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APPEAL

REVIEW OF CURRENT LAW AND LAW REFORM

ARTICLES

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PREFACE

The bottom line is this: You write in order to change the world, knowing perfectly well that you probably can't, but also knowing that literature is indispensable to the world. [...] The world changes according to the way people see it, and if you alter, even by a millimeter, the way a person looks or people look at reality, then you can change it.

James Baldwin, *The New York Times*, 1979

Dear reader,

Welcome to Volume 29 of *Appeal: Review of Current Law and Law Reform.*

The inaugural Board of Editors sought to create an alternative law journal that amplified the voices of law students. Since our first volume was published in 1995, *Appeal* has provided a forum for discussing the state of Canadian law and possibilities for its reform in a manner that is accessible, challenging, and representative of the views of tomorrow's law-makers. Twenty-nine years later, it is with these guiding principles at heart that we turned our minds to the creation of this volume of *Appeal*.

This year, the ongoing construction of the National Centre for Indigenous Law presented some storage challenges, but also the necessary motivation to take stock of our physical files. As we reviewed nearly 30 years of untouched documents, we uncovered the original society bylaws and registration forms, among other historical treasures. These discoveries led us to contemplate the life of *Appeal*, and the many people and ideas it has supported in its time.

Today, the journal's reach continues to impress. Volume 29 features work from across Canada, including British Columbia, Alberta, Ontario and Quebec. We received nearly 30 paper submissions, and over 20 applications for nine positions on this year's editorial board. We have approximately 40 student volunteers. Our affiliated podcast, *Stare Indecisis*, continues the objective of broadening our audience beyond the traditional legal sphere. Season five invites listeners to discover new perspectives and interrogate long-held beliefs.

We would like to thank our Faculty Advisor, Professor Andrew Buck, for his leadership and expertise. Thank you to the Faculty of Law, the staff at the Diana M. Priestly Law Library, the University of Victoria Law Society, our graphic designer Michael Doborski, and the CFUV radio station for their support and guidance throughout the year. We are grateful for our Volunteer Editors and Expert Reviewers who went above and beyond to assist us in the selection and editing of our papers. The caliber of the following six papers reflects their hard work and dedication to student scholarship.

Dimitris Logothetis proposes an amendment to the federal *Patent Act* that discourages anti-competitive practices without compromising "follow-on innovation." Logothetis navigates the complex environment of the pharmaceutical industry and advocates for more nuanced legislation that can balance the public health benefits of pharmaceutical innovation with the business concerns of companies.

Owen Crocker seeks to fill a gap in *Charter* scholarship regarding the section 2(a) freedom of conscience guarantee. Taking a philosophical approach, Crocker argues for a conception of conscience that is rooted in community beliefs, as opposed to individual beliefs, thereby providing courts with a less subjective foothold upon which to adjudicate section 2(a) claims.

Sarah Lachance-Cruz assesses whether the scope of British Columbia's *Employment Standards Act* is broad enough to protect children earning money on social media, otherwise known as child-influencers. Lachance contends that the legislation is inadequate and requires amendment to prevent the exploitation of children in this growing online marketplace.

Tayler Tallent surveys the evolution of section 96 jurisprudence by analyzing two recent cases. Tallent argues for a narrower conception of superior courts' core jurisdiction to emphasize their role as guardians of the rule of law through robust judicial review, aiming to balance the rule of law and access to justice while avoiding the marginalization of section 96.

Nicole Welsh examines the evolving interpretation of section 16 of the *Criminal Code* and *Oommen* in Canadian courts. Welsh suggests a return to a more liberal application of the defense of mental disorder, emphasizing the need to consider the accused's capacity to make rational choices and proposing a reformulation of the law to align with the historical purpose of the defense and modern understanding of mental illness.

Nikita Tafazoli explores the turbulent evolution of the right to shelter in jurisprudence, highlighting doctrinal optimism alongside judicial confusion. Tafazoli addresses the inconsistency in applying *Charter* guarantees across provincial borders and argues for clarity on the scope and content of such a right, emphasizing the interconnectedness of human rights and the need for substantive equality in socioeconomic rights.

On a personal note, we would like to express our sincere gratitude to the Board of Editors whose hard work throughout the year made this volume of *Appeal* a reality: Emma Conlon, Jessica Frappier, Max Gross Sabrina Jereza, Tanner Lorenson, Kai Peetoom, Youbin Seo, Indigo Smart, and K.C. Yen. These pages came to life through their efforts and we hope that you can trace their influence through this volume of *Appeal* as you read.

Mariyam Ali & Cassidy Menard

Editors-in-Chief

ARTICLE

REWARDING PHARMACEUTICAL INNOVATION FOR BEING *INNOVATIVE*: A SUMMARY OF THE PHARMACEUTICAL PATENT SYSTEM AND AN AMENDMENT TO THE *PATENT ACT* TO NEGATE "EVERGREENING" AND "PATENT THICKETS"

Dimitris Logothetis *

CITED: (2024) 29 *Appeal* 1

ABSTRACT

This article proposes an amendment to the *Patent Act* that discourages anti-competitive patent practices in the pharmaceutical industry without interfering with follow-on innovation. It begins by introducing the pharmaceutical industry and its reliance on patents. It then explores pharmaceutical follow-on innovations that amount to "secondary patents" and the arising issues of "evergreening" and "patent thickets." While follow-on innovation is imperative to public health and a natural outcome of pharmaceutical innovation, the secondary patents essential to encourage such innovation are being used gratuitously, likely representing anti-competitive strategies. Next, this article analyzes comparative law that has addressed these anti-competitive concerns, the inadequacy of this comparative law, and advocates that patentability standards should not be heightened to combat anti-competitive patent strategy. Finally, the article analyzes Canadian case law on the doctrine of selection patents to draw inspiration for a *Patent Act* amendment designed to thwart anti-competitive patent practice without impairing genuine and beneficial follow-on innovation.

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* Dimitris Logothetis is a second-year law student at the University of Toronto. He aspires to be a litigator and will start a summer student position at Stieber Berlach LLP in the Summer of 2024. He also has a newfound and growing interest in intellectual property law, and this article was written at the end of his first year as a product of his increasing passion and curiosity in this field.

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INTRODUCTION AND ARTICLE GOAL

Literature on anti-competitive patent practices in the pharmaceutical industry is extensive. It has researched trends such as Research and Development ("R&D") costs and patent timelines, corporate and cross-national influences, innovation effects on public health, regulatory effects and resolutions, and much more. This article summarizes significant findings from this literature to lay out an understanding of the pharmaceutical patent system. Importantly, it also illustrates the problematic trends of "evergreening" and "patent thickets", and elaborates on substantial factors that should be considered when combatting these patent strategies.

This article identifies anti-competitive issues in the pharmaceutical patent system and formulates a legislative amendment to resolve this issue. At the same time, its proposed amendment is intended not to overburden pharmaceutical companies in appreciation of the difficult situations they navigate, as highlighted in this article. To this end, this article argues against heightening patentability standards and proposes an amendment to the *Patent Act* that is uniquely inspired by Canadian case law on "selection patents."[1] The amendment delicately incentivizes genuine follow-on innovation without overburdening pharmaceutical companies, simultaneously discouraging follow-on innovation for anti-competitive patent strategy.

I. INTRODUCTION TO THE PHARMACEUTICAL INDUSTRY

The pharmaceutical industry is a highly regulated conglomerate of companies responsible for public health influences stretching to public-serving institutions like hospitals, clinics, and schools worldwide. The industry's portfolio is primarily a group of the largest pharmaceutical companies. In 2019, the world's top 10 pharmaceutical companies constituted nearly 50% of the prescription drug market.[2] While startups and generic drug companies are part of this industry, the largest brand-name companies dominate the market. Most of this industry is headquartered in the United States of America (the "US").[3] Due to this concentration of companies in the US, the Canadian pharmaceutical sector relies heavily on pharmaceutical products conceptualized in the US, with over half of Canadian pharmaceutical sales originating from across the border.[4]

Having a suffusive influence across many facets of life that has increased life expectancies by implementing novel drugs and treatments, the pharmaceutical industry is pivotal to augmenting healthcare quality.[5] While it contributes to the furtherance of patient and public health, we must remember that as a dynamic interlinkage of companies, the industry's

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1 *Patent Act*, RSC 1985, c P-4 *[Patent Act]*.

2 Matej Mikulic, "Top 20 pharmaceutical companies worldwide based on prescription drug market share in 2019 and 2026*" (24 October 2022), online (Statistic): <statista.com/statistics/309425/prescription-drugs-market-shares-by-top-companies-globally> [perma.cc/9ABP-LMZ8].

3 *Ibid*.

4 *Pharmaceutical industry profile* (9 April 2021), online: <ised-isde.canada.ca/site/canadian-life-science-industries/en/biopharmaceuticals-and-pharmaceuticals/pharmaceutical-industry-profile> [perma.cc/W73H-PEL5].

5 Jason D. Buxbaum et al, "Contributions of Public Health, Pharmaceuticals, And Other Medical Care to US Life Expectancy Changes, 1990-2015" (2020) 39:9 Health Affairs 1546 at 1546.

priority is its commercial success. Businesses fail if revenues do not surpass costs, thus ceasing pharmaceutical innovation.

Patents are a crucial component of a business's portfolio. Companies obtain patents for innovations that grant the patent-holder the proprietary right to this innovation, entailing a period of exclusivity that the company utilizes to effectuate huge revenue. Rewarding patents for inventions is an important social policy instrument to incentivize inventors.

The pharmaceutical industry is dependent on patent protection, but its use of patents is widely shadowed by controversy.[6] Particularly contentious is "evergreening." Evergreening is when a patentee extends its patent monopoly by patenting multiple follow-on innovations derived from its previous patented innovation, focusing on generating further revenue. Technically, this is legal in principle; the right to exclude others is inherent to the patent, and the patentee is exercising this right. Everygreening exists when a company practices its right to unilaterally exclude at an *extreme* degree, and these marketed innovations offer marginal or no benefit to society. Evergreening occurs in valid and invalid patents, leaving policymakers uncertain about how to deduce a patent as anti-competitive. This is because identifying evergreening or patent thickets is a matter of proportionality: considering all factors, does the patentee's patent reflect anti-competitive business intent that has outweighed its purpose to innovate?

Evergreening is capable of blocking competitors to eliminate competitive pricing, thus allowing companies to keep drug prices high and increase revenue. The numerous patents filed for evergreening purposes can create shields of patent protection that force competitors to navigate and innovate in fear of infringing a patent minefield. These are colloquially referred to as "patent thickets."[7] Like evergreening, patent thickets are exercised through valid patents. It is also a matter of proportionality of whether a group of patents is obstructive and anti-competitive enough to be considered a patent thicket. Evergreening and patent thickets are similar and can be used together to prevent competitive market involvement. These strategies directly prevent follow-on innovation by discouraging other companies from researching and marketing new drugs. It also indirectly thwarts innovation by encouraging companies to specialize their R&D initiatives on follow-on innovation for patent acquisition rather than socially helpful innovation.

Follow-on innovation is a keystone in pharmaceutical innovation and in augmenting public health. Still, data and drug case studies suggest companies are inclined to focus R&D on empty, uninfluential follow-on innovation that likely demonstrates companies' near-exclusive goal of "innovating" to enhance patent protection. Research on existing drugs leads to many forms of follow-on innovation in chemical reconfigurations, such as chemical polymorphs, derivates, salts, esters, and others. Such innovation may also arise from ancillary developments, such as patents for alternative uses for the same active ingredient or the manufacturing method

6 Typing the prompts "evergreening," "anti-competition," "pharma…," and "patents" into an internet search engine will provide a large amount of literature that generally addresses anti-competitive practices believed to be prevalent in the pharmaceutical patent system.

7 Congressional Research Service, *Drug Pricing and Pharmaceutical Patenting Practices* (Washington: Congressional Research Service, 2020) at 24.

of a drug. Patenting these innovations can extend patent terms and monopolies by either building upon the protection of an already patented drug or patenting a similar yet separate drug capable of maintaining a market presence. Partly due to the nature of pharmaceutical innovation often arising in incremental and continual development, evergreening is most prevalent in the pharmaceutical industry.[8] The current patent system correctly incentivizes genuine innovation, but the *Patent Act* is silent regarding follow-on innovation used for anti-competitive strategy. Thus, policymakers face the dilemma of deciphering frivolous, anti-competitive follow-on innovation from genuine follow-on innovation.

II. FOLLOW-ON INNOVATION AND SECONDARY PATENTS

Innovation does not occur in a vacuum. Instead, it is often built upon earlier innovation. This is known as follow-on innovation. Pharmaceutical follow-on innovation radically benefits public health by offering solutions to pharmacodynamic complexities, developing upon previous drugs to create a more appropriate, safe, or efficient treatment for diverse patients and conditions. Conclusively, the patent system must continue to incentivize follow-on innovation.

To acquire a patent, applicants must apply to the Canadian Intellectual Property Office (the "CIPO") and meet the standard patentability criteria.[9] The innovation must demonstrate its non-obviousness and inventiveness.[10] It must also be useful.[11] Here, courts have held that a "scintilla of utility" suffices when proving an invention's utility.[12] Further, the patent application must sufficiently disclose the innovation by offering a "person skilled in the art" enough information to make, use, or improve upon the invention when the patent expires.[13] Presumably, once these patent application criteria are met, the applicant is granted 20 years of exclusivity.[14] For this 20-year term, the patentee holds the exclusive right to make, construct, use, and sell the invention.[15] While patent terms grant an exceptional monopoly to patent-holders, this monopoly is not a limitless grant.[16]

Follow-on innovations must also meet these patentability criteria. While not definitively defined, patents for follow-on innovation are generally called "secondary patents." "Secondary" identifies the factual distinction that the new patent protects a later, advantageous development on an existing patent. They are not inferior to the original patent, as they award as much protection.

With increasing pharmaceutical follow-on innovation and arising concerns about follow-on innovation conducted for anti-competitive purposes, the United Nations attacked the validity of follow-on innovations and their complimentary secondary patents in its *Guidelines for*

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8 Congressional Research Service, *Patent "Evergreening": Issues in Innovation and Competition* (Washington: Congressional Research Service, 2009) at 1.

9 *Patent Act, supra* note 1, ss 3, 4.

10 *Ibid*, s 28(3).

11 *Ibid*, s 2.

12 *AstraZeneca Canada Inc v Apotex Inc*, 2017 SCC 36 at para 55.

13 *Patent Act, supra* note 1, s 27(3).

14 *Ibid*, s 44.

15 *Ibid*, s 42.

16 *Apotex Inc v Wellcome Foundation Ltd*, 2002 SCC 77 at para 37.

Pharmaceutical Patent Examination: Examining Pharmaceutical Patents from a Public Health Perspective (the "*Guidelines*").[17] The *Guidelines* criticized various follow-on innovations, alleging that these innovations were too uninventive or illegitimate to deserve an independent patent term and that policymakers should raise patentability standards to reduce secondary patent grants. While concern may be warranted – elaborated in Section III of this article – the *Guidelines*' arguments are erroneous.

For example, the *Guidelines* posit polymorphs are obvious and therefore unpatentable on the basis that it is "obvious for a person in the field to seek the most suitable polymorph… for pharmaceutical use."[18] This statement equivocates the meaning of "obvious" to support its argument that polymorphs are obvious follow-on innovations undeserving of patents. In Canadian legislation, reflected similarly in other jurisdictions, the obviousness standard does not solely assess the goal of the invention. It instead encompasses a broader range of factors, such as the method of discovery and mechanisms of achieving the goal.[19] It may be obvious that chemists should try to find the most effective polymorph for pharmaceutical use, but it remains unobvious which polymorph works best or how to isolate this polymorph.

Professor Christopher M. Holman offers an exhaustive criticism of the *Guidelines* while simultaneously offering strong support for follow-on innovations and their associated secondary patents.[20] He lists instances where patents were impactful incentives for important follow-on innovation, such as the breakthrough discovery of zidovudine ("AZT") to treat HIV/AIDS.[21] Initially, AZT was a failed cancer treatment drug, but further research discovered AZT as a prospective treatment for HIV.[22] A secondary patent incentivized this follow-on innovation that formed the first treatment for HIV/AIDS.

Follow-on innovation can also exemplify strides of inventiveness and ingenuity. In *Apotex v Sanofi-Synthelabo Canada Inc.*, the patent for Plavix® (protecting the active ingredient clopidogrel bisulfate), a follow-on innovation, was found non-obvious and inventive.[23] The earlier patent disclosed a class of over 250,000 compounds with anticoagulative properties, including the racemate clopidogrel bisulfate; however, it did not explicitly disclose the enantiomer of the racemate, which possessed unforeseen advantages.[24] Therefore, while the original patent disclosed a specific racemate, which theoretically entailed the existence

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17 Carlos M Correa, *Guidelines for Pharmaceutical Patent Examination: Examining Pharmaceutical Patents from a Public Health Perspective*, (New York: United Nations Development Programme, 2016).

18 *Ibid* at 25.

19 *Apotex Inc v Sanofi-Synthelabo Canada Inc*, 2008 SCC 61 at para 67 [*Apotex 2008*].

20 Christopher M Holman, "In Defense of Secondary Pharmaceutical Patents: A Response to the UN's Guidelines for Pharmaceutical Patent Examination" (2017) 50:3 Ind L Rev 759.

21 *Ibid* at 807.

22 *Ibid* at 807–808.

23 *Ibid* at 774.

24 *Ibid* at 774–775.

of two enantiomers, it did not disclose the precise variations and their advantages.[25] In contrast, the latter patent disclosed these specific variations, having disclosed the *exact* compound. Furthermore, we see that despite the procedure and outcome being initially deemed theoretically unpropitious, the secondary patent incentivized the Sanofi researchers to formulate this beneficial follow-on innovation. The evidence showed that the Sanofi researchers faced many obstacles and spent a burdensome five months formulating a procedure that isolated the relevant enantiomer.[26]

It is a perverse and thin idea not to reward a patent simply because the degree of innovation seems less on its face. If the following innovation is better and different from the initial innovation, its development should not be discouraged. Follow-on innovation has positively affected patient health, and it must continue to be available as a route of innovation for companies. Extending from this, a proper amendment to the *Patent Act* would ensure free-flowing follow-on innovation.

III. SECONDARY PATENTS: USING FOLLOW-ON INNOVATION FOR TERM AND MONOPOLY EXTENSION

A. Focusing on Follow-on Innovation

The platitude "Too much of anything is bad" describes the current trend in the pharmaceutical industry. Concerns have arisen regarding excessive secondary patenting. There is a propensity in the pharmaceutical industry to excessively patent follow-on innovations, likely in pursuit of extending patent monopolies and preventing competitive imitation.

The number of secondary patents is currently growing. Between 1991 and 2005, approximately 50% of marketed drugs in the US held an accompanying secondary patent. Between 2005 and 2015, of patented drugs in the US Food and Drug Administration records, 78% were for existing drugs.[27] 80% of companies applying for secondary patents conducted more than one market extension; nearly half of these entities added at least four patent protection extensions.[28] Between 1988 and 2005, secondary patents for specific pharmaceutical preparations to administer a product added 6.5 years to patent life.[29] The average life extension of secondary patents on polymorphs, isomers, prodrugs, or salt claims added 6.3 years.[30] Depending on the number of patents and the type of secondary patent, averages of patent extension terms added nearly 11 years on patent terms.[31]

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25 Enantiomers are compounds with identical molecular formulas that are non-superimposable; being non-superimposable, the enantiomers form mirror images. In the context of enantiomers, racemates are 50:50 mixtures of enantiomers. Differences between racemates and their enantiomers can have important implications for drug development. A notable practice is to isolate an enantiomer from the racemate, as the enantiomeric selection can yield benefits to the drug's clinical effects or decrease its adverse effects.

26 *Ibid*.

27 Robin Feldman, "May your drug price be evergreen" (2018) 5:3 JL and the Biosciences 590 at 597.

28 *Ibid*.

29 *Ibid*.

30 *Ibid* at 602.

31 *Ibid* at 597.

One may propose that the increasing number of secondary patents is a natural result of innovation since for every original innovation, many follow-on innovations stem from it. While this appeal to a Pareto-like principle seems attractive, further data signifies follow-on innovation is used for business strategy. Secondary patent usage was drastically emphasized with "blockbusters" being assigned at substantially higher rates for more profitable drugs: 70% of the top 100 best-selling drugs had patent terms extended, and 50% of these patents had more than one patent extension.[32]

Similarly in Europe, the European Commission found a disparity between primary and secondary patents in its 2009 report.[33] It discovered that the ratio between primary and secondary patents in the pharmaceutical industry was 1:7.[34] The proportion is larger when including pending patents: 1:13.[35] The increased discrepancy for pending patents may indicate lower quality patent applications for follow-on innovation, suggesting greater weight was assigned to these patents in the hope of prolonging patent terms than to innovate genuinely.[36] Similar to the US, the number of patent applications and grants correlated to the drug's value in that "blockbuster" drugs saw an increase in patent applications nearing expiration dates.[37]

Finally, these trends also exist in Canada. In 2008, 50% of the 494 medicines in the Patent Register had two or more patents attributed to one medicine, and some drugs had up to 22 patents.[38] Of drugs approved in Canada between 2014 and 2018, roughly three-quarters were for follow-on drugs.[39] The increasing number of patents per drug functions to delay other companies from entering the market as it did back in 1998 to 2008, where drugs with multiple patents delayed the decision to market a generic drug product for eight years.[40]

B. General Concerns

Many believe the increasing number of secondary patents is immoderate. In theory, excessive patent protections discourage research and marketing by drug companies who attempt to avoid patent infringement and litigation. Due to this, there are concerns about anti-competitive patents conflicting with competition law, believing that competition law should become increasingly involved as a means of intervention. The Canadian Competition Bureau (the "Bureau") has already shown its consternations regarding the overlap of secondary patents and anti-competitive practices: "There is a competition concern that [generic] entry may be

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32 *Ibid.*

33 European Commission, *Pharmaceutical Sector Inquiry Final Report* (Brussels: Department for Competition, 2009).

34 *Ibid* at para 427.

35 *Ibid.*

36 *Ibid* at paras 501–503.

37 *Ibid* at para 461.

38 Joel Lexchin, "Canada's Patented Medicine Notice of Compliance regulations: balancing the scales or tipping them?" (2011) 11:64 BioMed Central Health Services Research at 3 [Lexchin, "Effects of NOC Regulations"].

39 Joel Lexchin, "Time to market for drugs approved in Canada between 2014 and 2018: an observational study" (2021) 11:e047557 Brit Med J Open at 3 [Lexchin, "Time to market for Drugs in Canada"].

40 Lexchin, "Effects of NOC Regulations," *supra* note 38.

sufficiently impeded and that through an anti-competitive act, [brand-name companies] will successfully maintain its market power."[41]

Humira® and its many patents, the top-selling drug in 2020 sold by AbbVie, substantiates these concerns.[42] Humira's original patent expiration was in 2016, yet AbbVie applied for or obtained over 250 patents on ancillary developments of Humira.[43] Some of its secondary patents held expiration dates as late as 2037.[44] AbbVie filed 90% of its patent applications for Humira after it was brought to market – which likely suggests AbbVie anticipated Humira's patent expiration, strategically launching secondary patents to shield Humira from generic replication and to prolong Humira's monopoly. [45] An explicit example comes from the European pharmaceutical sector, where Servier Laboratories commented: "4 years gained – great success" regarding its patent term extension to block generic competition from marketing its product Coversyl®.[46] Excessive patenting can limit generic expansion into the market, and companies can enjoy setting high drug prices due to the lack of offsetting competition.

By now, the abundant diversity of secondary patents available for use by pharmaceutical companies is noticeable. Patent law embraces and accommodates the fluidity that creativity takes and protects a diverse spectrum of innovations. However, this correlates to an ampler arsenal of patents that pharmaceutical companies can procure for anti-competitive purposes.

Common practice is to "upgrade" a previous pharmaceutical agent and sell the new upgraded form. Here, the new drug is frequently preferred, achieving market control despite the patent expiration of the previous compound. Polymorph patents are an example. Polymorphism allows a molecule to assume multiple crystal structures, and these variations constitute the follow-on innovation. For example, Pfizer Inc.'s ("Pfizer") patent of their blockbuster drug Lipitor® protected the active ingredient atorvastatin.[47] The original patent expired in 2010, but Pfizer separately patented three polymorphic forms of the previous active ingredient, and these patents expired in 2017 – one of these three polymorphs continued to be marketed as the upgraded version of atorvastatin, thus extending the original patent lifespan.[48] Eli Lilly & Co. ("Eli Lilly") pursued a similar strategy to preserve billions of dollars of revenue from its blockbuster Prozac®.[49]

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41 Competition Bureau Canada, *Intellectual Property Enforcement Guidelines* (Competition Bureau Canada, 2019) at para 132.

42 Lisa Urquhart, "Top companies and drugs by sales in 2020" (2021) 20:253 Nature Reviews Drug Discovery.

43 US, Committee on Oversight and Reform, *Drug Pricing Investigation AbbVie—Humira and Imbruvica*, (Washington: Committee Print, 2021) at iv.

44 *Ibid* at 37.

45 *Ibid* at iv.

46 European Commission, *Competition Enforcement in the Pharmaceutical Sector (2009-2017): European competition authorities working together for affordable and innovative medicines* (Brussels: Department for Competition, 2019) at 40.

47 Runjjun Tandon, Nitin Tandon & Rajesh Kumar Thapar, "Patenting of polymorphs" (2018) 7:2 Pharmaceutical Patent Analyst 59 at 60.

48 *Ibid*.

49 Debra Robertson, "Pharma strategies extend drug lives" (1999) 17 Nature Biotechnology 220 at 220–221.

Eli Lilly's CEO, in reference to Eli Lilly considering producing a purified isomeric form of Prozac, stated this was to "face one of the biggest events of [Eli Lilly's] history – the Prozac patent expiration."[50]

Additionally, a secondary patent does not need to be of a distinct molecular compound. An innovation can be regarding the new use or indication of an already known compound. It may be a new fixed dosage form, new dosage range, or new dosage regimen of a known compound with a known use.[51] The subdivision of an innovation allows for many forms of secondary patents. Again, with good reason, these patents are encouraging beneficial follow-on innovation. This is shown by research on Pfizer's drug Mylotarg®, used to treat patients relapsing with acute myelogenous leukemia.[52] Mylotarg was found ineffective and was linked to cases of fatal toxicity; Pfizer removed it from the market and did not pay patent maintenance fees, so the patent expired.[53] The medication prescribed a recommended induction dose of 9 mg/m^2 on days one and 14.[54] Shortly after Pfizer's patent expired, researchers discovered that subdividing the recommended dosage into 3 mg/m^2 on days one, four, and seven improved overall survival in patients without increasing mortality rates.[55] Unfortunately, the researchers could not patent the new dosage regimen because Pfizer's expired patent was broad enough to anticipate this discovery.[56] Nonetheless, this research example shows minor alterations to a dosage regimen can be innovative and beneficial to public health.

Previously mentioned was the beneficial drug AZT. Initially a failed cancer treatment, it was innovated into a treatment for HIV/AIDS – this is a new medical use patent.[57] New medical use patents allow innovators to secure patents for preexisting drugs but for a new use. The patent would include a claim resembling the structure: "Use of compound X to treat Y."[58] Medical use patents provide 20 years of exclusivity with the caveat that the patent protects the newly indicated use rather than the compound itself. Because the original patent usually covers all uses of the previous compound, a new medical use patent can act to extend the patent protection of the compound.

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50 *Ibid*.

51 Canadian Intellectual Property Office, *Examples of purposive construction analysis of medical use claims for statutory subject-matter evaluation* (Ottawa: CIPO, 2015) at no 2 online: <ised-isde.canada.ca/site/canadian-intellectual-property-office/en/examples-purposive-construction-analysis-medical-use-claims-statutory-subject-matter-evaluation> [perma.cc/FU95-VXWP] [CIPO, *Examples of medical use claims*].

52 Ulrich Storz, "Extending the market exclusivity of therapeutic antibodies through dosage patents" (2016) 8:5 MAbs 841 at 843–844.

53 *Ibid*.

54 *Ibid*.

55 *Ibid*.

56 *Ibid*. "Anticipation" in patent law refers to a prior invention or disclosure of a given invention, implying that the newly founded invention would be found obvious and, therefore, unpatentable.

57 CIPO, *Examples of medical use claims*, *supra* note 51 at no 7.

58 *Ibid*.

AZT resembles a positive and socially beneficial innovation. However, see an antithesis such as Eli Lilly's Sarafem®, the new medical use patented drug corresponding to its earlier drug Prozac.[59] Prozac's patent expired in 2001, while Sarafem's expired in 2007. Despite the two drugs containing the same active ingredient, fluoxetine, and at identical dosages, Sarafem's cost was over 1000% more per pill.[60] Does the R&D for the new medical use elicit a price tag 10 times more than the R%D conducted for the compound itself? It follows that Eli Lilly prolonged its protection for fluoxetine, albeit for a new use, maintaining market exclusivity and strategically reaping the profits from this strategy. Some adjudge new medical use patents to be exceptionally powerful tools within the US' orphan drug framework, where companies actively manoeuvre orphan drug exclusivity schemes.[61] Orphan drugs are designated to treat rare diseases in small patient populations. Some speculate that pharmaceutical companies can manipulate who these target populations are, correspondingly able to create a plethora of orphan drugs by virtue of the many target populations that can be identified – this is colloquially referred to as "salami slicing."[62] While Canada does not have an orphan drug framework, this anti-competitive strategy should not entirely be dismissed; Canadian patent law allows quasi-medical use patents where a known compound can be patented against a new beneficial effect found for a specific group of patients.[63]

New medical use patents in Canada have blocked generic competition from entering the market. In *Apotex Inc. v. Ontario (Minister of Health)*, the drug in dispute was Zoloft® after Apotex's medication Apo-Sertraline® was found only partially interchangeable with Zoloft under the *Drug Interchangeability and Dispensing Fee Act*.[64] Pfizer's Zoloft patent, related to its use of treating depression expired, yet Pfizer held unexpired patents regarding its new use of treating obsessive-compulsive disorder ("OCD") and panic disorders. Due to these secondary patents, Apotex's drug was found not fully interchangeable to the extent of the persisting patents. For this reason, Apotex's alternative treatment option could not be offered to patients expecting cheaper alternatives for OCD and panic disorder treatments.

All secondary patents must still meet patentability requirements. Of course, researching and understanding the positive and negative effects of a drug and its many configurations significantly prospers society. However, when these innovations incur 20-year patent monopolies that act to uphold market presence, we must reevaluate the competitive landscape

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59 Himanshu Gupta et al, "Patent protection strategies" (2010) 2:1 JPharmacy and Bioallied Sciences 2 at note "New formulations".

60 World Trade Organization, World Intellectual Property Organization & World Health Organization, *Promoting Access to Medical Technologies and Innovation: Intersections between public health, intellectual property and trade*, 2nd ed Trilateral Study (Switzerland: Trilateral study by the World Health Organization (WHO), World Intellectual Property Organization (WIPO) and World Trade Organization (WTO), 2020) at Box 3.16.

61 Note that Canada does not have an orphan drug framework. Orphan drugs are pharmaceutical agents that are designated for the treatment of rare medical conditions that impact a small number of the population. Due to the nonviable cost-to-profit ratio associated with R&D for orphan drugs, certain market exclusivity periods are granted to encourage the innovation of orphan drugs.

62 Matthew Herder, "Orphan drug incentives in the pharmacogenomic context: policy responses in the USA and Canada" (2016) 3:1 JL and the Biosciences 158 at 158–159.

63 CIPO, *Examples of medical use claims*, *supra* note 51 at no 7.

64 *Apotex Inc v Ontario (Minister of Health)*, 2000 CanLII 22671 (ONSC)

these patents confer. Excessive patenting is especially suspicious for anti-competition if the patent protects an innovation with only slight improvements compared to the initial innovation from which it derives. Coversyl was found to have no clinical benefit over its initial innovation.[65] Another example is Lexapro® (protecting escitalopram), the follow-on innovation from Celexa® (protecting citalopram), demonstrating marginal increased benefit. Escitalopram is the chiral switch of citalopram, also intended to decrease depressive symptoms.[66] Lexapro's market penetration maintained the company's significant market share, suppressing generic drug imitations that offered a cost-effective option.[67] Despite Lexapro's dominant market share, its clinical benefits over Celexa were uncertain.[68] Therefore, the follow-on drug took control of the market and profited from this control while having no observed advantage over its parent drug. As mentioned before, determining a patent as evergreening or part of a patent thicket is undefinable. However, when the effects of the innovation are minimal and pale in comparison to the beneficial effects of the original innovation, the secondary patent is more likely an instance of anti-competitive strategy.

Innovators cooperate, build upon, and refute other innovators' ideas to advance innovation. However, an entity may be unable to market an exceptional feat of innovation if blocked by patents. The innovator may need to purchase the transference or licensing agreement of many other patents related to the innovation. Maybe the price is not the issue, but the patentee denies any transference or licensing agreement, even if the innovation is unused. Such scenarios have occurred before, where Michael Heller describes a treatment for Alzheimer's that could not reach the market because of numerous obstructing patents that required cumbersome and costly licensing negotiations.[69] In such cases, the collaborative nature of innovation is lost, and inevitably, pharmaceutical firms avoid researching scientific areas and previous innovations with too many patents.[70]

IV. VIVACIOUS LITIGATION

A. Obstructions and Costs

Competitors attempt to enter the market faster by invalidating impeding patents that slow their market entry. This has caused astronomical growth in pharmaceutical litigation that is both costly and inadequate for combatting anti-competitive patents. In 1990, there were fewer than 25 Federal Court cases (applications for prohibition orders, judicial review,

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65 *Ibid*.

66 Ali A Alkhafaji et al, "Impact of evergreening on patients and health insurance: a meta analysis and reimbursement cost analysis of citalopram/escitalopram antidepressants" (2012) 10:142 BMC Medicine at 6.

67 *Ibid* at 8.

68 *Ibid*.

69 Michael Heller, *The Gridlock Economy: How Too Much Ownership Wrecks Markets Stops Innovation, and Costs Lives* (New York: Basic Books, 2008) at ii.

70 Richard E Gold et al, "Are Patents Impeding Medical Care and Innovation?" (2009) 7:1 e1000208 PLoS Medicine at 3.

and appeals) where a generic drug company was involved.[71] In 2010, there were over 100.[72]

Such litigation discourages innovation and is one of many mechanisms for actuating anti-competitive strategy. Increased litigation arose from the enactment of the *Patented Medicines (Notice of Compliance) Regulations* (the "*NOC Regulations*"), requiring patented drugs to receive regulatory approval from Health Canada for marketing.[73] Brand-name companies utilized patents for follow-on innovations to burden generic competition by forcing competitors to complete an elaborate list of Notice of Allegations to ensure they did not infringe on one of many patent claims during market entry.[74] For example, GlaxoSmithKline navigated its use of *NOC Regulations* to delay Apotex Inc. from marketing Paxil®, contributing to an additional $300 million of revenue for GlaxoSmithKline from Paxil.[75]

Even if pharmaceutical competitors successfully fight anti-competitive patents, these victories are rendered pyrrhic due to high costs. From 2000 to 2012, Apotex Inc. claimed it spent $300-$400 million for litigation in Canada.[76] Extrapolated data shows that pharmaceutical patent litigation costs were well over $100 million annually.[77] Similar to how R&D costs are argued to contribute to higher drug prices in brand-name drugs, litigation costs for generic drug companies also lead to higher drug costs for generic drugs.[78] To avoid time-consuming and costly litigation, a company may be disincentivized from researching and marketing its product.

In the US, the recent emergence of biologic and biosimilar drugs has resulted in notable large-scale litigation.[79] Between 2010 and 2023, 271 patents were litigated, and manufacturers of 12 biologic drugs were litigated against 48 biosimilar manufacturers.[80] Of these 271 cases, 95% were concerning secondary patents.[81] Clearly, secondary patents are instrumental in invoking litigation that potentially prevents competitive R&D and imitation. Important to note from the 271 patents are the 8% of ancillary secondary patents – patents relating to complementary products or components of the original patent.[82] Although not a large segment of the litigated patents, they were acquired 18.3 years after the original patent

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71 "Paul Grootendorst, Ron Bouchard & Aidan Hollis, "Canada's laws on pharmaceutical intellectual property: the case for fundamental reform" (2012) 184:4 CMAJ 543 at 546 [Grootendorst]."

72 *Ibid*.

73 *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133.

74 *Ibid*, s 5(2.1).

75 Grootendorst, *supra* note 71 at 545.

76 *Ibid* at 546.

77 *Ibid* at 547.

78 *Ibid*.

79 Biologic drugs are organically produced through the protein expressions of living systems. Biosimilars are drugs that are deemed highly similar to a preceding biologic drug, which may be marketed after the biologic drug patent expires. For the purposes of this article, the relationship between biosimilars and biologics can be conceptualized as similar (but not identical) to the relationship between generics and brand-name drugs, respectively.

80 Rachel Goode, William B Feldman & S Sean Tu, "Ancillary Product Patents to Extend Biologic Patent Life" (2023) 330:21 JAm Medical Assoc 2117 at 2117.

81 *Ibid*.

82 *Ibid*.

and are believed to extend original patents' durations by approximately 10 years.[83] Therefore, the litigation in question problematically depicts companies focusing their effort and resources on combating intentionally frivolous patents.

B. "Valid" Anti-competitive Patents Unbothered

Another issue is that during litigation, courts are limited when addressing anti-competitive allegations because they can only invalidate invalid patents. Consequently, anti-competitive yet valid patents are unbothered. In *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, the Supreme Court of Canada (the "SCC") was explicitly aware of evergreening practices that barred generic company market entry: "[Accepting AstraZeneca's interpretation of *NOC Regulations*] would reward evergreening even if the generic manufacturer (and thus the public) does not thereby derive any benefit."[84] But its mention of evergreening is a corollary, claiming AstraZeneca's argument would result in the court rewarding evergreening.[85] The SCC's judgement does not consider whether AstraZeneca was evergreening. Rather, it is derived from assessing the validity of the Notice of Compliance issued to Apotex Inc.[86]

Courts also use the "obviousness-type double-patenting" judge-made law laid out in *Whirlpool Corp. v. Camco Inc.*[87] to address evergreening allegations. In this case, the SCC recognized two forms of double-patenting.[88] The first is where the secondary patent is outright "identical or coterminous" to the original, and the second is where the second patent is not "patentably distinct" from the first.[89] The double-patenting analysis emerges from interpreting the *Patent Act*, which states that no invention can have more than one patent.[90] But like *AstraZeneca Cana*da *Inc v Canada (Minister of Health),* the court applies a core tenant of the *Patent Act* to invalidate patents. This approach stands on a different footing from a system that considers allegations of evergreening when invalidating patents. Courts cannot use the argument of evergreening or patent thickets to invalidate a patent. This is articulated in *Apotex Inc v Sanofi-Synthelabo Canada Inc,* where the SCC notes that the mere concern for evergreening practices cannot overrule the validity of selection patents (a secondary patent).[91] Therefore, the courts currently operate with the assumption that evergreening and other anti-competitive patent techniques are prevented by voiding invalid patents, leaving valid secondary patents that intimate anti-competitive strategy untouched.

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83 *Ibid*.

84 *AstraZeneca Canada Inc v Canada (Minister of Health)*, 2006 SCC 49 at para 39 [*AstraZeneca 2006*].

85 *Ibid*.

86 *Ibid* at para 17.

87 *Whirlpool Corp v Camco Inc*, 2000 SCC 67.

88 *Ibid* at paras 64–66.

89 *Ibid*.

90 *Patent Act, supra* note 1, s 28.2(1).

91 *Apotex 2008, supra* note 19 at para 98.

V. COMPARATIVE LAW

Some countries have altered their legislation pursuant to The Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").[92] TRIPS offers flexibility for member countries to implement stricter patent rights if it does not contravene its other articles.[93] This flexibility led to varying patentability standards between countries.[94] Brazil and India are notable countries that raised patentability criteria in response to pharmaceutical follow-on innovation and anti-competitive concerns; however, the results are dissatisfactory.

Brazil enacted a triumvirate examination system involving health ministries during patent examinations, where pharmaceutical patents are subject to the patentability criteria of Brazil's patent office, the National Institute for Industrial Property, and must receive the prior consent of the National Agency for Sanitary Vigilance.[95] Brazil enacted strict patent application examinations by requiring multiple agencies to review and regulate patent applications, intending to decrease grants for secondary patents.[96]

On application, Brazil's patent system has not achieved its intentions. The patent scheme has lowered grants of secondary patents, as intended; among secondary patent applications through the Patent Cooperation Treaty, only 5% of applications are accepted.[97] Yet, there is a backlog of applications where 11% of patent applications are pending.[98] 60% of patent applicants withdraw their applications before examinations are complete.[99] Therefore, the low approval rate of secondary patents is due to high withdrawal rates.[100] Furthermore, despite a low grant rate for secondary patents, low grant rates for primary patents were found to be approximately equal to secondary patent grants.[101] The equivalently low grant rate of primary patents and high withdrawal rate demonstrate ineffective legislation, where the patent system fails to provide patent grants promptly and has reduced grants for ingenuine secondary patent applications to the detriment of reducing all patent grants.

India enacted explicit legislation that provides additional inspection for secondary patents. Section 3(d) of India's *The Patent Act, 1970* raises patentability standards for follow-on innovation.[102] This provision intended to impede excessive patenting for anti-competitive purposes, hoping to

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92 TRIPS: Agreement on Trade-related Aspects of Intellectual Property Rights, 15 April 1994, 1869 UNTS 299 [*TRIPS*].

93 *Ibid*, art 1.1.

94 Bhaven N. Sampat & Kenneth C. Shadlen, "The Effects of Restrictions on Secondary Pharmaceutical Patents: Brazil and India in Comparative Perspective" (2016) Harvard University at 10.

95 Bhaven N. Sampat & Kenneth C. Shadlen, "Secondary pharmaceutical patenting: A global perspective" (2017) 46:3 Research Policy 693 at 695 [Sampat, "Secondary pharmaceutical patenting"].

96 *Ibid*.

97 *Ibid* at 700.

98 *Ibid*.

99 *Ibid*.

100 *Ibid*.

101 *Ibid* at 699.

102 *Ibid* at 695.

structure a fairer pharmaceutical marketplace. It clarifies that "salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance[s] shall be *considered to be the same substance* unless they differ significantly in properties with regard to efficacy."[103] Thus, it presumes follow-on innovations are unpatentable unless the applicant demonstrates the innovation's increased efficacy. The follow-on innovation must "*differ significantly* in properties with regard to efficacy," offering the India Patent Office flexibility in determining what degree of effectiveness suffices.[104]

However, section 3(d) was also unsuccessful upon application. Recently, section 3(d)'s usage has increased and has been limiting patent grants, likely due to its flexible language. Its overuse resulted in India's patent office increasingly denying non-follow-on patent applications.[105] Now, secondary patents are granted at similar rates to primary patents.[106] Policymakers drafted section 3(d) to decrease secondary patents to prevent anti-competitive follow-on patents; but like Brazil, the equal grant rate between secondary and primary patents suggests that the legislative amendment has failed.

VI. DO NOT RAISE PATENTABILITY STANDARDS

Negating anti-competitive patents by raising patentability standards for all follow-on innovations is an obtuse and overinclusive approach. It will likely disincentivize innovation, running counter to the patent system's goal of incentivizing innovation.

The patent system must remain optimal for recouping R&D costs and achieving business interests. Patents help companies recoup high R&D costs. Considering average R&D costs – depending on drug type, treatment, and success rate – ranging from $300 million to over $2.8 billion US dollars, these price tags pressure companies to obtain patents to recoup their expenses and profit as a business.[107] Overall, statistics demonstrate astronomical costs for pharmaceutical innovation.[108] Despite patents granting 20 years of unilateral exclusion beginning on the patent's filing date,[109] companies must extract revenue within short market exclusivity windows to ensure their R&D expenditure is not rendered prodigal. Regulatory variables in the patent system delay a drug's market entry so that market exclusivity periods do not run concurrently with the patent period. In the US, top-selling prescription brand-name drugs had an effective market exclusivity period of 12.4 years between 2000 and 2011. Similarly, in Canada, between 2014

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103 *Ibid* [emphasis added].

104 *Ibid* [emphasis added].

105 Bhaven N Sampat & Kenneth C Shadlen, "Indian pharmaceutical patent prosecution: The changing role of Section 3(d)" (2018) PLoS One 13:4 at 8.

106 Sampat, "Secondary pharmaceutical patenting", *supra* note 95 at 17.

107 Olivier J Wouters, Martin McKee & Jeroen Luyten, "Estimated Research and Development Investment Needed to Bring a New Medicine to Market, 2009-2018" (2020) 323:9 JAm Medical Assoc 844 at 844.

108 Steven Simoens & Isabelle Huys, "R&D Costs of New Medicines: A Landscape Analysis" (2021) 26:8 Frontiers in Medicine 760762; Alex Philippidis, "The Unbearable Cost of Drug Development: Deloitte Report Shows 15% Jump in R&D to $2.3 Billion", Genetic Engineering and Biotechnology News (28 February 2023).

109 *Ibid*, s 44.

and 2018, the average market exclusivity for drugs was eight years.[110] Some brand-name drugs experienced incredibly short market exclusivity periods. Lamictal® (protecting lamotrigine) only had market exclusivity for 4.8 years in Canada.[111] Remeron® (protecting mirtazapine) had a market exclusivity period of just 2.7 years.[112] This lends credence to the idea that the problematic reliance on follow-on innovation and other post-patent strategies is somewhat endogenously caused by the patent system, where companies use anti-competitive methods because the original patent term was insufficient for commercial purposes.

Early patenting strategies deployed by pharmaceutical companies will also be hindered by heightened patentability standards, further disincentivizing innovation. Most patent systems in the world encourage early patenting;[113] in a competitive industry, waiting too long to patent will essentially forfeit your patent rights to competitors with similar R&D trajectories. R&D is inherently laborious; in the US, only 0.001% of potential drugs surpass the pre-clinical testing phase of R&D, and less than 10% of drugs pass the human clinical trials phase.[114] Under ideal circumstances, marketing a new drug takes 10 to 15 years.[115] Thus, early patenting allows companies to gauge the risk of their R&D endeavours and protect their innovations from competitive imitation.[116] Additionally, innovators confident in their patent protection can comfortably share information with other innovators in order to improve their innovations.[117] However, early patenting is also risky, where companies must patent before a well-grounded understanding of their product and its market success probability. Due to the imperative role that early patenting has within the pharmaceutical patent system, preserving this strategy's efficacy must be considered when assessing potential legislative amendments.

Startup companies will be especially disincentivized if patent standards hinder early patenting availability. Decreasing early patent acquisitions for startups will likely stunt startup growth, as quick patent acquisition is correlated to startups' growth and success.[118] Startups typically take risks and explore new avenues of drugs and treatments, and heightened patent standards will deter startups from undertaking audacious research. Startups rely on early patenting to improve company status. They may secure patents to increase company evaluation when pitching to venture capitalists, hoping to fund their R&D when under financial pressure.

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110 Lexchin, "Time to market for Drugs in Canada," *supra* note 39 at 4.

111 Grootendorst, *supra* note 71 at 545.

112 *Ibid*.

113 Christopher A Cotropia, "The Folly of Early Filing in Patent Law" (2009) 61:1 Hastings Law Journal at 9.

114 Gail A Van Norman, "Drugs, Devices, and the FDA: Part 1: An Overview of Approval Processes for Drugs" (2016) 1:3 JACC Basic to Translational Science at 170.

115 Peter Corr & David Williams, *Conflict of Interest in Medical Research, Education, and Practice*, (Washington DC: National Academics Press 2009) at 375.

116 *Ibid* at 22.

117 *Ibid*.

118 Joan Farre-Mensa, Deepak Hegde & Alexander Ljungqvist, "The Bright Side of Patents" (2016) National Bureau of Economic Research, Working Paper No 21959 at 30–32; Annamaria Conti, Jerry Thursby & Marie Thursby, "Patents as Signals for Startup Financing" (2013) 61:3 The Journal of Industrial Economics 592 at 618; Masatoshi Kato, Koichiro Onishi & Yuji Honjo, "Does patenting always help new firm survival? Understanding heterogeneity among exit routes" (2022) 59:2 Small Business Economics 449 at 451, 455.

