LGBTQ2 Rights and the *Charter* at 40: Recent Critiques of the Liberal Rights Model

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The constitutional entrenchment of the Charter *empowered Canadian courts in ways that undoubtedly strengthened LGBTQ2 rights. By reading sexual orientation into the equality rights section of the* Charter*, the Supreme Court of Canada opened up a new era for LGBTQ2 people as rights-bearing subjects in Canadian politics. This led to enhanced discrimination protections, same-sex relationship recognition, and same-sex marriage in Canada. At the same time, however, this legal recognition has been scrutinized extensively by diverse constituencies within LGBTQ2 communities and, in general,* Charter*-type models of liberal human rights have increasingly faced contestation at the global level. After providing a brief overview of the evolution of LGBTQ2 rights recognition in Canada under the* Charter*, this article surveys various critiques of the* Charter*-based human rights model, focussing on key concepts such as homonationalism and settler colonialism. In doing so, the article considers who is privileged and who is left behind within the* Charter*-based model of LGBTQ2 rights, specifically focussing on the interests of racialized, Indigenous, and trans people. Drawing on interdisciplinary scholarship in sexuality studies, the article argues that, despite Charter-based protections for LGBTQ2 people in Canada, formal-legal change has not always affected tangible, lived change for LGBTQ2 people, and* Charter*-based protections may actually have negative and damaging consequences for marginalized communities.*

La consécration constitutionnelle de la Charte canadienne des droits et libertés *a donné aux tribunaux canadiens des pouvoirs qui ont sans aucun doute renforcé les droits des personnes LGBTQ2. En intégrant l'orientation sexuelle dans l'article sur le droit à l'égalité de la* Charte*, la Cour suprême du Canada a ouvert une nouvelle ère pour les personnes LGBTQ2 en tant que sujets de droit dans le système canadien. Cela a conduit à une amélioration des protections contre la discrimination, à la reconnaissance des relations entre personnes de même sexe et au mariage entre conjoints de même sexe. Or, cette reconnaissance juridique a fait l'objet d'un examen approfondi de la part de divers groupes au sein des communautés LGBTQ2 et, en général, les modèles libéraux de droits de la personne similaires à celui de la* Charte *sont de plus en plus contestés à l'échelle mondiale. Après avoir donné un bref aperçu de l'évolution de la reconnaissance des droits des personnes LGBTQ2 au Canada en vertu de la* Charte*, cet article examine les critiques du modèle des droits de la personne fondé sur la* Charte*, en mettant l'accent sur des concepts clés comme l'homonationalisme et le colonialisme de peuplement. Ce faisant, l'article distingue entre ceux qui sont privilégiés et ceux qui ne le sont pas dans le modèle des droits LGBTQ2 fondé sur la* Charte*, en se concentrant spécifiquement sur les intérêts des personnes racisées, autochtones et trans. S'appuyant sur des études interdisciplinaires en matière de sexualité, l'article soutient que, malgré les protections fondées sur la* Charte *pour les personnes LGBTQ2 au Canada,*

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les changements juridiques formels n'ont pas toujours entraîné des changements tangibles pour les personnes LGBTQ2 et les protections fondées sur la Charte *peuvent avoir des conséquences négatives et dommageables pour les communautés marginalisées.*

Contents

I. Introduction

The constitutional entrenchment of the *Charter* empowered Canadian courts in ways that undoubtedly strengthened LGBTQ2 rights. By reading sexual orientation into the equality rights section of the *Charter*, the Supreme Court of Canada opened a new era for LGBTQ2 people as rights-bearing subjects in Canadian politics. This led to enhanced discrimination protections, same-sex relationship recognition, and same-sex marriage in Canada. However, from the beginning, this legal recognition was scrutinized from within the LGBTQ2 community, which had long engaged in legal mobilization, even before the entrenchment of the *Charter*. Queer people were criminals until the partial decriminalization of 1969 and, even after, policing of queer sexuality brought LGBTQ2 people in Canada into law's ambit. Defense against attacks on gay baths and on queer institutions such as the *Body Politic* newspaper presaged the *Charter* and sparked a deep-seated skepticism towards police.[1] Nonetheless, gay and lesbian political leaders of the pre-*Charter* period were well aware of the power of the emerging human rights template and proactively sought to highlight the existence of lesbians and gay men and to encourage their coming out through the deployment of human rights arguments.[2]

The advent of the *Charter* constituted a major political and legal opportunity for LGBTQ2 activists. This was taken up by the White-dominated lesbian and gay rights movement in English-speaking Canada and eventually in Quebec as well. The resultant train of litigation — starting with cases such as *Mossop*[3] and *Egan*[4] and continuing through *Vriend*[5] and *M v H*[6] — produced far-reaching legal and policy changes, including 1) the recognition of sexual orientation as a prohibited ground of discrimination in the human rights law of all Canadian jurisdictions; 2) the extension of rights to same-sex couples and parents in provincial family law; and 3) the advent of same-sex marriage through federal legislation in 2005.[7] While many LGBTQ2 people celebrated these changes, though, others critiqued them as exemplifying homonormativity; the

1 Tom Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2022).

2 Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999) [Smith, *Lesbian and Gay Rights*].

3 *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554, 100 DLR (4th) 658.

4 *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609.

5 *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385.

6 *M v H*, [1999] 2 SCR 3, 171 DLR (4th) 577.

