Part III

Immigration And Refugee Law And The Constitution

Safety Valves in Charter Analysis: A Quick Fix Rather Than a Structural Solution

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I. THE INSTALLATION OF SAFETY VALVES IN *CHARTER* ANALYSIS

A safety valve is a flap, lid or device that acts as a fail-safe. For those unfortunate to have experienced backflow into your home, a safety valve installed in a sewer line plays a critical role in preventing the reverse flow of sewage into your home from the main sewer line or septic tank. The valve permits wastewater to exit while blocking unwanted backflow. It is a reliable and indispensable tool in this context.

The legal world has adopted this term in constitutional analyses. It is in my opinion, an awkward term to deploy. Synonymous in the plumbing world with relief valve, pressure release valve and safety controls, this paper examines whether the safety valves identified in the legal context really do provide relief.

In this paper, I look at the evolving turn to the legal safety valve and assess whether it is an appropriate analytical device in constitutional law. While it has a celebrated, necessary, and essential place in our plumbing systems, I'm not so sure it should be installed in our analysis of the *Canadian Charter of Rights and Freedoms*.[1] The purported solution the safety valve provides in constitutional law, in my opinion, is potentially false. In this paper, I argue that we should go back to the foundations of *Charter* analysis and ask what are permissible ways to cure unconstitutional legislative provisions or schemes? In the plumbing world, the build-up of pressure may lead to leaks elsewhere or loosened joints which may result in catastrophic damage. In some situations, it calls for a safety valve, in others, a wholesale reconstruction of a pipeline with safety valves used as only a temporary fix until a systemic overhaul can occur. In my view, the legal safety valve has served only to conceal, suppress, or gloss over the main problem and provide only temporary solutions. It may, later, cause back-ups and a convergence of pressure that could lead to long-term and devastating consequences since there is little evidence they do provide the necessary escape from the ambit of unconstitutional schemes.

Legal safety valves are the provisions or mechanisms in a legislative framework that courts point to as curing or diminishing any unconstitutional effects of an impugned provision or scheme. They often come in the form of alternative applications, exemptions, or an exercise of discretion. They are patchwork solutions and are not a good substitute to replacing a system that has significant implications

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "*Charter*"].

for people subject to the law; in ideal situations, a more enduring and reliable solution could be crafted. They can be exercises of judicial or legislative power and have been referred to as "discretion, exemptions or escape clauses".[2] They can also insert itself in section 7 or 12 *Charter* analyses.

The safety valve can turn up at the first stage of a section 7 analysis and alter a finding that a right has been engaged in the context of the case.[3] However, in other instances, the safety valve arises in second stage of a section 7 *Charter* analysis, where courts ask whether a deprivation is in accordance with the principles of fundamental justice.[4] In cases invoking safety valves, courts are preoccupied with whether safety valves can address the principles of overbreadth and gross disproportionality. For example, can a safety valve provide a release so that not all cases are caught under the impugned provision, curing the problem of overbreadth or can a safety valve provide opportunities for a different outcome or remedy to be fashioned to address gross disproportionality.

In this paper, I provide an overview how safety valves have been installed in the Supreme Court of Canada's legal analyses. I then have a sober discussion of how this legal mechanism affects access to *Charter* protection at a practical level for vulnerable and marginalized persons, including, for example, in the immigration and refugee law context. I argue that safety valves may be a temporary stopgap measure but that over time, pressure will build, and we may eventually be wading through an eruptive mess.

II. SAFETY VALVES IN THE *CANADIAN COUNCIL FOR REFUGEES* CASE

On June 16, 2023, the Supreme Court of Canada released its much-anticipated decision in *Canadian Council for Refugees v. Canada (Citizenship and Immigration).*[5] The claimants in the case challenged the constitutionality of the scheme that enacted the Canada-U.S. Safe Third Country Agreement (the "STCA"), an agreement that imposes restrictions at the Canada-U.S. land border as to who and how persons can make a refugee claim.[6]

For lawyers practising in immigration and refugee law, this decision meant a continuation of a border scheme that would prevent people from seeking refugee

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[2] *R. v. Hills,* [2023] S.C.J. No. 2, 2023 SCC 2, at para. 123 (S.C.C.).

[3] See for example, *Obazughanmwen v. Canada (Minister of Public Safety and Emergency Preparedness),* [2023] F.C.J. No. 913, 2023 FCA 151, at para. 54 (F.C.A.).

[4] See for example, *Atawnah v. Canada (Public Safety and Emergency Preparedness),* [2016] F.C.J. No. 481, 2016 FCA 144, at para. 23 (F.C.A.).

[5] [2023] S.C.J. No. 17, 2023 SCC 17 (S.C.C.) [hereinafter "*CCR*"].

[6] For more information about the Safe Third Country Agreement and its litigation history see *CCR* (S.C.C.) and Canadian Council for Refugees, "Safe Third Country", online: <https://ccrweb.ca/en/safe-third-country>.

protection, potentially exposing them to refoulement to their home countries where they face persecution or back to the United States where they would face a problematic refugee determination system. Evidence before the Court indicated that those returned to the U.S. were potentially subject to detention, solitary confinement, and other problematic conditions in both detention and the refugee determination system. The Supreme Court held that persons seeking refugee protection and turned away at the Canada-U.S. land border as per the STCA did not violate those persons' *Charter* rights under section 7. The Court did provide a modicum of hope in that it referred the case back for a determination of whether the STCA violated the section 15 *Charter* rights of persons.

The Supreme Court held that while section 7 interests are engaged, it found "the legislation is tailored to prevent certain infringements of s. 7 interests and, importantly for present purposes, survives constitutional scrutiny here because legislative safety valves provide curative relief".[7] The Court acknowledged that while the lower court, the Federal Court stated, "that safeguards in the scheme were 'illusory', her assessment did not consider all the relevant safety valves" and that this "omission was an error of law that led her to improperly discount how the legislative scheme allows Canada to consider refugee status claims when the principles of fundamental justice so require, notwithstanding their presumptive ineligibility".[8] The Court reasoned that "[c]urative provisions create exceptional departures from a general rule" where, "the s. 7 interests persists, but it does not always materialize".[9] The Court stated, the "safety valves can therefore intervene to cure what might otherwise be unconstitutional effects".[10]

The Court held that several safety valves[11] exist within the *Immigration and Refugee Protection Act*[12] including: "administrative deferrals of removal (s. 48(2)), temporary resident permits (s. 24); humanitarian and compassionate (H&C) applications (s. 25(1)) and public policy exemptions (s. 25.2(1))".[13] The Court clarified however that judicial review in the federal courts cannot be considered a safety valve.[14]

Of note, the Court held that, "claimants bear the burden to show that legislative

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[7] *CCR,* at para. 10 (S.C.C.).