They may also patent early to encourage partnerships with large pharmaceutical entities, assuring funding and a more impactful influence on public health. Raising patentability standards for startups interferes with startup prosperity.

VII. WARRANTED CHANGE: LOOKING AT SELECTION PATENTS FOR GUIDANCE

Patent protection is not an unconditional grant. Patent law rests on the idea of a "bargain" between the inventor and the public; the invention benefits the people, and the patentee receives a monopoly for it.[119] The excessive number of secondary patents, likely anti-competitive, means such companies are not meeting their end of the bargain. These anti-competitive patents are associated with diminished public health and dive deep into patients' pockets. To ensure companies comply with this bargain, policymakers are pressured to combat prospective anti-competitive behaviour. However, they must carefully avoid overburdening the pharmaceutical industry, as the patent system must remain a strong incentive for pharmaceutical innovation. After all, the other side of the bargain is an effective and encouraging monopoly granted to patentees. A *Patent Act* reform that disincentivizes innovation by overstraining the sector and threatening early patenting strategies, subsequently affecting startup growth, is inadequate. A reasonable approach is not an overbroad change to legislation or a reassertion of patent rights from companies; instead, it is a nuanced reform that can delicately stun anti-competitive practices.

Canadian case law on the doctrine of "selection patents" offers such an approach, establishing a way to differentiate frivolous and genuine follow-on innovation. Selection patents are a type of secondary patent where the innovator selects a subset chemical from a previously patented class of solutions for its advantageous characteristics. Thus, the molecule is disclosed in the initial patent, but the later discovery of its unique and advantageous properties, inexistent in the initial compound family, is undisclosed. The SCC in *Apotex Inc v Sanofi-Synthelabo Canada Inc* upheld selection patents as valid in principle under the *Patent Act*.[120] Along with verifying their validity, the SCC laid down the requirements for a valid selection patent: 1) the selection must possess some substantive advantage over the genus; 2) all selected members must possess this advantage; 3) the advantage must be peculiar to the selected group and not be attributable to the general group chosen from.[121]

Courts have directed much attention to the first requirement, which entails an analysis of the inventiveness required for selection patents. The SCC concluded that "some substantive advantage" claimed by selection patents comprises the inventiveness of the invention.[122] Therefore, the advantageous utility of selection patents does not satisfy the utility requirement; rather, it is encapsulated within the inventiveness of the invention. What makes selection patents inventive is not limited to the compound but is reflected in its unique and advanced

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119 *Free World Trust v* Électro *Santé Inc*, 2000 SCC 66 at para 13 [*Free World Trust*]; *AstraZeneca 2006*, *supra* note 84.

120 *Apotex 2008*, *supra* note 19 at para 98.

121 *Ibid* at para 10 [emphasis added].

122 *Apotex 2008*, *supra* note 19 at paras 9, 78.

functionality.[123] The mere selection of a compound from the original compound family is insufficient for inventiveness, regardless of its utility, if the selected compound does not possess a substantive advantage relative to the original compound family. Hence, we reward selection patents for the peculiar form of inventiveness associated with them: their newly discovered distinct and substantively advantageous utility.

Case law on selection patents demonstrates not all forms of intellectual property are alike and that different patents may require other considerations. Understanding what makes selection patents uniquely inventive can help policymakers interpret the inventive quality in all secondary patents. Selection patents are a form of secondary patents and commonly overlap with other secondary patents. Selection patents have applied to the selection of salts and polymorphs.[124] They have pertained to the choice of esters and derivatives.[125] Selections of an advantageous enantiomer were concluded to be a patentable selection.[126] Conclusively, secondary patents are inventive because they have unique and new advantageous qualities the initial patent does not disclose. Earlier mentioned were new medical use patents, whose protections only extend to the claimed new utility for the preexisting compound. The rationale is that the invention is the new use, not the preexisting compound. Likewise, the inventive component of secondary patents is afforded by their unique and new advantageous qualities, as defined in case law. Despite this overlap, the patent protection for secondary patents of polymorphs or selections, for example, still relates to the compound itself and not their unique and new advantageous qualities.

Policymakers can interpret case law's understanding of *why* we grant patents for selection patents to determine *how* we should grant patents for secondary patents. This article's proposal implements the above rationale to organize the rights that secondary patents provide.

VIII. PROPOSAL

Policymakers should avoid raising patentability standards and apply case law's customized interpretation of selection patents to tailor the exclusivity rights accorded to secondary patents. The *Patent Act* should require the CIPO to focus on the advantageous and unique utility of the follow-on innovation to form a reasonable limitation on the rights of secondary patents. This requires the *Patent Act* to properly define and categorize secondary patents when dealing with pharmaceutical follow-on innovations.

A. Properly Defining Secondary Patents

The *Patent Act* should categorize secondary patents. Secondary patents should not be defined as patents for follow-on innovations, as it is stark and misidentifies what is "secondary." They are not "secondary" merely because the innovation arose afterward; if this were the case, every patent would be deemed a secondary patent except for the inaugural first-ever patent.

123 *Janssen Inc v Teva Canada Limited*, 2015 FC 247 at para 100.

124 *Merck Sharp and Dohme Corp v Pharmascience Inc*, 2022 FC 417 at para 92.

125 *Hoffman-La Roche Ltd v Apotex Inc*, 2013 FC 718 at para 142.

126 *Pfizer Canada Inc v Canada (Minister of Health)*, 2008 FCA 108 at para 46.

Secondary patents are not classified as secondary solely because they are subsequent innovations but also because they are intrinsically linked to the innovator's preceding innovation. Classifying a patent as secondary is contingent on the proprietor's identity. Secondary patents should differentiate companies that conduct follow-on innovation on their patented innovations versus companies involved in follow-on innovation who do not own the previous patent.

Accordingly, secondary patents are more precisely defined as patents awarded to patentees follow-on innovating based on their previously patented innovations. A patent for a follow-on innovation is a secondary patent only if the same entity is the one who secured the patent for the earlier innovation and its follow-on. Thus, all secondary patents protect follow-on innovations, but not all follow-on innovations are protected by secondary patents. Entities separate from the original patentee conducting follow-on innovation on the other company's innovation will be eligible for a standard patent.

B. A Proviso for Every Secondary Patent

Following the recommended categorization of secondary patents, every pharmaceutical secondary patent should possess a unique proviso. The proviso should be constructed by the patent's claims and restrict the exclusivity rights granted for secondary patents. The restriction is that the patent's rights will only apply to the innovation's disclosed and claimed utility, which is sufficiently unique and advantageous to render the innovation inventive, as inspired by the legal precedent regarding selection patents. The patentee will have all the rights of a typical patent. However, its exclusionary discretion will only apply if it pertains to the disclosed substantive, advantageous quality that sufficiently constitutes its inventiveness. Therefore, the patent protects only the "inventive heart" of the innovation.

The CIPO will formulate and apply provisos by interpreting the patent's claims. The patent's disclosure will follow the statutory requirements in the *Patent Act* that require patent applicants to describe the invention fully and completely.[127] Following, the advantageous utility of follow-on innovations is disclosed pursuant to the *Patent Rules*; disclosure mandates the applicant to describe the utility and background art significant for understanding the invention.[128] Note that the CIPO, never the patentee, will construct each secondary patent's provisos. This prevents applicants from drafting their provisos broadly intended to enlarge the scope of claims they cover, which would diminish the proviso's limitation effects.

For example, a patentee holds the patent for "Drug A," which protects an active ingredient. They discover a polymorph of the active ingredient in Drug A and call it "Drug B." Drug B can treat schizophrenia, a utility that is absent from the predecessor drug. The patentee of Drug A applies for a patent for Drug B, acquiring a secondary patent. The inventiveness sufficient to make the polymorph of Drug A's active ingredient into an independent drug, Drug B, will be disclosed. The patentee will have the exclusive right to make, use, offer for sale, sell, and import drug B for 20 years, but only *regarding its claimed substantive, advantageous, and unique quality that composes its inventiveness.* The patentee possesses control

127 *Patent Act*, *supra* note 1 at s 27(3).

128 *Patent Rules*, SOR/2019-251, s 56(1)(c)–(d).

to exploit their innovation for its substantive, advantageous quality of treating schizophrenia. The patentee may sue for patent infringement if another company imitates Drug B with the same substantive, advantageous quality. However, if a company sells Drug B for another quality that is unmentioned or dissimilar to the proviso, they have not infringed the secondary patent. Perhaps another company discovers that the active ingredient in Drug B can also treat bipolar disorder or, in combination with some other isomer, treat schizophrenia for a certain class of individuals better than Drug B. This displays an advantageous, unique quality that is distinguishable from Drug B. Here, the other company's innovation would not infringe the proviso and not lead to a patent infringement.

Applying provisos will weaken the effects of evergreening and patent thickets. Once the initial patent expires, the secondary patent tapers the patentee's rights by having the secondary patent's rights only apply to the innovation's claimed substantive, advantageous, and unique utility. This weakens evergreening by limiting the market share of a secondary patent. The proviso provides other companies with more maneuverability to sell the same product for another inventive reason. As the earlier hypothetical shows, a company can enter the market to sell the polymorph found in Drug B for treating schizophrenia and bipolar disorder. Therefore, qualifying secondary patent protection to only its inventive qualities correlates to a decrease in market share that combats evergreening.

Fair competition will emerge, where companies can research and market their innovations on already marketed follow-on drugs without fear of patent infringement. This arises from provisos and their limitations eroding the strength of patent thickets, where these impervious patent protection "shields" will be chipped due to the restrictions imposed by provisos. Competitors will be less worried about accidental patent encroachments, and elaborate patent thickets will not disincentivize follow-on innovation from competitors. Companies will be more willing to research and explore highly patented drugs; knowledge exchanges and continuous, collaborative innovation will be encouraged, contributing to higher rates of follow-on innovation from competitors.

Not only will this *Patent Act* amendment function to develop a fair pharmaceutical market, but the market itself will assist with this amendment's goal to discourage anti-competitive patents and encourage genuine follow-on patents. Provisos will trouble companies that engage in follow-on innovation solely or primarily for anti-competitive purposes because, presumably, they are selling an uninventive product. The effects of anti-competitive strategy companies obtained with secondary patents will weaken, and the patent will only protect innovation with little or stodgy utility that is unlikely to extract revenue. Invoking provisos will allow companies to enter the market more efficiently, increasing competitive presence and pricing. Naturally, products representing genuine follow-on innovation will be clinically and commercially superior.

These results are instantiations of the underlying logic of the patent system: the patent system fosters monopoly but does not guarantee it. It does not guarantee a patent monopoly because a patented invention's commercial success is partially accredited to its inherent inventiveness. Canadian courts have long held commercial success as an indicium for the

"inventive ingenuity" of an invention.[129] The Supreme Court of the United States holds the same assumption.[130] Secondary patents will not provide as much protection as before; implementing provisos will incentivize inventors to conduct R&D on projects they trust will bring about market success through the invention's inventiveness. Companies engaging in genuine follow-on innovation of their previous innovations will be unaffected since they intend to benefit public health and profit through the innovation's claimed inventiveness.

Hence, adopting a proviso-based approach for secondary patents will disincentivize uninspiring, empty follow-on innovation due to the diminished market returns and weakened anti-competitive consequences from marketing these products. Conversely, gifted and authentic follow-on innovation will be incentivized due to the presumed market returns resulting from their inventiveness. This recommendation does not raise patentability standards. Unlike the *Guidelines* or Brazilian and Indian patent laws, it does not disincentivize follow-on innovation or hinder early patenting strategies. Startups will be unaffected and can continue taking on risky and novel R&D projects. Hopefully, this recommendation may soothe the blistering conflict between competition and patent law, lessening the opportunity for companies to block competition through mass patenting.

A secondary patent's proviso would not "unreasonably conflict with the…normal exploitation of the patent and…unreasonably prejudice [the patentee's] legitimate interests."[131] To meet the sufficient disclosure required for patent applications, the patent applicant must circumscribe the perimeters of the invention, identifying what the patent does and does not cover; this is the "specification" of the patent.[132] The inventive quality of follow-on innovations is its substantive, advantageous, and unique utility, which the patent application claims. Thus, the legitimate interest of a patentee is to commercialize their product for its inventive qualities. Pharmaceutical entities cannot allege that the recommended proviso conflicts with the normal exploitation of their patent because the normal exploitation of secondary patents is using the product for its claimed substantive, advantageous, and unique utility. If a company has suffered economically by focusing its R&D on dull innovation, it is not the patent's proviso that causes this economic loss. The reality is that the company has "kneecapped" itself by focusing its efforts on a product whose inventive characteristics were commercially unwanted.

IX. IMPLICATIONS AND EXTENSIONS

A. Implications

Inevitably, legislative changes produce social and legal implications. Future pharmaceutical litigation will require the courts to interpret the claims and the assigned proviso of secondary patents, which is unprecedented. However, this interpretation can be governed by the doctrine

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129 *AstraZeneca Canada Inc v Apotex Inc*, 2014 FC 638 at para 342–343; *Coca-Cola Co v Canada (Attorney General)*, 2023 FC 424 at paras 50–54.

130 *KSR Int'l Co v Teleflex Inc*, 550 US 398 (2007).

131 *TRIPS*, *supra* note 92 at 26.

132 *Patent Act*, *supra* note 1 at ss 27(3)-(4).

of "purposive construction."[133] This is because the provisos for secondary patents will be derived from patent claims, so the interpretation of its claims will guide the interpretation of the proviso and allow the courts to read the patent claims and its derived proviso in the sense the patentee intended.[134] The CIPO will also be tasked with interpretative work. They must engage in quasi-purposive construction by configuring patent claims into adequate provisos. At first, it might be unusual or difficult for the CIPO to develop an approach to drafting provisos. However, the CIPO is not completely unacquainted with the use of provisos. Patent applications already allow for the use of provisos to exclude known subject-matter for the purposes of clarifying an invention's novelty or inventive step.[135] Although these provisos are applied differently, the CIPO nonetheless has experience analyzing provisos and how they interact with patent application claims. This makes this article's proposal promising with respect to its practicality.

Drug companies submitting Notice of Allegations must be informed of provisos and their respective secondary patents when navigating their intellectual property rights and alter their allegations in correspondence. *NOC Regulations* will have the new consideration that certain patents are categorized as secondary patents. If a company mistakenly believes a secondary patent to be a primary patent, the validity and success of its Notice of Allegation will be unpredictable. Over time, companies will become increasingly aware of how to manoeuvre their submissions per the distinct characteristics of secondary patents.

A potential drawback of this recommendation is its complexity. Legislative change could be more effective if kept as simple as possible to avoid misinterpretation and misapplication. As seen before, India's heightened patentability criteria for follow-on innovation were unsuccessful in its application. It follows *a fortiori* that the greater complexity of this recommendation will result in greater difficulties during application. However, the abundance of case law on selection patents provides plenty of discussion and guidance in determining the inventiveness of secondary patents. The courts, CIPO, and pharmaceutical entities can analyze this case law to predict the form a secondary patent's proviso should take.

B. Extensions

This article only recommends a *Patent Act* reform specifically for the pharmaceutical patent system. However, such a proposal may extend to other sectors where excessive patenting can actuate anti-competitive strategies, such as nanotechnology. Nanotechnological innovation is like pharmaceutical innovation in that follow-on innovation is critical to these industries. Nanotechnology companies prioritize their inventions to be smaller and compartmentalized from previous nanotechnologies. The large number of prospective secondary patents makes this article's proposal applicable.

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133 *Free World Trust*, *supra* note 119 at para 50; Purposive construction is intended to balance the needs of the patentee and public by parting from the literal interpretation of a patent's claims to determine the essential claims of the patent.

134 *Ibid* at para 51.

135 Canadian Intellectual Property Office, Manual of Patent Office Practice (Ottawa: Industry Canada, 1998) at ch 18.08, online: <ised-isde.canada.ca/site/canadian-intellectual-property-office/en/manual-patent-office-practice-mopop> [perma.cc/E4TX-7CX8].

Beyond the scope of this article's proposal, future research should address other forms of anti-competitive behaviour. This paper only mentions evergreening and patent thickets, yet many other anti-competitive behaviours exist. "Product hopping," "pay-for-delay," "patent pools," "submarine patents," and "pre-emptive patents" are all informal terms that relate to other anti-competitive practices similar to evergreening and patent thickets.[136] Anti-competitive patents can act concurrently, and considering these anti-competitive strategies can be convoluted. For example, the fragmentation of patent rights between entities which are considered to accentuate patent thicket effects.[137] The collaboration of these anti-competitive strategies may be used by companies to circumvent this article's recommendation for secondary patents and their complimentary provisos. New anti-competitive strategies will emerge in response to a legislative reform that attempts to prevent such strategies. Therefore, researching and predicting anti-competitive reactions to this article's proposal is necessary to guarantee a successful legislative amendment.

IMPORTANT TAKEAWAYS AND CONCLUSION

Creating and applying any legislative reform is extremely difficult due to the multiplicity of factors that affect and are affected by the pharmaceutical patent system. This article's proposal is not a dispositive solution to evergreening and patent thickets. However, a critical point of this article's proposal is the need to meet a "golden mean" when considering legislative reform. Proposals to combat anti-competitive patenting include raising patentability criteria. Some have advocated raising patent application fees.[138] Others have advocated fines for application rejections, aiming to encourage only promising applications.[139] Often recommended are proposals focusing on punishing wrongdoing, hoping the outcome will promote innovation. Such proposals ignore the fact that the pharmaceutical industry is highly regulated and faces numerous disheartening conditions – such as short market exclusivity and high R&D costs. This article's proposal does not worsen anyone's status, including the patentees who bear the conditions conferred by provisos. Instead, it engineers a patent system that facilitates only genuine innovation without unrealistically punishing patentees or applicants to incentivize innovation.

Pharmaceutical companies are business-oriented. Their success directly equates to their innovation output, and legislative reform should motivate innovation. Unduly burdening the parties participating in the pharmaceutical patent system will contravene this by discouraging innovation. The underlying notion of the patent system is to cultivate innovation, and this article's proposal remains deferential to this ideology.

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136 These forms of anti-competitive patenting can be used together.

137 Mahdiyeh Entezarkheir, "Patent thickets, defensive patenting, and induced R&D: an empirical analysis of the costs and potential benefits of fragmentation in patent ownership" (2017) 52 Empirical Economics 599 at 600.

138 Julien Pénin & Daniel Neicu, "Patents and Open Innovation: Bad Fences Do Not Make Good Neighbors" (2018) 25:1 Journal of Innovation Economics & Management 57 at 78.

139 *Ibid*.

ARTICLE

FREEDOM OF CONSCIENCE: A COMMUNAL-BASED APPROACH

Owen Crocker *

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ABSTRACT

Despite the plethora of freedom of religion literature (under section 2(a) of the *Canadian Charter of Rights and Freedoms*), the corresponding literature on the freedom of conscience is minimal. To further the discussion on the freedom of conscience, I rely heavily on the philosophical literature to make an important distinction; the difference between individual-based and communal-based conceptions of conscience. Whereas the former is plagued with subjectivity, making it difficult to conceptualize a working framework for the *Charter* right, the latter offers a promising foothold to rise above subjectivity and find a firm footing based on communal relations. In emphasizing the importance of the dialogical nature of human beings and the relational necessity undergirding moral judgements, I argue that the concept of conscience should be understood and practiced in community, rather than individually.

Keywords: Freedom of Conscience, Freedom of Religion, Conscience, Relationality, Personhood

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INTRODUCTION

Humans are a moral species (*homo moralis*[1]), continuously creating and reinforcing moral frameworks. The phenomena of conscience and religion contribute to these moral frameworks by motivating people to pursue various moral objectives. In any multi-cultural community, it is inevitable that moral viewpoints and objectives vary from person to person. Section 2(a) of the *Canadian Charter of Rights and Freedoms* states that everyone has the "freedom of conscience and religion".[2] This freedom, therefore, appears to act as a safeguard to ensure that people, regardless of their religious or non-religious commitments, can act in accordance with one's moral convictions. However, the current jurisprudence on section 2(a) is mostly, if not entirely, directed towards the religious component, leaving the legal concept of conscience wanting.

In what follows, it will be argued that in the courts' attempt to establish a working framework to consider conscience-based claims, the court should adopt an understanding of conscience as a *communal* phenomenon, as opposed to an entirely *individual* phenomenon. By adopting a communal conception of conscience, the courts' analysis should consider whether the conscience-based claim, at a minimum, considers the values and principles of the surrounding community.

I. CONSCIENCE

A. A Brief Linguistic History

For many, the concept of conscience denotes an internal voice, inclination, or disposition towards an act or omission which possesses a moral dimension. It is not uncommon to hear phrases such as "that particular act goes against my conscience" or "my conscience prohibits me from acting in a such a manner". From an internal heavenly voice[3] to an evolved human faculty,[4] the concept of conscience is a broad and often ambiguous concept, or as CS Lewis aptly put it, the idea of one's conscience is a "…simmering pot of meanings".[5]

The linguistic provenance of conscience appears to arise from the Greek playwrights, dating back to the fifth century BCE.[6] A theatrical metaphor, which described the act of "sharing knowledge with oneself, as if one were split into two", was expressed by the Greek term, *suneidenai*.[7] By breaking apart the Greek term into *sun* and *eidenai*, the term's meaning becomes clear. The first morpheme, *sun,* meaning "to share" accompanied by the latter, *eidenai,* meaning "knowledge" (alongside the associated term *heautôi*, meaning "oneself") carries the components

1 Raphael Domingo, "Restoring Freedom of Conscience" (2015) 30:2 JL & Religion at 176.

2 *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 Peter Kreeft & Ronald Tacelli, *Pocket Handbook of Christian Apologetics,* 1st ed (Downers Grove: InterVarsity Press, 2003) at 26 ("Conscience is thus explainable only as the voice of God in the soul").

4 Patricia Churchland, *Conscience: The Origins of Moral Intuition* (New York: WW Norton & Company, 2019) at 71 ("…attachment begets caring, caring begets conscience").

5 CS Lewis, *Studies in Words* (London: Cambridge University Press, 1960) at 196.

6 Richard Sorabji, *Moral Conscience Through the Ages: Fifth Century BCE to the Present* (Chicago: University of Chicago Press, 2015) at 12.

7 *Ibid*.

necessary to arrive at the metaphor of "sharing knowledge with oneself".[8] *Suneidôs*,[9] a derivative Greek term of *suneidenai*, later provided a direct translation into the Latin term, *conscientia*,[10] which bears a familiar resemblance to the current English term, conscience.[11]

The previously inward and internalized understanding of conscience – sharing knowledge with oneself – began to incorporate outward and externalized components. One possible explanation of the change in meaning is the imputation of the concept of conscience into the Christian lexicon. Such an event is believed to have taken place when Saint Jerome translated the biblical Greek term, *syneidêsis*, to the Latin term, *conscientia*, in the fourth century.[12] At the time, *conscientia* carried a communal connotation, as it was used to describe either knowledge shared with another,[13] mutual knowing,[14] or knowledge of community standards.[15]

By recounting the etymological roots of the word conscience, one can see two diverging understandings of its composition: the first, an individual self-awareness that arises by *sharing knowledge with oneself*, and the second, a mutual or collective knowledge that arises by *sharing knowledge with another*. The next portion of this paper will examine the philosophical literature and attempt to explicate the competing (or complementary) understandings of conscience.

B. Individual Conscience: Sharing Knowledge with Oneself

The individualistic conception of conscience deals primarily with the self, forgoing any substantive external element, whether that be reason, a sacred text, or social consensus. By emphasizing the individual, any larger narrative of morality and meaning is pushed to the background. Tom O'Shea, a political and moral philosopher, refers to this concept of conscience as the modern moral conscience and describes it as "an evaluative self-awareness which aims to produce particularistic and motivating moral knowledge".[16] One can see the etymological root of conscience (sharing knowledge with oneself) in O'Shea's definition in the idea of an evaluative self-awareness.

The emphasis on the self as a grounding for moral insight and knowledge is argued by some scholars to have been greatly influenced (or reinvigorated) by Jean-Jacques Rousseau's work,

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8 *Ibid*.

9 *Ibid* at 14. *Sun* means "shared with" and *eidêsis* means "knowledge".

10 *Ibid*. *Con* means "shared with" and *scientia* means "knowledge".

11 Others have argued that the Greek term *syneidêsis* was the term which the Latin term *conscientia* derived from.

12 Paul Strohm, *Conscience: A Very Short Introduction* (New York: Oxford University Press, 2011) at 8, who states that Jerome's use of *conscientia* carried with it the connotations that attached it to "public expectation" and the "public sphere", which appear to have derived from *Ciceronian* and *classical-legal* understandings of the term.

13 John Cottingham, "Conscience: What is its History and Does it Have a Future?" (2019) 45:3 Hist European Ideas 338 at 339.

14 Strohm, *supra* note 12 at 4.

15 Churchland, *supra* note 4 at 8.

16 Tom O'Shea, "Modern Moral Conscience" (2018) 26:4 Intl J Philosophical Studies 582 at 583.

Emile (1763).[17] Rousseau can be understood as describing humans with an innate principle of justice endowed into their souls. Rousseau writes, "[t]here is in the depths of souls, then, an innate principle of justice and virtue according to which, in spite of our own maxims, we judge others as good or bad. It is to this principle that I give the name conscience".[18] By positing a natural endowment of justice, individuals are justified in considering their conscience to be a truth-preserving faculty that produces correct moral judgments. Therefore, the modern moral conscience can have one explanation based on an innate principle of justice within the person.

Much of the modern conscience literature departs from Rousseau's endowment of justice, while it still highly prioritizes the self as determinative in moral matters. It seems that remnants of Rousseau's conception of conscience can be found in the literature of personal integrity as conscience. William Lyons writes that an important aspect of conscience is the development of "an objective moral point of view of our own",[19] which we commit ourselves to acting on.[20] This objective moral point of view (in other words, conscience) is foundational to one's personal integrity. By acting in accordance with one's personal objective moral viewpoint, we preserve our personal integrity, which in turn protects one's autonomy, self-respect, and identity.[21]

These individualistic and self-oriented conceptions of conscience inevitably bring to light the problem of the efficacy and value of individual conscience. History is full of examples where one's conscience has been "twisted out of all recognition" and has "made men do what they believed to be their duty", when such acts were morally grotesque.[22] Unless tempted to adhere to a relativistic moral philosophy, one should be skeptical about the weight, emphasis, and trust put on one's individual conscience to arrive at correct moral deductions.

C. Communal Conscience: Sharing Knowledge with Another

In contrast to the individual-based conscience, communal conscience[23] incorporates external principles to a greater degree. The contrast between these two conceptions of conscience (and by extension, the self) can be seen in much of Charles Taylor's work. He writes, "[f]or the pre-modern…I am an element in a larger order…The order in which I am placed is an

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17 Charles Taylor, *The Malaise of Modernity* (Toronto: House of Anansi Press, 1991) at 27; Carl Trueman, *The Rise and Triumph of the Modern Self: Cultural Amnesia, Expressive Individualism, and the Road to Sexual Revolution* (Wheaton, IL: Crossway, 2020) at 122.

18 Trueman, *supra* note 17 at 122.

19 William Lyons, "Conscience: An Essay in Moral Psychology" (2009) 84:4 Philosophy J 477 at 488.

20 It should be noted that Lyons account of conscience is non-authoritative, meaning that one's conscience does not necessarily reflect the true nature of objective morality (see *ibid*).

21 Patrick Lenta, "Freedom of Conscience and the Value of Personal Integrity" (2016) 29:2 Ratio Juris 246 at 248-253.

22 Martin van Creveld, *Conscience: A Biography* (London: Reaktion Books, 2015) at 164. Specifically, see Chapter V titled, "Conscience in the Third Reich".

23 By communal conscience, I refer to the tradition of conscience that relies heavily on various social architectures. A similar term, "collective conscience", can be seen as groups or institutions possessing a singular conscience. See Brian Bird, "The Call in Carter to Interpret Freedom of Conscience" (2018) 85:2 SCL Rev 107 at 123 and Kevin Wildes, "Institutional Identity, Integrity and Conscience" (1997) 7:4 Kennedy Ins Ethics J at 413.

external horizon which is essential to answering the question, who am I?…for the modern, the horizon of identity is to be found within, while for the pre-modern it is without".[24] The Canadian philosopher, George Grant, shares a similar viewpoint as Taylor. Regarding modern society, Grant writes, "[w]e no longer consider ourselves as part of a natural order…We see ourselves rather as the makers of history, the makers of our own laws. We are authentically free since nothing beyond us limits what we should do".[25] There are striking parallels between the analyses that Grant and Taylor offer on the modern understanding of the self. Moreover, one can see the parallels between Taylor's understanding of the modern self[26] and O'Shea's modern moral conscience. The emphasis put on locating one's identity by looking inward appears to form the basis for moral convictions and conscience-based claims grounded in internal, subjective beliefs. Therefore, rather than finding a principle of justice engraved within ourselves, as Rousseau opined, conceptions of communal conscience look to the "external horizon" or to "externally accountable standards" outside the self. [27]

As noted earlier, when Saint Jerome translated the biblical Greek term, *syneidêsis*, to the Latin term, *conscientia*, in the fourth century,[28] the concept of conscience inevitably entered the arena of theological debate. Max Scheler, a Catholic philosopher, writes, "[o]nly the cooperation of conscience and principles of authority and the contents of tradition with the mutual correction of subjective sources of cognition guarantees [moral insight]."[29] In other words, conscience must be buttressed against external authorities. Scheler, along with others (for example, Martin Luther and John Calvin), were worried about the efficacy of "special illuminations"[30] of conscience being held over other external sources of moral authority. Within the Christian tradition, as Paul Strohm notes, there was a clear divide between how much weight conscience should be given as an authority to arrive at moral conclusions.[31] However, the commonality between these concerns was that conscience should not be treated as an inerrant source of moral knowledge, but rather one part in a larger normative framework to arrive at moral conclusions.

After much theological debate, the idea of conscience began to take on a more secular formation around the 17th century.[32] Richard Sorabji writes, "Kant thus secularized conscience to the extent making God no longer an objective feature of it".[33] For Kant, conscience was

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24 The quote originates in Charles Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985) at 258, but was condensed in Jospeh Calano, "Charles Taylor and the Modern Moral Sources of the Self" (2015) Scientia: Research J College Arts & Sciences 121 at 121.

25 George Grant, *Philosophy in the Mass Age* (Toronto: University of Toronto Press, 1998) at 38.

26 See Charles Taylor, *Sources of the Self* (Cambridge: Harvard University Press, 1989).

27 O'Shea, *supra* note 16 at 591.

28 Strohm, *supra* note 12 at 8. Strohm states that Jerome's use of *conscientia* carried with it the connotations that attached it to "public expectation" and the "public sphere", which appear to have derived from *Ciceronian* and *classical-legal* understandings of the term.

29 *Ibid* at 33.

30 Strohm, *supra* note 12 at 31.

31 *Ibid* at 35-36.

32 Strohm, *supra* note 12 at 39.

33 Sorabji, *supra* note 6 at 180.

the "internal court in man",[34] which "determines whether an agent has acted in conformity with or contrary to the moral law in a given instance".[35] The reference to the moral law, regardless of what exactly that consists of, is an external reference point which grounds whether the person's action was correct or not. According to Kant, since people are unable to judge themselves in relation to the moral law, they must observe themselves from another's perspective[36] – or in legal terminology, from the viewpoint of the "reasonable person". By incorporating another person into the court of conscience, Kant's concept begins to resemble the idea of sharing knowledge with another, rather than an entirely individualistic conception of conscience. This communal sharing of knowledge is also reflected in some of the more current literature on conscience.

Recently, Françoise Baylis put forward a conception of conscience titled, "the relational view of conscience".[37] Baylis' conception of conscience consists of three primary parts: first, a thoughtful and reflective deliberation about which values, beliefs and commitments endorse one's own; second, one's best judgement about what should be done, taking into consideration a shared interest in living justly and well; and finally, an action that is aimed at keeping one in proper relation to oneself and in proper relation with others.[38] This conception of conscience incorporates communal standards and social consensus as one must not only be concerned about their own personal integrity, but also with social integrity. Such a conception incorporates a strong care ethic,[39] emphasizing the personalized nature of decision making, rather than abstract syllogisms about what the objective moral law demands of us.

As I have put forward, communal conceptions of conscience are those that substantially incorporate external elements into moral deliberation, compared to the individual conscience which lacks such external elements. O'Shea writes, "[c]onscience is better able to be morally responsive when it is buttressed by appropriate social architecture."[40] In this sense, when one's conscience is engaged and active, its efficacy is tempered against collective social values. This is not to say that communal modes of conscience are infallible, as groups and societies can fall into error just as individuals can.[41] However, communal modes of conscience have one additional fence to climb in arriving at a wrong decision – the concerns and moral disagreement of our neighbours who might disagree with us.

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34 Strohm, *supra* note 12 at 45.

35 Samuel Kahn, *Kant's Theory of Conscience* (Cambridge: Cambridge University Press, 2021) at 2.

36 Strohm, *supra* note 12 at 45-50.

37 Françoise Baylis, "A Relational View of Conscience and Physician Conscientious Action" (2015) 8:1 Intl J Feminist Approaches to Bioethics at 18.

38 *Ibid* at 30.

39 Care ethics can be seen to emphasis (external) personal relationships over abstract moral principles. See Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982) at 104-05.

40 O'Shea, *supra* note 16 at 593.

41 van Creveld, *supra* note 22 at 164.

II. FREEDOM OF CONSCIENCE

A. Legal Analysis

By considering the various philosophical approaches to conscience, one can now approach the courts' dealings with conscience with a more critical eye. In the same way that the courts have struggled with defining religion[42], the courts should begin in their struggle to define conscience. As Rober Vischer puts it, "[i]f our society is committed to facilitating the flourishing of conscience, it makes sense for the law to account for conscience's *true nature*".[43] To be fair, judges are unlikely to arrive at a complete analysis of the true nature of conscience – such an expectation would be unrealistic. However, it is reasonable to expect the courts to broach the topic and begin to consider what conscience's true nature might consist of. After all, the Supreme Court did state in *Amselem*, "[i]n order to define religious freedom, we must first ask ourselves what we mean by 'religion'".[44] Such a statement holds true here as well. Next, a brief legal analysis of four cases will be presented. By analyzing the courts' dealings with conscience, one is better situated to then make suggestions in how the Court ought to move their analysis forward.

B. Pre-Charter Jurisprudence

The conscience jurisprudence can be conveniently divided into two narratives: pre-*Charter* and post-*Charter.* Regarding the former, Brian Bird writes, "the overwhelming majority of pre-*Charter* jurisprudence that implicates conscience intimately links it to religion. In short, conscience is mainly understood as *religious* conscience".[45] In this perspective, if conscience is primarily understood as a religious conscience, then those who don't affiliate with any religious tradition or creed are at a disadvantage in their ability to manifest and protect their sphere of moral autonomy. There are two instances in the pre-*Charter* jurisprudence, however, where conscience and religion can be seen to be "weakly" separated,[46] – in other words, where the conception of conscience can be understood to be based in secular frameworks. Moreover, the two cases that follow can be seen as a starting point in considering the difficulty of classifying beliefs as religious-based or conscience-based.

i. *Anderson*

In *Re Civil Service Association of Ontario (Inc) v Anderson*,[47] a union worker refused to pay union fees since "his conscience dictated that strikes were morally wrong" because unions were

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42 The Court stated in *Syndicat Northcrest v Amselem,* 2004 SCC 47 at para 39 [*Amselem*] that to define religion may not be "possible".

43 Robert Vischer, *Conscience and the Common Good: Reclaiming the Space Between Person and State* (Cambridge: Cambridge University Press, 2010) at 99 [emphasis added].

44 *Amselem supra* note 42 at para 39.

45 Brian Bird, "Rediscovering Freedom of Conscience in Canada" (2021) 84 Sask L Rev 23 at 43.

46 *Ibid*. As Bird notes, the cases of *Re Civil Service Association of Ontario (Inc) v Anderson*, 1975 CanLII (ONSC) [*Anderson*] and *Butler v York University Faculty Association* referred to conscience and religion as distinct legal concepts.

47 *Anderson, supra* note 46.

"disruptive to society and the economy".[48] At the time of this case, there were exemptions in an Ontario statute that permitted individuals to not pay union fees if such union fees contravened their religious convictions or beliefs.[49] Interestingly, Anderson argued his belief was religious because his church community encouraged their congregants in "the making of individual moral judgments".[50] Despite the church's involvement on this matter, the union argued that the labour relations tribunal misconstrued Anderson's belief as religious[51] and the belief was "purely conscientious and thus not religious".[52] Ultimately, the tribunal allowed Anderson to refrain from paying the union fees based on their finding that Anderson's beliefs shoulder be characterized as a "religious conviction[s] or belief[s]".[53] In the judgement, the appellate court wrote,

> It is trite to say that in some circumstances, or with respect to some individuals, matters of morality might well be quite *separate and distinct* from matters of religious belief. However, it does not follow that a matter of individual morality and conscience may not, for some individuals, be an important element or tenet in their religious convictions or belief. Mr. Anderson, as found by the tribunal, regards the matter of making individual moral judgments on issues of this sort as being an element of his religious convictions or belief.[54]

The court's decision hinged on whether Anderson's belief (i.e., "strikes are immoral") was religiously based or secularly based. Arguably, his belief was not religious, as his church community encouraged their congregants to make "individual moral judgments." This category, that of individual moral judgements, is incredibly broad, which one could reasonably argue includes all sorts of beliefs, including beliefs that go against the church's religious doctrinal beliefs. As Bird notes, "[t]he Court in *Anderson* arguably committed a leap in logic. The claimant's 'religious' belief was that one must form and follow one's conscience, but the belief that strikes are immoral, a product of acting on that religious belief was strictly speaking, a conscientious belief or moral judgement unique to him as an individual".[55] That said, it is likely that Mr. Anderson's strong comments about his "religion [as] an inseparable part of his day to day living",[56] moved the court in determining Anderson's belief to be religious. The main point of this case that is worth noting is the court's mention of "individual morality and conscience" not necessarily comprising "an element or tenet" of one's "religious convictions or belief". The Court, therefore, acknowledges that for some individuals, conscience (as well as individual matters of morality) may be based in religious or non-religious foundations.

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48 *Ibid* at para 1.
49 Bird, *supra* note 45 at 43 and *Anderson* at para 1.
50 *Anderson*, *supra* note 45 at para 1.
51 *Ibid* at para 2.
52 Bird, *supra* note 45 at 43.
53 *Ibid*.
54 *Anderson*, *supra* note 47 at para 6.
55 Bird, *supra* note 45 at 42.
56 *Anderson*, *supra* note 47 at para 4.

ii. *Butler*

In *Butler v York University Faculty Association*, a similar case (approximately six years after *Anderson*), Butler, a university professor, argued that having to pay union dues was entirely against his conscience.[57] He grounded his claim in the fact that since the university is a place of "human culture",[58] the university should respect his "conscience and integrity".[59] Under the *Labour Relations Act,*[60] there was an exemption to paying union fees based on one's "religious conviction or belief".[61] The Board, thereby, had to determine whether Butler's strong convictions regarding union fees was religious in nature. The Board wrote,

> What the applicant is in effect asking the Board to do is to legislate the word "religious" out of section 39 altogether. This is not an appropriate function for the Board… Had the Legislature chosen to grant the objection simply on the basis of "personal conviction", or "genuine belief", or "matters of conscience", it could easily have done so. But it did not. The section is not written simply for "conscientious objectors.[62]

The Board determined that since the legislation expressly accounts for religious-based convictions but not those which are conscience-based, Mr. Butler's personal convictions or matters of conscience were not protected. The Board appears to acknowledge the existence of conscience-based beliefs as separate from religious-based beliefs. To clarify, the Board did not say that there exists a right (or sphere of protection) to personal convictions or matters of conscience that are not based in religion. However, the Board acknowledged (at least conceptually) that for some persons, matters of belief and conscience are not necessarily linked nor grounded in religion. In both *Anderson* and *Butler,* the courts acknowledged that for some, conscience-based claims will not be religiously grounded. As noted at the beginning of the pre-*Charter* section, these two cases represent outliers since most pre-*Charter* jurisprudence sees conscience as "*religious* conscience".[63] These cases foreshadow of a conversation that continues in the post-*Charter* jurisprudence. The next section will survey two of the major cases that deal with conscience as it relates to the freedom of conscience, after the enactment of the 1982 *Charter.*

C. Post-Charter Jurisprudence

The post-*Charter* cases discuss section 2(a) of the *Charter* which reads, "[e]veryone has the following fundamental freedoms: freedom of conscience and religion".[64] As stated in *R v Edwards Books and Art Ltd*,[65] "[t]he purpose of section 2(a) is to prevent interference with profoundly held personal beliefs that govern one's perception of oneself, humankind,

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57 *Butler v York University Faculty Association,* 1981 CanLII 827 (ONLRB) [*Butler*].

58 *Ibid* at para 7.

59 *Ibid*.

60 *Labour Relations Act*, RSO 1980, c 228.

61 Bird, *supra* note 45 at 42.

62 *Butler*, *supra* note 57 at para 16.

63 Bird, *supra* note 45 at 43.

64 *Charter*, *supra* note 3 at s 2(a).

65 *R v Edwards Books and Art Ltd,* 1986 CanLII 12 (SCC) at para 97 [*Edwards Books*].

nature, and, in some cases, a higher or different order of being". Others, such as Derek Ross, have argued that "[a]t their core [freedom of conscience and religion] are centered on the fundamental importance of truth and its observance".[66] In both the courts' perspective and scholars, such as Ross, section 2(a) has a broad overarching purpose to protect a person's ability to pursue and believe varying truth-claims about the nature of reality and the meaning of human existence. However, most section 2(a) jurisprudence discusses the meaning and the scope of religious freedom. The freedom of conscience on the other hand, has been neglected and seemingly "forgotten".[67]

i. *Big M Drug Mart*

We now turn to *R v Big M Drug Mart*, a leading case in freedom of conscience analysis.[68] Big M Drug Mart was charged with being in violation of the *Lord's Day Act,* which prohibited "any work or commercial activity upon the Lord's Day" (i.e. Sunday).[69] Big M Drug Mart subsequently challenged the *Lord's Day Act* as being unconstitutional due to its violation of section 2(a) of the *Charter*.[70] In the Court's decision, there are several passages that begin to shed light on the Court's understanding of what freedom of conscience may consist of. After briefly describing the importance of a society which accommodates diversity in beliefs, Chief Justice Dickson (as he then was) opined,

> Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, *no one is to be forced to act in a way contrary to his beliefs or his conscience*.[71]

Chief Justice Dickson by acknowledging the importance of both negative and positive aspects of freedom. Stated differently – freedom consists of one's ability to maintain a level of autonomy in the *forum internum* (i.e. private beliefs and thoughts) as well as a level of freedom in the *forum externum* (i.e. manifesting private beliefs and thoughts). As seen in the last sentence of this statement, Chief Justice Dickson (as he then was) refers to beliefs *or* conscience, which appears to distinguish between the two legal concepts. Nevertheless, since conscience has been steeped in religion for so long, one should be skeptical about any statement that does not clearly and precisely separate the two concepts. Later in *Big M Drug Mart*, Chief Justice Dickson (as he then was) offers a strong and definitive statement on the importance of persons being able to hold and manifest religious non-belief. He writes,

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66 Derek Ross, "Truth-Seeking and the Unity of the Charter's Fundamental Freedoms", in Dwight Newman, Derek Ross, and Brian Bird, eds, *The Forgotten Fundamental Freedoms of the Charter* (Toronto: LexisNexis, 2020) at 83.

67 See Mary Ann Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto: University of Toronto Press, 2013) at 195; Waldron titles a chapter, "Freedom of Conscience: The Forgotten Human Right".

68 *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC) [*Big M Drug Mart*].

69 *Ibid* at para 5.

70 *Ibid* at para 14.

71 *Ibid* at para 95 [emphasis added].

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest *whatever* beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own… Equally protected, and for the same reasons, are expressions and manifestations of *religious nonbelief* and refusals to participate in religious practice... For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.[72]

Again, Chief Justice Dickson (as he then was) takes note of non-religious belief and states that individuals should "be free to hold and manifest *whatever* beliefs" their conscience dictates. In the context of *Big M Drug Mart*, however, Chief Justice Dickson's (as he then was) statements may simply refer to not being coerced to abide by religious traditions and conventions, such as closing on Sundays. LaLater in his judgement, Chief Justice Dickson (as he then was) makes an interesting comment about the integrated nature of section 2(a):

> Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our *Charter*, the single integrated concept of freedom of conscience and religion.[73]

Drawing a definitive conclusion from such a passage is difficult, given its overtly theistic perspective, as evident in the passage itself. However, the pre-*Charter* position of conscience as religious conscience seems to be alive and well in Chief Justice Dickson's (as he then was) statement, given the reference to God planting the conscience "in His creatures". Additionally, Chief Justice Dickson (as he then was) strongly links conscience with religion as one concept. It is possible that the two concepts could work separately but attempting to decipher any implications from this statement would be speculative. Bird writes, "[t]he discussion of s. 2 (a) in *Big M Drug Mart* does not specify whether 'conscience' and 'religion' do any work independently of one another and, if they do, what the division of labour between them might be."[74] Despite not being able to ascertain a clear "division of labour" between conscience and religion, it is clear that Canadians are entitled to manifest belief systems that do not incorporate religion. What that manifestation would entail is another question – whether it is simply the right to not be coerced or a more robust right to manifest conscience-based beliefs. The following case sheds more light on these unanswered questions.

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72 *Ibid* at para 123 [emphasis added].

73 *Ibid* at para 120 [emphasis added].

74 Bird, *supra* note 45 at 51.

ii. *Morgentaler*

Three years after *Big M Drug Mart*, the decision in *R v Morgentaler*[75] addressed freedom of conscience in a somewhat different tone. It focused on whether the abortion provisions in the *Criminal Code* were in contravention to section 7 of the *Charter* and if so, could the infringement be saved under section 1 of the *Charter*?[76] The majority held that section 7 of the *Charter* was violated and could not be saved under section 1.[77] Regarding conscience – Justice Wilson, in a concurring judgment, stated the following:

> In my view, the deprivation of the s. 7 right with which we are concerned in this case offends s.2(a) of the *Charter*. I say this because I believe that the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience. I do not think there is or can be any dispute about that. The question is: whose conscience? Is the conscience of the woman to be paramount or the conscience of the state? I believe, for the reasons I gave in discussing the right to liberty, that in a free and democratic society it must be the conscience of the individual.[78]

There is much to be said about Justice Wilson's statement, including an intriguing philosophical question regarding collective conscience. The more relevant aspect of her statement, however, is the strong link between "moral decision(s)" and "matters of conscience". It seems fair to deduce from Justice Wilson s statement that conscience-based beliefs are often those which concern moral or normative matters. Attempting to deduce any implications from this statement about the separation between conscience-based and religious-based beliefs would be premature. Later in her judgement, Justice Wilson states:

> It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning. Accordingly, for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another. It is to deny freedom of conscience to some, to treat them as means to an end, to deprive them, as Professor MacCormick puts it, of their "essential humanity".[79]

This statement can be seen as the strongest and clearest statement to date that purports to separate conscience and religion. She begins by referencing religion and conscience together, but then states that the two should not be seen as "tautologous" – despite their related meaning. Moreover, Justice Wilson argues that conscientious-based beliefs can be grounded in religious

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75 *R v Morgentaler*, 1988 CanLII 90, 1988 CarswellOnt 9541 (SCC) [*Morgentaler*].

76 *Ibid* at para 1.

77 *Ibid* at para 79.

78 *Ibid* at para 256.