7 Miriam Smith, "Federalism, Courts and LGBTQ Policy in Canada" in Jill Vickers, Joan Grace & Cheryl N Collier, eds, *Handbook on Gender, Diversity and Federalism* (Cheltenham, UK: Edward Elgar, 2020) 107. On parenting, see Dave Snow, "Measuring Parentage Policy in the Canadian Provinces: A Comparative Framework" (2016) 59:1 Can Public Administration 5.

assimilation of radical queer cultures into the mainstream; and the marginalization of trans people and people of colour.

This critique of *Charter*-driven, legal recognition is mirrored at the global level, where liberal models of human rights are increasingly contested from different political directions. While political homophobia is deployed by populists against LGBTQ2 communities,[8] legally-based rights models have been critiqued as forms of neocolonialism in global politics.[9] LGBTQ2 movements have sought legal rights through human rights instruments such as the *Charter* in Canada while, on the other hand, progress in the recognition of such legal rights has been used against racialized communities and against those defined as cultural "others," as scholars such as Jasbir Puar have emphasized.[10]

This article surveys these critiques of the *Charter*-based human rights model in Canada, beginning with traditional critiques of the mainstreaming of queer life and continuing through an exploration of the key concepts of homonationalism, pinkwashing, and settler colonialism. It shows that critiques of liberal rights were important to the early gay liberation and lesbian feminist movements, and formed a backdrop to the first efforts by activists to push for legal recognition. At the same time, though, these critiques have developed in new directions over the last thirty years through the creation of new concepts such as homonationalism, and through deeper engagement with foundational concerns about racialization and Indigeneity. The article describes this trajectory before concluding with a discussion of LGBTQ2 *Charter* rights in an everyday setting to highlight the gap between *Charter* recognition and everyday experiences of stigma and homophobia. In doing so, the article considers who is privileged and who is left behind within the *Charter*-based model of LGBTQ2 rights. Drawing on interdisciplinary scholarship in sexuality studies, the article argues that, despite *Charter*-based protections for LGBTQ2 people in Canada, formal-legal change has not always affected change for LGBTQ2 people, and may actually have damaging consequences for marginalized communities. Whether this means that legal change should not be so actively pursued by LGBTQ2 communities is a question that must be decided by LGBTQ2 people themselves. It is not a question that can be decided by elites from the top down.

8 Michael J Bosia & Meredith L Weiss, "Political Homophobia in Comparative Perspective" in Meredith L Weiss & Michael J Bosia, eds, *Global Homophobia: States, Movements, and the Politics of Oppression* (Urbana, IL: University of Illinois Press, 2013) 1.

9 Rahul Rao, *Out of Time: The Queer Politics of Postcoloniality* (New York, NY: Oxford University Press, 2020).

10 Jasbir K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham: Duke University Press, 2007).

While there are barriers to access to justice in Canada, LGBTQ2 individuals may decide to challenge law and policy through the courts without regard for scholarly position-taking or community judgment, although such challenges may have unintended or unforeseen consequences. In this respect, it should be noted from the outset that this article confines itself to providing a historically grounded analysis of queer critiques of rights-seeking based on the Canadian LGBTQ2 experience.

II. Traditional Critiques of LGBTQ2 Rights Under the *Charter*

Early queer and feminist critiques of the human rights model of *Charter* protection focussed on its inattention to social justice and economic equality, whereas later critiques by feminist and anti-racist scholars began exploring the *Charter*'s failure to address structural factors like systemic racism and gender violence. In an early article published in 1993, Nitya Iyer pointed out that *Charter*-type protections against discrimination created boxes in which complainants were forced to choose a particular aspect of their identity as the basis for a legal claim.[11] By doing so, Iyer suggested, the *Charter* model made it impossible to recognize and acknowledge intersectional positions such as the experiences of women of colour.

Over a decade later, critiques of the *Charter* model began to shift in a more "structural" direction. For example, feminist legal scholar Melanie Randall argued that gender violence was difficult to address within a *Charter*-based gender equality framework,[12] while David Tanovich described the *Charter* as a "charter of whiteness" because of the ways in which legal actors ignored race and racism in the implementation of *Charter* protections in the criminal justice system.[13] In a similar vein, Pearl Eliadis's book on human rights legislation and human rights commissions argues that these instruments do a poor job of recognizing and resolving human rights complaints.[14]

These defects have also been found in other countries. Socio-legal scholarship on human rights protections in the US has repeatedly documented the

11 Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19:1 Queen's LJ 179.

12 Melanie Randall, "Equality Rights and the *Charter*: Reconceptualizing State Accountability for Ending Domestic Violence" in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 275.

13 David M Tanovich, "The *Charter* of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 SCLR 655.

14 Pearl Eliadis, *Speaking Out on Human Rights: Debating Canada's Human Rights System* (Montreal & Kingston: McGill-Queen's University Press, 2014).

failure of the complaint-based system to remedy systemic racism. Pioneering studies by Lauren Edelman and others have documented the many challenges in lodging discrimination complaints, beginning from the first stage of the process: that of naming the complaint and identifying discrimination by social institutions or employers. A key contribution by Edelman *et al* shows that the basic assumptions of the US human rights system — assumptions that are shared by the Canadian system — are inconsistent with the empirical findings of studies of gender and race-based discrimination.[15] For example, human rights instruments are based on the assumption that banning discrimination will deter discrimination, but Edelman *et al* demonstrate that, in the US, employers respond to legal challenges by implementing programs of liability management to address diversity, rather than acting to address systemic discrimination.[16] While the *Charter* explicitly permits positive state programs to remedy historical marginalization, it does not mandate them, thereby leaving the problem of discrimination for complainants to pursue.

