

INTERSECTIONAL FEMINISM, RACIAL CAPITALISM, AND THE COVID-19 PANDEMIC

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I. Introduction

A common narrative during the COVID-19 pandemic correctly observed that lockdowns which stripped public interactions to the bare minimum exposed the economic and social fault lines of Canadian society.¹ Since March 2020, women—particularly racialized² women in jobs with low pay—have disproportionately borne the brunt of the pandemic’s negative economic impacts. The fact that racialized women face systemic economic inequality and marginalization in Canada is not new. It is the structural foundation of an economy and sex-segregated labour market rooted in racial capitalism. The pandemic merely made the disparities impossible to ignore. At the same time, a reckoning with the roots of structural inequality has become ever more pressing because, coincident with the pandemic, mass politicization and mobilization accelerated on a global scale in response to police killings of Black

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¹ See Katherine Scott, “COVID-19 crisis response must address gender faultlines” (20 March 2020), online: *The Monitor* <[monitormag.ca/articles/covid-19-crisis-response-must-address-gender-faultlines](https://www.monitormag.ca/articles/covid-19-crisis-response-must-address-gender-faultlines)> [Scott, “Gender faultlines”].

² The term ‘racialization’ acknowledges that ‘race’ is a social construct with no inherent meaning. Racialization is the ideological process through which groups, identified on their purported ‘race’, are designated as ‘different’ and subjected to unequal treatment “in ways that matter to economic, political, and social life.” See “Racial discrimination, race and racism (fact sheet)”, online: *Ontario Human Rights Commission* <www.ohrc.on.ca/en/racial-discrimination-race-and-racism-fact-sheet>; “Policy and guidelines on racism and racial discrimination” (9 June 2005), online (pdf): *Ontario Human Rights Commission* <www3.ohrc.on.ca/sites/default/files/attachments/Policy_and_guidelines_on_racism_and_racial_discrimination.pdf>; Sheila Block, Grace-Edward Galabuzi & Ricardo Tranjan, “Canada’s Colour Coded Income Inequality” (December 2019) at 6, online (pdf): *Canadian Centre for Policy Alternatives* <www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2019/12/Canada%20s%20Colour%20Coded%20Income%20Inequality.pdf>.

people,³ state violence against Indigenous land defenders,⁴ rising fascist movements,⁵ anti-Asian violence,⁶ and the climate emergency. Intertwined social solidarity movements have forged deeper connections in the heat of these collective traumas. And the pandemic-induced period of reflection and questioning brings urgency to widespread demands for deep social and economic transformation. These movements demand that we confront who the imagined “we” is in the mantra that “we’re all in this together”⁷ and who benefits from that depoliticized narrative framing.

At the same time that social and economic activity narrowed, however, so too did law- and policy-making narrow its focus to address the impact of the pandemic. That latter dynamic exposed how governments’ active choices to advance different values and priorities through law and policy either exacerbated or lessened the harms of the existing social and economic fault lines. Analyzing the connections between political choices and social and economic consequences, where the immediacy of policy impacts is reflected in real time in COVID-19 exposure, infection, and death facilitates a deeper understanding of how systemic inequality is created and perpetuated through law. By comparing pandemic-era decision-making by different Canadian jurisdictions, the paper aims to contribute to deepening the legal analysis of

³ The killing of George Floyd by Minneapolis police officer Derek Chauvin on 25 May 2020 and the police killing of Breonna Taylor in her home Louisville on 17 March 2020 sparked mass global protests against anti-Black racism and in support of defunding police. Despite physical distancing directives, mass protests took place across Canada and demands to defund the police quickly developed traction with policy makers. See “Anti-black racism protests, vigils take place across Canada” (6 June 2020), online: *CBC News* <www.cbc.ca/news/canada/canada-anti-black-racism-protests-solidarity-rallies-1.5601792>; Mark Gollom, “Calls to defund the police gain traction with some Canadian policymakers. But what does it mean?” (10 June 2020), online: *CBC News* <www.cbc.ca/news/defund-the-police-canada-1.5605430>.

⁴ In the months preceding the pandemic shutdown, Indigenous nations and settler allies across Canada blockaded rail lines and other transportation routes to #ShutDownCanada in solidarity with the Wet’suwet’en nation and to protest RCMP violence and invasions of Wet’suwet’en territory. See Alex Ballingall, “‘Reconciliation is dead and we will shut down Canada,’ Wet’suwet’en supporters say” (13 February 2020), online: *Toronto Star* <www.thestar.com/politics/federal/2020/02/11/reconciliation-is-dead-and-we-will-shut-down-canada-wetsuweten-supporters-say.html>; Amber Bracken & Leyland Cecco, “Canada: protests go mainstream as support for Wet’suwet’en pipeline fight widens” (14 February 2020), online: *The Guardian* <www.theguardian.com/world/2020/feb/14/wetsuweten-coastal-gaslink-pipeline-allies>.

⁵ At the time of writing, years of rising fascist mobilizing and violence erupted in violent insurrection in Washington, D.C. as supporters of defeated US Presidential candidate Donald Trump invaded the Capitol Building on 6 January 2021 while the US Congress and Senate prepared to certify the election of President Joe Biden. See Dmitriy Khavin et al., “Day of Rage: An In-Depth Look at How a Mob Stormed the Capitol” (30 June 2021), online: *New York Times* <www.nytimes.com/video/us/politics/100000007606996/capitol-riot-trump-supporters.html>.

⁶ Justin Kong et al., “A Year of Racist Attacks: Anti-Asian Racism Across Canada One Year Into The COVID-19 Pandemic” (2021), online (pdf): *Chinese Canadian National Council Toronto Chapter* <mcusercontent.com/9fbfd2cf7b2a8256f770fc35c/files/35c9daca-3fd4-46f4-a883-c09b8c12bbca/covidracism_final_report.pdf>.

⁷ Nandita Sharma, “The Global COVID-19 Pandemic and the Need to Change Who We Think “We” Are” (2020) 23:4 *Theory & Event* at S-19–S29.

systemic discrimination, and to understanding how individual laws and policies build upon, accumulate, imbricate, and institutionalize systemic discrimination.

Part II outlines the intersectional feminist political economy perspective anchored in a frame of racial capitalism that is used to analyze the gendered and racialized contours of the pandemic “she-cession.”⁸ Part III surveys how women—particularly racialized and poor women—have faced greater risks from COVID-19, lost more jobs, taken on more unpaid work, and benefited less from the economic recovery than men. Part IV compares divergent legal and policy responses to precarious work and access to paid sick leave adopted by Canadian governments which have implications for women’s economic security. Undertaking a comprehensive analysis of all provincial, territorial and federal policies on these issues is beyond the scope of this paper. Accordingly, comparisons are made between two jurisdictions which are selected because of their contrasting approaches. First, the paper compares the legal and policy choices made by Ontario and British Columbia to address the pandemic risk posed by multiple job-holding in the long-term care sector. Second, it compares the federal and Ontario governments’ policy choices with respect to paid sick days for workers. This section asks: If the pandemic threw into stark relief the fault lines of an economy built on systemic discrimination, have governments’ responses targeted those fault lines? Do government choices enhance equality or entrench inequality? Part V considers how the pandemic’s disruption presents a generational opportunity for real change. Rethinking the meaning of essential work, centring care work and an ethic of care in a post-pandemic recovery offer the chance to transform economic and social structures to enhance decent work and substantive intersectional equality. But in order to seize that opportunity, an unblinkingly honest regard must be trained on the structural inequality the pandemic brings to light.

II. Disciplinary Silences in Law and the Pre-Pandemic Divide

For decades, economists and social scientists have documented the contours of Canada’s sex- and race-segregated labour market which impoverishes women and racialized communities.⁹ And while Canadian legal scholarship has analyzed how

⁸ This term was coined by Canadian economist Armine Yalnizyan in March, 2020 to describe the pandemic recession which is the first in history to be driven by the loss of women’s jobs in the service sector. See Armine Yalnizyan, “I coined the term she-cession, saying it in public for the first time in conversation with @mattgallowaycbc on @TheCurrentCBC on March 30, 2019. Here’s the origin story” (1 March 2021 at 11:08), online: *Twitter* <twitter.com/ArmineYalnizyan/status/1366420011682791429>; “Mar 30, 2020 episode transcript” (30 March 2020), online: *CBC The Current* <www.cbc.ca/radio/thecurrent/the-current-for-march-30-2020-1.5514566/mar-30-2020-episode-transcript-1.5515476>.

⁹ Pat Armstrong & Hugh Armstrong, *The Double Ghetto: Canadian women and their segregated work*, 3rd ed (Oxford University Press: 2010) (first published in 1978); Grace-Edward Galabuzi, *Canada’s Economic Apartheid: The Social Exclusion of Racialized Groups in the New Century* (Toronto: Canadian Scholars Press, 2006); Sheila Block & Grace-Edward Galabuzi, “Canada’s Colour Coded Labour Market: The Gag for racialized workers” (March 2011), online (pdf): *Canadian Centre for Policy Alternatives* <homelesshub.ca/sites/default/files/Colour_Coded_Labour_MarketFINAL.pdf>; Sheila Block & Grace-Edward Galabuzi, “Persistent Inequality: Ontario’s Colour-coded Labour Market” (December 2018), online (pdf): *Canadian Centre for Policy Alternatives*:

intersecting structural racism and sexism are baked in at the front end of making laws and policy that govern economic and social security,¹⁰ courts have been much slower to acknowledge and analyze these realities, resulting in the under-developed jurisprudence on this point.¹¹ By its nature, litigation examines discrimination in the rear view mirror, after a harm has been inflicted. As a result, in legal rulings discrimination is depicted as an aberrant disruption within an existing environment which is taken as given. How that environment or “context” is shaped by active decisions that produce unequal outcomes that are the norm for large portions of the population is typically unquestioned.¹² This “disciplinary silence”¹³ facilitates a predominantly White legal profession’s¹⁴ default to individualist and neoliberal explanations for social and economic difference.¹⁵ Such habits of thought leave lawyers and judges struggling to distinguish between formal and substantive equality and to identify systemic discrimination.¹⁶ Writing about the health profession’s disciplinary silences on structural racism, Sume Ndumbe-Eyoh proposes that the way forward

requires moving from colour-blind or race-neutral approaches to a view that racism’s contemporary manifestations are not arbitrary and mysterious, but systemic and knowable. Racial inequities then stop being seen as random but as the natural product of oppressive racist norms, values and actions.

<www.policyalternatives.ca/sites/default/files/uploads/publications/Ontario%20Office/2018/12/Persistent%20inequality.pdf>; Sheila Block & Grace-Edward Galabuzi, “Canada’s Colour Coded Income Inequality” (December 2019), online (PDF): *Canadian Centre for Policy Alternatives* <www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2019/12/Canada%27s%20Colour%20Coded%20Income%20Inequality.pdf>.

¹⁰ See generally the work of Adelle Blackett, Fay Faraday, Judy Fudge, Marlee Kline, Janet Mosher, Val Napoleon, Sherene Razack, Harsha Walia and many others.

¹¹ The Supreme Court of Canada has yet to hear a section 15 *Charter* equality claim about systemic race discrimination and has only grappled more directly with how systemic sex discrimination is constructed. See e.g. *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Quebec v Alliance*]; *Centrale des syndicats du Québec v Québec (Attorney General)*, 2018 SCC 18 [*CSQ v Québec*]; *Fraser v Canada (Attorney General)*, 2020 SCC 28.

¹² See Fay Faraday, “The Elephant in the Room and Straw Men on Fire” (2021) 30:2 Const Forum 15.

¹³ Sume Ndumbe-Eyoh, “What would it take for health promotion to take structural racism seriously?” (2020) 27:4 Global Health Promotion 3.

¹⁴ In Ontario, 79.3% of lawyers self-identified as “White” or “Racialized and White.” See “Statistical Snapshot of Lawyers in Ontario” (2017), online (pdf): *Law Society of Ontario* <lawsocietyontario.azureedge.net/media/iso/media/lawyers/practice-supports-resources/equity-supports-resources/snapshot-lawyers-2017-english.pdf>.

¹⁵ For example, see the dissenting judgments in *Quebec v Alliance*, *supra* note 11; *CSQ v. Québec*, *supra* note 11; and *Fraser v Canada*, *supra* note 11.

¹⁶ Faraday, *supra* note 12 at 22, 25; Jennifer Koshan & Jonette Watson Hamilton, “Meaningless Mantra: Substantive Equality after Withler” (2011) 16 Rev Const Stud 31; Jennifer Koshan & Jonette Watson Hamilton, “The Continual Reinvention of Section 15 of the Charter” (2013) 64 UNBLJ 19; Fay Faraday, “One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Canada” (2020) 94:2 SCLR 301.

Doing so subverts the assumptions of everyday life which work to uphold and bolster White dominance and racial inequities.¹⁷

Her remedial prescription is equally instructive for law. The first step in breaking the disciplinary silence is to name the dynamics and outcomes of systemic discrimination. Drawing on frameworks of feminist political economy and racial capitalism helps to deepen the analysis of how systemic discrimination operates in law and policy-making during the pandemic. Rather than looking through the rear-view mirror, this paper looks at the construction of the unequal economic landscape and the impact of government decision-making in real time.

