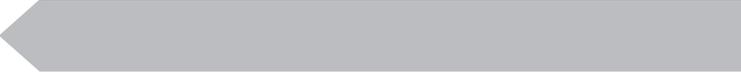


APPEAL



REVIEW OF CURRENT LAW AND LAW REFORM

VOLUME 20 ■ 2015

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The 2014/15 *Appeal* Editorial Board would like to thank the University of Victoria Faculty of Law for its ongoing financial and institutional support. We would also like to give special thanks to Michael M'Gonigle and Ted McDorman for their guidance in the production of this volume of *Appeal*.

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The *Appeal* Editorial Board wishes to congratulate

Alyssa Clutterbuck,

winner of the

2015 McCarthy Tétrault Prize for Exceptional Writing.

This writing prize, established in 2011, recognizes a student whose published work demonstrates excellence in legal scholarship and writing. The recipient of the prize is chosen each year by members of the Faculty of Law at the University of Victoria.

The *Appeal* Editorial Board is also pleased to recognize Michael M.J. Choi as the runner-up.

FOREWORD

by Dean Jeremy Webber

Congratulations on 20 years of publication of *Appeal: Review of Current Law and Law Reform*. The current editorial board and the editorial boards of each of the previous years of *Appeal* should rightly consider the success of the Journal as a major accomplishment in which all have played an important role.

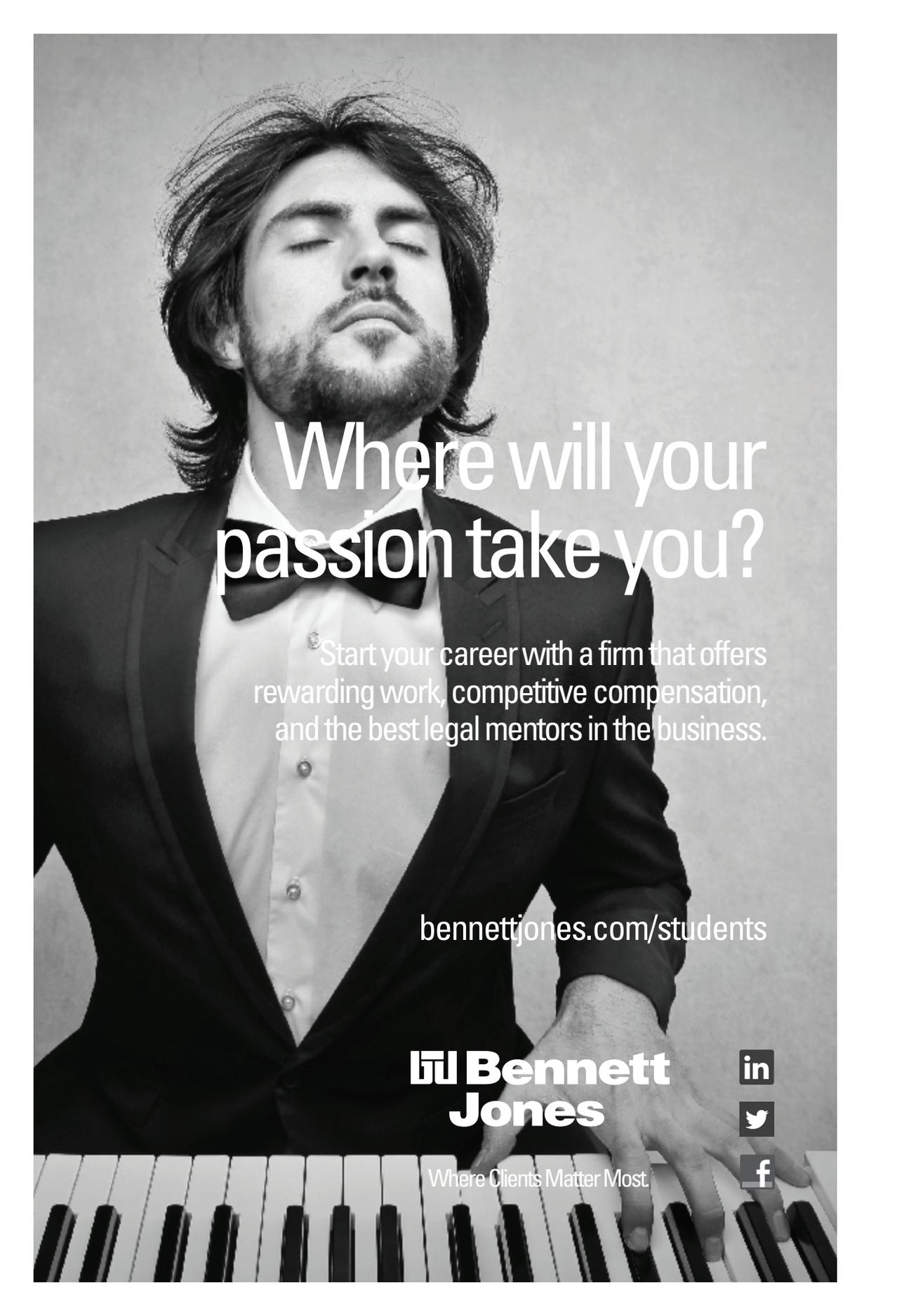
Over the years *Appeal* has changed its look and grown in size from the 50-70 pages of the early years to as much as 160 pages in recent years. It has drawn increasing numbers of submissions from UVic students and authors beyond the Island. The Journal has, over two decades, consistently published high quality articles, essays and commentaries.

As a student-run publication, *Appeal* has been instrumental in promoting student scholarship through providing an important avenue of opinion and perspective and an outlet for the work of many students at UVic and at other law schools.

My thanks to the numerous financial supporters of *Appeal* for their recognition of the role that a student-run law journal can play in a Law Faculty and for the benefits that accrue to the students (as editors and writers) in the annual production of the Journal.

The Law School takes great pride in *Appeal*.

Jeremy Webber, Dean



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INTRODUCTION

by Katherine Ratcliffe

First and foremost, I acknowledge with respect the history, customs, and culture of the Coast Salish and Straits Salish peoples upon whose traditional lands the University of Victoria Faculty of Law and *Appeal* reside.

When I first met with Ted McDorman last September, he told me that my experience as Editor-in-Chief would be different from those of the past few years' for two reasons. Although it had become usual for *Appeal* to have two Eds-in-Chief, I would be on my own. It was also typical for one of the Eds-in-Chief to be a returning Board member with prior institutional knowledge and experience, but I was new to *Appeal*. Thankfully, the journal has an incredible support structure to ensure its success.

First I want to recognize the efforts of the 2014-15 *Appeal* Editorial Board. Each member, in addition to their duties on the Board, participated in the paper selection process and worked with an author to prepare their article for publication. Editors and authors exchanged multiple drafts, working tirelessly to create the strongest volume possible.

The *Appeal* Board is also indebted to the students, faculty, and staff of the University of Victoria Faculty of Law. We have received invaluable guidance and support from our faculty advisors, Ted McDorman and Michael M'Gonigle; for this they have our endless gratitude. We thank the students who came out to help evaluate submissions, as well as the faculty members who provided expert reviews of our top choices. Thanks also to the external reviewers from outside the UVic community. We could not have completed our tasks without your insightful advice.

On behalf of the Board, I also extend sincere thanks to our patrons and sponsors. Without their generous support, we would not have been able to produce this journal. They have provided so many students with incredible experiences and opportunities.

Last, but certainly not least, I acknowledge the talent and dedication of our authors. This year we have featured articles from law students at UVic, McGill, and Osgoode Hall. I extend my thanks to every author for the time and effort they have invested in working with us. The Board is particularly pleased to present "Rethinking *Baker*: A Critical Race Feminist Theory of Disability" by Alyssa Clutterbuck, winner of the McCarthy Tétrault Prize for Exceptional Writing, as well as "Expanding the Role of Culture in British Columbia's Adoption Scheme" by Michael M.J. Choi, the writing prize runner-up. The quality of this year's submissions made for a heated debate in selecting a winner.

On a final celebratory note, I am especially proud to have been the Editor-in-Chief of the 20th Volume of *Appeal*. On behalf of twenty Editorial Boards, I thank the readers who have kept the journal alive. Please enjoy Volume 20.

ARTICLE

WRONGFUL CONVICTIONS AND THE AVENUES OF REDRESS: THE POST-CONVICTION REVIEW PROCESS IN CANADA

Andrea S. Anderson*

CITED: (2015) 20 Appeal 5

INTRODUCTION

In an ideal criminal justice system, only the guilty are punished while the innocent remain free. In reality, some individuals spend upwards of ten years in prison for crimes they did not commit, or crimes that never even took place at all. The Canadian media has showcased several high-profile cases of wrongful convictions, leading to increasing public awareness of the fallibility of the criminal justice process. In Canada, wrongful convictions are usually addressed and remedied through the appellate courts. Once these judicial avenues have been exhausted, section 696.1 of the *Criminal Code of Canada* (the “*Criminal Code*”) allows the Minister of Justice to review alleged wrongful convictions.¹ Canada’s post-conviction review process has been heavily criticized for not providing an adequate mechanism to deal with alleged miscarriages of justice after all statutory means of appeal have been exhausted.² As such, the public remains unsatisfied that the issue is being addressed.

This paper presents an overview of the current post-conviction review system in Canada and examines the continued calls for improvements. It is crucial for an appropriate mechanism to detect, review, and rectify errors within the criminal justice system to exist, yet the development of such a measure has been neglected in the discourse on wrongful convictions. Since 1986, seven public commissions of inquiry have been held in Canada following cases of confirmed wrongful convictions. Most recently, the Ontario government launched a public inquiry following the revelation that pathologist Dr. Charles Smith’s discrete testimony had allegedly contributed to a number of

* Andrea S. Anderson is a PhD Candidate at Osgoode Hall Law School, York University. She wishes to thank Professor David M. Tanovich, University of Windsor, Faculty of Law, and Professor Faisal Bhabha, Osgoode, for their continued support. She is particularly grateful to those who read multiple drafts of this paper and provided extremely insightful comments.

1 *Criminal Code of Canada*, RSC 1985, c C-46, s 696.1 [*Criminal Code*].

2 See Julian Roy & Elizabeth Widner, *Systemic Submissions of the Association in Defence of the Wrongly Convicted* (Toronto: The Association in Defence of the Wrongly Convicted, 2006); P Braiden & J Brockman, “Remediating Wrongful Convictions Through Applications to the Minister of Justice Under Section 690 of the Criminal Code” (1999) 17 Windsor Yearbook of Access to Justice 3.

miscarriages of justice relating to infant deaths.³ The Smith inquiry has drawn attention once again to the fallibility of the criminal justice system and has reignited discussion about post-conviction remedies. The manner in which causes of wrongful convictions are studied and what recommendations are presented to eradicate them are largely dependent on the effectiveness of the review process that investigates wrongful convictions. While the power of the Minister of Justice to review convictions has been amended, it has failed to challenge the status quo and does not increase public confidence in the criminal justice system. It is imperative to question whether there exists an effective alternative to section 696.1 of the *Criminal Code* for individuals who apply for a conviction review once they have exhausted all avenues of appeal.

This paper examines the review mechanisms in both the United States and Britain, and asks whether the role of the Minister of Justice in Canada should be replaced with an alternative system to review claims of innocence. Further, this paper argues that the Canadian government should create an independent review body to examine post-conviction claims because this approach is the best way to evaluate and address miscarriages of justice. Part I of this paper analyzes the ways that researchers, particularly in the United States, have attempted to define and identify cases of wrongful conviction. Part II describes the origins of the review process used in Canada, with a specific focus on the process that an individual who claims to have been wrongly convicted must go through when all avenues of appeal have been exhausted. Part III analyzes the limitations of Canada's current post-conviction review system, using case illustrations to demonstrate the difficulties inherent to the review process. The paper then discusses specific post-conviction review mechanisms in the United States and Britain aimed at reducing the imprisonment and execution of the innocent. In the conclusion, this paper addresses whether the establishment of an independent review process modeled closely after the United Kingdom's Criminal Cases Review Commission is feasible, and whether it is a more effective means for addressing miscarriages of justice in Canada, all while taking into account possible implications for Canada's criminal justice system.

PART I. SETTING THE STAGE—DEFINING WRONGFUL CONVICTIONS

A number of different terms are used throughout the literature to describe wrongful convictions, including 'miscarriage of justice', 'false imprisonment', and 'malicious prosecution'. However, there is no universally agreed-upon definition for wrongful conviction.⁴ The major studies conducted in the United States⁵ and the United Kingdom⁶ make distinctions between legal and factual innocence. Legal innocence refers to individuals whose convictions are quashed due to errors of law (for example, inadmissible evidence), and to those acquitted by the courts. In the Canadian legal system, however, a finding of legal innocence does not necessarily mean that the individuals are, in fact,

3 See Frank Dobrovnik & Omi Agency, "Compensation Means Little to a Wrongful Conviction Victim", *Canoe News* (10 May 2010) online: <<http://cnews.canoe.ca/CNEWS/Canada/2010/05/10/13893366.html>>; "Dr. Charles Smith's Victims to be Compensated", *CBC News* (10 August 2010) online: <<http://www.cbc.ca/news/canada/toronto/dr-charles-smith-s-victims-to-be-compensated-1.974472>>.

4 For example, see Hugo A Bedau & Michael L Radelet, "Miscarriages of Justice in Potentially Capital Cases" (1987) 40:1 *Stan L Rev* 21; C Ronald Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (Thousand Oaks, Cal: Sage, 1996).

5 Edwin M Borchard, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice* (New York: Garden City Publishing, 1932); Ruth Brandon & Christie Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (London: George Allen and Uwin, 1973); Bedau & Radelet, *supra* note 4; Martin Yant, *Presumed Guilty: When Innocent People are Wrongly Convicted* (Buffalo, NY: Prometheus Books, 1991); Huff et al, *supra* note 4.

6 Brandon & Davies, *supra* note 5.

innocent of committing the crime. Factual innocence refers to individuals who have been wrongfully convicted for crimes that they did not commit. In this paper, wrongful conviction is defined as the conviction of a factually innocent person.

American scholars suggest that a miscarriage of justice occurs whenever a suspect, defendant, or convict is treated by the state in a manner that breaches their constitutional rights.⁷ A miscarriage of justice is also used to describe (1) pre-trial detention for individuals who cannot afford bail⁸ and against whom the charges are later dropped, or who are acquitted after trial;⁹ (2) “individuals implicated in a crime or who were accessories to a crime in a minor way but not guilty of the more serious charge for which they were convicted”;¹⁰ (3) individuals whose convictions are later overturned on appeal;¹¹ (4) individuals whose convictions are later quashed;¹² and (5) false accusations of crime.

PART II. RESPONSES TO WRONGFUL CONVICTIONS

A. Overview of the Post-Conviction Review Process in Canada

Once convicted of a criminal offence, defendants have the opportunity to have their convictions revisited through the ministerial review process. Post-conviction review is available to most individuals who have been convicted of an offence under the criminal law, including both summary and indictable offences. Post-conviction review is also available to individuals who have been designated as dangerous or long-term offenders. However, in all cases, post-conviction review does not occur until all avenues of appeal have been exhausted.¹³

B. Origins—Common Law and Section 690

The ability to revisit a conviction is entrenched in Canadian legal history.¹⁴ Historically, the only method available for reconsideration of a criminal conviction following the exhaustion of appellate review was the common law Royal Prerogative of Mercy.¹⁵ This power, which continues to be part of the *Criminal Code*, allows the Crown to grant pardons and correct judicial errors. The right of the accused person to appeal criminal

7 Clive Walker, “Miscarriages of Justice in Principle and Practice” in Clive Walker & Keir Starmer, eds, *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press, 1999) 31 at 33.

8 Huff et al, *supra* note 4 at 10-11.

9 Barrie Anderson et al, *Manufacturing Guilt: Wrongful Conviction in Canada* (Halifax: Fernwood, 1998).

10 Brandon & Davies, *supra* note 5 at 19.

11 Anderson et al, *supra* note 9 at 73.

12 Brandon & Davies, *supra* note 5 at 20.

13 See *Criminal Code*, *supra* note 1, s 684(1):

[A] court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

See *R v Henry*, 2010 BCCA 462 (available on CanLII): Ivan Henry was wrongfully imprisoned, spending 27 years in jail for sex crimes. The Attorney General appointed a special prosecutor to investigate the potential miscarriage of justice. In 2008, the special prosecutor recommended that the Crown not oppose efforts by Mr. Henry to reopen his appeal. As a result, in 2010 the British Columbia Court of Appeal quashed his conviction and entered acquittals on all charges.

14 Anderson et al, *supra* note 9 at 118-28.

15 Canada, Department of Justice, *Addressing Miscarriage of Justice: Reform Possibilities for Section 690 of the Criminal Code* (Consultation Paper), (Ottawa: Communications Branch, Department of Justice, 1998) at 3 [Department of Justice, 1998].

cases was introduced in Canada in 1923.¹⁶ As well, section 1022 of the *Criminal Code* allowed the Minister of Justice to order new trials or refer to the Court of Appeal for its opinion. This provision underwent various amendments, culminating in the enactment of section 690 of the *Criminal Code* in 1968.¹⁷

Section 690 enabled the Minister of Justice, “upon application for mercy of the Crown by, or on behalf of, a person convicted in proceedings by indictment, or sentenced to preventive detention to”:

1. Direct a new trial, or a new hearing for a person in preventive detention if, after inquiry, the Minister is satisfied that in the circumstances a new trial or hearing should be directed;
2. Refer the matter to a court of appeal for hearing as if it were an appeal; or
3. Refer any question to a court of appeal for its opinion on which the Minister desires assistance.¹⁸

To apply for mercy under section 690, the Department of Justice generally required an applicant to submit trial transcripts, factums, reasons for judgment, and a brief setting forth the evidentiary and legal basis upon which the application to the Minister of Justice (who is also the Attorney General of Canada) was based.¹⁹ The literature notes that “successive federal Ministers of Justice have been of the view that the jurisdiction given to them by section 690 should not constitute another level of appellate review.”²⁰ Further, the extraordinary remedies provided by this section were not available unless new information demonstrated that there was a reasonable basis to conclude that a miscarriage of justice likely occurred. The legislation did not specify what evidence was required to satisfy the Minister of Justice that a remedy should be granted.²¹ In addition to lack of procedural rules, there was also a lack of guidelines and standardized forms. Once an investigation was complete, a report was prepared and then sent through various channels before being received by the Minister of Justice.²² Applicants were not given access to the reports or documents prepared by the Department, nor were they provided notice of any adverse findings or any opportunities to adduce evidence before the report went to the Minister.²³

Following several high profile wrongful convictions cases in the 1980s (including those of Donald Marshall Jr. and David Milgaard), section 690 came under heavy criticism.²⁴ In the 1990s, the Department of Justice implemented an internal study of the conviction review process. As a result of this study, the Department initiated changes in an attempt to “improve the timeliness of case review, provide more openness, and provide greater

16 *Ibid.*

17 *Ibid* at 3-4.

18 *Ibid.*

19 Philip Rosen, *Wrongful Convictions in the Criminal Justice System* (Ottawa: Library of Parliament, Research Branch, 1992) at 5.

20 Department of Justice, 1998, *supra* note 15 at 3.

21 However, in 1994, the Honourable Allan Rock, then Minister of Justice, in his reasons for decision in the section 690 application of W Colin Thatcher, articulated the principles which guide the discretionary powers found in section 690. For more information, see Department of Justice, 1998, *supra* note 15 at 3.

22 Rosen, *supra* note 19 at 5.

23 *Ibid.*

24 Nova Scotia, *Report of the Royal Commission on the Donald Marshall, Jr, Prosecution: Digest of Findings and Recommendations* (Nova Scotia: Royal Commission on the Donald Marshall, Jr, Prosecution, 1989) [Marshall Inquiry].

independence.”²⁵ In 1993, following many years of ad hoc review, the Criminal Conviction Review Group (“CCRG”) was formed, and it reported to the Assistant Deputy Minister of Justice. The CCRG consisted of a group of lawyers who reviewed convictions thought to be in error and made recommendations to the Minister. For a variety of reasons, discussed below, the conviction review process was considered inadequate and section 690 of the *Criminal Code* was amended and replaced by sections 696.1 to 696.6 in 2002.

C. 2002 Amendments—Current Conviction Review Process

Bill C-15A repealed section 690 of the *Criminal Code* and created sections 696.1 to 696.6. These amendments were intended to address the growing dissatisfaction with the previous legislation, particularly criticism of “the role of the Minister of Justice, procedural delays, secrecy, lack of accountability, and prosecutorial bias.”²⁶ Sections 696.1 to 696.6 set out the current law and procedures governing applications for post-conviction review in Canada. These sections give the Minister of Justice the power to review a conviction to determine whether a miscarriage of justice may have occurred. The amendments also included non-legislative changes in an attempt to distance the review process from the Department of Justice. These changes included the physical separation of the CCRG through relocation to another building, and the appointment of a Special Advisor to oversee the review process and provide advice directly to the Minister.²⁷

The new provisions were consistent with the previous legislation in many respects. Under the 2002 amendments the role of the Minister of Justice in determining applications for review was preserved; an application for ministerial review would not be accepted until the applicant had exhausted all available rights to appeal, and an applicant was still required to establish on a reasonable basis that a miscarriage of justice likely occurred. There were, however, some notable changes. For example, the Minister was now required to submit an annual report to Parliament concerning applications for review.²⁸ In addition, the amendments provided the Minister or his designate the powers of a commissioner under the *Inquiries Act* to take evidence, issue subpoenas, enforce attendance of witnesses and compel them to give evidence, and otherwise conduct an investigation in relation to the application for review.²⁹ These amendments also permitted the Minister of Justice to direct a new trial or to refer the matter to the Court of Appeal for hearing and determination if the Minister is “satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.”³⁰ In rendering his or her decision, the Minister is invited to take into account all matters that are considered relevant including, “whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister” and, “the relevance and reliability of the information that is presented.”³¹

Before applying to have a conviction reviewed by the Minister, the applicant must have exhausted all levels of judicial review or appeal and have new and significant information (often referred to as fresh evidence) relating to the conviction. As Kerry Scullion notes, this requirement means the application must be based on evidence that was not examined by the trial court, evidence that the applicant did not become aware of until all proceedings

25 Department of Justice, 1998, *supra* note 15.

26 Kathryn M Campbell, “The Fallibility of Justice in Canada: A Critical Examination of Conviction Review” in M Killas & R Huff, eds, *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Philadelphia: Temple University Press, 2008) 117 at 127.

27 James Bell & Kimberley A Chow, “Student Attitudes Toward the Post-Conviction Review Process in Canada” (2007) 90 *J Inst Just Int'l Stud* 3 at 91.

28 *Criminal Code*, *supra* note 1, s 696.1.

29 *Ibid*, ss 696.2(2), (3).

30 *Ibid*, s 696.3(3)(a).

31 *Ibid*, ss 696.4(a)-(b).

were over, or evidence that is reasonably capable of belief, relevant to the issue of guilt, and capable of having affected the trial verdict.³² Regulations governing applications also require that the applicant provide copies of all documents and transcripts related to pre-trial and appeal proceedings. No application can be considered until the original copies of all the prescribed documents have been submitted.³³ The conviction review process then takes place in four stages.

D. Stages of Review

i. Preliminary Assessment

In most cases, applications to the Minister of Justice are reviewed and investigated by the CCRG. If, however, an application is based on a matter that was prosecuted by the Attorney General of Canada, lawyers independent of the CCRG will conduct all stages of the review process. The process begins by assessing whether an application contains all of the necessary information and documentation. A preliminary assessment is then conducted to determine whether the application is based on new and significant evidence. If the application does not meet these criteria, the application will be screened out prior to proceeding to the investigation stage.³⁴ In this case, the applicant is not required to convince the Minister of their innocence, “but rather that there must be a reasonable basis to conclude that a miscarriage of justice likely occurred.”³⁵

ii. Investigation

The purpose of the investigation stage is to verify the information provided by the applicant. To assist the Minister of Justice in conducting the investigation, section 696.2(2) of the *Criminal Code* gives the Minister the power to subpoena witnesses to testify or produce evidence. The Minister has the authority to delegate this power to the CCRG or the independent lawyer(s) responsible for conducting the investigation.³⁶

iii. Investigation Report

Upon completion of the investigation, the CCRG or independent lawyer(s) prepare an investigation report summarizing the information gathered and send copies of the report to both the applicant and the Attorney General of the province or territory responsible for the prosecution. At this time, both the applicant and the Attorney General can submit any comments they might have. After these submissions have been received, the CCRG or independent lawyer(s) may conduct further investigation based on these comments. The CCRG or independent lawyer(s) conducting the review then create a final investigation report and prepare their recommendations.³⁷

32 Kerry Scullion, “Wrongful Convictions and the Criminal Conviction Review Process Pursuant to Section 696.1 of the Criminal Code of Canada” (2004) 46:2 Can J Criminology & Crim Just 189 at 190.

33 Bell & Chow, *supra* note 27 at 92.

34 Canada, Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice* (Annual Report), (Ottawa: Communications Branch, Department of Justice, 2005) [Department of Justice, 2005].

35 Campbell, *supra* note 26 at 119.

36 Department of Justice, 2005, *supra* note 34: The investigation stage may involve (1) interviewing or examining witnesses; (2) carrying out scientific tests; (3) obtaining other assessments from forensic and social scientists; (4) consulting police agencies, prosecutors, and defence lawyers who were involved in the original prosecution and/or appeals; or (5) obtaining other relevant personal information and documentation.

37 Bell & Chow, *supra* note 27 at 2-3.

iv. Decision by the Minister

After considering the recommendations made by the CCRG and the Special Advisor, if the Minister believes there is new evidence that presents a compelling reason to re-open a case, the Minister may order a new trial or refer the matter to the Court of Appeal.³⁸ The Minister may also, at any time, refer a question to the Court of Appeal for its opinion.

PART III. CRITICISMS OF THE REVIEW PROCESS

Despite the 2002 amendments to the *Criminal Code*, the conviction review process continues to be criticized for a variety of reasons. These criticisms can be grouped into two areas: (1) those aimed at the process itself and (2) those relating to the role of the Minister of Justice as the arbiter of conviction review.³⁹ The case of Steven Truscott illustrates two of the main issues with the current review process. In 1959, 14-year-old Steven Truscott was convicted of murdering 12-year-old Lynne Harper in Ontario. Truscott was initially sentenced to death, but this was commuted to life imprisonment. Truscott would serve ten years before being released on parole. During that time, his appeals against his conviction to the Ontario Court of Appeal and the Supreme Court of Canada were refused. In 2001, Truscott filed a conviction review application with the CCRG. Given the high profile nature of his case and conviction, the Minister appointed retired Justice Fred Kaufman to conduct the review. Kaufman completed his investigative report in 2004.⁴⁰ The Minister of Justice referred the case back to the Ontario Court of Appeal. The Court of Appeal heard the case in 2006, and acquitted Truscott a year later, “but fell short of declaring him innocent.”⁴¹ The Court of Appeal concluded that “while it cannot be said that no jury acting judicially could reasonably convict, we are satisfied that if a new trial were possible, an acquittal would clearly be the more likely result.”⁴² In the end, it would take six years from the time Truscott’s application was received by the CCRG for the Court of Appeal to reach a decision.

A. Shortcomings in Canada’s Current Review Process

Critics maintain that section 696.1 through 696.6 represent little more than a cosmetic change to preceding legislation and, as such, fall short in providing a reasonable standard of independence, fairness, efficiency, and transparency. Braiden and Brockman identify a number of problems with the post-conviction review process, such as the secrecy surrounding the process, the high cost of applying for a review, and the conflict of interest in the Minister’s role.⁴³ Many of the same criticisms of the section 690 process can be reiterated for the current legislation. The literature examining this topic has pointed to six broad categories in which the current system has failed: (1) lack of independence, (2) evidentiary burden too high, (3) barriers of access, (4) potential of application to be dismissed, (5) delays, and (6) lack of transparency.

38 *Criminal Code*, *supra* note 1, s 696.39(3).

39 Campbell, *supra* note 26. These recommendations and advice are then sent to the Minister. The Minister also receives advice on the application from the independent Special Advisor. The Special Advisor provides advice at all stages of the review process.

40 Canada, Department of Justice, *Report to the Minister of Justice* by F Kaufman (Ottawa: Department of Justice, 2004).

41 *Ibid.*

42 Clive Walker & Kathryn Campbell, “The CCRC as an Option for Canada: Forwards or Backwards?” in Michael Naughton, ed, *The Criminal Cases Review Commission: Hope for the Innocent* (New York: Palgrave MacMillan, 2010) 191 at 193-94.

43 Braiden & Brockman, *supra* note 2.

i. Lack of Independence—Conflict of Interest

The most obvious objection to the current review process in Canada is the lack of institutional independence on the part of the body responsible for determining applications for review. In Canada, the Minister of Justice serves a dual role as the Attorney General, meaning that he or she also supervises the prosecution of violations of federal statutes (other than the *Criminal Code*) in all provinces, as well as the prosecution of all federal offences (including the *Criminal Code*) in the territories.⁴⁴

The federal Minister of Justice, as the chief lawmaker, is too close to the prosecution of a case to render an impartial decision when approached with a post-conviction review application.⁴⁵ Having the power to grant a remedy in a case where a miscarriage of justice occurred is essentially incompatible with the role of the prosecution of crimes.⁴⁶ On the one hand, a prosecutor must balance his or her function as an adversary with the responsibility to exercise discretion as a guardian of the public interest. Yet, at the same time this individual is asked, through the conviction review, to critically examine those very same practices undertaken by members of the same team.⁴⁷ In those cases where a remedy is ordered by the Minister, “a member of the executive branch of government is essentially overruling the judiciary.”⁴⁸ Philip Rosen believes that this practice reflects a prosecutorial bias on the part of the Department of Justice, resulting in a “deference to judicial determinations of guilt and an insufficiently rigorous questioning of the foundations of criminal convictions.”⁴⁹ Traditionally, the constitutional separation of powers ensures that the executive does not interfere, nor can it be perceived as interfering with judicial processes. Through section 696.2 the Minister of Justice acts as a gatekeeper to the courts and is effectively authorized to usurp the powers of the court by refusing a reference. As noted by Braiden and Brockman, whether or not the Department of Justice officials are partial or impartial in their decisions, it is imperative that justice appears to have been achieved.⁵⁰ Any perceived conflict of interest, whether well-founded or not, undermines the integrity of the process.⁵¹

ii. Evidentiary Burden

Under the 2002 amendments, applicants are still required to investigate their own wrongful convictions, with the onus falling upon them to identify the legal grounds for their application. Critics of the current review process argue that this imposes too high a threshold on the applicant. For example, the requirement that the applicant “demonstrate a reasonable basis to conclude that a miscarriage of justice likely occurred” imposes a higher standard than would be applied by the Court of Appeal on a review.⁵² Additionally, opponents criticize the requirement that applications for post-conviction

44 Department of Justice, 2005, *supra* note 34.

45 Scullion, *supra* note 32 at 194.

46 Campbell, *supra* note 26 at 123; see also Braiden & Brockman, *supra* note 2 at 25.

47 M Bloomfield & D Cole, “The Role of Legal Professionals in Youth Court” in Kathryn M Campbell, ed, *Understanding Youth Justice in Canada* (Toronto: Pearson Education, 2005) 198; see Campbell, *supra* note 26 at 123.

48 *Ibid.*

49 Rosen, *supra* note 19 at 15-16.

50 Braiden & Brockman, *supra* note 2 at 29.

51 Rosen, *supra* note 19.

52 Canada, Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice* (Annual Report), (Ottawa: Communications Branch, Department of Justice, 2010) at 1 [Department of Justice, 2010].

review be based on ‘new’ and ‘significant’ evidence as being overly restrictive.⁵³ Although the Department of Justice now has the ability to compel evidence, the onus still remains primarily on the applicants themselves to identify what evidence is necessary for their application. As stated in the *Milgaard Commission*:

The key to exposing wrongful convictions is having the will and the resources to go out and investigate to see whether there is anything wrong and not simply sit back and say to the applicant, well, if you can show me something new I may react to it, but if you can’t, I’m sorry, there’s nothing I can do.⁵⁴

iii. Barriers to Access

a. Cost

In the current conviction review process potential applicants face a number of financial barriers. For example, the regulations provide that no application will be considered until the applicant provides all the necessary documents. Regulations governing applications for ministerial review require that they be accompanied by copies of all documents related to pre-trial, trial, and appeal proceedings.⁵⁵ Critics maintain that this requirement is prohibitive, as these documents are often so large that they fill numerous boxes.⁵⁶

Currently, if individuals wish to obtain legal assistance in making an application for ministerial review, they must either pay for it themselves or apply for legal aid from the province or territory in which they live. Only some provinces and territories will consider such a request.⁵⁷ When legal aid for post-conviction review is available, stringent criteria must be met. For example, similar to the requirement for making an application for ministerial review, an application for legal aid may not be considered unless the applicant can demonstrate, amongst other criteria, that ‘new’ and ‘significant’ evidence exists.⁵⁸ As noted by James Bell and Kimberley Chow, the majority of applicants are incarcerated and thus “unable to conduct their own investigation.”⁵⁹ As a result, volunteers from organizations such as Association in Defence of the Wrongly Convicted (“AIDWYC”) and other innocence projects like those found at Canadian law schools are often left with the burden of uncovering new evidence and providing legal assistance, which hardly seems fair or just.⁶⁰

b. Effectiveness

From April 2005 to March 2007, the CCRG received fifty-seven applications, completed five investigations, and made three decisions: one case was dismissed and two were referred to the Court of Appeal.⁶¹ These figures do not represent the actual incidences of

53 PL Braiden, *Wrongful Convictions and Section 690 of the Criminal Code: An Analysis of Canada’s Last-Resort Remedy* (Master’s Thesis, Simon Fraser University, 2000) [unpublished].

54 Saskatchewan, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard*, vol 1 (Saskatoon: Attorney General, 2006) at 389.

55 Canada, Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice* (Annual Report), (Ottawa: Communications Branch, Department of Justice, 2014).

56 Bell & Chow, *supra* note 27 at 92-93.

57 *Ibid.*

58 *Ibid* at 92.

59 *Ibid* at 91-92.

60 *Ibid.*

61 Kathryn Campbell, *Miscarriages of Justice in Canada: Causes, Response and Prevention* (Toronto: University of Toronto Press, 2009).

wrongful convictions in Canada.⁶² According to AIDWYC, “the Minister intervenes in about one percent of all applications.”⁶³ While AIDWYC’s report admitted that this low number of decisions reflects the integrity of the applications, it also demonstrates that the process may not be the most effective means of addressing wrongful convictions. Bell and Chow note that long-held criticisms of the ministerial review process center around lack of accountability and expediency.⁶⁴

iv. Delays

Reviews and investigations conducted by the CCRG are characterized by delays. According to Julian Roy and Elizabeth Widner, “the current review process makes no provision for ensuring that applications for review are considered and determined on a timely basis.”⁶⁵ The experience of AIDWYC demonstrates that applications can take years to process, with the applicant being largely uninformed during the process.⁶⁶ Statistics reported by the Minister in the 2013 Annual Report show that of the twelve applications received at the preliminary assessment, only three were completed during the reporting period (April 1, 2012 – March 31, 2013).⁶⁷ During this period the CCRG only rendered a decision in one case.⁶⁸ While the CCRG defends these delays by claiming that investigations take time, critics argue that these delays are inexcusable.⁶⁹ Further, even when investigations have been completed and recommendations and advice have been provided to the Minister, decisions may take up to an additional five years to be delivered.⁷⁰

v. The Potential of the Application to be Dismissed

According to AIDWYC, the preliminary assessment stage of the current conviction review process is also a significant concern. AIDWYC argues that the requirement that the applicant demonstrate to the satisfaction of the Minister that there “may be a reasonable basis to conclude that a miscarriage of justice likely occurred” puts the applicant in a catch 22 situation, in that “it is almost inconceivable that an unrepresented applicant, from his prison cell, could meet any such standard prior to some form of investigation (however modest) being conducted.”⁷¹ While the disclosure of the investigation report provides information to the applicant, the applicant is still not provided copies of the CCRG’s final submission to the Minister. The applicant is provided with facts, but is not fully informed of the findings, issues, and considerations on which the Minister proposes to make a decision.

62 Braiden & Brockman, *supra* note 2 at 35.

63 Bell & Chow, *supra* note 27 at 92.

64 *Ibid* at 93.

65 Roy & Widner, *supra* note 2.

66 *Ibid*.

67 Canada, Department of Justice, *Applications for Ministerial Review – Miscarriages of Justice* (Annual Report), (Ottawa: Communications Branch, Department of Justice, 2013) at 9-10.

68 Department of Justice, 2010, *supra* note 52: An application is considered to be “completed” when a person has submitted the forms, information and supporting documents required by the regulations. The Minister received seven completed applications during this reporting period. An application is considered to be “partially completed” where a person has submitted some but not all of the forms, information and supporting documents required by the regulations. For example, a person may have submitted the required application form but not the supporting documents required.

69 Braiden & Brockman, *supra* note 2.

70 *Ibid*.

71 Roy & Widner, *supra* note 2 at 23.

vi. Transparency

Finally, Kerry Scullion notes that, aside from the *Criminal Code* and the regulations, there are no publicly accessible guidelines or rules that prescribe how an application is to be considered, such as what documents ought to be provided for the Minister's consideration, or how evidence is considered and against what standard.⁷² The lack of legislative guidelines allows the discretion of the Minister to remain private and unscrutinized. These problems with transparency in the review process are compounded by the fact that the Minister's decisions are not made public. While annual reports to Parliament do provide some new information that is useful for statistical analysis, they reveal only a limited amount of statistical information. The essence of section 690 remains; what few changes have been made are primarily superficial—there has been little substantive change in post-conviction review procedures, and as such it is not surprising that there continue to be calls for reform in Canada.

B. Recommendations

This overview of the post-conviction review process as a last resort for the wrongfully convicted in Canada serves to illustrate its many challenges, deficits, and difficulties. With sufficient time and resources, individuals can apply for review but, as the past has indicated, the chances of being granted a remedy are remote. The current review process is cumbersome, onerous, and lengthy, rendering it inaccessible and ultimately ineffective for most wrongfully convicted individuals seeking redress. As a result, it is important to inquire whether an alternative method to effectively address post-conviction review in Canada exists.

i. Post-Conviction Review Mechanisms in Other Jurisdictions

a. The American Experience

In 2004, the *Advancing Justice Through DNA Technology Act* and the *Innocence Protection Act* (“IPA”) were included within a bill called the *Justice for All Act* of 2004.⁷³ The IPA is a package of criminal justice reforms intended to reduce the risk of innocent persons being executed by the State and ensure that potentially wrongfully convicted inmates have access to evidence that can establish their innocence.⁷⁴

b. Post-Conviction DNA Testing for Qualified Inmates

In federal cases, the IPA allows an inmate “under a sentence of imprisonment or a sentence of death” to apply for post-conviction DNA testing.⁷⁵ The court orders DNA testing if it finds that the specific requirements of section 411(a) of the IPA have been met. A motion for post-conviction DNA testing must be filed within five years after the enactment of the IPA or within three years of the applicant's conviction, whichever comes later.⁷⁶ After this period, an inmate can apply for such testing if he or she can demonstrate reason for failing to apply within the required time period. If the results of the DNA testing reveal that the applicant was the true source of DNA found at the crime scene, the court will consider whether the applicant's assertion of actual innocence

72 Scullion, *supra* note 32 at 193; Roy & Widner, *supra* note 2 at 24-25.

73 Michael E Kleinert, “Improving the Quality of Justice: The Innocence Protection Act of 2004 Ensures Post-Conviction DNA Testing, Better Legal Representation, and Increased Compensation for the Wrongfully Imprisoned” (2006) 44 Brandeis LJ 491; US, Bill HR5107, *Justice for All Act of 2004*, 108th Cong, 2003-2004 (enacted) [*Justice for All Act*].

74 US, Senate Committee on the Judiciary, 107th Cong, *The Innocence Protection Act of 2002* (S Rep No 107-315) (Washington, DC: US Government Printing Office, 2002) at 2.

75 *Justice for All Act*, *supra* note 73 § 411(a).

76 *Ibid* § 411(a)(10).

was false.⁷⁷ If the applicant has made false assertions, then he or she will be sentenced to a term of imprisonment of not less than three years.⁷⁸ On the other hand, if the DNA testing results establish that the applicant was innocent, he or she may file a motion for a new trial or a new sentencing hearing, as appropriate.⁷⁹ The court shall grant the motion if the DNA results, along with all other evidence, establishes that a new trial would likely produce an acquittal of the offense, or entitle “the applicant to a reduced sentence” or “new sentencing proceedings.”⁸⁰

Section 411 of the *IPA* also ensures that biological evidence in federal cases will not be destroyed while the individual is imprisoned.⁸¹ However, it is important to note that the evidence could be destroyed if the defendant “knowingly and voluntarily waived the right to request DNA testing” in a court proceeding, or if the court previously denied a request or motion for DNA testing.⁸² It could also be destroyed if the defendant failed to file a motion for DNA testing after being informed that the biological evidence could be destroyed. These requirements demonstrate that only certain prisoners are eligible to apply for and obtain post-conviction DNA testing.

Section 412 of the *IPA* established the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program to help states pay for post-conviction DNA testing.⁸³ As an incentive for states to consider claims of actual innocence, section 413 of the *IPA* awards grants to eligible entities in states that meet certain requirements. Under a particular state statute, rule, or regulation, the state must provide reasonable procedures for providing post-conviction DNA testing and preserving biological evidence while a person is imprisoned.⁸⁴ If a state has already adopted these procedures through legislation enacted before the *IPA*, it will automatically qualify for these grants. Likewise, the *IPA* authorizes the Attorney General to award grants to improve the ability of prosecutors in state capital cases.

c. Improving the Quality of Counsel

The *IPA* also attempts to fix the issue of ineffective counsel, one of the documented causes of wrongful convictions in the United States.⁸⁵ Some commentators argue that the *IPA* takes a “proactive approach in addressing wrongful convictions by aiming to provide better legal representation” to defendants in state capital cases.⁸⁶ Section 421 awards grants to states to “establish, implement, or improve an effective system for providing competent legal representation [...] to indigents charged with an offence subject to capital punishment.”⁸⁷ Michael Kleinert illustrates that this system may either be a public defender program or an entity that has jurisdiction in criminal cases.⁸⁸ This system must establish qualifications for lawyers, maintain a roster of competent counsel, perform and approve specialized training programs, and monitor the performance of these lawyers.⁸⁹

77 *Ibid* § 412(f)(2).

78 *Ibid* § 412(f)(3).

79 *Ibid* § 412(g)(1).

80 *Ibid* § 412(g)(2).

81 *Ibid* § 411(a)-(c).

82 *Ibid* § 411(c).

83 *Ibid* § 412. Kirk Bloodsworth was the first person on death row to prove his innocence through DNA testing. See Kleinert, *supra* note 73 at 503.

