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An Analysis of Missing and Murdered Indigenous Women and Girls: The RCMP Perpetuation of Colonial Violence

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Introduction

The extensive colonial history of the Canadian government against Indigenous peoples has inflicted trauma that remains with many Indigenous communities as they continue to cope with the generational effects. Indigenous women and girls throughout Canada have been disproportionately targeted by these colonial establishments, more specifically, by the police. Indigenous women are increasingly victimized compared to their non-Indigenous counterparts and continue to be overrepresented in missing person reports as well as homicide statistics. The epidemic of missing and murdered Indigenous women and girls (MMIWG) in Canada is a recognised human rights issue and has been referred to as a Canadian national crisis and genocide.[1] According to a Statistics Canada report released in 2016, Indigenous identity remains a risk factor for violent victimization among women despite controlling for all other selected risk factors, including mental health and substance abuse disorders, unemployment, and lower educational attainment.[2]

The ongoing victimization of Indigenous females has been detrimental to communities, as they continue to face unique challenges related to violence as a result of isolation, economic marginalization and a poor relationship with the police in remote areas. The Royal Canadian Mounted Police (RCMP) was created in 1920 as an instrument of colonial governance to suppress the independence of Indigenous groups and further implement colonial authority. The relationship between Indigenous women and the RCMP is fueled by distrust, resentment, and

[1] 'Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls' (2018) <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf> accessed 25 March 2020.

[2] Statistics Canada, 'Victimization of Aboriginal People in Canada, 2014' (2016) <https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm> accessed 25 March 2020.

fear, as the RCMP continues to misrepresent the severity of MMIWG in Canada. As a result, the inadequate policing practices by the RCMP have perpetuated the ongoing crisis of missing and murdered Indigenous women throughout Canada. The purpose of the current research is to explore how the RCMP interacts with Indigenous women and how systemic racism and ingrained colonialism further enable insufficient protection of this vulnerable group.

Police Bias: The Conflicting Numbers of MMIWG in Canada

When taking into consideration the total of Canada's female population, Indigenous women are significantly overrepresented in homicide statistics and are far more likely than other women to go missing. The overrepresentation of Indigenous female homicides is consistent throughout most of Canada's provinces and territories.[3] According to the RCMP, between the years 1980 to 2012, there were 1,181 police-reported incidents of Indigenous female homicides and unresolved missing persons investigations.[4] This number includes the total number of homicide victims and 164 cases of Indigenous women currently considered missing. Further, there are 225 unsolved cases of either missing or murdered Indigenous women. In Canada, Indigenous women and girls represent 16% of all female homicides, while only constituting 4.3% of the overall female population in Canada.[5] According to a 2011 report by Statistics Canada, it was estimated that the rate of homicide for Indigenous females was almost seven

[3] 'Reclaiming Power and Place' (n 1).
[4] Royal Canadian Mounted Police, 'Missing and Murdered Aboriginal Women: A National Operational Overview' (2014) <https://www.rcmp-grc.gc.ca/en/missing-and-murdered-aboriginal-women-national-operational-overview> accessed 25 March 2020.
[5] ibid, p. 9.

times higher than that of non-Indigenous females.[6] Indigenous females continue to be disproportionately affected by all forms of violence.[7]

The rationale for classifying an Indigenous woman as "missing" varies. The RCMP categorizes missing persons cases based on probable cause. The disappearance of an Indigenous woman could relate to them being a victim of violent crime, having gone missing due to an accident, or having disappeared voluntarily for personal reasons.[8] If a missing persons case is deemed non-suspicious or suspected to be the result of a mishap, there is often insufficient evidence to officially categorize the person as deceased. The RCMP recognises the possibility that the total number of missing Indigenous women could be different than the actual number.[9] A variety of factors could contribute to this misinformation, including a missing female not being identified as Indigenous during the investigation and/or a disappearance not being reported to the police. The overrepresentation of Indigenous female homicides is consistent throughout most of Canada's provinces and territories.[10]

The presence of racial bias in addressing cases of MMIWG has become evident across the country. In northwestern British Columbia, Highway 16 covers an enormous area of undeveloped wilderness and sparsely populated communities, making this highway remote and underserviced. Highway 16 is referred to as the 'Highway of Tears,' as a substantial number of

[6] Shannon Brennan, 'Violent victimization of Aboriginal women in the Canadian provinces, 2009' (2011) Catalogue No. 85-002-X <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2011001/article/11439-eng.pdf?st=87S7QAJn> accessed 25 March 2020.
[7] ibid, p. 5.
[8] ibid, p. 9.
[9] ibid, p. 9.
[10] ibid. p. 10.

Indigenous women have disappeared along this route.[11] Due to the area being significantly underdeveloped, hitchhiking is the primary mode of transportation used by the women who have disappeared along the Highway of Tears.[12] The lack of bus services and financial barriers to access these services also contribute to women using hitchhiking as a means for mobility. Highway 16 is an essential lifeline to connect these remote communities to larger populated areas. There are few rest areas, shelters, or emergency services for hitchhikers and other travelers to access between communities.[13] Further, cellphone reception is inconsistent, making it difficult to maintain contact with others or call emergency services.[14] The number of deaths and disappearances along Highway 16 range significantly.[15] The RCMP cites the official number as 18 confirmed cases, while Indigenous communities and advocacy organizations suggest the number is closer to 40 cases or more.[16] In response to the competing numbers of MMIWG along the Highway of Tears, the RCMP created Project E-PANA to investigate these cases.[17] However, Indigenous activist groups argue that institutional racism and sexism has affected the searches of MMIWG along the Highway of Tears.[18] Despite disappearances dating back to approximately 1969, the RCMP did not launch project E-PANA until 2005. Due to past experiences of discrimination and abuse, this has influenced Indigenous people's perception of the RCMP's investigative efforts to resolve the cases of missing and murdered women along the Highway of Tears. According to the families of MMIWG, "the police had assumed that many of the women

[11] Katherine Morton, 'Hitchhiking and Missing and Murdered Indigenous Women: A Critical Discourse Analysis of Billboards on the Highway of Tears' (2016) 41(3) Can J Sociol 299.
[12] ibid, p. 300.
[13] ibid, p. 302.
[14] ibid, p. 302.
[15] ibid, p. 312.
[16] ibid, p. 312.
[17] Don Sabo, 'Highway of Tears' (2016) TCE <https://www.thecanadianencyclopedia.ca/en/article/highway-of-tears> accessed 25 March 2020.
[18] ibid.

were drunk, prostitutes or had consented to sex before their disappearance or murder"[19] and allege that police ignored and blamed these women for their murder or disappearance.

According to activists, thousands of missing and murdered Indigenous women cases have not been properly investigated due to alleged police bias.[20] The 2010 case of serial killer Robert Pickton, illustrates the alleged police bias that occurred during the investigation of 49 murdered women in British Columbia, Canada. The families of the missing and murdered women claim that Pickton was able to continue killing for several years because police had not taken the disappearances seriously due to the women being sex workers and primarily Indigenous.[21] In 2001, a task force was created to collect the DNA of women missing from the downtown, east side of Vancouver.[22] During this time, Robert Pickton, who operated a pig butchering business, became a person of interest to the police.[23] The investigation resulted in the discovery of the dismembered remains of several women throughout Pickton's property. He was subsequently charged with 27 counts of first-degree murder but claimed to have murdered 49 women over the course of several years. The Pickton case prompted a provincial government inquiry to examine the operational authority taken by police during the investigation. In 2012, the Missing Women Commission of Inquiry issued its final report detailing the blatant failures of police, including

[19] ibid. (n 17)
[20] Jane Dalton, 'Murdered and missing women and girls in Canada tragedy is genocide rooted in colonialism, official inquiry finds' (2019) <https://www.independent.co.uk/news/world/americas/canada-genocide-murdered-missing-women-girls-indigenous-inquiry-report-a8939646.html> accessed 25 March 2020.
[21] ibid.
[22] *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198.
[23] ibid, p. 1.

inept criminal investigative work, compounded by police and societal bias against prostitutes and Indigenous women.[24]

Despite the RCMP's National Operational Overview, many Indigenous communities claim that the number of MMIWG is exceptionally higher than what has been reported. As previously mentioned, the RCMP acknowledged 1,181 missing and murdered women between 1980 and 2012.[25] However, Indigenous women's groups document over 4,000 cases of MMIWG throughout Canada during this period of time.[26] The under-reporting of violence against Indigenous women and girls, and the lack of an effective database, as well as the failure to identify these cases by ethnicity, has produced inaccurate numbers that do not properly reflect the severity of the issue.

Colonialism, Racism and Victimization of Indigenous Women and Girls

The colonial development within Canada enabled the tenuous history between police services and Indigenous peoples. The original aim of the government was to encourage settlement and the economic prosperity of the Canadian western frontier by ensuring that Indigenous peoples remained on their reservations.[27] Additionally, the assimilation of First Nations peoples into Canadian society remained a goal of the government which has since

[24] The Honourable Wally T. Oppal, 'Foresaken: The Report of the Missing Women Commission of Inquiry' (2012) <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/forsaken-es.pdf> accessed 25 March 2020.

[25] 'Missing and Murdered Aboriginal Women: A National Operational Overview' (n 4).

[26] Jennifer Brant, 'Missing and Murdered Indigenous Women and Girls in Canada' (2017) TCE <https://www.thecanadianencyclopedia.ca/en/article/missing-and-murdered-indigenous-women-and-girls-in-canada> accessed 25 March 2020.

