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Care and Social Justice: Developing a Right to Basic Income in Canada

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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Abstract

Canada's social safety net has failed to serve many marginalized people during COVID-19, leaving caregivers, low-income earners, those with disabilities, and others without an adequate floor of support. This level of insecurity has helped re-open the policy window for basic income in Canada. Two private members' bills have been introduced federally that would require Canada to develop a national framework for basic income. Though basic income may seem radical, Canada has a history of making major changes to social welfare in the face of global crises. Rather than approaching basic income through a distributive justice lens, this thesis advances an argument for viewing basic income through a feminist care ethics and human rights-based lens. Obstacles and opportunities for advancing basic income through law are examined. An exploration of what a more caring, more democratic system of social welfare in Canada might look like is also presented.

Keywords

Basic Income, Care Ethics, Social Welfare, Feminism, Canadian Constitutional Law

Summary for Lay Audience

“Basic income” is generally proposed as a direct cash transfer from the state to individuals that is universally available, provided unconditionally (with no ties to work or job-seeking), and paid regularly. In Canada, proposals for basic income are often focused on lifting individuals and families out of poverty, so a Canadian basic income would not be completely universal, but would instead be universally available to those whose income falls below the poverty line for any reason. Basic income has been researched, debated, and discussed in Canada since the 1970s, and Canada has run two experimental trials on the effects of basic income on people’s lives and health. The current pandemic has prompted a resurgence in public and political interest in the idea of more supportive, caring, and inclusive social welfare schemes like basic income. As we design our laws and policies for a post-COVID world, basic income could be the floor of support for people in Canada. Though basic income may seem radical, Canada has a history of making major changes to its social policies and laws in the face of global crisis. This thesis argues that Canada should take a feminist approach and view basic income as a form of care-providing and care-supporting social welfare. Learning from past legal strategies in the areas of income insecurity, health, and housing can inform how to advance basic income in Canada. This thesis examines and discusses legal obstacles and opportunities for basic income. This thesis explores what we can learn from these obstacles and how to leverage these opportunities to build a more socially just, more caring, and less oppressive system of social welfare in Canada.

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Chapter 1

1 Introduction: Why Canada Needs Basic Income

We¹ are living in a moment of great insecurity. In Canada and across the world, COVID-19 has caused mass death,² and continues to have a significant impact on peoples' health and lives.³ The devastating social effects of the pandemic have led to the “normalization of insecurity.”⁴ However, normalization does not mean equalization. As the Public Health Agency of Canada (PHAC) put it: “Both the direct and indirect impacts of COVID-19 in Canada have been worsened by systems that continue to perpetuate racism, ageism, sexism, and homophobia, in addition to other structural or social factors that further marginalize, such as homelessness. It is important to recognize that these are historical inequities that have existed within Canadian (and indeed other national and international) systems and institutions over many generations.”⁵

The pandemic has also prompted mass-mobilization of state-funded social welfare programs in Canada and around the world, which would have been unthinkable prior to March of 2020. An example of this was the \$2000 per month Canada Emergency Response Benefit (CERB) provided to those who lost work due to the pandemic through the *Canada Emergency Response Benefit Act*.⁶ Over \$74 billion through CERB and unemployment insurance supported 8.9 million people in the first several months of the pandemic.⁷ Unfortunately, these pandemic supports failed to help the most vulnerable members of our communities. People with disabilities, low-wage workers, recent immigrants,

¹ I will use “us” and “we” in this thesis as a relational exercise acknowledging the connection between writer and reader, and also how you and I, dear reader, both exist within complex systems of relations with other people, with larger social structures, and with the state and its institutions. I assume readers will likely be within Canada, so when I use “we” to refer to a collective, I mean those who are impacted by or living within Canada’s jurisdictional boundaries.

² “WHO Coronavirus (COVID-19) Dashboard” (Updated 9 Aug 2022), online: *World Health Organization* <<https://covid19.who.int/>> (6.4 million reported deaths as of 9 Aug 2022).

³ See e.g. Jonathan Jarry “The Debilitating Puzzle Box of Long COVID”, *McGill University, Office for Science and Society* (4 Feb 2022) <<https://www.mcgill.ca/oss/article/covid-19/debilitating-puzzle-box-long-covid>>.

⁴ Jamie Swift and Elaine Power, *The Case for Basic Income: Freedom, Security, Justice*, (Toronto: Between the Lines, 2021) at 16 [Swift and Power].

⁵ Public Health Agency of Canada, “CPHO Sunday Edition: The Impact of COVID-19 on Racialized Communities” (21 Feb 2021), online: *Canada.ca* <<https://www.canada.ca/en/public-health/news/2021/02/cpho-sunday-edition-the-impact-of-covid-19-on-racialized-communities.html>>.

⁶ “Canada Emergency Response Benefit (CERB): Closed” (updated April 30 2021) online: *Canada.ca* <<https://www.canada.ca/en/services/benefits/ei/cerb-application.html>>; *Canada Emergency Response Benefit Act*, SC 2020, c 5, s. 8 [CERB Act].

⁷ “Canada Emergency Response Benefit and EI statistics” (16 Feb 2021) online: *Canada.ca* <<https://www.canada.ca/en/services/benefits/ei/claims-report.html>> [Stats Can CERB].

undocumented migrants, and sex workers generally could not qualify for the Canada Emergency Response Benefit (CERB) or other pandemic relief programs.⁸ Canada required that people have earned \$5,000 in the previous year to qualify for CERB, and there have been court challenges to the *CERB Act* arguing that this minimum violates the human rights of workers with disabilities.⁹ The federal government was also forced to backtrack demands for CERB repayment from low-income workers after a massive public outcry and a proposed class-action lawsuit.¹⁰

With these holes in the “social safety net” on display,¹¹ it makes sense that the pandemic has been linked to increased public interest and greater public support for basic income to address precariousness and insecurity in a changing world.¹² Basic income literature sometimes discards the safety net metaphor and conceptualizes basic income as “a guaranteed floor below which no one’s income can fall.”¹³ Crisis events can sometimes spark radical change. The pandemic has prompted some significant questions about the structure of our social welfare systems and how we can develop strategies to better respond to future “unprecedented” challenges. With indications of growing public support, and measures like CERB paving the way, COVID-19 may have opened the “policy window” for implementing a federal basic income in Canada.¹⁴

⁸ K Scott, “Women, Work and COVID-19” (March 2021) online: *Canadian Centre for Policy Alternatives* <<https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2021/03/Women%20work%20and%20COVID.pdf>> [Scott] at 6-7; see also M Knight et al, “‘It’s Not Just about Work and Living Conditions’: The Underestimation of the COVID-19 Pandemic for Black Canadian Women” (2021) 10:6 *Social Sciences* 210 at 210.

⁹ Rosa Saba, “CERB and CRB discriminated against Canadians with disabilities, new Charter challenge claims”, *Toronto Star* (26 Nov 2021) <<https://www.thestar.com/business/2021/11/26/cerb-and-crb-discriminated-against-canadians-with-disabilities-new-charter-challenge-claims.html>> [Saba]; Erica Alini, “‘It didn’t seem right’: Class-action lawsuit proposed over CERB repayments”, *Global News* (updated 3 Dec 2021) <<https://globalnews.ca/news/7616993/class-action-lawsuit-proposed-cerb-repayments/>>.

¹⁰ Jamie Golombek, “How Canadians ended up keeping their CERB benefits, whether they had \$5,000 in gross or net income”, *Financial Post* (26 Aug 2021) <<https://financialpost.com/personal-finance/taxes/how-canadians-ended-up-keeping-their-cerb-benefits-whether-they-had-5000-in-gross-or-net-income>>.

¹¹ Srawoath Paitoonpong, Shigeyuki Abe, and Nipon Puopongsakorn “The meaning of ‘social safety nets’” (2008) 19:5-6 *J of Asian Economics* 467 at 468 (This metaphor is borrowed from tightrope walkers. The “social safety net” may help prevent “any walker who falls – unexpectedly or not – from hitting the floor and incurring catastrophic injuries.”).

¹² D Nettle et al, “Why has the COVID-19 pandemic increased support for Universal Basic Income?” (2021) 8:79 *Nature Humanities & Social Sciences Communications* online: <https://doi.org/10.1057/s41599-021-00760-7> at 1 and 11; “As COVID-19 rewrites playbook on social safety net, majorities support idea of basic income of up to 30K” (18 June 2020), online: *Angus Reid* <<https://angusreid.org/universal-basic-income-covid19/>>.

¹³ Swift and Power, *supra* note 4 at 197; “floor” is also used in Philippe van Parijs and Yannick Vanderborght, *Basic Income: A Radical Proposal for a Free Society and a Sane Economy*, (Cambridge, MA and London, UK: Harvard University Press, 2017) at 8 [Van Parijs and Vanderborght].

¹⁴ S Frankel, “Basic Income Advocacy in Canada: Multiple Streams, Experiments and the Road Ahead” in R Caputo & L Liu, eds, *Political Activism and Basic Income Guarantee*, (Palgrave Macmillan, Cham, UK: 2020) online: <https://doi.org/10.1007/978-3-030-43904-0_8> at 147 [Frankel].

Given these observations, the central argument of this thesis is that although there are significant legal and political roadblocks to implementing a basic income in Canada, law can be fertile ground for basic income arguments and opportunities for advancing a basic income in Canada. My arguments are premised on expanding a feminist democratic ethic of care into the political and legal spheres, and I argue that imbuing law and policy around basic income with elements of the ethics of care is necessary, but that embedding these ethics within a human rights-based approach is the strongest way to protect the long-term stability of basic income.

The remainder of this introductory chapter sets out key definitions, and then moves to a broad discussion of Canada's failures to uphold human rights commitments relating to income insecurity, food insecurity, and housing insecurity. I then define the features of basic income as I discuss them in this thesis and the history of basic income in Canada. I also present empirical data on how a basic income could help address income, food, and housing insecurity. I conclude the chapter with an outline of this following chapters and the legal methodology used here.

1.1 Definitions

Throughout this thesis, I use several key terms. For example, I refer to the "social determinants of health." People may indeed have physiological and genetic differences, but health outcomes are significantly shaped by the "conditions in which people are born, grow, live, work, and age," and not always by individual choices.¹⁵ These conditions are collectively called the "social determinants of health."¹⁶ Social structures, systems, and institutions shape these conditions, and these structures can both cause and exacerbate health inequities. Health inequities are then not to be understood as "a 'natural' phenomenon," but rather are "the result of a toxic combination of poor social policies and programmes, unfair economic arrangements, and bad politics."¹⁷

¹⁵ "Closing the gap in a generation: health equity through action on the social determinants of health - Final report of the commission on social determinants of health, Executive Summary" (2008), online: *World Health Organization* <<https://www.who.int/publications-detail-redirect/WHO-IER-CSDH-08.1>> at 1 [WHO].

¹⁶ *Ibid.*

¹⁷ *Ibid.*

Of all the factors that shape health outcomes, income is sometimes described as the “determinant of determinants.”¹⁸ There is a significant body of empirical research on the negative health effects of poverty and income inequality.¹⁹ Put bluntly – being poor is bad for human health. This research informs arguments for pre-emptive investment into income-based social welfare programs, whether these arguments are based on normative conceptions of social justice that underpin our concern for health equity,²⁰ or simply considering the downstream health costs of poverty.²¹

Another term is the metaphor of the “social safety net.” There are various programs that can be included in the concept of a social safety net: some literature refers only to formal cash transfer programs like unemployment insurance, pension programs, low-wage supplements, and disability supports,²² but other literature also includes workers’ minimums and labour relations legislation in the safety net.²³ Some scholars like Dennis Guest take an even broader view of the safety net and include other “social minima,” like a minimum standard of public health management, housing, education, publicly-funded health care, and even the establishment of a “minimum of political democracy and power-sharing” through voting rights.²⁴

We can think of these programs as part of the safety net, but I situate these programs and social minima within the concept of “social welfare” in this thesis. I refer to Canada’s interconnected system of social programs, supports, policies, and law here as “social

¹⁸ EL Forget, *Basic Income for Canadians: From the COVID-19 Emergency to Financial Security for All* 2nd ed (Toronto: James Lorimer and Co Ltd, 2020) at 70 [Forget Emergency].

¹⁹ See e.g. Judith D. Kasper et al, “Effects of Poverty and Family Stress Over Three Decades on the Functional Status of Older African American Women” (2008) 63:4 *The J of Gerontology: Series B* S201 at S201; KE Pickett & RG Wilkinson “Income inequality and health: a causal review” (2015) 128 *Soc Sci Med* 316 at 316.

²⁰ Maxwell J Smith, “Health Equity in Public Health: Clarifying our Commitment” (2015) 8:2 *Public Health Ethics* 173 at 173 <<https://doi.org/10.1093/phe/phu042>> [Smith].

²¹ EL Forget “The town with no poverty: the health effects of a Canadian guaranteed annual income field experiment” (2011) 37:3 *Can Public Policy* 283 at 283 and 300 (indicating reduced emergency room and doctor’s visits for recipients of Mincome compared to a control group) [Forget Poverty]; one re-analysis questions Forget’s 2011 findings suggests that the decline in hospital use was part of a longer-term trend of lowered hospital use, and that there was actually a 5% increase in hospital use during the Mincome payment period, which “could be plausible if the availability of a GAI allows people to take the time to attend to health issues (much as people today argue that sickness benefits would allow workers who have Covid to stay away from work),” see David Green “A Reanalysis of ‘The Town with No Poverty: The Health Effects of a Canadian Guaranteed Annual Income Field Experiment’” (2021) UBC School of Economics Working Paper at 14 <<https://econ2017.sites.olt.ubc.ca/files/2021/03/forget-cpp-reanalysis.pdf>>.

²² See e.g. K Subbarao, *Safety net programs and poverty reduction: lessons from cross-country experience* (Washington, D.C: World Bank, 1997) at 2.

²³ See e.g. Colin Busby, “Redesigning Canada’s Social Safety Net for the post-pandemic economy” (10 Aug 2021), online: *Policy Options, Institute for Research on Public Policy* <<https://policyoptions.irpp.org/magazines/august-2021/redesigning-canadas-social-safety-net-for-the-post-pandemic-economy/>>.

²⁴ Dennis Guest, *The Emergence of Social Security in Canada*, 3rd ed (Vancouver: UBC Press, 2003) at 26-27 [Guest].

welfare policies and laws.” Broadly, these are programs enabled through legislation and designed to support minimum standards of living through programs like workers’ supports, health care provision and protection, public education, housing supports, and direct cash transfer programs for low-income people and families. There is both a conceptual and legal reason for this labelling. “Welfare” can be used to describe social programs that flow from the “welfare state,” but its pre-20th century use was to describe both happiness and prosperity, which indicates dimensions of well-being and flourishing related to both internal experience and external resources.²⁵ In modern academic literature that uses measures of “welfare,” the concept is still used to discuss these dimensions of well-being, which can “be related both to the individual and to the collective.”²⁶ “Welfare” is also often connected to concerns for social justice,²⁷ which makes it a helpful concept when we are thinking about the quantifiable and unquantifiable elements of social justice and human flourishing. In a legal sense, welfare also has a unique place in Canadian constitutional history. From 1749 to 1866, many of Canada’s founding legal documents contain the phrase “peace, welfare, and good government” which empowered different levels and regions of government to make and enforce laws.²⁸ In 1867, this phrase was transformed into “peace, order, and good government,” as the basis for federal residual powers in the *British North America Act*.²⁹ This shift foreshadows later discussions on federalism.

I have noted that CERB was launched as a pandemic support program, but by focusing on workers,³⁰ CERB is grounded under the federal government’s exclusive powers to legislate on matters of unemployment insurance.³¹ CERB is not the first federal social support program designed in response to a global crisis. Canada has a history of making profound changes to the legal landscape to entrench, federalize, and institutionalize certain systems of social welfare: unemployment insurance was added to the federal government’s

²⁵ Bent Greve, “What is Welfare?” 2008 2:1 Central European J of Public Policy 50 at 51.

²⁶ *Ibid* at 52.

²⁷ *Ibid*.

²⁸ Dara Lithwick, “‘Welfare’ of a Nation: The Origins of ‘Peace, Order and Good Government’” (26 April 2017), online: *HillNotes, Library of Parliament* <<https://hillnotes.ca/2017/04/26/welfare-of-a-nation-the-origins-of-peace-order-and-good-government/>> [Lithwick].

²⁹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 91 [*Constitution 1867*].

³⁰ *CERB Act*, *supra* note 6, s 2 and 6(1) (so long as the worker had not quit their employment voluntarily).

³¹ *Constitution 1867*, *supra* note 29, s 91(2)(a); *Employment Insurance Act*, SC 1996, c 23 [*EI Act*].

enumerated heads of power after the Great Depression in 1940,³² and old age security through a nationalized pension then followed after World War II.³³

In addition to federal programs, each province has targeted income supports and social welfare programs.³⁴ Another layer added to the social welfare system is Canada's system of publicly funded health care through the *Canada Health Act* and the *Federal-Provincial Fiscal Arrangements Act (FPFA Act)*,³⁵ which has become central to Canadian life and identity. The adoption of the *Canadian Charter of Rights and Freedoms* in 1982 adds additional human rights demands and dimensions to all government action.³⁶

I therefore use “social welfare” broadly throughout this discussion. I also view social welfare through a feminist ethic of care lens, which leads me to consider that caring about both individual and collective well-being and prosperity is deeply connected to social justice, and that this conception of social justice should be one of the fundamental goals of law-making. This is a complex statement, and I dive into the interaction between care, social justice, and basic income in Chapter 2.

“Basic income” is also a key term, but the features of basic income are contested and debated in the literature. Basic income can generally refer to a direct cash transfer from the state to an individual or family, and I describe the predominant features of basic income as they are discussed in Canada below in more detail in section 1.5.1.

1.2 Economic Insecurity, Health Inequities, and Intersecting Oppression

I have noted the failures of Canada's pandemic relief programs for already-marginalized people, but it is not just CERB that shone a light on inequities. We can see evidence of exacerbated inequities through the impacts of COVID-19 on women. Women, and especially racialized women, are overrepresented in precarious, front-line care jobs

³² *Constitution Act, 1940* (UK) 3-4 George VI, c. 36.

³³ However, provincial laws providing old age pensions supersede federal ones, see *British North America Act, 1951* (UK), 4-15 George VI, c. 32, as rep. by the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Constitution 1982*]; later also amended to include survivors and disability benefits, regardless of age in *Constitution Act, 1964* (UK), 12-13 Eliz II, c. 73.

³⁴ E.g. the *Ontario Works Act, 1997*, SO 1997, c. 25, Sched A and its regulations [*Ontario Works Act*].

³⁵ Through the *Canada Health Act*, RSC, 1985, c C-6 [*CHA*] and the *Federal-Provincial Fiscal Arrangements Act*, RSC 1985, c F-8 [*FPFA Act*].

³⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

that have put their health at risk during the pandemic.³⁷ Women are also more likely to work in low-wage jobs in the service sector, which has been the hardest-hit by shutdowns and layoffs.³⁸ And “the moms are not alright”³⁹: women with children reported a significant increase in time spent on child care because of the pandemic.⁴⁰ The increase in time spent on unpaid care labour for family members caused additional “mental, physical and emotional strain” for many women.⁴¹ This data coincides with an exit from the workforce, as women’s labour participation levels have dropped lower than in the year 2000.⁴² Additionally, intimate partner violence has increased, especially for women living in remote areas of Canada.⁴³ Domestic violence has been labelled a “shadow pandemic” alongside COVID, with an increase in both volume and complexity of domestic violence cases seen in courts since the start of the pandemic.⁴⁴

These examples of oppression and marginalization all relate to some level of insecurity – health insecurity, job insecurity, stress and insecurity produced by gendered expectations of care, and the incredibly destructive experiences of physical, mental, and social insecurity caused by violence. Of course, these examples are not all about money, but they connect to having stable, adequate income in many ways. As I have noted, income is a significant social determinant of health. However, the health effects of low income are not just related to the inability to cover basic needs like food and shelter, but also to the chronic stress caused by not knowing when your next paycheck or financial support will

³⁷ KC Luna, “Racialized Women & COVID-19: Challenges in Canada – Factsheet 3” (2021), online: *CRIAW* <<https://www.criaw-icref.ca/wp-content/uploads/2021/04/Racialized-Women--COVID-19-Challenges-in-Canada.pdf>> at 1 and 3.

³⁸ Scott, *supra* note 8 at 12.

³⁹ Clifton van der Linden, “The moms are not alright: How coronavirus pandemic policies penalize mothers” (3 Sept 2020), online: *The Conversation* <<https://theconversation.com/the-moms-are-not-alright-how-coronavirus-pandemic-policies-penalize-mothers-144713>>.

⁴⁰ RM Johnston et al, “Evidence of Exacerbated Gender Inequality in Child Care Obligations in Canada and Australia during the COVID-19 Pandemic” (2020) 16:4 *Politics & Gender* 1131 at 1131 [Johnston et al].

⁴¹ KM Hillier and CJ Greig “Motherhood and Mothering during COVID-19: A Gendered Intersectional Analysis of Caregiving During the Global Pandemic within a Canadian Context” (2020) 5:1 *Journal of Mother Studies* online only: <<https://wp.me/P5P5pu-pG>>.

⁴² Scott, *supra* note 8 at 4; Sylvia Fuller and Yue Qian “Covid-19 and The Gender Gap in Employment Among Parents of Young Children in Canada” (2021) 35:2 *Gender & Society* 206 at 213-214 online: <<https://doi.org/10.1177/08912432211001287>> [Fuller].

⁴³ P Moffitt et al, “Intimate Partner Violence and COVID-19 in Rural, Remote, and Northern Canada: Relationship, Vulnerability and Risk” (2020) *J of Family Violence* 775 at 775 online: <<https://doi.org/10.1007/s10896-020-00212-x>>.

⁴⁴ J Koshan, J Mosher, and W Wieggers “COVID-19, the Shadow Pandemic, and Access to Justice for Survivors of Domestic Violence” (2021) 57:3 *Osgoode Hall LJ* 739 at 741 and 746.

arrive.⁴⁵ The question then becomes, who is responsible to rectify the systemic issues that lead to this kind of insecurity?

1.3 Canada's Failings on Realizing the Right to an Adequate Standard of Living

Literature on basic income often argues from a philosophical or ethical perspective.⁴⁶ There is some literature that also invokes human rights as a basis for the state's role in providing a minimum income to its citizens.⁴⁷ This rights-basis sometimes looks to the principles contained in international human rights documents like the *Universal Declaration of Human Rights*,⁴⁸ which have been incorporated into our domestic human rights regimes such as the *Canadian Bill of Rights*,⁴⁹ the *Canadian Human Rights Act*,⁵⁰ and the *Charter*.⁵¹ The *UDHR*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* are sometimes referred to as the "International Bill of Rights," but the *UDHR* is just a declaration of principles, while the other two documents are binding treaties that Canada has ratified.⁵² Canada has also ratified other international treaties that relate to the state's role in protecting and advancing political, social, and economic rights of women, children, racialized people, and disabled people.⁵³

⁴⁵ Forget Emergency, *supra* note 18 at 71.

⁴⁶ This approach is taken in the foundational paper marking a modern resurgence in basic income discourse from Philippe Van Parijs "Why Surfers Should be Fed: The Liberal Case for an Unconditional Basic Income" (1991) 20:2 *Philosophy & Public Affairs* 101 at 103-111 [Van Parijs Surfers].

⁴⁷ E.g. Jurgen De Wispelaere and Leticia Morales "Is There (or Should There Be) a Right to Basic Income?" (2016) 42:9 *Philosophy & Social Criticism* 920 at 928 [De Wispelaere]; Jurgen De Wispelaere and Leticia Morales "The stability of basic income: a constitutional solution for a political problem?" (2016) 36:4 *J of Public Policy* 521 at 532-533 [De Wispelaere and Morales]; Guy Standing, "About time: Basic income security as a right" in Guy Standing, ed, *Promoting Income Security as a Right: Europe and North America*, 2nd ed (London: Anthem Press, 2005) 1 at 14-15 [Standing Right].

⁴⁸ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) [*UDHR*].

⁴⁹ RSC 1970, App III [*Canadian Bill of Rights*].

⁵⁰ RSC, 1985, c H-6 [*Canadian Human Rights Act*].

⁵¹ *Charter*, *supra* note 36.

⁵² *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976), art 11 [*ICESCR*].

⁵³ *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [*CEDAW*]; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, accession by Canada 10 Dec 1981) [*CRC*]; *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 Mars 1966, 660 UNTS 195 (entered into force 4 January 1969, accession by Canada 14 Oct 1970); *Convention on the Rights of Persons with Disabilities*, 13 December 2006, UNTS, (entered into force 3 May 2008, accession by Canada 11 March 2010).

Basic income could be the means to achieve the right to an “adequate standard of living.” The descriptive content of this right is often drawn from the *ICESCR*, which provides “the right of everyone to an adequate standard of living... including adequate food, clothing and housing, and to the continuous improvement of living conditions,” and further commits that ratifier states “will take *appropriate steps* to ensure the realization of this right.”⁵⁴ *ICESCR* also contains the right to the “highest attainable standard of physical and mental health, including the right to health care,” as well as the right to “social security, including social insurance,” and to family assistance.⁵⁵ These are indications that *ICESCR* requires positive state action in the realization of these rights,⁵⁶ but compelling positive action is a complicated and difficult area of advocacy. I discuss issues and limitations on justiciability of socioeconomic rights in Chapter 3.

In the following section I describe Canada’s struggles and failures in the areas of income, food, and housing. I have already noted the interactions between health and income, but I expand on the connection between income, food, and housing insecurity to underscore the scope of these issues. I focus on income, food, and housing insecurity because these necessities are so fundamental to survival that they form promising connections to the right to life and security of the person contained in the *Charter*.⁵⁷

1.3.1 Poverty

In 2018, Canada adopted an official poverty line for the first time.⁵⁸ This measurement is called the “Market Basket Measure,” (MBM) and is based on the combined cost of “goods and services that individuals and families require to meet their basic needs and achieve a modest standard of living,” such as “healthy food, appropriate shelter and home maintenance, and clothing and transportation” as well as “other goods and services that permit engagement in the community,” like Internet access or extra-curricular

⁵⁴ *ICESCR*, *supra* note 52, art 11, emphasis mine.

⁵⁵ *Ibid.*, arts 9, 10, and 12.

⁵⁶ Seen in “*take appropriate steps to ensure the realization of this right*,” and the requirements to realize the rights of the Covenant “by all appropriate means,” *ibid.*, arts 11 and 2, respectively; see also commentary on the implementation of the *ICESCR* from the Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant*, UNESCOR, 19th Sess, UN Doc E/C.12/1998/24 (1998) at para 1 (The *ICESCR* requires states to “give effect” to the rights included in the Covenant through domestic legal orders) [General Comment 9].

⁵⁷ *Charter*, *supra* note 36, s 7; even if the case itself was not successful for the plaintiffs, we can see this connection through novel attempts to argue the right to housing in *Tanudjaja v Canada*, 2014 ONCA 852, leave to appeal to SCC refused, 36283 (25 June 2015) [*Tanudjaja*].

⁵⁸ Economic and Social Development Canada, *Opportunity for All – Canada’s First Poverty Reduction Strategy*, Catalogue No Em12-48/2018E-PDF (Gatineau: ESDC, 2018) at 6.

activities for children.⁵⁹ For example, I am writing to you from London, Ontario,⁶⁰ where the MBM for a family of four (two adults and two children) is about \$46,000 for the year.⁶¹

Approximately 2.4 million people in Canada live below the MBM-based poverty line, which is a significant decrease from the pre-pandemic poverty rate of 3.8 million people (10.3% of the population).⁶² This reduction is largely due to the increase in cash transfer programs prompted by the pandemic, indicating that giving people money has a clear impact on poverty.⁶³ Despite these promising changes, data indicates that there are still pernicious disparities in income for racialized and Indigenous people living in Canada, as well as those with disabilities.⁶⁴

1.3.2 Food Insecurity

Food insecurity can also occur as a result of poverty and income insecurity.⁶⁵ One in eight households in Canada is food insecure, and that number rises if members of the household are Black or Indigenous.⁶⁶ This means that 4.4 million people in Canada, including 1.2 million children, experience food insecurity, whether moderate, mild or severe.⁶⁷ Women-led, single parent households are at highest risk of food insecurity.⁶⁸ This indicates the intersecting dimensions of oppression associated with income insecurity.

This data on food insecurity was last collected in 2017-2018 so we do not yet know how much the pandemic has impacted food security in Canada. However, we can extrapolate from the increase in food bank use that food insecurity has likely increased due to the pandemic. Food banks reported being under pressure as people lost income in early

⁵⁹ *Ibid* at 11.

⁶⁰ I note that I am a settler writing from the traditional territory of the Anishinaabek, Haudenosaunee, Lūnaapéewak, and Chonnonton Nations who have cared for and been in relations with the lands and waters surrounding my home for generations, and will be for many generations to come. I acknowledge my place as a settler in relations with Indigenous peoples and with the land my home stands on.

⁶¹ Statistics Canada, *Market Basket Measure (MBM) thresholds for the reference family by Market Basket Measure region, component and base year*, Table 11-10-0066-01 (Ottawa: Statistics Canada, 23 March 2022) DOI: <https://doi.org/10.25318/1110006601-eng> [Stats Can MBM]; Based on the population size of London (543,551) from Statistics Canada, *Census Profile, 2021 Census of Population* (table) Catalogue no 98-316-X2021001 (Ottawa: April 27, 2022).

⁶² Statistics Canada, *Canadian Income Survey, 2020*, in *The Daily* (Ottawa: Statistics Canada, 23 March 2022) online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/220323/dq220323a-eng.htm>>.

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ V Tarasuk & A Mitchell *Household food insecurity in Canada, 2017-18* (Toronto: PROOF, 2020) (PROOF is the leading research group on food insecurity in Canada. PROOF's research asserts that food insecurity is caused by income insecurity in Canada) at 3 [Tarasuk].

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

2020.⁶⁹ CERB and other cash transfers helped ease some of this pressure, but by June 2020, many people stopped receiving pandemic supports, and Food Banks Canada recorded further increases in use due to the “perfect storm” of the rising cost of living and lower incomes.⁷⁰

It is important to understand that income insecurity and its effects are not just a pandemic problem. Canada’s social supports were criticized as inadequate prior to the pandemic. Research has shown that recipients of social assistance also have poorer health outcomes than other members of the community,⁷¹ and monthly payments do not cover basic needs like food and shelter.⁷² Food bank use increases with even small impacts to the reduction of disability benefits, the minimum wage, and increases to rent.⁷³ Provincial social assistance and disability payments are often lower than unemployment insurance or payments under the *Canada Pension Plan*,⁷⁴ which can be considered an expression of the values at the heart of residual programs: the “‘undeserving’ get miserly benefits... and are stigmatized and subject to suspicion and surveillance in the form of hundreds of rules.”⁷⁵

Food banks and meal programs are often cited as the solution to hunger, but by “de-politicizing” food insecurity and relying largely on charitable food programs since the 1980s, Canada has ignored the underlying issues of income insecurity, and arguably failed to comply with commitments under the *ICESCR*.⁷⁶ Canada was also chastised on the world stage in 2012 by Olivier De Schutter, United Nations Special Rapporteur on the right to

⁶⁹ Daily Bread Food Bank, North York Harvest Food Bank, “Who’s Hungry 2021” (2020), online: *Daily Bread* <<https://www.dailybread.ca/wp-content/uploads/2022/01/DB-WhosHungryReport-2020-print.pdf>>.

⁷⁰ Food Banks Canada, “Hunger Count: 2021 Report” (2021), online: <https://hungercount.foodbankscanada.ca/assets/docs/FoodBanks_HungerCount_EN_2021.pdf> at 4 [Food Banks Canada].

⁷¹ See generally, O Sod-Erdene et al, “Is social assistance boosting the health of the poor? Results from Ontario and three countries” (2019) 110:4 *Can J Public Health* 386 at 392-393.

⁷² Swift and Power, *supra* note 4 at 73 (citing a campaign of Ontario Works recipients who shared pictures of their empty fridges to prompt action on addressing Ontario Works’ inadequacy); see inadequacy also discussed in T McDowell & M Ferdosi “The Impacts of the Ontario Basic Income Pilot: A Comparative Analysis of the Findings from the Hamilton Region” (2021) 16:2 *Basic Income Studies* 209 at 222-223 [McDowell].

⁷³ R Kneebone and M Wilkins “The Sensitivity of Food Bank Visits to Social assistance, Housing and Labour Market Conditions in Toronto” (2022) 15:1 *U Calgary School of Public Policy Publications: Research Papers* <https://journalhosting.ucalgary.ca/index.php/sppp/article/view/73848/55732> at 1.

⁷⁴ *Canada Pension Plan*, RSC 1985, c C-8 [CPP].

⁷⁵ Swift and Power, *supra* note 4 at 17.

⁷⁶ Graham Riches and Valeria Tarasuk, “Canada: Thirty Years of Food Charity and Public Policy Neglect” in Graham Riches and Tiina Silvasti, eds, *First World Hunger Revisited: Food Charity or the Right to Food?* 2nd ed, (New York: Palgrave Macmillan, 2014) 42 at 43.

food, who noted that relying on charitable organizations was a failing approach to food insecurity.⁷⁷

Ultimately, food banks do not work to improve food insecurity. Though food insecurity data varies from province to province, the number of people in Canada who are food insecure has increased in the last decade.⁷⁸ Additionally, during the COVID-19 pandemic, food insecurity was associated with poorer mental health,⁷⁹ and only a small number of those who experienced food insecurity during the early phases of the current pandemic chose to or were able to access charitable food services.⁸⁰ The “choice” here is misleading and likely speaks to avoiding such programs because of the experiences of stigma, shame, and social exclusion when accessing these programs, which can have particularly detrimental effects on the mental health and well-being of women and their families.⁸¹ Market-based programs designed to address the even greater levels of food insecurity in Northern Canada have also failed, so simply privatizing targeted charitable programs is not the answer either.⁸²

What does work to alleviate food insecurity? Giving people money.⁸³ Income supplement programs targeting children and people over 65 in Canada have positive benefits for food security, especially for the lowest-income families.⁸⁴ There is also

⁷⁷ Olivier De Schutter, UN Special Rapporteur on the Right to Food, *Mission to Canada*, UN Doc.A/HRC/22/50/ Add.1 (Dec 24 2012) at 19.

⁷⁸ Tarasuk, *supra* note 65 at 14-15 (noting changes to data capture methodology over time that makes year-over-year comparison difficult).

⁷⁹ J Polsky and H Gilmour “Food insecurity and mental health during the COVID-19 pandemic” (2020) 31 Health Reports – Statistics Canada, Canadian Centre for Health Information 1 <<https://www.doi.org/10.25318/82-003-x202001200001-eng>>.

⁸⁰ F Men & V Tarasuk “Food insecurity amid the COVID-19 pandemic: food charity, government assistance and employment” (2021) 47:2 Can Public Policy 202 at 202.

⁸¹ C Pineau et al, “Exploring experiences of food insecurity, stigma, social exclusion, and shame among women in high-income countries: A narrative review” (2021) 8:3 Canadian Food Studies 107 at 107-108 and 118 [Pineau].

⁸² Food insecurity rates in Nunavut have risen since the implementation of Nutrition North, see Andrée-Anne Fafard St-Germain et al, “Food insecurity in Nunavut following the introduction of Nutrition North Canada” (2019) 191:20 CMAJ E552 at E552.

⁸³ Cash transfers would not solve food insecurity issues related to governmental inaction on climate change and diminished access to traditional foods for Indigenous peoples, but may improve access to market foods: “‘My Fear is Losing Everything’: The Climate Crisis and First Nations’ Right to Food in Canada” (Oct 2020), online: *Human Rights Watch* https://www.hrw.org/sites/default/files/media_2020/10/canada1020_web_1.pdf at 2.

⁸⁴ Erika M Brown & Valerie Tarasuk “Money speaks: Reductions in severe food insecurity follow the Canada Child Benefit” (2019) 129 Preventive Medicine 105876 at 7 [Brown and Tarasuk]; L McIntyre et al, “Impact of a guaranteed annual income program on Canadian seniors’ physical, mental and functional health” (2019) 107:2 Can J of Public Health e176 at e176 [McIntyre GAI]; L McIntyre et al, “Reduction of food insecurity among low-income Canadian seniors as a likely impact of a guaranteed annual income” (2016) 42:3 Canadian Public Policy 274 at 280-283 [McIntyre Reduction].

research suggesting that addressing the income insecurity at the root of food insecurity would save on health care costs in both the short and long-term.⁸⁵

1.3.3 Housing Insecurity

Housing insecurity can manifest in many ways. For example, experiencing homelessness can mean “living on the streets or in places not meant for habitation; staying in overnight or emergency shelters; living temporarily as a ‘hidden’ homeless person with friends, family or strangers, or in motels, hostels or rooming houses; and residing in precarious or inadequate housing.”⁸⁶ It is estimated that over 235,000 people in Canada experience homelessness in a year, and though living precariously may be temporary, this high number still speaks to a significant population of highly marginalized people living without adequate access to shelter.⁸⁷ Homelessness measures may capture the unmet housing needs for a certain population, but affordability concerns widen the scope of housing insecurity beyond just homelessness. “Core housing need” is another measure of housing insecurity in Canada, which is defined as “living in an unsuitable, inadequate or unaffordable dwelling, and not able to afford alternative housing in their community.”⁸⁸ About 1 in 10, or 1.6 million Canadian households face core housing need.⁸⁹ A significant majority of these households (75%) are “deemed to be in core housing need because they [do] not meet the affordability standard.”⁹⁰ Those categorized as “visible minorities,” were almost twice as likely to be in core housing need.⁹¹ Also, people living alone were twice as likely to be in core housing need than multi-person households.⁹² Living in social housing may help with affordability, but then unsuitability or inadequacy becomes an issue if the

⁸⁵ Tarasuk suggests that the connection between income insecurity, food insecurity, and health outcomes is so strong, that addressing income insecurity would likely have impacts on health outcomes, thus diminishing health care use/needs and by association, health care costs, see V Tarasuk, “Implications of a Basic Income Guarantee for Household Food Insecurity, Research Paper 24” (Thunder Bay: Northern Policy Institute, 2017) online: <<https://proof.utoronto.ca/wp-content/uploads/2017/06/Paper-Tarasuk-BIG-EN-17.06.13-1712.pdf>> at 8 [Tarasuk BIG], citing V Tarasuk et al., “Association between household food insecurity and annual health care costs” (2015) 187:14 CMAJ E429 at E249.

⁸⁶ Stephenson Strobel et al., “Characterizing people experiencing homelessness and trends in homelessness using population-level emergency department visit data in Ontario, Canada” (2021) 32 Health Reports – Statistics Canada, Canadian Centre for Health Information 1 <<https://www.doi.org/10.25318/82-003-x202001200001-eng>>.

⁸⁷ *Ibid* (though there are difficulties with data capture due to the various precarious living arrangements that are categorized as homelessness).

⁸⁸ Statistics Canada, “One in ten Canadian households living in core housing need in 2018” in *The Daily* (Ottawa: 2 Oct 2020) online: <<https://www.doi.org/10.25318/82-003-x202100100002-eng>>.

⁸⁹ *Ibid*, based on the most recent surveys taken in 2018.

⁹⁰ *Ibid*, the affordability standard is set at 30% or less of household income being spent on housing costs.

⁹¹ *Ibid*.

⁹² *Ibid*.

dwelling is too crowded, or major repairs are needed.⁹³ Food insecurity and housing insecurity are often intertwined: those who live in social housing are often food insecure, though having just one senior in the household lessens the likelihood of food insecurity, likely because of the availability of steady income through pensions, Old Age Security (OAS), or the Guaranteed Income Supplement (GIS).⁹⁴

In 2016, the Canadian government released *Canada's National Housing Strategy: A Place to Call Home* (NHS Policy).⁹⁵ The NHS Policy was explicit about the right to housing and that the federal government's plan was "grounded in the principles of inclusion, accountability, participation and non-discrimination, and will contribute to United Nations Sustainable Development Goals and affirm the [ICESCR]."⁹⁶ The NHS Policy was followed by the enactment of the *National Housing Strategy Act*, which also explicitly stated that the "housing policy of the Government of Canada" included a "recognition of the 'right to adequate housing' as a "fundamental right affirmed in international law," and again declared their intention to "further the progressive realization of the right to adequate housing" recognized by the *ICESCR*.⁹⁷

Largely, the NHS Policy is focused on developing affordable housing in Canada. The *NHS Act* enables the National Housing Council which is comprised of members with lived experience of homelessness and expertise in human rights.⁹⁸ Additionally, through the *NHS Act*, the newly-created Federal Housing Advocate will monitor the implementation of Canada's housing strategy, conduct research, consult with community members with lived experience of homelessness, and undertake systemic reviews of housing issues if they receive submissions on said issues (not on their own initiative).⁹⁹ The *NHS Act* imbues Canada's housing policy strategy with human-rights-based considerations.¹⁰⁰ This is an excellent progression on housing policy in Canada and will

⁹³ *Ibid.*

⁹⁴ AAF St-Germain and V Tarasuk "High vulnerability to household food insecurity in a sample of Canadian renter households in government-subsidized housing" (2017) 108 Can J Public Health e129 at e129 <<https://doi.org/10.17269/CJPH.108.5879>>.

⁹⁵ Employment and Social Development Canada, *Canada's National Housing Strategy: A Place to Call Home*, Catalogue no Em12-54/2018E-PDF (Gatineau: ESDC, 2018) [NHS Policy].

⁹⁶ *Ibid* at 8.

⁹⁷ SC 2019, c 29, s 4 [*NHS Act*].

⁹⁸ *Ibid*, ss 6-12.

⁹⁹ *Ibid*, ss 13 and 13.1.

¹⁰⁰ *Ibid*, ss 5(1) ("The Minister must develop and maintain a national housing strategy to further the housing policy, taking into account key principles of a human rights-based approach to housing.")

perhaps impact the availability of new affordable housing over time. However, nowhere in the NHS Policy nor in the *NHS Act* is there an indication that this plan is integrated with income-based measures, which is an example of our siloed approach to social welfare systems. Despite the connections I have described here between income security, food security, housing, and health, there are both legal and philosophical separations between programs designed to promote health, food, or housing security, and those designed to provide income security. This siloed approach produces a system where we continually attempt to manage symptoms like food and housing insecurity and the health effects of poverty, without ever addressing the disease, which is “a lack of money.”¹⁰¹

1.4 Making Connections Between Insecurity and Policy

I have noted two major social welfare schemes that were created following the Great Depression and World War II: Unemployment insurance and old age security, or pensions, required constitutional amendments to be federally administered across Canada.¹⁰² Publicly-funded health insurance followed these reforms – first provincially,¹⁰³ then shared through the *Canada Health Act* and its predecessors.¹⁰⁴ During this period of significant post-war reform, the federal government became more involved in additional social spending through the enactment of the *Canada Assistance Plan (CAP)* in 1966.¹⁰⁵ *CAP* “provided funding based on a cost-sharing model where the federal government equally matched the amount spent by each province for programs such as social assistance, social housing, child welfare, civil legal aid, and community programs such as child care,

¹⁰¹ Forget Emergency, *supra* note 18 at 169.

¹⁰² *Constitution 1867*, *supra* note 29 ss 91(2A) and 94(A).

¹⁰³ Saskatchewan being the first province to do so in 1947, a major project driven by the famous Tommy Douglas, see a timeline of the development of publicly funded health care in Danielle Martin et al, “Canada’s universal health-care system: achieving its potential” (2018) 391:10131 *The Lancet* 1718 at 1720 online: <[https://doi.org/10.1016/S0140-6736\(18\)30181-8](https://doi.org/10.1016/S0140-6736(18)30181-8)> [Martin et al].

¹⁰⁴ Canada only funds ~22% of provincial health care costs but increasing transfers increases federal deficits, which of course carries political costs. Health care costs for provinces are rising, leaving provinces with their own deficits. Premiers have called for an increase to health transfers to balance deficits for both levels of government, see Council of the Federation, “Increasing The Canada Health Transfer will Help Make Provinces and Territories More Financially Sustainable Over The Long Term: Report of the Provincial and Territorial Ministers of Finance to the Council of the Federation” (Feb 2021), online: <https://www.canadaspremiers.ca/wp-content/uploads/2021/03/PT_Finance_Report.pdf> at 2-3 [Premiers Report].

¹⁰⁵ *Canada Assistance Plan*, RSC 1970, c C-1 [CAP]; see also *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at where the SCC held that the federal government had the unilateral power to cap payments under the *CAP* for the “have” provinces [CAP Reference].

women’s counseling and shelter services.”¹⁰⁶ *CAP* was not the major anti-poverty tool it promised to be, mostly because of limited provincial up-take, but it did improve the “overall inclusiveness of social assistance programs” in Canada.¹⁰⁷

The heady days of post-war social welfare improvement did not last forever. Social welfare literature cites the rise of neoliberalism as the driving force for later reductions on social spending and the increase in poverty and precariousness, especially for already-marginalized people.¹⁰⁸ Neoliberalism can be defined as an ideology “that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.”¹⁰⁹ Neoliberalism gained traction around the world in the 1970s and 1980s, when Canada embraced market-driven, individualist policies “due to an increase in globalization and the need to remain competitive within a new economic reality.”¹¹⁰ Part of this vision of a boot-strapping, globally competitive Canada shifted discourse and policies on social support. In a neoliberal state, “citizens are expected to be financially self-reliant, which downplays the state’s responsibility in providing social welfare supports to citizens, unless under dire circumstances.”¹¹¹

We can see the effects of this shift in ideology in the reduction and dismantling of collectivist social welfare systems in favour of last-resort supports like food banks. Food banks were originally designed as an emergency response to the effects of inflation and recession in the 1980s, but are now essentially the “only public source of food assistance” for those facing food insecurity in Canada.¹¹² Housing policies in Canada also shifted as a result of neoliberalism, which meant a move toward policies that would encourage home ownership for those in the middle class, while diminishing funding for social housing.¹¹³ During this period of neoliberal influence, the federal government also capped federal-to-

¹⁰⁶ JK Gill “Unpacking the Role of Neoliberalism on the Politics of Poverty Reduction Policies in Ontario, Canada: A Descriptive Case Study and Critical Analysis” (2021) 10:12 *Social Sciences* 485 <<https://doi.org/10.3390/socsci10120485>> at fn 7 [Gill].

¹⁰⁷ Guest, *supra* note 24 at 146-147.

¹⁰⁸ E.g. Tracy Smith-Carrier “Reproducing Social Conditions of Poverty: A Critical Feminist Analysis of Social Assistance Participation in Ontario, Canada” (2017) 38:4 *J of Women, Politics & Policy* 498 online: <[10.1080/1554477X.2016.1268874](https://doi.org/10.1080/1554477X.2016.1268874)> at 504 [Smith-Carrier Feminist].

¹⁰⁹ David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005) at 2.

¹¹⁰ Gill, *supra* note 106 at 488.

¹¹¹ *Ibid* at 487.

¹¹² V Tarasuk, N Dachner, and R Loopstra “Food banks, welfare, and food insecurity in Canada” (2014) 116:4 *British food journal* 1405 at 1405 online: <[doi:10.1108/BFJ-02-2014-0077](https://doi.org/10.1108/BFJ-02-2014-0077)>.

¹¹³ Gill, *supra* note 106 at 493.

provincial transfer payments for health and social services under the *CAP*, and then eliminated *CAP* altogether,¹¹⁴ and introduced the Canada Health and Social Transfer (CHST) under the *Federal-Provincial Fiscal Arrangements Act*.¹¹⁵

Under the CHST, health transfer payments would be paid only if the provinces provided health services in accordance with the principles of “public administration, comprehensiveness, universality, portability and accessibility.”¹¹⁶ Social programs outside of health care provision had a similarly principled approach under the *CAP*, which required that social assistance and programs be universally “provided to any person in need, regardless of the reasons of the need for assistance,” and that cash transfer programs must “take into account the basic requirements of recipients.”¹¹⁷ *CAP* also required ongoing development of social welfare programs, and that “provincial residency requirements and waiting periods not be imposed; and that appeal procedures from decisions relating to assistance be made available.”¹¹⁸ Save for the residency requirements, these principles were gutted under the CHST, and instead, federal government and provinces were to negotiate and develop “shared principles and objectives” for social programs.¹¹⁹ This left considerable discretion for provincial administration of social programs, and allowed provinces to attach work requirements to cash transfer programs like Ontario Works. The most modern iteration of CHST is now even further conceptually and legally divided through the Canada Health Transfer and the Canada Social Transfer, which form two separate streams of funding under the *FPFA Act*.¹²⁰ The principled approach to health payments remains, while principles under the social stream are still mostly discretionary.¹²¹

This shift in ideology, law, and policy was accompanied by increased stigmatization of social supports, and an amplification of the narrative of failure that surrounds recipients of provincial programs like Ontario Works.¹²² This has significant gendered effects, since “the neoliberal state views women as principally responsible for

¹¹⁴ See this described in *CAP Reference*, *supra* note 105 at 532-534.

¹¹⁵ *Canada Health and Social Transfer Regulations*, SOR/97-468, enacted under *FPFA Act*, *supra* note 35.

¹¹⁶ *CHA*, *supra* note 35, s 7.

¹¹⁷ Martha Jackman “Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform” (1995) 8:1 *Can J of Women and L* 371 at 376 [Jackman Equality].

¹¹⁸ *Ibid* at 376.

¹¹⁹ *FPFA Act*, *supra* note 35, s 13(1)(d) and 13(3) as it appeared on 9 March 2005.

¹²⁰ *Ibid*, ss 24 and 24.3.

