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"Hearings" in Writing: Towards a Doctrinally and Theoretically Defensible Practice

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The COVID-19 pandemic accelerated technological innovation in courts, leading to the rise of virtual hearings and the practice of resolving cases solely through written submissions. While written "hearings" can reduce time and expense, they raise significant questions regarding procedural fairness and whether they are permitted under existing legislation. This paper explores these competing interests by drawing on comparative practices and administrative law principles, analyzing how access to justice can both favor and caution against dispensing with oral hearings. Courts should be reluctant to dispense with oral hearings, particularly in first-instance decisions on the merits or when statutory language implies an oral default. Although, while skepticism is necessary, there are a variety of factors which Courts may consider when determining whether to dispense with an oral hearing, on a case-by-case basis.

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I. Introduction

The COVID-19 pandemic forced courts to innovate in a variety of ways. The rise of "Zoom courts," where hearings proceed electronically, has been studied extensively.[1] Many innovations regarding use of technology, particularly for interlocutory matters, remain as a means to facilitate access to justice. This is evidenced in virtual hearings which reduce time and expenses for lawyers and self-represented litigants.

Beyond that mentioned above, another practice arose in the pandemic and remains occasionally present post-pandemic: dispensing with oral hearings entirely and resolving cases solely on the basis of written submissions.[2] Though rarer, the phenomenon of written "hearings" has the potential to save time and expense for litigants and courts. In certain administrative law contexts this procedure is well established and accepted.[3] Though a question remains, does it come at too great an expense to procedural fairness in the civil litigation context? Further, is it permitted pursuant to legislation and regulations that govern court practices? These matters divide the courts and scholarship.[4]

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1 S.E. Chiodo, "Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?" (2021) 57:3 *Osgoode Hall Law Journal*; K. Puddister & T.A. Small, "Trial by Zoom? The Response to COVID-19 by Canada's Courts" (2020) 53:2 *Canadian Journal of Political Science*; S.A. Bandes & N. Feigenson, "Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom" (2020) 68:5 *Buffalo Law Review*.

2 *E.g.*, *4352238 Canada Inc v SNC-Lavalin Group Inc*, 2020 ONCA 303 [*4352238*].

3 See, *e.g.*, *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 CanLII 699, [1999] 2 SCR 817 (CanLII) (SCC) [*Baker*].

4 See, *e.g.*, *4352238*. This has been a particular problem in the realm of allegedly vexatious or abusive proceedings: See *e.g.*, *Heiser v Bowden Institution*, 2022 ABCA 300; D.J. Netolitzky, "After the Hammer: Six Years of *Meads v Meads*" (2019) 56:4 *Alberta Law Review*; G.J. Kennedy, "The Alberta Court of Appeal's Vexatious Litigant Order Trilogy: Preserving

This article explores the competing interests concerning whether a matter can proceed in writing by drawing on comparative practices across Canada while occasionally drawing insight from the United States and United Kingdom. While this article emphasizes dispensing with oral hearings and proceeding in writing, lessons from instances of virtual as opposed to in-person hearings will be drawn upon where appropriate. Part I analyzes first principles of procedural fairness including when oral hearings are required. The administrative law context informs most of the relevant case law and highlights what the common law has already held to be mandatory. The analysis in Part I will then move to the relationship between procedural rights in administrative law, criminal law, and civil litigation. Part II analyzes controversial civil (and, solely as a point of comparison, criminal) case law to better understand the *status quo*. Part III proceeds to consider how "access to justice" can be a double-edged sword, both favouring and cautioning against dispensing with an oral hearing depending on the circumstances. Finally, in Part IV, best practices are put forward.

Briefly, it is argued that courts should be reluctant to dispense with oral hearings in civil litigation. A court's reluctance is heightened at the first instance decision on the merits of a case. At times a hearing "in writing" should be prohibited as a matter of statutory interpretation and legislative sovereignty. This is not to suggest, however, that natural justice always mandates oral hearings. Seven indicia, more commonly in the form of standards than that of rules, are suggested, even though some particularly strong presumptions still remain. Access to justice and principles of

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Access to the Courts, Respecting Legislative Supremacy, and Hopefully Not to a Fault" (2021) 58:3 *Alberta Law Review* [Kennedy Vexatious]; J. Macfarlane, K. Trask & E. Chesney, *The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?* (The National Self-Represented Litigants Project, November 2015) [Macfarlane et al.].

procedural fairness can be in tension in this area, but they can also be complementary. This article suggests best practices to reconcile this tension.

II. Procedural Fairness and Oral Hearings

A. Generally

Oral hearings are often taken for granted in the civil litigation process. This is, to some extent, constitutionally (in the case of the United States) or statutorily (in the case of Canada) mandated when there are jury trials[5]—the logistical complications of a jury trial in writing would be extensive.

Despite protestations from litigants claiming that oral hearings are required for reasons of procedural fairness[6] (historically called "natural justice"), is this really the case? A return to first principles in the administrative law context is helpful as it provides the richest source of case law on the requirement of oral hearings.

It should also be acknowledged that significant scholarship[7] and case law[8] in the United States has concentrated on the difference between a "hearing" and a "trial". This is not surprising given certain aspects of the American constitution, though this concern is much less salient in Canada. In Canada, it is well-established that "hearings"—despite having the root word "to hear"—can occur in writing, so long as permitted by legislation.[9] A "hearing" appears to be the opportunity of a party to have its position "heard", though this can also mean metaphorically "heard" through writing. It is accordingly

5 *Juries Act*, RSO 1990, c J.3; U.S. CONST. amend. VI.

6 *Baker* at para 30.

7 See, *e.g.*, K.C. Davis, "The Requirement of a Trial-Type Hearing" (1956) 70:2 *Harvard Law Review*.

8 See, *e.g.*, *Williams v New York*, 337 US 341 (1949).

9 See Part II of this article.

an all-encompassing term that can include oral argument, written argument, a traditional trial, and likely, various other more informal steps. However, it is important that a party is able to put forward its position and be "heard".

Alec Samuels[10] has addressed the issue of the right to an oral hearing in quasi-judicial procedures in the United Kingdom, particularly within the context of public and administrative law. The House of Lords has emphasized the necessity for a fair procedure, with the right to an oral hearing dependent on various factors such as the nature of the issue, the legal and administrative context, public interest, and the presence of disputed facts. Samuels observed that these can provide some challenges, especially given the administrative state's need to be nimble. Concerns include logistical issues, potential delays, and the redundancy of reiterating facts already presented in written form.

An oral hearing, as part of natural justice, is an old concept in Anglo-Canadian common law. The case of *Pett v Greyhound Racing Association Ltd.*,[11] concerned a licensed trainer of greyhounds who was entitled to an interlocutory injunction restraining an inquiry into an allegation regarding his dog, pending his being represented by counsel at the inquiry and receiving an oral hearing. The decision raised questions about the entitlement to legal representation before domestic tribunals, as judges continue to expand the content of the principles of natural justice. The rules of the National Greyhound Racing Club, under which domestic proceedings were taken against Mr Pett, had no express provision for the requirement of an inquiry by track stewards. However, Lord Denning held that "in a case such as this... fairness may require an oral hearing."[12] Denning emphasized that the

10 A. Samuels, "A Right to an Oral Hearing in Quasi-Judicial Proceedings?" (2005) 64:3 *Cambridge Law Journal* [Samuels].

11 [1968] 2 WLR 1471 [*Pett*].

12 *Pett* at p 1476.

entitlement to an oral hearing was dependent on the nature of the inquiry. Alternatively, the entitlement to an oral hearing could have been the basis of a contractual agreement (or legitimate expectations) as Mr Pett was invited by the track stewards back to the track for an oral hearing. Because Mr Pett was entitled to an oral hearing, Lord Denning found that natural justice would require that person to be represented by counsel if they so choose.[13]

The seminal Canadian case of *Baker*[14] is particularly illustrative of the factors that are relevant in determining one's entitlement to an oral hearing. Entitlement to an oral hearing was a central issue in the case—a case that has since become Canada's leading case on procedural fairness in administrative law more generally. The appellant, Mavis Baker, illegally resided in Canada for many years, during which time she gave birth to four Canadian-born children who were Canadian citizens. When she was ordered deported (an order that was clearly *prima facie* lawful given her acknowledged illegal immigration status), she sought an exemption from deportation based on "humanitarian and compassionate considerations".[15] She was able to provide written submissions to the immigration bureaucracy with the assistance of a lawyer but her request for an oral hearing was denied.

Her case eventually came before the Supreme Court of Canada where several issues were raised, one of which was denial of the oral hearing. L'Heureux-Dubé J, writing for a unanimous Court (Iacobucci J's concurrence

13 *Pett* at p 1476.

14 *Baker*.

15 Permitted pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 at s 25(1).

was confined to another issue), held that five factors should be considered in assessing the content of participatory rights, including an oral hearing:

1) The nature of the decision: the more quasi-judicial it is, the more court-like procedures will be required, while the more discretionary, the less that will be required;
2) The nature of the statutory scheme: the more internal procedural protections (such as internal appeals) are prescribed, the less the common law will need to supplement;
3) The importance of the decision to the affected party: the more important to the party, the more procedural fairness will be owed;
4) Any legitimate expectations based on clear, unequivocal, and unqualified[16] statements by the decision-making body regarding procedure; and,
5) Choices made by the decision-maker itself, giving some space for the decision-maker to make decisions.[17]

In this case, L'Heureux-Dubé J agreed that the third factor warranted a great deal of procedural fairness given the importance of the issue to Ms Baker. However, the other factors pointed to the lower end, particularly because Ms Baker was seeking an indulgence as no one has the right to stay in Canada for humanitarian and compassionate reasons. Therefore, an oral hearing was not owed, especially as it was unclear what the oral hearing would add to the case. She did, however, win the case on the grounds that the administrative decision-maker's reasons gave rise to a reasonable apprehension of bias.

Having said that, there are times when an oral hearing has been held to be necessary. This arises in cases where credibility is at stake. Additionally, if

16 Discussed in more detail in *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 [*CUPE*].

17 *Baker* at paras 23-27.

life, liberty, or security of the person is imperilled per section 7 of the *Canadian Charter of Rights and Freedoms*[18], legislation and regulations will not be able to amend common law procedural fairness entitlements. The leading Canadian case in this regard is *Singh v Minister of Employment and Immigration*,[19] where Mr Singh and his co-litigants sought refugee status in Canada. Were they well-founded, the implications of their claims were such that they had a risk of persecution were they to be deported to India. The relevant legislation at the time did not give them a right to an oral hearing. A unanimous Supreme Court of Canada held that the principles of fundamental justice mandated an oral hearing in circumstances where credibility is at stake. While this common law principle can usually be amended by legislation, this was not the case here given constitutional and quasi-constitutional protections for life, liberty, and security of the person. Though the substance of the deprivations of life, liberty, and security of Mr Singh would take place in India, Canada's prospective deportation played a role in that, mandating a procedure that accords with the principles of fundamental justice.[20] Mandating an oral hearing when constitutional and credibility issues are at stake is also consistent with American precedent

18 See, *e.g.*: *R v Bennett*, 2017 NLCA 59 at para 16:

> [a] party's right to be heard when its interests are at stake is a principle of natural justice. If the party's security of the person is engaged, it can also be a principle of fundamental justice under section 7 of the *Charter* [...] In any event, the right to be heard is fundamental to the proper functioning of our justice system.

19 *Singh v Minister of Employment and Immigration*, 1985 CanLII 65, [1985] 1 SCR 177 (CanLII) (SCC) [*Singh*], addressing considerations under the *Canadian Charter of Rights and Freedoms*, being Part One of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] (constitutional) and the *Canadian Bill of Rights*, SC 1960, c 44 (a quasi-constitutional statute).

20 *Singh*.

which requires an oral hearing prior to the termination of one's benefits.[21] Though this procedure is not applicable in Canada given the lack of constitutional protection for property rights,[22] it illustrates the importance of oral hearings when constitutional interests and credibility are both under consideration.

B. Virtual (But Oral) Hearings

It is worth emphasizing that there are a host of other cases from the administrative law context where it is accepted that a hearing proceeding virtually complies with duties of procedural fairness.[23] Further, the ability to navigate such hearings are also viewed as a basic skill for lawyers and tribunals to possess.[24] They present a valuable point of comparison and contrast. Writing prior to the COVID-19 pandemic, Zimra Yetnikoff and Professor Lorne Sossin (as he then was) urged caution in this regard, asserting that the use of videoconferencing should be carefully evaluated against the standard of procedural fairness, especially in cases involving vulnerable individuals.[25] They emphasized the need for a delicate balance between cost-saving measures and the fairness of hearings, particularly when

21 *Goldberg v Kelly*, 397 US 254 (USSC, 1970).

22 A lack of constitutional protection for property rights is unusual among most Western liberal democracies: see D. Newman & L. Binion, "The Exclusion of Property Rights from the Charter: Correcting the Historical Record" (2015) 52:3 *Alberta Law Review* 543; P. Warchuk, *Beyond Patchwork Protection: Towards Comprehensive Property Rights in Canadian Law* (Macdonald-Laurier Institute, 27 November 2025).

23 *Appeal Commission for Alberta Workers' Compensation,* Decision 2021-0554, 2021 CanLII 120410 (ABWCAC); *Appeal Commission for Alberta Workers' Compensation,* Decision 2021-0538, 2021 CanLII 128573 (ABWCAC).

24 See, *Ontario v Regan*, 2020 ONLSTA 15.

25 L. Sossin & Z. Yetnikoff, "I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources" (2007) 25 *Windsor Yearbook Access to Justice* [Sossin & Yetnikoff].

the use of videoconferencing may compromise the integrity of the judicial process. They raised critical questions about the legal sufficiency and constraints on tribunal funding and structure, urging a nuanced approach that considers the potential impact on fairness and reasonableness in tribunal decision-making.[26] Nonetheless, post-COVID, it is difficult to imagine the law in this area returning to the pre-COVID reservations regarding virtual hearings, especially as technology has improved and average persons have become more familiar with platforms such as Zoom.

It is also worth emphasizing that, even when credibility is central and an oral hearing is required, a virtual hearing is likely to suffice. This was still the case prior to the COVID-19 pandemic but given that there is now more experience with virtual hearings, one would expect them to be more widely accepted.[27] In *Klassen et al v Ember Resources Inc*,[28] the Alberta Land & Property Rights Tribunal held that an oral, albeit virtual, hearing provides adequate procedural safeguards to assess credibility. In *X (re)*, [29] the Immigration and Refugee Board reached a similar conclusion, largely on the basis that "Canadian Courts have determined that the requirements for procedural fairness are met and that a hearing by video-conference does not substantially differ from a hearing in person."[30] That said, the notion that a

26 Sossin & Yetnikoff.

27 *Arconti v Smith*, 2020 ONSC 2782 [*Arconti*]. *Arconti* has been cited over 70 times, including outside Ontario, such as by the Alberta Court of Appeal in *Mostafa Altalibi Professional Corporation v Lorne S Kamelchuk Professional Corporation*, 2022 ABCA 239 (at, in particular, paras 17-27) and the Federal Court in *Natco Pharma (Canada) Inc. v Canada (Health)*, 2020 FC 618 (at, in particular, paras 35-48).

28 *Klassen v Ember Resources Inc*, 2021 ABLPRT 505 at paras 19-24 [*Klassen*]; *Huang v Helm Property Management and Realty Ltd.*, 2021 AHRC 60.

29 *Thanaparatnam v Canada (Citizenship and Immigration)*, 2004 FC 349 [*Thanaparatnam*].

30 *Thanaparatnam* at para 26.

video hearing adequately meets the demands for procedural fairness was buttressed in *R v Dix*,[31] where Costigan J held—in the context of a criminal trial for murder, no less—that:

> In this case, reliability is safeguarded by the technological sophistication of the videoconference facility which allows the witness to be seen and questioned in a live broadcast and by the use of an oath recognized and enforceable in the jurisdiction in which the witness will be situated when she gives her evidence as well as by the use of the oath recognized by this Court. It is the very essence of the oath that it binds the witness's conscience, even in the absence of temporal sanctions.[32]

Obviously, the stakes here are higher than for the civil proceedings, which are of subject in this article. But Costigan J also addressed the ability of the Court to gauge the reaction of a witness in a virtual setting:

> The videoconference procedure…allows the witness to be brought electronically into the Court where the Court has the opportunity to hear and see the evidence as it is given and to control the evidentiary process while it is taking place. The witness is live before the Court and the Court is live before the witness.[33]

C. Administrative Law, Criminal Law, and Civil Litigation

How do we distinguish oral hearings, whether virtual or not, from written hearings? In *Mueller v Montana Alberta Tie Line*,[34] Miller J had to decide whether an oral hearing (as opposed to a written hearing) was required in the administrative law context. He looked to the five *Baker* factors to determine what common law procedural fairness requires. Citing Sara

31 *R v Dix*, 1998 ABQB 370 [*Dix*].

32 *Dix* at para 24.

33 *Dix* at para 17.

34 *Mueller v Montana Alberta Tie Ltd.*, 2011 ABQB 738 [*Mueller*].

Blake's *Administrative Law in Canada*,[35] he ultimately concluded that non-oral screening was not inherently procedurally unfair, particularly when a large volume of cases needs to be addressed. Of course, this is administrative law and not civil procedure, which makes an enormous degree of difference, given courts' unique constitutional role under s 96 of the *Constitution Act, 1867*.[36]

Even so, as the Supreme Court noted in *R v Nahanee*, administrative law's principles of procedural fairness extend beyond that context:

> [the] doctrine of common law procedural fairness was largely developed in administrative law cases, but the principles are also applicable to criminal cases […]. It is well established that the requirements for procedural fairness are context-specific […] Certain protections required in one context to ensure procedural fairness may not be required in another […]. In other words, "[w]hat is fair in a particular case will depend on the context of the case" (*Ruby v Canada (Solicitor General)* at para. 39).[37]

If administrative law principles can affect criminal procedure, they must logically be even more germane to civil litigation, which is the constitutional purview of the courts (like criminal law), but generally lacks constitutional procedural protections (like administrative law). Administrative law's informality can also not only be a boon for access to justice, but also a source of innovation that court systems can subsequently emulate.[38] At the same time, courts require a level of solemnity and formality that is important as a

35 S. Blake, *Administrative Law in Canada*, 4th ed (LexisNexis, 2006).

36 As such, administrators generally are not entitled to constitutional independence akin to judges: see, *e.g.*, *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 [*Ocean Port*].

37 *R v Nahanee*, 2022 SCC 37 [*Nahanee*].

38 See, *e.g.*, L. Sossin, "Designing Administrative Justice" (2017) 34:1 *Windsor Yearbook Access to Justice*.

public justice system.[39] One of the justifications for the publicly funded civil justice system is also that it ensures a forum for vulnerable parties to adjudicate claims with basic procedural fairness.[40] How do these principles intersect, with the state of the law to date, with respect to oral hearings in civil proceedings? That is the subject of the next section.

III. The *Status Quo* and Controversies to Date

A. The General Intersection of Procedural Fairness, Statutory Language, and the Entitlement to an Oral Hearing

Many procedural rules—for instance, those of the American federal courts[41] and the Ontario *Rules of Civil Procedure*—mandate, or at least imply, that hearings are to be oral[42]. As will be further referred to below, the history of controversies in this area illustrates the long history of oral hearings. Moreover, procedural statutes and regulations often refer to certain steps being permissible or mandated to be "heard" in writing.[43] The *expressio unius ext exclusio alterius* principle of statutory interpretation is germane in this

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39 See the decision of Lord Tenterden, CJ in *Garnett v Ferrand* (1827), 6 B & C 611 at 628 (KB):

> It will be, in many cases, impossible that a proceeding should be conducted with due order and solemnity, and with the effect that justice demands, if the presiding officer, whether he be Judge, coroner, justice, or sheriff, has not the control of the proceeding[.]

40 T.C.W. Farrow, *Civil Justice, Privatization, and Democracy* (University of Toronto Press, 2014) at pp 232-251.

41 *Federal Rules of Civil Procedure, SOR/98-106* at rr 38, 78; This has been cited in Canada in, *e.g.*, *Re Rose*, 1963 Carswell Ont 11 at para 8, [1964] 1 OR 299.

42 RRO 1990, Reg 194 [*Ontario Rules*].

43 *Ontario Rules* at rr 12.06(1.1.), 37.12.1(1), 37.12.1(4), 38.13(2), 61.03.1(1), 62.02(2).

regard: specification of particular exceptions to a general rule implies that those are the ***only*** exceptions to that general rule.[44] Applying this principle to this logically suggests, therefore, that these "hearings" in writing are exceptional—and the norm is thus for "hearings" to proceed orally. The default presumption of an oral hearing is demonstrated by the exceptional circumstances in which they have been denied. Even so, there is no absolute common law right to oral hearings in all circumstances. Statutes can certainly permit hearings in writing, even in courts. The determination of whether a litigant is entitled to an oral hearing depends on issues of procedural fairness (as discussed above in Part I), efficiency, the nature of the matter, and the nature of the statutory scheme.

The Ontario *Rules* contemplate "hearings" in writing for the following matters:

- Applications for leave to appeal (which are a screening mechanism to determine whether the order sought to be appealed has some merit, and/or if the good of finality should trump a possible error);[45]
- A motion on consent, unless the court orders otherwise (where presumably no prejudice is arising due to the matter proceeding in writing);[46]

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44 See, *e.g.*, P. Bryden et al., *Public Law: Cases, Commentary, and Analysis*, 5th ed (Emond Montgomery, 2025) at p 473-474. See also *Ontario Nurses' Association v Corporation of the County of Essex (Sun Parlour Home for Senior Citizens)*, 2020 CanLII 93596 (*ONLA*), for this principle's application in the administrative law context.

45 *Ontario Rules* at rr 12.06(1.1), 61.03.1(1), 62.02(2).

46 *Ontario Rules* at r 37.12.1(1).

- If a party wishes a motion to proceed in writing, though the responding party has a right to make oral submissions, meaning any prejudice would be to the moving party; [47] and,
- An application for a vexatious litigant order, where there is presumably concern that the responding party will abuse the process, but where the court still has discretion to order an oral hearing.[48]

As will be discussed further below, what unites all of these, apart from their statutory permissibility, is the fact that an oral hearing has occurred elsewhere in the process, or a party has a right to object to the dispensation with the oral hearing.

The importance of starting the analysis with the relevant legislation and regulations is also underscored in Alberta practice. For example, the Alberta *Rules of Court* explicitly state, "all appeals will be set down on the Civil Appeal Hearing List for an oral hearing."[49] However, the rule's opening clause states, "[u]nless otherwise directed,"[50] which implies that a judge has the authority to do otherwise and distinguishes this regime from Ontario's. The Alberta *Rules* also allow a single appeal judge to direct an appeal to be heard "without oral argument",[51] further distinguishing the regime from Ontario's.

To be sure, s 96 courts (such as the Alberta Court of King's Bench and the Ontario Superior Court of Justice) have inherent jurisdiction to control their own process. Meanwhile, statutory courts, such as provincial courts of

47 *Ontario Rules* at r 37.12.1(4).

48 *Ontario Rules* at r 38.13(2).

49 AR 124/2010 at r 14.32(1)(a) [*Alberta Rules*].

50 *Alberta Rules* at r 14.32(1).