84 *Ibid* § 413(2). See Kleinert, *supra* note 73.

85 *Ibid*.

86 *Ibid*.

87 *Justice for All Act*, *supra* note 73 § 421.

88 *Ibid* § 421(e). See Kleinert, *supra* note 73 at 504.

89 *Ibid*.

In addition, the entity or public defender program must “ensure funding for the full cost of competent legal representation by the defense team and outside experts selected by counsel.”⁹⁰

d. Criticism of the *IPA*

Critics of post-conviction testing note that not every person in the prison system will have the opportunity to apply for such DNA testing.⁹¹ To date, 47 states have adopted post-conviction DNA testing statutes; some have imposed additional limitations that hinder applicants from obtaining testing, such as prohibiting applications from those (1) that have plead guilty; (2) that have admitted to guilt in order to obtain parole; (3) whose attorneys did not request testing; (4) convicted of crimes for which relief could be sought; (5) who are sentenced to death; (6) who are able to establish a likelihood rather than a possibility the testing will be exculpatory; (7) where there are clear and convincing evidence that the new results would be significantly more discriminating than the results of previous testing; or (8) that fail to provide adequate safeguards to preserve biological evidence.⁹² For instance, Alabama and Kentucky only allow DNA testing in capital cases, and Pennsylvania only allows DNA testing for individuals who were convicted before 1995.⁹³

Further, commentators have maintained that the federal statute is limited to cases in which identification was an issue at trial, and contains chain-of-custody requirements that may be impossible to meet if interpreted literally. A few states even retain a statute of limitations in DNA testing.⁹⁴ For example, some of the states have statutes of limitations of six months or less on motions to present newly discovered evidence of innocence.⁹⁵ Such statutes severely “limit the ability of a person believed to be wrongly convicted to gain access to any evidence, let alone DNA, to aid in exonerations.”⁹⁶ Finally, the full effects of the financial assistance depends on numerous factors, including whether concerns over state sovereignty would impact the full utilization of the grant program, and whether the funds allocated to the grant program would be sufficient to cover the requests being submitted by the states.

In 2009, the United States Supreme Court heard a claim by a convict seeking DNA testing.⁹⁷ The convict was William Osborne, who was convicted in Alaska in 1993 of crimes resulting from a sexual assault, kidnapping, and assault. After losing his appeal, he sought post-conviction DNA testing of materials from the crime scene using new DNA technology that, he argued, could prove his innocence.⁹⁸ After seeking DNA testing in the state courts with no success, Osborne filed a complaint in 2003 in the federal district

90 *Ibid* § 421(e).

91 Kleinert, *supra* note 73 at 501-03.

92 Myrna Raeder, “Postconviction Claims of Innocence” (2009) 24:3 Criminal Justice 14 at 15.

93 See “US Supreme Court Decision on DNA Testing Is Disappointing But Will Have Limited Impact, Innocence Project Says” (18 June 2009), online: Innocence Project <http://www.innocenceproject.org/Content/US_Supreme_Court_Decision_on_DNA_Testing_Is_Disappointing_But_Will_Have_Limited_Impact_Innocence_Project_Says.php> [Innocence Project].

94 Raeder, *supra* note 92 at 15. See “Access To Post-Conviction DNA Testing”, online: Innocence Project <<http://www.innocenceproject.org/Content/304.php>>.

95 Myriam S Denvo & Kathryn M Campbell, “Criminal Injustice: Understanding the causes, effects, and responses to wrongful conviction in Canada” (2005) 21:3 Journal of Contemporary Criminal Justice 229 at 243.

96 *Ibid*.

97 *District Attorney’s Office v Osborne*, 552 US 52, 129 S Ct 2308 (2009) [Osborne].

98 Brandon L Garrett, “DNA and Due Process” (2010) 78:6 Fordham L Review 101 at 102-03; Raeder, *supra* note 92 at 16.

court stating that the due process clause of the Fourteenth Amendment entitled him to obtain DNA testing that could provide profound evidence of his innocence. The state of Alaska refused to permit the testing under its general post-conviction statute because DNA testing had been available, Osborne had admitted guilt to some of the crimes in an application for parole, and no constitutional right to obtain DNA post-conviction testing existed.⁹⁹

In *District Attorney's Office v Osborne* (“*Osborne*”), the Supreme Court held in a five against four decision that there “is no constitutional right to obtain post-conviction DNA testing, and that Alaska’s procedure for DNA testing did not violate due process.”¹⁰⁰ The Court did overcome its concerns about the effect of DNA on finality, declaring “the availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt.”¹⁰¹ In the majority opinion, “the Supreme Court ultimately decided that the finality of a conviction is more important than making sure the right person was convicted.”¹⁰² In effect, the *Osborne* decision concluded that the “floodgates would open to frivolous innocence claims if a right to testing was recognized.”¹⁰³ As noted by American law professor Myrna Raeder, “the Osborne majority ceded DNA post-conviction relief to state and federal legislators, claiming for the most part they had already enacted statutes with varying requirements to provide relief.”¹⁰⁴ In doing so, the Court held that the federal *IPA* was a model for post-conviction procedures regarding access to DNA testing. In states without adequate laws granting DNA testing, the federal court can be the last resort, as in Mr. Osborne’s case. Peter Neufeld, cofounder of the Innocence Project in the United States, has argued that the *Osborne* decision would not greatly impact most federal and state inmates in obtaining testing under existing DNA statutes. However, Neufeld does admit that the ruling would affect a small number of people who are denied testing in state courts, and claimed that “more innocent people will languish in prison.”¹⁰⁵

ii. The United Kingdom

a. Introduction to the Criminal Cases Review Commission

The Criminal Cases Review Commission (the “Commission” or “CCRC”) was established by the British Parliament under the *Criminal Appeal Act of 1995* following recommendations from the 1993 *Royal Commission on Criminal Justice* (the “*Royal Commission*”), a royal commission charged with investigating how effectively the British criminal justice system secured convictions of the guilty while ensuring acquittals of the innocent.¹⁰⁶ The *Criminal Appeal Act* established the CCRC “as an executive Non-Departmental Public Body” to consider applications for “review of the convictions of those who believe they have either been wrongly found guilty of a criminal offense, or wrongly sentenced.”¹⁰⁷ Prior to 1995, the Home Secretary had the power to refer cases to the Court of Appeal. The problems associated with the Home Secretary’s referral power

99 *Ibid.*

100 *Ibid.*

101 *Osborne*, *supra* note 97.

102 See Innocence Project, *supra* note 93.

103 Raeder, *supra* note 92 at 16.

104 *Ibid.*

105 See Innocence Project, *supra* note 93; see also Raeder, *supra* note 92 at 16.

106 UK, Home Affairs Committee, *First Report: the Work of the Criminal Cases Review Commission* (London: Home Affairs Committee, 1999).

107 David Horan, “The Innocence Commission: An Independent Review Board for Wrongful Convictions” (2000) 20:1 N III U L Rev 91 at 189.

are well documented¹⁰⁸ and calls came as early as the 1970s to establish an independent tribunal to reopen cases. These calls continued throughout the 1980s. The high-profile wrongful conviction cases of the Guildford Four and the Birmingham Six served as catalysts for change in the United Kingdom. The *Royal Commission* recommended that the Home Secretary's power to refer cases back to the Court of Appeal be removed and that a new body should be formed. This new body was to consider alleged miscarriages of justice, supervise their investigation if further inquiries were needed, and refer appropriate cases to the Court of Appeal.

By its own account, the CCRC is an independent body charged with “impartial, open, and accountable investigation of suspected miscarriages of justice in both convictions and sentencing in England, Scotland, Wales, and Northern Ireland.”¹⁰⁹ The depth of the Commission's investigative powers enables it to actively investigate miscarriage of justice claims before a decision is made on whether or not to refer the case to the appeal courts. The Commission, which rarely accepts cases that have not been previously appealed, is not restricted to innocence-based applications.

In summary, the CCRC's primary functions are (1) to consider suspected miscarriages of justice, (2) to arrange for their investigation where appropriate, and (3) to refer cases to the Court of Appeal in the event that the investigation revealed matters that ought to be considered further by the courts. The CCRC Members principally partake “in policy-making and final decision-making on references of cases” and “in providing expertise and guidance to Case Review Managers.”¹¹⁰ Further, the CCRC, as envisioned by the *Royal Commission* and established by Parliament, is not “within court structure,” and is not “empowered to take judicial decisions that are properly matters for the Court of Appeal” or “to change a decision made by a court.”¹¹¹

One of the main reasons to establish a new review body to replace the Home Office was the need for investigations that could be carried out independently of the executive. To ensure this, the *Criminal Appeal Act* provides that the CCRC “shall not be regarded as the servant or agent of the Crown.”¹¹² However, the Commission's connection with the Government is not completely severed, in that its eleven Members are appointed by the Queen on the recommendation of the Prime Minister. The Commission relies on the Ministry of Justice for resources and, additionally, the Minister of Justice sets the employment terms and conditions of the Commission's Members.¹¹³

b. Investigation and Review by the CCRC

Anyone claiming to have experienced a wrongful conviction may apply to the CCRC for case review, with or without the aid of a solicitor. A convicted defendant seeking a CCRC review can obtain a straightforward, standardized application form that the CCRC has made available. Upon application, the CCRC “examine[s] each case impartially and

108 See Nicolas Taylor & Michael Mansfield, “Post-Conviction Procedures” in Clive Walker and Keir Starmer, eds, *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press, 1999) 229; Mike McConville & Lee Bridges, eds, *Criminal Justice in Crisis* (Aldershot: Edward Elgar, 1994); Kate Malleson, “Appeals Against Conviction and the Principle of Finality” in S Field and PA Thomas, eds, *Justice and Efficiency? The Royal Commission on Criminal Justice* (Cambridge, MA: Blackwell Publishers, 1994).

109 UK, Criminal Cases Review Commission, *Annual Report 2002-2003* (Birmingham, UK: Her Majesty's Stationery Office, 2003) at 4.

110 UK, Criminal Cases Review Commission, *Annual Report 1997-1998* (London: Her Majesty's Stationery Office, 1998) at 16.

111 *Ibid.*

112 Horan, *supra* note 107 at 148.

113 *Criminal Appeal Act 1995* (UK), ch 35, ss 8(2), (4).

decide[s] whether it would have a real possibility of succeeding in the Court of Appeal.”¹¹⁴ If the CCRC determines that a case is eligible for review, the case is ranked “regularly in priority for allocation of caseworkers, taking into account the human costs of delay, the effective use of resources, and the date of receipt” as well as “whether or not the applicant is in custody, and the impact of the case on public confidence in the criminal justice system.”¹¹⁵ The CCRC has its own investigatory power and can appoint experts to assist in the investigations of cases and examinations of evidence. It can require any British public body to preserve materials under the public body’s control.¹¹⁶ The Commission conducts some inquiries through its own staff and will then inform the applicant of its findings and accept the applicant’s comment on the investigation.¹¹⁷ The CCRC will review the case in light of all the information before it, and the “decision on whether or not to refer the case to an appeal court will then be made by three or more Commission Members.”¹¹⁸

Eligibility for review depends on whether the application arises from a conviction in England, Wales, or Northern Ireland. Only in exceptional circumstances can a case be referred without the applicant having exhausted the normal appeal process. Previously, the Home Secretary could refer cases that he or she believed met the criteria, but the Commission’s referral power is much more restrictive.¹¹⁹

c. Decisions by the CCRC

Once Case Review Managers have completed their reviews, cases are passed to the CCRC members to decide whether the cases should be referred for appeal.¹²⁰ The CCRC may make a referral, under section 13 of the *Criminal Appeal Act*, if there is a real possibility that the conviction or sentence would not be upheld. The real possibility must arise from arguments or evidence not raised during the trial, at appeal, or due to exceptional circumstances. These exceptional circumstances are defined on a case-by-case basis. The CCRC will also make a referral if “an appeal against the conviction has been determined or leave to appeal against it has been refused.”¹²¹ When deciding whether to refer a case, the CCRC is required to consider representations made by the applicant, his or her representatives, the Government or other outside agencies or public or private bodies, and “any other matters which appear to the Commission to be relevant.”¹²² The CCRC is required to give reasons for its decision on whether or not to refer a case for appeal.¹²³ The CCRC’s involvement in a case concludes after a referral.¹²⁴ Following the CCRC’s referral of a conviction or sentence to the Court of Appeal, the applicants and their legal

114 “Applying to the Commission”, online: Criminal Cases Review Commission <<http://www.ccrcc.gov.uk/applying.hmt>>.

115 Horan, *supra* note 107 at 149. See Walker & Campbell, *supra* note 42.

116 Horan, *supra* note 107 at 149-50; see also “Background to the Commission”, online: Criminal Cases Review Commission <http://www.ccrcc.gov.uk/aboutus/aboutus_background.html>; UK, Criminal Cases Review Commission, *Annual Report 2005-2006* (London: Her Majesty’s Stationery Office, 2006) at 17.

117 Horan, *supra* note 107 at 150.

118 *Ibid*; see also *Criminal Appeal Act*, *supra* note 113, Schedule 1, ss 6(2)-(3); Stephanie Roberts & Lynne Weathered, “Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission” (2009) 29:1 Oxford J Legal Stud 43.

119 *Ibid* at 48.

120 See David Kyle, “Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission” (2004) 52:4 Drake L Review 657 at 670: A decision to refer a case must be made by a Committee of at least three Committee Members. A decision not to refer may be made by one or more of the Members or employees of the Commission.

121 *Criminal Appeal Act*, *supra* note 113, ss 13(1)(b)-(2), (c)-(2).

122 *Ibid*, s 14(2)(c).

123 Horan, *supra* note 107 at 150-51; *Criminal Appeal Act*, *supra* note 113, ss 14(4), (6).

124 *Ibid*, ss 14(4)-(b), (6).

representatives assume responsibility for arguing the case before the Court of Appeal. In the design of its procedures, the CCRC separated the review and decision-making functions to ensure that independence and objectivity are consistent throughout the process. This separation means that the Member assigned to assist the Case Review Manager with the review will not be involved in making the decision.¹²⁵

d. Criticism of the CCRC

For critics of the administration of justice in Britain, the CCRC signaled parliamentary acknowledgement of the failure of due process. That said, evaluations of the efficacy of the CCRC have raised serious concerns. In their critical assessments of the CCRC, Robert Schehr and Lynne Weathered identify the following key characteristics that generate serious impediments to the CCRC's ability to perform its oversight role: (1) the subordinate structural relationship of the CCRC to the Court of Appeal, (2) no objective determination of what constitutes a thorough investigation, (3) the role of caseworkers in screening viable cases of review, (4) the limited amount of time for case review, (5) limited resources to fully investigate cases and over-reliance on petitioners to generate grounds for appeal, and (6) limitations on case investigation to meet fresh evidence standards.¹²⁶ Further, some commentators note that, while "the chances of wrongs being righted has increased with the arrival of the CCRC, many innocent inmates may be forced to remain in jail because their cases simply do not qualify for CCRC consideration due, for example, to lack of any new evidence."¹²⁷ Others have severely criticized the CCRC for its slow progress and for being "too meticulous" and setting its standards too high.¹²⁸ Research shows that when the CCRC make the decision to move forward with an investigation, it typically takes three years to complete the case.¹²⁹ The CCRC is essentially the lone gateway to the Court of Appeal. The CCRC has also been heavily criticized for not being independent of the Court of Appeal, in order to focus on whether applicants are innocent as intended by the *Royal Commission* that recommended it be established.¹³⁰ CCRC critics maintain that it does not look at guilt or innocence; rather it considers whether it is a possibility that the Court of Appeal will find a conviction unsafe. In turn, the Court of Appeal hears new evidence offered by the appellant and considers whether, if a jury had heard it, the individual would have been convicted.¹³¹ Further, a single Commissioner is, in many cases, the ultimate decision maker regarding an applicant's case. Given this reality, the composition of the Commission and the caseworkers, along with any personal biases the members may bring to their position, may be highly relevant to the outcome of the applicant's case. Finally, some critics argue that the single greatest challenge facing the CCRC is a lack of adequate funding and resources.¹³²

125 See Kyle, *supra* note 120.

126 Robert Carl Schehr & Lynne Weathered, "Should the United States establish a Criminal Cases Review Commission?" (2004) 88:3 *Judicature* 123.

127 Duncan Campbell, "Guilty Until Proven Innocent", *The Guardian* (19 August 1998) at 17.

128 Horan, *supra* note 107 at 142, 161; see Bob Woffinden, *Justice Delayed* (London: Guardian, 1998) at 17.

129 Schehr & Weathered, *supra* note 126 at 125.

130 Michael Naughton, "The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System" (2012) 58 *Criminal Law Quarterly* 207 at 210.

131 Jon Robins, "Countering Criticism of the CCRC", *Criminal Law & Justice Weekly* (10 December 2011) online: CL&J <<http://www.criminalawandjustice.co.uk/features/Countering-Criticisms-CCRC>>.

132 Horan, *supra* note 107 at 162; see Alan Travis, *Justice Body's Case Plea Rebuffed by Straw* (London: Guardian, 1998) at 12.

C. What is the Best Model for Canada?

The Canadian experience demonstrates an inability to effectively identify, investigate, and challenge alleged miscarriage of justice by depending on the police, prosecutors, and the courts alone.¹³³ While DNA evidence has been used successfully in securing post-conviction exonerations in the United States, the vast majority of Canadian criminal cases and claims of miscarriages of justice are not subjected to DNA analysis. Given the reluctance of the courts to upset the finality of a decision, the Canadian system could benefit greatly by turning to an outside institutions to review claims of miscarriage of justice.

i. Calls for an Independent Review Body

The idea to introduce an independent post-conviction review commission in Canada is not novel.¹³⁴ While section 690 was replaced with sections 696.1 – 696.6, recommendations that a truly independent review body be created to replace the power of the Attorney General have gone unheeded. There has been extensive lobbying for the establishment of an independent body to undertake post-conviction review, particularly by AIDWYC and the Canadian Bar Association, as well as recommendations from commissions of inquiry.¹³⁵ In 1989, the Commissioners in the *Marshall Inquiry* wrote:

Although it is important to note that the RCMP's 1982 investigation did lead to Marshall being freed from prison – implying that one cannot always assume that a police force will not be able or willing to conduct a proper investigation into allegations of wrongful conviction – we believe that most citizens would feel more comfortable taking this sort of information, at least initially, to a person or body they do not consider to be part of the criminal justice system, or directly or indirectly involved in the original investigation. We believe that it makes more sense to expect citizens to provide information to a body that would not seem to have any sort of vested interest.

In order for such an independent body to function effectively, people must not only know about that body's existence and role, but also have confidence that such a body has the power and the resources to conduct a thorough reinvestigation of the conviction. There are two issues here. The first is the constitution of a reinvestigative body and the second, the nature of its powers.¹³⁶

The *Marshall Inquiry* made two recommendations, *inter alia*:

[Recommendation 1]

We recommend that the provincial Attorney General commence discussions with the federal Minister of Justice and the other provincial Attorney's General with a view constituting an independent review mechanism – an individual or body – to facilitate the reinvestigation of alleged cases of wrongful conviction.

133 Horan, *supra* note 107 at 112.

134 Walker & Campbell, *supra* note 42 at 197.

135 Denvo & Campbell, *supra* note 95 at 242; Walker & Campbell, *supra* note 42 at 197.

136 Marshall Inquiry, *supra* note 24 at 143-45.

[Recommendation 2]

We recommend that this review body have investigative power so it may have complete and full access to any and all documents and materials required in any particular case, and that it have coercive power so witnesses can be compelled to provide information.¹³⁷

Similarly, Commissioner Kaufman made the following recommendation in the 1998 *Commission on Proceedings of Guy Paul Morin*:

The Government of Canada should study the advisability of the creation, by statute, of a criminal case review board to replace or supplement those powers currently exercised by the federal Minister of Justice.¹³⁸

Further, in 2001 following Commissioner Cory's report of the *Inquiry Regarding Thomas Sophonow*, the following recommendation was made:

I recommend that, in the future, there should be a completely independent entity established which can effectively, efficiently, and quickly review cases in which wrongful conviction is alleged. In the United Kingdom, an excellent model exists for such an institution. I hope that steps are taken to consider the establishment of a similar institution in Canada.¹³⁹

ii. CCRC—A Model for Canada?

The section 696.1 process has been criticized for its delay and the burdens imposed on the applicants. Despite recommendations by public inquiries, the requirement that the Minister of Justice alone has the power to re-open a case after all appeals have been exhausted remains. Regardless of the approach adopted, there are compelling reasons to believe that an independent review body that is knowledgeable in cases of wrongful convictions, has special administrative powers, and possesses expertise in reviewing claims is a far more effective way of addressing claims of miscarriages of justice than the current model. While there has been criticism against the CCRC, a review of the model illustrates that there are key elements that a Canadian independent review body needs to include: (1) a committee with the power to investigate cases that raise questions of factual innocence and make policy recommendations to correct structural errors; (2) the power to order investigations in cases where factual innocence is alleged; (3) the power to subpoena documents and people, compel testimony, and bring civil suits against those who refuse their requests; (4) to allow factual records generated by their investigation to become part of the case file; (5) transparency, accessibility, and accountability; and (6) mandatory filing of public reports of their findings and recommendations, with those government bodies named in the reports providing a timely response to the findings.¹⁴⁰ In addition, members of the body must represent all sides of the criminal justice system as well as the diversity of the public in order to achieve the goal of improving public confidence. Further, annual reports, budgetary information, and a website should be available to the public.

137 *Ibid.*

138 Ontario, *The Commission on Proceedings Involving Guy Paul Morin* (Toronto: Ministry of the Attorney General, 1998).

139 Manitoba, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Attorney General, 2001) at 101.

140 Schehr & Weathered, *supra* note 126.

iii. Accessibility

The CCRC demonstrates a commitment to being accessible to its applicants, consistent with an inquisitorial, proactive approach to the identification and referral of possible wrongful convictions. There is no requirement that the applicant gather all of the necessary documentation before an application will be considered; commission staff take on the responsibility of assembling the appeal file, transcripts, and other documentations.

The statutory threshold test for the referral of an application ensures that the Court of Appeal reviews all possible wrongful convictions. There is no requirement to demonstrate a basis for a likely miscarriage of justice, or that the applicant is factually innocent; rather, an inference is made that “there is a real possibility that the conviction, verdict, finding or sentence would be upheld.”¹⁴¹ The low threshold test is consistent with an intention to seek out allegations of wrongful conviction, and to ensure that they are reviewed by the courts where there is a real possibility of success. It specifically contemplates the referral of cases that will not ultimately succeed. For example, addressing the cost of a new independent commission, AIDWYC asserts that the financial cost “would be small compared with the enhanced confidence in the administration of justice that would result from the creation of a Commission.”¹⁴² Further, the Commission’s work, insofar as it uncovers cases of wrongful conviction, would save considerable public funds that would otherwise be spent in the continued imprisonment of the wrongly convicted person.¹⁴³

iv. Fairness

The CCRC has devised a formal and transparent process that governs every stage of the case review process. Each application is assigned to a Case Manager, who is directed and supervised by a Commissioner, and the review follows a written investigation plan. There is an internal process for prioritizing case files to ensure their timely completion and identifying for special attention those cases that have not been subject to a determination within six months.

D. Benefits of an Independent Review Process

Despite the public awareness of wrongful conviction cases in Canada and the calls by advocates and organizations for an independent body to investigate such cases, the Minister of Justice has determined that “an independent body for conviction review [is] not needed in Canada.”¹⁴⁴ The government has rejected calls for such a model, arguing that transferring the job of reviewing alleged miscarriages of justice to an independent commission, similar to the CCRC, is not necessary because the Canadian Minister of Justice does not have the same conflict of interest problem as did the UK Home Secretary because “in Canada the vast majority of criminal prosecutions are conducted by the provinces.”¹⁴⁵ Further, with the appointment of an independent Special Advisor to oversee the review process and provide advice directly to the Minister, the government has rejected calls for an independent commission.

Former Minister McLellan concluded that “the ultimate decision-making authority in criminal conviction review should remain with the federal Minister of Justice, who is accountable to Parliament and the people of Canada.”¹⁴⁶ The Minister of Justice has a

141 *Criminal Appeal Act*, *supra* note 113, s 13(1)(a).

142 Roy & Widner, *supra* note 2 at 35.

143 *Ibid* at 35-36.

144 House of Commons, Standing Committee on Justice and Human Rights, 37th Parl, 1st Sess, Meeting 22, *Evidence* (2 October 2001).

145 *Ibid*.

146 *Ibid*.

stake in upholding criminal convictions in order to preserve the integrity of the country's judicial institutions and to ensure public confidence that the government is capable of ensuring justice in society. However, the continued discoveries of wrongful convictions undermine the justice system. The government has a vested interest in seeing that convictions are sustained to promote the legitimacy of the justice system. In general, an independent review body would not have the same vested interest as the government in maintaining a conviction.

An independent review process in Canada would play a vital role in restoring public confidence in the criminal justice system that has been shaken by the number of wrongful convictions. In addition, it is plausible that this proposed process may serve as a form of deterrence against misconduct by officials within the criminal justice system. An independent body also has the potential of becoming a repository of knowledge concerning the systemic causes of wrongful conviction, and a resource for those seeking to improve the criminal justice system. An independent review commission could also alleviate the hurdles applicants face in establishing the basis for a section 696.1 review. AIDWYC contends that Canadian cases of alleged wrongful convictions should “not [be] examined from the adversarial perspective of trying to show that the convicted person was rightfully treated by the court system” as occurs at present through the Minister of Justice's current practice under section 696.1¹⁴⁷ Rather, AIDWYC argues that an independent review board like CCRC should “undertake a fresh review without bias.”¹⁴⁸

AIDWYC suggests that an independent review body “would remove all political considerations from the review of applications submitted to it” and eliminate “the incompatible roles of the Minister as Chief Prosecutor and as the person to review wrongful convictions.”¹⁴⁹ The independent body would also offer an opportunity for a thorough investigation and review of many cases for which an investigation is not provided on appeal or post-conviction review due to appellate courts' procedural bars and emphasis on legal and procedural errors instead of factual errors. The creation of an independent review body challenges the status quo and could earn the respect of the courts, the prosecuting authorities, and the general public.

CONCLUSION

The current post-conviction review system in Canada attempts to address the criticisms leveled at the previous legislation and, to be fair, some improvements were made. However, the new system left some fundamental problems intact. Erroneous convictions provide a window through which to view the shortcomings and limitations of the criminal justice system. An independent review body is needed because the institutional incentives operating on the police, lawyers, and courts impede the detection and correction of many cases of wrongful conviction. Such a review body would actually enhance the judicial economy by screening out unmeritorious claims for a successful post-conviction review. The reality of wrongful convictions not only raises concerns regarding the fallibility of due process, human rights violations, and the limitations of the adversarial approach, but it also raises questions about the legitimacy of the justice system. Given the seriousness of wrongful convictions, not only for the wrongly convicted but also for the justice system as a whole, this problem demands further exploration. For individuals who believe they have suffered a miscarriage of justice, the conviction review process truly represents the last resort.

147 Horan, *supra* note 107 at 182-83.

148 *Ibid* at 183.

149 *Ibid*; Roy & Widner, *supra* note 2 at 28.

ARTICLE

ELI LILLY AND COMPANY V THE GOVERNMENT OF CANADA AND THE PERILS OF INVESTOR-STATE ARBITRATION

James Billingsley*

CITED: (2015) 20 Appeal 27

INTRODUCTION

We live in a world today where it is routine for foreign private companies to sue sovereign countries, claiming that domestic laws interfere with foreign investment activities. Take the case of *Eli Lilly v the Government of Canada*. Eli Lilly and Company (“Eli Lilly”), a multinational pharmaceutical corporation, is presently suing the Government of Canada (“Canada”), alleging that the invalidation of two patents amounts to an unlawful expropriation of Eli Lilly’s intellectual property. The company claims Canada’s patent laws are arbitrary, discriminatory, and in breach of the minimum standard of treatment owed to foreign investors under the *North American Free Trade Agreement* (“NAFTA”). The company is seeking damages in excess of half a billion dollars.¹

The two patents—for the drugs Strattera and Zyprexa—were found invalid in separate judgments of the federal courts, and both decisions were upheld on appeal. Despite the findings of Canadian courts, Eli Lilly relies upon its right under *NAFTA* to haul Canada before an *ad hoc* tribunal and have the country defend the laws and processes of its legal system. Canada must answer to Eli Lilly’s argument of what Canadian law ought to be.

Eli Lilly’s claim against Canada raises the question of whether and under what circumstances a foreign investor can circumvent domestic judicial outcomes through international arbitration. This article takes the position that the role of investor-state arbitration should not be expanded to provide a forum of *de facto* appeal. Eli Lilly’s claim challenges Canada’s regulatory sovereignty, undermining the country’s right to determine its own substantive patentability standards and govern intellectual property within its borders. The allegation that Canada interfered with Eli Lilly’s expectation of monopoly profits may have a chilling effect on the willingness of courts and lawmakers to regulate the brand-name pharmaceutical industry, and may ultimately impact the accessibility and affordability of medicines in Canada’s healthcare system.

This article is structured in three parts. Part I outlines the nature of investor-state arbitration and briefly introduces Canada’s international trade policy and investment

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1 *Eli Lilly and Company v The Government of Canada*, Notice of Intent to Submit a Claim to Arbitration under *NAFTA* (12 September 2013) UNCT-14-2 (NAFTA/UNCITRAL) at para 4 [Notice of Arbitration]; *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [*NAFTA*].

treaty regime. Part II critically discusses Eli Lilly's arbitration claim and the substantive *NAFTA* provisions on which the claim rests. It is argued that the treaty obligations material to Eli Lilly's claim—the minimum standard of treatment and expropriation provisions—should be interpreted to properly balance foreign investment protection with domestic policy autonomy. Part III considers the implications of Eli Lilly's claim for Canada's judicial and regulatory sovereignty, and comments more generally on the risks of allowing foreign investors to circumvent domestic legal processes through investor-state arbitration.

PART I. CANADA'S INTERNATIONAL TRADE POLICY AND INVESTMENT TREATY REGIME

Investor-state arbitration is a dispute settlement process recognized under public international law whereby a foreign investor is granted the right to bring a claim directly against the government hosting its investment. A tribunal presides over the dispute and decides whether the host government has breached its obligations towards the foreign investor and should be liable for damages. Investor-state tribunals derive their jurisdiction from international trade agreements, in which states agree to be bound by certain obligations in regard to foreign investment.

As of 1 June 2013, Canada has signed thirty-three bilateral investment treaties ("BITs"), which are referred to in Canada as Foreign Investment Promotion and Protection Agreements.² With respect to multilateral agreements, Canada is a party to *NAFTA* along with the United States and Mexico. More recently, Canada signed a *Comprehensive Economic and Trade Agreement* ("CETA") with the European Union and became a party to the ongoing *Trans-Pacific Partnership* ("TPP") negotiations.³ Canada also recently ratified the World Bank's *International Centre for Settlement of Investment Disputes* ("ICSID") *Convention*, a multilateral treaty that institutionalizes foreign investment dispute resolution.⁴

Canada's growing thirst for bilateral and multilateral trade agreements is consistent with the government's new international trade plan, which is said to adopt a "market-first approach to foreign policy."⁵ Trade agreements are intended to both enhance the

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- 2 Canada has signed and ratified agreements with Argentina, Armenia, Bangladesh, Barbados, Bosnia and Herzegovina, Costa Rica, Croatia, Czech Republic, Ecuador, Egypt, Hungary, Jordan, Latvia, Lebanon, Panama, Peru, Philippines, Poland, Romania, Russian Federation, Singapore, Slovakia, Thailand, Trinidad and Tobago, Ukraine, Uruguay, and Venezuela. Agreements with Benin, China, El Salvador, Kuwait, South Africa, and the United Republic of Tanzania have been signed but are not yet in force: *Bilateral Investment Treaties signed by Canada*, UNCTAD (2013), online: <http://unctad.org/Sections/dite_pcb/b/docs/bits_canada.pdf>.
 - 3 *Canada-European Union Comprehensive Economic and Trade Agreement* (agreed in principle 18 October 2013; ratification expected in 2015). Canada entered TPP negotiations 8 October 2012: Foreign Affairs, Trade and Development Canada, *Trans-Pacific Partnership Free Trade Agreement Negotiations* (last updated November 2013), online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/index.aspx>>.
 - 4 Julius Melnitzer, "Canada ratifies World Bank's ICSID Convention", *Financial Post* (2 November 2013), online: <<http://business.financialpost.com/2013/11/02/canada-ratifies-world-banks-icsid-convention>>; *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.
 - 5 John Ibbitson, "Tories' new foreign-affairs vision shifts focus to 'economic diplomacy'", *The Globe and Mail* (27 November 2013) online: <<http://www.theglobeandmail.com/news/politics/tories-new-foreign-affairs-vision-shifts-focus-to-economic-diplomacy/article15624653>>; see also Department of Foreign Affairs, Trade and Development Canada, *Global Markets Action Plan: The Blueprint for Creating Jobs and Opportunities for Canadians Through Trade* (27 November 2013), online: <<http://international.gc.ca/global-markets-marches-mondiaux/assets/pdfs/plan-eng.pdf>>.

protection afforded to Canadian investors abroad as well as promote foreign investment within Canada. Central to Canada's approach in negotiating trade agreements is the inclusion of investor-state dispute resolution provisions.⁶ For example, Section B of Chapter 11 of *NAFTA* provides that an "investor of a Party may submit to arbitration [...] a claim that another Party has breached an obligation [...] and that the investor has incurred loss or damage by reason of, or arising out of, that breach."⁷ This provision allows a foreign investor to bring a claim directly against a host state on the basis that the state breached one or more of its Chapter 11 substantive treaty obligations. These obligations include national treatment (Article 1102), most-favoured-nation treatment (Article 1103), minimum standard of treatment (Article 1105), performance requirements (Article 1106), transfer provisions (Article 1109), and requirements for expropriation and compensation (Article 1110).

Historically, foreign investors from capital-exporting states used investor-state arbitration to protect themselves from the expropriation or nationalization of their assets. Foreign investors viewed the international nature of arbitration as more reliable than the national court systems of developing host states.⁸ Today, however, some countries question the purported utility of resolving foreign investment disputes through investor-state arbitration. Australia—an advanced capitalist democracy with a rule of law culture similar to that of Canada—openly renounced the inclusion of arbitration in future BIT negotiations.⁹ More recently, some German officials have objected to the inclusion of the investor-state dispute settlement provisions in the Canada-European Union *CETA*, on the basis that the provisions inhibit a host state from passing domestic measures in the public interest.¹⁰

Other critics argue that investor-state arbitration lacks transparency and institutional independence, that conflicts of interest are common among arbitrators, and that the structural failings of the system raise a reasonable apprehension of bias in favour of investor rights.¹¹ Proponents of investor-state arbitration, in contrast, argue that the process provides a neutral and convenient forum for resolving disputes, and that investment treaties themselves impose reasonable obligations upon governments.

While evaluating the arguments for or against investor-state arbitration is beyond the scope of this article, the debate is relevant to the extent that it colours the nature of Eli Lilly's arbitration claim—a challenge to the "promise doctrine" of patentability.

6 See, for example, Canada's Model Foreign Investment Promotion and Protection Agreement: *Agreement Between Canada and -- for the Promotion and Protection of Investments*, online: <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng>.

7 *NAFTA*, *supra* note 1, art 1116.

8 Andreas F Lowenfeld, "The Responsibility of Host States to Foreign Investors: Customary International Law" in *International Economic Law*, 2d ed (London: Oxford University Press, 2008) at 483-85.

9 See Leo E Trakman, "Choosing Domestic Courts Over Investor-State Arbitration: Australia's Repudiation of the Status Quo" (2012) 35:3 UNSW Law Journal 979 at 981.

10 Gordon Isfeld, "Canada, EU leaders sign *CETA* pact despite German concerns", *Financial Post* (26 September 2014) online: <<http://business.financialpost.com/2014/09/26/stephen-harper-eu-leaders-meet-amid-ceta-cloud>>.

11 George Kahale III, "Is Investor-State Arbitration Broken?", *Transnational Dispute Management* 7 (October 2012) online: <<http://www.transnational-dispute-management.com/article.asp?key=1918>>; see also Gus Van Harten, "Toward an independent rules-based system of trade and investment", *MacDonald-Laurier Institute Commentary* (28 September 2011) online: <<http://www.macdonaldlaurier.ca/files/pdf/State-Investor-Arbitration-Commentary-Sept-28-2011.pdf>>.

PART II. ELI LILLY'S CHALLENGE TO THE PROMISE DOCTRINE

Eli Lilly's claim rests on the invalidation of two of its patents—one for the drug Strattera (atomoxetine), used to treat attention deficit hyperactivity disorder, and the other for the drug Zyprexa (olanzapine), used to treat schizophrenia and related psychotic disorders.¹² Canadian federal courts invalidated the patents on the grounds that Eli Lilly failed to demonstrate or soundly predict the promised utility of the inventions at the time the patents were respectively filed.¹³ The separate trial decisions were upheld at the Federal Court of Appeal, and leave to the Supreme Court of Canada was refused on both occasions.¹⁴ In the case of Zyprexa, the Supreme Court of Canada made a rare order for an oral hearing of the application for leave to appeal. Notwithstanding the process afforded to Eli Lilly, the company alleges that the “improvident loss” of its patents was a breach of Canada's obligations under *NAFTA*.¹⁵ Before discussing the *NAFTA* obligations at issue in Eli Lilly's claim, it is important to understand the legal grounds upon which the patents were invalidated.

To patent a drug, a pharmaceutical company must be able to prove that the drug has an intended use.¹⁶ A “mere scintilla of utility” will normally suffice, unless the inventor discloses a promise of utility in the patent.¹⁷ Where a pharmaceutical patent *promises* utility—by specifying an advantage of using the drug—that promise must be demonstrated or soundly predicted prior to the filing of the patent application. A patent that does not demonstrate or soundly predict its stated promise can be found to be invalid, and evidence of pharmacological utility after the filing date will not validate an otherwise invalid patent. Unlike the law of the United States, Canadian courts will generally not accept post-patent proof for the purpose of turning “dross into gold.”¹⁸ In a unanimous decision of the Supreme Court of Canada, Justice Binnie justified the doctrine on the grounds that “the public is entitled to obtain a solid teaching in exchange for the patent rights.”¹⁹ The promise doctrine reflects the principle that monopoly rights are extended to a patented invention in exchange for the disclosure of that invention

12 Notice of Arbitration, *supra* note 1 at para 2.

13 For Strattera, see *Novopharm Limited v Eli Lilly and Company*, 2010 FC 915 (available on CanLII); for Zyprexa, see *Eli Lilly Canada Inc v Novopharm Limited*, 2011 FC 1288 (available on CanLII) [Zyprexa FC].

14 For Strattera, see *Eli Lilly and Company v Teva Canada Limited*, 2011 FCA 220 (available on CanLII), leave to appeal to SCC refused, 34396 (December 8, 2011); for Zyprexa, see *Eli Lilly Canada Inc v Novopharm Limited*, 2012 FCA 232 (available on CanLII), leave to appeal to SCC refused, 35067 (May 16, 2013).

15 Notice of Arbitration, *supra* note 1 at para 85.

16 See *Apotex Inc v Wellcome Foundation Ltd*, 2002 SCC 77 at para 52 (available on CanLII) [emphasis in original] [Apotex]:

It is important to reiterate that the only contribution made by Glaxo/Wellcome in the case of AZT was to identify a new use. The compound itself was not novel. Its chemical composition had been described 20 years earlier by Dr. Jerome Horwitz. Glaxo/Wellcome claimed a hitherto unrecognized utility but if it had not established such utility by tests or sound prediction at the time it applied for its patent, then it was offering nothing to the public but wishful thinking in exchange for locking up potentially valuable research turf for (then) 17 years.

17 See, for example, *Eli Lilly Canada Inc v Novopharm Ltd*, 2010 FCA 197 at para 76 (available on CanLII); *Sanofi-Aventis v Apotex Inc*, 2013 FCA 186 at para 50 (available on CanLII).

18 *Apotex*, *supra* note 16 at para 46.

19 *Ibid* at para 69.

to the public.²⁰ In this respect, patents are seen in Canada as providing both a societal benefit and an incentive for innovation. The standards required for patentability—novelty, utility, and inventiveness—exist to balance the private interests of the innovator with the interests of the public, including competitors and consumers.

The promise doctrine is particularly relevant in the context of the pharmaceutical industry, where drug companies often seek patents for “a new use for an old chemical compound.”²¹ Jim Keon, president of the Canadian Generic Pharmaceutical Association, argues that the doctrine “exists to prevent the grant of speculative patents that over-promise and under-deliver—both of which are harmful to society and stagnating to innovation.”²² Eli Lilly notes that 18 pharmaceutical patents have been invalidated for lack of utility since the promise doctrine emerged as a sword for generic pharmaceutical companies to challenge brand-name patents.²³ Many of those patents were for new uses of existing drugs.²⁴ From the perspective of generic pharmaceutical companies, the promise doctrine is a judicially crafted response to the problem of “early speculative” and shotgun patenting on behalf of brand-name companies, who are alleged to abuse lax patentability standards in the hopes that at least some of their dross turns to gold in the future.²⁵ Ironically, however, it is the gold that is invalidated, as generic pharmaceutical companies only have incentive to seek the invalidation of patents that prove to be medically and commercially successful, as *Strattera* and *Zyprexa* exemplify.

According to Eli Lilly, Canada is the only jurisdiction in the world that invalidated the patents on the basis of inutility.²⁶ John Lechleiter, Eli Lilly’s chairman, president, and chief executive officer, has gone so far as to state that the utility standard set by the Canadian courts “makes successful acquisition and maintenance of a patent on an

20 As Canada submits, “[d]isclosure to the public is at the heart of the patent bargain, as it allows others to study and build upon existing inventions, avoid duplicative research, and properly use the invention once the monopoly expires. [...] Patent systems around the world are founded on this same bargain”: *Eli Lilly and Company v The Government of Canada*, Statement of Defence of the Government of Canada (30 June 2014) UNCT-14-2 (NAFTA/UNCITRAL) at para 13 [Statement of Defence]. Eli Lilly agrees with this point, recognizing that in exchange for monopoly rights, “the inventor must disclose its invention to the public by adequately describing it in the patent application”: *Eli Lilly and Company v The Government of Canada*, Claimant’s Memorial (29 September 2014) UNCT-14-2 (NAFTA/UNCITRAL) at para 27 [Claimant’s Memorial].

21 *Apotex*, *supra* note 16 at para 46.

22 Jim Keon, “Canada’s Patent Laws Promote Genuine Medical Innovation”, *Canadian Generic Pharmaceutical Association* (23 September 2013) online: <http://www.canadiangenerics.ca/en/news/sep_23_13.asp>.