¹²¹ *Ibid*, s 25.1.

¹²² Smith-Carrier Feminist, *supra* note 108 at 504-505.

social reproduction yet fails to provide the necessary supports to engage in this work. The need for assistance... is assumed to reflect a lack of self-sufficiency,” and by focusing only on the “individualistic explanations for poverty and unemployment,” the “structural influences that shape need disappear from view.”¹²³ This is not just an issue for women, but also for other marginalized people and equity-seeking groups. As human beings, we are all born inherently vulnerable and require care and support at various points in time, but in a society that still struggles with racism, sexism, ableism many other forms of social exclusion, “recognizing that patterns of disadvantage exist is insufficient; positive action must be taken to ensure substantive equality.”¹²⁴

1.5 Finding the Floor: Basic Income in Canada

Many health economists, food insecurity researchers, and anti-poverty advocates suggest that basic income is the best way to reduce poverty, eliminate food insecurity, and improve the health of vulnerable people, especially for women and families.¹²⁵ Basic income has the potential to improve Canada’s failing system of income supports and eliminate the need for charitable food services.¹²⁶

There is literature that compares basic income to other social policy interventions to address these issues,¹²⁷ but I adopt a “pragmatic justification of basic income,”¹²⁸ meaning that other programs could possibly reduce poverty and income insecurity and the associated effects, but there are specific draws toward basic income. This is in-part because of our human rights commitments to adequate living conditions, and how human rights themselves are grounded in the recognition of “human dignity and the inalienable rights”

¹²³ *Ibid* at 505.

¹²⁴ *Ibid*.

¹²⁵ H Segal et al, “A Federal Basic Income Within the Post COVID-19 Economic Recovery Plan” (2020), online: *Royal Society of Canada* <https://rsc-src.ca/sites/default/files/FBI%20PB_EN.pdf> at 5 [Segal RSC]; see Tarasuk BIG, *supra* note 85 at 15-17; Tracy Smith-Carrier and Chloe Happenny “The Case for Basic Income for Women” (Oct 2020), online: *Ontario Basic Income Network* <https://www.obin.ca/bi_and_women> at 7; Cee Strauss, “Basic Income & The Care Economy” (2021), online: *LEAF* <<https://www.leaf.ca/wp-content/uploads/2021/09/Basic-Income-The-Care-Economy-Full-Report-Final.pdf>> (but only if accompanied by other social supports, labour protections, and a shift in workplace norms) at 84-87.

¹²⁶ H Segal, K Banting, and E Forget “The need for a federal Basic Income feature within any coherent post-COVID-19 economic recovery plan” (2021) 6 *FACETS* 394 at 398 [Segal COVID]; Emery et al, “How a guaranteed annual income could put food banks out of business” (2013) 6:37 *SPP Research Papers* 1 at 17.

¹²⁷ E.g. the *Final Report of the British Columbia Expert Panel on Basic Income: Covering All the Basics: Reforms for a More Just Society*, vol 1 (Vancouver: Dec 2020) (Chair: David Green) [BC Panel].

¹²⁸ De Wispelaere, *supra* note 47 at fn 48.

of all people, and not just the alleviation of abject poverty.¹²⁹ There is data indicating that basic income is a dignity-enhancing form of social welfare.¹³⁰ If we are seeking to build a more socially just system of social welfare post-COVID, then that system should be centered on providing dignified care and support. Basic income could be that new system.

1.5.1 Defining Basic Income

I have so-far used the phrase “basic income” without defining it. This has given me the opportunity to argue for why Canada needs basic income in the first place. I have discussed how Canada, as a relatively prosperous and developed nation, still has significant difficulty with income insecurity and poverty, and how the state fails those who are already dealing with experiences of oppression through sexism, racism, ableism and other types of marginalization. I do not argue here that basic income will eradicate these systemic issues. Basic income is not a panacea for all social problems, but it could be designed to be the floor below which no one can fall, making Canada a healthier, safer, more socially inclusive community, and able to react quickly in the face of future global crises.¹³¹ It could also be designed with a diversity of life experiences and the needs of marginalized people in mind, rather than more traditionally “androcentric” life paths – where the state only considers waged labour to be a citizen’s central contribution to the community – being placed at the heart of social welfare systems.¹³²

Basic income – or basic-income-like programs – have a variety of names: universal basic income, unconditional basic income, freedom dividend, guaranteed income, negative income tax, and earned income tax credits are some of the most frequently used in media.¹³³ Other names used in the literature include “demogrant... state bonus, social dividend,

¹²⁹ See *UDHR*, *supra* note 48, preamble and art 1; see judicial interpretations of the *Charter* indicating that s 7 protects a sphere of “inherently private choices” that go to the “core of what it means to enjoy individual dignity and independence” *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55 at para 49.

¹³⁰ D Calnitsky “‘More Normal than Welfare’: The Mincome Experiment, Stigma, and Community Experience” (2016) 53:1 *Can Rev of Sociology* 26 at 27 and 64 [Calnitsky]; Leah Hamilton and James P. Mulvale “‘Human Again’: The (Unrealized) Promise of Basic Income in Ontario” (2019) 23:7 *J of Poverty* 576 at 593-594 online: <10.1080/10875549.2019.1616242> [Hamilton].

¹³¹ Forget Emergency, *supra* note 18 at 229 (the potential for adaptability is a central part of Forget’s analysis and arguments for basic income).

¹³² Almaz Zelleke “Feminist political theory and the argument for an unconditional basic income” (2011) 39:1 *Policy & Politics* 27 at 33 (Androcentrism describes “when men’s dominant life patterns are taken to represent the norm for all, and women’s recognition and income security depend on their conformity to those norms”) [Zelleke].

¹³³ See generally, S Berger Gonzalez and J Bidadanure “Universal Basic Income: What’s in a name?” 2020, Stanford Basic Income Lab online: <<https://basicincome.stanford.edu/research/papers/universal-basic-income-whats-in-a-name/>>.

universal dividend, universal grant, universal income, citizen's income, citizenship income, citizen's wage, and existence income."¹³⁴ Sometimes these names are chosen to indicate specific characteristics of the program being discussed in the literature. For example, "demogrant" was a popular term in the United States in the 1960s to describe a targeted cash transfer program based on age or sex.¹³⁵

Purposes and structures for basic income proposals vary greatly across the literature, and often depend on the ideological, normative, or political arguments that are attached to the proposal. For example, classic neoliberal and libertarian arguments for a one-time or regular cash transfer approach the idea as means of simplifying government and collapsing other social programs while leaving markets unaffected.¹³⁶ More left-leaning works identify basic income a part of a more socially just approach to distribution and argue that basic income could help mitigate rising income inequality and insecurity resulting from precarious work and the "gig economy."¹³⁷

Five characteristics are generally argued for in basic income proposals. Basic income should be 1) paid in cash; 2) universally available and not subjected to an income test nor based on a person's prior social insurance contributions; 3) individually paid (though sometimes paid per-family); 4) unconditional and not tied to any specific behaviour or performance of the willingness to work like many current income support programs; and 5) most modern proposals specify that payments would occur regularly such as on monthly basis.¹³⁸ These characteristics are then summarized as payments from the state that are distributed in cash, and paid universally, individually, unconditionally, and regularly.¹³⁹ There are usually some caveats to universality, such as a territorial limitation, but many argue that basic income should not be tied to citizenship status.¹⁴⁰ This is an

¹³⁴ Van Parijs and Vanderborght, *supra* note 13 at 8.

¹³⁵ *Ibid* at 8.

¹³⁶ See e.g. Milton Friedman, *Capitalism and Freedom*, (Chicago: University of Chicago Press, 1962) at 191-194 (endorsing a negative income tax) [Friedman]; see also Friedrich Hayek, *The Road to Serfdom*, (Chicago: University of Chicago Press, 1944) at 124-125 (advocating for forms of social insurance) [Hayek].

¹³⁷ Guy Standing, *Basic Income: And How We Can Make it Happen*, (UK: Pelican, 2017) at 107.

¹³⁸ Van Parijs and Vanderborght, *supra* note 13 at 8.

¹³⁹ Bida Juliana Uhuru Bidadanure "The Political Theory of Universal Basic Income" (2019) 22 Annual Review of Political Science 481 at 483 [Bidadanure].

¹⁴⁰ *Ibid* at 483; there is also literature that argues for a "global basic income" to address global income inequality and poverty, see Isabel Ortiz et al, "Universal Basic Income Proposals in Light of ILO Standards: Key Issues and Global Costing" (2018) online: <http://dx.doi.org/10.2139/ssrn.3208737>. Global basic income may also support those who migrate due to war or climate change, and help address the "welfare magnet" concern, see Van Parijs and

important requirement for a Canadian basic income, considering the high prevalence of poverty and precariousness experienced by newcomers to Canada.¹⁴¹ Literature that discusses basic income as an anti-poverty strategy also focuses on the adequacy of payments to cover basic needs.¹⁴²

In the Canadian literature, universality and individuality are modified or abandoned in favour of adequacy, regularity, and unconditionality.¹⁴³ This is because the cost of total universality would likely be politically impossible.¹⁴⁴ Basic Income Canada Network's proposal cites unconditionality and adequacy, but modifies universality by noting that basic income should be "*available* to all whose incomes fall below a certain threshold."¹⁴⁵ This means that the literature advocating for a fully *universal* basic income, and the literature that would argue how impossible or undesirable such a program would be, is excluded or discounted in the Canadian context.¹⁴⁶ In Canada, advocates do not discuss basic income as payments for every single person, rich or poor, but rather, Canadian basic income is proposed as a program to move low-income families and individuals above the poverty line and into the middle-income class. This makes labelling an issue, so perhaps a "guaranteed livable income" or "GLI" might be a better label for Canadian governments to distance from "universal basic income," or "UBI" that is popular in media. "Basic income" is still most often used as an umbrella term, and because I do not argue for a fully universal program here, I have chosen to use "basic income" throughout this thesis. Additionally, most of the literature is clear that a Canadian basic income should not diminish existing social supports and should not leave anyone who relies on government

Vanderborcht, *supra* note 13 at 219 and 226-230. Some literature even frames the potential for private funding for global basic income as reparations for the colonial origins of wealth among transnational corporations, see generally, T Okanouchi "Global Basic Income or Human Heritage Dividend: Colonial Origin of the Share Capital of All Major Transnational Corporations (TNCs), and the Best Way to Purify their 'Original Sin'" (2017), BIEN Congress Lisbon 2017 online: <https://basicincome.org/wp-content/uploads/2015/01/Tadashi_Okanouchi_Human_Heritage_Dividend.pdf> at 2.

¹⁴¹ Statistics Canada, Chronic Low Income Among Immigrants in Canada and its Communities, by Garnett Picot and Yuqian Lu, in *Analytical Studies Branch Research Paper Series*, Catalogue no 11F0019M (Ottawa: Statistic Canada: 29 Sept 2017) online: <<https://www150.statcan.gc.ca/n1/pub/11f0019m/11f0019m2017397-eng.htm>>.

¹⁴² Chandra Pasma and Sheila Regehr, "Basic Income: Some Policy Options for Canada" (2019) online: *Basic Income Canada* <https://basicincomecanada.org/wp-content/uploads/2021/04/Basic_Income_Some_Policy_Options_for_Canada.pdf> at viii (Pasma and Regehr developed two models, one is individual, and one puts couples/families together as joint recipients to reduce costs) [Pasma].

¹⁴³ Forget Emergency, *supra* note 18 at 20; see also Segal RSC, *supra* note 125 at 11.

¹⁴⁴ Derek Hum and Wayne Simpson "The Cost of Eliminating Poverty in Canada: Basic Income with an Income Test Twist" in Karl Widerquist, MA Lewis, S Pressman, eds, *The Ethics and Economics of the Basic Income Guarantee*, (Hampshire, UK: Ashgate Publishing, 2005) 282 at 290.

¹⁴⁵ Swift and Power, *supra* note 4 at 197, emphasis mine; see also Pasma, *supra* note 142 at 8.

¹⁴⁶ See generally this idea recurring in Forget Emergency, *supra* note 18.

support for their income and health services “worse off.”¹⁴⁷ This differentiates the Canadian approach from proposals that would value efficiency as the primary argument for collapsing other supports in favour of a basic income.

If basic income is conceived of as a “floor” of income security,¹⁴⁸ then defining the floor is a significant consideration. The amount of basic income payments is debated throughout the literature, but an example can be seen in the short-lived Ontario Basic Income Pilot (OBIP) that ran in 2018, which targeted low-income adults under age 65.¹⁴⁹ Monthly payments for participants of the pilot were set at \$1415.75 for individuals,¹⁵⁰ a significant increase from Ontario’s social assistance payments of \$721 per month.¹⁵¹ OBIP was only an experimental trial, but it was distributed in cash, regularly, individually, and unconditionally. OBIP paid \$16,989 annually for an individual and \$24,027 for a couple, with an additional payment of \$500 given to those with disabilities.¹⁵² Payments were intentionally set higher than regular social assistance, but still well below the poverty line, to test the impacts of this amount on health, food security, and housing for recipients.¹⁵³ Notably, CERB payments for workers affected by the pandemic were set at \$2000 per month, and if two people in a household were both receiving CERB, this would put the household just above the MBM-based poverty line at \$48,000 annually.¹⁵⁴ Of course, OBIP was an experiment in 2018 and CERB was an emergency pandemic support in 2020, so perhaps there are some inflationary, purposive, and situational adjustments that impact the difference in amounts. However, this draws our attention to how different cash transfer programs are conceptually grounded and the impact this has on program implementation.

Social assistance in Ontario is statutorily regulated by the *Ontario Works Act*, which provides a system of last-resort income supports.¹⁵⁵ Largely, this program is for people who are still deemed eligible to work. This becomes a significant issue for those with disabilities who struggle to work but may not fit the “ideal” type of permanent disability

¹⁴⁷ Swift and Power, *supra* note 4 at 197.

¹⁴⁸ Swift and Power, *supra* note 4 at 197; this echoes Van Parijs and Vanderborght, *supra* note 13 at 8.

¹⁴⁹ Results of this experiment analyzed in McDowell, *supra* note 72.

¹⁵⁰ *Ibid* at 222.

¹⁵¹ *Ibid*.

¹⁵² *Ibid*.

¹⁵³ *Ibid*. This is an interesting and ethically significant research choice: why set the amount well-below the poverty line? I did not find a direct answer to this question in the OBIP literature.

¹⁵⁴ Based on Stats Can MBM, *supra* note 61.

¹⁵⁵ *Ontario Works Act*, *supra* note 34.

policymakers expect the Ontario Disability Support Program (ODSP) to serve.¹⁵⁶ Additionally, proving that one is “disabled enough” to receive a bare minimum of income support is difficult.¹⁵⁷ Under Ontario Works and ODSP, benefits are reduced or clawed-back for a number of reasons, and if one does perform waged work, the minimum amount of income you can earn before incurring a reduction in income support is \$200.¹⁵⁸ Canadian basic income proposals suggest phasing out supports gradually as income increases, which would avoid getting caught in the “welfare trap” of disincentivizing waged work.¹⁵⁹

The overall cost of a basic income program is a significant concern for program design, but unconditionality is one of the most contested features in philosophical and economic debates about basic income because of concerns over work disincentives, and the claim that this feature violates social fairness and reciprocity by allowing some people to exploit the labour of others.¹⁶⁰ However, experiments have indicated that universality and unconditionality promote dignity by alleviating the stigma traditionally associated with income supports, and this has been linked to increased social solidarity and community well-being.¹⁶¹ Initially a critic of basic income due to the fairness and reciprocity concerns, Stuart White now argues that even if the “exploitation objection” to basic income has merit, “an objection can be valid without being decisive,” and there are “also ethical costs attached to making income support conditional on work or being willing to work. These costs are more morally troubling than the departures from reciprocity that basic income allows.”¹⁶²

As for fiscal costs, though estimates vary widely, based on the OBIP amounts, a federal basic income designed to support low-income people between the ages of 18 and

¹⁵⁶ Administered under the *Ontario Disability Support Program Act*, 1997, SO 1997, c 25, Sch B [*ODSP Act*]; see A McAllister “Mental illnesses are not an ‘ideal type’ of disability for disability income support: Perceptions of policymakers in Australia and Canada” (2020) 48:4 *Scandinavian J of Public Health* 452 at 452 doi: [10.1177/1403494818816903](https://doi.org/10.1177/1403494818816903) [McAllister].

¹⁵⁷ E Lightman et al, “‘Not disabled enough’: Episodic disabilities and the Ontario disability support program” (2009) 29:3 *Disability Studies Quarterly* 1 at 2 [Lightman].

¹⁵⁸ O Reg 134/98 General, s 49(1)ii [*OW Regulation*]; and O Reg 222/98 General, s 38(1).

¹⁵⁹ Forget Emergency, *supra* note 18 at 203; see also Forget Poverty, *supra* note 21 at 284.

¹⁶⁰ See the exploitation objection discussed in S White, *The Civic Minimum: On the Rights and Obligations of Economic Citizenship* (Oxford: Oxford University Press, 2003) at 153-170; see also the exploitation objection relating to both workers and care-givers discussed in Elizabeth Anderson “What is the Point of Equality?” 109:2 *Ethics* 287 at 298-302 [Anderson] and Daniel Engster, *Justice, Care, And The Welfare State* (Oxford, UK: Oxford Publishing, 2015) at 210-216 [Engster Welfare].

¹⁶¹ Calnitsky, *supra* note 130 at 27 and 64; see also Forget Emergency, *supra* note 18 at 54-55, and 73-77.

¹⁶² Stanislas Jourdan, “Interview with Stuart White: An Objection can be Valid Without Being Decisive” (22 Sept 2013), online: *BIEN – Basic Income Earth Network* <<https://basicincome.org/news/2013/09/stuart-white-an-objection-can-be-valid-without-being-decisive/>>.

64 could cost about \$23 billion annually if it replaces provincial social assistance programs and some tax credits for this age group.¹⁶³ An alternative model might only cost \$2 billion annually.¹⁶⁴ This could be funded by raising taxes slightly or recouped through savings on other areas of social spending like health care.¹⁶⁵ In 2020 alone, the Government of Canada spent approximately \$240 billion on pandemic relief programs, with about \$118 billion of that going to private businesses and non-profits, and \$105 billion directly going to support individuals.¹⁶⁶ It is fiscally possible to mobilize federal spending when it is needed. The issue is deciding what “need” really means.

I will follow examples from the Canadian literature in this thesis, and I agree that a Canadian basic income should be automatically available when someone’s income falls below a threshold based on the locationally-adjusted poverty line.¹⁶⁷ While my conception of basic income is therefore discussed as an income-targeted measure, payments would still be universally *available* to those who need them. Payments should also be made in cash, distributed regularly, paid out individually (or in some cases, to partners who share resources as a family unit, in which case the lower-income partner could receive the benefit), and given unconditionally until the recipient reaches an income above the poverty line through waged work or otherwise. Payments should also be progressively reduced as income rises, rather than being reduced dollar-for-dollar on income earned to avoid the “welfare trap.”¹⁶⁸ As I will discuss below, Canada already has some programs that carry these features for families with children and for people over 65 that I argue should be left intact, so extending basic income to people between 18 and 64 is my central concern here.

1.5.2 The History of Basic Income in Canada

Canada has been debating the merits and effects of basic income for decades through governmental panels, commissions, and committees. Two basic income experiments have also been performed in Canada and the data from these trials has been analyzed using a range of methodologies to understand what basic income could do for people and communities in Canada.

¹⁶³ Forget Emergency, *supra* note 18 at 201 (Based on analysis from the Parliamentary Budget Office).

¹⁶⁴ Pasma, *supra* note 142 at viii.

¹⁶⁵ Forget Emergency, *supra* note 18 at 202; Tarasuk BIG, *supra* note 85 at 8.

¹⁶⁶ “The Big Spend” (9 Dec 2020), online: *CBC News* <<https://newsinteractives.cbc.ca/thebigspend/>>.

¹⁶⁷ Stats Can MBM, *supra* note 61.

¹⁶⁸ Forget Emergency, *supra* note 18 at 203; see also Forget Poverty, *supra* note 21 at 284.

Evelyn Forget is one of the leading basic income scholars in Canada. Forget identifies the first policy suggestion of basic income in a 1971 “Special Senate Committee on Poverty report,” known as the “Croll Report,” which called for a Guaranteed Annual Income (GAI) as “major weapon” in “solving the poverty problem” in Canada.¹⁶⁹ The Croll Report noted that about 60% of low-income families had a head of the family who was working, but earning only “poverty wages.”¹⁷⁰ The report touched on many of the economic and social justifications for basic income that are leveraged today – poverty, inequality, poor working conditions, an insufficient minimum wage, and precariousness. 1971 sounds a lot like 2022: “in the post-industrial age, when jobs as we have traditionally known them may be in ever-scarcer supply, we must reassess our whole attitude towards work and stress much more an individual’s contribution in society in other, less routine ways.”¹⁷¹

Prior to the Croll Report though, by 1966 a form of basic income had already been implemented to support low-income seniors who qualified for OAS through the Guaranteed Income Supplement (GIS).¹⁷² Both OAS and GIS still exist today. They are income-tested and targeted at those over 65, so not universal, but they are guaranteed cash transfers at regular intervals. They are also unconditional and not attached to the performance of waged labour or any other behaviour.¹⁷³ However, these payments are provided for those who have presumably spent years participating in the labour market, so arguably they still hold conceptual connection to work, and thus to the social values of productive citizenship associated with protections aimed at workers.

Other cash transfers like youth allowances and family allowances have also periodically been provided in Canada (at either provincial and federal levels).¹⁷⁴ Federal family allowances were originally provided universally, which provided a sense of non-stigmatization and community solidarity, but this feature was re-examined during what Dennis Guest identifies as the “rediscovery of poverty in Canada” in the mid-1960s.¹⁷⁵

¹⁶⁹ *Poverty in Canada: Report of the Special Senate Committee on Poverty*, vol 1 (Ottawa: Senate of Canada, 1971) (David Croll, chair) at xxx.

¹⁷⁰ *Ibid* at 23.

¹⁷¹ *Ibid* at xi.

¹⁷² Guest, *supra* note 24 at 144; administered under the predecessor to the *Old Age Security Act*, RSC 1985, c O-9 [*OAS Act*].

¹⁷³ “Guaranteed Income Supplement: Overview” Modified Nov 3 2021 online: *Canada* <<https://www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security/guaranteed-income-supplement.html>>.

¹⁷⁴ Guest, *supra* note 24 at 142.

¹⁷⁵ *Ibid* at 163.

Family allowance payments were then criticized for their inadequacy in supporting low-income families.¹⁷⁶ This led to restrictions placed on who qualified for youth allowances, making larger payments available, but for only the lowest income-earning families.¹⁷⁷ Guest notes that this period of discourse “introduced the concept of *guaranteed annual income* to a much wider public,” which at the time “held out the promise of a right to a minimum income, free of means and needs tests.”¹⁷⁸ This was the period in which the Croll Report was published.

Just a few years later, an experiment called Mincome was launched in Manitoba. Mincome ran from 1975 to 1978, with a focus on determining the effects of basic income on labour participation.¹⁷⁹ The project lost public and political interest and was cancelled early after an election brought a conservative government to power in Manitoba, and it took decades for the results to be analyzed.¹⁸⁰ Mincome has since become an example of the beneficial health and community effects of basic income,¹⁸¹ and is cited as a support for claims that basic income might lessen direct health care costs by lowering emergency room use and doctor’s visits.¹⁸²

Various forms of basic income have been suggested by federal government reports and commissions since the 1970s: the Royal Commission on the Economic Union proposed a Universal Income Security Program for those affected by globalization and the expanding market capitalism of the 1980s.¹⁸³ Later, a 2009 Senate committee report again called for a basic income program, this time with a focus on supporting those with long-term disabilities.¹⁸⁴ The National Inquiry into Missing and Murdered Indigenous Women and

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid* at 164.

¹⁷⁸ *Ibid.*

¹⁷⁹ D Hum & W Simpson *Income Maintenance, Work Effort, and the Canadian MINCOME Experiment* (Ottawa: CCG Economic Council of Canada, 1991) (Focuses on Winnipeg sample, and not Dauphin participants) [Hum & Simpson].

¹⁸⁰ Forget Emergency, *supra* note 18 at 47-48.

¹⁸¹ Forget Poverty, *supra* note 21 at 283; see also EL Forget “New questions, new data, old interventions: the health effects of a guaranteed annual income” (2013) 57 *Preventative Medicine* 925 [Forget Health]; Calnitsky, *supra* note 130 at 27 and 64; M Gibson et al, “The public health effects of interventions similar to basic income: a scoping review” (2020) 5 *The Lancet Public Health* e165 at e165 online: <10.1016/S2468-2667(20)30005-0>.

¹⁸² *Ibid*; see also Segal COVID, *supra* note 126; however, David Green suggests that other factors may have accounted for the lowered use of health care services seen among Mincome participants, see BC Panel, *supra* note 127 at 349-351.

¹⁸³ Canada, *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, final report, Catalogue No Z1-1983/1-1E-PDF (Ottawa: PCO, 1985) (Donald S. Macdonald, chair); Swift and Power describe this proposal as a “classic right-wing version of Basic Income,” which would have eviscerated other important social supports, Swift and Power, *supra* note 4 at 44.

¹⁸⁴ Canada, *Report of the Senate Subcommittee on Cities: In from the margins: a call to action on poverty, housing and homeless*, final report, vol 1 (Ottawa: Senate of Canada, Dec 2009) (Art Eggleton, chair).

Girls also included the recommendation for a guaranteed livable income in its “Calls for Justice,” with an aim to address the experiences of poverty at the root of so much violence perpetrated against Indigenous women, girls, and Two-Spirit people.¹⁸⁵

Literature from Canadian academics, governments, and civil society organizations indicates that considering any form of basic income becomes a battle of values, and in some ways a battle of branding. GIS and OAS are prime examples. Also, a modern iteration of family allowances is the Canada Child Benefit (CCB) which is a monthly, non-taxable, per-child cash transfer payment provided to low and middle-income families.¹⁸⁶ There is evidence that both the CCB and the GIS have reduced severe food insecurity and improved health outcomes among families who receive these payments.¹⁸⁷ These programs are widely popular and exemplify many characteristics of basic income.¹⁸⁸

Most of the literature and policy history speaks to the *possibility* of more expanded basic income in Canada (beyond payments for children or the elderly) but there is obvious concern about *feasibility* that involve a variety of sociopolitical factors.¹⁸⁹ Academic analyses of the legal and political landscape that affects feasibility is a recent development in basic income research.¹⁹⁰

I have noted that COVID-19 has possibly opened a “policy window” for basic income. In public policy research, the “policy window” represents the point where the problem stream, the policy stream, and the political stream converge to produce an opportunity for implementing a specific policy solution.¹⁹¹ Sid Frankel argues that the likeliest policy window for basic income in Canada was between 2015-2019 during the development of the newly-elected Trudeau government’s poverty reduction strategy.¹⁹² This was the period when Canada adopted its official poverty line, and in 2018, Ontario

¹⁸⁵ Canada, *Reclaiming Power and Place: the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Calls for Justice (Vancouver: PCO 2019) at 11 [MMIWG Calls to Action].

¹⁸⁶ “Canada Child Benefit”, (modified 16 March 2022) online: CRA <<https://www.canada.ca/en/revenue-agency/services/child-family-benefits/canada-child-benefit-overview.html>> [Canada CCB].

¹⁸⁷ Brown and Tarasuk, *supra* note 84; McIntyre GAI, *supra* note 84; McIntyre Reduction, *supra* note 84.

¹⁸⁸ Segal COVID, *supra* note 126.

¹⁸⁹ See e.g. J De Wispelaere & JA Noguera “On the Political Feasibility of Universal Basic Income: An Analytical Framework” in Caputo RK, ed, *Basic Income Guarantee and Politics: International Experiences and Perspectives on the Viability of Income Guarantee* (NY: Palgrave 2012) 17.

¹⁹⁰ See e.g. De Wispelaere, *supra* note 47.

¹⁹¹ Frankel, *supra* note 14 at 141 (The problem stream is “filled with conditions that are constructed as problematic and appropriate for state intervention,” while the policy stream is filled with the “primeval soup of competing alternative solutions and proposals” from across governments, academia, and civil society, and the political stream contains the conditions that influence political action).

¹⁹² *Ibid.*

launched Canada’s second basic income experiment, the OBIP. The pilot was supposed to run for three years and test not just the impacts on labour participation, but the effects of basic income on “critical quality-of-life measurements such as physical and mental health, financial, housing and food security, and family, community, and social relations.”¹⁹³ The pilot was cancelled early by a newly-elected conservative government – risking the same fate as the forgotten Mincome data – but researchers worked to collect as much data as they could during the shortened period of payments.¹⁹⁴

The resurgence of basic income discourse in Canada due to the pandemic is not just in academic circles, but also through the proposal of a federal bill to test a national basic income pilot in 2020.¹⁹⁵ Two more bills have been put forward in the current federal parliamentary session – one as a private member’s bill in the House of Commons,¹⁹⁶ and the other in the Senate.¹⁹⁷ The language in both current bills does not suggest launching another basic income pilot, but instead would require the Minister of Finance to develop a “framework” for a national basic income in consultation with other ministers as well as Indigenous elders, Indigenous governing bodies, and “experts in other guaranteed livable basic income programs.”¹⁹⁸ This could be indication that we have enough empirical data, and perhaps it is time to just move forward with a framework for broader implementation and ongoing monitoring.¹⁹⁹

Most of the Canadian basic income literature focuses on the federal level, perhaps due to the limits on constitutional taxation powers granted to the provinces.²⁰⁰ However, in 2020, British Columbia’s Expert Panel on Basic Income made 65 recommendations to improve the social safety net in the province, but concluded that basic income was not the

¹⁹³ McDowell, *supra* note 72 at 212.

¹⁹⁴ *Ibid*; see also M Ferdosi et al, “Southern Ontario’s Basic Income Experience” (2020) online: *Hamilton Roundtable for Poverty Reduction* <researchgate.net/publication/340129178> [Ferdosi et al]; see also M Ferdosi & T McDowell “More than Welfare: The Experiences of Employed and Unemployed Ontario Basic Income Recipients” (2020) 15:2 *Basic Income Studies* 20200005 [Ferdosi & McDowell].

¹⁹⁵ Bill C-273, *An Act to Establish a National Strategy for a Guaranteed Basic Income*, 2nd Sess, 43rd Parl, 2020 (first reading 22 Feb 2021).

¹⁹⁶ C-223, *An Act to develop a national framework for a guaranteed livable basic income*, 1st Sess, 44th Parl, 2021 (first reading 16 Dec 2021) [*Bill C-223*].

¹⁹⁷ S-233, *An Act to develop a national framework for a guaranteed livable basic income*, 1st Sess, 44th Parl, 2021 (second reading 26 April 2022, most recent debate 7 June 2022) [*Bill S-233*].

¹⁹⁸ *Bill C-223, supra* note 196, s 3(1)-(2).

¹⁹⁹ Bru Láin and Roberto Merrill “Why Do We Run Basic Income Experiments? From Empirical Evidence to Collective Debate” (2021) 16:1 *Basic Income Studies* 27 DOI:10.1515/bis-2021-0018.

²⁰⁰ *Constitution 1867, supra* note 29 ss 91(3), 92(2), 92(9).

most just solution for BC.²⁰¹ The Panel cited Adam Smith, John Rawls, Martha Nussbaum, and Robert Nozick as sources of inspiration for their framing of a “just society” and “just economy,” arguing that these two concepts interact with one another, and that analyzing basic income on the basis of justice without considering economic and financial considerations “cannot provide satisfactory results.”²⁰² Ultimately, they found that “basic income emphasizes individual autonomy – an important characteristic of a just society. However, in doing so it de-emphasizes other crucial characteristics of justice that must be, in our view, balanced: community, social interactions, reciprocity, and dignity.”²⁰³ This is an example of the diversity of normative approaches to justice that shape much of the basic income literature, in both academic and government policy spheres. Value-framing in turn affects the outcomes of analysis.

I have outlined the history of basic income discourse in Canada and noted several cash transfer programs that exist at the federal level, and a few at the provincial level like Ontario Works and ODSP. Canada has a history of launching cash transfer programs in the face of changing social needs and norms. Below, I briefly discuss the empirical research that makes scholars and advocates hopeful about how basic income could improve the lives and health of many people living in Canada.

1.5.3 The Empirical Evidence

Basic income trials have been run all over the world using a variety of objectives and methodologies. They are usually designed like randomized drug trials with a recipient group and a control group. This means sample sizes are generally small. Pandemic supports like CERB may provide larger sample sizes for the effects of a minimum income support,²⁰⁴ but these temporary pandemic supports were not designed to test certain effects, nor were they unconditional. Spain launched a basic income program in 2020 called *Ingreso Mínimo Vital* (“minimum vital income”) which targets low-to-no-income families and has some basic income characteristics – adequacy, regularity, and some level of unconditionality – so future analysis may come from this program that will be provided to thousands of

²⁰¹ BC Panel, *supra* note 127.

²⁰² *Ibid* at 53.

²⁰³ *Ibid* at 35.

²⁰⁴ Stats Can CERB, *supra* note 7 (CERB and EI supported 8.9 million Canadians during the early pandemic).

families.²⁰⁵ We have also never seen the effects of long-term basic income, and participants know that the money they receive will not be available forever.²⁰⁶ This may impact choices and outcomes. Despite the limitations on these studies in terms of scope and duration, several social determinants of health have been documented to be improved by basic income: food security generally improves, as well as having some positive impact on health care access and educational attainment.²⁰⁷ Positive individual health impacts are seen across the literature in the Canadian experiments,²⁰⁸ as well as worldwide.²⁰⁹

A common concern raised in relation to basic income is that giving people enough money to live on will disincentivize them to work, but research indicates that basic income has a limited effect on participation in waged labour.²¹⁰ Unless people receiving basic income are ill, disabled, elderly, pursuing educational opportunities, or caring for children, they mostly keep working, so basic income has no significant impact on labour supply.²¹¹ For a specific example, in the Mincome experiment, mothers with young children used basic income to extend their statutory maternity leave time and young men stayed in school longer instead of leaving to find full time work, but outside of those two groups, limited labour effects were observed.²¹²

Basic income clearly “reduces material deprivation,” which accounts for the beneficial effects at the individual level, but data from Mincome also showed beneficial effects at the community level.²¹³ Even those who were not recipients of the basic income payments reported a greater sense of community solidarity in the saturation site of Dauphin, Manitoba, which researchers attribute to the de-stigmatization of receiving Mincome.²¹⁴ Mincome acted as a form of social insurance, even for residents of Dauphin

²⁰⁵ “Ingreso Mínimo Vital” (2022) online: *Government of Spain, Ministry of Inclusion, Social Security and Migration* <<https://www.seg-social.es/wps/portal/wss/internet/Trabajadores/PrestacionesPensionesTrabajadores/65850d68-8d06-4645-bde7-05374ee42ac7?changeLanguage=es>> (One does not have to work while receiving IMV, but recipients *are* obligated to participate in “inclusion strategies,” though there is no descriptions of those strategies).

²⁰⁶ This was especially the case in the OBIP, since the trial was cancelled early, which may have impacted the data collection by affecting participants views of the program and their life circumstances as a result, McDowell, *supra* note 72 at 210-211.

²⁰⁷ R Hasdell, “What we know about Universal Basic Income: A cross-synthesis of reviews” (2020) Stanford Basic Income Lab online: <https://basicincome.stanford.edu/uploads/Umbrella%20Review%20BI_final.pdf> [Hasdell].

²⁰⁸ Forget Poverty, *supra* note 21 at 283; McDowell, *supra* note 72 at 209.

²⁰⁹ Hasdell, *supra* note 207 at 17.

²¹⁰ *Ibid* at 16.

²¹¹ *Ibid*.

²¹² Forget Poverty, *supra* note 21 at 286, Forget undertook a re-analysis on the data from Hum & Simpson, *supra* note 179.

²¹³ *Ibid*; see also Forget Emergency, *supra* note 18 at 54.

²¹⁴ Calnitsky, *supra* note 130 at 27 and 64.

who never received payments, because they knew a basic income would be “there if [they] needed it.”²¹⁵ This sense of security translated to people reporting a “strong feeling of community in Dauphin,” which “reflected the kind of social cohesion often associated with better community health.”²¹⁶ Basic income experiments often include those with disabilities who may not otherwise qualify for social assistance. For example, in the OBIP, some recipients were living with disabilities, and these participants reported not just improved mental and physical health, food security, and housing stability, but also “were also able to participate more fully in their communities.”²¹⁷ This shows the ways adequate, stable income can reduced experiences of marginalization and exclusion.

I have noted that in the Mincome experiment, mothers used basic income to support longer maternity leave.²¹⁸ Other gendered analysis indicates that basic income could be a support for those who experience domestic or intimate partner violence by providing exit opportunities and a greater degree of control over one’s personal financial situation.²¹⁹ Arguing for a basic income for victims of domestic violence is “fairly uncontroversial and accepted” in the literature,²²⁰ and is often raised in connection with gendered analysis.²²¹ Many feminist scholars stress the potential for using a basic income to value unpaid reproductive and care work, which is largely performed by women, and even to supplement low wages for paid care work that is often undervalued.²²² There is significant debate on this point however, and I discuss this aspect of the gendered and feminist approaches to basic income in detail in Chapter 2.

Ultimately, my view is that basic income could be seen and implemented as a method of universal public care, much like universal health care. Basic income must also be nested within a network of other social welfare programs that are designed to enhance

²¹⁵ Forget Emergency, *supra* note 18 at 55.

²¹⁶ *Ibid.*

²¹⁷ Ferdosi & McDowell, *supra* note 194 at 33; see also Ferdosi et al, *supra* note 194 at 5.

²¹⁸ Forget Poverty, *supra* note 21 at 286.

²¹⁹ Pilar Gonalons-Pons & David Calnitsky “Exit, voice and loyalty in the family: findings from a basic income experiment” (2021) 00:0 Socio-Economic Rev 1 at 1 online: <<https://doi.org/10.1093/ser/mwaa050>> (explores Mincome) [Gonalons-Pons].

²²⁰ Bidadanure, *supra* note 139 at 492.

²²¹ See Forget Emergency, *supra* note 18 at 132-133; see also Anna Cameron and Lindsay M. Tedds “Gender-Based Analysis Plus (GBA+) of Two Policy Alternatives: Basic Income and Basic Services” (Dec 2020) online: *BC Basic Income Panel* <https://bcbasicincomepanel.ca/wp-content/uploads/2021/01/Gender_Based_Analysis_Plus_GBA_of_Two_Policy_Alternatives_Basic_Income_and_Basic_Services.pdf> at 7-8.

²²² E.g. C Vollenweider “Domestic Service and Gender Equality: An Unavoidable Problem for the Feminist Debate on Basic Income” (2013) 8:1 Basic Income Studies 19 at 38-39 [Vollenweider]; Zelleke, *supra* note 132 at 35.

health and well-being in Canada and provide care – including, but not limited to, workers’ supports, health care provision and protection, public education, housing supports, and publicly-subsidized or fully funded childcare – and it would form the central method of ameliorating income insecurity whenever someone’s income falls below the poverty line.²²³

1.6 Central Research Questions

In this thesis, I ask four central questions:

1. **Who do major social welfare policies and laws serve, and who do they fail?**
2. **How do these major policies frame or consider the concept of care?**
3. **What are the legal impediments and opportunities for the implementation of a federal basic income program in Canada?**
4. **How can we avoid/address these impediments and leverage these opportunities to build a socially just, caring, and anti-oppressive system of welfare designed around basic income?**

1.7 Outline

This thesis explores some ways that law can advance basic income in Canada. In Chapter 2, I build toward the conception of social justice that forms the foundation of my analysis, based on a feminist approach to the ethics of care. I largely draw from the work of Joan Tronto to advance an argument for viewing basic income through her “feminist democratic care” model.²²⁴ This involves exploring the limitations of a popular approach to basic income, which is to see cash transfers as part of a system of just distribution.

In Chapter 3, I apply feminist perspectives on care and social justice as I consider impediments and opportunities for basic income. I present why a right to basic income or a human rights justification for basic income is necessary for the long-term stability of basic income in Canada and to protect the rights and needs of marginalized people. I then present how case law on socioeconomic rights presents roadblocks to advancing basic income, but also shows some narrow opportunities by making connections between Canada’s domestic human rights and international obligations. I then explore nationalized

²²³ I have been vague about costs here because of my lack of expertise in economics, and I rely on the costed platforms I cite. Ultimately, the amounts must be high enough to provide a basic level of support, beyond subsistence living, and that the amount should likely be based on the Market Basket Measure, because this poverty measurement is sensitive to inflation and locational costs. However, the amounts for those with disabilities would have to be more context-specific due to the increased daily costs of living with disabilities, see Craig WM Scott et al, “Disability Considerations for Measuring Poverty in Canada Using the Market Basket Measure” (2022) 163 *Social Indicators Research* 389 at 389 online: <https://doi.org/10.1007/s11205-022-02900-1>.

²²⁴ As discussed and outlined throughout Joan Tronto, *Caring Democracy: Markets, Equality, and Justice* (New York: NYU Press; 2013) [Tronto Democracy].

pensions, unemployment insurance, and family allowances to understand how care, rights, and social welfare are approached in relation to these schemes, and what further roadblocks and opportunities are presented through these existing programs. I also explore other methods of significant democratic cooperation that are instructive for advancing basic income. I have chosen these areas of law because they represent profound legal changes to social welfare, such as the constitutional amendments for unemployment insurance, and pensions, or significant constitutional cooperation through funding under the *Canada Assistance Plan* and the current *FPFAA*. All of these have something to teach us about advancing basic income in Canada.

In Chapter 4, I then offer a brief, exploratory discussion that builds on these insights. I suggest ways to advance a human-rights based, care-focused basic income and to build a more caring and less oppressive system of social welfare in Canada.

1.8 Methodology

Here I hope to add to the multidisciplinary feminist work on basic income. This is an intentional work of academic advocacy. I take a critical feminist perspective on social welfare and the specific conceptions of justice and care that form the philosophical and ethical foundations of many social welfare laws and policies. I am interested in how social welfare can be made more inclusive, less androcentric, and more considerate of the diversity and plurality of modern lives.

My thesis utilizes a feminist jurisprudential methodology that is informed by feminist legal theory and its theoretical cousins critical race theory and queer legal theory. Though there is no central formulation of any of these theories of law, loosely these approaches could be classified as “outsider jurisprudence,” where law is considered “co-extensive with the interests and the comprehension of those in power,” and since law carries this “deep pathology,” these theories lead us to ask “how do we change the law to protect disenfranchised peoples, and even perhaps to advance their causes?”²²⁵

Feminist legal methods are varied, but I rely on a framework from Katherine Bartlett,²²⁶ with influence from critical race theory,²²⁷ and queer theory scholars.²²⁷ Feminist

²²⁵ Ann Scales, “Feminist Legal Method: Not So Scary” (1992) 2:1 *UCLA Women’s LJ* 1 at 4 [Scales].

²²⁶ Katherine T Bartlett “Feminist legal methods” (1990) 103:4 *Harvard L Rev* 829 [Bartlett].

²²⁷ See generally, *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, MA Fineman, JE Jackson, & AP Romero (eds) (2nd ed) (NY: Routledge, 2016).

jurisprudence draws from the standard methods of legal analysis and reasoning: “deduction, induction, analogy, and use of hypotheticals, policy, and other general principles.”²²⁸ From there, feminist methodologies differ by “asking the woman question,” engaging in “feminist practical reasoning,” and “consciousness-raising.”²²⁹

In my thesis, “asking the woman question,” is expanded upon by “looking to the bottom.”²³⁰ This requires not just an analysis of how women’s interests, rights, and even lives may be at stake when analyzing law, but rather is a “historical, contextual analysis of whose subjectivity has been relatively unfettered, and whose has been tragically constrained.”²³¹ “Looking to the bottom” will be used to answer my first research question and help to analyze major federal social welfare policies to “identify and challenge those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups.”²³² The “woman question” makes assumptions that even if law is stated as neutral, it may be both “nonneutral in a general sense, but also ‘male’ in a specific sense,” and the purpose of using this methodology is to “expose those features and how they operate, and to suggest how they might be corrected.”²³³

Of course, oppression is not limited to only to cisgender women’s experiences, and indeed many women experience various forms of privilege in society. I personally experience a significant amount of privilege as a White, cisgender woman, born in Canada. Thinking about oppression requires an understanding of the concept of intersectionality, so here I consider other unique experiences of marginalization that are a result of intersecting identities such as race, disability, immigration status, class, gender expression and identity, and sexuality.²³⁴ Additionally, there is even further nuance here as group status and identity are not static, and even classifications in law change as social norms may change.²³⁵

²²⁸ Bartlett, *supra* note 226 at 836.

²²⁹ *Ibid.*

²³⁰ Scales, *supra* note 225 at 27, citing the approach to this question from Mari J Matsuda “Looking to the Bottom: Critical Legal Studies and Reparations” (1987) 22 Harvard CRCL L Rev 323.

²³¹ *Ibid.*

²³² Bartlett, *supra* note 226 at 831.

²³³ *Ibid* at 837.

²³⁴ As articulated in Kimberle Crenshaw “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43:6 Stanford L Rev 1241 at 1244 to 1253.

²³⁵ E.g. the recent additions of “gender expression” and “gender identity” into many human rights codes across Canada, showing that legal identity categories can and do change over time as a reflection of social change, see *An Act to amend the Canadian Human Rights Act and the Criminal Code* SC 2017, c 13, which added “gender expression” and “gender identity” as prohibited grounds of discrimination for federal programs and services and for hate crimes.

Looking to the bottom will also influence my analysis of the concept of care that may be embedded – implicitly or explicitly – within the major social welfare policies I discuss.

My initial research leads me to the hypothesis that the federal social welfare programs I have identified were largely built on certain conceptions of citizenship and social participation that are in many ways androcentric and ableist. As discussed, this leads me to accept basic income as a system that could be based on more inclusive concepts of social responsibility and citizenship, and the foundational idea that social participation is not always about waged labour, but instead includes all manner of social reproduction.²³⁶ This initial hypothesis is why my third question focuses on the impediments and opportunities for basic income, which I will approach by engaging in feminist practical reasoning, which considers ways in which “legal resolutions are pragmatic responses to concrete dilemmas rather than static choices between opposing, often mismatched perspectives.”²³⁷ This pragmatic approach also looks to find the “best answer for now,” meaning that the selection of the best way forward in a given legal circumstance is “*provisional*,” and that “[s]olutions once embraced can cease to be useful or can be co-opted by others for bad ends. Therefore, this step requires constant vigilance about when the best answer for then becomes a bad answer for the future.”²³⁸ This element of feminist analysis will be used to frame the various impediments and opportunities for basic income. This means I do not offer a single answer in law that is definitive, but rather, a variety of legal pathways and concepts to draw from.

Finally, consciousness-raising seeks out “insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative.”²³⁹ My thesis does not offer new qualitative insights into the perspectives of people interacting with social welfare systems, but as in this chapter, I will

²³⁶ Catherine Hoskyns & Shirin M Rai, “Recasting the Global Political Economy: Counting Women’s Unpaid Work” (2007) 12:3 *New Political Economy* 297 at 300 online: <<https://doi.org/10.1080/13563460701485268>> (“[S]ocial reproduction can be taken to include the following: biological reproduction; unpaid production in the home (both goods and services); social provisioning (by this we mean voluntary work directed at meeting needs in the community); the reproduction of culture and ideology; and the provision of sexual, emotional and affective services (such as are required to maintain family and intimate relationships). These are all elements contributed to the economy and society in general by the household and the community. They are mainly contributed by women, regardless of their position in society and the resources they can muster to manage the pressures and rewards associated with social reproduction.”) [Hoskyns].

²³⁷ Bartlett, *supra* note 226 at 831.

²³⁸ Scales, *supra* note 225 at 29, emphasis in original.

²³⁹ Bartlett, *supra* note 226 at 835.

rely on research on the real-world effects of social welfare laws and policies. This expands my view from simply focusing on law “in the books” and helps ground me in social reality.

Feminist methodology of course relies on some measure of generalizing peoples’ lived experiences. When we think about how law impacts people on the basis of difference, it is difficult to avoid categorization or essentialism. Women do not share a monolithic social experience, nor do queer people or racialized people. Even feminists do not share a central thesis or perspective. Analyzing law on the basis of difference then comes with risks and limitations: “using difference as a category of analysis can reinforce stereotyped thinking and thus the marginalized status” of those categorized as “others,” and additionally suggests that “members of the category share a set of common, essential, ahistorical characteristics that constitute a coherent identity.”²⁴⁰ I am sensitive to these risks, but take a pragmatic approach to my analysis by using “presently understandable categories.”²⁴¹ Advancing the rights and interests of marginalized people often requires this form of “strategic essentialism.”²⁴²

1.9 Conclusion

To summarize my points here, Canada has made commitments to socioeconomic human rights such as the right to health, the right to social security, and the right to an adequate standard of living, which includes housing and food.²⁴³ Additionally, the *ICESCR* commits Canada to take “appropriate steps to ensure the realization” of these rights, “to the maximum of its available resources, with a view to achieving progressively the full realization” of rights contained in the *ICESCR*, “by all appropriate means, including particularly the adoption of legislative measures.”²⁴⁴ Though there is some evidence of progress on poverty, Canada has not adequately addressed food, housing, or income insecurity in a comprehensive way since the repeal of *CAP*, meaning that despite the strong

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² Strategic essentialism can be described as a “move away from essentialism as a negative practice and towards essentialism as a means to resist essentialism. It is the choice to develop an essentialized community, discrete minority or general category, such as “woman” or “queer,” for the purpose of advancing specific political goals.”: Lara Karaian, “The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis, Queer Porn, and Canadian Anti-discrimination Law” in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, MA Fineman, JE Jackson, & AP Romero (eds) (2nd ed) (NY: Routledge, 2016) 375 at 378.