[8] *CCR,* at para. 11 (S.C.C.).

[9] *CCR,* at para. 71 (S.C.C.).

[10] *CCR,* at para. 151 (S.C.C.).

[11] An overview of all the safety valves in *CCR* will not be provided here but in my forthcoming research co-authored with other scholars we provide an extensive overview of the safety valves identified in *CCR* and assess whether they do provide relief or are viable alternatives.

[12] *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 [hereinafter the "IRPA"].

[13] *CCR,* at para. 148 (S.C.C.).

[14] *CCR,* at para. 77 (S.C.C.).

safety valves do not remedy individual deprivations. To do so, they may, for example, advance arguments and lead evidence demonstrating that a legislative regime itself causes a statute's curative mechanisms to be practically unavailable."[15] The Court seemed to craft standard to rebut the presumption of safety valves adding curative value by saying that if safety valves are "illusory or otherwise inadequate to respond to potential harms" or if implementing officers act "unreasonably or unconstitutionally in their treatment of some returnees or in their interpretation of the legislative scheme, including its safety valves" the application of the legislative scheme would not be section 7 compliant.[16] Further, the Court added that a standard of perfection is not needed on the part of the government; if a scheme's safety valves prove to be imperfect, they can still render a section 7 violation as minimally impairing.[17] This burden and the commensurate standard is concerning for any person who wants to mount a challenge.

While there is much to discuss in *CCR*, including its section 15 finding, the Court's analysis regarding safety valves vis-à-vis *Charter* analysis raises questions as to what exactly can cure unconstitutional effects. Why is there a presumption that the presented safety valves are adequate? The discussion below will explore the potential impact the safety valves framework has on future *Charter* litigation. The paper will look at how safety valves have been deployed in other cases and explore how this creates an undue burden on claimants seeking *Charter* relief. In thinking about the practical ability to mount *Charter* claims, looking at safety valves is important because it crept into jurisprudence, complicating *Charter* litigation, and creating immense distance between claimants and *Charter* remedies.

III. *PHS* AND SAFETY VALVES

The Supreme Court in *CCR* relied primarily on the 2011 case of *PHS* in justifying its finding that there was no violation of section 7 due to the presence of safety valves.[18] *PHS,* concerned a discretionary decision made by the Minister of Health to deny Insite, a safe injection site, to be exempted from the prohibitions of possession and trafficking of controlled substances under the *Controlled Drugs and Substances Act* (the "CDSA") for medical and scientific purposes.[19] Insite had received conditional and temporary exemptions in the past.[20] The applicants in the case claimed that the application of the CDSA violated the claimants' section 7

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[15] *CCR,* at para. 170 (S.C.C.).

[16] *CCR,* at para. 170 (S.C.C.).

[17] *CCR,* at para. 171 (S.C.C.).

[18] *Canada (Attorney General) v. PHS Community Services Society,* [2011] S.C.J. No.44, 2011 SCC 44 (S.C.C.) [hereinafter "*PHS*"].

[19] *PHS,* at paras. 1-3 (S.C.C.).

[20] *PHS*, at para. 16 (S.C.C.).

Charter rights.[21]

The Supreme Court held that the relevant provisions of the CDSA directly engaged section 7 rights of the clients of Insite and the liberty interests of the health professionals providing the services.[22] The Court accepted evidence that the safe-injection site provided lifesaving and health-protecting services and that prohibiting Insite to offer these services constituted a limitation on section 7 rights because criminal charges would apply.[23] The Court reasoned that the Minister's discretion is not absolute and must conform to the *Charter*.[24]

A significant feature of this decision was the Court's use of the language, "safety valve". The Court states:

> Section 56 gives the Minister of Health a broad discretion to grant exemptions from the application of the Act "if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purposes or is otherwise in the public interest".
>
> The availability of exemptions acts as a safety valve that prevents the *CDSA* from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects.[25]

The Court, in *PHS*, thus points to a legislative provision and indicates a permissive exercise of Ministerial discretion to avoid a *Charter* violation. The exercise of power that was the subject of this case was this very discretion and how the Minister chose not to apply it. It is the absence of a discretionary grant of exemption in this case that leads to a *Charter* infringement. The Court was faced with examining whether that decision — the discretionary exemption — was done in the factual context. It was not the existence of the safety valve itself that was determinative but whether the Minister exercised discretion to avoid an unconstitutional outcome. It is worth emphasizing this because in *CCR,* a menu of safety valves was identified without a nuanced and deep discussion of when and how those items should be triggered to cure unconstitutionality. Their mere existence was enough to serve as a fix and they merely pointed to *PHS* as permitting this kind of finding.

On a more practical level, Alana Klein notes the limits of safety valves in *PHS* and finds that many criminal offences do not benefit from the exemption in *PHS*, courts remain deferential to exercises of discretion, and that since some harms associated with criminalization come from the mere threat of criminal sanction (sex work, sexual exposure of HIV, etc.) these circumstances do not lend themselves to the process offered by the safety valve.[26] Her assessment raises questions about how

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[21] *PHS*, at para. 3 (S.C.C.).

[22] *PHS*, at paras. 85-96 (S.C.C.).

[23] *PHS*, at paras. 85-96 (S.C.C.).

[24] *PHS*, at paras. 112-114 (S.C.C.).

[25] *PHS*, at paras. 112-113 (S.C.C.).

[26] Alana Klein, "Section 7 of the Charter and the Principled Assignment of Legislative

courts should be assessing safety valves and the extent to which they do cure unconstitutionality.