Feminist political economy is an interdisciplinary analytical approach that examines how gender is socially constructed and operates as an ideology and field of power that shapes individual identities, social relations, institutions, structures, governance, laws and policies in a way that privileges the masculine and devalues the feminine. Feminist political economy

makes explicit the linkages between economic, social and political spheres. It analyzes how power is exercised not only through coercive means, but also materials and ideas, and how these power relationships shape the institutional and ideological formations where gender identities and status are constructed.¹⁸

Critically, feminist political economy highlights the role of women's unpaid labour as an indispensable precondition for the paid labour that traditional economics measures. It accounts for the economic value of this labour as well as the "economic, social, and opportunity costs women incur while fulfilling care roles."¹⁹ In this way, feminist political economy brings to light "the relationship between micro and macroeconomics, and how the two intersect to reproduce and shape gender inequality."²⁰

¹⁷ Ndumbe-Eyoh, *supra* note 13 at 4.

¹⁸ See Julia Smith et al, "More than a public health crisis: A feminist political economic analysis of COVID-19" (2021) 16 *Global Public Health* 1364 at 1367. Canada has a long tradition of strong feminist political economy scholarship. See Pat Armstrong & M Patricia Connelly, "Feminist Political Economy: An Introduction" (1989) 30:1 *Studies in Political Economy* 5; Leah F Vosko, "The Pasts (and Futures) of Feminist Political Economy in Canada: Reviving the Debate" (2002) 68:1 *Studies in Political Economy* 55; Kate Bezanson & Meg Luxton, *Social Reproduction: Feminist Political Economy Challenges Neo-Liberalism* (Montreal: McGill-Queen's University Press, 2006); Judy Fudge, "Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction" (2014) 22:1 *Fem Leg Stud* 1; Judy Fudge & Leah F Vosko, "Gender Paradoxes and the Rise of Contingent Work: Towards a Transformative Political Economy of the Labour Market", in Leah F Vosko & Wallace Clement, eds, *Changing Canada: Political Economy as Transformation* (Montreal: McGill-Queen's University Press, 2003) 183.

¹⁹ Smith et al, *supra* note 18 at 1367.

²⁰ *Ibid.*

At the same time, the analytical perspective of racial capitalism as developed by Cedric J. Robinson recognizes that, from its origins pre-dating the Atlantic slave trade, “the development, organization, and expansion of capitalist society pursued essentially racial directions, so too did social ideology.”²¹ Jodi Melamed writes that capitalism depends upon extraction and accumulation through “relations of severe inequality among human groups” which require “loss, disposability, and the unequal differentiation of human value.”²² In this context, racism is the ideology that “enshrines the inequality that capitalism requires.”²³ Capitalism has been operationalized through the organizing principle of racialization to such an extent that “capitalism *is* racial capitalism”²⁴ and racism “permeate[s] the social structures emergent from capitalism.”²⁵ In the words of Kendra Strauss

A focus on racial capitalism requires greater attention to the essential processes that shaped the modern world, such as colonization, primitive accumulation, slavery, and imperialism ... racial capitalism requires that we place contemporary forms of racial inequality in a materialist, ideological and historical framework.²⁶

All these institutions and practices produce and sustain racialized divisions of labour and the devaluation of labour by racialized workers to facilitate the extraction of surplus value.

Without a doubt, Canada’s pre-pandemic labour market reflects the history and continued operation of systemic gendered and racialized segregation and devaluation of labour. This sex- and race-based segregation is so normalized that, although we are immersed in it every day, it is often effectively unseen by people of privilege. As a corrective, intersectional feminist political economy and racial capitalism frameworks focus attention on those unobserved elements to generate insight into the active, systemic way that power—that is ideological, cultural, social and material dominance and marginalization—is replicated. When the contours of structural inequalities are mapped, it becomes apparent that law making offers no simple or innocent policy choices. All acts of law and policy-making are decisions about whose well-being is valued enough to protect and who is asked to bear the cost of that selective protection. Accordingly, some attention is warranted to actively

²¹ See Cedric J Robinson, *Black Marxism: The making of the Black radical tradition*, 3rd ed (Chapel Hill: University of North Carolina Press, 2020) at 2, 26–28.

²² See Jodi Melamed, “Racial Capitalism” (2015) 1:1 *Critical Ethnic Studies* 76 at 77.

²³ See *Ibid.* See also Kendra Strauss, “Labour geography III: Precarity, racial capitalisms and infrastructure” (2020) 44:6 *Progress in Human Geography* 1212 at 1216.

²⁴ See Melamed, *supra* note 22 at 77.

²⁵ See Robinson, *supra* note 21.

²⁶ Kendra Strauss, “Labour geography III: Precarity, racial capitalisms and infrastructure” (2020) 44:6 *Progress in Human Geography* 1212 at 1215, quoting James M Blaut & Bobby Wilson.

surface the reality of the pre-pandemic status quo of who works where in what conditions.

Women²⁷ in Canada are disproportionately employed in female-dominated occupations within female-dominated industries working in female-dominated workplaces. Most women continue to be employed in just three service sector industries (healthcare and social assistance; educational services; and accommodation and food services) which “parallel their traditional gender roles of homemaking and caregiving.”²⁸ Women are “concentrated in sex-typed industries at more than double the rate of men” and within industries women and men tend to occupy distinct occupations, with women’s typically being at lower levels than men’s.²⁹ Moving from the level of industry to that of occupation, 56% of women in Canada are employed in just *five* occupations: care work, cashiering, clerical, cleaning, and catering, a distribution which has barely changed since 1987.³⁰ Systemic gender discrimination devalues feminized labour such that the more female-dominated an occupation is, the lower it is paid relative to male occupations of similar skills, effort, responsibility and working conditions.³¹ This gendering and devaluation of industries and occupations has historically been, and continues to be, accomplished through coercive gender norms which operate on a rigid female-male binary. Finally, as a result of gendered social norms which assign women primary responsibility for unpaid care work in families and communities, women’s access to stable full-time work is undermined: women make up 70% of part-time, casual, temporary agency and seasonal workers,³² and 59% of workers earning minimum wage.³³ Women work part-time at 3.5 times the rate of men, and do so because of unpaid care obligations at nearly six times the

²⁷ Currently, Census data and other statistics only identify employment patterns based on a female-male binary. The 2021 Census began to collect data on a broader gender spectrum so it is anticipated that a more accurate profile will be available in the years ahead as that disaggregated data is released.

²⁸ Melissa Moyer, “Women and Paid Work” (8 March 2017) at 22–24, online (pdf): *Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/89-503-x/2015001/article/14694-eng.pdf?st=BehNB2oA>

²⁹ *Ibid* at 23.

³⁰ *Ibid* at 23. In 1987, 59.2% of women were employed in these five occupations.

³¹ Armstrong & Armstrong, *supra* note 9. Pay equity legislation aims to redress the sex discrimination in pay that arises from this occupational segregation and associated devaluation of female-dominated work. See e.g. *Ontario Nurses’ Association v Women’s College Hospital* (1992) OPED No 20 at paras 16–18; *Haldimand-Norfolk (No. 33)* (1989), 1 PER 17, at para 44; Marie-Therese Chicha, *L’équité salariale: mise en oeuvre et enjeux*, 3è ed (Cowansville: Éditions Yvon Blais, 2011) at 23.

³² Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queen’s University Press, 2006); Leah F Vosko, *Managing the margins: Gender, citizenship, and the international regulation of precarious employment*, (Oxford: Oxford University Press, 2009).

³³ Dominique Dionne-Simard & Jacob Miller, “Maximum insights on minimum wage workers: 20 years of data” (11 September 2019), online (pdf): *Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/75-004-m/75-004-m2019003-eng.pdf?st=MRZuRwhu>.

rate of men.³⁴ In the cohort of workers aged 35-39, 45% of women working part-time do so because of unpaid childcare obligations.³⁵

At the same time, Canada's history as a settler colonial state, which has genocidal policies towards Indigenous peoples,³⁶ and had an explicitly race-based immigration system until the late 1960s, and race-based restrictions on access to different industries, occupations and training,³⁷ continues to influence the location and devaluation of Indigenous and racialized workers. Providing a consistent picture of the employment profile of Indigenous women is challenging because statistics do not consistently disaggregate data to reveal distinct patterns of First Nations, Inuit and Métis, of those living on/off reserve or within/outside of Inuit Nunangut, or based on sex. However, what is clear is that Indigenous women are among the most economically insecure people in Canada. Métis women have an employment rate of 60.3% and an unemployment rate of 11.2%,³⁸ whereas the overall employment rate for women aged 25 to 54 years in Canada is 82%, with an unemployment rate of just over 5%.³⁹ First Nations and Inuit women have among the lowest rates of employment (46.8% and 49%, respectively) and highest rates of unemployment (18% and 22.4%, respectively) of all women in Canada.⁴⁰ The unemployment rate for First Nations peoples on reserve is 24.9%.⁴¹ For all Indigenous women other than Métis women and

³⁴ Moyer, *supra* note 28 at 17.

³⁵ Martha Patterson, "Who Works Part-Time and Why" (2018) at 4, online (pdf): *Statistics Canada* <www150.statcan.gc.ca/n1/en/pub/71-222-x/71-222-x2018002-eng.pdf?st=1_9z31MH>.

³⁶ Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" (2015), online (pdf): <ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>; National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls" (2019), online (pdf): <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf>.

³⁷ The legal profession actively participated in this gendered and racialized exclusion. See Constance Backhouse, "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives," (Paper delivered at the Chief Justice of Ontario's Advisory Committee on Professionalism, First Colloquium on the Legal Profession, October 2003) [unpublished].

³⁸ "Aboriginal Population Profile, "2016 Census" (2018), online: *Statistics Canada* <www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/details/page.cfm?Lang=E&Geo1=PR&Code1=01&Data=Count&SearchText=Canada&SearchType=Begins&B1=All&C1=All&SEX_ID=1&AGE_ID=1&RESGEO_ID=1> [*Aboriginal Population Profile*].

³⁹ Moyer, *supra* note 28 at 3, 31.

⁴⁰ *Aboriginal Population Profile*, *supra* note 38. Only Arab women have lower rates of employment (43.3%) than First Nations women, while West Asian women have lower rates of employment (48.3%) than Inuit women. Only Arab women have higher unemployment rates (15.6%) than First Nations women, but Inuit women have the highest unemployment rates of all Indigenous and racialized women. See Data Tables from Statistics Canada, *2016 Census Data Tables: Labour Force Status (8), Visible Minority (15), Immigrant Status and Period of Immigration (11), Highest Certificate, Diploma or Degree (7), Age (13A) and Sex (3) for the Population Aged 15 Years and Over in Private Households in Canada, Provinces and Territories, Census Metropolitan Areas and Census Agglomerations, 2016 Census - 25% Sample Data*.

⁴¹ *Aboriginal Population Profile*, *supra* note 38.

First Nations women living off reserve, employment rates dropped between 2006 and 2016.⁴² More than half of all Indigenous women living off reserve are employed in sales and service occupations (30.6%), and business, finance and administrative occupations (22.1%).⁴³ Nearly 20% of all Indigenous women living off reserve work part-time, and 15% have non-permanent work, particularly seasonal or casual work.⁴⁴ Indigenous women face a 45% gender pay gap, meaning they earn only 55% of the average annual earnings of men in Canada.⁴⁵

Meanwhile, half of racialized women are segregated into just two occupations: 31.9% are employed in sales and services occupations, and 19.8% are employed in healthcare and social assistance.⁴⁶ Within those occupations, racialized women are disproportionately in lower paid jobs,⁴⁷ and they have more precarious forms of work. Nearly 60% of racialized women work part-time or in other precarious forms of work, compared to 53% of non-racialized women.⁴⁸ Although racialized people in Canada have higher levels of education than the general public, they earn significantly less than non-racialized Canadians.⁴⁹ Canada's labour market reveals a racialized and gendered hierarchy of earnings which has barely changed in decades. Census data consistently shows that non-racialized men have the highest average annual earnings.⁵⁰ Racialized men rank second earning 78 cents for every dollar non-racialized men earn, followed by non-racialized women earning 67 cents on the dollar, and by racialized women earning only 59 cents on the dollar.⁵¹ At the time of the 2016

⁴² "Labour in Canada: Key results from the 2016 Census" (29 November 2017), online: *Statistics Canada* <www150.statcan.gc.ca/n1/daily-quotidien/171129/dq171129b-eng.htm>.

⁴³ Thomas Anderson, "Aboriginal Peoples Survey: Employment of First Nations men and women living off reserve" (13 June 2019), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/89-653-x/89-653-x2019004-eng.htm>.

⁴⁴ *Ibid.*

⁴⁵ 2016 Census at "Annual Earnings", online: *Statistics Canada* <www12.statcan.gc.ca/census-recensement/2016/dp-pd/index-eng.cfm>.