[27] Nicholas A Jones, 'First Nations Policing: A Review of the Literature' (2014) CCJS <https://www.researchgate.net/publication/273435540_First_Nations_Policing_A_Review_of_the_Literature> accessed 25 March 2020.

perpetuated long-term institutionalised practices, including those within the criminal justice system.[28] Canada's history of settler colonialism and racist assimilation policies has impacted the present-day dynamics between police and Indigenous communities. The residential school system implemented by the Canadian government to forcibly remove Indigenous children and youth from their communities involved the active and complicit participation of the RCMP to enforce social policies.[29] The police ensured that Indigenous children attended these schools, which severed the connections to kinship networks and family, language, and culture. Within this historical context, Indigenous communities continue to mistrust, resent and be suspicious of law enforcement. In addition to the colonial injustice, more recent police failures and violent policing practices have continued to fuel Indigenous communities' fear of the police, contributing to the widely held belief that the police target and discriminate against Indigenous people.

In 2017, Human Rights Watch made a submission to the government of Canada on police abuse of Indigenous women in Saskatchewan, outlining the failures by police to protect Indigenous women from violence. In Saskatchewan, Human Rights Watch documented 64 alleged cases of violent abuse against Indigenous women by police, including excessive use of force, invasive body and strip searches, and sexual harassment.[30] These cases mirror a wider pattern of allegations of physical and sexual abuse by police services in other locations throughout Canada.[31] The lack of trust in police forces and fear of retaliation from police agencies inhibit Indigenous women and girls from reporting police abuse. Police mistreatment

[28] ibid, (n 27) p. 5.
[29] ibid, p. 5.
[30] Human Rights Watch, 'Submission to the Government of Canada on Police Abuse of Indigenous Women in Saskatchewan and Failures to Protect Indigenous Women from Violence' (2017) <https://www.hrw.org/news/2017/06/19/submission-government-canada-police-abuse-indigenous-women-saskatchewan-and> accessed 25 March 2020.
[31] ibid, p. 8.

and/or abuse of Indigenous women in Canada is not formally documented, therefore, estimates that indicate its prevalence do not exist.[32] There is no standardised mandate of ethnicity-data collection across police forces, due to the presumption of internal bias-free policing rules.[33] As a result, the RCMP does not collect sex- and race-disaggregated data on violence against women.[34]

There is significant evidence of RCMP officers being perpetrators of physical violence and abuse, as well as rape and sexual assault against Indigenous women and girls. In 2011, a Manitoba RCMP Constable arrested an Indigenous woman for intoxication at a house party, subsequently placed her in a police cell, and later returned, intending to bring her home to have a "personal relationship" with her. Fellow officers, including the Constable's senior officer, encouraged his actions claiming: "You arrested her, you can do whatever the fuck you want to do."[35] The RCMP Constable's actions were only investigated three years after the offence had occurred, resulting in the disciplinary action of seven days without pay – a punishment that in no way equates to the crime committed. Further, during the trial of former provincial judge, David Ramsay, who was imprisoned for targeting as well as physically and sexually assaulting young Indigenous girls, it was claimed that there are approximately ten reports of RCMP officers also involved in the sexual abuse of Indigenous girls that were never addressed.[36] The problem of gendered violence within the ranks of the RCMP demonstrates the need to address the concerns of victims and to prevent these offences from occurring. However, little has been done by the

[32] ibid, (n 30) p. 20.
[33] ibid, p. 20.
[34] ibid, p. 20.
[35] Holly Moore, 'Mountie Takes Woman Home from Jail to 'Pursue a Personal Relationship' (2015) CBC <https://www.cbc.ca/news/canada/manitoba/mountie-takes-woman-home-from-jail-to-pursue-a-personal-relationship-1.2893487> accessed 25 March 2020.
[36] Pamela Palmater, 'Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence against Indigenous Women and Girls in the National Inquiry' (2016) 28(2) Can J Women and the Law 253.

federal government, Department of Justice of Canada, the RCMP itself, or the Department of Public Safety.[37] Canada has failed to ensure that complaint processes against police abuse are available and accessible to Indigenous women and girls.[38]

Police accountability is required to ensure the safety of Indigenous women and girls. However, Canada has made limited progress towards the guarantee that police are held accountable for their failures affecting Indigenous peoples, as well as for the violence police officers have committed against Indigenous women and girls.[39] The province of British Columbia (BC) is notorious for both violence against Indigenous women and girls, and for the failure of law enforcement to effectively deal with the issue. In northern BC, Indigenous women and girls are under-protected and several reports indicate that they are subjected to ongoing abuse by the RCMP.[40] A Human Rights Watch report documented RCMP violations of the rights of Indigenous women and girls in ten towns across the north of BC. The reports include cases of women being pepper-sprayed and tasered; attacked by a police dog; repeatedly punched by an officer who had been called to help; strip-searched by male officers; and injured due to excessive force during arrest.[41]Allegations of rape and sexual assault by RCMP officers were also documented, with physical abuse often accompanied by verbal racist and sexist abuse.[42]

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[37] ibid. (n 36)
[38] ibid.
[39] Human Rights Watch (n 30).
[40] Human Rights Watch, 'Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada' (2013) <https://www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-indigenous-women> accessed 25 March 2020.
[41] ibid.
[42] ibid.

The harassment endured by Indigenous women and girls by law enforcement has come to define an uncertain relationship. The concerns for individual wellbeing have limited some women and community members from enjoying public spaces where contact with police officers may occur.[43] The abusive treatment has raised concerns about the policing tactics used in Indigenous communities and about the police's regard for the safety and dignity of Indigenous women and girls. The failure of the RCMP to protect Indigenous women and girls from violence has perpetuated their strenuous relationship, as many Indigenous women and girls believe police will not offer them protection when they face violence in the wider community.[44] The persistence of abusive police tactics indicates a need for deeper, coordinated interventions to address the systemic nature of the issue. Despite some attempts by the Canadian government to address the murders and disappearances of Indigenous women, the violent tendencies of some RCMP officers perpetuates the ongoing MMIWG crisis.

Police agencies across Canada have been criticized for their investigative measures involving Indigenous victims, specifically women. In 1971, the investigation into the sexual assault and murder of Helen Betty Osborne, a nineteen-year-old Cree woman from The Pas, Manitoba, prompted a provincial inquiry. The inquiry condemned the police involved for their "sloppy and racially biased police investigation that took more than 15 years to bring one of four men to justice,"[45] further finding that it was well known to police that white men were "sexually preying on Indigenous women and girls in The Pas,"[46] but that the police did not take the

[43] ibid. (n 40)
[44] ibid.
[45] Amnesty International, 'Stolen Sisters: A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada' (2004) <https://www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf> accessed 25 March 2020.
[46] ibid, p. 2.

appropriate actions and warrant an investigation. The Manitoba Justice Inquiry said of the murder of Helen Betty Osborne:

> Her attackers seemed to be operating on the assumption that Aboriginal women were promiscuous and open to enticement through alcohol or violence. It is evident that the men who abducted Osborne believed that young Aboriginal women were objects with no human value beyond sexual gratification.[47]

Racism and sexism intersect in stereotypes of Indigenous women as being sexually "available" to men, allowing perpetrators to assume that their violent actions against Indigenous women are justifiable or condoned by society.[48] These racist and sexist attitudes continue to be a factor in attacks on Indigenous women in Canadian cities. However, police are inconsistent in their acknowledgement of this threat, citing the belief that lifestyle factors contribute to violence against Indigenous women.[49] These factors include engaging in the sex trade or illegal drug use, however, police recognise that racism and sexism are facets in attacks on Indigenous women.[50]

The RCMP initiation and conduction of investigations into MMIWG are filled with gross systemic inadequacies. The overrepresentation of MMIWG at the national level is significant, but the provincial statistics provide a more horrific insight. In Saskatchewan and Manitoba, Indigenous women and girls represent 55% and 49% of those missing and murdered, respectively. The Canadian government, as well as the RCMP, need to acknowledge the severity of the high rates of violence against Indigenous women. Police officers across Canada should be

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[47] Commissioners A.C. Hamilton and C.M. Sinclair, 'Report of the Aboriginal Justice Inquiry of Manitoba: The Deaths of Helen Betty Osborne and John Joseph Harper' (1991) <http://www.ajic.mb.ca/volume.html> accessed 25 March 2020.

[48] Amnesty International (n 45).

[49] Human Rights Watch (n 30).

[50] ibid.

subject to appropriate discipline if they have failed to act on reports of missing women or have carried out biased or inadequate investigations into violence against Indigenous women. The RCMP should also be subjected to external review when allegations of police misconduct are brought forward by Indigenous women and girls.

Recommendations for Effective Change

By working closely with Indigenous peoples' organizations, and Indigenous women, the government of Canada can establish plans of action to stop violence against Indigenous women. In 2016, the National Inquiry into Missing and Murdered Indigenous Women and Girls was launched as a government initiative to end the disproportionately high levels of violence faced by Indigenous women and girls. The Inquiry conducted an in-depth study and analysis between 2016 and 2018 on MMIWG by collecting information from the community and institutional hearings; past and current research; and forensic analysis of police records. Further, the inquiry gathered evidence from over 1,400 witnesses, including survivors of violence and the families of victims. The National Inquiry provides individual accounts from Indigenous women of racism, sexism, and other forms of discrimination by the RCMP. The Inquiry concluded that violence against Indigenous people – including women and girls – is rooted in colonialism.[51] To end the violence against Indigenous women and girls, the ongoing colonial relationship that facilitates it must be resolved.

