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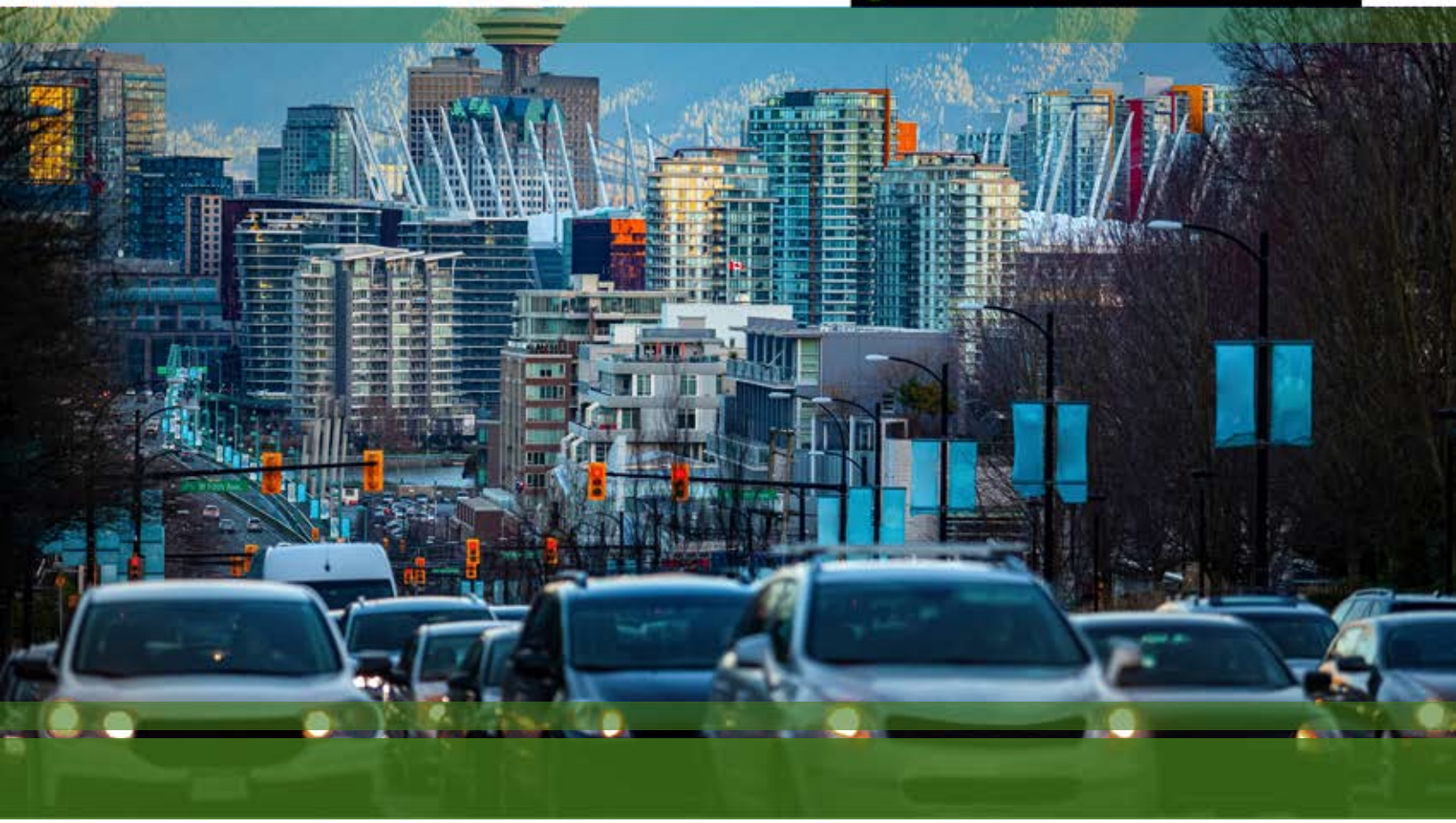

Commute Trip Reduction Initiatives: Implementing Efficiencies in Transportation for a Greener Future

An ELC Clinic report prepared for:
Be the Change Earth Alliance

Law Student: Richard Wagner
Articled Student: Ruben Tillman
Co-op Student: Alexa Powell
Supervising Lawyer: Deborah Curran

BE THE CHANGE
EARTH ALLIANCE

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BC's carbon emissions and congestion could be reduced by a Commute Trip Reduction initiative that would be authorized under the Climate Change Accountability Act. Photo of Lions Gate Bridge by FangXiaNuo for iStock.

Executive Summary

The purpose of this report is to evaluate how current law in British Columbia addresses the transportation demand management strategy of commute trip reduction (CTR) with a view to providing law reform recommendations to the Province of British Columbia to enable CTR. [1]

This evaluation is relevant to a proposed CTR initiative requiring all medium and large employers to calculate and report their total annual employee commute trip carbon emissions,

[1] Research on this topic was requested by Be The Change Earth Alliance <https://www.bethechangeearthalliance.org/> and CloserCommutes.org

and to make best efforts to reduce that amount each year.[2] The details of this proposed initiative are outlined at closecommute.com/research, along with an annotated bibliography of scientific studies on the effects of long commuting.

The Government of BC is committed to addressing the climate change crisis. Transportation accounts for over 40% of the province's greenhouse gas (GHG) emissions.[3] Commute trip reduction (CTR) initiatives have proven successful in reducing carbon emission and congestion in other jurisdictions.[4]

The objective of CTR is to reduce the number and length of trips (especially those taken in a single-occupancy vehicle at peak periods) to reduce the climate impacts and other harmful health, social and economic effects of commuting.

Examples of CTR tactics include work-from-home, creating satellite offices, compressed work scheduling, guaranteed ride home, discounted transit passes, providing secure bike lockers and EV charging stations, connecting employees with carpools, vanpools and carshare services, etc. One potentially very productive CTR tactic is *proximate commuting* (also referred to as closercommutes) which calls on multi-worksite employers to consider home-branch proximity when assigning new hires to their worksites, during internal transfers, and by offering peer-with-peer worksite swaps.

Part 1 of this report sets out the context of climate change and its impacts in British Columbia, with Part 2 canvassing some of the basic principles of CTR.

In Part 3 we provide a preliminary evaluation of the legislative frameworks for transportation, workplace health and safety, and climate action in British Columbia, and conclude that there is no transportation-specific law that addresses CTR. However, the *Climate Change Accountability Act* (*CCAA*) enables the provincial government to enact regulations requiring public service organizations (PSOs) – and potentially employers in other sectors – to report on total employee commute trip distances and/or GHG emissions. Law reform recommendations flowing from this analysis are summarized below. Note: these recommendations are numbered in suggested chronological order, *i.e.* the order in which each provision would be implemented.

RECOMMENDATION #1 Establish employee commute trip GHG emissions as a reporting requirement for PSOs under the *Climate Change Accountability Act*, section 12(2)(l) and (m) and 12(2)(b.1)

The *CCAA* contemplates that additional reporting requirements could be imposed on PSOs. The recording and reporting of commute trip GHG emissions is a first step in moving towards the implementation of CTR measures, and allows the provincial government and others to analyze

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[2] *Binder of Background Materials: Proposed Initiative for Reducing Commuting, Congestion and Carbon Emissions* (2019) prepared by Bruce Batchelor, CloserCommutes.org.
[3] British Columbia: Reduce 2007 emission levels 40% by 2030, 60% by 2040 and 80% by 2050. <https://www2.gov.bc.ca/gov/content/environment/climate-change/planning-and-action/legislation>
[4] <https://www.bloomberg.com/news/articles/2015-04-06/washington-state-s-commute-trip-reduction-program-is-a-model-for-the-nation>

the impacts of CTR strategies. We recommend this data be collected and publicly available to allow further analysis and research on the impacts of CTR measures. We discuss potential mobility, liberty and equality rights implications related to such a reporting requirement in Appendix A, and canvas privacy law as it relates to the collection of personal information from employees in Appendix B. As part of this recommendation we propose the involvement of the British Columbia Information and Privacy Commissioner in the development of this reporting requirement to ensure compliance with privacy law.

RECOMMENDATION #2 Enact regulations under section 12(2)(e), (f), (l) and (m) of the *Climate Change Accountability Act* that address GHGs through commute trip reduction

A combination of regulatory powers may provide authority to establish targets for different types of public sector organizations, or for different groups of entities under the *Act*. The goal of this recommendation is to expand CTR progressively by encouraging entities to implement programs to decrease their employee trip GHG emissions year over year.

RECOMMENDATION #3 Phase in non-PSO employers under the *Climate Change Accountability Act*, or other legislation

This step would bring non-PSO employers – specifically medium and large businesses and organizations – under the authority of the *CCAA* or similar legislation and allow the provincial government to extend the GHG reporting requirements and targets to these entities (as per recommendations #1 and #2 above). Through *CCAA* regulation, Cabinet may create a new category of organizations to capture entities that are not strictly speaking "public sector organizations," and bring that category of entities within the authority of the *Act.* The goal of this recommendation is to enable the *CCAA* to be binding on businesses, co-operatives and non-profit organizations. The requirements applying to these organizations under the *CCAA* could be flexible, but the first step is to bring those businesses and organizations within the scope of the *CCAA*.

While the *CCAA* contains broad regulatory powers, there is uncertainty as to whether the *CCAA* contemplates potential applicability to private sector corporations and other large organizations given the definition and use of "public sector organization" throughout. Therefore this may require amendments to explicitly include private businesses and other organizations under the *Act.*

RECOMMENDATION #4 Prohibit, by regulation, persons tasked with recruiting employees from having access to candidates' residential address during the hiring process

As employers seek to reduce total employee trip GHG emissions, the residential address of an applicant for employment should not be considered a factor in hiring the individual. It would be unfair to consider how far an applicant is going to commute before hiring them because a person's residential address is usually influenced by a variety of factors beyond their control.

Preventing the disclosure of an applicant's address may be accomplished by either limiting the information the candidate provides in their application, so no one in the employer organization knows their residential address, or redacting a candidate's residential address. If the person charged with hiring is also the person who receives the application, it makes more sense to issue instructions to applicants not to include any indication of their residential address on the application itself.

Given the range of personal, economic and community considerations involved in the decisions of where to live and work, CTR initiatives should in no way create incentives for employers to make employee hiring and/or dismissal decisions based on employees' or prospective employees' places of residence. CTR tactics are intended to be implemented with pre-existing employees to address long commutes and the consequent GHG emissions and economic costs. Therefore, it is crucial to design CTR initiatives carefully, so as not to provide the wrong incentives to employers.

Finally, in the Appendices, we examine some CTR-related issues in more detail. In Appendix A, we consider mobility, liberty and equality rights, as protected by the Canadian Charter of Rights and Freedoms, in the context of CTR. In Appendix B, we canvass privacy law related to employees and conclude generally that collection of employees' commute-related information does not violate privacy law, as long as collection is authorized by law. The proposed CTR initiative does not call on employers to report employees' individual commuting information – only to become aware of this information and report aggregated data ("the carbon burden"). The BC Information and Privacy Commissioner could be asked to confirm our conclusion.

In Appendix C, we outline select CTR case studies from other jurisdictions.

It is important to note that individual choices about where to live and work involve many factors – such as the affordability of housing and labour market opportunities – that are outside the scope of this report. The intent is to highlight the potential for CTR in law and as one of the many strategies BC needs to reduce GHG emissions and transportation problems. While we have made every effort to characterize accurately the three areas of BC law examined in this report – transportation, workplace health and safety, and climate change – each of these areas is vast. Therefore, the information in this report is intended for information purposes only and should not be relied on as legal advice.

British Columbia's spectacular natural beauty and stability is threatened by climate change. Fraser River photo by Holly Pattison

1. Background

British Columbia's spectacular natural beauty is recognized around the world. The ecological diversity, encompassing 14 ecological zones and 50,000 species, is matched by its diversity in character. Numerous Indigenous groups with distinct languages and cultures whose ties to the land stretch back to time immemorial, one of the world's most culturally diverse metropolitan areas, and the high standard of living and quality social services contribute to British Columbia as a strong and resilient community.[5]

[5] We recognize the terrain of inequalities that exists within British Columbia with regard to services as well as the economic inequalities, high cost of living, and poverty (British Columbia's child poverty rate in 2015 was 20%).

However, British Columbia's natural beauty and stability is threatened by climate change. In 2018 BC saw a record-setting area burned in wildfires. Some 2,117 fires consumed over 1.3 million hectares of land and wildfire suppression costs reached $615 million.[6] In the same year, historic floods forced thousands of British Columbians from their homes.[7] On June 17, 2019, the Canadian House of Commons declared a 'climate emergency,' following the lead of various municipalities across the country. Minister Catherine McKenna called on the House to recognize that climate change is an urgent crisis.[8] In their decision upholding the federal greenhouse gas (GHG) pricing scheme, the Saskatchewan Court of Appeal called climate change caused by anthropocentric GHG emissions "one of the great existential issues of our time."[9] Scientific consensus points to the urgent need to reduce GHG emissions if we are to avoid the dire consequences of an unstable environment that will impact the security of our health, food, water and essential services.[10]

British Columbia is a leader in the transition to a green economy. In 2008 it was the first jurisdiction in North American to implement a comprehensive price on carbon.[11] The province's 2019 CleanBC climate strategy builds on years of initiatives and promises significant investments in green technology and jobs, promising to grow the economy while making real reductions in GHG emissions. It is important to note that in the CleanBC plan, the provincial government has emphasized the need to identify additional reductions across more sectors of the economy in order to attain the remaining 25% of the 2030 reduction goals.[12] In the 2020 Speech from the Throne, BC Lieutenant Governor Janet Austin acknowledged that British Columbia's population is expected to grow by one million people over the next 10 years, putting pressure on BC's transportation and trade corridors – and British Columbians are already spending too much time in gridlock.[13] Austin further stated: ''This government is seeking ways to reduce emissions overall."[14]

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[6] British Columbia, *Wildfire Season Summary,* (2019) accessed at: <https://www2.gov.bc.ca/gov/content/safety/wildfire-status/about-bcws/wildfire-history/wildfire-season-summary>

[7] Roshini Nair and Tina Lovgreen, "Thousands forced from homes in BC due to historic flood" (2018) *CBC News,* accessed at: <https://www.cbc.ca/news/canada/british-columbia/bc-flooding-evacuation-1.4656616>

[8] CBC News, "House of Commons Declares a climate emergency ahead of pipeline decision" (2019) *CBC News*, accessed at: <https://www.cbc.ca/news/politics/climate-emergency-motion-1.5179802.>

[9] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, para. 4.