⁴⁶ 2016 Census at "Data Tables, 2016 Census", online: *Statistics Canada* <www12.statcan.gc.ca/census-recensement/2016/dp-pd/dt-td/Index-eng.cfm> (Visible Minority (15), Age (15A), Sex (3) and Selected Demographic, Cultural, Labour Force, Educational and Income Characteristics (900) for the Population in Private Households of Canada, Provinces and Territories, Census Metropolitan Areas and Census Agglomerations, 2016 Census - 25% Sample Data) [2016 Census Data Tables].

⁴⁷ Statistics Canada, *2016 Census of Population*, Catalogue No 98-400-X (Ottawa: Statistics Canada, 8 February 2017).

⁴⁸ *Ibid.* (68.6% of racialized people in Canada have some postsecondary training, compared to 64.8% of the general population; 42% of racialized people in Canada have a university certificate, diploma or degree at the bachelor's level or higher, compared to only 28.5% of the general population).

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Block, Galabuzi & Tranjan, *supra* note 2 at 4-5.

Census, median annual employment income of all workers was \$35,600.⁵² By contrast, the median annual employment income of racialized women was only \$24,900, which is less than one would earn doing full-time, full-year work at minimum wage in Ontario.⁵³ Nearly 60% of racialized women earned less than \$30,000 per year, and over 70% earned less than \$40,000.⁵⁴ For non-racialized women, the figures are 49% and 61% respectively.⁵⁵ Finally, racial capitalism takes its most notorious form in temporary labour migration programs which import primarily racialized workers from the Global South into highly gendered and racialized jobs in conditions which facilitate extreme exploitation and wage theft.⁵⁶ Even in the limited circumstances when migrant workers in low-wage care work—who are disproportionately Filipinx—obtain permanent residence, racialized and gendered stereotypes about who is “fit” to do care work replicates this gendered and racialized structural inequality, keeping many trapped in the low-wage care work they did as temporary migrants.⁵⁷

These baseline disparities based on gender, Indigeneity and race are so normalized that they are largely unquestioned. In law, such facts, if acknowledged, are used to paint a static background context of “vulnerability” rather than analyzed as structural and functional. Supreme Court of Canada jurisprudence regularly cites the purpose of equality rights as being to protect individuals and groups who are vulnerable, disadvantaged, or members of “discrete and insular minorities”⁵⁸ or to protect those who are subject to prejudice, stereotyping, historical disadvantage or vulnerability to political and social prejudice.⁵⁹ But this description of status offers no explanatory insight into why the disparities exist and have such staying power. By contrast, feminist political economy and racial capitalism frameworks demand an

⁵² “Income of individuals by age group, sex and income source, Canada, provinces and selected census metropolitan areas” (23 March 2021), online: *Statistics Canada* <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1110023901>.

⁵³ Calculated based on a 40-hour work week at \$14.25 per hour, the Ontario minimum wage at the time of writing.

⁵⁴ 2016 Census Data Tables, *supra* note 46.

⁵⁵ *Ibid.*

⁵⁶ Fay Faraday, “Profiting from the Precarious: How recruitment practices exploit migrant workers” (April 2014), online (pdf): *Metcalf Foundation* <metcalffoundation.com/site/uploads/2014/04/Profiting-from-the-Precarious.pdf> [Faraday, “Profiting from the Precarious”]; “Care Worker Voices for Landed Status and Fairness” (2019), online (pdf): *Migrant Workers Alliance for Change* <migrantrights.ca/wp-content/uploads/2018/11/Care-Worker-Voices-for-Landed-Status-and-Fairness.pdf>.

⁵⁷ Philip F Kelly et al, *Explaining the Deprofessionalized Filipino: Why Filipino Immigrants Get Low-Paying Jobs in Toronto* (Toronto: CERIS – The Ontario Metropolis Centre, October 2009).

⁵⁸ See e.g. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, [1989] 56 DLR (4th) 1 at 152 [*Andrews*]; *R v Turpin*, [1989] 1 SCR 1296 at 1333, [1989] 96 NR 115; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 16, [1999] 170 DLR (4th) 1, 68, 88, 95 [*Law*]; *Quebec (Attorney General) v A*, 2013 SCC 5 at paras 144–145 [*Quebec v A*].

⁵⁹ See, for example *Andrews*, *supra* note 58 at 180; *Law*, *supra* note 58 at para 68; *Quebec v A*, *supra* note 58 at para 182.

analysis of how poverty and marginalization are actively constructed and assigned through government choices made when enacting law and making policy. These frameworks also demand an analysis of who and what the disparity that is generated serves. Before engaging in that analysis in Part IV, the next Part examines the gendered and racialized economic impact of the COVID-19 pandemic.

III. Gendered and Racialized Economic Impacts of the COVID-19 Pandemic

The pandemic has demonstrated how profoundly it matters that disaggregated, intersectional data is collected. Without it, governments cannot develop meaningful and effective laws and social policy that meet its *Charter* obligations to “take into account differences which in fact exist between individuals” and not “[enact] provisions without taking into account their possible impact on already disadvantaged classes of persons.”⁶⁰ With it, governments can be held accountable for failing to meet those constitutional obligations.

Disaggregated data is needed to develop an accurate picture of a social dynamic or experience.⁶¹ It is also necessary to uncover how power operates within or structures that social dynamic, and to uncover the values that inform data analysis. This is ever more urgent when women, racialized, working class and migrant people are disproportionately excluded from policy development.⁶² Writing about intersectional feminist principles for COVID-19 related data collection and analysis, D’Ignazio and Klein emphasize that “data are not neutral or objective. They are the products of unequal social relations, and this context is essential for conducting accurate, ethical analysis.”⁶³ They also underscore the importance of collecting multiple forms of knowledge, including data that “elevate emotion and embodiment” and that “[include] the knowledge that comes from people as living, feeling bodies in the world.”⁶⁴ While sex-disaggregated data (based on a female/male binary)⁶⁵ was more readily available from the outset of the pandemic, data disaggregated by race,

⁶⁰ *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, [1997] 151 DLR (4th) 577 at para 64.

⁶¹ See Caroline Criado Perez, *Invisible Women: Data Bias in a World Designed for Men* (New York: Abrams Press, 2019).

⁶² Canadian Women’s Foundation et al, “Resetting Normal: Women, Decent Work and Canada’s Fractured Care Economy” (July 2020), online at 2 (pdf): [Canadian Women’s Foundation <cednet-redec.ca/sites/ccednet-redec.ca/files/resettingnormal-women-decent-work-and-care-en-1.pdf>](https://canadianwomen.ca/sites/ccednet-redec.ca/files/resettingnormal-women-decent-work-and-care-en-1.pdf); Catherine D’Ignazio & Lauren F Klein, “Seven intersectional feminist principles for equitable and actionable COVID-19 data” (2020) 1:6 *Big Data & Society* 1 at 1.

⁶³ D’Ignazio & Klein, *supra* note 62 at 4.

⁶⁴ *Ibid* at 3 (“embodiment” or “embodied cognition” refers to forms of knowing and understanding that are anchored in or constituted by human experience as physically embodied beings engaged in sensory interaction with the environment).

⁶⁵ Disaggregated data that makes visible people who identify as non-binary, gender fluid, non-gendered, or in other ways along a gender spectrum is lacking and needs to be included as a routine element of data collection.

workplace and occupation continue to be collected only inconsistently more than a year into the pandemic. This continues to hinder responsive, accountable—and, arguably, *Charter*-compliant—law and policy-making.

The data reveals that from the earliest stages of the pandemic, women suffered the greatest proportion of job losses, experienced them earlier than men, and continue to experience longer-term unemployment than men. Female-dominated service industries including airlines, travel and tourism, accommodations, food service, retail, arts and culture, and restaurants, were among the first to shut down and have borne the greatest proportion of job losses throughout the successive waves of the pandemic.⁶⁶ Indigenous people are also over-represented in the occupations that experienced the largest employment declines during the pandemic.⁶⁷

In the pandemic's first two months, February and March 2020, women suffered 63% of the then-one million job losses, and 70% of job losses among workers aged 25-54.⁶⁸ Across the board, job losses intensified with each step down the ladder of hourly wages. Earners in the top decile (\$48 per hour or more) had the fewest job losses and men in this decile actually saw job increases.⁶⁹ Meanwhile, earners in the lowest decile (\$14 per hour or less) had the greatest job losses.⁷⁰ During this period, 58% of women earning \$14 per hour or less lost their jobs or more than 50% of their hours, compared to 45% of men in the same wage bracket.⁷¹ The gender disparity in job losses narrowed by the end of April 2020 as construction and other male-dominated industries shut or slowed.⁷² But by this point, 1.5 million women had lost

⁶⁶ See David Macdonald, "Unemployment may hit 70-year high, but new EI replacement will help" (26 March 2020) online: *Canadian Centre for Policy Alternatives* <behindthenumbers.ca/2020/03/26/unemployment-may-hit-70-year-high-but-new-ei-replacement-will-help/>; Katherine Scott, "Women, work and COVID-19: Priorities for supporting women and the economy" (March 2021), online (pdf): *Canadian Centre for Policy Alternative* ^s <www.policyalternatives.ca/sites/default/files/uploads/publications/National Office/2021/03/Women work and COVID.pdf> [Scott, "Priorities for supporting women"]; Douwre Grekou & Yuqian Lu, "Gender differences in employment one year into the COVID-19 pandemic: An analysis by industrial sector and firm size" (26 May 2021), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/36-28-0001/2021005/article/00005-eng.htm>.

⁶⁷ Amanda Bleakney, Huda Masoud & Henry Robertson, "Labour market impacts of COVID-19 on Indigenous people: March to August 2020" (2 November 2020), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00085-eng.htm>.

⁶⁸ Canadian Women's Foundation et al, *supra* note 62 at 5.

⁶⁹ *Ibid* at 8.

⁷⁰ *Ibid*.

⁷¹ *Ibid* at 7.

⁷² *Ibid* at 5.

their jobs, dropping women's labour force participation to its lowest point since the mid-1980s.⁷³

Women also benefited less from the summer 2020 recovery, accounting for only 45% of job gains.⁷⁴ And while male-dominated industries returned to and sustained pre-pandemic employment levels by October 2020, female-dominated sectors began a second downward turn in September 2020 which has continued into 2021.⁷⁵ Women earning less than \$17 per hour continue to suffer the greatest job losses into the first quarter of 2021, and their employment has trended downwards since October 2020.⁷⁶ Meanwhile, men and women earning more than \$35 per hour rebounded to pre-pandemic employment levels by July 2020 and had surpassed those levels by the end of 2020.⁷⁷ As of January 2021, half a million women who lost jobs during the pandemic remained unemployed, with 200,000 considered "long-term unemployed".⁷⁸

Statistics Canada only began to track race and "visible minority"⁷⁹ status as part of its monthly Labour Force Survey in July 2020 in response to the broader public mobilization against anti-Black racism and out of a recognition that "the social, economic and labour market impacts of COVID-19 have not been equally felt by all Canadians."⁸⁰ Race-disaggregated data reveals that racialized women's pandemic unemployment rate nearly doubled that of non-racialized women.⁸¹ Meanwhile, Indigenous women were worst off as the employment rate for First Nations, Inuit, and Métis women combined dropped to only 47.8% by the end of 2020, compared to 57.7% and 64.4% for racialized and non-racialized women, respectively.⁸² Overall, racialized individuals were more likely to report strong or moderately negative financial impacts from the pandemic than non-racialized individuals; immigrants were

⁷³ Dawn Desjardinis, Carrie Freestone & Naomi Powell, "Pandemic threatens decades of women's labour force gains" (16 July 2020), online: *RBC Economics* <thoughtleadership.rbc.com/pandemic-threatens-decades-of-womens-labour-force-gains/>.

⁷⁴ *Ibid.*

⁷⁵ Scott, "Priorities for supporting women", *supra* note 66 at 5–6, 15–17, 20, 21.

⁷⁶ *Ibid* at 21.

⁷⁷ *Ibid.*

⁷⁸ Dawn Desjardins & Carrie Freestone, "COVID Further Clouded the Outlook for Canadian Women at Risk of Disruption" (4 March 2021), online: *RBC Economics* <www.rbcm.com/en/insights/story.page?dcr=templatedata/article/insights/data/2021/03/covid_further_clouded_the_outlook_for_canadian_women_at_risk_of_disruption>.

⁷⁹ The term "visible minority" is seen as problematic and highly offensive by many racialized people but it remains part of Statistics Canada reports because it is a defined category on which data is collected, per the federal *Employment Equity Act*, SC 1995, c 44, s 3.

⁸⁰ Canadian Press, "Statistics Canada to collect information on race for jobs numbers" (11 June 2020), online: *Global News* <globalnews.ca/news/7055977/statistics-canada-jobs-race/>.

⁸¹ Scott, "Priorities for supporting women", *supra* note 66 at 21–22.

⁸² *Ibid* at 6, 23.

a third more likely to report negative financial impacts than Canadian-born individuals;⁸³ and migrant and undocumented workers were largely ineligible for pandemic-related income supports.⁸⁴ So while the pandemic has a distinct gendered impact, it has most deeply affected racialized, immigrant, migrant, undocumented and working class women.