51 *Alberta Rules* at s 14.32(2).

appeal, the Ontario Divisional Court,[52] the Tax Court, the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada (which, although a statutory court, has constitutional status[53]), have implicit or penumbral powers to fulfill their judicial role.[54] This means that there may be residual power to order a hearing in writing even if not contemplated by statute. However, it is important to underscore that the exercise of inherent jurisdiction cannot conflict with statutory grants of authority, subject to constitutional challenge.[55]

In *Sgrignuoli v Sgrignuoli*,[56] the courts' inherent jurisdiction to dispense with oral argument came into tension with the Ontario *Rules*. The Ontario Divisional Court was faced with a motion to set aside an order and obtain a rehearing of a leave to appeal decision. Despite scheduling an oral hearing, McKelvey J only considered the leave motion in writing. He subsequently dismissed the motion with reasons provided. The Appellant argued that McKelvey J's decision to deny leave should be overturned as the Ontario *Rules* were violated by refusing the Appellant an oral hearing. To remedy the matter, the Appellant sought to set aside the order refusing leave to appeal two cost orders and to obtain a rehearing *orally*, or to direct the motion to a panel of the Divisional Court. Another issue was the jurisdiction to set aside

52 For an informative discussion, see *Isaac v Law Society of Ontario*, 2022 ONSC 3577; *Sgrignuoli v Sgrignuoli*, 2017 ONSC 651 at para 36 [S*grignuoli*]; *Lochner v Ontario Civilian Police Commission*, 2020 ONCA 720 at para 27; *R v 9746499 Ontario Inc*, 2001 SCC 81 at para 70.

53 *Reference re Supreme Court Act,* ss 5 and 6, 2014 SCC 21.

54 See *e.g.*, D. Stratas, "A Judiciary Cleaved: Superior Courts, Statutory Courts and the Illogic of Difference" (2017) 68 *University of New Brunswick Law Journal*.

55 See *e.g.*, I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems*; E. Campbell, *Rules of Court: A Study of Rule Making Powers and Procedures* (Law Book Company, 1985) at p 20–25.

56 *Sgrignuoli*.

the leave order and hear the appeal of the cost orders issued. The Court held that Rules 37 and 61.03 imply that leave motions to the Divisional Court should be heard through an oral hearing. However, there are exceptions to this general rule, as outlined in Rules 37.11(1)(e) and 37.12. Rule 37.12 allows motions to be heard in writing under specific circumstances, such as on consent, when unopposed, or without notice. Sutherland J held that:

> I do not imagine that the drafters of the *Civil Rules* intended to bestow greater procedural rights at the Divisional Court to appellants where the issue is only that of a final cost order than that of interlocutory orders for costs [...] This inconsistency of motion for leave to appeal of final orders on costs and interlocutory orders to the Divisional Court may require examination by the Civil Rules committee. It may be that appeals from final order where the only issue is that of costs and interlocutory orders should both be heard in writing.[57]

It is clear that Sutherland J struggled to balance reading the plain words of the Ontario *Rules* with the pragmatic implications of the strange division of jurisdiction and procedural rights between the Court of Appeal and the Divisional Court.[58] Ultimately, he directed the motion to a panel of the Divisional Court and reserved the costs to the panel.

Another instance where exigencies may have driven the dispensation with an oral hearing was *4352238*,[59] wherein Roberts JA held that the Court of Appeal of Ontario's inherent jurisdiction to manage its own process allowed it to mandate a written hearing early in the COVID-19 pandemic, notwithstanding the requirement that appeals be "heard". None of the

57 *Sgrignuoli* at paras 52–53.

58 See G.J. Kennedy, "Wither the Divisional Court? Looking at the Past, Analyzing the Present, and Querying the Future of Ontario's Intermediate Appellate Court" (2021) 53:1 *Ottawa Law Review*.

59 *4352238*.

aforementioned discrete exceptions for "hear[ings] in writing" were applicable to the case at hand. Her order was appealed, but that appeal was abandoned when the appellant abandoned the underlying appeal. Given the *expressio unius* principle of statutory interpretation, and the lack of constitutional stakes in the appeal, her decision could be critiqued from a statutory interpretation perspective. Even so, it illustrates that pragmatic considerations, particularly in the early days of the COVID-19 pandemic, may sometimes carry the day in these matters, especially with sophisticated commercial litigants.

It is more difficult to imagine this dispensing with an oral hearing being permitted before courts of first instance. Even here, however, written processes can be justified—particularly for cases that suffer from a manifest flaw. This is strikingly the case regarding Rule 2.1 of Ontario's *Rules of Civil Procedure*.[60] This rule permits a court to dispense with traditional procedure to dismiss a matter that is "on its face" frivolous, vexatious, or abusive. This Rule is quintessentially used in one of two situations:

a) where the deficiency in the pleading is obvious (such as frivolous complaints, exemplified in a lawsuit against a city after its lifeguard allegedly wrongly criticized the plaintiff for swimming too slowly in the fast lane of a pool[61]); or,

b) attempts to re-litigate matters already decided.[62]

The former category addresses instances where there is reason to believe the litigant will abuse the court process and even a motion to dismiss the matter will result in the "proposed cure" of a dispositive motion, "caus[ing] a fresh outbreak of the disease" that is abusive litigation tactics.[63] The latter

60 *Ontario Rules* at r 2.1.

61 *Asghar v Toronto (City)*, 2015 ONSC 4650.

62 *Simpson v The Chartered Professional Accountants of Ontario*, 2016 ONCA 806.

63 *Raji v Borden Ladner Gervais LLP*, 2015 ONSC 801 at para 8 [*Raji*].

category encompasses instances where a litigant has already had an oral hearing and is abusing the court system after failing to "move on". In other words, there are very acute, but very sound, reasons to dispense with the oral hearing in these circumstances. Moreover, litigants are still allowed to make written submissions as to why their proceedings should not be dismissed. It is important to observe that Rule 2.1 is an explicit rule designed for circumstances where the oral hearing is likely to be counterproductive (by giving a vexatious litigant a fresh opportunity to act vexatiously) in facilitating a just outcome; it is not a process that the courts have developed *sua sponte*.

Oral hearings are nonetheless mandatory when penal consequences are at stake. A public, oral trial is constitutionally guaranteed in the criminal context pursuant to s 11(d) of the *Canadian Charter of Rights and Freedoms*. As such, when quasi-criminal consequences are at stake in the civil or administrative context, an oral hearing will likely be required.[64] For instance, in *Jackson v Jackson*,[65] Chapel J held that contempt proceedings, given their quasi-criminal nature, require the same procedural protections as criminal proceedings:

> Having regard for the quasi-criminal nature of contempt, the alleged contemnor must be afforded the same protection and procedural safeguards as an accused in a criminal proceeding. These include the following:
>
> 1. The right to a hearing, including an oral hearing, if requested.
>
> 2. The right to make full answer and defence, including the right to counsel, to call evidence, and to cross-examine upon the other party's evidence.

64 Samuels; *John Howard Society of Saskatchewan v Saskatchewan (Attorney General)*, 2025 SCC 6.

65 *Jackson v Jackson*, 2016 ONSC 3466 at para 55 [*Jackson*]; *Antoine v Antoine*, 2024 ONSC 1397 at para 38.

> 3. The right not to be compellable as a witness in the hearing.[66]

This is also the case for administrative decisions with quasi-criminal consequences. For instance, in *Bilodeau-Massé v Canada (Attorney General)*,[67] Martineau J held that the principles of fundamental justice require that an offender, who was at risk of having a long-term sentence order being suspended (which would have severe consequences to his liberty), have the opportunity to appear in person before the board that will make such a decision.[68]

These cases build on uncontroversial cases from the criminal law context, which hold that oral hearings are required as a matter of constitutional law, prior to decisions being made that would jeopardize the accused's liberty. This goes beyond the trial itself and extends to special hearings that affect a sentence, such as dangerous offender hearings,[69] and incidents where the collateral consequences of a sentence on immigration status were not factored into what appeared to be a *pro forma* sentencing hearing.[70] This does not prohibit, post-sentencing, the possibility of a judge reaching out to counsel if the judge is considering factors and even penalties beyond what was discussed at the sentencing hearing—but only after there has been a sentencing hearing and the parties are given a reasonable amount of time to respond in writing.[71]

These are all interesting cases because they appear, like the aforementioned *R v Nahanee*, to apply principles from the administrative law context to the civil and/or criminal context. It is worth noting, however, that

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66 *Jackson* at para 55.

67 *Bilodeau-Massé v Canada (Attorney General),* 2017 FC 604 [*Bilodeau*].

68 *Bilodeau* at para 8.

69 *R v McDonald*, 2018 ONCA 369.

70 *R v Mills*, 2024 ONCA 204.

71 *Nahanee* at para 46.

these common law principles of fairness can be modified by statute—subject to constitutional constraints.

When liberty is at stake, the common law may not amend the procedural principles of fundamental justice, as guaranteed by s 7 of the *Charter*.[72] In the civil litigation context, however, it is possible to amend such principles and courts must respect legislative choice in this regard, unless the legislative choice offends the constitution. Such a constitutional issue is unlikely, given that particular procedural rights in the civil litigation process are unlikely to be subject to constitutional protection.[73]

B. Virtual But Oral Hearings

It should be emphasized that the previous subsection addressed the entitlement to any type of oral hearing. This is to be distinguished from virtual hearings, which are almost always permitted outside certain criminal contexts (and even there, elements of remote hearings can be permissible[74]). As always, statutory authorization for a proceeding virtually is important. In British Columbia, for instance, the governing statute holds that parties are to be examined within the province,[75] but an exception can be made "where it is just and convenient"[76] for persons residing outside of the province. This has been interpreted generously bearing in mind the interests of the witnesses, although the presumption remains that examinations are to take place in person in the province.[77]

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72 *Singh*.

73 *Poorkid Investments Inc v Ontario (Solicitor General)*, 2023 ONCA 172.

74 *R v Benjaminson*, 2020 SKPC 26 at paras 26-28; *R v Burns*, 2020 SKQB 228 at paras 16-17; *R v Turner*, 2002 BCSC 1135.

75 *Supreme Court Civil Rules*, BC Reg 168/2009 at r 7-2(11).

76 *Scott v Fresh Tracks (Canada) Inc.*, 2023 BCSC 1724 at para 28 [*Scott v Fresh Tracks*].

77 *Huang v Silvercorp Metals Inc.*, 2016 BCSC 778 [*Huang*].

Remote examinations became even more common upon the advent of the COVID-19 pandemic.[78] For instance, in *Arconti v Smith*,[79] COVID-19-related public health restrictions at the time precluded an in-person hearing, meaning the examination of witnesses would need to take place virtually or be delayed. The plaintiffs objected to a video examination, asserting that they:

a. needed to be physically present with counsel to assist with documents and facts during the examination;

b. it is more difficult to assess a witness's demeanour remotely;

c. the lack of physical presence in a neutral setting deprived the occasion of solemnity and a morally persuasive environment; and,

d. the plaintiffs did not trust the defendants to not engage in sleight of hand to abuse the process.

Myers J rejected these arguments and was quite blunt in doing so. He held:

> In my view, the simplest answer to this issue is, "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than person attendance. We should not be going back.[80]

78 *Scott v Fresh Tracks*; *Lo v Lo*, 1991 BCSC 3005; *Le Soleil Hotel & Suites Ltd. v Le Soleil Management Inc.*, 2007 BCSC 2049; *Huang*; *Baldface Mountain Lodge Limited Partnership v Swan Engineering*, 2013 BCSC 2198 at para 15.

79 *Arconti*.

80 *Arconti* at para 19; *Mostafa Altalibi Professional Corporation v Lorne S Kamelchuk Professional Corporation*, 2022 ABCA 239 at paras 17-27; *Natco Pharma (Canada) Inc v Canada (Health)*, 2020 FC 618 at paras 35-48.

He also expressly rejected the notion that there were "due process concerns" inherent in the context of a video hearing:

> I respectfully do not find the presence of any "due process concerns" inherent in the format of a video hearing. All parties have the same opportunity to participate and to be heard. All parties have the same ability to put all of the relevant evidence before the court and to challenge the evidence adduced by the other side. The only possible "unfairness" is a lack of comfort by one counsel that he or she will be at their best in presenting evidence and making arguments using technology.[81]

Myers J, who has had a particularly large impact in the development of Rule 2.1,[82] further held that comfort with such technology is part of a lawyer's basic competence. This may mean that dispensing with an in-person hearing is permissible. When can the oral hearing be entirely dispensed with, allowing matters to proceed in writing? That will be addressed in Part IV, but first it is important to consider the concept of access to justice.

IV. Access to Justice

"Access to justice" is a concept everyone expresses support for in the abstract, only for its meaning in particular cases to become contentious. [83] Traditionally, this has been conceived of as access to lawyers and court resolution processes. Under this procedural (in Canada, sometimes called the

81 *Arconti* at para 32.

82 G.J. Kennedy, "Rule 2.1 of Ontario's Rules of Civil Procedure: Responding to Vexatious Litigation While Advancing Access to Justice?" (2018) 35 *Windsor Yearbook of Access to Justice* at p 243 [Kennedy 2018].

83 T.C.W. Farrow, "A New Wave of Access to Justice Reform in Canada" in A. Dodek & A. Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) [Farrow 2016].

"First Wave" [84]) conception of access to justice, there is an implicit presumption that, should access to the justice system be fostered, access to justice will have been achieved. Therefore, somewhat unsurprisingly, this conception of access to justice emphasizes how lawyers practice law.[85] More germane for present purposes, however, this conception of access to justice also takes aim at court procedure: if only access to the court system can be facilitated through simpler procedure, access to justice will have been achieved. Accordingly, this conception of access to justice tends to emphasize both the delay and costs of civil litigation and seeks to minimize both.[86]

This procedural conception of access to justice can be critiqued for being too myopic, and not considering alternatives to litigation that can achieve more satisfactory results. [87] This conception is also fairly agnostic about outcomes, which Trevor Farrow's work demonstrates litigants value enormously. [88] Related to the concern about outcomes, this procedural conception of access to justice can also be critiqued for downplaying the extent to which procedure is required to achieve a just result—which is, after all, what procedure serves to facilitate.[89]

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84 R.A. Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in J. Bass, W.A. Bogart & F.H. Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Law Society of Upper Canada, 2005).

85 M.M. Leering, "Enhancing the Legal Profession's Capacity for Innovation: The Promise of Reflective Practice and Action Research for Increasing Access to Justice" (2017) 34:1 *Windsor Yearbook of Access to Justice* at p 220.

86 Farrow 2016.

87 J. Macfarlane & M. Keet, "Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program" (2005) 42:3 *Alberta Law Review* at p 677.

88 T.C.W. Farrow, "What is Access to Justice?" (2014) 51:3 *Osgoode Hall Law Journal* at p 957.

89 O.G. Chase, J. Smith & A. Lee, *Civil Litigation in Comparative Context*, 2d ed (West Academic Publishing, 2017) at p 387 [Chase et al.].

While it is possible to be focussed excessively on more efficient procedures to the detriment of other essential factors, minimal financial cost and speed remain, other things being equal, essential components of a just system.[90] This is reflected in the ancient maxim "justice delayed is justice denied". Moreover, if the public justice system is so expensive that it cannot be accessed, the common law will end up underdeveloped. As Louis Kaplow has put the matter starkly: "how [are we] to assess the truthfulness of a legal system that rarely errs but is prohibitively costly to employ?"[91] As such, we should critically examine the extent to which a more extensive process furthers just results, and the collateral consequences of seeking ultimately unattainable perfect procedural justice.[92]

How do oral hearings match up against these conceptions of access to justice? The short answer is "it depends". There is no question that an oral hearing—certainly, a traditional trial—delays matters and costs significant financial resources. Accordingly, if oral hearings can be dispensed with, that would logically further access to justice. This concern about delays and costs is amplified if there is reason to believe that a problematic litigant will "highjack" the oral hearing and turn it into a circus.[93] But even more generally, there are times where a decision is required urgently, or giving

90 Farrow 2016.

91 L. Kaplow, "Information and the Aim for Adjudication: Truth or Consequences?" (2013) 67:2 *Stanford Law Review* at pp 1365-1366.

92 *Revane v Homersham*, 2006 BCCA 8 at para 17, cited by the dissenting reasons of LeBel and Abella JJ in *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19; L. Sirota, "How Much Justice Can You Afford?" Double Aspect (23 April 2020) https://doubleaspect.blog/2020/04/23/how-much-justice-can-you-afford/.

93 *Raji* at para 8.

everyone an oral hearing is impractical. In such circumstances, written hearings must suffice.[94]

Having said that, even under a narrow procedural definition of access to justice, there are costs to dispensing with oral hearings. Judges may have questions for lawyers that will remain unanswered should the proceeding be entirely in writing. This is because even if questions are sent in writing by the judge, follow-up may be required. Litigants will further need to expand their written arguments, meaning judges need to spend more time preparing and lawyers need to spend more time writing, which may ultimately be more expensive for litigants.

Moreover, from a substantive access to justice perspective, there is a logical reason oral hearings exist: to allow lawyers to explain their argument before a captive audience and discern where potential problems may be. For self-represented litigants, this concern may be heightened. Such litigants may lack the sophistication to explain their case in writing and will rely upon the oral hearing to ensure the judge understands their position.[95] To be fair, however, some self-represented litigants may excel at writing and be unnerved by the court atmosphere.[96]

Ultimately, access to justice ***can*** favour dispensing with oral hearings. At the same time, there are access to justice costs, to say nothing about procedural fairness concerns, when matters proceed in writing. How can these considerations be balanced? That is the subject of the next subsection.

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94 *Fish v National Steel Car Ltd.*, 2012 HRTO 358, where expedited hearings are conducted via written submissions. But even *Baker* illustrates that practical considerations play a role in oral hearings not always being required.

95 *Kirby v Hope Place Centres*, 2013 ONCA 459 [*Kirby*]; Macfarlane et al.

96 A. Schmitz, "Measuring 'Access to Justice' in the Rush to Digitize" (2020) 88:6 *Fordham Law Review* at p 2385.

V. Towards a Theoretically and Doctrinally Sound Approach

What lessons should we draw from first principles and the *status quo* related to the dispensing with oral hearings? This article suggests seven factors should be considered. Generally, they are to be weighed, in a manner like the *Baker* factors, to determine whether procedural fairness requires an oral hearing. However, some warrant particularly strong consideration.

A. The Need to Comply with Governing Statutes and Regulations

As observed before,[97] courts in Canada have been reluctant to hold that a superior court's inherent jurisdiction (and, by analogy, penumbral powers of statutory courts) is displaced by legislation. In *R v Caron*, Binnie J noted that the breadth of the inherent jurisdiction of the Court is nearly limitless and is essential to ensure a court can fulfil its duties as a court.[98] Simultaneously, however, the breadth of this power means that courts should exercise inherent jurisdiction sparingly and with caution, cognizant of their proper and modest, albeit essential, role in the constitutional order. [99] Notwithstanding this, Binnie J held that a court's inherent jurisdiction will only be ousted "if the action contemplated through inherent jurisdiction would conflict with the statute."[100]

This, of course, begs the question of what "conflict" means here. Dickson J (as he then was) held in *Baxter Student Housing Ltd. v College Housing Co-operative Ltd.* that "the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating

97 Kennedy Vexatious at p 742, which this section is in large part based upon.

98 *R v Caron*, 2011 SCC 5 at para 30 [*Caron*].

99 *Caron* at para 32.

100 Kennedy Vexatious at p 747.

the unambiguous expression of the legislative will."[101] Even so, *Caron*, the decision of Bastarache J in *Canada (Human Rights Commission) v Canadian Liberty Net*,[102] and the scholarship of Professor Thomas Cromwell[103] (as he then was) all underscore that "explicit" or "clear" language is required to oust inherent jurisdiction. As Slatter JA held in *Jonnson v Lymer*,[104] courts should only rely on inherent jurisdiction in areas where the legislature has legislated if: a) the proposed exercise of the jurisdiction is compatible with the underlying statutes and regulations; and b) there is no other way to achieve a just result.

How does this intersect with the availability of oral hearings? Insofar as statutes and regulations mandate (or at least heavily imply considering the principles of statutory interpretation) that hearings are to be oral, this must be respected, at least in the absence of parties' consent to proceed entirely in writing. Interpretative provisions such as Rule 1.04 of the *Rules of Civil Procedure*, which emphasize the overarching importance of justness and proportionality in interpreting the rules, cannot override the more specific mandating of oral hearings.[105] Exceptions such as Rule 2.1 of Ontario's *Rules of Civil Procedure* are ***legislated*** exceptions addressing discrete problems. As noted before, relying on legislated rules and statutes is appropriate in terms

101 *Baxter Student Housing Ltd. v College Housing Co-operative Ltd.* (1975), [1976] 2 SCR 475 at p 480 (SCC).

102 *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 32 (SCC).

103 T.A. Cromwell, "Aspects of Constitutional Judicial Review in Canada" (1995) 46:5 *South Carolina Law Review* at p 1031.

104 *Jonsson v Lymer*, 2020 ABCA 167 [*Lymer*].

105 For discussion on conceiving of legislative purpose as an excessively abstract level, see, M. Mancini, "The Purpose Error in the Modern Approach to Statutory Interpretation" (2022) 59:4 *Alberta Law Review* at p 919.

of predictability, democratic legitimacy, and judicial humility.[106] When parties reasonably view a statute or procedural rules as entitling them to an oral hearing, courts should not rely on their inherent jurisdiction to contradict that. This is particularly the case in procedural law, where parties may have prepared written arguments or their pleadings assuming an oral hearing will follow.[107] Accordingly, a decision such as *4352238* is troubling, as it dispensed with even a virtual oral hearing after parties relied upon there subsequently being an oral hearing in writing their factum. Dispensing with an oral hearing in such circumstances would also not accord with legitimate expectations, which hold that parties may rely upon explicit representations of procedure to be followed.[108]

Ultimately, therefore, explicit prescriptions or heavy implications that hearings are to be oral, if found in governing statutes or procedural rules, must be respected by courts. Courts cannot dispense with oral hearings in such circumstances, and certainly not if the expectation of an oral hearing has been reasonably relied upon.

B. First Instance Decisions on the Merits

The second general category where oral hearings should (almost) always be mandated is first-instance hearings on the merits. By "first-instance hearing on the merits", I intend to encompass not just a trial but also a summary judgment motion or motion to determine a legal question that could dispose of an action. This should be close to an absolute rule, with very discrete exceptions. A trial was historically viewed as the epitome of a just process,

106 G.J. Kennedy, "The Rules-Standards Debate and Summary Procedures: A Case for More Rules" (2022) 47:1 *Journal of Legal Philosophy* at p 24 [Kennedy 2022].

107 Kennedy 2022.

108 *CUPE*.

with the denial of a trial being the quintessential procedural injustice.[109] While we have moved away from the paradigm of a trial being the only way to have fair resolution of a case on the merits,[110] there remains something essential about a party feeling ***heard***,[111] which is logically buttressed when matters take place orally. To deny even a first-instance oral hearing appears to offend very deep common law perceptions of fairness. While administrative law precedents show an oral hearing is not necessary to have a fair process, a court is a qualitatively different entity than an administrative body. While both are adjudicative, the former is constitutionally guaranteed and provides a unique and essential role in a constitutional democracy.[112] The fact that certain processes in criminal law or American civil jury trials must ***constitutionally*** be heard orally is a caution against dispensing with an oral process entirely.

Two caveats should nonetheless be added to this. First, many oral hearings need not look like a traditional trial. A summary judgment motion[113] and a motion to determine a legal issue[114] are both expeditious ways to have an oral

109 J. Walker, "Summary Judgment Has its Day in Court" (2012) 37:2 *Queen's Law Journal* at pp 697, 701 [Walker]; *Irving Ungerman v Ltd. Galanis (CA)*, 1991 CanLII 7275 (ON CA) at paras 550-551.

