Peoples of Canada as the *Royal Proclamation* of October 7, 1763 intended and to take land claims into account (Greene,

[2] **Note:** "Aboriginal" is used in reference to title as the precedent setting cases referenced later in this paper also refer to the Indigenous Title as Aboriginal Title. For the sake of continuity, when referring to legal cases, the term Aboriginal will be used. However, it is meant to be synonymous with Indigenous which will be used in all other instances. The terms are used interchangeably.

2014, pp. 81-82). Section 25 alone does not explicitly protect the rights of sovereignty and title to land that were outlined in Treaties between the Indigenous Peoples and Canada. Between 1982 and 1985 arguments were raised that Section 25 of the *Canadian Charter of Rights and Freedoms* (1982) guaranteed the concept of Aboriginal Title and sovereignty (Greene, 2014, p. 81). However, these arguments are better served on the grounds of Section 35 of the *Constitution Act* (1982) to ascertain the foundations of the binding legality of these claims upon the Government of Canada.

Section 35 of the *Constitution Act* (1982)

Section 35 of the *Constitution Act* (1982) was deliberately placed outside of the *Canadian Charter of Rights and Freedoms* (1982) as the rights spoke to an identifiable group and guaranteed specific rights in the future solely for that group, as opposed to Canadian citizens as a whole (Greene, 2014, pp. 353-354). It explicitly recognized the rights of the Indigenous Peoples whereby it built upon Section 25.

Section 35(1) of the *Constitution Act* (1982) states that "[t]he existing [Indigenous] and treaty rights of the [Indigenous] [P]eoples of Canada are hereby recognized and affirmed" (*The Constitution Act*, 1982). This firm recognition and affirmation of the existing rights of the Indigenous Peoples of Canada cemented the fiduciary duty of Canada towards its Indigenous Peoples. This fiduciary duty essentially places Canada as the trustee with respect to any dealings with the Indigenous Peoples of Canada; who as beneficiaries expect Canada to conduct deals that affect them with their best interests at heart (Litman, 2006). The obligation imposed by this fiduciary duty spans the historical treaties signed between Canada and multiple Indigenous groups, as well as any future treaties, land claims or agreements between the two entities. Together, Section 25 of the *Canadian Charter of Rights and Freedoms* (1982) and Section 35 of the *Constitution Act* (1982) create the *Charter* and Constitutional basis upon which the judiciary must rule when Indigenous Peoples and issues are concerned. This basis creates an obligation that permeates both the criminal and civil areas of Canadian law.

Criminal Law in Canada

This article will first address the obligation as it relates to Canadian criminal law, beginning with the two elements that are required for a criminal conviction. Criminal law concentrates on acts that are seen to offend the general populace and therefore, make the State a direct actor within the case. Criminal law forces the State to respond on behalf of all Canadians. The offence, even if an identifiable victim is included, is seen as an offence that is committed against the State, instead of against another, private individual as the case would be with civil law (Government of Canada, 2016). For a crime to lead to a conviction in Canada, two elements must be proven by the prosecution. These two elements are known as *actus reus*, the guilty act and *mens rea*, the guilty mind (Verdun-Jones, 2014, p. 5). Both must be proven to the point of beyond a reasonable doubt and the onus to bring forward this proof lies on the prosecution (Verdun-Jones, 2014, p. 8). *Actus reus* is often easier to realize as it is narrowed by only having one avenue as to whether the alleged criminal is the one who committed the act that they are accused of or not. The *mens rea* portion of the offence however, can be argued under two different avenues. The first is of objective *mens rea* where proof must be provided to the effect

> ...that [the accused] person deliberately intended to bring about a [crime] or even that they subjectively appreciated the risk that their conduct might produce such a result. Objective *mens rea* is predicated on the principle that [the reasonable person], in the same circumstances and with the same knowledge of those circumstances as the accused, would have appreciated that their conduct was creating a risk of producing [the crime]. (Verdun-Jones, 2014, p. 78).

It is not required that the actual accused know that their actions constituted a crime. What is needed is that a reasonable person in the same situation would know that their actions constitute a crime. This is different from the second understanding of *mens rea*.

The second avenue is known as subjective *mens rea,* and this is based on whether or not the accused deliberately intended to commit the crime and subjectively knew, or understood that their actions would constitute a crime. It is precisely this subjectivity that spills over into sentencing (Verdun-Jones, 2014, p. 78). This discussion of *mens rea* proves invaluable in understanding the jurisprudence related to Section 25 of the *Canadian Charter of Rights and Freedoms* (1982) and Section 35 of the *Constitution Act* (1982) with respect to Canadian criminal law and the restorative justice opportunities that can be alternatives to incarceration.

Indigenous Rights in Canadian Criminal Law – *R. v. Gladue* (1999)

Within the bounds of criminal law, this obligation and special status of the Indigenous Peoples is highlighted by cases such as *R. v. Gladue*, (1999). The case itself revolved around an Indigenous woman named Jamie Gladue who was charged with second degree murder after she suspected that the victim, her common law husband, was having an affair with her sister. Gladue was convicted after pleading guilty to manslaughter and the case reached the Supreme Court of Canada based on the issue of the mitigating factors that were included (or in this case, excluded) in the sentencing (*R. v. Gladue*, 1999, para. 19). The specific point of contention revolved around Section 718.2(e) of the *Criminal Code* (1985) of Canada which states that "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of [Indigenous] offenders" (*Criminal Code*, 1985, Section 718.2(e)). The Supreme Court decided that when sentencing an Indigenous offender, careful consideration must be given to their unique circumstances. Particularly this consideration must encompass two requirements: 1) a synopsis of the upbringing of the Indigenous offender before the court in an effort to highlight the unique systemic and background factors that contributed to the commission of the crime in question and 2) thoughtful consideration towards the alternative sentencing procedures and sanctions that align with the offender's Indigenous heritage (*R. v. Gladue*, 1999, para 93.6).