Skepticism towards the liberal rights model was well articulated in the early days of the gay liberation and lesbian feminist movements of the 1970s. The gay liberation movement often deployed legal challenges as a means of calling attention to the cause rather than with the expectation that the law would be changed as a result.[17] These legal challenges were used by the movement to foreground the very existence of lesbians and gay men in Canadian society, and to push for their right to live their lives in the open. In addition, queer communities engaged with law defensively in response to the bath raids in Toronto and Montreal, and the policing of gay spaces.[18]

The leadership of the gay liberation movement in the 1970s and 1980s was overwhelmingly White and male, although some White women did participate. By the 1980s, queer people of colour had established their own groups, which contested the racism and exclusion of White-dominated groups. These groups also focussed on service provision to their own communities, rather than on legal engagement.[19] Similarly, lesbians of the 1970s and 1980s were critical of what was termed "the human rights strategy," and saw their interests

15 Lauren B Edelman, Aaron C Smyth & Asad Rahim, "Legal Discrimination: Empirical Sociolegal and Critical Race Perspectives on Antidiscrimination Law" (2016) 12 Annual Rev L & Soc Science 395.

16 *Ibid* at 408.

17 Smith, *Lesbian and Gay Rights*, *supra* note 2, 20-42.

18 David M Rayside & Evert A Lindquist, "AIDS Activism and the State in Canada" (1992) 39:1 Studies in Political Economy 37.

19 Warner, *supra* note 1. For a comparative overview of racism in advocacy organizations, see Denton Callander, Martin Holt & Christy Newman, "Gay Racism" in Damien W Riggs, ed, *The Psychic Life of Racism in Gay Men's Communities* (Lanham, MD: Lexington Books, 2017) 1.

better reflected in the women's movement and in countering gender-based economic inequality and violence. Generally, lesbian feminists were not concerned with rights-claiming, and were not engaged with the liberal rights model.[20]

When the equality rights section of the *Charter* (section 15) came into effect in 1985, there were strong critiques from within the community and within academia regarding its potential effects for LGB people. For example, Didi Herman's book on early gay rights struggles in Canada highlighted the extent to which legal contestation produces a minority rights model that regulates sexuality in restrictive and normalizing ways.[21] Similarly, Lise Gotell's analysis of the landmark 1998 *Vriend* case argued that, despite its recognition of the obligation to include sexual orientation as a prohibited ground of discrimination in Alberta human rights legislation, the ruling replicated a restrictive view of the binary between gay/straight, which reinstated normative heterosexuality and reduced queer life to minority rights.[22] Brenda Cossman's early work on the *Charter* also stresses this point, suggesting that formal legal recognition of rights for lesbians and gay men came at the price of dividing queer communities into respectable minorities and those deemed sexual outlaws. Cossman's work has focussed specifically on the restrictiveness of legal recognition and the extent to which this formal recognition of rights to be free from discrimination in certain venues was accompanied by restrictions on queer sexual expression, as epitomized by the ongoing policing of queer sexuality.[23]

However, at the same time, there was enthusiasm about the potential to use these new provisions to advance the position of lesbian and gay people. During the parliamentary committee hearings on the new Constitution in 1980-81, MP Svend Robinson — Canada's first openly gay MP — proposed that sexual orientation be included as a prohibited ground of discrimination under the equality rights clause of the *Charter*. While the Liberals turned down this proposal, Robinson asked then Justice Minister Jean Chrétien whether sexual orientation could be added by the courts in future rulings, and Chrétien indicated that it could.[24] This exchange between Robinson and Chrétien presaged the decision of the Supreme Court of Canada in the 1995 *Egan* case, in which the Court ruled that sexual orientation was analogous to other grounds of discrim-

20 See Smith, *Lesbian and Gay Rights*, *supra* note 2 at 28-31.

21 Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994).

22 Lise Gotell, "Queering Law: Not by *Vriend*" (2002) 17:1 CJLS 89.

23 Brenda Cossman, "Lesbians, Gay Men, and the *Canadian Charter of Rights and Freedoms*" (2002) 40:3/4 Osgoode Hall LJ 223. See also Brenda Cossman et al, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997).

24 See Smith, *Lesbian and Gay Rights*, *supra* note 2 at 66-67.

ination in section 15, and was therefore a prohibited ground of discrimination under the *Charter*. Although there was no coverage of the pending entrenchment of the *Charter* in gay media (such as Toronto's *Body Politic* newspaper), or in French language media in Quebec, the Ottawa-based lesbian and gay rights group "Gays of Ottawa" kept a watching brief on *Charter* developments and pushed the government to consider gay rights. Under the Mulroney government (1984-1993), parliamentary committee hearings were held on the coming into force of section 15 of the *Charter*. During these hearings, a number of lesbian and gay rights groups submitted briefs that revealed the extent of grass roots engagement with the idea of constitutionally protected gay rights, and showed grass roots concerns about discrimination in employment and housing, and about rights for same-sex couples and parents.[25]

These examples show that from the start, there was grass roots interest in constitutionally-protected equality rights in Canada's lesbian and gay communities. However, this engagement coexisted with skepticism about legal rights-claiming from within these communities. These criticisms were, in themselves, gendered and racialized. In activist circles, women were critical of legal engagement, and even within legal academia, feminist critiques of law formed the core of contestation around the potential impact of the *Charter* and the potentially limiting effects of the minority rights model. In this early period, however, there was little engagement with the issues of racism, Indigeneity, or trans rights.