IV. LESSONS FROM THE MANDATORY MINIMUM CASES

Since *PHS,* the Supreme Court has turned to safety valves in other cases, notably those dealing with mandatory minimum sentence ("MMS") provisions, to address potential violations of a person's section 12 *Charter* rights. MMS created "largely unreviewable prosecutorial discretion and can exacerbate the power imbalances in the plea-bargaining process".[27] Venus Sayed notes that a line of cases dealing with mandatory minimum sentences are the "first explicit iteration of *statutory* exemptions, or safety valves, as a possible recommendation to Parliament as a way of dealing with the problems posed by [the provisions]".[28] As Sayed opines, constitutional exemptions via remedies through section 24(1) of the *Charter* were confronted with Parliamentary intention even though the legislative result was unconstitutional while also raising questions about whether or not this flexible judicial action undermined the rule of law since it left potentially unconstitutional law on the books and left the law uncertain and unpredictable.[29]

In the 2015 case *Nur,*[30] the Supreme Court found that the MMS for possessing loaded prohibited firearms resulted in grossly disproportionate sentences in reasonable hypothetical cases, violating section 12 of the *Charter*. Chief Justice McLachlin, writing for the majority, stated:

> . . . [t]he divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice . . . It deprives citizens of the right to know what the law is in advance and to govern their conduct accordingly, and it encourages the uneven and unequal application of the law . . . bad law, fixed up on a case-by-case basis by prosecutors, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada[31]

In the 2016 case of *Lloyd* the Court again was dealing with MMS and was concerned with the wide reach it had — it could capture a broad range of conduct

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Jurisdiction" (2012) 57 S.C.L.R. (2d) 59, at 64.

[27] Venus Sayed, "Safety Valves: A Band-Aid Solution to the Ills of Mandatory Minimums?" (2022) LLM Theses 57, at 25, see online: <https://digitalcommons.osgoode.yorku.ca/llm/57>.

[28] Venus Sayed, "Safety Valves: A Band-Aid Solution to the Ills of Mandatory Minimums?" (2022) LLM Theses 57, at 41, see online: <https://digitalcommons.osgoode.yorku.ca/llm/57>.

[29] Venus Sayed, "Safety Valves: A Band-Aid Solution to the Ills of Mandatory Minimums?" (2022) LLM Theses 57, at 41-43, see online: <https://digitalcommons.osgoode.yorku.ca/llm/57>.

[30] *R. v. Nur,* [2015] S.C.J. No. 15, 2015 SCC 15 (S.C.C.).

[31] *R. v. Nur,* [2015] S.C.J. No. 15, 2015 SCC 15, at paras. 72-73 (S.C.C.).

thus making it overbroad and unconstitutional.[32] The Court noted that while the one-year sentence of imprisonment would not be grossly disproportionate as applied to the claimant before the Court, it could in other reasonably foreseeable cases.[33] In *Lloyd,* the Court speculated that Parliament could legislate safety valves to avoid the application of mandatory minimum sentences — mechanisms akin to that found in *PHS* which would serve to avoid *Charter* violations.[34] In this case, McLachlin C.J.C. explicitly invites Parliament to create a safety valve to solve the unconstitutionality of the mandatory minimum sentence.[35]

In 2018, in *Boudreault,* the Court found a mandatory victim fine surcharge violated section 12 of the *Charter* and the Court held that Parliament should implement a legislative remedy.[36] In 2019, in *Morrison,* Karakatsanis J., in a concurring decision held that defects that made sentences grossly disproportionate and inconsistent with section 12 of the *Charter* could be avoided by "building a safety valve – residual discretion – into mandatory minimums".[37] In 2022, in *Sharma,* the Court again referred to safety valves as a way to "avoid unconstitutional sentences"[38] and in 2023, in *Bertrand Marchand,* the Court cited *Lloyd*: a "safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment".[39]

The Supreme Court, in the context of MMS, encouraged the development of legislative safety valves and a discourse where presence of one can cure the unconstitutional effects of a provision. Sayed writes that there are benefits to this approach in this context including the obvious reason of avoiding unconstitutional sentences, allowing MMS to be issued for abhorrent crimes, permitting legislatures to define parameters in discretionary safety valves, and utilizing safety valves to bring a modicum of individuality to sentencing decisions, among others.[40] Sayed however points out there are risks to this model. The first is shifting discretion from prosecutors to judges. More importantly, and relevant to our discussion, Sayed notes that courts left it in Parliament's hands to craft the safety valve, and that its form, reach, and efficacy are unknown, questionable even. Parliament's response may be

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[32] *R. v. Lloyd,* [2016] S.C.J. No. 13, 2016 SCC 13 (S.C.C.).

[33] *R. v. Lloyd,* [2016] S.C.J. No. 13, 2016 SCC 13 (S.C.C.).

[34] *R. v. Lloyd,* [2016] S.C.J. No. 13, 2016 SCC 13, at para. 36 (S.C.C.).

[35] *R. v. Lloyd,* [2016] S.C.J. No. 13, 2016 SCC 13, at para. 36 (S.C.C.).

[36] *R. v. Boudreault,* [2018] S.C.J. No. 58, 2018 SCC 58 (S.C.C.).

[37] *R. v. Morrison,* [2019] S.C.J. No. 15, 2019 SCC 15, at para. 194 (S.C.C.).

[38] *R. v. Sharma,* [2022] S.C.J. No. 39, 2022 SCC 39, at para. 244 (S.C.C.).

[39] *R. v. Bertrand Marchand,* [2023] S.C.J. No. 26, 2023 SCC 26, at para. 108 (S.C.C.).

[40] Venus Sayed, "Safety Valves: A Band-Aid Solution to the Ills of Mandatory Minimums?" (2022) LLM Theses 57, at 45-46, see online: <https://digitalcommons.osgoode.yorku.ca/llm/57>.

narrow, limited, and ineffective.[41]

While this line of cases shows a preoccupation between balancing two branches of government and the proper form of dialogue between courts and the legislature, the cases also highlight another tension relevant for future *Charter* litigation, namely, how much faith we have in discretionary safety valves?