It is specifically the requirement for judges to account for these considerations that have brought about the use of what is termed as the *Gladue* Report that is an added responsibility for, and prepared by defence counsel underlining an emphasis on restorative justice prior to a sentencing hearing. The Supreme Court of Canada itself in paragraph 93.7 of its judgement in *R. v. Gladue* (1999) notes that the trial judge will need this information to be compiled so that they are able to accurately judge the case. The compiled report must allow the judge to account for the systemic and background factors that played a role in the commission of the offence as well as recommend a

culturally acceptable sentence. This recommendation should include an option that aligns with the ideals of restorative justice in the form of a pre-sentence report that has been termed the *Gladue* Report (*R. v. Gladue*, 1999, para. 93.7). Specifically and succinctly explained in the words of the Supreme Court of Canada itself; the *Gladue* Report synthesizes information about the accused that includes the special circumstances that Indigenous Peoples and communities find themselves in. It also provides a recommendation of a sentence that would help the offender while balancing the interests of the State.

Restorative justice is one of these approaches (*R. v. Gladue*, 1999, para. 93.7) that opts to attempt to restore and heal the relationship between the accused and the victim, whereby balancing the interests of the State with that of the offender. The restorative justice approach speaks on behalf of the victim. The crux of this approach is to attend to the needs of both the offender and the victim (Brunk & Hadley, 2001, p. 53). It speaks to primarily restore the relationship between the offender and the victim and this requires an acceptance of responsibility from the offender. Brunk notes that the restorative approach to justice views "...the victims of an offense [as] not simply abstract entities like the 'State' or the 'sovereign,' but rather concrete individuals, institutions and communities whose interests the law protects" (Brunk & Hadley, 2001, p. 48).

It is in this victim focused view that the justice system needs to focus on the genuine nature of the offender to wish to correct their wrong to the victim or community so that the offender assumes responsibility for their actions or the harm caused. The justice system then must attempt to return the situation as close as possible to what it was before the crime occurred; restoring what was lost to the victim (Brunk & Hadley, 2001, p. 48). Essentially, the goal is for the offender to want to return the victim earnestly to a position similar to that of which the victim was in prior to the crime being committed. This approach also recognizes that a complete return of the victim to a state where the offence did not occur is impossible; there is a firm recognition of the damage that has been done (Brunk & Hadley, 2001, p. 50). While this paper focuses on Indigenous Peoples, it is important to note that Section 718.2(e) of the *Criminal Code of Canada* (1985) underlines that restorative approaches that avoid the punitive measure of incarceration are available for all offenders, but a focus is placed on Indigenous people in an attempt to combat high rates of over-incarceration (Rudin, 2008, pp. 687-697).

It is through the process of *Gladue* Reports that the special status of Indigenous Peoples is incorporated into the Canadian criminal justice system. The *Gladue* Report provides a brief insight into the circumstances of the accused, allowing their counsel to present mitigating factors in legal sentencing to the trial judge. While these mitigating factors and the *Gladue* Report can only impact the legal process of sentencing, it is by analyzing the commonalities between *Gladue* Reports for multiple inmates of the same group, such as Indigenous Peoples, that one can uncover areas where policy must be created to address the motivations for crime. Before *R. v. Gladue* (1999) the Supreme Court of Canada could only speak to the judicial aspect of the decision while being forced to leave the intricacies of solving the societal roots of the issue to policy experts. The desire to speak to these societal roots motivated the Supreme Court to specify Indigenous Peoples within their decision. The subjectivity of the law becomes visible as specific attention is given to the historical circumstances of Indigenous Peoples as these historical circumstances are markedly different from other Canadian citizens. In contrast, the obligation to take Indigenous rights of the present into account becomes strikingly apparent within the civil realm of Canadian law and

jurisprudence.

Civil Law in Canada

Civil law concentrates on acts that are between two or more private individuals. These are private cases between two or more people. The State is not an actor that steps in to respond on behalf of all Canadians. Instead, they are a Party involved in a dispute only if the State is a Party in the case (Government of Canada, 2016). The offence is simply one person or corporation against another private individual and is adjudicated on the balance of probabilities (Government of Canada, 2016). Essentially, the matter is adjudicated with an eye towards which case is more probable to bring the iconic scales of justice back to an even distribution between the parties involved. Two cases where the State was represented by the Province of British Columbia in a civil matter that concerned Indigenous rights are *Delgamuukw v. British Columbia* (1997) and *Tsilhqot'in Nation v. British Columbia* (2014).

Indigenous Rights in Canadian Civil Law – Aboriginal Title

The main civil law actions that saw Canada pitted against Indigenous groups in a court of law essentially revolved around the issue of Aboriginal Title. Aboriginal Title in its simplest sense is the inherent right of ownership and exclusive right to use over the land and territory that the Indigenous groups verifiably historically occupied (McNeil, 1997, p. 136). This essentially means that Aboriginal Title creates an obligation similar to general property law and representing Canada's connection and growth from British law. In the case that a proposed development crosses over into another person's territory or property, prior to implementation of the proposed development, one must seek the permission of, and notify that person of the development, its benefits, advantages and disadvantages indicating the person's free, prior and informed consent to the development occurring on their property (Speaight, 2012, p. 292).

This concept of Aboriginal Title in Canadian law is witnessed in the evolutionary nature of Aboriginal Title itself. There have been deep-rooted attempts to establish and grant Aboriginal Title for decades[3] but it has only recently seen fruition. The main tributaries discussed in this paper are *Delgamuukw v. British Columbia* (1997) and *Tsilhqot'in Nation v. British Columbia* (2014).