110 *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*].

111 E.A. Lind & T.R. Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988) at pp 76-81; E.A. Lind, et al, *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* (The Rand Corporation, 1989) at pp 78-80; J.V. Roberts & L.J. Stalans, *Public Opinion, Crime, and Criminal Justice* (Westview, 2000).

112 *Crevier v A.G. (Québec) et al.*, 1981 CanLII 30 (SCC), [1981] 2 SCR 220.

113 *Hryniak*; Walker; B. MacKenzie, "Effecting a Culture Shift: An Empirical Review of Ontario's Summary Judgment Reforms" (2017) 54:4 *Osgoode Hall Law Journal* at p 1275 [MacKenzie].

114 *Atlantic Lottery Corp. v Babstock*, 2020 SCC 19 [*Babstock*]; G.J. Kennedy, "Nevsun, Atlantic Lottery, and the Implications of 2020 Supreme Court of

hearing on the merits, even if not through the means of a traditional trial. Nothing in this article should suggest that these mechanisms ought not to be employed robustly if appropriate—both can be very beneficial in facilitating access to justice.[115]

Second, there are exceptional circumstances, as illustrated by Rule 2.1 in Ontario, where there is good reason to suspect that if a litigant is given an oral hearing, the litigant may abuse the process of the court. This is often because the claim is facially absurd or abusive and ought not to be given "another moment of court time."[116] Though this is rare, and courts should be zealous not to "water down" the standards in this regard, such instances do occur. If done with sufficient procedural safeguards in writing, dispensing with the oral hearing can be necessary to preserve the integrity of the court process. Another quintessential reason that a proceeding is abusive is when it is an attempt to relitigate a matter already decided. While courts should be careful to be certain that this is indeed what is occurring before dispensing with an oral hearing,[117] the fact is that such individuals have already had oral hearings and there is no need to provide another one.

By and large, however, a first instance hearing on the merits should almost always receive an oral hearing.

C. Interlocutory Matters

The first instance hearing on the merits can and should be contrasted with interlocutory matters. Interlocutory matters, by definition do not finally

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Canada Motion to Strike Decisions on Access to Justice and the Rule of Law" (2021) 72 *University of New Brunswick Law Journal* at p 82 [Kennedy 2021].

115 *Hryniak*; Walker; MacKenzie; *Babstock*; Kennedy 2021.

116 *Sarac v Wilstar Management Ltd.*, 2021 ONSC 7776 at para 25.

117 A real danger that can be seen in, *e.g.*, *Khan v Krylov & Company LLP*, 2017 ONCA 625 at para 14.

resolve an action.[118] To be sure, there are matters that are very close to a determination on the merits. For instance, a determination on jurisdiction or *forum non conveniens* may, as a practical matter, decide a case.[119] Similarly, a motion to strike out part of a claim may finally resolve that matter. Limitations determinations can similarly be dispositive of a claim or defence.[120]

At the same time, other interlocutory matters address issues of discovery, technical rules of pleadings, and whether an expert's report complies with procedural requirements.[121] These matters are far removed from a case's merits and, for example, Ontario permits motions concerning such matters to be brought in writing if there is consent.[122]

It is ultimately posited that the further an interlocutory matter is from the merits of a case, the more sanguine a court can be about dispensing with an oral hearing. This is truly a "standard" and not a rule, to be considered in conjunction with other factors raised in Part IV. But it recognizes that, as noted in *Baker*, "what is at stake" and how much of a legal "right" it is, are relevant to determinations of appropriate procedure.

D. Appeals

Appeals are another area where the necessity for an oral appeal is not as clear particularly when, as is almost always the case, there is no new evidence on

118 G.J. Kennedy, "Civil Appeals in Ontario: How the Interlocutory/Final Distinction Became So Complicated and the Case for a Simple Solution?" (2020) 45:2 *Queen's Law Journal* at p 243 [Kennedy Appeals].

119 *MJ Jones Inc. v Kingsway General Insurance Co.*, 2003 CanLII 37356 (ON CA).

120 *Charlebois v Les Enterprises Normand Ravary Ltee.*, 2006 CanLII 8873 (ON CA).

121 Kennedy Appeals.

122 *Ontario Rules* at r 33.08.

appeal.[123] On appeals, there has already been a determination on the merits, almost certainly after an oral hearing.[124] In many civil law jurisdictions such as Italy, there is a triage process to determine whether a matter appealed from warrants more than a cursory review of written submissions.[125] In many common law jurisdictions, leave processes before an appeal is permissible are common.[126] This is not surprising. As Daniel Jutras has noted, appeals are not an intrinsic good or a corollary of decision-making but rather have discrete purposes, such as the correction of legal error.[127] It may not be necessary to have an oral hearing to comprehensively address whether there has been a legal error in the court below.

To be sure, there are times where an appeal is very complicated and helping the judges understand the issues in the case is greatly aided by an oral process. There are other circumstances, quintessentially at apex courts, where the judges may want to ask questions of the litigants with back-and-forth banter being possible.[128] However, this will often not be necessary as a matter of procedural fairness to identify legal errors. This is not an invitation to dispense with legal requirements for an oral appeal.[129] But, when rule-crafters and/or judges are deciding whether dispensing with an oral hearing

123 *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759.

124 Section IV.B at pp 25-26.

125 F. Fiecconi, *The Role of Courts of Appeal in a Changing World: The Experience of the Court of Appeal of Milan in Civil Proceedings*, (Diretto Penale Contemporaeo, 2015) at p 4.

126 *Ontario Rules* at rr 12.06(1.1), 61.03.1(1), 62.02(2).

127 D. Jutras, "The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?" (2006) 32:1 *Manitoba Law Journal* at p 65.

128 Which have a fundamentally jurisprudential function: R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at pp 45, 50-51, 95-96.

129 *4352238* at paras 2-8.

is permissible and/or prudent, the comparative lack of importance of an oral hearing on appeal is another non-determinative factor to be considered.

E. Would the Oral Hearing Cause Expense and/or Delay?

As noted above, "access to justice" can be a double-edged sword when deciding whether to dispense with an oral hearing. Throughout this, Noel Semple's observation that "access" and "justice" are complementary is important to remember.[130] Reducing costs and delay, which can be done through dispensing with an oral hearing, can be in the best interests of the justice system. Very often, however, an oral hearing is not a source of delay or expense. It can allow the judge to better understand the issues and come to a decision more promptly. Assuming a matter is interlocutory, the oral hearing can allow the judge to engage in formal or informal case management, bringing the matter forward to trial in a more expeditious fashion,[131] which is more challenging when proceeding in writing.

At other times, this is much less likely to be the case. Interlocutory motions on peripheral matters may not benefit from any of the foregoing. If the written hearing is used as a triage step, having it proceed in writing is likely to keep costs down. In other words, delay and expense considerations on the way to a just resolution on the merits are fact-specific and should be considered alongside other considerations.

F. Is the Case of Broader Public Importance?

The open court principle encourages that justice be done in public. As Kasirer J noted for a unanimous Supreme Court in *Sherman Estate v*

130 N. Semple, "Better Access to Better Justice: The Potential of Procedural Reform" (2022) 100:2 *Canadian Bar Review*.

131 C. Piché, "Judging Fairness in Class Action Settlements" (2010) 28:1 *Windsor Yearbook of Access to Justice* at pp 116-117; G.J. Kennedy, "The Federal Courts' Advantage in Civil Procedure" (2024) 102 *Canadian Bar Review* at pp 125-126.

Donovan, "the open court principle […] is a central feature of liberal democracy".[132] Hearings in writing, to be sure, are not secret—evidence, pleadings, and decisions can all be publicly accessed. Even so, there is a tension between hearings in writing and the public's ability to access the courts through media who attended the proceedings. The interests served by the open court principle will usually not be significantly affected by hearings in writing because of the ability to access the court file, and the fact that it is rare for civil cases to be of public interest. However, in exceptional cases where the matter is of public interest such that the media or researchers may be interested in attending, the desirability of an oral hearing is greater, in line with Samuels's analysis.[133]

G. Self-Represented Litigants

Finally, it is worth adding a warning, albeit not an absolute prohibition, against dispensing with oral hearings when a self-represented litigant is a party. The National Self-Represented Litigant Project has noted that self-represented parties are likely to benefit from the opportunity to explain their case in court, rather than participating in processes largely in writing.[134] This finding is supported by the work of Jona Goldschmidt and Loreta Stalans, who note the importance of judicial involvement in cases involving self-represented litigants.[135] Lauwers JA further noted as much in *Kirby v Hope Springs*, where he observed that those who suffer from mental health problems, and are disproportionately likely to find themselves self-represented, find it particularly difficult to follow court processes and require

132 *Sherman Estate v Donovan*, 2021 SCC 25 at para 1.

133 Samuels.

134 Macfarlane et al. at p 15.

135 J. Goldschmidt & L. Stalans, "Lawyers' Perceptions of the Fairness of Judicial Assistance to Self-Represented Litigants" (2012) 30:1 *Windsor Yearbook of Access to Justice* at p 157 [Goldschmidt & Stalans].

judicial indulgences unless the responding party is actually prejudiced.[136] James Stone has made similar observations in the American context.[137] In this vein, a set of standard questions about their case and the issues raised may be helpful, to ensure the self-represented litigant has been asked essential questions. Standardization of questions, though challenging given the breadth of subject matter disputes that civil claims address, also prevents the judge from being seen as the self-represented litigant's advocate.[138]

Care must also be taken to avoid equating vexatious litigants, whose litigation is particularly likely to be appropriate to dismiss without an oral hearing, with self-represented litigants. Despite the temptation to conflate the two categories, these are very different phenomena, as Slatter JA emphasized in *Lymer*.[139] Watson JA similarly observed in *Nkusi v Patricia C Tiffen Professional Corporation* that "the vast majority of self-represented people are not vexatious litigants, nor do they foment or pursue abusive litigation."[140] This is not a *carte blanche*. While the vast majority of self-represented litigants are not pursuing vexatious litigation, the overwhelming majority of vexatious litigation is brought by self-represented litigants, perhaps due to ethical prohibitions on lawyers bringing frivolous litigation.[141] If there is legitimate reason to fear that a self-represented litigant will abuse the process of the court, or nothing would be added

136 *Kirby* at para 8; Lauwers JA was dissenting in the case, but the majority did not dispute this point.

137 James Stone makes this observation in the high stakes prison litigation context in, "The Prison Discovery Crisis" (2025) 134 *Yale Law Journal* at pp 2819-2820.

138 Canada, Canadian Judicial Council, *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) at p 2.

139 *Lymer* at para 14.

140 *Nkusi v Patricia C. Tiffen Professional Corporation*, 2023 ABCA 272 at para 14.

141 Law Society of Alberta, *Code of Conduct* (23 September 2025) at r 5.1-1.

through an oral hearing, an oral hearing should not be mandated. Even so, concerns about the perception of fairness in these circumstances are greater should a matter proceed entirely in writing. Moreover, the self-represented litigant may uniquely benefit from the opportunity to present their case in person. So, this is a caution in favour of having oral hearings when self-represented litigants are present.

VI. Conclusion

Oral hearings are quintessentially part of the common law process. They can further both "procedural justice" in the sense of feeling heard,[142] and can also facilitate reaching the "accurate" result.[143] But are they always required? And what do the concepts of procedural fairness and access to justice have to say about this? This article concludes that, in the main, the reasons for oral hearings are well-founded. They can reduce the burden on the judge by allowing them to concentrate on issues that are most important and, even more importantly, enhance the perception of fairness. Judges should be very reluctant to dispense with oral hearings on their own initiative, and they should be forbidden from doing so if procedural rules and/or governing legislation mandate oral hearings, as is often the case.

Having said that, it is also suggested that oral hearings are not always required to have a fair process and there are circumstances where matters should proceed in writing, complying with procedural fairness and furthering access to justice. This article considers several variations in this regard. Though the overarching consideration can boil down to this: barring constitutional interests being at stake, the further a particular step in litigation moves away from an initial first-instance decision on the merits, the more willing rule-crafters—and, more exceptionally, judges—should be

142 Goldschmidt & Stalans at pp 157-159.

143 Chase et al. at p 387.

to dispense with the requirement of an oral hearing. In other words, there is good reason to be skeptical of requests to dispense with oral hearings and judges should demonstrate the virtue of humility in this regard, as Binnie J indicated was necessary in *Caron*. But requests should occasionally be granted. This article, it is hoped, brings together some considerations in this regard.

Collateral Immigration Consequences in Sentencing: A Mitigation of Offender Moral Blameworthiness?

Brennan Carlson*

This paper critically examines the implications of the Supreme Court of Canada's (SCC) 2013 decision in R v Pham regarding collateral immigration consequences in sentencing and how these considerations impact the moral blameworthiness of non-citizen offenders. The ruling allows sentencing judges to factor immigration-related repercussions into their sentencing decisions, which has led to critical inconsistencies. This paper argues that such factors often result in disproportionate sentences, effectively diminishing the severity of punishment relative to the crime. The potential for collateral immigration consequences to unduly influence judicial discretion undermines the core sentencing principles of proportionality and accountability. As such, the current framework requires re-evaluation to restore retributivist sentencing practices. Legislative reform or clearer guidelines from the SCC may be necessary to ensure that sentences adequately reflect the gravity of offences committed. Without such changes, this growing disparity could attract public dissatisfaction and further legal complication.

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I. Introduction

Since the SCC seminal 2013 decision in *R v Pham,* the immigration status of an offender can be considered by a sentencing judge when crafting a fit and proportionate sentence.[1] The SCC further held that immigration concerns can be raised before an appellate court if they were not presented to the trial judge at sentencing. Collateral immigration consequences refers to those additional immigration-related problems faced by a non-citizen that arise out of a criminal conviction.[2] In light of *Pham*, courts across Canada have cited collateral immigration consequences to reduce sentences that, if not reduced, would have resulted in immigration-related repercussions.[3] For example, a reduced sentence was provided in *R v Singh*, where the trial judge concluded that the offender should receive a discharge and three years of probation "in consideration of the devastating collateral immigration consequences to recording a conviction."[4]

As such, this paper will explore to what extent the incorporation of collateral immigration consequences in sentencing decisions mitigates offender moral blameworthiness. Ultimately, it will be contested that the inclusion of collateral immigration consequences in sentencing tends to lead to disparate results that often diminish offender moral blameworthiness to such an extent that a re-evaluation of how *Pham* is being applied across Canadian courts is required. These issues also highlight a growing tension

1 See generally *R v Pham*, 2013 SCC 739 [*Pham*].

2 See A. Gerami & N. Ranger, "Pham, Immigration Consequences and Fairness in Sentencing" (2013) 2:1 *The Last Line, Magazine of Defence Counsel Association of Ottawa* at pp 11-13 [Gerami & Ranger].

3 See S. Baglay, "Collateral Immigration Consequences in Sentencing: A Six-Year Review" (2019) 82:1 *Saskatchewan Law Review* at pp 7-10 [Baglay 2019]; See generally A. Esnaashari, "Immigration Consequences for Permanent Residents Convicted of a Criminal Offence in Canada" (2017) https://esnalaw.com/wp-content/uploads/2023.

4 *R v Singh*, 2024 ABCJ 2 at para 31.

between the distinct legal regimes of sentencing and immigration legislation. The consequences of this issue may necessitate a return to a more retributivist approach to sentencing that curtails the weight given to considerations of collateral immigration consequences. It is argued that in doing so, sentencing in such situations can be brought back in line with section 718 of the *Criminal Code*.[5] This will also help to ease the growing tension between the sentencing process and immigration policy objectives, which have been inflamed by *Pham*. Solving these issues will require guidance by either the higher courts, such as the SCC, or by Parliament, to address how *Pham* is being applied across Canada and to ensure that its application is in accordance with sentencing principles and public expectations.

This paper will first begin with a brief introduction and a general outline of the succeeding analysis. It will then overview the necessary analytical background information required for the analysis. This overview will include a discussion of *Pham*, the introduction of collateral immigration consequences in sentencing, and their effects on the *Immigration and Refugee Protection Act* (IRPA).[6] In the subsequent section, this paper will then examine the pertinent case law since *Pham,* and seek to demonstrate that the introduction of collateral immigration consequences in sentencing decisions ultimately has led in many cases to outcomes that do not fulfil the objectives of section 718 of the *Criminal Code*.[7] After this, there is an exploration of how a retributivist theory of punishment may be used to mitigate some of the arguably negative consequences of *Pham*, along with some other possible solutions to these issues. Finally, this paper will conclude with some final considerations on these matters.

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5 *Criminal Code*, RSC 1985, c C-46 at s 718 [*Criminal Code*].

6 *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

7 See *Criminal Code* at s 718.

II. *R v Pham*, the Introduction of Collateral Immigration Consequences in Sentencing, and their Effects on the *Immigration and Refugee Protection Act*

Put simply, the intersection between Canadian criminal law and immigration law is both significant and broad. As such, the scope of this paper will predominantly focus on the interaction of the criminal law with two major types of non-Canadian residents: foreign nationals and permanent residents. Canadian immigration law will prevent a foreign national from gaining admission to Canada on the grounds of either criminality or serious criminality.[8]

The term 'foreign national' encompasses "anyone that is in Canada for a temporary purpose and may include a visitor on a work or study permit."[9] Criminality indicates "a conviction of any offence under an Act of Parliament which is punishable by way of indictment or the conviction of two offences under any Act of Parliament, so long as they do not arise out of a single occurrence."[10] Finally, serious criminality is in reference to the "conviction of an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of 10 years, or the conviction of any offence under an Act of Parliament where a term of imprisonment of more than six months has been imposed."[11]

Generally, a foreign national will also face possible deportation if they are convicted of an offence punishable by indictment or if they are convicted of

8 See generally M. Hughes, "Collateral Consequences: Immigration Consequences of Criminal Law" (6 July 2023) https://coxandpalmerlaw.com/publication [Hughes].

9 Hughes.

10 *IRPA* at s 36(1).

11 *IRPA* at s 36 (2).

two offences.[12] Usually, foreign nationals do not retain the right to appeal a deportation order. In contrast, a permanent resident will lose admissibility to Canada only on the grounds of serious criminality.[13] A permanent resident is defined as someone who does not hold Canadian citizenship (they are usually a citizen of another country) but has been given Permanent Resident status by the Canadian Government.[14]

For permanent residents, the consequences of becoming inadmissible to Canada on the grounds of serious criminality is the loss of their status along with possible deportation without the right to appeal.[15] Permanent residents may still face deportation even if their criminal behaviour does not meet the definition of serious criminality, but they will generally retain their ability to appeal a deportation order in such a scenario. Both foreign nationals and permanent residents can also lose admissibility to Canada on the grounds of organized criminality (transnational crime, for instance).[16] These groups will also lose their right to appeal a deportation order on such a basis.[17] The chart below provides visual clarification of these processes.[18]

12 Hughes.

13 Hughes.

14 Hughes.

15 Canadian Council for Refugees, "Permanent Residents and Criminal Inadmissibility: Resource for Front-Line Workers" (October 2018) https://ccrweb.ca/sites/ccrweb.ca/files [CCR].

16 *IRPA* at s 37.

17 *IRPA* at s 64(1).

18 A. Navaneelan, *Immigration Consequences of Criminal Dispositions and Sentencing* (Legal Aid Ontario, April 2016) https://legalaid.on.ca at p 30 [Navaneelan].

Figure 1: Consequences of Different Criminality Findings Under the Immigration and Refugee Protection Act

	Foreign National	Permanent Resident or Protected Person (non-Canadian Citizen)
Criminality: Deportable with No Right of Appeal	Yes	No (appeals and remedies are available)
Serious Criminality: Deportable with No Right of Appeal	Yes	Yes
Organized Criminality: Deportable with No Right of Appeal	Yes	Yes

Following the conviction of a foreign national or a permanent resident, the police will send the offender's information to the Canada Border Services Agency (CBSA) to determine if they will be deported or lose their status.[19] While a foreign national usually does not have a right to appeal their deportation order in any situation, a permanent resident can in some cases appeal to the Immigration and Refugee Board of Canada's (IRB) Immigration Appeal Division (IAD).[20] The IRB is an independent administrative tribunal responsible for decision-making in relation to

19 Toronto Criminal Lawyers, "Non-Canadian Citizens Face Deportation for a Criminal Conviction," https://torontocriminallawyers.com/article/.

20 Immigration and Refugee Board of Canada, "About the Board" (23 April 2024) https://irb-cisr.gc.ca/en/board/Pages/index.aspx [IRB].

immigration matters while the CBSA will enforce and carry out those decisions.[21]

Critically, if a permanent resident is sentenced to prison for six months or more, they will lose their right to appeal a deportation order.[22] This is important as a permanent resident can raise various considerations such as humanitarian factors as to why they should not be deported at an IAD hearing.[23] These humanitarian factors may include such things as the length of time they have spent in Canada, if they have families or children who were raised in Canada, or if they are suffering from mental health conditions.[24] It should also be noted that conditional sentence orders and discharges are not considered a "term of imprisonment for the purpose of serious criminality."[25] In contrast, a suspended sentence can result in a permanent resident losing their right to appeal a removal order.[26] Ultimately, if a permanent resident loses their right to appeal a removal order, the only remaining legal redress for them is to file an application for judicial review with the Federal Court, or to file an application with the Department of Immigration, Refugees and Citizenship Canada (IRCC). [27] Although complex, the following chart

21 IRB.

22 See generally Hughes.

23 See CCR.

24 CCR.

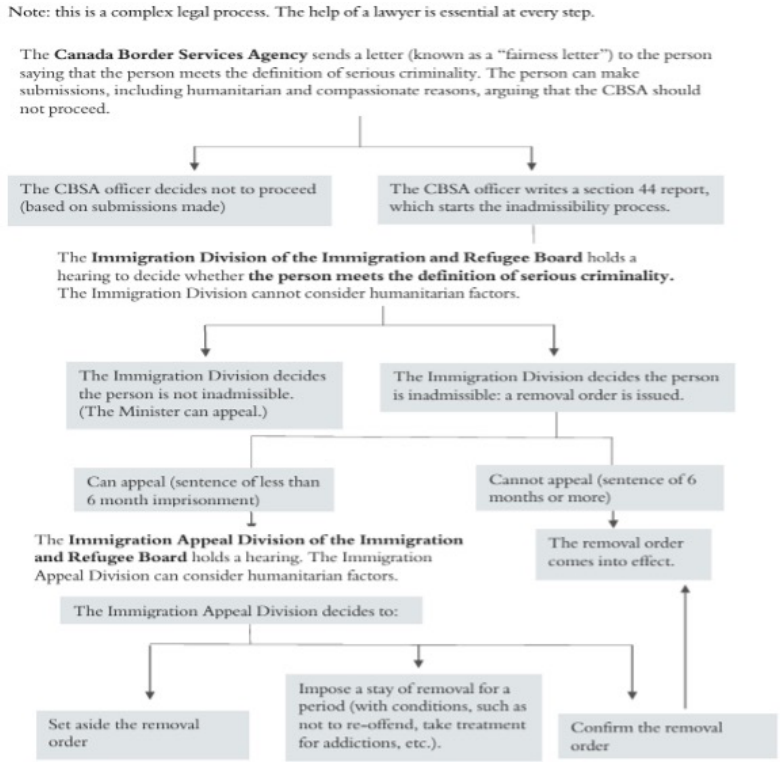
25 *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50. See also Hughes.