79 *Ibid* at para 260.

or secular moralities. One may even draw a connection to the previous quote by Wilson J., where conscience looked to be linked to moral decisions. In this sense, morality (whether secular or religious) is an essential component in Wilson J.'s understanding and conception of conscience. Whereas religion is concerned with religious practices and manifestations of religiously based beliefs, conscience might begin to be considered manifestations of internal moral beliefs held by the individual. Justice Wilson's statement about conscience adds an interesting new dimension to the conscience jurisprudence, but it should be reiterated that such thoughts are *obiter dicta*. After *Morgentaler,* the freedom of conscience jurisprudence remained static, except for the few times it was indirectly addressed in relation to freedom of religion.[80]

D. Confusion or Clarity: The Supreme Court of Canada on Conscience

The cases surveyed are not the only cases in the Supreme Court of Canada jurisprudence that have touched on the topic of conscience. There are others, such as *Alberta v Hutterian Brethren of Wilson Colony*,[81] *Syndicat Northcrest v Amselem*[82] or *Carter v Canada (Attorney General)*,[83] that discuss conscience. Although these cases do contribute to the overall context and understanding of the Supreme Court's position on the freedom of conscience, a lengthy analysis of each is not necessary. There is a common view that the Canadian jurisprudence is not clear about the meaning of conscience. Jocelyn Downie and Baylis state, "[n]o clear meaning of freedom of conscience can be taken from the jurisprudence. There is a lack of consistency at best, and confusion at worst".[84] Similarly, Bird suggests, "Canadian legal history does not settle that matter of what is protected by freedom of conscience in s. 2(a) of the *Charter*".[85] Both Bird, and Downie and Baylis have very different conceptions of what the freedom of conscience should incorporate, but all agree that the clarity and precision around the fundamental freedom is lacking.

III. CONCEPTUALIZING CONSCIENCE

The first portion of this paper traced the historical and philosophical developments regarding conscience. The concept of conscience manifested itself in two primary modes: communal and individual – or, in slightly different terminology (relying on Taylor and O'Shea) – the pre-modern and the modern conscience. The second portion of the paper analyzed two cases in the pre-*Charter* era and two cases in the post-*Charter* era. Despite the consensus regarding

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80 See *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*] and *Amselem, supra* note 42.

81 In *Hutterian Brethren*, *ibid* at paras 128 and 180, a few comments were made regarding freedom of conscience in a dissenting opinion, similar to those in *Amselem.*

82 In *Amselem*, *supra* note 42 at para 48, the Court defines religion in opposition to those beliefs that are secular, socially based or conscientiously held. In this sense, such beliefs may be thought to be considered conscience-based beliefs. However, such a conclusion is highly speculative.

83 In *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*] at paras 130-132, a brief comment suggested that conscience and religious beliefs may be separated.

84 Jocelyn Downie, & Françoise Baylis, "A Test for Freedom of Conscience Under the Canadian Charter of Rights and Freedoms: Regulating and Litigating Conscientious Refusals in Health Care" (2017) 11:1 McGill JL & Health S1 at S18.

85 Bird, *supra* note 45 at 59.

the lack of clarity and precision surrounding the meaning of conscience, the Court was seen to strongly emphasize the importance of preventing interference with "profoundly held personal beliefs".[86] In what follows, I will argue that the Court, in its attempt to arrive at a working understanding of freedom of conscience, should incorporate communal aspects of conscience to bulwark against the possibility of conscience becoming a completely subjective and individualistic concept.

A. Reframing Conscience

The Canadian *Charter* is highly individualistic – specifying the rights and protections that each person possesses. A dyadic framing runs through the *Charter*, positioning individuals against the state.[87] This dyadic framing likely relies on an underlying metaphysic, where the individual is placed prior to the relational or the communal.[88] Unfortunately, such a framing has tended to marginalize certain communal aspects of *Charter* rights. Benjamin Berger notes (in the religious freedom context) that our laws have a distinct "epistemologically colonial" framing that implicitly biases and favours the individual over the communal.[89] When pondering the idea of what conscience is, it is reasonable to think that the freedom of conscience should be understood as primarily individual. In this regard, the freedom of conscience will mirror the courts' understanding of the freedom of religion: "in essence religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment".[90] Conscience, therefore, will likely be deemed a deeply held personal conviction connected to one's normative framework and integrally linked to one's self-definition and personal fulfillment. Before the court arrives at an understanding of conscience, it has a unique opportunity – an opportunity to look at its past dealings with religious freedom and determine to what extent freedom of conscience will mirror or depart from that jurisprudence.

B. The Primacy of Relation

Constructing an entirely subjective framework for conscience might be correct if moral decisions were entirely idiosyncratic and personal. However, developing an entirely internal and personal moral conscience (which makes/informs moral decisions) without consideration of external relationships is a fanciful fiction. As Charles Taylor writes,

> "The general feature of human life that I want to evoke is its fundamentally *dialogical* character. We become full human agents, capable of understanding ourselves,

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86 *Edwards Books*, *supra* note 65 at para 97.

87 Kathryn Chan, "Religious institutionalism: A Feminist Response" (2021) 71:4 Toronto JL 443 at 461.

88 John Borrows has a fascinating chapter examining the law's metaphysic in relation to treaty interpretation in his book: John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019). He writes, "Law's exile of moral, philosophical, and religious insight about the nature of its own meaning-making metaphysics sustains a dangerous lack of self-reflexivity…We need legal processes that are more transparent about their nature and sources so that they can be questioned and placed in the realm of contestation" at 67.

89 Benjamin Berger, "Law's Religion: Rendering Culture" (2007) 45:2 Osgoode Hall LJ 277 at 283 and 286.

90 *Amselem*, *supra* note 42 at para 48.

> and hence of defining an identity through our acquisition of rich human languages of expression…The genesis of the human mind is in this sense not inherently "monological", not something each accomplishes on his or her own, but dialogical".[91]

This is the underlying metaphysic that grounds a communal conscience, as opposed to one which postulates and overemphasizes a person's self-sufficiency to the point where their relation to others is either pushed to the background or forgotten entirely. It is worth contemplating a monological and individual metaphysic, however, to see how it fares against our actual understanding and experience of the primacy of human relationships and the dialogic.

In William James' 1891 address to the Yale Philosophical Club, he postulates an entirely material world, consisting of only physical facts. According to James, the moral landscape in such a world drastically changes when "one sentient being…is made a part of the universe".[92] Once one person enters the picture, James argued that all moral relations reside in that person's consciousness.[93] In such a world, the person is the "sole creator of values in that universe" and there exists no moral obligations or demands external to themself.

The reason for raising James' hypothetical world is that it bears a familiar resemblance to philosophies postulating solitary thinkers using abstract principles to deduce the correct action in any given scenario (i.e., Descartes' solitary thinker). What these hypothetical solitary thinkers have in common is a remarkable self-sufficiency – a self-sufficiency that conveniently leaves out their reliance upon others. The Lockean or Hobbesian[94] social contracts are great examples of this. Ponder the following phrase by Hobbes, "…consider men as if but even now sprung out of the earth, and suddainly (like Mushromes) come to full maturity without all kind of engagement to each other".[95] Such a statement is difficult to fathom, given the analogy between the development of persons and mushrooms. Such "atomistic"[96] thinking fails to capture the necessity of relation. The care ethicist, Virginia Held, writes, "[m]oralities built on the image of the independent, autonomous, rational individual largely overlook the reality of human dependence and the morality it calls for".[97] The reality is that humans are necessarily reliant on others not only for their existence but also for their initial sustenance and survival. The priority and necessity of this initial caring relationship cannot be overlooked.[98] As Buber would say, "[i]n the beginning is relation…", as opposed to: "[i]n the beginning is isolation…"[99] The former is known and experienced to be true, as opposed to the latter – which is merely postulated.

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91 Charles Taylor, *The Malaise of Modernity* (Toronto: House of Anansi Press, 1991) at 32-33.

92 *Ibid* at 33.

93 *Ibid*.

94 Charles Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985) at 187.

95 Joseph Health, *Methodological Individualism*, (November 2020), online: <*The Stanford Encyclopedia of Philosophy:* plato.stanford.edu/entries/methodological-individualism/> [perma.cc/7Y95-6JSL].

96 I use this term in reference to Taylor's paper titled, "Atomism", in Taylor, *supra* note 94.

97 David Copp, *The Oxford handbook of Ethical Theory* (New York: Oxford University Press, 2006) at 538.

98 Virginia Held, *The Ethics of Care: Personal, Political, and Global* (New York: Oxford University Press, 2006) at 33.

99 Martin Buber, *I and Thou* (London: Routledge, 2004) at 27-28. For more on Buber's philosophy and its possible implications on the freedom of conscience, see Andy Steiger, "Rights and Responsibilities of Conscience: The Courts Cannot Have It Both Ways" (2023) 113 in Barry W. Bussey & Angus J. L. Menuge, eds, SC L Rev (2nd) (Toronto: LexisNexis Canada, 2023) at 203.

C. The Primacy of Relation and Legal Personhood

The priority and necessity of relation is true for natural persons, but it also looks to be true for *legal* persons. According to *Black's Law Dictionary,* "so far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties".[100] Legal persons are not necessarily natural persons, as corporations are also deemed to possess legal personality.[101] Therefore, the idea of legal personality is more of a legal fiction, rather than an actual category grounded in a metaphysical reality. Ngaire Naffine writes, "[t]he legal 'person', the one whom law is for, is imagined as pure abstraction, the basic conceptual unit of legal analysis".[102] Naffine's language of the "basic conceptual unit of legal analysis" is incredibly helpful here. Like the discussion of *atomism* above, there is a tendency to view legal persons as isolated legal entities based on either a legal, rational, religious, or natural conception of personhood.[103] Despite one's preferred philosophical anthropology, the primacy of relation still holds true for each of the four conceptions. Naffine writes:

> This fifth metaphysical approach is one that sees the person both in law and society as formed by their relations, rather than by their inherent characteristics…In this view, the way that law forms the person—relationally—directly reflects the way that the person is formed in society, likewise relationally; that is to say, the nature and form of legal relations, which make legal persons, mirror or picture…the nature and form of real human relations, which turn us into human subjects: into human persons.[104]

Naffine makes the analogy this paper has been working towards, that persons and legal persons are formed in relation to one another. A person comes into existence with the help of others, and a legal person comes into existence based on a pre-existing legal system that recognizes their legal personality. Without the pre-existing legal system, comprised of other legal persons, there would be no legal person to grant the newborn the status of legal personhood. Therefore, both natural and legal aspects of persons appear to be based in relation to and dependent on one another. The necessity of relation also has important implications when persons (or legal persons) engage in moral reasoning and moral judgments.

D. Relations and Moral Judgment

Conscience-based judgments are often (if not always) moral judgements. As Justice Wilson stated in *Morgentaler*, conscience is highly linked to moral decisions.[105] Given the priority of

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100 Visa Kurski, *A Theory of Legal Personhood,* 1st ed (Oxford: Oxford University Press, 2019) at 1.

101 Michael Welters, "Towards a Singular Concept of Legal Personality" (2014) 92:2 Can Bar Rev 417 at 417-18 and 426 92(2); "What We Talk about When We Talk about Persons: The Language of a Legal Fiction" (2001) 114:6 Harvard LR 1745 at 1750.

102 Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person,* 1st ed (Portland: Hart Publishing, 2009) at 1.

103 Naffine argues that there are essentially four primary modes of understanding what the legal person should be based on: legality rationality, religiosity, and naturalism. See Naffine, *supra* note 101 at 167.

104 *Ibid* at 169.

105 *Morgentaler, supra* note 75 at para 256.

relation in human development (as seen above), relation also seems to play an important role in moral judgements. At first, a moral decision or moral judgement like conscience, could be arrived at in either an *individual* or *communal* manner; in the former process, one arrives at a moral judgement through a personal process. For example, if one takes Rousseau's idea of the innate principle of justice within individuals,[106] then individuals can arrive at a moral judgment given their innate "justice-oriented" faculty, or as seen in William Lyon's account, conscience is "an objective moral point of view of our own",[107] which we commit ourselves to acting on.[108] Our moral judgments, therefore, would be dependent on which course of action best aligns with the prior normative precepts that we have committed to acting on. Of course, there are other individual models which one could conceive of, but the principle remains the same – moral judgements are internally produced by a personal and internal mechanism. From my perspective, there are two reasons why one should be concerned or wary of such an individualistic approach to moral judgements. First, such moral judgements appear entirely subjective and thereby lack a validity and objectivity when applied to other external contexts. Second, individual modes of moral judgement often fail to consider other people's perspectives and values during the deliberation process. As Baylis writes, "one's best judgment must originate from something more than undue deference to self".[109]

By incorporating relational aspects into our moral judgments, we begin to "free ourselves from idiosyncrasies and [personal] inclinations".[110] Hannah Arendt develops a preliminary concept of moral judgement which utilizes the idea of an "enlarged mentality" – a concept that originated with Kant.[111] For Arendt, an enlarged mentality "involves the act of reflecting on a matter from the perspective of others"[112] or "imagining judgments from the standpoints of others".[113] Otherwise, when one only considers moral judgments from their own point of view, such judgments are prone to being idiosyncratic and failing to take into consideration other important perspectives. By incorporating the viewpoint of others into one's moral judgement – as an external element – one can buttress against subjective shortcomings. Of course, how well one can imagine standing in another's place will vary. A large part of the success of an enlarged mentality will be the amount of information one can gain about another's position and perspective. In this sense, as Nedelsky notes, "[t]he whole process of the enlarged mentality works within a community that shares at least a core of the underlying

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106 Trueman, *supra* note 18 at 122.

107 William Lyons, "Conscience: An Essay in Moral Psychology" (2009) 84:4 Phil J 477 at 488. It should be mentioned that depending on what ethic one adopts for themselves, it might better fall under the communal category. For example, if one adopts a hedonist ethic it would be fairly individual, but if they adopt a care ethic, it would be fairly communal.

108 As stated previously, it should be noted that Lyons' account of conscience is non-authoritative, meaning that one's conscience does not necessarily reflect the true nature of objective morality.

109 Baylis, *supra* note 37 at 29.

110 Jennifer Nedelsky, "Communities of Judgment and Human Rights" (2001) 1:2 Theoretical Inquiries in Law J 245 at 250.

111 Madeleine Sinclair, "Freedom of Religion in Canada and France: Implications for Citizenship and Judgment" (2006) 15 Dal J Leg Stud 39 at 41.

112 *Ibid* at 41.

113 Nedelsky, *supra* note 111 at 250.

values, conceptions, and understandings of the world".[114] Viewed in this way, it would be incredibly difficult to incorporate the viewpoint of others with whom a person is unable to communicate with (or at least learn about from varying modes of communication) and begin to understand their perspective. In sum, the enlarged mentality appears to have significant restraints. However, the general principle remains applicable. Engagement with others and understanding their perspective before making a moral judgement (or conscience-based decision) is critical in arriving at a justified and defensible position.

E. Canadian Conscience: A Communal-based Approach

How then does conscience work in practice? And – what sorts of restraints or limits should be placed on expressions of conscience? In attempting to determine the bounds of this legal concept, it may be helpful to start with a fairly wide conception and begin to narrow it down. To begin, it is clear that conscience cannot be viewed as an infallible witness – whether that be grounded in Rousseau's innate endowment of justice[115] or various divine special illuminations".[116] Conscience-based judgements must be recognized as fallible and therefore, need some sort of restraint or proxy. The "Promethean Ideal" must be avoided.[117] Baylis and Downie proposed a novel *Charter* test for freedom of conscience and wrote, "[t]he elements of the proposed *Charter* test derive from the goal of promoting moral agency in pursuit of the larger goal of improved human ethical practice".[118] Baylis and Downie's coupling of moral agency with improved human ethical practice is a great place to begin when considering a test for freedom of conscience. In what follows, I suggest that the principle of relation should undergird the freedom of conscience jurisprudence.

i. The Relation Principle

As argued in the sections above, relationality is a necessary starting point in our understanding of the human person. No person is an island – no matter how hard they try. When one makes a conscience-based claim, they are appealing to others in hopes that they will recognize the validity of their claim. Communicating a conscience-based claim to another person starts a conversation (a mode or manifestation of relation) explaining why the particular action or

114 *Ibid* at 267.

115 Trueman, *supra* note 18 at 122.

116 Strohm, *supra* note 12 at 31.

117 See McPherson's chapter Existential Limits in his book: David McPherson, *The Virtues of Limits*, 1st ed (Oxford: Oxford University Press, 2022) at 5. He describes the "promethean ideal" as "playing God" and explains the virtue of limitations.

118 See Downie & Baylis' proposal in "A Test for Freedom of Conscience Under the Canadian Charter of Rights and Freedoms: Regulating and Litigating Conscientious Refusals in Health Care" (2017) 11:1 McGill JL & Health S1 at S28.

omission is important to the person.[119] The claimant is hoping to elicit understanding from the respondent by helping the person see things from their point of view. Such a process reflects Arendt's idea of an "enlarged mentality". There is simply no way around the necessity of relation when making conscience-based claims in a community composed of *homo moralis* – a moral species. Therefore, claims of conscience must make an appeal to the external community. Similarly, freedom of religion claimants must demonstrate that their religious belief has a "nexus with religion".[120] In requiring the religious claimant to demonstrate a nexus with religion, the court is essentially requiring the claimant to demonstrate how their religious belief connects to an external order or framework.[121] Religion must then be a combination between the ethic (an individual action) and the metaphysical (the external moral framework). Likewise, the court should also require the claimant to demonstrate that their conscience-based belief has a nexus (or connects) to an external value system or ethical framework.

However, instead of that framework being based on a connection to the divine, the external value system and ethical framework must incorporate a connection or appreciation to the surrounding community and its values or principles. Defining the surrounding community as well as the most relevant community is a difficult task. Since we are discussing the Canadian *Charter*, I would argue that the relevant community is the Canadian community. The Canadian community is founded on certain relevant core principles such as, federalism, democracy, constitutionalism, and the rule of law – as specified by the Supreme Court of Canada.[122] Moreover, the Court describes democracy as:

> …the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs,

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119 Language also seems to be a powerful argument for the primacy of relation, as language appears to inherently reflect the relation dimension of our social lives. Consider the following quote by Taylor, "[b]ut my principal point here is not that these words for roles, relations, activities, spheres, allow each of these severally to be part of our world, but rather the holistic point that our language for them situates them in relation to each other, as contrasting or alternating, or partially inter-penetrating. To grasp them in language *is* to have some sense of how they relate. This relationality may be more or less articulate in one or other of its aspects, may be more or less clearly defined. But some sense of it is always present in human life qua linguistic…" in Charles Taylor, *The Language Animal: The Full Shape of the Human Linguistic Capacity* (London: The Belknap Press of Harvard University Press, 2016) at 22.

120 *Amselem*, supra note 42 at para 46.

121 One cannot help but be reminded of Geertz's statement regarding religion as the combination of a metaphysic and an ethic. Geertz writes, "[n]ever merely metaphysics, religion is never merely ethics either…The powerfully coercive "ought" is felt to grow out of a comprehensive factual "is", and in such a way religion grounds the most specific requirements of human action in the most general contexts of human existence", see Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) at 126.

122 This non-exhaustive list was given by the SCC in *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) at para 32.

> respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[123]

This description of democracy entails a variety of highly communal aspects: social justice, equality, accommodation of beliefs, respect for group identity and participation of individuals and groups in society. All of these values are incredibly relation based. One's personal ethic or value system should not represent the Hedonist,[124] but rather, it should reflect some form of pluralism that incorporates a variety of communal interests. Of course, there will be vigorous debate about whether the value system in question is beneficial to the surrounding community, but that is not the point. The point is that the claimant, at a minimum, views their value system as beneficial to the community, rather than entirely self-interested and self-beneficial. By requiring the claimant to demonstrate the value of their conscience-based claim to the surrounding community, the claimant will inevitably need to "enlarge their mentality" and enter into a process of engagement with their fellow citizens. The person making a conscience-based claim should be required to demonstrate a nexus to their surrounding community, thereby grounding the claim in the communal, rather than the personal.

The current thesis aims to justify the incorporation of a communal element into the freedom of conscience test. To do so adds to the ongoing conversation about what conscience is and how the courts should best approach it. It seems that given the primacy and necessity of relation regarding natural persons, legal persons, and moral judgement, claims of conscience must incorporate communal aspects. It is my view that the concept of conscience should be understood as an exercise in knowledge sharing (i.e. sharing knowledge with another), rather than mere private knowledge holding (i.e. sharing knowledge with oneself). The former will promote an ongoing conversation of the rights and responsibilities of living in community with one another, whereas the latter will likely promote a continuing emphasis of self without consideration of one's neighbour. Other requirements such as sincerity or importance of belief will also need to be incorporated into an actual *Charter* test, both of which will now be briefly mentioned.

ii. Determining a Threshold

To establish a practical working concept of the freedom of conscience, the court will need to sift through the various claims that will be brought forward. Not all freedom of conscience claims will rise to a level worth protecting. Trivial or insincere claims will need to be vetted. While it is beyond the scope of this paper to establish a thorough threshold test and what such a test would consist of, it does need to be preliminarily addressed. In this regard, I have two suggestions that may be fruitful for further analysis.

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123 *Ibid* at para 64.

124 Jeremy Webber, "Understanding the Religion in Freedom of Religion" at 39 ("A person who was profoundly hedonistic, down to the very core of their being, would be unlikely to succeed in a case for special accommodation!") in Peter Cane, Carolyn Evans & Zoe Robinson, eds, Law and Religion in Theoretical and Historical Context (Cambridge: Cambridge University Press, 2008).

The first suggestion relies on Jocelyn Maclure and Taylor's distinction between mere preferences and core beliefs and commitments, which they refer to as "convictions of conscience".[125] Maclure and Taylor write:

> Not all beliefs and preferences, therefore, can be the basis of requests for accommodations. If beliefs and preferences do not contribute toward giving a meaning and direction to my life, and if I cannot plausibly claim that respecting them is a condition for my self-respect, then they cannot generate an *obligation* for accommodation. That is why a Muslim nurse's decision to wear a scarf at work cannot be placed on the same footing with a colleague's choice to wear a baseball cap.[126]

Moral convictions appear to refer to beliefs that guide action and are core to one's understanding of the world. On the other hand, preferences or mere opinions do not significantly contribute to how one behaves or understands the world. The former deserves protection because one's convictions are likely to be contributing factors to how one views oneself. The difficulty arises when the court is inevitably asked to discern between preferences and convictions. The court could opt for a sincerity test, much like the current freedom of religion test. Alternatively, the court could attempt to determine whether such conscience-based convictions are integral to the claimant's worldview.

My second suggestion is based on the philosopher, Gilbert Ryle, who put forth five criteria in which one's claims of conscience can be weighed against to determine one's sincerity:

1. That he *utters* it regularly, relevantly and without hesitation.
2. That other things which he says regularly, relevantly and unhesitatingly, presuppose it.
3. That he is ready or eager to try to persuade other people of it and to dissuade them of what is inconsistent with it.
4. That he regularly and readily behaves in accordance with it, on occasion when it is relevant.
5. That when he does not behave in accordance with it, he feels guilty, resolves to reform, etc.[127]

Ryle's five criteria appear to provide a basic framework for attempting to ascertain whether one's purported conscience-based claims are more than mere preferences. Moreover, it seems that the court in the case of *Maurice v Canada (Attorney General)* followed a similar framework in determining whether a conscience-based belief can be sustained by the available evidence.[128] The court in *Maurice* writes,

> On the evidence in the present case, I have no difficulty finding that the Applicant does have a strongly held belief regarding the consumption of animal products. The Applicant's numerous requestions and grievances regarding this issue, the extensive

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125 Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience* (Montreal: Harvard University Press, 2011) at 13.

126 *Ibid* at 76-77.

127 Gilbert Ryle, "Conscience and Moral Convictions" (1940) 7:1 Analysis J 31 at 33.

128 *Maurice v Canada (Attorney General),* 2002 FCT 69 [*Maurice*].

> time and effort he has expended on this judicial review, as well as his sustained efforts to maintain a vegetarian diet, is strong evidence that he holds a conscientiously held belief that falls under the meaning of "conscience' under s.2(a) of the *Charter*.[129]

As one can see, the court referenced Maurice's past behaviour to ground the validity of his conscience-based claim. Ryle's first, second, and fourth criteria appear to be engaged in the court's comments. Despite the court's reliance on behavioural factors as evidence, there are reasons that such a test may not work in practicality. For example, what if the claimant recently began to hold such a moral conviction, so the external evidence is slim or non-existent? Moreover, finding possible witnesses to testify may also prove challenging. Such inquiries into the sincerity of one's beliefs will prove difficult, which is likely one reason why the *Charter*'s section 2(a) freedom of religion test sets the bar low regarding whether one sincerely believes in the given religious proposition. Nevertheless, a threshold analysis will be necessary to adjudicate on such issues. What that threshold consists of is a matter worthy of future discussion and analysis.

CONCLUSION

The freedom of conscience jurisprudence remains largely unexamined compared to the vast amounts of jurisprudence on its counterpart, the freedom of religion. On the other hand, the philosophical literature on the nature of conscience is vast. What emerged from surveying the philosophical literature was a general tendency to view conscience as either a private act of sharing knowledge with oneself or a communal act of sharing knowledge with another. The latter concept not only better accounts for the primacy of relation regarding natural persons, legal persons, and moral judgment, but it also avoids a sort of atomism that over-emphasizes our self-sufficiency – a view which fails to capture our true dependence on our fellow humans. Given the limitations of an individualistic conception of conscience, I proposed the idea of a communal conscience, a view that takes seriously the dialogical nature of human beings not only in their formation but also in their daily interactions. The merit and utility of each person's conscience-based claim will be debatable, but by engaging other persons, we are collectively working towards a more ethical progression based on the values of our community. Those values include, but are not limited to, democracy, moral agency, and the rule of law. The freedom of conscience should not enable individuals to act on any conviction they have. Instead, it should enable persons to act in accordance with their normative precepts, reinforcing communal values that contribute to both their own flourishing and that of their neighbors.

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129 *Ibid* at para 15.

ARTICLE

IT'S NOT "WORK" IF THEY'RE HAVING FUN…RIGHT? THE APPLICATION OF B.C.'S *EMPLOYMENT STANDARDS ACT* TO CHILD-INFLUENCERS

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ABSTRACT

Influencers are becoming more entrenched in popular culture every year. However, it is not just adults participating in this lucrative career. Children are also earning a substantial income from posting influencer-content on social media platforms such as YouTube, Instagram, and TikTok. However, even though child-influencers are performing similar work, it is unlikely that the legal protections provided to child actors and performers apply to these "kidfluencers". This article examines British Columbia's employment standards legislation and whether its provisions apply to children earning money on social media. Based on this analysis, the article concludes that the statute's application to child-influencers is unclear and inadequate and contends that more needs to be done to regulate this ballooning area ripe for child-exploitation.

* Sarah Lachance obtained her JD from the University of Victoria Faculty of Law in 2023. She would like to thank the Appeal editorial team, volunteers, and the anonymous expert reviewer for their meticulous edits and feedback.

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INTRODUCTION

With 17.3 million followers, three year-old Wren Eleanor and her mom Jacquelyn's sponsored "Shein Try-on Haul", has amassed over 217,000 "likes" on TikTok.[1] On YouTube, ten-year-old Everleigh Labrant has been sharing toy hauls and toy unboxing videos with her nearly four million subscribers since she was four years old.[2] Perhaps most notably, eleven-year-old Ryan Kaji, star of the *Ryan's World* YouTube channel, was the highest-paid YouTuber in 2018, 2019, and 2020, earning $22 million, $26 million and $29.5 million each year, respectively.[3] This is not including the additional estimated $200 million he earned from branded toys and merchandise.[4]

Money is not the only thing at stake for child-influencers. In 2019, Machelle Hobson, creator of the *Fantastic Adventures* YouTube channel, was charged with alleged child abuse and kidnapping related to the treatment of her seven adopted children.[5] When the children did not perform to her standards on their family YouTube channel, it was alleged that she would physically assault, starve, and confine the children in closets for days at a time.[6]

Lawmakers have been slow to adapt legislation to accommodate adults earning money from social media, or "influencers". Considering that children are now participating in this lucrative industry, it becomes even more important to have legislated protections for child-influencers. Certainly, children working in entertainment is not new. In fact, a portion of British Columbia's ("B.C.") *Employment Standards Regulation*[7] (the "*Regulation*") outlines specific rules for child actors and performers in recorded and live entertainment. However, it is unclear whether or how these regulations would apply to child-influencers, colloquially known as "kidfluencers".

This paper contends that the application of B.C.'s employment standards legislation to children earning money on social media (child-influencers) is unclear and inadequate to achieve the purposes of that legislation. Part I examines B.C.'s current legislative framework for employing children, including the *Employment Standards Act*[8] (the "*Act*") and the *Regulation*. Part II applies this framework to child-influencers, determining whether this unconventional job fits within the

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1 Wren & Jacquelyn, "SHEIN Summer Try-on Haul with my mini-me…" (24 June 2023), online (video): <tiktok.com/@wren.eleanor/video/7112833815587933482?lang=en>.

2 Everleigh, "HI, I'M EVERLEIGH! MY VERY FIRST TOY UNBOXING!!!" (12 September 2017), online (video): <youtube.com/watch?v=grY5CeTBwE8>.

3 Jay Caspian Kang, "Ryan Kaji, the Boy King of YouTube", The New York Times (5 January 2022), online: <nytimes.com/2022/01/05/magazine/ryan-kaji-youtube.html>.

4 Rupert Neate, "Ryan Kaji, 9, earns $29.5m as this year's highest-paid YouTuber" (18 December 2020), online: <theguardian.com/technology/2020/dec/18/ryan-kaji-9-earns-30m-as-this-years-highest-paid-youtuber> [perma.cc/ZB57-QZ8B].

5 Katie Mettler, "This 'YouTube Mom' was accused of torturing the show's stars – her own kids. She died before standing trial.", *Washington Post* (13 November 2019), online: <http://www.washingtonpost.com/crime-law/2019/11/13/popular-youtube-mom-who-was-charged-with-child-abuse-has-died > [https://perma.cc/AZY6-8J28].

6 *Ibid*.

7 *Employment Standards Regulation*, BC Reg 396/1995.

8 *Employment Standards Act* RSBC 1996, c 113.

legislation's scope and the recorded entertainment industry regulations. Part III explores possible concerns with regulating child-influencers on social media. Finally, this paper concludes with a recommendation for additional protections and improved regulation on this ballooning area, which is ripe for child-exploitation. I acknowledge there are privacy implications that arise from parents sharing their children's images on social media. However, these concerns are beyond the scope of this paper which focuses on employment standards legislation.

I. BRITISH COLUMBIA'S LEGISLATIVE FRAMEWORK

In B.C., the *Act* governs child employment. Section 9 sets out parameters for hiring children under the age of 16. If a child is under the age of 14, the employer must seek permission from the Director of Employment Standards (the "Director") prior to employment.[9] Although employing children aged 14 or 15 for "light work" requires only written consent from the child's parent or guardian, all other types of work require the Director's consent.[10] Light work is defined by the *Act* as a prescribed work or occupation that is unlikely to be harmful to the health or development of a child.[11] Examples of "light work" include child care, cleaning and tidying, administrative work, and dishwashing.[12] Further conditions may be set for the employment of a child at the Director's discretion.[13] Children under 15 years old working in the recorded and live entertainment industry continue to require written consent from their parent or guardian to work.[14]

Industry-specific rules can be found in the *Regulation*. For example, paragraph 9(2)(a) and subparagraph 9(b)(ii), on the Director's permission requirement, do not apply to children aged 12-16 performing certain kinds of work[15] if the child's immediate family member is a controlling shareholder, sole proprietor or partner of the business or farm that employs the child.[16] Similar exemptions are available for children who are camp assistants, assistant coaches, referees or umpires for other children.[17] However, due to the unique nature of the recorded and live entertainment industries, specific regulations apply to children working in these fields.

The scope of the definition of "recorded entertainment industry" has not been delineated by the Court. The *Regulation* defines "recorded entertainment industry" as "the film,

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9 *Ibid* at s 9(2)(a).

10 *Ibid* at ss 9(2)(b)(i), 9(2)(b)(ii).

11 *Ibid* at s 9(1).

12 *Employment Standards Regulation*, *supra* note 7, s 45.22.

13 *Employment Standards Act*, *supra* note 8, s 9(3).

14 *Employment Standards Regulation*, *supra* note 7, s 45.04.

15 *Ibid* at s 45.21(a). The Director's permission requirement does not apply to children aged 12 to 16 if the employer does not require or allow the child to perform work that is listed in the regulation as work and occupations that are not "light work". For example, working at construction sites, repairing, maintaining or operating machinery, and using, handling, applying or being exposed to a hazardous substance.

16 *Ibid*, s 45.21(b)(i).

17 *Ibid*, s 45.21(b)(ii).

radio, video or television industry"[18] or "the television and radio commercials industry."[19] Children who fall within this definition enjoy additional protections on minimum age, limits on daily hours, split-shifts, time before recording devices, breaks, chaperones, education, and income protection. These apply to actors, background performers, and extras.[20]

Another division of the *Regulation* is for children in the "live entertainment industry," where the scope of each term has also not been delineated by the Court. The *Regulation* defines this as applying to children in the "performing arts industry that provides live entertainment in theatre, dance, music, opera or circus", including both rehearsals and performances.[21] The *Regulation* provides similar rules to those for the recorded entertainment industry pertaining to breaks, chaperones, and hours at work.

In addition to ensuring appropriate working conditions, income protection is an important feature of the regulatory scheme. To protect the child's earnings derived from work in the recorded and live entertainment industries, the *Regulation* mandates that a certain percentage of such earnings over a specified dollar amount must be remitted to the Public Guardian and Trustee ("PGT") to hold in trust. This protects children from potential financial exploitation and ensures that the child's earnings are not entirely spent by their parents or guardians.

For children in the recorded entertainment industry, the employer must remit 25% of any earnings over $2,000 to the PGT.[22] In the live entertainment industry, the employer must remit 25% of a child's earnings over $1,000 to the PGT.[23]

II. DOES THE ACT APPLY TO CHILD-INFLUENCERS?

Whether B.C.'s legislation applies to child-influencers is unclear. Typically, child-influencers are working with, or for, at least one parent with the work taking place both inside and outside of the household. First, there is the problem of whether this type of relationship is captured by the *Act.* Second, the *Regulation*'s entertainment industry definitions are likely too narrow to include child-influencers within their protections, despite doing substantively similar work.

A. Are Children "Employees" / Parents "Employers" under the Act?

The existing case law defining "employee" is typically decided in the context of whether a person is an employee or an independent contractor. However, legal principles from these cases are relevant in determining what the defining characteristics of an "employee" are at law.

There is no universal test to determine whether a person is an employee.[24] The Court in *671122 Ontario Ltd v Sagaz Industries Canada Inc* quotes Lord Denning "that it may be impossible to give a precise definition of the distinction (p. 111), and similarly, Fleming

18 *Ibid*, s 45.5(1)(a).

19 *Ibid*, s 45.5(1)(b).

20 *Ibid*, s 45.5(2).

21 *Ibid*, ss 45.15(1); 45.15(3).

22 *Ibid*, s 45.14.

23 *Ibid*, s 45.20.

24 *671122 Ontario Ltd v Sagaz Industries Canada Inc*, 2001 SCC 59 [*Sagaz*] at para 46.

observed that 'no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations . . .'"[25]

Generally, the Court will search for the total relationship between the parties, considering several factors that help distinguish between independent contractors and employees. These include the level of control in the relationship, the provision of equipment, and financial risk.[26]

However, whether a person is an "employee" under the *Act* is a matter of statutory interpretation based on the specific legislative scheme[27] while also considering the definitions and the purpose of the *Act*.[28] Since employment standards legislation is remedial in nature,[29] an interpretation that favours extending its protections to as many employees as possible is to be preferred over one that does not.[30] The purposes of the *Act* are outlined in section 2:

> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
>
> (b) to promote the fair treatment of employees and employers;
>
> (c) to encourage open communication between employers and employees;
>
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
>
> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
>
> (f) to contribute in assisting employees to meet work and family responsibilities.[31]

The *Act* defines "employee" non-exhaustively as including:

> (a) a person, including a deceased person, *receiving or entitled to wages for work performed* for another,
>
> (b) a person an *employer allows, directly or indirectly, to perform work normally performed by an employee*,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall
>
> [emphasis added].[32]

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25 *Ibid* at para 46.
26 *Ibid* at para 47.
27 See *McCormick v Fasken Martineau Dumoulin LLP*, 2014 SCC 39 at para 25.
28 See *Canwood International Inc v Bork*, 2012 BCSC 578 at para 102.
29 See *Machtinger v HOJ Industries Ltd.*, 1992 CanLII 102 (SCC) at para 31.
30 *Ibid* at para 32.
31 *Employment Standards Act*, *supra* note 8, s 2.
32 *Employment Standards Act*, *supra* note 8, s 1.

> The *Act* defines "employer" as including a person "(a) who has or had control or direction of an employee, or (b) who is or was responsible, directly or indirectly, for the employment of an employee."[33]

Applying these definitions to typical child-influencer work, where the child is working with their parent(s), suggests that this could be an employer-employee relationship. For example, Vancouver-based influencer Michele Phillips featured her young daughter in a sponsored post, sharing two photos of her playing with a Crayola product.[34] The first photo showed the daughter colouring using the product, with the product's packaging sitting on the table clearly facing the camera. In the second photo, the daughter was facing the camera and smiling while holding the product in her hand. While the account belongs to the mother, Michele, her daughter was the sole model used for this advertisement. Conceptualizing this work as modelling for a product photoshoot makes it clear that this child is performing work. Michele's daughter presumably has no control over the work product, has no financial risk, and did not provide her own equipment or tools. The child is there to model the product and be photographed. The mother by contrast, presumably accepts and provides work for the child, stages the shoot, directs the child, takes the photograph, and posts it online. While the mother is also doing work, concerning her relationship with the child, she is the one directing her daughter and arranging the work.

The specific details of the contractual arrangement between the parties is a relevant consideration in this analysis. Whether the brand itself contracts with the mother, who then uses her child for the work, or contracts with the child directly through the mother, is a relevant consideration. If the brand contracts with the child, it would likely be subject to the *Infants Act*[35] provisions on contracting with infants.[36]

A similar conclusion can be reached with YouTube video content. As mentioned above, Everleigh Labrant's YouTube channel is stylized as her personal account featuring a variety of lifestyle and toy-related videos. A video titled "Everleigh Spends 24 Hours in Backyard Bounce House!!!" masquerades as a video-blog when it is an advertisement for a friendship bracelet-making kit. In the first two minutes of the video, Everleigh opens the toy's packaging, shows all the components to the camera, and explains that she is using the product to "surprise her friend" who is coming to visit her. While you can hear her father providing commentary and guiding her from behind the camera, Everleigh is the sole subject of the video.[37] This is akin to an actor/director relationship on a film or commercial set.

While it is unlikely that the entire video was formally scripted, this is not organic content and should be considered work. Everleigh is acting in this video. She is sharing specific talking

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33 *Ibid*.

34 See Michele Phillips, "I'm always looking for fun…" (23 March 2023), online: <instagram.com/p/CqJ5OfkrntE/?img_index=1> [perma.cc/JQ54-DCER].

35 *Infants Act*, RSBC 1996, c 223, ss 18–27.

36 *Ibid*, ss 18–27, 40(1.1)(a).

37 See Everleigh, "EVERLEIGH SPENDS 24 HOURS IN BACKYARD BOUNCE HOUSE!!!" (9 July 2021), online: <youtube.com/watch?v=NVkfCq25iY8>.

points about the sponsored product, and she is speaking directly to the camera to the viewers. It is unlikely that this video would exist were it not for commercial purposes.

While influencing is analogous to traditional entertainment industry jobs, the parent-child relationship complicates the analysis. When considering the legislative scheme and the *Regulation*, the language in other provisions indicates the parent is typically contemplated as a separate entity from the employer or employee.

For example, there are rules in the *Regulation* pertaining to the child's chaperone in the recorded and live entertainment industries. A chaperone can be either the child's parent or guardian if they are not working as an actor or performer in the production, performance, or rehearsal[38] or can be a person over the age of 19 designated by the parent or guardian. However, this designated person cannot be the child's employer, tutor, or employee.[39] Another regulation with a similar distinction is the conditions of employment for children which states that "a person must not employ a child…unless the person has obtained the written consent of the child's parent or guardian."[40]

Given these distinctions, the application of these provisions contemplates three distinct parties: (1) the child; (2) the parent or guardian; and (3) the employer. Each party has different, and at times, competing interests. The *Act* requiring parent or guardian consent prior to employing a child suggests that the parent or guardian is there to mediate the employer/employee relationship and advocate for the interests of the child. Furthermore, the fact that the chaperone cannot be the child's employer underscores the competing interests at play and the need for someone to mitigate possible harm to the child.

An interesting issue also arises when considering that some of these accounts are created for monetization even before a child is born. Alessi Luyendyk's Instagram account was created while she was still in the womb.[41] Alessi, who is now four years old, has 302,000 followers and is used for sponsored content and brand partnerships. While policy considerations are likely to militate against finding an employer-employee relationship between a pregnant person and a fetus, this phenomenon provides context as to how a child's social media presence may be exploited.

B. Is this Work in the "Recorded Entertainment Industry"?

If child-influencers are in an employer-employee relationship as contemplated by the *Act*, it is unlikely that they would receive the additional protections for children working in the "recorded entertainment industry," despite doing similar work. The *Regulation* has additional protections for children working in recorded and live entertainment. However, these definitions have a limited scope. Since this is not live entertainment, film,

38 *Employment Standards Regulation*, *supra* note 7, s 45.13(1)(a), 45.19(1)(a).

39 *Employment Standards Regulation*, *supra* note 7, s 45.13(1)(b), 45.19(1)(b).

40 *Ibid*, s 45.04.

41 Samantha Schnurr, "Arie Luyendyk Jr. and Lauren Burnham's Unborn Child Already Has Instagram" (15 November 2018), online: <www.eonline.com/ca/news/987702/arie-luyendyk-jr-and-lauren-burnham-s-unborn-child-already-has-instagram> [perma.cc/RKQ7-TJ9J].

radio or television, the only term child-influencer work could fall into is the "video" industry.[42] However, this term is not further defined in the *Regulation* or the *Act*, and its scope has not been defined in Canadian jurisprudence. In addition, it is unlikely that this covers modelling work. Therefore, while child-influencers may be covered under the *Act* and *Regulation* generally, it is unlikely that they would benefit from the specialized entertainment industry protections, including the income protection provision.

C. Other Canadian Legislation[43]

i. Ontario

Ontario's legislation pertaining to child performers contains much broader definitions than the *Act*. The definition of "recorded entertainment industry" in Ontario's *Protecting Child Performers Act* ("*PCPA*") is broader than B.C.'s. Ontario's *PCPA* exists "to promote the best interests, protection, and well-being of child performers."[44] A child performer is defined as a child under 18 who "performs work or supplies services for monetary compensation in the entertainment industry as a performer, including as a background performer."[45] As in B.C., the broader entertainment industry is broken down into two groups: the recorded entertainment industry and the live entertainment industry.

However, in Ontario, recorded entertainment industry means "the industry of producing visual or audio-visual recorded entertainment that is intended to be replayed in cinemas, on the *Internet*, on the radio, as part of a television broadcast, or on a VCR or DVD player or a similar device, and includes the industry of producing commercials" [emphasis added]. This definition has remained the same since the *PCPA* was enacted in 2015.

The Court has not delineated the scope of this definition. However, including "internet" broadens the definition to encompass content created for sharing on social media. Still, the issue of categorizing the child/employee-parent/employer relationship remains outstanding as it is not addressed in the *PCPA*. In the Hansard debates of Bill 17, which spurred the creation of the *PCPA,* the focus was clearly on actors and more traditional performers such as dancers.[46] There was no mention in the debates of the *PCPA* extending to influencers on social media.

ii. Alberta

Alberta takes a different approach that provides even less clarity than the *Act*. In Alberta, the *Employment Standards Code*[47] outlines the rules for employing children under the age of 18. Per subsection 65(2), no person under the age of 15 may be employed without

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42 *Employment Standards Regulation*, *supra* note 7, s 45.5(1)(a), 45.5(1)(b).

43 Ontario and Alberta were compared as they are the two other common-law provinces outside of B.C. with the largest populations. Ontario and British Columbia also account for most of Canada's entertainment industry and would be most likely to have child performer protections.

44 *Protecting Child Performers* Act, SO 2015, c 2, s 2.

45 *Ibid,* s 1.

46 See "Protecting Child Performers Act, 2014 / Loi de 2014 sur la protection des enfants artistes", 2nd reading, *Legislative Assembly of Ontario*, 41-1, No 22 (30 October 2014), 1610.

47 RSA 2000, c E-9.

written consent from their parent or guardian and approval of the Director, subject to the regulations.[48] Alberta's *Employment Standards Regulation*[49] further states that the Director may only issue a permit to someone under 12 if it is for "employment in an artistic endeavour."[50] The definition of artistic endeavour does not include any mention of the internet or social media.[51] In addition, tying the entertainment industry to "art" further distances the definition from business-driven influencer content. The regulations also limit the hours that a child can work; however, a permit may authorize increased hours.[52] There are no provisions pertaining to chaperones or income protection.

D. Hollywood: California's Legislative Framework

In the United States of America, the broader, more general federal *Fair Labor Standards Act*[53] governs minimum wage, overtime, hours worked, and employer recordkeeping. Child acting was deliberately excluded from the *Fair Labor Standards Act* protections, and the career is subject to state-based laws.[54] Therefore, child-influencer work is likely excluded from the federal act as well.

California has been credited with spearheading child actor protections with the *California Child Actor's Bill*, also known as the Coogan Act.[55] Created after child actor Jackie Coogan's parents spent nearly all of his film earnings without his consent, the Coogan Act is intended to protect child actors and their hard-earned money.[56] Similar to B.C., the Coogan Act mandates that 15% of the child's earnings must be put into a blocked trust account, colloquially referred to as a Coogan account. There are also similar restrictions in the Code as to work hours, education, and working conditions for child actors.

Notably, "entertainment industry" is defined in subchapter 2, Employment Of Minors In The Entertainment Industry, as:

> any organization, or individual, using the services of any minor in: Motion pictures of any type (e.g. film, videotape, etc.), using any format (theatrical film, commercial, documentary, television program, etc.) by any medium (e.g. theater, television, videocassette, etc.); photography; recording; modeling; theatrical productions; publicity; rodeos; circuses; musical performances; and any other performances where minors perform to entertain the public.[57]

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48 *Ibid,* s 65(2).

49 Alta Reg 14/1997.

50 *Ibid,* s 51.3(a).

51 *Ibid,* s 51(b).

52 *Ibid,* ss 52(3)–(5).

53 *Fair Labour Standards Act*, 29 USC § 203 (1938).

54 See Marina A. Masterson, "When Play Becomes Work: Child Labor Laws in the Era of "Kidfluencers" (2020) 169: 577 U Pa L Rev at 587; See also Joan Reardon, "New Kidfluencers on the Block: The Need to Update California's Coogan Law to Ensure Adequate Protection for Child Influencers" (2022) Case W Res L Rev 73: 165 at 170.

55 US, SB 1162, *California Child Actor's Bill*, 1999-2000, Reg Sess, Cal, 1939 (enacted).

56 See SAG-AFTRA, "Coogan Law" (n.d.), online: < sagaftra.org/membership-benefits/young-performers/coogan-law> [perma.cc/B7E6-69KR].

57 *Supra* note 53, §11751.

This definition is much broader than that of B.C., Ontario, and Alberta, but still does not expressly include social media. Given its breadth, it is feasible that these "kidfluencers" would be subject to California laws. However, there has been little action by states to protect child-influencers and enforce these provisions outside of the traditional entertainment industry.[58]

E. France: Paving the Way

In 2020/2021, France enacted a new law giving child-influencers the same protections as other children working in the entertainment, advertising, and modeling industries.[59] This law was specifically created to fill the identified gaps above, regulating child-influencers on social media sites such as YouTube, TikTok and Instagram. Where a child is in a "labor relation" – for example, when they receive orders or directions from the video producer, prior government authorization must be sought.[60] France has also chosen to expand these protections to situations where there may not be a specific labour relationship, but the child is still spending a significant amount of time on the content or deriving significant income from it. This broadens the scope of its application. The new law also extends income protection to child-influencers.[61]

As France's legislation is still new, there is no information on the law's success or effectiveness. At the time of this article, France is still the only country that specifically regulates this kind of work. However, regardless of its impact, it has certainly shined a global spotlight on the issue and has likely contributed to the shifting public perceptions of child-influencer work.[62]

Since the law's introduction, France has continued paving the way for legislation respecting children and social media. In 2023, a new bill was introduced which would increase privacy protection and children's image rights for content posted on social media.[63]

III. CONCERNS WITH REGULATING CHILD-INFLUENCERS

A. Regulating Social Media in Canada

It is possible that declining to legislate with respect to social media is a politically motivated choice. There is a gap in both the *Act* and the *Regulation* when considering child-influencers. Attempting to fit the influencer-career into a legislative scheme created for traditional

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58 Masterson, *supra* note 54 at 588.