***Delgamuukw v. British Columbia* (1997) – The Existence of Title.** *Delgamuukw v. British Columbia* (1997) was a case brought forth in 1984 by the Gitksan and Wet'suwet'en First Nations and comprised a land claim to 58,000km^2 of land in northern British Columbia that was supplemented by oral histories of historical occupation of the land by the First Nations. The claim became a legal battle when the Provincial Government of British Columbia attempted to refute these claims by insisting that the First Nations had relinquished and extinguished their rights to the land prior to British Columbia joining Canada in 1871. The Provincial Government then shifted their position upon at the British Columbia Court of Appeal from a question of extinguishment of the ownership rights of Indigenous Peoples to their traditional lands to a question of jurisdiction over those lands (Borrows, 1999, pp. 538-

[3] **Note:** Aboriginal Title has evolved as a legal definition through more legal cases than can be discussed here. Main cases that may be of interest include but are not limited to: *Calder v. British Columbia (Attorney General)* (1973); *Guerin v. The Queen* (1984) and *R. v. Sparrow* (1990) (Hanson, 2009).

545).

Ultimately, the Supreme Court case did not resolve the dispute as the basis of the appeal shifted from ownership to jurisdiction warranting a new trial, but the Supreme Court underlined that the Provincial (and by extension, Federal) Governments or the Crown could not unilaterally extinguish Aboriginal Title to any tract of land. Indigenous ownership of the land provided a responsibility that was to coexist with the title of the Crown. Essentially, issues of Aboriginal Title represented issues that mirrored a fiduciary obligation where neither Party could undertake unilateral action to extinguish responsibilities underneath the acquisition of Title and making consultation with the Indigenous group a requirement for the Government (Borrows, 1999, p. 542).

The *Delgamuukw v. British Columbia* (1997) case begins to specify the reach and coverage that Section 35 of the *Constitution Act* (1982) imparts upon Indigenous Peoples. In this case, the Supreme Court of Canada confirmed the existence of Aboriginal Title. In paragraph 1 of their judgement it is explained that the case is expanding upon a host of precedent cases and attempting to define "...the nature and scope of the constitutional protection afforded by s. 35(1) to common law Aboriginal Title" (*Delgamuukw v. British Columbia*, 1997, para. 1). This attempt to define the area under constitutional protection by Section 35(1) of the *Constitution Act* (1982) highlights the requirement for consultation with Indigenous groups by the Government prior to any sale of land or development affecting Indigenous groups.

The Supreme Court of Canada affirms within paragraphs 3 and 133 of their judgement that Indigenous rights follow the principle of *sui generis*; a principle that confirms the intrinsic and pre-existing nature of Aboriginal Title that is unique among other protections (*Delgamuukw v. British Columbia*, 1997, para. 3). Paragraph 133 of the judgement explains that

> Aboriginal [T]itle at common law is protected in its full form by s. 35(1). This conclusion flows from the express language of s. 35(1) itself, which states in full: "[t]he existing [Indigenous] and treaty rights of the [Indigenous] Peoples of Canada are hereby recognized and affirmed" (emphasis added sic). On a plain reading of the provision, s. 35(1) did not create [Indigenous] rights; rather, it accorded constitutional status to those rights which were "existing" in 1982. The provision, at the very least, constitutionalized those rights which [Indigenous] peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since Aboriginal Title was a common law right whose existence was recognized well before 1982 (e.g., *Calder*, *supra*), s. 35(1) has constitutionalized it in its full form ("*Delgamuukw v. British Columbia*, 1997, para. 133).

It underlines the belief that Indigenous rights (inclusive of Aboriginal Title) are inherent within their own communities and groups (*Delgamuukw v. British Columbia*, 1997, para. 133). This exclusive acceptance of a right to land solely for the Indigenous Peoples of Canada continues to confirm the interlocking nature of the law and a special understanding with regards to rights of Indigenous Peoples in Canada.

Delgamuukw v. British Columbia (1997) is broadly applied to the groups that are subject to the *Indian Act* (1985) as Status Indians (*Indian Act*, 1985, Sections 5-7). The Government of Canada's Indian Registry specifies all of the Indigenous Peoples who are registered with the Government of Canada and therefore meet the definition of

Indian[4] (Government of Canada, 2011). However, the Supreme Court in *Daniels v. Canada (Indian Affairs and Northern Development)* (2016) has expanded this definition to include the Métis, non-status Indians under the definition of *Indian* in the *Indian Act* (1985) (*Daniels v. Canada (Indian Affairs and Northern Development)*, 2016).[5]

The *Delgamuukw v. British Columbia* (1997) case also touched on the ability of the Provincial Government to extinguish Aboriginal Title if in fact it did exist. This case delivered the *ratio decidendi*, or the vital basis of the Court's decision in the case prescribing the responsibility of extinguishing Aboriginal Title to the Federal Government and that only the Federal Government had the ability to prove that the pre-existing Aboriginal Title had been extinguished by the Indigenous group itself through consultation (Bell & Henderson, 2016). This removed the Province of British Columbia from the jurisdictional issue of management, sale, purchase and rights over lands; however, provision of services such as health care and education off-reserve would remain a Provincial responsibility. *Delgamuukw v. British Columbia* (1997) upheld the precedent cases of *Calder v. British Columbia (Attorney General)* (1973), *Guerin v. The Queen* (1984), and *R. v. Sparrow* (1990).[6] The fiduciary duty that the Government of Canada owes to the Indigenous Peoples of Canada remained intact and was central in the judgement of *Delgamuukw v. British Columbia* (1997). The case created a test for the establishment of Aboriginal Title as well as a test for its infringement, but avoided specifying a test for its extinguishment (Beaudoin, 2006). All in all, *Delgamuukw v. British Columbia* (1997) set the firm foundations of the Indigenous right to Aboriginal Title by confirming its existence and verifying that it was a right that could be infringed upon. This right culminated in and was expanded upon by the *Tsilhqot'in Nation v. British Columbia* (2014) case.