Policing representatives from various police forces, including the RCMP, presented evidence to the National Inquiry that comprehensive policies and procedures were in place and

[51] 'Reclaiming Power and Place' (n 1).

were continually updated. The representatives assured that there remains a standard and consistent process for police response to missing persons' reports and other major crimes involving Indigenous peoples. The RCMP Commissioner, Brenda Lucki, established both the RCMP's commitment to Indigenous communities and its focus on reconciliation with Indigenous peoples by enhancing the role, efficacy, credibility, and trust upon which the RCMP's authority depends.[52] This includes collaboration, partnering, and relationship building with Indigenous peoples, to ensure that policies reflect the priorities of community members. In terms of policies with specific relevance to MMIWG, RCMP representatives developed the 'Circle of Change' program which "provides advice and guidance to the RCMP, […] specifically on resources, policies, training, police tools, [and] communication to better enable the RCMP to investigate, prevent, and address violence against Indigenous women and girls in those communities."[53] In addition, the Major Case Management Policy and Service Standards Investigative Guides have been implemented to govern the oversight of investigative procedures for any major crime.[54] Further, the National Missing Persons Policy was developed in collaboration with families of MMIWG.[55] Although several policies have been enacted by the RCMP to help mitigate the number of MMIWG, more can be done.

Provided the lack of political action on MMIWG, Indigenous groups have highlighted the desire to work collaboratively with the police. To understand the immediate and systemic actions required to facilitate active improvement, recommendations were provided to the RCMP on how to achieve tangible results in preventing violence and locating MMIWG. The families of

[52] 'Reclaiming Power and Place' (n 1) p. 679.
[53] ibid, p. 677.
[54] ibid, p. 677.
[55] ibid, p. 677.

MMIWG stressed the importance of police accountability, and the need to improve communication between the families, the police, and justice officials.[56] This would include open forums to allow families of MMIWG to have direct communication with the police. Families suggested '24-hour contact persons' to enable families to ask questions and receive information about investigations. Further, an emphasis on an immediate action policy would be placed on police to promptly investigate cases of missing Indigenous women and girls.[57] The families also suggested an amber alert or search and rescue system for MMIWG, while also expressing a desire for continued investigation of older, unsolved cases.[58] Further, regular cultural sensitivity training for police and more Indigenous women on police forces was also strongly emphasized by the families.[59] The MMIWG Coalition expressed similar concerns and suggestions, indicating the importance for police to undergo decolonization and focus on how to be an ally to Indigenous peoples.[60] The MMIWG Coalition also stated that there must be "relationship-building between Indigenous people and police, and an increase in the number of Indigenous civilians working for police services. There should be more accountability within the police system, and there is a need to hire more Indigenous police members."[61] Coalition members also identified the need for police to be trauma-informed when working with families of MMIWG.[62]

The RCMP and other law enforcement agencies should work closely with Indigenous women's organizations and other frontline groups to identify and implement appropriate and

[56] Joelle Pastora Sala and Byron Williams, 'Families First: A Manitoba Indigenous Approach to Addressing the Issue of Missing and Murdered Indigenous Women and Girls' (2015) <https://www.legalaid.mb.ca/wp-content/uploads/2017/03/15-07-20-MMIWG-Families-First-Final-Report.pdf> accessed 25 March 2020.
[57] ibid, p. 27.
[58] ibid, p. 28.
[59] ibid, p. 27.
[60] ibid, p. 33.
[61] ibid, p. 33.
[62] ibid, p. 33.

effective protocols for action on cases involving MMIWG. As the RCMP begins to implement suggestions provided by the National Inquiry, it is important that officers receive specialized training to ensure an understanding of violence against Indigenous women, while hiring staff that review and coordinate responses to missing persons cases involving Indigenous women. The RCMP should organize meetings with Indigenous women leaders and other community members to build an understanding of the specific risks to Indigenous women in order to establish and strengthen relationships between the police and Indigenous communities.[63] The actions, including compliance with policies, of RCMP officers should be subject to independent civilian oversight during the investigation of missing person cases.[64] In addition, the creation of independent advocates and liaison workers should be adequately funded for Indigenous people in contact with the police during the investigative process.[65] Further, clear policies and practices should be established concerning the timely delivery of information to the families of MMIWG.[66] The RCMP should provide training and resources to make prevention of violence against Indigenous women a genuine priority. Canadian officials have an obligation to address the deeper problems of marginalization, dispossession and impoverishment that has placed many Indigenous women at risk, as their wellbeing and safety should be ensured and guaranteed.

Conclusion

In Canada, Indigenous women face an extraordinarily high risk of violence that is underreported by the Royal Canadian Mounted Police. The overrepresentation of Indigenous women and girls in missing persons reports, as well as homicide statistics, is due to a lack of

[63] Amnesty International (n 45).
[64] ibid, p 36.
[65] ibid, p. 36.
[66] ibid, p. 20.

comprehensive policing that perpetuates the violent victimization of this vulnerable group. The original purpose of the RCMP was to enforce colonial objectives related to displacing Indigenous communities from sovereign land. The generational effects of colonial violence administered by the RCMP has solidified a severe distrust of police amongst Indigenous peoples, further perpetuating a poor relationship between the police and Indigenous women and girls. Indigenous women and girls are significantly more likely to be racially targeted, profiled, and violently victimized compared to their non-Indigenous counterparts. The lack of proactive investigative practices and the underreporting of cases involving Indigenous women contribute to the RCMP's inadequate policing practices that perpetuate the high rates of MMIWG in Canada.

The Canadian government has an obligation to Indigenous peoples to address the disappearances and murders of Indigenous women and girls, as the government and its accompanying agencies have inflicted, as well as perpetuated, the problem. The investment into prevention efforts and implementation of sensitive training for RCMP officers does not adequately address the issue of MMIWG. Instead, the RCMP, and other police agencies, should prioritize reparations with Indigenous communities, to strengthen relations and repair trust. By providing a forum for Indigenous communities to express concerns and suggest prevention measures, the RCMP can begin to restore the relationship with Indigenous peoples and implement proper investigative methods related to MMIWG. Until the relationship with Indigenous women and communities has been amended, the RCMP will continue to perpetuate the ongoing crisis of missing and murdered Indigenous women and girls.

Bibliography

Amnesty International, 'Stolen Sisters: A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada' (2004) <https://www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf> accessed 25 March 2020.

Brant J, 'Missing and Murdered Indigenous Women and Girls in Canada' (2017) TCE <https://www.thecanadianencyclopedia.ca/en/article/missing-and-murdered-indigenous-women-and-girls-in-canada> accessed 25 March 2020.

Brennan S, 'Violent victimization of Aboriginal women in the Canadian provinces, 2009' (2011) Catalogue No. 85-002-X <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2011001/article/11439-eng.pdf?st=87S7QAJn> accessed 25 March 2020.

Commissioners A.C. Hamilton and C.M. Sinclair, 'Report of the Aboriginal Justice Inquiry of Manitoba: The Deaths of Helen Betty Osborne and John Joseph Harper' (1991) <http://www.ajic.mb.ca/volume.html> accessed 25 March 2020.

Dalton J, 'Murdered and missing women and girls in Canada tragedy is genocide rooted in colonialism, official inquiry finds' (2019) <https://www.independent.co.uk/news/world/americas/canada-genocide-murdered-missing-women-girls-indigenous-inquiry-report-a8939646.html> accessed 25 March 2020.

Human Rights Watch, 'Submission to the Government of Canada on Police Abuse of Indigenous Women in Saskatchewan and Failures to Protect Indigenous Women from Violence'

(2017) <https://www.hrw.org/news/2017/06/19/submission-government-canada-police-abuse-indigenous-women-saskatchewan-and> accessed 25 March 2020.

Human Rights Watch, 'Those Who Take Us Away: Abusive Policing and Failures in Protection of Indigenous Women and Girls in Northern British Columbia, Canada' (2013) <https://www.hrw.org/report/2013/02/13/those-who-take-us-away/abusive-policing-and-failures-protection-indigenous-women> accessed 25 March 2020.

Jones N, 'First Nations Policing: A Review of the Literature' (2014) CCJS <https://www.researchgate.net/publication/273435540_First_Nations_Policing_A_Review_of_the_Literature> accessed 25 March 2020.

Moore H, 'Mountie Takes Woman Home from Jail to 'Pursue a Personal Relationship' (2015) CBC <https://www.cbc.ca/news/canada/manitoba/mountie-takes-woman-home-from-jail-to-pursue-a-personal-relationship-1.2893487> accessed 25 March 2020.

Morton K, 'Hitchhiking and Missing and Murdered Indigenous Women: A Critical Discourse Analysis of Billboards on the Highway of Tears' (2016) 41(3) Can J Sociol 299.

Palmater P, 'Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence against Indigenous Women and Girls in the National Inquiry' (2016) 28(2) Can J Women and the Law 253.

Pastora Sala J and Williams B, 'Families First: A Manitoba Indigenous Approach to Addressing the Issue of Missing and Murdered Indigenous Women and Girls' (2015) PILC <https://www.legalaid.mb.ca/wp-content/uploads/2017/03/15-07-20-MMIWG-Families-First-Final-Report.pdf> accessed 25 March 2020.

R. v. Pickton, 2010 SCC 32, [2010] 2 S.C.R. 198.

'Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls' (2018) <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf> accessed 25 March 2020.

Royal Canadian Mounted Police, 'Missing and Murdered Aboriginal Women: A National Operational Overview' (2014) <https://www.rcmp-grc.gc.ca/en/missing-and-murdered-aboriginal-women-national-operational-overview> accessed 25 March 2020.