[10] Allen, M.R., *et al*, "Framing and Context" in Global Warming of 1.5C. An IPCC Special Report on the impacts of global warming of 1.5 degrees above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and effort to eradicate poverty (2018) *Intergovernmental Panel on Climate Change: UN.*

[11] *Carbon Tax Act,* SBC 2008, c. 40.

[12] Government of British Columbia, *CleanBC,* page 6. Accessed at: <https://www2.gov.bc.ca/assets/gov/environment/climate-change/action/cleanbc/cleanbc_2018-bc-climate-strategy.pdf.>

[13] CTV News Vancouver Island, "Full Text: 2020 BC Speech from the Throne" (February 11, 2020) accessed at: <https://vancouverisland.ctvnews.ca/full-text-2020-b-c-speech-from-the-throne-1.4807612.>

[14] Ibid.

BC has committed to reducing 2007 GHG emission levels 40% by 2030[15] and Canada has committed to reduce 2005 emission levels by 30% by 2030.[16]

In the unfolding climate emergency, technology and human behaviour are both critical to achieving GHG reduction goals.[17] The 20th and 21st centuries have seen a rapid expansion of suburban sprawl. Our built environment often requires transportation, which to date has contributed significant amounts of GHG emissions into the environment.[18] The proliferation of electric vehicles may reduce our reliance on GHG emitting sources, but electricity comes at a price and technological changes alone cannot address the issues of consumption and transportation inefficiencies related to personal and professional use.

The terrain of social and economic inequalities in British Columbia must also be acknowledged. In the transition to a green economy, issues of equity must be at the forefront to ensure that the burdens and benefits of adaptation are distributed justly. The reality is most British Columbians cannot choose where they live – the cost of housing is a primary motivation for location and style of residence.[19] While the government is addressing some of these challenges, these concerns inform our analysis of the law and our law reform recommendations throughout this report. In particular, we emphasize the importance of carefully crafting CTR initiatives to ensure that they do *not* create incentives to consider place of residence when making employee hiring and/or dismissal decisions.

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[15] British Columbia: Reduce 2007 emission levels 40% by 2030, 60% by 2040 and 80% by 2050. <https://www2.gov.bc.ca/gov/content/environment/climate-change/planning-and-action/legislation.>

[16] Canada: Reduce 2005 emission levels 30% by 2030. (https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/progress-towards-canada-greenhouse-gas-emissions-reduction-target.html)

[17] Robert Gifford, Christine Kormos and Amanda McIntyre, "Behavioral dimensions of climate change: drivers, responses, barriers, and interventions" in *WIREs Clim Change 2011*, (2011) accessed at: <https://pics.uvic.ca/sites/default/files/uploads/publications/kormos_wires_2011.pdf.>

[18] Swim, Clayton and Howard, "Human Behavioral Contributions to Climate Change: Psychological and Contextual Drivers" in *American Psychologist,* 2011, accessed at: <https://www.apa.org/pubs/journals/releases/amp-66-4-251.pdf.>

[19] BCGEU and CUPE 1767, *Building an Affordable BC* (2017) accessed at: <https://www.affordablebc.ca/provincial-plan> and British Columbia, "BC government addressing housing affordability challenges" Factsheet (2019) accessed at: <https://news.gov.bc.ca/factsheets/bc-government-addressing-housing-affordability-challenges.>

Photo: Transportation accounts for over 50% of BC's urban greenhouse gas emissions. Shortening and greening commutes will help BC attain its carbon reduction goals. Photo of Cambie Street by FangXiaNuo for iStock.

2. Commute Trip Reduction: Reducing Inefficiencies, Reducing GHG Emissions

Transportation accounts for over 40% of BC's overall GHG emissions[20] (over 50% of its urban GHG emissions). Commute trip reduction is a form of transportation demand management (TDM), and TDM aims to reduce the demand for transportation infrastructure or redistribute the demand in time or space.[21] CTR addresses GHG emissions from home-work transportation and fits with CleanBC's medium- to long-term strategies.[22] In addition to reducing GHG emissions, CTR offers the potential to improve employee wellbeing, nourish vibrant communities, improve

productivity, and reduce public costs for infrastructure maintenance, vehicle insurance, and health services.[23]

Key features of CTR include:

i. Employers tracking and reporting total employee commute GHG emissions in order to provide a baseline and demonstrate annual progress, and periodic reporting of efforts undertaken to reduce commute GHG emissions.

British Columbia's *Climate Change Accountability Act* already requires public sector organizations to be 'carbon neutral' and report yearly on their progress. In a similar nature, a CTR strategy could require employers to collect commute data from employees, report the aggregate GHG emissions, and create and act on a plan to reduce them through various CTR strategies. We consider the practical implications of this provision in more detail throughout the report.

ii. Employers considering home-work commuting proximity when assigning a cohort of new hires to their worksites, when assessing candidates for internal openings, and by offering peer-with-peer worksite swaps.

About 40% of all workers across the Capital Regional District and Metro Vancouver are employed by multi-worksite employers such as educational institutions, health authorities, retail and restaurant chains. Employers could consider employee residential proximity to worksites when making job assignments.

iii. Employers implementing other strategies to reduce commutes such as working from home, working remotely, and utilizing technology to reduce employee commutes.

The COVID-19 global pandemic has brought into sharp relief how today's technology increasingly allows us to work remotely, to communicate effectively from long distances, and to tend to many aspects of our lives digitally. CTR calls on employers to implement technology to reduce commutes. Meetings may be moved to virtual spaces, employees may be allowed to work remotely from home, libraries, coffee shops, satellite offices, or other appropriate venues

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[20] Government of British Columbia, *2019 Climate Change Accountability Report,* (2019), page 15, 2017 data. Accessed at: <https://www2.gov.bc.ca/assets/gov/environment/climate-change/action/progress-to-targets/2019-climatechange-accountability-report-web.pdf.>

[21] For further information on Transportation Demand Management (TDM) visit the Victoria Transport Institute website at: <https://www.vtpi.org/tdm/.>

[22] For further details refer to *Binder of Background Materials: Proposed Initiative for Reducing Commuting, Congestion and Carbon Emissions* (2019) prepared by Bruce Batchelor, CloserCommutes.org.

[23] See *Proposed Initiative for Reducing Commuting, Congestion and Carbon Emissions,* in *Binder of Background Materials*, *ibid.*

close to home where possible. Carpooling and greater use of public transportation reduce employee commute trip GHG emissions.

Because it is primarily a set of strategies with a specific purpose, CTR offers flexibility in its implementation. Before requiring large employers to consider and implement CTR strategies appropriate to their situation, these organizations would be required to provide an inventory of GHG emissions relating to employee commuting. An app using Excel spreadsheet macros to link to Google Maps has been developed to facilitate employers conducting a standardized inventory and initial assessment of strategies using only existing human resources data.[24]

We recognize potential objections to and arguments against the implementation of CTR. Concerns relating to infringement of citizens' freedom of mobility, liberty and equality rights as protected by sections 6, 7 and 15 of the Charter of Rights and Freedoms arising from proximate commute implementation are addressed in Appendix A to this report. In Appendix B, we provide an analysis of privacy law related to concerns arising from employee reporting of commute trip GHG emissions with attention to the legal frameworks regarding information and privacy in the workplace. See Appendix C to this report for a summary of the components of some the most comprehensive and longstanding CTR initiatives in the world.

As the examples in Appendix C demonstrate, successful CTR initiatives do not need to infringe on an individuals' right to mobility or privacy. Employees can still live wherever they want or need to. A properly designed CTR initiative will *not* provide incentives to employers to make hiring and/or dismissal decisions based on the place of residence of employees and/or prospective employees. Instead, it can set a baseline of GHG emissions from which employers can implement plans and programs over time to decrease employee commute distances, durations, frequencies and use of high-emission modes (such as a single-occupancy vehicle) as part of the organization's overall GHG reduction strategy.

With this background on core CTR initiatives, we turn to examining the legal regime in BC to evaluate the potential for implementing CTR more broadly under current law.

[24] BT Batchelor, Batchelor JT, Litman, T. "How Multi-worksite Employers can Use Secondary Data to Assess CTR Opportunities" Journal of Transportation Demand Management Research. 2020 (pending, currently under review).

Traffic in Vancouver, Mark Woodbury, *Creative Commons License*

3. The Legal Landscape for Commute Trip Reduction in British Columbia

This section assesses transportation, workplace health and safety, and climate change law in BC to determine whether there are existing legislative tools that have the potential to be used to implement CTR. In summary, there are no explicit provisions under the transportation or workplace health and safety legal regimes that could be used to address CTR. Under climate change law, the *Climate Change Accountability Act* offers potential to direct employer action on CTR. We explore the key provisions of the *Act,* and provide an analysis of potential opportunities and challenges.[25]

[25] The purpose is to highlight the potential of existing legal frameworks. We use permissive wording such as 'may ' and 'could 'as the legislation does not currently mandate any particular aspect of CTR.

I. Transportation

Transportation is a sprawling area of the law that is spread out across different statutes and juridictions.[26] We have reviewed core provincial laws pertaining to passenger transportation in order to determine if they could support implementing CTR at the provincial level.[27]

The *Transportation Act*[28] regulates aspects of public roads and highways such as their construction, design, use, and maintenance.[29] The *Community Charter* vests ownership of most roads in municipalities, while the *Transportation Act* gives the BC government jurisdiction over provincial highways.[30] The *Motor Vehicle Act* ("*MVA*")[31] establishes the rules of the road. The *Transportation Investment Act*[32] establishes the Transportation Investment Corporation whose statutory objective is to conduct business related to delivering, managing, operating, tolling or funding transportation projects, and the Minister may make regulations regarding tolls.[33]

None of these statutes specifically address transportation demand management, commute trip reduction, or employee vehicle use. None of the laws we assessed contemplate *how* people choose or are able to use roads, but rather the laws regulate technical aspects such as rules, and powers relating to financing, expropriation and maintenance of infrastructure. While section 304 of the *MVA* enables cabinet to make regulations establishing pilot projects to research, test and evaluate matters relating to the Act,[34] because the MVA primarily regulates the rules of the road, it is unlikely that these pilot project provision could relate to an employer CTR initiative aimed at reducing vehicle kilometres traveled and GHG emissions.

To confirm our findings we engaged a staff person within the Integrated Transportation Planning Branch of the BC Ministry of Transportation and Infrastructure.[35] They confirmed that the Ministry oversees the optimization of existing transportation infrastructure. While the Integrated Transportation Planning Branch considers transportation demand management in the planning and development phases of projects, those discussions pertain largely to physical infrastructure. While the Branch does consider information from surveys, workplaces, and GPS data in making decisions, it does not engage in CTR.

In **Law Reform Recommendation #1** we proposed establishing a reporting requirement under the *Climate Change Accountability Act* requiring PSO employers to report on their employee commute GHG emissions. We believe this reporting requirement would benefit public servants, various ministries, and would fit well with the provincial government's *Integrated*

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[26] British Columbia, *Transportation Statutes & Regulations,* (2017) accessed at: <https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/transportation-statutes-regulations>.
[27] This is not an exhaustive search of every transportation related law and regulation, but a narrow set of laws that pertain primarily to passenger transportation on roads and highways.
[28] *Transportation Act*, SBC 2004, c. 44
[29] The *Transportation Act* also regulates the BC Transportation Financing Authority. Section
[30] *Community Charter*, SBC 2003, c. 26, Div. 5, s. 35(1)(a).
[31] *Motor Vehicle Act,* RSBC 1996, c. 318
[32] *Transportation Investment Act,* SBC 2002, c. 65
[33] *Toll Exemption Regulation- 269/2012.*
[34] The *MVA* also sets out criteria for such pilot projects and states that the project must be related to the *MVA* and must be in the public interest.
[35] Teleconference, March 20, 2020.

Transportation Development Strategy.[36] Data on employee commuting patterns could provide an invaluable resource in assessing and planning future infrastructure projects.

II. Workplace Health and Safety

Similarly to transportation, the area of occupational health and safety, as well as the various items of information collected by employers, is spread out across multiple statutes and jurisdictions. We analyzed the *Employment Standards Act,*[37] *Workers Compensation Act,*[38] the *Personal Information Protection Act,*[39] and the *Personal Information Protection and Electronic Documents Act,*[40] for the purposes of determining whether the workplace health and safety or personal information and privacy laws could be used to implement CTR. It is important to note that we did not conduct an exhaustive review of every act and regulation pertaining to employment, labour or privacy law. This section provides an overview and is for information purposes only. See Appendix B to this report for a more thorough discussion of privacy law.

The *Employment Standards Act* sets out important minimum standards for employers including hours of work and overtime, statutory holidays, and payroll and wages. The purpose of the *Workers Compensation Act* is to provide compensation for workplace injury through the Workers' Compensation Board scheme, makes other provisions for workplace safety, and provides some requirements regarding information and confidentiality.[41] The *Personal Information Protection Act* and the *Personal Information Protection and Electronic Documents Act* are provincial and federal counterparts that we consider in greater detail in Appendix B outlining privacy issues.[42]

The *Employment Standards Act* empowers cabinet to pass regulations respecting the prescribing of information employers must provide for the purpose of establishing and maintaining a register of employees working in private residences.[43] While section 127 empowers the provincial government to make regulations, the focus is on private residences only and nothing in the Act addresses methods of transportation between home and work.

The *Workers Compensation Act* sets up the Workers Compensation Board and is a scheme to settle workplace injuries and compensation through a quasi-judicial body. The *Workers Compensation Act* places an obligation on workers to provide the Board with the information that the Board considers necessary to administer the worker's claim.[44] However, while the *Workers Compensation Act* does not preclude employers from inquiring about the commuting

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[36] Government of British Columbia, *Budget and Fiscal Plan 2020, online,* page. 45. The new Integrated Transportation Development Planning process is being undertaken by the Ministry of Transportation and Infrastructure and the Ministry of Municipal Affairs and Housing. The process will develop a collaborative vision of BC's transportation needs that contribute to an efficient transportation network. Data on employee commuting patterns provided from employers could help by highlighting inefficiencies in transportation patterns.
[37] *Employment Standards Act,* RSBC 1996, c. 113.
[38] *Workers Compensation Act,* RSBC 1996, c. 492.
[39] *Personal Information Protection Act,* SBC 2003, c. 63.
[40] *Personal Information Protection and Electronic Documents Act,* SC 2000, c. 5.
[41] *Workers Compensation Act,* Div. 7,
[42]" Personal Information" is defined in *PIPA* as "information about an identifiable individual and includes employee personal information but does not include (a) contract information, or (b) work product information."
[43] *Employment Standards Act,* s. 127(2)(f). A review of the *Employment Standards Regulation,* BC Reg 396/95 did not reveal any regulations passed regarding employee commuting.
[44] *Workers Compensation Act,* s. 57.1(1).

patterns of employee, its purpose is to reduce health and safety hazards in the workplace and provide compensation for injuries. It would be stretching the application of the *Act* to suggest it should be used for initiatives aimed at reducing commute trip GHG emissions as an employee's commute is not generally considered part of their work duties. If the *Act* does not deal with employee commute health and safety getting to and from work, then the regulations cannot suddenly address that topic.