***Tsilhqot'in Nation v. British Columbia* [2014] – Aboriginal Title is Conferred.** The *Tsilhqot'in Nation v. British Columbia* (2014) case was a case within the same vein as others referred to in this paper regarding Aboriginal Title. The Tsilqhot'in Nation claimed a certain tract of land in British Columbia and the Province allowed a logging company to perform operations in this tract of land. The First Nation alleged that the Province did not properly consult them and as negotiations between the two failed, the First Nation blockaded access of the logging company to the logging area (*Tsilhqot'in Nation v. British Columbia*, 2014). However, one significant difference between the preceding cases and this case was that Aboriginal Title was actually conferred upon the Tsilhqot'in Nation by the Supreme Court of Canada.

The Supreme Court reached this landmark decision of specifically confirming the Tsilhqot'in Nation had,

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[4] **Note:** "Indian" is used in reference to the *Indian Act* (1985) as a legislative term and definition. For the sake of continuity, when referring to legal cases and connections to the *Indian Act* (1985), the term Indian will be used. However, it is meant to be synonymous with Indigenous or Aboriginal, which will be used in all other instances. The terms are used interchangeably.

[5] **Note**: *Daniels v. Canada (Indian Affairs and Northern Development)* (2016) is not explained or analyzed at length in this paper as this deviates from the obligatory nature of the rights of Indigenous peoples as a whole to focus specifically on the Métis. Future research specifically regarding the rights of the Métis Peoples would benefit from focusing on this case.

[6] **Note:** *Calder v. British Columbia (Attorney General)* (1973); *Guerin v. The Queen* (1984) and *R. v. Sparrow* (1990) are cases that may be of interest for further research but the findings in these cases are parroted in *Delgamuukw v, British Columbia* (1997) to create the basis of legal precedent concerning issues of Aboriginal Title.

and continues to have, exclusive rights of ownership over 1,750km^2 of land within British Columbia (*Tsilhqot'in Nation v. British Columbia*, 2014, para. 153). This modified the consultation requirements imposed on the Government of Canada and specifically Indigenous and Northern Affairs Canada with respect to consulting Indigenous groups (*Tsilhqot'in Nation v. British Columbia*, 2014, para. 112) for their free, prior and informed consent to resource projects such as logging, oil extraction or mining among others. In addition to the need for sufficient consultation already required by Section 35 of the *Constitution Act* (1982), the express consent of the affected Indigenous group was required to allow the Federal Government to issue approval for the project to take place on Tsilhqot'in land ("*Tsilhqot'in Nation v. British Columbia*, 2014, para. 73).

This Supreme Court of Canada decision was particularly significant because it effectively nullified the doctrine of *terra nullius* (*Tsilhqot'in Nation v. British Columbia*, 2014, para. 69). Specifically, within paragraph 69 of their judgement and building upon that of *Guerin v. The Queen* (1984), the Supreme Court of Canada states that the burden upon the Crown's title to land was further

> …burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown (*Tsilhqot'in Nation v. British Columbia*, 2014, para. 69).

The Supreme Court of Canada articulated that the principle of European sovereignty over previously unclaimed land, also known as the doctrine of *terra nullius*, held no sway over the discussion of ownership of the land. The land was determined to be previously claimed under the sovereign governorship of the various Indigenous people who occupied Canada prior to its settlement and colonialization by the European Powers (*Tsilhqot'in Nation v. British Columbia*, 2014, para. 69).

Together, *Delgamuukw v. British Columbia* (1997) and *Tsilhqot'in Nation v. British Columbia* (2014) acting alongside *Calder v. British Columbia (Attorney General)* [1973], *Guerin v. The Queen* [1984],*R. v. Sparrow* [1990] and other cases not discussed in this article, form the cohesive argument that Aboriginal Title exists and form the jurisprudence regarding land ownership and usage rights within British Columbia.

The Limitation of Rulings on Aboriginal Title

While this article establishes the inherent obligation that Canada has towards its Indigenous Peoples, there are certain caveats embedded throughout the rulings of the Supreme Court of Canada on the subject. The Supreme Court of Canada has been careful in frequently reiterating that their confirmations of Indigenous rights, and particularly Aboriginal Title, do not constitute a veto power over development (Fine, 2014).

The root of this limitation stretches back to *Delgamuukw v. British Columbia* (1997) as that case continued to define Aboriginal Title and specifically provided a test for claimants to establish a claim to Aboriginal Title. In paragraph 67 of their judgement in *Tsilhqot'in Nation v. British Columbia* (2014) the Supreme Court highlights findings from *Delgamuukw v. British Columbia* (1997), noting that Aboriginal Title carries a right of exclusive use over the land for traditional and non-traditional purposes as long as it can be proven that these uses are related to the

Indigenous group's connection to the land in question (*Tsilhqot'in Nation v. British Columbia*, 2014, para. 67). However, the exclusive use of the land by the Indigenous group, as noted in the same case, is not an absolute right. Should the Government be able to provide justification that the reason for their proposed project on Indigenous lands is in line with an objective of the Government that simultaneously upholds their fiduciary duty towards the Indigenous group, the project can proceed with proper consultation (*Tsilhqot'in Nation v. British Columbia*, 2014, para. 112).

Further, the limitations of Aboriginal Title extend beyond the *ratio decidendi* of the cases decided upon by the Supreme Court of Canada. The *ratio decidendi*, or information that is foundational to the decision of the Court, differs from the information that is classified as *obiter dicta,* or information that is persuasive (Enright, 2002, p. 235). This limitation of the extent of Aboriginal Title and the stipulation of cases where Aboriginal Title can be encroached upon by Government is provided for in both the *ratio decidendi* of *Tsilhqot'in Nation v. British Columbia* (2014) given the paragraphs above, and in *obiter dicta.* In paragraph 135, the Supreme Court of Canada links this restriction as *obiter dicta* where the Supreme Court of Canada found that even though it is not stated in an actual case, the claims to Aboriginal Title are Federal issues but the Provinces, and the Federal Government, can infringe on this right if it can be justified by Section 35 of the *Canadian Charter of Rights and Freedoms* (1982) (*Tsilhqot'in Nation v. British Columbia*, 2014, para. 135). Any decision to develop the land on which Aboriginal Title rests must be done so as to preserve the land for the enjoyment and use of future generations. Decisions cannot solely benefit current Title holders but are not bound to only be uses that were prevalent prior to European sovereignty and this restriction binds both Indigenous groups and Canada (*Tsilhqot'in Nation v. British Columbia*, 2014, paras. 74-75).