59 See Amelie Blocman, "[FR] Law to Protect Child YouTubers and Influencers" (2020), online: <merlin.obs.coe.int/article/9026> [perma.cc/T6ND-G9B2].

60 See Nicolas Boring, "France: Parliament Adopts Law to Protect Child "Influencers" on Social Media" (30 Oct 2020), online: <loc.gov/item/global-legal-monitor/2020-10-30/france-parliament-adopts-law-to-protect-child-influencers-on-social-media> [perma.cc/62D4-THU6]; See also *Loi* n° 2020-1266 du 19 *octobre 2020 visant à encadrer l'exploitation commerciale de l'image d'enfants de moins de seize ans sur les plateformes en ligne*, JO, 20 October 2020, 1266 at art 7124-1.

61 *Ibid*.

62 See Rachel Caitlin Abrams, "Family Influencing in the Best Interests of the Child" (2023) 2:2 CJIL 110.

63 See Ysé Rieffel, "French MPs examine bill on children's right to privacy on social media" (5 March 2023), online: <lemonde.fr/en/france/article/2023/03/05/french-mp-proposes-bill-to-protect-children-s-privacy-on-social-media_6018268_7.html>.

employer-employee relationships is already difficult, let alone considering the added dimension of a parent-child relationship. Therefore, while it is important to recognize influencing as a career, it could be a political decision to withhold legislating in the realm of social media.

The federal government has already decided to exclude social media in its legislative efforts. In February 2022, the Minister of Canadian Heritage introduced Bill C-11, also known as the *Online Streaming Act*.[64] To provide some context for the Bill and its amendments to the *Broadcasting Act*, the Canadian Radio-television and Telecommunications Commission ("CRTC"), through the *Broadcasting Act* regulations[65] requires a certain percentage of Canadian content to be broadcast each day on each medium.[66] Among other things, Bill C-11 amended the *Broadcasting Act*, broadening its application to "online undertakings." Online undertaking is defined in the Bill as "an undertaking for the transmission or retransmission of programs over the Internet for reception by the public by means of broadcasting receiving apparatus."[67] Thus, this amendment extended the Canadian content requirements, the *Broadcasting Act,* and the regulations to these online undertakings including streaming services such as Netflix, CraveTV, and Prime Video. On its face, this definition conceivably includes the distribution of content on social media as well.

However, the Bill specifically excluded people using a "social media service to upload programs for transmission over the Internet and reception by other users of the service" from the scope of this definition.[68] This ensures that while streaming services would be captured as broadcasting undertakings, social media users would not be subject to those same rules.

In speaking about the Bill at its second reading, the Minister of Canadian Heritage, the Honourable Pablo Rodriguez clearly states:

> [W]e will not regulate users or online creators through the bill or our policy, nor digital-first creators, nor influencers, nor users [...] Our new approach to social media responds to concerns about freedom of expression [...] This legislation does not touch users, only online streaming platforms. Platforms are in; users are out.[69]

However, there was also a specific carve-out in the Bill, wherein the CRTC can make regulations considering "the extent to which a program, uploaded to an online undertaking that provides a social media service, directly or indirectly generates revenues."[70]

These provisions indicate that Parliament is alive to the reality of revenue generation through social media content. In this case, Parliament specifically chooses to exclude social media content from the expanded amendments due to backlash and freedom of expression concerns.

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64 Bill C-11, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, 1st Sess, 44th Parl, 2021, (third reading 21 June 2022).

65 See *Radio Regulations*, SOR/86-982; See also *Television Broadcasting Regulations*, SOR/87-49.

66 *Radio Regulations*, *ibid* at s 2.2; *Television Broadcasting Regulations, ibid* at s 4.

67 Bill C-11, *supra* note 64 at cl 2(2).

68 Bill C-11, *supra* note 64 at cl 2(3).

69 "Online Streaming Act", 2nd reading, *House of Commons Debates*, 44-1, No 32 (16 February 2022) at 1615 (Hon Pablo Rodriguez).

70 Bill C-11, *supra* note 64 at cl 4.

However, the Bill seems to leave the option open to regulate monetized social media content in the future at the CRTC's discretion.

Therefore, it is possible that the B.C. Legislature has made a choice not to regulate social media influencers under the *Act*. However, if this is a specific exclusion, the *Act* should be amended to reflect this exemption. Otherwise, we exist in a gray area of protections for children vulnerable to exploitation.

B. Parental Authority & the United Nations Convention on the Rights of the Child

There are important considerations that factor into the decision of whether to regulate child-influencers on social media. Child-influencing is more complicated than broadcasting. The parent-child relationship adds another dimension to the complexity of regulating this area. However, the risk of child abuse means that the stakes are also much higher.

The United Nations Convention on the Rights of the Child (the "Convention"), to which Canada is a signatory, is an important consideration in this decision. Specifically, article 32 entrenches a child's right to be protected from economic exploitation, hazardous work, work that interferes with their education, and work that could be harmful to their health, physical, mental, spiritual, moral or social development.[71] In implementing this, the state should take legislative, administrative, social, and educational measures to, in particular, provide a minimum age of employment, regulation of hours and conditions of employment, and appropriate penalties and sanctions for effective enforcement.[72]

While there is employment standards legislation throughout Canada, these statutes fall short of protecting working children on social media. Child-influencers are often performing the same substantive work as actors and models but are not receiving the same protections of working conditions, hours, or income protection. Whether the existing *Act* applies to child-influencers is ambiguous and amendments are required to clarify the Legislature's stance on this growing area of work. Canada is compelled by the Convention to fill these gaps.

However, on the other hand, the parent-child dimension to child-influencing further complicates the decision to regulate. This work often takes place in the child's home, managed by the child's parent(s) or guardian(s). Parental authority is a valid consideration weighing on the side of continued deregulation of this area. Article 5 of the Convention states that state parties shall respect the responsibilities, rights, and duties of parents to provide direction and guidance in the exercise by the child of the rights set out in the Convention.[73]

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71 See *United Nations Convention on the Rights of the Child*, UNTS 1577 (entered into force 2 September 1990) at Art 32.

72 *Ibid*.

73 *Ibid* at Art 5.

Furthermore, there may be implications for a parent's section 7 *Canadian Charter of Rights and Freedoms* ("*Charter*") rights.[74] In *B (R) v Children's Aid Society of Metropolitan Toronto*,[75] the Supreme Court held that "the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as a medical care, are *part of the liberty interest of a parent*"[76] [emphasis added]. It is presumed at common law that parents act in the best interests of their child, recognizing that parents are in the best position to care for their children and make all necessary decisions to ensure their wellbeing.[77] The Court elaborated on its section 7 analysis, holding that it is also presumed that "parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself."[78] As such, when the state does intervene when parents are not acting in the best interests of their child and where it is necessary, it should also be justified. Whether this would take precedence over a child's exploitation on social media is unclear but is a relevant consideration, nonetheless.

However, University of Saskatchewan law professor Mark Carter argues that special parental *Charter* rights "can only operate to diminish recognition of children as full rights-bearing members" of Canadian society.[79] In his article, he advocates for changes in the way parental rights are conceptualized, with children being recognized as the only rights-holder in the parent-child relationship. In this conception, the parent would act as agents for children in the exercise of their rights, and not as the "exerciser".[80] In this framework, the individual child's rights, and ideally their consent, would likely be a heavily weighted consideration with respect to allowing or prohibiting child-influencer work.

The traditional parent-child relationship as conceived by the court does not account for the parent also acting as the child's employer in this way. Therefore, when parents are making decisions for their children, conflicts arise, particularly in the case of child-influencers who are the sole provider for the family, or whose entire family is in the business of social media influencing. There are also external pressures, such as content deadlines or relationships with brands or advertisers, that the parent/employer must manage.

IV. RECOMMENDATIONS

Acting in a video is work. This is true whether the final product is on social media or projected at a movie theatre. However, the two are not treated the same under B.C.'s *Employment Standards Act*. This difference is concerning when the person doing the work is a child. Working children need legal protection because they are vulnerable to exploitation.

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74 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

75 1995 CanLII 115 (SCC).

76 *Ibid* at 317.

77 *Ibid*.

78 *Ibid*.

79 Mark Carter, ""Debunking" Parents' Rights in the Canadian Constitutional Context" (2008) 86:3 Can Bar Rev 479 at 480.

80 *Ibid* at 481.

This is why there are limits on hours, age, chaperones, and income protection provisions in place for children working in the recorded and live entertainment industry.

The *Act* is not equipped to deal with the reality of child-influencer work. Additional regulations should be created to address this unique parent-child working relationship, given the unconventional nature of the job. These changes should follow the path that France has paved with their new laws.

The *Act* and the *Regulation* should be amended to specifically include child-influencer work. There ought to be a division in the *Regulation* for child-influencers, just as there are divisions for the recorded entertainment industry and the live entertainment industry. First, the *Regulation* should require approval from the Director of Employment Standards prior to children engaging in influencer work. Adopting regulations that mirror the approach taken in France would better protect child-influencers, while allowing for additional protections imposed or removed by the Director on a case-by-case basis. This flexibility reflects the nature of the work, given that a child engaging in the occasional photograph for a brand shoot on their mother's Instagram account is a very different situation from a child on YouTube earning millions of dollars.

Second, the provisions pertaining to working hours, breaks, split shifts, minimum age, and income protection should be extended to child-influencers. Without clear guidelines, children could spend days producing influencer content and not be entitled to any of the earnings. While some of these restrictions may be difficult to enforce because influencer work often takes place in the home, alleged violations could be reported using the *Act's* complaint's investigation process.

V. CONCLUSION

Child-influencer work reveals a gap in B.C.'s *Employment Standards Act* coverage. There needs to be clarity as to whether the *Act* and the *Regulation* apply to these "kidfluencers." Regulating social media is an important choice that the legislature should be transparent about. In situations such as the *Broadcasting Act*, it is understandable why the federal government would choose not to extend those provisions to social media users. However, when it involves children working in potentially exploitative jobs, the stakes of choosing not to regulate are much higher.

In the best-case scenario, parents are in the best position to ensure their child is taken care of when they are performing this flexible and lucrative work on social media. However, in the worst case, children are being coerced into working long, unmonitored hours with no income protection or money being set aside for them whatsoever. There are also significant privacy concerns and safety threats that come with being a public figure. Whether or not the *Act* applies to child-influencers is unclear. However, what is clear is that it is time for the legislature to take a position. Child-influencer work is work.

ARTICLE

A JUDICIALLY NOURISHED PROVISION: HAS SECTION 96 ONCE AGAIN BECOME A BARRIER TO JUSTICE?

Taylor Tallent *

CITED: (2024) 29 *Appeal* 63

ABSTRACT

Pursuant to section 96 of the *Constitution Act, 1867*, the federal executive is responsible for appointing judges to the superior courts. While this provision may seem straightforward, its interpretation has has elevated the status of section 96 courts and confers on them a "core jurisdiction" that is protected from interference by Parliament and legislatures, sometimes at the expense of tribunals and other innovative adjudicative forums.

This paper begins by examining the evolution of section 96 jurisprudence. It then focuses on two recent cases: *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27 and *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2022 BCCA 163. This paper argues for a return to a narrower conception of the core jurisdiction of superior courts, emphasizing their role as guardians of the rule of law through robust judicial review. This approach seeks to strike a balance between preserving the rule of law and enhancing access to justice while avoiding the marginalization of section 96.

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INTRODUCTION

Section 96 of the *Constitution Act*, 1867, a "seemingly innocuous provision,"[1] has generated significant controversy and litigation. The text plainly states "[t]he Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."[2] On the surface, this provision is merely an appointing power that "means "[l]ittle, if anything… to an uninstructed"[3] reader, but "there is much more to section 96 than first meets the eye."[4]

Over a century of jurisprudence and "judicially-nourished luxuriance,"[5] section 96 courts have attained a "rather extravagant position" in relation to other courts and administrative tribunals.[6] It is now well-established that section 96 prevents both Parliament and the provincial legislatures from removing certain decision-making authority from superior courts. Essentially, section 96 guarantees a "core jurisdiction"[7] of the superior courts, ensuring that no inferior court or administrative tribunal may operate as "a shadow court."[8] Historically, the core was construed narrowly comprising only those "powers which are *essential* to the administration of justice and the maintenance of the rule of law."[9] Accordingly, the Constitution "confers a special and inalienable status on what have come to be called the 'section 96 courts'."[10]

Much ink has been spilled on the court's interpretation of section 96. According to John Willis, the courts have interpreted the provision "oddly,"[11] while Roderick MacDonald describes the judicial interpretation as "frequently erratic."[12] Others have referred to the section 96

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1 Peter B Adams & Paul J Murphy, "Section 96 Judges: Whether Ontario Residential Tenancies Commission Exercises S. 96 Functions. Reference Re: Residential Tenancies Act, 105 D.L.R. (3rd) 193" (1980) 6:1 Queen's LJ 282 at 282.

2 (UK), 30 & 31 Vict, c 3. I refer only to the Superior Courts as the District and County Courts no longer exist.

3 John Willis, "Section 96 of the British North America Act" (1940) 18:7 Can Bar Rev 517 at 518 [Willis, "Section 96"]; John Willis "Administrative Law and the British North America Act" (1939) 53:2 Harv L Rev 251 at 277 [Willis, "Administrative Law"].

4 *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2022 BCCA 163 at para 4, leave to appeal to SCC refused, 40291 (22 December 2022) [*Trial Lawyers* 2022].

5 Bora Laskin, "Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case" (1955) 33:9 Can Bar Rev at 993.

6 *Ibid* at 995.

7 *MacMillan Bloedel Ltd. v Simpson*, 1995 CanLII 57 (SCC) at para 15 [*MacMillan Bloedel*]; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC) [*Provincial Judges Reference*].

8 *Reference re Amendments to the Residential Tenancies Act (NS),* 1996 CanLII 259 (SCC) at para 73 [*Residential Tenancies* 1996].

9 *MacMillan Bloedel*, *supra* note 7 at para 38 [emphasis added].

10 *Ibid* at para 52.

11 Willis, "Administrative Law", *supra* note 3 at 256.

12 Roderick A MacDonald, "The Proposed Section 96B: An Ill-Conceived Reform Destined to Failure" (1985) 26:1 C de D 251 at 253.

jurisprudence as "arcane"[13] and "murky."[14] The primary point of contention raised by critics revolves around the expansive interpretation of section 96. Critics argue that the judiciary has failed to recognize the rationale behind the preference for administrative tribunals as a mechanism for applying certain provincial laws and, as a result, has fettered the ability of provinces to create and shape their justice system as they please.[15] Consequently, in 1984, David Matas characterized the justice system as being in a "state of crisis [as] [t]he courts have struck down one administrative tribunal after another as being unconstitutional."[16] Importantly, section 96 constrains not only tribunals but the role of provincial and federal courts as well. The disputes arising from the apparently harmless provision have come to be known as the "section 96 problem."[17]

Entering the early twenty-first century,[18] there was a "relative lull"[19] in successful section 96 cases, leading Ronald Ellis to write in 2003 that section 96 was "no longer a practicable concern for tribunal proponents."[20] Ellis observed that the Supreme Court had begun to embrace flexibility when analyzing the transfer of functions to tribunals.[21] However, recent developments challenge Ellis' assertion. In 2014, the Supreme Court used section 96 to invalidate hearing fees that would deny people access to superior courts.[22] Furthermore, as will be discussed at length in Part II, the Court ruled that section 96 invalidates Québec legislation granting exclusive jurisdiction over civil claims below $85,000 to an inferior court.[23] In the former case, *Trial Lawyers v BC 2014*, the Court arguably expanded section 96[24] as there was no transfer of core jurisdiction from the superior court to another decision-making body, a fact accepted by the Court.[25] In the latter case, *Article 35,* the majority articulated a broad interpretation of the protected core jurisdiction as encompassing "general private law jurisdiction."[26] Notably, the majority introduced a multi-factored analysis with six guiding factors.

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13 Peter W Hogg & Cara Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 UTLJ 715 at 731.

14 David Matas, "Validating Administrative Tribunals" (1984) 14:2 Manitoba LJ 245 at 245.

15 The Canadian Bar Association, "A Response to the Suggested Amendment Relating to Provincial Administrative Tribunals" (1985) 26:1 C de D 223 at 226; Willis, "Administrative Law", *supra* note 3 at 256.

16 Matas, *supra* note 14 at 245. Matas provides six examples spanning from 1972 to 1982 where the courts found tribunals unconstitutional and therefore invalid.

17 David Phillip Jones, "A Constitutionally Guaranteed Role for the Courts" (1979) 57 Can Bar Rev 669 at 676; Macdonald, supra note 12 at 252; Matas, *supra* note 14 at 257.

18 After *MacMillan Bloedel*.

19 Peter W Hogg & Wade Wright, *Constitutional Law of Canada,* 5th ed (Toronto: Thomson Reuters, 2022) at 7:15.

20 S Ronald Ellis, "The Justicizing of Quasi-Judicial Tribunals Part I" (2006) 19 Can J Admin L & Prac 303 at 320.

21 *Ibid*.

22 *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2014 CanLII 59 (SCC) [*Trial Lawyers* 2014].

23 *Reference re Code of Civil Procedure (Que.), art. 35*, 2021 SCC 27 [*Article 35*].

24 Gareth Morley observes that "[p]erhaps this holding will make very little difference outside the context of hearing fees. But it is possible to imagine it leading to a broad constitutionalization of civil procedure. Section 96 … has been turned into an individual right of access to courts": Gareth J Morley, "*Trial Lawyers of British Columbia v British Columbia*: Section 96 Comes to the Access to Civil Justice Debate" (2016) 25:2 Const F 61 at 65.

25 *Supra* note 22 at para 31.

26 *Supra* note 23 at paras 80, 82.

Using this analysis, the British Columbia Court of Appeal, in *Trial Lawyers 2022,* upheld the transfer of jurisdiction to a tribunal over the resolution and disposition of minor injury claims.[27]

Could these cases signify a "regrettable resurgence" of section 96 litigation, as previously characterized by renowned constitutional scholar Peter Hogg? [28] In my view, there is a significant likelihood that this will be the case. The split decisions in *Article 35* and *Trial lawyers 2022* suggest that the boundaries of section 96's application will continue to be contested and debated. In any event, these two cases provide interesting developments in the administrative law sphere.

This paper examines section 96 jurisprudence, focusing on the expanded "core jurisdiction" test in *Article* 35, and its subsequent application in *Trial Lawyers 2022* within a tribunal context, to shed light on the limitations it imposes on government actions. Current barriers to access to justice have been referred to as a "crisis,"[29] a "democratic issue,"[30] and a "human rights issue,"[31] so it is crucial to critically assess the broad interpretation of section 96 as articulated by the Court in *Article 35.* I argue that this reinterpretation may unduly restrict legislative authority over the administration of justice and the freedom to opt for alternative avenues of dispute resolution.

Inextricably linked to the "core jurisdiction" analysis is the unwritten constitutional principle of the rule of law, often invoked to safeguard the superior courts' domain. A tension arises between those advocating for upholding superior courts' core jurisdiction and those supporting alternative forums to address access to justice issues. Chief Justice Lamer stands out as one jurist who opposed the expansion of tribunal powers, as illustrated by his statement in *MacMillan Bloedel* where he asserted that "[g]overnance by *rule of law requires a judicial system* that can ensure its orders are enforced and its process respected."[32] However, as aptly observed by Justice Strayer in *Singh v Canada,* and subsequently endorsed by the Supreme Court, "[a]dvocates tend to read into the principle of the rule of law anything which supports

27 *Supra* note 4.

28 Hogg & Wright, *supra* note 19 at 7:15.

29 Andrea A Cole & Michelle Flaherty, "Access To Justice Looking For A Constitutional Home: Implications For The Administrative Legal System" (2016) 94:14 Can Bar Rev 13; The Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "The Challenges We Face" (Remarks delivered to the Empire Club of Canada, Toronto, 8 March 2007), online <scc-csc.ca/judges-juges/spe-dis/bm-2007-03-08-eng.aspx> [perma.cc/U7A2-HR42].

30 Supreme Court of Canada, "Remarks of the Right Honourable Richard Wagner, PC Chief Justice of Canada" (5 February 2018), online: <scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx?pedisable=true> [perma.cc/CN7K-BEKF].

31 *Ibid*.

32 *Supra* note 7 at para 37 [emphasis added]. Justice Lamer emphasized this point again in a concurring opinion in *Cooper v Canada (Human Rights Commission),* 1996 CanLII 152 (SCC) at para 11 [*Cooper*]. Extrajudicially Lamer J noted that for Canada to commit to the rule of law "there must be an institution charged with the responsibility of ensuring that it is the law that rules…that institution is the judicial branch of government": Antonio Lamer, "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996), 45 UNB LJ 3 at 6.

their particular view of what the law should be."[33] A broader interpretation of the rule of law is merited — one that accommodates "access to a fair and efficient dispute resolution process, capable of dispensing timely justice."[34]

The proposition put forth in this paper advocates a return to a narrower conception of superior courts' core jurisdiction while preserving their role as guardians of the rule of law, particularly through judicial review. It further asserts the necessity of circumscribing superior courts' jurisdiction to what is essential for them to effectively function as a "unifying force"[35] in the judicial system. Such an approach respects legislative authority with respect to the administration of justice, pursuant to section 92(14) of the *Constitution Act, 1867*, and affords them the latitude to opt for alternative avenues for dispute resolution.[36] Importantly, it is not my goal to marginalize section 96 to such an extent that superior courts become "empty institutional shells"[37] or comprehensively dissect the vast literature concerning access to justice and the rule of law. While acknowledging that the potential constraints posed by section 96 on government choices may be overshadowed by other access to justice hurdles, such as the scarcity of information available to litigants and the financial burdens they encounter, I maintain that the interpretation of section 96 remains an integral component of the discourse on access to justice.

This analysis unfolds across three sections. Part I outlines the emergence of administrative tribunals and the evolving interpretation of section 96. It highlights the shift from safeguarding judicial independence and shielding superior courts from external encroachment to a focus on upholding the rule of law and national unity. This section also directs attention to the perceived purpose underlying the inclusion of section 96 in the Constitution, coupled with historical calls for reform. The history of section 96 is extensive, yet understanding it is essential for appreciating the significance of the recent changes introduced by the Supreme Court's decision in *Article 35.* Part II examines two key decisions: *Article 35* and *Trial Lawyers 2022*. Finally, Part III proposes a balanced approach to the core jurisdiction analysis, aiming to reconcile the superior courts' role in protecting the rule of law with the need to enhance access to justice through alternative dispute resolution mechanisms. Through this exploration, this paper contributes to a deeper understanding of the intricate dynamics of section 96 and its implications for the Canadian legal landscape.

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33 *Singh v Canada (Attorney General) (CA),* 2000 CanLII 17100 (FCA) at para 33. The Supreme Court unanimously endorsed this comment in *R v Imperial Tobacco Canada Ltd*., 2011 SCC 42 at para 62 [*Imperial Tobacco*].

34 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 CanLII 65 (SCC) at para 242, Abella and Karakatsanis JJ, dissenting [*Vavilov*].

35 *MacMillan Bloedel, supra* note 7 at para 11.

36 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 [*Constitution Act*].

37 W R Lederman, "The Independence of the Judiciary" (1956) 34:10 Can Bar Rev 1139 at 1172.

I. SECTION 96: NOT JUST AN APPOINTING POWER

A. Access to Justice and the Rise of the Administrative State

Canada's administrative state evolved significantly throughout the 20th century, marked by the creation of the Board of Railway Commissioners in 1903 under the federal *Railway Act*.[38] The administrative state, which "describes a system of governance [in] which public policies and programs… are influenced by the decisions of public officials," emerged as a response to societal changes, particularly after the two world wars and the Great Depression.[39] The public's demand for state intervention in regulating societal interests led to the rapid growth of the regulatory state.[40] Various areas, including agricultural products, working conditions, occupational licensing, and social welfare, witnessed substantial regulation.[41] As John Willis noted, the state's character transformed from being a "soldier and policeman" to a "protector and nurse"[42] as it adapted to changing social conditions.

This shift prompted federal and provincial governments to innovate in service delivery and delegate regulatory adjudication to administrative tribunals. In the early 20th century, section 96 remained relatively insignificant, imposing minimal constraints on the delegation of power from legislatures to regulatory agencies.[43] Nonetheless, concerns were raised by Chief Justice Sir William Mulock of the Supreme Court of Ontario (as it then was) in 1934, who criticized the growing practice of "vesting in autocratic bodies the power to arbitrarily deal with matters affecting our liberties and other rights" without court intervention.[44] He viewed this practice as "depriving" Canadians of protection under the law and undermining the rule of law itself, emphasizing the fundamental role of access to justice through the *courts*.[45]

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38 *An Act to Amend and Consolidate the Law Respecting Railways*, SC 1903, c 58. See also Law Reform Commission of Canada, *Working Paper 25: Independent Administrative Agencies* (Ottawa: Minister of Supply and Services Canada, 1980) at 21–23 online: <lareau-legal.ca/LRCWP25.pdf> [perma.cc/W38C-Y4YY].

39 Alan C Cairns, "The Past and Future of the Canadian Administrative State" (1990) 40:3 UTLJ 319 at 322 citing Introduction' in OP Dwivedi, ed, *The Administrative State in Canada: Essays in Honour of J.E. Hodgetts* (Toronto: University of Toronto Press, 1982) at 5; Paul Daly, "The Ages of Administrative Law" (2022) Ottawa Faculty of Law Working Paper No 2022-16 at 9.

40 Cairns, *supra* note 39 at 327.

41 RCB Risk, "Lawyers, Courts, and the Rise of the Regulatory State" (1984) 9:1 Dal LJ 31 at 33; Law Reform Commission of Canada, *supra* note 38 at 21.

42 John Willis, *The Parliamentary Powers of English Government Departments* (Cambridge: Harvard University Press, 1933) at 13. Willis was referring to the British apparatus in the late 19th century; however, the same changes occurred in Canada, albeit a little later.

43 Risk, *supra* note 41 at 36.

44 Sir William Mulock, "Address of the Chief Justice of Ontario" (1934) 12:1 Can Bar Rev 35 at 38.

45 *Ibid* at 36–38.

In contrast, academics like Felix Frankfurter and his student John Willis advocated for "a strong executive and an elaborate administrative apparatus."[46] Willis argued the modern Canadian state required tribunals as a means of policy implementation. He believed that using administrators' specialized expertise could alleviate the economic challenges faced by the state, particularly during the Great Depression.[47] By appointing individuals with specific qualifications, tribunals can serve as specialist bodies dedicated to overseeing complex regulatory issues. Tribunals also tend to have certain advantages over the traditional court system including speed, procedural informality, and flexibility. More recently, they have been chosen to improve access to justice by addressing challenges faced by the court system, such as slow processes, prohibitive costs, and the need for legal professionals to guide individuals through the system. For instance, the British Columbia Civil Resolution Tribunal ("CRT"), established in 2016, emerged as Canada's inaugural online tribunal designed to assist individuals navigate dispute resolution independently without legal representation.[48] Tribunals can also create procedures to manage the caseload "that would choke the ordinary court system."[49]

However, Willis acknowledged that conferring power to commissions (i.e., tribunals) raised challenges related to the separation of powers doctrine.[50] While the "Canadian Constitution does not insist on a *strict* separation of powers,"[51] "it does "sustain some notion" of it.[52] Empowering tribunals with both executive and judicial functions blurs these lines.

B. Section 96 Caselaw: From *Toronto v York to MacMillan Bloedel v Simpson*

Despite some concerns regarding the conferral of judicial matters to tribunals in the early twentieth century, the "courts did not demonstrate any general hostility" towards the regulatory state and the creation of tribunals.[53] However, *Toronto v York* marked a pivotal shift when Lord Atkin of the Privy Council described section 96 as one of the "principal pillars in the temple of justice ... not to be undermined.""[54] The Privy Council ruled the

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46 Graeme A Barry, "Spectrum of Possibilities: The Role of the Provincial Superior Courts in the Canadian Administrative State" (2005) 31:1 Man LJ 149 at 151. See also Michael Taggart, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43:3 Osgoode Hall LJ 223 at 238.

47 Barry, *supra* note 46 at 167.

48 Civil Resolution Tribunal, "About the CRT" (last visited July 21, 2023), online: <civilresolutionbc.ca/about-the-crt> [perma.cc/NU58-63AQ].

49 Hogg & Wright, *supra* note 19 at 7:19.

50 John Willis, "Three Approaches to Administrative Law: The Judicial, The Conceptual, and the Functional" (1935) 1:1 UTLJ 53 at 56. While Willis employed the term "commissions" and observed that "[n]ot all commissions are administrative tribunals," his primary focus was to address the concerns related to commissions exerting "judicial power" and potentially encroaching upon the role of the courts (*ibid* at 57).

51 *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) at para 15 [emphasis added].

52 *Cooper, supra* note 32 at para 11.

53 Risk, *supra* note 41 at 37.

54 *Toronto (City) v York (Township)*, 1938 CanLII 252 (UK JCPC) at 594. The other two "pillars" are section 99 (guarantee of superior court judges' tenure until seventy-five) and section 100 (Parliament fixes and provides for the salaries of superior court judges).

Ontario government could not "clothe the [Municipal] Board with the functions of a court."[55] Despite acknowledging the provincial legislature's authority over the administration of justice under section 92(14), the Privy Council decided against the conferment of judicial powers on the Board.[56] Scholars have since questioned the foundation of this ruling and the notion of a rigid separation of powers doctrine within Canada's constitution.[57]

The disquiet caused by the "sweeping interpretation" of section 96[58] and the restrictive view of provincial authority under section 92 was partly alleviated a few months later in *Reference re Adoption Act*.[59] Chief Justice Duff clarified that specialized courts with limited jurisdiction fell within the province's legislative competence and emphasized that the jurisdiction of lower courts was not "fixed forever as it stood at the date of Confederation."[60] The focus shifted from a rigid interpretation of section 96 to assessing whether a statute "broadly conform[ed] to a type of jurisdiction generally exercisable by" lower courts rather than superior courts.[61] Initially, this more liberal interpretation of section 96 was limited to situations where jurisdiction was transferred from a superior court to an inferior court.[62]

Uncertainty about the authority of provinces to establish administrative tribunals persisted until the *John East Iron Works* case.[63] The Privy Council, speaking through Lord Simonds, observed that the exercise of judicial power did not necessarily signify a section 96 court.[64] This ruling provided the "green light" for the establishment of administrative tribunals, as long as they did not seek to replace superior courts in certain functions.[65] Lord Simonds proposed a two-step test for section 96 challenges: first, determine if the impugned function was "judicial" in nature, and if so, ascertain whether the tribunal was analogous to a superior court. If both questions were answered affirmatively, assigning the function to the tribunal would be considered invalid.

Over time, the interpretation of section 96 evolved, leading to the current three-step test for addressing challenges to the powers of administrative tribunals as outlined in *Residential Tenancies 1979*.[66] This test involves examining whether the transferred power aligns with

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55 *Ibid* at 595.

56 *Ibid* at 594.

57 Willis, "Section 96", *supra* note 3 at 521.

58 *Re Residential Tenancies Act* 1979, 1981 CanLII 24 (SCC) at 729 [*Residential Tenancies* 1979].

59 *Reference Re Authority to Perform Functions Vested by Adoption Act, The Children of Unmarried Parents Act, The Deserted Wives', and Children's Maintenance Act of Ontario,* 1938 CanLII 2 (SCC) [*Reference re Adoption Act*].

60 *Ibid* at 418.

61 *Ibid* at 421.

62 *Residential Tenancies* 1979, *supra* note 58 at 729.

63 *Saskatchewan (Labour Relations Board) v John East Iron Works Limited*, 1948 CanLII 266 (UK JCPC). The case set out a test which involved asking two questions: 1) whether or not the impugned function was a "judicial" one; and 2) if so, whether or not, the tribunal was analogous to a superior court. If both questions were answered in the affirmative, the assignment of a function to a tribunal was unconstitutional.

64 *Ibid* at 676.

65 Noel Lyon, "Is Amendment of Section 96 Really Necessary" (1987) 36 UNBLJ 79 at 81.

66 *Supra* note 58. As will be discussed this test is merely one aspect to consider in section 96 challenges. There is now the "core jurisdiction" test.

that exercised by superior courts at the time of Confederation.[67] If the inferior courts in a majority of the founding provinces "enjoyed a meaningful concurrency of power"[68] or a "shared involvement"[69] in the jurisdiction at issue, section 96 is not engaged. If the jurisdiction was exclusive to section 96 court, the next step evaluates whether the tribunal's function is "judicial" in nature. If it is, the last step assesses whether the jurisdiction is merely subsidiary or ancillary to an administrative function or inherently necessary to achieving a broader policy objective set by the legislature. If so, the transfer of power m*eets the Residential T*enancies test, allowing tribunals to assume authority previously held by section 96 courts.

Critics like Mary Hatherly have raised concerns about the subjectivity of this test which leads to different classifications of tribunals with "identical functions" and unwarranted inconsistencies in the application of laws across provinces.[70] Constitutional scholar Peter Hogg voiced similar apprehensions, calling each step "vague and disputable in many situations," as even minor discrepancies in the historical context or institutional structures among provinces can determine the validity or invalidity of seemingly comparable administrative tribunals.[71] The concern over conducting a historical inquiry holds some validity, considering the framers of the Constitution could not have anticipated the significant economic and social transformations that have taken place since then. The "largely frozen" historical approach to section 96 has also been criticized for not plainly identifying superior court functions.[72]

Thirteen years after the *Residential Tenancies* test, the Supreme Court introduced the "core jurisdiction" test in *MacMillan Bloedel*.[73] This case involved legislation granting exclusive jurisdiction to provincial youth courts over the offence of contempt of court committed by young offenders. Chief Justice Lamer, for a "bare five-four majority,"[74] concluded that the *Residential Tenancies* test exhausted the inquiry only when the challenged jurisdiction was *concurrent* with that of superior courts. As Lamer CJ explained, "the true problem in this case is the exclusivity of the grant,"[75] necessitating an inquiry into whether the legislation removed the superior court's *core* jurisdiction. The majority found that while the creation of a youth court system was "laudable" and the powers granted met the *Residential Tenancies* test,[76] the grant would remove one of the attributes of the superior courts' core jurisdiction and "maim the institution … at the heart of our judicial system."[77]

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67 *Ibid* at 734–35. The case uses the wording "at the time of confederation." Using a strict literal interpretation would mean focusing on the jurisdiction as it were at the date of confederation. However, in the *Residential Tenancies* 1996 case, Justice McLachlin for the majority advocated for a "flexible" approach, *supra* note 8 at para 79.

68 *Residential Tenancies* 1996, *supra* note 8 at 77. The four provinces at Confederation were: Nova Scotia, New Brunswick, Quebec, and Ontario.

69 *Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal (NS),* 1989 CanLII 116 (SCC) at 260 [*Sobeys*].

70 Mary Hatherly, "The Chilling Effect of Section 96 on Dispute Resolution" (1988) 37 UNBLJ 121 at 137.

71 Hogg & Wright, *supra* note 19 at 7:19.

72 Lyon, *supra* note 65 at 79–80.

73 *Supra* note 7.

74 Hogg & Wright, *supra* note 19 at 7:19.

75 *MacMillan Bloedel, supra* note 7 at para 27 [emphasis removed].

76 *Ibid* at para 26.

77 *Ibid* at para 37.

The addition of the core jurisdiction test has been met with strong criticism, as it was seen as "an unfortunate and unnecessary supplement to what is already a complex body of law under [section] 96."[78] After tracing the jurisprudential history of the core jurisdiction, Alyn Johnson found that the doctrine was "built on a surprising series of mistakes and missteps, and a surprising disregard for sources and contexts."[79] Notably, the path from the *Residential Tenancies* test to *MacMillan Bloedel* "lacks any stable point of reference," complicating the interpretation of section 96.[80] To better understand this assessment, it is useful to briefly consider four decisions that occurred prior to *MacMillan Bloedel: Crevier*,[81] *Jabour,*[82] *McEvoy,*[83] and *Reference re Young Offenders Act.*[84]

In *Crevier,* the Court addressed whether a statutory provision preventing any review of decisions made by a provincial adjudicative tribunal violated section 96.[85] The Court held that legislation shielding a statutory tribunal from judicial review of its adjudicative functions was unconstitutional as it effectively transforms the tribunal into a section 96 court.[86] Consequently, the affected party retains the ability to directly challenge a tribunal's decision based on jurisdictional grounds.[87] The Court underscored the significance of judicial review for superior courts and noted that questions of jurisdiction rise above and differ from errors of law:

> It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. However, given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, *I can think of nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review*.[88]

In *Jabour,* the Court unanimously ruled that federal legislation seeking to confer exclusive powers on the federal courts to review the constitutionality of legislation was invalid.[89] While section 101 of the *Constitution Act* allows Parliament to establish courts for the "better administration of the laws,"[90] it cannot oust the superior court's ability to declare federal statutes beyond Parliament's competence. Justice Estey cautioned that such an exclusion "would strip the basic constitutional concepts of judicature of this country, namely the

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78 Hogg & Wright, *supra* note 19 at 7.16, 7:19.
79 Alyn James Johnson, "The Genealogy of Core Jurisdiction" (2021) 54:3 UBC L Rev 815 at 815.
80 *Ibid* at 825.
81 *Crevier v Attorney General of Quebec*, 1981 CanLII 30 (SCC) [*Crevier*].
82 *Attorney General of Canada v Law Society of British Columbia,* 1982 CanLII 29 (SCC) [*Jabour*].
83 *McEvoy v Attorney General for New Brunswick et al*, 1983 CanLII 149 (SCC) [*McEvoy*].
84 *Reference re Young Offenders Act (PEI),* [1991] 1 SCR 252 [*Young Offenders* 1991].
85 *Supra* note 81.
86 *Ibid* at 234.
87 *United Nurses of Alberta v Alberta (Attorney General*), 1992 CanLII 99 (SCC) at 936, 1992 CanLII 99 (SCC).
88 *Crevier, supra* note 81 at pages 236-37 [emphasis added].
89 *Supra* note 82.
90 *Constitution Act, supra* note 36.

superior courts of the provinces, of a judicial power *fundamental* to a federal system as described in the *Constitution Act*."[91]

The *McEvoy* case originated in New Brunswick and addressed a proposal to establish a provincially appointed unified criminal court with jurisdiction over all indictable offenses.[92] In a unanimous decision, the Court determined that section 96 precludes Parliament, the legislature, or both together from establishing such a court since trying indictable offences fell within the superior court's jurisdiction in 1867.[93] The Court described the proposal as a "complete obliteration" of the superior court's criminal law jurisdiction, stating that "Parliament can no more give away federal constitutional powers than a province can usurp them."[94] Even though the proposal sought to provide concurrent jurisdiction to the unified criminal court, the Court deemed it insufficient to save the scheme:

> The theory behind the concurrency proposal is presumably that a Provincial court with concurrent rather than exclusive powers would not oust the Superior Courts' jurisdiction, at least not to the same extent; since the Superior Courts' jurisdiction was not frozen as of 1867, it would be permissible to alter that jurisdiction so long as the essential core of the Superior Courts' jurisdiction remained; s. 96 would be no obstacle because the Superior Court would retain jurisdiction to try indictable offences. With respect, we think this overlooks the fact that *what is being attempted here is the transformation by conjoint action of an inferior court into a superior court*. Section 96 is, in our view, an insuperable obstacle to any such endeavour.[95]

Finally, in *Reference re Young Offenders Act* 1991,[96] the Supreme Court examined the constitutional validity of assigning jurisdiction over criminal offences to provincially appointed youth courts. Chief Justice Lamer, writing for two other justices, concluded that "jurisdiction over young persons charged with a criminal offence" was a novel concept that did not exist at Confederation.[97] Consequently, the allocation was valid under the *Residential Tenancies* test. Justice Wilson, with Justice McLachlin concurring, also applied the *Residential Tenancies* test, leading Johnson to comment that "[t]his decision is from start to finish a *Residential Tenancies* decision. There is no deliberate attempt to modify the three-part test with a 'guaranteed core' refinement."[98]

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91 *Jabour, supra* note 82 at page 328.

92 *Supra* note 83.

93 *Ibid* at 717.

94 *Ibid* at 719–720.

95 *Ibid* at 721. Reconciling this statement, which suggests that concurrent jurisdiction does not shield a transfer of power from a section 96 challenge, with other jurisprudence presents a challenge. For instance, in *Jabour*, the Court centered its attention on the invalidity of conferring *exclusive* jurisdiction upon an inferior court. A similar stance was adopted in *Northern Telecom v Communication Workers*, 1983 CanLII 25 (SCC), where it was established that the Federal Courts could concurrently exercise jurisdiction over constitutional challenges to federal legislation and administrative actions. As elaborated further in Part III-A, the majority opinion in *MacMillan Bloedel* also identified the issue as the exclusive nature of the powers being delegated to an inferior court. It is possible this aspect of *McEvoy* is no longer good law.

96 *Supra* note 84.

97 *Ibid at* 268.

98 Johnson, *supra* note 79 at 832.

Johnson's observation that the Court made no attempt to modify the *Residential Tenancies* test applies to all four decisions. Nevertheless, the Court in *MacMillan Bloedel* drew upon these cases (except *McEvoy)* to establish the concept of an unassailable core jurisdiction, albeit with varying degrees of success. Surprisingly, Lamer CJ did not rely on *McEvoy* to support the idea of core jurisdiction, despite indications that the Court believed in the existence of an unremovable criminal core.[99] Instead, Lamer CJ heavily relied on his decision in *Reference Young Offenders*, although its relevance to the matter was tenuous at best.

In the *Reference Young Offenders Act* decision, Lamer CJ repeatedly employed the term "core," asserting that section 96 protected "the jurisdiction conferred on Youth Courts by Parliament is within the *core* of jurisdiction of superior courts"[100] However, Johnson points out that in *MacMillan Bloedel,* Lamer selectively quoted his previous statements, intentionally omitting references to *Residential Tenancies*.[101] When read in the context of *Residential Tenancies*, *Reference Young Offenders Act* "has nothing to do with a protected subset of superior court powers that can never be transferred."[102] Justice McLachlin's dissent in *MacMillan Bloedel* supports Johnson's interpretation, criticizing Lamer CJ's modification of the section 96 analysis as "needlessly derogat[ing]" from the *Residential Tenancies* test and highlighting the historical revision that occurred.[103] Justice McLachlin stressed that Lamer CJ's comment must be considered in conjunction with the paragraph following it. In its proper context, Lamer CJ's use of the term "core" in *Reference Young Offenders Act* "might have been seen simply as a shorthand reference to impermissible transfers under the *Residential Tenancies* test — i.e., transfers where the adjudicative function 'is a sole or central function of the tribunal [and] the tribunal can be said to be operating 'like a s. 96 court' (per Dickson J., in *Residential Tenancies* 1979...)."[104]

There is reason to believe then that section 96 has been shaped by "a misreading of *Young Offenders*"[105] leading the Court to "manufacture an unassailable core."[106] However, Lamer CJ finds stronger support for the notion of an unassailable core in *Crevier* and *Jabour*. This is because both cases deal with judicial review which is grounded in preserving the rule of law. The Supreme Court has recognized the rule of law as a fundamental constitutional principle inherited from the British from the preamble of the *Constitution Act, 1867* and explicitly from the preamble to the *Canadian Charter of Rights and Freedoms*.[107] The rule of law generally necessitates an independent judiciary to ensure that official actions are justified

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99 Patrick Healy, "Constitutional Limitations upon the Allocation of Trial Jurisdiction to the Superior or Provincial Court in Criminal Matters" (2003) 48:1 Crim LQ 31. Healy interprets the *McEvoy* decision as incorrectly affirming the concept of an irreducible core jurisdiction in criminal matters.

100 *Young Offenders* 1991, *supra* note 84 at page 264.

101 *Supra* note 79 at 871.

102 *Ibid* at 836.

103 *Supra* note 7 at para 71.

104 *Ibid* at para 72.

105 Johnson, *supra* note 79 at 837.

106 *Ibid* at 841.

107 *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC) [*Manitoba Language Rights*]; *Provincial Judges Reference, supra* note 7.

by law and that decision-makers operate within their granted powers.[108] Judicial review thus serves as a mechanism to uphold the rule of law and possesses a constitutional basis for being considered part of the core jurisdiction of superior courts.[109] Chief Justice Lamer leveraged the rule of law principle, supported by the judicial review decisions, to "establish the existence of superior court core jurisdiction."[110] He connects this back to the issue at hand in *MacMillan Bloedel*, the transfer of exclusive jurisdiction over contempt *ex facie* committed by youth, and asserts that the "rule of law requires a judicial system that can ensure its orders are enforced and its process respected."[111] In sum, Lamer CJ's rationale for the *MacMillan Bloedel* decision is solidly rooted in the rule of law. Building on this foundation, he advanced the notion of an inviolable core jurisdiction — one that cannot be stripped away from superior courts, which serve as protectors of the rule of law. This case firmly established the core jurisdiction test.

Another important aspect of the caselaw, starting with *MacMillan Bloedel*, pertains to the Court's narrow conception of the core. Similar to the historical inquiry from *Residential Tenancies*, the Court refrained from providing a comprehensive definition of the core powers of superior courts. Chief Justice Lamer recognized the challenges in delineating the core and deemed it "unnecessary … to enumerate the precise powers" in that particular case, as the power to try young individuals for contempt *ex facie* was "obviously" within the jurisdiction of superior courts. [112] The failure of the Court to specify the core powers implies that "only a series of cases" reaching the Court will establish the boundaries of this untouchable core.[113]

Nevertheless, various indications suggest that the core jurisdiction is restricted. A year after *MacMillan Bloedel,* Lamer CJ, in the concurring opinion from *Residential Tenancies* 1996, described the core as a "very narrow one which includes only critically important jurisdictions which are *essential* to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system."[114] The Court has elsewhere emphasized that the superior courts occupy a "position of prime importance in the constitutional pattern of Canada."[115] Consequently, section 96 prohibits provinces and the federal government from removing any features that are "fundamental" to the federal system,[116] or any powers that are the "hallmark of a superior court"[117] and "integral" to its operation.[118] The historical approach to section 96 unequivocally portrays the core as narrow, focused on upholding the rule of law. However, as will be explored in part III, the Supreme Court has recently expanded the core to include "general private law jurisdiction."[119]

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108 Hogg & Zwibel, *supra* note 13 at 727.
109 Johnson, *supra* note 79 at 848.
110 *Ibid* at 850.
111 *Supra* note 7 at para 37.
112 *Ibid* at para 38.
113 Hogg & Wright, *supra* note 19 at 7:19.
114 *Supra* note 8 at para 56, Lamer CJ, concurring [emphasis added].
115 *Jabour, supra* note 82 at 328.
116 *Ibid* at 328.
117 *Crevier, supra* note 81 at 237.
118 *MacMillan Bloedel, supra* note 7 at para 15.
119 *Article 35*, *supra* note 23 at para 6.