Sabo D, 'Highway of Tears' (2016) TCE <https://www.thecanadianencyclopedia.ca/en/article/highway-of-tears> accessed 25 March 2020.

Statistics Canada, 'Victimization of Aboriginal People in Canada, 2014' (2016) <https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14631-eng.htm> accessed 25 March 2020.

The Honourable Wally T. Oppal, 'Foresaken: The Report of the Missing Women Commission of Inquiry' (2012) <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/inquiries/forsaken-es.pdf> accessed 25 March 2020.

Dealing in Good Faith?

The future of an implied good faith doctrine in English Contract Law.

Leanne-Sydonie Goodlad

Last Updated: 2022

Introduction

Currently, there is no general obligation explicitly provided by the English law of contract to act in good faith outwith specific practice areas, such as the Consumer Rights Act 2015. The current approach to a doctrine of good faith is best described as "piecemeal".[67] Indeed, English contract law has been described as "swimming against the tide"[68] with regards to good faith; given that some form of understanding of good faith while contracting has existed in many civil law jurisdictions since Roman law.[69]

Good faith is notoriously difficult to define and is a point of contention, as discussed below. When used generally, outwith jurisprudence, someone acting in good faith is acting genuinely and honestly,[70] for example, keeping their promises, and not deceiving the other party. Within English contract law, generally speaking, deceiving the other party is already enveloped by the separate doctrine of misrepresentation.[71]

Turning to the definition of good faith provided by other jurisdictions is also unhelpful, with the French Civil Code only providing "Les contrats doivent être négociés, formés et executes de bonne foi… Cette disposition est d'ordre public"[72]. Or, in English, "contracts must be negotiated, formed, and executed in good faith… This provision is of public policy."[73] While the explanation of public policy provides the French reasoning behind good faith - that it benefits the public by

[67] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 per Bingham LJ, [439].
[68] *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [124].
[69] *ibid*.
[70] Cambridge Dictionary, 'English Definition of Good Faith' <https://dictionary.cambridge.org/dictionary/english/good-faith> Accessed 25 Aug 2022
[71] though outside the scope of this article, see e.g; making a false statement, *Avon Insurance plc v Swire Fraser Ltd [*2000] 1 All ER (Comm) 573.
[72] Art. 1104, *Code Civil* (French) *Ordonnance No* 2016-131, 2016.
[73] Cartwright J, Fauvarque-Cosson B, Whittaker S, 'Art. 1104, French Civil Code 2016, English translation' < http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf> Accessed 25 Aug 2022.

ensuring contractual relationships are not contentious - it does not explain what good faith actually constitutes. Reference to negotiation, formation and execution imply that good faith, whatever it may be, relates to the relationship between the contracting parties throughout the process. Therefore, to understand the purpose of a good faith doctrine, reference should be made to the understanding of co-operation between parties in English contract law.

Honest Co-operation Between Contractual Parties

Like an obligation to contract in good faith, there is no general duty of co-operation between contractual parties in English contract law. This means that there is no imposed obligation upon the parties to work together open and honestly. In contrast, it is established that in civil law jurisdictions the duty of co-operation arises from the doctrine of good faith. 'Negotiation' is protected by article 1104 of the French Civil Code. Within English jurisprudence, any imposed duty of co-operation would contrast with individualism: the concept that party interests are the responsibility of the party themselves. It has been argued that individualism is at the heart of all legal problems.[74] Individualism is reflected in the concept of freedom of contract. Professor van Dunné identifies that freedom of contract is the "prime produce"[75] of individualism, and "the natural epicentre"[76] of the debate surrounding a good faith doctrine. In civil law jurisdictions, negotiation, co-operation, and good faith is protected and ensured. In England, where freedom of contract is the basis of all contractual relationships, this is not the case. Contractual parties must

[74] Niall O'Connor, 'Whose autonomy is it anyway? Freedom of contract, the right to work and the general principles of EU law', (2020) Industrial Law Journal 49(3), 285, 301.
[75] Jan van Dunne, 'on a clear day, you can see the continent- the shrouded acceptance of good faith as a general rule of contract law on the British Isles' (2015), Construction Law Journal 31(1), 3, 7.
[76] *ibid.*

protect their own interests, and negotiation is their own responsibility. There appears to be, at least historically, a theoretical deviation between English jurisprudence which centres the principle of individualism, and civil law jurisprudence, which upholds the concept of co-operation.

Despite this, there is a clear trend within common law that shows the English courts will impose co-operation between parties in certain circumstances. Generally, co-operation cannot be imposed solely because it would be a desirable factor to make the contracting process easier or fairer; rather, co-operation must be essential for performance of the contract in question.[77]

In the case of *Hudson Bay Apparel Brands LLC v Umbro International Ltd,*[78] the court refused to give 'co-operation' a broad meaning and instead implied a limited duty to co-operate in the specific fact scenario presented. This suggests that even when a judgement implying co-operation is made, it will be limited to specific issues arising in the case in question.

In *Swallowfields Ltd v Monaco Yachting and Technologies SAM,*[79] the Court of Appeal considered the scope of an implied term of co-operation. In this case, it was clear that the duty of co-operation was again specific to the facts at hand in this specific type of contract.[80] Shipbuilding contracts are unique in that the builder only earns payment when certain 'milestones' are reached and certified as being reached by the buyer's representative.[81] Co-operation is then an "ordinary implication"[82] in this scenario as co-operation between the parties is necessary to progress. The building party must reach the milestones, and this progress must then be confirmed by the

[77] TT Arvind, *Contract Law* (2nd edition, 2019) OUP, p236.
[78] [2009] EWHC 2861 ch.
[79] [2014] EWCA civ 186.
[80] *ibid* per Longmore LJ, [32].
[81] *ibid.*
[82] *ibid.*

purchasing party. "If this is not spelled out in the contract expressly, a duty to co-operate in the project will be implied."[83] This trend of narrow reading of the contractual terms is in line with the narrow common law understanding of good faith,[84] resulting in a similar jurisprudential position towards co-operation.

Thus, co-operation should be considered alongside the following discussion of good faith, given the similar jurisprudential attitude towards the doctrines.

What is Meant by "Good Faith"?

In 1766, Lord Mansfield referred to good faith as: "the governing principle, applicable to all contracts and dealings". [85] However, in 1992 Professor Roy Goode announced; "we in England find it difficult to adopt a general concept of good faith… we do not know quite what good faith means."[86] It is clear that the doctrine is not a universally accepted approach in the English law of contract, whereas in civil jurisdictions the recognition of good faith is a fundamental, legislated factor in contracting.[87] Given the civil approach, it is clear that a good faith doctrine can be "perfectly workable".[88]

It is evident that good faith is not simply a concept that has unexpectedly arisen in England within the last ten years. Indeed, in 1991, Steyn J stated that "English law has had to resort to the implication of terms… in using the high technique of common law the closest attention is paid to

[83] *ibid.*
[84] See eg, *Medirest* [2013] at (n 97) below.
[85] *Carter v Boehm* [1766] 3 Burr 1905, [1910].
[86] R Goode, 'The Concept of Good Faith in English Law', *Centro di Studie Richerche di Dritto Comparator e Straniero, (Roma 1992).*
[87] Anthony Grey 'Unfair Contract Terms: Termination for Convenience' (2013) UWA Law Review 37(1).
[88] Justice Steyn "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy" (1991) 6 Denning Law Journal 131, 140.

the purpose of the law of contract, i.e. to promote good faith and fair dealing."[89] Yet in the case of *The Product Star (No 2),*[90] it was decided that the traditional approach of fairness in discretionary contractual terms was of little relevance, as long as discretion was being exercised "honestly and in good faith", [91] as well as "not exercised arbitrarily, capriciously or unreasonably."[92]

There could be many reasons for the apparent English 'lack of faith' in the concept of a general good faith doctrine, the most obvious being the fact that 'good faith' is notoriously difficult to define. Is the definition of good faith the duty to be honest, thus overlapping with the doctrine of misrepresentation? Or, alternatively, is good faith the requirement of a wide, positive duty which "looks to good standards of commercial morality and practice"[93]? (Effectively, open and fair dealing between the parties). With multiple interpretations for a single term, it is no surprise that settling on a clear understanding is difficult in our common law jurisdiction. Alternatively, Beatson and Friedmann wrote that: "theoretically it is now openly recognised that a substantial part of contract law derives from *ex lege* rules, although the parties are, in many instances, free to deviate from them."[94]

If the law centres the traditional idea of fairness, surely it would be more satisfactory to create a general good faith rule that parties can choose to deviate from, instead of having to explicitly comply with and write an express term of good faith into contracts, which is often easily forgotten

[89] *ibid*, (n 88) 141.
[90] [1993] 1 Lloyd's Rep (CA) 397.
[91] *ibid* Per Leggatt LJ.
[92] *ibid.*
[93] *Director General of FairTrading v First National Bank Plc* [2001] UKHL 52 per Lord Bingham, [17].
[94] From 'Classical' to Modern Contract Law; J Beatson, D Friedmann *Good Faith and Fault in Contract Law* (1996, OUP) p16.

about in cases where parties draft their own contracts without consulting lawyers. However, as with co-operation, a general duty of good faith cannot be implemented regardless of the impact on the concept of fairness. Any imposition would infringe on the theory of individualism and freedom to contract and bargain as the parties wish, which underpins the traditional approach to English contract law.