²⁴³ See e.g. *ICESCR*, *supra* note 52, art 11.

²⁴⁴ *Ibid.*, art 2.

connection between income security and health, the current legal and policy environment conceptually separates policies meant to address food, housing, or health, and those meant to provide income support. This means that last-resort supports like food banks and stigmatizing residual programs like Ontario Works are the only resources available for those fall through Canada's "safety net." Basic income could be a way forward to address many of the social determinants of health. There is currently proposed legislation on developing a federal framework for basic income.²⁴⁵

In terms of a legal approach to advocating for basic income, there is some literature that frames basic income as a justiciable right, instead of a policy that would be vulnerable to political whims.²⁴⁶ Rights contained within the *ICESCR* may provide justification for this approach,²⁴⁷ since the *Charter* is generally interpreted by Canadian courts using the framing and goals of international human rights protections.²⁴⁸ This means there are some calls to ground basic income in the section 7 rights to life and security of the person.²⁴⁹ However, Canadian courts have taken limited approaches to socioeconomic rights under the *Charter*,²⁵⁰ though there has been some movement on the issue of discrimination and the socioeconomic rights of women.²⁵¹ However, the SCC is still "caught between two views of equality and state obligation," one which focuses solely on the adjudicative process as the mechanism to correct "harmful state action," and the other "emphasizes distributive justice and places an obligation on the state to correct socio-economic inequality in the community."²⁵² Given this tension, Canada is a unique state to focus on and explore the

²⁴⁵ *Bill C-223*, *supra* note 196, and *Bill S-233*, *supra* note 197.

²⁴⁶ See generally, De Wispelaere, *supra* note 47; De Wispelaere and Morales, *supra* note 47 at 530-532; see also Standing Right, *supra* note 47 at 13-15.

²⁴⁷ *ICESCR*, *supra* note 52, art 11 (Recognizing "the right of everyone to an adequate standard of living... including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right").

²⁴⁸ This point discussed in detail in Chapter 3, but see *Quebec (Attorney General) v 9147-0732 Québec Inc*, 2020 SCC 32 at paras 30-38 and 42 (discussing a new approach to interpretive methodology for weighing international instruments in *Charter* analysis) [*Quebec Inc*].

²⁴⁹ Senator Yuen Pau Woo, "The Case For A Guaranteed Basic Income Must Go Beyond Poverty Reduction" (28 April 2021) online: *Senate of Canada* <sencanada.ca/en/sencaplus/opinion/the-case-for-a-guaranteed-basic-income-must-go-beyond-poverty-reduction-senator-woo/>; see also Martha Jackman, "Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?", in R J Sharpe & K Roach, eds, *Taking Remedies Seriously* (Montreal: CIAJ, 2010) 279 at 283 (Jackman argues socioeconomic rights are fundamental to section 7) [Jackman Box].

²⁵⁰ Martha Jackman "One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin" (2019) 39:1 *National Journal of Constitutional Law* 85 at 108 [Jackman Step].

²⁵¹ Seen recently in *Fraser v Canada (AG)*, 2020 SCC 28 (however, this case was about workers employed by the federal government, so cannot be directly extrapolated to other areas of economic rights).

²⁵² R Moon "Comment on Fraser v Canada (AG): The More Things Change" (2021) 30:2 *Const Forum* 85 at 94-95 [Moon].

relationship between law and income security by considering basic income as the specific vehicle for socioeconomic rights.

Ultimately, my goal is to explore how to radically change social welfare in Canada. I envision this new system to include a basic income that is built upon foundational concepts of care and support that may already be familiar to Canadian policy and law. I hope that this work can contribute to the discourse of renewal and rebuilding post-COVID by providing a framework for a basic income that is responsive to future crises – both personal and global – and promotes dignity for all.

Chapter 2

2 Caring Justice and a Framework for Basic Income

In this chapter I discuss the moral and ethical dimensions of care, social justice, and basic income that I rely on. My aim is to draw connections between health equity, justice, care, law, and basic income. I take the non-positivist position that even though the moral foundations of law are not always overt, law is almost always informed by moral and ethical ideals.²⁵³ Beyond democratically-enacted legislation, even in the common law, “judges cannot dodge appeals to morality, especially in hard cases.”²⁵⁴ Many socioeconomic rights cases are certainly hard cases since ruling in favour of a citizen (or citizens) in such cases imposes economic and policy consequences on the state, but ruling against citizen(s) can alternately impose significant social, health, and economic consequences on people and their families. I also rely on this understanding of law in Chapter 3 where I undertake a feminist analysis of social welfare legislation and case law. This understanding of law leads me to consider normative concepts that could inform a basic income scheme.

This chapter draws heavily on literature from various areas of political philosophy, and I connect these areas to basic income. My approach to the literature I discuss here is not systematic, but grew from an initial purposive sampling of literature on basic income in Canada, with a particular focus on the effects of basic income that relate to health and food security.²⁵⁵ The approach I have taken here is a “critical interpretive review,” inspired by the field of bioethics, since in bioethics, “questions tend to focus on ethical justifiability and deal in conceptual analyses and arguments,” which allows for a non-systematic approach to literature review, since the field also draws broadly from “theoretical, qualitative, and mixed methods studies.”²⁵⁶

²⁵³ This is inspired by the works of many legal theorists, but especially the work of Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); see also Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986); see also Lon Fuller, *The Morality of Law*, (New Haven & London: Yale University Press, 1964, 1969).

²⁵⁴ Rita Manning, “Care, Normativity, and the Law” in Daniel Engster and Maurice Hamington (eds) *Care Ethics and Political Theory*, 127 at 128 (UK: Oxford University Press, 2015).

²⁵⁵ E.g. the analysis of Mincome in Forget Emergency, *supra* note 18, and Forget Poverty, *supra* note 21.

²⁵⁶ As much as possible, I have attempted to present the following features of a “good critical interpretive review”: 1. Answers a specific research question, which may have been refined and determined during the literature review process, and 2. Analyses the literature as a whole as well as analyzing individual findings and arguments within that

My initial searches for content on basic income in Canada brought me to the work of Evelyn Forget,²⁵⁷ to the Mincome and OBIP experiments,²⁵⁸ and broadly to the arguments for basic income that I outlined in Chapter 1. This literature sometimes cited concepts like “social solidarity,”²⁵⁹ and “social justice,”²⁶⁰ not just the demonstrated effects of basic income experiments. A simple Google Scholar search for “basic income” also revealed the highly influential work of Philippe Van Parijs²⁶¹ and Guy Standing,²⁶² which is justice-based and politically focused. I also leveraged searches for “basic income + law” and “basic income as a right.” As I read and analyzed the articles and books that came out of these basic searches, I found additional relevant content that deepened my analysis of the theoretical literature. This was an iterative process. Reviewing this literature led me to broader work on basic income and political theory.²⁶³

Since I approach my work with a feminist lens, to find more explicitly feminist literature, I focused my searches in Google Scholar on “feminism + basic income.” This sampling led me to the work of Almaz Zelleke²⁶⁴ and Anca Gheaus,²⁶⁵ and others I discuss in detail below. Though much of the feminist literature is theoretical, some of it leverages empirical content to justify theoretical claims.²⁶⁶ One theme seen in the feminist literature is a focus on supporting care work through basic income, which I engage with in depth in this chapter.²⁶⁷ In consultation with experts on law, ethics, feminist theory, and feminist

literature, and 3. Does not utilize rigid quality assessment criteria, but comments within the review itself on quality issues, and 4. Generates theory and puts forward an argument about the literature, and 5. Captures all of the key ideas in the existing literature that are relevant to the research question, and 6. Records and reports the search strategy.”: R McDougall “Reviewing Literature in Bioethics Research: Increasing Rigour in Non-Systematic Reviews” (2015) 29 *Bioethics* 523 at 527.

²⁵⁷ Specifically Forget *Emergency*, *supra* note 18.

²⁵⁸ Analyzed in Forget *Poverty*, *supra* note 21; Forget *Health*, *supra* note 181; Hum & Simpson, *supra* note 179; Ferdosi et al, *supra* note 194; McDowell, *supra* note 72; Ferdosi & McDowell, *supra* note 194; Gonalons-Pons, *supra* note 219.

²⁵⁹ E.g. Forget *Emergency*, *supra* note 18 at 57, 63, and 74-77.

²⁶⁰ E.g. Swift and Power, *supra* note 4 at 21-26 and 80-86.

²⁶¹ E.g. Van Parijs and Vanderborght, *supra* note 13; Van Parijs *Surfers*, *supra* note 46.

²⁶² E.g. Standing *Right*, *supra* note 47.

²⁶³ See generally, Bidanure, *supra* note 139 for a scoping review on various political theories of basic income.

²⁶⁴ Zelleke, *supra* note 132.

²⁶⁵ Anca Gheaus “The feminist argument against supporting care” 8:1 (2020) *Journal of Practical Ethics* 87 at 89 [Gheaus Against].

²⁶⁶ See generally, Ingrid Robeyns “Will a Basic Income Do Justice to Women?: A Contribution to the Symposium on P. Van Parijs’s ‘Real Freedom for All’ in *Analyse & Kritik* 22(2)” (2001) 23:1 *Analyse & Kritik* 88 [Robeyns] (leveraging labour supply data); see also Vollenweider, *supra* note 222 at 21-28 (leveraging literature on the gendered and racialized experiences of domestic workers).

²⁶⁷ Zelleke, *supra* note 132; Robeyns, *supra* note 266; Vollenweider, *supra* note 222; Gheaus Against, *supra* note 265; see also Carol Pateman “Democratizing Citizenship: Some Advantages of Basic Income” (2004) 32:1 *Politics & Society* 89; John Baker “All Things Considered, Should Feminists Embrace Basic Income?” 2008 3:3 *Basic Income Studies* 1 [Baker].

approaches to social welfare, the scope of literature widened.²⁶⁸ In considering care work, I searched for broader content on the relationship between care and justice. This led me to feminist critiques of distributive justice which ultimately led me to literature on care theory.

This chapter represents my effort to thread these seemingly disparate areas of literature together and offer critical insights. I begin here by presenting how the social determinants of health are rooted in multiple dimensions of justice. I then describe justice-based arguments for basic income, but I complicate the usual distributive paradigms by discussing feminist arguments for and against basic income and other non-distributive dimensions. Following this discussion, I introduce care theory which is inspired by the ethics of care. In the final section of this chapter, I discuss how care theory informs the conceptual framework I argue would provide a more robust and nuanced understanding of care, social responsibility, and democracy that can inform a human rights-based basic income in Canada. I do not argue that the ethics of care should wholly replace ideals like equality or reciprocity, but I argue that care ethics can provide a more relational view of the way these ideals can be interpreted and applied in legal contexts, since care and social justice interact in relational and nuanced ways.

2.1 The Social Determinants of... Justice?

“Social justice is a matter of life and death.”²⁶⁹ This strong statement begins the final report of the World Health Organization’s Commission on Social Determinants of Health (WHO Commission). The WHO Commission’s 2008 report discussed health gaps between wealthier nations and developing nations, but also how health inequities exist within nations like Canada.²⁷⁰ I have discussed at length that income is a significant social determinant of health and that having low or precarious income contributes to food insecurity and housing insecurity. I have presented this in a detailed way because I believe these insecurities may often be hidden from view in a wealthy nation like Canada, even if the pandemic may have increased the “visibility” of such inequities by revealing the

²⁶⁸ Thank you to Jacob Shelley, Maxwell Smith, Kerry O’Neill, and Nicole Fice for suggested areas of literature.

²⁶⁹ WHO, *supra* note 15 at ii.

²⁷⁰ *Ibid.*

severity of housing precarity,²⁷¹ and food insecurity.²⁷² Additionally, I believe Canada's failures to address income insecurity among the most marginalized members of our communities is a fundamentally bad thing. Poverty in a wealthy nation represents multiple failures of policy and law, and failures to uphold human rights in many cases. You might believe that a certain level of inequality is the "normal or necessary consequences of the efficiencies of a 'free market,'" but we should consider "how much [inequality] is inconsistent with equal citizenship?"²⁷³

Public health researchers in Canada approach this question by differentiating between the immutable determinants of health that may cause health *inequalities*, like genetics,²⁷⁴ and health *inequities*, being those inequalities that "can plausibly be avoided or ameliorated by collective action," and which "may be deemed unjust and inequitable."²⁷⁵ Just like the WHO Commission, many health care and public health actors are indeed seeking to "close the gap" on health inequities through a variety of structural, institutional, and local measures.²⁷⁶

In addition to ratifying treaties on the right to health,²⁷⁷ Canada has made international declarations on addressing health inequities, including signing the Rio Political Declaration on Social Determinants of Health in 2011.²⁷⁸ Documents like the Rio

²⁷¹ Allison Devereaux, "Rural Canada's 'visible homelessness' problem driven by pandemic, high cost of housing", (19 Oct 2021) online: *CBC News* <<https://www.cbc.ca/news/canada/london/homeless-rural-ontario-huron-county-1.6204515>> ("The pandemic revealed pre-existing problems and worsened others, such as rising rent, addictions, lack of diverse housing, heightened mental health demands and transportation barriers faced by rural communities. Then... urban buyers started fleeing the city in search of wide open spaces... This has contributed to the disappearance of rental stock, squeezing out vulnerable people who depend on cheaper rent.").

²⁷² Food Banks Canada, *supra* note 70 at 4.

²⁷³ Jennifer Nedelsky "Reconceiving Rights and Constitutionalism" (2008) 7 *J of Human Rights* 139 at 143 [Nedelsky]. In Canada, our markets are not completely "free" and there are significant monitoring systems, and further we do spend public money on both social welfare programs and market subsidization in many ways, so I would not characterize Canada as a completely "free market" nation.

²⁷⁴ Though there is a burgeoning area of research on the impact of marginalized social circumstances on one's health outcomes through the framework of "minority stress," and part of the mechanism of poorer health outcomes may relate to the impact of stress on genetic expression of phenotypes (i.e. observable genetic characteristics). This area of study is called "epigenetics." See e.g. A Flentjeet et al, "The relationship between minority stress and biological outcomes: A systematic review" (2020) 43 *J of Behavioral Medicine* 673 at 673 online: <<https://doi.org/10.1007/s10865-019-00120-6>>.

²⁷⁵ Pan-Canadian Health Inequalities Reporting Initiative, *Key health inequalities in Canada: A national portrait* (report) Catalogue no HP35-109/2018E-1-PDF (Ottawa: Public Health Agency of Canada, 2018) at 4 [PCHIRI].

²⁷⁶ WHO, *supra* note 15.

²⁷⁷ E.g. *ICESCR*, *supra* note 52, art 12.

²⁷⁸ World Health Organization – World Conference on Social Determinants of Health, "Rio Political Declaration on Social Determinants of Health" (21 Oct 2011) online: *WHO* <https://cdn.who.int/media/docs/default-source/documents/social-determinants-of-health/rio_political_declaration.pdf>.

Declaration use language similar to the “progressive realization” of the right to health,²⁷⁹ since they focus on “reducing” health inequalities through a series of active measures, monitored over time.²⁸⁰ One of the recommendations from the WHO Commission for improving health equity is to “[e]stablish and strengthen universal comprehensive social protection policies that support a level of income sufficient for healthy living for all,” and to “[p]rogressively increase the generosity of social protection systems,” and also ensure these programs are inclusive to “those in precarious work, including informal work and household or care work.”²⁸¹ Basic income, as I have discussed and defined it,²⁸² fits squarely within such recommendations.

In line with the WHO Commission recommendations, Canada recently commissioned the Pan-Canadian Health Inequalities Reporting Initiative (PCHIRI) to conduct a broad review of nationwide health outcomes and concluded that “significant health inequalities were observed among Indigenous peoples, sexual and racial minorities, immigrants, and people living with functional limitations,” and additionally found “a gradient of inequalities by socioeconomic status (income, education levels, employment, and occupation status).”²⁸³ Seven principles for action and “promising practices” came out of the PCHIRI findings.²⁸⁴ All seven principles hold some connection to the idea that adequate financial and social support programs form part of Canada’s health system. This is indication that – at least in some areas of federal government – the connection between health and social supports is apparent. The report also notes that Canada’s commitments on the right to health are directly connected to the social determinants of health, and that “equitable access to *opportunities* for health and well-being and their determinants is a

²⁷⁹ *Ibid* at 6; similar language is found in *ICESCR*, *supra* note 52, art 2.

²⁸⁰ See e.g. PCHIRI, *supra* note 275 at 1, 31, and 59.

²⁸¹ WHO, *supra* note 15 at 10.

²⁸² Recall that basic income should be universally available to anyone who fell below a certain low-income threshold, should be paid in cash, distributed regularly, paid out individually for citizens of all ages (or in some cases, jointly to couples, or given to families by payments made for children), and given unconditionally.

²⁸³ PCHIRI, *supra* note 275 at 8.

²⁸⁴ *Ibid* at 423-428 (Canada should 1. Adopt a human rights approach to action on the social determinants of health and health equity... 2. Intervene across the life course with evidence-informed policies and culturally safe health and social services... 3. Intervene on both proximal (downstream) and distal (upstream) determinants of health and health equity... 4. Deploy a combination of targeted interventions and universal policies/interventions... implemented at different levels of intensities depending on the varying needs of specific sub-groups (“proportionate universalism”). 5. Address both material contexts (living, working, and environmental conditions) and sociocultural processes of power, privilege, and exclusion (how social inequalities are maintained across the life course and across generations)... 6. Implement a “Health in All Policies” approach... 7. Carry out ongoing monitoring and evaluation.”).

matter of fairness and justice.”²⁸⁵ Indeed, having enough money to survive, let alone thrive, provides access to opportunity for health and well-being.

There is some discussion about cost and efficiency in social determinants of health literature,²⁸⁶ but caring about human rights and justice seems to be the primary motivation for taking a health equity approach to social welfare programs. Even where the literature discusses cost and efficiency, cost is suggested as an added bonus – justice happens to be cost effective.²⁸⁷

While there are specific mentions of posited human rights, there is no clear conception of justice fleshed out in the WHO Commission’s foundational vision of health equity, nor in the Canadian PCHIRI report. The lack of clarity on what justice means in this context is seen across determinants of health literature.²⁸⁸ It is not always clear what to do about health inequities, or even how to categorize differences that are immutable versus those that can be deemed unjust.²⁸⁹ This categorization is part of the “descriptive task” of measuring inequities, but moving from pointing out to problems and toward fixing them requires understanding “how inequities ought to be redressed.”²⁹⁰

It has been suggested that a clear framing of justice would help identify inequalities that should be the target of collective action, and also the “ideal” that we are seeking to achieve as we attempt to “move from health inequity toward health equity.”²⁹¹ In other words, the way we normatively frame and think about justice in the context of health inequity helps us understand *what* we should care about, *why* we should care, and *how* we should care. For example, there has been considerable discourse on how marginalized communities faced more “severe impacts” from COVID-19.²⁹² Some populations faced increased risks of mortality and severity from COVID-19 due to existing health issues that may have already been a result of disparities in the social determinants of health.²⁹³ Public

²⁸⁵ *Ibid* at 423-424, emphasis mine.

²⁸⁶ See e.g. WHO, *supra* note 15 at 10 and 22.

²⁸⁷ *Ibid* at 10 and 22.

²⁸⁸ Smith, *supra* note 20 at 174-175.

²⁸⁹ PCHIRI, *supra* note 275 at 4.

²⁹⁰ Smith, *supra* note 20 at 173.

²⁹¹ *Ibid*.

²⁹² See e.g. a research series supported by the Canadian Social Sciences and Humanities Research Council, “Perspectives on COVID-19: Impacts on disadvantaged populations”, (21 Dec 2021) online: *SSHRC* <https://www.sshrc-crsh.gc.ca/news_room-salle_de_presse/perspectives/covid-19/populations-eng.aspx>.

²⁹³ Finlay A. McAlister et al, “Informing COVID-19 vaccination priorities based on the prevalence of risk factors among adults in Canada” (2021) 192:17 *CMAJ* E617 at E620 <DOI: 10.1503/cmaj.210529>.

health researchers have advocated for prioritizing these communities for vaccination rollouts on the basis of improving health equity through a distributive approach to justice.²⁹⁴

Similarly, basic income philosophers often invoke different normative conceptions of justice as they advocate for or against basic income.²⁹⁵ Though the philosophical and ethical justifications for basic income have varied over time, much of today’s academic thought in the area is rooted in liberal-egalitarian approaches to distributive justice, thanks to the work of Philippe van Parijs.²⁹⁶ This gives scholars the opportunity to explore and “[revisit] existing conceptions of justice,” while advocating that basic income does, or does not, fit these theories.²⁹⁷ But theories of justice are not just for philosophers. Recall that the BC Expert Panel rendered its recommendations about basic income and BC’s social welfare programs on the basis of a specific framework of justice,²⁹⁸ and even the SCC is split on whether a legal vision of distributive justice rooted in the *Charter* imposes “an obligation on the state to correct socio-economic inequality in the community.”²⁹⁹ Justice frameworks have consequences for real lives.

As I will outline below, the distributive justice arguments from liberal-egalitarians may indeed justify launching and sustaining an income support program like basic income that would “maximin” – or maximize the minimum – of the “real freedom of some of the better-off at the cost of a negligible decrease in the real freedom of the worse-off.”³⁰⁰ However, if we are concerned not just with the dollar amount or justifying taxation in favour of social programs generally, then the distributive justice arguments for basic income might be too reductive. That is, distributive justice gets us through the door and helps justify the redistribution necessary for social spending, but might not tell us enough about how things should work within social institutions to promote social justice.

²⁹⁴ See e.g. Shainoor J. Ismail et al, “Key populations for early COVID-19 immunization: preliminary guidance for policy” (2020) 192:48 CMAJ E1620 at E1625 online: <DOI: 10.1503/cmaj.202353>.

²⁹⁵ See a systematic outline of justice-based justifications for basic income from the Stanford Basic Income Lab, where researchers identify liberal egalitarian, left libertarianism, right libertarianism, republicanism, Marxism, and feminism as areas of political theory with various arguments for basic income, in Stanford Basic Income Lab, “Can people with vastly different political beliefs support a Universal Basic Income?” (4 Jan 2021), online: *Stanford Basic Income Lab* <<https://basicincome.stanford.edu/news/lab-updates/can-people-with-vastly-different-political-beliefs-support-a-universal-basic-income-1/>>, and I discuss various arguments against basic income throughout this chapter.

²⁹⁶ Bidanature, *supra* note 139 at 482-483.

²⁹⁷ *Ibid* at 483.

²⁹⁸ BC Panel, *supra* note 127 at 35.

²⁹⁹ Moon, *supra* note 252 at 94-95.

³⁰⁰ Van Parijs Surfers, *supra* note 46 at 103-104, inspired by John Rawls.

I take the social determinants of health as a jumping off point here. “Social justice” within this context does not focus entirely on distributional issues. For example, the PCHIRI appealed to human rights and additionally to the ideals of “fairness *and* justice.”³⁰¹ The simple use of “and” here implies that fairness and justice are not coextensive in this context and that there are other dimensions to justice beyond “fair” distribution of resources. Additionally, by identifying inequities as “unjust” and then creating active strategies to address these inequities, justice becomes both a process and an ideal. We know that many of these inequities are shaped by social forces and relate to existing experiences of marginalization and oppression.³⁰² If we are seeking a process that achieves an ideal, then social justice in this context arguably means the recognition and the “elimination of institutionalized domination and oppression.”³⁰³ In the context of health inequities in an imperfect world, we must understand that distribution is only one dimension of justice.

Having established that the social determinants of health are rooted in multiple dimensions of social justice, I move on to a discussion of basic income and justice below. I first provide some history of social welfare justifications. I then outline the distributive arguments that are popular in basic income literature. I then complicate the distributive paradigm, especially by leveraging the feminist basic income literature.

2.2 Justice and Basic Income

Some scholars trace the concept of state-provided cash transfers to ancient Athens, where citizens were paid for jury duty and voting.³⁰⁴ These payments had a social and political justification, since they encouraged democratic participation and also provided expanded time for leisure and learning, though *citizens* meant only a very small, elite portion of the free male population.³⁰⁵ The remaining people of Athens – women, slaves, and non-citizen free men – were excluded.³⁰⁶

³⁰¹ PCHIRI, *supra* note 275 at 423-424, emphasis mine.

³⁰² *Ibid* at 8 (Since health inequalities are disproportionately seen among racialized people, queer people, those with disabilities, and those with lower incomes).

³⁰³ Iris Marion Young & Danielle S Allen, *Justice and the Politics of Difference*, 2011 ed (Princeton, NJ: Princeton University Press, 2011) at 15 [Young].

³⁰⁴ See e.g. Karl Widerquist, “Three Waves of Basic Income Support” in Malcolm Torry, ed, *Palgrave International Handbook of Basic Income*, series Exploring the Basic Income Guarantee (Switzerland: Palgrave MacMillan, 2019) 31 at 32; Guy Standing also interprets Athenian social supports in this way in “Why a Basic Income Is Necessary for a Right to Work” (2012) 7:2 *Basic Income Studies* 19 at 38.

³⁰⁵ *Ibid* at 27.

³⁰⁶ *Ibid* at 32.

In addition to the Athenian social and political justifications, anti-poverty justifications for targeted cash transfers have been argued for centuries. Phillipe Van Parijs and Yannick Vanderborght trace the seeds of the anti-poverty justifications for basic income³⁰⁷ from Thomas More in 1516,³⁰⁸ to John Locke in 1697,³⁰⁹ and later to Jeremy Bentham's vision of utilitarian justice.³¹⁰ However, a general shift in social support discourse began around the industrial revolution, when social insurance became a more popular idea than state-funded or charitable cash transfers for the poor. "Social insurance schemes were generally regarded as superior... because of their inclusive, 'universal' nature. A scheme that covers all workers, rich and poor, is more respectful of the dignity of the poor than one that identifies the poor and targets them."³¹¹ These schemes excluded those who could not or did not perform waged work, which had significant consequences for the elderly, those with disabilities, and many women who were relegated to the "private sphere" after the industrial revolution and thus excluded from social insurance.³¹²

Another area of justification for cash transfers comes from the enlightenment and the French revolution. Many thinkers and writers from this period couched social protections and calls for state-made payments not in the language of charity or morals, but in the language of rights.³¹³ The first comprehensive proposal containing most of the modern characteristics of basic income – i.e. a cash transfer system that is truly universal, unconditional, and individual – comes from Thomas Paine in 1795.³¹⁴ In his pamphlet

³⁰⁷ Van Parijs and Vanderborght, *supra* note 13 at 51-56.

³⁰⁸ *Ibid* at 51, citing a translated passage from Thomas More's *Utopia* in 1516.

³⁰⁹ John Locke, "An Essay on the Poor Law (1697)" in Mark Goldie, ed, *Locke: Political Essays* (Cambridge, UK: Cambridge University Press, 1997) 182 at 189 ("Everyone must have meat, drink, clothing, and firing. So much goes out of the stock of the kingdom, whether they work or no... if care were taken that every one of those [poor] by some labour... should earn but 1d per diem... this would... make England above a million of pounds richer." Meaning, Locke wanted to collapse other social programs into workfare programs. He also advocated for hard labour for anyone caught begging without a licence, and whippings and child labour for poor children, so we could call this a libertarian-esque proposal with some unfortunate elements).

³¹⁰ Jeremy Bentham "Essays on the Subject of the Poor Laws, Essay I and II" in Michael Quinn, ed, *Writings on the Poor Laws*, vol 1 (Oxford: Oxford University Press, 1796/2001) 3 at 10 (suggesting help for the poor would secure landowners' interests).

³¹¹ Van Parijs and Vanderborght, *supra* note 13 at 67; see also Guest, *supra* note 24 at 40 (discussing this shift in the Canadian context, though it came later because of the division of powers limiting federal involvement in welfare, and because Canada was largely a rural nation and localized supports were mostly provided by charities and municipalities).

³¹² Ruth Gavison, "Feminism and the Public/Private Distinction" (1992) 45:1 *Stan L Rev* 1 at 22 (The industrial revolution created a distinction between "the world of work, removed from the household, and the world of family, in which children were raised and the physical needs of members were met.").

³¹³ Van Parijs and Vanderborght, *supra* note 13 at 62-64.

³¹⁴ Thomas Paine, "Agrarian Justice (1797)", in J Cunliffe and G Erreygers (eds), *The origins of universal grants: an anthology of historical writings on basic capital and basic income: introduction* *The origins of universal grants: an anthology of historical writings on basic capital and basic income* (Palgrave Macmillan, UK: 2004) at 3.

Agrarian Justice, Paine called for one-time payments for every adult person (inclusive of women) as just compensation for the loss of the common right to use of lands due to the rise of private property ownership that resulted in increased poverty.³¹⁵ Paine proposed that everyone – rich and poor – would gain from this system, as payments to support the poor would in turn secure “general acceptance” of property rights for landowners.³¹⁶

In a lesser-known piece, Thomas Spence responded directly to Paine with his own cash transfer proposal.³¹⁷ His pamphlet *The Rights of Infants* is written as a dialogue between a woman and a member of the aristocracy.³¹⁸ Both Paine and Spence involve women in their philosophical justifications for cash transfer systems. For example, Paine presents women as having the same natural rights to the commons as men, but Spence goes further and directly takes a woman’s perspective and includes discussions of the gendered dimensions of care work. Spence uses motherhood as a reason to advocate for a peaceful transition to new society, where the finances of a parish would be managed by a committee of women.³¹⁹ Spence justifies this because men had thus-far failed at making any significant improvement to the advancement of individual rights and working conditions.³²⁰ The woman in Spence’s dialogue presents a plan for a new society “on behalf of her young,” demanding fair compensation for the loss of her family’s “natural inheritance.”³²¹ When pressed on whether women have the ability to plead their own rights, the woman in the dialogue responds: “Our sex were defenders of rights from the beginning. And though men... sink calmly into apathy... You shall find that we not only know our rights, but have spirit to assert them, to the downfall of you and all tyrants.”³²² By presenting in a woman’s voice, devising an egalitarian-style plan of distribution, and providing insight into women’s

³¹⁵ JE King & J Marangos “Two Arguments For Basic Income: Thomas Paine (1737-1809) And Thomas Spence (1750-1814)” (2006) *History of Economic Ideas* 55 at 58-60 [King].

³¹⁶ *Ibid* at 63 (Similar to Jeremy Bentham’s work. Paine’s proposal sounds like the ancestor of the Alaska Dividend Fund that pays citizens for a stake in mineral-extraction profits, see Permanent Fund Dividend, “About Us”, (2021) online: State of Alaska, Department of Revenue <<https://pfd.alaska.gov/Division-Info/about-us>>.

³¹⁷ *Ibid* at 65.

³¹⁸ Thomas Spence, *The rights of infants* (London: printed for the author, at No. 9, Oxford-Street, lately removed from No. 8, Little Turnstile, 1797) at 5-10 [Spence].

³¹⁹ *Ibid* at 8.

³²⁰ *Ibid* (“And whereas we have found our husbands... woefully negligent and deficient about their own rights, as well as those of their wives and infants, we women mean to take up the business [of remaking society] ourselves and let us see if any of our husbands dare hinder us... To labor for ourselves and infants we do not decline; but we are sick of laboring for an insatiable aristocracy.”).

³²¹ King, *supra* note 315 at 67.

³²² Spence, *supra* note 318 at 6.

concerns and place in society, we could call Spence's pamphlet the first feminist defence of basic income.

Spence's version of basic income was more radical than Paine's. Spence called for the abolishment of private property and the aristocracy, and a return to democratic, decentralized, communal ownership of land to support all members of a parish-based community, no matter what work they performed.³²³ He proposed that any surplus money would be divided equally amongst all community members.³²⁴ His scheme even included sick days, parental leave, bereavement, and sufficient support for children, the disabled, and the elderly.³²⁵ Spence justified his proposal through natural rights to life and to the commons, but also included other social, political, and economic justifications. Spence argued his proposal would promote increased democratic involvement, better education, and would foster a "robust spirit of independence among the citizens" by eliminating charitable programs funded by the aristocracy, thereby putting power and money in the hands of the people.³²⁶

From Athens to Spence, we can see the roots of many basic income justifications: encouraging democratic participation; promoting dignity through universal social security programs that are universal; advancing individual rights or compensating for the loss of communal land rights; poverty reduction; increased opportunity for education and self-improvement; and improved social conditions for marginalized people like women, children, and the elderly. For hundreds of years, advocates from across the political and ideological spectrum have produced a variety of proposals for basic income-like cash transfers. Many of these justifications have been carried forward. For example, on poverty reduction, Milton Friedman and Friedrich Hayek both proposed libertarian arguments for collapsing social programs into one central payment which would provide the basics for

³²³ *Ibid* at 8.

³²⁴ *Ibid* at 9.

³²⁵ *Ibid*.

³²⁶ King *supra* note 315 at 68.

survival while leaving markets unaffected.³²⁷ Many modern basic income proposals are explicitly premised on egalitarian justifications, like Spence's plan.³²⁸

A significant portion of basic income discourse since the 1990s considers John Rawls' liberal-egalitarian concept of "justice as fairness."³²⁹ I will not present a fully-formed Rawlsian political theory here, but for the sake of developing later arguments, I will roughly outline Rawls' principles of justice. These principles flow from a thought experiment Rawls proposed in *A Theory of Justice* where we are to think of a pre-social state of nature, in the "tradition of social contract theory."³³⁰ Rawls calls his state of nature the "original position." In the original position, a "veil of ignorance" is placed over people who are collectively bargaining to build a new society, which means bargainers do not know their personal characteristics or the circumstances of the new society and their place in it.³³¹ Further, every person in the original position is a "rational and mutually disinterested" party and should be conceived of as "not taking an interest in one another's interests."³³²

We are to generally assume that the original position provides for a perfectly fair starting place. In terms of language use, "justice as fairness" stems from the assumed fairness of the original position, but similarly to the health equity literature I discussed above, Rawls is clear that "justice" and "fairness" are not the same concept, no more than "poetry" and "metaphor" are the same.³³³ Justice thus contains elements of fairness, but justice is not fully explained or defined by fairness. Rawls suggests that his principles of justice are what the rational, self-interested actors in the Original Position would bargain

³²⁷ Friedman, *supra* note 136 at 191-194; Hayek, *supra* note 136 at 124-125; "While Hayek is opposed to assuring an absolute security, he does recognize a need to provide a minimum level of security for some people, those who are unable to make a living in the market": Jacob J Shelley, *A Normative Framework for Public Health Law* (LLM, University of Alberta, 2009) [unpublished] at 148-149 [Shelley].

³²⁸ By egalitarian here I mean political and philosophical theories that are concerned with equality for all people in some way: "there are several different types of equality, or ways in which people might be treated the same, or might relate as equals, that might be thought desirable. In modern democratic societies, the term 'egalitarian' is often used to refer to a position that favors, for any of a wide array of reasons, a greater degree of equality of income and wealth across persons than currently exists.": Richard Arneson, "Egalitarianism", (24 April 2013) online: *The Stanford Encyclopedia of Philosophy*, Edward N Zalta (ed) <<https://plato.stanford.edu/archives/sum2013/entries/egalitarianism/>>.

³²⁹ Liberal-egalitarian here is meant to describe a focus on equality of individual rights and liberties, see generally, John Rawls, *A Theory of Justice* 2nd ed (Harvard: Harvard University Press, 1971, 1999) [Rawls TJ]; this approach is taken in Van Parijs Surfers, *supra* note 46; see also Phillippe Van Parijs, *Real Freedom For All: What (If Anything) Can Justify Capitalism?* (Oxford: Oxford University Press, 1995).

³³⁰ *Ibid* at 12.

³³¹ *Ibid* at 12.

³³² *Ibid* at 13.

³³³ *Ibid* at 12-13.

for, and that these principles would then shape the institutions that form the “basic structure” of society.³³⁴ Rawls’ aim was to develop a framework to judge the justness of distribution within the basic institutions of society.³³⁵

From the Original Position of complete fairness – where no one cares about anyone else and no one knows what or who they are – Rawls proposes two principles of justice.³³⁶ These principles can be summarized as 1. the “*liberty principle*,” which provides equal political rights and freedoms like voting, and 2. the “*principle of fair equality of opportunity*,” which provides equal access to social positions for “people with the same talents.”³³⁷ If any distributive inequalities are to arise after these principles are both satisfied, then 2(b). – the “*difference principle*” – demands that these inequalities still “work for the greatest benefit of the worst-off.”³³⁸

In various writings, Rawls outlined the “primary goods” that are to be indexed and distributed according to these principles of justice. In *Justice as Fairness*, Rawls’ list of primary goods includes “The basic rights and liberties,” like “freedom of thought and liberty of conscience and the rest”; “Freedom of movement and free choice of occupation”; “Powers and prerogatives of offices and positions of authority and responsibility”; “Income and wealth”; and “The social bases of self-respect,” being “those aspects of basic institutions” that support citizens to have a “lively sense of their worth as persons and to be able to advance their ends with self-confidence.”³³⁹ Rawls generally prioritizes “rights and liberties over other social and economic goods.”³⁴⁰ In summary, a Rawlsian view of justice as fairness prioritizes distribution of fundamental rights and freedoms, but proposes

³³⁴ *Ibid* at 7 (“Basic structure” means the “major social institutions” that “distribute fundamental rights and duties and determine the division of advantages from social cooperation,” and “major social institutions” are the political, economic, and social structures of the society, like choosing capitalism over communism, or monarchy over democracy, for example).

³³⁵ *Ibid* at 9.

³³⁶ *Ibid* at 266 (1. “Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. And 2. Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged... and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.”).

³³⁷ Summarized in Van Parijs and Vanderborgh, *supra* note 13 at 117.

³³⁸ *Ibid* at 117.

³³⁹ John Rawls, *Justice as Fairness: A Restatement*, E. Kelly (ed) (Cambridge, MA: Harvard University Press, 2001) at 58-59.

³⁴⁰ Rawls TJ, *supra* note 329 at 63 (which “suggests an important division in the social system,” but he notes that “there are surely circumstances in which [these distinctions] fail”).

that in a just society, all primary social goods “are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone’s advantage.”³⁴¹

Notably, Rawls did not argue for leisure as a primary good until 1988,³⁴² and this is how basic income and Rawls collided. Rawls wrote that the hours outside of the working day could be considered leisure, and if people chose not to work, then this would affect the reciprocity dimension of just distribution, so “those who surf all day off Malibu must find a way to support themselves and would not be entitled to public funds.”³⁴³ In a Rawlsian view, the unconditionality of basic income then “goes against a widely accepted notion of justice: it is unfair for able-bodied people to live” – or “free-ride” – “off the labor of others.”³⁴⁴

Philippe Van Parijs famously responded to this idea, claiming “John Rawls is being unfair to the Malibu surfers,” and arguing that Rawls’ principles of justice allow for a high level of unconditional income, even for those who did not work.³⁴⁵ This is because the difference principle requires that “socioeconomic advantages... be maximised, that is, distributed in such a way that the least advantaged end up with at least as many such advantages as the least advantaged would end up with under any alternative arrangement.”³⁴⁶ Van Parijs argued that if the difference principle is coupled with the goal of true liberal pluralism – meaning that everyone should have the “real freedom” to choose and pursue their personal and diverse conception of the “good life, whatever that is” (subject to some restraints) – then there is a strong argument for providing a minimum unconditional income that is “wealth distributing, power-conferring,” and “self-respect-preserving” as the means to provide access “real freedom.”³⁴⁷ Additionally, Rawls’ difference principle presents reciprocity as “a principle of mutual benefit” that focuses on social cooperation.³⁴⁸ In Van Parijs’ view, this reciprocity criterion “requires that the terms of cooperation should be reasonable for all to accept as free and equal persons, rather than

³⁴¹ *Ibid* at 62.

³⁴² John Rawls “The Priority of Right and Ideas of the Good” (1988) 17:4 *Philosophy & Public Affairs* 251 at 257 fn 7 [Rawls Priority].

³⁴³ *Ibid*. Presumably, Rawls was unaware that for many caregivers, the hours outside of the working day are not their own. See generally, the notion of the “second shift” discussed in Arlie Hochschild and Anne Machung, *The second shift: Working families and the revolution at home* (Penguin Books: New York, 2012).

³⁴⁴ Van Parijs and Vanderborght, *supra* note 13 at 99, citing John Elster.

³⁴⁵ Van Parijs Surfers, *supra* note 46 at 102.

³⁴⁶ *Ibid* at 104.

³⁴⁷ *Ibid* at 103.

³⁴⁸ Rawls TJ, *supra* note 329 at 102.

just accepted under pressure or because of manipulation.”³⁴⁹ This suggests that reciprocal social contribution, like work, should be uncoerced. Like Rawls, Van Parijs’ presents a social contract understanding of cooperation, since parties would require “real freedom” – provided through access to adequate resources – in order to freely enter into “cooperative arrangements for mutual benefit” without coercion.³⁵⁰ Put differently, to decide to distribute surplus money from a community’s use of the land as in Spence’s plan, community members would require access to enough resources to be able to voice their opinions and participate in negotiating this kind of arrangement. This becomes a chicken-or-egg sort of discussion: is appropriate distribution required before cooperation, or cooperation before distribution?

I am giving a very general overview of Rawls and Van Parijs here because the story of justice as fairness has some plot holes. First, Rawls was working in the tradition of “ideal theory,” which focuses on considering “the nature and aims of a perfectly just society,” which Rawls argues is the best way to approach the project of defining principles of justice.³⁵¹ In contrast, Rawls cites existing “unjust” circumstances like war or criminal punishment, or how to deal with “compensatory injustice,” and “weighing one form of institutional injustice against another” as the work of “nonideal theory.”³⁵² Describing “unjust” circumstances like this presents us with the same descriptive and normative issues as the determinants of health literature. One might ask, how does Rawls know how to identify and distinguish what “unjust circumstances” are and thus where his theory might not provide adequate insight? In the same way, how do we know what unjust health inequities are without defining justice?

The answers to these questions suggest an element of human intuition – or perhaps artistic licence – in defining justice. By presenting existing injustices as outside the scope of his theoretical work, Rawls is open about the difficulty of converting the concepts that flow from ideal theory into the brutal reality of a nonideal world. Such a conversion would require us to consider “whether the ideal principles of justice need to be adapted when we are theorizing justice in nonideal circumstances, or how to weight the different principles

³⁴⁹ Van Parijs and Vanderborght, *supra* note 13 at 279, citing Rawls (also noting that the justice argument against basic income on the basis of reciprocity is actually narrower than those based on “free riding”).

³⁵⁰ *Ibid* at 103.

³⁵¹ Rawls TJ, *supra* note 329 at 8-9.

³⁵² *Ibid* at 8.

of justice.”³⁵³ Perhaps Rawls’ formulation is inherently problematic for the real world and for discussions about basic income because there is no such place as the Original Position, and real life never resembles a pre-social state of nature. However, grounding elements of ideal theory in non-ideal reality does “enable us to make comparisons between different social states and evaluate which one is more just than the other... and second, to guide our actions in order to move closer towards the ideals of society.”³⁵⁴ This reality-grounded approach is how much basic income discourse proceeds, and how I generally proceed here. I therefore see the ideal-versus-nonideal issue as a surmountable methodological issue.

There is another problem with justice as fairness that I find to be insurmountable, however, and that is the “indexing problem.”³⁵⁵ The incredible variety of primary goods that must be distributed justly in a Rawlsian model are difficult, and perhaps impossible, to quantify or index. Wealth, property, and jobs might be easily measured, but how do you quantify and distribute a right to free expression, or the social basis of self-respect? Also, these primary goods will not be equally weighted amongst all people, since people have widely differing approaches to the good life and have differing needs.³⁵⁶

Further issues emerge. A Rawlsian account of ideal justice ignores the human realities of disability, childhood, old age, and the various ways people become dependent on one another.³⁵⁷ Some have suggested including dependency within a liberal-egalitarian theory of justice. For example, Eva Feder Kittay has proposed adding a Marxist-inspired “care principle” to Rawlsian justice: “To each according to his or her need for care, from each according to his or her capacity for care, and such support from social institutions as

³⁵³ Ingrid Robeyns “Ideal Theory in Theory and Practice” (2008) 34:3 *Social Theory and Practice* 341 at 347.

³⁵⁴ *Ibid.*

³⁵⁵ Discussed in Richard Arneson “Primary Goods Reconsidered” (1990) 24:3 *Noûs* 429 at 429.

³⁵⁶ See the “capability approach” to this question described in Ingrid Robeyns, “The Capability Approach”, (Winter 2016) online: *The Stanford Encyclopedia of Philosophy*, Edward N Zalta (ed) <https://plato.stanford.edu/archives/win2016/entries/capability-approach/> (Martha Nussbaum and Amartya Sen, among others, have focused on the diversity of human needs using a “capability approach” which is a conceptual framework that “prioritizes... peoples’ beings and doings and their opportunities to realize those beings and doings (such as their genuine opportunities to be educated, their ability to move around or to enjoy supportive social relationships). This stands in contrast to other accounts of well-being, which focus exclusively on subjective categories (such as happiness) or on the material means to well-being (such as resources like income or wealth).” The capabilities approach was in part a reaction to the “inflexibility” of Rawls “primary goods” categories, and how such categories inevitably carry varying weight and importance for individual people, and considering this in the real-world involves some measure of understanding how peoples’ abilities might be “converted” into capabilities in the real world.)

³⁵⁷ Ruth Abbey “Biography of a Bibliography: Three Decades of Feminist Response to Rawls” in R Abbey (ed), *Feminist Interpretations of John Rawls*, (University Park: Penn State University Press, 2013) at 12.

to make available resources and opportunities to those providing care.”³⁵⁸ This additional principle comes with its own measuring issues, however. How do we index needs and distribute care? Additionally, not all care is equal in quality, so how do we qualify what counts as “good care?”³⁵⁹

Distributive arguments from liberal-egalitarians may indeed justify launching and sustaining a society that provides social redistribution through taxation. I have noted that some libertarians justify redistribution on the basis of poverty-reduction. Other distributive approaches like “sufficientarianism,” would, for example, label poverty and income inequality as unjust because such inequalities “leave some individuals under a threshold of sufficiency.”³⁶⁰ Even at this point, we might say that a targeted basic income for poverty reduction is fully justified from a variety of different perspectives. However, in this thesis, I am concerned with considering the other justifications for basic income like enhancing dignity, reducing oppression, and improving the lives of marginalized people, not just with providing for the barest necessities. Distributive approaches do not tell us enough about relations within basic income institutions that would focus on these anti-oppressive aims – especially for women and gender diverse people – making distributive approaches too reductive. My arguments on this point are detailed in the following section where I “trouble” the distributive paradigm and the norms and binaries that seem inherent in basic income discourse, especially as they relate to care.³⁶¹ I then introduce care theory, which I argue provides more useful theoretical frameworks for thinking about basic income as a form of care-supporting and also care-providing policy.

2.2.1 Beyond Distribution

In the basic income context when we are literally discussing a program that distributes cash, it may seem unnecessary to think beyond distributive paradigms. However, even if cash in basic income programs serves as the means to access other basic

³⁵⁸ Eva Kittay, *Love's Labour: Essays on Women, Equality and Dependency*, (New York: Routledge, 1999) at 114 [Kittay Love].

³⁵⁹ This is an ongoing problem in care theory as well, which I discuss below – how do we differentiate between “good care” and “mere care,” especially when the concept of caring can be used for destructive aims, like justifying colonialism? This is discussed in U Narayan “Colonialism and its others: Considerations on rights and care discourses” (1995) 10 *Hypatia* 133 at 134-135 [Narayan].

³⁶⁰ Gheaus Against, *supra* note 265 at 89.

³⁶¹ Inspired by Queer Theory methods, discussed in Francisco Valdes, “Queering Sexual Orientation: A Call for Theory as Praxis” in *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, MA Fineman, JE Jackson, & AP Romero (eds) (2nd ed) 21 (NY: Routledge, 2016).

goods like safe housing or healthy food, the justifications go beyond distributing the minimum for survival. There is evidence that traditional, targeted social support programs are stigmatizing,³⁶² and many proponents cite basic income as a dignity-enhancing program that promotes greater social inclusion compared to traditional programs.³⁶³ Some of the literature also invokes human rights justifications.³⁶⁴ Additionally, the data on improved social solidarity and community well-being from Mincome and the Ontario Basic Income Pilot provides evidence for other non-distributive effects of basic income.³⁶⁵ Dignity, power, social inclusion, solidarity, and human rights are not easily indexed and distributed commodities. These are words used to describe relational experiences in society.

The feminist arguments for basic income also do not map onto distributive justice paradigms easily. For example, one of the most “uncontroversial” feminist arguments for basic income is that it would improve opportunities for exiting abusive relationships and increase women’s voice and power within the family unit.³⁶⁶ Basic income does not cause power to be neatly distributed into shares and then rearranged, but rather, having sufficient, independent financial security affects relational interactions within the family.³⁶⁷

Another major area of feminist basic income literature focuses on compensating both paid and unpaid care work through either basic income or a “caregiver’s wage,” and the benefits and drawbacks of these solutions.³⁶⁸ This literature is not solely focused on

³⁶² See e.g. Pineau, *supra* note 81 at 107-108; Smith-Carrier Feminist, *supra* note 108 at 499-500.

³⁶³ Forget Emergency, *supra* note 18 at 54-57; Calnitsky, *supra* note 130 at 27 and 64; Hamilton, *supra* note 130 at 593-594.

³⁶⁴ See *supra* note 47, generally.