The *Personal Information Protection Act* requires that before collecting personal information about an individual, an organization must disclose the purpose of collecting the information. Nothing in the *Act* precludes the tracking of employee commute GHG emissions, as the *Act* specifically contemplates that additional information may be required by law. To ensure there are no challenges to the collection of information regarding employee GHG emissions, see **Law Reform Recommendation #1**.

III. The *Climate Change Accountability Act*

a. BC's Climate Change Laws

BC has set a goal to reduce 2007 emission levels 40% by 2030.[45]

As previously mentioned, BC has a history of legislative action aimed at addressing climate change. In 2008, it was the first jurisdiction in North America to implement a comprehensive price on carbon.[46] The *Carbon Tax Act* sets out the mechanism for the 'carbon tax' allowing a prescribed tax on carbon. The *Greenhouse Gas Industrial Reporting and Control Act* sets out emission control and compliance requirements for GHG emitters.[47] It also establishes a registry for recording the offset and transaction of units of carbon.[48] This 'carbon registry' is tied in with carbon-neutral legislation. Through this interaction, institutions and other entities with carbon neutral requirements can off-set carbon emission units.

British Columbia's *Climate Change Accountability Act* (the "*CCAA*")[49] has been operational since 2007 and was recently subject to significant changes.[50] The *CCAA* already imposes yearly GHG reporting requirements on "public sector organizations" ("PSO") that take the form of carbon neutral action reports.[51] With the recent amendments, these reports are called climate change accountability reports and they must include the following:

(a) A description of the actions taken by the PSO in the relevant calendar year to minimize its greenhouse gas emissions;
(b) The PSO's plan to continue minimizing those emissions;

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[45] British Columbia goal to reduce 2007 emission levels 40% by 2030, 60% by 2040 and 80% by 2050. <https://www2.gov.bc.ca/gov/content/environment/climate-change/planning-and-action/legislation>.
[46] *Carbon Tax Act,* SBC 2008, c. 40.
[47] *Greenhouse Gas Industrial Reporting and Control Act,* SBC 2014, c. 29.
[48] *Greenhouse Gas Industrial Reporting and Control Act,* SBC 2014, c. 29, s. 13.
[49] *Climate Change Accountability Act,* SBC 2007, c. 42 ("*CCAA"*)
[50] Bill 38- 2019, *Climate Change Accountability Amendment Act,* 2019.
[51] *CCAA,* s. 8.1

(c) A determination of the organization's greenhouse gas emissions for the relevant calendar year;
(d) A statement of the offset units retired on behalf of the PSO in relation to those emissions (tied to BC's carbon registry system);
(e) A description of the actions taken by the PSO in the relevant year to comply with the requirements and to achieve the targets prescribed; and
(f) Any other prescribed information.[52]

The *CCAA* requires each PSO to be carbon neutral for the 2010 calendar year and each subsequent calendar year.[53] The *Act* sets out requirements for achieving carbon neutral status.[54] Cabinet may exempt a PSO from achieving carbon neutral status by regulation or agreement, [55] and from the reporting obligations.[56]

b. Regulatory Powers under the *Climate Change Accountability Act*

The *CCAA* gives Cabinet the power to enact regulations pursuant to the *Act.* The recent amendments to the *CCAA* broadened Cabinet's regulatory power in some significant respects.[57] In our view, the most significant regulatory powers under the *CCAA* for the purpose of CTR initiatives are as follows:

(i) Establishing additional reporting requirements in relation to greenhouse gas emissions and related matters;[58] and respecting the preparation of reports required under this Act including the timing, form and content of those reports, and respecting records that must be maintained in relation to these reports and access that must be provided to those records.[59]

A regulation under this provision could require all organizations and corporations brought under the *CCAA* to provide information on employee trip commuting and could be utilized to encourage employers to implement CTR strategies. This is a key feature of CTR, as described previously. Based on this provision we offer the following law reform recommendations. Note: these recommendations are numbered in suggested chronological order, *i.e.* the order in which each provision would be implemented.

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[52] *CCAA,* s. 8.1(2)(a)-(f).
[53] *CCAA,* s. 5(1).
[54] *CCAA,* s. 6.
[55] *CCAA,* s. h.4.
[56] *CCAA,* 12*(*j).
[57] Bill 38- 2019, *supra*, *note 45.* Regulations are subordinate laws passed under particular statutes. Although regulations have the force of law, they can be passed by cabinet without debate in the legislature and it is a power of the executive branch of government. They are also subject to the restraints of their enabling statute, and must be consistent with them and other applicable laws. Broad regulatory powers under an *Act* are significant for law reform because they may allow for more expedient implementation of the proposed measures.
[58] *CCAA,* s. 12(2)(l)
[59] *CCAA,* s. 12(2)(m)

LAW REFORM RECOMMENDATION #1: Establish employee commute trip GHG emissions as a reporting requirement under the *Climate Change Accountability Act*, s. 12(2)(l, m) and 12(2)(b.1)

The *CCAA* contemplates additional reporting requirements that could be imposed on organizations and corporations. Commute trip GHG emissions first must be catalogued to establish a baseline against which to measure whether organizations are implementing CTR measures and whether they are being effective. In short, reporting allows the government and others to analyze the impacts of CTR strategies. We recommend this data be publicly available in order to allow further analysis and research on the impacts of CTR measures. We discuss potential mobility rights and privacy objections to this reporting requirement in Appendix A and B respectively. As part of this recommendation we propose the involvement of the British Columbia Information and Privacy Commissioner in the development of this reporting requirement to ensure compliance with privacy law.

Care must be taken to ensure that reporting requirements do not create perverse incentives for employers to consider place of residence when making employee hiring and/or dismissal decisions. This can be done, for example, by implementing Law Reform Recommendation #4 below, which addresses hiring procedures that take care to exclude the residential addresses of prospective employees.

(ii) Prescribing requirements and targets respecting assessing and planning to minimize the PSO greenhouse gas emissions resulting from employee commutes.

There is the potential to establish requirements for overall per employee or organizational commute trip GHG emissions:

LAW REFORM RECOMMENDATION #2: Enact regulations under section 12(2)(e), (f), (l) and (m) of the *Climate Change Accountability Act* that address GHGs through commute trip reduction.

A combination of regulatory powers may provide authority to establish targets by regulation, or for different types of organizations. The goal of this recommendation is to progressively expand CTR by encouraging entities to implement initiatives that decrease their total employee trip GHG emissions year over year.

Another option is to provide information to organizations and corporations regarding possible commute trip reduction options and allow those entities to choose which initiatives to implement. This provision offers flexibility to balance the needs of various stakeholders. See Appendix C for examples of CTR initiatives from other jurisdictions.

(iii) Prescribing organizations or corporations as being included within the ambit of the CCAA.

The *CCAA* defines "public sector organization" as any of the following: (a) the provincial government, (b) an organization or corporation that is not part of the provincial government but is included within the government reporting entity under the *Budget Transparency and*

Accountability Act,[60] and (c) any other public organization or corporation included by regulation. The *CCAA* explicitly gives Cabinet the power to designate organizations or corporations as being included within the definition of "public sector organization."[61] As the *CCAA* as a whole and definition of PSO only contemplates public-like entities, it is unlikely that Cabinet may extend its reach to private sector organizations without explicit authorization under the *Act*. Because medium and large private, co-operatives and non-profit sector organizations could implement effective CTR programs, it is important to begin to capture these sectors in climate action reporting and planning activities.

This power could be utilized to include an organization or corporation within the requirements of the *CCAA.* This may allow for a gradual incorporation of reporting requirements and CTR implementation by progressively expanding the scope of the *CCAA's* application. The government has discretion regarding who to include, and could take an incremental or spatial approach to implementation. For example, in the first year, all corporations or organizations with over 1200 employees and in specified regions could be brought under the *Act.* After a period of time, the government could extend the applicability to the next tier of employers, and so on.

LAW REFORM RECOMMENDATION #3: Phase in non-PSO employers under the *Climate Change Accountability Act.*

This step could bring private sector organizations or corporations, co-operatives and non-profits under the authority of the *Act* and is important for effectively using the *CCAA* for CTR initiatives. By amending the *CCAA* and/or creating a new category to capture entities that are not strictly speaking "public sector organizations," different types of organizations can be brought within the authority of the *Act* (such as through s. 12(3), allowing a regulation under the *CCAA* to apply to different classes of matter or circumstance). The goal of this recommendation is to enable the *CCAA* to be binding on businesses and organizations in a phased approach and as necessary. The extent of the *requirements* under the *CCAA* could be flexible, but first it is required that the *CCAA* can actually bind those businesses and organizations.

Note that once these other types of employers are brought into the scheme or a new scheme, Recommendations 1 and 2 can be progressively applied to these other categories of organizations.

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[60] The *Budget Transparency and Accountability Act* defines "government reporting entity" to include education and health sector organizations.

[61] *CCAA,* s. 12(2)(b). In the definition of PSO in section 1 public modifies both organization and corporation. However, under section 12 Cabinet may designate any corporation or organization. This discrepancy seems to create a conflict within the Act regarding the type of organization that Cabinet may designate as a PSO. Given that the *CCAA* only addresses public entities, the broader purpose and intent of the law appears to contemplate extending its application only public sector-like organizations, and not private sector corporations, for reporting and climate action planning.

c. Additional Considerations

Taking the CCAA beyond the operation of PSOs to designated private sector organizations and to employee travel choices expands the nature and scope of climate action regulation. Given that where to live and work are choices that depend on many factors, it is important to take into account employee privacy and mobility concerns. A potential employee should not be discriminated against in the hiring process because of any consideration of commute distances under CTR initiatives. Accordingly, we recommend that persons charged with making hiring decisions do not have access to any candidates' residential address. Once the candidate is employed, the corporation or organization may work to integrate employees into their CTR programs:

LAW REFORM RECOMMENDATION #4: Prohibit, by regulation, persons tasked with recruiting employees from having access to candidates' residential address during the hiring process.

The residential address of a candidate should NOT be considered a factor in hiring the individual. It would be discriminatory to consider how far somebody is going to commute before hiring them because a person's residential address is usually influenced by a variety of factors beyond their control, in particular the price and availability of appropriate housing.

Safeguarding an applicant's residential address until after the hiring process may be accomplished by either limiting the information the candidate provides in their application, so nobody in the organization knows their residential address, or redacting a candidate's residential address. If the person charged with hiring is also the person who receives application, it makes more sense to issue instructions not to include any indication of their residential address on their application.

A regulation of this nature may be passed through the *Climate Change Accountability Act,* or some other information and privacy or employment framework.

For existing employees, a variety of strategies can be utilized to implement CTR initiatives at the organizational level. See Appendix C for a list of potential initiatives and various case studies. These initiatives may include commuter choice tax benefit programs, compressed work week, guaranteed return trip, rideshare services, telecommuting, transit subsidy, and vanpool programs.

In summary, the *CCAA* offers a potential framework for implementing CTR initiatives, however, the *CCAA* is not currently used for this purpose. The 2019 amendments to the *CCAA* expanded Cabinet's regulatory powers under the *Act* and creates additional opportunities to use the *CCAA* to help implementation CTR initiatives.

Transportation planning requires an understanding of commute patterns. Photo: Vancouver 2019 by Holly Pattison

4. Conclusions

Commute Trip Reduction (“CTR”) initiatives may help reduce GHG emissions from transportation and fits with CleanBC and British Columbia’s short and long term goals for addressing climate change, as well as local and regional targets to reduce emissions, traffic congestion, consumer costs and traffic accidents. Our review of these legal frameworks suggests the following.

Transportation policy and regulatory framework pertain to transportation demand management in the infrastructure planning phase. However, the transportation framework does not contemplate the use of employee vehicles specifically. Transportation planning requires an understanding of commute patterns, but CTR initiatives do not fit neatly within the type of regulations or projects that are typically undertaken by the Ministry of Transportation.

Employment and privacy law does not generally address disclosing information about the commute choices of employees. The CTR initiatives contemplate reducing inefficiencies from employee commutes, and employment law generally does not apply to employees’ commutes if the act of commuting is not considered a job duty. See Appendix B for a more in-depth analysis of information and privacy law.

The *Climate Change Accountability Act* may be a promising avenue through which CTR programs can be required for PSOs, and extended to the private, co-operative and non-profit

sectors through law reform. It offers flexibility in application (both temporal and spatial), and the potential of broad regulatory powers. The *CCAA* may be used to bring other organizations or corporations under its umbrella. Various provisions of the *CCAA* could be utilized to implement mandatory commute trip reporting and initiatives to reduce commute trip GHG emissions. See **Law Reform Recommendations 1 and 2.**

Finally, when crafting CTR initiatives, government must take care that regulatory requirements for reporting and action on employee commuting choices to not create incentives to discriminate against current or potential employees on the basis of their location of residence. This can be accomplished by mandating that individuals in hiring roles do not have access to the home address of candidates.

APPENDIX A

An Analysis of Mobility Rights and Commute Trip Reduction Initiatives

The purpose of this appendix is to provide a legal analysis of potential mobility rights issues arising from CTR initiatives. As discussed in the body of our report, the range of personal, economic and community considerations involved in the decision of where to live and work makes it crucial that CTR initiatives *not* create an incentive for employers to make employee hiring and/or dismissal decisions based on place of residence. We canvas mobility rights under the *Charter of Rights and Freedoms*[62] (the "*Charter*") and BC's *Human Rights Code*. Note that this is a preliminary analysis and should not be relied up on as legal advice.