Given that *Tsilhqot'in Nation v. British Columbia* (2014) granted Aboriginal Title over a section of land to the Tsilhqot'in Nation in British Columbia, it is vital to understand that the decision reached does not give an Indigenous group a firm veto over development. Instead, the decision stipulates that any action or development upon Indigenous land must uphold the fiduciary obligation and duty that is present upon Canada to deal in the best interest of the Indigenous group and their futures. The "…Government still has a right to intrude...only if it can reconcile Aboriginal interests with wider public purposes..." (Fine, 2014). The Government must now prove that the proposed project outweighs the rights of the Indigenous Peoples whose land is involved or impacted by the project. The decisions do however strengthen the consultation requirement pursuant to Section 35 of the *Constitution Act* (1982).

Conclusion

Indigenous rights permeate the changing landscape of the law in Canada. With deep roots within the history of the nation as evidenced by Section 25 of the *Canadian Charter of Rights and Freedoms* (1982), Section 35 of the *Constitution Act* (1982), as well as the precedent-setting cases of *R. v. Gladue* (1999), *Delgamuukw v. British Columbia* (1997) and *Tsilhqot'in Nation v. British Columbia* (2014). Canada owes its Indigenous Peoples protection of their special rights. A fiduciary duty is placed upon Canada to act in the best interests of the Indigenous Peoples in related deals regardless of whether the matters fall within the jurisdiction of Canadian criminal or civil law.

For effective policy creation, one must be cognizant of relevant cases as well as the intent of the judiciary.

R. v. Gladue (1999) presents an attempt by the judiciary to recognize historical differences that produce criminogenic environments. Instead of opting for the punitive measure of incarceration, it opts formore restorative sentencing approaches. *Delgamuukw v. British Columbia* (1997) establishes the existence of Aboriginal Title, and routes for Indigenous Peoples to prove that this right was infringed. *Tsilhqot'in Nation v. British Columbia* (2014) establishes that this Title is active and recognizes that the Indigenous Peoples of modern Canada have a history that includes intricate systems of governance, control, use and management of the land prior to European settlement, thus nullifying the doctrine of *terra nullius*. The rights of Indigenous Peoples are human rights that are entrenched in history and upheld by judicial decisions. As Nelson Mandela once stated, "...[t]o deny people their human rights is to challenge their very humanity" (Blanton & Kegley, 2017, p. 423) and Canada cannot contribute to such an injustice.

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IS CANADA A RELIGIOUSLY NEUTRAL STATE?

KAREN VAN STAVEREN

Since Confederation, and increasingly from the middle of the twentieth century onwards, the assumption that religious freedom is full or equal has been challenged in Canada. The courts play a vital role in establishing the parameters of religious freedom by determining which activities are appropriately called "religious". Through the introduction of the Charter and other human rights codes, the understanding of religious freedoms has developed into a grey area of society. Through the resolution of case law, the courts have increased protections of religious freedom for both major and minor religious denominations. But in doing so, they act in a manner that may not necessarily instill state neutrality.

Canadian law has evolved out of the Christian traditions that existed through the British government. As Canada evolved, the separation of church and state evolved into a practice that removed the sphere of religious influence from state matters. The federal constitution of 1867 did little to acknowledge the separation of the two institutions, nor has the state ever taken on an official state religion despite the British parliamentary position on religion (Jukier, 2014). Thus, it wasn't until 1982 that the religious freedom was implemented in regular Canadian legislation further resulting in a greater separation of the church and state (Jukier, 2014). The establishment of the Charter of Rights and Freedoms guaranteed "freedom of conscious and religion" under section 2(a) of the Charter (Beaman, 2012) Within the charter and the constitution there is a right to freely exercise religious beliefs including the right to openly practice them, executed by the state. The courts have ruled that having freedom of conscience and religion means that the state has an obligation of neutrality in religious matters (Jukier, 2014). Outside of the charter there are also various case laws and human rights codes, which outline greater rights discourses allocated in the protection of religious freedoms (Beaman, 2012).

The legal system has played a substantial role in understanding the limits and implications of religious freedoms. There are many instances where the state specifically, through the practice of law, has acted in a way that has upheld neutrality and in other cases acted against neutrality. The state upholds religious neutrality based on the four mechanisms of moral equality of persons, state neutrality towards religion, freedom of conscience and religion, and the separation of church and state (Jukier, 2014). The state must act in a way that ensures that equal importance is given to each of the mechanism (Jukier, 2014). These four provisions act within specific areas to address the different issues that could arise when trying to define religious freedoms. These provisions however do not account fully for the steps that the government can take in ensuring state neutrality. There is also a big distinction between matters that pertain to neutrality between religions and neutrality about religion (Beaman, 2012). Neutrality between religions assumes that the state must act in equal measure in the support of different religious traditions (Beaman, 2012). Neutrality about religion is the more difficult of the two, as the state must act in a way that does not portray a

religious affiliation or connection (Beaman, 2012). These distinctions or designations create a grey system of legality making each case a unique and influential decision in understanding the breadth of religious neutrality.

One can raise concern about whether the origins of Canadian law would play into the neutrality of the state. With the charter and the law there are provisions, which one might consider diverging for the neutrality of the state. Swearing on the bible is a way in which Christianity encroaches on the religious freedom of others. Those who choose not to practice Christianity are often still required to swear on the bible in court as a testament to their obligation to tell the truth (Dempsey, 2014). Although this has changed, one has to be concerned that individuals may be offended having to take an oath on a religious text that they do not practice (Dempsey, 2014). Movement towards affirming their truthful statements have been made with a greater number of courts keeping copies of other religious texts. However, many Canadians do not know this and are therefore left feeling awkward around the manner. This also plays into the provisions around the Christian background, which Canada is founded. Ryder notes in his article that the supremacy of God clause in the *Charter* is most understood as defining the state's role in not only respecting the autonomy of faith communities but also supporting them (Ryder, 2005 p. 176). It therefore acts to actually connect the secular state with the rights of religion. One might even argue that having this clause places the onus on the government to ensure that religiosity is protected by the state. The fact that that the Charter announces a God but not one specified to a particular religion plays weight in understanding that this could be reinterpreted today to refer to a higher power. Which is something that all religions aspire to.