The case of *Yam Seng Pte Ltd v International Trade Corporation Ltd* [95] has prompted a renewed interest in good faith in English contract law. Leggatt LJ emphasised that despite the classical hostility to good faith in English law, the doctrine has some role. In *Yam Seng*, the contract between the parties was brief and failed to set out the duties required of the parties in detail. The contract was drafted by the parties themselves, and when ITC failed to supply merchandise that was contractually agreed it would supply, Yam Seng was unable to meet obligations to other third party retailers. Leggatt J provided that a duty of good faith should be read into the contract. Leggatt J was influenced by many factors, including the long-term contractual relationship, and held that ITC had communicated false information, which amounted to a breach of the implied duty of good faith.

Despite this, Leggatt J also cautioned: "I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts."[96] Each interpretation of good faith is therefore decided in relation to the context and fact scenario of the case in which the dispute has arisen. *Medirest*,[97] decided soon after *Yam Seng*, made direct reference to Leggatt J's decision, with

[95] [2013] EWHC 111 (QB).
[96] *Yam Seng* (n 95), [131].
[97] *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (aka Medirest)* [2013] EWCA Civ 200.

Jackson LJ emphasising that there is no general doctrine of 'good faith' in English contract law,[98] "although a duty of good faith is implied by law as an incident of certain categories of contract… if the parties [to this case] wish to impose such a duty they must do so expressly".[99] As this case was considering a specific express term of good faith in the contract between the NHS Trust and Compass Group, it was decided that the term should be read narrowly, for if the parties had intended for a general principle of good faith, they would have penned such in the contract.

Bogle writes that Leggatt J could have merely implied that the argument was 'necessary for business efficacy', as in *The Moorcock.*[100] By expressly referring to 'good faith', Leggatt J reignited the discussion surrounding the principle, which has continued throughout the last ten years.

The place of 'obligations'

The English law of contract finds its home within the doctrine of obligations. Obligations have been accepted since Roman Law, and, generally, "an obligation is a tie of law; by which we are so constrained that of necessity we must render something according to the laws of our state."[101] Through obligations, people are afforded rights and duties within their private actions, with the obligation binding them to perform in a certain way, or refrain from acting in a certain way. The law of obligations encompasses both the creation and consequences of an obligation between two parties. Consider a simple written contract: after negotiation and discussion a contract is drafted, and both parties, 'A' and 'B', sign. They are thus bound to the terms of the contract and now

[98] *ibid* per Jackson LJ, [105].
[99] *ibid*.
[100] Stephen Bogle, 'Disclosing Good Faith in English Contract Law' (2018) Edin Law Review 18(1),141, 141.
[101] Justinian's Institutes, 3.13.

obligated to act in accordance with their contractual agreement. This is the creation. Party 'A' must build a shed for party 'B'. Party 'B' now has the right to demand performance from party 'A', as this right was created by the contract. Both are governed by contract law and therefore the law of obligations. If the parties do not act in in the prescribed way they may breach their obligation and may face legal consequences for doing so. This is the consequence of the obligation. If performance is completed and the contract is fulfilled, the contract is no longer required, meaning that both parties are excused; party 'A' of their obligation (in this case, to build the shed), and party 'B' of their right to demand performance (to have the shed built).

As previously discussed, there is no obligation to contract in good faith, nor negotiate in good faith. Once a contract has been agreed to, it must be performed, but this is not 'good faith', it is performance. Even if the contract is, to be blunt, a bad deal, the parties are still obligated to each other through their agreement, provided there are no grounds on which to invalidate the contract. Given its vast history, the concept of 'obligations' is wide[102] and unfortunately beyond the scope of this article. It is, however, interesting to compare the somewhat tepid approach to good faith with the judicial acceptance of the concept of obligation. While obligations underpin the function of contract, currently, the contractual obligation does not have to be created in good faith. Scott Veitch has produced significant work on the place of 'obligation' in society, as well as the 'age of rights' it can be said society enjoys today, which is especially relevant to good faith.

Obligations extend past the law, throughout society and within everyday interactions. Veitch argues that even our "moral and social sensibilities"[103] are shaped by obligation. Indeed, he argues that "obligations can provide undesired modes of control, discipline or subjection; but they are

[102] See for instance, Scott Veitch, 'Obligations: New Trajectories in Law' (1st edn, Routledge 2021).
[103] Scott Veitch, 'The Sense of Obligation' [2017] Jurisprudence (8)3, 415, 416.

also the stuff of loyalty, solidarity and love".[104] Love is an unexpected word when it comes to contract law, but it is important to consider this human aspect too. Contracts will involve humans; be the contracting party an individual, or an organisation that employs humans. The contract will be signed by humans. The contract will have consequences for humans. Humans have complex lives and emotions, which the law does not. We cannot separate the law, and dealings within the law, from the rest of society. Words in a contract will affect humans, particularly where that contract involves labour on behalf of another, such as the building of a shed. The law is affected by societal norms, and what people may consider fair may change with developments within society. Veitch identifies financial bonds especially as upholding norms: "interestingly, over exactly the same period as the discourse of human rights has come to ever greater prominence. so too has financial indebtedness."[105]

Is it any surprise that "the current combination of legal and economic ties secures these 'obediential obligations' with an omniscient force"?[106] The law underpins contract, even if those decisions and negotiation is private. The law is always present, and the law has the final opinion. If the contract is not made lawfully, either party has the right to seek remedy through the law. It is interesting that the developing understanding of human rights has coincided with financial indebtedness. Oftentimes, to become indebted to another party, a contract is signed.

Within a similar period, concerns have been raised about a so-called 'litigious society', wherein there are "too many cases, too many lawsuits, and too many lawyers".[107] This claim has often

[104] *Veitch* (n 103), 417.
[105] *ibid*, 426.
[106] *ibid*, 430.
[107] Dick Howard, 'Our Litigious Society' [1987] South Carolina Law Review 38 365, 376

been made with regards to America and, in 1987, Howard referred to "the law "industry"[108] similar to the 'movie industry'. The existence of a litigious society is fiercely debated and well beyond the scope of this article. However, it is fascinating to consider the strong American belief in 'fundamental rights'.[109] Fundamental rights underpin the American Constitution and culture in a unique way that our own Human Rights Act does not. America is the perfect example of the rights-driven society Veitch identifies, and the claim has been made that there is (too) strong a reliance upon the law. It seems when you have the right melting pot of financial debt, rights and obligations, and societal norms, you may just reach the courtroom.

Therefore, while it may be easy to consider contract law, and the law in general, as existing within its own sphere, the human aspect and the rest of society must be considered. With a greater understanding of rights and entitlements comes a greater reliance on the law.

One question Veitch has sought to answer is what a rights-driven society "really means in terms of the more hidden practices of obligation and obedience".[110] Otherwise, how does the 'discourse of human rights' affect contractual behaviour specifically? While there may be obligations on those entering a contract, what difference does the emphasis of rights make?

One example is through the fiction of 'free and equal parties'. It is assumed that parties entering a contract come to the contract as free and equal parties. The parties are assumed to be autonomous, and capable of making decisions for themselves. However, it is not always the case that parties are equal. Consider a decision made between an individual, a newly discovered singer,

[108] *ibid*, (n 107) 366.
[109] *ibid*, 377.
[110] *Veitch* (n 103), 417.

and a leading recording studio. The individual may have a legal team, but their resources do not equal that of the recording studio. The individual also does not have the same level of experience as the recording studio in signing contractual agreements within the music industry. The smaller party may be autonomous and capable, while still being more vulnerable to a bad deal, or unfair contractual terms. There is an inequality of bargaining power between these parties, even if they are both 'free', they certainly are not 'equal'. The recording studio can act in their own self-interest, to the detriment of the new singer.

If we consider society to be rights driven, it can be argued that good faith would only benefit and contribute to society positively. Good faith would act as another obligation to be upheld when contracting, in order to protect the rights of contracting parties, particularly vulnerable parties. In the above scenario, the singer, as the smaller party, would be afforded the protection of good faith, knowing that the recording studio would be bound to a fair agreement, rather than an agreement to the singers' detriment. The studio would not be able to exploit the vulnerability of the singer as the smaller party.

If it is a settled understanding that contractual parties are obligated to each other, in the form of performance of the contract, is it equitable that there should be no explicit protection of the parties through ensuring good faith agreements? Must the parties be obligated to perform a contractual agreement that was made in bad faith? How far does the fiction of freedom of contract stretch, when compared with the age of rights' Veitch identifies? It follows that if we understand obligations as existing within a society of rights rather than a legal bind only existing in an isolated legal sphere, contracting in good faith should be upheld and encouraged. Good faith would

promote a positive relationship between the parties, therefore reducing the risk of non-performance or contractual disputes, which can be costly, especially if brought before the court.

Without the structure of obligations to underpin contractual and commercial behaviour, many aspects of private law would fall apart. This has been a long-established principle. While there may be no obligation to act in good faith, good faith would serve to promote lawful and working relationships between contracting parties, which benefits their contractual arrangement, but also society as a whole. If good faith ensures that contract agreements are honest, fair and not deceptive, there would be less demand upon the legal remedy mechanisms currently available. Where obligations already provide the contractual structure, good faith would ensure that the rights of the parties were upheld when working within this structure. Furthermore, the "selfish motivations in modern commercial societies"[111] would be reduced and the playing field would be equalised between parties. If it is accepted that it is obligation that ensures contractual performance, what difference does it make if the parties were obligated to contract *in good faith*? In either case, the contract must be performed. Good faith would only further benefit the process, particularly through protecting vulnerable parties. Veitch argues that obligations come from a place of 'loyalty, solidarity and love'. If this is the case, allowing 'bad faith' agreements dismiss all three characteristics, and it may be better expressed as a place of 'selfishness, greed, and sneakiness'. Instead, upholding good faith promotes each, through a good working relationship between the parties.