In this appendix we consider the impact of a hypothetical CTR initiative first on section 6 of the *Charter* (mobility rights), second on section 7 of the *Charter* (life, liberty and security of the person), and third on section 15 of the *Charter* (equality rights). The bulk of this appendix concerns section 7 of the *Charter*, since we conclude that CTR initiatives are unlikely to engage either section 6 or 15. Regarding section 7, we tentatively conclude that section 7 may well be engaged by a CTR initiative, although the caselaw that supports this view is dated, and possibly no longer represents the state of the law on this subject. If section 7 is engaged, we conclude that a hypothetical CTR initiative that infringes on an employee's basic liberty interest would likely be unconstitutional to that extent. However, this infringement can be avoided by carefully crafting a CTR initiative so as not to motivate employers to make hiring and/or dismissal decisions on the basis of the place of residence of employees and/or prospective employees.

Section 6

Freedom of mobility is guaranteed by s 6 of the *Charter.* The mobility rights include the right to enter, remain in and leave Canada, and the right to become permanent resident of any province.[63] Generally, the *Charter* contemplates two forms of mobility rights protection, one international and the other interprovincial.

The international right of every citizen to enter, remain in, and leave the country is not relevant to CTR initiatives, and this appendix does not discuss this further.

The *Charter*'s interprovincial mobility rights are relevant, however. Subsection 6(2) says, "[e]very citizen of Canada and every … permanent resident … has the right (a) to move and to take up residence in any province; and (b) to pursue the gaining of a livelihood in any province". These rights are immediately limited by subsection 3, which makes interprovincial mobility rights "subject to (a) any laws or practices of general application in force in a province

[62] *Canadian Charter of Rights and* Freedoms, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[63] Section 6(1) states, "[e]very citizen of Canada has the right to enter, remain in and leave Canada," and 6(2) reads: "Every citizen of Canada and every person who has the status of permanent resident of Canada has the right (a) to move to and take up residence in any province; and (b) to pursue the gaining of a livelihood in any province."

other than those that discriminate among persons primarily on the basis of present or previous residence."[64]

In the words of the Supreme Court of Canada, "the *Charter* right to mobility is largely predicated on the right to equal treatment. In principle, then, s. 6 may be understood as giving effect to the fundamental human right of mobility, which is defined according to the obligation that individuals be treated without discrimination based on their residence."[65]

The general idea of *Charter*-protected mobility rights, then, is that government cannot discriminate against Canadian citizens and permanent residents based on their place of residence. More precisely, citizens and permanent residents have the right to move between provinces and live in any province, and to earn a living in any province, subject to the laws of that province that do *not* discriminate primarily on the basis of provincial residency.[66]

Two things are worth noting at this point. First, the *Charter* applies only to "government", which the courts have interpreted narrowly; [67] for instance, the *Charter* does not generally apply to universities,[68] although non-government institutions that act on behalf of government or to further a specific government policy or program may find themselves subject to the *Charter*.[69]

Second, the mobility rights of s 6 say nothing about discrimination based on residence *within* a province. The Supreme Court of Canada, in an early *Charter* decision,[70] concluded that ss 6(2)(a) and (b) "both relate to movement into another province, either for the taking up of residence, or to work without establishing residence".[71] In other words, interprovincial mobility rights guarantee citizens and permanent residents the right to work anywhere in Canada

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[64] Subsection 6(3) further makes the interprovincial mobility rights of s. 6(2) "subject to (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services". This limitation is irrelevant with respect to CTR initiatives, and will not be discussed. Also noteworthy but irrelevant is s. 6(4), says that ss. 6(2) & (3) "do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada".

[65] *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157, [1998] SCJ No 78 ("*Canadian Egg*") at para 58.

[66] See *Canadian Egg*, *ibid* note 65 at para 53, quoting *R v Big M Drug Mart Ltd*, [1985] 1 SCR 294, 18 DLR (4th) 321.

[67] Section 32 of the *Charter*, as interpreted by *Dolphin Delivery Ltd v RWDSU, Local 580*, [1986] 2 SCR 573, [1986] SCJ No 75.

[68] See *McKinney v University of Guelph*, [1990] 3 SCR 229, [1990] SCJ No 122 ("*McKinney*"), and *Harrison v University of British Columbia*, [1990] 3 SCR 451, [1990] SCJ No 123. Majorities of the court in both cases decided that, although universities depend on government funds to operate, they have autonomy with respect to their governance and operations. Therefore, "universities do not form part of the government apparatus" and "their actions … do not fall within the ambit of the *Charter*" (para 45 of *McKinney*). Note, however, that the Supreme Court of Canada has approached the issue of whether a particular institution is "government" on a case by case basis. As a result, community colleges *are* government: *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570, [1990] SCJ No 124 (in contrast to universities, government had discretion to remove the college board and to direct college operations).

[69] See *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, [1997] SCJ No 86 ("*Eldridge*"), in which hospitals (not normally considered to be government entities) carried out the specific government objective of providing medically necessary services under the *Health Insurance Act* and were therefore subject to the *Charter* to this extent. The court reasoned that governments cannot evade their *Charter* responsibilities by delegating the implementation of policies or programs to non-government entities.

[70] *Skapinker v Law Society of Upper Canada*, [1984] 1 SCR 357, [1984] SCJ No 18 ("*Skapinker*").

[71] *Spakinker supra* note 70 at para 36.

without discrimination primarily on the basis of their *province* of residence – not their place of residence within a province.

Therefore, in the first place the *Charter* would likely not be engaged at all for non-government employees (with the caveat that non-government employers who implement government programs may be subject to the *Charter*), and in the second place it is unlikely that CTR initiatives would infringe employees' interprovincial mobility rights, unless the initiative somehow discriminated between employees or prospective employees primarily on the basis of their province of residence.

Assuming that the relevant employer is subject to the *Charter*, CTR initiatives are more likely to infringe employees' or prospective employees' section 7 rights.

Section 7

Section 7 of the *Charter* says, "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

Section 7 therefore protects three interests: the life interest; the liberty interest; and the security of the person interest. The impact of CTR initiatives on rights protected by s 7 is solely concerned with the liberty interest, because it is only this interest that some courts have considered to encompass a form of mobility right.

Perhaps the most on point case in this respect is *Wilson*.[72] In that case, doctors successfully challenged provisions of the BC *Medical Services Act* that restricted their respective abilities to practice medicine wherever they liked within the province. Essentially, the provincial government required doctors to obtain practitioner numbers in order to bill their services to BC's Medical Services Plan, but there were, in some cases, geographic restrictions attached to these practitioner numbers. As a result, if a doctor with a geographically restricted practitioner number wanted to move within BC and set up practice in a new location, they would be unable to bill the Medical Services plan, and the court concluded that "denial of participation in the plan [amounted to] a denial of the opportunity to practice medicine in [BC]".[73]

The British Columbia Court of Appeal found that the doctors' s 7 liberty rights were infringed, noting that "history shows that restrictions on movement for the purpose of employment were, short of imprisonment, the most severe deprivation of freedom and liberty".[74] The court determined that s 7 "may embrace individual freedom of movement, including the right to choose one's occupation and where to pursue it".[75]

In a similar vein, a plurality of the Supreme Court of Canada found in *Godbout*[76] that the s 7 rights of a municipal employee whose contract required her to live within city limits were

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[72] *Wilson v British Columbia (Medical Services Commission)*, [1988] BCJ No 1566, 53 DLR (4th) 171.
[73] Since "99 per cent of the citizens of British Columbia subsribe[d] to the plan", "[a]s a practical matter, no doctor [could] work outside it" (para 34 of *Wilson*, *supra* note 72).
[74] *Wilson*, *supra* note 72 at para 70, citing *Mia v British Columbia (Medical Services Commission)*, [1985] BCWLD 1346, 17 DLR (4th) 385.
[75] *Wilson*, *supra* note 72 at para 46.
[76] *Godbout v Longueuil (City)*, [1997] 3 SCR 844, [1997] SCJ No 95.

infringed by this requirement. The employee was dismissed when she moved outside the city. La Forest J, writing for the plurality, stated,

> ...the autonomy protected by the s. 7 right to liberty encompasses only those matters that can be properly characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. […] In my view, choosing where to establish one's home is … a quintessentially private decision going to the very heart of personal or individual autonomy.[77]

It should be emphasized that *Wilson* and *Godbout* appear to be the only prominent cases to find that the liberty interest in s 7 includes some protection for mobility rights (distinct from the s 6 international and interprovincial mobility rights) in the employment context.[78] Moreover, *Wilson* may no longer be good law,[79] and *Godbout* was not decided according to the reasoning of the plurality in that case. While there is a general paucity of discussion on this topic, it is at least possible that the liberty interest in s 7 includes a form of mobility right, and that this right might be infringed by a CTR initiative.

To be clear, the reason why *Wilson* and the plurality in *Godbout* are weak precedents is that the courts are very clear that s 7 does *not* encompass "purely economic interests",[80] and mobility rights in the employment context have generally been interpreted as protecting these economic interests. Indeed, the court in *Wilson* carefully surveyed the existing caselaw at that time in order to distinguish the law being challenged from other laws that only infringed upon economic interests. In the court's words, "[t]he impugned enactments go beyond mere economic concerns or regulation within the profession".[81] Similarly, the plurality in *Godbout* considered and rejected an argument that the city employee was merely asserting an "economic right in the nature of a 'right to work'".[82]

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[77] *Godbout*, *supra* note 76 at para 66.

[78] Although a number of cases have accepted that "generalized freedom of movement in public spaces is an aspect if the liberty interest protected by section 7" (Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2nd Ed, (Toronto: Irwin Law, 2019) ("**Stewart 2019**") at pp 88-90; Stewart canvasses a number of cases, but notably discusses *R v Heywood*, [1994] 3 SCR 761, [1994] SCJ No 101, in which the Supreme Court of Canada found that a *Criminal Code* provision that made it an offence for sex offenders to be in various locations infringed sex offenders' liberty interests).

[79] Although *Wilson* has not been explicitly overturned, Hamish Stewart, professor of law at the University of Toronto, has written that it "must now be considered wrongly decided" (p 108 of Stewart 2019, *supra* note 78). Additionally, the Ontario Court of Appeal in *Mussani v College of Physicians & Surgeons (Ontario)*, [2004] OJ No 5176, 248 DLR (4th) 632 at para 41 considered that *Wilson* was implicitly overruled in *Vancouver School District No 39 v BCTF*, 2003 BCCA 100, [2003] BCJ No 336 ("*Vancouver School District*"). *Vancouver School District* did turn its attention to *Wilson*, but the court found that s 7 was not engaged on the facts of that case. Additionally, Lamer J in concurring reasons in *Reference re ss 193 and 195.1(1)(c) of the Criminal Code* discussed *Wilson* and rebuked its distinction between a "right to work" (not protected by s 7) and a "right to pursue a livelihood or profession", which *Wilson*, according to Lamer J, concluded *is* protected by s 7.

[80] On this point, see the discussion at pp 106-108 of Stewart 2019, *supra* note 77

[81] *Wilson*, *supra* note 72 at para 69.

[82] *Godbout*, *supra* note 77 at para 58.

Subsequent cases and commentary, however, generally take the view that the "right to pursue a livelihood or profession", recognized by *Wilson* as protected by s 7, is difficult to distinguish from the "right to work", which is not protected.[83]

Of course, if there is no possibility that s 7 encompasses a mobility right, then CTR initiatives are unlikely to attract *Charter* attention.[84] It is out of an abundance of caution that we proceed with a cursory consideration of how a s 7 argument might play out in the context of a CTR initiative. It is important to note that the superficial nature of the following analysis is a result of the hypothetical premise on which the analysis is based. In practice, if a person challenges a complex government scheme due to an alleged *Charter* violation, the details of the scheme feature prominently in the resulting legal analysis. Without these details, the analysis is necessarily cursory and speculative.

Section 7 Analysis

Assumptions

The following analysis proceeds based on the following assumptions. First, that the hypothetical CTR initiative has resulted in a government employer allegedly discriminating against an employee or prospective employee because of where they live. Second, that this allegation is sufficient to engage s 7. Third, the analysis assumes certain details about the CTR initiative in question, as follows. In line with this paper's Law Reform Recommendation #1,[85] the analysis assumes that the relevant employer is required by law to report commute trip GHG emissions of their employees. The analysis assumes that the employer is both (a) required to submit carbon neutral action reports to the government setting out, among other things, how the employer has minimized its GHG emissions so far, and how the employer plans to continue doing so,[86] (b) the employer is required to be carbon neutral,[87] and, (c) in line with Law Reform Recommendation #2,[88] the employer is incentivized by law to specifically reduce commute trip GHG emissions of its employees.

In other words, the following analysis assumes that the employer is subject to requirements similar in substance to both the existing requirements for Public Sector Organizations under the *Climate Change Accountability Act* and the additional requirements proposed by this paper.

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[83] See the brief discussion in *supra* note 79 on this point.
[84] This opinion, that if there is no s 7 protection for mobility rights within a province then it is likely there is no *Charter* protection for these mobility rights, is based on the fact that this appendix surveys ss 6, 7 and 15 of the *Charter* and concludes that ss 6 and 15 are unlikely to be engaged by CTR initiatives. Therefore, if s 7 does not offer protection, then it is likely that no other sections of the *Charter* do either.
[85] See p 17 of the body of this paper. This recommendation is that government establish employee commute trip GHG emissions as a reporting requirement of employers under the *Climate Change Accountability Act*.
[86] Public Sector Organizations are already subject to this requirement pursuant to the *Climate Change Accountability Act* (unless exempted by Cabinet) See the discussion at p 17 of the body of this paper.
[87] Public Sector Organizations under the *Climate Change Accountability Act* have been required to be carbon neutral since 2010 (unless exempted by regulation or agreement). See the discussion at pp 17-18 of the body of this paper.
[88] See p 19 of the body of the paper. This recommendation is that government utilize the *Climate Change Accountability Act* to implement regulations regarding commute trip GHG reductions.

The Section 7 Test

A s 7 analysis has two steps. First, the question is whether there has been a deprivation of life, liberty and/or security of the person. If not, the analysis ends because s 7 is not engaged. If there has been a deprivation, the second step asks if the deprivation accords with principles of fundamental justice. If the deprivation does *not* accord with principles of fundamental justice, then s 7 has been violated.[89]

In this case, we are assuming that there has been a deprivation of an employee's liberty interests, allegedly as a result of a CTR initiative. The question is therefore whether this deprivation accords with principles of fundamental justice.