C. Section 96's Purpose: From Independence to Unity

Several rationales have been proposed for the inclusion of section 96 in the Constitution. Historically, it was seen as a means to uphold judicial independence by removing judicial appointments from local pressures.[120] The Privy Council accepted this view, describing section 96 as "at the root of the means adopted by the framers of the [*Constitution*] … to secure the impartiality and independence of the Provincial judiciary."[121] This theory is most famously found in Professor William Lederman's extensive piece entitled "The Independence of the Judiciary." Yet, Lederman posited that it was the *cumulative* effect of sections 96-100 of the *Constitution* (the "Judicature Provisions"), not just section 96 alone, that safeguards the independence of the superior court judges. As only superior courts provided the qualities of an independent judiciary in Canada, through the guarantee of tenure until age seventy-five[122] and a fixed salary,[123] those courts possessed an "irreducible core of substantive jurisdiction assured to them."[124] However, doubts were cast on the independence theory by Justice Estey in *Re BC Family Relations Act*:

> [t]he generally accepted theory has been that the national appointment of superior ... court judges was designed to ensure a quality of independence and impartiality in the courtroom .... Duff CJ. reviewed the same argument in *the Adoption Refe*rence ... but evidently did not find it compelling .... Whatever [section 96's] purpose its presence has raised difficulties of application since Confederation.[125]

Historical records like the Confederation debates, which grounds the "equation of section 96 with judicial independence"[126] have "limited value in [contemporary] constitutional interpretation."[127] Some argue that section 96 aimed to ensure the selection of more qualified candidates and save provincial funds, not solely protect judicial independence.[128] Roderick MacDonald suggests section 96 may have "served to consolidate political authority by ensuring the ideological commitment of the senior judiciary to traditional values such as private property, fault-based liability and markets."[129] Hogg contends that section 96 exists because superior courts are courts of general jurisdiction handling matters concerning both federal

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120 Laskin, *supra* note 5 at 998; Hogg & Wright, *supra* note 19 at 7:16.

121 *O'Martineau & Sons Ltd v Montreal,* 1931 CanLII 387 (UK JCPC) at page 120.

122 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 99.

123 *Ibid*, s 100.

124 Lederman, *supra* note 37 at 1170–71.

125 *Re BC Family Relations Act*, 1982 CanLII 155 (SCC) at 93–94. Seven justices presided over this case; notably, Dickson J was absent.

126 Hatherly, *supra* note 70 at 130.

127 Laskin, *supra* note 5 at 999.

128 Hatherly, *supra* note 70 at 126–27; see also Matas, *supra* note 14 at 245 citing Paul Weiler, "Judges and Administrators: An Issue in Constitutional Policy" in *Proceedings of the Administrative Law Conference held at the University of BC, Faculty of Law on Oct 18-19, 1979* (P Gall ed 1981) 379 at 381.

129 Macdonald, *supra* note 12 at 261.

and provincial law, which necessitates some federal involvement in their establishment.[130] Others believe that sections 92(14) and 96 create a "dual regime"[131] reflecting and promoting federalism values,[132] although MacDonald refers to this idea as an "[in]sincere claim."[133] He questions why these virtues do not equally warrant protection from the lowest provincial courts to the highest federal court, if the regime is supposed to enhance the principles of federalism and the sharing of political power.[134]

In *Residential Tenancies* 1979, Justice Dickson (as he then was), without providing a source, embraced the view that the appointing power is part of a "historic compromise" reflecting the framers' intent to establish a "strong constitutional base for national unity, through a unitary judicial system."[135] In essence, section 96 contributes to national unity by establishing a court system with uniform jurisdiction across the country "and by the fact that appeals lie from all to the Supreme Court of Canada, which exercises a unifying influence."[136]

Despite different rationales, the courts ultimately upheld the judicial independence theory after *Residential Tenancies* 1979. A unanimous Court in *McEvoy* 1983 held "the judicature sections … guarantee the independence of the superior courts."[137] In *Sobeys Store* 1989, Justice Wilson for the majority (which included then Chief Justice Dickson) wrote "the jurisdiction of the inferior courts … [cannot] be substantially expanded so as to undermine the independence of the judiciary which s. 96 protects."[138] Chief Justice Lamer echoed this point in *MacMillian Bloedel* 1995 where he wrote section 96 "has come to stand for" the guarantee of judicial independence[139] and again in *Residential Tenancies* 1996 where he noted that "section 96 … [was] designed by the framers to ensure the independence of the judiciary."[140]

In *Provincial Judges Reference* 1997*,* Lamer CJ concluded that the rationale behind section 96 had shifted "away from the protection of national unity to the maintenance of the rule of law through the protection of the judicial role."[141] Nevertheless, the Court returns to

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130 Hogg & Wright, *supra* note 19 at 7:2; but see Peter Russell who argues that federal control over appointments to provincial courts is "surely not the right way to attend to this legitimate federal concern." Rather, if the way in which provincial judges interpret federal laws causes embarrassment to federal interests, the appropriate means for rectification are the federal Supreme Court's review of provincial court rulings pertaining to federal matters or legislative measures taken by the federal parliament: Peter Russell, "Constitutional Reform of Judiciary" (1969) 7:1 Alta L Rev 103 at 122.

131 Canada, Department of Justice, *The Constitution of Canada: A Suggested Amendment Relating to Provincial Administrative Tribunals: A Discussion Paper,* by The Honourable Mark MacGuigan, Catalogue No J2-47/198 (August 1983) at 1 online: <publications.gc.ca/collections/collection_2022/jus/J2-506-1983-eng.pdf> [perma.cc/3FLX-CK4T].

132 Macdonald, *supra* note 12 at 262.

133 *Ibid*.

134 *Ibid.*

135 *Supra* note 58 at 728.

136 *MacMillan Bloedel, supra* note 7 at para 51, McLachlin J, dissenting; *Article 35*, *supra* note 23 at para 89.

137 *Supra* note 83 at 720.

138 *Supra* note 69 at page 523.

139 *Supra* note 7 at para 11.

140 *Supra* note 8 at para 26.

141 *Supra* note 7 at para 88.

national unity alongside the rule of law as a justification for the inclusion of section 96, as will be explored in Part II.[142]

D. The "Section 96 Problem" and Proposed reforms

A brief overview of the case law leading up to the present reveals that section 96 has been a subject of considerable litigation, giving rise to what is referred to as the "section 96 problem."[143] Critics argue that section 96 was not intended to entrench the jurisdiction of superior courts.[144] Some provinces have found the provision to be "unduly restrictive,"[145] limiting their ability to assign functions to tribunals and provincial courts.[146]

Various proposals for constitutional amendments emerged in response to this "section 96 problem." In 1979, the Task Force on Canadian Unity proposed granting provincial governments the authority to appoint superior court judges after consulting with the federal government.[147] Alternatively, the MacGuigan Proposal suggested allowing provinces to confer jurisdiction analogous to that of a superior court on tribunals,[148] subject to review by a superior court "for want or excess of jurisdiction."[149] This approach aimed to preserve the vital supervisory role of superior courts in upholding the rule of law.[150] However, the MacGuigan Proposal faced criticism for being incomplete and "ill-conceived"[151] as it failed to fully address the impact of section 96 on federal tribunals and lacked a comprehensive understanding of the underlying disputes.[152] According to MacDonald,

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142 It should be noted that there is a principled distinction in the application of the independence rationale concerning the limitations that section 96 imposes on the functions of courts compared to those on administrative tribunals. Notably, subsequent to the *Provincial Judges Reference* case, both provincial and federal courts benefit from the safeguard of the unwritten constitutional principle of judicial independence. However, this is not the case for administrative tribunals, as explained in the following rulings: *Ocean Port Hotel Ltd v British Columbia* (*General Manager, Liquor Control and Licensing Branch)* 781, 2001 SCC 52; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4; *Walter v British Columbia (Attorney General*), 2019 BCCA 221. It could be argued that upholding a robust framework for judicial review serves as a sufficient substitute for the absence of constitutional safeguards regarding the independence of administrative tribunals.

143 Jones, *supra* note 17 at 676; Macdonald, *supra* note 12 at 152.; Matas, *supra* note 14 at 257.

144 E Robert A Edwards "Section 96 of the Constitution Act, 1867 - The Call for Reform" (1984) 42:2 The Advocate (Vancouver Bar Association) 191 at 191. See also Macdonald, *supra* note 12.

145 Department of Justice, *supra* note 131 at 2.

146 Lyon, *supra* note 65 at 79; Peter B Adams & Paul J Murphy, "Section 96 Judges: Whether Ontario Residential Tenancies Commission Exercises S. 96 Functions. Reference Re: Residential Tenancies Act, 105 D.L.R. (3rd) 193" (1980) 6:1 Queen's LJ 282 at 294.

147 Privy Council Office, The Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services Canada, January 1979) at 102 online <publications.gc.ca/collections/collection_2014/bcp-pco/CP32-35-1979-eng.pdf> [perma.cc/MVT3-DXC6].

148 Department of Justice, *supra* note 131 at 7. This proposal advocated for a new provision, "Section 96B," which would have granted provinces the authority to confer jurisdiction on "any tribunal, board, commission, or authority, other than a court.... in respect of any matter within the legislative authority of the Province".

149 *Ibid* at 7–8.

150 *Crevier, supra* note 81; *MacMillan Bloedel*, *supra* note 7 at para 37.

151 Macdonald, *supra* note 12 at 280.

152 Macdonald, *supra* note 12 at 256.; Canadian Bar, *supra* note 15 at 231; Matas, *supra* note 14 at 250–52.

the failure to clearly articulate the problem of section 96 hindered the proposal's ability to offer a viable solution and inadvertently invited provinces to try and exploit the superior courts.[153]

Former Professor of Law Noel Lyon opposed the call for a constitutional amendment and criticized the proposal as "fundamentally misconceived" for treating the issue as one concerning the federal division of powers, rather than acknowledging that the "primary value to be secured is not federalism but the rule of law" which can only be ensured by an independent judiciary.[154] Lyon recommended reserving only functions "essential to our system of government" exclusively for judges with constitutionally secured independence[155] rather than treating "all functions exercised by superior courts in 1867 as having a rational constitutional basis for exclusive reservation to those courts."[156]

Ultimately, the proposed amendments were abandoned, leaving the section 96's problem unresolved. Yet, some scholars have commented that the problem has been resolved. Ellis, drawing on cases from the late 1980s to the early twenty-first century, observed that the Supreme Court has made "ample constitutional room" for tribunals.[157] Apprehensions concerning section 96 seemed to recede as the courts, for some time, embraced a broad interpretation of the third branch of the *Residential Tenancies* test while maintaining a restrictive stance on the core jurisdiction test. Nevertheless, with the Supreme Court adopting a more expansive interpretation of the core jurisdiction in *Article 35,* the issue of section 96 has resurfaced.

II. GUARDIANS OF THE CONSTITUTION: RECENT SECTION 96 CASES

In both *Article 35* and *Trial Lawyers 2022,* the Supreme Court of Canada grappled with provinces transferring jurisdiction from superior courts to an inferior court and tribunal, respectively. *Article 35* involved an exclusive transfer of jurisdiction, while *Trial Lawyers 2022* dealt with a combination of exclusive and non-exclusive powers granted to a tribunal. The fact that both verdicts were split decisions highlights the ongoing debates and controversies surrounding the scope and implications of section 96. This section provides an overview of these cases and the recent judicial perspectives on section 96.

153 Macdonald, supra note 12 at 281. See also Matas who raises an important concern regarding the broad scope of the proposal. He points out that by permitting provincially appointed tribunals to handle *any* matter falling within provincial legislative authority, there is a risk of creating a dual system of courts that goes against the intended purpose of the Constitution: Matas, *supra* note 14 at 253.

154 *Supra* note 65 at 80.

155 *Ibid* at 86.

156 *Ibid* at 82. Lyon argues that, assuming that the judiciary is willing to "refine" its section 96 interpretation to allow provinces to "enjoy the benefit of … flexibility," reform is unnecessary (*ibid* at 85).

157 *Supra* note 20 at 320. For support that the Supreme Court has made space for tribunals, Ellis refers to the following: *Reference re Residential Tenancies* 1996, *supra* note 8; *MacMillan Bloedel*, *supra* note 7; *Sobeys*, *supra* note 69.

A. Article 35 Reference: Section 96 and Exclusive Jurisdiction

i. The Basics

In 2016, the Québec National Assembly amended Article 35 of their *Code of Civil Procedure,* raising the monetary threshold for civil disputes exclusively under the jurisdiction of the Court of Québec (an inferior court) from $70,000 to $85,000. Judges from the Superior Court of Québec opposed this change, arguing that it ran afoul of section 96 as it could potentially limit the superior court's capacity to state and advance the law regarding civil claims. In response, the Québec government sought clarification through a reference question at the Court of Appeal. The Court of Appeal ruled that, while ensuring access to justice remains a significant challenge within the judicial system, the monetary limit imposed lacked justification in light of section 96.[158]

The majority of the Supreme Court of Canada (per Justices Côté and Martin) agreed the monetary limit was too high.[159] Characterizing the matter as the transfer of civil disputes concerning contractual and extracontractual obligations to the inferior court, they described the allocation as "broad" and encompassing a "vast area at the heart of private law."[160] They noted that Article 35 granted the inferior court exclusive jurisdiction over civil matters under $85,000, with few exceptions.[161] This effectively created a "prohibited parallel court" that "impermissibly infringe[d] upon the core jurisdiction" of the superior court.[162] The Supreme Court of Canada observed that Article 35 facilitated a "wholesale court-to-court transfer of jurisdiction" instead of conferring a specific narrow power.[163]

As discussed in Part I-C, two tests are used to assess the validity of a jurisdiction grant under section 96. First, the *Residential Tenancies* test examines whether the law usurps the historical jurisdiction of section 96 courts. The Court found that Article 35 satisfied the historical inquiry since, at the time of Confederation, three out of the four founding provinces' inferior courts were sufficiently involved in resolving disputes relating to contractual and extracontractual obligations.[164] Accordingly, the superior courts did not possess exclusive jurisdiction over such matters, satisfying the *Residential Tenancies* test. Second, the core jurisdiction test questions whether legislation improperly delegates the essential characteristics of the superior courts to other adjudicative bodies. Here, the majority revised the analytical approach and adopted a multifaceted method that considers six

158 In the matter: Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the Code of Civil Procedure which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec, 2019 QCCA 1492 at paras 148, 185.

159 *Article 35, supra* note 23 at para 8.

160 *Ibid* at para 3.

161 The exclusions encompassed family matters other than adoption, as well as any other jurisdiction exclusively assigned to another adjudicative body, such as cases relating to immovable property, successions, and wills (*ibid* at paras 12–15).

162 *Article 35*, *supra* note 23 at paras 7, 71, 135, 138.

163 *Ibid* at para 3.

164 *Ibid* at paras 5, 75–76.

non-exhaustive factors when assessing potential infringements on section 96. This approach became a focal point of disagreement among the three opinions, highlighting the complex and evolving nature of interpreting section 96. The six factors are as follows:

1. The scope of the jurisdiction being granted;
2. Whether the grant is exclusive or concurrent;
3. The monetary limits to which it is subject;
4. Whether there are mechanisms for appealing decisions rendered in the exercise of the jurisdiction;
5. The impact on the caseload of the superior court of general jurisdiction; and
6. Whether there is an important societal objective.[165]

These factors are then weighed to achieve an appropriate balance between recognizing the provinces' authority over the administration of justice and safeguarding the nature, constitutional role, and core jurisdiction of the superior courts.[166] The majority viewed the constitutional role of superior courts as the "cornerstone of the unitary justice system and the primary guardians of the rule of law."[167] Under the majority's approach, the legislature has *some* flexibility in redefining the jurisdiction of the Court of Québec and exceeding the historical monetary ceiling, at least when the granted scope of jurisdiction remains limited.[168] However, this flexibility introduces uncertainty regarding the specific measures the province must take to limit the Court of Québec's jurisdiction in a manner that aligns with the new multifaceted approach. For instance, questions arise regarding the permissibility of restricting appeals to certain questions and the criteria for defining important societal objectives. As Professor of Law Paul Daly observed, "Québec legislators will have some work to do."[169]

ii. Safeguarding the Uniformity of the Canadian Judicial System

In *Provincial Judges Reference* 1997, Lamer CJ noted that the rationale behind section 96 evolved from protecting national unity to safeguarding the rule of law by preserving the judicial role.[170] Chief Justice McLachlin endorsed Lamer's observation in *Trial Lawyers 2014*, emphasizing section 96's "judicial function and the rule of law are inextricably intertwined."[171] There was. no discussion of the role of national unity in McLachlin's decision; nevertheless, the full Court in *Article 35* returned to the unity rationale alongside the rule of law, describing

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165 *Article 35*, *supra* note 23 at para 88.

166 *Ibid* at para 132.

167 *Ibid* at para 63.

168 *Ibid* at para 97.

169 Paul Daly, "Protecting the Core: Reference re Code of Civil Procedure (Que.), art. 35, 2021 SCC 27" (30 June 2021), online (blog): *Administrative Law Matters,* <administrativelawmatters.com/blog/2021/06/30/protecting-the-core-reference-re-code-of-civil-procedure-que-art-35-2021-scc-27> [perma.cc/7JDH-2MRL].

170 *Supra* note 7 at para 88.

171 *Supra* note 22 at para 39.

them as the two "key principles."[172] Accepting the idea of national unity as one of the roles of the superior court, it is crucial to grasp *what* that means.

This notion of national unity is not exactly what one might assume. National unity, in the context of section 96, does not refer to fostering a common purpose to bind Canadians together despite their provincial, ethnic, linguistic, religious, or other differences. Instead, the national unity rationale originated from Justice Dickson's comments in *Residential Tenancies* 1979 where he explained that section 92(14) and sections 96 to 100 "represent one of the important compromises of the Fathers of Confederation … [to effect] a strong constitutional basis for national unity, through a unitary judicial system."[173] National unity, as interpreted by the courts, focuses on maintaining a "strong unified judicial presence throughout the country."[174] Superior courts, established and administered by the provinces, exert a unifying influence by virtue of the similarities in jurisdiction, the presence of federally appointed and paid judges, and the avenue for appeals to the Supreme Court.[175] In this context, national unity does not refer to the uniformity of laws but rather emphasizes the necessity for superior courts throughout the country to possess a comparable core of authority.

Underlying the concept of national unity is the assumption of a unitary judiciary, wherein superior courts hold a dominant adjudicative position, while specialized provincial and federal courts occupy peripheral roles. However, this perspective is misleading. The distinguishing feature of superior courts resides in their possession of inherent jurisdiction. This inherent jurisdiction can be characterized as a "reserve or fund of powers, a residual source of powers, which the [superior] court may draw upon as necessary whenever it is just or equitable to do so."[176] Thus, the central inquiry within the realm of section 96 jurisprudence revolves around the extent to which the erosion of a superior court's inherent jurisdiction can occur without compromising the pivotal role played by these courts.

In this context, it is critical to assess *how* superior courts can maintain their responsibility for ensuring uniformity in the Canadian judicial system. The majority in *Article 35* posited that this involves examining the six factors outlined earlier. Once today's equivalent monetary ceiling is found (using the 1867 ceiling of $100), the multi-factored analysis guides how much flexibility a government has when seeking to exceed those ceilings.[177] The analysis offers a continuum. Grants of vast and exclusive jurisdiction without an accessible appeal mechanism or an important societal objective will limit the legislature's freedom and be deemed unconstitutional.[178] Conversely, concurrent grants of more limited jurisdiction, with an appeal mechanism and that serve an important societal objective, offer greater

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172 *Supra* note 23 at paras 42, 202, 322.

173 *Supra* note 58 at 728.

174 *MacMillan Bloedel*, *supra* note 7 at para 51, McLachlin J, dissenting but not on this point.

175 *Ibid*.

176 I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23:1 Current Leg Probs 23 at 51. Cited with approval in *Endean v British Columbia,* 2016 SCC 42 (CanLII) at para 23, 2011 SCC 5 (CanLII) at para 24, and *MacMillan Bloedel, supra* note 7 at paras 29-30.

177 *Supra* note 23 at paras 118, 132.

178 *Ibid* at para 133.

legislative flexibility. The majority in *Article 35* contended that the Québec government's grant of exclusive and "vast" jurisdiction to the inferior court over civil claims under $85,000, without an appeal mechanism,[179] undermines the superior courts' ability to resolve disputes. Consequently, this jeopardizes their status as the "cornerstone" of a unitary justice system.[180]

iii. Superior Courts: Primary Guardians of the Rule of Law

The importance of the superior courts to the rule of law is recognized in case law and all three opinions in *Article* 35. The majority in *Article* 35 characterized the rule of law as a "central" principle of section 96,[181] emphasizing that superior courts are best suited to preserve various facets of the rule of law due to Canada's constitutional architecture. This includes equality before the law, the creation and maintenance of an actual order of positive laws, and overseeing public powers.[182] While provincial courts also contribute to upholding the rule of law,[183] the constitutionally guaranteed independence of superior courts positions them as "*primary* guardians."[184] Provincial court independence is subject to constitutional guarantees but legislatures retain the authority to abolish or significantly constrain courts without violating the Constitution. In contrast, superior courts enjoy constitutional protection against such legislative interference. The majority contended that failing to preserve their core jurisdiction over civil claims would undermine the superior court's capacity to offer "jurisprudential guidance on private law," thereby endangering the rule of law in Canada.[185]

Justice Abella concurred with the connection between core jurisdiction and the rule of law but cautioned against an exaggerated scope of the concept.[186] She confined the rule of law to mean that superior courts must retain autonomy in enforcing their judgments, maintain impartiality and independence, and possess residual jurisdiction over cases not assigned to other competent forums. She challenged the notion that the rule of law requires resolving specific private law issues in one independent forum rather than another; instead, it "requires that competent and independent adjudicators decide questions of law."[187]

Chief Justice Wagner also discussed the rule of law's link to core jurisdiction. He emphasized that superior courts' core jurisdiction is narrowly defined, encompassing only critically important areas. Depriving them of these powers would impede their vital role in maintaining

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179 A notable aspect lies in the fact that the revised Article 35 code maintains the absence of an appeal mechanism to the superior courts, compelling litigants to exclusively pursue appeals through the Québec Court of Appeal. Nonetheless, as will be explored, *Crevier* continues to uphold a certain degree of judicial review, thereby enabling the superior courts to maintain their role in safeguarding the rule of law.

180 *Article 35*, *supra* note 23 at paras 101–02, 120.

181 *Ibid* at para 4.

182 *Ibid* at para 47; citing *Reference re Manitoba Language Rights, supra* note 107, *Imperial Tobacco, supra* note 33 at para 58*; Cooper, supra* note 32 at para 16.

183 *Provincial Judges Reference*, *supra* note 7.

184 *Article 35*, *supra* note 23 at para 50.

185 *Ibid* at para 86.

186 *Ibid* at para 300, Abella J, dissenting.

187 *Ibid* at para 318, Abella J, dissenting.

the rule of law and the unity of the constitutional and judicial system. [188] Wagner CJ concluded that while superior courts must have "substantial jurisdiction in private law" matters to state and develop the law, "their jurisdiction need not be exclusive."[189] To adequately develop the law requires ensuring that the superior courts oversee an adequate volume of cases in terms of number, proportion, and variety.[190]

B. *Trial Lawyers 2022*: Weighing the Factors

In 2019, the government of British Columbia granted the CRT jurisdiction to determine whether an injury qualifies as a "minor injury" and to handle personal injury claims up to $50,000.[191] This was in response to rising auto insurance costs and the financial burden on the province's public insurer. Notably, the CRT received exclusive jurisdiction in determining minor injury, thereby necessitating the British Columbia Supreme Court to dismiss any such proceeding brought before it. Any potential judicial review of injury categorizations is subject to the patent unreasonableness standard. For liability and damage claims within the monetary limit, the CRT is considered to have "specialized expertise" but not exclusive jurisdiction.[192] In such instances, the British Columbia superior court must dismiss the proceedings unless it finds that it is not "in the interests of justice and fairness" for the tribunal to adjudicate the claim.[193] The legal provisions in force during the legal challenge imposed different standards of review, with findings of fact and law concerning damages subjected to a correctness standard and liability-related findings subject to a correctness standard for legal questions and reasonableness for questions of fact.[194]

At the British Columbia Supreme Court, the Trial Lawyers Association of British Columbia argued that this transfer of jurisdiction amounted to an "impermissible derogation" of superior court jurisdiction and thus ran afoul of section 96.[195] Chief Justice Hinkson decided he would have invalidated the legislation based solely on the application of the *Residential Tenancies* test. Although the core jurisdiction test was presented during the case, the Chief Justice chose not to address it, asserting that "such an analysis is not warranted" in cases where a transfer or jurisdiction "does not survive the *Residential Tenancies* test."[196]

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188 *Ibid* at para 239, Wagner CJ, dissenting.

189 *Ibid* at para 240, Wagner CJ, dissenting.

190 *Ibid* at para 246, Wagner CJ, dissenting.

191 For the purposes of the *Insurance (Vehicle) Act,* RSBC 1996, c 231.

192 *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 133 [*CRTA*].

193 *Ibid*, s 16.1(2)(b).

194 Since 2021, the standard of review for questions of fact relating to damages are now evaluated under the reasonableness standard (*CRTA, supra* note 192, s 56.8).

195 *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348 at para 8.

196 *Ibid* at para 394.

Conversely, in *Trial Lawyers 2022*, the British Columbia Court of Appeal reached a consensus regarding the legislation's compliance with the *Residential Tenancies* test. They found that the powers granted were not exclusively exercised by the superior courts at the time of Confederation.[197] Considering the six factors from *Article 35*, the majority concluded that the superior court's core jurisdiction remained intact despite the new scheme. While the majority acknowledged that giving priority to any single factor is "likely [an] error,"[198] they emphasized factor number six: whether there was an important societal objective behind granting jurisdiction. The majority reviewed evidence indicating that the existing system of compensating for minor personal injuries was affecting the public insurer's sustainability and the actual compensation received by victims.[199] This prompted a need for innovative solutions to improve access to justice, leading to the development of the CRT. The majority emphasized that there was a clear link between the legislative goal of enhancing access to justice and the delegation of jurisdiction to the CRT.[200]

Together with the other factors, the Court concluded that the superior courts would continue to play a "robust role in the development of the law" in this particular domain, aligning with the underlying objectives envisioned by section 96.[201]

In her dissent, Justice Bennett employed the six-factor analysis, but her approach at times more closely resembled Chief Justice Wagner's perspective from *Article 35.* Specifically, in examining the "scope of the jurisdiction granted" factor, Bennett J drew on Wagner CJ's emphasis on the impact on the number of cases and the proportion of cases falling within superior court jurisdiction. Justice Bennett analysed the motor vehicle collision-related cases filed at the British Columbia superior court in 2019, noting that the "sheer number of cases commenced each year" suggested that the CRT will assume jurisdiction over a significant number of cases that are currently handled, tried, and managed by the superior court.[202] In her view, this "serious transfer" of superior court jurisdiction, amounted to the establishment of "an impermissible parallel court."[203]

Trial Lawyers 2022, decided shortly after *Article 35,* highlights the challenges arising from the Supreme Court's new six-factor analysis. While the majority in *Article 35* emphasized the importance of balancing the factors to achieve equilibrium between recognizing the province's authority over the administration of justice and preserving the constitutional role and core jurisdiction of the superior courts,[204] the majority in *Trial Lawyers 2022* placed particular emphasis on one factor: the societal objective.[205] Furthermore, in her dissent, Justice Bennett introduced a seventh

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197 *Trial Lawyers* 2022, *supra* note 4 at paras 130, 186.
198 *Ibid* at para 147.
199 *Ibid* at para 148.
200 *Ibid* at paras 147–59.
201 *Ibid* at para 180.
202 *Trial Lawyers* 2022, *supra* note 4 at paras 214-15.
203 *Ibid* at paras 216-17.
204 *Article 35*, *supra* note 23 at para 132.
205 *Trial Lawyers* 2022, *supra* note 4 at para 147.

factor: "the issue of judicial independence."[206] Although the majority in *Article 35* acknowledged that the six-factor list was not exhaustive, the crucial takeaway here is that the two opinions in *Trial Lawyers 2022* assign varying degrees of weight to different factors, resulting in divergent conclusions. This divergence further complicates the task of legal advisors when attempting to predict the outcome of challenges to schemes transferring jurisdiction to other administrative bodies.

III. AN EXAMINATION OF THE NEW CORE JURISDICTION TEST

This section addresses three issues. First, it presents the limitations of the Supreme Court's modified core jurisdiction test with a focus on how *Article 35* risks unduly restricting the use of alternative forums for dispute resolution. Second, it presents an alternative approach for future section 96 cases, which aims to balance the safeguarding of the rule of law by superior courts with the imperative of enhancing access to justice through alternative dispute resolution mechanisms. In navigating the evolving landscape of new adjudicative mechanisms and access to justice issues, an essential objective of courts should be to remain true to the original intent of the Fathers of Confederation while accommodating the contemporary demands of justice administration. Third, this section underscores the importance of avoiding an overly expansive interpretation of the core jurisdiction attributed to superior courts by touching on the access to justice crisis.

Article 35 raises concerns about the undue restriction of alternative dispute resolution forums without adequate justification in two ways. Firstly, the majority opinion expands the protected core by incorporating "general private law jurisdiction," which jeopardizes future grants of jurisdiction over civil law. While the majority's emphasis on "important societal objectives" in *Trial Lawyers 2022* somewhat mitigates this risk, the potential for future courts to prioritize different factors might obstruct government efforts to establish alternative forums. Secondly, the existence of multiple tests governing the transfer of jurisdiction from superior courts to alternative forums complicates the process of adapting and establishing adjudicative bodies, potentially constraining both Parliament and provincial legislatures in their pursuit of innovative solutions to improve access to justice.

A. Core Confusion: Narrow No More

Amid discussions about the risks to alternative dispute resolution forums, a significant concern emerges regarding the departure from the traditional narrow understanding of the core. The majority's assertion in *Article 35* that the core jurisdiction of superior courts now encompasses "general private law jurisdiction" marks a noteworthy shift.[207] Supreme Court of Canada Chief Justice Wagner, following *Trial Lawyers 2014,* accepted that the core jurisdiction of superior courts extends to "resolve disputes between individuals and decide questions of private and public law."[208] In contrast, Abella J firmly challenged this interpretation arguing that "superior courts have never had the exclusive responsibility of guiding the development of private law," rather it has been shared since Confederation.[209]

206 *Ibid* at para 210.

207 *Article 35*, *supra* note 23 at paras 80, 82.

208 *Ibid* at para 229, Wagner CJ, dissenting.

209 *Ibid* at para 302, Abella J, dissenting.

Delineating the superior courts' core powers has been an enduring challenge. Previously, the Supreme Court of Canada limited the core to powers considered "essential attribute[s],"[210] "integral to their operation,"[211] or "the hallmark of superior courts."[212] Introducing private law jurisdiction as part of the core seemingly contradicts the Court's prior emphasis on core jurisdiction covering only "critically important" areas "essential to the existence of superior courts."[213] Under the earlier core formulation, an act would only be deemed invalid if it significantly undermined or weakened the superior court's status as the cornerstone of Canada's judicial system, thereby safeguarding the compromise of the Fathers of Confederation.[214]

Considering the matter at hand, civil claims related to contractual and extracontractual obligations hardly seem "*essential to the existence* of a superior court" and its foundational role within our legal system.[215] The majority and Wagner CJ appear to have incorrectly imported the idea from *Trial Lawyers 2014* that superior courts "resolve disputes between individuals and decide questions of public and private law" into the core analysis from *MacMillan Bloedel.*[216] However, it is crucial to contextualise this statement. *Trial Lawyers 2014* did not involve a transfer of jurisdiction from a superior court to another judicial body; it concerned a litigant's ability to "access a public, independent, and impartial tribunal."[217] This leads Johnson to describe the presence of any discussion of the core jurisdiction in *Trial Lawyers 2014* as "somewhat discordant."[218]

In *Trial Lawyers 2014,* the majority ruled that imposing hearing fees unduly burdened economically disadvantaged litigants and effectively denied them access to the superior courts. Accordingly, Chief Justice McLachlin found that there must be sufficient judicial discretion to waive hearing fees where they would prevent access.[219] The key takeaway from *Trial Lawyers 2014* is that governments cannot obstruct court access.

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210 *MacMillan Bloedel*, *supra* note 7 at para 40.

211 *Ibid* at para 15.

212 *Crevier*, *supra* note 81.

213 *Residential Tenancies* 1996, *supra* note 8 at para 56, Lamer CJ, concurring; *MacMillan Bloedel*, *supra* note 7 at paras 30, 38; *Babcock v Canada (AG)*, 2002 SCC 57 at para 59; *R v Ahmad*, 2011 SCC 6, at para 61.

214 *Article 35*, *supra* note 23 at paras 36, 40. See also Abella J's discussion at paras 302-28.

215 *Residential Tenancies* 1996, *supra* note 8 at para 56, Lamer CJ, concurring [emphasis added].

216 *Trial Lawyers* 2014, *supra* note 22 at para 32.

217 *Article 35*, *supra* note 23 at para 299.

218 *Supra* note 80 at 880.

219 *Trial Lawyers* 2014, *supra* note 22 at paras 48, 57.

While this assertion may not seamlessly align with previous case law,[220] the case does not protect any core jurisdiction over civil claims. Interpreting *Trial Lawyers 2014* as recognizing the core jurisdiction to encompass "disputes between individuals and decide questions of private and public law" would imply that *any* exclusive grant of jurisdiction over civil law would be considered invalid. This would contradict the jurisprudence established by the Court over several decades.

The decisions in *Article 35* and *Trial Lawyers 2022* assume that superior courts *must* play a role in handling contractual and personal injury matters to ensure uniformity of justice and the rule of law. However, this raises a critical question: is it truly essential for superior courts to adjudicate contractual matters above a specific threshold? Should our focus not be on the manner in which the law is applied, rather than fixating on which specific institution applies it?[221] As Canadian political scientist Peter Russell observes, "[t]he real value that we should attempt to secure is that, where a person's rights and interests are affected … this decision is made as fairly and as impartially as possible."[222]

Moreover, the basis for distinguishing jurisdiction over contractual and minor injury disputes from any other historical artefact of superior court jurisdiction remains unclear.[223]

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220 This case has been criticized by academics and lawyers. Asher Honickman commented that the Court "fashioned a new individual right out of whole cloth and … anchored that right in the strangest of places – not in the *Charter of Rights and Freedoms*, but in section 96 ... "; Asher Honickman, "Looking for Rights in the All the Wrong Places: A Troubling Decision from the Supreme Court" (30 October 2014), online (blog): *Advocates for the Rule of Law* <ruleoflaw.ca/looking-for-rights-in-the-all-the-wrong-places-the-supreme-courts-troubling-decision-in-trial-lawyers-association> [perma.cc/V6NQ-YKWV]; Recently the Federal Court of Appeal rebuked the decision observing that "starting around the turn of this century, the Supreme Court began toying with a looser approach, one that has now been discredited and rejected. Under that approach … the text was not so much a constraint or an expression of the meaning of constitutional provisions. Rather, it was a cue, prompt, or springboard for the Court to fashion a much broader underlying feel, spirit, or vibe to widen the scope of the provisions. As a result, sometimes new unwritten constitutional rights, far removed from the constitutional text, were 'discovered': see, e.g., *Trial Lawyers* 2014 SCC 59"; *Canada v Boloh* 1(a), 2023 FCA 120 (CanLII) at para 20.

221 Russell, *supra* note 130 at 109.

222 *Ibid*.

223 In the event that private law *must* form part of the core, the better approach, in my opinion, is Wagner CJ's focus on ensuring that the superior courts handle an adequate volume of cases in terms of number and proportion in order to state and develop the law. Embracing this quantitatively focused interpretation of factors affecting superior court capacity to develop the law leads to the conclusion that *Article 35* did not impair section 96. While data on court caseloads is scarce, Wagner CJ notes that the proportion of civil cases before the superior courts has significantly increased, preserving their ability to play "a meaningful role in the development of the law" and protect the rule of law. Specifically, the data from 2017-18 reveals that approximately 45 percent of civil cases were opened at the superior court, a considerably higher proportion compared to the cases heard by the superior courts during Confederation, which was less than 20 percent. Furthermore, despite the increase in the monetary ceiling for the lower court to $85,000, the majority of cases opened at that court involve claims that do not exceed $40,000. A small fraction, approximately 3.3 percent of the civil cases opened at the Court of Québec in 2016-17 involved amounts ranging $70,001 and $85,000 (*Article 35, supra* note 23 at paras 142, 252-54).

For instance, consider condominium disputes. These conflicts were previously resolved solely by the British Columbia Supreme Court but are now mostly adjudicated by the British Columbia CRT.[224] Yet, the rationale behind accepting this differentiation remains elusive.

The issue of exclusivity in the original establishment of the core jurisdiction test in *MacMillan Bloedel* also merits consideration. In *MacMillan Bloedel,* Lamer CJ observed that the problem lay in the exclusive nature of powers transferred to the inferior court.[225] Accordingly, the *Residential Tenancies* test concluded the section 96 analysis when the challenged power of the inferior court or tribunal was concurrent. This suggested that the core doctrine would only apply when *exclusive* jurisdiction was granted to an inferior court or tribunal. However, the majority in *Article 35* departs from this limitation asserting that while a grant of jurisdiction may pass the *Residential Tenancies test,* this does not guarantee its constitutionality. An evaluation of its effects on the core jurisdiction of superior court is still necessary, even if the grant is concurrent.[226] Before *Article 35,* the *Residential Tenancies* test permitted jurisdiction transfers to inferior courts and tribunals when there existed a "meaningful concurrence of power" at Confederation.[227] Once this threshold was met, the section 96 analysis ended. Now, *Article 35* requires courts to consider the doctrine of the core when jurisdiction was *concurrent* during Confederation. This change marks a significant departure from the restricted approach to the usage of the core jurisdiction test. Importantly, does *Article 35* render the *Residential Tenancies* test redundant? Deciphering which elements of the *Residential Tenancies* test will persist in the new landscape becomes a challenging endeavour.

The majority in *Article 35* asserted that the new factors offer governments "clear guidance to determine what latitude it has under [section] 96 when it wishes to grant" another adjudicative forum "a significant portion of the common law without creating a parallel court."[228] However this latitude may yield contrary outcomes. Let us again consider condominium disputes in British Columbia where the CRT functions as the primary adjudicating body. Unlike in other areas, such as accident claims, the CRT's monetary jurisdiction in condominium disputes is unlimited[229] and its decisions cannot be appealed to the British Columbia Supreme Court.[230] Instead, they are subject to judicial review. Evaluating this transfer of jurisdiction today under the new modified core framework, it becomes challenging to determine its constitutional validity. If one were to emphasize the absence of a monetary ceiling and an appeal mechanism, as the majority did in *Article 35*, the transfer appears to violate section 96. However, if the focus shifts to the important societal objective of resolving

224 *CRTA*, *supra* note 193 at Division 4 of Part 10.

225 *Macmillan Bloedel, supra* note 7 at para 27.

226 *Article 35*, *supra* note 23 at para 80 [emphasis added].

227 *Residential Tenancies* 1996, *supra* note 8 at 77.

228 *Article 35*, *supra* note 23 at para 144.

229 *Ibid*; *Yas v Pope*, 2018 BCSC 282 at para 46.

230 The appeal provision, formerly section 56.5, was repealed in 2018. See *Civil Resolution Tribunal Amendment Act*, 2018, SBC 2018, c 17.

disputes "in a timely and cost-effective manner," as emphasized by the majority in *Trial Lawyers 2022,* it may not be in conflict with the constitution.[231]

The fact that CRT condominium decisions cannot be appealed to the British Columbia Court of Appeal may also be detrimental to its constitutional validity. In *Article 35*, the majority's discussion on appeal mechanisms revolved around whether there existed a "hierarchical distinction" between the Quebec superior court and the institution granted jurisdiction.[232] In that case, the inferior court decisions could not be appealed to the superior court, and there was a $60,000 threshold to appeal as of right to the Court of Appeal. In light of these considerations, the majority determined that the inferior court had transformed into a prohibited parallel court, thereby undermining the role of the superior court. However, in the CRT condominium scenario, there is no avenue for appeal whatsoever, whether to the superior or appellate courts. How much weight a court should attribute to the absence of an appeal mechanism is uncertain under the new core framework. The challenge lies in this ambiguity.

By advancing a test grounded in various qualitative factors, such as whether the scope assigned is vast and the significance of any societal objective, the Court has sanctioned an "undesirable level of subjectivity."[233] Perhaps most importantly, the Court missed an opportunity to delineate the specific judicial functions which merit constitutional protection. Instead, the Court provides governments and legal advisors with non-exhaustive factors when assessing section 96 in the context of government power transfers and the implementation of new adjudicative mechanisms. Some of these factors require an unacceptable degree of subjectivity. This lack of clarity makes it hard to appropriately support the adjudicative capacities of tribunals and alternative dispute resolution forums, while effectively eliminating section 96 shadow courts. As a result, the words of Noel Lyon continue to resonate even 37 years after publication: Noel Lyon writes, "[w]hen we know what judicial functions require the special protection of entrenchment, we will no longer see a threat to the constitution in every arrangement that seems to transfer authority from judges to administrators."[234]

B. Reimagining Section 96: The Quest for Clarity

The examination of *Article 35* unveils another significant issue: the existence of multiple tests for assessing section 96 infringements. Currently, there are three tests in play: the *Residential Tenancies* test, the core test, and the modified core test. Interestingly, the majority in *Article 35* stated that the multi-factored analysis was "*not* intended to replace the current law."[235] To be more precise, the Court held that the six factors must be considered "[w]here a transfer to a *court* with provincially appointed judges has an impact on the general private law jurisdiction

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231 Government of British Columbia, "The Civil Resolution Tribunal and strata disputes" (last visited 3 January 2024), online: <gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal> [perma.cc/7RLX-S9TM].

232 *Article 35*, *supra* note 23 at paras 119-23.

233 Hatherly, *supra* note 70 at 140.

234 Lyon, *supra* note 65 at 83.

235 *Article 35* at para 144 [emphasis added].

of the superior courts."[236] Some scholars questioned whether this ruling intended to limit the new test to cases involving courts only.[237] The application of the modified core test in *Trial Lawyers 2022* introduced a degree of uncertainty. The Supreme Court's refusal to grant leave to appeal means that the applicability of the modified core test to all section 96 challenges is yet to be definitively established.

Even if we assume that the modified core test applies to jurisdictional transfers to both courts *and* tribunals, the question remains: is there a need to maintain two separate tests, each with multiple factors to consider (i.e., the *Residential Tenancies* test and the core test)? It is time for the judiciary to contemplate simplifying the test for assessing section 96 infringements. Employing two tests unduly complicates the section 96 analysis and impedes the ability of Parliament and provincial legislatures to establish adjudicative bodies. Rather than providing a clear framework for government decisions on legislative and adjudicative initiatives, the current system presents a labyrinthine challenge for legal advisors.

Hogg and Professor of Law Wade Wright aptly point out that the transfer of powers, historically reserved for superior courts, is contingent upon satisfying the third step of the *Residential Tenancies*, and any exercise of those powers remains subject to superior court review.[238] This indicates that exclusivity alone is insufficient to eliminate superior court review based on administrative law principles. Consequently, the justification for retaining the core doctrine becomes challenging. Mark Mancini, a PhD student at University of British Columbia, offers an alternative approach of categorizing the core jurisdiction recognized in prior case law. He posits that this could accomplish much of the analytical work and potentially serve as a substitute for the *Residential Tenancies* test to safeguard the historical jurisdiction of superior courts.[239] This approach entails expanding the content of the core to encompass "substantive considerations (such as judicial review jurisdiction, private law jurisdiction, etc.) rather than simply procedural powers concerning the management of [the] inherent process."[240] The core jurisdiction test can effectively protect section 96's role on its own. Eliminating the *Residential Tenancies* test and focusing directly on the core analysis will bring more clarity and enable superior courts to preserve their vital role in upholding the rule of law.

However, Mancini's suggestion to broaden the core jurisdiction to include "private law" is not as sound. The challenge with incorporating the expansive jurisdiction of private law into the superior courts' core stems from the reality that this realm of authority, both historically

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236 *Ibid* [emphasis added].

237 Mark Mancini, "The Core of It: Quebec Reference and Section 96" (23 July 2021), online (blog): <doubleaspect.blog/2021/07/23/the-core-of-it-quebec-reference-and-section-96/#:~:text=In%20administrative%20law%2C%20s.,favour%20of%20administrative%20decision%2Dmakers> [perma.cc/ZX9F-7N73]; Paul Daly, "Life After Vavilov? The Supreme Court of Canada and Administrative Law in 2021" (Paper delivered at the CLEBC Administrative Law Conference, November 2021), online <administrativelawmatters.com/blog/2021/11/12/life-after-vavilov-the-supreme-court-of-canada-and-administrative-law-in-2021> [perma.cc/D5BA-5EDV].

238 Hogg & Wright, *supra* note 19 at 7,19.

239 Mancini, *supra* note 239.

240 *Ibid*.

and in the present, demonstrates the most pronounced demand for alternative avenues to facilitate prompt and cost-effective dispute resolution. Consequently, the courts should ensure the purpose of section 96 is met, that is that courts of inherent jurisdiction retain a key role in safeguarding the rule of law while avoiding unduly limiting the ability of legislatures to adopt alternative dispute resolution mechanisms. This approach necessitates a return to a narrow conception of the core.

Before *Article 35,* the core powers of superior courts encompassed crucial functions such as hearing constitutional challenges to federal and provincial administrative actions,[241] conducting judicial reviews of provincial (though not federal) administrative actions,[242] presiding over the most serious criminal cases,[243] and the authority to "control its process and enforce its orders."[244] With the exception of *McEvoy,* a common purpose of these constitutionally protected elements of inherent jurisdiction is that they are critical to upholding the rule of law. Among these powers, judicial review assumes particular significance, aligning closely with the foundational tenet of the rule of law — preventing arbitrary exercise of power.[245] Recently, in *Vavilov,* the majority of the Court acknowledged that "judicial review functions to maintain the rule of law while giving effect to legislative intent."[246] A narrower interpretation of the core, grounded in the preservation of the superior courts' supervisory role and resistant to scope expansion, aligns more cohesively with the historic compromise between superior court authority and the government jurisdiction over the administration of justice.[247] By maintaining a robust judicial review function, courts can ensure the preservation of superior court jurisdiction to state and advance the law, thereby upholding the "key principles" of uniformity of justice and the rule of law.[248] There is no need to further expand the scope by encompassing broader fields such as the "general private law jurisdiction."[249] Otherwise, the provinces' authority over the administration of justice is compromised.

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241 *Jabour*, *supra* note 82.

242 *Crevier*, *supra* note 81; *Federal Courts Act,* RSC 1985, c F-7 s 18: states that "the Federal Court retains exclusive judicial review jurisdiction over "any federal board, commission, or other tribunal."

243 *McEvoy*, *supra* note 83.

244 *MacMillan Bloedel*, *supra* note 7 at para 33.

245 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 27; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 13.

246 *Vavilov*, *supra* note 34 at para 2; One thing that the judiciary will have to work out is how to reconcile *Vavilov* and *Crevier. Crevier* asserts that jurisdictional review, as distinct from judicial review of questions of law more generally, is constitutionally guaranteed. In contrast, *Vavilov* critiques the utility of jurisdictional review as a concept and eliminated jurisdictional error as a distinct category requiring a correctness standard of review. Consequently, there is no separate classification of "jurisdictional" error that would allow a reviewing court to oversee, based on a correctness standard, the defined boundaries of an administrative decision maker's jurisdiction. The eventual alignment of these two approaches will be necessary.

247 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(14), reprinted in RSC 1985, Appendix II, No 5.

248 *Article 35*, *supra* note 23 at para 42.

249 *Article 35*, *supra* note 23 at paras 6, 71.

This is not to advocate for an overly restrictive interpretation of section 96 that would "maim"[250] the superior courts or reduce the provision to a mere appointing power, as suggested by the plain language of the text. The recognition of section 96 as "one of the important compromises of the Fathers of Confederation,"[251] must be balanced with respecting the provincial powers under section 92(14). For the superior courts to effectively serve as a "unifying force"[252] within the judicial system and to uphold the rule of law, the scope of their jurisdiction should be confined "to what is *necessary.*"[253] In this context, what is necessary encompasses a robust judicial review power.