[111] *Veitch* (n 103), 433.

COVID-19 Guidance on Responsible Contractual Behaviour

In 2020, England was affected by the global pandemic response caused by SARS-CoV-2 (Coronavirus Disease 2019 or COVID-19). Interestingly, during the initial 'lockdown' and COVID-19 response period, the Westminster Government released non-statutory guidance concerning the response to, and support of economic recovery from, the challenges presented by the pandemic.

As part of this guidance, there was specific guidance given to contractual parties, entitled 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency'.[112] Or in Short, 'Guidance on Responsible Contractual Behaviour'. This guidance was published on the 7th May 2020, two months after the initial lockdown response began.

The key guidance provided was that "parties to contracts should act responsibly and fairly, support the response to Covid-19 and protect jobs and the economy".[113] This guidance to act 'responsibly and fairly' can be interpreted in a similar way to the common law regarding good faith. Acting responsibly and fairly was defined in detail and included "acting in a spirit of co-operation and aiming to achieve practical, just and equitable contractual outcomes".[114] This constitutes a positive recognition of the benefit of co-operation throughout contractual relationships.

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[112] Cabinet Office, 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency' (May 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final___7_May_.pdf> accessed 20 Aug 2022.

[113] *ibid*, para 1.

[114] *Cabinet Office* (n 112), para 14.

The guidance was produced for "parties to contracts, in both public and private sectors, where the performance of contracts (including an obligation to make payment) is materially impacted by the Covid-19 emergency".[115] Given that the country, and the world as a whole, "ground to a halt"[116] during the pandemic, this guidance was relevant to almost any contractual situation, for instance, losing access to equipment to maintain it,[117] leading to non-performance of the contract, or other financial, and potentially insolvency related, issues arising from lockdown measures.[118]

If contracts could not be flexible in this most extraordinary situation and were instead held, unfairly, to the original terms, the contract may have been impossible to fulfil, potentially affecting supply chains and markets, or resulting in 'destructive disputes'.[119]

Given the non-statutory nature of the guidance, it was not a legal requirement to be adhered to, nor was the guidance intended to over-rule any express provisions in contractual parties' specific contracts.[120] This means that statutorily, the concept of an implied doctrine of good faith remains unchanged from its position before the pandemic.

However, the guidance was produced "for [the] collective benefit [to contracting parties], and for the long-term benefit of the UK economy".[121] The complications and delays that could have arisen from a failed or frustrated contract would have affected the economic recovery from Covid-

[115] *ibid*, para 6.
[116] Dominic Gilbert, 'How major cities around the world ground to a halt amid the coronavirus pandemic' The Daily Telegraph (London, 2 April 2020) <https://www.telegraph.co.uk/news/2020/04/02/major-cities-around-world-ground-halt-amid-coronavirus-pandemic/> Accessed 2 Sept 2022.
[117] A Sears-Black, 'Covid-19- Impact on Commercial Contracts' (*Shearman & Sterling*, 7 May 2020) <https://www.shearman.com/perspectives/2020/05/covid-19-impact-on-commercial-contracts> Accessed 2 Sept 2022.
[118] *ibid.*
[119] *Cabinet Office* (n 112), para 13.
[120] *ibid*, para 8.
[121] *ibid.*

19, as well as potentially adding to the workload of the judiciary if dispute cases were to be brought forward. It is clear from the guidance that the government hoped to avoid this outcome:

> "The Government would strongly encourage parties to seek to resolve any emerging contractual issues responsibly – through negotiation, mediation or other alternative or fast-track dispute resolution – before these escalate into formal intractable disputes".[122]

The benefit of recognising a fair and responsible contractual relationship, and subsequently acting in some good faith capacity throughout the contractual relationship, appears clear on public policy grounds.

Excluding the jurisprudence concerning an implied duty of good faith during contractual dealings, at least throughout the unprecedented pandemic response, at a governmental level there was clearly support for increased co-operation and good faith between parties. The guidance explicitly stated:

> "The Government is asking for an extraordinary response from everyone in the UK in their personal and work lives to overcome the emergency. An extraordinary response is also required from individuals, businesses (including funders) and public authorities in their contractual agreements".[123]

Regardless of the unprecedented circumstances the pandemic created, and the extraordinary response asked of contracting parties, this guidance demonstrates the value of some form of good faith within contracts, for the benefit of the public. This acknowledgement of the public policy benefit is similar to the French rationale towards good faith and honest negotiation. The benefits of this approach appear to somewhat harmonise English understanding of good faith with the civil

[122] *Cabinet Office* (n 112), para 17.
[123] *ibid*, para 11.

approach in France and other jurisdictions, without necessarily stipulating that good faith must be adhered to, respecting the concept of individualism and the autonomy of the contracting parties.

Conclusion

Good faith is a well-established civil law principle in other jurisdictions, notably jurisdictions across Europe. In comparison, a general, implied of 'good faith' in English contract law is not well-established, but appears to indeed be developing gradually, or 'incrementally' as HHJ Pelling referred to in the 2020 judgement *Taqa Bratani Ltd v Rockrose*.[124] This incremental approach has come to a head with the Covid-19 response guidance. After publishing such guidance, would it make sense or be fair for contractual relationships, and the protection offered by an understanding of good faith, to regress back to an exclusive, case-by-case and highly fact-specific understanding? Prior to the extraordinary Covid-19 situation and 2020 guidance, Common law had already began developing an understanding of both co-operation and good faith, largely in the limited context of the cases that have been raised.

Criticisms of the exclusive, individualistic English position have existed for decades, largely surrounding unfair contractual terms and the inability to harmonise with other jurisdictions. Simultaneously, some criticism of implementing a good faith doctrine is also valid, such as the uncertain role the doctrine would fulfil. Unlike civil law jurisdictions, English contractual jurisprudence is not codified as a single entity and there can be significant overlap between doctrines and concepts, some of which, such as misrepresentation, are already established and entrenched into practice. Additionally, is it acceptable to incorporate a generally implied 'good

[124] [2020] EWHC 58 (Comm), [46]

faith' obligation into English law of contract simply because different jurisdictions use the doctrine?

In an increasingly globalised commercial world, harmonisation between jurisdictions can only be a positive development. There would be value in adopting a clear, implied duty of good faith during contractual dealings in English contract law. As Lord Steyn wrote, "the aim of any mature system of contract law must be to promote the observance of good faith and fair dealing in the conclusion and performance of contracts."[125]

[125] Justice Steyn "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy" (1991) 6 Denning LJ 131, 131.

Devolution has led to Tax Competition and Legal Complexity; Would Further Devolution Help or Hinder Holyrood?

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Introduction

Devolution has locked Scotland's tax regime in step with that of the rest of the UK (rUK), thereby creating a burdensome system for Scottish taxpayers. This essay will examine three potential areas at risk of facing tax competition between Scotland and the rUK. It will then explore the legal complexity of the devolved tax system and suggest how further devolution may resolve this issue.

Tax competition

Tax competition between countries and tax jurisdictions is a hypothetical situation where one will cut their rates of taxation, which subsequently encourages another to cut theirs in order to stop companies and people from moving to the lower tax jurisdiction. This is an extreme example, but even where it is less dramatic tax competition ultimately results in falling revenues for both tax jurisdictions, and a poorer quality of life for the people living in them as governments have less money to spend. This section will discuss three areas in which tax competition could become a significant issue, namely: income tax, air departure tax and Scottish landfill tax. Furthermore, it will demonstrate how these significant risks of tax competition mean that Holyrood in practice has little power over Scotland's devolved taxes.

Income tax

The Scotland Act 1998 partially devolved to Holyrood the power to set personal income tax rates. As per s.73(1), the Scottish Executive could vary personal income tax rates set by Westminster by 3 pence, a prerogative known as the 'Scottish Variable Rate'. However, Holyrood never invoked this power, and it is longer available because,[126] in 2012, the 'Scottish Rate of Income Tax' (SRIT) was introduced.[127] The SRIT was 'pegged', which meant, for example, that if the Scottish Government increased the top rate of income tax, then it would have to increase all other rates accordingly. Finally, the Scotland Act 2016 gave Scotland the power to set its income tax rates

[126] Office of the Secretary of State for Scotland, 'Scottish Variable Rate of Tax No Longer Available' (November 2010) <https://www.gov.uk/government/news/scottish-variable-rate-of-tax-no-longer-available> accessed 05/12/2021.
[127] Scotland Act 2012, section 80C(1).

and thresholds.[128] Since gaining this power, Holyrood has made only minor changes to the income tax system, such as introducing the 'starter' and 'intermediate' rates.[129]

During the 2016 Scottish Elections, the Scottish National Party (SNP) campaigned for a substantial increase to the 'top' rate of income tax.[130] However, once in government, they only marginally increased the top rate from 45% to 46%.[131] As indicated by published government research, a more significant increase would have likely led to behavioural changes among top rate taxpayers that would result in a crucial loss of revenue for Scotland.[132] Top rate taxpayers have greater economic mobility regarding how they mitigate their tax liability, meaning that unfavourable changes to their tax rates can pose a considerable risk as they are able to adapt their behaviours to lower their tax liability. For example, top rate taxpayers 'could have more than one UK address and therefore change their residency on paper if income taxes are lower' in the rUK.[133] This demonstrates how having two income tax systems within the UK creates opportunities for tax competition between Scotland and the rUK.