The wording surrounding the Charter of Rights and Freedoms and the Canadian national anthem discuss the permanent existence of God's supremacy within documents that form the basis of our Canadian society. Although some may argue it in turn automatically places biases on the states position, one can argue that it acknowledges the historical origins of Canadian law. The Charters acknowledgment of the supremacy of God has been met with apprehensions that it instils a religious bias into the document text. Others denote that acknowledging religion in the text is only important as historical note (Jukier, 2014). The same can be said in regards the National Anthem. The national anthem acts as an overarching statement on Canada as a nation. Like the Charter, the mention of God is one that reflects the history of Canada, a country "true, north, strong and free".

The perception that is often assumed is that the Charter allows for all individuals to practice their belief. What is often misconstrued is the understanding that these rights have limits, the right of religious freedom can be limited especially if it violates the religious freedom of another. The right to practice religion in an open forum is something that raises great concern as it brings the private subject into the public sphere, which then makes it subjected to civil law. In the case of City of Saguenay and Tremblay v. Alain Simoneau, the private became public when the City of Saguenay began each of their town hall meetings with a Christian prayer (Simoneau v. Tremblay, 2011). Simoneau, who was an atheist, argued that by starting with a prayer, the public forum is showing preference to the Christian faith. He argued that the steps that the municipality took in attempting to accommodate all religions actually acted to discriminate and further isolate that not in that religious group (Simoneau v. Tremblay, 2011). The courts agreed with Simoneau in the matter. They found that the use of the prayer did in fact violate those rights. However, the council opted to place a non-denominational prayer followed by a break and then the meeting. The mayor in the case known as Tremblay felt that those who were concerned about their religious rights could leave for

the prayer and then return (Simoneau v. Tremblay, 2011). The court then found that the new bylaw actually further perpetuated the discrimination of those who did not follow the catholic faith (Simoneau v. Tremblay, 2011).

The case made it through all three levels of court with mixed reviews. The Quebec appeal court found that the city was justified on the grounds of preserving history and heritage (Simoneau v. Tremblay, 2011). This was overturned by the top court with the ruling that religious views cannot be imposed on citizens regardless of whether or not the state has the majority support of the council. Governments like the municipality have a duty to protect the religious freedoms of their citizens and must act in a matter that ensures state neutrality in matters of religion. Neutrality as the superior court noted, is of upmost importance in matters pertaining to public life (Simoneau v. Tremblay, 2011). This case proves that government at all levels must remain neutral in the supporting of religious and non-religious groups.

The Charter of Rights Freedoms was one of the defining moments in Canadian history. Its establishment was one that has become the background to many legal cases today. The first big test of the Charter was the case of *R v. Big M Drug Mart*. The case challenged the legitimacy of the Lord's Day Act, as one that infringes on the rights of non-Christians by forcing the closure of their business on Sunday, a day that is not their Sabbath (R. v Big M Drug Mart, 1985). The Respondent in the case argued that the Act, as it existed, violated their rights as Jewish people to exercise their religious freedoms. The biggest deciding factor in the cases was whether or not the Act compelled people to religions with Sunday Sabbath, therefore favouring one religion over another (R. v Big M Drug Mart, 1985).). The judge in the ruling found that

> "The *Lord's Day Ac*t to the extent that it binds all to a sectarian Christian ideal, works a form of coercion inimical to the spirit of the *Charter*. The Act gives the appearance of discrimination against non-Christian Canadians. Any law, purely religious in purpose, which denies non-Christians the right to work on Sunday denies them the right to practise their religion and infringes their religious freedom. The protection of one religion and the concomitant non-protection of others imports a disparate impact destructive of the religious freedom of society."(R. V Big M Drug Mart, 1985).

This was a major step in movement towards religious neutrality of the state. In this case, the Judiciary acted in a manner that promoted the equality of religion without taking a stance on the supremacy of one religion over another.

Although the case of *R v. Big M Drug Mart* was a step forward for religious neutrality there are other examples where the state has taken steps in infringing on religious freedom by limited the rights of a parent to uphold their religious beliefs. There are multiple cases including B. (R.) v. Children's Aid Society of Metropolitan Toronto and CAS v. M.S. where the religious freedoms were trumped by the state. The parents of the children were of Jehovah's Witness faith, a religious group that does not believe in the use of blood transfusions (Doyle, 1984). In both *CAS v. M.S.* and *B .v. Children's Aid Society of Metropolitan Toronto*, the life of the child was at stake, and in a similar rulings, the court found that as much as religious freedom are allowed in Canada, they could be restricted as per section 1 of the *Charter* (CAS v. M.S., 2011). In CAS v. M.S., the judge can be quoted with the reasoning that "Religious practices "can and must be restricted when they are against the child's best interests." In such an event, "there would be no infringement of the freedom of religion provided for in s. 2(a) [of the] *Charter*" as per the *case B. (R.) v. Children's Aid Society of Metropolitan Toronto* (CAS v. M.S., 2011, p. 43).