C. Final Thoughts: Creating Space for Alternatives

The Constitution grants superior courts a "special and inalienable status," but it does not prohibit the creation of other courts and tribunals by Parliament or the legislatures.[254] When interpreting section 96, the Supreme Court should exercise caution to avoid stifling the creation of effective dispute resolution forums. Chief Justice McLachlin recognized the importance of tribunals and their need to "be clothed with powers" once exclusive to section 96 courts to fulfil their functions.[255] With this in mind, a sensitive approach is warranted in interpreting section 96, one that considers institutional pluralism and the value of legislative ingenuity and institutional design which has facilitated the emergence of innovative bodies like the CRT.[256]

This approach is crucial considering the growing consensus that access to justice in Canada has reached crisis levels,[257] although the problem is not new.[258] Chief Justice McLachlin stressed that a justice system fails if it does not deliver justice to the people it serves [259]Presently, financial constraints hinder many Canadians from accessing the justice system, leaving unrepresented litigants grappling with sometimes complex legal and procedural demands while others "simply give up" their pursuit of justice.[260] Chief Justice Wagner echoed McLachlin's sentiment, acknowledging

250 *MacMillan Bloedel Ltd, supra* note 7 at para 37.

251 *Residential Tenancies* 1979, *supra* note 58 at 728.

252 *MacMillan Bloedel, supra* note 7 at para 11.

253 *Article 35*, *supra* note 23 at para 239, Wagner CJ, dissenting [emphasis added].

254 *MacMillan Bloedel Ltd, supra* note 7 at para 52.

255 *Ibid* at para 53.

256 Paul Daly, "Section 96: Striking a Balance between Legal Centralism and Legal Pluralism", in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) at 96 [Daly, "Pluralism"].

257 Cole & Flaherty, *supra* note 29; Olivia Stefanovich, "'We're in Trouble': Advocates Urge Ottawa to Help Close the Access to Justice Gap", *CBC News* (18 April 2021), online: <cbc.ca/news/politics/access-to-justice-federal-budget-2021-requests-1.5989872> [perma.cc/6GLZ-LGM2]; Canadian Bar Association, "Canada's Crisis in Access to Justice", (April 2006), online: <cba.org/CMSPages/GetFile.aspx?guid=0bca7740-5d06-4435-8b4d-9d0603ecb429> [perma.cc/XXN3-YF7M].

258 Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil & Family Justice: A roadmap for Change" (October 2013), online: <cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf at 4> [perma.cc/45EU-597S][Action Committee]; Andrew Pilliar, "Filling the Normative Hole at the Centre of Access to Justice: Toward a Person-Centred Conception" (2022) 55:1 UBC L Rev 149 at 201: Andrew Pilliar refers to the access to justice problems as "less a crisis than a chronic condition".

259 McLachlin, *supra* note 29.

260 *Ibid*.

that denying access to justice also "reinforces existing inequities."[261] Interestingly, while relying on section 96 to protect the jurisdiction of the superior courts, judges also express concerns about the overwhelming caseloads, unacceptable delays, and high litigation costs.

For instance, a two-day civil trial in 2015 averaged over $30,000, with a five-day trial costing approximately $56,439.[262] These figures have likely increased since then. The time to reach a judgment poses another significant challenge. An analysis of civil judgments from superior courts in Ontario and British Columbia from 2014 to 2019 revealed an average trial duration of seven days in Ontario and eight days in British Columbia.[263] Additionally, the average "time-to-judgment in civil non-jury, non-family trials" was 98.3 days in Ontario and 127.4 days in British Columbia's superior courts.[264] The extended duration for courts to dispose of civil cases is also troubling and exemplified by the thirty-seven percent increase in the average time to dispose of a civil case in Ontario from 2014/15 to 2018/19.[265] Reports further indicate that over one-fifth of the Canadian population take "no meaningful action" regarding their legal problems, while over sixty-five percent feel uncertain about their rights, lack knowledge of what to do, anticipate significant time and cost, or simply feel afraid.[266] In this context, it is unsurprising that litigants "simply give up on justice."[267] These alarming statistics indicate the urgency of addressing the crisis of limited access to justice in Canada.

While traditional judicial courts have long been the bedrock of the justice system, they grapple with ongoing challenges such as overwhelming caseloads, delays, and limited resources. As a response, alternative dispute resolution mechanisms, including tribunals, have emerged over the past century. These forums often offer an efficient and effective means of resolving disputes, particularly in areas that demand specialized expertise.[268] By facilitating access to fair and competent adjudicators beyond the confines of traditional courts, alternative forums promote inclusivity and efficiency within the justice system while upholding the rule of law. The rule of law, in the contemporary legal landscape, need not be narrowly confined to the traditional judicial system. Rather, the rule of law encompasses more broadly "access to a fair and efficient dispute resolution process, capable of dispensing timely justice."[269]

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261 The Right Honourable Richard Wagner, P.C Chief Justice of Canada, "Access to Justice: A Societal Imperative" (remarks on the occasion of the 7th Annual Pro Bono Conference, Vancouver, 4 October 2018), online <scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx?pedisable=true> [perma.cc/4TQN-SXGP].

262 Michael McKiernan, "The Going Rate", *Canadian Lawyer* (June 2015), online: <canadianlawyermag.com/staticcontent/images/canadianlawyermag/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf> [perma.cc/FQL5-CC9T].

263 Kevin LaRoche, M Laurentius Marais & David Salter, "The Length of Civil Trials and Time to Judgment in Canada: A Case for Time-Limited Trials" (2021) 99:2 Can Bar Rev 286 at 295.

264 *Ibid* at 302–09.

265 Office of the Auditor General of Ontario, *Annual Report 2019: Reports on Correctional Services and Court Operations, vol 3* (Ontario: Queen's Printer for Ontario, 2019) at 98, online: <auditor.on.ca/en/content/annualreports/arreports/en19/2019AR_v3_en_web.pdf>.

266 Action Committee, *supra* note 258 at 4.

267 *Hryniak v Mauldin*, 2014 SCC 7 at para 25.

268 Hatherly, *supra* note 70 at 124.

269 *Vavilov, supra* note 34 at para 242, Abella and Karakatsanis JJ, dissenting.

The emphasis on superior courts in the formulation of the rule of law, as exhibited by the majority in *Article 35*, compromises the overarching societal objective of advancing access to justice.

This article's endorsement of alternative dispute resolution forums and a narrow interpretation of section 96 should not be misunderstood as an "aversion" to judicial decision-making.[270] An independent judiciary remains paramount in upholding the rule of law. But, as McLachlin CJ aptly observed, there is room for tribunals to function "without their activities being depicted, as somehow threatening to the rule of law. Rather, they have a critical role to play in maintaining that rule of law."[271] Promoting the use of tribunals should be viewed as a recognition of the inherent limitations of the court system in effectively addressing the growing complexity of social issues. While courts remain indispensable, preserving their jurisdiction should not impede access to justice or hinder legislative authority in administering justice under section 92(14). As Lorne Sossin rightly asserts, "[a]ccess to a *decision-maker* may make the difference between justice and injustice being done."[272]

CONCLUSION

Alas, the "section 96 problem" persists. In *Article 35,* the majority claimed the *Residential Tenancies* test was inadequate for cases where a broad transfer of jurisdiction had occurred.[273] Thus, to "better protect the constitutional status of [section] 96 courts", a modified core jurisdiction test was required.[274] This test apparently upholds the two key principles underlying section 96: national unity and the rule of law. However, in my respectful opinion, the new test needlessly derogates from the approach outlined in *MacMillan Bloedel*. First, with little support, the Court claims private law jurisdiction forms part of the superior courts' core jurisdiction. This is a significant and unjustified departure from the Court's previous descriptions of the core as "narrow," encompassing only powers "essential to the existence" of superior courts.[275] By departing from a narrow conception of the core, the majority may have created a chilling effect on the capacity of legislatures and Parliament to establish alternative dispute resolution mechanisms and, ironically, undermined the rule of law, a principle "central" to the judicial system's organization.[276] This departure from the *MacMillan Bloedel* approach becomes more pronounced since *any* transfer of power must now undergo a core test analysis even if it passes the *Residential Tenancies* test and "*even if the grant is not exclusive*." [277]

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270 Hatherly, *supra* note 71 at 123.

271 Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (Paper delivered at the Canadian Bar Association Conference, Ontario, 19 June 1999) 12 Can J Admin L & Prac 171 at 174.

272 Lorne Sossin, "Access to Administrative Justice and Other Worries" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publishing, 2013) at 1 [emphasis added].

273 *Article 35*, *supra* note 23 at para 79.

274 *Ibid.*

275 *Residential Tenancies* 1996*, supra* note 8 at para 56, Lamer CJ, concurring [emphasis added].

276 *Article 35*, *supra* note 23 at para 4.

277 *Ibid* at para 80 [emphasis added].

Moreover, the existence of multiple tests for section 96 adds another layer of complexity to an already intricate area of law, leading to confusion and unpredictable outcomes depending on the weight placed on each factor. Although the *Trial Lawyers 2022* case upheld the expanded jurisdiction granted to the CRT using the new multi-factored analysis, this ruling does not eliminate the potential risk that future courts may apply the six factors in a manner that restricts provinces from "experiment[ing] with new forms of access to civil justice."[278] Simply put, the new multi-factored analysis introduces "considerable discretion and subjectivity"[279] which complicates the determination of the adjudicative functions that tribunals can assume without infringing upon the jurisdiction of section 96 courts.[280]

While upholding the principles of the rule of law and uniformity of justice remain pivotal, a more balanced approach, one that respects the compromise made at Confederation and acknowledges the powers of provinces under section 92(14), is required. This entails limiting the jurisdiction of superior courts to what is *necessary* for them to effectively serve as a unifying force within the judicial system and uphold the rule of law. As suggested, this requires focusing on maintaining a robust judicial review power. By adopting a more cautious and limited definition of the core, we can preserve the integrity of superior courts while leaving space for alternative forums, thereby fostering a stronger and more accessible legal landscape for all Canadians. It should not be forgotten that tribunals play a significant role in upholding the rule of law and facilitating access to justice. Any expansive interpretation of section 96 that impedes the use of tribunals threatens the efficient and accessible enforcement of rights and jeopardizes the very foundation of the rule of law. As noted by Daly, "[e]ven the Privy Council … appreciated the desirability of reading section 96 so as to permit provincial innovation in dispute resolution, thereby opening up a space for institutional pluralism."[281]

278 *Ibid* at paras 163, 205, Wagner CJ, dissenting.

279 Hatherly, *supra* note 70 at 136.

280 Barry, *supra* note 46 at 151.

281 Daly, "Pluralism", *supra* note 256 at 92–93.

ARTICLE

THE DEFENCE OF MENTAL DISORDER: A DIVERGENCE IN THE APPLICATION OF *R V OOMMEN* AMONG CANADIAN COURTS AND THE NEED FOR REFORM

Nicole Welsh *

CITED: (2024) 29 *Appeal* 98

ABSTRACT

The law recognizes through section 16 of the *Criminal Code* that, in exceptional circumstances, a person may be incapable of possessing the knowledge or intent of wrongdoing necessary to ground criminal liability by reason of mental disorder. For three decades, the Supreme Court of Canada's decision in *R v Oommen* has been the leading case on when the section 16 defence applies, such that an accused may be deemed not criminally responsible on account of mental disorder. This article examines a recently emerging divide in the application of section 16 and *Oommen* among Canadian courts that narrows the class of accuseds who may succeed in raising the defence. It will first summarize the elements of the defence and the principles enunciated by the Supreme Court of Canada in *Oommen*, and the historical foundations that informed the decision. This article will then analyze the shift towards a more narrow application of section 16 and *Oommen*, and explain the fault in this approach in light of the history and purpose of the defence. Finally, this article will propose a law reform that would protect the public, recognize the humanity of those living with mental illness, and resolve the current confusion as to what it means to possess knowledge of wrongdoing.

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INTRODUCTION

Canada's criminal justice system plays a critical role in prohibiting conduct that causes harm or threatens the safety of individuals or the public interest. Its ultimate objective is to maintain a just, peaceful, and safe society.[1] Therefore, criminal law identifies certain behaviours that our society considers to be wrong and deserving of punishment.[2] If found responsible for breaching criminal law, an individual is labelled a "criminal" and penalized by way of imprisonment, a monetary fine, or both.[3]

Proving that a person committed a wrongful act or omission is insufficient to ground criminal liability. Criminal responsibility also requires an "operating mind".[4] The Crown must prove, beyond a reasonable doubt, that at the time of the offence the accused had the intention or knowledge of wrongdoing. This is referred to as "*mens rea*".

The law recognizes that, in exceptional circumstances, a person may be incapable of possessing the necessary *mens rea* by reason of mental incapacity. Accordingly, the *Criminal Code* (the "*Code*") has always exempted such persons from criminal responsibility.[5] The current rendering of this principle is found in Section 16.[6] In essence, the provision permits a person to argue that they are not legally responsible for a crime because a mental illness prevented them from possessing the requisite "guilty mind".[7]

In the leading case of *R v Oommen,* the Supreme Court of Canada clarified that a person must possess both the general capacity to know right from wrong in the abstract sense, as well as the ability to apply that knowledge in a rational way during the alleged criminal act.[8] Otherwise, section 16 applies and the accused is deemed "not criminally responsible on account of mental disorder" ("NCRMD").[9] While initially applied quite liberally in the two decades following *Oommen*, it appears that a number of Canadian courts are now taking a stricter approach to the application of section 16, such that fewer accused succeed in raising a defence of NCRMD. Under this stricter approach, individuals who suffered from delusional symptoms at the time of committing an offence, but who remained aware that society would regard their actions as morally wrong, are exempt from the defence on the justification that they merely have a deviant moral code.

This interpretation of *Oommen* has raised significant concerns among some members of the psychiatric and legal communities. Establishing the requisite elements of the section 16 defence often involves an accused undergoing a comprehensive clinical assessment by a psychiatrist, who then testifies as

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1 *R v M(CA)*, 1996 CanLII 230 (SCC) [*M(CA)*].

2 *Cloutier v Langlois,* 1990 CanLII 122 (SCC) at para 54.

3 *M(CA)*, *supra* note 1 at para 36.

4 Government of Canada, *Response to the 14th Report of the Standing Committee on Justice and Human Rights, Government Responses and Standing Committee Reports*, (2002) [Response to the 14th Report].

5 Marilyn Pilon, *Mental Disorder and Canadian Criminal Law*, PRB 99-22E, revised ed (Ottawa: Library of Parliament, 2002).

6 *Criminal Code,* RSC 1985, c C-46, s 16.

7 Response to the 14th Report*, supra* note 4.

8 *R v Oommen*, 1994 CarswellAlta 121, *1994* CanLII 101 (SCC) [*Oommen*].

9 Response to the 14th Report*, supra* note 4.

to their findings.[10] Specifically, concerns arise both in the narrow context of the evidence required to raise the defence, and more broadly in its ramifications for society and those who are mentally ill.

This paper examines the emerging divide in the application of section 16 and *Oommen* among courts across Canada. I will first summarize the elements of the defence and the principles enunciated by the Supreme Court of Canada in *Oommen.* I will then look to its historical foundations, such as to understanding how the Court reached its decision in *Oommen,* and its intent in doing so. Next, I will analyze the shift away from this intended application and explain why all Canadian courts must return to a more liberal approach in light of the history and purpose of the defence. Finally, I will suggest a law reform that would reduce *Oommen's* confusion and that would protect the public while recognizing the humanity of those suffering from mental illness.

I. WHAT IS THE CANADIAN TEST FOR THE MENTAL DISORDER DEFENCE?

The *Code* provides for a defence of mental disorder by stipulating, in part, that:

> 16(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.[11]

Therefore, the party raising the issue must show on a balance of probabilities that:

1. The accused was suffering from a mental disorder at the time of the offence;
2. The mental disorder rendered the accused incapable of either a) appreciating the nature and quality of their act or omission, or b) knowing that it was wrong.

A. Suffering from a Mental Disorder

Section 2 of the *Code* defines "Mental disorder" as a "disease of the mind".[12] A person suffers from a disease of the mind if an illness, abnormal condition or disorder impaired their mind and its functioning when they committed the offence.[13] The Supreme Court of Canada defined disease of the mind in *R v Cooper:*

> In summary, one might say that in a legal sense "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. In order to support a defence of insanity the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong.[14]

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10 Response to the 14th Report, *supra* note 4.

11 *Criminal Code*, *supra* note 6, s 16(1).

12 *Ibid*, s 2.

13 CED 4th, *Criminal Law—Defences,* "Exemption from Conviction" at §41 (March 2023).

14 *R v Cooper*, 1979 CanLII 63 (SCC) at 1159.

B. Knowing the Act was "Wrong"

Oommen is the Supreme Court of Canada's leading case on section 16's second requirement: that a mental disorder rendered the accused incapable of appreciating the nature of their offence or knowing it was wrong.

Oommen concerned the death of Gina Lynn Beaton. Mathew Oommen shot Ms. Beaton between 9 and 13 times while she slept.[15] Mr. Oommen admitted to the killing, but argued he was exempt from criminal responsibility by reason of the mental disorder provision. Mr. Oommen suffered from a mental disorder described to be a "psychosis of a paranoid delusional type".[16] When he committed the offence, his paranoia was fixated on a belief that the members of a local union were conspiring to "destroy him".[17] The night of Ms. Beaton's killing, Mr. Oommen became convinced that such individuals had surrounded his apartment with the intent of killing him. Unfortunately, he came to fear that Ms. Beaton, who requested to spend the night at his home, was also a conspirator commissioned to kill him. When someone rang the buzzers to all the apartments in his building, Mr. Oommen believed it was a signal to Ms. Beaton to kill him.[18]

After killing Ms. Beaton, Mr. Oommen called a taxi dispatcher several times to request the police to his apartment.[19] When police arrived, Mr. Oommen explained that he shot Ms. Beaton because she came at him with a knife, and he had no other choice. He repeated a similar story to his lawyer and other officers.[20] Investigators reported that Mr. Oommen thought the cops were, or ought to be, investigating why Ms. Beaton was trying to kill him.

At trial, psychiatrists testified that Mr. Oommen possessed the general capacity to distinguish right from wrong, and that he knew it was wrong to kill Ms. Beaton.[21] However, his delusion deprived him of that capacity, leading him to believe the murder was necessary and justified. Either he shoot Ms. Beaton, or she would kill him. The Court said that there was little doubt Mr. Oommen's delusions provoked the killing. The availability of the section 16 defence rather turned on the interpretation of the phrase "knowing [the act] was wrong".[22] Specifically, the question was whether, to be found NCRMD, an accused must have the general capacity to know right from wrong, or rather an ability to know that the particular act was wrong in the circumstances.

The trial judge convicted Mr. Oommen of second-degree murder. Although Mr. Oommen subjectively believed his actions were right, the judge held that he was not entitled to the defence of mental disorder because he demonstrated capacity to know society would not hold

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15 *Supra* note 8 at para 1.
16 *Ibid* at para 3.
17 *Ibid* at para 4.
18 *Ibid* at para 7.
19 *Ibid*.
20 *Ibid* at para 8.
21 *Ibid* at para 11.
22 *Ibid* at para 20.

the same belief.[23] The Alberta Court of Appeal set aside the conviction on the ground that the judge erred in his interpretation of section 16(1), and ordered a new trial.[24]

In a decision penned by Justice McLachlin, the Supreme Court of Canada dismissed the Crown's appeal, stating that the evidence could support a conclusion that Mr. Oommen was deprived of the capacity to know his act was wrong by the standards of an ordinary person.[25] The Court stipulated that the section 16 inquiry "embraces not only the intellectual ability to know right from wrong, but the capacity to apply that knowledge to the situation at hand".[26]

Justice McLachlin was quick to clarify that no authority requires an accused to establish that their delusion permits them to raise a specific defence, such as self-defence.[27] She explained that:

> …the question is not whether, assuming the delusions to be true, a reasonable person would have seen a threat to life and a need for death-threatening force. Rather, the real question is whether the accused should be exempted from criminal responsibility because a mental disorder at the time of the act deprived him of the capacity for rational perception and hence rational choice about the rightness or wrongness of the act.

She also distinguished situations where an accused failed to exercise their will, noting that the defence is unavailable to an accused claiming that a mental disorder rendered them incapable of controlling their volition.[28] Further, at paragraph 32, Justice McLachlin wrote that section 16 does not target persons who follow a personal and deviant code of right and wrong. Such persons choose to commit offences despite knowing society would find it wrong.

As such, to be held criminally responsible, an accused must possess both the general capacity to know right from wrong in the abstract sense, as well as the ability to apply that knowledge in a rational way during the alleged criminal act. In applying these principles, the court summarized that:

> ...while the accused was generally capable of knowing that the act of killing was wrong, he could not apply that capacity for distinguishing right from wrong at the time of the killing because of his mental disorder… because of that disorder, Mr. Oommen was deluded into believing that he had no choice but to kill. These findings are consistent with the conclusion that Mr. Oommen's mental disorder deprived him of the capacity to know his act was wrong by the standards of the ordinary person.[29]

In the past 29 years, Canadian courts have cited *Oommen* over 200 times. The Supreme Court of Canada itself has yet to subsequently apply its analysis or provide further comment.

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23 *Ibid* at paras 1, 16.
24 *R v Oommen*, 1993 ABCA 131 at para 30.
25 *Oommen*, *supra* note 8 at para 34.
26 *Ibid* at para 35.
27 *Ibid* at para 30.
28 *Ibid* at para 31.
29 *Ibid* at para 35.

II. WHAT IS THE HISTORY OF THE MENTAL DISORDER DEFENCE AND WHAT PRINCIPLES UNDERLIE *R V OOMMEN?*

To interpret the phrase "knowing [the act] was wrong" in *Oommen*, the Supreme Court of Canada canvassed the history of the current section 16 defence and its roots in the common law.[30] The provision originates from the English "insanity defence", which negated criminal responsibility where an accused was deemed "insane".[31] Prior to 1750, the defence was not carefully considered, mostly due to the view that insanity was some form of demonic possession.[32] As society and science's understanding of mental disorders evolved, so did the case law, culminating in the 1843 British House of Lords decision in *M'Naghten*.[33]

A. The M'Naghten Rules

In *M'Naghten,* the accused was charged with murdering civil servant Edward Drummond.[34] Mr. M'Naghten suffered from paranoid delusions at the time of the assassination, and his trial focused on what constituted a legal defence of insanity.[35] The jury ultimately returned a verdict of not guilty on the ground of insanity, causing significant public outcry.[36] The press described Mr. M'Naghten as a "dangerous lunatic at large" and asserted that such lenience in the justice system would cause chaos.[37] In response to the public's concern, the House of Lords addressed a series of hypothetical questions to the High Court Justices, to which they answered, in part:

> ... the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or it he did know it, that he did not know he was doing what was wrong.[38]

The answer comprised multiple rules, but one often hears reference to the singular M'Naghten "Rule". Dr. Thomas Dalby, explains in his article that this is a contraction of the responses to two of the questions and "relates to the cognitive test of knowledge of right and wrong with persons having a mental disease".[39] Subsequently, the insanity defence became known as the "M'Naghten Rule".

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30 *Ibid* at para 23.

31 The term "insanity" can trivialize, stigmatize, and harm those living with mental illness. I use this term only in reference to the historical name of the mental disorder defence.

32 Anthony M Platt, "The Origins and Development of the "Wild Beast" Concept of Mental Illness and its Relation to Theories of Criminal Responsibility" (1965) 1:1 J Hist Behav Sci 1 355 at 355.

33 *M'Naghten's Case* (1843), 8 ER 718 (UK) [*M'Naghten*].

34 *Ibid* at para 6.

35 *Ibid* at para 9.

36 *Ibid* at para 10.

37 Thomas Dalby, "The Case of Daniel McNaughton: Let's Get the Story Straight" (2006) 27:4 Am J Forensic Psychol 17 at 28.

38 *Ibid.*

39 *Ibid* at para 29.

B. The Canadian Criminal Code

While *M'Naghten* was heavily criticized, several countries continue to apply some basic variation of the Rule as a test for the defence of mental disorder.[40] In Canada, the M'Naghten Rule was incorporated into the *Code* at its inception in 1892. In its first writing, the defence was found under section 11, as an exact adoption of the English Commissioners' provision on the insanity defence and a direct replication of the M'Naghten Rule.[41]

This iteration continued until the 1953-54 amendments to the *Code,* when section 11 was re-enacted as section 16. The most notable change altered the wording in the provision from "*and* knowing that such act or omission is wrong" to "*or* knowing that such act or omission is wrong", therefore broadening the application of the defence.[42] The section read as follows:

> 16.(1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.
>
> (2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.
>
> (3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.[43]

Canada again amended the law in the 1992 *Code*. The word "insanity" was replaced by the words "mental disorder", and a person was no longer referred to as "not guilty by reason of insanity" but rather "not criminally responsible due to mental disorder". Additionally, subsection (3) was repealed on the basis that it was redundant to the main Rule.[44]

The jurisdictions that adopted some variation of the M'Naghten Rule recognized early on that the interpretation of the phrase "knowing that the act was wrong" was a significant issue in its application. In *R v Windle*, England's Court of Appeal held in 1952 that "wrong" did not mean morally wrong, but rather contrary to the law.[45] Other jurisdictions adopted a less stringent interpretation, stipulating that the defence was available when an accused knew his act was contrary to the law, but believed a reasonable person would find his actions morally right.[46]

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40 Gerry Ferguson, "Insanity" in WC Chan, Barry Wright & Stanley Yeo*, Codification, Macaulay and the Indian Penal Code* (London: Ashgate, 2011).

41 Gerry Ferguson, "The Mental Disorder Defence: Canadian Law and Practice" in Ronnie Mackay & Warren Brookbanks, *The Insanity Defence: International and Comparative Perspectives* (Oxford University Press, 2022) [Ferguson, "The Mental Disorder Defence"].

42 *Criminal Code,* SC 1953-54, c 51, s 16.

43 *Ibid.*

44 Ferguson, "The Mental Disorder Defence", *supra* note 41.

45 *R v Windle*, [1952] 2 QB 826 [*Windle*].

46 See *Stapleton v The Queen* (1952), 86 CLR 358 (HC Austl).

The Supreme Court of Canada was historically indecisive in which of these interpretations it adopted. In 1976, in *R v Schwartz,* the Supreme Court followed *Windle.*[47] In 1990, the majority in *R v Chaulk* reversed *Schwartz* stating that the focus of the wrong must be on whether the accused was capable of understanding "that the act [was] wrong according to the ordinary moral standards of reasonable members of society".[48] Chief Justice Lamer wrote:

> The principal issue in this regard is the *capacity* of the accused person to know that a particular act or omission is wrong. As such, to ask simply what is the meaning of the word "wrong" for the purposes of s. 16(2) is to frame the question too narrowly. To paraphrase the words of the House of Lords in M'Naghten's Case, the courts must determine in any particular case whether an accused was rendered incapable, b*y the fact of his mental disorder, of knowing that the act committed was one that he ought not have done*. [Emphasis in original.][49]

Four years later, in *Oommen,* Justice McLachlin summarized that "[a] review of the history of our insanity provision and the cases indicates that the inquiry focuses not on general capacity to know right from wrong, but rather on the ability to know that a particular act was wrong in the circumstances".[50]

III. HOW HAVE CANADIAN COURTS APPLIED THE TEST FOR THE MENTAL DISORDER DEFENCE?

As explained in *Oommen,* "the crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not".[51] As explained below, for the first two decades following the decision, the principles enunciated in *Oommen* were liberally applied; however, in recent years some courts have narrowed the approach.

Regarding *Oommen's* statements that section 16 does not permit an accused to merely substitute their own moral code for that of society, many were under the impression that this principle was not intended to apply to those acting under delusional symptoms.[52] However, it appears that a line of cases has moved towards an interpretation of *Oommen* in which it does. Subsequent decisions have criticized this approach, commenting on what they view to be a misinterpretation of *Oommen.*

The consequence seems to manifest as a divergence of two camps. The first suggests that an individual is NCRMD if they were delusional and believed themselves to be justified in their actions. The second suggests that the same person is only NCRMD if they believe that others would also view their actions as justifiable. Both lines of cases are examined below.

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47 *R v Schwartz*, [1977] 1 SCR 673, 1976 CarswellBC 53.

48 *R v Chaulk*, 1990 CarswellMan 385 at para 104, [1990] 3 SCR 1303 [*Chaulk*].

49 *Ibid* at para 106.

50 *Oommen, supra* note 8 at para 21.

51 *Ibid* at para 26.

52 *Ibid* at para 32.

A. The Initial Liberal Application

In the decade or so following *Oommen,* judicial application of the section 16 test was quite broad. In numerous cases, discussed below, the court permitted the defence in situations where the accused, in his delusional state, believed his acts were "right", despite acknowledging that society would find them morally reprehensible. A key component of the inquiry centred on whether the accused could rationally choose between what was right or wrong.

i. *R v Szostak*

Mr. Szostak was found guilty of criminal harassment and threatening death against his former common law wife, Ms. Młodzianowska.[53] He testified that he was spying on her apartment when his son began calling out for help. Ms. Młodzianowska testified that their son never called for help. Police found the accused banging on the door. In the following days, Mr. Szostak called Ms. Młodzianowska repeatedly to utter threats and derogatory messages. The court ordered an assessment to determine if he was exempt from criminal responsibility under section 16.[54] The psychiatrist found that Mr. Szostak suffered from alcohol-related dementia, which caused delusions.

The trial judge was satisfied that Mr. Szostak believed his actions to be justified "because, in his own mind, given his delusional misperception of a danger to his son, he thought he was entitled to engage in that conduct in order to protect the child".[55] It was of no matter, in the trial judge's reading of *Oommen,* that Mr. Szostak had a general understanding of right versus wrong. His delusion led him to believe that in the circumstances, society would view his actions as "right". In reaching this conclusion, the judge reproduced the following expert testimony:

> ... in my view, he simply wasn't able to accurately gauge the level of risk posed to his son, and in my view, that's why I don't think he knew what he was doing was morally wrong. He felt completely justified in his actions during that time period, both in the telephone calls that he made, as well as appearing at his former spouse's residence.[56]

The trial judge noted the psychiatrist's elaboration that "the accused, confronted with what he perceived to be a danger to his son, was evidently unable to contemplate any rational alternatives to the course of conduct he adopted, which involved intervening immediately by attending at the apartment purportedly to save his son and thereafter by making the threatening phone calls".[57] Therefore, the accused believed his conduct to be entirely justified.

Mr. Szostak appealed the NCRMD finding. In dismissing the appeal, Justice Rosenberg stated the following on behalf of the court:

> In this case, the appellant did have a general understanding of the difference between right and wrong and even appreciated that his actions were illegal. However, he also felt

53 *R v Szostak (No. 2),* 2007 ONCJ 393 [*Szostak*].

54 *Ibid* at para 1.

55 *Ibid* at para 16.

56 *Ibid* at para 10.

57 *Ibid.*

> compelled to threaten and harass the complainant to protect his son and believed he was justified in taking this course of action. In the words of McLachlin J. in *Oommen,* he was deprived of the capacity for rational perception and hence rational choice about the rightness or wrongness of his acts.[58]

The accused's knowledge that the act was illegal and that generally, he should not do it, was irrelevant. Justice Rosenberg concluded, "[i]t is possible that a person may be aware that it is ordinarily wrong to commit a crime but, by reason of a disease of the mind, believes that it would be 'right' according to the ordinary morals of society to commit the crime in a particular context".[59]

ii. *R v W (JM)*

Two youths hijacked a school bus and its occupants as part of a plan to coerce the government into allocating them land, where they could accumulate nuclear weapons and "threaten the rest of the world into changing the existing social order".[60] Both were later diagnosed with schizophrenia.

At trial, the medical evidence showed that the youths knew what they were doing was legally wrong, and that society would regard it as morally wrong.[61] A psychiatrist also found that while carrying out the offence, the youth perceived under their delusions that they were acting for the greater good. The judge questioned the reliability of the evidence, but noted that even if given full weight, the defendants failed to meet their section 16 onus because they knew it was morally wrong in the eyes of an ordinary person. The youths appealed. On appeal, the British Columbia Court of Appeal defined the law in the following manner:

> ... the important question is not just whether the accused understood the difference between right and wrong, or their awareness of society's views on those questions in particular circumstances, but whether, notwithstanding those understandings, they were able to make a rational choice between what they knew was legally and morally wrong and what their delusions told them was nevertheless justifiable - or at least desirable in their view of the world.[62]

However, the Court cautioned that *Oommen* did not go so far as to exempt those who understand society's views of morality but do not care, or c*hose* to act contrary to those views from criminal responsibility, as was the case here.[63] The Court upheld the trial judge's decision finding that the youths did not adduce satisfactory evidence demonstrating that they were so driven by their delusions that they could not rationally choose which course to follow.[64]

58 *R v Szostak*, 2012 ONCA 503 at para 57.
59 *Ibid* at para 59.
60 *R v W (JM), 1*998 CanLII 5612 (BCCA) at paras 1–5 [W *(JM)]*.
61 *Ibid* at para 9.
62 *Ibid* at para 28.
63 *Ibid* at paras 30–31.
64 *Ibid* at para 12.

Further, the youth's ability to alter their plan during the offence to better achieve its goals indicated that they were capable of logical choice.[65]

While the section 16 defence did not apply, the decision clarified that an accused is not barred from its application because he knew an ordinary person would find it wrong, but rather because he retained capacity to make decisions despite his delusions.[66]

B. Divergence from the Liberal Application

The novel and narrower interpretation of *Oommen* began to surface in the 2010s. A selection of the most controversial of those decisions are discussed below.[67]

i. *R v Campione*

Ms. Campione had a history of mental illness and delusional conduct, and became convinced that her husband and his family were part of a conspiracy to "eliminate and replace her".[68] Ms. Campione expressed concern that her mental illness was being used in a custody battle over her two daughters, and once stated, "[i]f I can't have the kids, no one else can".[69] She later drowned both girls in the bathtub and attempted suicide. Afterwards, in a video recording, Ms. Campione spoke of how she wanted to "take [her] babies to the safe haven" and how only God could protect her and them from her violent husband.[70] She was unsuccessful in raising an NCRMD defence.

On appeal, Ms. Campione submitted that the trial judge erred in "providing confusing and unnecessary directions to the jury on the meaning of "moral wrongfulness" by incorporating a passage from the decision in *R v Ross…*"[71] The impugned passage in the charge stated:

> Our Court of Appeal has put it more succinctly saying that a subjective belief by the accused that his conduct was justifiable will not spare him from criminal responsibility even if his personal views or beliefs were driven by mental disorder, as long as he retained the capacity to know that it was regarded as wrong on a societal standard.[72]

The defence argued that this over-emphasized the measure of the accused's acts against societal standards, which may cause jurors to misunderstand the application of *Oommen.* The defence argued that "an accused who honestly believes his or her actions are morally justifiable in line with normal societal standards, still qualifies for an NCRMD defence no matter how unreasonable that belief may be".[73] The Court disagreed, describing its interpretation of the "wrongfulness" inquiry at paragraphs 39-41:

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65 *Ibid* at para 33.
66 *Ibid* at para 36.
67 Other cases, while not summarized in this paper, have been noted as part of this divergence: See eg, *R v McBride,* 2018 ONCA 323; *R v Baker,* 2010 SCC 9.
68 *R v Campione,* 2015 ONCA 67 at para 11 [*Campione*].
69 *Ibid* at para 11.
70 *Ibid* at para 18.
71 *Ibid* at para 26.
72 *Ibid* at para 32.
73 *Ibid* at para 36.

> The ultimate issue for the jurors to determine was whether - in spite of her delusions and any honest belief in the justifiability of her actions - the appellant had the capacity to know that those actions were contrary to society's moral standards. The centrepiece of the inquiry is her capacity to know and to make that choice; it is not the level of honesty or unreasonableness with which she may have held her beliefs. Concentrating on the latter unduly complicates the inquiry for the very reason the appellant raises in support of her argument; it leads to the application of reasonableness considerations to the appellant's delusions and subjective belief.
>
> …
>
> In short, a subjective, but honest belief in the justifiability of the acts - however unreasonable that belief may be - is not sufficient, alone, to ground an NCRMD defence, because an individual accused's personal sense of justifiability is not sufficient. The inquiry goes further. The accused person's mental disorder must also render him or her incapable of knowing that the acts in question are morally wrong as measured against societal standards, and therefore incapable of making the choice necessary to act in accordance with those standards.[74]

In finding the passage was a correct presentation of the defence, the appeal was dismissed.

ii. *R v Dobson*

Perhaps the clearest divergence was in *R v Dobson.*[75] Mark Dobson was charged with two counts of first-degree murder after killing two friends and attempting to kill himself. The trio previously agreed to die by suicide together "so that their souls would travel to a different, divine world".[76] Mr. Dobson claimed that satanic beings guided him in the murder-suicide. He advanced the section 16 defence, arguing that he suffered from a significant mental disorder that rendered him incapable of knowing his actions were wrong in the circumstances.

The facts were undisputed, including that Mr. Dobson suffered from a severe mental disorder that was causally related to the murders. The trial judge heard evidence from four psychiatric experts. While all agreed that Mr. Dobson knew it was legally wrong to kill at the time of the murder, they disagreed as to whether he knew such actions were "morally" wrong.[77] The judge convicted Mr. Dobson on the basis that the "wrongness" inquiry must ask whether the accused "had capacity to understand that his actions, in the specific circumstances, would be regarded as wrong according to the moral standards of reasonable members of society".[78] In regard to Mr. Dobson, the judge answered in the affirmative.

The court of appeal reproduced the following passage summarizing the trial judge's understanding of "knowing that it was wrong":

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74 *Ibid* at paras 39–41.

75 *R v Dobson,* 2018 ONCA 589 [*Dobson*].

76 *Ibid* at para 3.

77 *Ibid* at para 6.

78 *Ibid* at para 8.

> Under the second branch of section 16(1), the term "wrong" refers to morally wrong, that is to say, contrary to the ordinary moral standards of reasonable men and women. What is "morally wrong" is not to be judged by the personal standards of the person charged, but rather, by his or her awareness that society regards the conduct as wrong. In other words, the exemption extends only to those accused of crime who, because of a mental disorder, are incapable of knowing that society generally considers their conduct to be immoral.[79]

A primary issue on appeal was whether the trial judge erred in that interpretation. While both sides agreed *Oommen* was the leading authority on the meaning of "wrong" in section 16(1), they had substantially different takes as to what it said.

The defence submitted that an accused only knows an act is wrong if they are capable of making a rational choice. Because Mr. Dobson was in a delusional state, he was incapable of making a rational choice and therefore was incapable of knowing his act was "wrong". Counsel cited the following excerpts of *Oommen* in support:

> The crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not.
>
> …
>
> Thus the question is not whether, assuming the delusions to be true, a reasonable person would have seen a threat to life and a need for death-threatening force. Rather, the real question is whether the accused should be exempted from criminal responsibility because a mental disorder at the time of the act deprived him of the capacity for rational perception and hence rational choice about the rightness or wrongness of the act.[80]

The Crown disagreed, submitting that *Oommen* states an accused can only be NCRMD if he lacked the capacity to know society would regard his act as morally wrong.[81] A court may not assess capacity with sole reference to an accused's delusional perceptions. It is insufficient that an accused believed his acts were right according to his own moral code, by reason of his delusional state. Interestingly, the Crown cited different passages of *Oommen* than those of the defence:

> …[t]he issue is whether the accused possessed the capacity present in the ordinary person to know that the act in question was wrong having regard to the everyday standards of the ordinary person…
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> …

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79 *Ibid* at para 7.

80 *Ibid* at para 18, citing *Oommen* at paras 26, 30.

81 *Ibid* at para 19, citing *Oommen* at paras 30, 32.

> Finally, it should be noted that we are not here concerned with the psychopath or the person who follows a personal and deviant code of right and wrong. The accused in the case at bar accepted society's views on right and wrong. The suggestion is that, accepting those views, he was unable because of his delusion to perceive that his act of killing was wrong in the particular circumstances of the case. On the contrary, as the psychiatrists testified, he viewed it as right. This is different from the psychopath or person following a deviant moral code. Such a person is capable of knowing that his or her acts were wrong in the eyes of society, and despite such knowledge, chooses to commit them.[82]

The Ontario Court of Appeal's decision suggested that various extracts of the Supreme Court's decision in *Oommen* may attract different interpretations. However, the court ultimately sided with the Crown's interpretation, which it found consistent with an "unbroken line of authority in this court".[83]

Justice Doherty's approach presupposes that a subjective, but honest belief that an act is justified is insufficient to find a person NCRMD. It is not enough that the accused could personally justify their actions. Regardless of any delusions or honest belief, their mental disorder must also render them incapable of knowing their actions were contrary to society's moral standards. The inquiry should not focus on whether the accused's subjective beliefs and delusions were reasonable. Justice Doherty summarized this position as follows:

> … an accused who has the capacity to know that society regards his actions as morally wrong and proceeds to commit those acts cannot be said to lack the capacity to know right from wrong. As a result, he is not NCRMD, even if he believed that he had no choice but to act, or that his acts were justified. However, an accused who, through the distorted lens of his mental illness, sees his conduct as justified, not only according to his own view, but also according to the norms of society, lacks the capacity to know that his act is wrong. That accused has an NCRMD defence. Similarly, an accused who, on account of mental disorder, lacks the capacity to assess the wrongness of his conduct against societal norms lacks the capacity to know his act is wrong and is entitled to an NCRMD defence.[84]

Mr. Dobson's evidence failed to convince the judge that "he did not have the capacity to know that his actions would be viewed as morally wrong in the eyes of reasonable members of the community".[85] As such, the Court of Appeal concluded that the judge did not err in interpreting the meaning of "wrong" in the manner reflected in the higher court's

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82 *Ibid.*

83 *Ibid* at para 22 (referring to *Campione, R v Ross*, 2009 ONCA 149 [*Ross*], *R v Woodward*, 2009 ONCA 911 [*Woodward*], *R v Guidolin*, 2011 ONCA 264 [*Guidolin*] and *Szostak*. Justice Doherty does not explain how each case support the Crown's contention, and respectfully, in my view they do not, as the cited paragraphs simply comprise general restatements of the legal principles in *Oommen* with minimal guidance on their application. Neither do they purport to deviate from *Oommen*. As such, I do not find such cases to warrant discussion here).

84 *Ibid* at para 24.

85 *Ibid* at para 30.

jurisprudence post-*Oommen*.[86] The Crown filed to appeal to the Supreme Court of Canada, but the appeal was never heard. *Dobson* was subsequently followed by other courts, most notably in *R v Mann.*[87]

iii. *R v Mann*

Balwinderpal Mann was charged with threatening to kill his father and nephew. Upon arrest, he told police that he knew what he was saying and that it was wrong. A psychiatric report noted Mr. Mann suffered from schizophrenia that rendered him unable to appreciate the nature or wrongfulness of his acts.[88]

The trial judge found Mr. Mann NCRMD based on his incapacity to make rational choices, relying on the passage in *Oommen* which states that the accused "must possess the intellectual ability to know right from wrong in an abstract sense but must also possess the ability to apply that knowledge in a rational way to the alleged criminal act".[89] He concluded that:

> …While it may be that the accused was aware that he was threatening both his father and nephew at a basic level, I find however I am satisfied that it is also at least more likely than not that at the time he did so he was not criminally responsible because due to his disease he had an impaired ability to exercise rational choice that reflected the reality of the situation around him. That lack of capacity grew out of his mental disorder and as a result he could not truly access the fact that his conduct was morally wrong in the circumstances.[90]

On appeal, a primary issue was whether the trial judge applied the wrong test for a finding under section 16.[91] In overturning the decision, Justice Durno noted that the trial judge did not have the benefit of the newly decided *Dobson* and applied a misinterpretation of *Oommen*. He stated:

> Whether regarded as a restatement of the morally wrong criteria (a view I share with the appellant) or as new law, *Dodson* [sic] is clear that the "narrow" test adopted by the *Dodson* [sic] trial judge is a correct statement of the test, a test that does not include the capacity to make rational choices.[92]

Justice Durno concluded that by relying on the fact that Mr. Mann's schizophrenia robbed him of the capacity to make a rational choice; the trial judge applied the wrong test.[93]

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86 *Ibid.*
87 *R v Mann,* 2019 ONSC 1949 [*Mann*].
88 *Ibid* at para 12.
89 *Ibid* at para 30.
90 *Ibid* at para 37.
91 *Ibid* at para 16.
92 *Ibid* at para 78.
93 *Ibid* at para 79.

iv. Other Notable Applications of *Dobson*

This paper does not purport to discuss each case in detail, but it is significant that a number of other Ontario courts have cited and followed Justice Doherty's interpretation of *Oommen* in analyzing the applicability of section 16 to an accused.[94]

While Ontario provides the earliest and most notable divergence in the interpretation of *Oommen,* this narrower application appears to be making its way to other provincial courts as well. For example, Justice Doherty's pronouncement in *Dobson* that an accused "is criminally responsible if he has the capacity to know that society regards his actions as morally wrong and proceeds to commit those acts, even if he believed that he had no choice but to commit those acts or considered them justified" was recently cited in Saskatchewan in *R v CL*, 2022 SKQB 10 at para 62.[95]

C. Judicial Response to the Narrower Application

Subsequent Ontario cases have commented on this divergence as being a misinterpretation of *Oommen.* Lower courts in that province have considered whether they are bound by the higher provincial judgments at the Ontario Court of Appeal, or *Oommen* at the Supreme Court of Canada level. Most notably, in *R v Minassian,* the Ontario Supreme Court heavily criticized *Dobson* for what it viewed to be a misinterpretation of *Oommen.*[96]

i. *R v Minassian*

On April 23, 2018, the accused, Mr. Doe, drove a van into pedestrians on a sidewalk on Yonge Street in Toronto killing and injuring numerous people.[97] Mr. Doe raised the defence of not criminally responsible within the meaning of section 16.

Mr. Doe was assessed by a number of experts. Each agreed that he was on the autism spectrum, and that some people with Autism Spectrum Disorder ("ASD") have intellectual impairments. However, the judge found that Mr. Doe did not have any cognitive impairments and was rather above average in intelligence. The experts agreed he was not psychotic, nor was he suffering from delusions during the attack. He fully appreciated his actions were legally wrong.

Justice Molley thoroughly reviewed the underlying principles of section 16(1). While ultimately finding the defence was unavailable to Mr. Doe, a number of points regarding the interpretation of *Oommen* and criticisms of the Ontario Court of Appeal's approach are worth noting. Justice Molley stated her opinion that four key principles emerge from *Oommen:*

1. Under a s. 16 analysis, the focus is not on the accused's intellectual capacity to know right from wrong in the abstract sense, but rather on the capacity to know that a particular act was wrong in the particular circumstances of the case;

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94 See *R v Pereira,* 2019 ONSC 4321 at para 106–107. See also *R v Ganchev,* 2021 ONSC 545 at para 111.

95 See *R v Lamontagne,* 2021 NSSC 44 at para 36. See also *R v Mann,* 2018 BCSC 2412 at paras 151–152.

96 *R v Minassian,* 2021 ONSC 1258 [*Minassian*].

97 At paragraph 4 of her decision, Justice Molley of the Ontario Supreme Court placed great emphasis on the fact that the accused committed this horrific crime for the purpose of achieving fame, and therefore refused to use his name in her Reasons for Judgment. As such, I refer to the accused in the same manner that she did, as John Doe.

2. The issue is whether the accused possessed the capacity to know that the act in question was morally wrong having regard to the everyday standards of the ordinary person;
3. An accused cannot be said to "know" something is "wrong" within the meaning of s. 16 if, because of a mental disorder, he lacks the capacity for rational perception and hence rational choice about the rightness or wrongness of the act; and
4. This does not excuse psychopaths or any other persons following their own deviant code of behaviour because they choose to do so, rather than because they are incapable of knowing that their acts are wrong in the eyes of society.[98]

She then acknowledged that in *Dobson* the Ontario Court of Appeal suggested *Oommen* was previously misinterpreted in requiring that the meaning of "wrong" in section 16(1) include, as a component, the capacity for rational choice.[99] Both counsel in *Minassian* expressed a view that the decision in *Dobson* was incorrect in law, and inconsistent with both the binding Supreme Court of Canada decision in *Oommen,* as well as other decisions of the Ontario Court of Appeal. Justice Molley agreed, explaining that each case cited in *Dobson* in support of its particular interpretation of *Oommen* actually supports the contrary view, that section 16 is available to an accused who is delusional and believed himself to be justified in his actions, regardless of what he thought society would think.[100]

Recognizing that despite not examining the "capacity to rationally decide" issue that arose in *Oommen,* the trial judge in *Dobson* never rejected it; instead his decision turned on his findings of fact.[101] The trial judge was not satisfied that Mr. Dobson was in a psychotic state during the killings. As such, whether Mr. Dobson thought his own conduct to be morally right was irrelevant.[102] Justice Molley stated that the trial judge's observations concerning the veracity of Mr. Dobson's evidence on his knowledge of wrongdoing were rather immaterial to his ultimate decision. Despite this, the Court of Appeal focused on this very issue, explicitly affirming its acceptance of the Crown's interpretation of *Oommen* reproduced above.[103]

Justice Molley disagreed. She stated that a delusion depriving an accused of the ability to make a "rational" choice about his actions is not the same as acting on one's "own moral code" and explained:

> … [I]f the test under the second branch of s. 16 is restricted in the manner suggested in *Dobson,* I agree with the observation of the trial judge that it would have little meaning in a case involving a serious crime such as murder. The more serious the crime, the greater the overlap between knowing something is legally wrong and knowing that society would view it as morally wrong. If an accused had the capacity to appreciate the nature and quality of his act (killing someone) and knew that it was legally wrong,

98 *Ibid* at para 58.