This collection of MMS cases forces us to ask questions as to the proper way to cure the unconstitutionality of the provisions. Who should exercise discretion that could provide relief, and what of the conditions under which that discretion is exercise? The different approaches to answering these questions is apparent in *Nur* between McLachlin C.J.C.'s opinion for the majority and Moldaver J.'s dissent. Justice Moldaver's dissent prefers the flexibility of judicial discretion. He first notes that by creating a safety valve, "Parliament has effectively *conceded* the existence of reasonably foreseeable cases in which a mandatory minimum would be grossly disproportionate" and that using hypotheticals is redundant given this concession. Justice Moldaver's dissent however highlights an important step: the need to examine the safety valve and its implementation and a nudge to use section 24(1) to craft a remedy if necessary. He pointed to a two-stage analysis undertaken by the Chief Justice where it is first asked whether the provision was unconstitutional. Then, secondly, an inquiry is undertaken to determine whether the safety valve was implemented — discretion exercised — in a manner that violated the claimant's section 7 rights. If it was, then a remedy under section 24(1) is called for.[42] Justice Modaver's approach seems to remind us of the heart of the issue which is what exactly is curing the *Charter* violation and how and to move away from speculation or hypothetical scenarios to assure claimants and those affected that their rights are protected.

For her part, McLachlin C.J.C. did point out that prosecutors enjoy immunity from meaningful review and explained that the constitutionality of a provision cannot rest on an expectation that a prosecutor will always exercise discretion in a proper way.[43] She reasoned that prosecutors have a "trump card in plea negotiations" and that this is an "unfair power imbalance with the accused" incentivizing accused persons to plead to a lesser sentence to avoid a MMS.[44] This perspective is instructive as we think about the various ways in which discretion is exercised in the safety valves identified in *CCR* and in immigration law cases in particular.

Sayed points to data from the mandatory minimum sentencing cases and notes there is variance in Canada with different treatment across different provinces,

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[41] Venus Sayed, "Safety Valves: A Band-Aid Solution to the Ills of Mandatory Minimums?" (2022) LLM Theses 57, at 40-41, see online: <https://digitalcommons.osgoode.yorku.ca/llm/57>.

[42] *R. v. Nur,* [2015] S.C.J. No. 15, 2015 SCC 15, at paras. 149-152 (S.C.C.).

[43] *R. v. Nur,* [2015] S.C.J. No. 15, 2015 SCC 15, at paras. 94-95 (S.C.C.).

[44] *R. v. Nur,* [2015] S.C.J. No. 15, 2015 SCC 15, at paras. 94-95 (S.C.C.).

different trial levels.[45] Sayed notes that "[constitutional] challenges are rare, and the practical impacts of MMSs are felt long before a case reaches this stage of a challenge. When cases do reach the sentencing stage, most offenders do not have the legal resources to mount such a challenge".[46] Sayed however maintains a hopeful note that safety valves may help mitigate this. Sayed notes, "The crafting of a safety valve is, of course, only limited by a lawmaker's imagination."[47] Ultimately while Sayed finds that safety valves can be beneficial to Canada's criminal justice system, this analysis was conducted for a specific context. A wider analysis is needed to consider the implications writ large in our legal system and to the *Charter* regime.

In my view, some of the potential problems that safety valves pose to our legal system include how do we know there will not be the same variance in its application across geographical locations, administrative decision makers and courts? Why is the law on the books — the impugned provisions — not varied to meet the basic standard of constitutionality? Why isn't Parliament asked to go back to the drawing board and come up with options that are constitutional rather than adding a bandaged solution that may or may not stick? In my opinion, the risks are too high to leave it to discretionary access to a safety valve as will be explored below in the immigration law context.

V. APPLICATION OF THE SAFETY VALVES DISCOURSE IN IMMIGRATION LAW CASES

Using safety valves to shield legislation from *Charter* scrutiny is not new in immigration law. The act of pointing elsewhere in legislation as options for relief rather than *Charter* relief itself is a longstanding practice.[48] As a preliminary matter,

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[45] Venus Sayed, "Safety Valves: A Band-Aid Solution to the Ills of Mandatory Minimums?" (2022) LLM Theses 57, at 43, see online: <https://digitalcommons.osgoode.yorku.ca/llm/57>.

[46] Venus Sayed, "Safety Valves: A Band-Aid Solution to the Ills of Mandatory Minimums?" (2022) LLM Theses 57, at 43-44, see online: <https://digitalcommons.osgoode.yorku.ca/llm/57>.

[47] Venus Sayed, "Safety Valves: A Band-Aid Solution to the Ills of Mandatory Minimums?" (2022) LLM Theses 57, at 45, see online: <https://digitalcommons.osgoode.yorku.ca/llm/57>.

[48] For *e.g.*: *Bhatia v. Canada (Minister of Citizenship and Immigration),* [2017] F.C.J. No. 1020, 2017 FC 1000 (F.C.); *Kaur v. Canada (Minister of Citizenship and Immigration),* [2017] F.C.J. No. 800, 2017 FC 757 (F.C.); and *Braud v. Canada (Minister of Citizenship and Immigration),* [2020] F.C.J. No. 97, 2020 FC 132 (F.C.), in all cases, where Gascon J. pointed to s. 25(1) H&C applications of the *IRPA* as an alternative for failed refugee claims. In *Beros v. Canada (Minister of Citizenship and Immigration),* [2019] F.C.J. No. 294, 2019 FC 325 (F.C.), judicial stays of removal were characterized as safety valves. In *Paramananthalingam v. Canada (Minister of Citizenship and Immigration),* [2017] F.C.J. No. 419, 2017 FC 236 (F.C.), s. 97 of *IRPA* was considered a safety valve. *Ji v. Canada (Minister of Citizenship and Immigration),* [2019] F.C.J. No. 1095, 2019 FC 1219 (F.C.) is one of many cases finding that

many cases in immigration law raise questions about whether *Charter* rights are engaged at a certain junction of a person's immigration process. For example, in *Obazughanmwen,* the Federal Court of Appeal, in a case involving inadmissibility, stated, "there is a large body of jurisprudence to the effect that it is premature to consider potential Charter violations at the admissibility stage because the person, even if found inadmissible, may not be removed".[49] Indeed as the Federal Court of Appeal has stated, "the availability of the numerous safety valves provided by the Act provide a genuine opportunity for an individual's circumstances to be considered".[50] Further, the Federal Court of Appeal expressed, "The mere fact that [a safety valve] allows for some discretion is not a bar to its acting as a safety valve to ensure that unconstitutional results will be avoided."[51]