The law found in these cases that although religious freedom is a right, the life of the child was paramount. Although the state did not take a side regarding religion with this case, one has to question the state's ability to limit the beliefs of one religious group due to their provisions on medical treatments. This becomes a grey area for the law in which it must decide what the limits of the *Charter* are, and where they can be stopped. If secularism is based on the mechanisms of moral equality of persons, state neutrality towards religion, freedom of conscience and religion, and the separation of church and state, the state must act in a way that ensures that equal importance is given to each of the mechanisms (Jukier, 2014). This case denoted the right of the parents to control the medical treatment of their children. The courts favoured the protection of life over religious freedoms. The cases above show instances where neutrality on religious freedom failed however there are many cases where this did not occur. Specifically, towards the Jehovah's Witnesses community, there have been a variety of cases that have allowed religious rights to prevail including in the refusal of singing the national anthem in schools, the right of parents to restrict the exposure of their children to religious education and the right to circulate religious materials (Doyle, 1984).

The role of the state is one that must ensure neutrality between religions yet also neutrality about religion. These two areas act in cooperation with one another in protecting the religious freedoms of individuals in Canada. The religiosity of the Canadian landscape is one filled with diversity. As Canada moves towards secularization as a whole, there are many issues that have arisen that challenge religious freedoms and practices. The most ground-breaking cases in the Canadian context are *R. v Morgantaler, Halpern v. Canada and Bhinder v. CN rail*. Each case has challenged the neutrality of the state in instilling religious freedoms through the protection of rights.

The highly publicized case of *R v. Morgantaler* took the issue of abortion to the supreme court of Canada. Although the case challenged the right to life, liberty and security of the person under section 7 of the *Charter*, it was also a challenge to the religious sphere of influence on private matters (R v. Morgantaler 1988). Morgantaler, an abortion doctor argued that the existing ban on abortions in fact infringed on the rights of women. One might question the relation to religion in this context. At this time, religion was still something highly influential in the lifestyle of Canadians. Abortion is against the moral code of most religions. Thus, when this issue came to trial, Canadians around the country raised concern for the legalization of abortion. Section 251 of the criminal code became the contentious legal doctrine that was challenged in the case (R v. Morgantaler 1988). It protected the life of the fetus as a measure of protecting the life of the innocent. This assumption that life begins at conception is one that exists within religion and therefore upholds a notion of religious influence in the law.

> "The deprivation of the s. 7 right in this case offends freedom of conscience guaranteed in s. 2(*a*) of the *Charter*. The decision whether or not to terminate a pregnancy is essentially a moral decision and in a free and democratic society the conscience of the individual must be paramount to that of the state. Indeed, s. 2(*a*) makes it clear that this freedom belongs to each of us individually. "Freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality and the terms "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning."(R v. Morgantaler 1988, p. 179)

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom

they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue (R. v. Morgantaler, 1988). These are all examples of the basic theory underlying the *Charter,* namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life. This not only supports the notion of freedom of religion, but also freedom from religion and the right to choose not to engage in religious practices.

The second major case is legalization of same sex marriage as decided in *Halpern v. Canada*. The decision regarded the legality of marriage of same sex couples. Prior to this ruling, marriage existed under religious law although it also pertained to civil law. Under the law the definition of marriage was limited to one man and one woman, based on the religious sacrament of marriage (Halpern v. Canada, 2003). The common law definition of marriage created a formal distinction between same sex and opposite sex couples based on their sexual orientation. Historically the LGBTQ community has been a marginalized group, which reflects the notion of discrimination. In this case, the courts found that the assumption that marriage is only for the purpose of procreation and childbearing refutes the notion that marriage can be for the purpose of intimacy, companionship, economic benefits and many other justifiable reasons (Halpern v. Canada, 2003). The notion that same sex couples are disadvantaged because they cannot genetically produce children acts to delegitimize their relationships, which is therefore disadvantageous. Thus, the law surrounding these cases is discriminatory. The court overturned the existing law, allowing in turn for the civil recognition of same sex marriage (Halpern v. Canada, 2003). This change did not require that religious organizations allow for these marriages in their faith as per their tradition, but did allow for the civil recognition of these relationships (Halpern v. Canada, 2003). The choice made by the state in this matter supported the argument of freedom of religion while also shifting to support the rights of the LGBTQ* community. The *Civil Marriage Act* of 2005, changed the rules around marriage to "the lawful union of two persons to the exclusion of all others" thus establishing marriage existence outside the realm of religion.

The rights to religious freedom and freedom of conscience allow people to practice or not practice a faith (Jukier, 2014). The introduction of *The Marriage Act* provided greater opportunity for marriage outside religious groups. However, it also allowed religious groups to maintain their stances on same sex marriage (Jukier, 2014). The state's action in this matter took on a facet of neutrality by removing the religious aspect to marriage, placing it in an open civil context.

The case of *Bhinder v. CN Rail* is one, which challenges the notion of freedom of religion. Bhinder, a Sikh employee of CN rail argued that his employer CN Rail was violating his freedom of religion by forcing him to wear a hard hat. The issue of public professions of faith has come into greater concern in the last few years with the French banning of Burkas and the attempted instillation of the *Quebec Charter of Values.* The case of Bhinder challenged the right to openly practice religion in the work place. Bhinder, a Sikh Canadian felt that his religious freedom allowed him the right to practice his religion by wearing a turban on the job site instead of the hard hat (Barnett, 2006). The court found that although Mr. Bhinder had the right to openly practice his religion, the safety policy on wearing hard hats was a bona fide occupational requirement and therefore did not violate the religious freedom provision (Bhinder v. CN, 1985). In this case right to personal safety was judged more important than religious freedom. Bhinder was ultimately fired from his positions as he refused to comply (Bhinder v. CN, 1985).

The Canadian Human Rights Tribunal found CN had engaged in a discriminatory practice and ordered reinstatement and compensation for loss of salary, but on appeal The Federal Court found that the work rule was not a discriminatory practice in that it protected the human rights of others (Bhinder v. CN, 1985).