Critically, throughout the pandemic, mothers suffered significantly greater job losses than fathers, and single mothers' employment fell the most.⁸⁵ Roughly half of women in the core age 35-39 cohort who lost jobs in 2020 withdrew from the labour market entirely and stopped looking for work due to unpaid care obligations.⁸⁶ One year into the pandemic, nearly 100,000 women had withdrawn from the labour market compared to fewer than 10,000 men.⁸⁷ This disparity reflects the disproportionate extent to which women have shouldered (i) the unpaid care work required by the health emergency of the pandemic; (ii) the unpaid care for children as childcare facilities have closed or operated at severely reduced capacity; and (iii) the homeschooling and supervision of online learning required as elementary and secondary schooling toggled between in-person and remote learning.⁸⁸ By May 2020, 72% of child care centres were closed, 71% had laid off some or all of their staff, and more than a third were uncertain if they would ever reopen.⁸⁹ As of April 2021, the lack of a concerted policy response and financial investment during the pandemic to support childcare infrastructure has undermined women's ability to return to work at the same time that it drives unemployment in that female-dominated sector of work. As a result of this unequal burden, mothers reported greater rates of depression and anxiety than fathers. Mental health problems among mothers aged 25-44 doubled compared to their pre-

⁸³ *Ibid* at 22–23.

⁸⁴ For instance, eligibility for the Canada Recovery Benefit (CRB) requires the applicant to have a Canadian Social Insurance Number: See “Canada Recovery Benefit (CRB): Who Can Apply” (undated) online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/benefits/recovery-benefit/crb-who-apply.html>.

⁸⁵ Scott, “Priorities for supporting women”, *supra* note 66 at 5.

⁸⁶ Dawn Desjardins & Carrie Freestone, “Women Continue to Exit the Labour Market” (19 November 2020), online: *RBC Economics* <thoughtleadership.rbc.com/canadian-women-continue-to-exit-the-labour-force/>.

⁸⁷ Desjardins & Freestone, *supra* note 78.

⁸⁸ Statistics Canada, “International Women’s Day 2021” (8 March 2021), online: *Statistics Canada* <www150.statcan.gc.ca/n1/en/catalogue/89280001201800100020> [Statistics Canada, “International Women’s Day 2021”] (In 64% of households, “women reported that they were the parent mostly responsible for homeschooling or helping children with homework compared to 19% of men”).

⁸⁹ David Macdonald & Martha Friendly, “Sounding the Alarm; COVID-19’s impact on Canada’s precarious child care sector” (March 2021) at 11, online (pdf): *Canadian Centre for Policy Alternatives* <www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2021/03/Sounding%20the%20alarm.pdf>.

pandemic status, with First Nations, Inuit, and Métis mothers experiencing the highest depression scores among all mothers.⁹⁰

While women have disproportionately borne the economic losses caused by the pandemic, women have also disproportionately borne the dangers of staffing high-risk jobs that do not allow for physical distancing. Women do frontline “essential”⁹¹ work at more than double the rate of men.⁹² Women overwhelmingly staff the high-risk jobs in healthcare that have been on the frontlines of fighting the health crisis. They make up over 90% of nurses, 90% of personal support workers, 80% of medical lab technicians, 75% of respiratory therapists⁹³, and 70% of cleaners.⁹⁴ Women also do the large majority of public-facing service jobs, including more than 80% of cashiers,⁹⁵ 75-80% of community and social services,⁹⁶ 72% of food preparation jobs,⁹⁷ and nearly 60% of mail/postal delivery services.⁹⁸ Data from October 2020 reveals that women at all ages other than 60-69 were infected by COVID-19 in higher numbers than men, with women aged 20-29 accounting for the largest number of infections, and more than half of those under age 40 hospitalized due to COVID-19 were women.⁹⁹ At that point, 13,000 health care workers had filed workplace injury claims due to COVID-19, and healthcare workers made up nearly 20% of all COVID-19 infections across the country—a rate that was double the global average.¹⁰⁰ Again, the mental health impacts of these experiences have been devastating. In February 2021, Statistics Canada reported that 70% of healthcare workers reported worsening mental health due to the pandemic, with 40% reporting their mental health status as

⁹⁰ Wency Leung, “Pandemic’s toll on mental health of mothers exceeds fears of researchers, Lancet study finds” (25 March 2021), online: *Globe and Mail* <www.theglobeandmail.com/canada/article-pandemics-toll-on-mental-health-of-mothers-exceeds-fears-of/>.

⁹¹ Sara Mojtehdzadeh & Andrew Bailey, “Who is an essential worker in the GTA? Millions of us, data shows. This is life — outside lockdown — in five graphs” (2 February 2021), online: *Toronto Star* <www.thestar.com/news/gta/2021/02/02/who-is-an-essential-worker-in-the-gta-millions-of-us-data-shows-this-is-life-outside-lockdown-in-five-graphs.html> (In February 2021, it was calculated that 65% of workers in the Greater Toronto Area were deemed “essential”).

⁹² Canadian Women’s Foundation et al, *supra* note 62 at 3–4.

⁹³ *Ibid* at 2–3.

⁹⁴ *Ibid* at 3.

⁹⁵ *Ibid*.

⁹⁶ *Ibid*.

⁹⁷ *Ibid*.

⁹⁸ Canadian Women’s Foundation et al, *supra* note 62 at 3.

⁹⁹ Evan Dyer, “COVID-19 is changing the way men and women split the risk in the workplace” (12 October 2020), online: *CBC News* <www.cbc.ca/news/politics/covid-pandemic-gender-1.5754089>.

¹⁰⁰ Mario Possamai, “A Time of Fear: How Canada failed our health care workers and mismanaged COVID-19” (2020) at 9, 11–12, online (pdf): *Canadian Federation of Nurses Unions* <nursesunions.ca/wp-content/uploads/2021/03/a_time_of_fear_possamai_final_book_digital.pdf>.

fair or poor.¹⁰¹ Meanwhile, negative mental health impacts on migrant care workers were particularly severe, for reasons directly related to their precarious temporary or undocumented status in the country. That precarity, which is constructed under immigration laws and policies,¹⁰² is reinforced by work permits that tie them to specific employers in employment relationships with extreme power imbalances. Like other care workers, migrant workers experienced mental health stresses related to lack of personal protection equipment (PPE), and working in direct physical contact with at-risk populations. They also suffered due to isolation from their families during the pandemic, and work intensification, at the same time that 40% reported ongoing wage theft, and 37.5% were effectively imprisoned at work as employers prohibited them from leaving the employers' homes at all under threat and reality of termination.¹⁰³

Even though disaggregated data provides a much more nuanced understanding of who is affected by the pandemic and why, collecting Indigenous, race, and workplace disaggregated data continues only unevenly. Manitoba is the only province that systemically tracks and publishes race-based data for COVID-19 infections, though physicians, labour unions, and community advocates believe that this data reflects a reality faced in many parts of the country. Data released in March 2021 revealed that Filipinx residents were the most heavily overrepresented group among COVID-19 infections due to their disproportionate employment in essential jobs, and the frequency of living in multi-generational families.¹⁰⁴

Since June 2020, Public Health Ontario's COVID-19 *Weekly Epidemiologic Survey* has tracked the rate and number of infections in quintiles by "neighbourhood diversity" based on non-White "ethnic concentration" and "neighbourhood deprivation" based on "material deprivation". These reports have consistently shown

¹⁰¹ "Mental health among health care workers in Canada during the COVID-19 pandemic" (2 February 2021), online: *Statistics Canada* <www150.statcan.gc.ca/n1/daily-quotidien/210202/dq210202a-eng.htm>.

¹⁰² See e.g. Fay Faraday, "Made in Canada: How the law constructs migrant workers insecurity" (September 2012), online (pdf): *Metcalf Foundation* <metcalffoundation.com/site/uploads/2012/09/Made-in-Canada-Full-Report.pdf>; Faraday, "Profiting from the Precarious", *supra* note 56; Fay Faraday, "Canada's Choice: Decent work or entrenched exploitation for Canada's migrant workers" (June 2016), online (pdf): *Metcalf Foundation* <metcalffoundation.com/site/uploads/2016/06/Canadas-Choice-2.pdf>.

¹⁰³ "Behind Closed Doors: Exposing Migrant Care Worker Exploitation During COVID-19" (28 October 2020) at 8, online (pdf): *Migrant Rights Network* <migrantrights.ca/wp-content/uploads/2020/10/Behind-Closed-Doors_Exposing-Migrant-Care-Worker-Exploitation-During-COVID19.pdf>.

¹⁰⁴ Dakshana Bascaramurty & Tavia Grant, "Essential jobs, multigenerational homes: Filipino Canadians are bearing a heavy brunt of COVID-19" (5 April 2021), online: *Globe and Mail* <www.theglobeandmail.com/canada/article-filipino-canadians-bearing-a-heavy-brunt-of-covid-19-manitoba-health/?utm_medium=Referrer:+Social+Network++Media&utm_campaign=Shared+Web+Article+Links>. The Filipinx community has also been particularly hard hit in the United States where they make up 4% of nurses but 31.5% of deaths: "The Sisterhood: Filipina Nurses and the Pandemic" (25 February 2021), online (podcast): *The Atlantic Podcast* <www.theatlantic.com/podcasts/archive/2021/02/nurses/618110/>.

that the most racially diverse and most materially deprived neighbourhoods have by far the largest number of cases and infections. Except for surges in the least ethnically diverse quintile due to mass outbreaks among migrant farm workers, the rate and number of infections has increased sharply with each quintile of increasing ethnic diversity, and has increased with each quintile of material deprivation.¹⁰⁵ While these provincial data show broad trends, local public health units have the power to collect more detailed race-disaggregated data but only a handful do. Still, the results are telling. While making up 52% of Toronto's population, racialized people experienced 83% of the city's COVID-19 infections and 51% of them are considered low income.¹⁰⁶ Moreover, these infections were concentrated in the northwest corner of the city, in neighbourhoods with the highest concentrations of residents who are racialized, recent immigrants, refugees, have precarious or undocumented status, work in low-wage jobs that do not allow for physical distancing (such as personal support workers, workers in warehousing, transportation, manufacturing), live in multigenerational families and/or in overcrowded rental housing, and travel on the most crowded bus routes.¹⁰⁷ The neighbouring Region of Peel reported a similarly racialized, working class profile of its residents who accounted for the disproportionate share of COVID-19 infections there.¹⁰⁸ Yet, this data did not inform the early stages of the COVID-19 vaccine rollout, as these same communities lagged far behind in vaccine distribution and access compared to high-income, overwhelmingly White neighbourhoods where most workers can work from home and there is very low risk of COVID-19 infection.¹⁰⁹ It was only in April 2021, in response to public outcry at

¹⁰⁵ "Weekly Epidemiological Summaries" (last accessed 16 April 2021), online: *Public Health Ontario* <www.publichealthontario.ca/-/media/documents/ncov/epi/2021/04/covid-19-weekly-epi-summary-report-apr-10.pdf?sc_lang=en> (This database contains weekly summaries back to 31 May 2020).

¹⁰⁶ Cherise Seucharan & Dakshana Bascaramurty, "83% of COVID-19 cases in Toronto among racialized people from May-July, data suggest" (31 July 2020), online: *Globe and Mail* <www.theglobeandmail.com/canada/article-torontos-marginalized-communities-disproportionately-affected-by/>.

¹⁰⁷ *Ibid*: Jennifer Yang et al, "Toronto's COVID-19 divide: The city's northwest corner has been 'failed by the system'" (11 July 2020), online: *Toronto Star* <www.thestar.com/news/gta/2020/06/28/torontos-covid-19-divide-the-citys-northwest-corner-has-been-failed-by-the-system.html>;

Dr Arjumand Siddiqi et al, "Addressing Economic Racism in Canada's Pandemic Response and Recovery" (January 2021), online (pdf): *Broadbent Institute* <d3n8a8pro7vhmx.cloudfront.net/broadbent/pages/7831/attachments/original/1611011661/Addressing_Economic_Racism_in_Canada's_Pandemic_Response_and_Recovery_-_Report.pdf?1611011661>.

See also, Rajendra Subedi, Lawson Greenberg & Martin Turcotte, "COVID-19 mortality rates in Canada's ethno-cultural neighbourhoods" (28 October 2020), online: *Statistics Canada* <www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00079-eng.htm>.

¹⁰⁸ "COVID-19 and the Social Determinants of Health: Race and Occupation" (7 August 2020), online (pdf): *Region of Peel* <www.peelregion.ca/coronavirus/_media/COVID-19-race-and-occupation.pdf>.