Other than *CCR,* two notable cases from the Supreme Court refer to safety valves in the immigration law context. In *Kanthasamy,* the Court was reviewing a particular discretionary decision on an H&C application under section 25(1) of the *IRPA*.[52] While the Court was not assessing the constitutionality of a provision or scheme that could turn to the H&C application as a safety valve, the Court made comments about the characteristics of the H&C application. It is notable because the Court emphasizes it is a safety valve and the role the H&C application plays in keeping the *IRPA* constitutional permits the Court to provide instructions on how discretion in this application should be exercised. It is thus extraordinary that courts are mindful of the fact that improper exercise of discretion could upset the delicate balance of keeping a scheme constitutional. Despite this awareness, the Court described this application as "a safety valve for exceptional cases".[53] Still, the Court held that since "s. 25(1) is intended to act as a safety valve by providing flexibility to the normal

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H&C considerations are considered safety valves in the Immigration Appeal Division. In *Choudhary v. Canada (Minister of Citizenship and Immigration),* [2008] F.C.J. No. 583, 2008 FC 412 (F.C.), a pre-removal risk assessment is considered a safety valve.

[49] *Obazughanmwen v. Canada (Minister of Public Safety and Emergency Preparedness),* [2023] F.C.J. No. 913, 2023 FCA 151, at para. 54 (F.C.A.) citing *B010 v. Canada (Citizenship and Immigration),* [2015] S.C.J. No. 58, 2015 SCC 58, at para. 75 (S.C.C.); *Febles v. Canada (Citizenship and Immigration),* [2014] S.C.J. No. 68, 2014 SCC 68, at para. 67 (S.C.C.); *Moretto v. Canada (Citizenship and Immigration),* [2019] F.C.J. No. 1194, 2019 FCA 261, at para. 48 (F.C.A.); *Revell v. Canada* (*Citizenship and Immigration),* [2019] F.C.J. No. 1195, 2019 FCA 262, at para. 38 (F.C.A.).

[50] *Revell v. Canada* (*Citizenship and Immigration),* [2019] F.C.J. No. 1195, 2019 FCA 262, at para. 115 (F.C.A.).

[51] *Revell v. Canada* (*Citizenship and Immigration),* [2019] F.C.J. No. 1195, 2019 FCA 262, at para. 117 (F.C.A.).

[52] *Kanthasamy v. Canada (Citizenship and Immigration),* [2015] S.C.J. No. 61, 2015 SCC 61 (S.C.C.).

[53] *Kanthasamy v. Canada (Citizenship and Immigration),* [2015] S.C.J. No. 61, 2015 SCC 61, at para. 90 (S.C.C.).

operation of the *IRPA*" its "test should reflect the broad range of factors that may be relevant".[54] The Court explained:

> Section 25(1) is a safety valve that supplements the two normal streams by which foreign nationals can come to Canada permanently: the immigration classes and the refugee process. It empowers the Minister of Citizenship and Immigration (the "Minister") to grant applicants relief from the requirements of the *IRPA* when such relief is justified by H&C considerations. Properly construed, it provides a flexible means of relief for applicants whose cases are exceptional and compelling. For reasons that will become apparent, I am of the view that in deciding whether to grant relief under s. 25(1), decision makers must determine whether, having regard to all of the circumstances, including the exceptional nature of H&C relief, decent, fair-minded Canadians would find it simply unacceptable to deny the relief sought.[55]

It is important to remember that this context was given in the case of *Kanthasamy* as instructing the Minister's delegates of how to approach discretionary decisions under section 25(1) of the *IRPA* to ensure it is an effective safety valve. The Court's opinion here however gives us much to think about in terms of what constitutes a safety valve and what qualities make an option sufficient to cure unconstitutional provisions.

First, the Court in *Kanthasamy*, after looking at the legislative history of section 25(1), emphasizes that the H&C application is "exceptional" and meant to be "a plea to the executive branch for special consideration".[56] This quality of an exemption and one that must be pled should raise questions about how accessible this avenue is for those confronting a *Charter* violation. If it is an exception, how effective of a remedy can it be if a scheme is held to be overbroad or grossly disproportionate? Is it inclusive enough to remedy overbreadth? Is it granted in troubling cases where gross disproportionality is present?

Second, the H&C application is discretionary in nature. While the Court (as it did in *Kanthasamy*) and legislature alike have provided criteria and contours to how that discretion should be exercised, it nevertheless remains that the decision is at the whim of the Minister or their delegate. What kinds of discretionary mechanisms should be allowed to stand in place of other potential cures for *Charter* infringing schemes?

In the 2023 case of *Mason,* the applicants were foreign nationals charged with criminal offences and as a result were found inadmissible to Canada on "security

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[54] *Kanthasamy v. Canada (Citizenship and Immigration),* [2015] S.C.J. No. 61, 2015 SCC 61, at para. 100 (S.C.C.).

[55] *Kanthasamy v. Canada (Citizenship and Immigration),* [2015] S.C.J. No. 61, 2015 SCC 61, at para. 63 (S.C.C.).

[56] *Kanthasamy v. Canada (Citizenship and Immigration),* [2015] S.C.J. No. 61, 2015 SCC 61, at para. 93 (S.C.C.).

grounds" under section 34(1)(e) of the *IRPA*.[57] At issue was whether the criminal acts needed a nexus to national security and the Supreme Court held a nexus was required under section 34(1)(e). While this case did not ask the Court to assess the constitutionality of a scheme, it did comment, "while there are several 'safety valves' under the *IRPA* that provide discretionary exemptions . . . none of these discretionary exemptions detract from the concern that the IAD's interpretation of s. 34(1)(e) would, as a general rule, allow for a removal order without protection from *refoulement,* contrary to Article 33(1) of the *Refugee Convention*".[58]

This comment is instructive to the remaining discussion below; that safety valves should not detract from the main task of reviewing whether law is unconstitutional and from finding a comprehensive way to protect persons from harms flowing from *Charter* violations. The Court showed a capacity and willingness to review the proposed safety valves and reject them as suitable to cure the ills identified.[59] As Moldaver J. recommended in *Nur*, the existence of a safety valve is indication enough that there is a *Charter* violation. In some ways he intimates that safety valves existence is not curative on its own but asks whether it has been deployed to enact the cure. The task now, as he inferred, should be finding the appropriate remedy.