The devolved income tax situation has left Holyrood only two options. It could increase income tax rates and risk sparking tax competition with the rUK over the wealthy taxpayers who contribute 19% of Scotland's total income tax revenue.[134] Alternatively, Holyrood could hold onto those wealthy taxpayers and avoid tax competition by following what the rUK does to a significant degree. This dichotomy demonstrates how little power Scotland actually has over its income tax system; it can initiate tax competition with the rUK and risk revenue shortfalls or otherwise

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[128] Scotland Act 2016, section 13.
[129] Scottish Government, 'Income Tax Rates and Personal Allowances' (April 2021) <https://www.mygov.scot/income-tax-rates-and-personal-allowances> accessed 05/12/2021.
[130] SNP, 'Manifesto 2016' (2016) 9 <https://d3n8a8pro7vhmx.cloudfront.net/thesnp/pages/5540/attachments/original/1461753756/SNP_Manifesto2016-accesible.pdf?1461753756> accessed 08/12/2021.
[131] The Guardian, 'Scotland's highest earners to pay £164m more in income tax' (December 2017) <https://www.theguardian.com/politics/2017/dec/14/scotlands-highest-earners-to-pay-extra-164m-in-income-tax> accessed 05/12/2021.
[132] Scottish Government, 'Potential impact of an increase in the Additional Rate of Income Tax from 45p to 50p' (December 2017) <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2018/02/scottish-income-tax-2018-2019/documents/potential-impact-of-an-increase-in-the-additional-rate/potential-impact-of-an-increase-in-the-additional-rate/govscot%3Adocument/Potential%2Bimpact%2Bof%2Ban%2Bincrease%2Bin%2Bthe%2Badditional%2Brate.pdf> accessed 05/12/2021.
[133] ibid 2.
[134] ibid 1.

relinquish its decision-making power in that area to the rUK.

This analysis of the potential impact of significant divergence between how income tax operates in Scotland and the rUK establishes that the possibility of tax competition is a constant factor in Holyrood's decisions. Consequently, it is arguable that Scotland lacks complete control over its tax system.

Air departure tax (ADT)

Section 1 of the Air Departure Tax (Scotland) Act 2017 fully devolved to Holyrood the power to charge tax on the carriage of chargeable passengers on chargeable aircraft from airports in Scotland. However, as Holyrood is yet to introduce the ADT in Scotland due to 'the [unresolved] issue relating to the Highlands & Islands exemption…',[135] Westminster's Air Passenger Duty (APD) continues to apply.

Despite not yet being formally introduced, the Scottish Government's '[pledge] to halve the tax payable by airlines' has already proved to be a controversial proposal.[136] Additionally, the SNP has indicated that it would abolish the tax 'entirely when resources allow' to alleviate the tourism sector's significant tax burden.[137] Should the Scottish Government follow through on these pledges, it will likely cause tax competition between Scotland and the rUK. If the rates of ADT are significantly lower than APD, 'this may cause behavioural effects'.[138] English fliers living near the border, for example, may choose to fly out of Scotland more often because it is cheaper. In response to such a move by the Scottish Government, the rUK would likely reduce the rates of APD, so they do not lose significant revenue.

Thus, by slashing ADT rates, Scotland would initiate tax competition with the rUK, resulting in 'a race to the bottom with falling revenues for all',[139] and the environment potentially

[135] Revenue Scotland, 'Why has the introduction of Air Departure Tax been delayed?' (April 2019) <https://revenue.scot/taxes/air-departure-tax/air-departure-tax-faqs> accessed 05/12/2021.
[136] Justine Riccomini, 'Flower of Scotland' (2017) 4597 Taxation 14, 17.
[137] SNP (n 130) 13.
[138] Riccomini (n 136) 17.
[139] Charlotte Barbour and Justine Riccomini, 'Analysis — Scotland's devolved taxes: the practical reality '(2017) 1377 Tax Journal 9, 11.

suffering greatly in the process as it would encourage people to fly more.[140] This further demonstrates how devolution may lead to tax competition within the UK. Alternatively, the SNP's pledges could be seen as an example of Holyrood upholding its commitment to ensuring that Adam Smith's founding principles of taxation are implemented in Scotland. In this case, it ensures that the Scottish tourism sector's tax liability is 'proportionate to [its] ability to pay'.[141] However, this is hard to believe considering how little the system complies with Adam Smith's other canons, given its complexity, which will be discussed below.

Scottish landfill tax (SLfT)

Scotland gained control over SLfT under section 1 of the Landfill Tax (Scotland) Act 2014. Despite being fully devolved, Holyrood has yet to change the rates out of pace with the rUK; the rates of Landfill Tax and SLfT are the same.[142]

Barbour and Riccomini note that 'there is little scope [for Scotland] to diverge from' the rUK's rates due to 'the possibility of "waste tourism".'[143] Waste tourism refers to companies or individuals crossing borders to dispose of their waste due to lower landfill tax rates and consequently cheaper costs. While it is unlikely that a slight change to the rates would majorly affect most taxpayers' behaviour, should Scotland or the rUK significantly alter their rates, it could result in tax competition between them. Furthermore, it would likely encourage taxpayers to use landfill sites, which is detrimental to the environment. This again demonstrates how vulnerable the UK is to internal tax competition due to the nature of the devolved tax system, further risking a loss of revenue for both Scotland and the rUK.

The predicament Scotland finds itself in with SLfT is similar to that of income tax above: do not change the rates and effectively relinquish power to the rUK, or change the rates and potentially engage in tax competition. It is implausible that the rates will significantly change independently of each other due to the potential for tax competition, meaning that the rUK has not

[140] BBC News, 'Scottish Greens back 'progressive' use of new tax powers' (October 2017) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-41715593> accessed 05/12/2021.
[141] Revenue Scotland, 'Scottish Approach to Tax' (February 2020) <https://revenue.scot/taxes/scottish-approach-tax> accessed 07/12/2021.
[142] HMRC, 'Landfill Tax rates' (July 2021) <https://www.gov.uk/government/publications/rates-and-allowances-landfill-tax/landfill-tax-rates-from-1-april-2013> accessed 05/12/21; Revenue Scotland, 'SLfT Rates' (March 2021) <https://revenue.scot/taxes/scottish-landfill-tax/slft-rates-accounting-periods> accessed 05/12/2021.
[143] Barbour (n 139) 11.

given Holyrood any more power by devolving SLfT. Ultimately, Scotland has little power over the rates of SLfT, despite it being fully devolved.

In summary, the devolved tax system has created significant opportunities for tax competition within the UK. The devolution of income tax, ADT and SLfT are critical examples of this due to the potential for taxpayers to change their behaviour. Furthermore, devolving these taxes to Scotland has created the illusion that Holyrood has significant power over them, because Scotland must, to a certain extent, follow the rUK if it wishes to avoid tax competition.

Legal complexity for the taxpayer

This section will demonstrate how Scotland's devolved tax powers have created a tax system that is highly complex for the taxpayer by analysing the operation of income tax and National Insurance Contributions (NIC) in Scotland. It will also suggest further devolution that would help to alleviate this complexity.

Income tax and NIC in Scotland

As explained above, although 'Westminster is responsible for the tax base, allowances and reliefs, and administration [of income tax]; Holyrood sets the tax rates and' thresholds.[144] This means Scottish taxpayers have to look at both the Scottish rates and thresholds and the rUK's rules and guidance for everything else related to income tax. NIC is reserved, so Scottish taxpayers must also look at the rUK's rules for NIC despite it having the same tax base as income tax. This demonstrates some of the complexity devolution has caused for Scottish taxpayers when calculating the tax due on their earnings.

Furthermore, in Scotland, the upper earnings limit when the 2% NIC rate begins for employees is still tied to the rUK's higher rate threshold. This means if Scotland's higher rate threshold is lower than the rUK's, Scottish taxpayers are liable to pay the 41% higher rate of income tax as well as 12% NIC until they reach the rUK's higher rate threshold. This effectively

[144] Donald Drysdale, 'Scottish Taxes are far from Simple' (Bloomsbury Professional Blog, August 2018) <https://scotland.bloomsburyprofessional.com/blog/scottish-taxes-are-far-from-simple> accessed 06/12/2021.

makes those taxpayers' combined income tax and NIC liability 53%. This is the case in Scotland at the moment: the Scottish higher rate threshold is £43,662,[145] and the rUK's is £50,271.[146] Riccomini effectively contextualises the 'queries' businesses will face 'about differing take-home pay levels'.[147] Thus, a profoundly complex tax system has been created by devolving some aspects of tax on earnings and not others; some Scottish taxpayers earning over the higher rate threshold are paying significantly more tax on their earnings than employees in the rUK.

Taxation on Scottish taxpayers' earnings will soon be further complicated. In September 2021, the UK Government announced the new Health and Social Care Levy of 1.25%. The Levy aims to raise £36 billion to reform the NHS and social care, and will be collected on top of existing NIC.[148] As Riccomini explains, this means some of those employees earning over the Scottish higher rate threshold will effectively be paying 54.25% tax on their earnings.[149] Furthermore, it is unclear how the revenue raised from this levy will be allocated to Scotland since health and social care are devolved powers,[150] leading some to argue that Scottish taxpayers will effectively 'pay for England's social care'.[151] The disproportionate impact of the levy on Scottish taxpayers due to the inconsistent devolution of tax powers further demonstrates how complex the tax system has become. Some Scottish taxpayers will face significantly higher tax bills and may not even be paying for services they will use.

Therefore, devolution has led to a highly complex tax system in Scotland. Scottish taxpayers must understand how partly devolved income tax and reserved NIC operate together to work out the tax due on their earnings. Many are also paying significantly more than their peers in the rUK due to the operation of these taxes.