99 *Ibid* at para 60.

100 *Ibid* at paras 67–78 (regarding the decisions in *Ross, Woodward, Guidolin, Szostak* and *Campione*).

101 *Ibid* at para 79.

102 *Ibid* at para 80.

103 *Ibid* at para 82.

> it is hard to imagine a scenario in which he would be incapable of knowing that society would regard it as morally wrong. In my view, this is not in keeping with the *ratio* of the decision in *Oommen*… *Oommen* requires more than the intellectual knowledge that reasonable members of society would consider killing someone to be morally wrong.[104]

Ultimately, Justice Molley held that Mr. Doe's ASD did not deprive him of the capacity to rationally evaluate his actions, but rather he willingly chose not to comply with societal and legal norms.[105]

ii. Other Notable Criticism

Recent decisions of the Ontario Court of Justice have also denounced the expression of the law in *Dobson.* For example, in *R v Cheng*, 2021 ONCJ 248, the court endorsed Molley J.'s statement that the decision was incorrect at law and inconsistent with the Supreme Court of Canada's binding decision in *Oommen.*

IV. ANALYSIS OF THE DIVERGENCE

From canvassing the above case law, particularly that of Ontario in the past decade, some courts appear to be shifting towards a stricter application of the section 16 inquiry stipulated in *Oommen.* Specifically, a line of cases now interprets *Oommen* as precluding an accused from being found NCRMD where they have substituted their own moral code for that of society, even where that substitution was caused by delusions occasioned by a mental disorder.

This issue raises two important questions. First, whether this narrower application of *Oommen* is merely a function of the evidence presented in each case or a function of the courts interpreting and applying the law differently. Should it be the latter, the next question is which approach is correct, if either.

A. A Function of Evidence or Law?

In *Minassian,* Justice Molley suggested that what some perceive to be a discrepancy in the application of *Oommen* is simply a function of the specific evidence presented in each case. For example, in her opinion, no statement in *Campione* was inconsistent with the law as presented in *Oommen.* She further noted that the charge to the jury, which stated that "a subjective belief by the accused that his conduct was justifiable will not spare him from criminal responsibility even if his personal views or beliefs were driven by mental disorder…", was caveated by including the language from *Oommen* about the capacity to "rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not".[106] While the Court of Appeal in *Campione* acknowledged that the psychiatric evidence presented by the defence's expert could have supported an NCRMD verdict, it remained open to the jury to decide whether it accepted his evidence. Therefore, the statement of the law in *Campione* was in itself consistent with that in *Oommen.* However, based on the evidence,

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104 *Ibid* at para 84.

105 *Ibid* at para 205.

106 *Minassian, supra* note 94 at para 78.

the jury did not accept that Ms. Campione honestly believed that killing her children was the only way to keep them safe. The jury rather concluded that she knew killing her children was wrong in the circumstances.

This paper agrees with Justice Molley that in some cases, what others may view as a narrower application of the test resulting from a misstatement of the law in *Oommen* is simply a consequence of the evidence presented by the accused and that which was accepted by the trier of fact. However, other decisions, particularly that of *Dobson* and the line of cases following it, demonstrate a concerning stray from the principles stipulated in *Oommen.* Recall that in *Dobson,* the Ontario Court of Appeal accepted the Crown's submission that *Oommen* does not stand for the proposition that an accused, who in his delusional state believed his actions were "right", lacked the capacity to know right from wrong. This statement that *Oommen* does not allow an accused's delusions to be the basis for finding him NCRMD clearly differs from earlier decisions discussed above, which do appear to make such an interpretation.[107] Stated another way, the *Dobson* line of authority has deviated from requiring only that the accused was unable to rationally evaluate his actions. It necessitates a further expectation by the accused that a reasonable person in his position would have characterized his actions as justifiable.

B. Which Approach is Correct?

Having determined that the *Dobson* line of cases constitutes a different application of section 16 from those decisions penned in the two decades following *Oommen,* one must ask which interpretation is correct. That is, have earlier decisions misinterpreted the Supreme Court of Canada's statement of the test in *Oommen,* or did the court in *Dobson* unjustifiably digress from case law to write its own novel statement of the law? This paper holds that it is *Dobson* that has incorrectly interpreted *Oommen.*

i. The Purpose of the Mental Disorder Defence

Oommen must be interpreted in light of section 16's history and purpose. Before inflicting punishment for a crime or labelling an individual a criminal, Canadian criminal law requires proof that the accused, or a reasonable person in their position, had the intention or knowledge of wrongdoing.[108] Section 16 therefore shields individuals whose mental disorders prevent them from making rational choices from criminal responsibility.

There are many misconceptions as to what it means for an offender to be found not criminally responsible.[109] Some express concern that such persons "get away with" a crime or are afforded liberties that endanger the public.[110] However, an NCRMD verdict is

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107 See *W (JM)* (stating that *Oommen* permits an accused to be found NCRMD, despite being aware of societal views, if "their delusions told them it was nevertheless justifiable - or at least desirable in their view of the world").

108 Response to the 14th Report, *supra* note 4.

109 Community Legal Assistance Society, "Getting away with it": misconceptions about the mentally ill in the criminal law context" (25 September 2014), online: <https://clasbc.net/getting-away-with-it-misconceptions-about-the-mentally-ill-in-the-criminal-law-context/> [https://perma.cc/6CRU-WK24].

110 *Ibid.*

not an acquittal. Rather, it triggers an administrative process that gives effect to society's interest in protecting the public, while also ensuring that morally innocent offenders receive treatment rather than punishment.[111]

A provincial or territorial body, often known as a "review board", generally takes jurisdiction over the offender.[112] The options available to such boards range from ordering that the person remain in supervised community living, to ordering secure detention in a psychiatric facility. Such arrangements are in place until discharge requirements specified by the *Code* are met. Specifically, an absolute discharge is only permissible where the person no longer poses a significant threat to the safety of the public.[113] Further, research demonstrates that individuals found NCRMD experience greater restriction than those otherwise convicted, and are 3.8 times more likely to be detained than convicted offenders, and 4.8 times less likely to be released from detention.[114]

The purpose of this administrative process is to provide the offender appropriate care, while also controlling any potential threat to public safety. The majority of persons found NCRMD remain in the forensic psychiatric system indefinitely, under constant surveillance and treatment.[115] Trevor Aarbo was a senior director of patient care services at British Columbia's Forensic Psychiatric Hospital, where many individuals are admitted for treatment after an NCRMD verdict. He described the purpose as being to "treat people as patients, not criminals, so their symptoms can be managed… to provide treatment, and give them skills and rehabilitation so they can re-enter the community safely - while protecting the public".[116]

The Supreme Court of Canada has not specifically reconsidered its statements in *Oommen* regarding section 16. However, in the 2011 case of *R v Bouchard-Lebrun*, the Court re-emphasized the underlying principle that criminal responsibility must only be imposed where an individual can distinguish right from wrong, and rationally choose between the two under their own free will.[117] As such, one must proceed noting that the Supreme Court of Canada's position on exacting criminal responsibility remains unchanged.

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111 Government of Canada, "The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study" (last visited 1 January 2024) online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr06_1/p1.html> [https://perma.cc/77WU-RZWL].

112 *Ibid.*

113 *Criminal Code*, *supra* note 6, s 672.54.

114 Sandrine Martin et al, "Not a "Get Out of Jail Free Card": Comparing the Legal Supervision of Persons Found Not Criminally Responsible on Account of Mental Disorder and Convicted Offenders" (2022) 12:775480 Front Psychiatry 1.

115 Response to the 14th Report, *supra* note 4.

116 BC Mental Health & Substance Use Services, "What does it mean to be 'not criminally responsible' for a crime?" (24 July 2019), online: <http://www.bcmhsus.ca/about/news-stories/stories/what-does-it-mean-to-be-%E2%80%98not-criminally-responsible%E2%80%99-for-a-crime#:~:text=In%20B.C.%2C%20a%20court%20determination,the%20general%20public%20stay%20safe> [https://perma.cc/CR7T-G8S2].

117 *R v Bouchard-Lebrun*, 2011 SCC 58 at para 49.

ii. The Problems with *Dobson*

Dobson incorrectly interprets the law in *Oommen* and deviates from the purpose of the section 16 defence. The decision makes an arbitrary distinction among persons with mental illness and leaves an unduly narrow set of circumstances for an NCRMD verdict.

Dobson is most problematic in that it precludes an NCRMD verdict for an accused who believed he had no choice but to act, or that his acts were justified, but knew that society would regard the act itself as morally wrong. The court explicitly accepted the Crown's interpretation of *Oommen,* which was selective in omitting the passages of the decision that address the need to determine whether the accused, despite his mental disorder, retained capacity to exercise judgment or make rational choices. In doing so, *Dobson* places an unreasonable emphasis on an accused's conscious awareness of society's morality, when the question of whether he was able to willingly *exercise* that understanding is in fact at the crux of the inquiry. Such a distinction significantly narrows the circumstances under which the defence applies, especially for egregious crimes. Both courts in *Minassian* noted that this restriction renders the defence of little meaning in cases involving crimes like murder. In this regard, Justice Molley stated:

> The more serious the crime, the greater the overlap between knowing something is legally wrong and knowing that society would view it as morally wrong. If an accused had the capacity to appreciate the nature and qualify of his act (killing someone) and knew that it was legally wrong, it is hard to imagine a scenario in which he would be incapable of knowing that society would regard it as morally wrong.[118]

Recall *Chaulk,* where the court agreed that "wrong" in the context of section 16 meant more than "legally wrong". This position was endorsed in *Oommen* and was part of the history that the Court relied on in formulating the section 16 test. Thus, it seems counterintuitive to interpret *Oommen* in a manner that renders the principle irrelevant. Such an interpretation also makes an arbitrary distinction amongst individuals with mental disorders. Regardless of whether an accused thought society would think it wrong, if they suffered from a delusion which led them to believe their actions were nevertheless justified, that accused still acted outside his own volition by reason of his mental illness. Presumably, but for the delusions caused by the illness, they would not have committed the act. Committing a crime by reason of a delusional state cannot be equated to a psychopath acting by their own deviant moral code, which is what *Dobson* purports to do.

C. Proposed Reform to Judicial Application of the Law

i. The Root of the Problem

While this paper argues that *Dobson* is an incorrect statement of the law set out in *Oommen,* it also recognizes the difficulties inherent in the language of our leading case that occasioned such a divergence. It is clear from the above discussion that both courts and lawyers face difficulty in applying *Oommen.*

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118 *Minassian*, *supra* note 97 at para 84.

First, counsel often direct the court to different passages of *Oommen* in support of opposing positions. The Crown tends to emphasize those paragraphs that note section 16 does not apply to an accused with a deviant moral code. Contrarily, defence counsel seem to focus more on those paragraphs explaining that even if an accused was generally capable of knowing his actions were wrong, he may be NCRMD because his mental disorder deluded him into thinking he was justified in not applying that knowledge. Further, lengthy discussions of *Oommen* in many of the subsequent decisions evidence a grappling by judges to reconcile conflicting statements.

What is needed is a restatement of the law concerning the application of section 16 that denounces *Dobson* and prevents any future interpretation of *Oommen* as observed in that line of authority. The new approach must reflect a return to the first principles. It must effectively balance the rights of persons living with mental illness and the need to protect society, while supporting victims, their families, and witnesses.

A more liberal approach is supported by the history and purpose of section 16, as well as research pertaining to NCRMD verdicts. Notably, violent crimes account for approximately 8% of all NCRMD cases.[119] The majority of that 8% had a diagnosis on the psychosis spectrum, and their victims were almost always family members. Studies also conclude that persons found NCRMD, who were subsequently discharged following successful treatment, have very low rates of recidivism, especially in the context of violent crimes when compared to long-term offenders released from federal custody.[120]

The Mental Health Commission of Canada alerts us to the stigma surrounding mental illness and the difficulties in encouraging those suffering to seek treatment.[121] When a person with mental illness commits a serious crime, the best indicator of their likelihood to reoffend is whether they received subsequent treatment. This suggests that the most effective method of preventing future offences, and keeping the public safe, is to capture a wider range of offenders with some form of mental illness under section 16, such that they might be rehabilitated. The alternative is spending a determinate time in the prison system, culminating in a return to society, untreated.

Finally, it is concerning that once found guilty of a serious offence, an offender is often subject to a mandatory minimum penalty.[122] If that person was mentally ill, but in a manner insufficient to satisfy section 16, no weight may be given in sentencing to any contributing role of mental illness where the offence carries a life sentence.

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119 Mental Health Commission of Canada, "Fact Sheet: About the Not Criminally Responsible Due to a Mental Disorder (NCRMD) Population in Canada" online (pdf): <https://www.mentalhealthcommission.ca/wp-content/uploads/drupal/MHLaw_NCRMD_Fact_Sheet_FINAL_ENG_0.pdf> [https://perma.cc/45PL-3DEH].

120 *Ibid.*

121 *Ibid.*

122 Government of Canada, "Mandatory Sentences of Imprisonment in Common Law Jurisdictions: Some Representative Models" (last visited 1 January 2024) online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr05_10/p2.html> [https://perma.cc/HD2L-MASW].

ii. The Proposed Solution

Upon finding that an accused has a mental disorder, the court must ask whether he was capable of "knowing [the act] was wrong". In *Oommen,* the court suggested this was a two-part inquiry. First, the court must ask whether the accused possessed the cognitive ability to know right from wrong. Then, it must ask whether, despite his mental disorder, the accused retained a capacity to apply that knowledge to the particular circumstances of the offence.

In considering the former, I propose that the court ask whether the accused was generally aware that the act they committed was legally wrong. The latter focuses on the accused's ability to make a rational *choice* between right and wrong. If an accused's delusions led them to believe he was right to commit the act in the circumstances they perceived, then this requirement is not satisfied. Merely demonstrating that the accused had a general understanding of right and wrong, and that they knew their actions were illegal, will not suffice in establishing criminal responsibility. However, the defence will not be available should both questions be answered in the affirmative.

A point of contention has been applying the principle that section 16 does not apply to an individual acting under their own deviant moral code. In this regard, an accused acting under delusional symptoms is not substituting their own moral code for that of society. If a delusion rendered an accused unable to conceive of any rational alternative to the course of action they chose, they could not choose between right and wrong. Seeing no other option, such an accused believed themselves to be justified in their conduct.

I would go further in arguing that the defence should apply where an accused believed their acts were right according to their own "moral code" because of their delusional state. In my view, this situation differs from, and should not fall within, the exemption for psychopaths with a deviant moral code. Such individuals follow a deviant code by choice, not because delusions prevent them from knowing society would view their acts as wrong. Therefore, under this formulation of the test, an accused's delusions can be the basis for the NCRMD verdict if they affected his perception of reality such that he believed his actions were right in the circumstances.

CONCLUSION

It is a fundamental principle of Canadian law that criminal responsibility requires intention or knowledge of wrongdoing, and that those incapable of making a rational choice because of mental disorder are exempt under section 16 of the *Code.* While once applied liberally, recent case law demonstrates an exceedingly restrictive approach to the governing principles in *Oommen.* This approach, stemming from the decision in *Dobson,* fails to properly consider a mentally ill accused's capacity to exercise judgment and make rational choices and, as such, fails to reflect the history and purpose of the defence. Further, it constrains the application of modern psychiatric knowledge.

To resolve such discrepancies, I argue that one must look to first principles, which support a liberal application of the test. I propose that a court first ask whether the accused was cognitively capable of understanding the difference between right and wrong, then determine whether the accused was capable of applying that knowledge in the circumstances of the

offence. The latter is the heart of the inquiry and a question of whether the accused could rationally choose between right and wrong. The court should ask if the accused suffered from delusions as a result of his mental disorder. If so, the next question should be whether those delusions rendered him incapable of making a rational choice. Should the accused have believed, as a result of his delusions, that there was no other option in the circumstances than to commit the offence, then he was incapable of doing so and the defence should apply.

Perhaps nothing I propose is novel, but rather precisely outlines the range of circumstances Justice McLachlin intended the defence to apply to when she penned *Oommen.* However, to dispel the confusion and unreasonably narrow application of the test that exists, there must be a more clear and concise statement of the law. Particularly, one which clearly provides that delusions *can* be the basis for an NCRMD verdict. Such an application of section 16 is consistent with its history and purpose, as well as modern research pertaining to the presentation and treatment of mental illness.

ARTICLE

RECOVERING FROM THE INEQUALITY VIRUS: GIMME SHELTER OR PROTECTION FROM DISCRIMINATION FOR LACK THEREOF

Nikita Tafazoli *

CITED: (2024) 29 *Appeal* 123

ABSTRACT

The right to shelter has seen a markedly turbulent evolution in the jurisprudence. On the one hand, there is doctrinal optimism as to the possibilities left open by *Gosselin* and *Adams*. On the other hand, there is judicial confusion on whether such a right exists and how such a right might look. Trial and appellate courts in British Columbia and Ontario continue to oscillate between reliance on section 7 guarantees to enforce negative non-interference rights in striking down anti-encampment bylaws, with a reticence to heed any ground on equality claims advanced based on section 15 or similar provincial rights legislation. The judicial oscillation has led to inconsistency across provincial borders on what the *Charter* guarantees Canadians.

This article clarifies what such a right might look like and why it is both legally defensible and morally justified. I aim to draw a coherent picture of the underlying values of dignity and non-domination that animate considerations relating to housing and homelessness. To arrive at the argument, I survey extant case law, tracing the evolution of section 7 *Charter* cases and propose an argument based on a substantive account of equality and analogous grounds. The paper draws on Canada's international law obligations, including its domestically ratified commitments in the *National Housing Strategy Act*, provincial and federal case law, as well as relevant scholarship to argue for the necessity of linking rights within the constitutional framework where it concerns non-commercial human rights of a socioeconomic nature, such as adequate shelter and housing. These varied sources consider human rights as interrelated, giving renewed significance to the interpretation and merits of linking *Charter* rights. I use the Quebec COVID-19 Curfew Order as a case study to provide a glimpse of the socially constructed dimensions of homelessness.

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INTRODUCTION

"Housing rights are human rights, and everyone deserves a safe and affordable place to call home."[*]

Courts across the country have proved reluctant to extend the *Charter of Rights and Freedoms* ("*Charter*")[1] protection of equality to housing rights – be they equality claims based on homelessness as an analogous ground under section 15 or extending security of the person under section 7 to positive rights of adequate shelter.[2] On the other hand, the pandemic has exacerbated the distinct public health crisis that is poverty, including a long-term expected rise in homelessness,[3] disproportionately harming those at the socioeconomic margins while interacting with racialized and gendered inequality.[4] The pandemic marked a permanent change in the "political and cultural realities of Canadian society",[5] requiring a constitutional response to ensure that the *Charter* "speaks to the current situations and needs of Canadians."[6] Against the spectrum of socioeconomic rights, the living document that is the *Charter* has so far been more of a mangrove shrub than a maple tree. What follows thus proceeds from the premise that socioeconomic rights are inextricable from equality claims. People experiencing homelessness need only show that the distinction undermines substantive equality by perpetuating harm against them, such as historical economic disadvantage as well as psychological harms.

In a 1958 lecture, philosopher Isaiah Berlin argued for the bifurcation of the concept of liberty by tying a positive view of liberty to the notion of self-mastery and rational self-determination.[7] This conception has gained traction in cases where litigants have expressed a positive view of constitutional rights and freedoms. This characteristically positive view examines the state's role in promoting socioeconomic opportunities to increase the self-actualization of its citizens. The judicial trend thus far has consistently rejected this view in favour of a negative conception of rights and freedom. Negative freedom, as suggested by Berlin, views liberty as non-interference or the absence of interference by others.[8] This interpretation of freedom lives in many Western constitutional landscapes,

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

2 See below discussion at Part I.

3 Nick Falvo, "The long-term impact of the COVID-19 Recession on homelessness in Canada: What to expect, what to track, what to do" (December 2020), Final Report, Homeless Hub, online: <nickfalvo.ca/wp-content/uploads/2020/11/Falvo-Final-report-for-ESDC-FINAL-28nov2020.pdf> [perma.cc/9RMA-XNE8].

4 See Xinyue Duan, "The Relationship Between COVID-19 Pandemic and People in Poverty" (Aug 2020) UBC Sustainability Scholar Report at 1, online: <sustain.ubc.ca/sites/default/files/2020-41_Relationship%20between%20COVID-19%20and%20poverty_Duan.pdf> [perma.cc/WYX9-FSGF]; Deniqua Leila Edwards & Vanessa Poirier, "Poverty Pandemic Watch: The Effects of Poverty During COVID-19" (April-June 2020), Canada Without Poverty Report, online: <cwp-csp.ca/wp-content/uploads/2020/11/Poverty-Pandemic-Report-FINAL-Nov2.pdf> [perma.cc/5DYB-DYZS].

5 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 23 [*Canadian Western Bank*].

6 *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 78 *[Health Services*] .

7 Isaiah Berlin, *Four Essays on Liberty* (Oxford UK: Oxford University Press, 1969) at 131–133.

8 *Ibid* at 122.

such as Canada, whereby rights ultimately protect us against state interference. While negative rights emphasize freedom *from* government interference, positive rights require some direct state action to ensure meaningful access to rights.[9]

Part I traces the evolution of the 'right to shelter' cases that have emerged under section 7 of the *Charter*. According to a series of provincial decisions, while courts are willing to strike down or limit the application of anti-encampment bylaws under section 7, they consistently reject similar claims advanced under the section 15 equality rights. I turn to cases that invoked either a negative or positive right to suggest that the factors that determine judicial success include the framing of the substantive claim and presence of affirmative government action. The legal framing of the negative-positive rights dilemma is misleading and results in judicial restraint hindering the constitutional progress of human rights.[10] The decision in *Toussaint v Canada*[11] brings renewed significance to the justiciability of so-called positive rights claims and the binding nature of Canada's domestically ratified international obligations, such as the *National Housing Strategy Act ("NHSA")*.[12]

Part II foregrounds the equality link. I build on Jeremy Waldron's and Terry Skolnik's work on discrimination[13] to contend that homelessness – as a form of societal domination – can and should be recognized as a protected personal characteristic under s. 15 of the *Charter*. Drawing on Waldron's theory of homelessness and negative liberty and Catherine MacKinnon's work on domination and discrimination,[14] I suggest that the analysis of protected personal characteristics should be unambiguously tied to considerations of non-domination, the hallmark of true liberty. Against this backdrop, the Quebec Curfew Order[15] provides a glimpse of the socially constructed dimensions of homelessness – the picture that emerges is a stark lack of meaningful freedom, choice, and a general inability to obey the law. The article delves into a constitutional analysis of homelessness as a constructively immutable trait before surveying international human rights standards for persuasive guidance in *Charter* interpretation. I critique the judicial reticence, which has ultimately hindered the progressive realization of Canada's national and international commitments and obligations.

Part III discusses the security link and argues for the corollary recognition of a constitutional right to housing by affirming it as integral to security of the person rooted in the protection of human dignity. After noting how vagrancy laws engage the security interest under section 7,

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9 Normative arguments for a purposive interpretation of the *Charter* to include socioeconomic rights are well established; see Martha Jackman, "The Protection of Welfare Rights under the Charter" (1988) 20:2 Ottawa L Rev 257.

10 Margot Young, "Temerity and Timidity: Lessons from *Tanudjaja v. Attorney General (Canada)*" (2020) 61:2 C de D 469 at 480; Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin" (2019) 39 NJCL at 92 [Jackman, "One Step Forward"].

11 *Toussaint v Canada (Attorney General)*, 2022 ONSC 4747 [*Toussaint* ONSC].

12 *National Housing Strategy Act*, Canada, SC 2019, c 29, s 313 [*NHSA*].

13 Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991) 39:1 UCLA L Rev 295; Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 JLE 69.

14 Catherine MacKinnon, "Substantive Equality: A Perspective" (2011) 96 Minn L Rev 1 at 11.

15 *Clinique Juridique Itinérante v Attorney General of Quebec*, 2021 QCCS 182 [*Clinique*].

I turn to the possibility left open by the Supreme Court in *Gosselin v Quebec*.[16] Canada's statutory developments in legislative recognition of housing rights do little more than pay lip service to the legally binding instrument that is the *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR*").[17] To remedy this gap, a minimum positive rights approach should be adopted.

I. THE CONSTITUTIONAL "RIGHT TO SHELTER": TO DO OR NOT TO DO?

I discuss cases where claimants invoked either a negative or positive right to housing. Turning first to successful litigation in *Victoria (City) v Adams*[18] and subsequent cases, I note the judicial trend that characteristically rewards negative rights claims on narrow questions of government non-interference regarding homelessness. When rights violations are conceptualized as negative rights, plaintiffs are successful.[19] I then turn to the failed positive housing rights claim in *Tanudjaja v Attorney General (Canada),*[20] which was struck at a pre-trial motion.

A. The Genesis and Evolution of the Constitutional "Right to Shelter" Cases

In the absence of an authoritative ruling from the Supreme Court of Canada, lower courts remain divided on whether a constitutional right to shelter exists within Canada, and what such a right might resemble. While British Columbia courts seem to recognize and extend the constitutional 'right to shelter,' Ontario courts are more reluctant. This ongoing confusion creates an inconsistency that varies across provincial boundaries, signaling the need for clarity in the law on "whether the poor can benefit from *Charter* equality rights."[21] Individuals seeking rudimentary shelter are stuck between an oscillating 'right to do and not to do,' depending on the bylaw in question, the evidence presented, and the particular framing of the claim.

i. British Columbia Cases: *Victoria (City) v Adams et al*

The notion of a 'right to shelter' in the context of section 7 of the *Charter* first arose in the 2008 decision of the British Columbia Supreme Court in *Adams*.[22] The narrow question before the Court was whether a bylaw that prohibited homeless people from erecting a 'temporary abode overnight' in a public park violated their constitutional rights to life, liberty, and security of the

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16 *Gosselin v Quebec*, 2002 SCC 84, at para 83 [*Gosselin*] (whereby "one day s. 7 may be interpreted to include positive obligations [...] to sustain life, liberty, or security of the person [...] in special circumstances").

17 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [*ICESCR*].

18 *Victoria (City) v Adams*, 2008 BCSC 1363 [*Adams* BCSC], confirmed in *Victoria (City) v Adams*, 2009 BCCA 563 [*Adams* BCCA].

19 Martha Jackman, "Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?" in Robert J Sharpe & Kent Roach, eds, Taking Remedies Seriously (Montreal: Canadian Institute for the Administration of Justice, 2010) 279 [Jackman, "Charter Remedies"].

20 *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 [*Tanudjaja*]; upheld in *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852.

21 Bruce Ryder & Taufiq Hashmani, "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010" (2010) 51 SCLR (2d) 505 at 527.

22 *Adams* BCSC, *supra* note 18.

person. Justice Ross made a series of factual findings with respect to the specific bylaw at issue, such as the number of homeless people living in Victoria at the time, the number of available shelter beds, and noted that the bylaw does not prohibit sleeping in public spaces.[23] Individuals were legally permitted to sleep in the parks; just not to erect tents, tarps, or cardboard boxes as forms of rudimentary shelter. At no point were the litigants asserting a property right over the parks. Rather, they argued that the "city could not manage its own property in a way that interfered with their ability to keep themselves safe and warm."[24] Not only did the government create a bylaw prohibiting overnight shelters in parks, it also failed to provide sufficient beds for all the homeless. Taken together, this had the cumulative effect of forcing people to sleep in public spaces while denying them the right to erect temporary shelter, thus invariably exposing them to "significant health and safety risks."[25]

While Justice Ross finds the bylaw to be in violation of the right to security of the person in a way that is arbitrary and overbroad, he stops short of declaring that section 7 mandates a positive duty on the government to provide adequate housing. He cites *Gosselin* to note that the possibility for section 7 to include positive rights had not been foreclosed, but the plaintiffs in this case were not seeking such a finding.[26] Drawing the analogy to the situation in *Chaoulli v Quebec*,[27] where the prohibition on accessing private healthcare was found to violate the *Charter*, he reasons that the state's deprivation of a right was problematic, not the failure to provide it. Ultimately, the *Adams* case "did not afford the homeless any positive right to housing; it simply affirmed "a Charter right to sleep outside at night under a box.""[28] Similar cases challenging anti-encampment bylaws have emerged based on a narrow "right to shelter", as a distinct legal principle emanating from *Adams*.[29]

In *Johnston v Victoria*, the British Columbia Court of Appeal clarified that *Adams* "did not create a "right" to do anything" and noted that "the appeal decision mistakenly refers to a right to erect temporary shelters."[30] According to *Adams* and *Johnston*, recognizing a right "to do something" would amount to a property right, which the Court clarified was not the legal result.[31] Rather, *Adams* recognized "a right to be free of a state-imposed prohibition on the activity of creating or utilizing shelter". Its legal effect was thus to prevent such state interference.[32]

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23 *Ibid* at para 4.

24 *Ibid* at para 38.

25 *Ibid* (unavailability and insufficiency of shelters was framed around the inadequacy of what the city failed to provide).

26 *Ibid* at para 94, citing the majority and dissenting opinions in *Gosselin*, *supra* note 16.

27 *Ibid* at para 66, citing *Chaoulli v Quebec* [2005] 1 SCR 791 a*t paras* 183–85 [*Chaoulli*].

28 Colleen Sheppard, "'Bread and Roses': Economic Justice and Constitutional Rights" (2015) 5 Oñati Socio-Legal Series 1 at 235 [Sheppard, "Bread and Roses"], citing Jackman, "Charter Remedies", *sup*ra note 19 at 300.

29 *Vancouver Board of Parks and Recreation v Williams*, 2014 BCSC 1926; *Abbotsford (City) v Shantz*, 2015 BCSC 1909; *British Columbia v Adamson*, 2016 BCSC 584; *British Columbia v. Adamson*, 2016 BCSC 1245; *Nanaimo (City) v Courtoreille*, 2018 BCSC 1629; *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 [*Brett*]; *Prince George (City) v Stewart*, 2021 BCSC 2089.

30 *Johnston v Victoria (City)*, 2011 BCCA 400 a*t paras* 10–11 [*Johnston*] .

31 *The Corporation of the City of Kingston v Doe*, 2023 ONSC 6662, at para 65 [*Kingston*], citing *Johnston, supra* note 30 at para 11.

32 *Johnston, supra* note 30 at paras 11–13; *Adams* BCCA, *supra* note 18 at para 100.

In the 2022 decision of *Bamberger v Vancouver*, Justice Kirchner circumscribed the "constitutional right as articulated in *Adams*", noting that it is exercisable in two situations: (1) when the number of people who are homeless outnumbers the available indoor shelter beds and (2) the shelter is erected overnight.[33] Citing recent British Columbia cases, Justice Kirchner notes that while the jurisprudence has not expressly expanded the "scope of the constitutional right to daytime sheltering, it was not specifically enjoined."[34] For him, the question was only one of temporality: whether the existing right of sheltering in public parks could be extended to daytime hours. However, this limited *Charter* right has been refuted in recent Ontario cases where the nature of the prohibition in question restricted the legal analysis undertaken.[35]

ii. Ontario Cases: *Waterloo* and *Kingston*

In *Waterloo v Persons Unknown*, Justice Valente cites *Bamberger* to affirm that "the essence of the British Columbia decisions is the establishment of a constitutional right to shelter oneself when the number of homeless persons exceed the number of available and accessible indoor shelter spaces within a given jurisdiction."[36] To this he adds the condition of accessibility, namely that it is not purely a quantitative exercise of counting available beds. Rather "to be of any real value to the homeless population, the space must meet their diverse needs, or in other words, the spaces must be truly accessible."[37] Given that the encampment site in *Waterloo* concerned a vacant lot rather than a park created with the purpose of public enjoyment, Justice Valente forgoes the usual balancing exercise between the rights of those sheltering overnight and the interests of other residents. As a matter of judicial comity, he adopts British Columbia case law to find that "the constitutional right to shelter is invoked where the number of homeless individuals exceed the number of available and truly accessible indoor sheltering spaces" and "the Encampment residents' right to shelter is not limited to the overnight hours."[38] The bylaw exposes homeless persons to physical and psychological health risks, thereby depriving them of <u>security of their person</u>.[39] He finds the "ability to provide adequate shelter for oneself is a necessity of life that falls within the <u>right to life</u> protected by s. 7 of the Charter."[40] Shelter is also critical to an individual's dignity and independence,

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33 *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 [*Bamberger*].

34 *Ibid* at paras 13-20.

35 See *Black v Toronto (City)*, 2020 ONSC 6398 and *Poff v City of Hamilton*, 2021 ONSC 7224 where individuals sought an injunction to prevent the municipality from evicting them from city parks. The ONSC distinguished the BC decisions based on a factual finding that there were adequate shelter spaces to accommodate all the cities' homeless.

36 *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670 at para 82 [*Waterloo*].

37 *Ibid*.

38 *Ibid* at para 105.

39 *Ibid* at para 104 [emphasis added].

40 *Ibid* at para 96 [emphasis added] (Justice Valente further states that "the very clear and uncontroverted evidence before [him] is that exposure to the elements without adequate shelter can result in serious harm, inducing death.").

therefore interfering with the homeless population's choice to protect itself from the elements is a deprivation of liberty under section 7.[41]

In the 2023 decision of *Kingston v Doe* issued shortly after *Waterloo,* Justice Carter declared another anti-encampment bylaw unconstitutional under section 7.[42] After tracing the development of the "right to shelter" cases, Justice Carter concludes that no free-standing constitutional right exists, nor did the trial or appellate decisions in *Adams* purport to articulate such a right.[43] He further notes the principles of horizontal *stare decisis* apply to questions of law as a matter of judicial comity.[44] He finds that he is not bound by the *Waterloo* decision since the "conclusion with respect to day-time shelter is factual in nature and not a legal principle."[45] However, Justice Carter does not foreclose the possibility of daytime sheltering in parks, so long as the claimants do not purport to exercise exclusive use.[46]

In both *Waterloo* and *Kingston*, the section 15 equality claim is rejected. In *Kingston*, it was a question of insufficient evidence. In *Waterloo*, Justice Valente cites Justice Lederer's reasons in *Tanudjaja* in support of rejecting homelessness as an analogous ground, since it is neither a personal characteristic, nor a fact that is objectively discernible:[47]

> To my mind, there is inevitably a subjective element in determining what may or may not be accessible housing given an individual's particular circumstances […] Other than poverty, which is not an analogous ground, in my opinion there are no common characteristics that define those individuals experiencing homelessness in the Region […] While I acknowledge without hesitation that women, gender-diverse individuals, and those who suffer from mental illness and additions have been the subject of historic mistreatment, to my mind it does not follow that these groups of individuals, as compared to other groups, have been discriminated against in some way as a result of the By-Law.

B. The Constitutional Boogeyman of Justiciability: From *Tanudjaja* to *Toussaint*

i. The *Tanudjaja* Case: Positive Rights and Judicial Reticence

> "There is no positive obligation on Canada or Ontario to act to reduce homelessness and there are no special circumstances that suggest that such an obligation could be imposed in this case."[48]

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41 *Ibid* at para 101 [emphasis added], citing Justice Wilson in *R v Morgentaler*, 1988 CanLII 90 (SCC) at 164-166 [*Morgentaler*].

42 *Kingston*, *supra* note 31 at para 117.

43 *Ibid* at para 64.

44 *Ibid* at para 90, citing *R v Sullivan*, 2022 SCC 19 at paras 44, 46-56, 61-66, and 68.

45 *Ibid* at para 95.

46 *Ibid* at para 113 (disagrees with the City that invoking section 7 to protect sheltering amounts to the grant of a property right).

47 *Waterloo*, *supra* note 36 at paras 126–27.

48 *Tanudjaja, supra* note 20 at para 82.

These were the words of Justice Lederer when he granted the government's preliminary motion to dismiss the claim in *Tanudjaja*. Before him were four human beings, homeless or at the imminence of homelessness. The first claimant was a single mother living in precarious housing with her two sons unable to secure housing with her social assistance allowance.[49] The second claimant was a severely disabled man with two disabled children as his dependents living in inaccessible and unsafe housing unable to obtain subsidized accessible housing.[50] The third claimant was a widowed woman living with her two sons having been in and out of homelessness for years due to unaffordable housing.[51] The fourth claimant became homeless as he was unable to work and pay his rent due to his cancer diagnosis — he had awaited subsidized housing for four years.[52] Together, the four claimants asked the Court to recognize a positive right to housing based on the security of the person guarantee under the *Charter*. Notably, the case involved a positive rights dimension, which examined both government action and inaction. Justice Lederer expressed his sympathies but concluded that the courtroom was not the "proper place to resolve the issues involved."[53] By this he meant that socioeconomic rights are not justiciable in Canada. Surely, he would not be the first judge to open that can of worms. On appeal, Justice Feldman, in her dissenting reasons, finds "the motion judge erred in concluding that it is settled law that the government can have no positive obligation under s.7 to address homelessness […] *Gosselin* specifically leaves the issue […] open for another day."[54] She would not have struck the appellants' section 7 claim, suggesting the lower court was too quick to dismiss the 10 000 page, 16-volume record of evidence put before it.[55] She cautions that "it is premature and not within the intent of *Gosselin* to decide there are no "special circumstances" in such a serious case, at the pleadings stage."[56] Ultimately, the Ontario Court of Appeal dismissed the appeal.

ii. The *Toussaint* Case: A Novel Claim on the Right to Access Health Care

The *Toussaint* case brings renewed significance to the justiciability of positive rights claims and the binding nature of Canada's domestically ratified international obligations, such as the *NHSA*. The case raises novel questions about the relationship between various orders and sources of law, namely the enforcement of (1) human rights guarantees under the *Charter*, (2) human rights obligations under Canada's treaty obligations, and (3) similar obligations under customary international law.[57] The case speaks to the profound interrelationship between the *Charter*, customary international law, and domestic administrative law.[58]

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49 *Ibid* at para 13.
50 *Ibid*.
51 *Ibid*.
52 *Ibid* at para 14.
53 *Ibid* at 82.
54 *Tanudjaja*, *supra* note 20 at para 62.
55 *Ibid* at 66.
56 *Ibid*.
57 *Toussaint* ONSC, *supra* note 11 at para 3. *Toussaint v Canada (Attorney General)*, 2023 ONCA 117 allowed Canada's appeal in part on the issue of raising a limitations period defence and upheld the decision as to the ONSC's jurisdiction.
58 *Ibid* at para 146.

Ms. Nell Toussaint's tragic case signals a shift in the judicial current that has thus far been reticent to extend the recognition of justiciable human rights of a socioeconomic nature. It may present the type of 'special circumstances' necessary to recognize the merits of homelessness as worthy of protection from discrimination, with the jural correlative of a right to adequate housing or shelter. The unfortunate series of events spanned over two decades following Ms. Toussaint's lawful entry into Canada in 1999. Following the expiry of her visitor status in 2005, she was unable to regularize her resident status due to conditions beyond her control and remained in Canada as an irregular migrant. In 2009, Ms. Toussaint required urgent medical care, which Canada repeatedly denied over four years. In 2013, after gaining residency status and exhausting her domestic remedies at the Federal Court, she made a submission to the UN Human Rights Committee that Canada had violated her right to life and her right to non-discrimination.[59] In 2018, the Committee agreed that Canada violated Ms. Toussaint's right to life and non-discrimination recognized in articles 6 and 26 of the *International Covenant on Civil and Political Rights* ("*ICCPR*"), and equally failed to uphold its international obligations to ensure irregular migrants are not denied access to health care when their lives are endangered.[60] Pursuant to its undertaking in article 2.3 (a) of the *ICCPR,* Canada must provide Ms. Toussaint with an effective remedy and ensure future violations are prevented.

In a sweeping decision, Justice Perell dismissed Canada's motion to strike Ms. Toussaint's claim on the grounds of, *inter alia*, jurisdiction and justiciability. The Court of Appeal agreed with Justice Perell that the Ontario court has concurrent jurisdiction with the Federal Court in applications of judicial review where it concerns *Charter* claims against the federal government. Furthermore, the Minister's decision not to implement the UNHRC recommendation was an exercise of a Crown prerogative, and thus outside the exclusive jurisdiction of the Federal Court. Since all exercises of government discretion must conform to the *Charter* and Canada's prerogative powers are subject to judicial review,[61] the claim is reviewable.[62] Justice Perell makes a series of key findings on how the substantive claim is framed and Canada's relevant international obligations.

First, on the issue of framing, Justice Perell notes that Canada's mischaracterization of Ms. Toussaint's claim as a free standing constitutional right to universal healthcare is "a dog whistle argument that reeks of the prejudicial stereotype that immigrants come to Canada to milk the welfare system."[63] Her claim did not assert such a right, therefore "Canada's argument is a fallacious straw man argument that might successfully knock down claims that are not

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59 *Toussaint v Canada (AG)*, 2010 FC 810 (CanLII), aff'd 2011 FCA 213.

60 Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2348/2014*, 2018, UN Doc CCPR/C/123/D/2348/2014, online: <escr-net.org/sites/default/files/caselaw/toussaint_judgment.pdf> [perma.cc/3LXD-LEZR].

61 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [*PHS*]; *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC); J.A. Klinck, "Modernizing judicial review of the exercise of prerogative powers in Canada" (2017) 54 Alta L Rev at 997.

62 *Toussaint* ONSC, *supra* note 11 at paras 96-97, citing *Black v Canada (Prime Minister),* 2001 CanLII 8537 (ONCA) at paras 74, 76.

63 *Ibid* at para 134.

being asserted."[64] Justice Perell's explicit rejection of the 'framing issue' that continues to bar rights claimants at the procedural stage will make such mischaracterizations increasingly difficult. However, the reach of the *Toussaint* decision may be limited. As the reasoning in the *Kingston* decision suggests, the precedential weight of cases like *Toussaint* may be narrowly circumscribed to the immigration and healthcare context. In other words, Justice Carter's decision in *Kingston*, which followed the *Toussaint* decision just a few months later, could have considered the 'framing issue' of government action and inaction and the related issue of positive rights, but ultimately did not.

Second, on the question of judicial review, the *Toussaint* decision recalls the primacy of *Charter* compliance in the administrative law context, which extends to all exercises of statutory discretion.[65] To ascertain the reasonableness of state action, the courts apply the Doré/Loyola public law framework,[66] even where it concerns non-binding recommendations issued by the UNHR.[67] Citing *Nevsun v Araya*,[68] the *Toussaint* case highlights the principle of *pacta sunt servanda*, according to which all treaties are binding and must be performed in good faith — a central unifying principle of *jus cogens* and of the international legal system.[69] The *pacta sunt servanda principle* requires that "parties to a treaty must keep their sides of the bargain and perform their obligations in good faith."[70] Canada's actions pursuant to international law obligations and the courts' ability to review them as both a procedural and substantive matter falls into this latter category.

In this way, *Toussaint* may have significant implications in the context of the right to housing when considering Canada's domestically ratified international obligations. The *NHSA* recognizes and affirms the right to adequate housing as a fundamental human right found in international law and ties the right to the inherent dignity and well-being of persons.[71] It also declares the housing policy will "further the progressive realization of the right to adequate housing as recognized in the [*ICESCR*]."[72] The *NHSA* establishes a Federal Housing Advocate, a National Housing Council, and a Review Panel, which provide the government with non-binding "recommended measures" and opinions.[73] Accordingly, Canada's response to the measures that emerge from the *NHSA*'s mechanisms should similarly be judicially reviewable to check for reasonableness and good faith. In tandem with the Supreme Court's recent decision in

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64 *Ibid* at para 136.

65 *Ibid* at paras 150–153, citing *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 41; *R v Conway*, 2010 SCC 22.

66 *Doré v Barreau du Québec* 2012 SCC 12; *Loyola High School v Québec (Attorney General)* 2015 SCC 12.

67 *Toussaint* ONSC, *supra* note 11 at paras 198-199 (reasoning that it is not "plain and obvious" that the case is doomed to fail where Canada is alleged to be in breach of international obligations which it has domestically ratified).

68 *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras 70-73.

69 *Toussaint* ONSC, *supra* note 11 at paras 181–182.

70 *Ibid*, citing *Canada v Alta Energy Luxembourg SARL*, 2021 SCC 49 at para 59.

71 *NHSA*, *supra* note 12, s 4 (a)-(d).

72 *Ibid*.

73 *Ibid*, s 6, 13, 16.1.

Comission Scolaire[74] affirming the robustness of the *Doré* duty, plaintiffs could argue that once they establish a *Charter* engagement, the requirement of responsive justification requires the state or decision-maker to demonstrate a proportionate balancing of rights and statutory objectives. This way, any evidentiary hurdles in the context of judicial review may be partially alleviated when the onus shifts to the state actor to justify their decision.

II. THE EQUALITY LINK: HOMELESSNESS AS SOCIETAL DOMINATION

The recognition of homelessness as an analogous ground has the dual effect of "remedy[ing] the constitutional exclusion this group has experienced since the *Charter*'s enactment" while fulfilling Section 15's purpose to "prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice."[75] Under what conditions could homelessness – the status of lacking any real private property right for an indeterminate period – constitute a protected ground upon which to seek protection from discrimination under the law?

According to extant Canadian jurisprudence, the answer is unequivocally none. Courts across the country, at both appellate and trial levels, have categorically rejected equality arguments based upon homelessness as a personal characteristic — reasoning, on the one hand, that it is too amorphous to be circumscribed meaningfully, and that, either way, it fails to constitute an "immutable" or even "constructively immutable" trait to deserve protection from discrimination.[76] In other words, should Parliament or a provincial legislature enact a law to the explicit effect that "homeless people cannot receive vaccines", this legislation would not contravene the equality protection under section 15 of the *Charter.* Such an ex-post rationalization is both detached from and unduly reduces the real moral concerns underlying equality – as well as the lived experiences of society's most marginalized – to the antiseptic confines of legalistic reasoning.

A substantive equality framework remains pivotal to address the structural causes underpinning homelessness, and poverty more generally, as a societal problem. An emphasis on equality rights under section 15, regardless of any enforceable socioeconomic rights under other provisions, ensures appropriate focus on the discrimination endured by the most marginalized of society – a key condition in assessing the "reasonableness" of such government policies under international human rights law.[77] In other words, an equality framework sheds light on and makes more transparent the varying ways in which the homeless are stigmatized, recognizing that extreme poverty is more than simply a matter of unmet material needs but

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74 *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)* 2023 SCC 31 [*Commission scolaire*].

75 Emily Knox, Jeanne Mayrand-Thibert & Michelle Pucci, "Ticketing Poverty: An Analysis of The Discriminatory Impacts of Public Intoxication By-Laws on People Experiencing Homelessness in Montreal" (2023) 32 Dal J Leg Stud [Knox] at 176, citing *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at para 51 [*Andrews*].

76 *Tanudjaja*, *supra* note 20 at paras 103–10.