A principle of fundamental justice is[90] a (a) legal principles for which there is (b) sufficient consensus that the principle is vital or fundamental to our societal notion of justice[91] that (c) can be identified with precision and applied in a manner that yields predictable results. Examples of principles of fundamental choice that the courts have identified include the principle that a law must not be overbroad, the principle that a law must not be arbitrary, and the principle that a law must not be overly vague.[92] Procedural fairness is also principle of fundamental justice.[93]

To our knowledge, the courts have not identified any principles of fundamental justice that directly relate to environmental law.[94] Likely the most obvious candidate for such a principle is the precautionary principle.[95] The BC Court of Appeal describes this principle as follows: "lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[96]

Arguing for a new principle of fundamental justice to be recognized by the courts is beyond the scope of this appendix. Moreover, it is difficult to predict, in advance of any specific CTR initiative being implemented, exactly which already recognized principles of fundamental justice might be engaged in the CTR context.

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[89] See para 37 of *R v B(D)*, 2008 SCC 25, [2008] 2 SCR 3.

[90] See *Canadian Foundation for Children, Youth & the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 ("*Canadian Foundation*") at para 8.

[91] *Canadian Foundation*, *supra* note 90 at para 8, quoting *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, [1993] SCJ No 94 at p 590.

[92] See chapters 4 & 5 at pp 149-348 of Stewart 2019, *supra* note 78. These two chapters provide an overview of the principles of fundamental justice that have been identified to-date.

[93] See *e.g. Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, [1985] SCJ No 11 at para 57.

[94] Commentators have discussed s 7 in the environmental law context, but this is usually with a view to arguing for s 7 protection for environmental rights of some kind. See, *e.g.* Andrew Gage, *Public Health Hazards and Section 7 of the Charter*, (Vancouver: West Coast Environmental Law (WCEL), 2004), online: *WCEL* <www.wcel.org/publication/public-health-hazards-and-section-7-charter>. Gage argues marshals caselaw to argue that s 7 does offer protection to the public from government decisions that create serious public health risks.

[95] For a discussion regarding the precautionary principle and its interaction with s 7, see Avnish Nanda, "Heavy Oil Processing in Peace River, Alberta: a Case Study on the Scope of Section 7 of the Charter in the Environmental Realm", 27 Journal of Environmental Law and Practice 109-140 (2015), online: *Issuu* <issuu.com/nandacompany/docs/avnish_nanda_-_heavy_oil_processing>.

[96] Para 52 of *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, 434 DLR (4th) 213, aff'd in 2020 SCC 1 "***EMA Reference***" (emphasis in original), and quoting the *Bergen Ministerial Declaration on Sustainable Development* (1990)'s definition of the precautionary principle, as cited in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 at para 31.

Nonetheless, we can still do a general s 7 analysis, since, in practice, the s 7 analysis is a balancing act: "the rights claimant … bears the burden of proving that the balance struck by the impugned legislation violates s 7".[97] In this case, the balance would be between the interests of the employee and society's interests in the CTR initiative (and GHG emissions reduction), as represented by principles of fundamental justice.[98] In the application section of this analysis below, we consider in a general way how society's interests in having CTR initiatives implemented balances against an employee's s 7 interests.

The Section 1 Justification

Even if the deprivation of the employee's liberty interests does *not* accord with principles of fundamental justice, the infringement on the employee's liberty might be justified under s 1 of the *Charter*. The test for this involves yet more balancing of competing interests.

Section 1 reads, "[t]he [*Charter*] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Courts have interpreted s 1 to have two functions. First, to guarantee *Charter* rights and freedoms. Second, s 1 provides the criteria against which limitations on *Charter* rights are measured.[99] These criteria are:[100]

1) The limit to the *Charter* right(s) must be prescribed by law (if not, then the limit cannot be justified);
2) There must be a pressing and substantial objective pursuant to which the *Charter* right(s) has or have been limited; and
3) If the other two criteria have been met, there is a final three-part proportionality test:
   a) The *Charter* right limitation must be rationally connected to the pressing and substantial objective;
   b) The limit on the *Charter* right(s) must only minimally impair the right (in other words, the right must be impaired "as little as reasonably possible" in order to achieve the pressing and substantial objective);[101] and
   c) The salutary (*ie* beneficial) effects of the pressing and substantial objective must outweigh the deleterious (*ie* negative) effects on the *Charter* right(s).

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[97] Para 66 of *R v Mills*, [1999] 3 SCR 668, [1999] SCJ No 68.
[98] See *Godbout*, *supra* note 76 at para 76: "deciding whether the principles of fundamental justice have been respected in a particular case has been understood not only as requiring that the infringement at issue be evaluated in light of a specific principle pertinent to the case, but also as permitting a broader inquiry into whether the right to life, liberty or security of person asserted by the individual can, in the circumstances, justifiably be violated given the interests or purposes sought to be advanced in doing so".
[99] Para 65 of *R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No 7 ("*Oakes*").
[100] See *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37, [2009] 2 SCR 567 ("*Hutterian Brethren*") at paras 39-104 for authority on these criteria and an example of their application.
[101] *Hutterian Brethren*, *supra* note 100 at para 54, quoting *RJR-MacDonald Inc v Canada*, [1995] 3 SCR 199, [1995] SCJ No 68 at para 160.

Onus

The employee would have the onus to establish that their *Charter* right(s) has or have been violated.[102] If successful, the onus would switch to the employer, as the person seeking to justify the limit on the employee's right(s), during the s 1 analysis.[103]

Application

We assume that, following Wilson and Godbout, the employee has successfully argued that they have experienced a s 7 liberty deprivation. This might mean that the employee was not hired due to where they live (ie the employer hired someone who lived closer to the worksite), or the employee was fired after they moved further from work, or some other less serious deprivation.[104]

Principles of Fundamental Justice

The next step is to consider whether the employee has been deprived of their rights in accord with principles of fundamental justice.

In Godbout, the municipality relied on three "public interests" to justify the requirement that municipal employees reside within the city limits. Briefly, the city argued first that if employees lived in the city, they would be more in touch with the community's needs and desires and therefore better able to serve the community; second, that if employees lived in the city they would boost the city's economy; and third, that employees performing certain essential functions (*e.g.* operating a police radio, as the employee in that case did) needed to live in the city in order to fulfil those functions.[105]

The plurality in *Godbout* rejected each of the three "public interests" as justifications for the residency requirement. First, the plurality concluded that, even if employees who lived in the city would be better able to serve their community (a dubious proposition in the plurality's minds), there were less drastic measures available than requiring all permanent employees to live within city limits.[106]

For nearly identical reasons, the plurality rejected the second "public interest", concluding that the "mere possibility of stimulating local business or of augmenting the funds in the municipal purse does not … provide an adequate reason for overriding the constitutional guarantee at issue".[107]

Regarding the final "public interest", the plurality agreed with the municipality that, in some cases, a residency requirement might be justified (*eg* for emergency workers). However, the actual requirement was overbroad in this respect, since it applied to all workers, not just emergency workers. Moreover, the employee in question was not the kind of worker whose function justified the residency requirement.[108]

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[102] See *eg R v Loung*, 2000 ABCA 301, [2000] AJ No 1310 at para 9.
[103] *Oakes*, *supra* note 99 at para 70.
[104] Of course, the extent of the deprivation affects the analysis. If the deprivation is very severe (as losing one's job might be considered), then it will be harder to justify under s 1.
[105] See *Godbout*, *supra* note 76 at paras 80-91.
[106] Paras 81-82.
[107] Para 83.
[108] Paras 84-88.

In *Wilson*, the court found that the regulatory scheme governing medical practitioners was procedurally unfair, because it was "based on the application of vague and uncertain criteria, which, combined with areas of uncontrolled discretion, leaves substantial scope for arbitrary conduct."[109] The court also concluded that the scheme was substantively unfair.

The government had argued that the scheme had two important purposes: (a) cost control, and (b) control over the allocation of physicians' services within BC.[110] Similar to the reasoning of the plurality in *Godbout*, the court in *Wilson* concluded that the extent of the s 7 infringement outweighed either of these interests (and that there were unspecified less intrusive means of achieving these purposes).[111]

Based on *Godbout* and *Wilson*, we can roughly sketch out how a s 7 balancing might play out in the context of a CTR initiative. It should be reiterated that both of these cases are weak precedents. Assuming they can be relied on, the starting point is that the s 7 deprivation is serious. In both cases the court emphasized the importance of the liberty interest engaged.

As discussed in the body of this paper, the goal of CTR initiatives generally is to reduce the number, length and single-occupancy vehicle use of trips associated with travel from home to work, in order to reduce the climate impacts of commuting.[112] To further this goal, our hypothetical CTR initiative includes a requirement that the employer report the total of their employees' commute-related GHG emissions, and creates incentives for the employer to reduce these emissions.

Since we do not know the details of the CTR initiative, we can only speculate as to how it will be interpreted by a court. Note, however, that the CTR initiative should *not* have any provisions that explicitly create incentives for employers to make hiring and/or dismissal decisions based on how close employees and/or prospective employees live to the worksite. Therefore, the employer in this hypothetical scenario has at *most* taken itself to be implicitly authorized under the initiative to make hiring and/or dismissal decisions based partially on employees/prospective employees' place of residence.

Given that the Supreme Court of Canada (SCC) has, on multiple occasions and for decades recognized that "protection of the environmental has become one of the major challenges of our time,"[113] courts are likely to find the goal of the CTR initiative to be a worthy one and in the public interest. Weighed against a significant intrusion into an employee's s 7 liberty interest, however, a court might well conclude that less intrusive means are available to meet this goal. As we have seen, this is more or less the result of the s 7 analyses conducted in *Wilson* and *Godbout*.

Indeed, as this paper discusses, nothing intrinsic to CTR initiatives requires any significant intrusion into employees' liberty interest, even if this interest includes a form of mobility right. Since it is in fact possible to design a CTR scheme that does *not* involve an employer making hiring and/or dismissal decisions based in part on employees' and/or prospective employees' place of residence, a court could reasonable conclude that this kind of non-liberty intruding

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[109] Para 90, but see the preceding analysis starting at para 79.
[110] Para 94.
[111] Para 94, but see the analysis in the preceding paragraphs staring with para 91.
[112] See p 2 of this paper.
[113] Page 16 of *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, [1992] SCJ No 1 ("*Oldman River*").

CTR initiative is constitutionally preferred to the hypothetical initiative that resulted in an employee making a constitutional challenge to it.

Therefore, we can make an informed but still speculative conclusion that the employee would succeed in proving that their s 7 deprivation was *not* in accord with principles of fundamental justice.

Section 1

The final stage of the analysis involves the employer arguing that, although there has been a s 7 breach, it is justifiable under s 1. Strikingly, a majority of the SCC has never found an infringement of s 7 to be justified under s 1.[114] The SCC has explicitly stated that "the rights protected by s 7 … are very significant and cannot ordinarily be overridden by competing social interests;"[115] moreover, "rarely will a violation of the principles of fundamental justice … be upheld as a reasonable limit demonstrably justified in a free and democratic society [*ie* under s 1]."

In light of the SCC's comments, s 1 justification of the hypothetical employee's s 7 deprivation will be difficult. In *Wilson*, the government did not even attempt to justify the impugned scheme under s 1.[116] In *Godbout*, the plurality concluded that "all the considerations pertinent to [a s 1] inquiry … [were] already … canvassed in the discussion dealing with fundamental justice," and for good measure the plurality reiterated that "a violation of s. 7 will normally only be justified under s 1 in the most exceptional circumstances, if at all".[117]

Proceeding with the analysis, the first question is whether the limit on the employee's s 7 rights is prescribed by law. We will assume that this is the case in order to continue with the analysis; however, it is worth pointing out that if the employer's actions that resulted in the s 7 deprivation were only implicitly authorized by the hypothetical CTR initiative, then arguably the limit to the employee's rights would not be prescribed by law.

The next question is whether the s 7 limit is pursuant to a pressing and substantial objective. In this case, a court will likely agree that the goal of reducing the climate impacts of commute is a pressing and substantial one.[118]

Finally, we move to the three-part proportionality test.

First, the *Charter* limitation must be rationally connected to the pressing and substantial objective. There does seem to be a rational connection in this case. Employees with shorter commutes will tend to cause less GHG emissions during those commutes, and employees who live closer to the worksite will tend to have shorter commutes. Logically, if an employer is trying to reduce commute times to reduce emissions, hiring people who live closer to the worksite, and dismissal of employees who live too far away, will assist with this goal. Therefore, a court will likely find this stage of the proportionality test to have been satisfied.

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[114] Stewart 2019, *supra* note 78 at p 351.
[115] Lamer CJC in *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 99, as quoted in Stewart 2019, *supra* note 78 at pp 351-352.
[116] Para 96.
[117] Para 91.
[118] In support of this, consider that Stewart 2019 says at p 357 that "[i]n the vast majority of the cases where a *Charter* right is infringed, it is not difficult to identify a pressing and substantial objective". Therefore, this is not usually a significant hurdle in the s 1 justification test.

Having said that, depending on the details of the CTR initiative, there may be an argument that the limit on the employee's s 7 rights is *not* rationally connected to the goal of the initiative. This is likely if the CTR initiative spells out multiple goals, including the goal to treat all employees' equally regardless of place of residence. Generally, if the CTR initiative makes it clear that employers are *not* to consider place of residence when making hiring and/or dismissal decisions, then it is harder to argue that a hiring or dismissal decision that considers exactly that is rationally connected to the goals of the CTR initiative. As this paper has emphasized, CTR initiatives do not need to and should not include incentives that motivate employers to make hiring and/or dismissal decisions based on place of residence.

Assuming that the rational-connection test is met, the next question is whether the employee's s 7 right has been impaired as little as possible to achieve the pressing and substantial objective. This is very similar to the balancing test already undertaken with respect to the principles of fundamental justice. Therefore, a court is likely to conclude that the employee's *Charter* right has *not* been minimally impaired, considering the government objective. As discussed, there are ways to implement a CTR initiative *without* significantly limiting employee's s 7 right (such as using incentives for less GHG-emitting vehicles, rather than calculating vehicle distance traveled, or providing ride share or work-at-home options).

The analysis would likely end at the minimal-impairment stage. A court would likely conclude that the s 7 deprivation is not justified under s 1. Nonetheless, for the purposes of this exercise, we will briefly consider the final stage of the proportionality test: whether the salutary effects of the pressing and substantial objective outweigh the deleterious effects on the employee's *Charter* right.