³⁶⁵ Forget Emergency, *supra* note 18 at 54-57; Calnitsky, *supra* note 130 at 27 and 64; Hamilton, *supra* note 130 at 593-594.

³⁶⁶ Bidadanure, *supra* note 139 at 492.

³⁶⁷ See Gonalons-Pons, *supra* note 219 at 1 and 21-22. Mincome affected relationships by impacting the income and dynamics of patriarchal control within families, though notably there was no significant increase in family breakdown, however, this data is showing its age since households have become much more egalitarian since the mid-1970s. We do not have a complete empirical picture about the mechanisms and effects of cash transfer programs on gender equality within families, and more qualitative work is likely needed. Meta-analysis of other cash transfer programs show improvements in income inequality, but ambiguous results in other areas like care responsibilities or well-being. Even so, the “the symbolic or non-material impact [of basic income] should be recognized: economic autonomy, psychological valuation and feelings of control are of value for their own sake, irrespective of material welfare. Additionally, the individual nature of a BIG is, on its own, a powerful statement about women (and children) as citizens in their own right, not as dependents within a household.” Sara Cantillon and Caitlin McLean “Basic Income Guarantee: The Gender Impact within Households” (2016) 43:3 *The J of Sociology & Social Welfare* 97 online: <<https://scholarworks.wmich.edu/jssw/vol43/iss3/7>> at 117.

³⁶⁸ Robeyns, *supra* note 266 at 95 and 103 (Robeyns makes the argument that basic income alone won’t improve the position of women in society, and it must be nested in a system of other social welfare policies); see also Kathi Weeks “Anti/Postwork Feminist Politics and A Case for Basic Income” (2020) 18:2 *tripleC: Communication, Capitalism & Critique* 575 at 581-583 [Weeks] (Weeks is inspired by Marxist feminists and is concerned with allowing people to work less in the struggle against productivity as a moral virtue under capitalism).

distributional concerns. For example, Anca Gheaus has written in the past that basic income would have the same outcome as a state-provided “caregiver’s wage,” and would encourage women to remain at home caring for dependent children or other family members, which would increase gender disparity and undermine the advancements of women.³⁶⁹ In other words, basic income would “reinforce statistical discrimination” between men and women in the workplace by bolstering “sexist stereotypes that portray women as less well-performing employees, and thus further undermine equality of opportunities between women and men for positions of advantage.”³⁷⁰ I will call this concern the “*careotype argument*.”

Gheaus has more recently softened on this position and argued that the careotype argument “doesn’t generate a powerful reason against care-supporting policies – not in general, and even less so in unjustly unequal societies.”³⁷¹ This is because care-supporting policies would mostly benefit the least-advantaged women in society, and even if basic income reinforced some gender stereotypes associated with care, this concern would not significantly impact women in higher-paying, higher-status positions. Even if women in higher-status positions take issue with the gendered association with care, the careotype argument is grounded in the “expressive injustice” of such a policy, and not strictly distributive justice.³⁷² Indeed, we should be aiming to design policies that express the ideal of equality between people of all genders, and a policy aimed directly at supporting care might run contrary to these expressive goals by reinforcing that women are somehow less valuable workers, but Gheaus argues that this is not enough to defeat the other equality aims of supporting care.³⁷³ Additionally, care-supporting policies might serve to express and signal to society that care work is vitally important work, showing other dimensions to the expressive justice concerns for care-supporting policies as well.³⁷⁴

³⁶⁹ Anca Gheaus “Basic Income, Gender Justice and the Costs of Gender-Symmetrical Lifestyles” (2008) 3:3 Basic Income Studies 1 at 1.

³⁷⁰ Gheaus Against, *supra* note 265 at 88.

³⁷¹ *Ibid* at 89.

³⁷² *Ibid*, likely meaning something similar to the expressivist approach to law, see Elizabeth Anderson and Richard Pildes “Expressive Theories of Law: A General Restatement” (2000) 148 U Pa L Rev 1503 at 1504 (“At the most general level, expressive theories tell actors — whether individuals, associations, or the State — to act in ways that express appropriate attitudes toward various substantive values.”).

³⁷³ *Ibid* at 90-91.

³⁷⁴ Baker, *supra* note 267 at 1.

Using a personal example to illustrate Gheaus' recent point: as a woman seeking to make a career in law, I am sensitive to the concerns that I might be "careotyped" and passed over for a position because I represent a risky hire. However, I am aware of the significant privilege I have in being considered for a position in law. Like Gheaus, I do not see a compelling reason to double-down on my own privilege through the careotype argument. I am much more compelled by the social and expressive justice benefits that care-supporting policies might provide, and I fully support providing adequate pay and public resources to caregivers. I also sense a strong "White feminism" undercurrent beneath the careotype argument,³⁷⁵ since this argument privileges certain women – mostly White, cisgender women – as the centre of the feminist project.³⁷⁶ This is counterproductive and perhaps destructive, because the feminist project is, "at its best, is a movement that works to liberate all people who have been economically, socially and culturally marginalized by an ideological system that has been designed for them to fail."³⁷⁷

The careotype argument can be considered part of the "*universal breadwinner*" model for gender justice,³⁷⁸ where women are encouraged to fit into the "hierarchical, competitive, and emotionally cold" male world of work in order to succeed in the fight for gender equality.³⁷⁹ The universal breadwinner model also sees care as a commodity, where

³⁷⁵ Gheaus seems to label what others call "White feminism" as "boardroom feminism" and presents this approach as a conflict of interest against poor and marginalized women. She only mentions race once, but argues that equality of opportunity is not just based on gender alone, but affected by other identities: "existing societies are far from giving the same nurturing to all children; not only gender but also class, race and many other factors contribute to unequal nurturing": Gheaus *Against*, *supra* note 265 at 106.

³⁷⁶ Dreama G. Moon & Michelle A. Holling "White supremacy in heels": (white) feminism, white supremacy, and discursive violence" (2020) 17:2 *Communication and Critical/Cultural Studies* 253 at 254
DOI: 10.1080/14791420.2020.1770819 (Centring White women's experiences has been a consistent critique of "mainstream" feminism since the suffrage movement: "the centering of women's experience becomes a double-edged sword; that is, endeavoring to advocate for all women yet, operating from a singular identity or positionality that consequently jeopardizes the feminist project.").

³⁷⁷ Reni Eddo-Lodge, *Why I'm No Longer Talking to White People About Race* (London: Bloomsbury Publishing, 2017) at 181 (Full quote: "I fear that, although white feminism is palatable to those in power, when it has won, things will look very much the same. Injustice will thrive, but there will be more women in charge of it. Feminism is not about equality, and certainly not about silently slipping into a world of work created by and for men. Feminism, at its best, is a movement that works to liberate all people who have been economically, socially and culturally marginalized by an ideological system that has been designed for them to fail."); This is perhaps controversial, especially if feminism moves toward something that might be more "humanist" and less gender-specific, but I do not share these concerns. See e.g. an argument on losing the "subjectivity" of women in feminist legal scholarship in M Drakopoulou "The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship" (2000) 8 *Feminist Legal Studies* 199 at 220 online: <<https://doi.org/10.1023/A:1009266226936>>.

³⁷⁸ Zelleke, *supra* note 132 at 30.

³⁷⁹ See e.g. Barbara Bergmann "The Only Ticket to Equality: Total Androgyny, Male Style" (1998) 9:75 *J of Contemporary Legal Issues* 76 at 82-83 (Bergmann writes that "high commodification" of care work is increasingly the approach to care in society as gendered care roles become less rigid, but this would not go a far enough way to bring

care is “solved,” through “increased availability of child and elder care, housecleaning and meal preparation services” that are paid for by each breadwinner, with perhaps some state subsidies.³⁸⁰ I find this view to be incredibly alarming. In addition to erasing the possibility of men being cooperative, loving, emotionally warm human beings, this model “uncritically” accepts the workplace as the primary site of “individual empowerment and flourishing,” which reinforces the “separate spheres” of public versus private life that feminists have long fought against.³⁸¹ Commodifying care and domestic work also causes other issues that should be the concern of the feminist project. Care work that supports breadwinners is often precarious and undervalued, and paid domestic work is also largely performed by migrant women with different ethnic, racial, or social backgrounds to their employers, making these workers highly vulnerable, often with few legal protections.³⁸²

Those on the side of care-supporting policies (and against the careotype argument) sometimes advocate for the “*caregiver parity*” model of gender justice, which would provide some minimum protections and a state-funded caregiver’s wage conditional on providing care to family members.³⁸³ There is some evidence that cash transfers like this can address poverty and exploitation in some ways, though they do moderately retrench gender norms related to care, however, when unconditional cash transfer programs like basic income are used, the effect on the retrenchment of norms is less pronounced.³⁸⁴ This suggests that a caregiver’s wage has some effect on improving living conditions, but it would not go far enough to address the gendered distribution of care labour or the devaluing of care itself, socially and financially.³⁸⁵ Two interesting points flow from this idea – first, unconditionality as a feature of basic income helps soften the effects of being

equality between men and women unless women play the “male game” and compete in the “highly competitive” male world, “at least until a gentler and warmer way of human interactions evolves and becomes standard through [women’s] new influence.”)

³⁸⁰ Zelleke, *supra* note 132 at 31.

³⁸¹ *Ibid.*

³⁸² See an analysis of the vulnerability of domestic care workers and how they might be supported by basic income, and how basic income might also support everyone by providing opportunities to step away from work to devote more time to caring in Vollenweider, *supra* note 222 at 36-38.

³⁸³ See N Fraser, *Justice interruptus: Critical reflections on the ‘postsocialist’ condition* (London, Routledge, 1997) (Fraser suggests that the gay and lesbian liberation movement has had a significant and beneficial impact on challenging the “male breadwinner/female homemaker model,” and that feminists have alternately argued for the “Universal Breadwinner” model or the “Caregiver Parity” model, but that breaking down the gendered barriers of care and waged labour through a new “Universal Caregiver” model” should be the way forward for gender justice) at 55-62 [Fraser].

³⁸⁴ K Levasseur, S Paterson, and N Carvalho Moreira “Conditional and Unconditional Cash Transfers: Implications for Gender” (2018) 13:1 Basic Income Studies 20180005 at 8.

³⁸⁵ As Zelleke argues, *supra* note 132 at 32.

careotyped, and second, perhaps the caregiver parity model does not go far enough to address the other dimensions of justice that I have implicated here – such as the expressive importance of valuing care work – and further, this model does not provide many uncoerced life opportunities outside of the care-versus-work paradigm. Nancy Fraser proposes that an alternative to the “*universal breadwinner*” or “*caregiver parity*” models would be the “*universal caregiver*” model, where everyone participates in care work, which would promote true “gender equity by effectively dismantling the gendered opposition between breadwinning and caregiving.”³⁸⁶ Almaz Zelleke has further argued that under the “*universal caregiver*” model, a basic income would play a “crucial role” in broadly supporting everyone – not just women – to build a society that focuses on care, rather than androcentric models of wage labour and care work being separate spheres.³⁸⁷ Zelleke suggests that basic income would provide the minimum resources and security for those who provide care, but also by giving people opportunities “to step away from the responsibilities of care, to choose and pursue their own ends.”³⁸⁸

Inspired by Marxist feminists, Kathi Weeks also presents an argument for stepping-away in her “antiproductivist” suggestion that basic income would allow people to do *less care and less work*, not more, and thus support a multiplicity of life paths.³⁸⁹ Weeks argues that basic income would provide protections, though not full freedom, in the “struggle for ‘work/family balance’.”³⁹⁰ However, Weeks argues – and I agree – that basic income should not collapse other forms of social support like minimum working standards, health care, and education, nor should basic income be a substitute for “publicly funded, high-waged, high-quality childcare services.”³⁹¹

³⁸⁶ Fraser, *supra* note 383 at 61.

³⁸⁷ Zelleke, *supra* note 132 at 28.

³⁸⁸ *Ibid* at 33-34.

³⁸⁹ Weeks, *supra* note 368 at 581-581 and 589 (Weeks demand for basic income is influenced by the “Wages for Housework” movement of the 1970s).

³⁹⁰ *Ibid* at 588 (Weeks notes that the “work/family balance” has been called the “twin institutional pillars of heteropatriarchal capitalism” by Marxist feminists. Weeks also argues that basic income would support more genuine reproductive autonomy because “[d]eciding not to have children because one does not have the money or time to raise them does not count as reproductive choice,” nor is “deciding either to have or not to have children in a situation of dependence within an isolated heteropatriarchal family... a real choice”).

³⁹¹ *Ibid* at 589. To this I add that basic income should also not collapse or affect the quality of long-term care services for those who need them.

I am mostly in agreement with Zelleke and Weeks. I agree with the concern about working *less*,³⁹² because I see care-based social institutions as a form of social solidarity that would support people to step away from work when they need to. These institutions can act to improve life opportunities and increase dignity, especially when such arrangements are structurally designed to provide adequate and quality care. However, though Zelleke and Weeks are not explicit about their definitions of care, they seem limited to hands-on care provision. This point on the limited approach to care brings me to my final effort to trouble the distributive paradigm. Basic income presents an opportunity to challenge the care-versus-work binary. We cannot just focus on care work within the family versus work outside the home. This is a thin representation of modern life, especially for people who do not fit a heteronormative family model, or maybe even a “homonormative” model.³⁹³ If we consider the unpaid care work that extends beyond blood relations or familial ties, especially for gender diverse or queer people who care for friends and chosen family,³⁹⁴ we are forced to challenge family-centric care policies and expand our horizons. Also, supporting other forms of social reproduction – like making art, community organizing, caring for the Earth and contributing to climate resilience measures, or volunteering – and valuing the social and cultural benefits derived from these activities speaks to even further non-distributional dimensions to basic income.³⁹⁵ Perhaps many of these diverse life experiences would be well-supported by a universal caregiver model that extends beyond the family unit, but nonetheless these complicating dimensions

³⁹² Many care theorists suggest working less would be required to focus more on care and in her upcoming book, Jennifer Nedlesky suggests a “part time for all” model premised on the idea that no one should do paid work for more than 30 hours per week, and that 22 hours per week should be devoted to forms of hands-on care, whether that care is for other people, for animals, or for the Earth, see Jennifer Nedelsky “My Covid Pause” (2020) 25:4 *Law and Learning in the Time of Pandemic – A Collage* 84 at 85 online: <<https://www.lex-electronica.org/en/s/2192>>.

³⁹³ Eliza Garwood “Reproducing the Homonormative Family: Neoliberalism, Queer Theory and Same-sex Reproductive Law” (2016) 17:2 *J of Intl Women’s Studies* 5 at 6 online: <https://vc.bridgew.edu/jiws/vol17/iss2/2> (Homonormativity provides limited representation of gay-couple-led families. Even “same-sex reproductive laws... depend on neoliberal discourses of the ‘good’ family, promoting marriage, monogamy, and personal responsibility, allowing only those who fulfil normative ideals to access reproductive rights.”)

³⁹⁴ N Jackson Levin et al, “‘We Just Take Care of Each Other’: Navigating ‘Chosen Family’ in the Context of Health, Illness, and the Mutual Provision of Care amongst Queer and Transgender Young Adults” (2020) 17:19 *Intl J of Environmental Research and Public Health* 7346 at 1 and 16-18 [Jackson Levin]; NJ Knauer “LGBT Older Adults, Chosen Family, and Caregiving” (2016) 31:2 *J of L and Religion* 150 at 150 [Knauer]; Amy Marvin “Groundwork for transfeminist care ethics: Sara Ruddick, trans children, and solidarity in dependency” (2019) 34 *Hypatia* 101 at 110-112 [Marvin].

³⁹⁵ Hoskyns, *supra* note 236 at 300 (Recall that social reproduction includes any of the following “biological reproduction; unpaid production in the home (both goods and services); social provisioning (by this we mean voluntary work directed at meeting needs in the community); the reproduction of culture and ideology; and the provision of sexual, emotional and affective services (such as are required to maintain family and intimate relationships).”).

of the unconditionality of basic income challenge and stretch distributive approaches. At this point, you may object to the massive cost of a basic income that would support people who perform other forms of social reproduction, but recall that basic income in Canada would still be an income-targeted program for those below the MBM-based poverty line, and net-costed proposals vary between \$23 and just \$2 billion annually.³⁹⁶

Ultimately, the dimensions of basic income that many feminists discuss are not wholly distributive and thinking about care implicates relational and social concerns. You could argue here that I am confusing challenges to distributive paradigms with descriptions of various conceptions of the good or a good life. Such an argument flows from once again being trapped by fusing fair distribution with justice. We must still avoid merging “questions of justice” with “questions of the good life,” though talking or writing about justice is perhaps about expressive power, since “[a]ppeals to justice still have the power to awaken a moral imagination and motivate people to look at their society critically, and ask how it can be made more liberating and enabling.”³⁹⁷

Because of the institutional, social, and relational dimensions of basic income that I have discussed, I follow Iris Marion Young’s lead here and I argue that the best way to think about justice and basic income is to see social justice as a relational concept, rather than a strictly distributive problem. This does not mean I discuss or propose a model that entirely replaces the usefulness of a distributive paradigm, but rather I present frameworks drawn from the ethics of care that may help us think about both distributive and non-distributive aspects of basic income, especially the social and institutional contexts of distribution.³⁹⁸ For example, when discussing rights, “[o]ne may talk about having a right to a distributive share of material things, resources, or income. But in such cases it is the good that is distributed, not the right.”³⁹⁹ Conceiving of rights as a pie, where some people get bigger or smaller pieces, or perhaps none at all, is not instructive. “Right are relationships, not things; they are institutionally defined rules specifying what people can

³⁹⁶ Forget Emergency, *supra* note 18 at 201; Pasma, *supra* note 142 at viii.

³⁹⁷ Young, *supra* note 303 at 35-36 (“... Nevertheless, questions of justice do not merge with questions of the good life. The liberal commitment to individual freedom, and the consequent plurality of definitions of the good must be preserved in any reenlarged conception of justice.”).

³⁹⁸ *Ibid* at 33, 15, and 25 (Young’s central thesis in *Justice and the Politics of Difference* is that social justice is “wider than distributive issues,” and invoking social justice implies a concern with the “elimination of institutionalized domination and oppression.”).

³⁹⁹ *Ibid* at 25.

do in relation to one another.”⁴⁰⁰ In the basic income context, this relational framing of social justice aligns with justifications for basic income that are not strictly distributive.

Instead, we should conceive of justice as a highly democratic and relational concept, which focuses on “participation in deliberation and decisionmaking,” where “justice names the perspectives, principles, and procedures for evaluating institutional norms and rules.”⁴⁰¹ We do not have to go back to some pre-social time to think about injustice, but instead look to voices that are marginalized by social and institutional norms.

Jennifer Nedelsky has endorsed Young’s critique of the distributional paradigm, but instead of giving up on the concept of rights or seeing rights as too atomistic, she points out that law often sees rights through a relational framing.⁴⁰² This is especially because rights “must be defined before they can be protected,” and the process of defining rights in both a political and judicial sense involves a process of democratic and collective decision-making “about the implementation of core values.”⁴⁰³ “Constitutional rights, in particular, are part of a *dialogue of democratic accountability*.”⁴⁰⁴ Nedelsky calls for a “realignment of liberal tradition” to be more explicit about the democratic and collective components of rights when we analyze law, and “[make] clear that what rights in fact do and have always done is construct relationships – of power, of responsibility, of trust, of obligation.”⁴⁰⁵ I wholly agree with Nedelsky on this point. Indeed, the discipline of law is familiar with analyzing and defining relationships. Nedelsky provides these examples: “property rights are not primarily about things, but about people’s relation to each other as they affect and are affected by things,” and tort law even asks “‘who is my neighbour’ to determine to whom people owe an obligation to take reasonable care.”⁴⁰⁶ In contract law, “judges must make choices about the patterns of responsibility and trust the law will foster in commercial relationships,” and consider imbalances of voice and bargaining power.⁴⁰⁷

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid* at 33-34, relying on the work of Agnes Heller (“For a norm to be just, everyone who follows it must in principle have an effective voice in its consideration and be able to agree to it without coercion. For a social condition to be just, it must enable all to meet their needs and exercise their freedom; thus justice requires that all be able to express their needs.”)

⁴⁰² Nedelsky, *supra* note 273 at 154.

⁴⁰³ *Ibid* at 139.

⁴⁰⁴ *Ibid*, emphasis in original.

⁴⁰⁵ *Ibid* at 149.

⁴⁰⁶ *Ibid* at 142.

⁴⁰⁷ *Ibid.*

This relational approach to rights, democracy, and law is particularly important for our purposes here. If we conceive of basic income as simply an optional social welfare policy, such a program might be vulnerable to political whims, much like the OBIP or Mincome pilots. *Programs* may come and go, but perhaps *rights* have more staying power. I argue that we must design basic income within a rights-based framing – either as a newly articulated right, or within existing frameworks – for these reasons. Legal analysis of this rights-based basic income should be concerned with the articulation and content of rights relating to basic income, but it is necessary to have a more relational understanding of social justice and human rights in order to support such a framework, rather than a purely individualistic approach. This is because of both the individual and collective benefits for Canadian society that would (very likely) flow from basic income.⁴⁰⁸ Nedelsky proposes a methodology for relational analysis in law,⁴⁰⁹ but I find that a relational analysis is a tacit element of “looking to the bottom” in feminist critical legal methods, because looking to the bottom requires an understanding of the context and structure of institutional and social relations to analyze how certain groups or people might be marginalized, disadvantaged, or excluded by a particular law or set of laws.⁴¹⁰ In Chapter 3, part of my analysis then involves viewing how social and state relations are constructed within and through social welfare laws and policies. First though, I wish to take the relational concerns and considerations further by proposing a care-based framework for basic income in Canada.

2.3 Care Theory and Justice

In this section, I will briefly describe the origins and development of care theory. I will then describe how care fits within a relational view of social welfare law. Finally, I will propose a framework for theorizing the elements of care as they relate to basic income in the Canadian context. Care theory offers a relational approach to political theory that

⁴⁰⁸ On the beneficial individual impacts of basic income and basic-income-like cash transfers, see Hasdell, *supra* note 207 (increased health and educational attainment); Forget Poverty, *supra* note 21 (improved mental and physical health, educational attainment); McDowell, *supra* note 72 (improved quality of life measures); Ferdosi et al, *supra* note 194; Gonalons-Pons, *supra* note 219 (decreased family stress and greater autonomy for women within the family unit). On the beneficial community effects, see Calnitsky, *supra* note 130 at 27; see also Forget Emergency, *supra* note 18 at 54-55, and 73-77, and Forget Poverty, *supra* note 21.

⁴⁰⁹ Nedelsky, *supra* note 273 at 141-142 and 145 (This approach requires asking three questions in a given rights-based situation to see “how the law *should* construct relations”: 1. Examine the rights dispute “to determine what values are at stake.” 2. Ask “what kind of relationships would foster those values.” 3. “Determine how competing versions of a right would structure relations differently.”)

⁴¹⁰ Scales, *supra* note 225 at 27.

can help us understand not just how to distribute care, but how to provide normatively “good” care through a “comprehensive transformation of society that makes better living possible.”⁴¹¹ I ultimately utilize Berenice Fisher and Joan Tronto’s definition of care and “phases” of care model,⁴¹² and also include Tronto’s more recently articulated fifth phase of citizenship as a form of “*caring with*,” which posits that “what it means to be a citizen in a democracy is to care for citizens and to care for democracy itself.”⁴¹³ I describe in detail why Tronto’s approach is compelling later in this chapter.

I have used “care” here somewhat “promiscuously,” meaning not that I have been “casual” or “indiscriminate,” but that I have intentionally extended the concept of care beyond the family and to other “models of kinship,” as well as beyond hands-on caregiving.⁴¹⁴ This was inspired by the concept of “promiscuous care,” which involves both caring *more* and caring *without discrimination*, and thus “reclaiming forms of genuinely collective and communal life.”⁴¹⁵ Using care as a concept without completely defining it allowed for an expansive exploration of the ways we might think about the concept of “care” within a discussion of social welfare law and policy.

Care can indeed be considered a feeling (as in “I feel care for you”), but care is also an activity, action, or practice. The wide-ranging potentials for caring activities lead me to accept and operate here under the popular definition of “care” from Fisher and Tronto: “*Caring be viewed as a species activity that includes everything that we do to maintain, continue, and repair our ‘world’ so that we can live in it as well as possible. That world includes our bodies, our selves, and our environment, all of which we seek to interweave in a complex, life-sustaining web.*”⁴¹⁶ This definition is admittedly broad. It could almost

⁴¹¹ Elisabeth Conradi “Theorising care: attentive interaction or distributive justice?” (2020) 4:1 Intl J of Care and Caring 25 at 33 DOI: 10.1332/239788219X15633663863542 [Conradi].

⁴¹² As first proposed in B Fisher and J Tronto “Toward a Feminist Theory of Caring”, in *Circles of Care* E. Abel, M. Nelson (eds) (SUNY Press, Albany, NY: 1990) 36 at 40 [Fisher & Tronto]; see also Joan Tronto “An Ethic of Care” (1998) 22:3 *Generations: Journal of the American Society on Aging* 15 at 17 [Tronto Ethic]; see also Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (NY: Routledge, 1993) at 103 [Tronto Boundaries].

⁴¹³ Tronto Democracy, *supra* note 224 at x.

⁴¹⁴ A Chatzidakis, J Hakin, J Littler, C Rottenberg, and L Segal (The Care Collective), *The Care Manifesto: The Politics of Interdependence* (NY: Verso, 2020) at 41 (“Promiscuous care” is inspired by AIDS activist theorists, who argued that gay men’s promiscuity was not just the “origin” of the AIDS epidemic, but also the “solution”: promiscuity supported “multiplying and experimenting with the ways gay men were intimate with and cared for each other.” In this way, promiscuity allowed for creative exploration of safer sexual practices that helped collectively protect the gay community) [Care Collective].

⁴¹⁵ *Ibid* at 20.

⁴¹⁶ Fisher & Tronto, *supra* note 412 at 40, emphasis mine.

include everything humans do day-to-day, but it “avoids associating caring with any particular family practices or conception of the good life.”⁴¹⁷

This definition also presents care as a relational, cooperative, collaborative “species-centred” activity, which carries significant insight and meaning when we are thinking about the implications of care for social structures and policies. For example, I have indicated the hands-on and proximal practices of caregiving like caring for children, the elderly, or the disabled. I have discussed how domestic and caring labour is often unpaid or undervalued labour that is most often performed by marginalized people. I have also discussed health inequities that inform health care provision. I consider health care a form of direct care. I have also presented elements of broader social welfare policies and laws which I consider a form of public caring, even if the provision of such supports – like worker’s benefits, housing supports, public health measures, or disability support payments – are not hands-on. I consider all of these as species activities that would satisfy the Fisher and Tronto definition.

The concept of care informs philosophical work on the ethics of care, and the ethics of care have in turn informed the development of a political theory of care called “care theory.” Despite the popularity of Fisher and Tronto’s definition, there is no unified definition of care or caring. There is also no singular approach to “care ethics.” There is literature that roots and connects the Western ethics of care to much older Afrocentric approaches to collectivist morality,⁴¹⁸ but the work I focus on here is drawn from later 20th century Western feminist literature which was influenced by the work of Carol Gilligan.⁴¹⁹

Gilligan’s work in psychoanalysis challenged the view that women were “morally underdeveloped due to their reluctance to apply universal principles, their commitments to certain forms of partiality, and their demands for greater contextual detail.”⁴²⁰ Gilligan’s

⁴¹⁷ Daniel Engster, *The Heart of Justice: Care Ethics and Political Theory*, (UK: Oxford University Press, 2007) at 24 [Engster Heart].

⁴¹⁸ See generally an early example of this connection made in Sandra Harding, “The curious coincidence of feminine and African moralities: Challenges for feminist theory” in Eva Feder Kittay & Diana T Meyers (eds), *Women and Moral Theory* (Rowman & Littlefield: Totowa New Jersey, 1987) 296; see also Katie G Cannon, *Black Womanist Ethics* (Atlanta: Scholars Press, 1988); see also Metz, Thaddeus Metz “The western ethic of care or an Afro-communitarian ethic? Specifying the right relational morality” (2013) 9 J of Global Ethics 77 at 77 online: 10.1080/17449626.2012.756421 (Metz argues the ethics of care and Afro-communitarian ethics are sisters, not twins).

⁴¹⁹ ME Gary “From care ethics to pluralist care theory: The state of the field” (2022) 17:4 Philosophy Compass e12819 online only: <<https://doi-org.proxy1.lib.uwo.ca/10.1111/phc3.12819>> [Gary]; Though there have been a number of “retrospective genealogies” that trace earlier work than Gilligan’s as influential to care ethics, see Daniel Engster and Maurice Hamington (eds) *Care Ethics and Political Theory*, (UK: Oxford University Press, 2015) at 4.

⁴²⁰ *Ibid* at 2, citing Carol Gilligan, *In a different voice* (Harvard University Press, Boston: 1982) at 55.

study of “predominantly white, upper middle class women” showed that not only was this “morally underdeveloped” view incorrect, but that her study participants held a “broadly shared conception of morality as rooted in relationships between interdependent selves, resulting in starkly different intuitions” than those that might flow from the Anglo-American “ethic of justice.”⁴²¹ The “*ethic of justice*,” is largely concerned with “problems of inequality and oppression and holds up an ideal of reciprocal rights and equal respect for individuals.”⁴²² Gilligan proposed that her study participants shared a “different voice” of morality that she described as an “*ethic of care*,” which instead of centring equality and reciprocal rights, “draws attention to problems of detachment or abandonment and holds up an ideal of attention and response to need.”⁴²³ Gilligan’s work provided the empirical basis for ethics grounded in caring and attention to need, and for the “growing body of philosophical work taking gendered labor as its starting point for theorizing ethics.”⁴²⁴ The relationship between justice and care remains a salient point in contemporary care theory, though theorists are now more open to presenting care and justice as intertwined and less inclined to approach care and justice as starkly contrasting ethics or ideals.⁴²⁵ I consider and present care and justice as comingled concepts here as well.

Care ethics was originally described as “feminine” ethics, though not based on biological differences between men and women, but instead was “indicative of feminine socialization and masculinist domination.”⁴²⁶ Early care theorists centred the home and motherhood as the model site of caring relationships.⁴²⁷ Theorizing care through a gendered perspective was necessary due to the absence of women’s experiences in theoretical literature,⁴²⁸ but focusing on motherhood limited care ethics from expanding into political

⁴²¹ *Ibid.*

⁴²² C Gilligan & J Attanucci “Two Moral Orientations: Gender Differences and Similarities” (1988) 34:3 Merrill-Palmer Quarterly 223 at 225.

⁴²³ *Ibid* at 225, emphasis mine.

⁴²⁴ Gary, *supra* note 419 at 2.

⁴²⁵ *Ibid* at fn 42; see e.g. Virginia Held “Care and Justice, Still” in Daniel Engster and Maurice Hamington (eds) *Care Ethics and Political Theory*, (UK: Oxford University Press, 2015) 19 at 19; see also e.g. Engster Heart, *supra* note 417, generally.

⁴²⁶ *Ibid* at 2; see also Fisher & Tronto, *supra* note 412 at 36.

⁴²⁷ See generally, Nel Noddings, *Caring: A feminine approach to ethics and moral education* (University of California Press: Berkeley, CA, 1984, 2003, 2013).

⁴²⁸ Mothers were only portrayed in philosophical literature as having to “think or face moral problems when they ventured beyond the household into the world of men.” Virginia Held, *The Ethics of Care: Personal, Political, and Global*, (Oxford UK: Oxford Publishing, 2006) at 26 [Held Personal].

theory and opened the field up to objections that still “linger today.”⁴²⁹ Describing motherhood as the ideal form of caring relations ignores the patriarchal structures that shape these expectations and visions of motherhood.⁴³⁰ Some care theorists like Virginia Held have acknowledged such limitations, especially given that the “actual feelings of mothers are highly ambivalent and often hostile toward the children for whom they care,” but nonetheless see the value in ideals of motherhood, since “a commitment to the practice and goals of mothering provides standards [of care] to be heeded.”⁴³¹ I appreciate this point, but throughout this discussion, I have presented many dimensions to care and consider that care is much broader than parental paradigms. For example, I return to Nedelsky’s point on the relational aspects of law like determining who has a duty of care by asking ““who is my neighbour”” in the context of tort law.⁴³² Could we feasibly and comprehensively apply parental paradigms to a negligence analysis? Perhaps not without distorting the ideals of motherhood or imposing parental paradigms inappropriately. Instead, we should consider that, just as it is in a legal sense, “care is a complex process with many components,” and we should not “romanticize” care.⁴³³ Care “is more likely to be filled with inner contradictions, conflict, and frustration than it is to resemble the idealized interactions of mother and child,” or even “teacher and student or nurse and patient.”⁴³⁴

Another issue with focusing on motherhood in care ethics flows from the portrayals of what “good mothering” and thus “good care” might look like – mothering in ideal terms is often described as highly interactive and hands-on, which ignores the realities and care practices of many caregivers.⁴³⁵ Early care theorists were predominantly “White, cisheterosexual, middle-class mothers... many of whom drew explicitly on personal narrative in crafting their theories.”⁴³⁶ Unfortunately, these narratives connected to

⁴²⁹ Gary, *supra* note 419 at 5 (“Centering the maternal relation ends up centering a highly normative vision of motherhood that, in turn, prioritizes a regressive organization of society and the function of care within it.”)

⁴³⁰ *Ibid.*

⁴³¹ Held Personal, *supra* note 428 at 26.

⁴³² Nedelsky, *supra* note 273 at 142.

⁴³³ Tronto Ethic, *supra* note 412 at 17.

⁴³⁴ *Ibid* at 17.

⁴³⁵ See e.g. Fisher & Tronto, *supra* note 412 at 38-39 (Describing a Black student’s differing description of the care provided by her mother – a single mom who worked as a night nurse – which included non-proximal caring like working and coordinating with other family or community members to provide nourishing food, supervision, adequate shelter, and basic necessities, compared to the description of conversations between mothers and children about emotions which were proposed as the description of caring by White students).

⁴³⁶ Gary, *supra* note 419 at 5.

portrayals of womanhood that have historically perpetuated racism in North America, since “the morality of women was tied to motherhood,” and motherhood was in turn “tied to combatting the influence of immigrant, Black, and working class men.”⁴³⁷ Even where theorists sought to decouple the idea of motherhood from any specific gender or race-biased practices of caring,⁴³⁸ focusing on the interpersonal elements of hands-on care still limited the expansion of care ethics into the world of political theory.

Later work on care ethics moved away from mothering as the paradigmatic example of care and explored broader ideas of care in society.⁴³⁹ This allowed the ethics of care to expand into the arena of political theory and inform the broad and varied discipline of care theory today.⁴⁴⁰ Joan Tronto’s work was foundational to this expansion. Tronto articulated the concern that focusing on motherhood and presenting care ethics as “women’s morality” limited care’s wider political potential, and instead, suggested asking, “What would it mean... to take seriously, as part of our definition of a good society, the values of caring – attentiveness, responsibility, nurturance, compassion, meeting others’ needs – traditionally associated with women and traditionally excluded from public consideration?”⁴⁴¹

From *Moral Boundaries* forward, care theorists have suggested breaking down traditional boundaries that have divided morality from the world of politics, especially since this division situates “women’s morality” as belonging outside of the political sphere and strictly in the private sphere of the family.⁴⁴² In care theory, as in many other areas of feminist theory, “*the personal is political*.”⁴⁴³

There is no unifying care theory – similarly to there being no central approach to feminism or any other critical theory – but some themes in the literature guide my use of

⁴³⁷ Tronto Boundaries, *supra* note 412 at 2.

⁴³⁸ See e.g. Kittay Love, *supra* note 358 at x; see also Held Personal, *supra* note 428 at 40.

⁴³⁹ See especially Virginia Held’s general approach in, *Feminist Morality: Transforming Culture, Society, and Politics* (Chicago and London: University of Chicago Press, 1993); see also Sara Ruddick, *Maternal Thinking: Toward a Politics of Peace* (Boston: Beacon Press, 1989, 1995, 2002)

⁴⁴⁰ Care theory is sometimes called the “ethics of care” theory, but since the ethics of care is used in other areas of study like bioethics, medicine, social work, religion, education etc, I use “care theory” here to describe political approaches, as does Gary, *supra* note 419 at 3.

⁴⁴¹ Tronto Boundaries, *supra* note 412 at 2-3.

⁴⁴² Timothy Kaufman-Osborn et al “Symposium Review: 25th Anniversary of *Moral Boundaries* by Joan Tronto” (2018) 14:4 Politics and Gender 1 at 2 online: <<https://doi.org/10.1017/S1743923X18000417>>.

⁴⁴³ This slogan from the feminist movement of the 1960s and 1970s is often attributed to Carol Hanisch, “The Personal is Political” in *Notes from the Second Year: Women’s Liberation – Major Writings of the Radical Feminists*, Shulamith Firestone and Anne Koedt (eds) (NY, 1970).

care theory. First, “relational considerations are primary.”⁴⁴⁴ Care is and should be considered an inherently social and relational interaction between people, or even between people and animals, or people and the Earth.⁴⁴⁵ Another theme is “responsiveness,” which means taking the needs of “the other” (person/animal/environment) in a given care-requiring situation as the starting point for an analysis of the kinds of care that might be needed.⁴⁴⁶ This requires a contextual understanding of the other’s experience, which necessitates providing opportunities for voice and discussion of needs (if possible), and understanding the “particularities of the other’s experience, including their history, relative power, [and] relationships.”⁴⁴⁷ In engaging in this contextual, relational analysis, most care theorists understand “emotions as informative and motivating moral tools,” which can help “create empathetic connections that promote caring actions,” rather than remaining detached in analysis.⁴⁴⁸

There are two somewhat distinct “strands” of care theory seen in the literature.⁴⁴⁹ One is the “*ethico-political*” strand.⁴⁵⁰ The other strand is the “*welfare-resourcing*” strand.⁴⁵¹ In terms of the relationship between care and justice, the “ethico-political strand aims to bring the traditional norm of justice *out of the centre* so as to make room for other normative viewpoints; the welfare-resourcing strand wants to *broaden the scope* of the traditional norm of justice” to include considerations of care and needs.⁴⁵²

The general goals of these two strands are slightly different. The ethico-political strand “seeks to make disregarded voices heard, highlight unrecognised forms of communication and improve the quality of supportive social interactions.”⁴⁵³ Additionally, the ethico-political strand would “like to see the social and political framework changed so

⁴⁴⁴ Jennifer Llewellyn and Jocelyn Grant Downie (eds), *Being Relational: Reflections on Relational Theory and Health Law*, (Vancouver: UBC Press, 2012) at 3 [Llewellyn].

⁴⁴⁵ See generally, *The Feminist Care Tradition in Animal Ethics*, Josephine Donovan & Carol J Adams (eds) (Columbia U Press, NY: 2007).

⁴⁴⁶ Llewellyn, *supra* note 444 at 3-4.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ See these strands discussed throughout Conradi, *supra* note 411.

⁴⁵⁰ *Ibid* at 26 (Primarily located in the discipline of philosophy, where theorists “[criticize] the one-sidedness of existing ethical theories” like theories of justice, and then focus on evaluating existing practices of care, examine the “ethical beliefs that come to bear on care practices in close social relationships,” and consider “whether such ethical beliefs can be extended from the social to the societal and, ultimately, to the political.”).

⁴⁵¹ *Ibid* (Primarily relies on sociological theory “to analyse the function of supportive activities in society,” and reflect on “power relations” and “forms of privilege” that impact the position of carers and care work in society, and often presents ideas for “a fundamental socio-economic and political transformation” in relation to care).

⁴⁵² *Ibid* at 33, emphasis in original.

⁴⁵³ *Ibid.*

that attentive interaction is encouraged and enabled. It seeks to determine the criteria for good practice and a more successful or better life by concentrating on those who receive support.”⁴⁵⁴ The welfare-resourcing strand instead “promotes the social acknowledgement of unappreciated supportive activities,” and “its larger goal is a comprehensive reorganisation of society that establishes more social equality in the provision and consideration of needs,” rather than distribution of care being based on privilege.⁴⁵⁵ For example, the welfare-resourcing strand would likely approach the social science evidence relating to care work as I have above and recognize that women, gender-diverse, racialized, and other marginalized people are more likely to perform both underpaid and unpaid care in Canadian society. Welfare-resourcing care theorists would then make suggestions to address the imbalance of this labour and promote policies to support caregivers.⁴⁵⁶ The ethico-political strand, by contrast, would look to analyze interactions between caregivers and care-receivers as inspiration for more collaborative, relational frameworks for interaction between people in society, not just focus on policy strategies.

I find myself at the intersection of both strands in my arguments on basic income. I have acknowledged that care work is largely performed by marginalized people in Canadian society.⁴⁵⁷ I have also presented the variety of ways that inequities in health, income, and housing are connected to marginalization as well. I have presented this evidence not as natural or inevitable inequalities, but that many of these outcomes are influenced by sexism, racism, ableism and other manifestations of patriarchal oppression and cultural domination. I am therefore not just interested in *care-supporting* policies that would adequately support people to provide care in various ways, but also in *care-providing* policies like income supports for those who need them. I see basic income as a multi-dimensional policy solution because it is both *care-supporting* and *care-providing*. I advocate here for rebuilding social welfare law and policy in Canada by embedding basic income as a central feature of the floor of social support. This concern for adequacy of that floor of support is more of a welfare-resourcing approach to care. However, I have also discussed that providing an unconditional basic income would support and enhance the

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid* at 34.

⁴⁵⁶ E.g. Engster Heart, *supra* note 417 at 119-152 (on creating a caring economy and caring institutions).

⁴⁵⁷ See *supra* notes 39 to 42, generally.

expressive value of care and social reproduction in Canadian society. I have suggested that basic income would promote other expressive aims by providing more dignified care through income supports, which forces us to consider who and what we value and why. These arguments connect to the ethico-political strand. Ultimately, elements of the ethico-political strand – like reflecting on power relations and making room for other normative viewpoints – can inform welfare-resourcing approaches to care, especially in the context of considering basic income as I have discussed it so far.

Joan Tronto’s most recent work blends both ethico-political and welfare-resourcing strands of care theory, which is why I have chosen to rely most heavily on Tronto’s work here.⁴⁵⁸ Tronto advocates for focusing on a “feminist democratic ethic of care” in policy-making, which I describe in more detail below.⁴⁵⁹ Tronto is also somewhat supportive of the idea of basic income, though not clear on this point, and I expect her concern would be the contextual details and purposes of the basic income proposal in question.⁴⁶⁰ I also contrast Tronto’s work with the work of Daniel Engster, who can be described as primarily a welfare-resourcing care theorist. Engster’s work is also instructive because he speaks to the interaction between care and distributional justice and has made some comments on basic income.⁴⁶¹ I find Tronto’s approach to care theory more compelling for a number of reasons that I address below, and I also address Engster’s arguments on basic income.

2.4 Two Approaches to Care and Basic Income

Recall that Fisher and Tronto define care as any “*species activity... that we do to maintain, continue, and repair our ‘world’ so that we can live in it as well as possible.*”⁴⁶² Daniel Engster takes a more narrow approach, and defines care as “*everything we do directly to help individuals to meet their vital biological needs, develop or maintain their basic capabilities, and avoid or alleviate unnecessary or unwanted pain and suffering, so*

⁴⁵⁸ Gary describes this shift in Tronto’s work as a move toward “relational theory,” *supra* note 419 at 4.

⁴⁵⁹ Tronto Democracy, *supra* note 224 at 30.

⁴⁶⁰ *Ibid* at 174 (“If we think of the production responsibility as an equal responsibility of citizens, how would we allocate it? Among the many arguments for a basic income is the view that there is no longer enough “work” in the globalized political economy for everyone to earn enough to live. Perhaps it makes sense to give people a basic income; perhaps it makes sense to give people a job. But to approach this question as a systematic concern would mark a great change in the way that the political economy is now managed.”)

⁴⁶¹ Engster Heart, *supra* note 417 at 64; Engster Welfare, *supra* note 160 at 210-216.

⁴⁶² Fisher & Tronto, *supra* note 412 at 40, emphasis mine.

that they can survive, develop, and function in society.”⁴⁶³ The focus in Engster’s definition is on serving an *individual’s* “vital biological needs.”⁴⁶⁴ The focus is then on supporting individuals to survive, not necessarily thrive, which presents a lower bar for the minimum types of social welfare policies that would support care.⁴⁶⁵

Notably, Engster does not include sexual activity in the “scope of caring,” because he argues that sexual activity is more akin to exercise and is not “essential to survival and functioning in the same way that food, water, or medical care are.”⁴⁶⁶ He is correct in some respects – one can survive without sexual activity – but this shows the highly individual focus of Engster’s definition. Of course, not all sexual activity is for procreation, but sexual activity is a primary method of human reproduction. Species survival itself relies on sexual activity, especially for those without access to medically-supported reproductive methods. A more social and relational approach to the concept of care makes this omission glaring. The omission also denies the possibility for consensual sexual activity between people (either paid or unpaid) to operate as a form of care, or for self-pleasure to be self-care.

To use a more mundane example, plumbing a sink so that a household may live with safe, accessible running water could be considered a “species activity” that maintains and continues our world. Plumbing would then satisfy Fisher and Tronto’s definition of care. In contrast, Engster specifically excludes plumbing under his definition of care, though he acknowledges that plumbing and housebuilding might “be practiced in a caring manner, as when a group of people come together for the explicit purpose of building houses for the homeless.”⁴⁶⁷ I agree that outcomes matter when it comes to analyzing care, though I take no position on whether intention or outcome can be hierarchically prioritized. I would require more context-specific details about a given care situation. Trying to care

⁴⁶³ Engster Heart, *supra* note 417 at 29 and 31, emphasis in original (Engster also states here that alleviating pain must be done in a manner that is “attentive, responsive, and respectful”).

⁴⁶⁴ *Ibid* at 26 (“Vital needs may be defined as those needs that must be met if human beings are to avoid harm or death or having their lives blighted”).

⁴⁶⁵ A similar approach based on the “capabilities” model that could inform “democratic equality” as described in Anderson, *supra* note 160 at 289. Though highly influential, Anderson’s arguments on providing a basic amount of social welfare over basic income are similar enough to Engster’s that I do not discuss them here.

⁴⁶⁶ Engster Heart, *supra* note 417 at 26.

⁴⁶⁷ *Ibid* at 32-33. Engster attaches a sense of moral “right action” associated with performing one’s trade on a project with positive social benefit, but implies that plumbing is just a non-care activity that might be performed with a caring attitude. In Engster Welfare, *supra* note 160 at 24, Engster indicates that “virtuous intentions are not enough,” and that indeed the consequences of one’s actions – whether caring or not – matter in an analysis of the ethics of care. See a discussion of care theory’s relationship to a theory of right action generally discussed in Steven Steyl “A Care Ethical Theory of Right Action” (2021) 71:3 The Philosophical Quarterly 502 online: <<https://doi.org/10.1093/pq/pqaa063>>.

and failing to produce a positive result might still be called care, even if it was unsuccessful.⁴⁶⁸ Nonetheless, I take the position that plumbing helps “*maintain, continue, and repair our ‘world’ so that we can live in it as well as possible.*”⁴⁶⁹

Of course, there are limits to what we can consider care. Tronto suggests that “to play, to fulfill a desire, to market a new product or to create a work of art is not to care,” though – similarly to Engster and plumbing – she leaves open the possibility to perform these activities as a form of care so long as the phases of care (*1. caring about 2. caring for 3. care-giving and 4. care-receiving*⁴⁷⁰ and *5. caring with*⁴⁷¹) are fulfilled.⁴⁷² Other non-caring actions are important to acknowledge here. For example, violence cannot be said to be a form of care. There is even a risk that an expansive understanding of care can be used for violent aims. For example, colonialism was often justified by colonizing governments and religious organizations through the idea of “caring” for Indigenous peoples.⁴⁷³ In Canada, the roots of health disparities between Indigenous and non-Indigenous people connect to governmental policies of starvation, colonization, and assimilation.⁴⁷⁴ These policies cannot be described as caring.

Tronto and Engster’s differing definitions of care influence their respective considerations and conclusions. For our purposes here, Tronto and Engster’s different conceptual methodologies, differing conceptions of the self and autonomy, and different approaches to responsibility to care are relevant to a discussion of basic income. I discuss all of these differences in turn below and then present Tronto five phases of caring that I argue could beneficially influence the framing of basic income in Canada.

In Tronto’s work, care as a species activity provides the basis for her proposal of a “feminist democratic ethic of care,” which is first approached through a descriptive exercise of “envisioning a series of caring practices, nested within one another. The broadest of these nested practices are those that pertain to society as a whole,” and then

⁴⁶⁸ Though there is debate on this point, see e.g. Steven Steyl “Caring Actions” (2020) 35:2 *Hypatia* 279 at 292 online: <doi:10.1017/hyp.2020.12> (“Successful care is a category of care we wish to retain, but it is one of several we ought to leave conceptual space for, including care that is nonculpably unsuccessful.”).

⁴⁶⁹ Fisher & Tronto, *supra* note 412 at 40.

⁴⁷⁰ *Ibid* at 41-45; also Tronto Boundaries, *supra* note 412 at 105-108, emphasis mine.

⁴⁷¹ Tronto Democracy, *supra* note 224 at 34-35.

⁴⁷² Tronto Boundaries, *supra* note 412 at 104.

⁴⁷³ See Narayan, *supra* note 359 at 134-134.