23 Notice of Arbitration, *supra* note 1 at paras 11, 66. In its Claimant’s Memorial, *supra* note 20 at para 3, Eli Lilly submits that the Canadian federal courts have invalidated a pharmaceutical patent on the grounds of nonutility a total of 23 times over the past nine years.

24 Other patents, like the one for *Zyprexa*, were for compound(s) selected from a pre-existing patent over a larger group (or genus) of compounds. These are known as selection patents, where “the invention is the discovery of a substantial advantage over the genus compounds”: *Zyprexa FC*, *supra* note 13 at para 265.

25 Keon, *supra* note 22. Canada notes in its Statement of Defence, *supra* note 20 at para 55 that “[Eli Lilly] filed at least ten alternative patent applications for the use of atomoxetine [*Strattera*] for the treatment of ten other pathologies” and at para 67 that “[Eli Lilly] filed at least 29 other Canadian patent applications relating to olanzapine [*Zyprexa*], purporting to have invented at least 16 distinct new and surprising uses for the compound”. Eli Lilly, in response, notes that “for every drug that succeeds, thousands of compounds have failed”: Claimant’s Memorial, *supra* note 20 at para 3.

26 Notice of Arbitration, *supra* note 1 at paras 56, 65. Eli Lilly points out that neither the United States nor the United Kingdom adheres to the promise doctrine, and neither jurisdiction found the *Strattera* or *Zyprexa* patents invalid in similar litigation. For *Zyprexa*, see *Dr Reddy’s Laboratories (UK) Ltd v Eli Lilly and Company Ltd*, [2009] EWCA Civ 1362 and *Eli Lilly and Co v Zenith Goldline Pharmaceuticals Inc*, 471 F 3d 1369 (Fed Cir 2006).

innovative new medicine in Canada essentially impossible.”²⁷ Moreover, the promise doctrine has attracted criticism from the United States Trade Representative, which has made known its “serious concerns” about the “heightened utility requirements” adopted by the Canadian courts.²⁸ The high level of intellectual property protection demanded by the United States government reflects the increasing reliance of the American economy on its innovative industries. Eli Lilly is a prime example. It maintains that patent protection is the “lifeblood” of the company.²⁹

Eli Lilly characterizes Canada’s actions as a form of foreign free riding, whereby Canadians enjoy the low prices of generic competition while Americans foot the bill for pharmaceutical innovation. Canada, by contrast, views Eli Lilly’s claim as the last-ditch effort of a disappointed litigant whose claim unduly impinges on Canada’s need to navigate its own patent laws and policy landscape. With this context in mind, I now turn to the *NAFTA* claim—that the invalidation of the Strattera and Zyprexa patents on the grounds of inutility breaches two *NAFTA* Chapter 11 obligations: Article 1105, the minimum standard of treatment, and Article 1110, expropriation.

A. Article 1105: Minimum Standard of Treatment

Eli Lilly alleges that the application of the promise doctrine to its patents, and Canada’s failure to rectify the doctrine, violates the minimum standard of treatment guaranteed to foreign investors under *NAFTA* Article 1105. The provision provides that each “Party shall accord to investments of investors of another Party treatment in accordance with international law, including *fair and equitable treatment* and full protection and security.”³⁰ The standard of fair and equitable treatment is included in most trade agreements and pleaded in almost every investor-state arbitration claim.³¹ The standard has been held to obligate states to ensure (a) vigilance and protection; (b) due process; (c) lack of arbitrariness and non-discrimination; and (d) transparency and stability, including the protection of legitimate expectations.³² Eli Lilly’s claim rests on the latter three principles—that the federal courts’ decisions were “improper and discreditable” and thus lacking in due process; that the promise doctrine was applied “discriminatorily and arbitrarily” to pharmaceutical patents including Strattera and Zyprexa; and that Eli Lilly was entitled to reasonably rely upon the “stability, predictability, and consistency of Canada’s legal and business framework”, as well as the legitimate expectation that Eli Lilly’s patent rights would not be revoked.³³

NAFTA tribunals have considered the scope and interpretation of Article 1105 extensively. In *SD Myers Inc v The Government of Canada* (“*SD Myers*”), the tribunal stated that an infringement of the minimum standard of treatment under Article 1105 occurs only when a foreign investor has been treated “in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”³⁴ The

27 John Lechleiter, “How Lax Patent Rules In Canada Are Suffocating Life-Saving Innovation”, Editorial, *Forbes* (26 August 2013) online: <<http://www.forbes.com/sites/johnlechleiter/2013/08/26/how-lax-patent-rules-in-canada-are-suffocating-life-saving-innovation>>.

28 Demetrios Marantis, Acting United States Trade Representative, Office of the United States Trade Representative, *2013 Special 301 Report* (May 2013) at 46.

29 Claimant’s Memorial, *supra* note 20 at para 25.

30 *NAFTA*, *supra* note 1, art 1105 [emphasis added].

31 Katia Yannaca-Small, “Fair and Equitable Treatment Standard: Recent Developments” in August Reinisch, ed, *Standards of Investment Protection* (London: Oxford University Press, 2008) 111 at 112.

32 *Ibid* at 118.

33 Notice of Arbitration, *supra* note 1 at paras 80-84; Claimant’s Memorial, *supra* note 20 at paras 261-91.

34 *SD Myers Inc v The Government of Canada*, Partial Award (13 November 2000, *NAFTA/UNCITRAL*) at para 263 [*SD Myers*].

tribunal emphasized that the determination must be made with due regard to the “high measure of deference” that international law extends to the right of sovereign states in regulating “matters within their own borders.”³⁵ In *Glamis Gold, Ltd v United States of America*, the presiding tribunal stated that conduct that violates Article 1105 must be “sufficiently egregious or shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards.”³⁶ In *Mondev International Ltd v United States of America*, the tribunal considered the minimum standard of treatment in the context of denial of justice in judicial proceedings:

The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of *NAFTA* (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.³⁷

With respect to the legitimate expectations of foreign investors, *NAFTA* tribunals consider whether a host state created reasonable and justifiable expectations that were relied upon by the investor.³⁸ The justification for the doctrine is that a foreign investor’s decision to invest in a particular host state is based on (1) representations made by the host state’s government officials and (2) an understanding that the legal structures of the host state will remain stable, transparent, and receptive to their investment activities.³⁹

Thus, taken together, the fair and equitable treatment standard protects foreign investors and investments from government measures that are arbitrary, discriminatory, lacking in due process, or in breach of representations reasonably relied upon.⁴⁰ The standard is additionally subject to a binding interpretation of the Free Trade Commission (“FTC”), mandating that Article 1105 prescribes the minimum standard of treatment under customary international law, and that “fair and equitable treatment” as set out in the article does not exceed that which is required by customary international law.⁴¹ Further,

35 *Ibid.*

36 *Glamis Gold, Ltd v United States of America*, Award (8 June 2009, UNCITRAL) at para 627, cited in Statement of Defence, *supra* note 20 at para 99 (Canada arguing that the threshold set for a violation of the minimum standard of treatment is set extremely high under customary international law).

37 *Mondev International Ltd v United States of America*, Award (11 October 2002) ARB(AF)-99-2 (NAFTA/ICSID) at para 127 [*Mondev*].

38 See, for example, *Metalclad Corporation v The United Mexican States*, Award (30 August 2000) ARB(AF)-97-1 (NAFTA/ICSID) at para 99 [*Metalclad*]; see also *International Thunderbird Gaming Corporation v The United Mexican States*, Award (26 January 2000, NAFTA/UNCITRAL) at para 147, finding a breach of fair and equitable treatment “where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor (or investment) to suffer damages.”

39 *Ibid.*

40 *Waste Management, Inc v United Mexican States*, Award (30 April 2004) ARB(AF)-00-3 (NAFTA/ICSID) at para 98 [*Waste Management*].

41 NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001), online: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx>>.

the FTC interpretation mandates that a breach of a separate international agreement or another provision of *NAFTA*, such as the intellectual property provisions of Chapter 17, does not establish a breach of the minimum standard of treatment under Article 1105.⁴²

The question is thus whether the common law promise doctrine and its application to Eli Lilly's patents constitute unfair and inequitable treatment to such an extent that they violate the minimum standard of treatment under customary international law. To support the argument that Canada's measures were arbitrary, discriminatory, lacking in due process, and contrary to Eli Lilly's legitimate expectations, Eli Lilly cites Canada's international obligations, including the World Trade Organization *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("*TRIPS*")⁴³ and the intellectual property protections enshrined in *NAFTA* Chapter 17. Article 27.1 of *TRIPS* provides that "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application."⁴⁴ *NAFTA* Article 1709(1), which was based on a draft of the *TRIPS* agreement,⁴⁵ similarly states as follows:

[E]ach Party shall make patents available for any inventions, whether products or processes, in all fields of technology, provided that such inventions are new, result from an inventive step and are capable of industrial application. For purposes of this Article, a Party may deem the terms 'inventive step' and 'capable of industrial application' to be synonymous with the terms 'non-obvious' and 'useful', respectively.⁴⁶

Eli Lilly argues that the meaning of "capable of industrial application" or "useful" should be determined by reference to the patent laws of the United States and Europe, as the laws of these jurisdictions formed the basis for the language used in both *NAFTA* Article 1709(1) and *TRIPS* Article 27(1).⁴⁷

Eli Lilly's argument, if accepted, effectively denies the interpretation of Canadian legislation in accordance with Canadian law, and runs afoul of the principle—as espoused in *SD Myers*—that a high measure of deference ought to be extended to domestic authorities in regulating matters within their own borders.⁴⁸ Within Canada's borders, patent laws find their source in legislation, subordinate regulations, and common law jurisprudence. The *Patent Act* defines an invention as any new and useful "art, process, machine, manufacture or composition of matter" or any new and useful improvement thereof.⁴⁹ This definition is consistent with *TRIPS* and *NAFTA*.⁵⁰ While the patent laws of the United States and Europe may be of some help in determining the normative content of this definition, domestic courts and administrative decision-makers must

42 *Ibid.*

43 *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Annex IC of the *Marrakesh Agreement establishing the World Trade Organization*, 15 April 1994, 1869 UNTS 299, 33 ILM 1197 (signed in Marrakesh, Morocco) [*TRIPS*].

44 *Ibid.*, art 27.1.

45 See *Canada – Patent Protection of Pharmaceutical Products (Complaint by the European Communities and their Member States)* (2000) WTO Doc WT/DS114/R at para 4.6 and n 29, cited in *Eli Lilly and Company v The Government of Canada*, Notice of Intent to Submit an Arbitration Under *NAFTA* Chapter 11 (7 November 2012) UNCT-14-2 (*NAFTA/UNCITRAL*) at para 10 [Notice of Intent]; also cited in Notice of Arbitration, *supra* note 1 at para 42.

46 *NAFTA*, *supra* note 1, art 1709(1).

47 Notice of Intent, *supra* note 45 at para 10.

48 *SD Myers*, *supra* note 34 at para 263.

49 *Patent Act*, RSC 1985, c P-4, s 1.

50 According to Canada, "[*TRIPS*] left ample room for national variations and approaches to substantive patent issues": Statement of Defence, *supra* note 20 at para 91.

interpret and apply patentability standards on a case-by-case basis in accordance with Canadian law. The United Nations Conference on Trade and Development has stated that Article 27.1 of the *TRIPS* Agreement

sets up the criteria of patentability, without however harmonizing the way in which they have to be implemented. Thus, Members have considerable leeway in applying those three criteria (novelty, inventive step and industrial applicability).⁵¹

Notwithstanding this flexibility, Eli Lilly argues that Canada must adopt a harmonized meaning of utility that is more particular than the broad definitions under *TRIPS* and *NAFTA*. Canadian courts are not bound to interpret the broad patentability standards of *TRIPS* and *NAFTA* in accordance with European and American patent law. They are, however, bound to interpret standards of patentability in accordance with Canadian law. For this reason, Eli Lilly's argument that it had a legitimate expectation that Canadian law would abide by the company's preferred interpretation of patentability standards is untenable. On the contrary, a foreign investor reasonably and legitimately expects that its investment will be subject to the legal system of its host state and the domestic laws therein.

While domestic law as applied to foreign investors should not breach minimum standards of customary international law, the minimum standard should not be equated with the preferred laws of other legal systems. Domestic measures will breach the minimum standard if they display "a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety"⁵² or "unreasonably depart from the principles of justice recognized by the principal legal systems of the world".⁵³ Like any legal rule, the promise doctrine is not immune from critique. However, it is not enough for an investor-state tribunal to believe that a court decision is wrong under the laws of the relevant domestic legal system.⁵⁴ To establish a breach of the minimum standard of treatment, the decisions must be "grossly unfair or inequitable under the customary international law standard of treatment".⁵⁵ To hold otherwise, a tribunal would be encroaching on domestic appellate jurisdiction. As Canada points out, tribunals have "repeatedly emphasized" that they do not serve the function of *de facto* Courts of Appeal.⁵⁶ In this case, the promise doctrine was developed, clarified, and approved by Canada's highest judicial body. The federal courts applied the doctrine to Eli Lilly's patents following the due process of a full adversarial trial, and these decisions were reviewed by appellate bodies. In this regard, the interpretation and application of the promise doctrine presents no unreasonable departure from principles of justice. While the doctrine may be different from the standard of patent usefulness in other legal systems, it falls within the internationally accepted mandate that domestic authorities apply the criteria of patentability flexibly within their borders.

51 United Nations Conference on Trade and Development-ICTSD, *Resource Book on TRIPS and Development* (Cambridge: Cambridge University Press, 2005) at 358, cited in "Eli Lilly Investor-State Fact Sheet", *Public Citizen* (last updated March 2013) online: <<http://www.citizen.org/eli-lilly-investor-state-factsheet>>.

52 *Mondev*, *supra* note 37 at para 127.

53 Louis B Sohn & RR Baxter, *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* (1959), art 8(b), cited in *Mondev*, *supra* note 37.

54 *ADF Group Inc v United States of America*, Award (9 January 2003) ARB(AF)-00-1 (ICSID) at para 190 [*ADF Group Inc*], cited in Statement of Defence, *supra* note 20 at para 98.

55 *ADF Group Inc*, *supra* note 54 at para 190.

56 *Ibid*, citing, for example, *Mondev*, *supra* note 37 at para 136; *Robert Azinan and others v United Mexican States*, Award (1 November 1999) ARB(AF)-97-2 (ICSID) at para 99; *SD Myers*, *supra* note 34 at para 261; see also Statement of Defence, *supra* note 20 at para 99.

Further, it is reasonable for a foreign investor to expect that domestic law, particularly in a common law jurisdiction, is subject to clarification and development, and that prevailing law will apply to investment activities, foreign or otherwise. Patents themselves are subject to contestation, and some disputes will lead to invalidation whereas other disputes will lead to validation.⁵⁷ By nature, the case-by-case determination of patent validity will lead to different outcomes. Such outcomes are not necessarily arbitrary or discriminatory, but a natural and necessary consequence of the judicial system. Canadian courts must formulate and apply legal rules as is necessary to fairly and justly resolve the particular dispute before them. For all these reasons, the claim that Canada breached the minimum standard of treatment owed to Eli Lilly cannot be reasonably sustained.

B. Article 1110: Expropriation

Eli Lilly also claims that Canada directly or indirectly expropriated the rights conferred by the Strattera and Zyprexa patents. The determination of what constitutes an expropriatory measure is contentious. Some commentators have suggested that the streams of jurisprudence on the doctrine of expropriation are “at best incoherent” in both international and national law.⁵⁸ This incoherence leads to considerable uncertainty in the adjudication of expropriation claims. Whether a claimant will succeed in arguing that a particular government measure constitutes expropriation turns not only on the substantive principles of the law of expropriation, but also on the particular doctrinal position of the individual tribunal members deciding the dispute, as gleaned from their previous writings and awards.⁵⁹

Despite the lack of predictability on the law of expropriation, it is generally accepted that arbitral awards have widened the basis upon which foreign investors may claim expropriatory conduct by a host state.⁶⁰ Further, the expansive wording of *NAFTA* Article 1110 contemplates various forms of domestic regulatory control that can deprive a foreign investor of their assets:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation [...].

57 Canada argues that the “reasonable understanding of a rational actor” is “well aware that initial patent grants” are “only presumptively valid” and “subject to court review”: Statement of Defence, *supra* note 20 at para 104. It further argues that that “[u]nder Canadian law, an initial patent grant is always made subject to invalidation by the Federal Court, the ultimate arbiter of patent validity and the authoritative interpreter of *Patent Act* requirements”: *ibid* at para 43.

58 Campbell McLachlan, Laurence Shore & Matthew Weininger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007) at 8.03, citing Rosalyn Higgins, “The Taking Of Property by the State: Recent Developments in International Law” (1982) 176 *Recueil des Cours* 259 at 268.

59 McLachlan, Shore & Weininger, *supra* note 58 at 8.06.

60 *Ibid* at 8.05.

In *Waste Management, Inc v The United Mexican States*, the *NAFTA* tribunal clarified the distinction between expropriation and a measure tantamount to expropriation in Article 1110, finding that the latter requires “no actual, transfer, taking or loss of property by any person or entity.”⁶¹ A measure tantamount to expropriation need only render the ownership of the foreign investor’s property ineffective or irrelevant.⁶² Perhaps the broadest conception of expropriation was found in *Metalclad Corporation v The United Mexican States* (“*Metalclad*”), where the tribunal stated that expropriation under Article 1110 included

covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.⁶³

On judicial review of the *Metalclad* decision, Justice Tysoe of the Supreme Court of British Columbia found that the definition was “extremely broad” and would encompass, for example, “legitimate rezoning of property by a municipality or other zoning authority.”⁶⁴ Indeed, this extremely broad definition would also seem to encompass the determination of patent validity by a federal court. It is undisputed that there must be something more to this definition, and Eli Lilly readily concedes that a state may revoke a patent, provided it does not violate a rule of international law in doing so.⁶⁵

With respect to the limits of the expropriation and compensation provision, Article 1110(7) provides that Article 1110 does not apply “to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with [Chapter 17].”⁶⁶ Accordingly, for Eli Lilly’s expropriation claim to succeed, the promise doctrine as applied by the federal courts to the *Strattera* and *Zyprexa* patents must be *inconsistent* with *NAFTA* Chapter 17, the chapter governing intellectual property. Eli Lilly argues that the invalidation of its patents was unfair and “contrary to recognized principles for the protection of intellectual property”,⁶⁷ therefore, Eli Lilly alleges that the failure of Canada to adequately protect the company’s intellectual property rights is inconsistent with Chapter 17.

The problem with Eli Lilly’s argument is that Chapter 17 in *NAFTA* is of considerable generality, contemplating both the need for robust intellectual property protections as well as the right of state regulatory autonomy. This generality is exemplified in the principle provision at issue in Eli Lilly’s claim, Article 1709(1), which leaves “capable of industrial application” undefined as a patent standard, except to say that it is synonymous

61 *Waste Management, supra* note 40 at para 143.

62 Conversely, see *Feldman v United Mexican States*, Award (16 December 2002) ARB(AF)-99-1 (NAFTA/ICSID), another *NAFTA* dispute where the tribunal stated that indirect expropriation and measures tantamount to expropriation are functionally equivalent.

63 *Metalclad, supra* note 38 at para 103.

64 *United Mexican States v Metalclad Corp*, 2001 BCSC 664 at para 99 (available on CanLII).

65 Claimant’s Memorial, *supra* note 20 at para 15.

66 *NAFTA, supra* note 1, art 1110(7). Canada argues that the tribunal has no jurisdiction over any alleged violations in Canada’s international intellectual property obligations under *TRIPS* or *NAFTA* Chapter 17: Statement of Defence, *supra* note 20 at para 84.

67 Notice of Arbitration, *supra* note 1 at para 78.

with “usefulness.”⁶⁸ The substantive standards of patentability, including the concept of utility, were left to domestic legal development and clarification.

Additional provisions in Chapter 17 further support the proposition that the promise doctrine is not inconsistent with the chapter. Article 1709(8) allows a state to revoke a patent when “grounds exist that would have justified a refusal to grant the patent.”⁶⁹ Arguably, this provision contemplates a state’s right to invalidate a patent on the grounds that the patent failed to demonstrate or soundly predict its promised usefulness at the time of filing. At the very least, it affirms that the granting of a patent at first instance is subject to subsequent review and possible revocation. Article 1709(2) provides that states may exclude inventions from patentability in order to “protect human health.”⁷⁰ While it is not suggested that the *Strattera* and *Zyprexa* doctrines were invalidated on exclusionary grounds, the fact that *NAFTA* Chapter 17 provides for public policy exceptions adds further indication to the chapter’s contemplation of domestic regulatory autonomy. Other examples include Article 1704, which mediates the balance between the intellectual property rights afforded in Chapter 17 and the need for domestic authorities to regulate their internal markets:

Nothing in this Chapter shall prevent a Party from specifying in its domestic law licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. A Party may adopt or maintain, consistent with the other provisions of this Agreement, appropriate measures to prevent or control such practices or conditions.⁷¹

These examples demonstrate both the breadth and nuance of Chapter 17. They suggest that the promise doctrine is no more inconsistent with Chapter 17 than it is consistent. Chapter 17 establishes a principled framework for a patent regime while leaving a host state with flexibility in the regime’s particular domestic implementation. While Eli Lilly argues that Canada has “clearly and substantially redefined utility as contemplated by *NAFTA*,”⁷² the fact remains that utility was left undefined as a patent standard. Without second-guessing the appropriate interpretation and application of Canadian patent law with respect to this standard, a tribunal has no basis upon which to conclude that Canada’s approach to utility is in violation of a rule of international law.

Nevertheless, Eli Lilly cites the introductory provision of Chapter 17—states should provide “adequate and effective protection and enforcement of intellectual property rights, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade”—as the overarching obligation which Canada has breached.⁷³ While it is true that the protection of intellectual property rights is the core purpose of Chapter 17, it does not necessarily follow that Canada failed to protect intellectual property rights by invalidating Eli Lilly’s patents. On the contrary, the patents were invalidated out of a concern for protecting legitimate claims to intellectual property. Lax patentability standards may be just as much a barrier to

68 *NAFTA*, *supra* note 1, art 1709(1). Notwithstanding, Eli Lilly’s argument necessarily implies that utility under *NAFTA* in fact has an “internationally-accepted” meaning: see, for example, Notice of Arbitration, *supra* note 1 at paras 17, 196. Canada, in reply, contends that “as in *TRIPS*, reflecting substantial differences in their respective intellectual property regimes, the *NAFTA* Parties were unable to agree even on common terminology for core concepts of patentability”: Statement of Defence, *supra* note 20 at para 88.

69 *NAFTA*, *supra* note 1, art 1709(8).

70 *Ibid*, art 1709(2).

71 *Ibid*, art 1704; see also *TRIPS*, *supra* note 43, art 40.

72 Claimant’s Memorial, *supra* note 20 at para 17.

73 *NAFTA*, *supra* note 1, art 1701(1); Notice of Arbitration, *supra* note 1 at paras 5, 43.

legitimate trade as strict patentability standards. Unmeritorious patent holders exercising their monopoly rights may hinder the efforts of legitimate innovators and efficient competitors. As Justice Binnie noted in *Apotex Inc v Wellcome Foundation Ltd*, “[a] policy of patent first and litigate later unfairly puts the onus of proof on the attackers to prove *invalidity*, without the patent owner’s ever being put in a position to establish validity.”⁷⁴ The promise doctrine, which assesses utility on the merits of the patent, is thus consistent with the recognition and enforcement of intellectual property rights.

Finally, Eli Lilly cites the ICSID arbitration award of *Saipem v Bangladesh* (“*Saipem*”) for the proposition that “a judicial decision contrary to the host State’s treaty obligations is an illegal decision.”⁷⁵ It is argued that because the federal court decisions invalidated Eli Lilly’s patents in breach of Chapter 17, the decisions are illegal and thus expropriatory in nature. However, the decisions of the Canadian federal courts are in no way comparable to the impropriety of the Bangladeshi courts in *Saipem*. In *Saipem*, the Bangladeshi national courts failed to recognize and enforce an award of the International Chamber of Commerce, and a subsequently constituted ICSID tribunal found that the conduct of the Bangladeshi courts constituted an “abuse of rights” amounting to an illegal expropriation under Article 5 of the Italy-Bangladesh BIT.⁷⁶ The apparent lack of independence and neutrality in the Bangladeshi courts influenced the ICSID tribunal in applying the internationally accepted principle of prohibition of abuse of rights to rectify an otherwise manifestly improper decision. A court exercising its “supervisory jurisdiction for an end which [is] different from that for which it [is] instituted”⁷⁷ is clearly distinguishable from a court lawfully exercising its statutory mandate and function at common law. The foregoing analysis suggests that the federal courts have exercised their judicial function in a manner consistent with Canada’s treaty obligations and consistent within the policy space that such international treaties readily allow. Judicial interpretation of the provisions of Canada’s *Patent Act* is both allowable and desirable, and a decision contrary to the financial interests of a foreign investor does not, by itself, amount to an expropriation.

PART III. CHILLING EFFECTS

In addition to the taxpayer burden of a half a billion-dollar award, Eli Lilly’s arbitration action may narrow Canada’s policy space with respect to pharmaceutical patent rights and constrain domestic control over the country’s healthcare system. The threat of costly arbitral awards may cause legislators, judges, and policymakers to think twice about measures that might limit, regulate, or affect the rights of pharmaceutical patent-holders. Following a *NAFTA* award in favour of Eli Lilly, federal court judges would likely abandon the promise doctrine altogether, for any subsequent foreign investor could bring suit against Canada if their patent was invalidated on the basis of the doctrine. Thus, notwithstanding the findings of the Federal Court, upheld by the Federal Court of Appeal and undisturbed by the Supreme Court of Canada, a single arbitral award could have the effect of changing Canada’s patent laws.

While a *NAFTA* tribunal does not have the authority to render the patents valid under Canadian law, a judgment in favour of Eli Lilly is functionally the same as if *Strattera* and *Zyprexa* were valid. Eli Lilly would be entitled to its expected monopoly profits from the drugs, and future patent challenges in Canadian courts would not be subject to Canada’s

74 *Apotex*, *supra* note 16 at para 46.

75 Notice of Intent, *supra* note 45 at para 92; see *Saipem SPA v The People’s Republic of Bangladesh*, Award (30 June 2009) ARB-05-07 (ICSID).

76 *Ibid* at para 204.

77 *Ibid* at para 161.

promise doctrine. Accordingly, an award would effectively extend the jurisdiction of Eli Lilly's preferred patent laws within Canada's borders. Indeed, the action might open up additional claims, whereby other Canadian courts that deviate from applying the preferred law of a foreign investor may be subject to international challenge.

To be clear, this article does not suggest that foreign investors are never justified in claiming damages against host states. Nor is it suggested that the promise doctrine is necessarily preferable over other interpretations of patent utility. A critique of the actions of Eli Lilly does not depend upon the substantive merits of the promise doctrine, except to the extent I have argued that the doctrine is an appropriate expression of the Canadian common law and not in breach of NAFTA and customary international law, including NAFTA Chapter 17, the minimum standard of treatment, and the provisions against expropriation. Further, this article does not take a position between how the interests of brand name pharmaceutical companies and the interests of generic companies should be balanced, recognizing that both have a role to play in bringing innovative medicines to a competitively efficient and affordable market. Instead, the scope of my argument is that states are required to mediate this balance, and are entitled to a measure of judicial and regulatory sovereignty in doing so. Judicial and regulatory sovereignty is necessary for a host state to effectively attend to the myriad of interests that must be represented, including but not limited to the interests of foreign investors.

Eli Lilly's arbitration claim rests on a rejection of judicial and regulatory sovereignty that is both extreme and without merit. In profiting from its investment in Canada, Eli Lilly is required to comply with Canadian laws, regulations, and court directives. While government measures can and do treat foreign investors unfairly and inequitably, Eli Lilly's loss of two court challenges in fair hearings does not justify using investor-state arbitration for a *de facto* appeal. Eli Lilly is challenging Canada's legal process not because the process is contrary to international law, but because circumventing the Canadian courts through investor-state arbitration is in the company's interests, Canadian law notwithstanding. Canada, of course, expressly assented to NAFTA, including the dispute resolution provisions of Chapter 11. Even if Eli Lilly's claim is unfounded, affording foreign investors access to investor-state arbitration is a part of the agreement of NAFTA from which Canada also receives benefits. However, investor-state arbitration should not be a conduit by which a foreign investor can reject Canada's legal system for its own corporate objectives.

In addition to Eli Lilly's claim, Canada's conclusion of CETA and engagement with TPP negotiations raises further concerns with respect to expansive patent protections creating barriers to affordable medicines. During CETA negotiations, for example, it was estimated that the proposed lengthening of the period of exclusivity for innovative pharmaceuticals would lead to an annual increase in drugs costs in the range of CDN \$2.8 billion.⁷⁸ The government of the Province of Ontario has already indicated that it will demand that the federal government "mitigate the impact" of CETA on Ontario's healthcare sector.⁷⁹ This comes at a time when healthcare costs are already steadily rising as a result of an aging population. Standard & Poor has warned that Canada will face

78 Paul Grootendorst & Aidan Hollis, *The Canada-European Union Comprehensive Economic & Trade Agreement: An Economic Impact Assessment of Proposed Pharmaceutical Intellectual Property Provisions*, commissioned by the Canadian Generic Pharmaceutical Association (7 February 2011).

79 Ontario, Ministry of Economic Development, Trade and Employment, *Statement from the Minister of Economic Development, Trade and Employment on a Trade Deal Between Canada and the European Union* (17 October 2013), online: <<http://news.ontario.ca/medt/en/2013/10/statement-from-the-minister-of-economic-development-trade-and-employment-on-a-trade-deal-between-can.html>>.

credit downgrades unless policymakers takes proactive measures, including increasing the provision of private sector health services and reducing the extent of coverage.⁸⁰

Eli Lilly's claim risks pulling on yet another thread from the fabric of Canada's public healthcare system, as the cost of monopoly medicine creates perverse incentives for privatization. Questions regarding healthcare privatization, as well as the balance between protecting pharmaceutical innovators and promoting public health interests through generic competition, are becoming increasingly important to Canada's social and economic future. Once again, this article does not take a position on how those questions should be answered—it only seeks to maximize the space in which Canada can answer these questions on its own terms.

CONCLUSION

The arbitration against Canada serves as a cautionary tale to the country. The benefit of expanded trade relationships—obtained by granting foreign investors expansive rights under investment treaties—must be balanced with the need for effective policy autonomy. At a time when the executive branch of government is boldly entering into new trade agreements, it is important to be mindful of how the increased state obligations that attach to foreign investment can affect other levels and branches of government, including provincial legislatures, Parliament, and the judiciary. In the absence of adequate democratic consultation, extending unbounded rights to foreign investors may result in unforeseen and possibly irretrievable losses for Canada. It will be difficult to reclaim these losses once gone, and only then at great cost.

80 "Health-care costs could downgrade Canada's credit", *CBC News* (31 January 2012) online: <<http://www.cbc.ca/news/business/health-care-costs-could-downgrade-canada-s-credit-1.1183525>>.

ARTICLE

EXPANDING THE ROLE OF CULTURE IN BRITISH COLUMBIA'S ADOPTION SCHEME

Michael M.J. Choi*

CITED: (2015) 20 Appeal 43

INTRODUCTION

Adoptive parents, government agencies, lawmakers, and courts continue to wrestle with the difficult question of how a child's cultural or racial heritage should be integrated into the Canadian adoption system. Canadian courts have generally taken one of two approaches in an effort to manage the complexities involved in identifying and accommodating children's cultural needs. Some have adopted a singular, monolithic perspective of culture as a natural consequence of biological heritage.¹ Others have refrained from engaging the question at the judicial level, leaving the matter to the case-by-case discretion and policies of adoption agencies, government departments, and adoption agreements, with only a small nod towards culture's potential impact on the best interests of the child.

While the current British Columbia *Adoption Act* (the "Act")² requires specific consideration of the importance of cultural preservation in the adoption of Aboriginal children, the expansion of positive duties placed on all adoptive parents may substantially benefit adopted children from other cultural or racial groups. Drawing from the experience of the cultural planning processes already mandated in the adoption of Aboriginal children, such measures would ideally address an adopted child's potential cultural needs and ensure that a more even standard is applied in all adoption cases. In arguing for this position, I will proceed by examining the current legislative structure's treatment of adoption and culture, making a case for the need for reform, and concluding with suggestions for possible implementations.

PART I. MULTIPLE STANDARDS

Under section 3(2) of the current Act, adoption applications concerning Aboriginal children specifically make consideration of "the importance of preserving the child's cultural identity" mandatory.³ For adoptions generally, the Act lists "cultural, racial, linguistic and religious heritage" as a "relevant factor" in determining the best interests of the child under section 3(1)(f).⁴ These multiple standards create a risk of culture being subsumed in the overall assessment. As the Act presently stands, adopted Aboriginal

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1 Fareen L. Jamal, "Cultural Fluency for Family Lawyers" (2012) 31:2 Can Fam LQ 203 at 209.

2 *Adoption Act*, RSBC 1996, c 5.

3 *Ibid*, s 3(2).

4 *Ibid*, s 3(1)(f).

children are governed under one standard, while all other adoptions fall under a second, generalized standard. The Act's Adoption Regulation (the "Regulation")⁵ stipulates that prospective adoptive parents must undertake studies on the child's cultural, racial, linguistic and religious heritage as well as the potential impact of "inter-racial and cross-cultural adoption";⁶ however, these provisions fall short of the "preservation" standard required for adoptions of Aboriginal children.

The high standard imposed for the adoption of Aboriginal children is a necessary legal recognition of their particular needs and the importance of their ties to Aboriginal culture. For Aboriginal children adopted by non-Aboriginal parents, the statutory standard is a policy tool aimed at facilitating the children's access to their historical roots and encouraging the preservation and continuance of Aboriginal cultures generally. While culture is a critical consideration in the development of adopted children from other countries or regions, their originating cultures may continue to exist and proceed apace. In those circumstances, emphasis falls more on the individual child's development. In contrast, Aboriginal cultures do not have a source or base in another country where they may persist: these cultures are indigenous to Canada, and their preservation and continuance must be treated as domestic responsibilities.

This distinction is one point of separation between children adopted from Aboriginal heritage within Canada and those adopted from other countries. However, it is unclear why a sharp dividing line has been established between them at the statutory level in dealing with the impact of culture on childhood development. Adopted children of other cultural, racial, linguistic, or religious backgrounds do not benefit from the more rigorous statutory expectation, which may be detrimental to their development according to growing evidence of the importance of cultural education and understanding for adopted children generally. The Act and the Regulation impose consideration of a child's cultural heritage as a "relevant factor" when adoption orders are created, but the specific parameters of future plans regarding this factor are left to broad discretionary grounds and are thus vulnerable to uneven implementation. The standard of "consideration" under the Act, left unqualified, is insufficient to address properly the potential psychological needs of adopted children.

This is not to say that the current scheme is insufficiently prepared to consider culture in determining the child's best interests. An assessment of the prospective adoptive parents' "willingness to help the child appreciate and integrate [their cultural, racial, linguistic and religious] heritage" is a mandatory part of the pre-placement assessment process.⁷ The *Practice Standards and Guidelines for Adoption*⁸ used by the British Columbia Ministry for Children and Families Adoption Branch mandates awareness of and sensitivity to the child's cultural heritage throughout its procedures, as do the *Child, Family and Community Service Act*⁹ and the *Hague Convention on Intercountry Adoptions*,¹⁰ the latter of which is incorporated by reference under Part 4, Division 2 of the Act. Rather, my contention is that the distinction that *requires* a cultural preservation plan and approval in the case of Aboriginal children being placed with non-Aboriginal adoptive parents but only *considers* it in determining the placement of other adopted

5 *Adoption Regulation*, BC Reg 291/96.

6 *Ibid*, ss 3(1)(g), 3(2)(e). See also *ibid*, ss 4(1)(a)(ii), 4(1)(e)(ii).

7 *Ibid*, s 3(1)(g).

8 British Columbia, Ministry for Children and Families Adoption Branch, *Practice Standards and Guidelines for Adoption*, (Victoria: Ministry for Children and Families Adoption Branch, 2001) [*Practice Standards*].

9 *Child, Family and Community Service Act*, RSBC 1996, c 46.

10 *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, 29 May 1993.

children¹¹ should be abolished. Instead, a uniform standard set at the higher level should prevail for all adoptions.

PART II. THE NEED FOR REFORM

Reform of these standards will require a concerted effort on multiple fronts. Courts must be given sufficient discretion and information to assess properly the situations and needs of the child and the adoptive parents in creating adoption orders. Government agencies and private parties involved in the adoption process must be provided with sufficient support. Such reforms must, at all points, be informed by information and research pertinent to all stages of the adopted child's life.

As a result of their adopted and racialized status, transracial adopted children face significant challenges as they grow into later childhood, adolescence, and beyond, especially in cases where the parents are visibly of a different race than the child.¹² The potential socio-psychological issues adopted children already face are compounded in the development of transracial adoptees by experiences of race- or culture-based discrimination, hostility, and overt racism. These negative experiences lead to a high risk of feelings of “belittlement, anger, and alienation”¹³ and may have other severe consequences. Studies have suggested “that substantial numbers of children in transracial placements have become increasingly maladjusted as they grow older[,] with higher than average rates of suicide and mental health problems”.¹⁴

Currently, the role and impact of culture in the determination of the best interests of the child is largely treated in a diminished capacity in Canadian courts. Cultural considerations are discussed by the courts in transracial adoption cases, but judicial discourse has, on occasion, treated cultural planning in a reductive manner or as being of secondary importance, at least in comparison to more easily quantifiable and demonstrable factors, such as income levels, housing situations, and other socio-economic resources.

In *Re Adoption Act and Infant Female #99-0733*,¹⁵ which concerned the adoption of a Canadian child of mixed Greek and Egyptian heritage, Justice Paris determined the adoptive parents to be “virtually ideal” based on the following analysis:

[T]hey appear to be well suited to adopt the child. They are native-born British Columbians of Italian ancestry. They are university educated with a combined annual income of over \$80,000. They are regular church goers.

11 *Practice Standards*, *supra* note 8 at 1-8.

12 For some examples, see Derek Kirton et al, “Searching, Reunion and Transracial Adoption” (2000) 24:6 *Adoption & Fostering* 6; Ruth McRoy & Amy Griffin, “Transracial Adoption Policies and Practices: The US Experience” (2012) 36:3-4 *Adoption & Fostering* 38; Jayashree Mohanty & Christina E Newhill, “Asian Adolescent and Young Adult Adoptees’ Psychological Well-Being: Examining the Mediating Role of Marginality” (2011) 33:7 *Children and Youth Services Review* 1189; and Colleen Butler-Sweet, “‘A Healthy Black Identity’: Transracial Adoption, Middle-Class Families, and Racial Socialization” (2011) 42:2 *Journal of Comparative Family Studies* 193.

13 M Vashchenko et al, “‘Just Beyond my Front Door’: Public Discourse Experiences of Children Adopted from China” (2012) 49:1-2 *Am J Community Psychol* 246 at 247.

14 Mark Anderson, “Protecting the Rights of Indigenous and Multicultural Children and Preserving their Cultures in Fostering and Adoption” (2014) 52:1 *Family Court Review* 6 at 18. See also Margaret A Keyes et al, “Risk of Suicide Attempt in Adopted and Nonadopted Offspring” (2013) 132:4 *Pediatrics* 639.

15 *Re Adoption Act and Infant Female #99-0733*, 2000 BCSC 65 (available on CanLII). Although this decision was subsequently overturned on appeal, the Court of Appeal took no issue with the trial judge's findings and conclusions quoted above: see *Re British Columbia Birth Registration No ###*, 2000 BCCA 109 (available on CanLII).

They both have large extended families to whom they are close. He is 40 and she is 35 years of age, they have been married for over eight years and evidently their marriage is solid. They have tried to have children of their own, including with medical assistance, but have been unsuccessful.¹⁶

The adoptive parents' age, education, income, religious beliefs and habits, and marital relationship were all considered to be salient factors that informed the analysis. Culture, however, received only a brief nod in recognizing "ancestry", which did not provide insight into any cultural support to be tendered to the child. While the adoptive parents may certainly have been willing to provide such support, the court's lack of interest in this matter is troubling. The decision appears to suggest that the child's immediate well-being is the primary scope of the court's analysis, and that cross-cultural heritage will not present challenges once the child has been subsumed into the adoptive parents' cultural processes or the perceived dominant Canadian culture.

Despite the Supreme Court of Canada's recognition in *Van de Perre v Edwards* that "evidence regarding the so-called 'cultural dilemma' of biracial children [...] is relevant and should always be accepted",¹⁷ the view put forward in *Racine v Woods* that "the significance of cultural background and heritage as opposed to bonding abates over time"¹⁸ continues to live on in courts across Canada.¹⁹ Although it is reasonable that factors such as financial ability should remain foundational considerations in determining the suitability of adoptive parents, judicial emphasis on material resources risks treating cultural awareness and accommodation as second-tier factors. Amending the enabling legislation to raise culture to a foremost consideration, as it is in the case of Aboriginal adoptees, would significantly mitigate this risk and ensure that culture is given appropriate treatment.

In this area of the law, the courts have preferred a general strategy of risk management and minimization: in determining the best interests of the child, judicial analysis focuses heavily on determining where the child is exposed to the least amount of quantifiable risk.²⁰ The necessity of addressing the child's pressing and imminent requirements may explain why courts have been reluctant to engage with murkier issues of culture and the later development of the child. The impact of culture on a person's development may take decades to manifest fully. When there is no immediate, measurable, and inevitable risk attached to a factor's omission or reduction, as can potentially be the case with culture, such a factor is more likely to be relegated to a position of lesser relevance in the overall decision, on grounds of vagueness or potential inapplicability.

When approving an adoption order, the court will understandably focus on ensuring that the child's observable, immediate, and pressing needs are met: food, shelter, caring parents, and medical attention as required. However, given that adoption orders have a permanent and lifelong impact on the individuals involved, courts should ideally also consider the adoptive parents' plans to accommodate a child's cultural needs, both in childhood and in later years. Adoption orders should not be made with an artificial dividing line in mind, where on one side the court and lawmakers ensure that risks to

16 *Ibid* at para 18.

17 *Van de Perre v Edwards*, 2001 SCC 60 at para 40 (available on CanLII).

18 *Racine v Woods*, [1983] 2 SCR 173 at 187 (available on CanLII).

19 See *Re DH*, 2013 ABPC 283 (available on CanLII); *Re RRE*, 2011 SKQB 282 (available on CanLII); and *Adoption – 1212*, 2012 QCCQ 2873 (available on CanLII).

20 See *Re British Columbia Birth Registration No 1999-59-017333*, 2011 BCSC 830 (available on CanLII); *CD v PB*, 2006 BCSC 1515 (available on CanLII); and *Director and AM*, 2005 BCPC 672 (available on CanLII).

the child's physical health are minimized, but beyond which the parents and the adopted child bear the responsibilities and risks that come with age-based or later development.