III. From Homonationalism to Necropolitics

A new generation of rights critiques was marked by the publication of Jasbir Puar's pathbreaking *Terrorist Assemblages* in 2007.[26] Puar's book highlights the concept of homonationalism, which links the recognition of LGBTQ2 rights to a chauvinistic nationalism that vaunts the superiority of Western nations over other cultures and nations that allegedly do not recognize LGBTQ2 rights. In the post 9/11 context, Puar focussed on the ways in which court rulings that recognized same-sex rights in the US were used to demonize Muslims and justify US wars in Afghanistan and Iraq. As Puar points out, the gay rights movement in the US was traditionally dominated by White activists, and legally focussed activism tended to reinforce racialized, social, political, and economic inequality and subordination.[27] In this regard, Puar's analysis echoes earlier

25 *Ibid* at 79-83.
26 See Puar, *supra* note 10.
27 *Ibid.*

arguments by scholars like Lisa Duggan on homonormativity. Duggan argued that the US gay rights movement contributed to the idealization of a privatized, neo-liberal homonormativity at the expense of sexual liberation and freedom. As such, Duggan saw homonormativity as a structure that complemented and reinforced heteronormativity rather than challenging it.[28] Similarly, Puar's linking of homonormativity to US nationalism highlights the role of racism and cultural othering in the War on Terror and links LGBTQ2 legal rights with assertions of the superiority of Western values.

Carceral homonationalism and pinkwashing are also important concepts that grew out of Puar's work, and that extend and deepen the traditional critique of liberal rights. Carceral homonationalism explores the ways in which the mainstream LGBTQ2 movement is linked with and legitimizes police power. Rather than critiquing the police and the criminal law, as was the case in the historic struggles of the trans, gay, and lesbian communities at Stonewall and afterwards, the analysis of carceral homonationalism suggests that the LGBTQ2 movement is currently sanctioning police conduct, seeking support from police in battling hate crimes, and incorporating police into Pride events.[29] As Dean Spade has pointed out, the state is not neutral; systems of criminal law, social welfare, and immigration control are deployed to police and conduct surveillance on marginalized people, such as trans people of colour.[30] Similarly, pinkwashing denotes the use of legal rights-recognition to excuse otherwise bad conduct by states, public authorities, or corporations. Like greenwashing, in which companies publicize token environmental initiatives while failing to address structural environmental failures, pinkwashing vaunts LGBTQ2 rights as a means of distracting from other forms of exploitation and marginalization, such as police brutality and unchecked violence against queer and trans people of colour — especially trans women of colour. Taken together, these concepts — carceral homonationalism and pinkwashing — emphasize the extent to which equality-seeking through law may leave existing structures of power intact and, by legitimating such structures, may directly damage communities of colour and Indigenous people.

28 Lisa Duggan, *The Twilight of Equality? Neoliberalism, Cultural Politics, and the Attack on Democracy* (Boston: Beacon Press, 2003).

29 Alexa DeGagne, "Pinkwashing Pride Parades: The Politics of Police in LGBTQ2S Spaces" in Fiona MacDonald & Alexandra Dobrowolsky, eds, *Turbulent Times, Transformational Possibilities? Gender and Politics Today and Tomorrow* (Toronto: University of Toronto Press, 2020) 258; Sarah Lamble, "Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment" (2013) 24:3 L & Critique 229.

30 Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Durham, NC: Duke University Press, 2015).

Homonationalism has become an important critique of the liberal rights model of LGBTQ2 rights in Canada and has been linked to a wave of new scholarship on the racialization of the Canadian LGBTQ2 movement. The advent of same-sex marriage in Canada, along with the extensive legal changes ushered in through *Charter* litigation, generated a celebratory tone in the mainstream LGBTQ2 movement. This "success" was represented by the legal networks that litigated these cases, and by pan-Canadian LGBTQ2 organizations, such as Egale. The Liberal government of Paul Martin, which had passed the 2005 *Civil Marriage Act*, enunciated a clear connection between the Liberals' willingness to pass the *Act* and the impact of the *Charter.* Speaking in the House of Commons on the passage of the same-sex marriage provision, Martin associated the recognition of same-sex marriage in Canada with *Charter* values that had been promulgated specifically by the Liberal Party. More recently, Justin Trudeau's Liberals have claimed the mantle of leadership on LGBTQ2 issues and used the issue as a signifier — distinguishing themselves from the Conservatives and from right-wing populists. As in other countries, LGBTQ2 rights in Canada have become a litmus test of progressive politics.

The vaunting of Canadian tolerance in the name of *Charter* values has also reinforced the racialization and othering of Muslims and other cultures viewed as intolerant of LGBTQ2 people as well as the trend toward assimilation and homonormativity. Early critiques of the *Charter* emphasized the extent to which *Charter*-based legal strategies reinforced arguments that same-sex couples and queer people were the same as straights and straight couples, thus denying the sexual freedom of queer cultures and non-binary sexualities. However, following Puar and other scholars, a number of Canadian analyses have directly considered racialized homonationalism in Canadian politics. As Suzanne Lenon has pointed out, the same sex marriage movement in Canada has often presented a vision of undiluted whiteness and, like the US civil rights movement, has upheld a norm of whiteness that denies the intersectionality of diverse queer lives. In this regard, Lenon suggests that the mainstream same-sex marriage movement, centred on the legal recognition of *Charter* rights for same-sex couples, put forth a view of gay life as a privatized and consumer driven, middle-class existence, based on racial normativity.[31] Lenon's analysis accordingly views racialization as a key component of homonormativity, just as Puar links neoliberalism and racism in her analysis of homonationalism in the US.