⁴⁷⁴ See *Final Report Summary: Honouring the Truth, Reconciling for the Future*. Winnipeg: Truth and Reconciliation Commission of Canada, 2015 at 90-99 [TRC Report].

second, to normatively consider that “[t]he goal of such practices is to ensure that all of the members of the society can live as well as possible by making the society as democratic as possible.”⁴⁷⁵ For Tronto, democracy connects care and justice. Tronto indicates that her methodology is distinct from ideal justice theorists, but instead of just working in non-ideal theory, she proposes a different ontology and epistemology – i.e. different ways of understanding human nature and ways of knowing – that grounds her work within the “‘relational revolution’.”⁴⁷⁶ She approaches human nature through a “relational ontology,” which considers humans as socially connected and integrated, not solely individually interested: “[t]he view of human nature intrinsic to a caring democracy presumes that citizens are equal not by virtue of being declared equal, but through an elaborate social process through which they become equal.”⁴⁷⁷ This approach to human nature moves further away from “standard theories of justice, which start from the premise of competing separate parties.”⁴⁷⁸ We might be more generous here and describe egalitarian justice theorists like Rawls, Van Parijs, Zelleke, and others as more focused on mutually beneficial but still separate parties, not necessarily competing parties.⁴⁷⁹

Engster’s conceptual methodology instead remains wholly normative, though taking a non-ideal approach. He argues that his vital needs understanding of care “be placed at the center of a public conception of justice and applied to the basic institutions and policies of society so that more support and accommodation is provided for care work.”⁴⁸⁰ This is reminiscent of a Rawlsian approach, though Engster specifically differentiates his approach from a fairness-based approach to distributive justice.⁴⁸¹ Taking such a broad, non-context-specific approach to a normative theory of care-based justice requires a minimal definition of care, because without society-specific details, we could not know the financial circumstances of the state in question, or whether there is war or famine or any other significant impediment to the basic functioning of said state.

⁴⁷⁵ Tronto Democracy, *supra* note 224 at 30.

⁴⁷⁶ *Ibid* at 184 fn 5.

⁴⁷⁷ *Ibid* at 120.

⁴⁷⁸ *Ibid* at 184 fn 5.

⁴⁷⁹ Rawls TJ, *supra* note 329 at 102; Van Parijs and Vanderborght, *supra* note 13 at 103-104; though Zelleke’s approach is more considerate of the demands of relations and dependency, Zelleke, *supra* note 132 at 35.

⁴⁸⁰ Engster Heart, *supra* note 417 at 8 and 12-14, emphasis in original.

⁴⁸¹ *Ibid* at 2-12.

Toronto and Engster's approaches to the self and autonomy also differ. Engster leverages an individually-focused conception of care-based justice.⁴⁸² For example, Engster suggests a prioritized order of distributing responsibility for caring that begins with "self-care," since caring for the self "precedes and sustains caring for others."⁴⁸³ Engster's vision of care is premised on the self as an autonomous and somewhat atomistic unit, which – just as other liberal theories have been criticized for – "fails to account for the ways in which our essential humanity is neither possible nor comprehensible without the network of relationships of which it is a part."⁴⁸⁴ There are surely situations where this hierarchy of care fails. Once again, parenting comes to mind. Faced with the decision to pay for necessary prescription drugs or purchase food to sustain their children, parents are likelier to choose food.⁴⁸⁵ If self-care precedes caring for others, these parents are failing to uphold the care hierarchy. Engster's model misses the particularity that is required in real-life circumstances. Engster acknowledges this issue, noting that his hierarchy of priorities for care tells us who is *justified* in caring, but not who has an *obligation* for caring, which requires more context-specific details of relations, proximity, availability of resources, and other factors.⁴⁸⁶ Engster glosses over one of the most compelling relational aspects of care theory: analyzing "who *should* care" is a relational question that I argue requires a relational understanding of the self and autonomy.

Tronto's approach to the self is more socially situated and relational than Engster's.⁴⁸⁷ In Tronto's "feminist democratic care" model, the self is not atomistic, nor fully communitarian – where the self might be completely determined by one's community. Rather, Tronto argues that the self is constituted by and situated in a complex web of social relations: "the world consists not of individuals who are the starting point for intellectual reflection, but of humans who are always in relations with others," therefore, "to make

⁴⁸² *Ibid* at 2.

⁴⁸³ *Ibid* at 56.

⁴⁸⁴ Nedelsky, *supra* note 273 at 149.

⁴⁸⁵ Seth A Berkowitz, Hilary K Seligman, Niteesh K Choudhry "Treat or Eat: Food Insecurity, Cost-related Medication Underuse, and Unmet Needs" (2014) 127:4 American J of Medicine 303 at 303 <<https://doi.org/10.1016/j.amjmed.2014.01.002>>; Dena Herman et al, "Food Insecurity and Cost-Related Medication Underuse Among Nonelderly Adults in a Nationally Representative Sample" (2015) 105 American J of Public Health e48_e59 at e48 and e58 <<https://doi.org/10.2105/AJPH.2015.302712>>.

⁴⁸⁶ Engster *Heart supra* note 417 at 58.

⁴⁸⁷ Though Engster acknowledges aspects of the relational nature of human dependency for survival, *ibid* at 43 ("In short, we live in a web of dependency and caring. It is not just that we have depended and probably will depend upon the care of others one day; rather, human existence is inextricably implicated in relations of dependency and caring.").

sense of human life requires a relational perspective.”⁴⁸⁸ Relations help define elements of identity and the self, especially when we understand that identity is not a “thing” nor a fixed idea, and that identity is connected to social inclusion and exclusion.⁴⁸⁹

In addition to the methodological differences and differing approaches to the self that I have described, Tronto and Engster’s accounts of responsibility in relation to care vary. They both agree on expanding the notion of personal responsibility for care beyond just what we do for ourselves or our families and to broader notions of social responsibility for caring.⁴⁹⁰ Put another way, we all have *obligations to care* – meaning obligations to support and contribute to social institutions and arrangements that will provide and promote care – but Tronto and Engster have differing accounts of where this obligation stems from, and whether these obligations rise to the level of a right to receive care.⁴⁹¹

Recall that a liberal-egalitarian approach to the social obligation to care is premised on an individual duty related to reciprocity. For example, Rawls considers fairness-based reciprocity as a “principle of mutual benefit” that focuses on social cooperation.⁴⁹² Also recall that Van Parijs argues that reciprocity requires that no one be coerced into their contributions to society.⁴⁹³ Fairness-based reciprocity means that we all owe each other some form of individual pay-back because we individually benefit from cooperative social arrangements. This means that everyone who benefits from the work (or care) of others in their community must contribute to the community in some equally beneficial way, with a bias toward waged work in the case of Rawls.⁴⁹⁴ Engster argues that even if fairness helps justify our duties to care for people within our communities, it does not help with justifying caring for “distant others” – those we do not have a proximal or intimate connection to – and further, fairness-based reciprocity “limits our caring duties to individuals *capable of contributing* to the cooperative scheme of caring,” meaning that no one has a duty to care

⁴⁸⁸ See e.g. Tronto Democracy, *supra* note 224 at 36.

⁴⁸⁹ *Ibid* at 118, fn 4 (“If people think of an “identity” as a thing, then they are likely to miss the loci of responsibility for its [social] formation and what is needed to undo its harms.”).

⁴⁹⁰ Engster Heart, *supra* note 417 at 42-54; Tronto Democracy, *supra* note 224 at 46-66.

⁴⁹¹ As Engster articulates, *ibid* at 53.

⁴⁹² Rawls TJ, *supra* note 329 at 102.

⁴⁹³ Van Parijs and Vanderborght, *supra* note 13 at 103; This differentiates Rawls and Van Parijs’ views from some theorists who might suggest that humans are inherently self-interested creatures and since we all individually benefit from social organizations that provide care, we might “all have self-interested, or prudential, reasons to care for others.” Engster Heart, *supra* note 417 at 44, discussing and discounting this approach.

⁴⁹⁴ Rawls Priority, *supra* note 342 at 257 fn 7.

for people who cannot reciprocate, like the severely disabled or infants.⁴⁹⁵ If we begin from the premise that we value human life at all, this is obviously an unacceptable outcome. Engster instead suggests that our “moral obligations to others” can be rooted in our “empirically verifiable dependency upon others and others’ dependency upon us” at various points in every human’s life cycle.⁴⁹⁶ Engster describes this form of moral obligation as the “*principle of consistent dependency*.”⁴⁹⁷ Our own human dependency and needs and “claims for caring... thus logically commit us to extend care to all other beings who necessarily depend upon human care for their survival, development, and functioning.”⁴⁹⁸ This approach could be described not a “pay back” model of Rawlsian reciprocity, but a “pay forward”⁴⁹⁹ model of the individual responsibility to care for others.

The benefit of framing responsibility this way, Engster claims, is that it creates a “*right to care*,” which is a “shorthand way of indicating that individuals in need can justify their claims on others for care, and consequently, that capable individuals have an obligation to care for individuals in need when they can do so.”⁵⁰⁰ If someone presents a need for care and others fail to provide the necessary care, then it can be said that there has been a breach of the right to care. Engster’s approach requires a certain level of self-reflectivity and understanding of no one being a “self-made” person. It also requires empathy for distant others. Since this is a principles-first approach to placing care at the heart of justice, it also does not consider the social and historical context of a given society. This risks ignoring structural reasons why people might feel that their own care needs are not met in society, and therefore why they might not feel responsible or have the necessary resources to care-it-forward.⁵⁰¹ The “right to receive care” in this “natural law”⁵⁰² sense is

⁴⁹⁵ Engster Heart, *supra* note 417 at 45.

⁴⁹⁶ *Ibid* at 51.

⁴⁹⁷ *Ibid* at 50, emphasis mine.

⁴⁹⁸ *Ibid* at 51.

⁴⁹⁹ Eva Feder Kittay “A theory of justice as fair terms of social life given our inevitable dependency and our inextricable interdependency” in Daniel Engster and Maurice Hamington (eds) *Care Ethics and Political Theory*, (UK: Oxford University Press, 2015) at 52 (Kittay here discusses her version of reciprocity which she calls the “principle of *doulia*” as a similar pay-forward model to support care-givers).

⁵⁰⁰ Engster Heart, *supra* note 417 at 53.

⁵⁰¹ Though seemingly the assumption is that if we organized society on the basis that everyone’s basic vital needs must be met through social structures and institutions that provide care, then required resources would be provided by such structures.

⁵⁰² Engster suggests his approach is “[c]onsistent with the natural law tradition” of “reflecting upon the nature of human existence and the practices necessary to sustain human life as we know it,” and identifying “basic principles of morality” that flow from these practices. Engster Heart, *supra* note 417 at 11.

compelling, but the level of abstraction might demand too much from people who already live in a world of so much inequity and carelessness.⁵⁰³

There is also some literature that also discusses the “right to *provide* care,” which might help promote institutions that support caregivers.⁵⁰⁴ Robin West suggests that unpaid caregivers like parents and those who care for elderly or disabled dependents do not often abandon their dependents – “even under very harsh circumstances.”⁵⁰⁵ Ultimately, whether these unpaid caregivers are adequately supported by society or not, they will likely continue to perform this kind of proximal, familial caring work, sometimes “enduring either impoverishment or dependency as the cost of doing so.”⁵⁰⁶ Even if we understand that “caregiving labor is an essential, foundational, precondition of liberal society,” if people continue providing care regardless of whether support systems to do so are in place, then there is no incentive for the market to support caregivers, and the political will to support caregivers may wax and wane.⁵⁰⁷ West notes that the individual rights at the cornerstone of liberal democracies are focused on preserving individual freedoms or family autonomy, not supplying positive “rights of *support*” for caregivers, and that such a right would have to be constitutionally created.⁵⁰⁸ In the Canadian context, family autonomy is framed as the “right to nurture” without state interference, but this has not been interpreted as a positive right to any kind of basic minimum level of income or resources that supports care-giving.⁵⁰⁹ A discussion of the legal divide between positive and negative rights relating to care is given more attention in Chapter 3, but this indicates the ways that even when liberal rights systems consider caregiving at all, the consideration is partial and centres mostly on the protection of individual choices and autonomy.

⁵⁰³ “Carelessness” here is used to describe the ways in which neoliberal ideology encourages social institutions and attitudes that promote individually-focused, market-based approaches to care and responsibility. This approach encourages a scarcity mindset where people are competitors, not social collaborators, as they try to gather enough resources to support themselves and their families. See Care Collective, *supra* note 414 at 7-18.

⁵⁰⁴ See e.g. Robin West, “The Right to Care” in Eva Feder Kittay & Ellen K Feder, eds, *The subject of care: feminist perspectives on dependency* (Lanham, Maryland: Rowman & Littlefield, 2002) 88 at 88 [West].

⁵⁰⁵ *Ibid* at 98 (because people are morally compelled to continue care work once it has begun, and these care-givers generally have a strong attachment to the people they give care to).

⁵⁰⁶ *Ibid*.

⁵⁰⁷ *Ibid* at 90.

⁵⁰⁸ *Ibid* at 91, emphasis in original.

⁵⁰⁹ See e.g. *B(R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 370 (On interpreting s 7 rights: “the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent.”) [*B(R)*].

Engster also suggests his framing of responsibility as a right to care could apply to any nation regardless of the context or method of political and legal governance.⁵¹⁰ He claims that a liberal democracy is not “sufficient to ensure attentiveness, responsiveness, and respect,” since liberal democracies are “not always sensitive to the basic needs of all citizens, especially the poor and disenfranchised.”⁵¹¹ Indeed, as just noted, liberal democracies focus on framing rights individually. This can sometimes undermine the formation of social welfare schemes, because such schemes require people to give up some of their individual resources to collective social arrangements.⁵¹² However, Tronto argues that you cannot take the social context out of framing our responsibility to care, even if we framed such responsibility as a right: “[w]hile it is possible to speak about ‘responsibility’ in abstract terms, the goal of connecting care to responsibility is to bring responsibility back to the real and actual practices in any given society.”⁵¹³ Tronto’s position is that even if liberal democracies have their drawbacks, democracy is *required* if people are to be given any opportunity to voice their needs for care or negotiate liberal rights at all.⁵¹⁴ I agree with this point, though of course democracies can be more functional or less functional – more “backslidden” or less.⁵¹⁵

Tronto argues that instead of focusing on presenting rights ahead of the form of political or social arrangements, she suggest that “feminist democratic caring” be organized around the idea that humans are equal in their need for care at various points in life, and that this “quality of being *needy*” should be the starting point for equality.⁵¹⁶ This does not stray so far from Engster’s point on inevitable dependency, but instead of grounding a right to care however, Tronto suggests that given that our needs vary significantly over time and based on our individual circumstances, it requires us to approach care “from the standpoint of the recipient of care.”⁵¹⁷ This creates a direct connection between care and democracy, because approaching care from the standpoint of the person who needs it requires a means to voice those needs. Put another way: care needs give rise to the requirement that people

⁵¹⁰ Engster Heart, *supra* note 417 at 92-94.

⁵¹¹ *Ibid* at 92.

⁵¹² *Ibid* at 92-93; but even more libertarian thinkers leave room for collective efforts to support social minimums for health, see this discussed in Shelley, *supra* note 327 at 148-149.

⁵¹³ Tronto Democracy, *supra* note 224 at 64.

⁵¹⁴ *Ibid* at 11-12; see also Tronto Boundaries, *supra* note 412 at 157-180.

⁵¹⁵ See Nancy Bermeo “On Democratic Backsliding” (2016) 27:1 J of Democracy 5 at 5-6.

⁵¹⁶ Tronto Democracy, *supra* note 224 at 29.

⁵¹⁷ *Ibid* at 29.

be able to voice needs, which demands a form of democracy. Democracy embodies many features that provide for the opportunity to voice needs for care – like negotiating laws and policies and voting. Democracy also contains the tools to negotiate new rights, and those rights in turn represent and frame relationships.⁵¹⁸

Tronto proposes that in turn, the purpose of democratic politics and institutions should be to “center upon assigning responsibilities for care, and for ensuring that democratic citizens are as capable as possible of participating in this assignment.”⁵¹⁹ The process of negotiating caring responsibilities is not just about asking “*who is responsible*” for care, but also about considering experiences of domination and oppression, inclusion and exclusion, and recognizing our own differing levels of “*privileged irresponsibility*,” and ensuring these experiences are considered when we negotiate the terms of a more caring political life.⁵²⁰

Ultimately, Tronto proposes that we can define justice as “[o]ur political responsibility to other citizens,” which requires us to collectively ensure that “in our democracy, no one goes without care. Justice thus comes from the public decisions about caring responsibilities that we make collectively. This is the proper role of government in a contemporary state.”⁵²¹ Justice in an idealized sense can help us “distinguish among more and less urgent needs,” and therefore where resources for care should be directed, but the process of understanding and prioritizing needs must be performed within a democratic process where the “needy” are “taken seriously, rather than being automatically delegitimized because they are needy.”⁵²² “In order to collectively determine what justice looks like in a particular society, [e]veryone, from the richest to the poorest, from the most self-reliant to the most dependent, has to sit down at the table and be involved in the renegotiation of caring responsibilities.”⁵²³ Tronto grounds this democratic approach to justice in the fifth phase of caring she calls “*caring with*.”⁵²⁴ Justice and care are then both

⁵¹⁸ Nedelsky, *supra* note 273.

⁵¹⁹ Tronto Democracy, *supra* note 224 at 48.

⁵²⁰ *Ibid* at 33 (“Privileged irresponsibility” describes the way power and privilege leads some groups of people to give themselves ‘passes’ out of certain forms of responsibility. Tronto categorizes these “passes” as the “protection pass, the production pass, the taking-care-of-my-own pass, the bootstrap pass, and the charity pass” which all serve as excuses for people who are engaged in other forms of activity to opt-out of certain forms of caring work).

⁵²¹ *Ibid* at 62.

⁵²² Tronto Boundaries, *supra* note 412 at 138-139.

⁵²³ Tronto Democracy, *supra* note 224 at 170.

⁵²⁴ *Ibid* at 23, emphasis mine.

processes and *ideals* and involve radical levels of access to democratic processes and the ability to voice needs. This understanding of justice as a process and an ideal also relates back to the social determinants of health literature I have discussed.

I do not claim that this approach explains every aspect of justice, but in my mind, the process of assigning responsibility for care and renegotiating the terms of what is just through democratic processes is practical and workable. This is especially so in Canada, given that the Supreme Court considers that the “underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be... demonstrably justified.”⁵²⁵ In our legal context, it is the collective nature of democracy itself that provides both the values and the limits of fundamental human rights.

To put the breadth of this discussion in context, whether we use existing posited rights to support basic income – as in the case of the right to social security or to an adequate standard of living,⁵²⁶ or the right to life⁵²⁷ – or we develop a new posited “right to basic income,” or a “right to adequate care/right to adequate support for care-giving” through a basic income, then democracy has a significant part to play in how such rights are both proposed and interpreted. Indeed, in Tronto’s feminist democratic care model, she seems to leave questions of whether we might decide to provide a basic income or a state-provided job (i.e. workfare) to be decided by our democratic institutions, but Tronto’s version of democracy demands that everyone be given a real voice to negotiate these arrangements.⁵²⁸ Recall again that Van Parijs interpretation of Rawls leads to the argument that an adequate basic income must precede the ability to negotiate socially cooperative institutions and structures and participate in reciprocal social activities, uncoerced.⁵²⁹ In some ways, Tronto’s approach is similar, but not determinative.

Engster has instead specifically written that care theory does *not* justify an unconditional basic income “for capable individuals who refuse to work or care for

⁵²⁵ *R v Oakes*, [1986] 1 SCR 103, cited to 1986 CanLII 46 (SCC) at para 64 (The “values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”) [*Oakes*].

⁵²⁶ *ICESCR*, *supra* note 52, arts 9 and 11.

⁵²⁷ *Charter*, *supra* note 36, s 7.

⁵²⁸ Tronto Democracy, *supra* note 224 at 174.

⁵²⁹ Van Parijs and Vanderborght, *supra* note 13 at 103.

others.”⁵³⁰ This is largely because he uses Van Parijs’ model of a *universal* basic income, which he argues is not justifiable for four reasons. First is the high cost of a universal program that would risk bankrupting a state, second is the risk of disincentivizing work and thus lowering the tax-base for other social programs, and third, Engster presents a form of the “careotype” argument with concerns for the equality of women in society.⁵³¹ The fourth reason is that, for Engster, “care ethics suggests that all capable individuals have a responsibility to help others meet significant needs that they cannot reasonably meet on their own... and a ‘non-productive’” (i.e. non-working) and “non-caring life is... selfish and morally irresponsible when willingly chosen by a person capable of work or care.”⁵³² The first three concerns I have dealt with here at some length, especially the careotyping argument. On cost, recall that in the Canadian context, myself and many other basic income advocates do not argue for a fully universal program, meaning a threshold-based, federally-funded basic income is possible in Canada without dire financial consequences.⁵³³ On work disincentives, the data from basic income experiments indicates that people mostly keep working when provided with basic income supports, so this concern is not strongly supported by the literature.⁵³⁴ Additionally, we can expect that a *basic* income – meaning supporting people to live at or above the MBM-based poverty line – is not enough for people to experience modern luxuries at all. More likely is that basic income will support people who need it for various periods of dependency – whether because they cannot work due to periodic or permanent disability, are taking a break from waged labour to perform direct care activities, or are seeking educational opportunities, or making constructive moves in their lives or in their communities toward better health and well-being.

On Engster’s final point about selfishness and moral irresponsibility, I suggest that seen relationally, the social, familial, and community-level benefits of basic income might outweigh the small risk of some people “free-riding” on basic income and surfing all day in Tofino – since Malibu is not even in Canada.⁵³⁵ Further, when there are so many degrading aspects of traditional targeted income supports attached to specific behaviours,⁵³⁶

⁵³⁰ Engster Heart, *supra* note 417 at 64; see also Engster Welfare, *supra* note 160 at 210-216.

⁵³¹ Engster Welfare, *supra* note 160 at 211-214.

⁵³² *Ibid* at 214.

⁵³³ See generally, Pasma, *supra* note 142 at 8; see also Forget Emergency, *supra* note 18 at 201.

⁵³⁴ See e.g. Hasdell, *supra* note 207 at 16; see also Forget Poverty, *supra* note 21 at 286.

⁵³⁵ See social and community-level benefits discussed in Forget Emergency, *supra* note 18 at 54-55, and 73-77.

⁵³⁶ See e.g. Pineau, *supra* note 81 at 107-108; Smith-Carrier Feminist, *supra* note 108 at 499-500.

and people with disabilities and low incomes are sometimes forced into situations that are detrimental to their survival,⁵³⁷ it is frustrating to still be discussing selfish surfers at all. Perhaps moving forward with basic income requires “radical trust” in our “neighbours, friends, relatives, even when they make decisions different from the ones we might prefer.”⁵³⁸ A caring democratic approach to basic income implies this kind of trust – indeed, when people make democratic decisions that we do not prefer, we do not eliminate their rights to vote.

Though the literature on care ethics and basic income is sparse (Tronto and Engster’s work being some of the only references), Hee-Kang Kim also suggests that care ethics supports a basic income, so long as basic income is complemented by other care-based policies.⁵³⁹ A care-based basic income “should play a part in the recognition of the primary and fundamental value of care, help to ensure that the giving and receiving of care should not be discriminatory or disadvantageous, and actively challenge and correct the inequalities of care today.”⁵⁴⁰

Considering the values and moral qualities that would be required to ground caring social welfare policies brings me to my final section here. Because of the deep connection between opportunity for voicing needs and care, focusing on building a caring democracy is central to the development of care ethics-based policies. Tronto’s five phases of caring provide an instructive guide for developing a basic income in Canada and for designing aspects of decision-making within legal institutions that might support basic income. I describe this model briefly below and then conclude this chapter.

⁵³⁷ Many advocates and people with disabilities argue that investments in health and mental health care as well as social supports would address concerns that disabled people are now accessing medically assisted dying in the absence of adequate social and medical care, see Leyland Cecco, “Are Canadians being driven to assisted suicide by poverty or healthcare crisis?” (11 May 2022) online: *The Guardian* <<https://www.theguardian.com/world/2022/may/11/canada-cases-right-to-die-laws>>; see also a 31-year-old applied and is awaiting approval for medically assisted dying, Avis Favaro, “Woman with disabilities nears medically assisted death after futile bid for affordable housing” (Updated 4 May 2022) online: *CTV News* <<https://www.ctvnews.ca/health/woman-with-disabilities-nears-medically-assisted-death-after-futile-bid-for-affordable-housing-1.5882202>>; see also a “disturbingly” similar story in Avis Favaro, “Woman with chemical sensitivities chose medically-assisted death after failed bid to get better housing” (Updated 14 April 2022) online: *CTV News* <<https://www.ctvnews.ca/health/woman-with-chemical-sensitivities-chose-medically-assisted-death-after-failed-bid-to-get-better-housing-1.5860579>>.

⁵³⁸ Evelyn Forget & Hannah Owczar, *Radical Trust: Basic Income for Complicated Lives* (Winnipeg, Manitoba: ARP Books, 2021) at 11-12.

⁵³⁹ HK Kim “The basic income and care ethics” (2021) 52 *J Soc Philos* 328 at 340 (drawing on Van Parijs’ UBI).

⁵⁴⁰ *Ibid.*

2.5 The Phases of Care and Caring Democracy

The phases of care Fisher and Tronto originally described involved four steps in the processes of caring – “1. *caring about*, 2. *caring for*, 3. *care-giving*, and 4. *care-receiving*.”⁵⁴¹ Tronto later added a fifth, democratically-connected step of “*caring with*.”⁵⁴² The phases of care have been suggested as a framework for various areas of health care and health research,⁵⁴³ in housing research and policy,⁵⁴⁴ and in a gender-sensitive approach to public administration.⁵⁴⁵

Tronto suggests that the first four phases of caring align with the ethical qualities of attentiveness, responsibility, competence, and responsiveness.⁵⁴⁶ In the first phase, *caring about* requires attentiveness, where “someone or some group notices unmet caring needs,” and that “attentiveness [requires] a suspension of one’s self-interest, and a capacity genuinely to look from the perspective of the one in need [even with ourselves].”⁵⁴⁷ In the second phase, *caring for* requires responsibility for caring being taken after the needs of the other are identified, meaning that “someone or some group has to take on the burden of meeting those needs.”⁵⁴⁸ The third phase, *care giving*, requires competence in the actual work of caring, which is “not simply a technical issue, but a moral one.”⁵⁴⁹ The fourth phase, *care receiving*, requires the moral quality of responsiveness, because “[o]nce care work is done, there will be a response from [the recipient],” and responsiveness is required to “[observe] that response, and [make] judgments about it (for example, whether the care given was sufficient, successful, or complete?)... The person cared for need not be the one who completes the process of responding, but some response is necessary. And the response will often involve noting that new needs emerge as the past ones are met, thus the

⁵⁴¹ Fisher & Tronto, *supra* note 412 at 41-45; also Tronto Boundaries, *supra* note 412 at 105-108, emphasis mine.

⁵⁴² Tronto Democracy, *supra* note 224 at 23, emphasis mine.

⁵⁴³ E.g. VD Lachman “Applying the Ethics of Care to Your Nursing Practice” (2012) 21:2 *Medsurg Nursing* 112-4, 116 (nursing); Giovanni Maio, “Fundamentals of an Ethics of Care” in F Krause and J Boldt, eds *Care in Healthcare: Reflections on Theory and Practice* (Palgrave MacMillan, 2018) at 51; see also E Van Zadelhoff et al, “Good care in group home living for people with dementia. Experiences of residents, family and nursing staff” (2011) 20 *J of Clinical Nursing* 2490.

⁵⁴⁴ E.g. Emma Power “Assembling the capacity to care: Caring-with precarious housing” (2019) 44 *Transactions of the Institute of British Geographers* 763 online: <<https://doi.org/10.1111/tran.12306>>.

⁵⁴⁵ E.g. DeLysa Burnier “Other Voices/Other Rooms: Towards a Care-Centered Public Administration” (2003) 25:4 *Administrative Theory & Praxis* 529 DOI: [10.1080/10841806.2003.11029423](https://doi.org/10.1080/10841806.2003.11029423)

⁵⁴⁶ Tronto Boundaries, *supra* note 412 at 127-136; also Tronto Democracy, *supra* note 224 at 34-35.

⁵⁴⁷ Tronto Democracy, *supra* note 224 at 34.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ Tronto Democracy, *supra* note 224 at 35.

process continues.”⁵⁵⁰ These four phases are both descriptive and normative, they “serve as an ideal to describe an integrated, well accomplished, act of care,” and “[d]isruptions in this process are useful to analyze.”⁵⁵¹

In *Moral Boundaries*, Tronto suggested that because care often carries conflict, maintaining the “integrity of care” involves resolving those conflicts.⁵⁵² In *Caring Democracy*, Tronto introduced the concept of the fifth phase of *caring with* to democratically resolve conflicts about care. I have already touched on some of the democratic concerns that influence this final phase of caring, but to reiterate, instead of only allowing the family or the market to deal with and take responsibility for issues of care, “*caring with*” is “political concern that proposes that democratic citizens are all engaged in providing and needing care together,”⁵⁵³ and resolving conflicts about care requires a highly participatory model of politics where everyone is able to come to the table to voice their needs.⁵⁵⁴ *Caring with* then requires the moral qualities of plurality, communication, trust, respect, and solidarity.⁵⁵⁵ I lay these elements out in more detail when I discuss Tronto’s five phases in relation to a Canadian basic income in Chapter 4.

2.6 Conclusion

In this chapter I have discussed the dimensions of social justice that inform literature on the social determinants of health and basic income. I explored the limitations of distributive justice frameworks by looking to the feminist literature on basic income and approaches to valuing and providing support for care. From there, I advanced a more nuanced understanding of care and social responsibility seen in the care theory literature. I discussed the differing approaches to care taken by Daniel Engster and Joan Tronto and explored how they approach basic income, and I argued for accepting Tronto’s more relational approach to care to ground a framework for basic income. Since my goal is to explore ways to advance basic income in Canada through law, I suggest that Tronto’s democratic phase of *caring with* is where we might situate how to make basic income

⁵⁵⁰ *Ibid.*

⁵⁵¹ Tronto *Boundaries*, *supra* note 412 at 109.

⁵⁵² *Ibid* at 136.

⁵⁵³ Tronto *Democracy*, *supra* note 224 at 34-35.

⁵⁵⁴ *Ibid* at 140.

⁵⁵⁵ *Ibid* at 34-35.

happen, and that all five phases of care provide instructive normative frameworks for the structure and ongoing assessment of basic income in Canada.

Importantly, assessing basic income through the phases of care framework might support a system of democratic participation that would allow for the creation of social welfare programs, but recall that Tronto leaves it to a polity to decide whether basic income would be beneficial for their society.⁵⁵⁶ I hope I have articulated a strong enough case for basic income so far, but if not, let us assume that indeed basic income would be beneficial for Canada and would also be financially feasible. My next chapter addresses questions of political feasibility and the long-term stability that might be provided through a rights-based basic income. I do this by looking to major social welfare policies and jurisprudence on such policies and take a feminist approach to exploring the legal impediments and opportunities for advancing a rights-based basic income in Canada.

⁵⁵⁶ *Ibid* at 174.

Chapter 3

3 Learning from the Past: Legal Obstacles and Opportunities for Basic Income

In this chapter, I undertake a feminist analysis of the major social welfare policies I identified in Chapter 1: nationalized pensions and unemployment insurance, family allowances, and the development of joint federal and provincial partnerships on health and social spending. I have identified these as “major” policies because they required significant legal changes to allow for the mobilization of federal spending on individuals and families. I explore the ways that these existing social welfare structures consider rights to support or rights to payment. I also discuss COVID-related cash transfers and what we might learn from them, but pandemic programs are grounded mostly under unemployment supports, so I do not consider such programs as a separate category. Family allowances are another area of direct cash transfers that could be categorized as a major social welfare program, though family allowances did not require constitutional amendment, instead being justified on the federal government’s spending power and residual powers over peace, order, and good government.⁵⁵⁷

My goal in this chapter is to identify and discuss some obstacles and opportunities for advancing a rights-based basic income in Canada. This is not an exhaustive discussion but focuses on some recent litigation approaches and past and present legislative approaches. The cases I discuss here are exclusively drawn from public law. Though I mostly focus on cases involving the federal government, a few cases involving provincial governments are instructive, especially the recent attempt to certify a class action regarding the early cancellation of the OBIP.⁵⁵⁸ The first section describes why a rights-based approach to basic income is necessary for long term stability and managing conflicts around basic income – or put another way, conflicts around care. I then describe how cases attempting to address positive rights to health care, income supports, and housing have had

⁵⁵⁷ See this discussed in the only constitutional challenge to family allowances, *Angers v Minister of National Revenue*, 1957 Carswell Nat 246, [1957] Ex CR 83 [*Angers*]. The appellant in this case was a prominent Quebecois nationalist and intellectual who fought the constitutionality of family allowances in a case against the Ministry of Revenue over ten years, see Jean-Philippe Carlos “« Ma chicane avec l’impôt » : une critique traditionaliste de l’État-providence canadien (1945–1957)” (2019) *The Can Historical Rev* online: <muse.jhu.edu/article/745752>.

⁵⁵⁸ *Bowman v Ontario*, 2020 ONSC 7374 [*Bowman ONSC*]; *Bowman v Ontario*, 2022 ONCA 477 [*Bowman ONCA*].

limited success in Canada and present some roadblocks and few opportunities to advancing basic income. This is largely because courts have not strongly supported socioeconomic rights in Canada, nor viewed positive rights – meaning rights that would compel the state to provide certain minimum resources to citizens – favourably.⁵⁵⁹ These cases illustrate why the *Charter* and Canada’s international commitments alone may not be enough to ground a right to basic income, but the relationship between international and domestic human rights still shows some narrow opportunities for advancing basic income. I explore ways that novel approaches to *Charter* litigation in light of international human rights decisions may support advancing basic income, but also how decisions to cancel social welfare programs might also be challenged.

Following this discussion on litigation approaches, I then explore the background and beginnings of several major social welfare policies in Canada and I contrast institutional and residual approaches to social welfare from the past to the present. I discuss legislation and jurisprudence that illustrate the issues residual approaches present for marginalized people, especially women.⁵⁶⁰ I explore the ways cash transfer payments under federalized pensions, unemployment insurance, and family allowances consider care and caregivers, and I use these areas of social welfare to illustrate obstacles and opportunities for basic income. In the final section, I turn to the development of more recent joint constitutional partnerships on health and social programs to show ways principled approaches to social welfare are important to advancing a care-based basic income.

Throughout this chapter, I pay particular attention to who is served by and who is left out of the social welfare policies I discuss by using an intersectional version of the “woman question,” that requires “looking to the bottom.”⁵⁶¹ I also analyze how these policies consider the concept of “care” – either in the care-providing sense, or in supporting caregivers – and I present how feminist care ethics are already embedded in Canadian law.

3.1 Developing a Right to Basic Income

Beyond the sort of “manifesto rights” or natural rights approaches I discussed in Chapter 2, I have indicated that there is literature that advocates for institutionalizing basic

⁵⁵⁹ Again, using citizens here to describe people living in Canada, not just passport holders.

⁵⁶⁰ I discuss and define institutional versus residual approaches in detail below, but see Guest, *supra* note 24 at 3-5 for a discussion of the distinction in the Canadian context.

⁵⁶¹ Bartlett, *supra* note 226 at 837; Scales, *supra* note 225 at 27.

income through a legal rights-based system, because this may produce more long-term stability than a discretionary program.⁵⁶² This strongly relates to Canada’s legal duties to advance and protect the rights to social security and an adequate standard of living under the *ICESCR*.⁵⁶³

Jurgen De Wispelaere and Leticia Morales suggest that grounding basic income as merely a “moral right” that is used to achieve the human right to an adequate standard of living does not go far enough to explain why other policies like workfare programs, increasing the minimum wage, or paying a state-funded caregiver’s wage might not also achieve the right to an adequate standard of living.⁵⁶⁴ There is evidence that basic income could indeed help to achieve an adequate standard of living for many people,⁵⁶⁵ but perhaps the relationship between the promising empirical effects of basic income and the right to an adequate standard of living is too “contingent” to ground basic income as a moral right.⁵⁶⁶ Basic income is then an instrument – a means to achieve moral ends.⁵⁶⁷ Defining basic income as a moral right might help inform the bases for posited legal rights – as in the case of the right to an adequate standard of living,⁵⁶⁸ or the right to life, liberty, and security of the person⁵⁶⁹ – but might not help make basic income more likely to be accepted as a legal right unto itself.

I do not mean to suggest that a right to basic income in Canada would be absolute. Indeed, every right has limits, and ignoring the legitimate limits of a right makes achieving that right politically difficult, increases the potential for division and conflict, “and can hamper the more expansive and open types of dialogue which serve to foster understanding in a pluralistic society.”⁵⁷⁰ The purpose of creating a rights-based basic income would be to protect the program’s long-term stability, to advocate for prioritizing basic income “over other types of policies,” to provide budgetary protection from “political interventions,” and to put pressure on the state to ensure that each individual receives the basic income they

⁵⁶² See generally, De Wispelaere, *supra* note 47.

⁵⁶³ *ICESCR*, *supra* note 52, art 9 (social security), 11 (adequate standard of living) and 2 (on “taking steps” to advance rights contained in the *ICESCR*, especially through legislation).

⁵⁶⁴ De Wispelaere, *supra* note 47 at 925-928.

⁵⁶⁵ See Hasdell, *supra* note 207 at 15-17.

⁵⁶⁶ De Wispelaere, *supra* note 47 at 928.

⁵⁶⁷ *Ibid* at 929, and throughout.

⁵⁶⁸ *ICESCR*, *supra* note 52, art 11.

⁵⁶⁹ *Charter*, *supra* note 36, s 7.

⁵⁷⁰ Emmett Macfarlane “Terms of Entitlement: Is there a Distinctly Canadian ‘Rights Talk’?” (2008) 41:2 *Can J of Political Science* 303 at 304 [McFarlane].

are entitled to.⁵⁷¹ But why should we prioritize basic income or ensure its stability? De Wispelaere and Morales suggest a pragmatic reason that speaks to a support for democracy and pluralism itself: “the real advantage of a basic income scenario might be that it avoids unnecessary competition between policy instruments,” and by supporting a broad range of people in society whenever they enter a period of dependency, the “right to basic income... does not require us to engage constantly in the prioritization of social rights or goals, which may bypass at least some of the problems associated with pluralism and persistent disagreement.”⁵⁷² This prioritization might then help with the inevitable conflicts that arise when rights are presented as in competition with one another.⁵⁷³ Further, developing a right to basic income would allow for said right to become justiciable – justiciability meaning that disputes around basic income may then be appropriate for courts or administrative adjudicators to become involved.⁵⁷⁴

Additionally, prioritizing basic income would mean putting adequate resources into monitoring social effects, which could in turn reinforce broad support for a right to basic income, especially if the effects indicate cost savings.⁵⁷⁵ Perhaps entrenching a legal right to basic income requires a soft-launch – like observing the effects of a smaller-scale basic income and comparing it to other programs – since “a plausible case for a legal right to basic income is essentially comparative and contingent on demonstrating basic income

⁵⁷¹ De Wispelaere and Morales, *supra* note 47 at 928; I described that Tronto’s phases of care model includes the democratic phase of *caring with*, where every member of society is involved in relations of caring for one another and for democracy itself, which gives everyone a voice in social decision-making about care. You could argue that applying this type of democracy to basic income decisions would be likely to defeat any basic income proposal because of the risk of the “tyranny of the majority” sidelining and marginalizing minority voices who might benefit from such a program. I am not advocating for a dismantling of Canada’s system of constitutional democracy, so obviously the structural architecture of rights and freedoms guaranteed within various constitutional and quasi-constitutional documents should remain in place to protect against this type of tyranny.

⁵⁷² *Ibid* at 930.

⁵⁷³ McFarlane, *supra* note 570 at 305.

⁵⁷⁴ See *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 33-34 (“Put more simply, “[j]usticiability is about deciding whether to decide a matter in the courts”... “There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter... In determining this, courts should consider “that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties’ positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute” citing Lorne Sossin in *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Carswell: Toronto, 2012) at 1 and 294).

⁵⁷⁵ De Wispelaere, *supra* note 47 at 930.

outperforming competing policies in terms of their impact on core social goals or social rights.”⁵⁷⁶

Canada is well-situated to understand the effects of other competing policies. At the federal level, there is some discussion of launching a federally-funded, province-wide basic income in Prince Edward Island, which has support from all political parties in PEI.⁵⁷⁷ Additionally, as I described Chapter 1, Canada has a history of enacting broad, long-running cash transfer programs like OAS and GIS and the CCB, which all have some characteristics of basic income. These programs have been shown to reduce poverty and improve the health of recipients and their families and reduce experiences of food insecurity.⁵⁷⁸ I also described some provincial, residual social welfare programs like Ontario Works and ODSP and Canada’s reliance on food banks. I indicated how these programs by comparison do not adequately improve health, food security, or housing security. Canada does have a history of making profound changes to the legal landscape to entrench, federalize, and institutionalize certain systems of social welfare. Canada might be the political and social environment that is needed to support a right to basic income. However, as I discuss in the next section, our current human rights regimes may not adequately support such a right without democratic intervention.

3.2 Litigating Illusive Positive Rights

In Chapter 1, I suggested that there may be some connection between basic income and the rights to an “adequate standard of living,” the right to the “highest attainable standard of physical and mental health,” and also the right to social security and family assistance as they are framed in the *ICESCR*.⁵⁷⁹ There is even some connection to civil and political rights contained in the *ICCPR* and the *Charter*, considering that both documents contain the rights to “life,” to “liberty,” and to “security of the person,” and that minimum resources are arguably required to give any real content to these rights.⁵⁸⁰ Perhaps human rights that speak to providing for basic human needs and the concept that minimum resources are required for life, liberty, and security of the person indicate that the policy

⁵⁷⁶ *Ibid* at 931.

⁵⁷⁷ “Bill S-233, An Act to develop a national framework for a guaranteed livable basic income”, 2nd reading, *Debates of the Senate*, 44-1, Vol 153 No 50 (7 June 2022) at 1510.

⁵⁷⁸ See *supra* note 84, generally.

⁵⁷⁹ *ICESCR*, *supra* note 52, arts 9-12.

⁵⁸⁰ *ICCPR*, *supra* note 52, art 6; *Charter*, *supra* note 36, at s 7.

window for basic income is always held open by the framing of human rights themselves. Forcing action on these rights in a legal sense can mean litigating cases to advance them, developing legislation around them, or both.

In terms of litigating internationally-framed human rights, Canada has ratified the *Optional Protocol* to the *ICCPR*,⁵⁸¹ but has *not* ratified the more recent *Optional Protocol* for the *ICESCR*.⁵⁸² This means that individual complaints may be filed to the United Nations Human Rights Committee (UNHRC) on breaches of Canada's commitments under the *ICCPR*, but not to the Committee on Economic, Social and Cultural Rights (CESCR) under the *ICESCR*.

3.2.1 *Toussaint v Canada*

The *ICCPR* complaint process was recently leveraged by Nell Toussaint regarding Canada's denial of health care coverage for irregular migrants. This case shows the tenuous relationship between international human rights and Canada's domestic frameworks which presents some roadblocks for grounding basic income in existing posited rights, though Ms. Toussaint's long battle for the right to health care for herself and other irregular migrants in Canada is not yet over, and there may be some hope.

Ms. Toussaint lawfully came to Canada as a visitor from Grenada in 1999 and subsequently remained working and living in Ontario as an irregular migrant, sometimes contributing to collective social welfare schemes through tax deductions and *CPP* and *EI Act* contributions.⁵⁸³ Ms. Toussaint attempted to apply for permanent residency, but after paying a significant amount of her savings to a "dishonest" immigration consultant, she ran out of funds to continue the immigration process.⁵⁸⁴ In 2006, Ms. Toussaint's health began to deteriorate due to multiple complicated medical conditions. By 2008, she could no longer work nor pay out of pocket for health care services as she had previously. By 2009, her health conditions had become life-threatening. Despite qualifying for Ontario

⁵⁸¹ Optional Protocol to the International Covenant on Civil and Political Rights, GA Res 2200(XX), 16 December 1966, 999 UNTS 302 (in force 23 March 1976, accession by Canada 19 May 1976).

⁵⁸² *Optional Protocol for the International Covenant on Economic Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63rd Sess, UN Doc A/63/435 (2008) [*Optional Protocol ICESCR*].

⁵⁸³ *Toussaint v Canada*, Communication No 2348/2014, UN Doc CCPR/C/123/D/2348/2014 (2018) at para 2.1 [*Toussaint UN*]. This detail implicitly connects Ms. Toussaint to rights and to collectivist social welfare schemes, despite her irregular immigration status. Notably, the FCA does not mention any such contributions, sticking to the idea that Ms. Toussaint "disregarded" Canadian law and then sought to benefit from it, see *Toussaint v Canada*, 2011 FCA 213, leave to appeal to SCC denied, at para 8 [*Toussaint FCA*].

⁵⁸⁴ *Ibid* at paras 2.2-2.7.

Works and later for ODSP on compassionate grounds, her application to be covered by the Ontario Health Insurance Plan was denied, and her subsequent application to the federal government's Interim Federal Health Benefit Program was denied because she was not a refugee nor a trafficked migrant.⁵⁸⁵ The decision to deny health care coverage did not mention the "life-threatening nature" of Ms. Toussaint's health issues.⁵⁸⁶ Ms. Toussaint applied for judicial review of this decision to the Federal Court, and then the Federal Court of Appeal (FCA). She was unsuccessful at each level of court on the basis that the "operative cause" of her life-threatening condition was due to "her own conduct – not the federal government by its Order in Council [to exclude irregular migrants from health coverage]," meaning that Ms. Toussaint had "endangered her life and health" by not obtaining legal immigration status.⁵⁸⁷ Additionally, the FCA reiterated holdings from the SCC: there is no "freestanding" right to health care grounded in the *Charter*.⁵⁸⁸ Further, the Federal Court and the FCA found that even if the decision to deny her health coverage breached her section 7 rights to life and security of the person, the decision was nonetheless saved by the principles of fundamental justice, considering the illegal nature of Ms. Toussaint remaining in Canada.⁵⁸⁹ Despite evidence of Ms. Toussaint's life-threatening condition, and the financial circumstances that led to an inability to pay for care or even to regularize her immigration status, "fundamental justice" in this case referred to the state's concern over becoming a "health care safe haven."⁵⁹⁰

This decision represents a serious failure to consider either the positive dimensions of rights to basic access to health care under section 7 of the *Charter*, or the negative dimensions of an infringement on the right to life and security of the person based on a restrictive approach to who gets – and who deserves – care. Ms. Toussaint's case sits at the intersection of failures on human rights and failures with respect to the ethics of care. Perhaps one could argue that Ms. Toussaint forfeited her rights to health care by virtue of

⁵⁸⁵ The only categories of migrant available for health coverage, *ibid* at para 8.3; see also *Toussaint FCA*, *supra* note 583 at para 71; see also *Ontario Works Act*, *supra* note 34, ss 9 and 26(2) (re: the provision of "emergency assistance" which is a discretionary decision and not subject to appeal to the Social Benefits Tribunal); see also provisions of the *ODSP Act*, *supra* note 156, s 6 (re: support in "exceptional circumstances").

⁵⁸⁶ *Toussaint UN*, *supra* note 583 at para 2.2.

⁵⁸⁷ *Toussaint FCA*, *supra* note 583 at para 72.

⁵⁸⁸ *Ibid* at para 77, citing *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 104 (*per* McLachlin C.J.C. and Major J) [*Chaoulli*].

⁵⁸⁹ *Ibid* at para 83.

⁵⁹⁰ *Ibid* at paras 83 and 112.

her illegal conduct, as the FCA seemed to suggest.⁵⁹¹ To make this connection would risk justifying the denial of health care to incarcerated Canadians. A slippery slope, to be sure, but because federal inmates are excluded from the definition of “insured person” under the *CHA*, they may already lack access to adequate health care,⁵⁹² so perhaps a familiar slope.

Despite a denial of leave to appeal to the SCC, Ms. Toussaint leveraged the *ICCPR* complaint process.⁵⁹³ The UNHRC made the connection between publicly-funded health care and the right to life contained in the *ICCPR*.⁵⁹⁴ The Committee also restated that in other decisions, the UNHRC “has found that restricting ‘access to all basic and life-saving services such as food, health, electricity, water and sanitation’ is inconsistent with the right to life.”⁵⁹⁵ This is promising language on positive rights from a committee with significant influence on the interpretation of human rights. However, despite ratifying the *Optional Protocol* for the *ICCPR*, decisions made by the UNHRC are not binding on Canada.⁵⁹⁶ Canadian courts have described the absence of an enforcement mechanism in the *Optional Protocol* “as one of the weaknesses of that system.”⁵⁹⁷ However, Ms. Toussaint is now pursuing efforts to have Canadian courts interpret the *Charter* in light of the UNHRC’s views on the right to life as it is framed internationally, and many advocacy groups have joined this effort as interveners.⁵⁹⁸

Perhaps there is some hope for advancing socioeconomic rights by leveraging international human rights treaties and the findings of human rights bodies, since the “presumption of conformity” is a “firmly established interpretive principle in *Charter* interpretation,” meaning that “the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human

⁵⁹¹ See generally, *ibid* (Language throughout the decision focuses on migration status).

⁵⁹² *CHA*, *supra* note 35, s 2; instead, health care provision falls to the Correctional Service of Canada, who have been accused of providing inadequate care for prisoner during COVID and beyond, and further, that such a delegation is beyond the constitutional authority of the federal government over matters of health care provision, see *Devlin et al v Canada (CSC)*, Statement of Claim of the Plaintiff, filed in Halifax NSSC, November 2021 <<https://johnhoward.ca/wp-content/uploads/2021/11/Final-Statement-of-Claim-Nov-30-1.pdf>>.