26 S. Karas & R. Goel, "Canada – Immigration Consequences of Criminal Sentences and Discharges" (Spring 2022) https://karas.ca/publications.ca/publications/ [Karas & Goel].

27 While the IRB is independent of the IRCC, it still reports to Parliament through the IRCC. See generally IRB, and Karas & Goel.

illustrates the administrative and legal process that a permanent resident who has been convicted of an offence constituting serious criminality faces.[28]

Figure 2: Criminal Inadmissibility and Permanent Residents: The Process



With these background factors in mind, the SCC in *Pham* ultimately made it clear that a sentencing judge "may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender."[29] In addition to considering the

28 See CCR.

29 *Pham* at para 14.

collateral immigration consequences facing an accused, the SCC further stated that an "appellate court has the authority to intervene if the sentencing judge was not aware of the collateral immigration consequences of the sentence for the offender, or if counsel had failed to advise the judge on this issue."[30]

In *Pham*, the offender was a non-citizen charged and convicted for "producing and possessing marijuana for the purpose of trafficking"[31] and was subsequently sentenced to two years' imprisonment. At the time, this triggered a deportation order and the loss of the offender's ability to appeal the order under the IRPA.[32] The offender successfully appealed this decision to the SCC where it was found that the sentencing judge had not taken into consideration the offender's immigration situation when crafting a fit and proportionate sentence.[33] As such, the SCC reduced the sentence by a single

30 *Pham* at para 24.

31 Legally Canadian, "R v Pham, 2013 SCC 15: It is Appropriate to Consider Deportation Order as a Factor in Reducing Sentencing" https://legallycanadian.com/articles/r-v-pham-2013-scc-15 [Legally Canadian].

32 Bill C-43 [*The Faster Removal of Foreign Criminals Act*] passed shortly after the decision in *Pham*. Prior to Bill C-43, a non-citizen could appeal their deportation order with the IAD if they received a sentence of imprisonment that did not surpass two years. Following the passing of this bill, a permanent resident offender can now only appeal a deportation order as long as their sentence of imprisonment does not exceed six months. See National Law Immigration Law Section, *Bill C-43, Faster Removal of Foreign Criminals Act* (Canadian Bar Association, November 2012).

33 H. Gardiner, "Immigration Consequences can affect Sentencing, SCC Rules" *Canadian Lawyer* (14 March 2013) https://canadianlawyermag.com/news/general/immigration-consequences-can-affect-sentencing-scc-rules/.

day so that the offender would not lose their right to appeal the deportation order under the IAD.[34]

The decision in *Pham* ultimately brought greater recognition to the way in which criminal law and immigration law intersects; particularly in that criminal sentences of a specific length can "trigger additional immigration consequences for non-citizens, including the potential for deportation."[35] As such, collateral immigration consequences, in the context of the criminal law, generally refer to three main consequences under the IRPA: (1) a declaration of inadmissibility to Canada; (2) a deportation order; and (3) the removal of the ability to appeal a deportation order with the IAD.[36] Consequently, an accused must be aware of any potential immigration ramifications before entering a guilty plea, while a sentencing judge must consider collateral immigration consequences prior to crafting a sentence.[37]

The SCC stated in *Pham*, "collateral immigration consequences are but one relevant factor among many others related to the nature and gravity of the offence," therefore a sentencing judge is not, *per se*, compelled to "adjust a sentence in order to avoid the impact of collateral immigration consequences on the offender."[38] The SCC also emphasized that a sentence for a non-citizen offender must still be proportionate and in parity with similar sentences for that particular offence. [39] Put another way, the

34 See Legally Canadian.

35 British Columbia Civil Liberties Association, "R. V. Pham (Supreme Court of Canada)" (16 January 2013) https://bccla.org/case/r-v-pham-supreme-court-of-canada/.

36 M. Street, "Collateral Immigration Consequences" *BarTalk* (1 February 2019) https://bartalk.org/article/features/2019-02/collateral-immigration-consequences/ [Street].

37 Street.

38 See generally Legally Canadian.

39 *Pham* at para 18.

"fundamental principle of proportionality must prevail in every case."[40] Sentences in these situations must thus remain within the relevant sentencing ranges while also considering factors such as rehabilitation prospects, moral blameworthiness, and the individual characteristics of the offender.[41]

While the precedent set by *Pham* appears reasonable and prudent in itself, it is ultimately how the principles of this case have been applied in subsequent decisions that has proven to be arguably problematic.

A. The Legislative Logic of the Immigration and Refugee Protection Act and Its Structural Tension with Sentencing Principles

Before delving into the pertinent case law, a more robust understanding of the implications of *Pham* requires a closer examination of the legislative architecture of the IRPA and the policy logic that underpins its criminal inadmissibility regime. Parliament has clearly designed the IRPA to impose consequences on non-citizens who commit certain categories of offences, with the explicit objective of protecting the public and ensuring the timely removal of individuals deemed to pose a risk to Canadian society.

These consequences are independent of the criminal sentencing process and are triggered not by judicial assessments of moral blameworthiness, but by statutory thresholds tied to the nature of the offence and the length of the sentence imposed.[42] Under sections 36 and 37 of the IRPA, the distinction between 'criminality,' 'serious criminality,' and 'organized criminality' reflects an escalating framework of immigration consequences for increasingly severe

40 *R v Suter*, 2018 SCC 34 at para 56.

41 *Pham* at para 8.

42 C. Vinayak, "Immigration Consequences of Criminal Convictions in Canada: Recent Case Law Developments" (1 May 2025) https://cila.co/immigration-consequences-of-criminal-convictions.

levels of criminal behavior.[43] The six-month custodial threshold, which is a critical factor for permanent residents, was introduced through Bill C-43 to expedite the removal of non-citizens convicted of more serious offences by eliminating their right of appeal to the IAD.[44]

Arguably, Parliament's intention was to create a clear, administratively efficient mechanism for removal of non-citizens, one that does not depend on individualized assessments of rehabilitation, hardship, or family circumstances unless the offender remains eligible to access the IAD's humanitarian avenues of relief. In this sense, IRPA's structure is intentionally rigid in that it creates clear consequences for criminal actions, thus prioritizing public safety.

This legislative design sits uneasily alongside the discretionary, individualized nature of criminal sentencing under section 718 of the *Criminal Code*. Sentencing judges are required to impose a punishment proportionate to the gravity of the offence and the offender's moral blameworthiness, guided by principles of parity, denunciation, deterrence, and rehabilitation. These principles are offender-centric and grounded in shared morals. By contrast, IRPA consequences are status-centric and risk-oriented. They are designed purely for immigration policy objectives.[45] One may clearly observe that these two systems operate on different normative logics: one moral and individualized, one administrative.

Perhaps it is this underlying structural inconsistency that creates the tension exposed in the application of *Pham*. When sentencing judges artificially adjust otherwise fit sentences to avoid triggering IRPA consequences, they conflate these two separate regimes which leads to

43 *IRPA* at ss 36-37.

44 Bill C-43, *An Act to amend the Immigration and Refugee Protection Act*, 41st Parl, 1st Sess, 2013 (assented to 19 June 2013), SC 2013, c 16.

45 *IRPA* at s 3.

untenable outcomes. The different thresholds embedded in IRPA begin to exert undue influence on the sentencing process, thereby encouraging judges to treat immigration consequences as if they were the overarching principle in the proportionality analysis at sentencing. *R v Chugh* warns of this dynamic:

> [The] flexibility in sentencing should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences, thus circumventing Parliament's will in other legislation.[46]

A deeper understanding of IRPA's legislative goals therefore clarifies why the overemphasis on collateral immigration consequences is problematic. Evidently, this is a structural incompatibility between two separate legal processes with fundamentally different purposes that is exasperated through an inconsistent application of *Pham*.

As such, sentencing cannot be unduly altered to avoid triggering IRPA consequences. Doing so impacts the integrity of the criminal sentencing process and impedes the immigration objectives of Parliament. While a court should "strive to reach a proportionate sentence by considering collateral consequences, it must not sacrifice a fit sentence in the process."[47] While it is acknowledged that the SCC in *Pham* did not desire to institute a parallel system of sentencing that is unduly influenced by immigration-related matters, the subsequent section highlights how lower courts appear to be drifting in this direction.[48]

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46 *R v Chugh*, 2020 ABPC 247 at para 18.

47 *R v Mann*, 2025 ONJC 486 at para 77.

48 *Pham* at paras 13-16.

III. R v Pham and the Incorporation of Collateral Immigration Consequences: Problems, Inconsistencies and Additional Considerations

While the decision in *Pham* recognized the significance of collateral immigration consequences in sentencing decisions for non-citizens, the way in which Canadian courts have sought to apply the principles of *Pham* has not come without its issues.[49] As Baglay recalls:

> *Pham* also left several issues unclear, making the application of its framework challenging. Over time, lower courts found ways to address some of these gaps. For example, they developed two methodological approaches to the consideration of immigration consequences…it appears that *Pham* is interpreted and applied differently in the context of cases with fit sentences around six months versus those with fit sentences well over six months.[50]

Consequently, in relation to crimes whose punishment is typically well over the six-month incarceration range, collateral immigration consequences were rarely considered as there would be no right available to appeal a deportation order with the IAD.[51] Reducing a sentence below six months solely to avoid immigration consequences can be viewed as an improper and excessive departure from the typical punishment range, making the stricter approach appropriate in such cases.

Contrastingly, for sentences that are typically in and around the six-month range, collateral immigration consequences played a much more significant role in determining the sentencing outcome.[52] This is likely because of the right to appeal a deportation order with the IAD being more explicitly at stake. Ultimately, it is within these types of cases where the

49 See especially Baglay 2019 at p 41.

50 Baglay 2019 at p 41.

51 Baglay 2019 at p 42.

52 Baglay 2019 at pp 41-42.

application of the principles from *Pham* have arguably produced problematic outcomes. This is because the underlying structural tension between two separate legal regimes, as described above, is more likely to be present in such cases. Taking a closer look at the relevant case law may evince the presence of this dynamic.

A. Critical Analysis of Pertinent Case Law

In *R v Yare*, a case from the Manitoba courts, the accused was a permanent resident who plead guilty to the offences of flight from police by motor vehicle, two counts of uttering threats, and failing to comply with a recognizance.[53] The accused, who had a prior record for assault with a weapon and assaulting a police officer, deliberately rammed a police car at a traffic stop and fled the scene.[54] Following his release on bail conditions, the accused was again arrested for breach of bail conditions.[55] The Crown sought a sentence of 18 to 19 months' incarceration. Defense counsel instead proposed a sentence that would incorporate the 179 days of pre-sentence custody the accused had accumulated, thereby avoiding a total sentence exceeding the IRPA's six-month threshold.[56]

The sentencing judge, while acknowledging the "importance of the principles of deterrence and denunciation," also recognized that a "sentence greater than six months might result in the accused's deportation from Canada."[57] After imposing a sentence of five months and 25 days' incarceration, the sentencing judge further stated that "I am not inclined to subject you to deportation hearings, but you need to know how lucky you

53 *R v Yare*, 2018 MBCA 114 at paras 2, 4 [*Yare*].

54 *Yare* at paras 9, 25.

55 *Yare* at para 5.

56 *Yare* at paras 7-8.

57 *Yare* at para 9.

are."[58] The sentencing judge had further stated that the accused "ought to be jailed for about a year for these charges."[59] The Crown subsequently appealed the decision to the Manitoba Court of Appeal (MBCA) contesting that the sentencing judge had "erred in his assessment of the relevant factors by placing undue weight on collateral immigration consequences". [60] The MBCA allowed the appeal and imposed a new sentence of 13 months and ten days incarceration.[61] Critically, the MBCA stated that:

> In our view, the sentencing judge imposed an artificial sentence in order to circumvent Parliament's will and, in doing so, he erred in principle by overemphasizing the collateral consequences. Moreover, reducing the sentence by more than six months from what he considered appropriate to avoid immigration consequences resulted in a sentence that is not proportionate having regard to the circumstances of the offence and the moral culpability of the offender.[62]

The sentence imposed by the lower court fell within the permissible range for the offences, albeit on the low end. However, the accused's deliberate conduct and high moral culpability warranted prioritizing the sentencing principles of denunciation and deterrence. These principles should have remained the primary objectives in this case, regardless of whether doing so would have resulted in significant collateral immigration consequences.[63]

Ultimately, in *Yare*, the sentencing judge explicitly acknowledged that a proportionate sentence for the offender's conduct—deliberately ramming a police vehicle, fleeing from police, and breaching bail—would have been

58 *Yare* at para 12.

59 *Yare* at para 10.

60 *Yare* at paras 2, 13.

61 *Yare* at para 29.

62 *Yare* at para 23. See also *R v Stampp*, 2022 BCCA 408.

63 *Yare* at paras 23-28.

approximately one year of incarceration. Yet, the sentencing judge reduced the sentence to five months and twenty-five days to preserve the offender's right to appeal a removal order. Arguably, this reduction was not grounded in the offender's moral culpability, prospects for rehabilitation, or any mitigating personal circumstances. Rather, it appears that it was driven almost entirely by the six-month IRPA threshold. The MBCA correctly identified this as an 'artificial sentence,' one that subordinated the proportionality principle to immigration consequences.

The finding in *Yare* appears to be in accordance with similar appellate court decisions in Canada. In *R v Lopez-Orellana*, a case from the Alberta Court of Appeal (ABCA), the appellant asked for a reduction of four months and one day from a global sentence of 10 months to avoid facing collateral immigration consequences.[64] However, the ABCA dismissed this appeal and stated that such a reduction would "render this an unfit sentence and one that is inconsistent with the fundamental purpose and principles identified in the *Criminal Code*."[65]

The sentencing judge in *Yare* put too much emphasis on collateral immigration consequences which ultimately resulted in an initial sentence that was not fit and proportionate to adequately address the accused's moral culpability and denounce their actions. The overemphasis on the accused being deported as a result of a sentence in excess of six months was the primary catalyst in this case for the imposition of a sentence that was disproportionate to the gravity of the offence.[66]

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64 *R v Lopez-Orellana,* 2018 ABCA 35 at para 28 [*Lopez-Orellana*].

65 *Lopez-Orellana* at para 28.

66 *Yare* at para 13; See also M. Forrest, "Judge Gave Excessively Light Sentence to Avert Deportation of Refugee who Threatened to Kill Police: Appeal Court" *National Post* (19 November 2018) https://nationalpost.com/news/canada/ judge-gave-excessively-light-

Yare thus illustrates how *Pham* brings to the forefront IRPA's rigid administrative thresholds. These thresholds distort the sentencing process by exerting external pressure on judicial discretion. They encourage judges to treat immigration consequences as if they were part of the culpability analysis, when they are not.

Similarly, the British Columbia Court of Appeal (BCCA) found that the sentencing judge in *R v Lee* reduced a sentence to the point that it was disproportionate to the gravity of the offence and the moral blameworthiness of the offender.[67] In this case, the offender was a permanent resident who had stabbed the victim twice and pursued him, thus causing critical injuries.[68] The sentencing judge had imposed a conditional sentence order of two years less a day in order for the offender to preserve their right to appeal a deportation order under IRPA.[69] The Crown on appeal contested that the "judge was led into error by attempting to preserve the respondent's right of appeal, resulting in a demonstrably unfit sentence."[70] The BCCA agreed and imposed a custodial sentence of three and a half years while noting that the sentencing judge "used the collateral immigration consequences at issue here to reduce the respondent's sentence to the point where it became

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sentence-to-avert-deportation-of-refugee-who-threatened-to-kill-police-appeal-court.

67 *R v Lee*, 2025 BCCA 292 [*Lee*].

68 *Lee* at paras 4-5.

69 *Lee* at paras 20-21. While a conditional sentence order would not be treated as a term of imprisonment under IRPA, it would still entail a criminal conviction which would trigger possible deportation under the IRPA category of non-serious criminality. However, a permanent resident would still retain their right to appeal deportation in this case.

70 *Lee* at para 21.

disproportionate to both the gravity of the offence and the moral blameworthiness of the offender."[71]

While the misapplication of collateral immigration consequences may be appealed and rectified in some cases, this ultimately takes time and resources to pursue. These appellate court decisions still demonstrate a general problem amongst the lower courts regarding the application of collateral immigration consequences.

This pattern appears common across Canada. In *R v J.S.*, a case from the British Columbia Provincial Court, the accused plead guilty to sexual assault and forcible confinement of two separate underage women.[72] The offender was a foreign national studying in British Columbia on a student visa and was thus subject to becoming inadmissible to Canada on the grounds of criminality if they received a criminal record as a result of a conviction in this case.[73] The trial judge ultimately imposed a conditional discharge following the completion of twenty-four months of probation so as not to leave the offender with a criminal record which would jeopardize his immigration status.[74]

Indeed, conditional discharges do not trigger sanctions within the IRPA. [75] While deciding between the Crown's recommendation of a suspended sentence ranging to a conditional sentence, and defence counsel's recommendation of a conditional discharge, the trial judge stated that the "imposition of a criminal record is the key issue in this case because that would very likely jeopardize J.S.'s ability to remain in Canada."[76]

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71 *Lee* at para 38.

72 *R v JS*, 2020 BCPC 213 at paras 7-12 [*JS*].

73 *JS* at paras 1-6.

74 *JS* at para 73.

75 *JS* at para 29.

76 *JS* at para 6.

In coming to this decision, the trial judge applied the two-step common law test for granting a conditional discharge as set out in *R v Fallofield*.[77] This test dictates that a conditional discharge firstly must be found to be in the best interests of the accused and secondly it must also not be contrary to the public interest.[78] The first step of the test was satisfied as being able to remain in Canada was clearly found to be in the best interests of the accused.[79] Regarding the second half of the test, an analysis of the public interest "requires a nuanced and contextual assessment of a variety of factors" such as public safety, the protection of vulnerable peoples, rehabilitation, and denunciation and deterrence.[80]

It is not exactly clear how the trial judge deemed that it would be in the public interest to impose a conditional discharge for the offender, thus preventing the offender from receiving a criminal record and a possible deportation order. On one hand, the trial judge stated that he was "not persuaded that J.S. truly understands the impact his behaviour has had on the two young women involved in these incidents,"[81] while on another he stated that the offender's "unique perspective as an individual from another country will allow him to help others and become a contributing member of this community."[82] Needless to say, it is uncertain how the public will benefit from the perspective of an offender of this nature.

Given that these were deliberate actions taken against vulnerable underage females by an offender who had entered Canada to pursue further education, it is not exactly clear how the public interest is being upheld in

77 *R v Fallofield*, 1973 BCCA 472 [*Fallofield*].

78 *Fallofield*.

79 *JS* at para 40.

80 *JS* at para 63.

81 *JS* at para 56.

82 *JS* at para 72.

this case. It appears that the lingering presence of collateral immigration consequences played a decisive role in the trial judge's decision to grant J.S. a conditional discharge, thus preventing the commencement of additional actions under the IRPA.

The trial judge's reasoning made clear that the decisive factor was the desire to avoid a criminal record that would render the offender inadmissible to Canada. The public-interest analysis under *Fallofield* was reframed around immigration consequences rather than the seriousness of the offences or the vulnerability of the victims. The result was a sentence that shielded the offender from IRPA consequences at the expense of denunciation, deterrence, and public confidence in the administration of justice. *J.S.* demonstrates how the gravitational pull of collateral immigration consequences can lead courts to prioritize the preservation of immigration status over the moral evaluation of the offence, even in cases involving significant harm to vulnerable persons.

In *R v Singh*, of which is a recent decision by the Alberta Court of Justice (ABCJ), collateral immigration factors were even more pronounced.[83] The offender in this case was on a visitor permit when they sexually assaulted a female in a Calgary bar.[84] After being found guilty of sexual assault at trial, the primary issue at sentencing was "determining a fit sentence" for the offender who had committed a "brazen" sexual assault, while also weighing the collateral immigration consequences.[85] Since a conviction in this case would result in a criminal record and deportation without the right to appeal, the trial judge again opted for the imposition of a conditional discharge.[86]

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83 *R v Singh*, 2024 ABCJ 2 [*Singh*].

84 *Singh* at paras 3-20.

85 *Singh* at para 1.

86 *Singh* at paras 10, 31. This is because the Crown elected to proceed by indictment, which, upon conviction, would subject the offender, a foreign

As the trial judge explained, in "consideration of the devastating collateral immigration consequences to recording a conviction, I conclude that the appropriate sentence for Mr. Singh is a conditional discharge with a probation order of maximum duration, 3 years."[87]

In *Singh*, it appears once again that the sentencing judge overemphasized the significance of collateral immigration consequences when considering an appropriate sentence. While the collateral immigration consequences for the offender in this case would have been significant, they should not have been used to diminish the overall moral blameworthiness of the offender. The trial judge openly acknowledged that a conviction would lead to deportation without the right to appeal and described these consequences as 'devastating.'[88] The trial judge's reasoning arguably did not adequately explain how a discharge - ordinarily reserved for offenders whose conduct is minor, aberrational, or unlikely to be repeated - could be reconciled with the seriousness of the offence.

Instead, the conditional discharge conceivably functioned as a mechanism to avoid IRPA's mandatory removal threshold. This outcome underscores how the structural tension between IRPA and sentencing principles is exacerbated by the concept of collateral immigration consequences. That tension can in turn lead to sentences that diverge sharply from proportionality and moral blameworthiness. This dynamic creates the appearance of a dual sentencing system: one for citizens and one for non-citizens.

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national, inadmissible on grounds of criminality under *IRPA*. This would then trigger deportation without the right to appeal. See *IRPA* at s 2(a).

87 *Singh* at para 31.

88 *Singh* at paras 10, 23.

In the case of *R v Khant*,[89] the offender was a permanent resident who had been apprehended as a result of Project Juno, which was an anti-human trafficking sting operation in Ontario designed to target those attempting to obtain sexual interactions with underage teens.[90] The Crown sought a 90 day custodial sentence which was "consistent with the sentences imposed on others involved in Project Juno."[91] The Defence proposed a conditional discharge, "accompanied by 12 months' probation with strict conditions, including a three-month period of house arrest."[92] The sentencing judge in this case ultimately opted for the conditional discharged propose by Defence Counsel. In deciding this, the sentencing judge stated that "a conviction would lead to severe collateral consequences, such as jeopardizing his immigration status, delaying his citizenship, and preventing him from sponsoring his wife, which would likely result in their separation. [93] Interestingly, the Crown referenced R v *Faroughi*,[94] a case with a similar fact pattern, where a discharge and suspended sentence were deemed to not be appropriate (a custodial sentence was emphasized).

However, the sentencing judge viewed *Khant's* collateral immigration consequences to be "far more severe than those faced by Mr. Faroughi, who was a Canadian citizen with no such vulnerabilities...courts have recognized that such consequences can justify a more lenient sentence, including a

89 *R v Khant*, 2025 ONJC 352 [*Khant*].

90 Postmedia News, "Windsor, Essex Men Among Staggering 1,100 Men in Ontario Inquiring About Sex with Kids in Police Sting" *Windsor Star* (31 July 2025) https://windsorstar.com/news/ local-news/windsor-essex-men-among-staggering-1100-men-in-ontario-inquiring-about-sex-with-kids-in-police-sting.

91 *Khant* at para 37.

92 *Khant* at para 2.

93 *Khant* at para 61.

94 *R v Faroughi*, 2024 ONCA 178.

discharge."[95] Without undue speculation, it appears plausible then that *Khant* may have received a custodial sentence if he had a Canadian citizenship.[96] A desire to avoid IRPA consequences again appeared to be the primary sentencing principle here.