Viewed from a wide angle, the beneficial effects of reducing GHG emissions may well outweigh the negative impacts on one employee. A court will likely be receptive to the pressing and substantial objective of the CTR initiative.[119] On the other hand, following the plurality in *Godbout*, a court might consider that the employee's basic liberty interest has been infringed to such a degree that the negative effects outweigh any benefits from the CTR initiative's laudable goal.

If the impugned CTR initiative survived the first two stages of the proportionality test, it may survive the third stage. However, this speculative analysis has concluded that the initiative would very likely fail at the second stage, because there are alternative, less intrusive ways to achieve the goal of the CTR initiative. Depending on the details of the initiative, it may well fail the first, "rational connection", stage.

This concludes the cursory, speculative consideration of whether a CTR initiative that allegedly resulted in a s 7 deprivation would survive a court challenge. We conclude that it would likely not; however, this is because it is easy to conceive of a CTR initiative that does *not* infringe on employees' *Charter* rights. To avoid a *Charter* challenge, the provincial government and employers must take care to ensure that CTR initiatives do not pressure employers to make hiring and/or dismissal decisions based on place of residence.

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[119] The BC Court of Appeal in *EMA Reference*, *supra* note 96 at para 1, echoing *Oldman River*, said, "[t]he protection of the environment is one of the driving challenges of our time. No part of the world is now untouched by the need for such protection; no government may ignore it; no industry may claim immunity from its constraints".

Section 15

We also briefly considered *Charter* equality rights. The purpose of this analysis is to determine whether employee reporting on their commutes or employers implementing CTR strategies would offend any equality rights. Under s 15, the *Charter* gives every individual the benefits of equality before and under the law and equal protection and benefit of the law without discrimination. The enumerated characteristics (race, national or ethnic origin, religion...) are not determinative of the scope of equality rights. Canadian courts have 'read-in 'other grounds that are protected from discrimination, such as sexual orientation.[120]

We looked at whether s15 of the *Charter* includes 'place of residence as an analogous ground and in our opinion, place of residence is not a protected characteristic under the *Charters* equality rights.[121] As noted Canadian constitutional scholar Peter Hogg writes, place of residence ''lacks the element of immutability that is common to the listed grounds and is required for the analogous grounds".[122] While the Supreme Court of Canada has determined that ''aboriginality residence" is an analogous ground, it does not extend to any other context.[123]

British Columbia's *Human Rights Code* prohibits discrimination in employment based of listed or analogous grounds.[124] These grounds do not list 'place of residence and we could not find any case law or Human Rights Tribunal ruling to include 'place of residence'. However, one's place of residence is influenced by various factors including socio-economic conditions, housing market rates, and a range of other factors.

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[120] *Egan v Canada,* [1995] 2 SCR 513; *Vriend v Alberta,* [1998] 1 SCR 493.
[121] *R. v. Turpin*, [1989] 1 SCR 1296;
[122] Hogg, *Constitutional Law of Canada, supra,* note 81. 55.23.
[123] *Corbiere v Canada* [1999] 2 SCR 203; *Haig v Canada (Chief Electoral Officer),* [1993] 2 SCR 995. This logical exception to the general rule is due to the history of reserves, dispossession, and discrimination in the relationship between government and Indigenous peoples.
[124] *Human Rights Code,* RSBC 1996, c. 210, s. 13.

APPENDIX B

An Analysis of Privacy Laws and Commute Trip Reduction Initiatives

Abstract: *This appendix briefly summaries the law in British Columbia with respect to the collection of personal information by employers. It is likely that "personal information" includes any information about an employee's commute. In general, employers need consent from their employees before they can collect personal information; however, if the collection of the information is required by law, then consent can be dispensed with. For provincial public bodies, including universities, consent is not required to collect personal information; however, personal information can only be collected in certain circumstances – for example, if the collection is expressly authorized under an Act, or if the collected information relates direct to and is necessary for a program or activity of the public body. In the case of federal government institutions, although consent is also not required, the collection of personal information must directly relate to an operating program or activity of the institution. In the private sector, consent can be dispensed with if the collection of the personal information is necessary to establish, manage, or terminate the employment relationship.*

Introduction

This appendix is a brief summary of the law in BC with respect to the collection of personal information by employers. It is important to note that this summary is short and simple relative to the length and complexity of the applicable law, and should not be relied upon as legal advice. This appendix does not contain an exhaustive overview of all applicable law; instead, it contains summary information about the law with respect to the collection of personal information by organizations (including employers) in BC.

The four statutes listed in Table 1 below are the four personal information protection statutes that, collectively, apply to virtually all employers in BC.[125] If an employer in BC wants to collect

[125] This does not include the federal *Access to Information Act*, RSC 1985, c A-1 ("AIA"). The AIA and the federal *Privacy Act* "are parallel statutes, designed to work in concert to restrict the federal government's control over certain kinds of information" (para 47 of *Dagg v Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403 ("*Dagg*") (the reasons of La Forest J, dissenting but not on this point)). La Forest, J continues at para 47 that the

(or use or disclose) personal information from its employees, the employer must comply with the requirements of whichever act applies to the employer.

The *Privacy Act* (PA)[126] and the *Freedom of Information and Protection of Privacy Act* (FIPPA)[127] apply to federal and provincial public sector employers, respectively; this includes the federal and provincial governments, including their respective ministries and departments.[128] It also includes various bodies and offices that are listed in schedules in each respective act.[129] FIPPA applies to, among other things, universities,[130] and governing bodies of professions or occupations.[131]

The *Personal Information Protection Electronics Documents Act* (PIPEDA)[132] and *Personal Information Protection Act* (PIPA)[133] apply to federally regulated and provincially regulated private sector employers in BC, respectively. Since most private sector employers are regulated provincially, PIPEDA only applies to a small (but significant) group of employers, including banks.[134]

All four statutes are complex and set out rules that the organizations they apply to must adhere to, not only with respect to the collection of personal information, but also with respect to the use and disclosure of personal information. This appendix does not discuss these wider requirements in any detail. For more information on provincial law, please see the guidance documents issued by the BC Office of the Information and Privacy Commissioner (BC OIPC).[135] These guidance documents cover a range of topics – for instance, among many other documents, there are guidelines for private sector organizations to build a privacy

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AIA "gives individuals a right of access to government information," while the "*Privacy Act* permits them to gain access to information about themselves held in government data banks, and limits the government's ability to collect, use and disclose personal information". Furthermore, BC regulates the protection of personal health information separately, under the *E-Health (Personal Health Information Access and Protection of Privacy) Act*, SBC 2008, c 38; however, this *Act* is restrictive in scope. It is concerned with the creation of "health information banks," their management, and public access to personal health information stored in these banks. Strictly speaking, then, there are arguably *six* personal information protection statutes that apply in BC; however, for the purposes of this appendix, which is concerned with an employer's ability to collect employees' personal information, only the four acts listed in Table 1 are relevant.

[126] *Privacy Act*, RSC 1985, c P-21.

[127] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165.

[128] See the definition in PIPA of "government institution" in s 3, and the definition in FIPPA of "public body" in Schedule 1.

[129] There is only one schedule to PIPA; in FIPPA the relevant schedule is Schedule 2; see also the definition of "government institution" in PIPA and "public body" in FIPPA, *supra* note 4.

[130] Terms in FIPPA are defined in Schedule 1; see the definition of "public body," which includes a "local public body". A "local public body," in turn, includes "an educational body." An "educational body" includes a university.

[131] If they are listed in Schedule 3; see the definitions in Schedule 1 of "public body" and "local public body."

[132] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

[133] *Personal Information Protection Act*, SBC 2003, c 63.

[134] See *infra* note 26 for more details. PIPEDA applies to federal works, undertakings or businesses, which means "any work, undertaking or business that is within the legislative authority of Parliament" (s 2(1) of PIPEDA); the definition in 2(1) of PIPEDA includes a list of such works, undertakings or businesses. In addition to banks, this list includes, among other things, railways or other works that connect a province with another or extends beyond the limits of a province, airports and airlines, radio stations, and any work, undertaking or business that is operated or carried on for or in connection with navigation and shipping.

[135] "Guidance Documents," online: *Office of the Information & Privacy Commissioner for British Columbia* <www.oipc.bc.ca/resources/guidance-documents/>.

management program,[136] there is a guidance document to help businesses and organizations understand PIPA's requirements,[137] and there is a document on employee privacy rights.[138] For more information on federal law, the Office of the Privacy Commissioner of Canada (OPC) has a number of resources that explain how PIPEDA works[139] and how the PA works,[140] respectively.

In additional to statutory law, the common law applies in BC with respect to the employment relationship. This appendix does not discuss the common law in any detail, except for a brief discussion on the tort of invasion of privacy.

This appendix is organized by section. After Table 1, there is a section on the meaning of ''personal information" in each of the four statutes. Next, there is a section on the general rule in each statute that applies to employers 'collection of personal information from their employees. After that, there is section on exceptions to the general rule in each statute. Finally, there are sections on general privacy principles and other issues, and the ten privacy protection principles that underlie all privacy legislation, respectively.

TABLE 1

STATUTE	APPLICATION	WHAT IT COVERS	GENERAL RULE	NOTABLE EXCEPTIONS
Privacy Act (PA)	Applies to all federal *government institutions*, including Crown Corporations	*Personal information* recorded in any form	No personal information shall be collected by a government institution unless it **relates directly to an operating program or activity of the institution**	Any collection of personal information must fit under the general rule

[136] The guidelines are called, "Getting accountability right with a privacy management program"; *ibid*.
[137] This document is called, "A Guide to PIPA for businesses and organizations"; *ibid*.
[138] Entitled "employee privacy rights"; *ibid*.
[139] "The *Personal Information Protection and Electronics Documents Act* (PIPEDA)" (date modified: 4 September 2019), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/>.
[140] "The *Privacy Act*" (6 September 2019), online: *Office of the Privacy Commissioner of Canada* <www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-privacy-act/>.

TABLE 1				
STATUTE	**APPLICATION**	**WHAT IT COVERS**	**GENERAL RULE**	**NOTABLE EXCEPTIONS**
Freedom of Information and Protection of Privacy Act (FIPPA)	Applies to all provincial *public bodies*, including universities	Recorded *personal information*	A public body may only collect personal information for certain listed purposes	Public bodies may collect personal information if the collection of the information is **expressly authorized under an Act**
Personal Information Protection and Electronic Documents Act (PIPEDA)	In BC, only applies to a *federal work, undertaking or business*, including banks	*Personal information*	The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information	An organization may collect personal information without the knowledge or consent of the individual if the collection is made **for the purpose of making a disclosure that is required by law** or **to establish, manage or terminate an employment relationship**
Personal Information Protection Act (PIPA)	Applies to every *organization*	*Personal information*	An organization must not collect personal information about an individual unless the individual gives consent to the collection	An organization may collect personal information without consent if the collection is **required or authorized by law** or **for the purposes of establishing, managing or terminating an employment relationship**

Personal Information

All four statutes have very similar definitions of "personal information," although there are some differences; most notably, as the table identifies, FIPPA only covers *recorded* personal information. PIPEDA and PIPA likely apply even to *non*-recorded personal information,[141] with the PA perhaps falling somewhere in between.[142]

In any case, all four statutes define "personal information" broadly. It always means "information about an identifiable individual." As an illustration of the scope of this definition, the Federal Court adopted the federal Privacy Commissioner's test for determining when information is about an identifiable individual, as follows:

> *[i]nformation will be about an identifiable individual where there is a serious possibility that an individual could be identified through the use of that individual, alone or in combination with other available information.*[143]

In general, then, information will count as "personal information" as long as the individual that the information is about could likely be identified by the information.[144]

Recorded information about an individual's commute likely falls under the definition of "personal information" in all four statutes.

The General Rule

In general, for employers in the private sector, consent from the individual is required before the employer can collect any personal information. For employers in the public sector, the applicable statutes restrict the purposes for which personal information may be collected.

The difference between the private sector and public sector statutes reflects their different purposes. For instance, FIPPA's purpose is expressly "to make public bodies more accountable to the public and to protect personal privacy".[145] That is to say, it has a dual purpose due to the

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[141] See, for example, *Unifor Local 114 (Re)*, 2019 BCIPC 42, P19-03 (2019-10-21), in which the BC Information and Privacy Commissioner determined at para 35 that "the definition of 'personal information in PIPA includes information about an identifiable individual, *even if that information is not recorded information*" (emphasis added).
[142] While the PA also seems to include only "recorded" information in its definition of "personal information" ("information about an identifiable individual that is recorded in any form"), the inclusion of the words "in any form" in its definition, and the specific inclusion of "the views or opinions of another individual about the individual", suggest that the definition may be broader than the one in FIPPA. Having said that, it should be clearly stated that very little research into applicable caselaw on this point has been done – more research is needed before a definitive opinion can be expressed with respect to the scope of the definition of "personal information" in PIPA.
[143] *Gordon v Canada (Health)*, 2008 FC 258, [2008] FCJ No 331 at para 34.
[144] Moreover, as mentioned in *supra* note 38, personal information about an individual can include *other peoples' opinions* about that individual.
[145] FIPPA, s 2(1). Similarly, the PA's express purpose is "to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information" (s 2). Note, however, that whereas BC has included in *one* statute laws with respect to both the right of individuals to access government information and the protection of personal information held by government, the federal government has divided these purposes among two

nature of public bodies – they must be accountable to the public, but they must also take measures to ensure that the personal information they collect from the public is protected. In contrast, the private sector statutes are solely concerned with the protection of personal information held by private organizations.

Exceptions to the General Rule

For public sector employers, there are no exceptions to the general rule – in order to collect personal information, the purpose for which the information is collected must be authorized by the applicable act, either the PA or FIPPA, as the case may be. In the case of the PA, any collection of personal information must *directly* relate to an operating program or activity[146] of the employer.[147] In the case of FIPPA, if the collection of the information is expressly authorized under an act, then the collection can proceed. Additionally, similar to the rule in the PA,

statutes: the PA and the *Access to Information Act*, RSC 1985, c A-1. For a bit more detail, see the brief discussion in *supra* note 1.