⁵⁹³ Though in the intervening years Ms. Toussaint became a permanent resident and gained Canadian health coverage, she did not recover for the years of loss of coverage financially, mentally, or emotionally, and was focused on vindicating her human rights, see *Toussaint UN*, *supra* note 583 at 2.15-2.17.

⁵⁹⁴ *Ibid* at 7.9 (“although the Covenant does not contain a self-standing ‘right to health’” as the *ICESCR* does, the right to life in art 6 of the *ICCPR* “engages issues of access to health care”).

⁵⁹⁵ *Ibid*.

⁵⁹⁶ *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 147-148 [*Kazemi*].

⁵⁹⁷ *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 at 133, citing *Ahani v Canada (Attorney General)*, 2002 CanLII 23589 (ON CA), leave to appeal dismissed May 16, 2002.

⁵⁹⁸ *Toussaint v AG of Canada* (12 Jan 2022) Toronto CV-20-00649404 (ONSC) online: <<https://www.socialrights.ca/2022/Decision%20of%20Justice%20Belobaba%20on%20Intervener%20Motions.pdf>>.

rights documents which Canada has ratified.”⁵⁹⁹ Additionally, even administrative decision-makers are encouraged to look to international human rights documents when considering decisions that may affect human rights, even where such rights are not adopted by domestic statutes.⁶⁰⁰ However, this hope should be tempered: the SCC has cautioned that “[t]he interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy.”⁶⁰¹

The SCC and lower courts have generally taken very limited and siloed approaches to grounding socioeconomic rights in the *Charter*, and considerable literature has discussed the positive versus negative rights distinction that produces roadblocks to advancing rights to minimum standards of health care, housing, and income.⁶⁰² The siloed approach to rights casts ““positive and negative freedom as theatrical rivals rather than supporting actors,”” which is an artificial division, “given there is no intrinsic difference between them. Both may require positive actions, are resource-dependent and are justiciable.”⁶⁰³ Further, international human rights bodies, advocates, and academics suggest that human rights are universal, indivisible, interdependent, and interrelated.⁶⁰⁴ There is also empirical research suggesting that violations of rights in socioeconomic areas – like rights to clean water or

⁵⁹⁹ *Quebec Inc.*, *supra* note 248 at para 31, emphasis in original removed (in this case, the SCC also developed a new hierarchy for treaty documents and indicated a lean toward a more textualist approach to constitutional interpretation, representing a shift in jurisprudential methods); citing *Kumaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 65; *India v Badesha*, 2017 SCC 44 at para 38; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 64; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 23; and *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 70.

⁶⁰⁰ See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at 114 [Vavilov]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69-71 [Baker v Canada].

⁶⁰¹ *Kazemi*, *supra* note 596 at para 150; see also *Quebec Inc.*, *supra* note 248 at para 23.

⁶⁰² See e.g. Moon, *supra* note 252 at 90; Jackman Step, *supra* note 250 at 86-121; Jackman Box, *supra* note 249 at 281-301; see generally the essays included in *Advancing Social Rights in Canada*, ed Martha Jackman & Bruce Porter, eds (Toronto: Irwin Law, 2014) [Jackman & Porter]; P O’Connell “The Death of Socio-Economic Rights” (2011) 74 *The Modern L Rev* 532 at 543-545.

⁶⁰³ Kwadrans, Ania. “Socioeconomic Rights Adjudication in Canada: Can the Minimum Core Help in Adjudicating the Rights to Life and Security of the Person under the Canadian Charter of Rights and Freedoms?.” (2016) 25 *Journal of Law and Social Policy* 78 at 83.

⁶⁰⁴ *Ibid* at 84, citing the *Vienna Declaration and Programme of Action* (Adopted by the World Conference on Human Rights in Vienna on 25 June 1993), online: OHCHR [perma.cc/YP7N-ZNDD]; see also General Comment 9, *supra* note 56 at 10 (“a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”).

minimum standards of sanitation – correlate with rights violations in civil and political areas.⁶⁰⁵ Interdependence in concept and in practice is then important to consider.

In the Canadian context, *Gosselin v Quebec* showed some promise in potentially grounding the right to a minimum level of state-provided income under section 7 of the *Charter*.⁶⁰⁶ Section 7 of the *Charter* reads that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁶⁰⁷ Justice Louise Arbour cautioned against a limited, negative-rights-only reading of section 7:

Freedom from state interference with bodily or psychological integrity is of little consolation to those who, like the claimants in this case, are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases . . . *positive state action is what is required in order to breathe purpose and meaning into their s. 7 guaranteed rights*.⁶⁰⁸

The majority of the Court in *Gosselin* nonetheless found no positive right to a minimum level of income support under the *Charter*.⁶⁰⁹ However, even the majority found that indeed a “positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances,” and further suggested that section 7 was not “frozen” in time and

⁶⁰⁵ See generally, P Neves-Silva, GI Martins & L Heller “Human rights’ interdependence and indivisibility: a glance over the human rights to water and sanitation” (2019) 19 BMC Int Health Hum Rights 14 online: <https://doi.org/10.1186/s12914-019-0197-3>.

⁶⁰⁶ *Gosselin v Quebec*, 2002 SCC 84 [*Gosselin*].

⁶⁰⁷ *Charter*, *supra* note 36, s 7.

⁶⁰⁸ *Gosselin*, *supra* note 606 at para 377, emphasis mine (The decision in *Gosselin* was highly-contested and complex, resulting in one majority opinion and four different dissents. The case was launched as a class action in 1987. The claimant, Louise Gosselin, struggled to maintain work over her adult life due to mental health issues and substance use disorder. She turned to Quebec’s social assistance scheme for care periodically. For recipients under 30 years old, Quebec’s social assistance scheme paid only one third the amount of standard assistance payments, and the only opportunity to increase payments was to participate in workfare programs or “remedial education.” Even then payments were capped at 45% below the poverty line. In true neoliberal fashion, the SCC noted this was to help young people “find permanent employment and avoid developing a habit of relying on social assistance during these formative years,” at para 7. *Gosselin* was treated as an age discrimination case under section 15(1) of the *Charter*. Perhaps in a more contemporary case, *Gosselin* would have focused on disability-based discrimination considering the shifting medical, social, and legal treatment of substance use disorders, see e.g., *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 101. Substance use disorder is also a disability under human rights legislation like the *Canadian Human Rights Act*, *supra* note 50, s 25, and the *Human Rights Code of Ontario*, RSO 1990, c H 19, s 10(1)(d); see also *Ontario (Disability Support Program) v Tranchemontagne*, 2010 ONCA 593 (ODSP cannot discriminate on the basis of disabilities like substance use disorder).

⁶⁰⁹ *Ibid* at paras 88-96 (Also finding no positive right to minimum income support under Quebec’s *Charter of Human Rights and Freedoms*, CQLR c C-12, s 45, which specifically speaks to the right to “measures of financial assistance and the social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.” The SCC found the adequacy of social assistance was limited from judicial review by the words “*susceptible of ensuring*,” leaving questions of adequacy to the Quebec government).

may one day be interpreted to include “positive obligations” on the state to “guarantee adequate living standards” as they are described in the *ICESCR*.⁶¹⁰

Twenty years after *Gosselin*, we are still waiting for that day. *Gosselin* was supposed to open the door to broader interpretation for poverty-related rights, but instead, Canadian courts have consistently taken narrow approaches to any positive rights to housing, health, and income.⁶¹¹ Some movement has been seen on health care rights for refugees,⁶¹² but not for irregular migrants like Ms. Toussaint.⁶¹³

Right to housing cases have only been successful when dealing with narrow by-law issues.⁶¹⁴ Even novel strategies have not proven effective: despite attempting to demonstrate causal connections between governmental decisions and homelessness through over 10,000 pages of evidence, in *Tanudjaja v Canada*, the Ontario Court of Appeal (ONCA) denied the opportunity to hear a right to housing claim at all, citing that the issue of homelessness is “not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review.”⁶¹⁵ Note the language of “accountability” here, rather than “responsibility,” or “duty” in a legal sense. Justice Pardu of the ONCA commented that even if the court declared that Canada was required to develop a housing strategy, “that would be so devoid of content as to be effectively meaningless.”⁶¹⁶ Accountability here then means leveraging democratic processes to pressure the Canadian government to advance the rights of vulnerable people, not about requiring that government take responsibility for care. In *Tanudjaja*, the ONCA allowed the government’s motion to

⁶¹⁰ *Ibid* at para 82.

⁶¹¹ Jackman *Step*, *supra* note 250 at 108-121.

⁶¹² *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 (Though decided on the basis of section 12 – the right not to be subjected to cruel and unusual punishment. The FC declined to find under s 7. The government at the time appealed, but a newly-elected government withdrew the appeal in 2015).

⁶¹³ *Toussaint FCA*, *supra* note 583.

⁶¹⁴ See e.g. a narrow win where a bylaw limiting people from erecting shelters overnight in public parks in Victoria despite all shelter beds being full was shown to violate s 7 and was not saved by s 1, *Victoria (City) v Adams*, 2009 BCCA 563; see also allowance for overnight shelters on the basis of s 7 re: “autonomy and fundamental personal choices” in *Abbotsford (City) v Shantz*, 2015 BCSC 1909.

⁶¹⁵ *Tanudjaja ONCA*, *supra* note 57 at para 33; see also *Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410.

⁶¹⁶ *Ibid* at 34.

strike the claim, which is now the same strategy being used against Ms. Toussaint in her most recent action.⁶¹⁷

Perhaps the narrow approach courts take to socioeconomic rights is rooted in valid democratic concerns that these rights “are too complex or ‘polycentric’ to adjudicate owing to their dependence on the distribution or re-distribution of resources.”⁶¹⁸ Once again though, rights are not purely distributive concepts. “Rights are relationships.”⁶¹⁹ Perhaps courts are not the perfect venue for parsing out complex social evidence to come to some decision on policy implementation, but they do have a role to play in assessing the relations created by rights and in compelling Canada to act on its commitments. If domestic courts cannot declare the Canadian government responsible for acting in accordance with international human rights treaties, then socioeconomic rights are essentially meaningless: “[w]hen characterized as non-justiciable and as a matter to be relegated to legislation and resolution by elections, social rights lose their legitimacy as rights claims and become no more than competing policy positions advocated by ‘interest groups’ lacking political power.”⁶²⁰

The appeal to polycentrism also ignores a significant portion of the legal analysis courts undertake in relation to human rights claims under the *Charter*. Courts inevitably weigh different policy choices when conducting a section 1 analysis to consider whether a *Charter* infringement is nonetheless a “reasonable [limit] prescribed by law” that “can be demonstrably justified in a free and democratic society.”⁶²¹ “Values” and “principles” guide this analysis, including, but not limited to “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”⁶²² The SCC suggests that the values and principles “of a free and democratic society” serve as the “genesis” of

⁶¹⁷ *Toussaint v Canada*, CV-20-00649404-0000, Amended Motion to Strike of the Defendant <<https://www.socialrights.ca/2022/AFC%20Amended%20Motion%20to%20Strike.pdf>>; see also *Toussaint v Canada*, CV-20-00649404-0000, Factum of the Defendant <<https://www.socialrights.ca/2022/AG%20Factum%20Motion%20to%20Strike.pdf>>.

⁶¹⁸ David DesBaillets, *The Past Present and Future of the Right to Housing in Canada from the Charter To the National Housing Strategy: Where is the Right to Social Housing in Canada Today* (University of Montreal, PhD, 2020) [unpublished] <<https://ssrn.com/abstract=3752386>> at 54.

⁶¹⁹ Young, *supra* note 303 at 25.

⁶²⁰ Martha Jackman & Bruce Porter, “Introduction” in Jackman & Porter, *supra* note 602 1 at 15.

⁶²¹ *Charter*, *supra* note 36, s 1.

⁶²² *Oakes*, *supra* note 525 at para 64.

Charter rights, and also the “ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.”⁶²³ To categorize courts’ role as completely non-political would be to ignore this portion of *Charter* analysis. A section 1 evaluation is therefore an act of comparative policy analysis that must be conducted with reference to normative concepts like dignity, social justice, equality, pluralism, and inclusion. Given that these concepts are relational in nature, injecting the ethics of care into this analysis is not so far-fetched. This might produce some discomfort over the idea of “judicial activism” if courts take a too-broad approach to social policy.⁶²⁴ However, the standard used internationally to measure the advancement of socioeconomic rights under the *ICESCR* is that of reasonableness.⁶²⁵ Though Canada is not a signatory state to the Optional Protocol for the *ICESCR*, reasonableness as a method of legal review is familiar to Canadian law.⁶²⁶ Reasonableness would then provide a framework for courts to ensure Canada upholds its commitments while still allowing for a “range of possible policy measures” to implement rights contained in the *ICESCR*.⁶²⁷ Again though, this would require making the connection between domestic and international human rights. Perhaps making this connection indeed requires some judicial activism, but this kind of activism seems more procedural than social policy related: Canada has made binding international commitments to advance and protect socioeconomic human rights, and in my view, enforcing those commitments through domestic courts is a choice of venue issue more than an issue of judicial activism.

Even if courts do not make the connection between international treaties and domestic human rights, courts still weigh in on policy decisions to determine compliance with the *Charter*. This is not viewed as judicial activism, but rather, upholding the constitution. Otherwise, allowing government to be the “‘final arbitrator’ of compliance with the *Charter*” over all policy initiatives would render the *Charter* as merely offering “rights without a remedy.”⁶²⁸ Even if all government action could be categorized as “policy

⁶²³ *Ibid.*

⁶²⁴ De Wispelaere and Morales, *supra* note 47 at 536.

⁶²⁵ *Optional Protocol ICESCR*, *supra* note 582, art 8(4) (“When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.”).

⁶²⁶ I.e. the majority’s reasonableness analysis methodology in *Vavilov*, *supra* note 600 at paras 73-142.

⁶²⁷ *Optional Protocol ICESCR*, *supra* note 582, art 8(4).

⁶²⁸ *Supreme Court of Canada in Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at para 111-113 (Per Binnie J, writing for a unanimous Court).

initiatives,” policy initiatives are not insulated from constitutional scrutiny.⁶²⁹ These initiatives are then subject to judicial comparison between various “reasonable” legislative decisions to determine whether “other less limiting measures” may achieve the same policy goals, once again with references to normative concepts like dignity and inclusion.⁶³⁰

However, regardless of the demands of the *Charter* and its bedrock values and principles, courts still take a limited approach to justiciability of socioeconomic rights. There may be more potential for advancing socioeconomic rights through private law actions, as seen in the class action regarding the cancelled OBIP pilot, though this is a very narrow and specific circumstance. *Bowman* is both a cautionary tale for governments when they make commitments regarding cash transfers, and a cautionary tale for plaintiffs seeking to advance *Charter* claims.

3.2.2 *Bowman v Ontario*

Recall that the 2018 OBIP was supposed to run for three years and provide participants with a set amount of monthly income for the duration of the study. A new government was elected in Ontario just after the launch of the pilot in June of 2018, promising to keep the study running, but then, without warning, announced an early cancellation of the program just a month later in July.⁶³¹ The government then decided to allow the pilot to continue for a few months, though participants only received about a year of promised payments and the winding down plan was found to breach research ethics standards by a third-party research firm.⁶³² Plaintiffs in the OBIP case first applied for judicial review of the decision to cancel the pilot, but the administrative law remedies available were limited, since the OBIP was a cabinet-crafted program, and not born from statute.⁶³³ The Ontario Divisional Court held that the decision to cancel was a “policy decision” made by Cabinet, which was not “irrational” nor made in bad faith, and review of this decision was therefore outside the purview of the courts, especially because the distribution of government funds is a constitutionally-protected political function.⁶³⁴ The

⁶²⁹ *Ibid* at para 111.

⁶³⁰ *Ibid*.

⁶³¹ *Bowman et al v Her Majesty the Queen*, 2019 ONSC 1064 (Div Ct) [*Bowman JR*].

⁶³² *Ibid* at paras 22-34.

⁶³³ *Ibid* at paras 42-44.

⁶³⁴ *Ibid* at paras 57-58, and 38 citing *Re Metropolitan General Hospital and Minister of Health* (1979), 1979 CanLII 2058 (ON SC) at paras 10-13.

rationality of the cancellation was given little attention in this holding, however, which is relevant to my consideration of the principles of fundamental justice below.

After failing on judicial review, the OBIP plaintiffs attempted to certify a class action for breach of contract, negligence, breach of public law duty, and a breach of section 7 of the *Charter*.⁶³⁵ The Ontario Superior Court found that none of these causes of action were sustained by the plaintiffs' pleadings, and therefore allowed the Ontario government's motion to strike the claim. On the section 7 cause of action, the ONSC found that "in the absence of a constitutional right requiring government to act in the first place, there can be no constitutional right to the continuation of a program, even where the program accords with or enhances *Charter* values."⁶³⁶ At the certification stage of a class action, courts are looking to see if certain criteria are satisfied, and are not called to determine the case on its merits.⁶³⁷ The Court took a cursory look at the plaintiffs' claim and found that the "discontinuance of the payments could only be a breach if, at the point of discontinuance, the government had an obligation to continue them."⁶³⁸ Further, even if the plaintiffs had made "fundamental life decisions going to their physical and psychological integrity, and well-being, in reliance upon the promise that those payments would be made," this did not amount to a constitutional right to "not have payments discontinued."⁶³⁹

The plaintiffs appealed, and in June of 2022, the ONCA found that the statement of claim did indeed disclose a cause of action, but only for breach of contract.⁶⁴⁰ The ONCA found that whether section 7 of the *Charter* may include economic interests (especially referring to the right to "security of the person") was irrelevant to the motion at-issue. This was purely a procedural problem. The plaintiffs had not plead which principle(s) of fundamental justice were offended by the termination of OBIP, and therefore had not plead the required elements for a section 7 claim.⁶⁴¹ This omission was "fatal" to the section 7 cause of action.⁶⁴²

⁶³⁵ *Bowman ONSC*, *supra* note 558.

⁶³⁶ *Ibid* at para 71, citing *Flora v Ontario Health Insurance Plan (General Manager)*, 2008 ONCA 538 at para 104.

⁶³⁷ *Bowman ONCA*, *supra* note 558 at para 25 and 42, citing *Hollick v Toronto (City)*, 2001 SCC 68 (noting that Bale J had overstepped the bounds of the required motion and performed a merits analysis on the breach of contract claim).

⁶³⁸ *Bowman ONSC*, *supra* note 558 at paras 72.

⁶³⁹ *Ibid* at paras 75-77.

⁶⁴⁰ *Bowman ONCA*, *supra* note 558 at paras 44-45 (The remaining causes of action did not satisfy the "plain and obvious" test to determine whether the plaintiff's pleadings disclose a cause of action supported at law).

⁶⁴¹ *Ibid* at para 93-96.

⁶⁴² *Ibid* at para 97.

On a motion, courts can allow for amendments to civil pleadings in certain circumstances, but this is a discretionary measure.⁶⁴³ Perhaps an amendment could be pursued to advance the section 7 claim, but with no guarantee of success, this would be resource intensive and risky. If it were possible for the plaintiffs in *Bowman* to amend the pleadings and advance the section 7 cause of action, then the principles of fundamental justice would have to be adequately argued. These principles can sometimes be based on procedural principles of justice, like the right to a fair trial,⁶⁴⁴ or the right to reasons that rationally sustain a decision by an administrative body.⁶⁴⁵ Cabinet is not technically an administrative body, and the decision to cancel the OBIP was not made within a statutory scheme, which was in-part why the judicial review of the decision to cancel the OBIP failed.⁶⁴⁶ Procedural principles might therefore not be relevant in the *Bowman* case, but this would not necessarily impede arguments on substantive principles of fundamental justice.

In the past, the SCC has stated that substantive principles of fundamental justice can be founded on “international conventions on human rights,” because these conventions are “recognized as essential elements of a system for the administration of justice which is founded upon a belief in ‘the dignity and worth of the human person’ ... and on ‘the rule of law.’”⁶⁴⁷ This might be beneficial for the plaintiffs in *Bowman* because of Canada’s commitments under the *ICESCR*, since this Covenant is a binding international treaty that Canada has ratified. Canada has obligations to implement the *ICESCR* within the domestic legal order, though the method for implementation – like adopting the *ICESCR* through legislation or incorporating its content into judicial decision-making on domestic laws – is flexible.⁶⁴⁸ However, the “flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant.”⁶⁴⁹

If an argument connecting Canada’s commitments under the *ICESCR* was used to ground a novel substantive principle of fundamental justice, this novel principle would be subjected to a test laid out in *R v Malmo-Levine* and *R v Caine*, which requires that a

⁶⁴³ Per the *Rules of Civil Procedure*, RRO 1990, Reg 194, rules 26.01 and 26.02.

⁶⁴⁴ *R v Harrer*, [1995] 3 SCR 562 at para 13.

⁶⁴⁵ *Suresh v Canada*, 2002 SCC 1 at para 126.

⁶⁴⁶ *Bowman JR*, *supra* note 631 at paras 57-58.

⁶⁴⁷ *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC) at para 30, citing the *Canadian Bill of Rights*, *supra* note 49, and the preamble to the *Charter*, *supra* note 36.

⁶⁴⁸ General Comment 9, *supra* note 56 at para 1.

⁶⁴⁹ *Ibid* at para 2.

principle of fundamental justice must be: 1. “a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate,” and 2. “it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.”⁶⁵⁰ In this framework, the SCC has stated that, when grounding a principle of fundamental justice in an international treaty, the first stage of the *Malmo-Levine* test asks “(a) whether there is significant international consensus regarding the interpretation of the treaty, and (b) whether there is consensus that the particular interpretation is fundamental to the way in which the international legal system ought to fairly operate.”⁶⁵¹ For a *Malmo-Levine* analysis, the SCC has described General Comments from human rights bodies as persuasive but not determinative, but for the sake of the remainder of my arguments here, I will assume that as the adjudicating body for the *ICESCR*, the Committee’s General Comments represent “international consensus” on the interpretation of the *ICESCR*.⁶⁵²

Recall that article 11 recognizes the right to an adequate standard of living, “including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right.”⁶⁵³ If the choice to ground the principles of fundamental justice at-issue in *Bowman* was based on the right to an adequate standard of living, then the interpretative consensus on this provision would be salient. This is sometimes broken into separate rights to housing and food. The right to housing is generally discussed in terms of ensuring housing accessibility, adequacy, and affordability, but not specifically about income

⁶⁵⁰ 2003 SCC 74 at para 113 [*Malmo-Levine*].

⁶⁵¹ *Kazemi*, *supra* note 596 at para 147.

⁶⁵² *Ibid* at para 147 (finding that the Committee against Torture did not have the final say on whether art 14 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85 provided a right to a civil remedy for torture conducted in a foreign state).

⁶⁵³ *ICESCR*, *supra* note 52, art 11, emphasis mine. There are other dimensions to consider that do not devoted space to here, such as the requirement to “take steps” to progressively realize the rights contained in the *ICESCR* seen in art 2.1, and the standards for assessing “progressive realization” of the rights contained in the *ICESCR*. This language is generally interpreted with reference to the specific state’s resources, but the CESCR has “emphasized that even if the full implementation of Covenant rights cannot be achieved immediately because of resource or related constraints, this does not relieve governments of immediate obligations. States have an immediate obligation ‘to work out and adopt a detailed plan of action for the progressive implementation’ of each of the rights contained in the Covenant.” Bruce Porter, “Rethinking Progressive Realization: How Should it be Implemented in Canada? Background Paper for a Presentation to the Continuing Committee of Officials on Human Rights” (4 June 2015), online: *Social Rights* <https://www.socialrights.ca/documents/publications/Porter%20Progressive%20Implementation.pdf> at 3; Others suggest that the standard to assess progressive realization should include a time component, see e.g. Katharine G Young, “Waiting for Rights: Progressive Realization and Lost Time” in Katharine G Young, ed, *The Future of Economic and Social Rights* 654 at 654-683 (Cambridge, UK: Cambridge University Press, 2019).

supports to fulfill these requirements.⁶⁵⁴ The right to food is framed as a right to sustainable access to both culturally and dietarily adequate food.⁶⁵⁵ These rights are again “indivisible” from other human rights, and the CESCR has stated specifically that the right to food is “inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.”⁶⁵⁶

The Government of Ontario justified the cancellation of the OBIP as part of a package of social welfare “reforms” framed as anti-poverty initiatives; “reforms” included a 1.5% cut to the planned increases for Ontario Works and ODSP, which the government stated was part of their plan to “[help] people lift themselves out of poverty” – presumably by the bootstraps.⁶⁵⁷ A backgrounder on the cancellation stated that although “many people are struggling for independence, and one in seven Ontarians live in poverty,” basic income “was not the answer Ontario families need. Ontario will focus resources on more proven approaches.”⁶⁵⁸ The announcement hinted that the way to eradicate poverty is to keep cash transfer payments low to compel people to work, and to then provide tax breaks for workers and provide gas and hydro subsidies.⁶⁵⁹ Though questionable in terms of “proven” or “appropriate” policies for poverty eradication, an adequate standard of living can indeed be achieved in a variety of ways, and framing the cancellation of OBIP as an anti-poverty initiative therefore weakens the connection to an adequate standard of living.

However, article 9 of the *ICESCR* also recognizes the right to “social security, including social insurance.”⁶⁶⁰ General Comment 19 from the CESCR identifies that “[t]he right to social security has been strongly affirmed in international law.”⁶⁶¹ Normatively, “social security should be treated as a social good, and not primarily as a mere instrument

⁶⁵⁴ See e.g. Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, UNESCOR, 6th Sess, UN Doc E/1992/23 (1991) at 8.

⁶⁵⁵ See e.g. Committee on Economic, Social and Cultural Rights, *General Comment No 12: The right to adequate food (art 11)*, UNESCOR, 20th Sess, UN Doc E/C.12/1999/5 (1999) at paras 7-13.

⁶⁵⁶ General Comment 9, *supra* note 56 at para 10.

⁶⁵⁷ “Ontario’s Government for the People to Reform Social Assistance to Help More People Get Back in Track” (31 July 2018) online: Ontario Newsroom <<https://news.ontario.ca/en/release/49831/ontarios-government-for-the-people-to-reform-social-assistance-to-help-more-people-get-back-on-track>> [OBIP Announcement].

⁶⁵⁸ “Backgrounder: Helping People with a Plan to reform Social Assistance” (31 July 2018) online: *Ontario Newsroom* <<https://news.ontario.ca/en/backgrounder/49830/helping-people-with-a-plan-to-reform-social-assistance>> [OBIP Backgrounder].

⁶⁵⁹ OBIP Announcement, *supra* note 657.

⁶⁶⁰ *ICESCR*, *supra* note 52, art 9.

⁶⁶¹ Committee on Economic, Social and Cultural Rights, *General Comment No 19: The right to social security (art 9)*, UNESCOR, 39th Sess, UN Doc E/C.12/GC/19 (2008) at para 7 [General Comment 19].

of economic or financial policy,” and that the right to social security “includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage... as well as the right to equal enjoyment of adequate protection from social risks and contingencies.”⁶⁶² Legal obligations flow from this normative framing. Since principles of fundamental justice must be grounded in legal principles, these obligations could perhaps ground a novel principle of fundamental justice.

As with all human rights under the *ICESCR*, state parties have “specific” legal obligations to “respect, protect, and fulfil” the right to social security: respect requires non-interference with the enjoyment of the right, protection involves adopting effective legislative measures to safeguard the right, and fulfillment requires active measures to “facilitate, promote and provide” social security through national strategies and action plans.⁶⁶³ These are all forward-looking requirements that discourage states from developing precarious social welfare programs, or taking “retrogressive” actions – meaning backtracking on socioeconomic rights.⁶⁶⁴ But what happens when social security is nevertheless cancelled, reduced, or clawed-back? There is one “general” legal obligation in these circumstances:

There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party.”⁶⁶⁵

General Comment 19 then provides factors the CESCR will consider in determining whether the retrogressive measure was “duly justified”:

The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on

⁶⁶² *Ibid* at para 9.

⁶⁶³ *Ibid* at para 43-51.

⁶⁶⁴ Though in later letters to states, the CESCR may have broadened the circumstances where retrogression can be justified, moving more toward “a model of emergency ‘accommodation’” which gives states more discretion in financial and economic crises, and may be seen to relax the requirements under the *ICESCR*, see Ben TC Warwick “Socio-economic Rights During Economic Crises: a Changed Approach to Non-Retrogression” (2016) 65:1 Intl and Comparative L Quarterly 249 at 255-256 online: <http://www.jstor.org/stable/24761363>.

⁶⁶⁵ General Comment 19, *supra* note 661 at para 41.

the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.⁶⁶⁶

Deliberately adopting “retrogressive measures” that are “incompatible” with these “core obligations” amounts to a violation of the *ICESCR*.⁶⁶⁷ These obligations relate in many ways to Tronto’s feminist democratic ethic of care, because they require consideration of the impacts on and needs of social security recipients, and also demand democratic input through genuine participation of affected groups.

Assuming this interpretation represents consensus on the right to social security, we must then consider whether this interpretation is “fundamental to the way in which the international legal system ought to fairly operate.”⁶⁶⁸ The presumption that retrogressive measures will likely violate the *ICESCR* is indeed fundamental to the right to social security and thus to the operation of the *ICESCR* within the international legal order. This is because without a presumption that retrogressive measures violate the *ICESCR*, states may choose to simply cancel, reduce, or claw-back social security at will, with limited justification, and with no opportunity for legal redress of the harm retrogressive measures may cause. Without this presumption, the right to social security – or any right under the *ICESCR* – becomes a right without a remedy, rendering it politically vulnerable, non-justiciable, and meaningless.

In *Bowman*, the recipients of the OBIP were low-income earners and thus marginalized in many areas of society. Some of them were people living with disabilities and thus further marginalized. Given a small amount of breathing room through OBIP, the plaintiffs made “fundamental life decisions going to their physical and psychological integrity, and well-being” in reliance upon the promise that [OBIP] payments would be made.”⁶⁶⁹ The plaintiffs argued that by cancelling the OBIP without warning, the Ontario government breached their *Charter* rights to life, liberty, and also security of the person. To overcome the positive-versus-negative rights hurdle here, I suggest that providing a cash transfer-based social welfare program advances section 7 rights to life, liberty, and

⁶⁶⁶ *Ibid* at para 42.

⁶⁶⁷ *Ibid*.

⁶⁶⁸ *Kazemi*, *supra* note 596 at para 147.

⁶⁶⁹ *Bowman ONSC*, *supra* note 558 at paras 75-77.

security of the person through the right to social security, and that a retrogression on social security then represents a retrogression on section 7. A retrogression can be seen a breach or a deprivation. The principle of fundamental justice to then measure against these deprivations should be framed “with sufficient precision.”⁶⁷⁰ Using the CESCR’s comments, I suggest that the principle of fundamental justice grounded in the right to social security and the presumption against retrogressive measures can be framed this way: *deliberately retrogressive measures must be carefully considered against all alternatives and duly justified by reference to other socioeconomic rights, and made in the context of the full use of the maximum available government resources.*⁶⁷¹ This framing includes the factors required for “duly justifying” retrogressive measures, like consultation with affected groups and ensuring the measures are not discriminatory.⁶⁷² For simplicity, this could be called the *principle against retrogression*.

The decision to cancel the OBIP is arguably a retrogressive measure against the right to social security for thousands of OBIP participants and was announced without consultation with recipients. The evidence on consideration of alternatives is not clear, but the cancellation announcement makes no reference to alternative measures for the OBIP recipients, nor was it justified with reference to other socioeconomic rights. The decision to cancel OBIP was described with some reference to Ontario’s available resources, but only framed as part of a plan to “focus resources on more proven approaches” without describing such approaches.⁶⁷³

My framing of the substantive principle of fundamental justice potentially at-issue in *Bowman* is novel. Canadian courts mostly prefer to consider arguments that relate to three previously recognized principles of fundamental justice, which connect to “failures of instrumental rationality” in governmental decisions, and considers whether the state action in question is arbitrary, overbroad, or grossly disproportionate.⁶⁷⁴ The preference for arbitrariness, overbreadth, and gross disproportionality means that courts rarely recognize new substantive principles, which makes *Charter* analysis somewhat formalistic, leading

⁶⁷⁰ *Malmo-Levine*, *supra* note 650 at para 113.

⁶⁷¹ Based on the language of General Comment 19, *supra* note 661 at para 41.

⁶⁷² *Ibid* at para 42.

⁶⁷³ OBIP Backgrounder, *supra* note 658.

⁶⁷⁴ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 107 [*Bedford*].

Martha Jackman to comment that rather than a “living tree,” principles of fundamental justice look more like a “wizened stump.”⁶⁷⁵

The *principle against retrogression* also does not neatly conform to analyses under arbitrariness, overbreadth, or gross disproportionality. Arbitrariness considers whether there is a “*rational connection*” between a law’s purpose and its effects which cause a section 7 deprivation.⁶⁷⁶ Overbreadth is related to arbitrariness because both principles consider whether there is “*no connection* between the effects of a law and its objective,” but overbreadth is distinct because it “allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.”⁶⁷⁷ Gross disproportionality is generally saved for “extreme” cases where “the law’s effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported,” and the “seriousness of the deprivation is totally out of sync with the objective of the measure,” and the “draconian impact of the law and its object [are] entirely outside the norms accepted in our free and democratic society.”⁶⁷⁸ Peter Hogg has written that the three principles are distinct, but related in that they all provide a means for Canadian courts to accept a legislative objective as constitutional, but then “scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.”⁶⁷⁹

In *Bowman*, cancelling a specially designed social welfare experiment and justifying that decision as a method of poverty reduction seems to lack some instrumental rationality. There was no specific legislative scheme to challenge in this case, so the frameworks for arbitrariness, overbreadth, or gross disproportionality are not a perfect fit. But we can consider that if a social welfare program advances life, liberty, or security of the person, and that program is cancelled, diminished, or hobbled by underfunding, then this can be seen as a retrogression on these rights. My framing of the *principle against retrogression* relates to instrumental rationality because it requires weighing retrogressive

⁶⁷⁵ Martha Jackman “Wizened Stump or Living Tree? Section 7 Principles of Fundamental Justice” (2022) online only: <http://dx.doi.org/10.2139/ssrn.4032740> (pre-publication draft of a chapter in Howard Kislwicz, Kerri Froc & Richard Moon, eds, *The Surprising Constitution* (Vancouver: UBC Press, forthcoming) [Jackman Stump].

⁶⁷⁶ *Bedford*, *supra* note 674 at paras 111, emphasis mine.

⁶⁷⁷ *Ibid* at para 117, emphasis mine.

⁶⁷⁸ *Ibid* at para 120.

⁶⁷⁹ *Ibid* at para 107, citing Peter Hogg “The Brilliant Career of Section 7 of the Charter” (2012) 58 SCLR 195 at 209.

measures carefully against alternative policy options and then justifying governmental decisions in the context of advancing other socioeconomic rights. It also demands that the government carefully consider and consult on its choices when those choices may impact human rights and human needs of people in Canada. For example, if the Ontario government had consulted with recipients, and cancelled the OBIP in favour of providing recipients with direct access to adequate food, housing, and health care (through extended health and drug coverage), then maybe the retrogression on the right to social security could then be duly justified in the context by advancing the rights to an adequate standard of living and to health.

Perhaps the *principle against retrogression* could be useful in future cases like *Bowman*, but the circumstances are so unique – an experimental social welfare trial being promised and then cancelled – that we may not see another case like it. The ONCA ultimately allowed the certification claim to be advanced on breach of contract but sent the determination of the remaining issues back down to the ONSC. The plaintiffs in *Bowman* will likely wait years as the remaining issues are argued, decided, and then potentially appealed even before the class action is allowed to proceed. Though this phase of *Bowman* could be seen as a success for poverty rights advocacy, the success is narrow and rests on private law, not human rights. This provides limited opportunities for future challenges to social welfare decisions when programs are cancelled and vulnerable people are left in precarious positions.

If we think in terms of Tronto's framework of caring democracy, the cases I have described here represent instances where courts are tasked with managing disputes over assigning responsibilities for care. In this model, courts are supposed to be sites where justice involves a process of considering different perspectives and evidence and coming to a decision on who is responsible for caring. When courts see socioeconomic rights as non-justiciable or limit their scope of understanding to private law concepts, plaintiffs are left with little recourse to reinforce the long-term stability or viability of any social welfare program unless the circumstances might rise to the level of contractual obligation. Human rights are nearly irrelevant. The reinforcing message is that – despite promises to the contrary in some cases – the government has no duties (in a legal sense) nor responsibilities (in a moral sense) to provide care, and even if they might have legal duties, they may

dispute the enforcement of such duties. These cases are really asking larger questions like “what is the purpose of government?” or “who is government designed for?” The demands of the rule of law are implicated as well, which I do not discuss here but may warrant exploration in considering how care interacts with the rule of law.⁶⁸⁰

In this section, I have discussed the tensions and relations between international human rights and domestic human rights. Through this discussion, I have explored some opportunities and impediments for advancing basic income mostly through *Charter* litigation and making connections to existing human rights domestically and internationally, though there are limited situations where private law concepts may help, as with *Bowman*. These cases require significant resources to support and sometimes take years to resolve, as with *Gosselin* and *Bowman*, or might never even get a chance to be fully heard at all, as with *Tanudjaja*. These are not promising for advancing basic income in relation to human rights, but even with these failings on recognizing positive rights, courts still offer a mechanism for review to ensure that even policy decisions do not discriminate against groups protected under section 15(1) of the *Charter*.⁶⁸¹

Perhaps advancing socioeconomic rights through the courts faces even bigger structural problems because “the antiquated private law model of corrective justice is not fit for the systemic goals of human rights legislation.”⁶⁸² Litigation often takes disputes about responsibility for care and makes them into disputes about financial liability, like the allowance of the breach of contract claim in *Bowman*. Human rights tribunals or other administrative bodies tasked with decisions around the provision of care are perhaps more suited to these kinds of context-driven cases and to providing more systemic remedies. However, courts still have the opportunity to hear judicial reviews of tribunal decisions in Canada and can even reverse or uphold decisions on systemic remedies that tribunals may

⁶⁸⁰ Though the “rule of law” is a contested concept – much like “feminism” or “care” – the SCC has described the rule of law as a principle and the content of this principle as requiring legal limits to the actions of both government actors and private citizens, but also requires the creation of positive laws for the benefit of the public, because “individuals rely upon [law] to organize their lives and protect them from harm,” *Ontario (Attorney General) v G*, 2020 SCC 38 para 96, citing *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721 at 748-750 and 757.

⁶⁸¹ *Charter*, *supra* note 36.

⁶⁸² Tracy Smith-Carrier et al, “Erosion of Social Support for Disabled People in Ontario: An Appraisal of the Ontario Disability Support Program (ODSP) Using a Human Rights Framework” (2020) 9:1 *Canadian Journal of Disability Studies* 1 at 23 <doi: 10.15353/cjds.v9i1.594>.

impose on governments.⁶⁸³ Courts may then become involved in such disputes in other ways.

I am hesitant to suggest that opportunities exist for advancing socioeconomic rights like the right to a basic income through *Charter* litigation. Perhaps if there is movement toward affirming the connection between the right to life or security of the person and health care on Ms. Toussaint's most recent filing, or the *Charter* claim in *Bowman* is still able to be pursued, then the relationship between international human rights and domestic human rights will prove less tenuous. Realizing socioeconomic rights in Canada may ultimately require more democratic, legislative action, perhaps influenced by concepts of care that I discussed in Chapter 2. In the next section, I explore what we can learn from the enactment of past major social welfare schemes and the purposes of such schemes to illuminate further obstacles and opportunities for basic income in Canada.

3.3 Legislating Positive Rights Through Institutional Programs

In the past, two major social welfare programs required constitutional amendments to be administered federally across Canada: unemployment insurance and pensions.⁶⁸⁴ Prior to the enactment of the *Charter* in 1982, these amendments were the only constitutional changes that related to the division of powers for social programs.⁶⁸⁵ Other major federal social welfare programs are premised on the federal government's spending powers or residual powers.⁶⁸⁶ These major programs have two central lessons to teach us about roadblocks for basic income: first, basic income must contend with what the literature describes as “*residual*” versus “*institutional*” approaches to social welfare that affect rights to care (meant here to describe both hands-on care and also viewing cash transfers as a form of public care).⁶⁸⁷ The second lesson is that federalism presents a significant legal

⁶⁸³ See e.g. *Moore v British Columbia (Education)*, 2012 SCC 61 at para 57 (despite the SCC upholding the factual findings relating to both individual and systemic discrimination against students with disabilities in North Vancouver's school board, they nonetheless found the remedies too “remote” from the complaint).

⁶⁸⁴ Now contained in *Constitution 1867*, supra note 29 ss 91(2A) and 94A, respectively.

⁶⁸⁵ There was a change to the *Constitution 1867* in 1930 that provided BC, Alberta, Manitoba, and Saskatchewan with natural resource rights over federal lands to bring them into “equality” with other provinces, *Constitution Act*, 1930, 20-21 Geo V, c. 26 (UK), which amended some federal powers though not for a specific stream of social programs.

⁶⁸⁶ Such as family allowances which were held to be constitutional in *Angers*, supra note 557; see also aspects of constitutional change relating to family allowances discussed in Raymond B Blake, *From Rights to Needs: A History of Family Allowances in Canada, 1929-92* (Vancouver, BC: UBC Press, 2009) at 198-229 [Blake].

⁶⁸⁷ Guest, supra note 24 at 3-4, emphasis mine; see different approaches to social welfare discussed generally in, Erdem Yörük et al, “The Four Global Worlds of Welfare Capitalism: Institutional, Neoliberal, Populist and Residual Welfare State Regimes” (2022) 32:2 J of European Social Policy 119 <[10.1177/09589287211050520](https://doi.org/10.1177/09589287211050520)> [Yörük].

obstacle to implementing a national-level social welfare policy. In terms of opportunities, institutionalized programs offer greater responsiveness and robustness in the face of crises, both socially and constitutionally. Judicial treatment of institutionalized, national programs like unemployment insurance may provide some insight into the constitutional flexibility of the concept of “social insurance” that is embedded within certain social welfare policies. To illustrate opportunities to advance a care ethics-based basic income, I also discuss the ways that care is considered or embedded in the legislative schemes explored here.

3.3.1 Residual versus Institutional Social Welfare

“Residual” social welfare regimes approach care, support, or social help as primarily the concern of the family and the market, and that any support outside of these private arrangements are seen as “gratuitous,” “temporary,” and discretionary.⁶⁸⁸ The residual approach is often connected to libertarian or neoliberal notions of small, laissez-faire government, and the boot-strapping notion that if people are given too much support, they will lack independence and not learn the virtues of “industry and thrift.”⁶⁸⁹ The OBIP cancellation announcement leveraged some of these notions when they cited that “many people are struggling for independence” in Ontario,⁶⁹⁰ and the province would develop policies to “[help] people lift *themselves* out of poverty.”⁶⁹¹

In contrast, the “institutional” model of social welfare recognizes that “the risks to an individual’s social security are part of the costs of operating a society,” and also that “society should not allow the costs of its progress to fall upon individuals and families.”⁶⁹² In the institutional model, social welfare laws and policies are then seen as the “primary defence against adversity,” and benefits under institutional programs are often attached to receiving benefits as “rights” or entitlements, not gratuities.⁶⁹³ Present-day literature classifies Canada – along with many other high-income, market-based economies – as an

⁶⁸⁸ *Ibid.*

⁶⁸⁹ *Ibid* at 5; Residual approaches are also associated in welfare state literature with “less developed emerging markets,” so in addition to ideological influences, capacity to fund social welfare programs influences policy structures, see Yörük, *supra* note 687 at 121 and 126 (Discussing the examples of Bangladesh, Mexico, Pakistan, Peru and the Philippines to make this point).

⁶⁹⁰ OBIP Backgrounder, *supra* note 658.

⁶⁹¹ OBIP Announcement, *supra* note 657, emphasis mine.

⁶⁹² Guest, *supra* note 24 at 4; though other work indicates a differentiation between the “welfare state” and the “social security state” which Guest seems to conflate, see generally, N Furniss and TA Tilton, *The case for the welfare state: from social security to social equality* (Bloomington: Indiana University Press, 1977).

⁶⁹³ *Ibid.*

“institutional” welfare state, though by some metrics Canada can also be classified as a “neoliberal” welfare state.⁶⁹⁴ A rights-based basic income would be a primary defence against adversity caused by income insecurity, and would thus be an institutional program.

Some background is required to understand Canada’s shift from residual to more institutional social welfare structures and even the constitutional amendments on social welfare. The “modern era” of institutional social welfare in Canada began with worker’s compensation schemes to address poverty caused by an increase in “industrial death, disease, and injury.”⁶⁹⁵ At the turn of the 20th century, the only recourse to receive compensation for workplace injuries was to sue an employer, with little hope of success.⁶⁹⁶ Workers began organizing for better protections, minimum standards, and better supports for injuries, illnesses, disabilities, and death.⁶⁹⁷ The first state-supported income insurance scheme to come out of this period was the Ontario *Workmen’s Compensation Act* in 1914,⁶⁹⁸ which provided “compulsory income protection” for those impacted by “work-related sickness, disability, or death.”⁶⁹⁹ Let us “ask the women question” here.⁷⁰⁰ Notice that this legislation uses “workmen’s” instead of the more neutral “workers.”⁷⁰¹ This is not just a superficial detail, because the scheme provided protection for more men than women, since it targeted formal, industrial workplaces and specifically excluded “outworkers” (who performed mending and washing of items in their own homes), clerical workers, “casual” workers, farm labourers, and domestic or “menial servants.”⁷⁰² Women were increasingly working outside the home in Ontario at the time, but were almost entirely employed in these informal settings, and many Black and Indigenous women would have been barred

⁶⁹⁴ Yörük, *supra* note 687 at 123 (due to limited statutory sickness benefits).

⁶⁹⁵ Guest, *supra* note 24 at 40.

⁶⁹⁶ English and Canadian courts were reticent to modify the “harshness” of common law employer liability for negligence, which demanded high standards of proof in situations where multiple employees or agents may have been involved in the accident, and a variety of defences for employers to avoid liability or compensation for dead or severely injured workers, see Eric Tucker “The Law of Employers’ Liability in Ontario 1861-1900: The Search for a Theory” (1984) 22:2 *Osgoode Hall LJ* 213 at 221.

⁶⁹⁷ Guest, *supra* note 24 at 40-48.

⁶⁹⁸ 1914 SO 4 Geo V c 25 [*Workmen’s Compensation Act*].

⁶⁹⁹ Guest, *supra* note 24 at 40.

⁷⁰⁰ Bartlett, *supra* note 226 at 837; Scales, *supra* note 225 at 27.

⁷⁰¹ “*Workmen’s*” remained in the title of the Act until 1982, pursuant to the changes made in the *Workmen’s Compensation Amendment Act*, 1982, SO 1982, c 61, when more than 60% of women had entered the formal workforce in Canada, see Statistics Canada, *Women and Paid Work in Women in Canada: A Gender-Based Statistical Report*, by Melissa Moyer, Catalogue no 89-503-X2015001 (Ottawa, Statistics Canada, 2014).

⁷⁰² *Workmen’s Compensation Act*, *supra* note 698, ss 2(n) and (p) (outworkers and clerical workers), 3(4) (casual workers), 109 (farm, domestic, and menial servants).

from working in formal positions at all.⁷⁰³ These women no doubt dealt with workplace injuries and illnesses and their job security was also subject to market changes, but they had no state-funded support.⁷⁰⁴ The *Workmen's Compensation Act* also provided pensions only to “widows” of workers killed on the job, indicating further legislative assumptions that workers were men.⁷⁰⁵ In social welfare policy, women were then mostly considered mothers, not workers, during this period.

During this same period of urbanization, increases in divorce, disease, war, and industrial accidents led to significant family breakdown and a surge of women-led, single-parent families.⁷⁰⁶ These women could no longer rely on the “informal social security systems” provided by family and extended community in more rural settings.⁷⁰⁷ At this time, income supports for women were largely provided through residually-based charitable or municipal organizations, but the social changes caused by urbanization influenced a movement for “mothers pensions.”⁷⁰⁸ Even labour organizations endorsed mothers’ pensions, but this was because state-funded supports for mothers would likely reduce “competition for jobs” for men.⁷⁰⁹ Proponents of seeing these programs as “pensions” leveraged rights-based language – “the rights of children” and the “rights of the dependant mother” – which was in contrast to the conservative political voices who preferred the language of “allowance,” with no attached rights.⁷¹⁰ When provinces responded by enacting legislation for mother’s pension programs, the language of “allowance” prevailed in many provinces.⁷¹¹ Even where “pension” remained in the statute – as in British Columbia – courts interpreted payments as a “gift” from the province, with

⁷⁰³ Raelene Frances, Linda Kealey, and Joan Sangster “Women and Wage Labour in Australia and Canada, 1880-1980” (1996) 38 *Labour/Le Travailleur* 54 at 58 (It was not until the labour shortages of World War II gave more women in Canada the opportunity to earn higher wages within factories, and until WWII Black women were not even permitted the opportunity to work in factories, and after the war, these workers were once again relegated to domestic work) [Frances].

⁷⁰⁴ Guest, *supra* note 24 at 50.

⁷⁰⁵ *Workmen's Compensation Act*, *supra* note 698, s 5 and 28 (Payments for widows were also only paid “during her widowhood” meaning that payments ended if the widow remarried).

⁷⁰⁶ Guest, *supra* note 24 at 50 (discussing divorce and desertion and war); Margaret Jane Hillyard Little, ‘No Car, No Radio, No Liquor Permit’: *The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Toronto: Oxford University Press, 1998) at 2-3 (discussing disease, war, and accidents) [Little Radio].