VI. THE USE OF SOCIAL SCIENCE RESEARCH AND ACCESS TO JUSTICE ISSUES

1. *Bedford* and *PHS* and the Ascent of Social Science Research

In the aftermath of *Bedford* and *PHS,* there was celebration for some communities and a sense of validation that social science research could play an important role in harnessing rights-based remedies in the courts. The social science research in both cases gave important context to the court and was essential to educating the court on how the law is experienced by those most affected. Indeed, there is now attention given to how to mount cases with these models in mind.[60] This is important as we consider how to rebut the presumption that safety valves can cure all kinds of *Charter* violations.

In the spring before the *CCR* decision from the Supreme Court was released, I sat on an administrative law panel to talk about the STCA litigation with Barb Jackman,

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[57] *Mason v. Canada (Citizenship and Immigration),* [2023] S.C.J. No. 21, 2023 SCC 21 (S.C.C.).

[58] *Mason v. Canada (Citizenship and Immigration),* [2023] S.C.J. No. 21, 2023 SCC 21, at para. 110 (S.C.C.).

[59] *Mason* was implemented in *Canada (Minister of Public Safety and Emergency Preparedness) v. Canadian Assn. of Refugee Lawyers,* [2024] F.C.J. No. 677, 2024 FCA 69, at paras. 49-51 (F.C.A.).

[60] Benjamin Perryman, "Adducing Social Science Evidence in Constitutional Cases" (2018-2019) 44 Queens L.J. 121.

an immigration lawyer and frequent flyer at the Supreme Court. She could not talk much that day because she had lost her voice temporarily but when she did speak, she said something that haunted me. She commented that the trend for litigants to have to submit social science research is troubling. She noted that, like the inclusion of medical reports (physical and mental) as evidence in all kinds of legal processes, the evidence is helpful and important, but she worried about the work necessary to garner such evidence and what this meant to the overall approach to *Charter* litigation.

Rebecca Sutton seems to concur and writes that the evidence in *PHS* had a "significant impact on the legal arguments" and that the case has "deeper and potentially problematic implications for constitutional litigation in Canada". For Sutton, the "persuasive narrative based on compelling facts and social scientific evidence may overpower legal questions of a constitutional nature". Sutton acknowledges that the remedy was "meaningful and robust" where "lives are clearly imperiled" but that the decision-making process of reviewing the evidence may have "eclipsed" the *Charter* analysis. Sutton argues, "we only have to imagine what might have happened in *Insite* if the federal government had been able to gather stronger social science evidence pointing to the need for Insite's closure".

Sonia Lawrence in reflecting on the *Bedford* decision noted that the trial judge "faced 25,000 pages of evidence in 88 volumes".[61] She wrote, "Both inside and outside the legal arena, a variety of academic and non-academic expertise was displayed and mobilized, including a sizable body of experiential expertise from current and former sex trade workers on both sides of the debate" and that "the voice of experience is critical".[62] She also however asked, *"what* was won?".[63] Lawrence opines that following *Bedford* and Bill C-36:

> We have a new law and no data on how this law works in any Canadian context. We need solid scholarship — on this, at least, supporters and opponents of the law can agree. But we should reflect on this experience, from the genesis of the court challenge(s) to the passage of the new *Act,* because Bedford offers a handy reminder of laws' embeddedness in context. . .When we as scholars are in the space where advocacy and expertise meet, regardless of what side we are on, we still need to think hard about how we make our arguments and how we want to win.[64]

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[61] Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in *Bedford* and Bill C-36" (2015) 30:1 Cdn. J. of L. & Soc. 5, at 5.

[62] Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in *Bedford* and Bill C-36" (2015) 30:1 Cdn. J. of L. & Soc. 5, at 5.

[63] Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in *Bedford* and Bill C-36" (2015) 30:1 Cdn. J. of L. & Soc. 5, at 6.

[64] Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in *Bedford* and Bill C-36" (2015) 30:1 Cdn. J. of L. & Soc. 5, at 7.

2. A Case Study in Immigration Law: Regulation 117(9)(d)

Refugee and immigration lawyers are aware of this burden. While there are several examples to draw from, there is one example that is illustrative on how social science research can lead to a change — a pilot project to respond to the harsh application of section 117(9)(d) of the *Immigration and Refugee Protection Regulations ("Regulations").*[65] The policy rationale for this regulation was to combat fraud — to ensure people were not claiming people who were not "family" to be sponsored as a family member under the *IRPA*.[66]

One of the earliest turns to safety valve type analysis in the immigration law context is in the 2005 case of *de Guzman* at the Federal Court of Appeal.[67] The applicant in this case claimed a section 7 *Charter* violation, specifically her right to liberty and security of the person caused by state-imposed, permanent family separation.[68] At the time the case was heard, the Court acknowledged she had been separated from her family for 12 years.[69] The applicant claimed that section 117(9)(d) of the *Regulations,* imposed a lifetime ban from sponsoring family members, if they were not disclosed and examined at the time of the applicant's immigration to Canada, and is contrary to Canada's international obligations as identified through the objectives of the *IRPA*. She claimed it was contrary to the best interests of her children under the *Convention on the Rights of the Child* and the right to family under the *International Covenant on Civil and Political Rights*.[70]

The Federal Court of Appeal in *de Guzman* did not use the term safety valve but identified section 25(1) of the *IRPA* (H&C applications) and section 24(1) of the *IRPA* (temporary permits), both discretionary exercises of Ministerial power, as "other possible bases" for the applicant.[71] These two legislative mechanisms were

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[65] Government of Canada, "Program delivery update: Pilot program to exempt permanent residence applicants in the family class or the spouse or common-law partner in Canada (SCLPC) class from paragraph R117(9)(d) or 125(1)(d) exclusion" (October 30, 2023), see online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes/family-class-spouse/pilot-exempt-r117-r125.html>.

[66] "Regulatory Impact Analysis Statement" (2004) C. Gaz. II, Vol. 138, No. 16, at 11.

[67] *De Guzman v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 2119, 2005 FCA 436 (F.C.A.).