31 Suzanne J Lenon, "Marrying Citizens! Raced Subjects? Re-thinking the Terrain of Equal Marriage Discourse" (2005) 17:2 CJWL 405; Suzanne Lenon, "'Why Is Our Love an Issue?': Same-Sex Marriage and the Racial Politics of the Ordinary" (2011) 17:3 Soc Identities 351.

The normative assumptions of a racialized urban Pride celebration dominated by Whites has been brought to the fore in recent years by controversies in Toronto and Montreal, including the participation of Queers Against Israeli Apartheid (QUIA) in Toronto Pride and the role of Black Lives Matter (BLM) in protesting police violence at Pride marches in both Toronto and Montreal. The role of QUIA, a group organized around issues in the Middle East, became a central issue in Toronto Pride in 2010. While some in the Toronto queer community welcomed the presence of left politics and political debate in Pride, others wanted to keep "political" issues out of the Pride parade and defined QUIA's concern with what it viewed as Israeli apartheid against Palestinians as an issue outside of the LGBTQ2 community. By contrast, others argued that Pride had traditionally been a political celebration that encapsulated the radical politics of the gay liberation movement. As such, groups like QUIA were to be encouraged as returning Pride to its roots as a radical, political intervention, rather than a corporate and consumer-driven tourist event.

Perhaps inevitably, QUIA's participation in Pride was exploited by populist politicians such as Rob Ford — then mayor of Toronto — as well as by right-wing city councillors who threatened to cut funding to Pride if QUIA marched in the parade. The issue was eventually resolved when a city council committee that was investigating QUIA concluded that there was no violation of Canada's hate speech laws and when QUIA itself dropped out of the official Pride parade and held its own independent events in 2011.[32] The city later determined that QUIA's participation did not violate the city's discrimination policy, and QUIA participated in Pride in 2014 before disbanding in 2015.[33]

Black Lives Matter has also played a central role in critiquing the White-dominated LGBTQ2 movement. While BLM has challenged Pride celebrations in several Canadian cities, calling for an end to police participation,[34] it has been particularly important in Toronto. In July 2016, BLM Toronto demonstrated at Toronto Pride and stopped the parade until its demands were met. These demands were: that police in uniform should not march in Pride, that police should not carry guns, and that space and funding for Blockorama — a

32 Tim McGaskell, *Queer Progress: From Homophobia to Homonationalism* (Halifax: Between the Lines, 2016), Chapter 13.

33 Abigail B Bakan & Yasmeen Abu-Laban, "Israeli Apartheid, Canada, and Freedom of Expression" in Ghada Ageel, ed, *Apartheid in Palestine: Hard Laws and Harder Experiences* (Edmonton: The University of Alberta Press, 2016) 163.

34 DeGagne, *supra* note 29; Alexie Labelle, "Why Participate? An Intersectional Analysis of LGBTQ People of Color Activism in Canada" (2021) 9:4 Politics, Groups & Identities 807.

Black queer and trans space at Pride — should be expanded.[35] While the demands on removing police presence in the parade itself were met, concerns over Blockorama were only partly resolved. Blockorama's central space at Toronto Pride was restored; however, Blockorama was required by Pride organizers to serve alcohol, which required police surveillance of the site.[36]

While the rules have been relaxed in recent years, this incident opened up deep rifts in the Toronto queer and trans communities around policing and violence, and highlighted the Whiteness of Pride celebrations and the lack of critical attention to the role of policing in racialized and Indigenous queer communities. As Walcott commented, "[t]he war rages between those who believe all gay rights are now secure and those who understand that rights are parsed out according to privileged identities."[37] BLM Toronto allied with Indigenous activists and integrated Indigenous protest into its demonstrations, linking the two movements as addressing the colonial violence of slavery and land theft — issues that are ignored in White liberal accounts of LGBTQ2 rights.[38] From this perspective, *Charter* rights are a marker of privilege, rather than a source of universal legal protection.

The discussion of homonationalism, pinkwashing, and racialization within the LGBTQ2 movement is also connected to recent analyses of the relationship between settler colonialism and LGBTQ2 identities. Settler colonialism has been viewed as dismantling traditional gender roles in First Nations' communities by undermining Two-Spirit identities and imposing heteronormative gender roles through *Indian Act* policies as well as through the violence of residential schools.[39] In this vein, Sonny Dhoot points to Canada's pinkwashing of settler colonialism at the 2010 Olympics. During the Games, tolerance towards

35 Rinaldo Walcott, "Black Lives Matter, Police and Pride: Toronto Activists Spark a Movement", *The Conversation* (28 June 2017), online: <theconversation.com/black-lives-matter-police-and-pride-toronto-activists-spark-a-movement-79089> [perma.cc/N8QU-B69T]; Beverly Bain, "Fire, Passion, and Politics: The Creation of Blockorama as Black Queer Diasporic Space in the Toronto Pride Festivities" in Patrizia Gentile, Gary Kinsman & L Pauline Rankin, eds, *We Still Demand! Redefining Resistance in Sex and Gender Struggles* (Vancouver: UBC Press, 2017) 81 [Bain, "Fire, Passion, and Politics"]; Beverly Bain, "Right to Party: 20 Years of Black Queer Love and Resilience", *The Conversation* (29 June 2017), online: <theconversation.com/right-to-party-20-years-of-black-queer-love-and-resilience-80040> [perma.cc/8EWT-64NR] [Bain, "Right to Party"].