¹⁰⁹ See Saron Fanel, "Advocates say COVID-19 'vaccine desert' leaves racialized communities behind in rollout" (22 March 2021), online: *CTV News* <toronto.ctvnews.ca/advocates-say-covid-19-vaccine-desert-leaves-racialized-communities-behind-in-rollout-1.5357999>;

"Toronto's COVID-19 vaccine rollout slower in low-income, hardest hit areas, data suggests" (7 April 2021), online: *CBC News* <www.cbc.ca/news/canada/toronto/toronto-covid-19-vaccines-1.5978107>; Inori Roy, "Plenty of Pharmacies, but No Vaccines in Toronto's Northwest" (26 March 2021), online: *The Local* <thelocal.to/plenty-of-pharmacies-but-no-vaccines-in-torontos-northwest/>; May Warren, "Toronto

the racial and socio-economic disparity revealed by the disaggregated data, that the Ontario government began to prioritize vaccine-rollout to the highly racialized, low-income neighbourhoods with the highest COVID-19 transmission rates.¹¹⁰ But even then, controversy immediately arose because five of the 114 designated postal codes, four in ridings represented by members of the governing Progressive Conservative party, had lower than average pandemic burdens.¹¹¹

The picture that emerges from the available disaggregated data brings to life how, in Ruth Wilson Gilmore's terms, racial capitalism accomplishes a process of "partition" in which racial and class difference is produced and exploited to create "group-differentiated vulnerability to premature death, in *distinct yet densely interconnected political geographies*".¹¹² This "antirelationality" creates "dense interconnections" within "amputated social relations" in which collective life is reduced "to the relations that sustain neoliberal democratic capitalism".¹¹³ That is the reality of life in the pandemic. As demonstrated in Toronto and Peel, wealthier, predominantly White residents whose work and income are largely uninterrupted, most frequently live in neighbourhoods with low rates of COVID-19 infection and death and are more commonly able to work from home reducing their exposure to workplace and community spread of the disease. However, this privilege is only possible because it is supported by the undervalued, low-wage labour of racialized workers continuing high-risk in-person and public facing work, travelling on public transit, and living in crowded neighbourhoods with high rates of COVID-19 infection and death. These are dense interconnections involving complex networks of low-wage racialized workers deployed in serving the personal "needs" and "wants" of consumers of privilege. But the connections are "amputated" in being strictly transactional interconnections within clearly designated roles of unequal power beyond which the physical and psychological geographies of the participants' lives do not intersect. The question, then, is whether legal and policy responses to the pandemic rectify or amplify this structural inequality.

neighbourhoods with highest numbers of racialized people have lowest vaccination rates: research" (16 April 2021), online: *Toronto Star* <www.thestar.com/news/gta/2021/04/16/toronto-neighbourhoods-with-highest-numbers-of-racialized-people-have-lowest-vaccination-rates-research.html>.

¹¹⁰ "Ontario's COVID-19 Vaccination Strategy Targets High-Risk Neighbourhoods" (13 April 2021), online (news release): *Office of the Premier* <news.ontario.ca/en/release/61124/ontarios-covid-19-vaccination-strategy-targets-high-risk-neighbourhoods>.

¹¹¹ Mike Crawley, "These 'hot spots' getting vaccine priority are less hard-hit by COVID-19 than Ontario average" (12 April 2021), online: *CBC News* <www.cbc.ca/news/canada/toronto/ontario-covid-19-vaccination-postal-code-hot-spots-1.5983155>.

¹¹² Melamed, *supra* note 22 at 78 (Quoting Ruth Wilson Gilmore; Italics in original).

¹¹³ *Ibid* at 78–79.

IV. Policy Choices Matter: Rectifying or Amplifying Structural Inequality

It bears emphasizing that the COVID-related social and economic harms outlined in Part III do not establish a “new” normal. They simply magnify the inequalities of the pre-pandemic reality. The harms flowed along the existing trajectories of inequality powered by the values, logic, and laws on which those unequal relationships are built. This Part focuses on two critical moments of political choice, one from the first wave of the pandemic, and one from the third wave, which had direct implications for large populations of racialized women workers.

During the first wave, COVID-19 infections and deaths were concentrated in long-term care facilities where large majorities of both residents (65-70%) and workers (>90%) are women.¹¹⁴ During this phase, attention was focused on the extent to which part-time and casual work patterns created vectors for disease transmission that increased risks for residents and workers. This issue is examined in light of the contrasting policy responses taken by provincial governments in British Columbia and Ontario. Priority vaccinations in long-term care facilities dampened infections in this sector in early 2021. As a result, during the third wave of the pandemic in the winter and spring of 2021, infections and deaths were concentrated among other low-wage, racialized workers whose labour serviced those who were able to work from home. The focus in the third wave, then, turned to the workplace and community risk posed by a lack of access to paid sick days. This issue is analyzed with reference to the policy responses taken by the federal government and by the provincial government in Ontario.¹¹⁵

A. Women’s Precarious Work in Long-Term Care

Care provided in long-term care facilities is not funded under the *Canada Health Act* as part of the national universal healthcare system. Instead, it is regulated at the provincial and territorial level where governments fund facilities at varying levels to provide a correspondingly varied range of services. One commonality, however, is that over the past two decades, as the population has aged and healthcare costs have increased, governments repeatedly chose to institute austerity measures and “turned to private sector delivery and for-profit managerial strategies that have ended up delivering lower quality care at greater expense, while shifting more of the costs and labour involved to seniors and their families.”¹¹⁶ Government choices to (i) adopt

¹¹⁴ Pat Armstrong et al, “Restoring Trust: COVID-19 and The Future of Long-Term Care” (June 2020) at 14, 16, online (pdf): *Royal Society of Canada* <[rsc-rc.ca/sites/default/files/LTC_PB_ES_EN_0.pdf](https://www.rsc-rc.ca/sites/default/files/LTC_PB_ES_EN_0.pdf)> [Armstrong et al, “Restoring Trust”].

¹¹⁵ As addressed below, Ontario’s approach was later adopted by several other provinces.

¹¹⁶ Canadian Women’s Foundation et al, *supra* note 62 at 22–23. See also Pat Armstrong et al, “Reimagining Long-term Residential Care in the COVID-19 Crisis” (24 April 2020), online (pdf): *Canadian Centre for Policy Alternatives* <www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2020/04/Reimagining

austerity agendas; (ii) apply unrealistic funding formulas;¹¹⁷ (iii) lower tax rates; (iv) promote private for-profit ownership; and (v) preserve or restore legislation that allows for differential treatment of part-time workers doing the same work as full-time workers, encouraged employer cost-cutting strategies. Services such as food preparation, laundry and housekeeping services were increasingly contracted out to reduce staffing costs, creating increasingly precarious low-paid work without benefits for the women doing those jobs.¹¹⁸ Staffing levels of doctors, nurses, and other regulated health professionals were reduced, transferring resident care to lower paid workers. As a result, “upwards of 90% of direct resident care in nursing homes” across the country is performed by personal support workers (PSWs) and other care aides.¹¹⁹ These legal and policy choices encourage employers to replace full-time jobs with lower paid part-time jobs doing the same work and to expand part-time work at greater rates than full-time.

It is frequently said that the ‘conditions of work are the conditions of care’¹²⁰ which, even pre-pandemic, imposed systemic hardship on personal service workers (PSWs)—the bedrock of long-term care. Across Canada, 90% of PSWs are women, 60% are immigrants or migrants whose first language is not English,¹²¹ and around 40% are racialized.¹²² PSWs are the lowest paid workers in the nursing home hierarchy, earning between \$12 to \$24 per hour across the country.¹²³ That said, PSW annual earnings are lower than this hourly wage would suggest. Employers rely overwhelmingly on part-time (48%) and casual staff (11%) to fill PSW positions, even

ing%20residential%20care%20COVID%20crisis.pdf> at 5–6 [“Armstrong et al, “Re-Imagining Long-Term Care”].

¹¹⁷ In Ontario PSWs in long-term care are funded at a level that allows them only six minutes per resident to wake them, perform their morning toileting and hygiene routines, dress them and ready them for the day’s activities. In 2018, Unifor ran a social media campaign, the #SixMinuteChallenge, challenging members of the public to see how much of their own morning routine they could complete within six minutes. See Jackie Dunham, “Six Minute Challenge: Can you get ready as fast as nursing home residents?” (10 January 2018), online: *CTV News* <www.ctvnews.ca/canada/six-minute-challenge-can-you-get-ready-as-fast-as-nursing-home-residents-1.3753212>.

¹¹⁸ This was the factual underpinning to *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, which ruled on freedom of association implications of the contracting out but not the equality rights impacts; See also Judy Fudge, “Conceptualizing Collective Bargaining under the Charter: The Enduring Problem of Substantive Equality” (2008) 42 SCLR 213.

¹¹⁹ Armstrong et al, “Restoring Trust”, *supra* note 114 at 14.

¹²⁰ See e.g. Jennifer L Dobbelsteyn, “*The conditions of work are the conditions of care*”: a focused ethnography of teamwork in a senior care facility in New Brunswick (PhD Dissertation, University of New Brunswick, 2018) [unpublished].

¹²¹ Armstrong et al, “Restoring Trust”, *supra* note 114 at 14, 19.

¹²² Statistics Canada, *2016 Census of Population*, *supra* note 47.

¹²³ Armstrong et al, “Restoring Trust”, *supra* note 114 at 18.

though half of these employees would rather work more hours.¹²⁴ As a result, between 25% to 30% of PSWs hold multiple part-time jobs in multiple healthcare facilities.¹²⁵ To put this in perspective, healthcare and social assistance is the industrial sector with the highest proportion of multiple jobholding, with 8.7% of workers in this sector holding more than one job.¹²⁶ Finally, PSWs in long-term care facilities regularly work short-staffed because employers' business model depends heavily on increasing unpaid labour by family members, volunteers and private caregivers paid by the resident's family (all, predominantly women), as well as regular staff members who stay beyond their shifts without pay.¹²⁷

Policy choices over two decades which prioritized the interests of businesses seeking lower tax rates and for-profit health facilities seeking to increase dividends to their shareholders, came at the direct cost of making PSWs' work, economic security, and quality of life increasingly precarious, and eroding the quality of life and care for a largely female resident population. When the pandemic hit, governments recognized that PSWs' pattern of multiple jobholding increased the risk of spreading COVID-19 throughout the long-term care system. British Columbia and Ontario approached this risk in diametrically opposed ways: BC by addressing the roots of precarious work, Ontario by exacerbating them.

British Columbia confirmed its first case of COVID-19 on 28 January 2020¹²⁸ and its first outbreak in a long-term care facility on 7 March 2020.¹²⁹ Beginning on 26 March 2020, BC's Provincial Health Officer Dr. Bonnie Henry issued a series of orders under the *Public Health Act* applicable to all direct employers, contractors, and subcontractors of labour to healthcare facilities which aimed to restrict movement of

¹²⁴ Long-Term Care Staffing Study Advisory Group, "Long-Term Care Staffing Study" (30 July 2020) at 8, online (pdf): *Ontario Ministry of Long-Term Care* <files.ontario.ca/mltc-long-term-care-staffing-study-en-2020-07-31.pdf>.

¹²⁵ Armstrong et al, "Restoring Trust", *supra* note 114 at 19. Many PSWs hold multiple jobs within the long-term care sector, but approximately 15% hold second or third jobs outside of long-term care, including in low wage work such as "home care, hospital/acute care, assisted living/group homes, cleaning services, and grocery shops": See Yinfei Duan et al, "Care Aides Working Multiple Jobs: Considerations for Staffing Policies in Long-Term Care Homes During and After the COVID-19 Pandemic" (2020) 21 *J Post-Acute & Long-Term Care Medicine* 1390 at 1391.

¹²⁶ Meghan Fulford & Martha Patterson, "Multiple jobholders in Canada" (28 October 2019) at 6, online (pdf): *Statistics Canada* <publications.gc.ca/collections/collection_2019/statcan/71-222-x/71-222-x2019003-eng.pdf>.

¹²⁷ Armstrong et al, "Restoring Trust", *supra* note 114 at 15, 19; Armstrong et al, "Re-Imagining Long-Term Care", *supra* note 116 at 7–9

¹²⁸ Amy Judd, "BC marks one-year anniversary of first confirmed case of COVID-19" (28 January 2021), online: *Global News* <globalnews.ca/news/7604970/bc-one-year-first-case-covid-19-anniversary/>.

¹²⁹ Sean Boynton, "BC declares COVID-19 outbreak at North Vancouver care home, 6 new cases announced" (7 March 2020), online: *Global News* <globalnews.ca/news/6645114/coronavirus-bc-cases-update-march-7/>.

staff between facilities to prevent disease transmission.¹³⁰ One such Order, released on 15 April 2020, transferred authority to make staffing decisions from individual facilities and centralized them with the relevant medical health officer (MHO) for a period of six months.¹³¹ The MHO, in turn, was guided by twelve “Principles and Process for Allocation of Staff to a Facility” which protected workers’ job security, seniority, and ability to express preferences as to the facility where they would work; set out processes for making staffing decisions through “ongoing dialogue and problem solving” between the Provincial Health Officer, MHO, health authorities, employers, unions, the Ministry of Health, and other affected parties; prioritized keeping staff in the workplace where they did the most hours to maintain institutional knowledge and continuity of care; and set out goals to maintain the maximum hours of care.¹³² The BC government also promised a review of the long-term care sector, including a commitment to address the pay and precarious conditions of work in the sector.¹³³

The centralized allocation of staff is anchored in the “critical” principle that allocation decisions must “ensure that there is sufficient staff at every facility to safely meet patient care needs”.¹³⁴ Centralized staffing ensured that workers worked at only one facility unless specific approval was received from the MOH.¹³⁵ All long-term care workers under centralized staffing, whether they had previously been full-time, part-time, or casual workers, were treated and paid as full-time workers.¹³⁶ This ensured their economic security and removed the pressure to work at other facilities. Significantly, the Order also ensured that all workers received living wages. All workers’ wages were raised to the rate paid to unionized workers in government-run facilities.¹³⁷ For some PSWs, this represented a \$7 per hour wage increase. Employers were prohibited from terminating employment and prohibited from terminating or reducing worker benefits.¹³⁸

¹³⁰ “Facility Staff Assignment Order” (15 April 2020), online (pdf): *Government of British Columbia* <www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/covid-19/covid-19-pho-order-long-term-care-facility-staff-assignment.pdf>.