[146] The meaning of the words, "program or activity" has been discussed by the BC Information and Privacy Commissioner ("BCIPC"), albeit in the context of FIPPA, not the PA. In *British Columbia (Finance) (Re)*, 2019 BCIPC 41 (2019-10-18), F19-37, the BCIPC found that the BC Ministry of Finance's organized effort to implement the speculation and vacancy tax (a tax "designed to apply to foreign and domestic speculators and satellite families who own property in BC but do not pay their share of income taxes" (para 12)) was a "program" (para 31). In general, the BCIPC said, any "organized effort by a ministry of the Province to implement a law is a 'program'" (para 30). The BCIPC consulted the Canadian Oxford Dictionary, as well as the definition of "program" adopted by a delegate of the Ontario Information and Privacy Commissioner in relation to the Ontario version of FIPPA (para 27), and considered past orders of the BCIPA with respect to the word, "program" (para 28), before coming to a conclusion in para 30. The dictionary definition of "program" referenced by the BCIPC is "a course of activities or actions undertaken to achieve a certain result;" the Ontario finding on the meaning of program is a "set of related measures or activities with a particular long-term aim."

[147] The Federal Court in *Union of Canadian Correctional Officers/Syndicat des Agents Correctionnels du Canada Confédération des Syndicats Nationaux CSN (UCCO-SACC-CSN) v Canada (Attorney General),* 2016 FC 1289 (CanLII), [2017] 3 FCR 540 ("*UCCO*") found that this is *not* a "necessity test, but a less onerous test of establishing a direct, immediate relationship with no intermediary between the information collected and the operating programs or activities of the government" (para 139).

information may be collected if it ‘‘relates directly to and is necessary for a program or activity of the public body.”

For private sector employers, consent can be dispensed with if the information is collected in order to establish, manage or terminate an employment relationship; additionally, if the collection is authorized or required by law,[148] then consent can be dispensed with.[149]

Finally, under both PIPA and PIPEDA, there are exceptions to the requirement to obtain consent for the collection of personal information where the collection is ‘‘reasonable for the purposes of establishing, managing or terminating an employment relationship.”[150] Although

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[148] A few cases have considered the meaning of the words, “required by law” and similar phrases. In short, based on the limited number of cases surveyed, it seems likely that the words “required by law” or “required or authorized by law” have an expansive meaning in accord with their common use; “law” does not seem to be restricted to statute. With respect to PIPEDA, *Cash Converters Canada In. v Oshawa (City)*, 2006 CanLII 3469 (ON SC), 50 Admin LR (4th) 184 (“*Cash Converters*”) provides an illustration of what the words, “required by law”, mean. In that case, an Oshawa bylaw that, among other things, required second-hand goods dealers to record personal information about selling customers (including name, gender, date of birth, residential address, telephone number, and approximate height (para 11)), was challenged on a number of grounds, including that the bylaw was in conflict with PIPEDA. The court found the “Bylaw is exempted from the application of *PIPEDA*” (para 28), since it is obvious that the bylaw required the collection of personal information by second-hand goods dealers. Hence, the collection was “required by law”. Another Ontario case, *Ferenczy v MCI Medical Clinics*, 2004 CanLII 12555 (ON SC), 70 OR (3d) 277 (“*Ferenczy*”), also considered the meaning of the words, “required by law” (although this was with respect to the *disclosure* provision in s 7(3)(c)(i) of PIPEDA, instead of the collection provision – s 7(3)(c)(i) says that an organization may disclose personal information without consent if the disclosure is required by law). The court in *Ferenczy* also considered the meaning of similar words in PIPEDA, including “the laws of Canada or a province” (found in s 7(1)(b)). The court found “no reason to conclude that the law of Canada or of a Province does not include the common law, including the law of tort” (para 33); moreover, the court found that the wording of s 7(3)(i), which includes the phrase “required by law”, to be “broad enough to cover the disclosure of information in accordance with the rules of court and at trial” (*ibid*). With respect to PIPA, the British Columbia Court of Appeal in *United Food & Commercial Workers Union, Local 1518 v Sunrise Poultry Processors Ltd*, 2015 BCCA 354, 389 DLR (4th) 228 (“*United Food*”) considered the meaning of “required or authorized by law”, with results similar to those in the Ontario cases discussed already. In *United Food*, the context was a labour dispute. The union representing the grievor truck driver argued that PIPA precludes labour arbitrators from including the information of grievors or witnesses in arbitration awards without express consent. With respect to the collection of personal information, the court found that, since the *Labour Code* requires arbitrators to resolve disputes, and gives arbitrators the power to decide all matters relating to the application (including human rights issues, tort and *Charter* issues), arbitrators are implicitly authorized to receive or collect personal information without further consent, once a party initiates the arbitration process (para 77). Therefore, the collection of personal information in this case was authorized by law and exempt from the consent requirements in PIPA. The BC Information and Privacy Commissioner (“BCIPC”) has also considered these words, in the context of an investigation into how BC’s main political parties handle personal information (*Political Parties Investigation (Re)*, 2019 BCIPC 7 (2019-02-06) P19-01). The BCIPC stated that the *Election Act* and regulation, which expressly permit registered political parties to collect voters lists, including voter participation data from Elections BC, thereby authorized by law the collection of this information by political parties, and exempted this collection from PIPA’s consent requirements (at 2.1.3 “Collection without consent”).

[149] Having said that, the wording is different in PIPA, which applies to most private sector employers in BC, than it is in PIPEDA, which applies to federal works, undertakings or businesses – notably banks. In PIPEDA, consent is not required if the collection is made for the purpose of *making a disclosure* that is required by law; in contrast, under PIPA consent can be dispensed with if the collection is authorized or required by law. The import of this difference is unclear; indeed, the wording of PIPEDA is oblique. An Ontario case that considered the relevant PIPEDA provision did not notice the distinction at all: the court stated that PIPEDA “make[s] [it] clear that [PIPEDA] [does] not apply where the collection of personal information is ‘required by law’” (para 28 of *Cash Converters*, *supra* note 45).

[150] These words are found in s 13(2)(b) of PIPA. PIPEDA in s 7.3(a) allows collection of personal information without consent if this is “necessary to establish, manage or terminate an employment relationship.” Both provisions seem to mean essentially the same thing. The structure of PIPA is more complex in this regard – “personal information” is

information for this purpose may be collected without consent, an employer must notify the individual to whom the information relates that the information will be collected, and the purposes of the collection, before collecting the information.[151]

With respect to public sector employers, they are authorized under either the PA or FIPPA, as the case may be, to collect personal information if it "relates directly to an operating program or activity of the institution."[152] This wording allows for the collection of information for the purposes of managing an employment relationship.[153]

General Privacy Principles and Other Issues

Employers must be careful to comply with all applicable laws when handling their employees' personal information. This includes not only the statutes discussed above, but also, potentially, human rights legislation, the *Charter of Rights and Freedoms* (the "*Charter*"), and the common law. A discussion of these other laws is beyond the scope of this appendix; however, in brief, human rights legislation may be engaged if, for example, the personal information collected also touches on a protected characteristic of the individual to whom it relates.[154] *Charter* issues

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defined in s 1 to include "employee personal information," which is itself defined in s 1 to mean "personal information about an individual that is collected, used or disclosed solely for the purposes reasonably required to establish, manage or terminate an employment relationship." It is specifically "employee personal information" that may be collected without consent if the collection is reasonable for employment relationship purposes, as already discussed.

[151] PIPA s 13(3); PIPEDA s 7.3(b).

[152] Section 4 of the PA; s 26(a) of FIPPA similarly allows collection of personal information if "the information relates directly to *and is necessary for* a program or activity of the public body" (emphasis added). As discussed above, the wording is nearly identical in both acts, but FIPPA has an additional "necessity" requirement. See para 61 of *University of British Columbia (Re)*, 2007 CanLII 42407 (BC IPC), F07-18 (2007-09-24) ("*Re UBC*"): "[i]n order to fit within s. 26(c), information must meet two requirements. It must relate directly to an operating program or activity of the public body, and be necessary for that program or activity." Contrast with the Federal Court's findings with respect to the PA in *UCCO*, *supra* note 43 at para 139.

[153] See *Re UBC*, *ibid*, at para 53 in particular – in the context of a former UBC employee who was fired partially due to allegations about his personal internet use at work, which UBC was monitoring. There was no dispute that s 26(c) of FIPPA authorized the employer to collect personal information necessary for the management of the employment relationship (but tracking of the employee's internet activity was *not* "necessary" for this purpose; therefore, UBC contravened s 26(c)).

[154] For instance, drug and alcohol testing of employees can engage human rights law if an employee has a drug or alcohol dependency, which is recognized as a disability and therefore a protected ground from discrimination. For a longer discussion on this issue, see the discussion of the legal framework surrounding drug testing in Shana Wolch et al, "Keep Calm and … Understand Cannabis: What Employers in the Energy Sector Want to Know About Legalized Cannabis in the Workplace", (2018) 56:2 Alt Law Rev 337 at 344, online: <www.canlii.org/t/2cvw>.

may arise with respect to personal information that touches on an individual's "biographical core."[155]

The common law now recognizes the tort of intrusion upon seclusion, following the landmark Ontario case of *Jones v Tsige*.[156] In that case, the plaintiff bank employee sued another bank employee for surreptitiously and without permission viewing the plaintiff's banking information for years. Finding that the defendant intentionally and unlawfully invaded the plaintiff's private affairs, the court allowed the action on the basis of the tort of inclusion upon seclusion.[157] BC apparently recognizes this common law tort;[158] however, BC also has a statutorily-created tort of invasion of privacy.[159] Therefore, if an employer willfully violates the privacy of an employee, the employer may be liable for invasion of the employee's privacy, regardless of the other statutes discussed above.

It should also be noted that an employer's responsibilities with respect their employee's personal information may be affected by any collective bargaining agreements that apply; employees covered by a collective bargaining agreement have additional privacy protections, though this will vary depending on the specific terms of the particular agreement. As the Supreme Court of Canada has stated, in the context of an employer-imposed random alcohol testing policy that the employer argued was in the interests of workplace safety, "the task of negotiating workplace conditions, both on the part of unions and management … has historically – and successfully – included the delicate case-by-case balancing required to preserve public safety concerns while protecting privacy."[160] Moreover, "even in a non-unionized workplace, an employer must justify the intrusion on privacy resulting from random testing by reference to the particular risks in a particular workplace."[161] The same comments should apply, with the necessary changes made, regarding the balancing of employees 'privacy interests against *any* other competing interests, pursuant to which employees 'information is collected.

With respect to general privacy principles, the following quote of Labour Arbitrator Stan Lanyon, QC, is applicable (he was discussing PIPA in particular but his remarks can be generalized).

> …PIPA balances an individual's right to privacy with the "need" of an organization to collect, use and disclose personal information. That balancing test first appears in Section 2 (Purpose) of PIPA: are the needs of an

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[155] For example, see *R v Cole*, 2012 SCC 53, [2012] 3 SCR 34. This case concerned the search of the contents of a high school teacher's employer-issued laptop, in the context of a child pornography case. Note that the *Charter* will be engaged only where the state is involved in the collection of the information – "[*v*]*is-à-vis* the state, everyone in Canada is constitutionally entitled to expect privacy in personal information of this kind [*i.e.* information, such as browsing history and correspondence, found on an individual's computer and thus goes to the user's biographical core]" (para 2).

[156] 2012 ONCA 32, 108 OR (3d) 241.

[157] *Ibid* at para 89.

[158] See for instance the recent case of *John Doe 1 v The University of British Columbia*, 2019 BCSC 673, [2019] BCJ No 808 at para 20.

[159] See s 1(1) of the *Privacy Act*, RSBC 1996.

[160] Para 19 of *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34, 2013] 2 SCR 458.

[161] *Ibid* at para 20.

> organization "reasonable" in the circumstances (one that a "reasonable person would consider appropriate in the circumstances"). The same test is repeated in Section 11 (Collection), Section 14 (Use) and Section 17 (Disclosure) of PIPA. Moreover, this reasonableness test applies with respect to the need of an employer to collect, use and disclose an employee's personal information; it must be "reasonable for the purpose of establishing, managing or terminating an employment relationship between the organization and the individual". This test with respect to an employee's personal information is set out in Sections 13, 16 and 19 (collection, use and disclosure, respectively). **Thus, one word, "reasonableness", captures the statutory standard required by PIPA."** [162]

Although the public sector regulating statutes, the PA and FIPPA, are different in terms of their purposes – as discussed above, since public sector organizations are accountable to the public, the statutes that regulate public sector collection and retention of personal information are also concerned with the public's right to access that information – nonetheless, the theme of "reasonableness" and "balancing" permeates all the personal information statutes. For example, the BC Supreme Court recently said that the purpose of FIPPA "requires a balancing between the dual purposes of *FIPPA*: accountability through access to public records and protection of individuals 'right to privacy".[163] Thus, although all personal information statutes are concerned with reasonableness and balance, the public sector statutes are balancing different interests; the recognized need for public bodies to be accountable, versus the privacy of individuals. In contrast, the "need" of private sector employers to collect, use, and disclose information is less obvious, however, it is precisely this interest that is balanced against the privacy rights of individuals in PIPEDA and PIPA.

The Ten Principles of Privacy Protection

Schedule 1 to PIPEDA contains ten privacy principles that experts describe as "at the core of all Canadian privacy laws, including those applicable to workplace privacy."[164] Indeed, although these principles are not explicitly enshrined in the other three statutes discussed in this appendix, the BC government *has* explicitly states that "the ten principles of privacy protection are internationally recognized and are found in most privacy legislation around the world;"

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[162] Para 63 of *Kadant Carmanah Design v International Association of Machinists and Aerospace Workers, District 250,* 2015 CanLII 79278 (BC LA) (emphasis added).
[163] Para 8 of *British Columbia Hydro and Power Authority v British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 2128, [2019] BCK No 2371.
[164] Éloïse Gratton & Lyndsay A Wasser, *Privacy in the Workplace* (4th ed) (Toronto: LexisNexis Canada Inc, 2017) at p 8.

moreover, ‘‘[t]hese principles inform the way private organizations collect, secure, use and disclose personal information.”[165]

As mentioned, this appendix does not purport to provide details with respect to the general requirements that apply to employers regarding the collection, use and disclosure of personal information. The ten principles underlie the specific requirements that apply, and thus give a general sense of an employer’s responsibilities in this regard. For more information, please consult the applicable acts, as well as information provided by the BC OIPC and the OPC.[166]

The Ten Principles of Privacy Protection are as follows:

1. Be accountable.
2. Identify the purpose.
3. Obtain consent.
4. Limit collection.
5. Limit use, disclosure and retention.
6. Be accurate.
7. Use appropriate safeguards.
8. Be open.
9. Give individuals access.
10. Provide recourse.