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[145] Scottish Government (n 129).
[146] UK Government, 'Income Tax Rates and Personal Allowances' (2021) <https://www.gov.uk/income-tax-rates> accessed 06/12/2021.
[147] Riccomini (n 136) 17.
[148] UK Government, 'Record £36 billion investment to reform NHS and Social Care' (September 2021) <https://www.gov.uk/government/news/record-36-billion-investment-to-reform-nhs-and-social-care> accessed 06/12/2021.
[149] Justine Riccomini, 'The Health and Social Care Levy' (ICAS, September 2021) <https://www.icas.com/landing/tax/the-health-and-social-care-levy> accessed 06/12/2021.
[150] ibid.
[151] The National, 'National Insurance increase a 'Union dividend', Boris Johnson claims' (September 2021) <https://www.thenational.scot/news/19563893.national-insurance-increase-union-dividend-boris-johnson-claims/> accessed 06/12/2021.

The case for devolving NIC

This essay has explained the complex operation of NIC and income tax in Scotland; it will now discuss whether devolving NIC to Scotland would be an effective solution. Firstly, NIC and income tax have the same base, and Her Majesty's Revenue and Customs (HMRC) collects them both simultaneously from employees' earnings. This indicates that it would not be overly complicated from a practical viewpoint to devolve NIC; HMRC already has to identify Scottish taxpayers for income tax purposes. Secondly, by giving Scotland power over NIC, Holyrood could tie the 2% NIC rate to the Scottish income tax higher rate threshold rather than the rUK's. This would fix the issue in the system that results in some higher rate taxpayers paying 53% tax on their earnings, thus easing those taxpayers' burdens and the complexity of the system. Therefore, devolving NIC to Scotland would alleviate some significant complexities of the tax system.

Previously, the strongest argument for keeping NIC reserved was that it was 'perceived as too linked to the welfare system to be' devolved to Scotland;[152] '[t]he argument for reserving NICs lies in their relationship with the contributory benefit system, itself reserved'.[153] In other words, NIC should remain reserved because the welfare system to which it contributes is reserved. However, in recent years significant parts of the welfare system have been devolved to Scotland. For example, the Scotland Act 2016 devolved powers over certain disability and carers' benefits and specific benefits for maternity, funeral and heating expenses.[154] Furthermore, the Scottish Government is enacting ambitious welfare policies, such as doubling the Scottish Child Payment from April 2022[155] and establishing a £40 million Scottish Welfare Fund.[156] Scotland's significant responsibility for its welfare system demonstrates that Holyrood needs the additional income of NIC to fund its welfare system and that the argument for keeping NIC reserved due to the reserved welfare system no longer applies.

Therefore, devolving NIC to Scotland would be impactful. For Scottish taxpayers, it would simplify tax reporting and potentially lower their tax liability while potentially increasing funding

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[152] Bill Dodwell, 'The Q&A: Devolution of further tax powers for Scotland' (2014) 1232 Tax Journal 7.
[153] Sandra Eden, 'Scotland Act 2016: Further Tax Powers Come North' (2016) 20 Edin LR 376, 379.
[154] Scotland Act 2016, sections 22–23.
[155] Scottish Government, 'Doubling the Scottish Child Payment' (November 2021) <https://www.gov.scot/news/doubling-the-scottish-child-payment/> accessed 06/12/2021.
[156] Daily Record, 'Scottish Budget: Income tax rates frozen next year under SNP/Green Government plan' (December 2021) <https://www.dailyrecord.co.uk/news/politics/scottish-budget-income-tax-rates-25657419> accessed 09/12/2021.

for Scotland's growing welfare system. Thus, devolving NIC to Scotland is an effective solution to a number of problems with Scotland's tax system.

In summary, by having income tax partly devolved and NIC remaining reserved, Scotland has developed an extremely complex tax system which is only set to become even more complicated due to the Health and Social Care Levy. However, devolving responsibility for NIC to Scotland would significantly alleviate this complexity and assist Holyrood in funding Scotland's welfare system.

Conclusion

This essay has demonstrated significant issues with Scotland's devolved tax system, so it agrees with Eden that '[t]here are many reasons *not* to have multiple tax systems within a single state',[157] including the potential for tax competition and legal complexity for the taxpayer. The risk of tax competition has prevented the Scottish Government from following through on its ambition to increase the top rate of income tax significantly and has, to a certain extent, locked Scotland in step with the rUK in terms of income tax, ADT and SLfT. The partial devolution of income tax and continued reservation of NIC has led to significant discrepancies between the tax liability of some Scottish taxpayers and their counterparts in the rUK.

However, there *is* more than one tax system within the UK, which means action must be taken to reduce the burden on taxpayers. Devolving NIC to Scotland would do so. Most Scottish taxpayers would only need to look at Scottish rules on taxation of their earnings, and it would resolve a number of significant issues with the system, as well as provide revenue Holyrood can use to fund its developing welfare system.

[157] Eden (n 153) 377.

Bibliography

Primary Sources

Legislation

Air Departure Tax (Scotland) Act 2017

Landfill Tax (Scotland) Act 2014

Revenue Scotland and Tax Powers Act 2014

Scotland Act 1998

Scotland Act 2012

Scotland Act 2016

Political Party Publications

Scottish National Party, *Manifesto 2016* (2016) <https://d3n8a8pro7vhmx.cloudfront.net/thesnp/pages/5540/attachments/original/1461753756/SNP_Manifesto2016-accesible.pdf?1461753756> accessed 08/12/2021

Scottish Governmental Body Publications

Revenue Scotland, *Scottish Approach to Tax* (February 2020) < https://revenue.scot/taxes/scottish-approach-tax> accessed 07/12/2021

Revenue Scotland, *SLfT Rates* (March 2021) <https://revenue.scot/taxes/scottish-landfill-tax/slft-rates-accounting-periods> accessed 05/12/2021

Revenue Scotland, *Why has the introduction of Air Departure Tax been delayed?* (April 2019) <https://revenue.scot/taxes/air-departure-tax/air-departure-tax-faqs> accessed 05/12/2021

Scottish Government, *Doubling the Scottish Child Payment* (November 2021) <https://www.gov.scot/news/doubling-the-scottish-child-payment/> accessed 06/12/2021

Scottish Government, *Income Tax rates and Personal Allowances* (April 2021) <https://www.mygov.scot/income-tax-rates-and-personal-allowances> accessed 05/12/2021

Scottish Government, *Potential impact of an increase in the Additional Rate of Income Tax from 45p to 50p* (December 2017) <https://www.gov.scot/binaries/content/documents/govscot/publications/factsheet/2018/02/scottish-income-tax-2018-2019/documents/potential-impact-of-an-increase-in-the-additional-rate/potential-impact-of-an-increase-in-the-additional-rate/govscot%3Adocument/Potential%2Bimpact%2Bof%2Ban%2Bincrease%2Bin%2Bthe%2Badditional%2Brate.pdf> accessed 05/12/2021

UK Governmental Body Publications

HMRC, *Landfill Tax rates* (July 2021) <https://www.gov.uk/government/publications/rates-and-allowances-landfill-tax/landfill-tax-rates-from-1-april-2013> accessed 05/12/21

Office of the Secretary of State for Scotland, *Scottish Variable Rate of tax no longer available* (November 2010) <https://www.gov.uk/government/news/scottish-variable-rate-of-tax-no-longer-available> accessed 05/12/2021

UK Government, *Income Tax Rates and Personal Allowances* (2021) <https://www.gov.uk/income-tax-rates> accessed 06/12/2021

UK Government, *Record £36 billion investment to reform NHS and Social Care* (September 2021) <https://www.gov.uk/government/news/record-36-billion-investment-to-reform-nhs-and-social-care> accessed 06/12/2021

Secondary Sources

Blogs

Drysdale D, *Scottish Taxes are far from Simple* (Bloomsbury Professional Blog, August 2018) <https://scotland.bloomsburyprofessional.com/blog/scottish-taxes-are-far-from-simple> accessed 06/12/2021

Riccomini J, *The Health and Social Care Levy* (ICAS, September 2021) <https://www.icas.com/landing/tax/the-health-and-social-care-levy> accessed 06/12/2021

Books

Eden S and Morse G, *Davies: Principles of Tax Law* (Thomson Reuters 2020)

Journal Articles

Barbour C and Riccomini J, *Analysis — Scotland's devolved taxes: the practical reality* (2017) 1377 Tax Journal 9

Dodwell B, *The Q&A: Devolution of further tax powers for Scotland* (2014) 1232 Tax Journal 7

Eden S, *Scotland Act 2016: Further Tax Powers Come North* (2016) 20 Edin LR 376

Riccomini J, *Flower of Scotland* (2017) 4597 Taxation 14

Newspaper Articles

BBC News, *Scottish Greens back 'progressive' use of new tax powers* (October 2017) <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-41715593> accessed 05/12/2021

Daily Record, *Scottish Budget: Income tax rates frozen next year under SNP/Green Government plan* (December 2021) <https://www.dailyrecord.co.uk/news/politics/scottish-budget-income-tax-rates-25657419> accessed 09/12/2021

The Guardian, *Scotland's highest earners to pay £164m more in income tax* (December 2017) <https://www.theguardian.com/politics/2017/dec/14/scotlands-highest-earners-to-pay-extra-164m-in-income-tax> accessed 05/12/2021

The National, *National Insurance increase a 'Union dividend', Boris Johnson claims* (September 2021) <https://www.thenational.scot/news/19563893.national-insurance-increase-union-dividend-boris-johnson-claims/> accessed 06/12/2021