These factors are again shown in the case of *R v Kovac*.[97] Here, the offender was a permanent resident who was operating a motor vehicle while severely intoxicated and caused serious injuries to the victim. While the Court of Quebec (QCCQ) acknowledged that "severe sentences are particularly important for offences involving impaired driving given the huge societal problem that impaired driving represents," the offender was still granted a conditional sentence order of 18 months.[98] The QCCQ explicitly acknowledged that a conditional sentence will "preserve the accused's right to appeal the finding of inadmissibility under the IRPA which will flow from his conviction."[99]

Again, one can observe the undue influence of IRPA thresholds within the sentencing process. While a conditional sentence order is intended to be a form of imprisonment, it is to be served in the community, not in the correctional system. Whether or not an individual who is not facing collateral immigration consequences would be afforded a conditional sentence in this case is uncertain.

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95 *Khant* at para 51.

96 J. Sarkonak, "Non-Citizen Johns Shouldn't get Sentence Discounts for their Crimes" *National Post* (15 July 2025) https://nationalpost.com/opinion/jamie-sarkonak-non-citizen-johns-shouldnt-get-sentence-discounts-for-their-crimes?utm_source=twitter&utm_medium=organic&utm_campaign=NP_social&utm_content=comment.

97 *R v Kovac*, 2024 QCCQ 1152 [*Kovac*].

98 *Kovac* at paras 66-74.

99 *Kovac* at para 74. This decision is very similar to *R v Singh*, 2021 ABPC 103.

In a way, the above cases illustrate a pattern of lower court behaviour that appears to treat and apply collateral immigration consequences almost as if they are outright mitigating factors. As the SCC makes clear in *Pham*, "collateral consequences are not aggravating or mitigating factors;" they are the consequences that result from "the impact of the sentence on the particular offender" and "may be taken into account in sentencing as the personal circumstances of the offender."[100]

B. Implications from Case Law Regarding the Structural Tension Between IRPA and Sentencing Principles

It should be noted that, although the previously analyzed cases are but a select microcosm of the total amount of cases where collateral immigration consequences were considered at the trial level since *Pham*, the fact that they appear in courts across Canada can be viewed as indicative of a possible pattern. As well, not every legal decision is recorded with many rulings being delivered orally from the bench. It is also conceivable that the misapplication of *Pham* has created problematic precedents in cases that have not been appealed, due to the nature of *stare decisis*. Collateral immigration consequences in sentencing are likely to continue to grow in relevancy, with immigration rates steadily increasing in the last five years. Therefore, it is also likely that the issues related to the application of collateral immigration consequences that are highlighted in this paper will as well continue to be prevalent. Baglay succinctly observes this growing trend:

> The changing importance of collateral immigration consequences in sentencing is evident in the results of a case law search. A Quicklaw boolean search ("sentenc! /p immigration /p consequence") found only five decisions for the time period between April 1, 1978 and July 10, 1995, and nine decisions for the time period between July 10, 1995 and June 28, 2002, where collateral immigration consequences were considered in sentencing.

100 *Pham* at para 11.

> In contrast, the same boolean search from June 28, 2002, to March 13, 2013 turned up over one hundred decisions, and the period from March 13, 2013 to March 1, 2019 resulted in over three hundred.[101]

If the above is true, one may further expect a continuation of the tension between the sentencing process and immigration policies, based on the case law analyzed thus far. The case law discussed then gives us a glimpse of what to expect going forward. Clearly, these cases demonstrate how sentencing judges sometimes reshape otherwise fit sentences to avoid triggering removal or the loss of appeal rights, when confronted with the harshness of IRPA's mandatory consequences. These decisions reveal not only an inconsistent application of *Pham*, but a deeper judicial struggle to reconcile two legal regimes that operate on fundamentally different premises. *Pham* has perhaps brought to the forefront these underlying issues through the introduction of collateral immigration consequences at sentencing, even though the decision in *Pham* itself is not entirely to blame for this. However, it appears that lower courts struggle more with these dynamics when compared to appellate courts.

Taken together, these cases reveal a consistent pattern, perhaps more so at the lower court level. Some sentencing judges attempt to soften those consequences by adjusting criminal sentences downward, when confronted with the harshness or inflexibility of IRPA's administrative consequences. This judicial impulse is understandable, particularly in cases involving long-term residents or individuals with strong ties to Canada. Evidently, IRPA's administrative logic is not designed to be harmonized with the moral logic of sentencing. A distortion of the proportionality principle and a diminished emphasis on moral blameworthiness occurs when judges attempt to reconcile the two.

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101 Baglay 2019 at pp 20-21.

C. Collateral Immigration Consequences: Nuance and Skepticism

In all cases, a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender."[102] A flexible sentencing regime cannot be permitted to impose "artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will."[103] The particular significance of collateral immigration consequences are dependant on the facts and situation of a case.[104]

In some cases, collateral immigration consequences will play a much more prominent role than in others. Collateral immigration consequences should not be applied with unwarranted significance in every single case as the facts of that case may not necessitate it. Nuance in the application specific to the facts at hand is needed. For instance, the risks of deportation and losing admissibility to Canada arguably vary in significance as per the individual situation of a non-citizen offender. It is clear that collateral immigration consequences will play an important factor in a sentence, in the case of a permanent resident who has grown up their entire life in Canada.

Alternatively, collateral immigration consequences incurred by a criminal conviction will be less severe in the case of either a foreign national or a permanent resident who has not lived their entire life in Canada and still retains significant ties to their home nations. As the Ontario Court of Appeal (ONCA) recognized in *R v Quick*, "some of these [collateral immigration] consequences may be too remote" or "too insignificant" to be legally relevant.[105] Collateral immigration consequences need not be significantly

102 *Pham* at paras 13-15.

103 *Pham* at paras 13-15.

104 *Pham* at paras 13-15.

105 *R v Quick*, 2016 ONCA 95 at para 31.

emphasized in every case despite being *prima facie* applicable. It is determining the extent of their applicability that must be analyzed closely. Perhaps the "best approach to collateral consequences begins with the recognition that not all collateral consequences are the same."[106]

Considering what exact state benefit or public interest is being pursued by allowing such a foreign national or permanent resident to remain in Canada by lowering their sentence due to collateral immigration consequences is a deeper, more theoretical, consideration for the judiciary. The ability to deport a non-citizen is but a basic competency of all sovereign nations and it is arguably not unduly harsh for the citizenry to expect the judiciary to facilitate such a function where applicable. [107] Collateral immigration consequences are but a natural consequence of a sovereign state's right to create separate legal distinctions between different classes of citizens and non-citizens, despite the tendency of collateral immigration consequences to result in extra punishment in addition to the criminal sanction received by an offender.[108]

Trial judges consider collateral immigration consequences, and adjust a sentence accordingly, based on the prospective negative immigration-related consequences that a particular sentence may incur for that specific offender. However, removal orders often are not even enforced, even when a criminal conviction does trigger a deportation order for a non-citizen offender. For instance, Faulino Deng, a Sudanese national who has been convicted of aggravated assault, sexual assault, and cocaine trafficking in Ontario, still

106 E. Monkman, "A New Approach to the Consideration of Collateral Consequences in Criminal Sentencing" (2014) 72:2 *University of Toronto Faculty of Law Review* at p 74.

107 Such as imposing fit and proportionate sentences which may invariably lead to a deportation order.

108 See generally B. Berger, "Sentencing and the Salience of Pain and Hope" (2015) 11:4 *Osgoode Legal Studies*.

remains in Canada, despite being issued a deportation order in 2007.[109] Similar examples appear to be startingly frequent.[110]

Thus, an increasing "number of foreign citizens remain in Canada despite having been ordered out on public safety and security grounds."[111] The number of foreign citizens who have been issued removal orders has ultimately increased from just 291 in 2021, to 1,200 in 2018.[112] Essentially then, sentences are adjusted in accordance with possible collateral immigration consequences that may not ever come to fruition in the first place.[113] The inability to functionally carry out a deportation order may in part be due to ongoing bureaucratic issues within the immigration system itself, of which is a discussion admittedly beyond the scope of this paper.

Furthermore, there is still a significant chance that a non-citizen will be able to remain in Canada, if they retain their right to appeal a removal order following a criminal conviction.[114] For instance, Baglay explains that 6,000 admissibility decision appeals ended in removal orders being stayed and

109 S. Bell & A. Russell, "Canada is Failing to Deport Criminals. Here's Why it can take Years, Sometimes Decades" *Global News* (21 March 2018) https://globalnews.ca/news/4087292/canada-deporting-dangerous-criminals-ineffective-still-here/ [Bell & Russell].

110 See especially J. Sarkonak, "Foreign Criminals Keep Getting their Deportations Cancelled" *National Post* (26 November 2025) https://nationalpost.com/opinion/jamie-sarkonak-committing-a-crime-should-guarantee-deportation.

111 Bell & Russell.

112 Bell & Russell.

113 See generally C. Singer, "Most of those Sent Deportation Letters Still Living in Canada Year Later" (15 February 2024) https://immigration.ca/most-of-those-sent-deportation-letters-still-living-in-canada-years-later/.

114 See J. Sarkonak, "Canada's Criminal Sentencing Discounts for Non-Citizens are Unfair" *National Post* (6 May 2024) https://nationalpost.com/opinion/jamie-sarkonak-canadas-criminal-sentencing-discounts-for-foreigners-are-unfair [Sarkonak 2024].

3,000 were appealed, of the 13,000 admissibility decision appeals held between 2002 and 2017.[115] A sizeable portion of appellants thus appear to be successful.

As such, the IAD can still grant special relief and thus stay or quash that removal order, even if a foreign national or permanent resident loses the right to appeal a deportation order.[116] These special reliefs are usually granted on the basis of either humanitarian or compassionate grounds.[117] In other situations, public pressure and media outrage can also be harnessed to pursue a stay of a removal order. Various migrant organizations rallied to show support and put public pressure on the CBSA to not enforce the removal order of Charles Mwangi, a Kenyan national who was issued a deportation order.[118] In the end, he was granted a one-year temporary residency.[119]

The point here is to draw attention to the observation that the idea of collateral immigration consequences is being used for sentence reductions, while the actual collateral immigration consequences that could occur appear do not frequently materialize. In many cases deportations are not carried out for years, if ever. Ultimately, you may have, theoretically, a non-citizen criminal who gets a reduction in sentencing for collateral immigration consequences that may not even occur. A combination of either public pressure or the various levels of special appeal and judicial review that are

115 S. Baglay, "In the Aftermath of *R v Pham*: A Comment on Certainty of Removal and Mitigation of Sentences" (2018) 41:4 *Manitoba Law Journal* at pp 187-198 [Baglay 2018].

116 Baglay 2018 at p 190.

117 Baglay 2018 at p 190; See also Navaneelan at p 31.

118 J. Omstead & R. Lim, "Canada Halts Planned Deportation of Man to Kenya" *Toronto Star* (25 August 2024) https://thestar.com/ news/ontario/a-victory-canada-halts-planned-deportation-of-bisexual-man-to-kenya/article_39a81aa7-6de7-51ce-b793-465a933cb71e.html [Olmstead & Lim].

119 Olmstead & Lim.

available under the IRPA, or even bureaucratic inefficiency, would ensure this outcome.[120]

D. Competing Perspectives on *Pham*, Immigration Policy, and the Sentencing Process

Like any nuanced topic, there are a multitude of different interpretations and perspectives. It is commonly perceived that *Pham* actually promotes individualized sentencing through recognizing that non-citizens face disproportionate hardships compared to citizens convicted of the same offence, by allowing judges to consider collateral immigration consequences.[121] Scholars adopting this view argue that ignoring such consequences would itself violate proportionality, as the same sentence may carry dramatically different real-world impacts depending on the offender's immigration status.[122] On this account, adjusting a sentence to avoid triggering deportation is not an artificial distortion but a necessary correction to ensure fairness. Of course, the very logic in *Pham* itself is a part of this line of thought.

Immigration consequences becoming the dominant factor in the proportionality analysis is an issue, despite individualization in crafting sentences being essential. Many trial courts have reduced sentences not because of mitigating circumstances intrinsic to the offender's moral culpability, but because of the mechanical thresholds in the IRPA, as the case law analyzed above has shown. This shifts the focus from the offender's blameworthiness to the administrative structure of immigration law. The result arguably is not individualized justice but a parallel sentencing regime for non-citizens. This is the outcome that *Pham* explicitly warned against.[123]

120 See especially Singer.

121 Baglay 2019 at pp 5, 33.

122 Gerami & Ranger at pp 12-13.

123 *Pham* at paras 14-16.

A similar contention holds that preventing the deportation of long-term residents, individuals with strong community ties, or those with compelling humanitarian circumstances, aligns with broader societal values.[124] From this perspective, adjusting sentences to preserve access to IAD appeals or to avoid the IRPA thresholds may prevent outcomes that are socially and morally undesirable.[125] Doubtlessly, humanitarian-based concerns are compelling, but they are best addressed within the immigration system itself, such as through the IAD's discretionary humanitarian and compassionate jurisdiction.[126] Allowing sentencing courts to pre-emptively adjust sentences to preserve access to that process effectively collapses two distinct legal regimes into one. This not only undermines Parliament's intent in structuring IRPA consequences but also risks distorting criminal sentencing principles. The appropriate venue for weighing humanitarian factors is the immigration appeal process, not the sentencing hearing. Maintaining this separation preserves the integrity of both systems.

Another critique suggests that the intersection of criminal and immigration law may diminish in significance as Canadian immigration policy evolves. For example, changes to admissibility rules, humanitarian pathways, or prosecutorial discretion could reduce the number of non-citizens facing removal for criminality. If so, the doctrinal tension identified in this paper may be temporary or overstated.

The structural tension between IRPA's rigid, status-based inadmissibility regime and the *Criminal Code*'s individualized proportionality framework remains, even if immigration policy shifts in the future. The IRPA thresholds continue to exert a powerful gravitational pull-on sentencing decision, as

124 *IRPA* at ss 3(f)-(h).

125 See generally *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3.

126 Baglay 2019 at p 190.

evidenced by recent jurisprudence. In addition, Canada's non-citizen population continues to grow and remain steady, thus increasing, rather than diminishing, the likelihood of criminal-immigration law intersections.[127]

Most importantly, the normative question at the heart of this paper transcends policy fluctuations: to what extent should collateral immigration consequences influence the determination of a fit sentence? The risk of artificial sentencing outcomes persists regardless of demographic or policy trends. Sentencing is a core expression of the criminal justice system's legitimacy. The public interest is impacted when sentences are distorted to avoid collateral immigration consequences.

Consequently, existing scholarship has tended to focus on fairness and equity issues for non-citizens during the sentencing and deportation processes, but less attention has been paid to how Pham destabilizes proportionality. The structural incompatibility between IRPA's legislative logic and sentencing principles is a novel and understudied area requiring further scholarly analysis. Accordingly, this paper has sought to fill this analytical gap within the literature on this subject.

Overall, as the SCC in *Pham* reiterated, the focus of sentencing "must be on the fundamental principle of proportionality…a sentence must be proportionate, having regard to the gravity of the offence and the degree of responsibility of the offender, and only then may collateral consequences be taken into account."[128] Collateral immigration consequences cannot be used to justify the imposition of an artificial sentence that is not proportionate to the particular offence and the moral blameworthiness of the specific

127 J. Finlayson and S. Globerman, "Average Annual Immigration was 617,800 from 2000 to 2015 Compared to 1.4 million from 2016 to 2024" *Fraser Institute* (8 July 2025) https://fraserinstitute.org/studies/canadas-changing-immigration-patterns-2000-2024.

128 *Pham* at paras 13-15.

offender.[129] The artificial diminishment of the moral blameworthiness of the offender occurs as a result of the over-emphasis of the importance of collateral immigration consequences or conceiving of them and their possible negative implication for an offender in a broad and general sense (when these negative implications may not even materialize). This leads to sentences that are arguably disproportionate to the gravity of the offence.

IV. The Retributivist Theory of Punishment as a Theoretical Remedy and Other Possible Solutions

As this paper previously mentioned, collateral immigration consequences play a much more important role at sentencing when a permanent resident is convicted of an offence whose typical punishment is in and around the six-month range, or when a foreign national is facing the imposition of a criminal record. A possible remedy here would be to amend the IRPA so that both foreign nationals and permanent residents can appeal deportation orders regardless of the type of punishment that they receive.[130] In a way, this would keep trial judges focused on crafting a sentence that is truly fit and proportional without having to consider whether that sentence should be lowered so that a non-citizen offender will not face deportation without a right of appeal. However, this approach may face limitations in that it could exert excess bureaucratic stress on the immigration system's appeal division if every non-citizen offender facing deportation could appeal such an order. It may also appear to the public as if the state is granting 'special treatment' to non-citizens and giving them too much leniency for their criminal actions.

Alternatively, a more extreme solution would be to amend the *Criminal Code* and exclude collateral immigration consequences from sentencing

129 *Yare* at para 23.

130 See Forrest.

decisions entirely.[131] However, the *Charter* rights of non-citizens may be impeded if this were done.[132] The overturning of the precedent set in *Pham* would also likely receive extensive criticism from the legal community and render a lot of post-*Pham* jurisprudence void. As such, a solution to these issues lays somewhere in the middle. The principles set out in *Pham* have become embedded within the relevant jurisprudence and arguably deserve a place in a liberal and democratic Canada. However, as this paper has contended, collateral immigration consequences in some cases have been poorly applied, overemphasized, and have led to sentences that are not proportionate to the gravity of the offence. Thus, any solution must be capable of addressing these particular problems.

Consequently, a return to a more retributivist theoretical perspective on sentencing, when collateral immigration consequences are a factor, is needed. The retributivist theory of justice posits that an offender must be "punished in proportion to the severity of their crime."[133] As per the concept of just deserts, the requisite punishment must be proportionate to the gravity of the crime committed and should not be artificially lowered.[134] The retributivist theory also contends that both "equality of punishment and proportionality are necessary conditions for a fair sentencing system."[135] In Canada, the public generally perceives routinely imposed sentences as far too lenient. In

131 Forrest.

132 Forrest.

133 Legal Information Institute, "Retributivism," *Cornell Law School*https://law.cornell.edu/wex/retributivism.

134 A. McKee, "Just Deserts," https://docmckee.com/cj/docs-criminal-justice-glossary/just-deserts-definition/; See generally S. Cohen, "An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment" (1981) 27:1 *McGill Law Journal*.

135 See generally S.D. Krup, "Retributive Justice Model of Sentencing" (1981) 45:4 *Federal Probation*.

an opinion poll published by the Government of Canada, around 79% of Canadians share these sentiments.[136]

Figure 3: Canadians' Perceptions of the Harshness of the Justice System

	Too Lenient	About Right	Too Strict
Sentencing	79%	14%	2%
Enforcement	69	25	3
Laws	65	29	3

Moreover, the criminal justice system should exercise caution to avoid giving the impression to the public that similar offences, when committed by a citizen and a non-citizen, lead to disproportionate outcomes. For instance, Sarkonak suggests that the misuse of collateral immigration consequences in sentencing can lead to the public perception that "non-citizens have additional padding when they commit crimes in comparison to Canadians."[137] Whether correct or not, public perception of the criminal justice system matters, and the public must have confidence that it operates efficiently and produces fair and just outcomes.

With these factors in mind, this analysis has largely examined cases where the requisite sentence was arguably disproportionate to the gravity of the offence because of an over-emphasis on collateral immigration consequences. Retributivist theory would contend here that this is a mitigation of offender moral blameworthiness, and such a sentence is not adequate. [138]

136 Department of Justice Canada, "Public Perception of Crime and Justice in Canada: A Review of Opinion Polls" (17 August 2022), https://justice.gc.ca/eng/rp-pr/csj-sjc/crime/rr01_1/p0.html.

137 Sarkonak 2024.

138 Stanford Encyclopedia of Philosophy, "Retributive Justice" (18 June 2014) https://plato.standford.edu /entries/justice-retributive/ [Stanford]. See generally W. Hurlburt, "Why Do We Punish? The Case for Retributive Justice and the Justification of Punishment" (1979) 17:2 *Alberta Law Review* [Hurlburt].

Contrastingly, retributivist theory also decries sentences that disproportionate when they punish an offender too severely beyond what they morally deserve for the offence that they committed.[139] Consequently, in particular situations, retributivist theory and attention to collateral immigration consequences can be complementary in sentencing decisions.

Most would likely agree that a sentence which leads to the deportation of an offender who committed an offence that is either trivial or where the offender's moral culpability is severely diminished, would be a disproportionate punishment. Likewise, a sentence that leads to deportation where the offender faces certain death in their nation of origin would also be grossly disproportionate. While these are extreme cases, retributivist theory and collateral immigration consequences would align in situations where a sentence leading to deportation would be disproportionate.[140] However, a more challenging situation arises when a non-citizen offender commits a heinous crime whose requisite punishment must invariably lead to a sentence that will trigger deportation, and that offender faces possible death in their nation of origin. In that case, the courts could not artificially lower such a sentence, and the offender would have to appeal to the humanitarian safeguards within the IRPA.

Retributivism generates the balancing solution here because it provides a principled limit to how far collateral immigration consequences influence sentencing: they may be considered only insofar as they bear on the offender's moral culpability, not as independent policy objectives. Retributivism does not demand that sentencing judges ignore the lived realities of offenders. Rather, it requires that all mitigating or aggravating factors be assessed through the lens of moral culpability. Collateral immigration consequences may therefore be considered only to the extent that they illuminate the

139 Stanford; Hurlburt.

140 Stanford; Hurlburt.

offender's degree of responsibility or the personal circumstances that bear on their blameworthiness. What retributivism rejects is the use of immigration consequences as an independent policy objective (such as preserving appeal rights or avoiding deportation thresholds) when these consequences do not meaningfully relate to the offender's culpability for the underlying offence.

This distinction is crucial. Under a retributivist framework, the IRPA thresholds are not a morally relevant factor in itself. It is an administrative trigger created by Parliament for immigration purposes, not a reflection of the offender's moral desert. Retributivism therefore provides a principled basis for preventing the IRPA's structural thresholds from distorting the proportionality analysis required under section 718 of the *Criminal Code*. In this way, retributivism does not conflict with *Pham*; rather, it operationalizes *Pham*'s insistence that collateral consequences remain "but one relevant factor" and that proportionality must still prevail.[141]

Outside of these extreme theoretical cases, judges should remember that the mere act of deportation is a logical result tied to the legal distinction of non-citizen status created by Parliament. To create sentences that cite these factors in justification of a lower sentence where it is unwarranted is to essentially dilute the significance of this legal distinction. Parliament has created different legal classes of residency and the implications of this should not be artificially mitigated in but extreme circumstances.

A. Incorporating a Retributivist Approach

Accordingly, the next question to ask is how exactly such a retributivist-informed perception of collateral immigration consequences can be brought into practice.

Sentencing guidelines related to collateral immigration consequences that are informed by retributivist perceptions which do not permit such consequences to be over-emphasized or lead to sentencing outcomes that are

141 *Pham* at paras 18-20.

grossly disproportionate to the gravity of the offence, could be used here as a possible solution. A retributivist framework incorporated into sentencing guidelines could either come from the SCC or by Parliament in a legislative amendment to the *Criminal Code*.