[165] “Ten Principles of Privacy Protection,” online: *Government of British Columbia* <www2.gov.bc.ca/gov/content/employment-business/business/managing-a-business/protect-personal-information/principles>.
[166] See *supra* notes 11 to 16.

APPENDIX C

Commute Trip Reduction Case Studies

The purpose of transportation demand management (TDM) is to reduce the demand for transportation infrastructure and/or redistribute the demand in time or space.[167] This is seen as a cost-effective alternative to continually increasing road and other infrastructure capacity in response to traffic congestion. TDM strategies seek to reduce traffic by a variety of means, including economic incentives, regulatory measures, linking land use and transportation decisions, and modern communication technologies. These strategies inform, encourage or require travelers to maximize the efficiency of the transportation system, resulting in improved mobility, reduced congestion and greenhouse gas emissions.[168] CTR is one strategy set employed by TDM practitioners. CTR includes a variety of strategies, one of which is proximate commuting.

Some CTR strategies include:

1. Encouraging cycling, walking, and transit instead of using a personal vehicle;
2. Creating transit-oriented incentives such as pass subsidies or reimbursement;
3. Providing subsidies or reimbursement for cycling and walking gear;
4. Providing on-site cycling storage, and shower/change room facilities;
5. Developing incentives and arrangements for carpooling/vanpooling to-and-from work;
6. Allowing employees to work full or part-time from home or remote/satellite offices;
7. Strategically selecting or moving an office location to a transit hub;
8. Providing a guaranteed ride home service; and
9. Allowing voluntary worksite transfers to reduce commute trip distance, duration, cost and emissions.

We explored TDM and CTR policies and laws in a variety of jurisdictions to provide a sample of the varied ways CTR programs have been deployed. This review revealed that proximate commuting continues to be a peripheral CTR strategy. It is employed explicitly by only one program in the identified case studies, and only as one strategy in a suite of many, typically optional, strategies to reduce commute times. The case studies offer examples of the types of policies needed to deploy proximate commuting in tandem with other strategies legislating or instituting CTR approaches.

[167] International Transport Forum, *Smart Use of Roads* (2019), ITF Research Reports, OECD Publishing, Paris (last visited 20 March 2020), online (pdf): <https://www.itf-oecd.org/sites/default/files/docs/smart-use-roads_1.pdf>.
[168] Mobility Lab, "What is TDM?" (last visited 20 March 2020), online: *Mobility Lab* <https://mobilitylab.org/about-us/what-is-tdm/>.

Case Study	Jurisdiction	Legal Mechanisms	CTR Strategies
Washington State Commute Trip	The Washington State Commute Trip Reduction law is state legislation, implemented through local governments and private partnerships with employers. Washington has the only comprehensive statewide employer based CTR program in the United States.	The State of Washington adopted its legal provisions relating to CTR in 1991 and incorporated	1. Commuter Choice tax benefits 2. Employee transit passes 3. Bike & pedestrian incentives 4. Shared mobility services or subsidies 5. Ride-matching services 6. Alternative work schedules 7. Parking management programs

Case Study	Jurisdiction	Legal Mechanisms	CTR Strategies
Reduction Law [169]		them into the Washington *Clean Air Act*.[170] The Washington State Department of Transportation (WSDOT) tracks and reports on progress with a biennial CTR survey of employees. WSDOT administers the CTR program and convenes a 16 member CTR board and technical advisory group for oversight and guidance. The intent of the CTR law is to reduce automobile-related air pollution, traffic congestion, and energy use through employer-based programs that encourage the use of alternatives to the single-occupant vehicle traveling during peak traffic periods for the commute trip. The legislation provides that participants will prepare commute trip reduction plans. These plans require major employers and state agencies to implement programs to reduce single-occupant vehicle commuting by employees at major worksites. Local governments in counties experiencing less severe automobile-related air pollution and traffic congestion may implement CTR plans at their discretion. Between 2007 and 2016, half a million employees at over 1,000 CTR worksites left about 22,400 cars at home every workday, opting for alternative transportation methods.	

[169] Washington State Commute Trip Reduction Board, *2017 Report to the Legislature* (December 2017) Washington State Department of Transportation (last visited 20 March 2020), online (pdf): <https://storage.ning.com/topology/rest/1.0/file/get/1485265875?profile=original>; Seattle Department of Transportation, *Commute Trip Reduction Strategic Plan 2019-2023* (July 2019) City of Seattle, (last visited 20 March 2020) online (pdf): <https://www.seattle.gov/Documents/Departments/SDOT/TransportationOptionsProgram/CTR_Final_Plan_20190822.pdf>.

[170] *Washington Clean Air Act*, 70 RCW § 94.521-551 (1991) (last visited 20 March 2020), online: <https://app.leg.wa.gov/RCW/default.aspx?cite=70.94.521>.

California South Coast Air Quality Management District & Rule 2202 [171]	The South Coast Air Quality Management District is a regional air pollution agency regulating air pollution in the South Coast air basin in Southern California. The south coast of California includes primarily Los Angeles, San Diego, and Orange County.	The Management District has a program to reduce emissions caused by employee commuting. Rule 2202 provides on-road motor vehicle mitigation options and employee commute reduction program guidelines.[172] This mechanism is similar to a local government bylaw in Canada. However, implementation of an Employee Commute Reduction Program (ECRP) is strictly optional under Rule 2202. This program is designed to meet ambient air quality standards mandated by the Federal *Clean Air Act.* As an indirect mobile source emission control strategy, it is intended to reduce vehicle miles traveled and increase the average vehicle ridership (AVR) of work-related trips at subject worksites. The guidelines offer 33 CTR strategies. This includes "voluntary worksite transfers" under "Other Strategy(ies)" (17). Most of the strategies are oriented towards education and information sharing, financial or other incentives for alternate commute methods, and alternative work scheduling.	1. Free Auto Services 2. Bike to Work Incentives 3. Commuter Choice tax Benefits Programs 4. Compressed Work Week 5. Direct Communication 6. Direct Financial Awards 7. Discounted/Free Meals 8. Employee Clean Vehicle Purchase/Lease Program 9. Employee Newsletter, Flyer, Announcements, Memos or Letters 10. Employee Rideshare Events 11. Flex Time 12. Gift Certificates 13. Guaranteed Return Trip 14. Marketing Class 15. New Hire Orientation 16. Off Peak Rideshare Program 17. Other Strategy(ies) 18. Parking Charge/Subsidy 19. Parking Cash-Out/Parking Management Strategies 20. Personalized Commute Assistance 21. Points Program 22. Preferential Parking for Ridesharers 23. Prize Drawings 24. Rideshare Bulletin Board 25. Rideshare Matching Services 26. Rideshare Meetings / Focus Groups 27. Rideshare Website 28. Startup Incentives 29. Telecommuting 30. Time Off with Pay 31. Transit Information Center 32. Transit Subsidy 33. Vanpool Program

Case Study	Jurisdiction	Legal Mechanisms	CTR Strategies
Metro Vancouver Employee Trip Reduction Program & OnBoard Program (later TransLink TravelSmart) [173]	Metro Vancouver is the regional federation of 21 municipalities, one Electoral Area and one Treaty First Nation. The Employee Trip Reduction program was first developed for the employees of Metro Vancouver and implemented by the Communications and Education Department and the Air Quality Department with assistance from BC Transit. It became a model for other employers in Metro Vancouver, under the name OnBoard. Currently, it seems CTR is not mentioned in any provincial legislation, nor have any municipalities in Metro Vancouver adopted CTR ordinances. However, several plans and programs reflect CTR principles including: The City of Vancouver's Transport 2020 Plan and 'Sustainable Commuting' Program for city employees, and TransLink's TravelSmart Program.[174]	The Employee Trip Reduction Program & OnBoard Program were strictly voluntary programs. Program implementation required a full-time coordinator for its first year. The coordinator conducted a baseline employee survey, obtained employee commitments, and phased out parking subsidies. Within the Metro Vancouver organization, the program resulted in an elimination of 42 SOV commuter trips per day. The program was considered a success and a third party was hired to deliver similar programs to other companies and organizations in Metro Vancouver. OnBoard claimed it helped more than 300 companies in Metro Vancouver implement CTR programs. In 2006, the program helped eliminate 700,000 SOV trips in total over the full year. OnBoard was replaced by TransLink's TravelSmart Program in 2009. TravelSmart's effectiveness was limited by employers not being required to participate; the program was phased out in 2019 to concentrate on promoting transit ridership.[175]	1. Carpool Ride-matching program 2. Vanpool empty seat insurance 3. Cycling safety workshops and facility upgrades 4. Guaranteed ride home service 5. Flextime work schedule 6. Subsidized transit program 7. Employer pass program 8. Ridesharing 9. Corporate car share 10. Active transportation promotion 11. Parking management 12. Teleworking 13. Park and Ride

[171] South Coast Air Quality Management District, "Rule 2202 On-Road Motor Vehicle Mitigation Options", online: *South Coast Air Quality Management District* <http://www.aqmd.gov/home/programs/business/business-detail?title=rule-2202-on-road-motor-vehicle-mitigation-options>.

[172] South Coast Air Quality Management District, *Rule 2202 – On-Road Motor Vehicle Mitigation Options* (6 June 2014) (last visited 20 March 2020), online (pdf): <http://www.aqmd.gov/docs/default-source/rule-book/reg-xxii/rule-2202.pdf?sfvrsn=7>.

[173] Jay Kassirer, "Vancouver's Employee Trip Reduction Program" (2007), online: *Tools of Change* <https://toolsofchange.com/en/case-studies/detail/28>.

[174] Alexandra Doran, "The Quest for Commute Trip Reduction Part- II: Opportunities and Challenges for Effective CTR across B.C." (13 September 2019) (last visited 20 March 2020) online: *Price Tags* <https://pricetags.ca/2019/09/13/the-quest-for-commute-trip-reduction-part-ii-opportunities-and-challenges-for-creating-and-maintaining-effective-ctr/>; City of Vancouver, *Transportation 2040: Moving Forward* (2012) (last visited 20 March 2020) online (pdf): <https://vancouver.ca/files/cov/transportation-2040-plan.pdf>; City of Vancouver, "Sustainable commuting" (last visited 20 March 2020) online: *City of Vancouver* <https://vancouver.ca/green-vancouver/sustainable-commuting-for-staff.aspx>; TransLink, "TravelSmart" (last visited 20 March 2020) online: *TransLink* <https://www.translink.ca/Rider-Guide/TravelSmart.aspx>.

[175] Per Bruce Batchelor's in-person meeting with TransLink's TDM team 2018-12-20.

Case Study	Jurisdiction	Legal Mechanisms	CTR Strategies
City of Santa Monica TDM Ordinance [176]	This local government ordinance (bylaw) applies to the employers and worksites in the City of Santa Monica, California.	The purpose and objective of the TDM ordinance is to implement the goals and policies of the City's General Plan by proactively managing congestion, reducing automobile dependence and enhancing transportation choices by requiring trip reduction plans for all types of trips—work, shopping, leisure, school, and appointments. Santa Monica Municipal Code Chapter 9.53 requires employers to submit detailed reporting on the transportation habits of employees. This information is provided annually to the City of Santa Monica by completing plan forms. Santa Monica employers are required to submit 1 of 2 different plans: 1. Employers with 10-29 employees complete the Worksite Transportation Plan 2. Employers with 30 or more employees complete the Emission Reduction Plan Each worksite is assigned a Due Date by which they must deliver the completed plan forms. Failure to fulfill these requirements may lead to business license suspension, violation fines, and/or the imposition of administrative remedies. Employers can choose from a variety of CTR strategies.	1. Employee surveys 2. Amenities for alternative transportation methods 3. Commute transportation services education 4. Bike, walk, public transportation, carpool incentives 5. Ridematching 6. Flextime work schedules 7. Telework options 8. Commuter shuttles 9. Alternative transportation subsidies

[176] City of Santa Monica, "Santa Monica's TDM Ordinance Overview"(November 2017) (last visited 20 March 2020), online (pdf): <https://www.smgov.net/uploadedFiles/Departments/PCD/Transportation/Employers/TDM%20Overview.pdf>; City of Santa Monica, "Transportation Demand Management- Santa Monica Municipal Code Chapter 9.53: Essential for Employers" (last visited 20 March 2020), online: *City of Santa Monica* <https://www.smgov.net/Departments/PCD/Transportation/Employers/>; Allison Simmons, "Establishing an Effective Commute Trip Reduction Policy in Massachusetts: Lessons Learned from Leading Programs" (August 2014), *A Better City,* online (pdf): <https://www.abettercity.org/docs/Effective%20TRO%20Final.pdf>.

Case Study	Jurisdiction	Legal Mechanisms	CTR Strategies
Greater Toronto Area Smart Commute [177]	An initiative of Metrolinx and municipalities in the Greater Toronto areas. Participation by employers was always voluntary.	The program began in 2001 with the launch of the 'Black Creek Regional Transportation Management Association' (TMA), which served in and around York University in Toronto and neighbouring Vaughan. The number of TMAs had since increased to ten, expanding across the GTA. The Smart Commute program seeks to address several challenges: to relieve traffic congestion, improve air quality and health, and reduce emissions that cause climate change. In 2005, Smart Commute launched a regional coordinating body and single online ridematching system, the Carpool Zone. Smart Commute is unusual in that two levels of government (municipal and provincial) funded local delivery agents (Boards of Trade, Chambers of Commerce and NGOs). In 2019, Smart Commute was defunded by Peel Region, other municipalities and the Ontario Government. [178]	1. Carpooling and vanpooling: ridematching 2. Site assessments and baseline employee surveys 3. Shuttle programs 4. Emergency ride programs 5.Telework and flextime arrangements 6. Alternative transportation incentives and promotions 7. Educational seminars and fun events

[177] Smart Commute, "What is Smart Commute?" (2018) online: <https://smartcommute.ca/>; City of Toronto, "Smart Commute Initiative" (2008) online: <https://www.toronto.ca/legdocs/mmis/2008/pg/bgrd/backgroundfile-13043.pdf>.

[178] Mayor Patrick Brown Releases Statement Regarding Peel Region Funding Cuts. (last visited 30 June 2020) <https://www.inbrampton.com/mayor-patrick-brown-releases-statement-regarding-peel-region-funding-cuts> Burlington Mayor Still Worried Despite Doug Ford's Cut Cancellations. (last visited 30 June 2020) <https://www.inhalton.com/burlington-mayor-still-worried-despite-doug-fords-cut-cancellations>.