[68] *De Guzman v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 2119, 2005 FCA 436, at paras. 45-52 (F.C.A.).

[69] *De Guzman v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 2119, 2005 FCA 436, at para. 48 (F.C.A.).

[70] *De Guzman v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 2119, 2005 FCA 436, at paras. 93-108 (F.C.A.).

[71] *De Guzman v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 2119, 2005 FCA 436, at para. 49 (F.C.A.).

seen as dampening any possible *Charter* infringement the regulation may subject persons to.

Following this decision, immigration lawyers were cognizant of the fact that these "other possible bases" could be deployed to prevent a court from addressing the merits of whether a particular provision or scheme was unconstitutional. One way to counter this was to provide evidence and therefore research on the accessibility and efficacy of the legislative alternatives.

I, along with two lawyers, Prasanna Balasundaram, and Jennifer Stone, conducted a lawyer and case law survey and published our findings in an academic journal in 2017.[72] We were preoccupied with the question of whether the main safety valve identified in *de Guzman* really did provide relief for persons caught by section 117(9)(d) of the Regulations as the court claimed. Our research confirmed what we knew as practising lawyers — that section 25(1) of the *Regulations*, the H&C application, was not a viable safety valve. Our research identified three troubling trends: (a) it took several years to obtain an H&C decision (up to 14 years in some cases); (b) less than half of the applications that explained non-fraudulent reasons led to family reunification; (c) considering the main policy reason was to prevent fraud, factors such as the involvement of children and the innocent or non-fraudulent reasons for why family were not disclosed did not guarantee a discretionary grant.[73] In other words, the safety valve did not provide relief in deserving, heartbreaking situations where one expected.

The study was used to advocate the government to address this misconception that there were viable alternatives for those caught by section 117(9)(d). To deal with the overbreadth and grossly disproportionate effect of this regulation, the government created a pilot program to allow people impacted by section 117(9)(d) to apply for an exemption.[74] This pilot program has been renewed several times. It is important to note that this program remains a pilot and this response is not a permanent fixture but one that is responsive to the risk of a *Charter* violation.

In some ways, the government just created another point of release — another safety valve so to speak. For many of us, this is an unsatisfactory response because

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[72] Jamie Liew, Prasanna Balasundaram & Jennifer Stone, "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers" (2017) 26 J. of L. & Soc. Pol'y 112.

[73] Jamie Liew, Prasanna Balasundaram & Jennifer Stone, "Troubling Trends in Canada's Immigration System Via the Excluded Family Member Regulation: A Survey of Jurisprudence and Lawyers" (2017) 26 J. of L. & Soc. Pol'y 112.

[74] Government of Canada, "Program delivery update: Pilot program to exempt permanent residence applicants in the family class or the spouse or common-law partner in Canada (SCLPC) class from paragraph R117(9)(d) or 125(1)(d) exclusion" (October 30, 2023), see online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/non-economic-classes/family-class-spouse/pilot-exempt-r117-r125.html>.

it still does not deal with the core problem of having this harsh regulation in place and it is unclear to what extent this is providing a viable solution. Why must we have this regulation in this form and are there better alternatives? Shouldn't the courts demand more of the government where *Charter* rights are concerned?

3. Social Science Research: A Barrier to Access to Justice

It may seem strange, as a legal academic, to be wary of the undertaking of research, but like Jackman, Sutton, and Lawrence, it is not the social science research I am wary of but what impact this might have on *Charter* analysis. It is important that courts are receptive to social science expertise to help demystify how law operates. Still, the question I ask is how many litigants have been told by lawyers that they don't have a chance or are being denied a true examination of the merits of their case because of this barrier in our analytical process in *Charter* litigation. What kinds of questions, modes of consideration and assessment are overlooked because of this requirement to provide social science evidence that safety valves are not operating as they are envisioned by the court or legislature?

More than that, as one of the principal researchers on the section 117(9)(d) study, I can attest to the immense time, resources and work that must be undertaken to mount evidence to rebut the presumption that a safety valve is working. In this study, three lawyers and several students were engaged in the research. The journal article had to undergo peer review and several revisions before publication. This is not a task any litigant can just take on within the time constraints litigation demands. The work necessary to producing evidence in the form of social science research raises bigger questions about the accessibility of *Charter* remedies when such evidence is needed to reach them. As in the section 117(9)(d) example, we, the co-authors of the initial study, are not sure whether the pilot project is providing necessary and effective relief. More research needs to be conducted to assess this new safety valve. This example is a reality check or warning on how much distance is being created between those directly impacted by law and the process to obtain *Charter* protection. How are the safety valves analysis thinning paths to *Charter* protection? The next section invites us to challenge the courts on how they are arriving at their findings of the existence of safety valves and how they cure the unconstitutionality of the impugned provisions.

VII. BACKING UP AND ASKING: WHAT IS A SAFETY VALVE, AND SHOULDN'T WE JUST FIX THE PROBLEM?

The use of the term "safety valve" in *PHS*, its precedential power and expanded deployment in *CCR* should cause us to pause with concern. While there is an important dance between the courts and legislatures, perhaps rather than engage in a dialogue through immense expert research, we should revaluate this approach and look again at what the test for identifying a *Charter* violation demands; whether there should be greater accountability for the party that has greater power vis-à-vis vulnerable people making *Charter* claims. As Alison Latimer writes, "A functional constitutional conversation would build on the insights of both speakers and thereby

lean towards rights recognition and access to justice."[75] Like Latimer, I question the increased restraint or deference the Court has shown in the face of evidence showing law as *Charter* violating. This constraint is becoming an ensconced fixture in our constitutional plumbing through the safety valve. I share concerns with Latimer that despite the overwhelming costs of litigation, "courts often refuse to adjudicate upon constitutional arguments that are fully developed because of a misplaced adherence to the principle of restraint".[76]

How much judicial restraint to exercise is an enduring question. Indeed, Peter Hogg stated, "The general idea is that a proper deference to other branches of government makes it wise for the courts, as far as possible, to frame their decisions in ways that do not intrude gratuitously on the powers of other branches."[77] However, when thinking about judicial restraint and respect for the legislature, one must be reminded of the purpose of the *Charter* in giving courts the tools to keep legislatures accountable especially where law and its operation affects individuals so profoundly. Peter Hogg and Cara Zwibel in discussing the definition of the rule of law include the subjection of government to law. In other words, law must be constitutional.[78] This is grounded in section 52(1) of the *Constitution Act, 1982*. The problem in many of the cases discussed above is that the affected persons may not know if the legislation they are subjected to is constitutional. We can, as their lawyers, only say, it depends. The existence of laws that are on its face unconstitutional but may be rendered constitutional depending on the exercise of discretion — a power found somewhere else in the legislative framework — seems fundamentally unsound.