77 *Toussaint* ONSC, *supra* note *10.* See discussion above at Part I(B)(ii).

also, crucially, a denial of dignity and thus equality. To quote the *Federal Poverty Reduction Plan* by the House of Commons' Standing Committee, an equality approach "limits the stigmatization of people living in poverty".[78] In a similar vein, as the Senate Sub-Committee on Cities notes in its report, *In from the Margins*:

> The *Charter*, while not explicitly recognizing social condition, poverty or homelessness, does guarantee equality rights, with special recognition of the remedial efforts that might be required to ensure the equality of women, visible minorities (people who are not Caucasian), persons with disabilities, and Aboriginal peoples. As the Committee has heard, these groups are all overrepresented among the poor – in terms of both social and economic marginalization.[79]

What follows thus proceeds from and presumes the premise that socioeconomic rights are inextricable from equality claims. Building on legal philosopher Jeremy Waldron's and Professor Terry Skolnik's work on discrimination,[80] this article contends that homelessness can and should be recognized as a protected personal characteristic under section 15 of the *Charter*. The argument is twofold. First, using the Quebec government's mandated curfew order as a case study, we glean the socially constructed dimensions of homelessness. The picture that emerges is a stark lack of meaningful freedom, choice, and a general inability to obey the law. Second, drawing on Jeremy Waldron's theory of homelessness and negative liberty and Catherine MacKinnon's work on domination and discrimination,[81] the section suggests that the analysis of protected personal characteristics should be unambiguously tied to considerations of dignity and non-domination, the hallmark of true liberty. Against this backdrop, the article delves into a constitutional analysis of homelessness as a constructively immutable trait – akin to the recognition of "off-reserve residential status" as a protected ground in the Supreme Court decision of *Corbiere*[82] – before surveying international human rights standards for persuasive guidance in the *Charter* interpretation.

A. Discrimination Beyond The Two Concepts Of Liberty

The positive and negative rights debate has occupied large terrain in Canadian legal academia since the genesis and patriation of the *Charter*. The rigid bifurcation of positive and negative

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78 House of Commons, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada*: *Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities*, 40-3 (November 2010) (Chair: Candice Hoeppner) online: <ourcommons.ca/Content/Committee/403/HUMA/Reports/RP4770921/humarp07/humarp07-e.pdf> [perma.cc/8556-RVYN].

79 Senate, The Standing Senate Committee on Social Affairs, Science and Technology, *In From the Margins: A Call to Action on Poverty, Housing and Homelessness: Report of the Subcommittee on Cities*, (December 2009) at 69, online: <sencanada.ca/content/sen/Committee/402/citi/rep/rep02dec09-e.pdf> [perma.cc/N8J5-N6US].

80 Waldron, *supra* note 13; Skolnik, "Homelessness", *supra* note 13.

81 MacKinnon, *supra* note 14.

82 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*].

rights and government action reflects an unsettled debate in Canadian constitutional law.[83] The framing of the distinction is dubious – many judges themselves increasingly questioning the sharp divide.[84] The centrality of the rights dichotomy effectively bars *Charter* claims at the pre-trial stage – hindering the very social inclusion the *Charter* was created to protect. The effect of this discursive move is to foster confusion and disadvantage some of the most marginalized members of society. Those individuals living through situations of homelessness do not have the means to continually litigate *Charter* claims. In such cases, Colleen Sheppard notes:

> "Erasure occurs through a range of conceptual and discursive techniques, including the purported centrality of the positive versus negative rights dichotomy, the division between civil and political versus social and economic rights and arguments about judicial incapacity to adjudicate social and economic rights."[85]

Questions of socioeconomic justice should be understood as questions of substantive human rights.[86] One need only turn to the history of the Supreme Court of Canada's decision making in the past 40 years of *Charter* litigation to see that the Court has recognized that rights are comprised of both negative and positive dimensions. A brief survey of previous case law suggests the rights dichotomy is a futile angle to approach *Charter* litigation. According to Sandra Fredman, most rights comprise a positive dimension as they are situated within and carried out by an active state apparatus.[87] Rights equally have a negative dimension when they require the government *not* to step in. They are two sides of the same coin: whether the argument involves freedom from government interference or a right to government action, the right being heralded is the same. The distinction "is notoriously difficult to make [and] appropriate verbal manipulations can easily move most cases across the line."[88] Accordingly, the Supreme Court has applied a unified legal standard to a wide variety of rights claims. For instance, this purposive approach is consistently applied to equality rights as seen in *Eldridge* where translation services were provided for deaf hospital patients[89] and in *Vriend* where legislative protection against discrimination based on sexual orientation was read into Alberta's rights code.[90] The protection of freedom of association was read purposively in *Health Services* to include a right to collective bargaining;[91] in *Mounted Police Association* to include a right to statutory protections for collective bargaining;[92] and in *Ontario v Fraser*

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83 Lawrence David, "A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication" (2014) 23 Const Forum Const 41. See also Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights* (Oxford UK: Oxford University Press, 2008) [Fredman].

84 See *Toussaint* ONSC, *supra* note 11; *Gosselin*, *supra* note 16 (Justice Arbour's dissent).

85 Sheppard, "Bread and Roses", *supra* note 28 at 232.

86 See e.g. Martha Jackman & Bruce Porter, A Human Rights Context for Addressing Poverty and Homelessness (2012) Exchange Working Paper Series (Ottawa, PHIRN), online: <socialrightscura.ca/documents/publications/HR-context-poverty-homelessness.pdf> [perma.cc/TVR9-3JUN].

87 Fredman, *supra* note 83 at 34.

88 Seth Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984) 132:6 U Pa L Rev 1293 at 1325.

89 *Eldridge v British Columbia*, [1997] 3 SCR 624 [*Eldridge*].

90 *Vriend v Alberta,* [1998] 1 SCR 493 [*Vriend*].

91 *Health Services, supra* note 6.

92 *Mounted Police Association of Ontario v Canada*, [2015] 1 SCR 3 [*Mounted Police Association*].

to include a right to good faith bargaining.[93] Similarly, the standard is applied to the right to life, liberty, and security of the person as seen with the right to a publicly funded abortion,[94] medical assistance in dying,[95] and safe injection facilities.[96] In each of the previously listed cases, the threshold did not vary with the nature of the claim to the right. Each right has its own definitional scope and content, subject to a robust proportionality test under section 1.

In other words, if it sounds like a human right and acts like a human right, it most probably is a right worthy of *Charter* recognition and protection. There is no reason to superimpose an additional hurdle on the constitutional structure of dividing rights into positive and negative ones for analytic purposes. In that vein, Jeremy Waldron takes up Berlin's arguments and adopts a negative conception of freedom. He posits that the unfreedom faced by homeless people is grounded in the reality that "everything that is done has to be done somewhere,"[97] whether it be on public or private property. As Skolnik notes "the cumulative effect of private property rules and laws [...] forecloses homeless people's liberty to pursue both options."[98] Laws regulating public property, such as by-laws prohibiting encampments or mandatory curfew orders, ultimately coerce and prohibit rudimentary human conduct, such as sleeping and urinating. The lack of meaningful alternatives, such as private property to engage in basic human conduct, forces homeless people into an impossible scenario: to live illegally or to face grave physical and psychological harm. It is in this way that "homeless people lose the negative freedom to engage in human conduct."[99] Appealing to the classical republican tradition, Skolnik argues that to experience homelessness "is to lack protection against others' power over us."[100] While Skolnik ties considerations of equality to those of liberty, I propose it is explicitly tied to human dignity, which "finds expression in almost every right and freedom guaranteed in the *Charter*."[101] Against this conceptual backdrop, the government of Québec's curfew order during the COVID-19 pandemic emerges as a prime case study of the social dimensions of homelessness.

B. Québec's Curfew Order: Case Study

On January 8th, 2021, the Québec government issued an Order in Council No. 2-2021 prohibiting all non-exempt persons from being outside their residence from 8pm until 5am at the risk of being fined anywhere from $1000 to $6000.[102] The local Mobile Legal Clinic, represented by counsel from Trudel Johnston & Lespérance, filed an application for judicial review challenging Article 29 of the Order in Council, which established a curfew for all people

93 *Ontario (Attorney General) v Fraser*, 2011 SCC 20.

94 *Morgentaler*, *supra* note 41.

95 *Carter v Canada*, [2015] SCC 5 [*Carter*].

96 *PHS, supra* note 61.

97 Waldron, *supra* note 13 at 296.

98 Skolnik, "Homelessness", *supra* note 13 at 74.

99 Waldron, *supra* note 13 at 302.

100 Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43 Queen's LJ 297 at 324.

101 *Morgentaler*, *supra* note 41 at 166. Wilson J further reasons at 164 that "[t]he *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity."

102 Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation, OC 2-2021, (2021), GOQ II, art 29, ss (a)–(k)).

subject to limited exceptions — none of which applied to individuals experiencing homelessness. The application sought to have the order declared invalid to the extent that it applied to these individuals. Justice Chantal Masse issued a safeguard order suspending the application of Article 29 to the extent that it applied to individuals experiencing homelessness.[103] The following day, the Minister of Health and Social Services announced that Quebec would not challenge the Superior Court of Quebec's decision to suspend the curfew's application.

The two primary legal issues before the Court were sections 7 and 15 *Charter* challenges to the Order in Council. Specifically, the Mobile Legal Clinic alleged that the impugned provision (article 29) would infringe the rights to life, liberty, and security of people experiencing homelessness unjustifiably and contrary to the principles of fundamental justice. Secondly, they argued that the measure would have further discriminatory and disproportionate effects on such people contrary to the right to equality per section 15. These arguments, however, were not adjudicated at a full trial on the merits given the promptness of the safeguard order to protect the rights of the homeless. Nonetheless, Justice Masse did go on to cite seven important points of "uncontradicted evidence" which guided her decision and favoured the Mobile Legal Clinic when considering the balance of inconvenience in issuing a temporary injunction.[104]

The uncontradicted evidence linked the adverse effects of the curfew to health concerns of people experiencing homelessness. First, it was noted that during the hours that the curfew is in effect, these people sought to hide from the police for fear of being arrested, which effectively put their health and safety at risk during winter months. Further, many had legitimate fears of contracting the COVID-19 virus in overcrowded shelters known to have been subject to outbreaks.[105] The last of the evidence dealing with health concerns looked at the mental health aspect of the curfew. The curfew's adverse impacts on the homeless exacerbated pre-existing mental health problems like anxiety linked with densely populated spaces. Many of the shelters have strict rules on drug and alcohol consumption and do not allow certain persons based on their alcohol/drug consumption level. Finally, the strict prohibitions on consumption dissuaded many people struggling with addiction from staying in the shelters overnight. Beyond health concerns, the evidence showed that many shelters lacked access and capacity.[106]

i. Relevant Social Science Evidence

Justice Masse's decision scarcely relied on social science evidence; however, social science entirely corroborates her reasoning. Indeed, research suggests that homeless individuals are almost invariably likely to have experienced some form of clinical trauma; putting aside the fact that homelessness itself can be conceived as a traumatic experience, in addition to

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103 *Clinique*, *supra* note 15.

104 *Ibid* at paras 10, 17.

105 *Ibid*. See also Alexandra Mae Jones, "Shelter outbreaks leave people experiencing homelessness even more vulnerable during COVID-19" CTV News (21 March 2021), online: <ctvnews.ca/canada/shelter-outbreaks-leave-people-experiencing-homelessness-even-more-vulnerable-during-covid-19-1.5356600?cache=y> [perma.cc/AA5Y-PKY3].

106 *Clinique*, *supra* note 15 at paras 10, 17.

increasing the further risk of victimization and retraumatization.[107] Moreover, the prelude to many individual's experience of homelessness is known to include child abuse and disrupted attachment, among other traumatic incidents – with domestic violence continuing well into adulthood for many and often paving the way for homelessness.[108] In her extensive work on social rights and *Charter* litigation in Canada, legal scholar Martha Jackman has argued that there is an inextricable link between health and homelessness, noting "it has become obvious that governments' failure to ensure reasonable access to housing and to an adequate standard of living for disadvantaged groups undermines section 7 interests."[109] The uncontradicted evidence citing the various health risks in the record only supports this determination. While there is no reliable census nor sufficient data, available research conservatively approximates that over 35,000 Canadians experience homelessness on a given night — amounting to one individual sleeping outdoors for every five in a shelter.[110] As those numbers invariably increased amid the COVID-19 pandemic, there was also a corollary increase in the policing of encampments at the municipal level.[111] The criminalization of homelessness is anything but novel; vagrancy prohibitions enjoy a 700-year-old history in English criminal law, holistically targeting the very presence and survival tactics of homeless people in public places.[112] Homeless encampments in Canada must also be considered more broadly within the context of the global housing crisis, which has been recognized by the UN Human Rights Office of the High Commissioner:

> Homelessness has emerged as a global human rights crisis even in States where there are adequate resources to address it. It has, however, been largely insulated from human rights accountability and rarely addressed as a human rights violation requiring positive measures to eliminate and to prevent its recurrence. While strategies to address homelessness have become more prevalent in recent years, most have failed to address

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107 Elizabeth K Hopper et al, "Shelter from the Storm: Trauma-Informed Care in Homelessness Services Settings" (2010) 3 The Open Health Services and Pol'y J at 80.

108 Joan Zorza, "Women battering: a major cause of homelessness" (1991) 25 Clgh Rev at 412-29.

109 Martha Jackman & Bruce Porter, "Rights Based Strategies to Address Homelessness and Poverty in Canada: The Charter Framework", in Martha Jackman & Bruce Porter, eds, Advancing Social Rights in Canada (Toronto: Irwin Law, 2014) at 7.

110 Stephen Gaetz et al, "The State of Homelessness in Canada 2016" (2016) Canadian Observatory on Homelessness Press, Working Paper No 12, online: <homelesshub.ca/sites/default/files/SOHC16_final_20Oct2016.pdf> [perma.cc/8AYC-2T4M].

111 Leilani Farha & Kaitlin Schwan, *A National Protocol for Homeless Encampments in Canada* (United Nations Special Rapporteur on the Right to Housing) 2020 at 5 ("[T]he term 'encampment' [refers] to any area [where a person] or a group of people live in homelessness together, often in tents or other temporary structures (also known as homeless camps, tent cities, homeless settlements or informal settlements"), online: <make-the-shift.org/wp-content/uploads/2020/04/A-National-Protocol-for-Homeless-Encampments-in-Canada.pdf> [perma.cc/J2J9-PMSM].

112 Joe Hermer & Elliot Fonarev, "The Mapping of Vagrancy Type Offences in Municipal By-Laws" (22 July 2020), online: <homelesshub.ca/blog/mapping-vagrancy-type-offences-municipal-laws> [perma.cc/6BRW-WSFX].

> homelessness as a human rights violation, and few have provided for effective monitoring, enforcement, or remedies.[113]

These statistics show only the tip of the iceberg.[114] Homeless people are also more prone to be victims of violent crime relative to the general population,[115] with homeless women particularly vulnerable to sexual violence.[116] These intertwined *indicia* of vulnerability and marginalization are central to the analogous grounds analysis under section 15. As discussed, the proposed approach considers both the negative liberty argument of non-interference and the positive liberty argument of self-mastery against the pervasive system of asymmetrical power dynamics that shape society. In this way, we acknowledge the intimate link between liberty and non-domination to allow for a more robust understanding of substantive equality in line with the progressive realization of the *Charter*'s human rights commitments, including Canada's obligations under international law.

ii. The Provincial–Federal Equality Link

Recent law graduates, Emily Knox et al., explore the usefulness of human rights legislation in the context of the discriminatory impacts of public intoxication by-laws on people experiencing homelessness in Montreal.[117] The authors propose an analytical framework under section 10 of the *Quebec Charter of Rights and Freedoms*[118] based on the protected ground of 'social condition' to expand the scope of the anti–discrimination protection. They reason that "successful claims [...] affirming that people experiencing homelessness are a protected, equity-seeking group may be persuasive to one day expand Canadian courts' analysis of constructive immutability within the interpretation of analogous grounds in Subsection 15(1)." Their strategy underscores the importance of building provincial case law as a source of persuasive interpretation for appellate courts throughout Canada. Such case law, they argue, may guide courts towards an interpretation of the Canadian *Charter* that is inclusive of economic and social rights since human rights codes also attract a broad and purposive interpretation.[119] A national "consensus that homelessness is a protected ground

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113 United Nations Human Rights Office of the High Commissioner, "Homelessness and the Right to Housing" (nd), online: <ohchr.org/en/special-procedures/sr-housing/homelessness-and-human-rights> [perma.cc/Q5KU-Q9S2].

114 For further discussion on the intersecting vulnerabilities faced by various groups, see Stephen W Hwang, "Mortality among Men Using Homeless Shelters in Toronto, Ontario" (2000) 283 J of the Am Medical Assoc 2152 (on mortality rates for homeless young men in Toronto's shelter system being eight times that of the general population); James Frankish, Stephen W Hwang & Darryl Quantz, "Homelessness and Health in Canada: Research Lessons and Priorities" (2005) 96 Can J of Pub Health S23 at S24–5 (on the higher likelihood of contracting contagious diseases due to the confined nature of shelters); Roy et al, "Mortality in a Cohort of Street Youth in Montreal" (2004) 292 J of the Am Medical Assoc 569 at 569–70 (on the mortality rate for homeless youth in Montreal being 31 times higher than the general population).

115 Barrett A Lee, Kimberly A Tyler & James D Wright, "The New Homelessness Revisited" (2010) 36 Annual Rev of Sociology 501 at 506.

116 Jana Jasinski et al, *Hard Lives, Mean Streets: Violence in the Lives of Homeless Women* (Lebanon, NH: Northeastern University Press, 2010) at 55–6

117 Knox, *supra* note 75 at 157.

118 *Charter of Human Rights and Freedoms*, CQLR c C-12, s 10 [*Quebec Charter*].

119 *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at paras 31, 103.

within an equality rights framework in Quebec may eventually provide "a persuasive source for interpreting the scope of the [Canadian] *Charter*."" [120] However, this strategy may only be a limited source of persuasive guidance for other provincial courts considering the *Quebec Charter*'s unique structure and quasi-constitutional status. [121] The authors note this limitation as well as "a lack of case law in which equality provisions in human rights codes are applied to declare by-laws inoperable outside of Quebec." [122] Since the guarantees of the right to life, security, and dignity exist within an anti-discrimination framework in Quebec, the authors limit their proposed strategy, which does not speak to the section 7 guarantees of the Canadian *Charter*. [123]

While no claim has yet been successful in this context, anchoring the analysis in a provincial human rights framework may prove effective. In the context of challenges to municipal by-laws, courts in other Canadian provinces, notably in British Columbia and Ontario, have extended remedial protections to people experiencing homelessness through exemptions, declarations of unconstitutionality, and refusals to grant injunctions to remove encampments. The constitutional basis of successful rights litigation elsewhere has consistently been rooted in the security of the person guaranteed under section 7 of the *Canadian Charter*. A constitutionally anchored argument can be made at the intersection of sections 7 and 15 to find that "security and equality are not mutually exclusive bases." [124]

C. Homelessness as Constructively Immutable

In the 2020 decision of *Fraser v Canada*, Justice Abella clarified the test to establish a *prima facie* violation of the section 15(1) *Charter* right to equality. Claimants must show at the first stage of the test that the impugned law or state action "imposes differential treatment based on protected grounds, either explicitly or through adverse impact." [125] At the second stage, the claimant must establish that this distinction has "the effect of reinforcing, perpetuating or exacerbating disadvantage." [126] As is the case with many seemingly neutral laws, the explicit wording of the bylaw is not discriminatory as it appears to apply to the entire population equally. *Fraser* confirmed the Court's commitment to substantive equality by noting how the "increased awareness of adverse impact discrimination has been a central trend in the development of discrimination." [127] In the case of Québec's curfew order, as in *Tanudjaja*, the adverse distinction created was not based on an enumerated ground, but rather, on an analogous one.

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120 *Ibid* at para 176, citing *Health Services, supra* note 6 at para 78.

121 *Ibid* at 196. This is a result of the Quebec Charter's in-operability or paramountcy clause under s 52, the functional provincial equivalent of s 52(1) of the *Constitution Act.*

122 *Ibid* at 196.

123 *Ibid* at 196–197; *Quebec Charter*, *supra* note 118, ss 1, 4.

124 *Ibid* at 197.

125 *Fraser v Canada (Attorney General)*, 2020 SCC 28 *at pa*ra 81 [*Fraser*].

126 *Ibid*.

127 *Ibid* at para 31.

i. Distinction

The distinction here is between the homeless population and those with a home. For seemingly neutral laws, distinctions are discerned by examining the impact. The curfew's adverse impacts included ticketing and uncertainty of police discretion, most felt by the homeless. Further evidence may be useful in showing that the curfew order has a negative impact on the homeless, such as the disproportionate ratio of fines given to the homeless compared to the general population. As Terry Skolnik argues, "laws that manage public property operate like a self-fulfilling prophecy against those without access to housing." As such, people are at the greatest risk of alleviating their needs on public property, which in turn justifies the "state's management of public property through coercion."[128] The first hurdle of the legal analysis is thus met: seemingly neutral laws controlling public property, such as the curfew order, create a distinction between those with a home and those without one.

While there is no need for a formal "mirror comparator", there may be some difficulty in identifying a comparator group based on enumerated or analogous grounds.[129] Claims based on "intersecting grounds of discrimination" are accepted.[130] As noted by Justice Masse, the homeless population are at the intersection of various marginalized groups such as those with mental and physical disabilities, Indigenous persons (race), racialized persons, as well as youth and seniors.[131] Nonetheless, courts thus far have been reticent to recognize the intersectional ground of homelessness as a freestanding analogous ground of discrimination.

ii. Analogous Ground: Constructively Immutable

How, then, would the Supreme Court of Canada assess whether homelessness as a ground of differential treatment deserves protection? The 1999 decision in *Corbiere*, now the *arrêt de principe* for analogous grounds, marked the first clear endorsement of immutability — or 'constructive' immutability — as the prime variable of the analysis. The inquiry has since evolved to be both contextual and multivariable.[132] No one variable is decisive — the Supreme Court considers vulnerability,[133] links to a discrete and insular minority,[134] and political powerlessness[135] as relevant to recognizing new protected characteristics. The inquiry into immutability is based on liberty and on values of freedom, autonomy, and dignity.[136]

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128 Terry Skolnik, "Freedom and Access to Housing: Three Conceptions" (2018) 35 Windsor YB Access Just at 241.

129 *Fraser, supra* note 125 at para 67; *Tanudjaja*, *supra* note 20 at para 82.

130 *Corbiere, supra* note 82.

131 *Clinique, supra* note 15 at para 10.

132 See Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality at 37.

133 See *Andrews, supra* note 75 at 152; *Egan v Canada,* [1995] 2 SCR 513 at 554.

134 *Ibid*. See also *Miron v Trudel,* [1995] 2 SCR 418 at para 158.

135 See Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80 Can Bar Rev 893 at 908.

136 Sophia Moreau, "In Defense of a Liberty-based Account of Discrimination" in Deborah Hellman & Sophia Moreau, eds, Philosophical Foundations of Discrimination Law (Oxford UK: Oxford University Press, 2013) 71 at 81.

In *Andrews v Law Society of British Columbia*,[137] the first *Charter* equality case before the Supreme Court, the inquiry concerned whether citizenship could be an analogous ground under section 15(1).[138] In her concurring reasons, Justice Wilson described the analogous category as including "discrete and insular minorities," which are "those groups in society to whose needs and wishes elected officials have no apparent interest in attending [and] will continue to change with changing political and social circumstances."[139] The inherent social and relational notions of power thus inform the analogous grounds analysis. In this way, not only do the homeless, sitting at the margins of society, readily constitute a "discrete and insular" group, but they are also socially dominated and thus politically powerless.

The Montreal homeless population, for instance, does not constitute an amorphous group whose scope cannot be circumscribed. In fact, as discussed by Justice Masse in detailing the uncontradicted evidence in the case of the curfew order, the homeless population in Montreal includes at least 3000 people,[140] which is a "discrete and insular minority."[141] The adverse impact on this "insular minority" must flow from historical disadvantage and stereotyping. Skolnik notes that "homeless people have historically experienced discriminatory disadvantages through vagrancy statutes and laws that regulate public property."[142] In detailing the many historical and contemporary disadvantages faced by this insular and circumscribed group, Skolnik documents the health and liberty disparities, and the disparate impact of vagrancy laws on the homeless compared to those with a home. Courts should take judicial notice that the homeless have historically faced significant socio-economic disadvantages given their treatment as second-class citizens, both societally and legally. Historically, "vagrancy statutes prohibited positive acts in which homeless people characteristically engaged, such as wandering and sleeping on public property without providing an account of oneself."[143] In many ways, the curfew order operates as a *justified* vagrancy law in the context of the COVID-19 pandemic.

The artificial distinction between status and conduct is further challenged when one accounts for the systemic power dynamics at play. Those at the socio-economic margins of society have no meaningful control over their dire situation, which is often grounded in mental disability. Courts can and should take judicial notice of a long history of vagrancy laws disproportionately harming the homeless (including municipal regulations in parks, trespassing, mandatory victims' surcharge, etc.).[144] In *Corbiere*, the majority emphasized that categories of discrimination cannot be reduced to watertight compartments but will inevitably overlap.[145] Differential treatment on the basis of homelessness can hardly be separated from the reality that *racialized* and *disabled* persons are disproportionately affected by vagrancy laws

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137 *Andrews, supra* note 75.

138 *Ibid* at 183.

139 *Ibid* at 152, citing John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

140 *Clinique, supra* note 15 at para 10.

141 *Corbiere, supra* note 82 at para 62.

142 Skolnik, "Homelessness", *supra* note 13 at 72.

143 *Ibid* at 79.

144 Knox, *supra* note 75.

145 *Corbiere, supra* note 82 at para 259.

such as the curfew. Government arguments that homeless people "choose to be homeless" only further stigmatize and stereotype the illusory notion of choice in the vicious cycle of poverty resulting in homelessness. That the status is theoretically changeable in no way dilutes its constructive immutability – what matters is *meaningful* control thereon, akin to marital status or "off-reserve residence" as protected grounds. To conclude otherwise conflates the distinct notions that are immutability *de jure* (such as race, etc.) and immutability *de facto* (or *constructive*). Arguments to this effect misunderstand the jurisprudence of the Supreme Court on immutability which endorses a multivariable and contextual approach.

Indeed, the constructive immutability analysis also accounts for societal power imbalances and historical disadvantage. It considers intersecting grounds, for no characteristic is a watertight compartment. That is, any differential treatment based on homelessness – be it explicit or implicitly through adverse impact — is hardly separable from the fact that it will disproportionately affect racialized, disabled, and Indigenous people. It constitutes a flagrant denial of their human dignity, the value underpinning section 15, in addition to fueling the stereotype that those at socioeconomic margins are either unlucky or lazy — a blatantly inaccurate conclusion which ignores the structural dynamics underlying homelessness as a *societal* problem. To reject equality claims by homeless people on legalistic technical grounds diverges from the purposive approach endorsed by the jurisprudence. It also ignores the vast body of social science literature explaining the causes, consequences, and complex vulnerability of lacking shelter.

In assessing disadvantage, courts should use a purposive and contextual approach and acknowledge that there is no "rigid template" of *indicia*.[146] The homeless need only show that the distinction undermines substantive equality by perpetuating harm against them, such as historical economic disadvantage as well as psychological harms. Vagrancy laws such as the curfew perpetuate such harm by imposing unreasonable financial penalties and forcing individuals into situations that exacerbate their physical and psychological vulnerabilities. This leads to a burden on the homeless that those with a home do not experience.

D. Interpretive Significance of International Law

Any analysis of the plausibility of homelessness as a protected personal characteristic must also consider Canada's obligations under international law. Former Chief Justice Dickson's frequently quoted passage from *Alberta Reference* is the locus classicus for the interpretive significance of international law in a *Charter* analysis.[147] The Court declared that the various sources of international human rights law are persuasive sources for *Charter* interpretation.[148]

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146 *Fraser, supra* note 125 at para 76.

147 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 59 [*Alberta Reference*] ("The *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.")

148 *Ibid* at para 57 ("declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms"). See also Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in M Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209 at 214-15.

The Supreme Court has embraced this interpretative presumption several times.[149]

The relevance of Canada's binding international obligations to the interpretation of sections 7 and 15 should accordingly seem trite. However, it has proved controversial in a recent Supreme Court decision holding that the *Charter*'s protection against cruel and unusual punishment under section 12 does not extend to corporations.[150] While unanimous on the result, the Court was split on the proper significance of international law in constitutional interpretation. Justices Brown and Rowe, reflecting the majority, criticized Justice Abella for "the prominence she gives to international and comparative law in the interpretive process."[151] For them, international standards play "a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation."[152] Respectfully, the majority's statement represents a marked departure from the Court's consistent jurisprudence on the persuasiveness of international law, which has been lauded globally.[153] Empirically, from 2000 to 2016, the Supreme Court referred to international treaties 336 times, in addition to citing 1,761 judgments from foreign jurisdictions.[154] Considering how other courts have dealt with similar questions is undeniably helpful in determining how to exercise judicial discretion.[155] This echoes the late Peter Hogg, according to whom "the search for wisdom is not to be circumscribed by national boundaries."[156] As legal scholar Karen Eltis similarly explains, living tree constitutionalism and the *Charter*'s commitment to multiculturalism indicate an approach that embraces looking outward to foreign and international law.[157]

There are at least six international human rights treaties, ratified by Canada, of relevance to the discrimination of the homeless.[158] Chief among them is the *International Covenant on Economic,*

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149 *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 (the Court refers to Canada's ratification of the *ICESCR*); *Health Services, supra* note 6 at para 70 ("Canada's current international law commitments and the [...] state of international thought on human rights [is] a persuasive source for interpreting the scope of the Charter").

150 *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32.

151 *Ibid* at para 19.

152 *Ibid* at para 22 [emphasis in original].

153 See Ran Hirschl, "Going Global? Canada as Importer and Exporter of Constitutional Thought", in Richard Albert and David R. Cameron, eds, Canada in the World: Comparative Perspectives on the Canadian. Constitution (Cambridge, UK: Cambridge University Press, 2018) 305.

154 Klodian Rado, "The use of non-domestic legal sources in Supreme Court of Canada judgments: Is this the judicial slowbalization of the Court?" (2020) 16 Utrecht L Rev 57 at 61, 73.

155 Adam Dodek, "Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities" (2009), 47 SCLR (2d) 445 at 454.

156 Peter W. Hogg, Constitutional Law of Canada (5th ed Supp), s 36.9(c).

157 Karen Eltis, "Comparative Constitutional Law and the 'Judicial Role in Times of Terror'" (2010), 28 NJCL 61 at 69-70.

158 Other than the *ICESCR*, relevant treaties ratified by Canada include: *Convention on the Rights of Persons with Disabilities*, 12 December 2006, Can TS 2010 No 8 art 28 (entered into force 3 May 2008, accession by Canada 11 March 2010); *Convention on the Rights of the Child*, 20 November 1989, Can TS 1992 No 3 art 27 (entered into force 2 September 1990, accession by Canada 12 December 1991); *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 art 5 (entered into force 4 January 1969, accession by Canada 14 October 1970); as well as the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Can TS 1982 No31 art 14 (entered into force 3 September 1981, accession by Canada 10 December 1981).

Social and Cultural Rights ("*ICESCR*"), which includes the articulation of the right to housing under its article 11.1 as follows: "the right of everyone to an adequate standard of living for [themselves] and [their] family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."[159] The right to housing has been interpreted by the UN Committee on Economic, Social and Cultural Rights ("the Committee") in General Comments No. 4 and 7.[160] Notably, the Committee has warned that under article 11.1 of the *ICESCR* "the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity."[161] As part of these obligations, Canada must "take steps to the maximum of [its] available resources with a view to achieving progressively the full realization of the right to adequate housing, by all appropriate means, including particularly the adoption of legislative measures."[162] In doing so, Canada is obligated to prioritize marginalized groups living in precarious housing conditions — including residents in homeless encampments.[163] The same rights are articulated in article 25(1) of the *Universal Declaration of Human Rights*. The Office of the UN Commissioner explains that the right to adequate housing extends beyond a physical structure since "adequacy is determined by social, economic, and cultural elements, as well as [...] security of tenure, availability of services [...] affordability, habitability, accessibility, location, cultural adequacy."[164] As such, discrimination faced by the homeless and the right to adequate housing cannot be considered in a national vacuum, but rather, must be informed by the global housing crisis internationally.[165]

There are at least two bundles of lessons that can be distilled from the relevant international authorities. The first concerns the pivotal role of municipalities — merely "creatures of provincial statute" under the constitutional separation of powers (section 92(8) of the *Constitution Act*, 1867).[166] Provincial and federal governments in Canada have historically deferred engagement with the homeless and policing thereof to municipal officials who receive minimal support or guidance, in fact, most are often unaware of their legal obligations

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159 *ICESCR*, *supra* note 17, Article 11 (masculine pronouns corrected).

160 Committee on Economic, Social and Cultural Rights, General Comment 4 (1991), UN Doc E/1992/23 [General Comment 4], online: <refworld.org/legal/general/cescr/1991/en/53157> [perma.cc/5N9S-VX7H]; Committee on Economic, Social and Cultural Rights, General Comment 7 (1997), UN Doc E/1998/22, online: <refworld.org/legal/general/cescr/1997/en/53063> [perma.cc/MG4S-FQGJ].

161 General Comment 4, *supra* note 160 at para 7.

162 *ICESCR*, *supra* note 17, Article 2(1).

163 Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, UNGA, 2023, UN Doc A/HRC/55/12, online: <undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F55%2F12&Language=E&DeviceType=Desktop&LangRequested=False> [perma.cc/ZRL2-UH3E].

164 For a more comprehensive discussion of the right to adequate housing in International Law, see Office of the United Nations High Commissioner for Human Rights, *The Right to Adequate Housing*, Fact Sheet 21 Rev 1, May 2014, online: <ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf> [perma.cc/7PAZ-9JYM].

165 Farha, *supra* note 111.

166 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 92(8); see also Ron Levi & Mariana Valverde, "Freedom of the City: Canadian Cities and the Quest for Governmental Status" (2006) 44 Osgoode Hall LJ 409.

under international human rights law.[167] This does not absolve Canada from its international obligations. To the contrary, human rights treaties ratified by Canada "extend to all parts of federal States without any limitations or exceptions" and municipal governments are equally bound by these obligations.[168] This is particularly relevant in a context where the over-policing of the homeless and the enforcement of vagrancy laws falls upon municipal authorities.

Secondly, the right to adequate housing under the *ICESCR includes* the right to be free from discrimination of any kind on the basis of one's lack of shelter whether through explicit differential treatment or disproportionate adverse impact.[169] As such, international law recognizes that the lack of housing constitutes a protected personal characteristic that deserves protection from discrimination under the law, albeit indirectly. This is relevant to section 7 rights as well through a negative conception of non-interference. Tangibly, it means that the right to housing includes protection from arbitrary or unlawful interference with one's privacy, family, and home as well as any forced eviction, independently of legal title. As a result, many usual motives for evictions of encampments, such as the "public interest", urban planning, or real estate development, in no way justify such interferences.[170] Instead, the assessment of relocation or eviction must be rooted in the dictum that "the right to remain in one's home and community is central to the right to housing."[171] What form, then, would this right to housing take under section 7?

III. THE SECURITY LINK: CONCEPTUALIZING A RIGHT TO ADEQUATE HOUSING

To better unpack the content of the right to housing, it is helpful to view housing rights as a spectrum. This ranges from minimum and necessary conditions, such as government non-interference, to more robust and sufficient conditions, such as cultural adequacy in housing. Without providing an operational definition of what such a right encompasses, we risk overly widening its scope or inversely, being unduly narrow in its potential reach. As Margot Young suggests, "housing insecurity at large — its causes, manifestations, and potential solutions — is a pixelated picture."[172]

On the one end of the spectrum lie negative rights claims, such as the curfew case[173] and the *Adams* case,[174] where at a minimum in situations of homelessness, government action

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167 Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, UNGA, 2019, UN Doc A/HRC/43/43 [A/HRC/43/43] at paras 7, 60, online: <make-the-shift.org/wp-content/uploads/2020/04/A_HRC_43_43_E-2.pdf> [perma.cc/X5X2-G53K].

168 *ICESCR*, *supra* note 17, Article 28.

169 A/HRC/43/43, *supra* note 167.

170 *Ibid* at para 36.

171 Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, UNGA, 2018, UN Doc A/73/310/Rev.1 at para 26.

172 Young, *supra* note 10 at 479.

173 *Clinique*, *supra* note 15.

174 *Adams*, *supra* note 18.

should not undermine or exacerbate housing precarity. Government non-interference is the minimum standard of necessary conditions on one end of the scale. This accounts for instances of homelessness, housing precarity, and shelter availability.

The middle of the spectrum includes instances of positive rights claims which ask the government to step in and provide remedial relief for specific litigants. The case of *Tanudjaja* involved a positive rights dimension, that looked both at government action and inaction while also asking for the recognition of a positive right to housing under section 7. This closely resembles the South African case of *Government v Grootboom*.[175] The South African constitution recognizes an extensive list of positive socio-economic rights, including article 26, the right to housing, and article 27, an acceptable standard of living.[176] In *Grootboom*, the South African Constitutional Court concluded that the country's national housing program did not live up to the government's obligations under the Constitution because it did not provide relief for those in desperate need. It further reasoned that "civil, political, social and economic rights in the Constitution are all interrelated and mutually supporting, and that affording socio-economic rights to people enables them to enjoy their other rights."[177]

On the other end, are more robust positive rights claims, in line with the federal government's international commitments and obligations under the *ICESCR*, which would require increased resource allocation initiatives. Under the *ICESCR*, conditions for housing include such things as a location with access to healthcare services, schools, employment possibilities and other social services.[178] More robust conditions such as cultural adequacy means that the construction of housing must consider cultural identity and diversity.[179] In that respect, Jesse Hohman explains how housing fulfils an important psychological need associated with social, democratic participation and social inclusion:

> Housing provides and protects some of our most fundamental needs. It shields us from the elements and provides refuge from external **physical threats.** It gives us a base from which to build a livelihood and take part in the community, from the neighbourhood to the state. Moreover, housing provides a space in which our **psychological needs** can be met and fostered… housing is important in the formation and protection of identity, community and place in the world. [180]

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175 *Government v Grootboom and Others*, ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) South Africa Constitutional Court [*Grootboom*].

176 *The Constitution*, Republic of South Africa, Bill of Rights, Chapter 2, article 26 and 27, 1996.

177 *Grootboom*, *supra* note 175. See Child Rights International Network, Government v Grootboom, online: <archive.crin.org/en/library/legal-database/government-v-grootboom.html> [perma.cc/Q7R7-EK9C].

178 General Comment 4, *supra* note 160 at para 8(f) ("housing should not be built in polluted sites [...] that threaten the right to health of the inhabitants").

179 *Ibid* at para 8(g) (including building materials, methods, and policies).

180 Jesse Hohmann, *The Right to Housing: Laws, Concepts, Possibilities,* (Oxford: Hart Publishing Ltd, 2013) at 197 [emphasis added].

A. Adequate Housing as Security of the Person

i. The Security Link: Section 7's Life, Liberty, and Security

Security of the person is broadly interpreted and contains both a physical and psychological aspect. Foremost, it includes a person's right to control their bodily integrity and will be engaged where the state interferes with personal autonomy, as seen with prohibitions on medical assistance in dying and imposing unwanted medical treatment.[181] Equally, the security interest has an important health dimension and will be engaged where state action has the likely effect of seriously impairing one's physical or mental health.[182] As recognized in *Canada v. Bedford*,[183] government action that prevents individuals engaged in "risky but legal activity" from taking steps to protect themselves from such risks implicates the security of their person. Further, in the landmark decision on healthcare rights, *Chaoulli v Quebec*, the Court held that the government's failure to ensure access to health care of "reasonable" quality within a "reasonable" time engaged the right to life and security of the person – triggering the application of section 7 and the equivalent guarantee under the *Quebec Charter*.[184] A few years later in *Insite* (*PHS*), the Court reaffirmed that where a law creates a health risk, this amounts to a deprivation of the right to security of the person and that "where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer."[185]

State action causing severe psychological harm will also engage the right to security where it has "a serious and profound effect on the person's psychological integrity" and the harm results from the state action.[186] As with the curfew order under the security interest, one need only point to the many health risks, which amount to seriously impairing one's physical and mental health as well as constituting serious state-imposed psychological stress. Here, the risks with unavailable shelters would effectively mirror the abortion delays in *Morgentaler*, forcing homeless people on the streets in winter conditions and causing "profound consequences on physical and emotional well-being."[187] Other risks include hiding from the police in winter conditions, contracting COVID-19 in crowded shelters prone to outbreaks, and the mental health impacts of those with dependency who remain in the shelter without access to alcohol and drugs. The harmful conditions here can also be analogized to *Bedford*, whereby the government is "imposing dangerous conditions" on the *usually* legal activity of merely being outdoors. It also may impede homeless peoples' ability to control their "physical or bodily integrity."[188] Given the preponderance of evidence put forth regarding the link between mental and physical health and homelessness, including the right to adequate housing under the security of the person interest seems most in line with the section's guarantee and the Court's jurisprudence thus far.

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181 *Morgentaler, supra* note 41 at 56; *Carter, supra*, note 95.

182 *Chaoulli, supra* note 27 at paras 111–24.

183 *Canada v Bedford*, [2013] 3 SCR 1101 [*Bedford*].

184 *Chaoulli, supra* note 27.

185 *PHS, supra* note 61.

186 *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44 at paras 58, 60–61 [*Blencoe*].

187 *Morgentaler, supra* note 41.

188 *Bedford*, *supra* note 183.

B. Gosselin and the Open Door

Among the *Quebec Charter's* list of enumerated protected rights is section 45, an "acceptable standard of living."[189] The plain text may indicate an obligation incumbent on the government to satiate what they provide for as: "Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living".[190] The first case to challenge provincial legislation under this section was *Gosselin v Quebec*.[191] Louise Gosselin argued that a Quebec law excluding citizens under the age of 30 from receiving full social security benefits violated her right to security of the person under section 7 of the *Charter*, the prohibition against age discrimination under section 15, and the right to an acceptable standard of living under section 45 of the *Quebec Charter*.

In 1992 at the Superior Court of Quebec, Justice Reeves dismissed Louise Gosselin's claim under the *Quebec Charter* on the grounds that section 45 is merely a statement of policy which provides no authority for the courts to review the adequacy of social measures the legislature chooses to adopt.[192] Seven years later on appeal, Justice Robert of the Quebec Court of Appeal ruled that the provincial regulation violated section 45 of the *Quebec Charter*.[193] At the Supreme Court of Canada, Justice L'Heureux Dubé, in her dissenting reasons, agreed with Justice Robert's finding that "Section 45 of the Quebec Charter […] bears a very close resemblance to article 11 of the International Covenant on Economic, Social and Cultural Rights […] and was intended to establish a domestic law regime that reflects Canada's international commitments."[194] In this way, section 45 contains "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels [of subsistence needs and the provision of basic services]."[195] However, Justice Robert found that, in accordance with the remedial and anti-derogation provisions set out under sections 49 and 52 of the *Quebec Charter*, section 45's guarantee of financial assistance "susceptible of ensuring [...] an acceptable standard of living" is not judicially enforceable.[196] Ultimately, all three Justices of the Quebec Court of Appeal agreed that Gosselin's claim to an adequate level of assistance involved an economic right that was not included in section 7.[197]

Writing for the majority, Chief Justice McLachlin (as she then was) upheld the trial decision, but left open the possibility that "one day s.7 may be interpreted to include positive obligations [...] to sustain life, liberty, or security of the person […] in special circumstances."[198]In doing so, she evoked Lord Sankey's celebrated phrase in *Edwards* that "the *Canadian Charter* must

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189 *Quebec Charter*, *supra* note 118, s 45.

190 *Ibid*.

191 *Gosselin, supra* note 16.

192 *Gosselin v Quebec*, [1992] QCCS, RJQ 1647 at 1667.

193 *Gosselin v Quebec*, [1999], RJQ 1033 [*Gosselin* QCCA].

194 *Gosselin*, *supra* note 16 at para 147. See also *Gosselin* QCCA, *supra* note 193 at 1092, 1099.

195 *Ibid*.

196 *Gosselin* QCCA, *supra* note 193 at 1119.

197 *Ibid* at 1042-43.

198 *Gosselin*, *supra* note 16 at para 83.

be viewed as a living tree capable of growth and expansion within its natural limits."[199] Chief Justice McLachlin also recalled Justice LeBel's cautionary words in *Blencoe* that it "would be dangerous to freeze the development of this part of the law" and the Court "should safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*."[200] While the majority left the door open for future cases, they shut it for *Gosselin* due to a lack of evidence.[201]

In her dissenting opinion, concurred by Justice L'Heureux Dubé, Justice Arbour would have accepted *Gosselin*'s section 7 challenge and found that section 7 imposed positive obligations on the government to act.[202] The bulk of her argument rejected the inflexibility of the Canadian positive-negative rights dichotomy as well as the need for affirmative government action to render claims justiciable. Using a purposive, contextual, and textual analysis, she concluded that "any approach to the interpretation of s. 7 mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension."[203] Justice Arbour dealt with the issue of section 7 and economic rights by citing *Irwin Toy v Quebec (AG)*, where the Court distinguished between "corporate-commercial economic rights" which are excluded from *Charter* protection, and "economic rights fundamental to human life or survival" which may fall within the scope of section 7.[204] As Chief Justice Dickson (as he then was) explained:

> The rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing, and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous.[205]

Justice Arbour referred to this reasoning to explain why "those economic rights fundamental to human life or survival" should not in fact be treated as the same kind of thing as corporate-commercial economic rights.[206] I draw the same distinction here. As was the case in *Gosselin*, certain rights, such as a right to adequate housing, "are so intimately intertwined with considerations related to one's basic health [and hence "security of the person"] that they can readily be accommodated under s. 7 without the need to constitutionalize property rights."[207] Since security of the person has both physical and psychological dimensions, socio-economic rights can be effectively reframed as basic human rights in those circumstances where a physical and psychological aspect is inherently tied to the right claimed. Such a right would be distinct from the type of purely corporate-commercial right that Chief Justice Dickson distinguished. As noted in both *Irwin Toy* and *Gosselin*, housing rights are the sort

199 *Ibid*.
200 *Ibid*. See also *Blencoe, supra* note 186 at para 188.
201 *Gosselin*, *supra* note 16 at para 83.
202 *Ibid* at paras 319–329.
203 *Ibid* at para 324.
204 *Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927 [*Irwin Toy*].
205 *Ibid*.
206 *Gosselin*, *supra* note 16 at para 324.
207 *Ibid* at para 311.

of interest which fall under the scope of human rights distinct from commercial property rights. Conflating the human right to adequate housing with economic rights effectively obfuscates the true substance of the protected security interest.

CONCLUSION: RECOVERING FROM THE INEQUALITY VIRUS

The past few years have been a tale of two pandemics; not only did COVID-19 disproportionately harm the poor, it also amplified financial disparities which predated it, further marginalizing racialized individuals and women in particular .[208] The expected long-term rise in homelessness, and over-policing thereof, only reflects the tip of this inequality iceberg. Politics aside, a constitutional response to the pandemic is worth considering. Thankfully, the *Charter* remains subject to the living tree doctrine, through which we can revisit definitional issues related to what constitutes life, liberty, and security of the person and account for evolving notions of equality in modern Canadian society. The substance of section 7 and section 15 must account for the vast and emerging body of social science literature on the structural causes, health consequences, and complex vulnerability resulting from a lack of shelter. Against the pixelated spectrum of housing rights, the ambit of *Charter* rights may evolve incrementally, from non-interference to holistic adequacy, transcending the rigid and artificial positive-negative divide between state action and inaction.

The pandemic marked a permanent change in the "political and cultural realities of Canadian society"[209] because it exacerbated the lived realities of housing inequality. To ensure that the *Charter* is a responsive document that "speaks to the current situations and needs of Canadians"[210] it must recognize homelessness as worthy of equality. Such constitutional recognition need not open the floodgates to a revolution of justiciable socioeconomic rights. Canada's constitutional history is one of evolution, rather than revolution.

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208 See Zara Liaqat, "Why Covid-19 is an Inequality Virus", *Policy Options* (20 April 2021) online: <policyoptions.irpp.org/magazines/april-2021/why-covid-19-is-an-inequality-virus> [perma.cc/S4HX-9Y3K].

209 *Canadian Western Bank*, *supra* note 5 at para 23.

210 *Health Services, supra* note 6 at para 78.

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