Regarding the former, this would likely require the SCC to revisit collateral immigration consequences in a new case to give updated jurisprudential guidance, however, the timeframe on when this would occur is admittedly uncertain. Regarding the latter, Parliament would have to have the political will to make such an amendment which could only happen if there was public pressure to do so or if such a change was amenable to the political views of the pertinent legislators. Regardless, making these changes would allow for a retributivist-informed application of *Pham* principles while improving the public's perception of how non-citizens are sentenced.[142]

However, it should be noted that such changes in terms of applying collateral immigration consequences in accordance with a more retributivist-informed framework may bump up against trial judge discretion. As the SCC stated in *Pham*, "a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender."[143] As *R v Lacasse* [*Lacasse*] affirms, trial judges are granted by Parliament a broad discretion to create appropriate sentences under section 718.3(1) of the *Criminal Code*.[144] In a

142 See generally M. Altman, *A Theory of Legal Punishment: Deterrence, Retribution, and the Aims of the State*, 1st ed (London: Routledge, 2021); See also C. Cowley, *Moral Responsibility*, 1st ed (London: Routledge, 2014).

143 *Pham* at paras 13-15; See also *R v Lacasse*, 2015 SCC 64 at para 53 [*Lacasse*].

144 A. Puchta, "Let's Talk About Lacasse, Part 2: The Implications of Lacasse for the Sentencing Process" (15 January 2017) https://canliiconnects.org/en/commentaries/44540.

way, this 'wide latitude" afforded to sentencing judges may 'bump up against' any legislative intrusions that limit this discretion.[145]

On this note, some commentators may argue that sentencing judges are well-positioned to balance the competing demands of proportionality and compassion. According to this view, *Pham* simply affirms the flexibility inherent in sentencing and trusts judges to avoid excessive departures from fit sentences.[146] While judicial discretion is essential to sentencing, the case law demonstrates that discretion alone has not produced consistent or principled outcomes. The structural tension between IRPA and the *Criminal Code* creates predictable pressure points that cannot be resolved through case-by-case discretion alone. This supports the need for either a refined doctrinal framework or legislative clarification.

Finally, even if this retributivist-informed framework faces too many difficulties in coming to fruition, Crown attorneys should remain cognizant of these dynamics and be ready to initiate a leave of appeal in situations akin to *Yare* where the final sentence at the trial level has placed "undue weight on collateral immigration consequences and failed to impose a sentence that was proportionate to the gravity of the offences and the moral culpability of the offender."[147] Of course, appellate-level litigation cannot always be counted on due to a lack of resources and time. Regardless, further guidance related to the application of the *Pham* principles, along with better oversight of the types of sentences that such an application creates, is ultimately needed to ensure that the requisite sentence remains proportional to the gravity of the offence committed.

145 *Lacasse* at paras 11-12.

146 Baglay 2019 at p 5.

147 *Yare* at para 13.

Hypothetically, it is worth examining what a retributivist-informed framework, in the form of new sentencing guidelines, would look like. The following four-step structure is proposed.

The starting point would be to determine the proportionate sentence without reference to immigration status. This initial step anchors the proportionality analysis in the offender's moral blameworthiness, the gravity of the offence, and parity with comparable cases. It prevents the IRPA's administrative thresholds from becoming the de facto starting point.

The second step would be to determine whether any immigration-related hardship is relevant. Hardship is morally relevant only when it bears on the offender's culpability or personal circumstances in a manner analogous to other recognized collateral consequences (employment issues or family disruption). For example, a precarious immigration status that contributed to the offender's vulnerability or reduced autonomy may be relevant here. However, in contrast, the mere fact that a sentence of six months in custody will eliminate the right to appeal a removal order for a permanent resident is not morally relevant, as it does not speak to the offender's responsibility for the offence.

At the third step, a sentence should only be adjusted when the hardship meaningfully affects moral blameworthiness. This step ensures that any downward sentence adjustment remains attached to just deserts, not to the avoidance of IRPA consequences. It prevents the imposition of 'artificial sentences,' such as those criticized in *Yare*, where the sentence was reduced solely to preserve appeal rights.[148]

Lastly, judges should articulate why the immigration consequence is or is not morally relevant, how the adjustment preserves proportionality, and why the sentence does not circumvent Parliament's immigration objectives. This

148 *Yare* at para 9.

transparency in decision-making enhances both jurisprudence and public confidence.

As mentioned above, it is important to reiterate here that these guidelines would not require legislative amendment. they could be adopted judicially as a principled method for applying *Pham* in a manner consistent with section 718 of the *Criminal Code*.

B. Addressing Public Perceptions and the Normativity of a Retributivist Solution

A retributivist framework also responds to concerns about public confidence in the administration of justice. A common objection that has already been noted is that limiting the weight of collateral immigration consequences may lead to harsh outcomes for non-citizens. However, retributivism protects against undue harshness by still allowing for the consideration of collateral immigration consequences, but only when they impact the moral blameworthiness of the offender. Relief is still available under the IRPA.

Alternatively, the opposite common concern here is that the public may perceive lenient sentences in serious cases as illegitimate, particularly where immigration consequences appear to drive the outcome. A retributivist approach directly addresses this concern by ensuring that serious offences receive sentences that are commensurate with their gravity, regardless of immigration status. Thereby, the IRPA thresholds are prevented from influencing the sentencing process.

Through the proposed guidelines, a retributivist approach provides a principled framework for determining when collateral immigration consequences are relevant and how much weight they should carry. Rather than outright rejecting *Pham,* the retributivist approach refines it by ensuring that collateral consequences do not overshadow the fundamental principle of proportionality.

By clarifying the framework of retributivism and offering substantive guidelines for judicial application, this approach provides a coherent method for reconciling sentencing principles with the IRPA's legislative objectives. It prevents the IRPA's administrative thresholds from distorting the sentencing process while preserving space for individualized consideration where immigration consequences genuinely bear on moral blameworthiness. In doing so, it strengthens both the integrity of sentencing and public confidence in its outcomes.

V. Conclusion

As is evident, there are many intersections between criminal law and immigration law. Since the SCC decision in *Pham* and the introduction of collateral immigration consequences in sentencing, these intersections have only increased. Subsequently, this paper has explored the extent to which the incorporation of collateral immigration consequences in sentencing decisions mitigates offender moral blameworthiness.

Overall, it has been contested that the inclusion of collateral immigration consequences in sentencing tends to lead to disparate results that often diminish offender moral blameworthiness. This paper began with a background analysis pertaining to the interconnected features of the criminal law and immigration law systems, particularly in relation to how criminal convictions can trigger additional implications under the IRPA for non-citizens. Typically, a foreign national will receive a deportation order by the immigration authorities after receiving a criminal conviction.[149] Foreign nationals in such a situation will also not be given a right to appeal such a deportation order.[150] In the case of a permanent resident, they will be issued a deportation order along with the loss of the right to appeal such an order

149 As enumerated in section 36(1) of the *IRPA*. See *IRPA* at s 36(1).

150 *IRPA* at s 36(1).

if they are convicted of a criminal offence whose sentence is more than six months incarceration.[151] As such, criminal convictions can have serious implications on a non-citizen's admissibility to Canada.

Subsequently, this paper then critiqued how collateral immigration consequences have been applied in relevant situations. Through various case analyses of *Yare*, *Lopez-Orellana*, *Lee*, *J.S.*, *Singh*, *Khant*, and *Kovac*, this paper highlighted how collateral immigration consequences can be applied in a manner where they lead to a disproportionate sentence that mitigates offender moral blameworthiness. These cases arguably demonstrated how the over-emphasis on collateral immigration consequences have led to sentences that are not proportionate to the gravity of the offence committed.

Essentially, these dynamics occur when a trial judge uses their discretion to over-emphasize the potential impact that a criminal conviction will have on a non-citizen offender's immigration status in Canada. The trial judge then uses the spectre of these potential collateral immigration consequences to justify the imposition of a sentence that is lower than what that offender would normally receive if these collateral consequences where not relevant. Often, this is done so that the offender avoids these consequences after sentencing. In other cases, this is done so that the offender retains their ability to mitigate these consequences after sentencing. For example, a non-citizen offender facing likely deportation may be given a lesser sentence so that they retain their ability to appeal a deportation order. The cases analyzed also identify how collateral immigration consequences have exacerbated a tension between the distinct legal regimes of sentencing and immigration law. IRPA's mandatory consequences operate independently of moral culpability, which is precisely why adjusting sentences to avoid them risks distorting proportionality.

151 As enumerated in section 36(2) of the *IRPA*. See *IRPA* at s 36(2).

In other situations, this paper highlighted how collateral immigration consequences may not even materialize. This occurs when deportation orders are either not carried out due to bureaucratic inefficiency, or when they are stayed. The staying of deportation orders may occur due to either public pressure, or if the non-citizen applicant successfully appeals. Even if a deportation order cannot be appealed, it still may be stayed on humanitarian or compassionate grounds. In some cases, this may be worrisome as, essentially, sentences are crafted and lowered in relation to collateral consequences that may not ever actually materialize.

While the sampled cases analyzed in this paper are clearly not representative of all situations where collateral immigration consequences have been applied, they could be indicative of a larger trend as they were taken from courts across Canada. Given that cases involving collateral immigration consequences have steadily increased in recent years, it is logical to infer that the propensity of cases where collateral immigration consequences may be abused could increase. [152] These occurrences may necessitate a re-evaluation of how *Pham* is being applied across Canadian courts as trial judges cannot artificially lower sentences. Sentences must be proportionate to the gravity of the offence at hand.

In light of these issues, this paper argued for a return to a more retributivist approach to sentencing as a potential solution. The proposed four-step retributivist-informed framework, implemented through new sentencing guidelines, would curtail the weight accorded to collateral immigration consequences.

Regardless of the approach, this paper has contested that legal reform in this area is required. Countering the over-emphasis of collateral immigration consequences in sentencing decisions will ensure that sentences in such situations can be brought back in line with section 718 of the *Criminal*

152 See page 14 of this paper.

Code.[153] Fundamentally, collateral immigration consequences should not be used to artificially lower a sentence from what is typically a fit and proportionate sentence in such a situation. This diminishes offender moral blameworthiness and leads to results that arguably are out of line with fundamental sentencing principles and public expectations.

While the principles from *Pham* do deserve a place in the relevant jurisprudence, perhaps they should be limited to more exceptional circumstances. The failure to mitigate against these problems may lead to a "de facto new range of sentences for non-citizens."[154] Overall, in most situations, the requisite sentence must match the gravity of the offence. Due to Canada's increasing immigration demographics, it is likely that the criminal courts will have to grapple with collateral immigration consequences more frequently. Thus, coherent legislative changes or new judicial guidelines are needed so that these problems do not persist, lest they begin to attract the indignation of the public to a greater extent.

153 *Criminal Code* at s 718.

154 Baglay 2019 at p 7.

The Claimant's Unwelcome Burden: Rethinking *Janzen* in Sexual Harassment Adjudication

Kimia Shiri*

Workplace sexual harassment remains a pervasive issue at institutional, national, and global levels. Although the Supreme Court of Canada's decision in Janzen v Platy Enterprises Ltd, [1989] 1 SCR 1252, recognized sexual harassment as a form of sex discrimination, the legal framework has not kept pace with evolving social norms. This paper critiques the Janzen test and argues against an objective assessment of the "unwelcomeness element" in the adjudication of sexual harassment complaints before the British Columbia Human Rights Tribunal. While Canadian sexual assault law has undergone significant reform to eliminate reliance on stereotypes, myths, and improper inferences, comparable developments have not occurred in the human rights context for sexual harassment law. The unwelcomeness element of Janzen continues to operate in a manner that risks overlooking several, important intersectional nuances. The law must undergo significant change to address the disproportionate burden placed on claimants, as well as these nuances. These legal factors influence both liability and potential remedies.

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I. Introduction

In the wake of the 2017 #MeToo protests, the public found renewed momentum in condemning perpetrators of sexual violence and harassment in the workplace. In early 2020, this momentum intensified following the highly publicized conviction of Hollywood film producer Harvey Weinstein on charges of sexual assault. The #MeToo movement drew public attention to the prevalence of sexual harassment in the workplace and shined a light on the deficiencies of sexual harassment laws internationally. The intersection of historical and social factors that exacerbate sexual harassment and other forms of discrimination are essential considerations for the development of Canadian human rights jurisprudence.

It has now been 36 years since the Supreme Court of Canada introduced the legal test for sexual harassment in *Janzen v Platy Enterprises Ltd.*,[1] 20 years since the #MeToo movement first began, and 9 years since it became a global social media movement.[2] The *Janzen* test was foundational in establishing sexual harassment as a form of sex discrimination and it meaningfully advanced Canadian human rights law at the time the decision was rendered. However, this paper critiques the *Janzen* test on the basis that it imposes a disproportionate evidentiary burden on claimants, fails to engage with the claimant's subjective experience of consent and harm, and fails to accommodate claimants who have multiple grounds of disadvantage. Although this paper analyzes *Janzen's* shortcomings through tribunal jurisprudence in British Columbia, the critique extends to *Janzen's* operation across Canadian human rights jurisprudence and is intended to inform jurisprudential reform nationally.

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1 *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252 [*Janzen*].

2 Canadian Women's Foundation, "The Facts about the #MeToo Movement in Canada"(November 2021) https://canadianwomen.org/ the-facts/the-metoo-movement-in-canada/.

II. Adjudication of Sexual Harassment Claims in British Columbia

In *Janzen*, the Supreme Court of Canada defined sexual harassment in the workplace as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences" for the claimants.[3] As the SCC further held, sexual harassment constitutes a form of sex discrimination and as a result, it is prohibited under the human rights legislation of every Canadian jurisdiction.[4]

Workplace sexual harassment complaints are often dealt with through human rights legislation and adjudicated by a specialized tribunal.[5] In British Columbia, workplace sexual harassment complaints are dealt with through the *Human Rights Code*[6] and adjudicated by the British Columbia Human Rights Tribunal (the "**BCHRT**"). The *Canadian Human Rights Act* [7] is the governing legislation for federal employees and prohibits sexual harassment as a form of sex discrimination. The *Canada Labour Code*[8] goes further by imposing a positive obligation on employers to undertake reasonable efforts to ensure that no employee is subjected to sexual harassment through their organizational policies and practices. The *CHRA* and *CLC* statutes apply to industries falling within federal jurisdiction under section 91 of the

3 *Janzen* at pp 1253, 1284.

4 *Janzen* at pp 1253, 1284.

5 B. Hastie, "Workplace Sexual Harassment and the "Unwelcome" Requirement: An Analysis of BC Human Rights Tribunal Decisions from 2010 to 2016" (2020) 32:1 *Canadian Journal of Women & the Law* at p 62 [Hastie 2020].

6 *Human Rights Code*, RSBC 1996, c 210 [*Code*]

7 *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*].

8 *Canada Labour Code*, RSC 1985, c L-2 at ss 122.1, 124 [*CLC*], supported by the *Workplace Harassment and Violence Prevention Regulations*, SOR/2020-130 at s 10(1).

Constitution Act.[9] The *Code* governs all workplaces in British Columbia, aside from those arising in federally regulated workplaces.

The BCHRT is the specialized administrative body hearing sexual harassment claims under section 13 of the *Code*. Section 13 prohibits discrimination in employment based on protected grounds including, but not limited to, race, ancestry, place of origin, sex, and sexual orientation.[10] While this provision does not itself codify the prohibition on sexual harassment, it has the effect of prohibiting sexual harassment by virtue of the *Janzen* decision. Of further note, in *Bombardier,* the SCC established that a claimant is not required to prove that a respondent intended to discriminate, and discriminatory intent is not a required element of a discrimination claim. [11] The claimant need only establish a nexus between the protected characteristic and the adverse treatment. [12]

III. A Critical Analysis of the *Janzen* Framework

The *Janzen* test is the authoritative legal standard for adjudicating sexual harassment complaints in Canada. A claimant must show that the sexual conduct complained of was "unwelcome" (the "unwelcomeness element").[13] BC tribunal jurisprudence has elaborated on this element by asking whether, considering all the circumstances… "[a reasonable person would have known that the conduct in question was not welcomed by the claimant.]"[14] The unwelcomeness element imports an objective standard that can discount the

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

10 *Code* at s 13.

11 *Quebec (Commission des droits de la personne et des droits de la jenuesse) v Bombardier Inc.,* 2015 SCC 39 at para 32 [*Bombardier*].

12 *Bombardier* at para 49.

13 *Janzen* at p 1284.

14 *Mahmoodi v UBC and Dutton*, 1999 BCHRT 56 at para 136 [*Mahmoodi*].

claimant's subjective experience and appeal to stereotypes-laden assumptions about what conduct is deemed inappropriate or unwanted. The test for sexual harassment must guard against an unduly narrow focus on the claimant's outward behavior or apparent compliance, as doing so risks shifting the evidentiary burden.

Consider, for instance, a female immigrant worker from Ghana who is employed as a server and is subjected to repeated inappropriate comments and deliberate physical proximity by her supervisor. She does not object or report the conduct. As a newcomer, she is adapting to the cultural norms and is scared to jeopardize her employment as well as her immigration and financial stability. As a result, she continues working without outward resistance despite subjectively experiencing the conduct as humiliating. In this example, an adjudicative focus on the absence of active resistance or apparent acquiescence to the supervisor's conduct risks mischaracterizing the encounter as welcomed. However, intersecting vulnerabilities including immigration status, cultural norms, and an inherent power imbalance with the supervisor may constrain the claimant's ability to report or actively resist. It has long been established in the jurisprudence and legal scholarship that a claimant's "silence or passivity" in respect of sexually charged conduct does not automatically translate to acceptance, and that drawing that inference is a mistake of law.[15] With the current test in *Janzen,* there is a risk of placing a disproportionate burden on claimants to affirmatively demonstrate that sexually charged conduct was unwelcome, rather than placing the onus on the alleged harasser to establish that it was not.[16]

15 *R v Ewanchuk*, [1999] 1 SCR 330 at para 51 [*Ewanchuk* SCC]; Hastie 2020 at p 84.

16 Hastie 2020 at p 68.

A. The Myopic Reasonable Person Standard

Who is the reasonable person and who defines the character of the reasonable person? The answer to this question is the subject of legal and ethical debate among legal scholars, as the reasonable person is characterized based on the norms and values held by society, and it is therefore an ever-changing social construct. The reasonable person construct applies in many diverse areas of the law, from tort law to human rights and criminal law. It is a fundamental objective legal standard which has the effect of attracting liability where a person's behavior departs from that of a prudent person and causes harm to another.[17] Cultural and social change are the main drivers of the dominant norms which ultimately shape the concept of the reasonable person. With the passage of time, the objective legal standard has become inherently troubling for litigants who belong to historically disadvantaged groups, as the objective standard reinforces systemic inequality by appealing to the shared characteristics of people generally rather than individual qualities and the lived experiences of individuals.[18]

In Canada, the reasonable person refers to a hypothetical person with "ordinary intelligence and prudence," who forms the objective legal standard used to determine whether the parties' conduct was reasonable in the circumstances. [19] As stated by law professor Mayo Moran, the concept of

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17 *Donoghue v Stevenson*, [1932] AC 562 [*Donoghue*]; *R. v. Hundal*, [1993] 1 SCR 867 [*Hundal*]:

> In tort law the reasonable person standard colors the entire legal analysis of harm and the standard of care expected of a person who has a duty of care, is that of the ordinary and prudent person; In criminal law, the reasonable person may be imported into the assessment of culpability for any offence where the standard of care involves objectively dangerous conduct.

18 M. Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford, 2003) at p 195 [Moran].

19 *Vaughn v Menlove*, (1837) 132 E.R. 490; L. Klar, *Tort Law,* 4th ed (Carswell: 2008) at 333-344.

reasonableness draws heavily on social norms, and "troubling or discriminatory social understandings of particular groups thereby seep into determinations of reasonableness under the objective standard." [20] Accordingly, the concept of the objective reasonable person standard is based on shared rather than individual qualities and may therefore fail to capture the unique lived experiences of individuals and the distinctive gender, political, social, racial, and ethnic identity of claimants.[21]

In *Janzen*, the Court did not explicitly engage with the reasonable person standard, but the objective reasonable person standard became embedded within the test for sexual harassment by virtue of the BCHRT decision in *Mahmoodi v University of British Columbia and Dutton*.[22] The Tribunal in *Mahmoodi* framed the inquiry as a hybrid subjective-objective inquiry, where the objective prong of the test asked whether a reasonable person in the respondent's position knew or ought to have known the conduct was unwelcome to the claimant. The Tribunal's analysis was heavily contextual in the circumstances of *Mahmoodi's* case, as they assessed the power differential between the parties as professor and student, recognized that the claimant's refugee status rendered the claimant's vulnerability more acute, and recognized that as a newcomer the claimant was socially isolated. [23] In this respect, the *Mahmoodi* decision addressed the unique vulnerability of individuals with intersecting grounds of disadvantage. In practice, however, the door *Mahmoodi* opened through its objective assessment of the unwelcomeness element of *Janzen* has operated to the disadvantage of claimants. As law professor Bethany Hastie stated in her paper, this conceptualization of a reasonable person standard has essentially provided

20 Moran at p 164.

21 Moran at p 32.

22 *Mahmoodi*.

23 *Mahmoodi* at paras 83, 141, 239.

"an entry point for gender-based myths and stereotypes to influence the legal analysis."[24]

What began as an inquiry into what a respondent ought to have known from the surrounding circumstances has, in subsequent cases such as *Han v Gwak and Nammi Immigration*[25] and *Kang v Hill*,[26] slid into an inquiry into whether the claimant behaved as a reasonable victim would have. If the claimant did not object, leave, protest, or report promptly, the inference that followed in the jurisprudence was that a reasonable person in the respondent's position could not have known the conduct was unwelcome.[27] The *Kang* decision shows how the Tribunal shifted the evidentiary burden for establishing sexual harassment onto the claimant by requiring them to demonstrate objection to the impugned conduct. In doing so, the decision endorses the stereotype that a claimant should outwardly protest the impugned conduct, and failure to do so leads to the inference that a respondent could not have known the conduct was unwelcome.[28] As discussed below, this risk is particularly acute for claimants whose intersecting identities shape their perception of the impugned conduct and the harm resulting from it.

B. Stereotypes, Myths, and Credibility in Sexual Harassment Adjudication

The objective reasonable person standard, based on the "normal" person of "ordinary" intelligence, is largely informed by dominant social norms.[29]

24 B. Hastie, "An Unwelcome Burden: Sexual Harassment, Consent and Legal Complaints." (2021) 58:2 *Osgoode Hall Law Journal* at p 427 [Hastie 2021].

25 *Han v Gwak and Nammi Immigration*, 2009 BCHRT 17 [*Han*].

26 *Kang v Hill*, 2011 BCHRT 154 [*Kang*].

27 *Kang* at paras 46-58.

28 *Kang* at paras 50-51, 54, 57.

29 The use of dominant social norms is used interchangeably with the term "customary norms", both referring to what is considered acceptable or normal

Often, social norms align with legal norms[30] to ensure that any person seeking relief under the law is treated with dignity in the adjudicative process.[31] However, this is not always the case. Sexual assault and harassment are areas of the law where competing beliefs about rape, prior sexual histories, victim blaming, and consent have paved the way for systemic and gender-based discrimination in the complaint process. Historically, social and legal norms treated a claimant's intoxication or manner of dress as determinative factors in sexual assault cases, perpetuating harmful stereotypes that rape shield laws in Canada were ultimately enacted to dismantle.[32]

Looking beyond Canadian jurisdictions to California, the *People v Brock Turner*[33] case illustrates how myths and stereotypes introduced through defence cross-examination can migrate into the adjudicator's legal reasoning and conclusion. In the widely publicized 2016 California case of *Turner*, the victim's alcohol consumption became central to the defense' argument, effectively placing the victim's judgment and credibility on trial rather than the accused's. [34] What became particularly concerning was the Judge's

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in a particular social context (for instance, a dominant or customary norm 50 years ago may have been that women who drink are partially at fault for any sexual assault they experience. However, in contemporary society today, this would be a subordinate norm and would be a prohibited inference to make in both social and legal settings).