36 Bain, "Right to Party", *supra* note 35.

37 Walcott, *supra* note 35.

38 *Ibid*.

39 Julie Depelteau & Dalie Giroux, "LGBTQ Issues as Indigenous Politics: Two-Spirit Mobilization in Canada" in Manon Tremblay, ed, *Queer Mobilizations: Social Movement Activism and Canadian Public Policy* (Vancouver: UBC Press, 2015) 64; Qwo-Li Driskill, "Doubleweaving Two-Spirit Critiques: Building Alliances between Native and Queer Studies" (2010) 16:1/2 GLQ 69.

LGBTQ2 was advertised and championed through the establishment of "Pride House," a queer-friendly, physical space that was created despite Indigenous protests.[40] In support of these protests, Dhoot argues that queer inclusion in the Canadian nation entails the erasure of Indigenous presence on the territory. Mainstream LGBTQ2 recognition is incorporated into settler colonialism at the expense of Indigenous people, Dhoot suggests, including Two-Spirit people and Indigenous LGBTQ2 people. This is especially evident in the fact that Indigenous territory was eliminated from view in the logic of Pride House and the badges of national tolerance that were vaunted throughout the Games. Moreover, Two-Spirit people are currently excluded from the pan-Canadian definition of LGBTQ2, as they may view themselves as part of the Indigenous movement, which is erased through homonational practices that celebrate undiluted Canadianism. Dhoot makes the link to *Charter*-based rights by arguing that "[q]ueer legal claims based in homonationalism add legitimacy to liberal framings of rights, where rights are understood as something possessed by individuals rather than collective groups,"[41] thus leading to the denial and erasure of Indigenous rights.

There are ultimately two different positions on the implications of the critical analysis of homonationalism and settler colonialism for *Charter* rights. The first position is that *Charter* rights overlook and invisibilize the interests and identities of trans people, as well as racialized and Indigenous peoples. This invisibilization is connected directly to intersectional identities that present fundamental problems for antidiscrimination law insofar as law seeks certainty and consistency and is ill equipped to process legal issues that fall across multiple categories.[42] In many real life cases, survivors of discrimination may not know if they were discriminated against based on their gender, their race, or their sexual orientation. These are the problems of law and of solving problems of social inequality through law. While an intersectional approach can draw attention to these elisions, it may nonetheless be difficult to integrate collective identities, such as Two-Spirit identities, into section 15 litigation, which requires a naming of state action that distinguishes unlawfully on a particular ground of discrimination.

40 Sonny Dhoot, "Pink Games on Stolen Lands: Pride House and (Un)Queer Reterritorializations" in OmiSoore H Dryden & Suzanne Lenon, eds, *Disrupting Queer Inclusion: Canadian Homonationalisms and the Politics of Belonging* (Vancouver: UBC Press, 2015) 49.

41 *Ibid* at 59.

42 Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies" (1989) 1 University of Chicago Legal Forum 139-167.

The second position on the *Charter* that flows from the critical analysis of homonationalism, pinkwashing, and settler colonialism is that seeking legal equality rights through *Charter* litigation is a damaging project that reinforces racism, colonialism, and violence against racialized and Indigenous peoples. By presenting a picture of equality and by achieving court victories that privilege White, middle class LGBTQ2 communities, the project of *Charter*-based LGBTQ2 rights reinforces racial privilege and contributes to the construction of the neoliberal security state. As carceral homonationalism emphasizes, equality-focussed campaigns can strengthen the police and condone racialized incarceration. Analyses of necropolitics — the politics of death — are pertinent here, focussing on the ways in which particular laws and policies treat particular groups as non-existent in law and policy. From this perspective, to the extent that *Charter*-based recognition of LGBTQ2 rights perpetuates racialized exclusion, it is more than neglectful. It is a dangerous and damaging form of necropolitics.

Therefore, while the first position would see anti-discrimination law as potentially redeemable through the construction of legal and political strategies that would address intersectionality and racism, the second position would see the project of *Charter*-based rights litigation as irremediably unjust.

IV. Law and the Everyday

Another critique of the liberal rights model of the *Charter* stems from socio-legal studies, which emphasizes the gap between law on the books and law in practice.[43] In short, the value of this critique is that it highlights the fact that liberal rights may have limited applicability in the everyday world in which LGBTQ2 people face daily stigmatization and barriers. LGBTQ2 people may succeed in the courts under the *Charter*, but may not be recognized and treated with dignity and fairness in their everyday lives. In socio-legal studies, the term "law in the everyday" signifies this gap between formal law and actual, lived experience. This raises questions about the extent to which formal law is implemented and the ways in which law may be mobilized (or not) by marginalized peoples, including LGBTQ2 populations. Despite *Charter* victories, the gap between formal law and social reality may lead LGBTQ2 communities to reject law as an instrument for addressing inequities, or as a solution to everyday problems.

43 Jon B Gould & Scott Barclay, "Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship" (2012) 8 Annual Rev L & Soc Science 323.