On a more global level, will these judicial approaches encourage Parliament to pre-emptively avoid constitutional challenges by building safety valves as buffers. Avoiding *Charter* scrutiny through legislating safety valves is a low-risk endeavour especially when, so far, the courts are not engaged in scrutinizing themselves the mechanics and efficacy of the safety valves.

In my view, the rationale that having legislated safety valves would create more certainty or predictability in law is speculative. This belief is premised on the notion that the legislature has crafted a sound mechanism to cure the unconstitutional nature of the impugned scheme. It assumes that the safety valves function as they should and privileges Parliament in enjoying a default position putting the work and onus on claimants to rebut that presumption.

Alison Latimer and Benjamin Berger in their appropriately titled piece, "A

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[75] Alison Latimer, "Constitutional Conversations" (2019) 88 S.C.L.R. (2d) 231, at 231.

[76] Alison Latimer, "Constitutional Conversations" (2019) 88 S.C.L.R. (2d) 231, at 247.

[77] Peter W. Hogg, *Constitutional Law of Canada* (5th ed., supplemented) (Looseleaf) (Toronto: Thomson Carswell, 2007) §59.5, at 59-22.

[78] Peter Hogg & Cara F. Zwibel, "The rule of law in the Supreme Court of Canada" (2005) University of Toronto Law Journal, at 718.

Plumber with Words" didn't directly speak to the development of the term safety valves but did address the judicial trend to defer to legislatures.[79] They reflect on *Charter* remedies and its access and note that courts are sometimes reluctant to grant remedies and often defer or send back matters to Parliament to remedy. They write:

> Where a litigant can demonstrate systemic Charter wrongs at the hands of the state, it suggests that more legislative reflection and action is needed. The matter needs to be remitted to the legislature — the more transparent and deliberative branch of government — and the remedial route to do so is section 52 of the *Constitution Act*.[80]

They characterize this practice as the "*Little Sisters* problem" and states that this judicial approach:

> . . . insulates statutory schemes from direct constitutional challenge by attributing rights-limiting effects to the "maladministration" of the statute rather than laying those constitutional harms at the feet of statute itself. Having been so characterized, the constitutional harms are treated as the product of state action rather than the consequence of law, taking the section 52(1) remedy sought by an applicant off the table. Rather than engaging in constitutional review of legislation, courts employing this tool shift to a recommendatory posture regarding executive action implementing legislation.[81]

Courts have asked Parliament in various cases to craft safety valves, or mine legislation for them but there has been no deep thought as to what can and should constitute a safety valve. A review of case law gives us hints but for something to be considered a cure, it is concerning that courts have not given more care to outlining how one identifies or crafts a safety valve. They are turned to in an ad hoc manner.

Given the increased frequency in which courts will be engaging in exercises of identifying or tasking Parliament to craft safety valves, much more attention should be paid in discussing what qualities of a legislative scheme or provision give rise to an understanding it may cure a *Charter* breach. For example, relying on discretionary remedies through immigration applications is a very unsatisfying solution for those facing *Charter* infringements. In my opinion, courts should not blindly believe discretion may and will be exercised in the cases that matter most, as we found in our research on section 117(9)(d) of the *Regulations*. Courts should show more

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[79] Alison M. Latimer & Benjamin L. Berger, "A Plumber with Words: Seeking Constitutional Responsibility and an End to the Little Sisters Problem" (2022) 104 S.C.L.R. (2d) 104.

[80] Alison M. Latimer & Benjamin L. Berger, "A Plumber with Words: Seeking Constitutional Responsibility and an End to the Little Sisters Problem" (2022) 104 S.C.L.R. (2d) 104, at 150.

[81] Alison M. Latimer & Benjamin L. Berger, "A Plumber with Words: Seeking Constitutional Responsibility and an End to the Little Sisters Problem" (2022) 104 S.C.L.R. (2d) 104, at 160.

skepticism that the options paraded in front of the Court are not only legitimate safety valves but also that they operate as presented.

More than that, in my opinion, there should be less emphasis on a reliance of safety valves to cure *Charter* violations and more front-end attention to the fact that legislative frameworks themselves should be *Charter* abiding at the outset rather than adherence only after government discretion has been exercised in an exemption type scenario. This is not to say a safety valve can never be invoked, but it should be done sparingly, as a means of last resort, and a higher onus must be placed on the government invoking them to show it is an effective and operational solution.

The default question should be, can the *Charter* infringement be cured directly at the site causing the issue. Should the legislature return to the drawing board? Should the provision or scheme exist in its current form? Courts should be given strong reason to veer from this default position to allow unconstitutional segments of legislation to stand with an outlet to allow those whose rights are infringed to escape. It should not become a practice to allow legislatures to pass law as they please and insulate itself from *Charter* scrutiny through further legislating release hatches. Safety valves should be used cautiously. The preference should be to rework the line and to ensure that no one falls through the cracks.

Latimer and Berger writes, "Charter breaches affect real people, most of them not lawyers. It is the lived experience of the law that ultimately ought to draw our concern, energy and talents. If you want to bend the law toward justice, you need to focus on remedial attention on what the law actually does and to whom, and on what the courts can actually do and for whom." As discussed, there is a new structural defect in *Charter* analysis, one that is an active barrier to addressing the very problems our constitution was meant to remedy. More importantly, the construction of safety valves in our constitutional framework, rather than relieving pressure, allows it to build up. It prevents claimants from obtaining the release they need from the harsh applications of law. Our focus should return to the raison d'être of the *Charter* and who it is meant to serve. Once it does, hopefully, the appropriate questions will then be asked how do we remedy this now in a structural and systemic way rather than apply a quick fix.