The Bhinder case is one of the many cases arising involving individuals with more identifiable religious practices. The other more notable case would be in the Multani case involving the carrying of a kirpan by a Sikh boy (Barnett, 2006). These two cases resulted in different interpretations of religious freedom and the limits of the law. For Bhinder, the bona fide occupational requirement over wrote his religious freedoms. Yet in the case of Multani, religious freedom trumped school policy on weapons and he was allowed to carry a small version of the symbolic knife though with specific restrictions (Barnett, 2006). These two cases express the competing interests of the same religion within the societal context in which both visible symbols were met with different rights. This mixed provision leaves a sense that religious freedom is a flexible topic that cannot easily be clearly defined.

The public funding of separate religious schools is an area of contention where the law and religious neutrality intersect. Under article 93 of the *Constitution Act* the Ontario government has been constitutionally obliged to fund Catholic 'separate' schools (Julkier, 2014). The province also funds public secular schools. This creates a dichotomy, which places one religion above another. Specifically, this creates problems when the province refuses to fund other religious schools.

Funding Catholic schools but not other religion schools is a Canadian and, specifically, Ontarian issue. In 1999 the United Nations stated that the full funding of Catholic schools by the government was discriminatory based on the case *Adler v. Ontario 1996* (United Nations, 2000). The refusal by the government to fund other religious schools acknowledged a bias in the neutrality of the state in these matters. The state failed to follow the UN declaration, arguing that the establishment of the charter was not means to override existing constitutions provisions such as that of article 93 (United Nations, 2000 p. 89). The Canadian government in this case justified their reasoning as

> "All children of every or no religious denomination have the same right to attend free secular public schools maintained with tax funds. It is not a deprivation by the Government that a child or a parent voluntarily chooses to forego the exercise of the right to educational benefits provided in the public school system. The State party emphasizes that the province of Ontario does not fund any private schools, whether they are religious or not. The distinction made in the funding of schools is based not on religion, but on whether or not the school is a public or a private/independent institution." (United Nations, 2000 p. 89).

The government went so far as to argue that the schools do not discriminate against religion but fulfills the constitutional obligation of the state (United Nations, 2000). In so far that one does not limit a religious group from establishing a private school one does not provide funding to all religious schools. Doing so could and most likely would undermine the ability to promote neutrality and tolerance (United Nations, 2000).

The Adler case is one that denotes the notion that the state is neutral in matters of religion. This case shows that perhaps neutrality is not a black and white solution but a contextual stance that changes based on time and context. If the *Constitution* supersedes the *Charter,* how can one be sure that the state is acting in a manner that protects the neutrality between religions. If Catholic schools can receive public funding, does this not show that the

state has an intrinsic bias towards Christian religions? Scholars have argued that freedom of religion does not entitle one to state support for one's religion in Canada (Ryder, 2005). In fact, religious neutrality does not mean that the state must avoid taking sides on matters of religious disagreement but that the state is not to take a position on the matters, acting in a way that prevents religious indoctrination (Ryder, 2005). The funding of public Catholic schools could in fact act as a form of indoctrination if one so feels that they are coercive in nature. However, this is unlikely as these institutions are regulated to the same standard as public secular school including curriculum requirements, unlike the private school sector (United Nations, 2000).

One has to wonder whether state neutrality can exist within the legal system or whether or not having neutrality is something that we need in the legal systems. Within the Canadian context there are two ways to look at religious neutrality. Freedom between religions and freedom about religion. These two methods ultimately result in a disconnect between religion and law. As much as Canadian would like to believe that the state acts as a neutral body in matters pertaining to religion, there are many cases where section two of the Charter, freedom of religion is limited. Assuming neutrality would assume that the state would choose to avoid acting in matters pertaining to religion, however this is quite the opposite. The state has acted in a manner that violates neutrality in the name of safety, security and ultimately individual human rights. One then has to wonder if it is possible for the government to exist as a neutral state.

Legislation in Canada cannot be understood separately from the deep cultural and social roots that exist between it and religion. "States and courts are not impartial since they maintain and generate identities, ideologies and interests" (Barzilai, 2004 p. 397). Canadian history is not one with full state neutrality, but one highly influenced by Christian beliefs. The law is an inseparable and interchangeable power within various interactive spaces (Barzilai, 2004). The neutrality that exists within the Charter of Rights and Freedoms is often misconstrued as being one that removed or limits religious biases. Yet the law also stems from a history and a context of Christianity. As noted above, there are many instances that prove that when push comes to shove, neutrality does not always win out. In effect, the main protection afforded by our law to a person whose religious freedom has been violated is his right of civil action, but only to the extent that it does not inflict harm on others (Doyle, 1984). The courts have made formal commitments to neutrality, yet their application is limited by history and circumstance. Matters pertaining to private aspects of religion have remained relatively neutral, yet matters that shift into the public sphere have been subjected to regular politics, thus limiting the factor of neutrality (Moon, 2012). Therefore, state neutrality is seemingly only possible if religion remains a private matter (Moon, 2012). One has to wonder whether neutrality can exist within the state or whether it is even necessary.

So-called state neutrality towards religion can in fact neglect those on the margins from being protected (Beaman, 2012). What at first glance appears to be a neutral stance of not acting on matters of religion can in fact result in abuse by majority religions to enforce or coerce their beliefs onto others. Canada exists on a legal system that was highly influenced by religion. Christianity has for the majority influenced the cultural landscape of Canada and the way its citizens are morally regulated. It is therefore possible that by accepting neutrality as a government position, we as Canadians in fact are losing our roots and cultural heritage. It may be suggested that instead of a policy of neutrality the government should move towards a policy of inclusion and equality. The position would

allow for all Canadians to practice their religion freely, within the limits of the law, yet also acts to protect and makes acknowledgement of the cultural and historical roots of the legal system. Canada's laws were built based on a Judeo-Christian belief system. The courts acknowledge that these beliefs and morals still exist within the system and may even act as potentially coercive (Beaman, 2012). Although strides have been made to remove them, they are deeply entrenched within our system. The idea of neutrality is a pragmatic notion that assumes moral beings are capable of remaining unbiased. Therefore, it may be better both economically and socially for the government to take a stance based on inclusivity and equality than to maintain its unreliable stance of neutrality.

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