Furthermore, the *Racine v Woods* view that the importance of culture abates over time is a myopic and outdated understanding of culture's impact on psychological development that has been refuted by modern scholarship.²¹ The prevailing opinion in studies of transracial adoptions is now that the opposite proposition is closer to the truth: while infants and very young children may show little understanding of race or appreciation of its consequences, transracial adoptees become increasingly aware of the impact of racial or ethnic differences on their relationships with others and on themselves as they grow older.²²

While the importance of race and culture may or may not diminish over time in terms of the child's relationship with the parents during childhood, as was believed in *Racine v Woods*, research indicates that these factors grow substantially more significant over the course of the child's entire lifetime. Consequently, the assessment of the adoptive parents' suitability must be made with a view of the child's future, and adoptive parents must anticipate the potential impact and risks associated with the child's potential future awareness of his or her cultural and racial heritage from the very early stages of their relationship with the adopted child. There must be planning to manage and minimize the impact of such negative experiences on the child's development and also clear recognition by all parties of the child's intersectional position and "complex identity"²³ as both a transracial person and an adoptee. Integration of these considerations at the statutory level would ensure that the issue is thoroughly considered in all transracial adoption cases.

PART III. WAYS FORWARD

While mandatory cultural planning processes appear to have been, on the whole, successful in easing the adoption process for Aboriginal children and have been recognized as "a feature of a successful model of caring for Indigenous children in permanent ways",²⁴ these measures have not been expanded to apply to transracial adoptions generally. Instead, the determination of the best interests of the child in transracial or multiracial child adoption cases continues to proceed in a piecemeal fashion that may fail to capture adequately the importance of cultural values over the course of the adoptee's life.

The most apparent solution to these risks would be to extend the cultural planning process to all adoptions. Measures enacted in accordance with a "preservation" requirement such as the Act's section 3(2) for Aboriginal children, extended broadly, would require parents to assess and formulate plans for a child's needs by going beyond the basic, mandatory considerations to actual strategic planning. The statutory framework for this higher standard is already in existence and operational; applying it to all adoptions would, in

21 See FE Aboud, "The Formation of In-Group Favoritism and Out-Group Prejudice in Young Children: Are They Distinct Attitudes?" (2003) 39:1 *Developmental Psychology* 48.

22 See NS Huh, "Korean Adopted Children's Ethnic Identity Formation" in KJS Bergquist et al, eds, *International Korean Adoption: A Fifty-Year History of Policy and Practice* (New York: Haworth Press, 2007) 79 and J Triseliotis, "Intercountry Adoption: In Whose Best Interests?" in M Humphrey and H Humphrey, eds, *Inter-Country Adoption: Practical Experiences* (London: Routledge, 1993) 119.

23 I borrow this term from Beatriz San Roman's study of transracial adoptees in Spain and the difficulties they experience in negotiating the "trans" nature of their physical, other-racialized bodies and their cultural sense of self: see Beatriz San Roman, "'I Am White ... Even if I Am Racially Black' 'I Am Afro-Spanish': Confronting Belonging Paradoxes in Transracial Adoptions" (2013) 34:3 *Journal of Intercultural Studies* 229.

24 Jeannine Carriere, *You should know that I trust you... Cultural Planning, Aboriginal Children and Adoption Phase 2* (Victoria: University of Victoria, 2010) at 15.

many ways, be treading familiar ground. While many adoptions are already likely to involve significant planning devoted to this end by willing and proactive adoptive parents in conjunction with government agencies, a statutory framework and a regimented policy would ensure that all adopted children benefit from such measures.

Resource availability, however, must be considered in any expansion of duties placed on adoptive parents, both for the adoptive parents as well as for the administrative and judicial frameworks. Fully addressing this matter is outside the scope of this paper, but I wish to acknowledge here that there are many obstacles to the successful expansion of the cultural planning process. Significant expenditures by the courts and especially the relevant government agencies would likely be required if more oversight was involved in an application's approval. Identifying appropriate support networks for adoptees who originate from countries with little representation in Canada may be disproportionately difficult or costly, particularly in rural areas. Furthermore, the current adoption process is already a long, expensive, and often fraught experience for all parties involved; increasing assessment requirements may exacerbate these existing issues and introduce new delays.

Adoptive parents would likewise face increased costs if the adopted child required special counselling or initiatives to accommodate their cultural needs, including the cost of programs, travel, language training, and other relevant activities. Parents who would otherwise be found fit may, if culture were made a governing consideration, fail to meet the standard of expectation through no fault of their own. Geographical or demographic limitations may inhibit prospective parents' ability to adopt transracial children simply because they live in a place where the child's culture could not be cultivated in a social context: of Canada's six million visible minority people, 70% reside in Toronto, Montreal, or Vancouver.²⁵ It is possible that adoptive parents in urban centres would be disproportionately found to be more suited for adoption than those outside of Canada's largest cities. Prospective parents may be unduly penalized if they reside in a Canadian city or town that cannot meet a higher standard in providing the adoptee with access to cultural resources.

A more intermediate proposal is to reinforce the education received by prospective adoptive parents during their initial assessment and pre-approval stages. Although information about the adopted child's cultural or racial background is already an important part of the adoption process for parents, further emphasis should be integrated into the training and home study portions of the adoption preparation process to raise awareness of the unique problems transracial adopted children may face as members of visible minorities in Canada. Experiences and needs vary in meaningful ways between generations of immigrants, and these issues may be exacerbated by the child's lived experience as an adoptee.²⁶ A visit to the child's country of origin may be a valuable experience, but it is equally, if not more, important to ensure that the adoptive parents are prepared to guide the adopted child through the difficult experiences of coping with racism, discrimination, and otherness at home.

25 Statistics Canada, *Immigration and Ethnocultural Diversity in Canada*, (Ottawa: StatCan, 2011) at 4.

26 See generally Rubén G Rumbaut, "Ages, Life Stages, and Generational Cohorts: Decomposing the Immigrant First and Second Generations in the United States" (2004) 38:3 *International Migration Review* 1162; Msia Kibona Clark, "Identity Among First and Second Generation African Immigrants in the United States" (2008) 6:2 *African Identities* 169; Karthick Ramakrishnan, "Second-Generation Immigrant? The '2.5 Generation' in the United States" 85:2 *Social Science Quarterly* 380; and Bic Ngo, "Beyond 'Culture Clash': Understandings of Immigrant Experiences" (2008) 47 *Theory Into Practice* 4.

CONCLUSION

There is no clear answer to the question of how culture should be factored into adoption processes. While there is little doubt that culture plays a crucial role in the emotional and psychological development of transracial adopted children, culture's intangible and variable nature makes it difficult for courts accustomed to a quantifiable risk-management model to integrate it properly into decisions. Furthermore, the vast discrepancies in the availability of cultural resources across Canada may present obstacles to the formation of a uniform standard that does not unduly penalize those who reside outside of the major metropolitan centres.

Whatever the logistical difficulties involved, the need for change is clear. Transracial adopted children continue to face disproportionate challenges due to inadequate social and emotional support networks as they grow into adulthood and wrestle with difficult questions of identity, race, and culture. While adoptive parents no doubt make their best efforts to care for their children, the courts, government agencies, and lawmakers have an instrumental authority in creating that family relationship. They cannot absolve themselves of the responsibility to ensure that the child's best interests are met, not only at the time of the adoption and immediately afterwards, but over the course of that child's growth. Difficulty is not an excuse for inaction and, as indicated in this analysis, Canada's adoption system is in need of action.

Winner of the 2015 McCarthy Tétrault Prize for Exceptional Writing

ARTICLE

RETHINKING *BAKER*: A CRITICAL RACE FEMINIST THEORY OF DISABILITY

Alyssa Clutterbuck*

CITED: (2015) 20 Appeal 51

INTRODUCTION

One of the dangers of standing at the intersection [...] is the likelihood of being run over.¹

— Ann duCille

Baker v Canada (Citizenship and Immigration) (“*Baker*”)² is widely regarded as a leading case in administrative law establishing a new standard for the review of administrative discretion and the duty of procedural fairness.³ However, many analyses of *Baker* erase the multiple sources of vulnerability that Ms. Mavis Baker, the appellant, faced. Ms. Baker was a Black woman immigrant from Jamaica, living in poverty as a single mother, and suffering from a mental illness. Even though her appeal was successful, her social position was largely absent from the decision of the Supreme Court of Canada (“SCC”). Understanding this case from a Critical Race Feminist perspective demonstrates the ways that even successful litigation can fail to unpack how administrative systems are violent towards people at the margins.

Ms. Baker’s case was a challenge to the ruling of an Immigration Officer who denied her Humanitarian and Compassionate considerations (“H&C”) application. Ms. Baker

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- 1 Ann duCille, “The Occult of True Black Womanhood: Critical Demeanor and Black Feminist Studies” (1994) 19 Signs 591 at 593.
- 2 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (available on CanLII) [*Baker* SCC cited to SCR].
- 3 See Roger Rowe, “*Baker* Revisited” (2007) 38 J of Black Stud 3; David Dyzenhaus & Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v. Canada*” (2001) 51 UTLJ 193; Gerald P Heckman, “Unfinished Business: Baker and the Constitutionality of the Leave and Certification Requirements Under the Immigration Act” (2001) 27 Queen’s LJ 683; David Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2001) 27 Queen’s LJ 445; Gerald Heckman & Lorne Sossin, “How do Canadian Administrative Law Protections Measure Up to International Human Rights Standards? The Case of Independence” (2005) 50 McGill LJ 193 at 252.

left her four adult children in her home country and entered Canada on a visitor's visa in 1981. While living in Canada, she had four children. After the birth of her final child in 1992, Ms. Baker began suffering from paranoid schizophrenia as a result of post-partum depression. She applied for welfare and underwent treatment as an in-patient at the Queen Street Mental Health Centre in Toronto for approximately one year.⁴

Ms. Baker was without legal status and subject to an outstanding deportation order, which was issued in 1982. She received another deportation order in December 1992 after it was determined that she had worked illegally in Canada and overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residency from outside Canada, based upon H&C considerations, pursuant to section 114(2) of what is now the *Immigration and Refugee Protection Act*.⁵ The application included a letter from the Children's Aid Society, and a letter from her mental health professional, Dr. Collins.⁶ The documentation provided that although she was still experiencing psychiatric problems, she was making progress. It also stated that her deportation might trigger another bout of mental illness since treatment might not be available in Jamaica.⁷

In 1994, Ms. Baker was denied permanent residency on H&C grounds without explanation in the notice sent to her. Only after persistent requests were the application notes (taken by Officer George Lorenz, and which formed the basis of Chief of Removals Officer Caden's decision) made available to Ms. Baker's publicly funded counsel. Mr. Lorenz's notes, in part, stated that Ms. Baker should be denied state protection from deportation based on the following:

This case is a catastrophe [*sic*]. It is also an indictment of our 'system' that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND OTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.⁸

Officer Lorenz's notes, written in his capacity as an executive member of the Canadian government, are now renowned as a demonstration of the improper use of discretion and decision-making authority in administrative law and immigration law, with the SCC's decision cited as a leading authority. Mr. Lorenz relied on stereotypes of Black women as hypersexual welfare queens, whose childrearing is in pursuit of greater social

4 *Baker SCC, supra* note 2 at para 5; Sharryn Aiken & Sheena Scott, "Baker v Canada (Minister of Citizenship and Immigration)" (2000) 15 J of Law and Social Policy 211. This case began as a poverty law file taken on by lawyer and community advocate Roger Rowe.

5 *Immigration and Refugee Protection Act*, SC 2001, c 27.

6 *Baker SCC, supra* note 2 at para 10.

7 Aiken & Scott, *supra* note 4.

8 *Baker SCC, supra* note 2 at para 5 [emphasis in original]. See Appendix A, below, for the entirety of Officer Lorenz's notes, which were reproduced in the SCC ruling.

welfare services, draining the public coffers funded by responsible taxpayers.⁹ Ms. Baker's vulnerabilities did not elicit the conditions to demonstrate extraordinary hardship; rather, they helped portray her as an undesirable dependent whose circumstances failed to demonstrate the requisite extraordinary hardship for H&C grounds.

The SCC's ruling that Ms. Baker's rights to procedural and substantive fairness were violated made clear pronouncements on the scope of procedural fairness, the duty to give reasons for dismissing an H&C application, and the requirements of decision makers to consider the best interests of children. Despite a favorable ruling for Ms. Baker, the Court did not engage with the multiple justiciable vulnerabilities that afflicted Ms. Baker. Legal advocates and scholars have enunciated the ways the Court failed to address the role of racism in the immigration system and in the treatment of Ms. Baker.¹⁰ However, to date, almost no studies have examined the ways that Ms. Baker's disability contributed to her second deportation order. The circumstances of Ms. Baker's maltreatment by Canada's immigration system require an analysis of the multiple intersecting sources of vulnerability and the ways in which her life circumstances ("a paranoid schizophrenic [...] on welfare"¹¹) were used against her.

This essay forwards a Critical Race Feminist theory of disability.¹² Critical Race Feminism ("CRF") illuminates the ways in which anti-discrimination and human rights doctrines and laws impact women of colour. Thus far, the experiences of women of colour with disabilities are largely absent in Critical Race Feminist perspectives. I contend that for women of colour the experience of disability is both compounded by and the result of racist-sexist treatment, a multidimensional experience of subordination that makes their experiences of disability unique. Ableism can be racist and sexist; sexism can be racist and ableist; racism can be ableist and sexist. I advance a theory of disability that is grounded in CRF and centres disability in women of colour's experiences with law and legal systems, experiences beyond the legal imagination. In Part I, I demonstrate the inattention to disability in existing Critical Race Feminist perspectives. I show how anti-discrimination and human rights law remain ill-equipped to confront the contextual and intersecting realities of disabled women of colour. In Part II, I apply a Critical Race Feminist theory of disability to consider the elements of *Baker* that are missing in the SCC judgment. I use Dean Spade's notion of administrative violence to analyze Ms. Baker's treatment and the multiple vulnerabilities that positioned her as an undeserving member of Canadian society and a target for immigration officials.

9 See Hazel Carby, *Reconstructing Womanhood: The Emergence of the Afro-American Woman* (New York: Oxford University Press, 1987).

10 See, for example, Aiken & Scott, *supra* note 4; Rowe, *supra* note 3.

11 *Baker* SCC, *supra* note 2 at para 5.

12 The Ontario *Human Rights Code*, RSO 1990, c H19, defines disability in section 10(1)(a)-(e) and includes past and present physical disability, infirmity, malformation or disfigurement caused by bodily injury, birth defect, etc. Mental disorders are explicitly enumerated. The Ontario Human Rights Commission notes that "disability" should be interpreted broadly. They also note that protection for disabled people explicitly includes, among other things, mental illness: "'Disability' should be interpreted in broad terms. It includes both present and past conditions, as well as a subjective component based on perception of disability [...] Protection for persons with disabilities explicitly includes mental illness": Ontario Human Rights Commission, *Policy and guidelines on disability and the duty to accommodate*, online: OHRC <<http://www.ohrc.on.ca/en/policy-and-guidelines-disability-and-duty-accommodate/2-what-disability>>. My theoretical treatment of disability encompasses this legal definition, but also the ways in which disability is socially constructed and reified through lived experience and marginalization.

PART I

A. Disability: The Margins of Critical Race Feminism

In developing the essential black woman, ultimately the ‘unwanted’ or ‘inferior’ is humiliated, forced out of the discourse, or compelled to change to fit within a problematic construct. If she cannot change to fit within the construct, she is abandoned.¹³

— Michele B. Goodwin

CRF accounts for and addresses women of colour’s relation to the law. Emerging most solidly in the last 15 years, CRF followed a similar trajectory as Critical Race Theory (“CRT”), which emerged as a departure from Critical Legal Studies (“CLS”). CLS is an intervention into mainstream legal theory that attempts to challenge the status quo of legal academia and assesses how the law and the legal profession can be oriented toward social change.¹⁴ As a legal intervention, CRF considers how race, gender, class, sexuality, and imperialism interact within a system of white male patriarchy and racist oppression to make the experiences of women of colour in law and society distinct.¹⁵ As Adrien Wing writes, “existing legal paradigms have permitted women of color to fall between the cracks, so that they become, literally and figuratively, voiceless and invisible under so-called neutral law or solely race-based or gender-based analyses.”¹⁶ CRF rejects contentions in CRT that assume women of colour’s experiences are in similitude to those of men of colour. CRF critiques have enunciated intra-racial/intra-gendered distinctions, refusing to advance analyses of race or gender to the exclusion of other bases of discrimination. CRF also rejects the emphasis on gender oppression within a system of patriarchy without examining the role of racism and classism in Feminist Legal Theory. It challenges the imperialism of representing the experiences of white, upper-middle class, and well-educated women as the experiences of all women. Accordingly, CRF is highly critical of feminist claims that there is a universal female experience. Anti-essentialist theorizing unpacks this notion that “a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”¹⁷

CRF has been central to exposing the legal realities for women of colour, unearthing law’s limited ability to understand how discrimination and oppression impact their lives. However, few CRF studies have seriously examined the role of disability in women of

13 Michele Goodwin, “Gender, Race, and Mental Illness: The Case of Wanda Jean Allen” in Adrien Wing, ed, *Critical Race Feminism: A Reader*, 2d ed (New York: New York University Press, 2003) 228 at 232.

14 Adrien Wing, ed, *Critical Race Feminism: A Reader*, 2d ed (New York: New York University Press, 2003); Sherene Razack, Malinda Sharon Smith & Sunera Thobani, eds, *States of Race: Critical Race Feminism for the 21st Century* (Toronto: Between the Lines, 2010). It is important to note that many key writings in Critical Race Feminism that described women of colour’s experiences with law pre-date the development of CRF’s intellectual canon. Many writings cited here were written in the 1980s and are often cited as CRT works. This overlap is in part due to the fact that women of colour were driving a considerable amount of CRT works and considering women of colour’s multiple identities and vulnerabilities. See, for example, Mari Matsuda, “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1992) 14 *Women’s Rights L Rep* 297. For a discussion on the development of CRT see Kimberlé Crenshaw et al, eds, *Critical Race Theory: Key Writings that Formed the Movement* (New York: The New Press, 1995).

15 Angela Onwuachi-Willig, “Foreword: This Bridge Called our Backs: An Introduction to the Future of Critical Race Feminism” (2006) 39 *UC Davis L Rev* 733; Mary Jo Wiggins, “Foreword: The Future of Intersectionality and Critical Race Feminism” (2000) 11 *J Contemp Legal Issues* 677.

16 Wing, *supra* note 14 at 2.

17 Angela Harris, “Race and Essentialism in Feminist Legal Theory” (1990) 42 *Stanford LR* 581 at 585.

colour's social and legal disadvantages.¹⁸ CRF scholars Nimala Erevelles and Andrea Minear have pointed out the inattention to disability in their analysis of Patricia Williams' description of the murder of Eleanor Bumpurs in "Spirit Murdering the Messenger: The Discourse of Finger Pointing as the Law's Response to Racism."¹⁹ Ms. Bumpurs was a poor, elderly, overweight, disabled Black woman killed by NYPD police officers. Professor Williams reads this murder as an unambiguous example of "racism as [...] an offense so deeply painful and assaultive as to constitute [...] 'spirit-murder.'"²⁰ Erevelles and Minear argue that Williams' failure to discuss disability as central to the circumstances that led to Ms. Bumpurs' fatal shooting is reminiscent of what Angela Harris describes as "nuance theory", in which the presence of disability oppression is only an "intensified example" of Black women's oppression.²¹ Their analysis reveals how Ms. Bumpurs' social construction as a "dangerous, obese, irrational, Black woman" contributed to the perception of her being criminally "insane" (i.e. disabled).²² Her reaction to losing her housing, described as a "murderous rage", is perceived as a disproportionately irrational response to what law enforcement described as a "mere" legal matter.²³ Ms. Bumpurs' death points to an important reality. The racialized and gendered experience of disability can have disastrous consequences for women of colour when they come into contact with legal authorities. Williams' inattention to Ms. Bumpurs' disability in her discussion leaves out a crucial factor that led to the fatal violence inflicted against her.

Michele Goodwin's essay, "Gender, Race and Mental Illness,"²⁴ is a rare work that centers disability within a Critical Race Feminist framework. Goodwin discusses the case of Wanda Jean Allen, a Black, queer, poor, and intellectually disabled woman who was the first Black woman since 1954 to be executed in the United States and the first Black woman to be executed in the state of Oklahoma since 1903.²⁵ Allen was convicted of first-degree murder for killing her partner, Gloria Leathers, in 1998. Allen's defense lawyer argued that she shot Leathers in self-defense and was attempting to fend off an attack from Leathers with a rake. The State's case against Allen relied on portraying her as dangerous, a threat to society, immoral, manly, and sexually deviant, using stereotypes of her queered Black woman-ness and her disability to construct an image of an obviously deviant criminal. Goodwin notes that "[n]umerous references were made to the fact that she was the 'aggressor', 'man', or dominant personality in her relationship with Leathers."²⁶ Goodwin's attention to the complicated web of identities and experiences in Wanda Jean Allen's life that led to her conviction and execution call for a deconstruction of "the essential Black woman" in Black feminist and Critical Race Feminist thinking: the tendency to essentialize a Black woman's experiences by privileging a discussion of race and gender without attendant intersections of class, sexuality, and disability. Her

18 Meekosha & Shuttleworth contend that intersectionality scholars remain attached to a "conventional mantra of race, gender, sexuality and class" and continue to dismiss groups such as disability and age: Helen Meekosha & Russell Shuttleworth, "What's so 'Critical' About Critical Disability Studies?" (2009) 15:1 *Australian J of Human Rights* 47 at 62.

19 Patricia Williams, "Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism" in Adrien K Wing, ed, *Critical Race Feminism: A Class Reader* (New York: New York University Press, 1997) 229; Nimala Erevelles & Andrea Minear, "Unspeakable Offenses: Untangling Race and Disability in Discourses of Intersectionality" (2010) 4:2 *J of Literary & Cultural Studies* 127.

20 Williams, *supra* note 19 at 230.

21 Harris, *supra* note 17 at 595. Harris applies "nuance theory" to white feminist understandings of Black women's experiences in which black women's oppression is the "ultimate example of how bad things [really] are" for all women, at 596. Also see Erevelles & Minear, *supra* note 19 at 127-28.

22 *Ibid* at 128.

23 *Ibid*.

24 Goodwin, *supra* note 13.

25 *Ibid* at 228.

26 *Ibid* at 233.

work rightly points out the marginalization of Black disabled women (and Black disabled queer women) within CRF perspectives.²⁷

Beth Ribet has advanced a theory of disability within a CRT framework that provides a key set of entry points for a CRF perspective of disability. Ribet argues that tactics deployed by people of colour to overcome systemic disadvantage can produce disabilities.²⁸ She describes one common tactic as hyper-performance: over-performing as a means to rebut the presumption of incompetence or racial deficit.²⁹ Ribet's work exposes the material and socio-spatial realities of women of colour in workplace and educational settings and the consequences of their disproportionate burdens. Stressors such as micro-aggressions, subtle and overt racial and/or sexual harassment, and earning disparities lead one to adopt a hyper-performing response to defeat these obstacles. These stressors become chronic and compound over time, increasing the likelihood of disablement and creating a sense of shame in one's inability to 'overcome'. Thus, disability is both an outcome of structural marginalization and the cause of continued marginalization when it leads to impoverishment or immobilization.

Despite the limited accounts of race, gender, and disability within CRF perspectives, empirical research suggests that disabled people with multiple barriers face increased vulnerabilities in North America.³⁰ A recent study examined the proportion of *Americans with Disabilities Act* ("ADA")³¹ harassment charges with respect to race, gender, age, and disability.³² The researchers identified a clear interactive effect among the characteristics of disability, race, gender, age, industry, and size of employer as these relate to reports of disability-based harassment. Generally, being female, being older, having a behavioural disability, and racial minority status placed individuals at higher risk of experiencing

27 Gabriel Arkles' recent work illuminates the violent realities of disability-based violence against queer women of colour and trans people of colour. Queer women of colour and trans people of colour's self-defense against state and police violence inflicted against them often results in their criminalization, or institutionalization under the pretext that they suffer from mental illness. Furthermore, traumatic violence and systemic discrimination contributes to high rates of emotional distress and psychological injury among trans people of colour and queer women of colour. Arkles also notes how queer women of color and trans people of colour have been particularly targeted for various forms of psychiatric abuse, yet have often been denied access to quality, consensual mental health services: Gabriel Arkles, "Gun Control, Mental Illness, and Black Trans and Lesbian Survival" (2013) 44 *Southwestern L Rev* 855 at 876.

28 Beth Ribet's work builds on Dorothy Roberts and Jennifer Pokempner's work that addresses the role of racialized and gendered poverty in creating new physical, emotional, and socially-embedded disabilities: Beth Ribet, "Surfacing Disability Through a Critical Race Theoretical Paradigm" (2010) 2 *Georgetown Journal of Law & Modern Critical Race Perspectives* 209. Roberts and Pokempner reveal the overlap between social services related to welfare and disability, noting the fusion of poverty and disability not just relative to poverty as a disabling force, but also to the use of (or invention of) disability diagnoses as a basis to make claims for resources, which, prior to welfare reform, were more rooted in socio-economic status: Dorothy Roberts & Jennifer Pokempner, "Poverty, Welfare Reform, and the Meaning of Disability" (2001) 62 *Ohio St LJ* 425.

29 Ribet, *supra* note 28.

30 For a thorough discussion of the limited quantitative and empirical studies of women of colour's experience of workplace discrimination and harassment, see Tanya Kateri Hernandez, "A Critical Race Feminist Empirical Research Project: Sexual Harassment and the Internal Complaints Black Box" (2006) *UC Davis LR* 1235. Hernandez discusses the failure by existing methods that have not taken up an intersectional framework into their quantitative analyses.

31 *Americans with Disabilities Act*, Pub L No 101-336, 104 Stat 327 (1990) (codified as 42 USC § 12101).

32 Linda R Shaw, Fong Chan & Brian T McMahon, "Intersectionality and Disability Harassment: The Interactive Effects of Disability, Race, Age, and Gender" (2012) 55 *Rehabilitation Counseling Bulletin* 82.

disability harassment.³³ The experience of disabled people who encounter multiple intersecting grounds of discrimination in the workplace was the subject of a 2001 report by the Ontario Human Rights Commission's Policy and Education Branch. The report proposed "an intersectional approach to discrimination" and acknowledged the unique vulnerabilities of complainants with multiple grounds of discrimination.³⁴ Nevertheless, incorporating intersectional approaches that are meaningful to the lives of disabled women of colour thus far has proven difficult.

B. Intersectionalizing Disability

Intersectionality reflects a commitment neither to subjects nor to identities per se but, rather, to marking and mapping the production and contingency of both.³⁵

— Devon Carbado

Disabled women of colour's experiences of discrimination pose unique challenges to law. The multidimensionality of their subordination is best understood through the lens of intersectionality, a theory introduced by Kimberlé Crenshaw that illuminates the multiple and simultaneous sites of subordination and the limits of feminist, antiracist, and other critical discourses. The theory has provided grounds for scholarly writing on women of colour, queer and trans people of colour, and groups with multiple and simultaneous experiences of oppression and structural marginalization. Crenshaw developed the notion of intersectionality in her early writings, where she focused on the experiences of Black women plaintiffs in race and sex discrimination cases in the United States. She demonstrated the incongruity of Black women's multidimensional experiences within dominant "single-axis" frameworks in anti-discrimination law that forced plaintiffs to prove one ground of discrimination:

[The] single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group. In other words, in race discrimination cases, discrimination tends to be

33 *Ibid* at 88. Specifically, they write:

[A] careful examination of the top five harassment charge groups reveals that women older than 35 years from racial and ethnic minority backgrounds with behavior disorders represented three of the five highest harassment groups. The top five harassment groups all represent minorities with disabilities and all work for companies that are either very small or very large, and the top three groups all consist of individuals older than 35 years, but it is the unique combinations of those characteristics along with particular racial category, type of impairment, and type of industry that place them at different likelihoods of having filed a charge of harassment.

Psychological studies have long shown that disability can be the result of daily episodic reactions to racist aggression. Carter & Scheuermann, for instance, discuss race-based traumatic stress as when employees suffer severe, demonstrable emotional or psychological injury due to harassment or discrimination, or what is more commonly known as race-based traumatic stress: Carter & Scheuermann, "Legal and Policy Standards for Addressing Workplace Racism: Employer Liability and Shared Responsibility for Race-Based Traumatic Stress" (2012) 12 U Md LJ Race Religion Gender & Class 1 at 3.

34 Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims* (2001), online: OHRC <<http://www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims>>.

35 Devon W Carbado, "Colorblind Intersectionality" (2013) 38 Signs 811 at 815.

viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.³⁶

Crenshaw's analysis of *DeGraffenreid v General Motors*, a workplace discrimination case where Black women unsuccessfully attempted to sue as a class, looks at the Court's unwillingness to acknowledge that 'Black women' were a unified group in the discrimination they experienced.³⁷ She contends that this is a consideration that Congress, in passing Title VII of the *Civil Rights Act*, perhaps failed to contemplate.³⁸

Nitya Duclos applied Crenshaw's analysis to race and sex discrimination cases reported to Canadian human rights tribunals between 1980 and 1989 in an effort to reveal how they responded to discrimination claims brought by women of colour. She found that the reported cases often made it impossible to know if women of colour were involved in disputes. Even when it was clear, the cases were almost invariably treated as if the claimants were "raceless women or genderless racial minorities."³⁹ She points out that as a complainant departs from the norm of being a cis, white, able-bodied man, it is less likely their complaint will be held to constitute discrimination in law.⁴⁰

Crenshaw foregrounded a central flaw in antidiscrimination law that permeates human rights doctrine, enumerated and analogous grounds analyses, and social movement politics. Women of colour are forced to negate the specificities of their identities at play in their subordination and risk their ability to represent men of colour or white women when claiming discrimination. In the alternative, they must ignore intersectionality in order to state a claim that does not lead to the exclusion of men of colour or white women.⁴¹ As a methodology, intersectionality is a vital tool for understanding a Critical Race Feminist theory of disability. As Crenshaw suggests, Black women and women of colour can experience discrimination in ways that are similar to and different from those experienced by white women, Black men, and men of colour. In a similar vein, women of colour's experiences of disability fundamentally affect their experiences of racism and sexism. It is different from disabled white women's experiences, able-bodied women of colour's experiences, and disabled men of colour's experiences simultaneously. A CRF theory of disability exposes how women of colour experience multiple dimensions of harm, something that more closely resembles their lived experience.⁴²

An intersectional approach to disability reveals the problems of analogizing between oppression in both Critical Disability Studies ("CDS") and feminist studies of disability.⁴³

36 Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U Chi Legal F 139 at 140.

37 *DeGraffenreid v General Motors*, 413 F Supp 142 (available on WL Next Can) (ED Mo 1976).

38 *Civil Rights Act*, Pub L No 88-352, 78 Stat 241 (1964). Title VII of the *Civil Rights Act* prohibits discrimination on the basis of race, color, religion, sex, or national origin. It also prohibits discrimination against an individual because of his or her association with another individual of a particular race, color, religion, sex, or national origin.

39 Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 Can J Women & L 25 at 58.

40 *Ibid* at 44.

41 Crenshaw, *supra* note 36 at 148. Crenshaw's discussion specifically refers to Black women in relation to Black men and shows the dilemma created by antidiscrimination doctrine for claimants with multiple grounds of discrimination.

42 Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 Can J Women & L 37 at 59.

43 CDS is a growing theoretical and interdisciplinary framework studying the social, legal, and political influences that impact the lives of disabled people. As Meekosha & Shuttleworth write, CDS "has accompanied a social, political and intellectual re-evaluation of explanatory paradigms used to understand the lived experience of disabled people and potential ways forward for social, political and economic change": Meekosha & Shuttleworth, *supra* note 18 at 49.

Many foundational works in CDS have analyzed disability and race as oppositional or analogous categories. Lennard J. Davis' *Ending Normalcy*, for instance, compares "the disabled figure" to "the body marked as differently pigmented."⁴⁴ Often, the relationship between people with disabilities and other minorities is presented in hierarchical terms—an attempt to gain recognition of disabled people as a political minority. The frequent use of "like race" analogies or describing disabled people as "cultural minorities" in disability scholarship antagonizes the interests of disabled people of colour. Theresa Man Ling Lee points out that efforts to describe people with disabilities as a "cultural minority" ignores the simultaneity of disabled and racialized experiences and, moreover, adopts a liberal, multiculturalist strategy to protect group rights based on an abstract, decontextualized, and essentialist understanding of what living while disabled is like.⁴⁵

Analogies that equate ableism with racism obscure the importance of race for the perceived benefit of the group and "take center stage from people of color."⁴⁶ In these comparisons, it becomes impossible to think through complex intersections of racism and ableism in the lives of disabled people of colour.⁴⁷ A form of "disability essentialism" emerges out of such reasoning, where the experiences, needs, desires, and aims of all disabled people are presumed to be the same. Those with "different" disabled experiences are accommodated only to the extent that their claims do not undermine the movement's foundational arguments.⁴⁸

Disability essentializing is used by feminist disability studies in claiming a unitary experience of gendered disability, a study that removes ontological questions of womanhood from race, class, sexual orientation, and other vulnerabilities. This approach is used by Fiona Sampson in her analysis of the SCC's decision *R v Parrott* ("Parrott").⁴⁹ Sampson attempts to illuminate the "distinctive experiences of gendered disability discrimination so as to maximize the value of equality rights law for women with disabilities."⁵⁰ In *Parrott*, a man was accused of kidnapping and sexually assaulting a thirty-eight-year-old woman with Down's Syndrome from a hospital in St. John's, Newfoundland. The survivor's mental development was equivalent to that of a four-year-old. When the survivor was found, several hours after the kidnapping was reported, her shorts were on backwards, her underwear was hanging out over her shorts, and she was heavily scratched and bruised. The central issue on appeal was whether the Crown was obliged to call the survivor as a witness at the *voir dire* held to determine the admissibility of her out-of-court statements, which the Crown sought to rely on as hearsay evidence. The Court's analysis focused primarily on the necessity and reliability of the hearsay evidence from the survivor, including her answers that the person who hurt her was "[t]he man."⁵¹

44 Lennard J Davis, *Enforcing Normalcy: Disability, Deafness, and the Body* (London: Verso, 1995) at 80; see extended discussion in Anna Mollow, "When Black Women Start Going on Prozac...: the Politics of Race, Gender, and Emotional Distress in Meri Nana-Ama Danquah's *Willow Weep for Me*" in Lennard J Davis, ed, *The Disability Studies Reader*, 3d ed (New York: Routledge, 2010) 486.

45 Theresa Man Ling Lee, "Multicultural Citizenship: The Case of the Disabled" in Dianne Pothier & Richard Levin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: University of British Columbia Press, 2005) 87 at 88.

46 Trina Grillo & Stephanie Wildman, "Obscuring the Importance of Race: The Implications of Making Comparisons between Racism and Sexism (or Other Isms)" in Richard Delgado & Jean Stefancic, eds, *Critical White Studies: Looking Behind the Mirror* (Philadelphia: Temple University Press, 1997) 619 at 619.

47 Mollow, *supra* note 44 at 487.

48 *Ibid.*

49 *R v Parrott*, 2001 SCC 3 (available on CanLII) [*Parrott*].

50 Fiona Sampson, "Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law" in Dianne Pothier & Richard Levin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: University of British Columbia Press, 2005) 267 at 267.

51 *Parrott*, *supra* note 49 at para 12.

Sampson rightfully highlights that by siding with the accused, the Court's decision is influenced by problematic misconceptions of disability and a willful ignorance of gendered disability discrimination. However, in articulating that *Parrott* fails to uphold equality rights for women with disabilities, Sampson appropriates "feminist critical race" critiques of sexual assault against women of color.⁵² Using Professor Crenshaw's analysis of the good/bad dichotomy in sexual assault law that marginalizes women of colour's experiences, Sampson mentions that "[w]omen with disabilities have also experienced disadvantage as a result of the legitimization of the good/bad victim dichotomy in sexual assault law."⁵³ She contends:

The sexual assault of women with disabilities must be understood in terms of the experience of gendered disability, just as violence against women of colour demands an analysis that transcends the limitations of analyses devoid of a race perspective. The sexual assault of a woman with a disability is not the result of a disabled woman's 'additive' status as a woman and as a person with a disability.⁵⁴

This well-intentioned attempt to craft a gendered theory of disability emanating from the awful outcome in *Parrott* is an unfortunate extension of a presumed universal white female subject into a disability analysis. Even as Sampson attempts an intersectional analysis, she re-inscribes an analogous comparison of the 'disabled women' and 'women of colour', a solipsistic erasure of disabled women of colour. Sampson's use of Crenshaw without attention to the contextual factors of her work replicates the problematic understandings that were the basis of the critiques in the first place. Analogizing a gendered experience of disability without contemplating women of colour's experiences with disability imports a unitary experience of disability into feminist thinking.

C. Intersectional Disability and the Limits of Law

Law by its nature is conservative, and when calls for change that threaten to destabilize existing distributions of material and symbolic power are made, change through law will occur in ways that preserve existing distributions to the greatest extent possible.⁵⁵

— Angela Harris

Intersectional perspectives reveal the ways in which law and legal prohibitions against discrimination are incongruent with the lived experiences of people with multiple vulnerabilities. CRF, CRT and Feminist Legal Theory have pointed out the shortcomings

52 Sampson, *supra* note 50 at 279.

53 *Ibid* at 280. Sampson cites Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 *Stan L Rev* 1241 at 1266:

Feminists have attacked other dominant, essentially patriarchal, conceptions of rape, particularly as represented through law. The early emphasis of rape law on the property-like aspect of women's chastity resulted in less solicitude for rape victims whose chastity had been in some way devalued. Some of the most insidious assumptions were written into the law, including the early common-law notion that a woman alleging rape must be able to show that she resisted to the utmost in order to prove that she was raped rather than seduced. Women themselves were put on trial, as judge and jury scrutinized their lives to determine whether they were innocent victims or women who essentially got what they were asking for. Legal rules thus functioned to legitimize a good woman/bad woman dichotomy in which women who lead sexually autonomous lives were usually least likely to be vindicated if they were raped.

54 Sampson, *supra* note 50 at 279.

55 Angela Harris, "Stonewall to the Suburbs?: Toward a Political Economy of Sexuality" (2006) 14 *WM Mary Bill Rts J* 1539 at 1540.

of law and the limits of anti-discrimination and human rights doctrine. These doctrines understand discrimination in such limited way that it becomes exceedingly difficult to prove cases of discrimination and human rights claims. As formal equality frameworks, they fail to understand the historically rooted nature of oppression, discrimination, harassment, and the host of social and economic disadvantages that are distributed along systems of oppression.⁵⁶

Alan Freeman argues that anti-discrimination legislation conceptualizes the harm of discrimination through a perpetrator/victim dyad:⁵⁷ a perpetrator irrationally hates people on the basis of their race and fires, denies services to, beats, or kills his victim(s) because of this inexplicable animus. Under such a paradigm, discrimination becomes individualized and is only the result of bad individuals who premeditate and carry out discriminatory acts.⁵⁸ Relying on the perpetrator perspective also supports the naïve belief that equality is a present reality with no legacies of discrimination. Understanding discrimination through the perpetrator's intention fails to consider the pre-existing vulnerabilities that make certain people more likely to be adversely impacted by discrimination regardless of a perpetrator's intent.

Despite decades of criticism, single-axis frameworks and enumerated and/or analogous grounds analyses remain the prevailing approach to human rights statutes and anti-discrimination law. In Canada, section 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") was initially drafted with a finite list of enumerated grounds.⁵⁹ The final version qualifies those grounds as "in particular," thereby opening the door for a broader application of section 15 when analogous grounds of discrimination are established.⁶⁰ The development of section 15 jurisprudence has been unpredictable and the SCC has itself acknowledged that this provision is the most difficult to apply and yields variable decisions.⁶¹ As Dianne Pothier writes, "[a]lthough there are no specific statutory bars to claims based on multiple and intersecting grounds, the legal mindset has had difficulty with such claims."⁶² Similarly, Natasha Kim and Tina Piper argue that since *Andrews v Law Society of British Columbia*⁶³—the inaugural section 15 case—the enumerated or analogous grounds approach can be reduced to "a game of categorization", especially when courts must confront multiple and intersecting grounds of discrimination.⁶⁴ In *Canada (AG) v Mossop*, for instance, the SCC did not conceive of "family status" as incorporating a same-sex family as an appropriate analogous ground. Instead, the majority of the Court encouraged the plaintiff to ground his claim solely under sexual

56 Dean Spade, "Intersectional Resistance and Law Reform" (2013) 38 *Signs* 1031 at 1034 [Spade, "Intersectional Resistance"].

57 Alan David Freeman, "Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine" in Kimberlé Crenshaw et al, eds, *Critical Race Theory: Key Writings That Formed the Movement* (New York: The New Press, 1995) 29.

58 See Spade, "Intersectional Resistance", *supra* note 56 at 1034.

59 *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, s 15.

60 Pothier, *supra* note 42 at 38-39. Also see *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 (available on CanLII) [Corbière cited to SCR].

61 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at 507 (available on CanLII) [Law]. See also Beverly McLachlin, "Equality: The Most Difficult Right" (2001) 14 *SCLR* (2d) 17.

62 Pothier, *supra* note 42 at 39.

63 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 (available on CanLII) [cited to SCR].

64 Natasha Kim & Tina Piper, "Gosselin v Quebec: Back to the Poorhouse..." (2003) 48 *McGill LJ* 749 at 771.

orientation.⁶⁵ In *Symes v Canada*, the majority refused to accept the idea of inequalities *between* women suffering from different types or levels of disadvantage. Instead, the Court insisted that a claim based on sex required the *same* disadvantage to *all* women equally.⁶⁶ Claimants with multiple intersecting harms face an uphill battle and must translate the complexities of the harm they suffer into discrete, protected categories that equality jurisprudence can support.