The Canadian human rights system provides an example of the ways in which formal law fails to address discriminatory conduct. Even though sexual orientation, gender identity, and gender expression are included in the human rights regimes at federal, provincial, and territorial levels, there are serious problems with the implementation of human rights protections.[44] These systems are complaint-based, rather than proactive. Complaint-based systems entail systemic barriers for marginalized communities that may have difficulty in accessing the knowledge and resources needed to file a claim. Moreover, human rights tribunals in many provinces are bogged down with lengthy delays that prevent the hearing of cases. In Ontario, for example, under the Ford government, the number of adjudicators has recently been halved, and political appointees have been assigned to lead the Ontario Human Rights Tribunal and potentially stymie its work.[45]

To add to these problems, the specific grounds of discrimination in human rights law may discourage or even prevent intersectional claims that reflect the complexity and specificity of claimants' experiences. Human rights commissions and tribunals in Canada have not gathered systematic demographic data on complainants or, if they have, have not made such data publicly available. Therefore, it is not possible to know how many LGBTQ2 people of colour or Indigenous or Two-Spirit people have brought claims of discrimination, even when examining past cases that have been heard by a tribunal. The Canadian Human Rights Commission is now gathering data on what it calls "intersectionality" — claims made based on more than one ground of discrimination — and is attempting to gather data on past race-based complaints.[46] These belated measures reflect awareness of the failings of the human rights system in recognizing intersectional identities. However, for most provincial and territorial jurisdictions, data has not been collected, even though provincial human rights legislation is the main protection for most workers and provincial human rights adjudication is central to other key areas, such as housing and public accommodation.

Despite the well-known defects of formal legal protection, there are few studies that specifically focus on how this impacts LGBTQ2 people, let

44 See Eliadis, *supra* note 14.

45 Raj Anand, Kathy Laird & Ron Ellis, "Justice delayed: The decline of the Ontario Human Rights Tribunal under the Ford government", *The Globe and Mail* (29 January 2021), online: <www.theglobeandmail.com/opinion/article-justice-delayed-the-decline-of-the-ontario-human-rights-tribunal-under> [perma.cc/J8B6-5H4Z].

46 Canadian Human Rights Commission, *Build Back Better: The Canadian Human Rights Commission's 2020 Annual Report to Parliament* (Ottawa: Canadian Human Rights Commission, 2021).

alone LGBTQ2 people *in Canada*. However, other disciplines, such as social work, have developed a rich scholarship on everyday life, especially focussing on how LGBTQ2 people are served or not served by social services, and on how LGBTQ2 people of colour and Indigenous people are subjected to racist treatment from within LGBTQ2 organizations and community institutions. Through this work, LGBTQ2 people of colour recount extensive experiences of racialization, stigma, and abuse in the institutions of Canadian society, ranging from schools and workplaces to LGBTQ2 organizations themselves.[47] Giwa and Cameron's study of LGBTQ2 social service providers of colour in Toronto demonstrates how people of colour, working within social service environments, experience racism directly in their social service jobs and within LGBTQ2 community organizations. Many LGBTQ2 people of colour experience queer community organizations as White dominated and organized solely around the issues of heterosexism and homophobia, making it difficult for LGBTQ2 people of colour to challenge this apparent unity.[48]

While formal legal strategies are not mentioned in this research, it is evident that the White, male-dominated movement has driven the issues of the mainstream LGBTQ2 communities, including *Charter*-based equality litigation. In this respect, focussing on law and legal change creates a dynamic in which privileged and well-resourced voices within the community carry more weight. Moreover, *Charter*-based litigation requires single-axis legal strategies that marginalize people of colour and Indigenous people. Indeed, the law's emphasis on clear categories and grounds of discrimination invisibilizes intersectional positions. As LGBTQ2 organizations engage with litigation, this legal dynamic can reinforce the sociological privilege and dominance of White gay men in organizing.

Another example of the gap between law on the books and law in action is provided by an examination of recent legal disputes over religious rights versus equality rights for LGBTQ2 people. Beginning in 2000, several important cases have pitted LGBTQ2 equality rights against religious rights in various forms. These have included the Surrey book banning case,[49] a case over the BC Federation of Teachers' refusal to certify teacher training at Trinity Western

47 Labelle, *supra* note 34; Sulaimon Giwa & Cameron Greensmith, "Race Relations and Racism in the LGBTQ Community of Toronto: Perceptions of Gay and Queer Social Service Providers of Color" (2012) 59:2 J Homosexuality 149.

48 Giwa & Greensmith, *supra* note 47.

49 *Chamberlain v Surrey School District No. 36* 2002 SCC 86 (CanLII).

University (TWU),[50] and cases in which the Supreme Court of Canada upheld a ban on the accreditation of students trained at a proposed new TWU law school by law societies in BC and Ontario.[51] The problem, though, is that very few of these cases give any idea of the experiences of LGBTQ2 people navigating these institutions, thereby demonstrating the courts' focus on formal rather than substantive or lived equality.

Heather Shipley's empirical study of LGBTQ2 students at Trinity Western University is one of the few to explore the lived realities at stake in *Charter* litigation. This study directly asked university students to reflect on their experiences on campus, given the disputes over the University's official "Community Covenant" against homosexuality. The study finds that the litigation against TWU does "not respond to concerns about current or future LGBQTI+ students (or faculty or staff) at Trinity Western regarding their experiences on campus."[52] Further, Shipley's research uncovered the relationship between the University's Covenant and "pervasive issues of campus sexual violence across university campuses," demonstrating the ways in which the TWU Covenant made it more difficult to challenge such violence.[53] Incredibly, Shipley's study is one of the few that directly asks those affected by a Supreme Court of Canada *Charter* decision to comment on what they thought of the constitutional dispute and whether, in their view, and based on their experience, the process of legal mobilization would address the challenges they faced in relation to the exercise of their equality rights.