¹³¹ Mike Hagar & Andrea Woo, “BC health officer takes over nursing-home staffing as coronavirus spreads” (2 April 2020), online: *Globe and Mail* <www.theglobeandmail.com/canada/british-columbia/article-bc-health-officer-takes-over-nursing-home-staffing-as-coronavirus/>.

¹³² “Facility Staff Assignment Order”, *supra* note 130 at Appendix A.

¹³³ Hagar & Woo, *supra* note 131.

¹³⁴ “Facility Staff Assignment Order”, *supra* note 130 at Appendix A.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Moira Wyton, “BC Boosts Pay for Long-Term Care Workers amidst COVID-19” (1 April 2020), online: *The Tyee* <theyee.ca/News/2020/04/01/Long-Term-Care-Worker-Pay-Boosted/>.

BC's approach, then, acknowledged and directly addressed the structural inequalities that undermined both the quality of work and quality of care in the long-term care system. It set out a clearly articulated six-month plan that established certainty and stability for those in the sector. BC acknowledged that precarious work necessitated multiple jobholding and designed its response to pre-empt the economic pressures that individual healthcare workers would face if their employment was restricted to a single workplace. It increased funding to the sector in a way that ensured workers' certainty in their wages for the duration of the pandemic. Its response put resident and worker safety, and workers' economic security at the centre of its planning. In this way, it also modelled a foundation of full-time work at living wages that could inform the planned review of the system.

By contrast, Ontario confirmed its first COVID-19 case on 25 January 2020.¹³⁹ Ontario acted to address the risk posed by multiple jobholding in long-term care three months later, when on 15 April 2020, it issued an Order under the *Emergency Management and Civil Protection Act* that took effect on 22 April 2020.¹⁴⁰ The Order was a brief seven sections. It ordered each employee in a long-term care facility or retirement home to work at only one facility.¹⁴¹ It ordered long-term care providers and retirement homes to ensure that employees worked only at one facility.¹⁴² It also ordered employees to do the work that they were assigned even if it would be in breach of a collective agreement.¹⁴³ This gave employers license to implement staff redeployment plans "without complying with provisions of a collective agreement, including lay-off, seniority/service or bumping provisions" and to use non-unionized workers to do bargaining unit work.¹⁴⁴ The original order expired after 14 days and was renewed multiple times, creating a state of perpetual uncertainty, before being formalized as a regulation.

Ontario's strategy diverged from BC's in significant ways. The response did not examine underlying structures of inequality and precarity. It adopted an individualized rather than structural approach which exacerbated the economic insecurity of the most precariously employed long-term care workers while actively inviting employers to pursue strategies that undermine collective agreement rights and workers' collective representation. Ontario's approach placed the entire financial

¹³⁹ Ministry of Health, News Release, "Ontario Confirms First Case of Wuhan Novel Coronavirus" (25 January 2020), online: *Government of Ontario* <news.ontario.ca/en/release/55486/ontario-confirms-first-case-of-wuhan-novel-coronavirus>.

¹⁴⁰ O Reg 146/20.

¹⁴¹ *Ibid*, s 4.

¹⁴² *Ibid*, s 6.

¹⁴³ *Ibid*, s 5(b).

¹⁴⁴ "Ontario Implements Third Emergency Order to Support Long-Term Care Homes Amid COVID-19 Outbreak" (15 April 2020), online: *Matthew Dinsdale Global HR Lawyers* <matthewdinsdale.com/ontario-implements-second-emergency-order-to-support-long-term-care-homes-amid-covid-19-outbreak/>.

impact of this strategy on the individual worker whose income would be limited to what she could earn in one part-time job. This created staffing chaos as workers held onto the jobs that offered the most secure earning. But, the fact this was economically unsustainable created pressure on workers to continue working at multiple workplaces. Ontario exacerbated this by setting up a relationship of distrust and surveillance by making employers responsible for monitoring worker compliance with the one-workplace rule. This fuels a public narrative that demonizes workers' individual 'choices' and effectively blames them for the disease spread. Ontario later provided short term "pandemic pay" that boosted wages for long-term care workers and other frontline workers by \$4 per hour for hours worked between 24 April 2020 and 13 August 2020.¹⁴⁵ A second, temporary round of pandemic pay was announced on 1 October 2020, this time at \$3 per hour, and available to a much smaller group of workers, including PSWs.¹⁴⁶ But by January 2021, a total of 217 long-term care facilities had not made those payments to their PSW staff despite receiving the funds from the government.¹⁴⁷ Overall, Ontario's response was characterized by uncertainty and inconsistency and it magnified insecurity.

Importantly, all of this transpired within a field of work facing persistent challenges to worker retention. Ontario's own 2020 staffing report notes that 40% of PSWs leave the healthcare sector within a year of graduating or completing their training.¹⁴⁸ Among PSWs with two or more years of work experience in long-term care, there is an annual turnover rate of 25%.¹⁴⁹ The staffing report further notes that "50% of PSWs are retained in the health care sector for fewer than 5 years, and 43% left the sector due to burnout [from] working short staffed."¹⁵⁰ With working conditions even worse during the pandemic, long-term care facilities in Ontario are experiencing dangerous levels of understaffing as PSWs increasingly exit the field.¹⁵¹ Even knowing this, Ontario made a choice not to address the structural roots of poor working conditions and low pay. Instead, Ontario proposed to provide free tuition to

¹⁴⁵ "Archived - COVID-19: Temporary pandemic pay" (5 May 2020), online: *Government of Ontario* <ontario.ca/page/covid-19-temporary-pandemic-pay>.

¹⁴⁶ "Temporary wage increase for direct support workers" (last modified 11 June 2021), online: *Ministry of Children Community, and Social Services* <www.mcscs.gov.on.ca/en/mcscs/programs/developmental/servicesupport/temp-wage-increase.aspx>.

¹⁴⁷ Kerissa Wilson, "Over 200 long-term care homes haven't paid PSWs \$3 per hour temporary wage increase" (16 January 2021), online: *CTV News* <toronto.ctvnews.ca/over-200-long-term-care-homes-haven-t-paid-psws-3-per-hour-temporary-wage-increase-1.5269713>.

¹⁴⁸ Long-Term Care Staffing Study Advisory Group, *supra* note 124 at 9.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Eric Andrew-Gee & Laura Stone, "Understaffing turned seniors' homes into COVID-19 danger zones, health workers say. What can be done to fix that?" (10 August 2020), online: *Globe and Mail* <www.theglobeandmail.com/canada/article-understaffing-turned-seniors-homes-into-covid-19-danger-zones-health/>; Don Mitchell, "Fear, stress factors in staffing shortages at Ontario's long-term care homes amid COVID-19 crisis" (26 November 2020), online: *Global News* <globalnews.ca/news/7482855/coronavirus-psw-shortage-ontario-long-term-care/>.

people who want to train as PSWs. But when these future workers complete their training, they will enter jobs with the same working conditions that have been driving the long-term labour shortages and worker burnout.¹⁵²

B. Access to Paid Sick Days

Even absent a pandemic, it is a basic tenet of public health that staying home when sick is a critical strategy to reduce the spread of disease. Well before COVID-19, public health agencies have been recommending that people should stay at home when they are sick with an infectious disease.¹⁵³ And global, cross-jurisdictional comparisons have repeatedly confirmed that access to paid sick days reduces the community spread of respiratory illness and influenza, and reduces the rate at which children who are sick attend school or childcare.¹⁵⁴ By contrast, workers without access to paid sick days “are 1.5 times more likely to go to work contagious ... and less likely to see a health care provider when sick.”¹⁵⁵ Meanwhile, studies of jurisdictions which have introduced paid sick days have demonstrated that there is little to no economic impact on employers and that employers’ fears that workers would abuse sick days were unfounded.¹⁵⁶ Yet, in Canada, most workers lack access to paid sick days.

Under the constitutional division of powers, minimum standards for most employment in Canada is regulated at the provincial level.¹⁵⁷ The federal government only has jurisdiction to legislate minimum standards for employment that is federal in nature or that crosses provincial borders (such as banking, transportation, communications).¹⁵⁸ The federal government does, however, have jurisdiction over employment insurance.¹⁵⁹ As a result, the issue of paid leaves from work has been constructed in Canada through a mix of provincial legislation that provides job-protection during an extended leave from work, while income replacement has been

¹⁵² See Julie Ireton, “Ontario’s PSW plans include free tuition for sped-up training”, (25 February 2021), online: *CBC News* <www.cbc.ca/news/canada/ottawa/ontario-psw-train-jobs-tuition-1.5926837>.

¹⁵³ Jody Heymann et al, “Protecting health during COVID-19 and beyond: A global examination of paid sick leave design in 193 countries” (2020) 15:7 *Global Public Health* 925 at 925.

¹⁵⁴ *Ibid* at 925–926.

¹⁵⁵ *Ibid* at 925.

¹⁵⁶ “Still Working on the Edge: Building Decent Jobs from the Ground Up” (2016) at 31, online (pdf): *Workers Action Centre* <workersactioncentre.org/wp-content/uploads/2016/07/StillWorkingOnTheEdge-Exec-Summary-web.pdf>; Heymann et al, *supra* note 153 at 931 (the “economic cost[s] of providing paid sick leave are modest compared to the economic costs of a pandemic, particularly once the more rapid spread of disease caused by workers going to work sick is factored in.”)

¹⁵⁷ *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 92(13).

¹⁵⁸ *Ibid*, s 91.

¹⁵⁹ *Ibid*, s 91(2A).

provided through the federal *Employment Insurance Act*. Provincial employment standards laws provide for a wide range of unpaid leave of varying length during which a worker's employment is protected. For example, Ontario's employment standards legislation provides for job-protected pregnancy leave, parental leave, family medical leave, organ donor leave, family caregiver leave, critical illness leave, child death leave, crime-related child disappearance leave, and domestic and sexual violence leave.¹⁶⁰ These leaves range in duration from 8 weeks (family caregiver leave) to 104 weeks (child death leave).¹⁶¹ Under the provincial legislation, all of these leaves are unpaid, with the exception of the first five days of domestic and sexual violence leave, which must be funded by the employer.¹⁶² Whether or not a worker on any of the provincially recognized leaves of absence is entitled to income replacement depends on whether the leave is recognized under the federal *Employment Insurance Act*.

Canada's *Employment Insurance Act* provides access¹⁶³ to partial income replacement at a rate of 55% of regular earnings to a maximum of \$595 per week, for up to 15 weeks, when a worker has a prescribed illness, pregnancy, injury, or when they must quarantine or provide support to a critically ill adult(s).¹⁶⁴ However, income support under the *Employment Insurance Act* is only available for illness resulting in a lengthy absence from work, and a worker can only receive benefits for weeks during which the illness resulted in a loss of more than 40% of their regular earnings.¹⁶⁵ The benefits are also subject to a one-week waiting period,¹⁶⁶ meaning that a worker relying on this benefit will receive their first income support only after a second full week of reduced earnings.

However, this sick leave recognized under provincial employment standards laws and for which income replacement is provided under the *Employment Insurance Act* cannot be accessed for short absences which involve only a day, or even a few days of sickness. As a result, paid sick *leave* is a very different benefit from paid sick *days*, the latter of which are paid for by employers as a cost to the business and which workers can access directly, at their own initiative, with no preconditions or preapprovals, in single or consecutive days. With paid sick days, a worker can simply "call in sick" without any penalty or interruption to their pay and with security knowing that their job is also protected. The access to leave and continuity of pay is seamless. This distinction between paid sick *days* and paid sick *leave* is particularly

¹⁶⁰ *Employment Standards Act*, SO 2000, c 41, s 46–49.7 [Ontario ESA].

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ To be eligible for benefits, a worker must have accumulated the prescribed hours of work in insurable employment during the preceding twelve months: *Employment Insurance Act*, SC 1996, c 23, ss 7–8.

¹⁶⁴ *Employment Insurance Act*, *supra* note 163, s 12(3).

¹⁶⁵ SOR/96-332, s 14(2).