30 Legal norms refer to practices that have developed in the judicial process based on customary norms in society (for instance, the development of rape shield laws is a legal norm developed in response to a societal norm of protecting victims of assault).

31 Moran at p 15.

32 *Criminal Code*, RSC 1985, c C-46 at ss 273.1, 273.2, 276–276.5, and 277 [*Criminal Code*].

33 *People v Turner*, No B1577162 (Sup Crt Cal, Santa Clara County, 2 June 2016).

34 "Chanel Miller: The Full '60 Minutes' Report on the Author and Sexual Assault Survivor" (22 September 2019), online (video): CBS News

decision at sentencing, which expressly treated the accused's intoxication as a mitigating factor, reasoning that "there is less moral culpability attached to the defendant who is legally intoxicated" (Transcript, p. 1196). The intoxication evidence was ultimately weaponized against the victim throughout proceedings. First, it was employed to undermine the claimant's credibility as a witness, and subsequently to reduce the accused's culpability for the assault. This reasoning led to a 55,000-signature petition calling for change, and shortly thereafter, the State of California enacted mandatory minimum sentences for sexual assault and closed the door on the loophole that allowed lenient sentences where the claimant was too intoxicated to physically resist.[35]

When the law fails to keep pace with prevailing social norms, public confidence in the justice system is undermined and survivors are left re-traumatized by the adjudicative process.[36] Humans are innately biased, and the imposition of an objective legal standard can still manifest into subjectively held beliefs about what is reasonable and normal in a particular situation. In *Saskatchewan Human Rights Commission v Whatcott*,[37] the SCC acknowledged the inevitable subjectivity associated with any objective legal standard, where they stated, "as long as human beings act in the role of judge

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https://www.cbsnews.com/video/chanel-miller-the-full-60-minutes-report-on-the-know-my-name-author-and-brock-turner-sexual-assault-survivor-2019-09-22/.

35 Harvard Law Review, "Recent Election" (2019) 132:4 *Harvard Law Review* at p 1371; T. Salinger, "Recall Petition Started Against California Judge Who Sentenced Former Stanford Swimmer to Six Months for Rape" *New York Daily News* (7 June 2016) https://www.nydailynews.com/news/crime/recall-petition-started-judge-stanford-rape-case-article-1.2663260.

36 See C. Miller, *Know My Name: A Memoir* (Viking, 2019) – a memoir written by the complainant in the *People v Turner* case and her harrowing experience of seeking justice in the US legal system.

37 *Saskatchewan Human Rights Commission v Whatcott*, 2013 SCC 11 [*Whatcott*].

or arbitrator, there will be a subjective element in the application of any standard or test to a given fact situation."[38] While public confidence in the justice system is premised on impartial decision making, social norms are constantly evolving and how they shape the law will necessarily reflect the subjective values and experiences of those applying it, as demonstrated by the *Turner* case.

The legal standard of the reasonable person can be particularly troubling where there is no settled understanding of the social norm. Moran suggests that "where there is a deeper tension between the legal and the customary norm," we must revisit the implications of the reasonable person standard and its connection to the "ordinary" person.[39] This characterization of a "deep tension" between legal and social norms has been a hallmark of sexual assault cases in Canada historically, where troubling misconceptions about rape and consent pervaded the legal analysis.[40] The court's discretion to interpret sexual assault complaints through myths and stereotypes enabled discriminatory inferences to take hold as a widespread institutional problem.[41] Even after the introduction of rape shield legislation, decision-makers still continued to employ flawed reasoning in their analysis of sexual assault claims. In *R v Wagar*, the Alberta Court of Appeal overturned a decision of the lower court on the basis that there were doubts as to the trial judge's understanding of sexual assault, and in particular, "the meaning of consent and restrictions on evidence of the complainant's sexual activity imposed by section 276 of the *Criminal Code*."[42] Further, the ABCA was persuaded by the Crown that the trial judge's decision-making was

38 *Whatcott* at para 33.

39 Moran at p 15.

40 Moran at p 15.

41 Moran at p 15.

42 *R v Wagar*, 2015 ABCA 327 at para 4 [*Wagar*].

influenced by sexual stereotypes and stereotypical myths that have "long been discredited." [43]

Several myths and stereotypes have historically pervaded the legal analysis of sexual assault in Canadian criminal law, but they now constitute prohibited lines of questioning and reasoning, including:

- A claimant's sexual history impacts the likelihood that they consented at the time of the alleged assault.[44]
- A woman who dresses provocatively is "asking for it."[45]
- A lack of protest equals consent.[46]
- A lack of reporting or delayed reporting means it was not assault.[47]

Historically, in sexual assault law, the courts' inquiry into consent often measured the claimant's behavior against that of a "reasonable" victim. The evidentiary burden would shift onto the claimant to justify what they were wearing, how much they were drinking, and their overall behaviour in the interaction. This shift permitted judicial reliance on myths and stereotypes in the adjudication of sexual violence complaints. In *R v. Ewanchuk*, 1998 ABCA 52 (overturned on appeal), McClung JA effectively reversed the onus of proof onto the claimant to prove an "obvious lack of consent," rather than placing the burden on the accused to establish that consent had been

43 *Wagar* at para 4.

44 Section 276(1) of the *Criminal Code* illustrates that a defendant in a sexual assault case cannot introduce evidence of the claimant's history of sexual activity; see *R v Darrach*, 2000 SCC 46 at paras 1-3.

45 *Ewanchuk* SCC at para 51.

46 *Ewanchuk* SCC at para 103.

47 *R v W(R)*, [1992] 2 SCR 122 at p 136.

affirmatively given. [48] In the ABCA decision, the analysis displaced the claimant's subjective experience and employed an internally held belief about how a reasonable victim would behave. The SCC overturned the decision on appeal, confirming that consent is a "subjective inquiry" into the "claimant's state of mind" at the time of the sexual activity in question.[49]

Since *Janzen* emerged 36 years ago, there has been a meaningful evolution in both legal and social understandings of consent, sexual assault, sexual harassment, and prohibited lines of questioning during the cross-examination of claimants. The ABCA decision in *Ewanchuk* which minimised non-consensual sexual contact as "hormonal rather than criminal," would be widely denounced in contemporary Canadian society.[50] Rape myths and gender stereotypes that once infiltrated legal reasoning are now statutorily prohibited in the adjudication of sexual assault claims under the *Criminal Code*,[51] and would likely be appealed if a decision-maker were to permit evidence and reasoning that led to prohibited adverse inferences about the claimant. While the BCHRT has rejected stereotype-based reasoning in recent years,[52] the unwelcomeness element in *Janzen* inevitably allows for scrutiny of a claimant's conduct.

48 *R v Ewanchuk*, 1998 ABCA 52 at paras 18, 21 [*Ewanchuk* ABCA] (implying that the claimant ought to have employed physical resistance as evidence of non-consent).

49 *Ewanchuk* SCC at para 26.

50 *Ewanchuk* ABCA at para 21.

51 *Criminal Code* at s 276.

52 See *Basic v Esquimalt Denture Clinic and another*, 2020 BCHRT 138 at para 104 [*Basic*].

IV. Disproportionate Burden on Claimants of Sexual Harassment

As discussed by law professor Bethany Hastie of UBC, the unwelcomeness element in *Janzen* contains a significant limitation by inviting increased scrutiny of a claimant's conduct and credibility.[53] The *Janzen* test risks shifting the analytical focus of the harassment to the claimant, an approach that modern criminal law has largely moved away from. While tribunals recognize that the *Janzen* analysis is heavily contextual, this contextual flexibility cuts both ways and provides the adjudicating body with a high degree of interpretive flexibility in how sexual harassment is assessed.

The unwelcomeness element effectively requires victims of unwanted sexual conduct to account for their own behavioral response to that conduct. In Canadian criminal law, the courts have evolved past traditional lines of questioning that perpetuate gender-based stereotypes about consent and rape. An adjudicator or defence may once have sought to contextualize a claimant's behaviour in relation to sexual assault allegations by questioning them on what they were wearing, how much they had to drink, or whether they really said "no," but this is now a prohibited line of questioning and reasoning in sexual assault proceedings across Canada.[54] Further, lack of reporting or delayed reporting for sexual violence in Canada is connected to the "fear of the criminal justice process," which can be traced to the historical and poor treatment of sexual assault victims in criminal courtrooms.[55] The lesson from the criminal law context is that when adjudicators impose disproportionate burdens on claimants or draw adverse inferences from their

53 Hastie 2021.

54 L. Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials," (2019) 44:2 *Queen's Law Journal* at p 326.

55 E. Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill University Press, 2018) at p 3 [Craig].

conduct in respect of a sexual harassment claim, they risk reproducing the very barriers that the *Janzen* test is designed to address.

While Canadian criminal law has dispensed with prohibited lines of reasoning premised on troubling understandings of autonomy, sex, and consent,[56] the unwelcomeness element in *Janzen* has not been reformed in a similar way to ensure the protection of victims. The burden on claimants to show that the conduct complained of was unwelcome in an "objective" sense trigger outdated beliefs about consent and undermines the claimant's subjective belief about a sexually objectionable environment. The test systematically disadvantages those whose indifference reflects structural circumstances rather than genuine acceptance of the impugned conduct.

Tribunal jurisprudence following *Janzen* has not settled either the analytical framework for assessing unwelcomeness or the question of who bears the evidentiary burden of proving the unwelcomeness element. As the case-law review below demonstrates, human rights adjudication lacks the same statutory safeguards that criminal law has developed to guard against stereotype-laden assumptions and reasoning in sexual harassment cases.

A. *Kang* and *Han*: Adverse Inferences and the Persistence of Stereotype-Based Reasoning

In *Han*, the BCHRT found the respondent had made sexual comments towards the claimant, but also found the claimant was "a person with strong opinions "and "entirely capable of making her thoughts and feelings known."[57] The Tribunal found that based on her character, she would have spoken to the alleged harasser had the comments made her uncomfortable.

56 Craig at p 167.

57 *Han* at para 35.

In effect, the Tribunal's perception of the claimant as an assertive individual led to the flawed inference that her silence implied consent.[58]

Similarly, in *Kang*, a claimant alleged sexual harassment under section 13 of the *Code* against her supervisor when he discussed intimate topics at work and confessed his romantic feelings for her.[59] The Tribunal concluded that the claimant did not establish, on a balance of probabilities, that the respondent's actions or words were unwelcome or that they had an adverse impact on employment. The tribunal member stated that the claimant had asked "highly personal questions" about the respondent's marriage early in the employment relationship which indicated to the respondent that she was not "averse to discussing such intimate matters in the workplace."[60] The characterization of the complaint demonstrates misconceptions about consent and its impact on the legal determination of "unwelcomeness." To suggest that consent at an earlier point in time translates to consent at later point in time is one of the flawed inferences that has long been abandoned in criminal law.

The Tribunal's portrayal of consent in *Kang* and *Han* is indicative of how the analysis of the unwelcomeness element and consent can perpetuate stereotypes leading to flawed inferences in legal analysis. The culture of consent in Canada has evolved, such that a claimant who does not protest sexual advances is no longer assumed to have automatically consented.[61] To place the onus on the claimant to demonstrate a lack of consent or to justify their lack of protest in human rights proceedings, is an affront to the dignity of the claimant.

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58 *Han* at paras 32 and 35.

59 *Kang* at para 1.

60 *Kang* at para 50.

61 Craig at p 3.

B. *Deep Creek*, *Byelkova* and *Employee*: Recognizing the Disproportionate Burden

Several recent decisions at BCHRT have recognized the disproportionate burden on claimants to prove the unwelcomeness element in *Janzen*. In the *Employee v The University and another (No. 2),* the BCHRT stated "it has been thirty years since *Janzen* was decided, and it may be time to revisit whether this requirement unfairly places the burden of establishing a lack of consent on a claimant."[62] The tribunal member went on to reject three gender-based myths and stereotypes raised by the respondent as an argument to suggest the conduct complained of was not "unwelcome." They found that 1) lack of protest; 2) participation in prior behaviour; and 3) delay in reporting, are myths and stereotypes which will not factor in the analysis of the "unwelcome" element.[63] The *Employee* decision engaged with the flawed unwelcomeness element in *Janzen*, but the tribunal did not undertake to explore how the test can be reshaped in light of changing dominant and legal norms.

Another noteworthy decision made by the BCHRT in recent years is *Ms. K v. Deep Creek Store and another.* [64] In *Deep Creek*, the Tribunal declined to follow tribunal precedent from *Mahmoodi* in guiding the application of the unwelcomeness element in *Janzen*. [65] Instead, the Tribunal proposed a modified test where a claimant still needed to show the unwelcome nature of the impugned conduct but did not have to establish it in an objective sense. The tribunal member stated they are bound by the decisions in *Dutton v*

62 *Employee v The University and another (No. 2)*, 2020 BCHRT 12 at para 175 [*Employee*].

63 *Employee* at paras 178-180.

64 *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158 [*Deep Creek*].

65 *Deep Creek* at para 78.

BCHRT[66] and *Bartman v Twohey et al*[67] for the principle that sexual harassment necessarily requires the decision maker to find the conduct was unwelcome.[68] However, they also noted that there is no appellate authority that requires them to follow *Mahmoodi* and establish that a *reasonable person* would know the conduct was not welcomed. On that point, the Tribunal in *Deep Creek* determined that where a claimant establishes an adverse impact standard from the impugned conduct, it necessarily follows that the conduct was unwelcome. The tribunal member summarized the test as follows:

> In summary, to find sexual harassment contrary to the *Code*, the Tribunal must determine that the conduct is unwelcome or unwanted. The burden on the complainant is to prove that they were adversely impacted by the sexualized conduct. If they do so, it is implicit in that finding that the conduct is unwelcome. It is open to a respondent to challenge an alleged adverse impact, so long as they do not rely on gender-based stereotypes and myths. [69]

Following the lead in *Deep Creek*, the Tribunal in *Byelkova v Fraser Health Authority and another (No. 2)* adopted similar reasoning, where they determined a claimant must show a nexus between the alleged sexual harassment and the adverse effect in employment. [70] Recent tribunal decisions reflect an evolution in how consent and unwelcomeness are understood, but that evolution is fragile without legal reform. There is no statutory framework to prohibit inferences rooted in stereotypes within BC tribunal proceedings, and no appellate authority displacing the objective

66 *Dutton v BCHRT*, 2001 BCSC 1256 [*Dutton*].

67 *Bartman v Twohey et al*, 2004 BCSC 1211 [*Bartman*].

68 *Deep Creek* at para 89.

69 *Deep Creek* at para 93.

70 *Byelkova v Fraser Health Authority and another (No. 2)*, 2021 BCHRT 159 at para 119 [*Byelkova*].

unwelcomeness standard. In *Basic*, a 2020 tribunal decision, the respondent led evidence that the claimant wore "provocative attire," "engaged in sexual banter in the workplace," and performed "inappropriate internet searches."[71] While the tribunal rejected this evidence and determined it was rooted in stereotypes and myths, *Basic* illustrates how stereotypes continue to migrate into proceedings as late as 2020, despite a shift in legal and customary norms.

While *Deep Creek* demonstrates a meaningful step towards reducing the evidentiary burden on claimants, the decision is not a binding precedent on other tribunal panels. Nonetheless, the BCHRT should not await legislative or appellate intervention to shift the legal analysis of sexual harassment claims in the human rights context. The interpretive flexibility required to re-orient the unwelcomeness element currently exists within the *Janzen* test itself, as shown in *Deep Creek*. The reasonable person must be properly contextualized to consider how a person in the claimant's position would have perceived the conduct, rather than predominantly focusing on how the claimant outwardly responded. Returning to the earlier scenario of the Ghanian female who was a recent immigrant worker, the analysis should ask how a person in her position would experience the conduct. The factors to be considered include her economic dependence on the job, her responsibility to support her family, the power imbalance created by a long-tenured male supervisor in a position of authority, her precarious immigration status, and her understanding of culturally appropriate responses to superiors. The analysis cannot begin and end with whether the claimant's outward behavior demonstrated rejection of the conduct, as this would constitute a mistake of law. Future jurisprudence should assess how intersecting vulnerabilities can impact the claimant's experience and response to discriminatory conduct. The next section analyzes how intersectionality shapes claimants' experiences

71 *Basic* at paras 129, 131-133.

of sexual harassment, their understanding of those experiences, and the harms they suffer.

V. Intersectionality in the Adjudication of Sexual Harassment Claims

Workplace sexual harassment constitutes an affront to the dignity of employees who experience it.[72] When sexual harassment intersects with other protected grounds such as race, socio-economic status, or disability, the resulting experience is qualitatively distinct.[73] The Tribunal should examine how protected grounds intersect and give rise to consequences unique to the claimant's structural position in society. The intersectionality analysis[74] should also inform how tribunals make sense of the structural conditions influencing a claimant's response to unwelcome conduct.

A. Intersectionality as a Theoretical Principle: Crenshaw's Framework

Kimberle Crenshaw, a civil rights advocate and a leading scholar in race theory, coined the term "intersectionality." Intersectionality is defined in the Merriam Webster dictionary as the "complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and

72 *Janzen* at p 1284.

73 K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1989:1 *University of Chicago Legal Forum* at pp 140, 149 [Crenshaw].

74 In this section, "multiple minority identities," "multiple-ground analysis," and "intersectional analysis" are used to describe analytical approaches that consider how discrimination may arise from the interaction of two or more protected grounds or marginalized identity characteristics, rather than from any single ground in isolation (which will be referred to as single ground analysis or single-axis analysis).

classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups."[75] When interviewed by the Columbia Law School in New York almost 20 years after introducing the term, Crenshaw was asked whether using the term for a purpose other than black women is a misunderstanding. [76] Her response was as follows:

> Intersectionality is a lens through which you can see where power comes and collides, where it interlocks and intersects. It's not simply that there's a race problem here, a gender problem here, and a class or LBGTQ problem there. Many times that framework erases what happens to people who are subject to all these things.[77]

In her scholarship, Crenshaw ultimately argues that protected-ground categories have problematically been built around the experiences of the dominant members of each disadvantaged group.[78] To describe the impact of assessing a single ground versus multiple ground discrimination claim, Crenshaw draws an interesting analogy to a basement. She suggests that people disadvantaged by multiple factors are stacked at the bottom of the basement, while those with a single disadvantage have their heads pressed against the ceiling. Above the ceiling is a small, privileged room, which admits only those who can show that "but for" a single axis of disadvantage they would already belong upstairs. As a result, those disadvantaged on multiple grounds are left in the basement, as the single axis framework is not

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75 *Merriam-Webster Dictionary* (Merriam-Webster Inc., 2026) "intersectionality".

76 Columbia Law School, "Kimberlé Crenshaw on Intersectionality, More than Two Decades Later" (8 June 2017) https://law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later [Columbia Law School].

77 Columbia Law School.

78 Crenshaw at pp 143, 149.

equipped to understand the unique discrimination and burden they face to help draw them out.[79]

The earlier example discussed in this paper regarding a Ghanian female immigrant worker who is subjected to unwanted sexual harassment illustrates the analytical gap contemplated by Crenshaw in the single axis-analysis. That is, those disadvantaged on multiple intersecting grounds not only experience discrimination differently but are harmed by it differently. In 2026, the *Code* recognizes a broader array of protected grounds than in 1989,[80] and adjudicators must be attentive to the ways those grounds intersect to produce forms of disadvantage that a single-axis analysis cannot capture. A Ghanaian immigrant worker who fears employer reprisal and is unfamiliar with Canadian workplace norms faces intersecting vulnerabilities that the *Janzen* framework is not equipped to recognize. The *Janzen* test allows for emphasis to be placed on the claimant's outward conduct rather than the structural conditions that shape it. Sexual harassment should be assessed through an intersectional lens, as protected grounds shape the claimant's experience and understanding of harassment.

The principle of intersectionality in sexual harassment law has been critically studied and the subject of conceptual debate in scholarship but has not been subject to many empirical studies in Canada. Although, empirical research has shed light on discrimination and the theory of intersectional disadvantage. In an empirical study of workplace discrimination in Canada, a General Social Survey (GSS) collected information from 19,609 workers

79 Crenshaw at pp 151-152.

80 See Bill 27, *Human Rights Code Amendment Act, 2016*, 40th Parl, 5th Sess, British Columbia, 2016 (assented to 28 July 2016), SBC 2016, c 26 (addition of gender identity to the *Code)*; Bill 18, *Human Rights Code Amendment Act, 2021*, 42nd Parl, 2nd Sess, British Columbia, 2021 (assented to 25 November 2021), SBC 2021, c 39 (addition of Indigenous identity to the *Code*).

regarding their identities and experiences of discrimination.[81] The data showed that a "person's identification with two marginalized groups increases the chances of discrimination and augments further with three marginalized identities."[82] Thus, intersectionality strongly predicts disadvantage and the detrimental effects faced by discrimination. The empirical research from the GSS strongly suggests that pre-existing disadvantage is not merely correlated with experiences of sexual harassment, but also shapes the impact faced by those with multiple-marginalized identities. While the GSS provides valuable insight into experiences of discrimination, it is acknowledged that the scope extends beyond sexual harassment specifically and reflects the experiences of a single survey population at one point in time.

Even Canadian government data collection on workplace sexual harassment reflects a primarily single-axis approach. The 2020 Survey on Sexual Misconduct at Work, released by Statistics Canada, frames its central findings through gender alone and reports the experiences of visible minority women, Indigenous women, women with disabilities, and LGBTQ2+ workers as comparisons against their non-counterpart groups rather than examining the intersections among these axes.[83] The report stated that 94% of workplace sexual harassment complaints were filed by women, and that persons with disabilities and visible minorities were disproportionately represented among claimants.[84] Women with disabilities reported the highest rates of workplace harassment of any group surveyed, with 58%

81 P. Nagnia & T. Arora, "Discrimination in the Workplace in Canada: An Intersectional Approach," (2021) 46:2 *Canadian Journal of Sociology* [Nagnia & Arora].

82 Nagnia & Arora at p 147.

83 Statistics Canada, *In 2020, one in four women and one in six men reported having experienced inappropriate sexualized behaviours at work in the previous year*, Catalogue No 11-001-X (2021) [Statistics Canada 2021].

84 Statistics Canada 2021.

reporting lifetime exposure compared to 41% among women without disabilities.[85] The inference that could be drawn from this is that a young woman with a disability likely faces a much higher statistical risk than a woman who does not identify with those additional factors. Although the federal government's data is limited by its primarily single axis analysis, it supports the inference that overlapping forms of social disadvantage are associated with a higher incidence of sexual harassment.

B. Objective Standards and Dominant Group Default: A Parallel Between *Law v. Canada* and *Janzen*

Crenshaw's foundational critique is that discrimination law often treats protected grounds as separate, self-contained categories and defines those categories through the experiences of the most dominant or socially visible members of each disadvantaged group.[86] In doing so, it overlooks those whose discrimination arises at the intersection of multiple grounds. The *Janzen* and *Law v. Canada (Minister of Employment and Immigration)*[87] decisions reflect a structurally similar problem. In both decisions, the reasonable person construct risks importing dominant-group assumptions into an inquiry meant to advance substantive equality. In *Janzen*, the "reasonable person" standard governs the assessment of unwelcomeness; in *Law*, the context-sensitive reasonable person governed the dignity analysis. Although both standards are framed as objective, they operate through dominant social assumptions and overlook the intersecting identities that shape the harm.