Health care is another problematic sector for LGBTQ2 people. A number of studies show how queer communities encounter obstacles in accessing care and in being themselves in the health care setting. Invisibility, in this respect, continues to be a major problem. LGBTQ2 people may be afraid to come out to their health care provider,[54] and many studies demonstrate the distinct barriers for older LGBTQ2 people in accessing caregiving. As Daley *et al* argue, the discourse of inclusion of LGBTQ2 people in health care and caregiving

50 *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 (CanLII).

51 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (CanLII); *Trinity Western University v Law Society of Upper Canada,* 2018 SCC 33 (CanLII).

52 Heather Shipley, "Sites of Resistance: LGBTQI+ Experiences at Trinity Western University" (2020) 35:1 CJLS 111.

53 *Ibid* at 114.

54 Carmen H Logie et al, "'In the North You Can't Be Openly Gay': Contextualising Sexual Practices among Sexually and Gender Diverse Persons in Northern Canada" (2018) 13:12 Global Public Health 1865; Erin Fredericks, Ami Harbin & Kelly Baker, "Being (in)Visible in the Clinic: A Qualitative Study of Queer, Lesbian, and Bisexual Women's Health Care Experiences in Eastern Canada" (2017) 38:4 Health Care for Women Intl 394.

fails to recognize structural exclusion and the right to access for LGBTQ2 elders.[55] *Charter*-based litigation does nothing to remedy this, and generally does not address social policy issues such as equal access to health care and caregiving services, even though these are an important dimension of the lived realities of the everyday for LGBTQ2 people. This point also applies to other areas of health care. As Mulé describes, a 2019 federal assessment of LGBTQ2 health care argued for LGBTQ2 inclusion but did not address the specific differences in the needs and agency of LGBTQ2 people. In addition, Mulé points to the lack of attention to intersectionality within the LGBTQ2 communities in federal policymaking.[56] None of these issues have been or are likely to be addressed by *Charter* litigation.

V. Conclusion

This article has described three main critiques of LGBTQ2 rights-claiming under the *Charter*: early critiques that focussed on legal recognition as privileging homonormativity and marginalizing feminist concerns; more recent critiques that stemmed from the concepts of homonationalism, pinkwashing, and settler colonialism; and critiques highlighted by empirical studies of everyday stigma and discrimination experienced by LGBTQ2 people across social institutions and in everyday life. These three approaches highlight the question of who benefits from *Charter*-based legal recognition, with each pointing to a different set of winners and losers. Traditional critiques of human rights and legal engagement from the 1970s emphasize the ways in which legal engagement privileges the position of gay men and marginalizes women's concerns with gender-violence and economic equality. Early work by legal scholars pointed to the ways in which the *Charter* forces a distinction between good and bad queers, penalizing sex radicals, sexual expression, and queer cultures as well as reinforcing the binaries of "sexual orientation." The second critique, by contrast, focusses squarely on race, racialization, and Indigeneity by describing the ways in which the mainstream LGBTQ2 movement has elided the concepts of race and Indigeneity and put forth a unitary image of White gay life. The strong version of this critique suggests that the problems with mainstream *Charter*-based rights-claiming cannot be "fixed" by simply including trans people, people of colour, and Indigenous people. Rather, according to this view, *Charter*-based rights-claiming actively damages these communities and even defines them out

55 Andrea Daley et al, "Providing Health and Social Services to Older LGBT Adults" (2017) 37:1 Annual Rev Gerontology & Geriatrics 143.

56 Nick J Mulé, "State Involvement in LGBT+ Health and Social Support Issues in Canada" (2020) 17:19 Intl J Environmental Research & Public Health 7314.

of existence in ways that are irredeemably unjust. Finally, scholarship on stigma and discrimination in everyday life and in different types of social institutions demonstrates, in vivid ways, the extent to which *Charter*-based legal recognition does not solve or address the structural problems of homophobia and heteronormativity that shape everyday life for LGBTQ2 people.

However, it is unlikely that awareness of these critiques will lead LGBTQ2 people away from the deployment of law as a strategy for dealing with inequity, stigma, transphobia, and homophobia. Most activists and individual plaintiffs are well aware that the law does not always provide remedies, let alone long-term political solutions — however these might be envisaged. LGBTQ2 communities are diverse, and cannot direct litigation or select the cases that should be pursued — a lesson that was learned by LGBTQ2 political and legal leaders during the same-sex marriage campaign in Canada and the US. In both countries, LGBTQ2 legal elites did not want to pursue a same-sex marriage case to the high court for fear of a loss, but plaintiffs decided to undertake and pursue marriage recognition cases despite this advice.[57]

Nonetheless, the diverse critiques of law presented in this article alert us to the unintended consequences of the pursuit of equality rights. By drawing on critical concepts such as homonationalism and settler colonialism, LGBTQ2 *Charter* rights can be situated in an interdisciplinary framework that considers the long-term implications of LGBTQ2 legal victories for social justice. Work on LGBTQ2 *Charter* rights must integrate and privilege the diverse voices of the LGBTQ2 communities in Canada in light of a globally situated, but specifically Canadian, historical experience. We must recognize and incorporate this history of Canadian queer legal-engagement into contemporary debates on equality-seeking and liberal rights recognition.

57 Jason Pierceson, *Same-Sex Marriage in the United States: The Road to the Supreme Court* (New York: Rowman & Littlefield, 2013); Miriam Smith, *Political Institutions and Lesbian and Gay Rights in the United States and Canada* (New York: Routledge, 2008).