¹⁶⁶ *Employment Insurance Act*, *supra* note 163, s 13.

significant for low-wage workers whose economic precarity means that they cannot afford taking unpaid time off work, even for a matter of days, without risking their ability to pay rent and other basic living expenses. This risk is particularly great for workers who provide labour through temporary help agencies who risk losing access to continuing or future assignments if they miss work, and for migrant workers who frequently face termination and/or deportation if they miss work due to illness or injury.¹⁶⁷

Employment standards laws across the country generally protect a limited number of *unpaid* sick days. However, as of April 2021, only three Canadian jurisdictions protect *paid* sick days. Even then the statutory protection is meager. Workers in federally regulated workplaces are entitled to 3 paid sick days per year,¹⁶⁸ while workers in Quebec and PEI are entitled to two paid days and one paid day, respectively.¹⁶⁹ Ontario amended its *Employment Standards Act* in 2018 to introduce two paid sick days,¹⁷⁰ but these were immediately repealed after a provincial election brought a Progressive Conservative government into power later that same year.¹⁷¹ This lack of statutory protection for paid sick days results in a situation where the only workers who do have paid sick days tend to be higher earning, unionized, and/or more privileged workers who have this protection through their collective agreements and professional or executive contracts.

Across Canada, 58% of all workers have no access to paid sick days while 70% of low-wage, precarious and part-time workers lack this protection.¹⁷² Within the disproportionately gendered and racialized sectors most directly affected by COVID-19, 50% of healthcare workers and 75% of service sector workers lack paid sick days.¹⁷³ Beyond the gendered and racialized skew of the populations of workers without paid sick days, the need for this protection is intertwined with a further gendered dynamic. Due to gendered norms around responsibility for unpaid child and family care, women more often miss work because of a child's or family member's illness than men and miss work because of other unpaid family responsibilities at twice

¹⁶⁷ See e.g. Aaron M Orkin et al, "Medical Repatriation of Migrant Farm Workers in Ontario: A Descriptive Analysis" (2014) 2:3 Can Medical Association J Open E192.

¹⁶⁸ *Canada Labour Code*, RSC 1985, c L-2, s 206.6(1).

¹⁶⁹ *Act Respecting Labour Standards*, CQLR, c N-1.1, s 79.16; *Employment Standards Act*, RSPEI 1988, c E-6.2, s 22.2(4).

¹⁷⁰ *Ontario ESA*, *supra* note 160 was amended by the *Fair Workplaces, Better Jobs Act*, SO 2017, c 22, s 39(1). This revision introduced s 50(8) to the *Ontario ESA*.

¹⁷¹ *Ontario ESA*, *supra* note 160 was amended by *Making Ontario Open for Business Act*, SO 2018, c 14, s 19 [*Ontario Open for Business Act*], which repealed s 50 of the *Ontario ESA* and replaced it with a new s 50(1) that provided two days of unpaid sick leave.

¹⁷² "Before It's Too Late: How to close the paid sick days gap during COVID-19 and beyond" (19 August 2020) at 4, online (pdf): *Decent Work and Health Network* <d3n8a8pro7vhmx.cloudfront.net/dwhn/pages/135/attachments/original/1604082294/DWHN_BeforeItsTooLate.pdf?1604082294> ["Before It's Too Late"].

¹⁷³ *Ibid* at 5.

the rate of men.¹⁷⁴ Some provinces provide job protected days for family responsibilities, but again, this statutory protection is limited to a minimal number of days and is *unpaid*.¹⁷⁵

In view of this gap in legislative protection, access to statutorily guaranteed employer-paid paid sick days has been a consistent demand of workers for years before the pandemic and throughout the pandemic. But the issue came into urgent focus in the pandemic's third wave as disaggregated data increasingly became available which identified the workplaces that are key sites of transmission and the communities of workers that bore the brunt of COVID-19 infections and deaths.

Vaccinations have flattened the curve in long-term care facilities which had until January 2021 accounted for more than 80% of all COVID-19 infections and deaths.¹⁷⁶ As community spread continued to rise, other sites of transmission came under closer scrutiny. In January 2021, Toronto Public Health began to release weekly reports naming the specific workplaces experiencing COVID-19 outbreaks.¹⁷⁷ Combined with the broader provincial data on COVID-19 infections in neighbourhoods measured by ethnic diversity and material deprivation, a more detailed picture of who was getting infected with COVID-19 emerged. The data revealed that the overwhelming majority of infections in the third wave arose in (i) manufacturing; (ii) shipping and warehousing, delivery and construction; (iii) bars and nightclubs, (iv) food processing; and (v) retail¹⁷⁸ – all sectors which are disproportionately racialized, and all, other than manufacturing and construction, which are also disproportionately gendered female. With individual workplaces named, it became easier to draw connections between those locations and the communities that provide their labour force. Again, data confirmed that the highly racialized, low-wage workers who live in the ethnically concentrated neighbourhoods in the northwest corner of Toronto were those most disproportionately being infected and dying.¹⁷⁹

¹⁷⁴ Moyer, *supra* note 28 at 17–18. Some provinces provide unpaid family responsibility leave days, but these are very limited in number. See e.g. *Ontario ESA, supra* note 160, s 50.0.1.

¹⁷⁵ See e.g. *Ontario ESA, supra* note 160, s 50.0.1(2)–(3), which provides for three days of unpaid leave to care for a closed list of identified family members.

¹⁷⁶ Armstrong et al, “Restoring Trust”, *supra* note 114 at 5.

¹⁷⁷ Sara Mojtchedzadeh, “Health authorities to start naming specific Toronto workplaces with significant COVID-19 outbreaks” (4 January 2021), online: *Toronto Star* <www.thestar.com/business/2021/01/04/health-authorities-to-identify-workplaces-with-significant-covid-19-outbreaks.html>.

¹⁷⁸ *Ibid.*

¹⁷⁹ COVID-19: Status of Cases in Toronto (last accessed 16 April 2021), online: *City of Toronto* <www.toronto.ca/home/covid-19/covid-19-latest-city-of-toronto-news/covid-19-status-of-cases-in-toronto/>.

When the pandemic hit, provinces introduced temporary emergency leave to protect workers from being terminated for COVID-19 related absences.¹⁸⁰ But, again, this provincial legislation which anticipated extended absences due to workplace shut downs, quarantines, illness, and caring for family members, provided only for unpaid leave. In line with the constitutional division of powers outlined above, the federal government provided income replacement by introducing the Canada Sickness Recovery Benefit (CSRB) which is administered through the Canada Revenue Agency. This limited income replacement scheme was introduced seven months into the pandemic, in late September 2020.¹⁸¹

The CSRB is a temporary benefit available to employees or self-employed individuals in both federally and provincially regulated workplaces “who are unable to work because they are sick or need to self-isolate due to COVID-19, or have an underlying health condition that puts them at greater risk of getting COVID-19”.¹⁸² Individuals are only eligible if they have been unable to work for at least one full week between 27 September 2020 and 25 September 2021. Workers must make a separate application for each week that they are unable to work, and they must apply within 60 days of the end of that week’s absence. They can receive a benefit of \$500 per week (\$450 after taxes are withheld) for a maximum of four weeks.

As the majority of workers’ employment and entitlement to sick days is regulated provincially, the federal government admittedly has limited tools by which to deliver financial support for such absences. While CSRB flows some support to workers absent due to COVID-19, the program is fundamentally different than paid sick days. This difference undermines its accessibility for the most impoverished workers who are in greatest need of the support. CSRB is, at best, a temporary band aid.

Paid sick days create economic security, and are an effective public health tool, precisely because workers know, in advance, that they can stay home when sick without interruption to or loss of income, and without risk of losing their job. Access is immediate, straightforward and within the discretion of the worker to activate. Workers can determine how many of their paid sick days they need to take at a time. They can use them one day at a time or in a block.¹⁸³ By contrast, CSRB requires

¹⁸⁰ See e.g. *Ontario ESA*, *supra* note 16, s 50.1.

¹⁸¹ Employment and Social Development Canada, News Release, “Government of Canada introduces legislation to support Canadians through Recovery Benefits and extend access to funds for emergency measures” (24 September 2020), online: *Cision* <www.newswire.ca/news-releases/government-of-canada-introduces-legislation-to-support-canadians-through-recovery-benefits-and-extend-access-to-funds-for-emergency-measures-816796512.html>.

¹⁸² “Canada Recovery Sickness Benefit” (last modified 17 June 2021), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/benefits/recovery-sickness-benefit.html>.

¹⁸³ *Canada Labour Code*, *supra* note 168, s 206.6(3) provides, with respect to the three paid sick days, that “[t]he leave of absence may be taken in one or more periods. The employer may require that each period of leave be of not less than one day’s duration.”

workers to incur both a lengthy illness and a loss of income before they are eligible to apply for a partial reimbursement of lost wages. First, a worker cannot apply for CSRB until after they have missed at least one full week of work. Most precarious and low-wage workers cannot afford to lose a week's pay without risking their ability to pay rent or cover the cost of food and other basic needs. As a result, even this initial threshold of eligibility is out of reach for the lowest paid workers. Second, in most of the country, the \$500 weekly benefit is significantly below earnings from a 40-hour work week paid at minimum wages.¹⁸⁴ For most workers then, even after receiving CSRB, they will suffer income loss. Again, this creates a solid barrier for the most marginalized workers. Third, in order to apply, applicants must open an account with Canada Revenue Agency and submit documents including recent pay slips, an employment verification letter, a Record of Employment, and bank statements showing their name, address and payroll deposit in order to verify their entitlement.¹⁸⁵ This creates added delays for those who manage to apply, but it also means that workers do not know in advance whether their claim will be accepted and verified. Meanwhile, the requirement to have a Canada Revenue Agency account and to submit documentation is a non-starter for undocumented workers who will not have the formal records needed for verification or will be hesitant to submit documents if it will risk disclosing their status and opening the potential for detention and deportation. In contrast, undocumented workers would be entitled to paid sick days under employment standards legislation as all employment standards are available to workers regardless of migration status.¹⁸⁶ Finally, the benefit is a time-limited exception which does not change the underlying precarity that workers experience.

During the pandemic, worker and community mobilization to demand paid sick days has been most intense in Ontario. The community was already educated on the issue as it had been a core part of a pre-existing, broad-based multi-year campaign by \$15 and Fairness¹⁸⁷ and the sting of an ideologically driven repeal of those rights 18 months before COVID-19 hit is still fresh.¹⁸⁸ The current mobilization in Ontario, though, is exponentially deeper and broader than it was in 2018, now encompassing an expansive range of health professionals, public health officials, mayors, small businesses and labour. The Decent Work and Health Network of health professionals

¹⁸⁴ With minimum wages respectively of \$11.45, \$11.75, and \$11.90, workers in Saskatchewan, New Brunswick and Manitoba would earn less than \$500 in a 40-hour work week. In Newfoundland and Labrador, with a minimum wage of \$12.50, workers would earn \$500 in a 40-hour work week. With minimum wages that range from \$12.95 to \$16.00 per hour, workers in all other jurisdictions receive less through CSRB than working at minimum wage for a 40-hour week.

¹⁸⁵ "Canada Recovery Sickness Benefit (CSRB): How to apply" (last modified 19 August 2021), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/benefits/recovery-sickness-benefit/crsb-how-apply.html>.

¹⁸⁶ The definition of "employee" is employment standards legislation makes no distinction on the basis of migration status: see e.g. *Ontario ESA*, *supra* note 160, s 1(1).

¹⁸⁷ See "Resources", online: *Fight for \$15 and Fairness* <www.15andfairness.org/resources>.

¹⁸⁸ Paid sick days and other employment standards were repealed by *Ontario Open for Business Act*, *supra* note 171.

released a report making the case for universally accessible paid sick days in August 2020.¹⁸⁹ A report from Canada's Chief Public Health Officer, Dr. Teresa Tam, in October 2020, called for paid sick leave as an essential part of an evidence-based health equity approach to combating COVID-19.¹⁹⁰ A report by Corporate Knights, also in October 2020, that studied paid sick leave in 43 countries identified Canada among the 12 countries whose sick leave policies were insufficient.¹⁹¹ Formal calls for paid sick days also came from the Ontario Medical Association,¹⁹² the Ontario Big City Mayors (an organization of mayors of communities with more than 100,000 residents that accounts for 70% of the province's population),¹⁹³ Toronto's Chief Medical Officer and the Toronto Board of Health,¹⁹⁴ 10 federations of labour,¹⁹⁵ the Better Way Alliance (an organization of small business owners),¹⁹⁶ and the Association of Local Public Health Agencies which represents all 34 local medical officers of health in the province.¹⁹⁷ In addition, two Private Member's Bills were introduced in the Ontario legislature that would have enacted permanent protection for paid sick days and protection for additional paid sick days during public health emergencies. Bill 239, the *Stay Home If You Are Sick Act, 2021* introduced by NDP MPP Peggy Sattler in December 2020 was defeated at Second Reading.¹⁹⁸ A second, Bill 247, the *Paid Personal Emergency Leave Now Act, 2021*, introduced by Liberal

¹⁸⁹ "Before It's Too Late", *supra* note 172.