The narrow and individualized conception of harm, discrimination, harassment, and violence in anti-discrimination and human rights doctrine shapes even successful outcomes. Claimants with ‘winnable’ cases who have success are celebrated and these victories are touted as watershed moments that will engender widespread social change. However, as Dean Spade points out, in a sense these moments help naturalize the status quo by amplifying one form of legally recognizable and prohibited discrimination.⁶⁷ Even when plaintiffs are successful, the core of their mistreatment is often not the subject of the successful judgment; their cases are won on legal technicalities, or courts rule according to procedural matters and ignore the issues of social inequality that were the basis of the case.⁶⁸ Law, therefore, does not provide a totalizing remedy for racism, sexism, and/or ableism. It addresses only legally prohibited discrimination—observable and relatively discrete acts of individuals, narrow acts of “objective discrimination.”⁶⁹

In Part II of this essay, I return to *Baker*, a case I contend is a paradigmatic example of the multiple intersecting barriers disabled women of colour encounter. Though some have explored issues of race and gender at play in *Baker*, little attention has been placed on the role of disability. I argue that *Baker* is an apt illustration of the inability of courts to recognize how people with intersecting vulnerabilities are targeted and attacked by

65 *Canada (AG) v Mossop*, [1993] 1 SCR 554 (available on CanLII) [cited to SCR]. Writing for the minority in the *Mossop* case, Madam Justice L’Heureux-Dubé remarked, “it is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap or some other combination,” at para 152. Justice L’Heureux-Dubé acknowledges the problems of rigid categorization of discrimination: “[C]ategorizing [...] discrimination as primarily racially-oriented, or primarily gender-oriented misconceives the reality of discrimination,” at para 152. Justice L’Heureux-Dubé reiterated this approach in her dissent in *Egan v Canada*, that grounds of discrimination cannot be reduced to compartments, but overlap: *Egan v Canada*, [1995] 2 SCR 513 (available on CanLII) [cited to SCR]. In *Law*, the SCC recognized that a discrimination claim can present an intersection of grounds that are a synthesis of those listed in section 15 or are analogous to them. Subsequent to *Law*, the SCC applied this analysis to recognize a new analogous ground of discrimination, namely “aboriginality-residence”: *Law*, *supra* note 61. In *Corbière* the Court considered a provision of the *Indian Act* which barred band members who live off-reserve from voting in band elections. In establishing the new analogous ground, the Court noted that the group experiencing differential treatment was based on a combination of traits, namely being Aboriginal persons who are band members but living off a reserve. Justice L’Heureux-Dubé’s decision also noted the particular adverse impact that the impugned law had on Aboriginal women because of the history of their involuntary loss of Indian status: “Aboriginal women, who can be said to be *doubly disadvantaged* on the basis of both sex and race, are among those particularly affected by legislation relating to off-reserve band members, because of their history and circumstances in Canadian and Aboriginal society”: *Corbière*, *supra* note 60 at para 72 [emphasis added].

66 *Symes v Canada*, [1993] 4 SCR 695 at 769 (available on CanLII).

67 Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn: South End Press, 2011) [Spade, *Normal Life*].

68 *Ibid* at 84-85. Spade criticizes how equality- and rights-seeking arguments participate in logics and structures that undergird relations of domination and become sites for the expansion of harmful systems and institutions, because they often reproduce deservingsness frameworks. This is especially problematic for women of colour with disabilities, since the purportedly universal subject of rights is actually a very narrow category of persons. The ability to avail oneself of supposedly universal rights is often predicated on one’s pre-existing access to whiteness, wealth, citizenship, settler and not-indigenous status, and the ability to conform to body, health, gender, sexuality, and family norms: Spade, “Intersectional Resistance”, *supra* note 56 at 1039.

69 Duclos, *supra* note 39 at 29-30.

administrative systems. I apply Spade's notion of administrative violence to understand the violence committed against Ms. Baker by Canada's immigration system and the epistemic violence of legal approaches that privilege procedural questions and ignore the centrality of race, gender, and disability as justiciable issues. Spade's notion of administrative violence is based upon women of colour feminist perspectives and is useful in understanding the ways in which administrative practices perpetrate violence against people at the margins.⁷⁰

PART II

A. Administrative Law and Administrative Violence: Rethinking *Baker*

Administrative systems [...] govern the distribution of life chances.⁷¹

— Dean Spade

From a CRF perspective, *Baker* was a pivotal legal moment for Canada's highest Court: a Jamaican-born, Black woman, single mother, former domestic worker, living undocumented in Canada for over a decade with a psycho-social disability, successfully appealed her deportation order. Despite the presence of these intersecting vulnerabilities and their interplay with the circumstances that led to her deportation order, however, the arguments advanced on Ms. Baker's behalf and the Court's decision to reverse the deportation order focused on the procedural issues at administrative law and the issue of the rights of the child, leaving the equality concerns in Ms. Baker's request for permanent residency largely untouched. Both the facts of the case presented in the judgment and the engagement of these facts bring to the fore the role of administrative violence in Ms. Baker's experience with Canadian society and the Canadian immigration system as a disabled woman of colour.

Administrative violence is a critical intervention that illuminates the ways in which purportedly neutral state-administered services are actually key vectors for violence. These services are principally concerned with population control and masked as delivery points of public support.⁷² Spade describes administrative violence as the "regimes of practices and knowledge that coalesce in conditions and arrangements that affect everyone and that make certain populations highly vulnerable to imprisonment."⁷³ Spade discusses daily and episodic forms of administrative violence in legislation, immigration policies, health care, and social services that help produce imprisonment, criminalization, and deportation. These social institutions that permit discretionary decision-making are imbued with the "gendered racialization of population control: a criminal modality that prioritizes containment and incarceration over treatment."⁷⁴ Seeing the state's institutions as modalities of "population control" departs from individualized discussions of discrimination and maltreatment and centres a systems-based analysis of the harms produced and distributed across racialized, gendered, and/or disabled populations.⁷⁵ Spade's writing on administrative violence informs my understanding of Ms. Baker's treatment by the Canadian immigration system and explains the Court's emphasis

70 Spade's analysis focuses on white trans people and trans people of colour. In applying the concept of administrative violence to *Baker*, I am not attempting to erase the ways in which trans people and trans people of colour face specific forms of violence from the state and other administrative systems. I argue that the concept is illustrative to the set of facts at play in *Baker* and for thinking more closely about the use of one's disability, race, gender, and poverty to justify deportation.

71 Spade, *Normal Life*, *supra* note 67 at 11.

72 Spade, "Intersectional Resistance", *supra* note 56 at 1047.

73 Spade, *Normal Life*, *supra* note 67 at 22.

74 Spade, "Intersectional Resistance", *supra* note 56 at 1035-36.

75 *Ibid.*

on procedural fairness and the standard of review without attending to the equality concerns and *Charter* issues raised.

B. *Baker* at the Lower Courts: Presumed Violent

At the trial division of the Federal Court, Ms. Baker and her counsel raised the following three issues: (1) Officer Lorenz's notes included statements not supported by evidence and that indicated bias; (2) in making the H&C decision, Officer Caden was obliged to treat the interests of Ms. Baker's four Canadian children as a primary factor in his assessment by reason of the *Convention on the Rights of the Child* ("CRC"); and (3) because of the doctrine of legitimate expectations, Ms. Baker was entitled, as a procedural matter, to an H&C assessment based on the best interests of the child.⁷⁶

Justice Simpson held that Officer Lorenz's language did not raise a reasonable apprehension of bias, but stated that the views expressed in his notes, while displaying "an anger and frustration with the Canadian immigration law enforcement"⁷⁷ were unimportant because they were not those of the ultimate decision-maker, Officer Caden. Justice Simpson denied the relevance of Lorenz's notes by stating that "[n]o blatant error is to be found in the officer's Notes. His expressions of personal opinion were unfortunate, but they do not taint the decision-maker."⁷⁸ Justice Simpson certified the claim as a "serious question of general importance" under section 83(1) of the *Immigration Act*:

Given that the *Immigration Act* does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under section 114(2) of the *Immigration Act*?⁷⁹

In rejecting the applicant's request, Justice Simpson expressed doubt about the evidence Ms. Baker presented from her medical professionals that she would be willing to work to support herself and her four children: "I think it reasonable to conclude that the experts do not expect the Applicant to work."⁸⁰ Justice Simpson's claims were made without real substantiation and appeared overly concerned with Ms. Baker's self-sufficiency without referencing or contextualizing Ms. Baker's mental illness—a recognized disability.⁸¹ Justice Simpson also characterized Ms. Baker as violent based on portions of Officer Lorenz's notes that mention that the applicant has the potential for violence. The following summation is telling:

Officer Lorenz's Notes mention that the Applicant has the potential for violence. Counsel for the Applicant says that, in view of the fact that she was

76 *Baker* SCC, *supra* note 2 at para 16. The doctrine of legitimate expectations is a British doctrine accepted by the SCC. It provides a procedural fairness guarantee. In *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners*, the Court recognized that a general duty of fairness is owed when administrative decisions are being made: *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners*, [1979] 1 SCR 311 (available on CanLII) [cited to SCR]. See also David Wright, "Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law" (1997) 35:1 Osgoode Hall LJ 139. In *Agraira v Canada*, the SCC reiterated the principles of legitimate expectation: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (available on CanLII).

77 *Baker v Canada (Minister of Citizenship and Immigration)* (1995), 101 FTR 110 at para 31 (available on WL Next Can) (FCTD) [*Baker* FCTD].

78 *Ibid* at para 44.

79 *Baker* SCC, *supra* note 2 at para 9.

80 *Baker* FCTD, *supra* note 77 at para 23.

81 See *ibid* at paras 17-24.

not convicted of assault, this is unfair. I do not agree. No one has suggested that the events underlying the charges did not occur. Accordingly, on this subject, Officer Lorenz's statement is supported by the evidence.⁸²

Implicit in the Federal Court's decision is the perpetrator perspective--the willingness to see Officer Lorenz as a well-intentioned individual acting in good faith.⁸³

Meanwhile, great lengths are taken to attack Ms. Baker's character, based on stereotypes frequently mapped onto Black females: that they are aggressive, welfare-dependent, hyper-sexual, and violent. Furthermore, rather than naming Ms. Baker's mental illness a disability, it is used as further evidence of her dependency on the state for resources and thus her undesirability as a potential permanent resident. Justice Simpson's willingness to depict Ms. Baker as violent—essentially supporting Officer Lorenz's statements in his notes—deploys racist-sexist-ableist stereotypes to attack Ms. Baker's character. Her portrayal buffered both the rejection of her H&C application and Canadian immigration's control over low-income racialized women.⁸⁴

At the Federal Court of Appeal, Justice Strayer limited the appeal to the question certified by Justice Simpson. He rejected Ms. Baker's request to challenge the constitutional validity of section 83(1) of the *Immigration Act*. Justice Strayer reasoned that an international treaty cannot have legal effect in Canada unless implemented through domestic legislation and that the *CRC* has not been adopted in either federal or provincial legislation.⁸⁵ The appeal judgment did not address the attacks on Ms. Baker's character by the trial division judge or the stereotypes in Officer Lorenz's notes.

The case was granted leave to appeal to the SCC in 1999. A number of interveners on behalf of Ms. Baker were certified to raise issues of interest to immigrant communities. The Charter Committee on Poverty Issues raised violations of the *CRC* and sections 7 and 15 of the *Charter*. They were the only intervener to identify and denounce the specific examples of intersecting stereotypes reflected in Lorenz's notes concerning Ms. Baker's identity as a Black woman, single mother, social assistance recipient, psychiatric survivor, and immigrant.⁸⁶ The Canadian Council of Churches ("CCC") and the Canadian Foundation for Children, and Youth and the Law focused on the rights of the child. The CCC emphasized the importance of access to an effective remedy for Ms. Baker and her children.⁸⁷ The Canadian Foundation for Children, and Youth and the Law argued that section 7 of the *Charter*, guaranteeing the right to security of the person in accordance with the principles of fundamental justice, afforded Ms. Baker's children a constitutionally protected right to psychological and emotional integrity as well as to protection and preservation of their family. Further, the children enjoyed a liberty interest in choosing their place of residence, which was supported by their right to

82 *Ibid* at para 27.

83 See Freeman, *supra* note 57.

84 Spade, *Normal Life*, *supra* note 67.

85 *Baker v Canada (Minister of Citizenship and Immigration)*, [1997] 2 FCR 127 (available on CanLII) (FCA) [cited to FCR].

86 Aiken & Scott, *supra* note 4 at 221. Aiken & Scott describe the collaborative litigation strategy mapped out by the appellant and the interveners. The Charter Committee's factum argued that international human rights law informs *Charter* rights and can be used to limit administrative discretion. They also argued that the presumption of legislative compliance with international law can be used in statutory interpretation: *Baker* SCC, *supra* note 2 (Factum of the Charter Committee on Poverty Issues at paras 52–53).

87 The Council argued that international human rights instruments, specifically articles 9 and 10 of the *Convention on the Rights of the Child*, grant access to human rights: *Baker* SCC, *supra* note 2 (Factum of the Canadian Council of Churches at para 10; also see paras 20-24).

remain in Canada pursuant to the *Charter's* mobility rights guarantee under section 6.⁸⁸ The interveners proceeded on the assumption that a coalition consisting of the African Canadian Legal Clinic, the Congress of Black Women of Canada, and the Jamaican Canadian Association would address the role of anti-Black racism in the case. However, Justice Major denied the coalition's motion for leave to intervene in the case. No disability rights organizations applied to be interveners in the case, despite the fact that Ms. Baker's mental illness was central to the facts and the impugned comments by Officer Lorenz.

C. *Baker* at the SCC: Sweeping Intersectionality Under the Proverbial Rug

The facts in *Baker* provided an opportune moment for the SCC to conceptualize racism, sexism, classism, and ableism as a feature in attitudes among certain personnel in Canada's immigration system. However, the Court did not engage these central aspects of the case, sweeping their possible justiciability under the proverbial rug. Justice L'Heureux-Dubé, writing for the majority, removed these considerations at the outset and focused on questions of procedural fairness and best interests of the child pursuant to the *CRC*:

Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position.⁸⁹

The Court focused on three sub-issues with respect to procedural fairness in administrative law:⁹⁰ (1) whether the participatory rights accorded to both the appellant and her children were consistent with the duty of fairness; (2) whether the failure to provide reasons was consistent with the common law duty of fairness; and (3) whether there was a reasonable apprehension of bias. Justice L'Heureux-Dubé held that there was a denial of the duty of procedural fairness based on the fact that the written reasons of Officer Lorenz used by Officer Caden created a reasonable apprehension of bias.⁹¹ Secondly, the Court held that Officer Caden exercised discretion in an unreasonable manner by failing to seriously consider the interests of Ms. Baker's four Canadian-born children. Justice L'Heureux-Dubé considered the importance of children's rights and best interests established in the *CRC* and other international law instruments ratified by Canada.⁹² The Court held that a contextual approach must be used to determine whether an officer's decision was consistent with the requirements of the statute and the values of

88 Aiken & Scott, *supra* note 4 at 222; *Baker SCC*, *supra* note 2 (Factum of the Canadian Foundation for Children, Youth and the Law *et al* at paras 22-24). Anecdotal accounts suggest that counsel for Ms. Baker was dissuaded from raising the constitutional equality issues by interveners and court observers in the human rights community: Rowe, *supra* note 3.

89 *Baker SCC*, *supra* note 2 at para 11.

90 For a review of procedural fairness in Canadian administrative law see, for example, Roderick A Macdonald, "Judicial Review and Procedural Fairness in Administrative Law: I" (1980) 25 McGill LJ 520; David J Mullan, "Natural Justice and Fairness—Substantive as well as Procedural Standards for the Review of Administrative Decision-Making?" (1982) 27 McGill LJ 250; Anna C Pratt, "Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act" (1999) 8 Social Legal Stud 199. Justice L'Heureux-Dubé reviewed factors influencing procedural fairness in SCC jurisprudence in *Baker SCC*, *supra* note 2 at paras 21-28.

91 Justice Iacobucci wrote a separate concurring opinion on behalf of himself and Justice Cory arguing that "an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation": *Baker SCC*, *supra* note 2 at para 79.

92 *Convention on the Rights of the Child*, 1577 UNTS 3, Can TS 1992 No 3 (ratified by Canada 13 December 1991).

administrative law. International legal instruments were held to constitute an important part of compassionate or humanitarian considerations.⁹³

By privileging procedural questions of administrative law in its decision, the SCC elided the intersections of racism, sexism, ableism, and classist denigration at play in Ms. Baker's appeal.⁹⁴ These forces were present not just in Ms. Baker's life in Canada—the fact that she worked as a domestic, for instance—but explicitly in Officer Lorenz's notes. There are two passages where Justice L'Heureux-Dubé acknowledges the structural realities in Ms. Baker's experiences that require “sensitivity.”⁹⁵

Regarding immigration decisions, she writes:

Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.⁹⁶

93 *Baker SCC*, *supra* note 2 at paras 69-71.

94 For other instances where the SCC has downplayed issues of race in favor of a discussion of procedural questions see *Van de Perre v Edwards*, 2001 SCC 60 (available on CanLII) and *R v RDS*, [1997] 3 SCR 484 (available on CanLII) [cited to SCR]. In *Van de Perre v Edwards*, for instance, the SCC was tasked with deciding a family law custody dispute where the race and racial identity of a mixed-raced Black child played a role. The Court restored the trial judge's decision that awarded custody to Ms. Van de Perre, the child's white mother, on the basis of the faulty standard of review applied by the BC Court of Appeal. In its reversal, the Court failed to identify that the significance of race for biracial Black children is deeply linked to the realities of anti-Black racism in Canada. Echoing the trial judge, the Court suggested that biracial children should be encouraged to positively identify with both racial heritages and that race was but one factor in determining a child's best interests. But in its attempt to address the role of race in best interest consideration, the SCC did not discuss the lived realities that Black and biracial Black male children face. See Lawrence Hill's discussion of the racial implications of the case in “No Negroes Here” in *Black Berry, Sweet Juice: On Being Black and White in Canada* (Toronto: HarperCollins Publisher, 2001) 150. In *R v RDS*, a Black woman judge, Justice Corinne Sparks, a descendant of Africville and a Black Scotian, had one of her rulings challenged for apprehension of bias and for, allegedly, giving supplementary reasons for her judgment after the appeal was filed. The impugned case concerned an African Canadian male youth who was charged with assaulting a peace officer with intent to prevent the lawful arrest of another person and resisting a peace officer engaged in the lawful execution of his duty. Justice Sparks was accused with exhibiting bias despite the fact that her impugned remarks—that police officers are known to overreact in dealing with non-white groups—were supported by data, especially data on police stops of young Black men. A six-justice majority of the SCC held that Justice Sparks did not exhibit a reasonable apprehension of racial bias. Justices L'Heureux-Dubé and McLachlin were emphatic that Judge Sparks' comments were “an entirely appropriate recognition of the facts in evidence in this case and of the context within which the case arose”: at para 30. However, three SCC Justices—Major, Lamer, and Sopinka—dissented and Justice Cory came close to dissenting. As Sherene Razack notes, the discomfort with the ‘victory’ for Judge Sparks stems from the fact that it brought to the surface “the line[...] the line we must not cross [...] the line [that] separates those who think race always matters from those who think it only matters, if at all, under highly limited circumstances involving specific individuals”: Sherene Razack, “*RDS v Her Majesty the Queen: A Case About Home*” (1998) 9 Const Forum Const 59 at 60. See also April Burey, “No Dichotomies: Reflections on Equality for African Canadians in *R v RDS*” (1998) 21 Dalhousie LJ 199; Reg Graycar, “Gender, Race, Bias and Perspective: OR, How Otherness Colours Your Judgment” (2008) 15 Int'l J Legal Profession 73; Carol A Aylward, “Take the Long Way Home: *RDS v R - The Journey*” (1998) 47 UNBLJ 249.

95 *Baker SCC*, *supra* note 2 at para 47.

96 *Ibid.*

This analysis is problematic for a number of reasons. First, it does not acknowledge the fraught relationship between the settlers that formed the Canadian state and First Nations people, whose presence in Canada, as a percentage of the population, has been diminished through deliberate efforts at population extermination and cultural genocide. Moreover, it does not differentiate the starkly different experiences of Black immigrants from the Caribbean from, for instance, those of mainly-white immigrants from Europe. Systems of oppression, including the legacy of slavery that has left many Caribbean women dependent on low-wage domestic work in North America as well as the specific barriers put up by Canadian immigration schemes that render them as less desirable immigrants, are not probed by Justice L'Heureux-Dubé's attempt to provide context.⁹⁷

After making this comment, Justice L'Heureux-Dubé continues:

“[T]hese statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness.”⁹⁸

Justice L'Heureux-Dubé rightly identifies Officer Lorenz's ableism in connecting Ms. Baker's mental illness, the fact that she is a domestic worker, and the number of children she has. This demonstrates some sophistication in understanding how disability was used as a pretext to indict other aspects of Ms. Baker's life. However, the learned Justice did not connect her analysis to the simultaneous racism and sexism present in the statements or to the *Charter*, even as an interpretive tool. It is not enough to say that the comments relied on stereotypes if one then does not engage what those stereotypes mean, who they signify, and how they deliver a materially detrimental impact when levelled by an officer vested with administrative authority. Justice L'Heureux-Dubé concludes that there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias because the exercise of the H&C discretion was unreasonable.⁹⁹ Ms. Baker won her appeal; however, her solicitor-client costs were not covered as was requested.

In the decade and a half since *Baker* was decided and hailed as a landmark decision in Canadian administrative law, no widespread attempts to address the administrative violence in Canadian immigration policy and the maldistribution of health care and social services have taken place. Roger Rowe, lead counsel for Ms. Baker, has demonstrated the systemic ways in which the Canadian immigration system continues to administer violence against Black women with disabilities.¹⁰⁰ A more recent case garnering Rowe's commentary, *Carmelita Haynes and the Minister of Public Safety and Emergency Preparedness*, follows a similar path as *Baker*.¹⁰¹ A Black woman from St. Vincent had worked for several years in Canada as a domestic worker and was ordered to be deported. She returned to Canada in an attempt to flee from domestic violence and resumed domestic work in Canada. She suffered from postpartum psychosis after

97 See Sharryn Aiken's discussion of the experiences of African Caribbean people's history of migration in Canada. Aiken connects a history of slavery and racist immigration policies to contemporary immigration policies and practices: Sharryn J Aiken, "From Slavery to Expulsion: Racism, Canadian Immigration Law, and the Unfulfilled Promise of Modern Constitutionalism" in Vijay Agnew, ed, *Interrogating Race and Racism* (Toronto: University of Toronto Press, 2007) 63. See also Afua Cooper, *The Hanging of Angelique: The Untold Story of Canadian Slavery and the Burning of Old Montreal* (Toronto: HarperCollins, 2006); Robin Winks, ed, *The Blacks in Canada: A History* (Montreal: McGill-Queen's University Press, 1997); Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Halifax: Fernwood Publishing, 1999).

98 *Baker SCC*, *supra* note 2 at para 48.

99 *Ibid* at para 76.

100 Rowe, *supra* note 3.

101 *Carmelita Haynes and the Minister of Public Safety and Emergency Preparedness* [unreported] in Rowe, *supra* note 3 at 343.

the birth of her child in Canada and became schizophrenic, requiring medication not available to her in St. Vincent. She was also the primary caregiver for her two-year-old child and had no criminal record. Immigration officials issued a second deportation order against her, and Canadian immigration authorities then sought to remove her from Canada even though her H&C application was pending. Ms. Haynes appealed to the Federal Court after the removals officer refused her request for a deferral of removal pending final disposition of her H&C application.

The Court denied her request:

[T]he Court [could not] find that the balance of convenience favours the granting of a stay of removal in her favour over the interests of the Respondent and of the Canadian public in general, notwithstanding that her removal may entail substantial risk of irreparable [harm] for herself and her child.¹⁰²

Systemic injustice in the delivery of administrative services such as immigration proceedings raises concerns about the prospects for reform. Spade is convinced that only transformation of administrative legal approaches will fulfill access to justice needs for marginalized people because institutions formed through gendered racialization cannot be molded into fair and neutral systems. In fact, their presentation as neutral and fair systems only helps conceal the violence they inflict on racialized, gendered, and disabled populations. Administrative systems are designed to extinguish perceived threats in order “to protect and enhance the livelihood of the national population.”¹⁰³ Since disability is already seen as a legitimate reason for denying an applicant admission to Canada, racialized people with disabilities are especially vulnerable in these structures. They are seen as lacking the ability to be productive in a capitalist economy and quickly assimilate into dominant Canadian culture.¹⁰⁴ Disabled, poor, Black women immigrants who are single mothers like Ms. Baker do not measure up well in how Canada’s immigration system deems an applicant worthy for humanitarian and compassionate grounds. Their life struggles and hardships in Canada instead make them the target of administrative violence.

CONCLUSION

This paper has advanced a Critical Race Feminist theory of disability rooted in interdisciplinary scholarship, North American jurisprudence, and anti-discrimination legislation and human rights doctrine. I have identified the limited studies of disability taken up by Critical Race Feminism, as well as appropriation of intersectionality by white feminists that analogize between the experiences of disabled women and women of colour. By centering a racialized and gendered experience of disability in legal scholarship and Supreme Court of Canada jurisprudence, I have shown the legal imagination’s inability to understand the contextualized experiences of disabled women of colour. I have revisited the *Baker* decision, a case that is primarily seen as administrative law decision, but which is a profound example of how the intersections of race, gender, poverty, and disability make people the target of administrative violence. Ultimately, this essay seeks to ignite a conversation about intersectionality within anti-discrimination and human rights law, legal theory as well as disability studies, with the experiences of disabled

102 *Ibid.*

103 Spade, “Intersectional Resistance”, *supra* note 56 at 1047.

104 Dianne Pothier & Richard Levin, “Introduction” in Dianne Pothier & Richard Levin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (Vancouver: University of British Columbia Press, 2005) 1 at 17, citing Rose Voyvodic “Into the Wasteland: applying equality principles to medical inadmissibility into Canadian immigration law” (2001) 16 *Journal of Law and Social Policy* 115. Also see Daiva Stasiulis & Abigail B Bakan, *Negotiating Citizenship: Migrant Women in Canada and The Global System* (Toronto: Palgrave Macmillan, 2003).

women of colour at the forefront. Throughout this project, I have been mindful of the overrepresentation of Black women's epistemologies, the result of my own identity as a Black woman as well as Ms. Baker's Black female identity. My intent has been to open up space for better conceptualization of the intersections of race, gender, and disability using legal perspectives that have interdisciplinary appeal.

APPENDIX A

I refer to a portion of Officer George Lorenz's notes that were the basis of the decision to reject Ms. Baker's H&C application. Below is the entirety of the Officer's notes, which the SCC reproduced in its judgment:

PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN

Says only two children are in her 'direct custody'. (No info on who has ghe [*sic*] other two).

There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse.

Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned -

Letter of Aug. '93 from psychiatrist from Ont. Govm't.

Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.

Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.

This case is a catastrophe [*sic*]. It is also an indictment of our 'system' that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.

There is also a potential for violence - see charge of 'assault with a weapon' [Capitalization in original.]¹⁰⁵

105 *Baker SCC, supra* note 2 at para 5.

ARTICLE

A SECOND CHANCE FOR THE HARM PRINCIPLE IN SECTION 7? GROSS DISPROPORTIONALITY POST-*BEDFORD*

Alexander Sculthorpe*

CITED: (2015) 20 Appeal 71

INTRODUCTION

For what purposes can the state legally imprison its citizens? This basic question has been the source of rich legal scholarship, from Jon Stuart Mill's harm principle to the storied debate between Sir Patrick Devlin and H.L.A. Hart over the place of legal moralism.¹ The Canadian judiciary has not escaped the question. In the 2003 *R v Malmo-Levine* ("*Malmo-Levine*") decision, the Supreme Court of Canada ("SCC") rejected the notion of the harm principle as a principle of fundamental justice and, thus, a source of protection under section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").² In a powerful dissent, Justice Arbour found that the state cannot resort to imprisonment for acts that do not cause or risk harm to others. In subsequent decisions, the Court has identified and elaborated on both the recognized principles of fundamental justice³ and the appropriate frameworks for assessing harm.⁴ This paper will argue that the gulf between the majority and Justice Arbour's dissent in *Malmo-Levine* can best be addressed by adopting a harm sub-rule within the fundamental principle of justice barring 'grossly disproportionate' laws. This harm sub-rule will put forward that a criminal law will be found to be grossly disproportionate where the punishment is imprisonment and the object of the law does not include the prevention of non-trivial harm or risk of harm to others. This paper will begin by examining the Court's exploration of the harm principle in *Malmo-Levine*, as well as its characterization of gross disproportionality in *Bedford*. The proposed sub-rule will then be presented, and the case will be made that its adoption would serve to clarify the values guiding the application of the gross disproportionality principle and also address the core of Justice Arbour's concern in *Malmo-Levine*. Finally, possible counter arguments will be considered, as well as the special circumstance of morality based crimes.

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1 John Stuart Mill, *On Liberty* (Boston: James R Osgood and Company, 1871) at 7-32; Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965); HLA Hart, "Immorality and Treason", *The Listener* (30 July 1959) 162 at 162-63.

2 *R v Malmo-Levine*, 2003 SCC 74 (available on CanLII) [*Malmo-Levine*]; *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, s 7.

3 *Canada (AG) v Bedford*, 2013 SCC 72 (available on CanLII) [*Bedford*].

4 *R v Labaye*, 2005 SCC 80 (available on CanLII) [*Labaye*].

PART I. MALMO-LEVINE: THE DEBATE OVER THE HARM PRINCIPLE AS A PRINCIPLE OF JUSTICE

The harm principle, famously put forward by John Stuart Mill, states that “[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”⁵ *Malmo-Levine* was a case concerning the criminalization (including the possibility of imprisonment) of marijuana possession. In the case, the appellant argued that the harm principle was a principle of fundamental justice protected by section 7 of the *Charter*. The majority rejected this claim, *inter alia*, finding that the harm principle was too ambiguous to be used in a precise manner.⁶ Justice Arbour, however, found the harm principle to be a principle of fundamental justice, stating that “a minimum of harm to others must be an essential part of the offence. The state cannot resort to imprisonment as a punishment for conduct that causes little or no reasoned risk of harm to others.”⁷ Further, Justice Arbour, going *beyond* Mill’s classical conception of the harm principle, found that in order for criminalization to be justified “[t]he harm or risk of harm to society caused by the prohibited conduct *must outweigh* any harm that may result from enforcement.”⁸ Thus the decision revealed not a gap, but rather a gulf between Justice Arbour and the majority on an issue of critical importance to Canadian criminal law.

PART II. BEDFORD AND THE GROWTH OF GROSS DISPROPORTIONALITY?

While the majority in *Malmo-Levine* clearly rejected the idea of the harm principle as a principle of fundamental justice, the past two decades have seen the organic evolution of the concepts of arbitrariness, overbreadth, and gross disproportionality as principles of fundamental justice. These principles were most recently clarified by the SCC in the 2013 *Bedford* case. The Court found that arbitrariness applies to a situation where there is no rational connection between the effect and the object of a law,⁹ while overbreadth occurs where a law goes too far and interferes with actions that have no connection to its objective.¹⁰ The third principle, which is the focus of this paper, is the concept of gross disproportionality. In *Bedford*, the Court found that the gross disproportionality principle would be violated where a law deprived an individual of life, liberty, or security of the person “in a manner that is grossly disproportionate to the law’s objective. The law’s impact on the s.7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.”¹¹ The proportionality assessed is thus between a law’s purpose and its impact.

While the *Bedford* decision clarified these emergent principles of fundamental justice, they are still relatively new and will arguably continue to develop. Alana Klein noted just prior to the *Bedford* decision that “[w]e are in the early days of the development of the principles of fundamental justice that relate to the means-ends fit, or proportionality, of government action.”¹² Thus there is value in exploring just how these principles might further evolve and, specifically, if the inclusion of some variant of the harm principle might fit well within an expanded principle of gross disproportionality.

5 Mill, *supra* note 1 at 23.

6 *Malmo-Levine*, *supra* note 2 at para 127.

7 *Ibid* at para 244.

8 *Ibid* at para 249 [emphasis added].

9 *Bedford*, *supra* note 3 at para 98.

10 *Ibid* at para 101.

11 *Ibid* at para 109.

12 Alana Klein, “The Arbitrariness in ‘Arbitrariness’ (And Overbreadth and Gross Disproportionality): Principle and Democracy in Section 7 of the Charter” (2013) 63 SCLR (2d) 377 at 387.

A. Further Exploration of Gross Disproportionality

In *Bedford*, the Court found that the concept of gross disproportionality was best captured by the hypothetical example of a law “with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk.”¹³ By providing this example, the Court affirmed that it has a role to play in weighing the purpose of a law against the direct impact of its enforcement, not just in terms of possible collateral harm such as the effects of the prostitution laws in *Bedford*, but also with regard to the direct harm of imprisonment itself. Thus, while recent jurisprudence has focused on gross disproportionality in the context of section 7 security of the person challenges (including the *Bedford* case itself),¹⁴ with the ‘sidewalk spitter’ example, the Court confirmed that the gross disproportionality principle also properly applies to section 7 liberty challenges.

Note that the majority in *Malmo-Levine* had previously questioned whether punishment could properly be considered under section 7. The majority found that the issue of punishment (and specifically imprisonment) should be considered under section 12 of the *Charter*, which protects against cruel and unusual treatment or punishment, and not section 7, which addresses fundamental principles of justice.¹⁵ Justice Arbour, however, rejected the decision of the majority, finding that a consideration of imprisonment as punishment was required for a proper section 7 analysis.¹⁶ By providing the ‘sidewalk spitter’ scenario in *Bedford* as the example of gross disproportionality, the Court confirmed that imprisonment can properly be considered under section 7, and not only section 12.

In terms of exploring the potential application and expansion of the gross disproportionality principle, it is also worth emphasizing that the Court has recently affirmed not only the existence of the principle in theory, but also a willingness to find it in practice. In *Bedford*, the Court described gross disproportionality as reserved for “extreme” cases where the law’s effects are “totally out of sync” with its objectives.¹⁷ Yet the Court considered the principle of gross proportionality in relation to two of the three statutory sections under review (the prohibition on bawdy-houses and the prohibition on communicating in public for the purposes of prostitution) and found *both* provisions to be grossly disproportionate.¹⁸ Similarly, in *Canada (AG) v PHS Community Services Society*, the Court found the federal government’s refusal to exempt an existing safe injection site from drug possession laws to be grossly disproportionate, as the risk of harm from disease and death to injection drug users was grossly disproportionate to the objectives of drug possession laws, public health, and safety.¹⁹ Thus, per the Court’s decisions in *Bedford* and *PHS*, while the threshold to engage the gross disproportionality principle may be high, the Court seems willing to apply it in practice.

Again, the Court’s willingness to invoke gross disproportionality in these two cases is particularly noteworthy, as they were both in the context of security of the person challenges. This means that in each case, the Court was weighing statutory objectives against an *increased risk* of harm (such as increased risks posed by not allowing sex workers to operate in a fixed indoor location), as opposed to *certain* harm (such as imprisonment). Given this fact, one would expect the Court to be equally willing to

13 *Bedford*, *supra* note 3 at para 120.

14 See *Bedford*, *supra* note 3; *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 (available on CanLII) [*PHS*].

15 *Malmo-Levine*, *supra* note 2 at paras 158, 160-61.

16 *Ibid* at para 260.

17 *Bedford*, *supra* note 3 at para 120.

18 *Ibid* at paras 129-36, 146-60.

19 *PHS*, *supra* note 14 at paras 131, 133.

find gross disproportionality in challenges to liberty interests in which a statute would not only increase the risk of a harm, but rather *specify and ensure* such a harm through imprisonment (as in the ‘sidewalk spitter’ imprisoned for life example).

B. Clarifying Grossly Disproportionate: A Proposed Harm Sub-rule

As previously noted, the Canadian legal system appears to be in a phase of development of those emergent fundamental principles based on proportionality: arbitrariness, overbreadth, and gross disproportionality. The legitimacy of these evolving principles may be at risk, however, if their application appears arbitrary or uncertain. Klein suggests that “[i]f proportionality is to retain legitimacy among the principles of fundamental justice, courts may need to be more explicit about the values that guide its application.”²⁰ Given this context, one way for the law to adapt, in order to address Justice Arbour’s core concerns in *Malmo-Levine* while also providing valuable clarification on the values guiding gross disproportionality moving forward, would be to build into the principle of gross disproportionality a basic form of the harm principle. The Court could accomplish this by determining that a criminal law will be found to be grossly disproportionate where the punishment is imprisonment and the object of the law does not include the prevention of non-trivial harm or risk of harm to others.

Admittedly, this proposed sub-rule is neither as expansive nor as robust as the version of the harm principle advocated by Justice Arbour in the *Malmo-Levine* dissent. The *de minimis* harm requirement in the harm sub-rule would not require that harm to society *outweigh* any harm from enforcement, as Justice Arbour proposed. Instead, rather than identifying and quantifying the harm a law seeks to address and then weighing that against the aggregate harm the enforcement of the law would cause, the revised test would simply require a (fairly low) threshold of harm in order to justify imprisonment. While not capturing the full extent of Justice Arbour’s submissions in the dissent, the revised test would arguably address the very core of her concern that “it is common sense that you don’t go to jail unless there is a potential that your activities will cause harm to others.”²¹

C. A Middle Ground: Revised Test Fits Well with ‘Grossly Disproportionate’ Principle Norms and Legitimacy

The principle of gross disproportionality can comfortably accommodate the inclusion of this harm sub-rule. As the Court noted in *Bedford*, the purpose of the principle is to ensure that the connection between the impact of the law and its object is not “entirely outside the norms accepted in our free and democratic society.”²² Justice Arbour’s core concern in *Malmo-Levine*—that it is common sense that you don’t jail someone for something that poses no harm to others—is precisely the type of societal norm which gross disproportionality is designed to protect. The fundamental balancing nature of gross disproportionality remains in place—purpose versus impact. The harm sub-rule is simply a shortcut which would state that, in order for the severe impact of imprisonment not to be found disproportionate to the objective, the objective must include the prevention of harm or risk of harm to others.

Further, the sub-rule would seem to have support from a number of other justices in *Malmo-Levine*. While Justice Arbour was the only judge in *Malmo-Levine* to find the harm principle to be a principle of fundamental justice, two others dissented from the majority decision. The dissenting opinion of Justice Deschamps, echoed by Justice

20 Klein, *supra* note 12 at 397.

21 *Malmo-Levine*, *supra* note 2 at para 244, quoting Justice Braidwood in *R v Malmo-Levine*, 2000 BCCA 335 at para 134 (available on CanLII).

22 *Bedford*, *supra* note 3 at para 120.

LeBel, found the impugned law unconstitutional on the basis that “the harm caused by using the criminal law to punish the simple use of marihuana far outweighs the benefits that its prohibition can bring.”²³ Specifically, the dissenting judges questioned whether marihuana use caused harm or risk of harm to others:

On the whole, with a few exceptions, moderate use of marihuana is harmless. Thus, it seems doubtful that it is appropriate to classify marihuana consumption as conduct giving rise to a legitimate use of the criminal law in light of the *Charter*.²⁴

While both Justice Deschamps and Justice LeBel treated this disproportionality analysis not as a separate doctrine but rather as a test for arbitrariness,²⁵ the SCC’s subsequent jurisprudence, including *Bedford*, has clarified that gross disproportionality exists as a stand-alone doctrine.²⁶ Thus, the dissenting opinions’ focus on the relationship between non-trivial harm required and gross disproportionality broadly corresponds with the proposed sub-rule.

Finally, the proposed sub-rule would fit well in relation to the other principles of fundamental justice. In keeping with the ‘purpose versus impact’ analysis at the core of the gross disproportionality principle, the proposed sub-rule would only find a law to be grossly disproportionate if the *object* of the law did not include the prevention of non-trivial harm. Thus if the Government passed a criminal law with the express object of preventing harm to others, but in practice the conduct criminalized posed no harm whatsoever, such a law would *not* be captured by the gross disproportionality doctrine. This law would, however, likely be found unconstitutional for violating the fundamental principle against arbitrariness, as it would lack “a real connection on the facts to the purpose the [law] is said to serve.”²⁷

PART III. ADDRESSING COUNTER-ARGUMENTS

Critics may respond that no variant of the harm principle should be imported into the grossly disproportionate principle for the very reasons that the majority in *Malmo-Levine* found the harm principle not to be a principle of fundamental justice. These criticisms will be dealt with in turn.

First, the majority in *Malmo-Levine* found that there was not a sufficient consensus that the harm principle is the sole justification for “criminal prohibition,” noting the widespread acceptance of paternalistic laws such as those that require individuals to wear seatbelts.²⁸ In response, note how this question is different from the one which Justice Arbour repeatedly emphasizes in her dissent: is there sufficient consensus that the harm principle is applicable to the highest form of restriction of liberty, namely, *imprisonment*?²⁹ The proposed harm sub-rule would deal exclusively with issues of imprisonment.

Secondly, the majority in *Malmo-Levine* also found that the harm principle was not a manageable standard against which to measure deprivation of life, liberty, or security of the person:

23 *Malmo-Levine*, *supra* note 2 at paras 280, 301.

24 *Ibid* at para 295.

25 Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2014) at para 47.16, n 269.

26 *Ibid* at para 47.16.

27 *Chaoulli v Quebec (AG)*, 2005 SCC 35 at para 134 (available on CanLII).

28 *Malmo-Levine*, *supra* note 2 at paras 115, 124.

29 *Ibid* at paras 244-46.

Harm, as interpreted in the jurisprudence, can take a multitude of forms, including economic, physical and social (e.g., injury and/or offence to fundamental societal values). In the present appeal, for example, the respondents put forward a list of ‘harms’ which they attribute to marihuana use. The appellants put forward a list of ‘harms’ which they attribute to marihuana prohibition. Neither side gives much credence to the ‘harms’ listed by the other. Each claims the ‘net’ result to be in its favour.³⁰

Despite these concerns, there is ample evidence that nuanced assessments of harm are possible, and in fact already play a role in section 7 analyses. While the majority in *Malmo-Levine* rejected the harm principle as a fundamental principle of justice under section 7, in part due to its ostensibly unmanageable character, elsewhere in that very decision the majority applied a nuanced assessment of harm.

In fact, in this very same case (*Malmo-Levine*), beyond the issue of whether the harm principle was a fundamental principle of justice, the Court also considered whether the legislation violated the then-nascent section 7 principle of gross disproportionality. While the majority found the legislation was not grossly disproportionate, they did so largely on harm-based considerations. Specifically, the court found that “given the findings of harm flowing from marihuana use [...] we do not think that the consequences in this case [including imprisonment] trigger a finding of gross disproportionality.”³¹ The ‘findings of harm’ the majority referenced included not only harm to users themselves, but also the potential harm to others of marihuana use associated with operating machinery, or with marihuana trafficking.³²

Ultimately, then, the majority partially grounded its finding that there was no gross disproportionality on the fact that the conduct prohibited (marijuana possession) caused harm to others. While Justice Arbour did not address the doctrine of gross disproportionality and instead focused solely on the harm principle as a stand-alone principle of justice, it is clear from her dissent that she did not agree with the majority’s finding that the law prevented harm to others. However, this disagreement between the judges surrounding the existence of harm does not show that harm itself is an unmanageable standard, but rather demonstrates that an assessment of harm is to some degree *already embedded* in the gross disproportionality test. The fact that there exist different perspectives as to what constitutes harm results inevitably from the application of law to fact. Roslyn Levine notes of the majority’s decision that “[t]he Court’s section 7 analysis made little real room for state interests that comprise pure, positive state action to improve social well-being, rather than support the reduction of apprehended harm.”³³ In other words, despite the majority’s concern that ‘harm’ was not a manageable standard as a principle of fundamental justice, the assessment and weighing of harms remains a key component of the principle of gross-disproportionality.