⁷⁰⁷ *Ibid.*

⁷⁰⁸ *Ibid* at 53.

⁷⁰⁹ By removing single women and children from the labour force, Little Radio, *supra* note 706 at 22-23.

⁷¹⁰ Guest, *supra* note 24 at 52-58.

⁷¹¹ See e.g. *Mothers' Allowances Act*, RSO 1927, c 280, (first enacted by *The Mothers' Allowance Act*, SO, 1920, c 89, and repealed by the *Family Benefits Act*, SO 1966, c 54) [Ontario MAA]; see also *Mothers' Allowances Act*, SNS 1930, c 4 (Nova Scotia); *Mothers' Pensions Act*, SS 1917, c 68, repealed and later became the *Mothers' Allowances Act*, 1922, SS 1921-1922, c 73 (Saskatchewan); *Mothers Allowance Act*, SA 1919, c 6 (Alberta).

no available judicial review of administrative decisions, even if decisions were contrary to the provisions of the enabling legislation.⁷¹² The political rationale for mothers' allowances was more connected to alleviating child poverty than to supporting caregivers or attending to the "financial anxiety" of mothers, and payments were set well below subsistence level.⁷¹³ Nonetheless, these were the first Canadian programs that carried some of the features of basic income – they were paid in cash, regularly, and individually (though intended to support a mother and children).⁷¹⁴

Moral regulation through social welfare schemes is another relevant discussion relating to the residual roots of social welfare in Canada. Mother's allowance programs had a strict asset or means test that limited eligibility for payments, which is a requirement that remains today in residual provincial programs like Ontario Works.⁷¹⁵ Mothers' allowance schemes also required that the mother "be a fit and proper person" to have care or custody of children to qualify.⁷¹⁶ The means test and the "fit and proper" provisions translated into significant discretion for "investigators" to determine whether applicants would qualify.⁷¹⁷ Mothers were subject to humiliating and undignified scrutiny for any behaviour that might be deemed improper.⁷¹⁸ The wide discretion granted to investigators allowed for racism against Indigenous, Black, and Eastern European families to influence

⁷¹² See e.g. *Lee v Workmen's Compensation Board*, 1942 CanLII 241 (BC CA) at 670 (Citing an unreported case, *Rex (Wardman) v Manson and Howe* dealing with the 1931 version of the *Mothers' Pensions Act*, SBC 1920, c 61: "the pension lay in the gift of the government, and was not claimable as of right, that the superintendent was the Crown's agent, and even if he was not doing his duty, the pensioner had no legal remedy."); see also no rights of appeal from decisions of Mothers' Allowance Commission in Ontario, *Ontario MAA*, *supra* note 711, s 8.

⁷¹³ See e.g. Little Radio, *supra* note 706 at 36-37; (Similar to the MBM, the basic cost of living for a family of four was calculated at \$98.65 per month in 1923. The maximum available mothers' allowance under the *Ontario MAA* was \$55 per month for a woman with five or more children. Little contrasts this with the privately-funded Canadian Patriotic Fund for widows of the war provided up to \$100 per month. Armed forces allowances for those still fighting overseas provided \$67 per month on top of wages); see also see Guest, *supra* note 24 at 61-63 (Guest describes an interesting contrast to mothers' allowances in the armed forces allowance paid on top soldiers' wages. These payments were provided to "soldiers' dependents" and were intentionally set at a level "above subsistence," with the rationale that this would "save the soldier from financial anxiety and relieve him, in possible, from home worries so that he might be an efficient fighting man.").

⁷¹⁴ Women gained voting rights across most of Canada between 1916 and 1920, so some new abilities to lobby and leverage political power coincided with these programs, see *ibid* at xiv; see also Guest, *supra* note 24 at 54.

⁷¹⁵ Requiring the liquidation of all assets above \$2500 in home equity or \$350 in liquid assets, see *ibid* at 50-53; *Ontario Works Act*, *supra* note 34, s 7(3); *OW Regulation*, *supra* note 158, s 17(2) and 38 (Applicants are ineligible unless their budgetary requirements exceed their income, and their assets do not exceed the prescribed limits of \$10,000 for individuals and \$15,000 for couples, with an additional \$500 per child).

⁷¹⁶ E.g. *Ontario MAA*, *supra* note 711, ss 2(1)(f) and 2(2), whether her children or someone else's children who she found in her care.

⁷¹⁷ Little Radio, *supra* note 706 at 43-45; even modernly, Ontario Works case workers have the discretion to "veer to the more demanding and often literal interpretation of policy directives or create some wiggle room," see Stephanie Baker Collins "The Space in the Rules: Bureaucratic Discretion in the Administration of Ontario Works" (2016) 15:2 *Social Policy and Society* 221 at 228 <<https://doi.org/10.1017/S1474746415000251>> [Baker Collins].

⁷¹⁸ See generally, *ibid* (Little discusses the lack of dignity and level of scrutiny throughout this work).

the decision to provide payments.⁷¹⁹ The “fit and proper” provisions in these schemes “helped to lay the groundwork for the state’s involvement in the moral scrutiny of the poor” that has continued for 100 years.⁷²⁰ Present-day, residual approaches persist, and produce some of the most stigmatizing and degrading elements of social welfare policies that I have discussed, where recipients of programs like ODSP must prove they have the “ideal” disability to qualify,⁷²¹ and those who still need income support but are deemed eligible to work are subject to intense bureaucratic oversight through programs like Ontario Works.⁷²²

By including elements that analyze the “moral worthiness” of recipients, residual programs may also “be less likely to be endorsed by the public.”⁷²³ In this way, attaching stringent conditions to social welfare policies may be “self-defeating if their unpopularity undermines their political feasibility.”⁷²⁴ In addition to taking into account the dimensions of care, social justice, and human rights that I have discussed here, David Calnitsky has suggested that programs like basic income “that take the question of the motivations and morality of the poor off the table may be more robust.”⁷²⁵

Structurally, modern residual programs like ODSP and Ontario Works also have features that are intended to make access to assistance difficult, and a failure to follow the complex and discretionary rules might result in a denial of benefits.⁷²⁶ Residual social welfare programs are not designed as entitlements, nor are they attached to rights. These programs arguably also constitute a form of public care, but they are not approached from the perspective or position of the person in need, as the phase of care labelled *caring for* might demand, and their subsistence-level payments certainly call into question competence in *care-giving*.⁷²⁷

⁷¹⁹ *Ibid* at 67 (For example, community activism by Black families – “behaviour that was commended when noted in White families” – was deemed “suspicious” and disqualifying).

⁷²⁰ Margaret Hillyard Little “‘Manhunts and Bingo Blabs’: The Moral Regulation of Ontario Single Mothers” (1994) 19:2 *The Canadian Journal of Sociology / Cahiers Canadiens de Sociologie* 233 at 234-235 <https://doi.org/10.2307/3341346> (Moral regulation can be described as “the on-going processes by which the state and social agencies organize social life. They observe how these practices become a project of normalizing, of rendering natural unequal relationships between the rulers and the ruled. These moral regulatory practices may reinforce class, gender, and/or race interests.”).

⁷²¹ See McAllister *supra* note 156 at 452; see also Lightman, *supra* note 157 at 2.

⁷²² Smith-Carrier Feminist, *supra* note 108 at 500.

⁷²³ Calnitsky, *supra* note 130 at 28 (“There is evidence that people’s perception of the moral virtue of the poor (rather than class position alone) is a good predictor of their support for generous forms of redistribution.”)

⁷²⁴ *Ibid*.

⁷²⁵ *Ibid*.

⁷²⁶ Baker Collins, *supra* note 717 at 222-232 (Even if front line social workers do their best to interpret the “space between the rules” in favour of the recipient, the legislative system is designed to make access difficult).

⁷²⁷ Tronto Democracy, *supra* note 224 at 34-35.

Residual and neoliberal approaches to social welfare impact the level of inclusiveness and adequacy, the type of oversight, and the moralizing attached to social welfare policies. Recall that basic income in Canada, as I have discussed it, should be paid in cash, distributed regularly, paid out individually (or in some cases, jointly to couples, or families), universally available to anyone who fell below a certain low-income threshold, and given unconditionally (i.e. not attached to a specific behaviour) until the recipient reached the income threshold again through waged work or otherwise. The programs I have discussed in this section are cash transfers that would be distributed regularly and are largely provided individually. We can then say that Canada has a track record of providing some features of basic income over the last 100 years. Universality and unconditionality are the features to truly contend with, and these features are more present in institutionalized programs. Below, I explore some of Canada's more institutionalized cash transfer programs through nationalized pensions, unemployment insurance, and family allowance to understand what they can teach us about institutionalizing basic income.

3.3.2 Nationalized Pensions

Mothers' allowances show us the importance of the concept of "pension" versus "allowance" in attaching rights to cash transfers, but even in Canada's modern, institutionalized pension programs, the concept of a "pension" does not carry the weight of a right to income support.⁷²⁸ The modern *Canada Pension Plan (CPP)* is sister legislation with the *Old Age Security Act (OAS Act)*.⁷²⁹ Both statutes contain the language of "pension," even though the *CPP* is a contributory pension insurance scheme, and the *OAS Act* is a non-contributory scheme that provides a base level cash transfer through Old Age Security (OAS) and top-up transfer through the Guaranteed Income Supplement (GIS) for low-income people. OAS was originally developed in response to public pressure and labour and pensioner lobbying groups, resulting in the enactment of a universal "demogrant" program under the 1951 *OAS Act* that eliminated some of the residual-style stigma and

⁷²⁸ *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at para 9 (Rather, the scheme is insurance-based: "The CPP was designed to provide social insurance for Canadians who experience a loss of earnings owing to retirement, disability, or the death of a wage-earning spouse or parent. It is not a social welfare scheme. It is a contributory plan in which Parliament has defined both the benefits and the terms of entitlement, including the level and duration of an applicant's financial contribution.") [*Granovsky*].

⁷²⁹ Or younger people in some circumstances, as with early retirement, spousal and survivor's payments, and disability payments under the *OAS Act*, *supra* note 172.

means-testing of previous programs.⁷³⁰ Recall that another name for age or characteristic-targeted basic income is a “demogrant.”⁷³¹ OAS and GIS are paid in cash, distributed regularly, paid individually, universally available for those over 65, and are unconditional. From 1951 to today, Canada has therefore provided a basic income for many older people.

Unlike many provincial cash transfer programs, OAS is indexed to inflation.⁷³² The *OAS Act* also provides spousal benefits for those over 60 who do not yet qualify for their own benefits.⁷³³ These mechanisms allow the *OAS Act* to flexibly achieve its purposes of alleviating poverty among “elderly households.”⁷³⁴ There is some suggestion that extending OAS and GIS to all Canadians based on income rather than age might be one “low road” for advancing basic income using existing programs,⁷³⁵ but this would still require fundamental changes to the explicit purposes of the legislation. Additionally, OAS and GIS – though institutional programs – are not designed around a human rights framework. Though it would be politically unpopular to cancel these programs, there would be limited legal recourse if the federal government de-funded or discontinued them.

Importantly, the *CPP* provides no guarantee of payment, even though it is funded through individual contributions and paid out of a trust, whereas OAS and GIS are paid out of general government funds and carry some guarantee of payments.⁷³⁶ Courts consider this an important distinction when considering the purposes of the *CPP*. An example of this distinction can be seen in a recent Federal Court of Appeal (FCA) case which specifically speaks to whether the *CPP* considers the expressive value of caregiving.

⁷³⁰ Guest, *supra* note 24 at 137.

⁷³¹ Van Parijs and Vanderborght, *supra* note 13 at 8.

⁷³² *OAS Act*, *supra* note 172, ss 7(2)-(5).

⁷³³ If the spouse is over 60, *ibid*, s 19.

⁷³⁴ *Egan v Canada*, 1995 CanLII 98 (SCC) <<https://canlii.ca/t/1frkt>> at 519 and 606 (though not directly relevant to our discussion, this case shows the heteronormative framing of the concept of family at the SCC. Here the SCC recognized sexual orientation as an “analogous ground” protected under s 15(1) of the *Charter*, but also upheld the legislative provisions of the *OAS Act* that only provided spousal benefits to married or common-law men and women. This was because gay couples were considered “unmarried,” and the provision’s effects of benefitting heterosexual couples was aimed at married and common-law couples as a “fundamental social unit” that Parliament had chosen to protect. At paras 538-540, the majority essentially found that gay couples rarely formed family units).

⁷³⁵ Tracy Smith-Carrier and Steven Green “Another Low Road to Basic Income? Mapping a Pragmatic Model for Adopting a Basic Income in Canada” (2017) 12:2 Basic Income Studies 20160020 at 14.

⁷³⁶ *OAS Act*, *supra* note 172, s 45 (“All benefits payable under this Act shall be paid out of the Consolidated Revenue Fund.”); see this distinction discussed in *Confédération des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68 at para 74 (so long as the spending is made in connection with employment) [CSN].

3.3.2.1 *Weatherley v Canada*

Robena Weatherley – a 90-year-old, twice-widowed woman – recently pursued a complaint that section 63(6) of the *CPP* (limiting surviving spouses to only one benefit payment) was contrary to section 15(1) of the *Charter* on the basis of sex equality.⁷³⁷ Prior to significant amendments in 1987 that brought the *CPP* in line with the *Charter*, a survivor’s *CPP* pension would be terminated if they remarried.⁷³⁸ Ms. Weatherley lost her first husband in 1969 and earned a survivor’s pension until 1973 when she remarried. In 1993 she reapplied for *CPP* and was paid survivor’s benefits while her second husband was alive. This consistent income allowed her to be her second husband’s caregiver while he was ill in his later years.⁷³⁹ Ms. Weatherley spent a lifetime caring for her spouses and children and worked part-time or not at all to do so, which affected her personal contributions to *CPP*.⁷⁴⁰

In the initial decision on Ms. Weatherley’s claim, the Social Security Tribunal (SST) accepted that amendments made to the *CPP* in the 1980s related to the *Charter*, but also to shifting social views on valuing women’s labour in the home.⁷⁴¹ Ms. Weatherley argued that the survivor’s benefit should be interpreted to provide “symbolic recognition for non-monetary contributions” that non-wage-earning spouses make during marriage.⁷⁴² In essence, Ms. Weatherley was arguing that a survivor’s benefit was intended to be a caregiver’s pension. The Tribunal agreed, and the Minister of Employment and Social Development appealed the decision. The Appeal Division of the SST found that there was no evidence connecting section 63(6) regarding spousal benefits to the *Charter*-focused amendments in 1987, and further, that a 1985 parliamentary advisory committee had specifically rejected grounding a “homemaker pension” within the *CPP*.⁷⁴³

⁷³⁷ *Weatherley v Canada (Attorney General)*, 2021 FCA 158 (Ms. Weatherley abandoned her early arguments on being twice widowed and instead pursued the claim on the basis of sex discrimination under s 15(1) of the *Charter*. The FCA ultimately held that she did not advance evidence satisfactory to establish a disproportionate adverse effect on women, and regardless that any potential discrimination was saved by section 1) [*Weatherley*].

⁷³⁸ See *RW v Minister of Employment and Social Development*, 2019 SST 122 at para 75-77.

⁷³⁹ *Ibid* at para 11.

⁷⁴⁰ *Ibid* at para 8-10.

⁷⁴¹ *Ibid* at para 88 (Noting a shift in social views that had moved beyond the notion that if a woman remarried, she no longer needed support through programs like CPP because she had “a new man to take care of her.”).

⁷⁴² *Weatherley*, *supra* note 737 at para 59.

⁷⁴³ *Minister of Employment and Social Development v RW*, 2020 SST 147 at para 54.

Ms. Weatherley applied to the FCA for judicial review of the Appeal Division’s decision. At the FCA, the survivor benefit was interpreted to only “provide a minimum income supplement, related in part to [monetary] contributions made to the Plan by the [deceased] spouse” and not to the non-monetary contributions of a spouse as a caregiver or homemaker.⁷⁴⁴ Writing for a unanimous court, Stratas JA held that there was no *Charter* breach. The structure of the *CPP* program was central to making this decision. Stratas JA described the *CPP* as a “far-reaching, national, compulsory income insurance scheme,” which is structurally different than a “social welfare” scheme, meaning that the *CPP* was never intended to be comprehensive nor “meet the needs of all contributors in every conceivable circumstance.”⁷⁴⁵

Courts’ view of the differences between social welfare and insurance programs is a key distinction for the purposes of basic income. Even with constitutional backing for the federal government to administer the scheme, and with long-running benefits like survivor’s supports, the *CPP* is only a “compliment” to private retirement savings and pensions and is “*not anything like a guaranteed annual income*. It is more like modest help for recipients to meet their basic needs.”⁷⁴⁶ Paying into *CPP* does not translate into an automatic right to pension support, but instead, “some who have paid plenty into [*CPP*] might never receive a cent while others who have paid little might get much more.”⁷⁴⁷ Rights of appeal to the SST and subsequent judicial review and appeals to the courts are available, but there is no right attached to payment.

Weatherley was recently followed in *Landau v Canada* where an applicant alleged discrimination on the basis of being a single person who never married, claiming that the *CPP* forced her and other single people to subsidize survivor’s benefits.⁷⁴⁸ The FCA once again stated that the *CPP* “was designed to provide partial earnings replacement in certain circumstances,” and that due to the nature of the *CPP*, “an increase in benefits or reduction of contributions for some often must result in the reduction of benefits or increase in contributions or both for others; and many of these others are needy and vulnerable and

⁷⁴⁴ *Weatherley*, *supra* note 737 at para 59.

⁷⁴⁵ *Ibid* at para 8, citing *Granovsky*, *supra* note 728 at para 9 and *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at paras 68-69 [*Miceli-Riggins*].

⁷⁴⁶ *Ibid* at para 10, emphasis mine.

⁷⁴⁷ *Ibid* at para 44-45, citing *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 32 and 34.

⁷⁴⁸ 2022 FCA 12.

also arguably fall under section 15(1) of the Charter.”⁷⁴⁹ This suggests the necessity for parsing out winners and losers in an insurance-based scheme. Courts might end up asking “who’s discrimination *matters?*”

In *Weatherley*, the FCA wrote that if Ms. Weatherley’s arguments on how the courts should interpret discrimination were accepted, then “all of the provisions of the [CPP] would have to be read for situations where they do not address pre-existing disadvantage based on any of the section 15(1) grounds. In all of those situations, subject to section 1 [of the *Charter*] the [CPP] would have to positively redress it.”⁷⁵⁰ This would be a step too far in the eyes of the Court, and would limit Parliament’s ability to design legislation, and further, would “require Parliament to design and positively implement a sweeping scheme designed to eradicate all pre-existing inequality, whether or not caused by government, in all foreseeable circumstances,” which the SCC has found to be even beyond the purposes of the equality provisions in section 15(1) of the *Charter*.⁷⁵¹ Why is the remediation of inequality beyond the purposes of the *Charter*? Once again, positive versus negative rights becomes an obstacle: without any positive rights to social welfare supports, “the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.”⁷⁵²

In *Weatherley*, the FCA also cautioned against relying on a “web of instinct” to ground *Charter* discrimination claims, meaning that a claimant must present adequately compelling evidence about a specific group or specific individuals that are adversely affected by an impugned law, but “evidence that ‘captures a vastly larger, more diverse population than the community affected’ by the impugned law is also not helpful at all.”⁷⁵³ This is important to consider for any future cases attempting to prove a *Charter* discrimination claim for caregivers, because caregivers are a highly heterogenous group.

In *Weatherley* and *Landau* we can see a distinction drawn between not just institutional and residual approaches, but to limitations on the construction of a right to

⁷⁴⁹ *Ibid* at para 14, likely referring to those who are disabled.

⁷⁵⁰ *Weatherley*, *supra* note 737 at para 60-62 (Ms. Weatherley argued that the double pension limitation perpetuated the existing disadvantage of twice-widowed women without redressing it).

⁷⁵¹ *Ibid* at para 63, citing *Auton (Guardian ad litem of) v British Columbia (AG)*, 2004 SCC 78 at paras 2 and 41 [*Auton*].

⁷⁵² *Auton*, *supra* note 751 at para 41.

⁷⁵³ *Weatherley*, *supra* note 737 at para 45.

payment if the program is structured as an insurance scheme. From the perspective of the courts, *pension* insurance schemes – even ones that are administered by a government – are premised on the idea of social solidarity as mutual self-interest,⁷⁵⁴ where each beneficiary pays into a scheme with the hope that the scheme will pay out a higher output than input, but with no guarantee. However, perhaps we could see this another way. Implicit in the inclusion of survivor’s benefits and disability payments under the *CPP* is seemingly a “pay-it-forward” model of responsibility for care. The SCC has held that “drawing lines is an unavoidable feature of the *CPP* and comparable schemes,” meaning that people who are in greater need of support for long-term financial stability (like the disabled or elderly people who lose a spouse) are provided with higher levels of care.⁷⁵⁵ Courts’ description of the *CPP* suggests that contributors must accept limitations to their own payments in order to care for others, and this is because perhaps one day they too will be older or more permanently disabled, and at that point, the contributions of others will in turn support them.⁷⁵⁶ This pay-it-forward model has some connections to the ethics of care, but courts accept that the *CPP* explicitly excludes caregivers or those who contribute to society through non-waged work, so the scheme is missing an important dimension of care ethics. It is therefore not formulated with a care-it-forward approach to social solidarity.

Many people in Canada are also excluded by the *CPP* because they perform certain types of excluded work⁷⁵⁷ or pay very little into *CPP* contributions, as in the case of Ms. Weatherley because of her various roles as a caregiver. In this regard, the under-inclusiveness of the *CPP* model would fail to live up to Tronto’s *caring with*, meaning that “democratic citizens are all engaged in providing and needing care together,” and not just those who happen to earn enough to pay into a public pension scheme.⁷⁵⁸ The *CPP* is not about protecting vulnerable people. It is ultimately about collectively insuring against the inability to re-enter the labour force later in life.

⁷⁵⁴ Engster Heart, *supra* note 417 at 44, discounting the “mutual self-interest” approach to solidarity.

⁷⁵⁵ Granovsky, *supra* note 728 at para 79.

⁷⁵⁶ *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 at para 100 (discussing age discrimination within the *CPP* for those under 45 who have their spousal support diminished – survivor’s benefits are purposively meant to “enable older widows and widowers to meet their basic needs during the longer term.”) [Law]; see also the same sort of holding relating to reduction in death benefits on the basis of age being found valid in *Withler v Canada (Attorney General)*, 2011 SCC 12.

⁷⁵⁷ *CPP*, *supra* note 74, s 6(2) (excepted employment is a long list and includes “casual” workers, and those in the agriculture or food harvesting industries, and in forestry).

⁷⁵⁸ Tronto Democracy, *supra* note 224 at 34-35.

In this section, I have not looked at Quebec’s pension program that supersedes the *CPP* in that province.⁷⁵⁹ Though it is beyond the scope of this thesis, a comparative analysis may be warranted to understand the impacts on marginalized people, and if and how Quebec’s pension system considers care. In the next section, I discuss unemployment insurance, and the way this program impacts women and caregivers, and what we might learn from the development of the *EI Act* for the purposes of basic income.

3.3.3 Nationalized Unemployment Insurance

Robustness of social welfare schemes can be described in the sense of political popularity and thus long-term stability as Calnitsky suggests,⁷⁶⁰ but we could also see robustness another way. Leading into the Great Depression, the limitations and conditions on private, charitable supports, and also provincial targeted programs (for injured workers and “fit and proper” mothers) were no match for the massive unemployment and poverty in Canada between 1930 and 1939.⁷⁶¹ Canada did not have programs robust enough to respond to public needs for care in the face of crisis. Similarly, during the early days of COVID, Canada scrambled to respond to the public health crisis and mass unemployment, and our existing social welfare systems failed many people. Temporary programs like CERB needed to be enacted, but even CERB left many unsupported.

There is also differentiation between the modern *EI Act* and *CPP* programs that is relevant for a discussion of robustness and responsiveness of social welfare. Both are insurance schemes, but the federal government’s *CPP* account is controlled as a pension trust fund. *EI Act* premiums do not form a trust, but instead form “part of the government’s revenues,” which courts have found gives the government flexibility in spending for *EI* premiums.⁷⁶² Basic income could indeed be a contributory scheme – so long as it were broad and inclusive enough to include all adults living in Canada – but such contributions should not form a trust. This is because flexibility of basic income would be key to ensuring adequate responsiveness if Canada were ever to face another COVID-like public health

⁷⁵⁹ Administered under the *Act respecting the Québec Pension Plan*, CQLR c R-9.

⁷⁶⁰ Calnitsky, *supra* note 130 at 28 (in relation to eliminating elements of moral regulation and therefore making these programs more widely popular).

⁷⁶¹ Guest, *supra* note 24 at 83-102.

⁷⁶² *EI Act*, *supra* note 31 s 72 (paid into a specific EI operating account) vs *CPP*, *supra* note 74, s 108-113; discussed in *CSN*, *supra* note 736 at para 74.

crisis or a major financial crisis like the Great Depression. The development of nationalized unemployment insurance in Canada illustrates this point.

During the Great Depression, the significant levels of poverty was one social and political drivers for the implementation of a new system of social welfare through the federal *Employment and Social Insurance Act* of 1935.⁷⁶³ Despite the benefits of this scheme, the legislation was challenged as an incursion on provincial powers and was found to be *ultra vires* the federal government.⁷⁶⁴ The federal government needed to find a new way forward to build a more resilient system of social welfare, one that could better respond to future crises *and* constitutional challenge. The political will on the part of then-Prime Minister William Lyon Mackenzie King pushed a number of social reforms forward after the Great Depression, which paved the way for Canada’s modern, institutional social welfare schemes, even in the face of resistance from his own cabinet.⁷⁶⁵ King’s government prompted a negotiation to transfer powers over unemployment insurance to the federal government.⁷⁶⁶ There was both an individual and a collective dimension to King’s justifications for the transfer of power: “a national system of unemployment insurance would contribute materially to individual security and industrial stability throughout Canada, and would assist in mitigating the distress incident to any recurrence of widespread unemployment.”⁷⁶⁷ The SCC has discussed this history, noting that when the *Constitution 1867* was amended to give powers over unemployment insurance to the federal government, the purpose was to “curb the destitution caused by unemployment and provide a framework for workers’ re-entry into the labour market.”⁷⁶⁸

Following the 1940 constitutional amendment regarding unemployment, an amendment for powers over old age pensions followed in 1951.⁷⁶⁹ The Canadian

⁷⁶³ Guest, *supra* note 24 at 88-89; *The Employment and Social Insurance Act*, 25-26 Geo V, c 38.

⁷⁶⁴ *Reference re legislative jurisdiction of Parliament of Canada to enact the Employment and Social Insurance Act (1935, c 48)*, 1936 CanLII 30 (SCC), [1936] SCR 427, affirmed in *Attorney-General for Canada v Attorney-General for Ontario*, 1937 CanLII 363 (UK JCPC), [1937] AC 355 (PC).

⁷⁶⁵ When his cabinet minister was concerned about the cost of a nationalized unemployment scheme, Mackenzie King “took a firm stand,” claiming that “it was a real fight” to bring his finance minister on board, Guest, *supra* note 24 at 105.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Reference re Employment Insurance Act (Can)*, ss 22 and 23, 2005 SCC 56 at para 41 (citing a letter from Mackenzie King to the Premiers in 1937) [*Ref Re Maternity Benefits*].

⁷⁶⁸ *Ibid* at para 47.

⁷⁶⁹ This was only because the proposed pension scheme was to be funded in part by an “earmarked” tax on personal and corporate income, which presumably would have been challenged as the 1935 unemployment insurance scheme

government had learned their lesson on the tensions of federalism: social welfare schemes required democratic agreement to achieve long-term stability and resilience.⁷⁷⁰

Despite the significant change in the legal landscape around public care, the 1940 *Unemployment Insurance Act* enacted after the constitutional amendment was limited to certain segments of the workforce.⁷⁷¹ Later legislative amendments provided broader coverage,⁷⁷² but when workers were deemed eligible, benefits were still paid well-below a “‘living wage’ standard.”⁷⁷³ For women, possible benefits under the early legislative schemes were even lower.⁷⁷⁴

The SCC has explored the history of relations between women and unemployment insurance, finding that the early legislative schemes reflected social perceptions at the time: “[w]hile working was not exactly regarded as a whim for a woman whose husband was working, it was considered to be optional and unusual [into the 1950s].”⁷⁷⁵ There is likely a racial dimension unconsidered here, since in the early 20th century, many women of colour – married or not – worked to sustain themselves, their families, and their communities, which was not optional or unusual.⁷⁷⁶

Insuring against loss of work is one dimension of unemployment, but many women in the past and still today find themselves unable to fully participate in waged labour due to care responsibilities. As noted in Chapter 1, the COVID-19 pandemic has even prompted

was. Guest describes this “earmark” approach as an effort on the part of the “conservative” voices in the federal cabinet at the time who “insisted that an earmarked tax be imposed to remind Canadians of the consequences of pension demands. It was hoped that such a tax would dampen enthusiasm for any further increases.” Paternalism then seemed to be a factor for constitutional amendment: Guest, *supra* note 24 at 137.

⁷⁷⁰ However, provinces were still able to enact their own pension programs. *Constitution 1867*, *supra* note 29 s 94A (“The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors’ and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.”).

⁷⁷¹ It excluded employees in air and water shipping, “logging, domestic work, hospital work, teaching, and government employment,” as well as higher-earning employees, see Ann Porter, *Gendered states: women, unemployment insurance and the political economy of the welfare state in Canada, 1945-1997* (Toronto: University of Toronto Press, 2003) at 42 [Porter Gendered].

⁷⁷² *Ibid.*

⁷⁷³ Guest, *supra* note 24 at 107.

⁷⁷⁴ In the previous 1935 unemployment legislation (the scheme which was found *ultra vires* prior to constitutional amendment), payments made to unemployed female workers were legislated at a lower rate than male workers. Though these gendered provisions were removed from the 1940, this was not necessarily about advancing women’s equality. Administrators “believed that the same outcome – lower rates for women – would be achieved through a benefit structure based on income rather than flat rates. Even among those favouring equal treatment for women, the concern was about single women wage earners” who would have been considered “more like males” anyway, see Porter Gendered, *supra* note 771 at 44.

⁷⁷⁵ *Ref Re Maternity Benefits*, *supra* note 767 at para 19 (“From this perspective, it is easy to understand why women’s claims for benefits were looked on as suspect.”).

⁷⁷⁶ See generally, Frances, *supra* note 703 at 57-59 and 67-70.

an exit from the labour force for women, due to limited childcare options available as waves of COVID swept through schools and daycares.⁷⁷⁷ The *EI Act* today does offer pregnancy leave and parental leave, though these benefits are only for new parents, and not intended to respond to other care-supporting situations, like the effects of a pandemic on caregiving.⁷⁷⁸ Regardless, these represent a positive development in the recognition of the familial and social value of caring, which is discussed in the following section.

3.3.3.1 *Reference Re Employment Insurance Act*

In *Reference re Employment Insurance Act (Can)*, ss 22 and 23, the government of Quebec challenged maternity and parental benefits under the *EI Act*, arguing that these benefits encroached on the provincial powers over property and civil rights, but the SCC seemed to take a broad and relational approach to these care-supporting policies. The Court found that the purpose of such benefits was to provide income replacement for the loss of employment due to pregnancy or the arrival of a new child, and to support parents to maintain connection with paid employment and thus re-enter the workforce.⁷⁷⁹ This sufficiently grounded these programs under section 91(2A) of the *Constitution 1867*. In effect though, these benefits do serve a broader social purpose. The SCC stated that pregnancy is “of fundamental importance in our society,” and that “[c]hildren are one of society’s most important assets, and the contribution made by parents cannot be overstated,” making it appropriate to insurance against the loss of income caused by pregnancy, birth, and early parenting.⁷⁸⁰ Further, the collective and public nature of insurance under the *EI Act* “provides even greater justification for the decision to have all contributors assume together the risk of the loss of women’s earnings that is associated with maternity.”⁷⁸¹ Insuring against unemployment for parents of very young children is not just for the benefit of individuals or families, but situates families within broader social relations. Parenting is a collective social concern, and to the SCC, a valid concern for enabling an expansive understanding of federal powers over unemployment insurance. Though thinking of children as public “assets” like an investment portfolio is somewhat

⁷⁷⁷ Scott, *supra* note 8 at 4; see also Johnston et al, *supra* note 40 at 1131; Fuller, *supra* note 42 at 213-214.

⁷⁷⁸ *EI Act*, *supra* note 31, s 22(1) and 23(1).

⁷⁷⁹ *Ref Re Maternity Benefits*, *supra* note 767 at paras 25, and 66-75.

⁷⁸⁰ *Ibid* at paras 53-54.

⁷⁸¹ *Ref Re Maternity Benefits*, *supra* note 767 para 55.

uncomfortable, by discussing the broader social benefits of care, the SCC described the *EI Act* in a care-it-forward framework of social responsibility and solidarity. This is a significant differentiation between the SCC's comments on the *CPP*, considering that both are insurance schemes connected to loss of work or the inability to return to the labour market.⁷⁸² Additionally, the pregnancy and parental leave provisions are directly intended to benefit and support pregnant people and parents as they move in and out of the labour force to attend to care responsibilities.⁷⁸³ By including elements of care that extend beyond just the individual or the family unit and into broader considerations of the social value of care, the SCC describes the purpose of the *EI Act* from more of a feminist ethics of care standpoint than the *CPP*.

Of course, the legislation is not ideal, and the *EI Act* excludes many caregivers. Pregnancy and parental benefits under the *EI Act* are also time-limited.⁷⁸⁴ Additionally, these benefits are only available to parents of biological or “lawfully” adopted children.⁷⁸⁵ There are other “special benefits” available under the *EI Act* for people caring for a critically ill family members, or for compassionate benefits for end-of-life care for a family member.⁷⁸⁶ These are narrow, familial caring circumstances, but indicate other dimensions of care considered under the *EI Act*. Other programs beyond the *EI Act* provide some supports for caregivers, but these are based on non-refundable tax credits, which requires earning a minimum level of income to receive the benefit, and provides greater benefits to higher income earners because of this structure.⁷⁸⁷ Additionally, like the care-based provisions of the *EI Act*, caregiver's tax credits are limited to those who provide care for direct family members.⁷⁸⁸ These programs are positive steps towards the recognition of the need to support caregivers, but are exclusive to certain relational structures.

⁷⁸² On the *CPP*, see *Granovsky*, *supra* note 728 at para 9; see also *Weatherley*, *supra* note 737 at para 8; and *Miceli-Riggins*, *supra* note 745 at paras 68-69.

⁷⁸³ *Ref Re Maternity Benefits*, *supra* note 767, generally.

⁷⁸⁴ *EI Act*, *supra* note 31, s 22(1) and 23(1) (15 weeks for maternity benefits, which provides only up to \$638 per week maximum, and either 40 weeks of standard benefits, or 69 weeks of extended benefits at a lower rate of support).

⁷⁸⁵ *Ibid*.

⁷⁸⁶ *Ibid*, ss 23.3(1), 23.2(1) and 23.1(1)

⁷⁸⁷ Canada Revenue Agency, “Canada Caregiver Amount” (modified 8 Jan 2022) online: *CRA* <<https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/deductions-credits-expenses/canada-caregiver-amount.html>> (Only for those who support family members with mental or physical impairments).

⁷⁸⁸ *Ibid* (you or your spouse's “child or grandchild... parent, grandparent, brother, sister, uncle, aunt, niece, or nephew”).

The *EI Act* also excludes many workers from any coverage at all, particularly casual or “self-employed” workers like those in the gig economy.⁷⁸⁹ This is significant, considering that in 2016, approximately 8.2% of Canadian workers were “gig workers,” and more women than men were participating in the gig economy to allow for flexible working conditions to balance gendered care responsibilities.⁷⁹⁰ A more recent survey conducted by H&R Block – a company that provides tax filing services for many gig workers – indicates that 13% of Canadian workers participated in the gig economy in 2021, with 3% (or approximately 930,300) newly entering the gig economy because of changes to their employment or financial circumstances due to the pandemic.⁷⁹¹ Gig work is highly precarious and usually low-waged, and the median annual net income for a gig worker in 2016 was only \$4,303.⁷⁹² Reducing marginalization of vulnerable and precarious workers is a significant lesson to be learned from COVID-related programs.

3.3.3.2 COVID-19 Supports

Like the strain caused by the Great Depression, Canada’s social welfare schemes faced resilience issues as a result of COVID-19. Canada ended programs under the *CERB Act* in December of 2020,⁷⁹³ and instead launched programs for specific groups of workers through the *Canada Recovery Benefits Act (CRB Act)* which implemented new measures like the Canada Recovery Caregiving Benefit (CRCB) for those who have had to reduce work by at least 50% to care for a sick family member.⁷⁹⁴ The CRCB is available for up to 44 weeks, but only for caregivers who had made at least \$5000 in income in the previous year, just like CERB.⁷⁹⁵ Left out of all of the care-supporting programs for workers under

⁷⁸⁹ *EI Act*, *supra* note 31, ss 5(2) and 7(2)(b) (Casual employees, government employees, international organization employees etc are excluded, and insured workers must have worked a minimum of 420 insurable employment hours during the previous year to qualify for benefits).

⁷⁹⁰ Sung-Hee Jeon, Hujun Liu, and Yuri Ostrovsky “Measuring the gig economy in Canada using administrative data” (2021) 54:4 *Can Journal of Economics* 1638 [Jeon et al].

⁷⁹¹ H&R Block Canada Inc, “Gig economy workforce rockets to more than one in ten of Canadians; a further third are open to joining, reveals new study”, *Cision* (11 April 2022), online: <<https://www.newswire.ca/news-releases/gig-economy-workforce-rockets-to-more-than-one-in-ten-of-canadians-a-further-third-are-open-to-joining-reveals-new-study-812441559.html>>.

⁷⁹² Jeon et al, *supra* note 790.

⁷⁹³ *CERB Act*, *supra* note 6, s 5(2) (“No worker is permitted to file an application after December 2, 2020”).

⁷⁹⁴ Or due to a child’s school being closed due to COVID, so long as they had not already received any other pandemic supports, see Canada Revenue Agency, “Canada Recovery Caregiving Benefit” (2 March 2022) online: *CRA* <<https://www.canada.ca/en/revenue-agency/services/benefits/recovery-caregiving-benefit/crcb-who-apply.html>>.

⁷⁹⁵ *Canada Recovery Benefits Act*, SC 2020, c 12, s 17(1)(d) [*CRB Act*].

both the *EI Act*, the non-refundable tax credit system, and the *CRB Act* are members of the queer community who may provide care for chosen family.⁷⁹⁶

Other pandemic supports under the newer *CRB Act* were also available for gig-workers who could not qualify for *EI* benefits, like the Canada Recovery Benefit (CRB) and Canada Recovery Sickness Benefit (CRSB), but these are again limited to those who earned over \$5000 in the previous year.⁷⁹⁷ This excludes workers below that median annual income of \$4,303. Like the challenge to the *CERB Act* on the basis of disability discrimination that I noted in Chapter 1,⁷⁹⁸ there is the potential that this level of under-inclusion in the *CRB Act* could be subject to a similar *Charter* challenge.⁷⁹⁹ Instead of a floor of support, once again, even the emergency “safety net” has holes.

Why transition from a broad-based program to these narrower, categorical ones? Debates on the legislation suggested this was to address gaps under the *EI Act* and the *CERB Act* because limited supports for caregivers and workers had failed to meet Canada’s needs during the pandemic. Canada’s Minister of Employment, Workforce Development and Disability Inclusion, Carla Qualtrough, suggested that unemployment insurance in Canada needs a massive overhaul, but that the temporary programs under the *CRB Act* necessarily targeted vulnerable groups of workers like parents of young children.⁸⁰⁰ Unemployment insurance was presented as a resilient method of collective social support in the debates on the *CRB Act*, especially if the insurance scheme “is flexible in its ability to respond to major changes in the Canadian labour market.”⁸⁰¹

Other Members of Parliament were not so hopeful about the potential for unemployment insurance to be a resilient, flexible social welfare system. Member of Parliament Jenica Atwin suggested that instead of piecemeal changes to the *EI Act* and narrow categories of support through the temporary *CRB Act*, basic income would “eliminate the hoops and the burden of extra administration, as well as the associated costs. The most vulnerable, the perpetually left behind, would be financially okay.”⁸⁰²

⁷⁹⁶ Jackson Levin, *supra* note 394 at 1; Knauer, *supra* note 394 at 150; Marvin, *supra* note 394 at 110-112.

⁷⁹⁷ *CRB Act*, *supra* note 795, ss 3(1)(d) and 10(1)(d), respectively.

⁷⁹⁸ Saba, *supra* note 9.

⁷⁹⁹ Especially since the *Act* excludes those who receive income through programs like ODSP who might still perform some waged labour that could be affected by care responsibilities. *CRB Act*, *supra* note 795, s 3(1)(h).

⁸⁰⁰ *House of Commons Debates*, 43-2, No 005 (29 Sept 2020) at 2144 (Hon Carla Qualtrough).

⁸⁰¹ *Ibid* at 2139.

⁸⁰² *Ibid* at 1905 (Hon Jenica Atwin).

Indeed, the *CRB Act* could be seen as just another temporary, “revamped EI program,”⁸⁰³ but as noted, the jurisprudence around the *EI Act* itself suggests the flexibility of unemployment insurance might provide a possible way forward for basic income. The SCC has held that parliament’s powers over unemployment insurance, “must be interpreted progressively and generously,” which “permits social change to be taken into account” and for the federal government to provide “income replacement benefits.”⁸⁰⁴ Additionally, the SCC has described “four characteristics that are essential to a public unemployment insurance plan,” which are, “(1) It is a public insurance program based on the concept of social risk (2) the purpose of which is to preserve workers’ economic security and ensure their re-entry into the labour market (3) by paying temporary income replacement benefits (4) in the event of an interruption of employment.”⁸⁰⁵ This description provides some similar justifications for basic income – like paying replacement wages and preserving economic security through cash transfers – but it is obviously highly connected with waged work and concepts of actuarial risk drawn from private insurance systems. Should we calculate the “risk” of people taking time off work to further their education or to provide care to family, friends, and their greater community and embed the cost in a public unemployment insurance scheme? What about the “risk” of disability, generally? What would that mean for those who need longer-term care and support? Or should unemployment insurance simply evolve into basic income?

There is some literature suggesting that even if cash transfers are provided through insurance schemes, these schemes should be categorized as a “service in kind,” similarly to public health care or social housing.⁸⁰⁶ Perhaps the “services in kind” argument relates to the *CPP*, considering it is intended as a collective pension savings scheme and held in trust. However, the flexibility built into the *EI Act* suggest that employment insurance is more than a service in kind is inaccurate. Even if the *EI Act* provides “insurance” in the

⁸⁰³ *Ibid.*

⁸⁰⁴ *Ref Re Maternity Benefits, supra* note 767 at paras 47 and 77.

⁸⁰⁵ *Ibid* at para 48.

⁸⁰⁶ See generally, Joseph Heath and Vida Panitch “Why Cash Violates Neutrality” (2010) 5:1 Basic Income Studies 1 at 1 (Heath and Panitch also argue that people use social insurance schemes as a form of “self-binding” mechanism to force themselves not to be improvident with savings. There is then a concern that converting social insurance schemes to basic income would invite the same concerns around dismantling other social programs like publicly funded health care or education in favour of a lump sum cash payment – people will spend their money foolishly. I have not suggested a lump sum payment system here, nor for dismantling of publicly-funded health care or education in favour of basic income, so the second concern is not relevant to this thesis).

event of job loss, the SCC sees the *EI Act* in a social and relational framework because it is both care-providing (through cash transfers) and care-supporting (by including caregivers). Thus the *EI Act* connects to care a species activity by connecting the caring work of individuals, families, and communities.⁸⁰⁷ Employment insurance is then not just a subsidized individual insurance plan. It is an inherently social scheme of support.

If the *EI Act* were overhauled to include everyone in Canada of a working age (18-64) and premiums were required to be paid by *all* people and *all* employers, then it might be possible for unemployment insurance to be the basis for basic income. However, this raises potential concerns over whether basic income might then become a residual social welfare program due to high levels of oversight, regulation, and significant conditions to ensure that people are falling into what might be deemed the appropriate categories of insurable “social risk,” and further, might not go far enough to consider the additional needs of people with disabilities.

3.3.4 Nationalized Family Allowances

Family allowance is another area of institutionalized social welfare that is instructive for basic income, though the lessons I explore here do not neatly correspond with obstacles or opportunities. Rather, family allowance illustrates some issues with addressing oppression and marginalization through social welfare programs and the need to consult with affected groups.

After the global crises of the Great Depression and World War II, Canada’s focus on creating broader social welfare programs followed the trends of other industrialized nations, and family allowances were discussed alongside unemployment insurance and pensions.⁸⁰⁸ We could see institutionalized social welfare programs as rooted in the post-war development of liberal human rights regimes, since more universal and institutional schemes are related to advancing “international security and peace.”⁸⁰⁹ Or, institutionalized social welfare could be seen as a mechanism to avoid future depressions and maintain the family unit’s purchasing power, thereby preserving fiscal and political stability.⁸¹⁰ We

⁸⁰⁷ *Ref Re Maternity Benefits*, *supra* note 767 at para 55.

⁸⁰⁸ Blake, *supra* note 686 at 6.

⁸⁰⁹ Nancy Christie, *Engendering the state: family, work, and welfare in Canada* (Toronto: U of T Press, 2000) at 269-270 [Christie].

⁸¹⁰ *Ibid* at 270.

could also see the advancement of these programs from a Marxist perspective, which views social welfare advancement primarily as a result of the labour movement (which has historically been concerned with progress on labour reforms for men).⁸¹¹ Indeed, as with mothers' allowances, family allowances had support from labour unions and big business, because these payments were "geared specifically to protect the wage standard of male unionized labour."⁸¹² Nancy Christie suggests that the introduction of family allowances in Canada was then premised on the idea that government's role was to "'maintain' a national minimum standard of living by traditional means – by creating jobs for men," but by presenting family allowances in an anti-poverty and humanitarian light, family allowances provided the "ideological glue" that allowed for national unity on the issue "in a way that no other contemporary issue could."⁸¹³

Federal family allowances were first introduced in Canada in 1944 through the *Family Allowances Act*.⁸¹⁴ During debates, "the House of Commons was told that the purposes of the *Act* were to protect the rising generation, assuring children of their basic needs. Its second purpose was to maintain purchasing power in the postwar era," and thus avoid the economic difficulties of the 1930s.⁸¹⁵ Family allowances were then "an extension" of the principles of caring for children through mothers' allowances and workers' compensation, since payments were based on the number of children in the family.⁸¹⁶ From 1945 to 1992, family allowances were paid monthly to many families with children.⁸¹⁷ These payments were initially universally available all Canadian families who applied – similar to a *universal* basic income.

Notably, this was one of Canada's first social welfare schemes that did not explicitly exclude Indigenous people, but required that children of recipient families "regularly attend school" or be involved in "equivalent" education.⁸¹⁸ This had a severe and detrimental impact on many Indigenous families living in remote communities who moved

⁸¹¹ Blake, *supra* note 686 at 8-9 (discussing the various Marxist interpretations of social welfare reforms worldwide).

⁸¹² Christie, *supra* note 810 at 294.

⁸¹³ *Ibid* at 297.

⁸¹⁴ 1944-1945, c 40 [*Family Allowances 1944*]; see also *Family Allowances Act 1973-74*, c 44.

⁸¹⁵ Guest, *supra* note 24 at 124.

⁸¹⁶ *Ibid* at 124.

⁸¹⁷ The final *Family Allowances Act*, RSC 1985, c F-1 was repealed by *An Act to Amend the Income Tax Act, to Enact the Children's Special Allowances Act, to Amend Certain Other Acts in Consequence Thereof and to Repeal the Family Allowances Act*, SC 1992, c 48.

⁸¹⁸ *Family Allowances 1944*, *supra* note 815, s 4(3); though not the same legislative iteration that existed in 1944, the *Indian Act*, RSC, 1985, c I-5, ss 114-122 provides for agreements with provinces on education.

far from their homes to ensure their children could attend school so they could receive family allowances.⁸¹⁹ Even if day school was available within the community, the loss of traditional knowledge, culture, and language in many Indigenous communities in Canada resulting from attending day schools has had particularly devastating effects on Indigenous women, girls, and Two-Spirit people.⁸²⁰ Whether we consider this part of a broader “genocide” of Indigenous people in Canada,⁸²¹ or “cultural genocide,”⁸²² this clearly shows that universality of cash transfers is impacted by the level of conditionality. Social context is key to considering *how* to provide care. It is likely that the government saw the provision of education and some financial assistance through family allowances as a form of care,⁸²³ but once again, the violence of colonialism cannot justifiably be described as care.

The interconnectedness of human rights is once again necessary to touch on here. As I have discussed, posited rights to an adequate standard of living and social security exist in international treaties. Treaties also speak to the right to education.⁸²⁴ But by focusing on minimum financial resources and education (though the education was provided with racist intentions to “civilize” Indigenous children⁸²⁵) and leaving behind the “socio” portion of other socioeconomic rights – like rights to participate in cultural life⁸²⁶ – the provision of basic income and public education can become a tool of further oppression and marginalization.