¹⁹⁰ Chief Public Health Officer of Canada, "From Risk to Resilience: An Equity Approach to COVID-19" (October 2020), online (pdf): *Government of Canada* <www.canada.ca/content/dam/phac-aspc/documents/corporate/publications/chief-public-health-officer-reports-state-public-health-canada/from-risk-resilience-equity-approach-covid-19/cpho-covid-report-eng.pdf>.

¹⁹¹ "Paid Sick Leave Provision Report 2020" (2020), online (pdf): *Corporate Knights* <www.corporateknights.com/wp-content/uploads/2020/10/Paid-Sick-Leave-Provision-Report-2020_Final.pdf>.

¹⁹² Ontario Medical Association, News Release "Ontario's doctors call for paid sick days" (10 December 2020), online: *Ontario Medical Association* <www.oma.org/newsroom/news/2020/dec/ontarios-doctors-call-for-paid-sick-days/>.

¹⁹³ "Ontario's Big City Mayors start 2021 focusing on pandemic, worker protection and recovery efforts" (15 January 2021), online (news release): *Ontario's Big City Mayors* <www.ontariobigcitymayors.ca/news/details.php?id=721>.

¹⁹⁴ "Toronto's top doctor calls for province to allow workers 10 days of sick leave during pandemic" (11 January 2021), online: *CBC News* <www.cbc.ca/news/canada/toronto/ontario-paid-sick-leave-1.5868581>.

¹⁹⁵ Canada's Provincial and Territorial Federations of Labour, Joint Statement, "We can't afford to wait. It's time for paid sick leave for every worker in Canada" (25 February 2021), online: *Ontario Federation of Labour* <ofl.ca/we-cant-afford-to-wait-its-time-for-paid-sick-leave-for-every-worker-in-canada/>.

¹⁹⁶ "Small investment, big payback': Business owners call on Ford government to legislate paid sick leave" (10 February 2021), online: *CBC News* <www.cbc.ca/news/canada/toronto/business-owners-paid-sick-leave-ontario-government-better-way-alliance-1.5907723>.

¹⁹⁷ Chris Herhalt, "All of Ontario's local medical officers ask Ford government to reinstate paid sick leave" (11 February 2021), online: *CP24* <www.cp24.com/news/all-of-ontario-s-local-medical-officers-ask-ford-government-to-reinstate-paid-sick-leave-1.5304636>.

¹⁹⁸ Bill 239, *An Act to amend the Employment Standards Act, 2000 with respect to paid leave*, 1 Sess, 42nd Leg, Ontario, 2020 (first reading 8 December 2020).

MPP Michel Coteau, was also defeated at Second Reading.¹⁹⁹ In total between 2018 and April 2021, the Ontario government voted against resolutions, motions, and private member bills in favour of paid sick days 23 times, even though 83% of people in Ontario favour paid sick days.²⁰⁰

In the face of this broad consensus, Ontario's refusal to consider enacting paid sick days stands as an ideological commitment to prioritizing private profit over worker and community safety. That ideology stands in defiance of the reality of human embodiment. Human beings get sick. That is inevitable. A legislative choice to place the full economic risk of that inevitability on individual workers encodes an extreme capitulation to the demands of profit accumulation at the cost of human reality. It tells employers that they can demand a workforce that never gets sick and can set their expectations of profit without consideration of the embodied essence of their human labour force. It is an active political choice to sacrifice lives of racialized working-class workers. The illogic and cruelty of that political calculation, and the sacrifice it demands of the essential workers who are performatively lauded as "heroes" for facing personal health risks while serving others' safety and comfort, demonstrates beyond any ambiguity that "we" are not all in this together.

That social divide was made even more blatant on 16 April 2021. On that day, as COVID-19 infection rates were soaring among Ontario's low-wage racialized workforce, the provincial government enacted sweeping new police powers to enforce stay-at-home orders.²⁰¹ Police were granted unrestricted power to stop both individuals and vehicles to question any person who was outside their residence, demand the reason for being outside their residence, and require them to provide their home address. Failure to provide the information would result in a \$750 fine.²⁰² An intense public outcry immediately condemned the policy for heightening the risk to the very low-income racialized communities of essential workers who continued to work during COVID-19, who were already experiencing the highest rates of infection, and who are already subject to racial profiling. After police services across the province refused to exercise the powers in the face of the public pushback, the provincial government backtracked somewhat to permit police to stop people "only if they are

¹⁹⁹ Bill 247, *An Act to amend the Employment Standards Act, 2000 with respect to personal emergency leave*, 1 Sess, 42nd Leg, Ontario, 2021 (first reading 17 February 2021).

²⁰⁰ Matt Dionne, "The Government of Ontario votes against paid sick days for 23rd time" (26 April 2021), online: *Insauga* <www.insauga.com/the-government-of-ontario-votes-against-paid-sick-days-for-23rd-time>.

²⁰¹ Chris Fox, "Ontario introduces new restrictions on inter-provincial travel, lower capacity limits at essential businesses" (16 April 2021), online: *CP24* <www.cp24.com/news/ontario-introduces-new-restrictions-on-inter-provincial-travel-lower-capacity-limits-at-essential-businesses-1.5389929>.

²⁰² Bryann Aguilar, "Ontario gives police authority to stop people, vehicles, ask purpose of travel" (16 April 2021), online: *CP24* <www.cp24.com/news/ontario-gives-police-authority-to-stop-people-vehicles-ask-purpose-of-travel-1.5390791>.

suspected of participating in an organized event or social gathering.”²⁰³ But the provincial government’s unfiltered revelation of whose safety matters (those who are able to stay home) and how that safety will be protected (through police powers rather than employment standards) was profoundly damaging and harshly reinforced the fault lines in society.

The public backlash in the wake of this police power fiasco, however, created the final push that forced the Ontario government to take some action on paid sick days. On 29 April 2021, Ontario amended the *Employment Standards Act, 2000* to provide, on a temporary basis only, access to three paid sick days where the absence is specifically related to COVID-19, COVID-19 vaccinations, and COVID-19-related public health orders.²⁰⁴ This paid leave is only available for the period between 19 April 2021 and 25 September 2021.²⁰⁵ However, these are not the employer-funded sick days that workers and advocates were seeking. Under Ontario’s temporary scheme, employers are reimbursed for wages paid on sick days from the Workplace Safety Insurance Board.²⁰⁶ For employers, it is effectively a return of their WSIB premiums, while that reimbursement simultaneously depletes funds available to workers for WSIB benefits generally. Some other provinces have followed Ontario’s model of paid sick days with employers being reimbursed,²⁰⁷ and some provinces have also adopted 3-hour paid leaves to encourage vaccination.²⁰⁸ But like Ontario, where these policies have been introduced, they are strictly time limited and related to the COVID-19 pandemic. Accordingly, governments, particularly those like Ontario which will be heading into elections within the year,²⁰⁹ have taken great pains to signal to employers that this is an exceptional benefit and not one that will be rolled into minimum employment standards moving forward.

V. Conclusion

The pandemic experience provokes deep questioning at scales both individual and societal about what is truly essential and what is the meaning of care. In successive rounds of lockdowns and stay-at-home orders, the question is ever-present: what can we fairly ask others to sacrifice—literally at the risk of their lives—to keep our communities functioning? And what does it mean to have a functional community that

²⁰³ Phil Tsekouras & Bryann Aguilar, “Ford government revises new police pandemic powers after pushback” (17 April 2021), online: *CP24* <www.cp24.com/news/ford-government-revises-new-police-pandemic-powers-after-pushback-1.5391473>.

²⁰⁴ *COVID-19 Putting Workers First Act*, SO 2021, c 9.

²⁰⁵ *Ontario ESA*, *supra* note 160 s 50.1(5.2).

²⁰⁶ *Ibid*, s 50.1.1.

²⁰⁷ British Columbia, Manitoba, Nova Scotia, and PEI introduced similar programs between March and May 2021.

²⁰⁸ British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and PEI have introduced this leave.

²⁰⁹ Ontario’s fixed election date is 2 June 2022.

is more than a series of consumer transactions? How do we take care of others? And recognizing our dependence on others, and who those others are, how do we acknowledge the value of the care that is extended to us? Ultimately, each of those questions emerges as urgent because the pandemic has exposed the political geography of our dense interconnections under an unforgiving spotlight. As a result, the notion of “essential work” has undergone a radical transformation. When society has been stripped to its essence, it is the disproportionately female and racialized working-class labour in formerly disrespected and overlooked jobs—PSWs, childcare workers, farm workers, grocery store clerks, warehouse and delivery workers, transit drivers and others—which has proven indispensable. The fact that these “essential” workers do not earn a living wage while the corporations they work for have earned record profits during the pandemic²¹⁰ and for-profit long-term care facilities collected wage subsidies while also paying out dividends to their shareholders,²¹¹ creates an unsustainable tension between the values of the pre-pandemic ‘normal’ and those engendered during collective crisis and trauma.

The pandemic also underscored that unpaid and paid care work makes all other work in the economy possible. Most importantly, the pandemic unequivocally reveals how policy choices actively reinforce or dismantle social and economic inequality. Access to disaggregated data allows us to ask more complex questions about that terrain and its revelatory power reinforces the need for even more rigorous data collection. But having ‘counterdata’ to the pre-pandemic dominant narratives that makes visible labour, power and the connections between them, “on its own does not dissipate all inequality”.²¹² Knowledge demands action. The challenge is to build that data, sightlines, and insights into a new public narrative that can both call out and hold government accountable for the ways in which law and policy actively create and sustain the structural inequality of gendered racial capitalism, and also point the way towards uprooting that structural inequality. Social and economic recovery is only possible if we constantly interrogate how structural inequality is replicated so it can be dismantled.

The beginnings of that shift are taking shape as intersectional feminist reform strategies target the roots of structural inequality and demand that post-pandemic recovery be built by centring decent work in the care economy and by rebuilding the economy on an ethic of care.²¹³ Addressing precarious work and access to paid sick

²¹⁰ Alex Hemingway, “One year later: Canadian billionaire wealth up by \$78 billion” (14 April 2021), online: *Policy Note* <www.policynote.ca/the-rich-and-the-rest-of-us/>.

²¹¹ John Lancaster, “2 Ontario LTC operators got \$157M in COVID-19 aid. They also paid \$74M to shareholders” (9 December 2020), online: *CBC News* <www.cbc.ca/news/canada/toronto/big-spend-long-term-care-aid-dividends-1.5832941>.

²¹² D’Ignazio & Klein, *supra* note 62 at 2.

²¹³ See e.g. Canadian Women’s Foundation et al, *supra* note 62; Anjum Sultana & Carmina Ravanera, “A Feminist Recovery Plan for Canada: Making the Economy Work for Everyone” (July 2020), online: *Gender and the Economy* <www.gendereconomy.org/a-feminist-economic-recovery-plan-for-canada/>; “The Care Economy Statement” (April 2021), online: <thecareconomy.ca/statement/>.

days engage both streams of that reform strategy. Investing in social infrastructure such as long-term care, childcare, education, community and social services would rebuild the economy by targeting the sectors, workers, and communities that have been hardest hit, while simultaneously understanding and reprioritizing these sectors as key drivers of economic and community well-being. Meanwhile, introducing and normalizing paid sick days would bring an ethic of care into the protection of decent work. But both developments face the deep challenge of uprooting systemic discrimination with respect to the labour of racialized women. The ideological devaluation of women's paid and unpaid care work happens not just at micro- and meso-levels. At a macroeconomic level, systemic discrimination has rendered invisible the care economy's real value as the economic engine of society. In 1998, Statistics Canada calculated the value of unpaid domestic labour at \$297 billion.²¹⁴ While Statistics Canada has not updated that calculation, the lack of redistribution of unpaid work would suggest its value is sustained. Meanwhile, paid work in the care economy currently contributes 12% of GDP and accounts for 21% of all paid jobs in the economy.²¹⁵ Moreover, the care economy is also a concerted area of growth accelerated by an aging population.²¹⁶ Ensuring that all jobs in the care economy are decent, secure jobs that provide a living wage and benefits would build back better and differently by lifting the economy from the bottom and centring the work and workers who we now know truly are essential. Recognizing the value of care work and the value of caring about the well-being of workers is one route in to dislodging patterns that sustain gendered and racialized inequality.

In Canadian equality law, governments' policy choices are typically only assessed long after the fact through the lens of section 1 of the *Charter*, where courts give broad scope to governments' self-defined objectives and justifications in violating rights to equality. As little legal attention is directed towards the social and economic impacts of the pandemic and governments' active policy choices through the lens of intersectional feminist political economy and racial capitalism, this paper aims to complicate the implications of what a substantive analysis of section 1 of the *Charter* might look like.

²¹⁴ Meg Luxton, "Valuing Unpaid Work in the Home", online (pdf): *Policy4Women* <www.criaw-icref.ca/wp-content/uploads/2021/04/Valuing-Unpaid-Work-in-the-Home.pdf>.

²¹⁵ Armine Yalnizyan, "Care is a powerhouse" (19 March 2021), online: *This Minute* <futureofworkers.substack.com/p/care-is-a-powerhouse>.

²¹⁶ *Ibid.*