Similarly, in describing and applying the gross disproportionality principle in *Bedford*, the Court clearly identified and weighed different harms. For instance, in assessing the constitutionality of the legislative provision concerning communicating in public for the purposes of prostitution, the Court concluded that “[t]he provision’s negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.”³⁴ In this case the Court

30 *Ibid* at paras 128-29.

31 *Ibid* at para 174.

32 *Ibid* at paras 135-36.

33 Roslyn J Levine, “In Harm’s Way: The Limits to Legislating Criminal Law” (2004) 24 SCLR (2d) 195 at 208.

34 *Bedford*, *supra* note 3 at para 159.

identified the negative impact (i.e. the harm) of the law on the safety and lives of street prostitutes and asked if it was grossly disproportionate to the purpose of the law—to prevent the risk of nuisance, arguably a minimal form of harm to society. Through the gross disproportionality principle, then, the Court was already deeply engaged in an assessment and weighing of harms and risks.

Thus, rather than further confusing the situation with the imposition of an unmanageable standard, the addition of the harm sub-rule could serve to clarify the values underpinning the gross disproportionality principle and would, to some degree, make its application more straightforward and predictable. Levine notes that “[t]he harm principle may be outwardly invisible, but it still stalks the Charter’s liberty right.”³⁵ This paper advocates that the best way for the law to move forward is not to try to eliminate this invisible but omnipresent principle, but rather to illuminate it.

PART IV. SPECIAL CIRCUMSTANCE: MORALITY BASED CRIMES

In the case of *Malmo-Levine* as well as *Bedford*, the object of the law has been either health or public order, and the degree of harm caused has been assessed in relation to these legislative purposes. But what about those situations where the object of the law is a moral purpose? What if Parliament were to pass legislation criminalizing an act, under penalty of imprisonment, on the sole ground that the activity was a moral danger to Canadian citizens? In her vigorous defence of the harm principle as a fundamental principle of justice in *Malmo-Levine*, Justice Arbour did not directly address the issue of whether legislation on moral grounds would suffice as a justification to resort to imprisonment. She neglected to do so on the basis that no such moral purpose was claimed by the state in that case.³⁶ She did, however, allude to the fact that any such claim might centre on whether the conduct that allegedly offends morality could be said to harm others or society as a whole.³⁷ One way to address this issue for the purposes of the proposed harm sub-test would be the importation of the *R v Labaye* (“*Labaye*”) test.

In *Labaye*, the SCC moved away from a *morality*-based assessment of the *Criminal Code of Canada* provision against “indecent” criminal conduct and towards a *harm*-based rationale.³⁸ The Court found that in order to establish indecent criminal conduct, the Crown must demonstrate that two requirements have been met:

1. That, by its *nature*, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by, for example:
 - (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty; or
 - (b) predisposing others to anti-social behaviour; or
 - (c) physically or psychologically harming persons involved in the conduct, and
2. That the harm or risk of harm is of a *degree* that is incompatible with the proper functioning of society.³⁹

35 Levine, *supra* note 33 at 208.

36 *Malmo-Levine*, *supra* note 2 at para 243.

37 *Ibid.*

38 *Labaye*, *supra* note 4.

39 *Ibid* at para 62 [emphasis in original].

This test is sufficiently rigorous that it would serve as an appropriate vehicle to determine if a law with an ostensibly moral purpose were in violation of the proposed sub-test: that the object of the law must include the prevention of non-trivial harm or risk of harm to others in order for imprisonment to not be found to be grossly disproportionate. The moral objective would only be found to be valid if the conduct at issue were found to cause harm or present a risk of harm in line with the *Labaye* test. While purists will no doubt argue that the true Mill's harm principle would never permit the state to imprison an individual for undermining societal values, in practice the question of when, if ever, barring allegedly 'immoral' behavior could be said to prevent society as a whole from harm is sure to arise. The *Labaye* test serves as a valuable tool to address this challenge.

CONCLUSION

This paper has suggested that the gross disproportionality principle should evolve to include a sub-rule which encapsulates a variant of the harm principle: the object of a law must include the prevention of non-trivial harm or risk of harm to others in order for the punishment of imprisonment to not be found grossly disproportionate. The sub-rule seeks to legally ground Justice Arbour's core concern in *Malmo-Levine*—that it is common sense you don't go to jail unless there is the potential that your activities will cause harm to others. The introduction of such a rule would no doubt spark a vigorous debate within the Canadian judiciary as to what particular conduct constitutes harm to others beyond a *de minimis* standard. Rigorous judicial engagement with this question should be welcomed, as it will serve to ensure that individuals are not deprived of liberty in a manner that violates our most fundamental norms.

ARTICLE

REVISITING *CHARTER* APPLICATION TO UNIVERSITIES

Franco Silletta*

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INTRODUCTION

Universities have long been considered bastions of academic freedom—freedom to safely study, research, and express innovative and even controversial opinions. However, as our society has evolved—and with it our definitions of tolerance and acceptance—many of these freedoms are now simply ignored by university governance. Often, a student whose freedom of expression has been infringed by a university decision must appeal within the same university engaging in the infringement or to a Human Rights Tribunal with limited powers.¹ Crucially, students in this position cannot invoke the broad protections provided by the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).² Following early *Charter* decisions, courts have generally found that the *Charter* has no application to universities. However, in light of more recent decisions and the modern realities of universities, this trend must be reviewed and the *Charter* must be seen to now apply in some contexts.

In order to show the importance of reconsidering *Charter* application, I first draw on examples of universities infringing *Charter* rights throughout Canada. Second, I outline the early decisions of the Supreme Court of Canada (“SCC”) on the *Charter*’s application to universities and similar institutions. Third, I examine recent decisions that have brought new life to arguments in support of the *Charter*’s application, and how these cases have been treated by other courts. Finally, I tie together the principles that have been discussed with reference to university governing legislation to identify the situations in which the *Charter* should be found to apply to universities across Canada.

PART I. WHY IT MATTERS—EXAMPLES OF RIGHTS-INFRINGEMENT AT CANADIAN UNIVERSITIES

Recent events at the University of Calgary highlight the importance of *Charter* application to protect students’ freedom of expression from discriminatory practices. Since 2006, students at the University of Calgary have participated in an ongoing, peaceful, pro-life protest. The students would form a large circle in a well-trodden area of campus and hold graphic signs that likened abortion to genocide. While proving extremely offensive to many students on campus, these displays fall within the protected ambit of freedom of expression in the *Charter*.³ In 2007, students opposed to the demonstrations physically blocked access to the protest and obstructed the displays with their own banners. The university took no action to prevent the opposing group from inhibiting the protestors’ expression. The following year, the university’s legal department demanded that the protestors turn their signs inwards, so that no passers-by could see the signs. The students refused these demands, stating that their protests would prove less effective if their message could not be seen. In response, the university charged the student protesters with trespass and penalized them under the university’s non-academic misconduct policy. The trespassing charges were stayed by the Crown; however, on appeal, the university’s board of directors upheld the non-academic misconduct penalties.⁴

1 Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto: University of Toronto Press, 2013) at 17.

2 *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*].

3 See *R v Spratt*, 2008 BCCA 340 (available on CanLII), which held that “[t]he right to express opposition to abortion is a constitutionally protected right” at para 91.

4 Cameron Wilson et al, “Brief of Argument”, online: Justice Centre for Constitutional Freedoms <<http://www.jccf.ca/wp-content/uploads/2013/02/Wilson-Brief-Feb-2013-re-17-April-Special-Application.pdf>>.

The university's inconsistent reasoning demonstrates the need for *Charter* protection. Rather than take actions to prevent students from physically interfering with a group's peaceful expression, the university tried to shut down the protests in the interest of "safety". However, if safety was truly the university's concern, why would it not have reprimanded the students whose attempts to obstruct the protest resulted in the unsafe environment? The university's actions suggest that it prefers students taking physical, and possibly illegal,⁵ action to disrupt unpopular demonstrations over allowing expression of divergent viewpoints. Indeed, Alberta's Court of Queen's Bench ("ABQB") found the university's board of directors' decision unreasonable in April 2014, as will be discussed in Part III of this essay.

The protestors at the University of Calgary are not alone in their struggles. At the University of Victoria, the Catholic Student's Association ("CSA") was ordered to enter into mediation with the university's Students' Society ("UVSS") because of the display of controversial pamphlets during a club promotional day in September 2012. If the CSA refused mediation, the UVSS threatened to consider further disciplinary actions. Here again, the CSA's freedom of expression and religion were curtailed because the opinions expressed were considered offensive.⁶

The Justice Centre for Constitutional Freedoms ("JCCF") released a 2013 *Campus Freedom Index* which evaluates the state of free speech at universities across Canada.⁷ The index found that all of the universities studied maintain policies that allow them to shut down the speech of students, faculty, and invited guests whose views are considered controversial, offensive, or unpopular. The implementation of these vague, arbitrary, and subjective policies led to a finding that half of the 45 universities studied actively engaged in censorship of student expression.⁸

If the *Charter* applied to universities, it could protect students from having their opinions and beliefs unjustifiably silenced. At present, universities across Canada regularly censor students in favour of maintaining an inoffensive environment. In doing so, universities seemingly disregard the *Charter*, because they strongly hold to the view that they are free from *Charter* interference.⁹ This viewpoint stems from the early *Charter* decisions discussed in Part II of this essay.

PART II. IN THE BEGINNING—EARLY CHARTER DECISIONS

A. *McKinney v University of Guelph*

The issue of *Charter* application to public universities was last addressed by the SCC nearly 25 years ago.¹⁰ In 1990, the Court released four concurrent judgments that addressed mandatory retirement employment contracts. Two of these decisions, *McKinney v University of Guelph* ("*McKinney*")¹¹ and *Harrison v University of British*

5 See *Criminal Code*, RSC 1985, c C-46, s 430: "It is an offence to obstruct, interrupt or interfere with any person in the lawful use, enjoyment or operation of property."

6 "Agenda for AGM October 17, 2013", online: University of Victoria Students' Society <<http://uvss.ca/wp-content/uploads/2012/07/Agenda-2013-10-17-AGM.pdf>>.

7 "2013 Campus Freedom Index", online: Justice Centre for Constitutional Freedoms <http://www.jccf.ca/wp-content/uploads/2013/10/October_2013CampusFreedomIndex.pdf>.

8 *Ibid* at 2.

9 In every case cited in this paper, the defendant university claimed that it was free from *Charter* scrutiny.

10 In 2001, the SCC determined that Trinity Western University was a "private institution [...] to which the *Charter* does not apply": *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 25 (available on CanLII). This paper seeks to address *Charter* application to public universities.

11 *McKinney v University of Guelph*, [1990] 3 SCR 229 (available on CanLII) [*McKinney* cited to SCR].

*Columbia*¹², addressed claims by university staff and faculty that they were being discriminated against because of their age, in violation of their section 15(1) equality rights. The remaining decisions, *Stoffman v Vancouver General Hospital* (“*Stoffman*”)¹³ and *Douglas/Kwantlen Faculty Association v Douglas College* (“*Douglas College*”)¹⁴, dealt with the same arguments in regard to hospitals and community colleges.

The divided judgments in *McKinney* demonstrate the complexity of the issue of *Charter* application to universities. Five separate judgements were delivered: Justice La Forest wrote the majority opinion, supported by Justices Dickson and Gonthier; Justices L’Heureux-Dubé and Sopinka each issued concurring opinions; and Justices Wilson and Cory dissented in separate opinions.

Justice La Forest began his analysis with an examination of the *Charter* itself, specifically section 32:

This *Charter* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.¹⁵

In Section 32, Parliament and the legislatures are named in addition to the government of Canada and each province. By the principles of statutory interpretation, the meaning of government cannot be limited to just those bodies. Therefore, the essential question to be addressed was what constitutes government. Justice La Forest reasoned that the *Charter* applies in four ways. First, the *Charter* applies to all legislation. Second, the *Charter* applies to governmental actors, such as the executive and administrative branches.¹⁶ This category also includes municipalities as they perform a “quintessentially governmental function”.¹⁷ Third, the *Charter* applies to bodies that are exercising a delegated statutory authority—in other words, any entity that wields statutory power.¹⁸ Finally, the *Charter* applies to entities that are governmental actors by virtue of the control the government has over them.¹⁹ The last two categories are of special importance as they prevent the legislature and government from evading their *Charter* responsibility by simply appointing a “non-governmental” entity to carry out the purposes of a statute.²⁰

Justice La Forest held that the first two categories were inapplicable to the universities at bar. The mandatory retirement provisions were not legislated, and universities were not part of the executive or administrative branches, and could not be analogized to municipalities. The third category also did not apply in this instance. The employment contracts were negotiated freely by the universities and their employees; the universities did not have any statutory power to compel their employees to enter into such contracts.

12 *Harrison v University of British Columbia*, [1990] 3 SCR 451 (available on CanLII) [cited to SCR].

13 *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 (available on CanLII) [*Stoffman* cited to SCR].

14 *Douglas/Kwantlen Faculty Association v Douglas College*, [1990] 3 SCR 570 (available on CanLII) [*Douglas College* cited to SCR].

15 *Charter*, *supra* note 2, s 32.

16 *McKinney*, *supra* note 11 at para 25.

17 *Ibid* at para 36.

18 *Ibid* at para 29.

19 *Ibid* at para 41.

20 *Ibid* at para 29.

Justice La Forest focused his analysis on the fourth category of *Charter* application—when an entity forms part of the government due to the control the government has over it. He explicitly rejected the idea that an entity falls under sufficient government control merely because it fulfills a public purpose or is incorporated by statute. Justice La Forest found support for this decision by analogizing universities to “railroads and airlines, as well as symphonies and institutions of learning”, which all have public purposes but are “undoubtedly not part of the government”.²¹ He acknowledged that the fate of universities is largely in the hands of government, and universities are subject to important limitations on what they can do—either by virtue of government regulation or universities’ dependence on government funding.²² However, even this dependence and ostensible subordination to the government’s will was insufficient to bring universities within the ambit of governmental control.

Justice La Forest held that an entity is only considered to be under the control of the government if its governing body is made up of a majority of government-appointed members that act under the will of the Lieutenant Governor in Council. Justice La Forest noted that each of the universities at issue had its own governing body with only a minority of members appointed by the Lieutenant Governor (a significant point that will be discussed in more detail in Part IV below). Due to the structure of university governance, the government was held to have no legal power to control the institutions, even if it so wished. Any attempts by the government to influence university decisions would be strenuously objected to.²³ Justice La Forest’s reasoning may be summarized as follows: the *Charter* did not apply because universities are not government actors (by way of the executive or administrative branches); the mandatory retirement contracts were not compelled by the government (they were not legislated and the universities were not exercising statutory power); and, finally, the universities were not under sufficient governmental control.

At first glance, Justice La Forest’s judgment seemingly excludes all universities from *Charter* scrutiny; however, a closer reading of *McKinney* reveals that the issue is actually left quite open. First, Justice La Forest clarified that although the particular universities were found not to be under sufficient governmental control to attract *Charter* application, the same may not be true for all universities:

My conclusion is not that universities cannot in any circumstances be found to be part of government for the purposes of the *Charter*, but rather that *the appellant universities* are not part of government given the manner in which they are presently organized and governed.²⁴

Second, Justice La Forest suggested that, in other cases, the *Charter* may apply to specific university activities:

There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing *here* to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities.²⁵

21 *Ibid* at para 35.

22 *Ibid* at para 39.

23 *Ibid* at paras 40–41.

24 *Ibid* at para 46 [emphasis added].

25 *Ibid* at para 42 [emphasis added].

Justice La Forest presented two factors that may bring a university within the scope of the *Charter*. First, different universities may be sufficiently controlled by the government. In Part IV of this paper I will examine the governing structures of other universities to determine whether or not this qualification is met. Second, certain activities of a university may be considered to be a decision of the government. This reasoning forms the basis of *Eldridge v British Columbia (AG)* (“*Eldridge*”), discussed in the pages that follow.²⁶

The concurring judgments of Justices L’Heureux-Dubé and Sopinka in *McKinney* clearly did not hold that universities were entirely free from *Charter* scrutiny. Justice L’Heureux-Dubé, while agreeing that the hiring and firing of employees did not engage the *Charter*, noted that “universities may perform certain public functions that could attract *Charter* review.”²⁷ She based her opinion on the fact that universities are substantially publicly funded. Justice Sopinka held that the *Charter* did not apply in this case; however, he “would not go so far as to say that none of the activities of a university are governmental in nature.”²⁸

Justices Wilson and Cory’s dissenting judgments both found that the *Charter* applied to universities, including in the context of mandatory retirement. Justice Wilson would have found that universities act pursuant to statutory authority in furtherance of a governmental objective:

[T]he fact that universities are so heavily funded, the fact that government regulation seems to have gone hand in hand with funding, together with the fact that the governments are discharging through the universities a traditional government function pursuant to statutory authority leads me to conclude that the universities form part of “government” for purposes of s. 32.²⁹

Each of the five opinions in *McKinney* held that the *Charter* may apply to universities in some circumstances, and yet, as I discuss in Part III of this essay, subsequent decisions dealing with *Charter* application to universities fail to consider whether or not the control structures and activities at issue could be distinguished from those in *McKinney*.

Stoffman, one of the companion cases to *McKinney*, is particularly relevant to this question. In *Stoffman*, the same majority ruled that a hospital is not subject to the *Charter* for the same reasons that a university is not—specifically, it holds no statutory authority, and it is not subject to sufficient governmental control.³⁰ However, unlike universities, the SCC has revisited the issue of *Charter* application to hospitals and surprised many by finding that they are, in specific cases, subject to the *Charter*.

B. *Eldridge v British Columbia (AG)*

In *Eldridge*, the plaintiffs alleged that the Province discriminated against deaf people by failing to provide them with paid interpreters for medical services. Without interpreters, they were deprived of receiving medical services equivalent to those received by hearing persons, thereby infringing their right to equality under section 15(1) of the *Charter*. Their application was dismissed at both the British Columbia Supreme Court (“BCSC”) and the Court of Appeal (“BCCA”). The BCCA held that the *Charter* could not apply in

26 *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 (available on CanLII) [*Eldridge* cited to SCR].

27 *McKinney*, *supra* note 11 at para 371.

28 *Ibid* at para 436.

29 *Ibid* at para 273.

30 *Stoffman*, *supra* note 13 at paras 87-106.

this case as “the application of the *Charter* to the actions of hospitals has been conclusively determined in the *Stoffman* case.”³¹

Surprisingly, the SCC found that the *Charter* did apply to hospitals in this instance because the hospital—despite being a private entity not under the control of government—was implementing a “specific governmental program or policy.”³² Justice La Forest, speaking for a unanimous Court, developed and clarified an additional category for when the *Charter* can be found to apply—it applies to private entities insofar as they act in furtherance of a specific governmental program or policy. Justice La Forest’s decision in *Eldridge* drew upon his reasons in *McKinney*:

[T]here may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government.³³

The specific governmental function found in this case was the provision of medical services. Justice La Forest held that the purpose of the *Hospital Insurance Act* was for the government to provide particular services to the public by way of private institutions—the hospitals. Therefore, hospitals were bound by the *Charter* when implementing the specific governmental purpose of providing health care.³⁴

Eldridge is striking in that it appeared to read down the prior decision in *Stoffman* which had been interpreted as holding that the *Charter* could not apply to hospitals—an interpretation endorsed even by the BCCA. Justice La Forest himself acknowledged that the judgments may appear contradictory:

There is language in *Stoffman* that could be read as precluding the application of the *Charter* in the circumstances of the present case. There, I wrote, at p. 516, that ‘there can be no question of the Vancouver General’s being held subject to the *Charter* on the ground that it performs a governmental function, for ... the provision of a public service, even if it is one as important as health care, is not the kind of function that qualifies as a governmental function under s. 32’. *That statement, however, must be read in the context of the entire judgment.* I determined only that the fact that an entity performs a ‘public function’ in the broad sense does not render it ‘government’ for the purposes of s. 32 and specifically left open the possibility that the *Charter* could be applied to hospitals in different circumstances.³⁵

Like the provision of health care in *Stoffman*, the Court found in *McKinney* that the provision of education, though important and a public function, did not qualify universities as being a part, or under the control, of government. However, if the SCC revisited this issue in regard to universities, it would be open to the Court to read the result in *McKinney* “in the context of the entire judgment” and find that the provision of education could constitute a specific governmental objective. In this way, universities would be subject to the *Charter* in implementing this objective. This line of reasoning has already found favour in the Alberta courts.

31 *Eldridge v British Columbia (AG)* (1995), 7 BCLR (3d) 156 at para 21 (available on CanLII) (CA).

32 *Eldridge*, *supra* note 26 at para 42.

33 *Ibid* at para 41.

34 *Ibid* at para 50.

35 *Ibid* at para 47 [emphasis added].

PART III. THE DEBATE CONTINUES—DIVIDED JURISPRUDENCE ON *CHARTER* APPLICATION

A. A New Wrinkle—Recent Alberta Judgments finding *Charter* Application

i. *Pridgen v University of Calgary* (Court of Queen’s Bench)

In 2010, the ABQB in *Pridgen v University of Calgary* (“*Pridgen*”) ruled that the University of Calgary is not a “*Charter* free zone.”³⁶ This case involved two students who commented on a Facebook page entitled “I No Longer Fear Hell, I took a Course with Aruna Mitra”. Each of the students posted a critical message of the named professor, who, in turn, complained to the university. The students were found to have committed non-academic misconduct and were required to write a letter of apology and refrain from posting or circulating any material that could be defamatory to members of the university or bring the Faculty of Communication and Culture into disrepute. One of the students was placed on 24 months’ academic probation and both were warned that failure to comply with the sanctions could result in suspension or expulsion. The students applied for judicial review to set aside the decision on various grounds, including that their *Charter* right to free expression was infringed.

Justice Strekaf began her analysis by reading *McKinney* and *Eldridge* as holding that the *Charter* could apply, on the facts before her, in one of two ways; it may apply to a government actor or it may apply to non-government actors responsible for the implementation of a specific government policy or activity. She also noted that although *McKinney* held that the *Charter* did not apply to the universities at issue in that case, the decision left open the possibility that the *Charter* could apply in different circumstances.³⁷ Like the universities in *McKinney*, the University of Calgary was not found to be an “organ” of the government, as its governing structure—namely, its senate and board—were not under sufficient governmental control.³⁸

Nevertheless, Justice Strekaf found that the *Charter* applied because the university was implementing a specific statutory scheme or government program of the kind described in *Eldridge*. The specific governmental function was the provision of education. Justice Strekaf’s finding was not based on any specific provision of the university’s governing statute, the *Post-Secondary Learning Act* (“*PSLA*”), but rather on its preamble:

[T]he Government of Alberta is committed to ensuring that Albertans have the opportunity to enhance their social, cultural and economic well-being through participation in an accessible, responsive and flexible post-secondary system[...]³⁹

Further, the preamble states that “the Government of Alberta is committed to ensuring Albertans have the opportunity to participate in learning opportunities.”⁴⁰ This was sufficient, in Justice Strekaf’s opinion, to make the provision of education a specific governmental objective:

In dictating the terms upon which a student may receive an education at a public institution the University is performing a function that is integrally

36 *Pridgen v University of Calgary*, 2010 ABQB 644 at para 69 (available on CanLII) [*Pridgen* QB].

37 *Ibid* at paras 38–41.

38 *Ibid* at para 48.

39 *Post-Secondary Learning Act*, SA 2003, c P-19.5, Preamble [*PSLA*].

40 *Ibid*.

connected to the delivery of post-secondary education as set out by the PSL Act. [...] The Government of Alberta retains responsibility with respect to access to, and participation in, the post-secondary system. *The University is the vehicle through which the government offers individuals the opportunity to participate in the post-secondary educational system.* When a university committee renders decisions which may impact, curtail or prevent participation in the post-secondary system or which would prevent the opportunity to participate in learning opportunities, it directly impacts the stated policy of providing an accessible educational system as entrusted to it under the PSL Act. *The nature of these activities attracts Charter scrutiny.*⁴¹

Justice Strekaf also distinguished the nature of the activity in *McKinney* from the facts before her. She held that the hiring and firing of employees does not impact the pursuit of education by students, whereas the disciplining of students and the placement of restrictions on a student's ability to exercise his or her *Charter* rights does.

ii. *R v Whatcott*

The University of Calgary appealed the *Pridgen* decision; however, prior to the decision of the Alberta Court of Appeal (“ABCA”) being released, the ABQB was faced with yet another case involving the *Charter*'s application to the University of Calgary. In *R v Whatcott* (“*Whatcott*”),⁴² Justice Jeffrey held that the university had infringed Mr. Whatcott's freedom of expression in barring him from distributing anti-abortion pamphlets on campus:

[I]n utilizing provincial trespass legislation to curtail Mr. Whatcott from disseminating his viewpoint that some other University attendee did not like, the University cannot act contrary to the *Charter* any more than could the Alberta Legislature when it created by statute the trespass offence.⁴³

This line of reasoning anticipates Justice Paperny's holding in the ABCA's subsequent decision in *Pridgen* that a university is subject to the *Charter* in exercising a statutorily-conferred coercive power. Additionally, Justice Jeffrey found that the *Charter* applied in this case by virtue of the governmental objective test, just as Justice Strekaf held in the earlier *Pridgen* decision. By restricting free expression on its campus, the university prevented Albertans from having “the opportunity to participate in learning opportunities”—a stated governmental objective of the *PSLA*.⁴⁴ Interestingly, Mr. Whatcott was not even a student of the university, and yet banning his distribution of pamphlets was found to be contrary to the *PSLA* objectives.

iii. *Pridgen v University of Calgary* (Court of Appeal)

The University of Calgary appealed the *Pridgen* decision principally on the ground that the SCC's decision in *McKinney* precluded the application of the *Charter* to universities. The university was supported by two interveners, the Association of Universities and Colleges of Canada (“AUCC”) and the Governors of the University of Alberta. The AUCC is the “national voice” for 97 public and private universities and university-degree-level colleges.⁴⁵ The AUCC's intervention indicates that the vast majority of universities

41 *Pridgen* QB, *supra* note 36 at para 67 [emphasis added].

42 *R v Whatcott*, 2012 ABQB 231 (available on CanLII).

43 *Ibid* at para 31.

44 *Ibid* at para 30.

45 “About Us”, online: Association of Universities and Colleges of Canada <<http://www.aucc.ca/about-us>>.

across the country supported and argued for the notion that the *Charter* should not apply to them. The Canadian Civil Liberties Association (“CCLA”) intervened on behalf of the students in arguing that the *Charter* should apply.

Justice Paperny of the ABCA began her analysis by dividing the application of section 32 into five categories, similar to the division in the *McKinney* and *Eldridge* cases. She held that the *Charter* applies to the following:

1. Legislative enactments;
2. Government actors by nature;
3. Government actors by virtue of governmental control;
4. Bodies exercising statutory authority; and
5. Non-governmental bodies implementing government objectives.⁴⁶

Justice Paperny held that universities generally do not qualify under the first three categories, but acknowledged that denying that universities are under governmental control could lead to “inconsistent and illogical results.”⁴⁷ She emphasized the importance of the last two categories, as they address the problem of the government “contracting out” its *Charter* obligations.⁴⁸ The fourth category recognizes that when legislation grants a non-governmental actor the ability to exercise a power of compulsion, that actor must abide by the *Charter* in so doing. However, this category does not capture the instances in which the government may allow a non-governmental actor to undertake a governmental act without granting it any statutory power of compulsion. Justice Paperny held that this gap in the law is closed by the fifth category, as was demonstrated in *Eldridge*.

Justice Paperny next affirmed that Justice Strekaf was correct in holding that the University of Calgary was subject to the *Charter* under the fifth category, the governmental objective requirement. In her view, the provision of post-secondary education by universities was a governmental objective, just as the provision of medical services by hospitals was found to be in *Eldridge*.⁴⁹ The university had submitted that, unlike in *Eldridge*, there was no “specific” governmental objective in this case. Justice Paperny found this distinction to be “without merit.” She held that “*Eldridge* does not require that a particular activity have a name or program identified, but rather that the objective be clear. The objectives set out in the *PSLA*, while couched in broad terms, are tangible and clear.”⁵⁰ Part IV of this essay will examine whether or not the governmental objective test is likely met by universities governed by different statutes.

Justice Paperny went on to find that the application of *Eldridge* was only one possible approach to this problem. She held that the fourth category of *Charter* application, bodies exercising statutory authority, “fits more comfortably” with the issues of imposing disciplinary sanctions. The *PSLA* granted the university power to impose sanctions that go “beyond the authority held by private individuals or organizations”—the powers to fine, suspend, or expel a student from the university.⁵¹ Consequently, the university cannot use these powers in a way that infringes upon *Charter* rights, including the right to express oneself on Facebook. The University argued that student discipline is an

46 *Pridgen v University of Calgary*, 2012 ABCA 139 at para 78 (available on CanLII) [*Pridgen CA*].

47 *Ibid* at para 83.

48 *Ibid* at para 85.

49 *Ibid* at para 104.

50 *Ibid*.

51 *Ibid* at para 105.

internal, contractual matter and not governmental in nature. Justice Paperny rejected this argument, stating that although the university could, and indeed did, form a contractual relationship with students regarding discipline, this did not change the fact that the legislature saw fit to expressly authorize disciplinary sanctions.⁵² Further, Justice Paperny held that the regulation of student speech is not just an internal matter. The public, including current and future students, has a vested interest in receiving student opinions and engaging in discussion about the quality of education that a university—or a particular class—provides. Furthermore, the potential impact on current students is not limited to the private relationship between themselves and the university because sanctions, particularly suspension or expulsion, can effectively prevent students from entering their preferred field. This essay will examine the analogous relationship between universities and professional regulators in more detail in Part IV. For now, it is sufficient to note that Justice Paperny found that for students aspiring to enter a profession like medicine or law, a university acts as a gatekeeper in the same way as a regulatory body.⁵³

Justice Paperny’s judgment provides a lucid summary of the development of *Charter* application jurisprudence over the past 25 years. She found that the *Charter* applied to the University of Calgary in this instance, and her reasons outline the circumstances in which the *Charter* could apply to other universities. The two other justices of the ABCA did not address the *Charter* question but would have found for the students based solely on administrative principles. Justice McDonald considered a *Charter* analysis inappropriate and unnecessary:

[W]hile it may be time to reconsider whether or not universities are subject to the *Charter*, it was unnecessary for the judicial review judge to do so in this case. And, in my respectful view, this Court ought not to compound that error by undertaking such an analysis now.⁵⁴

Justice O’Ferrall thought it was “perhaps even undesirable [to consider *Charter* application] because the issue of *Charter* infringement was not explored at first instance.”⁵⁵ It is unfortunate that the concurring justices did not consider the application of the *Charter*, given that the law in this area is unsettled and the fact that two groups (the AUCC and CCLA) intervened solely to argue this matter. Justice O’Ferrall, while not considering application *per se*, held, in part, that the university’s decision was unreasonable because it failed to consider the students’ rights to freedom of expression and freedom of association.⁵⁶ His reasons suggest that even if the *Charter* does not apply to the university in question, *Charter* values must still be considered in the decision-making process. Reading this holding with Justice Paperny’s decision, it is clear that even if the *Charter* does not apply directly to universities, they must at least consider the impact of possible rights infringement in exercising their disciplinary authority.

iv. *Wilson v University of Calgary*

For the third time in four years, the *Charter*’s application to the University of Calgary was considered by the ABQB in the 2014 decision of *Wilson v University of Calgary* (“*Wilson*”).⁵⁷ In this case, the plaintiff was appealing the university’s decision that students who refused to turn their pro-life protest signs inwards had thereby violated the university’s Non-Academic Misconduct Policy. The case dealt with a variety of

52 *Ibid* at para 107.

53 *Ibid* at para 109.

54 *Ibid* at para 132.

55 *Ibid* at para 183.

56 *Ibid* at para 179.

57 *Wilson v University of Calgary*, 2014 ABQB 190 (available on CanLII).

administrative law matters, but only the application of the *Charter* will be considered here. Justice Horner attempted to reconcile the differing approaches to *Charter* application that the ABCA took in *Pridgen*:

I do not read these three sets of reasons as together casting doubt upon the requirement to undertake a consideration as to the effect that disciplinary action has on a student's *Charter*-protected rights.⁵⁸

Justice Horner found that the university failed in its obligation to consider the *Charter* interests of the students when making its decision.⁵⁹ Thus, the ABQB found that a university's administrative decisions may be unreasonable if they disregard students' *Charter* rights.

B. The Same Old Story—Recent Decisions Distinguishing the Alberta Judgments

The reasoning of the *Pridgen*, *Whatcott*, and *Wilson* decisions has yet to be followed in another jurisdiction. The Ontario cases of *Lobo v Carleton University* ("*Lobo*"),⁶⁰ *Telfer v University of Western Ontario* ("*Telfer*"),⁶¹ and *AlGhaithy v University of Ottawa* ("*AlGhaithy*")⁶² were distinguished from the ABQB's *Pridgen* decision. These judgements are questionable, however, because the courts cite *McKinney* for the proposition that the *Charter* does not apply to the universities without examining the particular activities at issue in light of the subsequent decision in *Eldridge* or the contemporary realities of universities. Similarly, the January 2015 decision of the BCSC in *BC Civil Liberties Association v University of Victoria* ("*BCCLA*") considered both the ABCA decision in *Pridgen* and the ABQB decision in *Wilson*, but found that the *Charter* did not apply in the given circumstances.⁶³

i. *Lobo v Carleton University*

In *Lobo*, a group of students alleged that the University of Carleton breached their freedom of expression in failing to allocate space for pro-life displays. The ONSC found *Pridgen* to be inapplicable outside of the statutory context of Alberta:

[The ABQB] made specific reference to the governing structure of the University in that case which involved significant government involvement. On this basis, the Court found the University was delivering a specific government program in partnership with the government. *By contrast, the Carleton University Act, 1952 created an autonomous entity whose structure and governance is in no way prescribed by the government.*⁶⁴

This reasoning conflates the governmental control test applied in *McKinney* with the governmental objective test applied in *Eldridge*. The ABQB in *Pridgen* did not hold that the *Charter* was applicable because of the "governing structure of the University"; in fact, the court found that the university was not under sufficient governmental control to make it an organ of the government. Rather, according to the ABQB decision, the University of Calgary was subject to the *Charter* only because it was furthering a specific

58 *Ibid* at para 148.

59 *Ibid* at para 158.

60 *Lobo v Carleton University*, 2012 ONSC 254 (available on CanLII) [*Lobo* SC], *aff'd* 2012 ONCA 498 (available on CanLII) [*Lobo* CA].

61 *Telfer v University of Western Ontario*, 2012 ONSC 1287 (available on CanLII) [*Telfer*].

62 *AlGhaithy v University of Ottawa*, 2012 ONSC 142 (available on CanLII) [*AlGhaithy*].

63 *BC Civil Liberties Association v University of Victoria*, 2015 BCSC 39 (available on CanLII) [*BCCLA*].

64 *Lobo* SC, *supra* note 60 at para 14 [emphasis added].

governmental purpose—namely, providing educational opportunities. Simply holding that Carleton University has a different “structure and governance” does nothing to distinguish the case from *Pridgen*, where the structure and governance of the University of Calgary were not the reason why the *Charter* applied.

In the *Lobo* appeal, however, the students’ argument that the motion judge failed to consider *Eldridge* sufficiently was tersely dismissed:

As explained by the motion judge, when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*. In carrying out this particular activity there is, therefore, no triable issue as to whether *Charter* scrutiny applies to the respondent’s actions.⁶⁵

This conclusion is unsatisfactory for two reasons. First, framing the issue narrowly as “book[ing] spaces for non-academic extra-curricular use” ignores the crucial fact that the students were denied space only as a result of the content of their expression. The case would be far different if all non-academic bookings were automatically denied space. Instead, the university allowed what it considered to be valid expression and denied expression that it deemed controversial. Second, the motion judge did not consider what governmental policies Carleton University serves. Rather, he simply held that the structure and governance of the university are not prescribed by the government.

ii. *Telfer v University of Western Ontario; AlGhaithy v University of Ottawa*

In *Telfer* and *AlGhaithy*, the courts relied on the different legislation governing the universities in question to distinguish the cases from *Pridgen*. In *Telfer*, the ONSC found that the exercise of disciplinary authority by an Ontario university did not attract *Charter* scrutiny:

[T]he statutory scheme applicable to the University of Western Ontario is quite different from that applicable to the University of Calgary. As set out earlier in these reasons, s. 18 of the University of Western Ontario’s *Act* gives it a right to control and direct its affairs through the Board of Governors and the Senate. It is not acting as an agent of the provincial government to implement any academic policy of the government.⁶⁶

The ONSC again focused only on the university’s control structure to find that the university was not implementing a governmental policy. However, governmental control is only one way in which the *Charter* may apply. In *AlGhaithy*, the ONSC again declined to apply *Pridgen*:

[T]he case is distinguishable, given that Alberta legislation requires universities to carry out a specific government objective of facilitating access to post-secondary education. There is no equivalent legislation in Ontario.⁶⁷

Part IV of this essay will question the reasoning that education can only be seen as a governmental objective if it is included in legislation.

⁶⁵ *Lobo CA*, *supra* note 60 at para 4.

⁶⁶ *Telfer*, *supra* note 61 at para 59.

⁶⁷ *AlGhaithy*, *supra* note 62 at para 78.

iii. *BC Civil Liberties Association v University of Victoria*

The 2015 decision in *BCCLA* further highlights the need for the SCC to resolve the uncertainty that surrounds the question of *Charter* application to universities.⁶⁸ In this case, the British Columbia Civil Liberties Association (“BCCLA”), acting on behalf of a former student, Cameron Côté, petitioned the BCSC to declare that the UVSS policy on booking space on campus violated students’ *Charter* rights. The UVSS had denied Youth Protecting Youth (“YPY”)—an anti-abortion protest group—permission to hold a protest in February 2013, on the basis that the protest violated the UVSS’s Booking of Outdoor Space policy. YPY persisted in holding the event. In response, the University revoked their outdoor space booking privilege for a one year period.⁶⁹

The BCCLA’s arguments echo many of the points raised in this paper, from the application of the government function branch of *Eldridge* to the reasoning of the recent Alberta decisions. The BCSC ultimately found that the *Charter* did not apply to the university. Chief Justice Hinkson referred to Justice Paperny’s holding in *Pridgen* that the regulation of speech on university property attracts *Charter* scrutiny, but found it significant that the other two members of the ABCA in *Pridgen* “did not agree with Madam Justice Paperny.”⁷⁰ The BCSC distinguished the instant facts from *Pridgen* by noting that British Columbia’s *University Act* differs from Alberta’s and that “unlike the student in *Pridgen*, Mr. Côté was not the subject of any actual discipline by the University.”⁷¹

The Chief Justice did not go as far as holding that the *Charter* could never apply to the University of Victoria, but rather limited the breadth of his holding to the facts at issue. The BCSC held that “in booking space for student club activities, the University is neither controlled by government nor performing a specific government policy or program as contemplated in *Eldridge*” and thus “the *Charter* does not apply to the activities relating to the booking of spaces by students.”⁷² As in *Lobo*, the court narrowly defined the activity objected to, but left open the possibility of *Charter* application to other university activities.

PART IV. PUTTING THE PIECES TOGETHER—WHEN THE CHARTER SHOULD BE FOUND TO APPLY

The law of *Charter* application to universities looks more like a Picasso than a Rembrandt. In *McKinney*, Guelph, York, and Laurentian Universities were found not to be subject to the *Charter* in negotiating employment contracts; however, all five judgments left open the possibility that the *Charter* could apply under different circumstances. Though the court did not give examples of what these different circumstances could be, reading *McKinney* together with *Eldridge* suggests that universities attract *Charter* scrutiny when they are under sufficient control of the government, exercising statutory authority, or implementing a specific governmental function. The ABQB found the latter factors to be met in the *Whatcott*, *Pridgen*, and *Wilson* decisions; however, the Ontario courts chose not to follow these cases. Similarly, the BCSC found that the *Charter* did not apply to the University of Victoria, but only in the narrow circumstances of *BCCLA*.

I will now argue that the *Charter* should be found to broadly apply to universities based on these three principles: sufficient governmental control, statutory authority, and

68 *BCCLA*, *supra* note 63.

69 *Ibid* at paras 76-81.

70 *Ibid* at paras 137-38.

71 *Ibid* at para 141.

72 *Ibid* at paras 151-52.

specific governmental objectives. In support of this argument, I will draw principally upon the governing legislation of the universities in British Columbia.

A. Charter Application Factor 1—The Government Controls the Entity

In *McKinney*, Justice La Forest provided a test for determining if a university was under sufficient governmental control to make it subject to the *Charter*. In his opinion, the essential question was this: Who controlled the university's governing body? If only a minority of directors were appointed by the Lieutenant Governor in Council, then it was clear that the government had no legal control. Even if a majority of directors were appointed by the Lieutenant Governor in Council, the control test will not be met if the appointees are under a duty to act in the best interests of the university, rather than those of the government.⁷³ Justice La Forest gave the example of section 2(3) of the *University of Toronto Act*, which states that “members of the Governing Council shall act with diligence, honestly and with good faith in the best interests of the University and University College.”⁷⁴

A legislative review reveals the unlikelihood that any university would fall within sufficient governmental control by this standard. Take, for example, the University of Victoria, Simon Fraser University, and the University of Northern British Columbia, which are all governed by British Columbia's *University Act* (“*BCUA*”).⁷⁵ Unlike most universities, a majority of their board members are appointed by the Lieutenant Governor in Council (8 out of 15).⁷⁶ However, the *BCUA* also states that the board members must act in the best interests of the university,⁷⁷ and so, following *McKinney*, the government does not control the boards.

The reasoning that the government cannot be in control of a board when the legislation holds that its members must act in the best interest of the university is overly simplistic for two reasons. First, the existence of such a clause in the *College and Institution Act*⁷⁸ was not dispositive in the case of *Douglas College*—Douglas College was found to be an organ of government even though its board was to act in its own best interests, not the government's.⁷⁹ Second, this reasoning ignores other provisions, like section 22 of the *BCUA*, which states that the Lieutenant Governor may, at any time, remove from office an appointed member of the board. Thus, even though appointees are called to act in the best interests of the university, any decisions that conflict with the wishes of the government could potentially result in removal from the board. Board members without secure tenure are not necessarily free to act only in the best interests of the university.

Further, this test ignores the modern realities of universities. In *Douglas College*, Justice La Forest held that the college was under government control “both in form and in fact.”⁸⁰ However, even when, based on the test outlined above, universities are not under government control “in form”, governments inevitably exercise significant control over universities “in fact.” It may be time to reconsider Justice La Forest's holding that “though extensively regulated and funded by government, [universities] are essentially

73 *McKinney*, *supra* note 11 at para 40.

74 *University of Toronto Act*, SO 1971, c 56, s 2(3).

75 *University Act*, RSBC 1996, c 468 [*BCUA*].