For Indigenous peoples in Canada, there is now a greater recognition of rights to self-determination through section 35 of the *Constitution 1982*, and also through Canada’s ratification and subsequent domestic enactment of the *United Nations Declaration on the Rights of Indigenous Peoples*.⁸²⁷ Basic income could improve the standards of living for

⁸¹⁹ Families with children who attended residential schools were excluded, see Blake, *supra* note 686 at 143; see also Amy Anderson, Dallas K Miller and Dwight G Newman “Canada’s Residential Schools and the Right to Family Integrity” (2018) 41:2 Dalhousie LJ 301 at 316 [Anderson et al].

⁸²⁰ See generally, Canada, *Reclaiming Power and Place: the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Executive Summary, Catalogue No CP32-163/2-3-2019E-PDF (Vancouver: PCO 2019).

⁸²¹ *Ibid* at 54.

⁸²² See TRC Report, *supra* note 474 at 1.

⁸²³ Though not using the word “care,” the government’s focus on attempting to provide support to Indigenous communities through the flexible application of the family allowance scheme is discussed in Blake, *supra* note 686 at 143, indicating an interest in providing for the specific needs of these communities.

⁸²⁴ See *ICESCR*, *supra* note 52, arts 13-14; see also *CRC*, *supra* note 53, art 28.

⁸²⁵ Anderson et al, *supra* note 820 at 313.

⁸²⁶ Contained in several international documents like the *UDHR*, *supra* note 48, art 27.

⁸²⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UNGAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008); *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

many Indigenous people in Canada, and would also provide care and support for many Indigenous women, girls, and Two-Spirit people who experience extremely high levels of violence which is often related to experiences of poverty.⁸²⁸ However, basic income would have to be implemented in relation with Indigenous governments and in accordance with respect for Indigenous rights, and should not be provided in lieu of fulfilling other state responsibilities.

Modernly, the current iteration of family allowances provided through the CCB is a tax-free, monthly cash transfer to low and middle-income families, but families still need to file annual taxes to receive it.⁸²⁹ This hurdle affects many Indigenous families living on reserve.⁸³⁰ For a basic income, this kind of logistical issue needs to be managed in consultation with Indigenous communities. Perhaps tax filing should not be required to receive benefits like basic income, and payments could be provided to those who need them through a different system. This also might open a broader conversation on whether we still need annual self-reporting, or instead, that people with simple filings would benefit from an automatic filing system that includes pre-filled forms or real-time reporting.⁸³¹ We could even see these logistical measures as an extension of the ethics of care – attentiveness to unmet needs and taking responsibility for those needs would be address through the structure and provision of basic income. Competently providing the care through a delivery system that is truly effective for the recipient would require understanding what delivery methods work for the recipient, and responsiveness would require monitoring and communication about how these systems work for care recipients.⁸³² If you have an instinct here to object to potential privacy issues, then it is necessary to note that our current self-reported taxation system already “depends on the honesty and integrity of the taxpayers for its success,” which corresponds with a “very low expectation of privacy” in relation to tax records.⁸³³

⁸²⁸ MMIWG Calls to Action, *supra* note 185 at 11.

⁸²⁹ Canada CCB, *supra* note 186.

⁸³⁰ Jordan Press “The Canada Child Benefit is climbing, but over 20 per cent of Indigenous families on reserve will miss out” (6 May 2019), online: *Global News* <<https://globalnews.ca/news/5247615/thousands-miss-child-benefit/>>.

⁸³¹ See some of these options discussed in Gillian Petit et al, “Re-envisioning the Canada Revenue Agency: From tax collector to benefit delivery agent” (2021) 69:1 Can Tax Journal 99 at 103-113.

⁸³² Tronto Democracy, *supra* note 224 at 34-35.

⁸³³ *Canada (National Revenue) v Royal Bank of Canada*, 2021 FC 830 at paras 14-15, citing *R v McKinlay Transport Ltd.*, 1990 CanLII 137 (SCC) at pp 636-37 and 648, and *Redeemer Foundation v Canada (Minister of National Revenue)*, 2008 SCC 46 at para 25.

In the previous sections, I explored attempts to compel action on socioeconomic rights through litigation, and how the limited interpretation of such rights may lead to unsuccessful outcomes for citizens. Additionally, I have explored the conflicts and tensions that arise when the federal government has attempted to centralize social welfare programs. In the past, democratic approaches to these conflicts have resulted in constitutional amendments that paved the way for national, institutionalized social welfare schemes. The conflicts over federalism that I described above are illustrative for when government is politically interested in developing a social welfare scheme, but again, compelling state action in the first place is difficult. With some political will behind a particular social welfare project however, democratic conflicts over care can be managed in other ways. In the next section, I present a brief discussion on the legal aspects of other cooperative democratic approaches to social welfare and care. I then conclude the chapter.

3.4 Democratic Cooperation

Though I have explored the ways a federal basic income might be advanced in Canada through an expanded understanding of federal powers over unemployment insurance, there are other methods of constitutional cooperation that could be leveraged to ensure resilience of basic income in Canada. For example, basic income could be organized through individual provincial/territorial agreements, or be provided under existing transfer payment streams. This form of constitutional cooperation is not new. The SCC no longer sees constitutional powers as “watertight compartments,” but rather, “has favoured a flexible view of federalism – what is best described as a modern form of cooperative federalism – that accommodates and encourages intergovernmental cooperation.”⁸³⁴

The federal government is involved in cooperative social spending in many ways. The federal government has “spending power,” which is not explicitly provided for in constitutional documents, but rather, is drawn from a variety of sources.⁸³⁵ Federal spending power provides the constitutional authority to attach conditions to transfer payments for social welfare programs, and these conditions in turn support national standards for social

⁸³⁴ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 50 [*Greenhouse Gas Reference*].

⁸³⁵ E.g. *Constitution 1867*, supra note 29 s 91(1A) re: “the Public Debt and Property.”

welfare in Canada.⁸³⁶ For example, in the past, spending power justified *CAP*'s requirement to provide social welfare services to any person "in need."⁸³⁷ Now, transfers between the federal government and provincial government on health and social spending are administered under two different streams under the *FPFA Act* – the Canada Health Transfer and the Canada Social Transfer.⁸³⁸ Other funding agreements on social welfare programs exist as well, such as the recently negotiated early learning and child care agreements, which will hopefully make child care more affordable and more accessible across Canada.⁸³⁹ The current *FPFA Act* does not contain any provisions on providing for "people in need." The Canada Social Transfer has only one condition that prohibits a minimum residency period for social programs.⁸⁴⁰ There are no other principles attached to Canada Social Transfer payments, but rather, the federal government and provinces are supposed to negotiate "shared principles."⁸⁴¹ Conversely, under the Canada Health Transfer, payments for health care are contingent on the provincial governments abiding by the principles of the *CHA*, which are "public administration, comprehensiveness, universality, portability and accessibility."⁸⁴² These sorts of democratic agreements are important for the purposes of advancing basic income, but increasing spending on essential services and the potential for fiscal deficits carries political costs,⁸⁴³ and this could mean levels of government abdicating responsibility for care.

⁸³⁶ See *Chaoulli*, *supra* note 588 at para 16, citing the constitutionality of such transfer arrangements discussed in *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 SCR 624, at para 25; see also *CAP Reference*, *supra* note 105 at 567.

⁸³⁷ Additionally, cash transfer programs were required to "take into account the basic requirements" and "budgetary requirements of that person and the income and resources available to that person to meet those requirements." *CAP*, *supra* note 105, s 6(2)(a)-(b), reproduced in *Finlay v Canada (Minister of Finance)*, 1993 CanLII 129 (SCC), [1993] 1 SCR 1080; discussed in Jackman Equality, *supra* note 117 at 376 as developing a right to adequate social support.

⁸³⁸ The federal government unilaterally limited payments under *CAP* and then repealed *CAP* the *Budget Implementation Act, 1995*, SC 1995, c 17, ss 31-32, and enacted the *FPFA Act*, *supra* note 35, ss 24 and 24.3.

⁸³⁹ "Early Learning and Child Care Agreements", (Modified 22 June 2022) online: *Canada.ca* <<https://www.canada.ca/en/early-learning-child-care-agreement/agreements-provinces-territories.html>>. In the 2020 Speech from the Throne, these childcare agreements were described as part of the "feminist" pandemic recovery plan to support many areas of care-receiving and care-giving, see Governor General, *A stronger and more resilient Canada: Speech from the Throne to Open the Second Session of the Forty-third Parliament of Canada*, September 23, 2020, 43rd Parl, 2nd sess (23 Sept 2020) Catalogue No SO1-1 at 25.

⁸⁴⁰ *FPFA Act*, *supra* note 35, s 25.1(1)(a)-(b).

⁸⁴¹ *Ibid*; the Government of Canada's guidelines on the directive and policy on transfer payments only speak to shared principles on jurisdictional respect and to avoiding onerous reporting responsibilities, not to anything like "universality, portability" etc. These principles are administrative considerations for governments and not intended to directly benefit program recipients, see Treasury Board of Canada Secretariat, *Guideline on the Directive on Transfer Payments*, (Guideline) (modified 1 April 2022) online: <<https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=19421>>.

⁸⁴² *CHA*, *supra* note 35, s 7.

⁸⁴³ Though Premiers often lobby for increases to transfer payments, especially for health care, since there is evidence that doing so would only marginally affect the balance of federal budgets, depending on the amount of the increase, see generally, Premiers Report, *supra* note 104 at 2-3.

One constitutional measure to enhance the duty to cooperate on public care is seen in section 36(1) of the *Constitution 1982*, which states that:

Without altering the legislative authority of Parliament or of the provincial legislatures... Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) *promoting* equal opportunities for the well-being of Canadians;
- (b) *furthering* economic development to reduce disparity in opportunities; and
- (c) *providing* essential public services of reasonable quality to all Canadians.⁸⁴⁴

Note the language of “furthering” and “promoting” in section 36(1)(a) and (b), which are perhaps less action-oriented, but the commitment in section 36(1)(c) speaks to a duty to *provide* essential public services to “all Canadians.” These commitments are followed by section 36(2) on making equalization payments to the provinces.⁸⁴⁵

Academic commentary has described section 36 as the codification of a “decade-long process” of negotiation on equalization payments, and an opportunity to “shore up” the federal government’s spending power.⁸⁴⁶ There was even some debate on including Canada’s commitments under *ICESCR* within section 36, but then-Justice Minister Jean Chrétien stated that “Canada has already committed itself to give domestic effect” to its international human rights obligations, and that “we cannot put everything there [in the constitution].”⁸⁴⁷ Canada’s own review reports under the *ICESCR* and *ICCPR* have cited section 36 and the relationship to international human rights.⁸⁴⁸ Since Canadian courts leverage international instruments to interpret domestic constitutional documents, it follows that section 36 could also be interpreted in light of the *ICESCR* and *ICCPR*.⁸⁴⁹ This approach might not help specifically advance basic income, but section 36 speaks to both

⁸⁴⁴ *Constitution 1982*, *supra* note 33, s 36(1), emphasis mine.

⁸⁴⁵ *Ibid*, s 36(2) (“to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation”).

⁸⁴⁶ *Cape Breton (Regional Municipality) v Nova Scotia (Attorney General)*, 2009 NSCA 44 at para 70, leave to appeal to the SCC dismissed 17 Dec 2009 [*Cape Breton*], citing Aymen Nader “Providing Essential Services: Canada’s Constitutional Commitment under S. 36” (1996) 19:2 Dal LJ 306 at 307 and 310 [Nader].

⁸⁴⁷ Karen Busby “Providing Essential Services of Reasonable Quality to All Canadians: Understanding Section 36(1)(c) of the Constitution Act, 1982” (2016) 20:2 Rev Const Stud 191 at 207 [Busby]; see also Martha Jackman & Bruce Porter, “Rights-Based Strategies to Address Homelessness and Poverty in Canada: the Constitutional Framework,” Ottawa Faculty of Law Working Paper No. 2013-10, online: *CURA* <<https://socialrightscura.ca/documents/publications/Constitutional%20Framework%20Canada.pdf>> at 12.

⁸⁴⁸ *Ibid* at 207-208.

⁸⁴⁹ See *Quebec Inc.*, *supra* note 248 at para 31; see also in Nader, *supra* note 847 at 362-363, and Busby, *supra* note 848 at 206-209. Further, there are implications for judicial approaches to federalism here, since international treaties can provide a grounding for federal jurisdiction where matters have a “extraprovincial and international character,” which can sometime be established in relation to the requirements of treaty obligations if there is “provincial inability” to deal with the matter: *Greenhouse Gas Reference*, *supra* note 835 at paras 145-159.

federal and provincial commitments to “providing essential public services of *reasonable* quality.”⁸⁵⁰ There is a relationship between this language and international standards, since when assessing whether states have adequately taken “steps... to the maximum of their available resources” to progressively realize the rights contained in the *ICESCR*, the *CESCR* uses a reasonableness standard.⁸⁵¹ The *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of the Child* might also be relevant for the purposes of understanding what providing adequate essential services and support for caregiving might look like.⁸⁵²

There is some commentary indicating that when governments “rely on the complexities of Canadian federalism to abdicate responsibility in relation to homelessness or poverty... section 36 provides constitutional authority for rights claimants to insist that their rights should not be compromised by jurisdictional overlap or ambiguity.”⁸⁵³ Seen this way, section 36 could arguably “translate into a constitutional right to co-operative and coherent federal and provincial strategies, that are focused on affirming and realizing fundamental social rights as paramount over jurisdictional divides.”⁸⁵⁴ Through transfer payments and external agreements, there is a certain level of intergovernmental cooperation that does occur, and even if the programs and policies that I have discussed throughout this thesis may fall short in many ways, they could still often be said to be providing *some* level of services. This has not been historically the case for essential services like the provision of clean drinking water and sanitation infrastructure for some Indigenous communities on reserves.⁸⁵⁵ Jurisdictional divides are also seen for irregular migrants like Ms. Toussaint in the provision of health care.⁸⁵⁶

⁸⁵⁰ *Constitution 1982*, *supra* note 33, s 36(1)(c), emphasis mine.

⁸⁵¹ *Optional Protocol ICESCR*, *supra* note 582, art 8(4) (“When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.”); this holds some connection to the reasonableness standard in administrative law. See a fulsome discussion of the standard of reasonableness of administrative decisions generally, in *Vavilov*, *supra* note 600.

⁸⁵² *CEDAW*, *supra* note 53; *CRC*, *supra* note 53, which was referenced in *Baker v Canada*, *supra* note 600 at paras 69-71 in relation to a deportation order for a woman with children born in Canada, but the rights of Ms. Baker as a mother and a caregiver were not strongly considered because the SCC ultimately found that the deportation order violated principles of administrative law due to a reasonable apprehension of bias.

⁸⁵³ “Section 36 of the Constitution Act, 1982” (undated) online: *Social Rights Ontario*

<<https://www.socialrightsonario.ca/jurisprudence/domestic-jurisprudence-2/section-36-of-the-constitution-act-1982>>.

⁸⁵⁴ *Ibid.*

⁸⁵⁵ Busby, *supra* note 848 at 192-196.

⁸⁵⁶ *Toussaint UN*, *supra* note 583 at para 8.3; see also *Toussaint FCA*, *supra* note 583 at para 71.

But section 36 has rarely been considered by Canadian courts, and when it has been considered, it has not been interpreted to provide citizens with a positive right to services, nor even a right for municipalities to force governments to providing adequate funding for local programs.⁸⁵⁷ At the SCC, section 36 has been interpreted (in a dissenting opinion) to support legislation that would prohibit public workers from striking in order to uphold the government’s commitments to providing essential public services – though this framing was not about citizens’ rights to receive essential services in the first place, but about hindering the government’s ability to flexibly fulfill its commitments.⁸⁵⁸

The Nova Scotia Court of Appeal (NSCA) is one of the few courts to undertake a statutory analysis of section 36 in *Cape Breton (Regional Municipality) v Nova Scotia (Attorney General)*, finding that the section represents “vague standards” and only speaks to rights regarding intergovernmental transfers through a form of privity – meaning that the section is a constitutional representation of agreements between the provincial/territorial and federal governments, to the exclusion of all others.⁸⁵⁹ However, Karen Busby argues that all constitutional language could be described as “vague,” pointing to other constitutional clauses like the federal residual powers over “peace, order, and good government” to illustrate this point.⁸⁶⁰ Additionally, Busby argues that the use of “*all Canadians*” in section 36(1)(c) provides for an explicitly stated “beneficiary” for the provision of “essential services.”⁸⁶¹ Further, Busby rightly suggests that the NSCA’s use of the concept of “privity” confuses this private law doctrine with “standing” in constitutional challenges.⁸⁶² Even in division of powers cases individuals and corporations are not excluded from leveraging constitutional arguments about relations between levels of government.⁸⁶³

⁸⁵⁷ As in *Cape Breton*, *supra* note 847 (Cape Breton was not seeking a redistribution of equalization payments in Nova Scotia, but a declaration that the province had breached its commitments under s 36 to force a re-negotiation between the province and its municipalities on the distribution of funding for public programs).

⁸⁵⁸ *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 119 (Per Rothstein and Wagner JJ: “The federal and provincial governments have committed to “providing essential public services of reasonable quality to all Canadians”... In constitutionalizing a right to strike, the majority restricts governments’ flexibility and impedes their ability to balance the interests of workers with the broader public interest.”).

⁸⁵⁹ *Cape Breton*, *supra* note 847 at para 62 and 86.

⁸⁶⁰ Busby, *supra* note 848 at 201.

⁸⁶¹ *Ibid*, emphasis mine.

⁸⁶² *Ibid* at 200.

⁸⁶³ See leading cases on division of powers where litigants were corporations, as in *R v Hydro-Quebec*, [1997] 3 SCR 213, or individuals, such as *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19 and *Law Society of British Columbia v Mangat*, 2001 SCC 67.

Particularly troubling from a feminist perspective is the NSCA’s decontextualization of section 36. Though the provision sits within its own part of the *Constitution 1982*, it is preceded by part I, the *Charter*, and by Part II on the rights of Indigenous peoples in Canada. The *Charter* is focused on anti-discrimination through section 15, but also doubles down on other anti-marginalization efforts through protections for Indigenous peoples and minority language speakers.⁸⁶⁴ Additionally, section 28 of the *Charter* was originally intended to provide legal equality for women through a provision that even excluded section 1’s limitations.⁸⁶⁵ The *Constitution 1982* also contains mechanisms for amendment and for judicial scrutiny of all Canadian laws to ensure that they are consistent with Canada’s constitution.⁸⁶⁶ Why would these provisions and mechanisms for protecting human rights and democracy surround merely “vague” commitments to government cost sharing? Such an approach renders section 36 constitutionally irrelevant. *Cape Breton* was denied leave to appeal to the SCC, so we are left with the NSCA’s comments on section 36 for lower courts to follow.⁸⁶⁷

It is not clear the circumstances in which the content of section 36 might be found to be legally relevant or justiciable by a Canadian court. Further, if it is justiciable, what counts as an “essential service?” This shows the necessity of designing explicit rights around social welfare at all, but designing these rights are once again about structuring relations between citizens and the state, between governments (Indigenous, federal, provincial, or territorial) or between citizens themselves, not about strictly distributional concerns such as the per capita amount of transfer payments. Advancing socioeconomic rights requires a more relational, more democratically negotiated approach, and perhaps one that returns to elements of the needs-based approach contained in the *CAP*.

On bringing rights and needs together, one final note should be made about Canada’s approach to publicly funded health insurance. I have noted that the principles contained in the *FPFA Act* and the *CHA* on public health care insurance are “public

⁸⁶⁴ *Charter*, *supra* note 36, ss 15, 25, 16-23.

⁸⁶⁵ However, courts have rarely considered section 28, and have even more rarely recognized section 28’s ability to “block section 1, and then, only in relation to male claimants,” see Kerri Froc, *The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms* (PhD, Queen’s University School of Law, 2015) at 7.

⁸⁶⁶ *Constitution 1982*, *supra* note 33, ss 38-49 and 52, respectively.

⁸⁶⁷ See e.g. *Regional District of East Kootenay v Augustine*, 2017 BCSC 322 (section 36 cannot be used to argue that a bylaw infringes on the opportunity for economic development of a piece of land); see also *Langlois v Canada (Attorney General)*, 2018 FC 1108 (section 36 cannot be used to compel the Minister of National Revenue to waive taxes on OAS and GIS in light of the rising cost of living).

administration, comprehensiveness, universality, portability and accessibility.”⁸⁶⁸ Public administration, universality, portability and accessibility speak to values of social solidarity in a care-it-forward sense – meaning that we all need health care at various points in life, and so Canada is committed to taxing for and providing for health care coverage to attend to these needs, and tax-payers are all committed to sharing in the care that is required. Comprehensiveness, universality, and accessibility speak to attending to needs, and that “access to health care should be based on need, not ability to pay.”⁸⁶⁹ This needs-based, universal approach to care “is a defining national value.”⁸⁷⁰ Why not extend such a value to other social welfare programs?

Of course, there are limits to these values, and the SCC has discussed the structural limits of the *CHA*: “The legislative scheme... does not have as its purpose the meeting of all medical needs... its only promise is to provide full funding for core services, defined as physician-delivered services. Beyond this, the provinces may, within their discretion, offer specified non-core services. It is, by its very terms, a partial health plan.”⁸⁷¹ Even these limits provide some level of basic care, guided by the principles of the *CHA*. By not attaching similar conditional principles to other social welfare programs under the *FPFA Act* as with health care, there is no “core” minimum of care for other basic needs. By designing principles that align with the values associated with the ethics of care – attentiveness to needs, taking responsibility for care, providing competent care, being responsive within caring relations, and promoting plurality, communication, trust and respect, and solidarity⁸⁷² – basic income in Canada could contain some similarly principled elements to the *CHA*.

3.5 Conclusion: Overcoming Obstacles and Leveraging Opportunities

In this chapter, I have broadly considered judicial and legislative approaches to social welfare law and policy in Canada from a feminist lens. I have also discussed various social welfare schemes that carry some features of basic income – like universality,

⁸⁶⁸ *CHA*, *supra* note 35, s 7.

⁸⁶⁹ Martin et al, *supra* note 103 at 1718.

⁸⁷⁰ *Ibid.*

⁸⁷¹ *Auton*, *supra* note 751 at para 43.

⁸⁷² Tronto Boundaries, *supra* note 412 at 127-136; Tronto Democracy, *supra* note 224 at 34-35.

unconditionality, regularity, and cash-based benefits. The areas of social welfare that I have focused on may seem distinct, but they are arguably interconnected and indivisible – just as fundamental human rights are. What is a net without each thread or fibre? What is a floor without each floorboard? What is clear is that no matter how flawed or limited these schemes may be, many of them serve as both care-providing and care-supporting policies and carry some connections to the ethics of care. Taking care into account and considering both individual and collective needs is a deeply rooted approach to social welfare law and policy in Canada, but further work is needed to advance socioeconomic rights, especially for those who are most marginalized.

Two major legal obstacles emerge from this discussion. First, the tensions produced by federalism will likely affect the ability to implement a national basic income. Opportunities exist, however. If the collectivist approach to care and the flexibility of unemployment insurance discussed in *Ref Re Maternity Benefits* is expanded beyond just parenting, maybe there is some hope for grounding basic income under an employment insurance scheme. Beyond just the social benefits of parenting, perhaps incorporating a more expansive understanding of care as a “species activity”⁸⁷³ would provide the necessarily broad approach to what counts as an insurable loss of income for the purpose of either pensions or unemployment insurance. If we agree that some element of choice goes into taking time to parent and care for young children (even if such a choice is often made under the pressure of gendered social conditions and expectations around care) than perhaps the understanding of choosing to perform other types of activities that support a caring society might also be covered by unemployment insurance. We can also learn from constitutional cooperation on other types of care-providing policies: federalism could also be addressed by leveraging existing transfer payment streams and attaching conditions to those payments, or by making individual conditional agreements with each province. Even family allowances paid through the current CCB show some promise that provinces already accept the provision of a form of basic income that is unrelated to unemployment or pensions, even if it is only supplemental.

The second major obstacle is more ideological. Residual and neoliberal approaches to social welfare still exist in Canada. These approaches can detrimentally affect

⁸⁷³ Fisher & Tronto, *supra* note 412 at 40.

marginalized people. Care provided under social welfare schemes connects to the residual approach when it is provided as a discretionary allowance and not a right. Canadian courts are also reserved about establishing any positive rights to social welfare. However, opportunities can be seen in some more universal approaches to care, as with the provision of core services under the *CHA*, and with cash transfers under the *OAS Act*, the *EI Act*, and through the CCB. Expanding the features and principles of any of these programs could ensure that all people are provided with an adequate level of basic income as a form of public care. Without the political motivation seen in moments of global crises like the Great Depression, World War II, and in the early days of COVID-19, the obstacles remain significant, but the opportunities suggest some hope.

Chapter 4

4 Planning for the Future: Advancing a Caring Basic Income

In this concluding chapter, I provide some elements of what a care-based basic income could look like in Canada and I make some final observations on obstacles and opportunities. This discussion is exploratory, and thus is it brief and non-exhaustive, but it draws together many concepts that I have considered here so far.

Recall that Canada faces some challenges around income insecurity, food insecurity, and housing insecurity, especially for already marginalized people. These types of insecurities have been exacerbated by the COVID-19 pandemic. Though basic income would not be a panacea for these problems – nor fully address dimensions of oppression and marginalization relating to racism, sexism, and ableism – basic income could help by forming a floor of support for those who need it. This is especially the case for caregivers (using caregivers broadly here to describe care as a “species activity”⁸⁷⁴) whose social contributions may not take the form of waged labour.

As discussed in Chapter 3, there is a certain level of androcentrism that has formed the foundation of Canada’s social welfare laws and policies. The focus on workers and income insurance schemes related to the labour market render everyone a worker, even if one cannot work due to mental or physical health issues or caring responsibilities. This “*universal breadwinner*” model of equality means that the demands of care that nonetheless still exist are erased or left for the market to solve.⁸⁷⁵ We can see this in the framing of the *CPP* as a “partial” insurance plan that provides “modest” help for recipients to meet basic needs, and though survivor benefits are available for certain spouses, personal contributions can be impacted by the amount of money one makes and pays into the plan over time.⁸⁷⁶ This has implications for lower-wage earners and caregivers. The *EI Act* is much the same – payments are based on wages and prior contributions, so that a higher wage earner would receive a higher benefit payment for the duration of the benefit period.⁸⁷⁷ Changes to Canada’s institutionalized social welfare policies have attempted to address the

⁸⁷⁴ Fisher & Tronto, *supra* note 412 at 40, emphasis mine.

⁸⁷⁵ Zelleke, *supra* note 132 at 31; Canadian social welfare policy has over time supported women as mothers, then both mother and workers, and now mostly as workers, see Porter Gendered, *supra* note 771 at 21-24.

⁸⁷⁶ Weatherley, *supra* note 737 at para 10.

⁸⁷⁷ *EI Act*, *supra* note 31, ss 14(1)-(4).

needs of certain vulnerable caregivers, like extending spousal supports under the *OAS Act* and survivor's pensions under the *CPP*, or the addition of pregnancy and parental leave under the *EI Act*. However, these are piecemeal efforts to work within the confines of the androcentrism baked into our major social welfare schemes in the first place.

An unconditional basic income may be the right solution to help support caregivers of all varieties – not just familial caregivers – and advancing a basic income that combines both care and rights is a way to ensure the adequacy and stability of such a program. This is where a feminist ethics of care understanding of human rights is helpful. Just as human rights are interconnected, so too are people. An ethics of care approach then offers insight into the relational “purpose” of rights themselves: if we say that human rights protect human interests, and human interests are “bound up” in our interconnected networks of caring relations with one another, then “human rights should serve to protect the conditions for such relations to flourish,” which means that the “real issue at stake, then, is how human rights are best implemented.”⁸⁷⁸

Just as siloed approaches to social welfare can create gaps in the provision of care, siloed approaches to positive versus negative rights is a false separation that leaves both the rights and needs of marginalized people unaddressed. If we understand human rights as interconnected and indivisible, then taking steps to implement rights to an adequate standard of living, to health, and to social security requires a more holistic system of social welfare. The Canadian state is obligated in a legal sense (due to the binding international treaties discussed above) to “respect, protect, and fulfil” these interconnected socioeconomic rights, and the state is in the best position to advance publicly funded programs and institutions to do so.⁸⁷⁹ Taking a relational and interconnected view of socioeconomic rights also leads to a more holistic approach to addressing the social determinants of health, which, as a practical matter, may even lead to cost savings on social spending over time.⁸⁸⁰

A rights-based basic income is one way to holistically implement interconnected human rights and to also promote and maintain networks of caring relations. To ensure the

⁸⁷⁸ Thomas E Randall “A Care Ethical Justification for an Interest Theory of Human Rights” (2020) Critical Review of Intl Social and Political Philosophy 1 at 10 <10.1080/13698230.2020.1774184>.

⁸⁷⁹ General Comment 19, *supra* note 661 at paras 43-51 (on the right to social security, though this is a general duty relating to all socioeconomic human rights).

⁸⁸⁰ Tarasuk BIG, *supra* note 85 at 8; Forget Emergency, *supra* note 18 at 202.

stability and resilience of basic income – and avoid rollbacks or retrogressions seen as with the OBIP experiment – enshrining basic income in Canada’s domestic constitutional or human rights is likely required. Without this form of protection, basic income would be politically vulnerable and easily dismantled, which would be hugely detrimental to the people who rely on such cash transfers as a form of public care. As with amendments made to the *Constitution 1867* for unemployment insurance and pensions, or the inclusion of the *Charter* and section 36 under the *Constitution 1982* (despite respective limitations), perhaps advancing basic income requires constitutional sea change.

De Wispelaere and Morales have suggested the option of constitutionalizing basic income through a basic income Bill of Rights, but caution that this is “not as straightforward a solution as its advocates believe it to be. Judicial review crucially depends on judges interpreting key provisions entailed by a constitutional right to basic income in a manner that conforms to the intentions of the enacting coalition.”⁸⁸¹ Relying on judicial decision-making to define the scope of a right to basic income will produce difficulties that are generally attached to constitutional cases, namely the tension between “judicial activism” and “judicial restraint” that are often framed as being at odds.⁸⁸² Further, textualist readings of constitutional provision presents another obstacle. This is where Tronto’s feminist democratic care model could help.

Recall that the phases of care are 1. caring about, 2. caring for, 3. care-giving, 4. care-receiving, and 5. caring with.⁸⁸³ The first four phases align with ethical qualities of *attentiveness* to unmet needs, taking on *responsibility* for care, providing *competent care*, and *responsiveness* to observe whether care was successful.⁸⁸⁴ This fifth phase also requires the ethical qualities of *plurality*, *communication*, *trust*, *respect*, and *solidarity*.⁸⁸⁵ Starting from the fifth phase of “caring with” may be required to address the other phases of care in relation to both socioeconomic rights and needs in Canada. This may require a “relational revolution,” where all people in Canadian society understand how socially connected and integrated we truly are.⁸⁸⁶ In this revolution, human rights themselves are

⁸⁸¹ De Wispelaere and Morales, *supra* note 47 at 523 and 536.

⁸⁸² *Ibid* at 536.

⁸⁸³ Tronto Democracy, *supra* note 224 at 23; see also Fisher & Tronto, *supra* note 412 at 41-45; see also Tronto Boundaries, *supra* note 412 at 105-108.

⁸⁸⁴ *Ibid* at 34-35.

⁸⁸⁵ *Ibid*.

⁸⁸⁶ *Ibid* at 184 fn 5.

not the things that declare us equal as human beings, but rather, rights should be born of democratic negotiations where everyone has a seat at the table, which would look like “an elaborate social process” that then allows us to “become equal.”⁸⁸⁷ This “alternative account of equality... requires acceptance of difference and plurality and a willingness to provide what is necessary to make certain that all have voice.”⁸⁸⁸

Perhaps advancing basic income then requires attention to democracy itself. Tronto invites us to “take seriously the idea that democratic citizens care,” and proposes that caring democratic citizens would take actions to “support higher wages and salaries for necessary care workers,” and “promote democratic forms of care” through diverse social institutions that provide care.⁸⁸⁹ Caring democratic citizens would also “care enough about care to organize and to act on their commitments to freedom, equality, and justice.”⁸⁹⁰ In my view, this requires examining municipal, provincial, and federal elections and the methods of voting and representation to ensure politics are focused on care. I do not suggest that enhancing democracy will always mean that collective choices will then be made in the best interests of marginalized people in society, but by promoting a radical level of democracy – perhaps utilizing modern technology – then there may be more opportunity for people to voice their needs and force governments to devise systems to care for those needs. Proportional voting may be one way to enhance the representation and diversity of political voices in Canada, but each level of government controls their voting processes, with the provincial governments controlling municipal elections. For example, in the early months of the pandemic, the Ontario government enacted *Supporting Ontario’s Recovery and Municipal Elections Act, 2020*, banning municipalities from using ranked-choice balloting, citing improved efficiency and decreased costs.⁸⁹¹ I would characterize this as a set-back for democracy, but it is a set-back that is presently permissible in our constitutional order.

⁸⁸⁷ *Ibid* at 120.

⁸⁸⁸ *Ibid* at 40.

⁸⁸⁹ *Ibid* at 179-180.

⁸⁹⁰ *Ibid* at 180.

⁸⁹¹ SO 2020, c 26, Sched 2, amending and repealing sections and regulations under the *Municipal Elections Act, 1996*, SO 1996, c 32 that allowed for ranked choice balloting, taking choice away from municipalities, see Legislative Assembly of Ontario, *Official report of Debates (Hansard)*, 42-1, Vol 198A (22 Oct 2020) at 9908 (Mr. Parm Gill: “[T]his change was intended to reduce the need to make corrections on election day, shorten wait times and save municipalities money, especially during some of the most difficult times that we’re going through right now with COVID-19, where resources could be put to use in other areas to help local constituents.”)

Considering such a democratic set-back shows us at a practical level how constitutional interpretation is a key issue in protecting democracy and human rights. In Canada, there is no constitutional protection for a specific method of democratic representation. To extend this sort of protection would imply a positive right to a certain type of governance. As discussed in detail, Canadian courts are reticent to explore positive dimensions of constitutional rights, but in addition to this hurdle in *Charter* cases, the tension between flexible interpretive approaches and more textual approaches is also a concern for advancing any constitutional approach to basic income.

Toronto (City) v Ontario (Attorney General) on the constitutionality of Ontario redrawing electoral ward boundaries in Toronto during a municipal election is illustrative of this concern.⁸⁹² In a 5-4 decision, the majority in *Toronto v Ontario* found that the province legislating to reduce Toronto's electoral wards from 47 to 25 wards 69 days before an election did not violate the constitutional right to free expression under section 2(b) of the *Charter*. This was because the change to the electoral wards did not rise to the level of "substantial interference" with free expression, which would require "radically frustrating expression to such an extent that meaningful expression is "effectively preclude[d]."⁸⁹³ Additionally, though the concept of democracy is "a principle by which our Constitution is to be understood and interpreted," the majority stated that democracy is still an "*unwritten*" principle, meaning that it is not explicitly defined in Canada's constitution, but rather, along with other principles like the rule of law, democracy forms the "context and backdrop to the Constitution's written terms."⁸⁹⁴ Then-Justice Abella took aim at this textualist approach and described unwritten constitutional principles instead as the "lifeblood" of Canada's constitution, meaning that the text of the constitution "*emanates* from underlying principles," and "[elaborates]" those principles, but the text of the constitution is "not exhaustive of our Constitution."⁸⁹⁵

⁸⁹² 2021 SCC 34 [*Toronto v Ontario*].

⁸⁹³ *Ibid* at paras 27, 36-37 ("Candidates continued to campaign vigorously... And even had they not, nothing in the *Act* prevented them from doing so... Many of the challengers who continued to campaign ultimately had, by any measure, successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression." However, the dissent noted at para 105 that of the 509 candidates certified to run in the election, many candidates withdrew due to the ward changes, and only 293 remained in the campaign).

⁸⁹⁴ *Ibid* at paras 49-50, emphasis mine.

⁸⁹⁵ *Ibid* at paras 167-169, emphasis mine.

Toronto v Ontario can be read together with the recent *Quebec (Attorney General) v 9147-0732 Québec Inc* decision on the SCC's new methodology for weighing international human rights documents in constitutional analysis. Where previously international documents could be widely used to support *Charter* interpretation, the majority in *Québec Inc* developed a new interpretive framework, holding that since binding documents were more persuasive than non-binding ones, the use of non-binding documents in judicial decision-making must now be explicitly justified, and further, that binding documents that pre-date the *Charter* were to be given more weight in *Charter* interpretation.⁸⁹⁶ Jackman's concern over the wizened stump once again comes to mind, because such an approach freezes the *Charter* in the legal understanding of human rights that was present in 1982. Once again writing for the dissent, Justice Abella criticized the majority in *Québec Inc* for focusing on the "primacy" of the text of the constitution in their interpretive approach, rendering constitutional interpretation more like ordinary statutory interpretation.⁸⁹⁷ Justice Abella also expressed concern that the new methodology requires explicit justification for the use of non-binding international instruments, because this would "[transform] the Court's usual panoramic search for global wisdom into a series of compartmentalized barriers. For constitutional, comparative and international law, this apparent change in direction is a worrying setback."⁸⁹⁸

This textualism-versus-interpretivism divide is an obstacle for any coalition seeking to ground basic income in a domestic constitutional approach or in international law. We should look cautiously to our neighbours to the south and recognize that we are also enmeshed in relations with the United States and with their social and legal understanding of interpretive methodology. If you have had a conversation about the US Supreme Court and "originalism" outside of legal scholarship recently, then you may sense the increasing public awareness and importance of establishing clear interpretive standards for constitutional rights. Constitutional rights are not the property of the courts, they are the rights of people within a polity. As such, the methodological approach to considering those rights becomes a significant concern for democracy. Though we may not see reasons from the SCC that are as blatantly ideological in its use of originalism as in the recent

⁸⁹⁶ *Quebec Inc*, *supra* note 248 at paras 30-38 and 42.

⁸⁹⁷ *Ibid* at para 61.

⁸⁹⁸ *Ibid*.

rollback of abortion rights in the US,⁸⁹⁹ a shift that renders the Canadian constitution more of a wizened stump will impact the advancement of human rights and democracy.

If we understand that courts are engaged in a form of democratic decision-making – as in no single judge makes law, but rather, law develops through a relational and collective exercise in reasoning and clarifying what law is and ought to be – we can ask, what if the approach to democracy within that collective decision-making put care first? Instead of showing deference to democracy by placing the words of the constitution at the forefront of interpreting rights, placing *care for people* at the heart of a normative framing of democracy would have an impact on the analysis and outcomes of many cases that consider social welfare and human rights. This idea relates back to the original framing of the powers of Canadian government to make laws for the “peace, welfare, and good government.”⁹⁰⁰ Law as a mechanism for enhancing and preserving the welfare of people, individually and collectively, relates to the maxim: “*salus populi suprema lex*” – the health/welfare of the people is the supreme law.⁹⁰¹ Beyond just power, what if welfare were indeed the supreme purpose of law-making itself, and not only did the Canadian government have the *power* but also the *responsibility* to make laws to advance the welfare of people in Canada? *Salus populi* suggests that the “business of good government” should indeed be to “protect and sustain the public’s health,” and further, that the powerful have responsibilities to attend to the welfare of those with less power.⁹⁰² This understanding of law implies the requirement to attend to needs when they are expressed or recognized, and a corresponding duty to then take responsibility for caring.

This approach to welfare and to care for people requires taking needs seriously, but again, taking needs seriously requires a means for people to voice democratically. We might consider that “[e]lections are to democracy what breathing is to life, and fair elections are what breathe life into healthy democracies. They give the public a voice into the laws and policies they are governed by, and a chance to choose who will make those laws and policies. It is a process of reciprocal political discourse.”⁹⁰³ But how will people

⁸⁹⁹ *Dobbs v Jackson Women’s Health Organization*, 597 US __ (2022).

⁹⁰⁰ Lithwick, *supra* note 28.

⁹⁰¹ Shelley, *supra* note 327 at 66 and 112-113 (discussing various interpretations of this maxim attributed to Cicero).

⁹⁰² *Ibid* at fn 421, citing P Mackie and F Sim “Ollis Salus populi suprema lex esti” (2009) 123 Public Health 205 at 205.

⁹⁰³ *Toronto v Ontario*, *supra* note 893 at 86 (per Abella J).

access this relational process of reciprocal discourse without adequate resources for survival, let alone thriving? Placing care at the heart of democracy might then require first attending to basic needs through the provision of adequate resources, like a basic income, but negotiating and attaching rights to basic income requires democratic engagement and discourse. I am once again drawn into the chicken-or-egg discussion prompted by Van Parijs' understanding of the "real freedom" that is necessary to allow for social arrangements to be negotiated without coercion.⁹⁰⁴ My perspective is that we do not have to choose which comes first: basic income could be both the chicken and the egg, and should be launched at the same time as a holistic reorientation of law and policy toward a more caring democracy. Policy implementation should and could be attached to a method for ongoing discussion and assessment of any given program with the people and families it serves, and with the broader social community. I do not just mean going to the polls to show support or non-support for a particular policy, but rather, a caring democracy suggest a more interactive vision of reciprocal discourse that involves opportunities to voice needs where people are – in their homes, communities, and relations.

Maybe this means that the Canadian government should pass one of the presently proposed bills and design a framework for basic income and monitor its effectiveness across all areas of social well-being: health, poverty mitigation, housing security, food security, social inclusion, supporting caregivers etc.⁹⁰⁵ Pulling basic income from the "chaotic primeval soup" of policy options⁹⁰⁶ would satisfy the phase of "caring about," which requires attentiveness to need. Either the federal government taking responsibility over implementation or making democratic arrangements with provinces, territories, and Indigenous governments would then satisfy the phase of "caring for" by ensuring someone takes responsibility for care on an ongoing basis. "Care-giving" then requires providing competent care, which would demand an understanding of the best way to implement basic income in a dignified way, and the amount required to meet adequate basic needs, which should be responsive to market changes like inflation. This would require consultation with experts in the area and with the people who would receive basic income, as in the example of some Indigenous families being left out of CCB supports because they do not file taxes,

⁹⁰⁴ Van Parijs and Vanderborcht, *supra* note 13 at 103.

⁹⁰⁵ Proposed in *Bill C-223*, *supra* note 196, and *Bill S-233*, *supra* note 197.

⁹⁰⁶ Frankel, *supra* note 14 at 144.

or with provincial cash transfer programs not covering basic needs like food or shelter. Communicating with care-recipients and their communities to understand how care could be improved would help address these gaps.

“Care-receiving” also requires some response from the care recipient. This is an interesting phase in relation to basic income, because it demands a level of *reciprocal* communication between the state and a basic income recipient. While being cautious not to replicate stigmatizing and degrading elements of surveillance attached to other cash-transfer programs, perhaps surveys like those used in the OBIP study to monitor social and health effects of payments might help us understand what works and what does not within a basic income program. Payments should not be contingent on completion of such surveys, but if basic income was unconditional and recipients were not afraid of the loss of income due to personal scrutiny, then they would perhaps be more motivated to participate. These surveys would help improve the program over time and provide data on the local and broader social benefits of basic income, and thus once again contribute to resilience by producing information that might reinforce public support for a right to basic income.

Even after the implementation of a basic income – after determining the amount of payments, or the scope of who will qualify, or how people will receive payments – “caring with” requires a highly-democratic system of resolving conflicts around care. Similar to the approach to housing taken under the *NHS Act* with the formation of the National Housing Council and the Federal Housing Advocate, a national Basic Income Council and Basic Income Advocate could monitor the program and assess its functionality and adequacy over time. This could mean working to “assess its impact on persons who are members of vulnerable groups,” and “analyze and conduct research... on systemic [income insecurity] issues, including barriers face by [vulnerable persons].”⁹⁰⁷ Caregivers would be one group that should be viewed as vulnerable persons in the context of basic income. However, perhaps this would only replicate the siloed approach to social welfare that I have criticized throughout this thesis. A broader approach to care that unites various areas of social welfare may be warranted. This implicates constitutional cooperation between levels of government. Creating something like a National Council of Care that studies and

⁹⁰⁷ Language from the *NHS Act*, *supra* note 97, ss 13 (a) and (c).

monitors all forms of care and programs that support caring relations is more in line with the relational nature of rights and care that I have discussed here.

Basic income should be attached to a guarantee of payments for qualifying recipients, but also to rights of appeal and review for decisions made around payments, similarly to modern, institutional programs like those under the *CPP* and *EI Act*. A new administrative body could be designed to manage decisions around basic income, but existing federal administrative bodies like the SST of Canada could be effective in this context. This could also improve access to justice and provide the necessary flexibility to consider need-specific concerns in certain situations for those with special circumstances, health costs, or disabilities, as the ethics of care would demand. Providing increased accessibility to decision-making processes through a more flexible tribunal model instead of the courts would conform to Tronto's feminist democratic care model, where the purpose of democratic institutions (like administrative bodies) should be to "center upon assigning responsibilities for care, and for ensuring that democratic citizens are as capable as possible of participating in this assignment."⁹⁰⁸

There are various ways to phrase a central right that could be associated with basic income. This most obvious is framing basic income as a "right to a guaranteed, state-provided minimum income." But basic income cannot collapse other forms of social welfare and support. This perhaps leads to the need to advance a broader socioeconomic bill of rights which could also contain the "right to support for caregivers." In addition to a basic income, this right would require the funding and implementation of high-quality education, childcare, elder care, health care, and care for those with disabilities.⁹⁰⁹ It would also require taking action to guarantee a safe and healthy environment in which to provide such care, which implicates action on climate change.

By nesting basic income in this network of caring relations, basic income would form a key part of a more relational approach to public care and to democratic life. No longer would the right/freedom to care or nurture be framed only as the liberty to make individual decisions about family autonomy,⁹¹⁰ but would require that the state be involved in shaping the relational and material conditions that are necessary for this liberty to exist

⁹⁰⁸ Tronto Democracy, *supra* note 224 at 48.

⁹⁰⁹ Discussed in West, *supra* note 504 at 91.

⁹¹⁰ As framed in *B(R)*, *supra* note 509 at 370.

at all. This is the same reasoning advanced by Arbour J in *Gosselin*: positive state action on social welfare is required to “breathe purpose” into fundamental freedoms to life, liberty, and security of the person.⁹¹¹ Positive state action is similarly required to breath purpose into the freedom to care.

4.1 Conclusion

In this thesis, I have advanced the argument that Canada’s needs a basic income to help address the gaps and issues relating to income, food, and housing insecurity, especially for marginalized people. I took a detailed look at the limitations of viewing social justice through a distributive lens and I argued for an ethics of care approach to social welfare policy and to a Canadian basic income. I have engaged in a form of feminist practical reasoning and explored obstacles and opportunities for advancing basic income in Canada.

I have discussed several legal obstacles to advancing an ethics-of-care-centred, human rights-based basic income: the positive versus negative rights distinction and siloed approach to socioeconomic versus political rights; residual approaches to social welfare program design; constitutional disagreements over powers relating to social programs; Canada’s androcentric social welfare programs that are designed largely for workers and exclude or further marginalize caregivers; and also textualist approaches to constitutional interpretation.

Opportunities exist, however. These opportunities offer some of the “best answers for now,” but because changes to legal and political environments happen continuously, these opportunities are not static and may indeed change in the future.⁹¹² If a connection between international and domestic human rights in Canada is more clearly drawn by Canadian courts, then perhaps advancing basic income through *Charter* litigation may be possible. This could be achieved by making the connection between *Charter* rights and rights contained in the *ICESCR*, or the acceptance of international standards for judging the advancement of human rights through a reasonableness analysis. Further, if programs that advance, protect, or fulfil human rights are rolled back or cancelled, then my framing of the principle against retrogression may be useful for *Charter* litigation on the basis of section 7 claims.

⁹¹¹ *Gosselin*, *supra* note 606 at para 377.

⁹¹² Scales, *supra* note 225 at 29.

We can also see opportunities by recognizing that major changes to social welfare are not impossible and indeed have happened before through constitutional amendment. Change has also occurred through democratic cooperation seen in transfer payment arrangements and in principled approaches to health care. These democratic arrangements and principled approaches could be imparted onto other areas of social welfare. Other changes can be seen through the attempts to advance support for caregivers under existing social insurance programs. We can also see flexibility in the concept of social insurance itself in the SCC's discussion of care and unemployment insurance. All of these suggest opportunity for advancing a federal basic income in Canada either through a new legislative scheme, or by expanding on existing ones.

Past social welfare changes show us that providing a basic income in Canada is not so radical: Canada provides a basic income to a significant portion of the population through the CCB and through OAS and GIS. Advancing basic income for those between the age of 18-65 is certainly possible, and perhaps not that utopian. Just as in the post-war period of the 1940s and 1950s when Canada was rebuilding itself as a more supportive society, institutional social welfare programs that may have seemed far away became part of Canadian identity. The same could be suggested for the future of basic income: "one day we shall wonder why it took us so long to fit beneath our feet a solid floor on which we can all stand. What used to be regarded as the fantasy of a handful of lunatics will then have become an irreversible and self-evident achievement."⁹¹³

But how do we get there? Political will and public agitation are necessary. Perhaps COVID-19 has created the right moment of insecurity and crisis to help us get agitated. We can be guided by ideals like social justice, human rights, and democracy, but these ideals demand action. Here, I join Tronto's call to become more caring democratic citizens and "care enough about care to organize and to act on [our] commitments to freedom, equality, and justice."⁹¹⁴ This means supporting programs like basic income that would provide "sufficient resources for care."⁹¹⁵ Ensuring that everyone has the freedom to care is perhaps what real freedom truly looks like for Canada.

⁹¹³ Van Parijs and Vanderborght, *supra* note 13 at 246-247.

⁹¹⁴ Tronto Democracy, *supra* note 224 at 180.

⁹¹⁵ *Ibid* at 182.

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