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85 Statistics Canada, *Gender Results Framework: A new data table on workplace harassment*, Catalogue No 11-001-X (2024) at p 6 [Statistics Canada 2024].

86 Crenshaw at pp 143, 149.

87 *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 [*Law*].

In *Law,* Iacobucci J. recognized that a discrimination claim may place an "evidentiary focus upon a person or subgroup identified by several grounds."[88] While this marked an important recognition of intersectionality in human rights law, it was an incomplete step toward a fully operational intersectional framework. The SCC identified a hybrid objective-subjective legal standard for assessing discrimination complaints under section 15 of the *Charter*. The discrimination was to be assessed through the lens of "the reasonable person, in circumstances similar to those of the claimant, who takes into account the contextual factors relevant to the claim." [89] The reasonable person was intended to be "context-sensitive" under the *Law* framework as it was concerned with the "perspective of a person in circumstances similar to those of the claimant."[90]

This standard was developed further in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*. In concurring reasons, L'Heureux-Dubé J. stated that the reasonable person must acknowledge "not only the circumstances of those like him or her but also appreciate the situation of others."[91] The section 15 *Charter* challenge in *Corbiere* concerned legislation that precluded band members living off reserve from voting in band elections. L'Heureux-Dubé J.'s concurring reasons explicitly recognized that Indigenous women affected by this legislation were "doubly disadvantaged on the basis of sex and race," and that the assessment of disadvantage under section 15(1) must account for the intersection of multiple grounds. [92] Notably, this intersectional analysis appeared in concurring rather than majority opinion, so it is not binding. However, *Law* and *Corbiere* affirmed

88 *Law* at para 37.

89 *Law* at para 7.

90 *Law* at para 61.

91 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 65 [*Corbiere*].

92 *Corbiere* at para 72.

in principle the importance of considering the lived realities of claimants in a discrimination analysis, and the *Law* framework was foundational for establishing the principle that subordinated groups may need to be treated differently to achieve substantive equality. However, the *Law* framework, particularly the human dignity legal test, was an abstract and unworkable doctrine that became an "additional burden on equality claimants."[93]

The objective reasonable person analysis in *Janzen* and the dignity inquiry in *Law* suffer from a shared operational problem. Each framework requires the claimant to prove their experience of harm against a normative benchmark of an objective (*Janzen*) or context-sensitive (*Law*) reasonable person. The reality is that an objective reasonable person standard is not neutral when it is applied across unequal social positions.[94] In both *Law* and *Janzen*, the claimant is disproportionately burdened, despite the intent of both tests being to advance equity. In *Janzen*, this imbalance allows stereotype-laden assumptions about reasonableness to inform the analysis of sexual harassment and reinforces the inequalities the framework was intended to address. In theory, both legal tests were designed to address discrimination; in practice, their application has often produced the opposite effect.

The SCC reformed the *Law* framework in response to the analytical problems associated with the claimant borne burden of proof in establishing the abstract notion of injury to dignity.[95] In a line of SCC decisions, the *Law* analysis was addressed and reframed: *R v Kapp*[96] reformulated the core test

93 *R v Kapp*, 2008 SCC 41 at para 22 [*Kapp*].

94 C.A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) at p 181.

95 *Kapp* at para 22.

96 *Kapp* at paras 21-22.

and reduced the emphasis on the dignity inquiry; *Withler v. Canada*[97] abandoned the rigid comparator group analysis; and *Fraser v. Canada*[98] recently signaled towards intersectional reasoning by recognizing that adverse-effects discrimination can arise from the intersection of multiple grounds. This trajectory demonstrates the SCC's willingness to reconsider equality frameworks that have failed to operationalize their equality objectives in practice. Of note, the *Janzen* framework has not undergone comparable reform to address the disproportionate burden on claimants. The unwelcomeness standard developed through *Janzen* and further distilled in *Mahmoodi* govern sexual harassment adjudication in BC, but the way the test is applied has since become the subject of scrutiny. *Deep Creek* has departed from the *Mahmoodi* approach suggesting that the decisions currently binding on the BCHRT do not require the claimant to objectively prove conduct was unwelcome. This has left panels with a choice between two competing analytical frames in *Mahmoodi* and *Deep Creek*. Until appellate authority resolves the tension, the framework that governs claimants' cases will turn on which line a given panel elects to follow.

VI. Reforming the *Janzen* Framework

A. Beyond the Objective Standard: The *Deep Creek* Workaround

An objective standard for assessing unwelcome conduct generates a legal analysis detached from the social context in which harassment occurs, including but not limited to, workplace power dynamics, the claimant's lived experience, and the intersection of protected grounds that may compound the experience of sexual harassment and its discriminatory impact.

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97 *Withler v Canada (Attorney General)*, 2011 SCC 12 at paras 55-64, [2011] 1 SCR 396 [*Withler*].

98 *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras 30-32, 51 [*Fraser*].

In an attempt to fill an analytical gap left by *Janzen* in distilling the concept of unwelcomeness, the Tribunal in *Mahmoodi* adopted the objective reasonable person test, asking whether a reasonable person would know the impugned conduct was unwelcome. Although the "objective" reasonable person inquiry was, in theory, intended to focus the analysis on the alleged harasser's conduct, its practical effect directed the inquiry toward the claimant's behaviour and response.[99] Nonetheless, the BCHRT adopted *Mahmoodi*'s objective framework for assessing unwelcomeness in subsequent decisions.[100]

The BCHRT departs from *Mahmoodi*'s objective framework in *Deep Creek*. In *Deep Creek*, the Tribunal found that a complainant need only establish a nexus between the sexual conduct and its adverse impact to satisfy the unwelcomeness element.[101] In doing so, the Tribunal aligned the sexual harassment analysis with the *Moore* test for *prima facie* discrimination which currently governs all other claims under the *Code*.[102] The Tribunal's reasoning in *Deep Creek* illustrates recognition of the importance of a claimant's subjective experience of the alleged harassment and minimizes the unjust evidentiary burden on claimants to show conduct was objectively unwelcome. While the claimant still bears the burden with the adverse impact standard, it is less divorced from the social context in which sexual harassment occurs. The Tribunal's flexible interpretation of *Janzen* offers a workable interim solution. However, given that *Deep Creek* is persuasive rather than binding, there is no guarantee that subsequent BCHRT decisions will adopt it in future sexual harassment proceedings.

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99 Hastie 2020 at p 67.

100 See for example: *Basic* at paras 96-97; *Kafer v Sleep Country Canada and another (No. 2),* 2013 BCHRT 289 at paras 32-39.

101 *Deep Creek* at paras 90-95.

102 See *Deep Creek* at paras 75 and 77 citing *Moore v British Columbia (Education),* 2012 SCC 61.

In summary, *Deep Creek* marks an important step toward realigning the *Janzen* legal test with contemporary understandings of both consent and unwanted sexually charged conduct. Longer-term reform requires legislative intervention to prohibit adverse inferences drawn from myths and stereotypes in the unwelcomeness analysis.

B. Statutory Reform: Affirmative Consent and Prohibited Adverse Inferences

The affirmative consent model operates on the premise that consent necessarily involves "yes means yes," placing the burden of proof on the presence of an affirmative "yes" rather than an "affirmative no."[103] Section 273.1 of the *Criminal Code* defines consent as the "voluntary agreement of the claimant to engage in the sexual activity in question and notably excludes consent where the claimant expresses by words or conducts a lack of agreement, or where the accused induces participation by abusing a position of trust, power, or authority."[104] While this provision operates specifically in the criminal justice context, the underlying rationale that consent must be affirmatively established rather than assumed from silence, can be translated directly to the human rights setting.[105]

The criminal law's adaptation to changing societal norms demonstrates that Canadian law is not only capable of dismantling gender stereotypes embedded in historical legal standards, but that it has already done so in another area of the law. As mentioned earlier, the *Criminal Code* prohibits the use of sexual history evidence of a claimant and other stereotype-based

103 B. Burger et al, "Saying No to 'Yes Means Yes': Limitations of Affirmative Consent for Mitigating Unwanted Behavior Online According to Women and LGBTQIA+ Stakeholders" (2025) https://dl.acm.org/doi/10.1145/3706598.3713236.

104 *Criminal Code* at s 273.1.

105 Hastie 2020 at p 84.

reasoning about consent and unwanted sexual conduct. [106] This provision has changed the face of legal norms respecting sexual assault cases in Canadian criminal law and has offered much greater protection to survivors of sexual violence. Human rights proceedings concerning sexual harassment have not offered the same degree of statutory protection to claimants, and stereotypes and microaggressions can still implicitly influence the adjudication of a discrimination complaint, as demonstrated by earlier cases such as *Kang* and *Han.*[107]

While the principle of affirmative consent is not a legislated standard for sexual harassment in BC, it does often arise in the institutional context by way of policy. Educational institutions in BC are required under the *Sexual Violence and Misconduct Policy Act* to adopt sexual violence policies, and institutions can operationalize this by developing definitions of consent and other terms related to sexualized violence.[108] The University of British Columbia, for instance, has defined consent in its policy as the active, voluntary agreement to engage in sexual activity, specifying that it cannot be implied and cannot be assumed from silence or inaction. [109] Thompson Rivers University also has an institutional policy respecting sexualized violence which is a broad term synonymous with sexual misconduct, and it encompasses both sexual assault and sexual harassment. Consent is similarly

106 *Criminal Code* at ss 273 and 276.1.

107 *Han*; *Kang*.

108 *Sexual Violence and Misconduct Policy Act,* SBC 2016, c 23 at s 2.

109 University of British Columbia, *Sexual Misconduct Policy*, Policy SC17 (October 2024) https://universitycounsel.ubc.ca/files/2024/12/Sexual-Misconduct-Policy_SC17.pdf.

defined in TRU's policy as voluntary, communicated expressly through words or conduct, revocable, and specific to each sexual activity. [110]

Consent across all contexts should be assessed in large part from the subjective perspective of the claimant rather than through an objective reasonable person lens. This approach is consistent with the Supreme Court's direction in *R v Ewanchuk* that consent is a "subjective inquiry" into the "state of mind of the claimant."[111] Assessing consent objectively, by reference to how a reasonable claimant would conduct themselves, risks reintroducing the very myths and stereotypes the affirmative model is designed to eliminate. The affirmative consent model would effectively displace the inference that silence constitutes acceptance, a stereotype-laden assumption that has long informed sexual assault and harassment law. At the legislative level, the *Code* could be amended to include provisions analogous to the rape shield framework built into the *Criminal Code*, prohibiting those involved in a proceeding from drawing inferences about the welcome nature of conduct from a claimant's silence, prior conduct, or failure to protest verbally or physically.[112]

In addition to the rape shield framework, the criminal law context has implemented statutory amendments to the *Judges Act* and the *Criminal Code* to mandate continuing judicial education on sexual assault, consent, systematic discrimination and social context.[113] The amendments require judges to provide reasons for decisions in sexual assault proceedings and mandates reporting on educational seminars by the Canadian Judicial

110 Thompson Rivers University, *Sexualized Violence*, Policy BRD 25-0 (19 July 2023) https://www.tru.ca/__shared/assets/BRD_25-0_Sexualized_Violence40359.pdf .

111 *Ewanchuk* SCC at para 51.

112 *Criminal Code* at s 273.1.

113 *An Act to Amend the Judges Act and the Criminal Code*, SC 2021, c 8 at ss 2-3 [*Act to Amend the Judges Act*]

Council. [114] Equivalent guidance and training would help the BCHRT build consensus among its members on the foundational concepts that shape sexual harassment claims including, but not limited to, consent, unwelcomeness, "sexually charged" conduct, and the "reasonable person" standard in the human rights context. Further, professional development training in the realm of sexual harassment law will also ensure that tribunal members are attune to the nuanced ways that stereotypes migrate into proceedings, especially when led by the respondent.

C. From Theory to Practice: Operationalizing Intersectional Analysis

Sexual harassment adjudication must be attentive to the way in which a claimant's intersecting identities shape their subjective experience of the impugned conduct. Where applicable, adjudicators should meaningfully engage with the overlapping grounds of disadvantage to understand how intersecting identities inform both the sexual harassment analysis and the determination of an appropriate remedy under *Janzen*.

As discussed earlier, the reasonable person inquiry within the *Janzen* test is framed around the dominant and normative group in society, effectively failing to capture those with multiple minority identities. The *Janzen* test prioritizes sex discrimination in isolation from gender, socio-economic status, race, and other protected grounds. Where a claimant is a racialized woman, the test does not provide an analytical mechanism for adjudicating conduct that is both racial, gendered, and sexual. The intersection of the protected grounds produces a distinct form of harm that cannot be reduced to any one factor in isolation.[115]

Although human rights tribunals in Ontario and BC have engaged with intersectionality in human rights adjudication, the depth and consistency of

114 *Act to Amend the Judges Act.*

115 Crenshaw at p 139.

the analysis vary considerably. Where more than one protected ground is engaged, tribunals have often pigeonholed the claim by separating the harm into its constituent grounds and treating them as parallel but distinct injuries, or by subordinating one ground to the others based on the evidentiary record.[116] Both analyses effectively ignore the unique form of discrimination the claimant experienced and the distinct harm that it caused. *Alexander v British Columbia* offers a clear illustration of this point. The claimant, a First Nations woman with a visible disability, was refused service at a liquor store on the store manager's assumption that she was drunk.[117] Although she alleged discrimination on multiple grounds, including race, colour, ancestry, and disability, the Tribunal disposed of the claim as one of disability discrimination only, declining to consider whether racialized stereotypes about alcohol use shaped the manager's perception.[118]

Despite the dominant single-axis approach to discrimination, the Women's Legal Education and Action Fund (LEAF) intersectionality paper, reveals two cases where tribunals take a more "robust understanding of intersectionality into their [analysis]." [119] In the Ontario case of *Baylis-Flannery v Dewilde (Tri Community Physiotherapy),*[120] and the BC case of

116 See OHRC, "An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims" https://www.ohrc.on.ca/en/book/export/html/2467 [OHRC].

117 *Alexander v British Columbia (Ministry of Labour and Consumer Services, Liquor Distribution Branch)*, 1989 CanLII 9053 at paras 2-5, 10 CHRR 5871 (BC HRT) [*Alexander*].

118 *Alexander* at para 19.

119 Women's Legal Education and Action Fund (LEAF), *Intersectionality in Law and Legal Contexts* (LEAF, 2020) at p 8.

120 *Baylis-Flannery v Dewilde (Tri Community Physiotherapy)*, 2003 HRTO 28 [*Dewilde*].

Radek v. Henderson Development (Canada) and Securiguard Services (No. 3),[121] the tribunals in both cases recognized that discrimination claims must be assessed with respect to intersecting protected grounds, acknowledging that individuals' experiences of harassment will differ based on the intersection of factors.

In *DeWilde*, the HRTO engaged in a meaningful intersectional analysis of a Black woman's claim of racialized sexual harassment. Drawing on principles of intersectionality, the Tribunal held that the claimant's experience as a Black woman could not be reduced to the separate categories of race and sex discrimination. The Tribunal warned that a single-axis approach would risk reframing the case as sexual harassment that merely happened to involve a Black complainant, thereby concealing the racial dimension of the harm. [122] Although the Tribunal accepted that the evidentiary record could establish discrimination on the basis of either race or sex alone, it recognized that a single-axis analysis would fail to capture the distinct category of disadvantage produced by the claimant's intersecting minority identities. The Tribunal notably stated that "[the claimant] is not a woman who happens to be black, or a black person who happens to be female, but a black woman."[123]

This more integrated approach in *DeWilde* can be compared with the BCHRT's reasoning in *Radek*, where the Tribunal recognized the relevance of intersecting grounds but ultimately treated some aspects of the claimant's identity as secondary rather than constitutive. Although *Radek* marked an important step toward recognizing the value of an intersectional analysis, the language in the decision still implicitly suggests a hierarchy between primary

121 *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 [*Radek*].

122 *Dewilde* at para 145.

123 *Dewilde* at para 145.

and secondary grounds. The Tribunal characterized the complaint as "primarily" grounded in race/color/ancestry, while cautioning that the analysis "must not ignore her disability, and the possibility of compound discrimination which may have occurred."[124] While the Tribunal seemingly collapsed race, colour, and ancestry into a unified discriminatory experience connected to Indigenous identity,[125] it stopped short of fully integrating disability into that intersectional framework. Nonetheless, *Radek* is a fundamental decision that expressly recognized the relevance of intersectionality in human rights claims in BC and adopted the concern, articulated in *Dewilde,* that single-axis reasoning can conceal the effects of multiple-ground discrimination.[126]

Notably, the integrated approach to intersectionality in human rights adjudication was adopted in *Young Worker v. Heirloom and another*,[127] where the BCHRT used an intersectional lens to analyze the enumerated grounds of race and sex. In *Young Worker,* a 13-year-old Black girl alleged that her manager treated her differently because she was Black and female, citing incidents in which the manager blamed her for cash shortages, removed her from cashier duties, and characterized her as having a "bad attitude."[128] The Tribunal undertook a detailed intersectional analysis, referencing several decisions involving anti-Black stereotypes, stereotypes directed toward Black women and children, and gendered stereotypes concerning women in the workforce.[129] Ultimately, the Tribunal's intersectional assessment of race and sex, alongside the contextual social factor of age, led it to conclude that the

124 *Radek* at para 465.

125 *Radek* at paras 463-467.

126 *Dewilde* at para 145.

127 *Young Worker v. Heirloom and another*, 2023 BCHRT 137 [*Young Worker*].

128 *Young Worker* at paras 19, 31, 72.

129 *Young Worker* at paras 50-63.

manager's treatment of the claimant was influenced by racialized and gendered stereotypes directed at Black girls and women.[130] The Tribunal's reasoning reflected that race and sex were inseparable aspects of the complainant's lived experience rather than parallel or constituent grounds of discrimination. The decision reflects a more robust intersectional analysis grounded in the interaction of multiple marginalized identities.

An intersectional approach to sexual harassment adjudication would capture the distinct harms experienced by claimants belonging to one or more marginalized groups. *Young Worker* provides a strong example of how the intersectional analysis can be operationalized in the human rights context. However, before a comparable framework can be developed in the context of sexual harassment claims, tribunals must first reassess how the "unwelcome" criterion is evaluated through the lens of the reasonable person standard. Without reconsidering that threshold inquiry that has been interpreted to be "objective," more nuanced forms of intersectional analysis may remain underdeveloped.

VII. Conclusion

The *Janzen* framework, though a landmark decision in recognizing sexual harassment as sex discrimination, has left analytical gaps that the BCHRT has since struggled to navigate. First, the unwelcomeness element, assessed through an objective reasonable-person lens, effectively requires claimants to bear the evidentiary burden of establishing both non-consent and that the conduct was unwelcome. This paper argues that the reasoning is backwards as the evidentiary burden should rest on the respondent, not the claimant. Second, the unwelcomeness element ignores that whether conduct is unwelcome is a subjective experience shaped by the claimant's position, and the "reasonable person" against whom that experience is measured is

130 *Young Worker* at paras 100, 120.

modelled against the dominant group in society. Third, the *Janzen* test and the tribunal jurisprudence that followed have not meaningfully grappled with how multiple intersecting grounds of disadvantage shape the way harassment is experienced. The result is a framework that cannot accommodate intersectional analysis at either the liability or the remedial stage.

The first critique concerns the evidentiary burden *Janzen* imposes on claimants, which effectively puts them on trial rather than the respondent. *Kang* and *Han* are illustrative of this point. The unwelcomeness element collapses into a consent inquiry, and ultimately a claimant is required to show active resistance, without which the conduct is presumed both consensual and welcome. The criminal justice system has long abandoned this chain of inference. Yet stereotypes about how a "reasonable" claimant would respond to harassment continue to migrate into legal reasoning, in large part because human rights law has not legislated against them in the way the criminal sphere has. The *Act to Amend the Judges Act* and sections 273 and 276(1) of the *Criminal Code* expressly prohibit decision-makers and defence counsel from drawing inferences rooted in myths and stereotypes about consent. The BCHRT operates without comparable statutory safeguards, with the result that a claimant in the human rights system faces precisely the kind of evidentiary scrutiny that a claimant in the criminal system is statutorily protected from.

The second critique concerns the test's indifference to the claimant's subjective experience of consent and harm. The *Mahmoodi* decision conceptualizes the *Janzen* test for unwelcomeness through an objective reasonable-person lens, asking "whether a reasonable person, taking into account all the circumstances, would know the conduct was unwelcome."[131] This framing, while intended to shift the analysis onto the respondent's

131 *Mahmoodi*.

conduct, has practically shifted the evidentiary burden onto the claimant. The chain of inference that silence equals consent assumes that protest is the universal response to unwelcome conduct, ignoring the structural role of power asymmetries, fear of reprisal, and accommodation as a survival strategy within workplace hierarchies. While the *Mahmoodi* decision acknowledged power differentials and the possibility of tolerated yet unwelcome conduct in its reasoning, subsequent tribunal decisions followed *Mahmoodi* for its objective framing of unwelcomeness to the detriment of claimants. The framing strips out the contextual assessment of the claimant's response and folds back into the first critique by placing an undue evidentiary burden on the claimant to justify their own conduct.

The third critique concerns the *Janzen* tests' silence on multiple-axis discrimination. Protected grounds frequently overlap in ways that produce compound and distinctive forms of discrimination, and these overlapping dynamics should be recognized at both the liability and remedial stages of sexual harassment adjudication. The *Janzen* test treats sex as the operative axis of harm in isolation and leaves a gap in the analysis as to how other enumerated grounds in the *Code* shape claimant's experiences. When tribunals confront claims involving intersecting grounds, they typically respond by assessing each ground as a separate claim or by subordinating one ground to another, as seen in *Radek*. Neither approach captures what matters most about intersectional discrimination, that the harm is generated at the intersection and cannot be reconstructed by parting the discrimination into separate components. The single-axis approach to discrimination renders an entire category of claimants who have multiple marginalized identities, partially invisible to the *Janzen* doctrine.

This paper has identified several paths forward for the adjudication of sexual harassment claims at the BCHRT and beyond, ranging from analytical adjustments tribunals can make immediately to longer-term legislative and jurisprudential reform. In the short term, the BCHRT can

follow the *Deep Creek* approach and ground the unwelcomeness analysis in the adverse impact of the respondent's conduct rather than placing the evidentiary burden on the claimant to establish a lack of consent and the unwelcome nature of the impugned conduct. More broadly, tribunals should interpret the "unwelcome" criterion purposively and within the broader social context in which the conduct occurs, with attention to the remedial objectives of the *Code*. Once the threshold issues with the unwelcomeness element are resolved, tribunals can look to *Young Worker* and *Dewilde* as models for how intersectional analysis can be operationalized in legal reasoning where multiple grounds are engaged.

As a longer-term solution, the unwelcomeness element should be reoriented around an affirmative consent framework, and the *Code* should be amended to incorporate protections analogous to the statutory protections for claimants in the criminal sphere which prohibit adjudicators and defence from drawing inferences rooted in myths and stereotypes about sexual harassment. Further, the BCHRT's reception of *Janzen* through the *Mahmoodi* decision should be revisited, ideally through appellate authority to displace the objective unwelcomeness standard. The criterion should be redefined to centre pre-existing disadvantage and the subjective experience of claimants, building on the reorientation *Deep Creek* has initiated.