76 *Ibid*, s 19.

77 *Ibid*, s 19.1.

78 *College and Institution Act*, RSBC 1996, c 52. Section 8.2 provides: “In carrying out the objects of an institution, the members of the board of the institution must act in the best interests of that institution.”

79 *Douglas College*, *supra* note 14 at para 37.

80 *Ibid* at para 49.

autonomous bodies.⁸¹ The practice of selective funding, for example, demonstrates the degree to which governments can exert influence over university decision-making. This issue is addressed below, under the third *Charter* application factor—the implementation of governmental objectives.

B. *Charter* Application Factor 2—Statutory Authority

Recall that Justice La Forest held that a body is subject to the *Charter* when it is exercising statutory authority. Case law has revealed two ways in which statutory authority has been exercised by a university. In *Pridgen*, Justice Paperny found that the University of Calgary was subject to *Charter* scrutiny when exercising the disciplinary powers given to it by the *PSLA*, such as the powers to fine, suspend, or expel a student from the university. Additionally, Justice Jeffrey in *Whatcott* found that the University of Calgary could not enforce provincial—as opposed to university-specific—trespass legislation in a manner contrary to the *Charter*. The enforcement of laws of general application are so intrinsically linked with government that it is reasonable to assume that this finding in *Whatcott* would apply to all universities across Canada. The *Charter* clearly applies to situations where campus security is used to enforce provincial laws—in 2003, the University of Western Ontario was found to contravene the *Charter* when the special police constables it employed wrongfully arrested and detained a student.⁸²

The University of Calgary is not the only university that has been given specific statutory powers. All Albertan universities must abide by the *Charter* in disciplining students, as the *PSLA* applies to them as well. Further, the *BCUA* has an analogous section that explicitly gives the president of every university in British Columbia the power to “suspend a student and to deal summarily with any matter of student discipline.”⁸³ Therefore, based on Justice Paperny’s reasoning, all British Columbian universities must abide by the *Charter* when disciplining students.

Universities across British Columbia would dispute this holding. Justice Paperny’s reasoning, while clear and compelling, was not supported by the other justices of the ABCA. It is arguable that though Justice Paperny was correct to follow *McKinney* in holding that bodies exercising statutory authority were subject to the *Charter*, her extension of this principle to student discipline policies is too far-reaching. Significantly, universities cannot exercise this authority over any citizen, but only those who choose to attend the institutions. Therefore, the powers of suspension might be characterized as arising from a contractual agreement and the university’s decisions as being merely the exercise of the same contractual powers available to any natural person. This view correlates to Professor Hogg’s formulation that “the distinctive characteristic of action taken under statutory authority is that it involves a power of compulsion that is not possessed by a private individual or organization.”⁸⁴

However, it is a fallacy to say that universities have only the powers of a natural person. The modern reality is that universities are gatekeepers to a wide range of careers. The difference in full-time paid employment rates between Canadian bachelor’s degree holders and high school graduates has increasingly widened in recent years.⁸⁵ In fact,

81 *Ibid.*

82 *Jackson v University of Western Ontario* (2003), 111 CRR (2d) 63 (available on CanLII) (ON Sup Ct J) [cited to CRR].

83 *BCUA*, *supra* note 75, s 61.

84 Peter W Hogg, *Constitutional Law of Canada*, 2013 Student Edition (Toronto: Carswell, 2013) at 37-13.

85 Statistics Canada, *Wages and Full-time Employment Rates of Young High School Graduates and Bachelor’s Degree Holders, 1997 to 2012* (Ottawa: StatCan, April 2014) online: Statistics Canada <<http://www.statcan.gc.ca/pub/11f0019m/11f0019m2014360-eng.pdf>> at 6.

even certain undergraduate degrees hold little weight in today's market, where masters degrees are increasingly becoming the norm. Professional careers like the law are completely inaccessible without extended, post-secondary education. Lawyers in British Columbia, aside from those who qualified in other jurisdictions, must have attended university or college for the equivalent of at least six years.⁸⁶ The law societies that set these regulations are clearly subject to the *Charter*; attempts to bar extra-provincial lawyers from practicing in a province have been struck down by the SCC.⁸⁷ If a law society violates the *Charter* by preventing a lawyer from practicing in another province, how can a university that can prevent someone from becoming a lawyer in the first place not also be subject to the *Charter*?

As well, universities have been granted specific statutory authority to grant degrees, powers not given to any other natural person. One has no option but to contract with a university—and therefore subject oneself to its powers of student discipline—in order to become a doctor, lawyer, engineer, nurse, teacher, or accountant, or enter into any other profession requiring a degree. When exercising the statutory power to grant degrees, it follows that universities should be made subject to the *Charter*. Further, this view falls within the framework laid out by Justice La Forest in *McKinney*. Even if the hiring and firing of staff members does not attract *Charter* scrutiny, the public dimensions of degree-granting cannot be ignored when students' fundamental freedoms are infringed.

C. *Charter* Application Factor 3—Specific Governmental Objective

Finally, the *Charter* applies to universities that are implementing a specific governmental objective. Recall that only the Alberta government has so far been found to have education as a governmental objective, and only then because the *PSLA* expressly states that “the Government of Alberta is committed to ensuring Albertans have the opportunity to participate in learning opportunities.”⁸⁸ Aside from Prince Edward Island, no other Province appears to have expressly legislated this objective.⁸⁹

Can it reasonably be said that no other provincial government considers education an objective? On the contrary, governments have long provided primary and secondary education for the purposes of equipping and enabling its citizens to participate in society and the workforce. With the growing demands for a university degree, it only makes sense that governments now continue this basic objective by providing university education.

Provincial governments' funding patterns not only reveal that education is a governmental objective, but also that the government exercises immense control over universities. Consider the University of Victoria; in the fiscal year 2012-2013, government grants made up \$264,000,000, or 52 percent, of the university's \$511,000,000 revenue.⁹⁰ It is illogical to suggest that the government would contribute so heavily to a single entity

86 Admission to the Law Society of BC presupposes the equivalent of at least three years of undergraduate study prior to completion of a bachelor of laws or equivalent degree at an approved faculty of law. See generally *Law Society Rules*, Adopted by the Benchers of the Law Society of British Columbia under the authority of the *Legal Profession Act*, SBC 1998, c 9, online: The Law Society of British Columbia <https://www.lawsociety.bc.ca/docs/publications/mm/LawSocietyRules_2014-12.pdf>.

87 See *Black v Law Society*, [1989] 1 SCR 591 (available on CanLII) [cited to SCR].

88 *PSLA*, *supra* note 39, Preamble.

89 See *University Act*, RSPEI 1988, c U-4, Preamble, which provides that “it is considered desirable, for the advancement of learning and the provision of sound instruction in the arts, the sciences and certain professional studies, to create a single, public, non-denominational institution of higher education in Prince Edward Island, having the rights and powers of a University”.

90 “2012-2013 Audited Financial Statements”, online: University of Victoria <<http://www.uvic.ca/vpfo/accounting/assets/docs/financial/uvicfinancialstatements/audited-financial-statements-2012-13.pdf>>.

except in furtherance of a specific objective. Furthermore, such large contributions must give rise to governmental control—universities consider the government’s interests in their decisions because they are reliant on government grants for over half of their revenue. This scenario applies equally to universities throughout Canada. If anything, the contribution to the University of Victoria is on the low end of the scale. Justice La Forest noted in *McKinney* that government operating grants made up 68.8 percent of York’s operating budget, and 78.9 percent of Guelph’s.⁹¹ Statistics Canada reveals that government contributions accounted for \$20.5 billion of university and college revenues across Canada in 2009.⁹²

Further, the government is not merely interested in furthering education in general, but rather uses selective funding to universities to pursue specific goals. In September 2013, the *Globe and Mail* reported the following:

Ontario’s government has taken its boldest step yet to compel universities and colleges to make hard choices about how they spend their resources, circulating a draft policy designed to stretch limited provincial dollars by narrowing some schools’ missions.⁹³

The Ontario government would greatly reduce funding to universities that refused to cater their programs to better suit the government’s objectives.

Using funding to force governmental objectives is nothing new. In 2002, Prime Minister Jean Chrétien unveiled “Canada’s Innovation Strategy”.⁹⁴ This white paper outlined the objectives of the government, which included giving universal opportunity to high school graduates to participate in postsecondary education, ensuring that fifty percent of 24 to 26-year-olds obtain postsecondary credentials, and implementing a five percent increase in admissions to masters and doctoral programs over the succeeding eight years. These objectives were ambitious and specific. One author described the import of the paper:

In a word, the federal government has set its sights on transforming Canada’s universities into [...] the entrepreneurial university and what others have described as capitalizing knowledge or academic capitalism.⁹⁵

Although this essay focuses specifically on the delivery of education by universities, the issue of selective government funding applies equally, if not more so, to university research. Not only do faculty members receive grants to conduct their research, but the universities are paid a significant administrative top-up to facilitate research programs. The government has essentially outsourced the majority of its research initiatives to universities through programs such as Canada Research Chairs and the Canada Foundation for Innovation.⁹⁶

91 *McKinney*, *supra* note 11 at para 39.

92 Statistics Canada, *Universities and Colleges Revenue and Expenditures* (Ottawa: StatCan, 31 August 2009) online: Statistics Canada <<http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/govt31a-eng.htm>>.

93 James Bradshaw, “Specialize or risk losing funding, Ontario tells universities and colleges”, *The Globe and Mail* (18 September 2013) online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/specialize-or-risk-funding-ontario-tells-universities-and-colleges/article14393294>>.

94 David Cameron, “The challenge of change: Canadian universities in the 21st century” (2008) 45:2 *Canadian Public Administration* 145 at 164.

95 *Ibid.*

96 *Ibid* at 158.

The fact that education is a specific governmental objective is seen not only in the funding that is given to universities directly but also in the funding given to students to facilitate their education. In 2012, over 450,000 students were granted student loans so that they could attend post-secondary institutions.⁹⁷ Grants are awarded to any student of low- or middle-income families who has assessed need.⁹⁸ The government also contributes up to \$500 annually to a child's Registered Education Savings Plan.⁹⁹ Further, the amount of money that a university is able to charge its students is also regulated by the government.¹⁰⁰ Since 2005, the British Columbia government has limited tuition fee increases to 2 percent annually.¹⁰¹ Again, this array of government programs that facilitate access to education exists only because the pursuit of post-secondary education is a governmental objective.

Opponents of *Charter* application could argue that government funding alone was not sufficient to find that the *Charter* applied to universities in *McKinney*. However, recall that *McKinney* dismissed the notion that significant funding resulted in *governmental control* over a university.¹⁰² It was not until *Eldridge* that the governmental objective factor was fully elucidated. Therefore, even if the finding in *McKinney*—that government funding does not establish government control over universities—still holds true, *Charter* application to universities is still warranted on the basis that they are entrusted to fulfill a specific governmental function—the pursuit of education.

CONCLUSION—THE BENEFITS OF FREEDOM

It is understandable why universities have so vehemently opposed *Charter* application. Why would an organization willingly accept more restrictions to the way in which it operates? However, *Charter* rights are worth protecting, even at the cost of such restrictions. The clashes between universities and students canvassed in this paper have involved freedom of expression and religion, two freedoms that strengthen, rather than contradict, the purposes of universities. Justice Paperny found no conceptual conflict between academic freedom and freedom of expression:

Academic freedom and the guarantee of freedom of expression contained in the *Charter* are handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge. There is no apparent reason why they cannot comfortably co-exist.¹⁰³

Universities exist to push the bounds of human knowledge and research, and to raise up the next generation of professionals, academics, and leaders. Mass censoring

97 Canadian Federation of Students, "BC Students on Parliament Hill this week to call for action on record high student debt", online: CNW <<http://www.newswire.ca/en/story/1247535/bc-students-on-parliament-hill-this-week-to-call-for-action-on-record-high-student-debt>>.

98 "Canada Student Grants", online: CanLearn <http://www.canlearn.ca/eng/loans_grants/grants/index.shtml>.

99 "Canada Education Savings Grant", online: CanLearn <<http://www.canlearn.ca/eng/savings/cesg.shtml>>.

100 See, for example, "Government's Letter of Expectations between the Minister of Advanced Education and The Chair of the Board of University of Victoria for 2014/15", online: University of Victoria <http://www.uvic.ca/universitysecretary/assets/docs/boardoperation/GLE_2014web.pdf> at 1: "The Government is responsible for setting the legislative, regulatory and public policy frameworks in which the public post-secondary institutions operate and which set the Institution's mandate as defined by the *University Act*."

101 "Affordable higher education for both students and taxpayers", online: Ministry of Advanced Education <<http://www.aved.gov.bc.ca/tuition>>.

102 *McKinney*, *supra* note 11.

103 *Pridgen CA*, *supra* note 46 at para 117.

of minority opinion hurts these goals and promotes a dangerous worldview—one in which it is permissible to ignore, or even silence, viewpoints that cause you to critically evaluate your own beliefs. There can be no meaningful exchange of ideas if we refuse to hear contradictory opinions. Universities' *raison d'être*, the pursuit of knowledge and the meaningful exchange of ideas, are also better served when freedom of expression, religion, and association are protected. Regardless of our religious beliefs, or lack thereof, we all have an organizational system that we use to process the information we encounter to formulate ideas and opinions. Freedom of conscience and freedom of religion protect these organizing systems, whether they are grounded in a traditional or secular belief, to ensure that democratic conversation is not stifled.¹⁰⁴

Furthermore, recognition of *Charter* application in no way prevents universities from legitimate censorship or action. Although the conflicts I have examined feature universities infringing rights in the interest of maintaining a trouble- and offence-free environment, this will not always be the case. Protection of our fundamental freedoms is subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹⁰⁵ The events between the student pro-life protesters and the University of Calgary are illustrative here. If the students' expressions truly did physically endanger others, then their censorship may have been justified. What makes the University's actions appear unjustified is that the danger did not stem from the protestors, but rather from another group of students who disagreed with the protestors' views. University autonomy is not threatened by requiring such important institutions to justify the infringement of students' *Charter* rights.

The recent cases that have come before the courts of Alberta, Ontario, and British Columbia reveal that the questions around *Charter* application to universities—left open by the SCC in *McKinney*—have yet to be conclusively answered. Alberta courts have reconciled *McKinney* and *Eldridge* by finding that the *Charter* applies to universities either in exercising statutory authority or in implementing the governmental objective of education. The Ontario courts have narrowly applied the former factor and have rejected outright the latter, holding that the Ontario legislation does not make education a governmental objective. However, regardless of what the legislation says, it is illogical to believe that education is not a governmental objective. One need only consider the billions of dollars of funding that is poured into universities across Canada to see that the government is using universities to fulfill its specific objectives of education and research. When the issue eventually returns to the SCC, the Court ought to declare that universities must abide by the *Charter* in facilitating the pursuit of education. Protecting the fundamental rights of students on university campuses will further the meaningful exchange of ideas and the pursuit of knowledge, the very reasons why universities exist.

104 See generally Waldron, *supra* note 1 at 9-14.

105 *Charter*, *supra* note 2, s 1.

CASE COMMENT

NO SECOND CHANCES: THE DEFAULT EXCLUSION OF REFUGEE CLAIMANTS ON GROUNDS OF SERIOUS CRIMINALITY A CASE COMMENT ON *FEBLES V CANADA*

James Billingsley*

CITED: (2015) 20 Appeal 99

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* James Billingsley received his JD from the University of Victoria in 2014. He would like to thank Professor Donald Galloway at the University of Victoria Faculty of Law for his helpful guidance.

INTRODUCTION

Are rehabilitated criminals deserving of refugee protection? In the recent case of *Febles v Canada (Citizenship and Immigration)* (“*Febles*”), a majority of the Supreme Court of Canada answered that question in the negative.¹ According to the court, an asylum seeker who has committed a serious non-political crime outside the country of refuge is forever barred from obtaining refugee status by operation of Article 1F(b) of the *Convention Relating to the Status of Refugees* (“*Refugee Convention*”).² Such an individual can never be granted refugee protection, even if the offence is dated and the asylum seeker is presently rehabilitated. Prior to the decision, courts struggled to delineate the appropriate scope of Article 1F(b) and offered divergent interpretations as to its application. The majority judgment in *Febles* settled the issue: the only factors relevant to the application of Article 1F(b) are those related to the circumstances of the past offence. Post-offence circumstances, such as the expiation and rehabilitation of the claimant, are precluded from consideration.

The case of *Febles* raises the fundamental question of who deserves refugee status and who does not. If Article 1F(b), like Articles 1F(a) and 1F(c), was confined to crimes of a grave and heinous nature, the mandatory exclusion of individuals with a serious criminal past may perhaps be justifiable.³ However, Parliament and the courts have adopted a broad definition of what constitutes a serious crime. Under the *Immigration and Refugee Protection Act* (“*IRPA*”), serious criminality comprises offences that, if committed in Canada, could attract a term of ten years imprisonment, including, for example, non-violent property offences.⁴ Combined with the recent pronouncement of the Supreme Court of Canada in *Febles*, this definition casts too wide a net, excluding individuals who, despite their pasts, are deserving of protection. In this article, I argue that the majority’s interpretation of Article 1F(b) is contrary to the humanitarian goals that the *Refugee Convention* is purported to advance. Individuals who have taken positive steps to make reparations and reintegrate into society are automatically and unfairly excluded from refugee status.

In support of this argument, I first introduce Article 1F(b) and situate the exclusion clause within its statutory context in the *IRPA*. I then trace the Canadian jurisprudence on Article 1F(b) from its early interpretations to its current iteration in *Febles*. Next, I critically discuss the *Febles* case. I argue for an alternate interpretation of Article 1F(b) that considers the present deservingness of a refugee claimant together with the circumstances of his or her criminal past. I conclude by considering the broader implications of *Febles* with respect to the determination of refugee status under the *IRPA*.

1 *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 (available on CanLII) [*Febles*].

2 *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 [*Refugee Convention*]; *Protocol Relating to the Status of Refugees*, 31 January 1967, Can TS 1969 No 29.

3 Article 1F(a) excludes claimants who have committed a crime against peace, a war crime, or a crime against humanity, and Article 1F(c) excludes claimants guilty of “serious, sustained or systemic violations of fundamental human rights”: *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 64 (available on CanLII) [*Pushpanathan*].

4 *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]; see, for example, ss 98, 36(1), 101(2), 112(3), 113(3). These provisions make Article 1F(b) a more sweeping tool of exclusion than Articles 1F(a) and (c).

PART I. THE BASIC DEFINITION OF ARTICLE 1F(B)

Article 1F of the *Refugee Convention* excludes certain categories of individuals from refugee protection. It provides:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.⁵

Article 1F is incorporated directly into Canadian domestic law through section 98 of the *IRPA*:

A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.⁶

Articles 1F(a) and 1F(c) concern “international criminals,” who, because of their contribution to “serious, sustained or systemic violations of fundamental human rights,”⁷ are “rightly unable to claim refugee status.”⁸ Article 1F(b), by contrast, applies to individuals who have committed a serious ordinary crime prior to their arrival in the country of refuge. The seriousness of a crime under Article 1F(b) is determined in accordance with international norms, domestic legislation, and case law. According to the Federal Court of Appeal, factors relevant to the standard of seriousness include the following: the elements of the crime, the mode of prosecution, the penalty prescribed, the facts of the crime, and the mitigating and aggravating circumstances underlying the conviction.⁹ References to serious criminality in the *IRPA* provide “strong indication” of its meaning within Article 1F(b).¹⁰ As noted, the *IRPA* indicates that a serious crime is one that, if committed in Canada, constitutes an offence punishable by a maximum term of at least 10 years imprisonment. There is no minimum sentence that an individual must have served for a crime to be regarded as serious. In Canada, claimants have been excluded under Article 1F(b) for offences including bribery, possession of 0.9 grams of cocaine for the purpose of trafficking, using a false passport, falsifying business records, and driving while impaired.¹¹

5 *Refugee Convention*, *supra* note 2, art 1F.

6 *IRPA*, *supra* note 4, s 98.

7 *Pushpanathan*, *supra* note 3 at para 64.

8 *Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FCR 433 at 445 (available on CanLII) (FCA); see also *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40 at para 34 (available on CanLII) [Ezokola]; *Pushpanathan*, *supra* note 3 at para 63.

9 *Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404 at para 44 (available on CanLII) [Jayasekara].

10 *Ibid* at para 40.

11 *Febles*, *supra* note 1 (Factum of the Intervener Canadian Association of Refugee Lawyers at para 12), citing *Vlad v Canada (Minister of Citizenship and Immigration)*, 2007 FC 172 (bribery); *Abdi (Re)* (22 November 2012) Toronto TB1-10190 (RPD) (possession for the purpose of trafficking); *Durango v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1081 (using a false passport); *AP v Canada (Minister of Citizenship and Immigration)*, 2012 FC 494 (falsifying business records); *X (Re)*, 2010 CanLII 91951 (IRB) at para 23 (driving while impaired).

Given this broad standard of seriousness, the question turns to what Article 1F(b) is intended to achieve. Is Article 1F(b) intended to allow a country of refuge to exclude from refugee protection any individual with a serious criminal past? Or does the exclusion clause serve a more circumscribed role, limiting exclusion to the most egregious of crimes or in cases where the claimant's criminal character remains predominant? The following section considers, in chronological order, the development of the case law on Article 1F(b) leading up to *Febles*, where appellate courts have elaborated upon the purposes served by the exclusion clause and the circumstances relevant to its application.

PART II. THE JURISPRUDENCE ON ARTICLE 1F(B)

Febles reflects the culmination of two decades of jurisprudence on the interpretation of Article 1F(b). As will become evident, the case law proceeds in three distinct phases. In the first phase, the courts preferred a strict interpretation, finding that Article 1F(b) applies to criminals who claim refugee status as a means of avoiding prosecution in their country of origin. In the second phase, the courts broadened their approach, deciding that persons who have already served a criminal sentence may still be subject to exclusion under Article 1F(b). The third phase, as represented in *Febles*, interprets Article 1F(b) as necessarily excluding from refugee protection persons who have committed a serious non-political crime abroad, regardless of whether their sentence has already been served or whether they have been rehabilitated. As a corollary to these phases, the case law also develops the procedural and substantive distinction between exclusion from refugee status under Article 1F and removal from the country of refuge.¹² This distinction has justified interpretations of the *Refugee Convention* that deviate from its broad human rights objectives, and proved decisive in the *Febles* appeal at the Supreme Court of Canada.

A. Phase One

i. *Ward* (1993)

The doctrinal origins of refugee law owe much of their precedential content to *Canada (Attorney General) v Ward* (“*Ward*”).¹³ In this case, Justice La Forest, speaking for the Supreme Court of Canada, had occasion to comment upon the nature of exclusion of criminals from Canada and the purpose of Article 1F(b) in particular. The court held that a refugee claimant must pass two preliminary hurdles to be granted refugee status in Canada. The first hurdle, section 19 of the old *Immigration Act*, provided a comprehensive framework for inadmissibility, including for reasons of serious criminality.¹⁴ The second hurdle was Parliament's incorporation of the exclusionary provisions of Refugee Convention Articles 1E and 1F into the legislative definition of “Convention refugee.”¹⁵ According to the court, the first hurdle was carefully drafted to exclude claimants who may pose a danger to Canada while still allowing the Minister to consider whether rehabilitation has occurred. The court held that “Parliament opted not to treat a criminal past as a reason to be estopped from obtaining refugee status.”¹⁶ Further, the court noted that while section 19 concerns itself with convictions, Article 1F(b) refers instead to the

12 Article 33(1) provides that no state party shall return a refugee to a territory in which he or she may be persecuted. However, Article 33(2) denies this right of non-*refoulement* where there “are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”: *Refugee Convention*, *supra* note 2.

13 *Canada (AG) v Ward*, [1993] 2 SCR 689 (available on CanLII) [*Ward* cited to SCR].

14 *Ibid* at 741; see also *Immigration Act*, RSC 1985, c I-2, s 19.

15 *Ward*, *supra* note 13 at 741.

16 *Ibid* at 742.

commission of a serious crime.¹⁷ The court agreed with Professor James Hathaway that Article 1F(b) was intended to exclude claimants who, having committed a serious non-political crime abroad, evade prosecution by claiming refugee status.¹⁸ On the facts of the case, the court found that the respondent, Mr. Ward, would not be excluded under Article 1F(b), as he had already been convicted of his crimes and served his sentence.¹⁹ *Ward* thus viewed Article 1F(b) as operating to exclude current fugitives from justice, not rehabilitated individuals with a criminal past.

ii. *Pushpanathan* (1998)

The next decision of the Supreme Court of Canada to consider Article 1F(b) was *Pushpanathan v Canada (Minister of Citizenship and Immigration)* (“*Pushpanathan*”).²⁰ In this case, the appellant was convicted in Canada of conspiracy to traffic in heroin. After serving his sentence and facing deportation to his country of origin, the appellant made an application for refugee protection. The appellant’s application was denied on the basis of Article 1F(c), which applies where there are serious reasons for considering the person is “guilty of acts contrary to the purposes and principles of the United Nations.”²¹ While the case was decided on the basis of Article 1F(c), Justice Bastarache, speaking for the majority, had an opportunity to consider the purpose of Article 1F(b), finding that it is “generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status.”²² The Supreme Court of Canada in *Pushpanathan* thus appeared to be in agreement with its previous finding in *Ward*, that Article 1F(b) ensures that common criminals are not able “to avoid extradition and prosecution” by exploiting the refugee system.²³

iii. *Chan* (2000)

Two years after *Pushpanathan*, the Federal Court of Appeal ruled on the specific question of sentence completion in the decision of *Chan v Canada (Minister of Citizenship and Immigration)* (“*Chan*”).²⁴ In *Chan*, the appellant was convicted for an offence related to drug trafficking in the United States. After serving his sentence, the appellant was deported to his country of origin, China. The appellant then fled China and sought refugee status in Canada, but his claim was denied on the basis that the appellant’s drug offence constituted a serious non-political crime within the meaning of Article 1F(b). The court was tasked with the question of whether Article 1F(b) excluded the appellant even though he had already served his sentence. Justice Robertson, speaking for the court, found that Article 1F(b) does not exclude refugee claimants who, although convicted of a crime outside of Canada, have nonetheless served their sentence prior to arrival.²⁵ The court advanced two principal bases for this holding. First, it relied upon the aforementioned *obiter* in *Ward* and *Pushpanathan*. Second, the court found that a broad interpretation of Article 1F(b)—to exclude any person who had committed a serious non-political crime—was inconsistent with the scheme of the *Immigration Act* in force at the time. The legislation provided an exception to inadmissibility on grounds of serious criminality for persons who had satisfied the Minister of Employment

17 *Ibid* at 743, citing James Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 221.

18 *Ibid*.

19 *Ibid*.

20 *Pushpanathan*, *supra* note 3.

21 *Refugee Convention*, *supra* note 2, art 1F(c).

22 *Pushpanathan*, *supra* note 3 at para 73.

23 *Ibid*.

24 *Chan v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FCR 390 (available on CanLII) (FCA) [*Chan* cited to FCR].

25 *Ibid* at para 4.

and Immigration that they had rehabilitated themselves.²⁶ A broad interpretation of Article 1F(b) would deprive refugee claimants of this legislative scheme and divest the Minister of his discretionary power.²⁷ Further, the court noted that claimants with prior convictions would be denied refugee protection, regardless of whether they had rehabilitated themselves and no longer posed a danger to the public.²⁸

B. Phase Two

i. *Zrig* (2003)

Zrig v Canada (Minister of Citizenship and Immigration) (“*Zrig*”) marked the beginning of a shift in the judicial interpretation of Article 1F(b).²⁹ In that case, the appellant sought to rely upon *Pushpanathan* as standing for the proposition that Article 1F(b) is limited to crimes extraditable under treaty. Justice Nadon, speaking for the Federal Court of Appeal, rejected this argument, finding that such a limitation would lead to the “absurd” result that “extraditable criminals would be excluded from refugee protection whereas offenders whose crimes were not extraditable would not be excluded.”³⁰ The court went further, however, and went on to reject the interpretation in *Ward* and *Pushpanathan* that Article 1F(b) is limited to excluding fugitives from justice. The court preferred a plain reading interpretation of the broad language of Article 1F(b), finding that “the only question that must be answered is whether there are serious reasons for considering that a claimant committed a serious non-political crime.”³¹

In concurring reasons, Justice Décaré held that *Chan* only provides authority for the proposition that Canada is not *barred* from granting refugee status to individuals who have committed serious non-political crimes, but have already completed their sentence. However, he noted that this is distinct from Canada having a positive obligation to *grant* status to such individuals:

[U]nder Article 1F(b) it is possible to exclude both the perpetrators of serious non-political crimes seeking to use the Convention to elude local justice and the perpetrators of serious non-political crimes that a state feels should not be allowed to enter its territory, whether or not they are fleeing local justice, whether or not they have been prosecuted for their crimes, whether or not they have been convicted of those crimes and whether or not they have served the sentences imposed on them in respect of those crimes.³²

Thus, *Zrig* departs from *Chan*, *Pushpanathan*, and *Ward*. According to the court, Article 1F(b) is not necessarily inapplicable to a refugee claimant who has already completed his or her sentence for a serious non-political crime.³³

ii. *Xie* (2004)

In *Xie v Canada (Minister of Citizenship and Immigration)* (“*Xie*”), the Federal Court of Appeal drew a sharp distinction between the jurisdiction of the Refugee Protection

26 *Immigration Act*, *supra* note 14, s 19(1)(c.1). The provision also required that at least five years had elapsed since the expiration of the sentence.

27 *Chan*, *supra* note 24 at para 15.

28 *Ibid.*

29 *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178 (available on CanLII) [*Zrig*].

30 *Ibid* at para 67.

31 *Ibid* at para 79.

32 *Ibid* at para 129.

33 See also Martin Jones & Sasha Baglay, *Refugee Law* (Toronto: Irwin Law, 2007) at 162.

Division (“RPD” or the “Board”) in determining refugee status and the jurisdiction of the Minister in removing claimants from Canada.³⁴ While the case does not relate specifically to the question of rehabilitation, *Xie* is important in delineating the scope and role of Article 1F(b). The appellant, a Chinese citizen, was denied refugee status because she faced charges in China for the embezzlement of seven million yuan. The Board held that but for the appellant’s exclusion under Article 1F(b) the appellant would qualify as a person in need of protection under the *Refugee Convention*, because she risked torture if returned to China. The appellant sought judicial review of the Board’s decision, arguing that the assessment of exclusion under Article 1F(b) requires a balancing between the risk of torture and the seriousness of the crime. Justice Pelletier, speaking for the Federal Court of Appeal, held that, in applying Article 1F(b), the RPD is neither “required nor allowed” to consider a claimant’s risk of torture if returned to his or her country of origin.³⁵ The court found this conclusion to be justified by virtue of the scheme of the *IRPA*, which provides individuals with two avenues of protection. Persons excluded from refugee protection may still apply to the Minister for a Pre-Removal Risk Assessment (“PRRA”), whereby the Minister balances a claimant’s need for protection with the interests of public safety and national security.³⁶ These latter considerations, according to the court, are for the Minister to decide, not the RPD.

iii. *Jayasekara* (2008)

Zrig and *Xie* opened up the door to *Jayasekara v Canada (Minister of Citizenship and Immigration)* (“*Jayasekara*”), in which the Federal Court of Appeal had the opportunity to review the precedent in *Chan*.³⁷ In this case, the appellant, a Sri Lankan citizen, was convicted in the United States of selling opium and possessing marijuana. He was sentenced to 29 days in jail and a 5-year term of probation. After serving his jail sentence in full, the appellant was issued a voluntary departure order to leave the United States. The appellant received this order one month into his probation, so he entered Canada and filed a claim for refugee status. The appellant was held to be excluded on the basis of Article 1F(b). According to the Board, there were “serious reasons for considering that [the appellant] had committed a serious non-political crime outside of Canada” and, as the appellant fled during his probation, he had not completed his sentence in the United States.³⁸

Like *Chan*, the Federal Court of Appeal was faced with the question of whether serving a sentence for a serious non-political crime allows a claimant to avoid exclusion under Article 1F(b). While the appellant argued that *Chan* established a general principle that Article 1F(b) does not apply if the claimant has already served his or her sentence, Justice Létourneau, speaking for the court, disagreed. The court read down *Chan* as deciding only that claimants who have served their sentence prior to arriving in Canada were “not necessarily excluded from a refugee hearing or rendered ineligible to apply for the refugee protection afforded by the Convention.”³⁹ The court went on to elaborate upon four factors that may be considered in applying the exclusion clause in Article 1F(b): (1) the elements of the crime, (2) the mode of prosecution, (3) the penalty prescribed, and (4) the facts and the mitigating and aggravating circumstances underlying the conviction.⁴⁰ Accordingly, the court found that if a sentence is relevant to the application of Article

34 *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250 at para 38 (available on CanLII).

35 *Ibid* at para 40.

36 *IRPA*, *supra* note 4, s 112.

37 *Jayasekara*, *supra* note 9.

38 *Ibid* at para 11.

39 *Ibid* at para 26 [emphasis added].

40 *Ibid* at para 44.

1F(b), it should only be considered in the context of the circumstances of the crime. The court excluded factors extraneous to the crime from the scope of analysis under Article 1F(b), such as the risk of persecution in the country of origin, per *Xie*.

iv. *Gavrila and Németh* (2010)

After *Jayasekara*, *Febles* was the next appellate court decision to consider the implication of rehabilitation on the application of Article 1F(b). It is nevertheless helpful to briefly reference the companion cases *Gavrila v Canada (Justice)* (“*Gavrila*”) and *Németh v Canada (Justice)* (“*Németh*”), decided in the interim by the Supreme Court of Canada.⁴¹ These cases considered Article 1F(b) in the context of extradition legislation. Of note is Justice Cromwell’s finding in *Németh* that Parliament, in enacting the *IRPA*, had decided that a crime punishable by at least 10 years imprisonment constitutes a “serious non-political crime” within the meaning of Article 1F(b).⁴² Like *Xie*, the court also showed deference to the procedural bifurcation of refugee status determination by the RPD and removal from Canada by way of Ministerial discretion. The court in *Németh* held that Canada could satisfy its non-*refoulement* obligations pursuant to either the *IRPA* or the *Extradition Act*.⁴³ As discussed below, this bifurcated approach has expanded significantly since the passage of Bill C-31, which greatly limits the rights of refugee claimants with serious criminal pasts by automatically diverting their asylum claims to the Minister.⁴⁴ It is important to keep this new legislative context in mind when considering the third phase of Article 1F(b)’s interpretation.

C. Phase Three

i. *Febles*—Facts

Luis Alberto Hernandez Febles is a Cuban citizen born in 1954. Opposed to his country’s political system, he fled Cuba for the United States in 1980 and was granted refugee protection. In 1984 and again in 1993, Mr. Febles committed violent crimes. In 1984, he attacked his roommate with a hammer. He turned himself in to the police and was charged with attempted murder. Mr. Febles pled guilty to the lesser offence of assault with a deadly weapon and served one year in jail and three years of probation. In 1993, Mr. Febles threatened to kill his roommate’s girlfriend at knifepoint. Again, he pled guilty to assault with a deadly weapon. He served two years in jail and an additional three years of probation.

Mr. Febles claims that he was under the influence of alcohol during the commission of both offences. He also claims that, since the offence in 1993, he has been sober and crime-free. Mr. Febles lost his refugee status because of his crimes and a warrant for his removal from the United States remains in effect today. From 1998 to 2002, the United States immigration authorities detained Mr. Febles, and during that time he completed an Alcoholics Anonymous course. From 2002 to 2008, Mr. Febles was gainfully employed in the United States. In 2008, facing deportation, Mr. Febles illegally crossed the Canada-US border and submitted a refugee claim in Montréal, Québec. Mr. Febles freely disclosed his criminal past to the Canadian authorities, who elected not to issue an

41 *Gavrila v Canada (Justice)*, 2010 SCC 57 (available on CanLII); *Németh v Canada (Justice)*, 2010 SCC 56 (available on CanLII) [*Németh*].

42 *Ibid* at para 120.

43 *Ibid* at para 51; *Extradition Act*, SC 1999, c 18, s 44(1)(b). The right of non-*refoulement* is contained in Article 33(1) of the *Refugee Convention*, *supra* note 2 (“no state party shall return a refugee to a territory in which he or she may be persecuted”).

44 Bill C-31, *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, 1st Sess, 41st Parl, 2012 (assented to 28 June 2012).

opinion that he was dangerous. Nonetheless, an inadmissibility report was issued against Mr. Febles on the grounds of serious criminality. As a result, the Board's Immigration Division concluded that Mr. Febles was inadmissible to Canada pursuant to section 36(1)(b) of the *IRPA* and issued a deportation order against him.⁴⁵

Concurrent to the administrative process ordering the deportation of Mr. Febles, the RPD evaluated his refugee claim. Prior to the hearing, the Minister of Public Safety and Emergency Preparedness filed a Notice of Intervention, alleging that Article 1F(b) applied to exclude Mr. Febles. On October 14, 2010, the Board conducted a hearing to assess whether Mr. Febles was ineligible for refugee protection. While the Board member ultimately determined that the offence from 1984 excluded Mr. Febles, the Board member made reference to Mr. Febles' past struggles with alcoholism and the fact that he served his sentences in full. According to the Board member, Mr. Febles "took the second chance that life was offering him 17 years ago and chose to follow a straighter path."⁴⁶ However, despite Mr. Febles' efforts towards rehabilitation, the Board member concluded that it must "respect the legislation and the current jurisprudence that require that a person who has been convicted of a serious non-political crime, as is the case here, must be excluded from the application of the Convention."⁴⁷ Mr. Febles sought judicial review of the decision at the Federal Court.

ii. *Febles*—Federal Court (2011)

Justice Scott, the applications judge, first turned his mind to the appropriate standard of review of the RPD decision. He found that the Board's interpretation of the *IRPA* and Article 1F(b) was not a constitutional question, not of central importance to the legal system, and not in relation to the Board's jurisdiction. Instead, he found that the Board was interpreting its "home statute," which accordingly attracts a reasonableness standard of review.

More importantly, the court found that all factors arising subsequent to the commission and completion of a crime are irrelevant to the application of Article 1F(b). According to the court, the only task of the Board is to determine whether the refugee claimant committed a serious non-political crime.⁴⁸ The court found support for this position in *Jayasekara*, and quoted the following passage from the decision:

I believe there is a consensus among the courts that the interpretation of the exclusion clause in Article 1F (b) of the Convention, as regards the seriousness of a crime, requires an evaluation of the elements of the crime, the mode of prosecution, the penalty prescribed, the facts and the mitigating and aggravating circumstances underlying the conviction [...]. In other words, whatever presumption of seriousness may attach to a crime internationally or under the legislation of the receiving state, that presumption may be rebutted by reference to the above factors. There is no

45 *IRPA*, *supra* note 4. Section 36(1)(b) is a general inadmissibility provision and is distinct from Article 1F(b):

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for [...]

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

46 *Hernandez Febles v Canada (Citizenship and Immigration)*, 2011 FC 1103 at para 21 (available on CanLII) [*Febles FC*], citing para 24 of the Board's decision.

47 *Ibid.*

48 *Febles FC*, *supra* note 46 at para 51.

balancing, however, with factors extraneous to the facts and circumstances underlying the conviction such as, for example, the risk of persecution in the state of origin [...].⁴⁹

As such, Justice Scott concluded that the fact that a refugee claimant has completed his or her sentence in full is relevant only to the determination of whether the claimant in fact committed a serious non-political crime. Completion is not relevant to anything “extraneous to the facts and circumstances underlying the conviction,” such as whether the claimant is remorseful or has turned his or her life around.⁵⁰ Rehabilitation and expiation are thus precluded from consideration. Justice Scott nonetheless went on to certify the following question for the Federal Court of Appeal:

When applying Article 1F(b) of the [*Refugee Convention*], is it relevant for the Refugee Protection Division of the Immigration and Refugee Board to consider the fact that the refugee claimant has been rehabilitated since the commission of the crime at issue?

iii. *Febles*—Federal Court of Appeal (2012)

Justice Evans, speaking for the Federal Court of Appeal, answered the certified question in the negative.⁵¹ The court disagreed with Justice Scott’s decision that the standard of reasonableness applied in this case, finding instead that a correctness standard is necessary to achieve a uniform interpretation of Article 1F(b).⁵² On this standard, the court found that it is incorrect in law to apply Article 1F(b) with reference to factors such as rehabilitation and present dangerousness.⁵³ According to the court, balancing such factors with the seriousness of the crime “would likely lead to a lack of consistency in RPD decision-making bordering on arbitrariness.”⁵⁴ Further, the court found that this interpretation was inconsistent with *Zrig* and *Jayasekara*, which were found to have overruled *Chan*.

The court then went on to conduct its own analysis of the interpretation of Article 1F(b). Mr. *Febles* argued that Article 1F(b) is principally intended to exclude fugitives from using refugee status to evade prosecution for serious non-political crimes committed in their country of origin. In exceptional cases, Mr. *Febles* argued that Article 1F(b) applies to claimants who have completed their sentence for a serious non-political crime but nonetheless continue to pose a danger to the state of asylum. The court, however, rejected this interpretation. The court supported its conclusion through an analysis of the text of Article 1F(b), the purpose of the provision, and the statutory context in which the provision is incorporated into domestic law. First, with respect to the text, the court noted that Article 1F(b) is broadly worded in the *Refugee Convention*, and the *IRPA* does not expressly limit its application to claimants who pose a danger to the Canadian public.

Second, as for the purpose of Article 1F(b), the court struggled to arrive at a determinative conclusion. The court began by citing the concurring reasons of Justice Décaré in *Zrig*, who found that Article 1F(b) ensures, *inter alia*, “that the country of refuge can protect its own people by closing its borders to criminals whom it regards as undesirable because

49 *Ibid* at para 49, citing *Jayasekara*, *supra* note 9 at para 44.

50 *Febles FC*, *supra* note 46 at para 50.

51 *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 at para 74 (available on CanLII) [*Febles FCA*].

52 *Ibid* at para 24.

53 *Ibid* at para 5.

54 *Ibid* at para 34.

of the seriousness of the ordinary crimes which it suspects such criminals of having committed.”⁵⁵ The court continued as follows:

[It] indicates that while the signatories were prepared to sacrifice their sovereignty, even their security, in the case of the perpetrators of political crimes, they wished on the contrary to preserve them for reasons of security and social peace in the case of the perpetrators of serious ordinary crimes. This ... purpose also indicates that the signatories wanted to ensure that the Convention would be accepted by the people of the country of refuge, who might be in danger of having to live with especially dangerous individuals under the cover of a right of asylum.⁵⁶

Justice Evans was cognizant that *Zrig* was concerned not with the question of rehabilitation, but with the question of whether Article 1F(b) was confined to crimes extraditable by treaty. Despite Justice Décary’s references to security and social peace as relevant to the purposes of Article 1F(b), the court found that it was unclear whether Justice Décary was of the view that a serious crime, by its nature, automatically excluded a claimant. Ultimately, the court found that while Article 1F(b) was clearly not confined to fugitives from justice, any discerned purpose to protect the state from dangerous criminals was insufficiently clear to “warrant an interpretation that is markedly narrower than the ordinary meaning of the text.”⁵⁷

Third, the court considered the interpretation of Article 1F(b) within the overall statutory context of the *IRPA*. Mr. Febles argued that the general scheme of the *IRPA* mitigates the negative consequences of a finding of serious criminality if the claimant satisfies the Minister of his or her rehabilitation. As such, interpreting Article 1F(b) to automatically exclude claimants from refugee protection, without considering factors such as rehabilitation, would be inconsistent with the scheme of the *IRPA*. The court did not find this argument persuasive. Like *Xie* and *Németh*, the court drew the distinction between exclusion from refugee status pursuant to a decision of the RPD and removal from Canada pursuant to a decision of the Minister. The court found that dangerousness is only relevant to the latter process, where, as in the case of the PRRA, the Minister of Citizenship and Immigration determines whether interests of safety and security trump a claim for protection. This bifurcated approach to protection is key to Justice Evans’ analysis:

Applying for and obtaining a stay of removal from the [Minister of Citizenship and Immigration] under the PRRA provisions may not be as satisfactory to Mr Febles on grounds of process and substance as an application to the RPD for the grant of refugee protection and the rights attached to that status. Nonetheless, protection would comply with the non-*refoulement* principle for those who are excluded from refugee status for serious criminality, but if removed are at risk of death, torture, cruel and unusual treatment or punishment, or the deprivation of other rights guaranteed by section 7 of the Charter.⁵⁸

The court found that the availability of the PRRA “goes a long way” to addressing the unfairness of denying refugee status to claimants such as Mr. Febles who, although having committed a serious non-political crime, have since completed their sentence and made attempts at rehabilitation.⁵⁹ The court concluded by remarking that exclusion

55 *Ibid* at para 41, citing *Zrig*, *supra* note 29 at paras 118-19.

56 *Ibid*.

57 *Febles* FCA, *supra* note 51 at para 63.

58 *Ibid* at para 69.

59 *Ibid* at para 70.

under Article 1F(b) is intended to protect the integrity of refugee status, and extending protection to serious criminals would degrade this integrity.⁶⁰

iv. *Febles*—Supreme Court of Canada (2014)

a. Majority

In a five against two decision, the Supreme Court of Canada agreed with the conclusion of the RPD Board, upheld the decisions of the lower courts, and dismissed Mr. Febles' appeal. Chief Justice McLachlin, speaking for the majority, found that the phrase “has committed a serious non-political crime” as found in Article 1F(b) only refers to “the crime at the time it was committed.”⁶¹ Consequently, Article 1F(b) does not exempt individuals who, while having committed a serious crime in their past, are presently rehabilitated, expiated, or no longer dangerous. Nor, according to the majority, should Article 1F(b) be confined to exclude only fugitives from justice.

In reaching this conclusion, Chief Justice McLachlin found that Article 1F(b) must be interpreted in accordance with the principles of treaty interpretation as set out in the *Vienna Convention on the Law of Treaties* (“*Vienna Convention*”).⁶² She noted that Article 31 of the *Vienna Convention* provides that interpretation of a treaty is determined with reference to the ordinary meaning of its terms, its context, and its object and purposes. Further, where uncertainty remains even after the interpretive principles of Article 31 are applied, Article 32 provides that recourse may be had to supplementary means of interpretation.

With this interpretive framework in mind, Chief Justice McLachlin noted that Article 1F(b) of the *Refugee Convention* refers only to a serious crime having been committed; it does not reference acts or circumstances subsequent to the crime itself. She concluded that the ordinary meaning of Article 1F(b) “refers only to the crime at the time it was committed.”⁶³ Further, she held that there is nothing in the plain language of Article 1F(b) that limits the exclusion clause to fugitives from justice or presently dangerous individuals, and there is no mention of factors such as expiation or rehabilitation. Next, Chief Justice McLachlin addressed the treaty provision in the schematic context of Article 1F and the *Refugee Convention* as a whole. She found nothing in the scheme of the Article or the *Refugee Convention* to support Mr. Febles' proffered interpretation.

Lastly, with respect to the object and purposes of the *Refugee Convention* and Article 1F(b) in particular, Chief Justice McLachlin found that the *Refugee Convention* is intended to strike a balance between helping refugees and protecting the interests of host states.⁶⁴ She wrote that the *Refugee Convention* is not an “abstract principle” but “an agreement among sovereign states in certain specified terms, negotiated by them in consideration of the entirety of their interests.”⁶⁵ In a telling part of the judgment, she wrote as follows:

While exclusion clauses should not be enlarged in a manner inconsistent with the *Refugee Convention's* broad humanitarian aims, neither should overly narrow interpretations be adopted which ignore the contracting states need to control who enters their territory.

60 *Ibid* at para 72.

61 *Febles*, *supra* note 1 at para 15.

62 *Vienna Convention on the Law of Treaties*, 23 May 1969, Can TS 1980 No 37 (entered into force 27 January 1980, assent by Canada 14 October 1970) [*Vienna Convention*], cited in *Febles*, *supra* note 1 at para 11.

63 *Ibid* at para 17.

64 *Ibid* at para 30.

65 *Ibid* at para 29.

Finding that her preferred interpretation strikes this balance, Chief Justice McLachlin rejected the contention that Article 1F(b) is “directed solely at some subset of serious criminals who are undeserving at the time of the refugee application.”⁶⁶ Rather, she went on to find that Article 1F(b) serves only one main purpose: “to exclude persons who have committed a serious crime.”⁶⁷ In forever excluding *all* claimants who have, at some point in their lives, committed serious non-political crimes, Chief Justice McLachlin found that Article 1F(b) reflects “the contracting states’ agreement that such persons by definition would be underserving of refugee protection by reason of their serious criminality.”⁶⁸

The majority also found support in the *Travaux Préparatoires*—a record of the preparatory materials preceding the *Refugee Convention*—as well as international case law.⁶⁹ With respect to the former, Chief Justice McLachlin first noted that the meaning of Article 1F(b) is sufficiently clear such that recourse to extrinsic materials is unnecessary. Notwithstanding, Chief Justice McLachlin found that the *Travaux Préparatoires*, even if considered, lend support to the interpretation arrived at in her reasons. Moreover, with respect to international case law, she concluded that the dominant tide of authority in other jurisdictions supports the conclusion that the seriousness of the crime is not to be balanced against factors extraneous to the commission of the crime, such as present dangerousness, expiation, or rehabilitation.⁷⁰ With respect to the prior findings of the Supreme Court of Canada in *Ward* and *Pushpanathan*, Chief Justice McLachlin dismissed the comments in these cases as *obiter dicta*. She stated that these comments find little support in the international case law and should no longer be followed in Canada.⁷¹

Finally, Chief Justice McLachlin went on to consider the question of how a crime’s seriousness should be assessed:

While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.⁷²

Chief Justice McLachlin’s comments on this point will prove decisive moving forward. Because post-offence conduct is now irrelevant to the application of Article 1F(b), refugee claimants with a criminal history will no longer have the opportunity to argue that their present individual circumstances merit consideration. The principal task of refugee claimants will now be to prove that their criminal history is not “serious”.

Applying these principles to the facts of Mr. Febles’ refugee claim, the majority of the court ultimately found that the Board was correct to conclude that Mr. Febles was ineligible for refugee protection.⁷³ Chief Justice McLachlin noted that while Mr. Febles may prefer to be granted refugee protection, he is excluded from the *Refugee Convention*

66 *Ibid.*

67 *Ibid* at para 35.

68 *Ibid.*

69 United Nations, *Collected Travaux Préparatoires of the 1951 Geneva Convention Relating to the Status of Refugees*, vol III, *The Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* (Amsterdam: Dutch Refugee Council, 1989).

70 *Febles*, *supra* note 1 at para 59.

71 *Ibid.*

72 *Ibid* at para 62.

73 *Ibid* at para 70.

as a result of his commission of serious crimes in his past.⁷⁴ His alternative recourse is to seek a stay of removal from the Minister.

b. Dissent

In dissenting reasons, Justice Abella referred to the *Refugee Convention* as the “Rosetta Stone” of refugee protection under international law and emphasized the significant consequences that result when an individual is excluded from status.⁷⁵ She noted that the humanitarian protections provided by the *Refugee Convention* are denied altogether when Article 1F is applied, including the right of non-*refoulement* under Article 33. In light of the human rights purposes of the *Refugee Convention*, Justice Abella found that Article 1F(b) requires a “less draconian” interpretation than that offered by the majority.⁷⁶ Further, she found that the interpretive approach to Article 1F(b) must proceed with caution, given the dramatic consequences of exclusion.⁷⁷

In the opinion of the dissent, refugee claimants should not be automatically excluded from the *Refugee Convention* except in the case of very serious crimes.⁷⁸ Rather, Justice Abella was of the view that circumstances subsequent to the offence are relevant to a refugee claim and should be taken into account. In support, Justice Abella found that the territorial limitation of Article 1F(b)—which confines the provision to crimes committed “outside the country of refuge prior to his [or her] admission to that country of refuge”—as a “strong textual indication” that Article 1F(b) was intended to exclude from protection those who seek to exploit the refugee system.⁷⁹ This interpretation, according to Justice Abella, is supported by the surrounding context of the provision, its drafting history, previous international agreements, as well as in the interpretations of Article 1F(b) adopted in other jurisdictions and by the United Nations High Commission for Refugees (“UNHCR”).⁸⁰ Contrary to the reasons of Chief Justice McLachlin, Justice Abella held that the negotiations surrounding Article 1F(b) only concerned individuals who, having committed a crime outside the country of refuge, “*had not been convicted or served a sentence for that crime.*”⁸¹

Justice Abella noted that other jurisdictions widely accept that the original purpose of Article 1F(b) was to deny refugee status to fugitives. She found that while “there is little doubt” that the original purpose of Article 1F(b) was to exclude individuals who attempt use the refugee system as a means to evade justice in another jurisdiction, there is likewise “little agreement” as to other circumstances in which Article 1F(b) applies.⁸² She then went on to reject the majority’s suggestion that recent international jurisprudence indicates that persons who have committed a serious crime are by definition undeserving of protection.⁸³ Indeed, Justice Abella found little or no authority for the majority’s proposition that *everyone* who has committed a serious non-political crime, regardless of their personal circumstances, remains “permanently undeserving” of refugee protection.⁸⁴ She characterized such an approach as “relentlessly exclusionary.”⁸⁵

74 *Ibid* at para 68.

75 *Ibid* at paras 72, 87.

76 *Ibid* at para 78.

77 *Ibid* at para 92.

78 *Ibid* at para 74.

79 *Ibid* at para 101.

80 *Ibid*.

81 *Ibid* at para 116 [emphasis in original].

82 *Ibid* at paras 101, 118.

83 *Ibid* at para 129.

84 *Ibid* at para 131.

85 *Ibid*.

Instead, applying the requisite good faith approach to treaty interpretation as mandated by the *Vienna Convention*, Justice Abella held that the meaning of Article 1F(b) must not be divorced from its human rights purpose.⁸⁶ Consequently, except in the case of very serious crimes, Justice Abella was of the opinion that individuals should not be automatically disqualified from refugee status. Further, she found that the goals of exclusion under Article 1F(b) can be satisfied where “the individual’s circumstances reflect a sufficient degree of rehabilitation or expiation.”⁸⁷ Justice Abella specifically noted that the completion of a sentence, along with factors such as the passage of time since the commission of the offence, the age at which the crime was committed, and the individual’s rehabilitative conduct, will all be relevant.⁸⁸

On the facts of this case, Justice Abella found that Mr. Febles had expressed remorse, turned himself into the police, pled guilty, and served his time. She further noted that Mr. Febles had taken steps to address his problems with alcohol. In the result, Justice Abella would have remitted the matter back to the Board for reconsideration of the seriousness of the offences in light of Mr. Febles’ post-offence conduct. She found that it had yet to be determined whether Mr. Febles’ crimes were so serious that his subsequent personal circumstances ought to be disregarded in considering his claim for refugee status. Justice Cromwell concurred with Justice Abella in the dissent.

PART III. ANALYSIS

A. *Febles* Overextends the Application of Article 1F(b)

As the history of the case law illustrates, the interpretation of Article 1F(b) has expanded dramatically between *Ward* and *Febles*. The clause, which was originally held to apply to fugitives from justice, has broadened to exclude any asylum seeker who has at some point in his or her lifetime committed a serious criminal offence, no matter how dated or what steps the individual has taken towards rehabilitation.

The majority judgment in *Febles*, however, creates a false dichotomy between a plain meaning interpretation of Article 1F(b), where the commission of a serious non-political crime excludes claimants *ab initio*, and a purposive interpretation of Article 1F(b), where exclusion is limited by implication to fugitives or currently dangerous criminals. There is another option. In my view, the text and purposes of Article 1F(b) all derive from the same principle. Whether condemning prior heinous acts, preventing fugitives from evading justice, or protecting the public from present danger, Article 1F(b), like Article F generally, is intended to exclude claimants *undeserving of protection*.⁸⁹ In failing to appreciate the potential relevance of expiation and rehabilitation, the Supreme Court of Canada in *Febles* overextends the application of Article 1F(b) to exclude claimants whom the *Refugee Convention* should protect. This becomes evident when considering the full context of the *Refugee Convention* and Article 1F(b) in particular.

B. Reinterpreting the *Refugee Convention*

The ratification and implementation of the *Refugee Convention* requires courts to strive for interpretations of domestic law that are consistent with Canada’s international obligations. Accordingly, in the recent decision of *Ezokola v Canada (Citizenship and*

86 *Ibid* at para 130.

87 *Ibid* at para 132.

88 *Ibid*.

89 See, for example, Hathaway, *supra* note 17 at 214; see also Asha Kaushal & Catherine Dauvergne, “The Growing Culture of Exclusion: Trends in Canadian Refugee Exclusions” (2011) 23 Int’l J Refugee L 54 (“[t]he primary, overarching rationale [of the exclusion clauses] is that the perpetrators of these acts are *undeserving of protection as refugees*” at 57).

Immigration) (“*Ezokola*”), the Supreme Court of Canada relied upon the purpose of the *Refugee Convention* together with the purpose of Article 1F(a) to guide its analysis in delineating the scope of exclusion of international criminals.⁹⁰ It is appropriate to interpret the scope of Article 1F(b) with respect to serious criminality under the same analytical framework. The Preamble of the *Refugee Convention* provides a starting point for interpreting Article 1F(b) and the Convention generally:

CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms [...].⁹¹

In *Ezokola*, Justice LeBel and Justice Fish, speaking for a unanimous court, emphasized the intent of the international community “to assure refugees the widest possible exercise of ... fundamental rights and freedoms.”⁹² The court also cited with approval its own finding in *Pushpanathan* that individual provisions of the *Refugee Convention* must be interpreted in the context of the “overarching and clear human rights object and purpose” of the document as a whole.⁹³ The inclusion of Article 1F in the *Refugee Convention* indicates that refugee protection is not an unqualified status available to everyone. According to the court in *Ezokola*, Article 1F(a) “guards against abuses of the *Refugee Convention*” by denying protection to individuals who “exploit the system to their own advantage.”⁹⁴ Article 1F(b), by extension, should similarly apply to exclude individuals who seek to exploit refugee status. This is consistent with the Supreme Court of Canada’s previous comments on the purpose of Article 1F(b) in *Pushpanathan* and *Ward*.

Analogous to *Ezokola*, Article 1F(b) must be interpreted in a way that both promotes the “broad humanitarian goals” of the *Refugee Convention* and protects “the integrity of international refugee protection.”⁹⁵ Contrary to the majority reasoning in *Febles*, excluding claimants who, despite their criminal past, have satisfactorily rehabilitated themselves would denigrate rather than protect the integrity of refugee status. The default exclusion of any person who commits a serious offence, regardless of the present circumstances of the individual, is overbroad in application and antithetical to the *Refugee Convention*’s fundamental humanitarian purpose. Article 1F(b) should not exclude individuals who, through their post-offence conduct of expiation and rehabilitation, have demonstrated their deservingness of international protection.

As the UNCHR, academic commentators, and previous courts have noted, there is no principled reason why circumstances subsequent to the commission of the offence are necessarily precluded from consideration.⁹⁶ Support for a contextualized rather than default application of Article 1F(b) is found in the UNCHR’s “Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention

90 *Ezokola*, *supra* note 8 at para 31; see also *Vienna Convention*, *supra* note 62, art 31.

91 *Refugee Convention*, *supra* note 2.

92 *Ezokola*, *supra* note 8 at para 32.

93 *Ibid*, citing *Pushpanathan*, *supra* note 3 at para 57.

94 *Ibid* at paras 33, 36.

95 *Ibid* at para 36.

96 See, for example, *Chan*, *supra* note 24 at para 11; *Hathaway*, *supra* note 17 at 282.

relating to the Status of Refugees” (“UNCHR Guidelines”),⁹⁷ which the Supreme Court of Canada used as an interpretive aid in *Ezokola*.⁹⁸ The UNHCR Guidelines state the following regarding the purposes underlying Article 1F:

The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied “scrupulously” to protect the integrity of the institution of asylum [...]. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner.⁹⁹

The UNHCR Guidelines go on to further consider the question of rehabilitation and expiation. They state that the application of Article 1F(b) may no longer be justified “where expiation of the crime is considered to have taken place.”¹⁰⁰ Evidence of expiation may include the claimant serving his or her penal sentence in full, the passage of time, the claimant expressing regret for his or her actions, and the claimant taking positive steps towards rehabilitation.¹⁰¹ However, as stated above and as noted in the dissenting reasons of Justice Abella in *Febles*, some crimes may be so “grave and heinous” that circumstances of expiation are trumped by the severity of the offence.¹⁰² According to the Background Note accompanying the UNHCR Guidelines, “this is more likely to be the case for crimes under Article 1F(a) or (c), than those falling under Article 1F(b).”¹⁰³ The Background Note adds further clarity to the position of the UNHCR, noting that the rationale behind the exclusion clauses is twofold: first, that “certain acts are so grave that they render their perpetrators undeserving” of refugee status; and second, that refugee protection should not “stand in the way of serious criminals facing justice.”¹⁰⁴ The Background Note stipulates that these purposes must be applied in the context of the “overriding humanitarian objective” of the *Refugee Convention* and, likewise, interpreted restrictively.¹⁰⁵

On the subject of expiation, the UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* adopts a test of whether or not the criminal character of the claimant still predominates:

The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption

97 *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR, HCR/GIP/03/05, 4 September 2003 [UNHCR Guidelines].

98 *Ezokola*, *supra* note 8 at paras 35, 76.

99 UNHCR Guidelines, *supra* note 97 at para 2 [emphasis added].

100 *Ibid* at para 23.

101 *Ibid*.

102 *Ibid*.

103 *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UNHCR, 4 September 2003, at para 73.

104 *Ibid* at para 3.

105 *Ibid* at paras 3-4.

that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.¹⁰⁶

This test can be subsumed under a test for deservingness, as current serious criminals are presumptively undeserving of refugee protection. Interpretive aids to the *Refugee Convention* thus add further support to the argument that the application of Article 1F(b) may involve considerations beyond the circumstances of the offence itself. Only then can fair consideration be given to claimants whose post-offence acts have demonstrated their present deservingness.

It requires no stretch of the imagination to recognize that the *Febles* interpretation would exclude persons who deserve compassion rather than condemnation. Part of the problem is the general definition that Parliament and the courts have set for serious criminality. As Justice Cromwell noted in *Németh*, Parliament has indicated that “a crime punishable by at least 10 years imprisonment constitutes a serious non-political crime within the meaning of Article 1F(b).”¹⁰⁷ In Canada, indictable offences punishable by a maximum of at least ten years include non-violent property offences where loss is valued at over \$5000, such as theft, possession of stolen property, fraud, and mischief.¹⁰⁸ This rule also captures drug-related offences, such as the trafficking or possession of certain controlled substances for the purpose of trafficking.¹⁰⁹ There is no requirement that the claimant in fact served any time in prison, leaving the definition of serious criminality open to considerable discretion. However, by not extending this discretion to circumstances of rehabilitation, claimants may be denied refugee protection because of a single mistake in their distant past, a mistake which need not be grave or violent. This approach ignores the intersection of common criminality with the circumstances of poverty and marginalization that many persecuted groups experience.

In addition, the *Febles* interpretation is inconsistent with the forward-looking nature of refugee status. The Supreme Court of Canada has consistently held that the purpose of Article 1F is to “exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status.”¹¹⁰ The interpretation of Article 1F(b) in *Febles*, however, limits consideration of the *bona fide* status of a refugee claimant to the time of the offence itself. While Chief Justice McLachlin is correct to point out there is no express language in Article 1F(b) that confines the provision to fugitives, presently dangerous claimants, or otherwise undeserving individuals, there is similarly nothing in the language of Article 1F(b) that confines application of the provision to the time of the offence itself.

The majority in *Febles* characterizes the interpretive divergence of Article 1F(b) as between, on the one hand, a broad interpretation excluding all serious criminals *ab initio*, versus a narrow interpretation on the other hand, which excludes only those who are dangerous, evading justice, or otherwise undeserving of protection. However, another way of characterizing the divergence is between an interpretation which limits consideration to the time of the offence itself, versus an interpretation that takes into account the full context of the offence and the offender. Viewed in this light, the majority interpretation may be seen as a restrictive construction of the treaty provision.

106 *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UNHCR, HCP/IP/4/Eng/REV.1, January 1992 at para 157, cited in *Pushpanathan*, *supra* note 3, at para 53.

107 *Németh*, *supra* note 41 at para 120.

108 *Criminal Code*, RSC 1985, c C-46, ss 334(a), 355(a), 380(1)(a), 430(3).

109 *Ibid*, ss 348-49; *Controlled Drugs and Substances Act*, SC 1996, c 19, ss 5(1)-(2).

110 *Pushpanathan*, *supra* note 3 at para 58 [emphasis added] (with respect to Article 1F(c)), cited in *Ezokola*, *supra* note 8 at para 38 [emphasis added] (with respect to Article 1F(a)).

Further, this restrictive interpretation is inconsistent with previous jurisprudence on how the exclusion clause of Article 1F ought to be applied. With respect to Article 1F(c), the Supreme Court of Canada has held that “any act performed before a person has obtained that status must be considered relevant.”¹¹¹ Relevant to the determination of whether a claim for refugee status is *bona fide* might very well include acts subsequent to the offence itself, such as circumstances of rehabilitation. Of course, an offence may be so severe that no subsequent act could justify the commission of the serious crime itself. Given the text of Article 1F(b), the seriousness of the offence is obviously central to the application of the clause. However, an exclusive focus on the offence, and not the offender, fails to fully capture the purpose that Article 1F(b), and the *Refugee Convention* as a whole, seek to achieve. In balancing the nature and severity of the offence with the overall circumstances of the claimant, it stands to reason that some individuals, despite a criminal past, are worthy of refugee status.

PART IV. PROCEDURAL BIFURCATION AND BILL C-31

Leaving aside the majority interpretation of Article 1F(b) in *Febles*, a claimant with a serious criminal background faces an additional, perhaps impassable, legislative hurdle. As a result of the passage of Bill C-31 in 2012, an increasingly broad class of “serious criminals” is now deemed ineligible to be referred to the RPD.

Subsection 101(1)(f) of the *IRPA*, unchanged by the amendments, reads as follows:

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

[...]

(f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c).¹¹²

Therefore refugee claimants falling within subsection 101(1)(f) are denied the procedural right to an oral hearing before the RPD, and are instead automatically diverted to the discretionary PRRA process of the Minister.¹¹³

Bill C-31 expands the category of claimants falling within subsection 101(1)(f) by deleting the requirement that a person is a danger to the public to constitute “serious criminality” [amended text italicized]:

101. (2) A claim is not ineligible by reason of serious criminality under paragraph (1)(f) unless

[...]

(b) in the case of inadmissibility by reason of a conviction outside Canada, *the Minister is of the opinion that the person is a danger to the public in Canada and* the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.¹¹⁴

111 *Pushpanathan*, *supra* note 3 at para 58.

112 *IRPA*, *supra* note 4.

113 Bill C-31, *supra* note 44.

114 *IRPA*, *supra* note 4, s 101(2), as amended by Bill C-31, *supra* note 44.

Consequently, even if the dissent's interpretation of Article 1F(b) had been adopted in *Febles*, any individual who meets the statutory definition of serious criminality would still be disqualified from refugee status determination before the RPD, regardless of whether the individual otherwise meets the criteria of exclusion under Article 1F(b). Parliament has attempted to avoid this seeming breach of its international obligations through a saving clause in the PRRA provisions of the *IRPA*. Section 113, as amended, provides the following [amended text italicized]:

113. Consideration of an application for protection shall be as follows:

[...]

(d) in the case of an applicant described in subsection 112(3) — *other than one described in subparagraph (e)(i) or (ii)* — consideration shall be on the basis of the factors set out in section 97 [insert title] and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada

[...]

(e) *in the case of the following applicants, consideration shall be on the basis of sections 96 to 98 and subparagraph (d)(i) or (ii), as the case may be:*

[...]

(i) *an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, unless they are found to be a person referred to in section F of Article 1 of the Refugee Convention.*¹¹⁵

Accordingly, the Minister under the PRRA scheme has taken on the obligation of evaluating the refugee claim of any claimant with a serious criminal past. Depending on the application of Article 1F, the evaluation for removal from Canada is assessed under either section 97 or sections 96 – 98. Interestingly, this regime seems to go against the interpretation in *Febles* that the mere fact of serious criminality, at least to the extent that serious criminality is defined in the *IRPA*, excludes a claimant *ab initio*. Regardless, Bill C-31 extinguishes the right of individuals with a serious criminal past to a hearing before the RPD, even if the claimant is rehabilitated and poses no present danger to Canada.

Further, section 112(3) of the *IRPA* precludes the granting of refugee protection from a PRRA application on grounds of serious criminality:

112. (3) Refugee protection may not result from an application for protection if the person

[...]

(b) is determined to be inadmissible on grounds of serious criminality [...] with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of

115 *IRPA*, *supra* note 4, s 113, as amended by Bill C-31, *supra* note 44.

Parliament punishable by a maximum term of imprisonment of at least 10 years [...].¹¹⁶

The question of exclusion under Article 1F(b), especially if circumstances of rehabilitation are relevant, should be evaluated on its merits before the RPD, where credibility can be fully assessed during an oral hearing. A claimant should be not barred from refugee status at the eligibility stage. However, as evidenced in the *Németh* decision, the courts are not willing to interfere with this administrative trend. As long as the wording of the legislation satisfies the minimum standard of Canada's international obligations, the courts have little incentive to interfere. This trend represents an unfortunate and significant step backwards from the fundamental principle that a claim to persecution must be given full and fair consideration in the country of refuge.¹¹⁷

CONCLUSION

The jurisprudence from *Ward* to *Febles* is a troubling path to follow. With respect, *Febles* exemplifies how Canada's international obligations risk being interpreted through the lens of domestic policy rather than precedent and principle. I have argued that if serious criminality is defined broadly, then Article 1F(b) must be applied with restraint. Excluding *ab initio* any individual with a "serious" criminal past ignores post-offence conduct that may demonstrate the individual deserves refugee protection. Without considering the present circumstances of refugee claimants, the default exclusion rule in *Febles* ignores the values behind the concepts of expiation and rehabilitation and, likewise, undermines Canada's humanitarian obligations in implementing the *Refugee Convention*. Further, Bill C-31, together with *Febles*, deprives any individual with a serious criminal background of the opportunity to have their refugee claim considered fully and fairly. With *Febles*, the Supreme Court of Canada had the opportunity to advance a flexible and just interpretation of Article 1F(b). Instead, the strictly literal interpretation of the majority leaves no room for second chances.

116 *IRPA*, *supra* note 4, s 112(3).

117 See *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 (available on CanLII) [cited to SCR].

CASE COMMENT

THE REQUIREMENT OF CONSENT TO WITHDRAW TREATMENT: A CRITIQUE OF THE *RASOULI* DECISION

Sarah Jones*

CITED: (2015) 20 Appeal 121

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INTRODUCTION

[T]he guiding principle for medical decision-making is not life in itself as an absolute value, but the patient's overall welfare. In most instances, this welfare imposes the maintenance of life, but this is not always the case. It is not the case when the prolonging of life has become purely artificial. It is not the case when the maintenance of life can only be achieved by an undue prolongation of the patient's agony. It is not the case when the maintenance of life results only in the infliction of additional suffering. In other words, it is not the case when the treatment is diverted from its proper end and merely prolongs the dying process rather than life itself.¹

This quotation, from the Law Reform Commission of Canada, highlights a danger inherent to the rapid advancement of life-sustaining medical technologies in our society. Modern hospitals are able to keep some patients alive in a comatose or vegetative state almost indefinitely and to use extraordinary measures to prevent their deaths.² This phenomenon has caused the final stages of life to become an increasingly technical and artificial process.³ Along with our aging population, this type of medical care has led to the emergence of pressing legal and ethical challenges.⁴ Although it may be possible to delay a patient's death through aggressive medical treatment, doing so will not always be the best course of action. There comes a point where life-sustaining measures are no longer serving the purpose of promoting recovery, but are simply extending patient suffering and tying up hospital resources.⁵ However, there has been much contention over who is entitled to decide when withdrawing life support is appropriate.

Historically, a doctor's expertise was highly revered and patients tended to trust their health care practitioners to make even the most vital and personal determinations unilaterally. Over the years, however, an increasing demand from patients for more autonomy and self-determination has resulted in a shift in the Canadian common law of medical consent.⁶ Balancing patient autonomy with physicians' professional and ethical duties illuminates potential conflicts.⁷ On one hand, patients can refuse life-saving treatment and consent to palliative sedation that may hasten death.⁸ On the other hand, physicians' duty to "do no harm" prevents them from actively bringing about death via assisted suicide or euthanasia.⁹ In the recent case of *Cuthbertson v Rasouli* ("*Rasouli*") the

1 The Law Reform Commission of Canada, *Working Paper 28: Euthanasia, Aiding Suicide and Cessation of Treatment* (Ottawa: Minister of Supply and Services Canada, 1982) at 59. Note that the Commission goes on to say that a physician should still continue provision of life support in such a scenario if the patient requests it.

2 *Airedale NHS Trust v Bland*, [1993] AC 789 at 8, 1 All ER 821 [*Airedale*]; Hilary Young, "Why Withdrawing Life-Sustaining Treatment Should Not Require "*Rasouli* Consent"" (2012) 6 McGill JL & Health 54 at 54.

3 Richard I Hall & Graeme M Rocker, "End-of-Life Care in the ICU: Treatments Provided When Life Support Was or Was Not Withdrawn" (2000) 118:5 Chest 1424 at 1429.

4 *Ibid* at 1424; Young, *supra* note 2 at 56.

5 Sharon Kirkey, "Rasouli case may make doctors reluctant to start life support in "borderline" cases" (16 December 2012) online: O Canada <<http://o.canada.com/news/rasouli-case-may-make-doctors-reluctant-to-start-life-support-in-borderline-cases>>; Young, *supra* note 2 at 57.

6 Ian McDowell, "Further Concepts in Medical Ethics", online: Society, the Individual, and Medicine <http://www.med.uottawa.ca/sim/data/Ethics2_e.htm>.

7 Graeme Rocker & Scott Dunbar, "Withholding or Withdrawal of Life Support: The Canadian Critical Care Society Position Paper" (2000) 16 J Palliat Care S53 at S54.

8 *Ibid*; McDowell, *supra* note 6; Young, *supra* note 2 at 57.

9 *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 (available on CanLII) [*Rodriguez* cited to SCR]. A new case, *Carter v Canada (AG)*, has recently been heard by the SCC and may overturn the prohibition on assisted suicide, although the judgement will be released post-publication: *Carter*, *infra* note 158.

Supreme Court of Canada (“SCC”) ruled that a substitute decision-maker (“SDM”) was entitled to insist on the continuation of her husband’s life support after multiple physicians concluded that he was in a permanent vegetative state with no hope of recovery.¹⁰

In this paper, I will critically analyze the SCC’s majority decision in *Rasouli*. I agree with the dissent in that the majority erred by interpreting Ontario’s *Health Care Consent Act* (“HCCA”) too broadly and thus concluded that the withdrawal of life support is “treatment” that requires consent.¹¹ The Court’s analysis ought to have considered the common law of consent, *Charter* rights, and policy issues to ultimately find that neither patient nor SDM consent should be required to withdraw medically ineffective life support. In Part I, I will give a brief overview of the facts and court decisions in *Rasouli* and the main legal issues discussed in this paper. In Part II, I will analyze the SCC’s statutory interpretation of the HCCA. I contend that the withdrawal of life support does not have a “health-related purpose” and was not intended to require consent under the HCCA.¹² In Part III, I will argue that the common law of consent does not require consent to withdraw life support. In Part IV, I will assess arguments for a right to refuse withdrawal grounded in the *Canadian Charter of Rights and Freedoms* (“*Charter*”),¹³ finding that these are also likely to fail. In Part V, I will discuss policy considerations and proposals for improving end-of-life care. Ultimately, although physicians should consult with patients’ families and SDMs, the physicians should be able to withdraw patients’ life support without consent, based on their professional expertise regarding whether or not such treatment is beneficial to the patient.

PART I. BACKGROUND

A. Facts

In October 2010, 59-year-old Hassan Rasouli contracted an infection after undergoing brain surgery that caused diffuse brain damage.¹⁴ His physicians, including Dr. Brian Cuthbertson and Dr. Gordon Rubinfeld of Sunnybrook Health Sciences Centre, provided him with artificial nutrition and hydration, and had him on a mechanical ventilator.¹⁵ These treatments could potentially keep him alive for years in a permanent vegetative or minimally conscious state.¹⁶ His physicians had come to believe that the continuation of these life-sustaining treatments was no longer serving its purpose.¹⁷ They believed that Mr. Rasouli had no chance of recovery, and thus there was no medical benefit to continuation. The life support served only to subject Mr. Rasouli to “a long progression of complications as his body deteriorate[d]”.¹⁸

The doctors wished to remove Mr. Rasouli’s life support so that he could die peacefully. This process would entail removing life-sustaining medical therapy or intervention and would usually involve administering palliative care to allow Mr. Rasouli to succumb to

10 *Cuthbertson v Rasouli*, 2013 SCC 53 (available on CanLII) [*Rasouli*]. Please note, the change in Mr. Rasouli’s diagnosis from vegetative state to minimally conscious does not affect the legal arguments and discussion in this paper.

11 *Health Care Consent Act*, SO 1996, c 2 [HCCA].

12 *Ibid*, s 2(1).

13 *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*].

14 *Rasouli*, *supra* note 10 at para 1.

15 *Ibid* at para 5.

16 *Ibid* at para 1.

17 *Ibid* at para 6.

18 *Ibid* at para 1.

his underlying disease.¹⁹ Dr. Parichehr Salasel,²⁰ Mr. Rasouli's wife and SDM, disagreed with the doctors. She insisted that there was still hope of recovery and that her husband, because of his Shia Muslim religious beliefs, would have wanted his life support continued.²¹ The doctors obtained a concurring second opinion from an independent neurologist, attempted to transfer Mr. Rasouli to another institution, and offered Dr. Salasel the opportunity to obtain a third opinion, which she chose not to do.²² The doctors believed that her consent should not be required in order to proceed with the removal of Mr. Rasouli's life support. Dr. Salasel applied to the Ontario Superior Court for an injunction.²³

B. Court Decisions

The Ontario Superior Court granted Dr. Salasel's injunction, declaring that Mr. Rasouli's physicians were not entitled to withdraw life support without consent.²⁴ The court confirmed that physicians wishing to challenge an SDM's decision must do so via the *HCCA's* Consent and Capacity Board ("the Board") on the grounds of the patient's best interest.²⁵ The physicians appealed this decision in the Ontario Court of Appeal in *Rasouli (Litigation guardian of) v Sunnybrook Health Sciences Centre* ("*Rasouli ONCA*"), but were again unsuccessful.²⁶ The Ontario Court of Appeal concluded that the withdrawal of life support was integrally linked to the administration of palliative care, and was thus a "treatment package"²⁷ falling under the definition of "treatment"²⁸ in the *HCCA*. Section 10(1) of the *HCCA* states that a patient's, or their SDM's, consent must be acquired before a health care practitioner can administer treatment.²⁹ Therefore, consent would be required in order to withdraw life support.

The SCC upheld the lower court's decisions. Chief Justice McLachlin, writing for the majority, found that the withdrawal of life support constituted "treatment" as defined in the *HCCA*.³⁰ She noted that, since it was covered by the statute, there was no need to make a ruling with regard to the common law on this issue.³¹

C. Main Legal Issues

The main issues addressed in this paper are whether or not the SCC erred in interpreting "treatment" to include the withdrawal of life support, and whether or not there is another legal basis for a requirement of consent to withdraw life support. I will argue that a proper interpretation of the *HCCA* does not require consent for the withdrawal of life support. Even though the SCC has already made its decision with respect to Mr. Rasouli, an analysis of the common law and *Charter* regarding consent to withdrawal of life support may still make its way to the Court as provinces other than Ontario, which are

19 Rocker & Dunbar, *supra* note 7 at S53.

20 Dr. Salasel was a physician in Iran before she immigrated to Canada with her family.

21 *Rasouli*, *supra* note 10 at para 7.

22 *Ibid* at para 8.

23 *Rasouli (Litigation Guardian of) v Sunnybrook Health Sciences Centre*, 2011 ONSC 1500 (available on CanLII).

24 *Ibid*.

25 *HCCA*, *supra* note 11, s 69.

26 *Rasouli (Litigation guardian of) v Sunnybrook Health Sciences Centre*, 2011 ONCA 482 (available on CanLII) [*Rasouli ONCA*].

27 *Ibid* at para 52.

28 *HCCA*, *supra* note 11, s 2(1).

29 *Ibid*, s 10(1).

30 *Rasouli*, *supra* note 10 at para 76.

31 *Ibid* at para 16.

not bound by the *HCCA*, still lack guidance.³² I will argue that the common law does not support a requirement for consent to withdraw life support and *Charter* claims to a right to consent are likely to fail. Furthermore, it is preferable, from a policy standpoint, that physicians have the final say regarding the withdrawal of medically ineffective life support. Concerns about physicians having the final say, such as SDM and family discontentment with end-of-life decisions, can be addressed and reduced through the initiatives I will propose in Part V.

PART II. STATUTORY INTERPRETATION

Under section 10(1) of the *HCCA*, treatment cannot be administered unless “the person has given consent” or “the person’s substitute decision-maker has given consent on the person’s behalf.”³³ Chief Justice McLachlin ruled that the withdrawal of life support constituted “treatment” as defined in the *HCCA* and therefore imposed an obligation on Mr. Rasouli’s physicians to obtain consent before withdrawal. The Chief Justice employed Driedger’s modern approach to statutory interpretation. This contextual approach requires consideration of a term’s ordinary and grammatical sense, the scheme of the act, the purpose of the act, and the intention of the Legislature.³⁴ I will apply this approach to both the definitions of “treatment” and “plan of treatment” within the *HCCA* to illustrate why Chief Justice McLachlin’s interpretation of these terms was inadequate.

A. Treatment

i. Ordinary Meaning

At first blush, the term “treatment” would not ordinarily be thought to include the withdrawal of treatment. In *Child and Family Services (CFS) v RL and SHL* (“*Lavallee*”), the word “treatment” in the *Child and Family Services Act* was ruled not to include withdrawal.³⁵ However, the *HCCA* provides a definition in section 2(1) which Chief Justice McLachlin claims broadens the meaning. “[T]reatment” is defined as “anything that is done for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan.”³⁶

The requirement that a treatment have a “health-related purpose”³⁷ serves to, in Chief Justice McLachlin’s words, “set limits on when actions taken by health practitioners will require consent.”³⁸ However, her interpretation of a health-related purpose is so broad that it fails to meaningfully limit the definition at all. She states that a health-related purpose should not be restricted to what the doctors believe has medical benefit, or otherwise the Legislature would have used that terminology.³⁹ When withdrawing Mr. Rasouli’s life support, the health-related purpose would be to “ease suffering and prevent indignity at the end of life.”⁴⁰ This could fall under the “therapeutic”, “preventative” or “palliative”

32 Cristin Schmitz, “SCC rules against physicians in end-of-life treatment case”, *The Lawyers Weekly* (1 November 2013) 1; “The Limited Effect of the Decision in Rasouli” (4 November 2013), online: Bull Housser <<http://www.bht.com/resources/limited-effect-decision-rasouli>>.

33 *HCCA*, *supra* note 11, s 10(1).

34 Elmer Driedger, *The Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983).

35 *Child and Family Services (CFS) v RL and SHL*, [1997] 154 DLR (4th) 409 (available on CanLII) (MBCA) [*Lavallee* cited to DLR].

36 *HCCA*, *supra* note 11, s 2(1).

37 *Ibid*, s 2(1).

38 *Rasouli*, *supra* note 10 at para 37.

39 *Ibid* at para 39.

40 *Ibid* at para 61.

health-related purposes listed in the definition of “treatment”.⁴¹ In the dissenting reasons, however, Justice Karakatsanis contends that the withdrawal of Mr. Rasouli’s life support does not have a health-related purpose. The purpose is simply to “bring treatment to an end.”⁴²

The problem with Chief Justice McLachlin’s broad interpretation of a health-related purpose is that it fails to differentiate between the withdrawal of life support and the withdrawal of other types of treatment.⁴³ Consider a patient receiving a prescription drug to treat a disease. If that patient begins to experience severe side-effects that outweigh its benefits, then ceasing to provide this treatment would certainly prevent the suffering caused by the side-effects. Using Chief Justice McLachlin’s logic, this would be preventative, and thus a health-related purpose. However, the prescribing physician would be under no obligation to continue prescribing the drug, regardless of the patient’s wishes. To continue supplying the drug simply because the patient refused consent to withdraw this treatment would be akin to the doctor poisoning the patient. Chief Justice McLachlin states that it would be absurd for consent to be required in such a scenario but neglects to provide a meaningful way to distinguish it from the withdrawal of life support.⁴⁴ Thus, she draws a vague and arbitrary line, creating uncertainty around when the *HCCA* might be applied in cases of withdrawal of other treatments.

Philippa Foot’s “existing threat” theory of moral responsibility provides a possible solution.⁴⁵ According to Foot, if a victim or, for the purposes of this discussion, a patient is under a pre-existing threat of harm, then the agent, or doctor, merely allowed the harm to occur. On the other hand, if the doctor were to initiate a new threat, he or she would actually be *doing* the harm.⁴⁶ I propose that for the act to have a health-related purpose the doctor must be “doing” rather than simply “allowing.”

Some modifications have been suggested for Foot’s theory. Notably, initiating and sustaining have both been categorized as “doing,” whereas, allowing and enabling have both been considered “allowing.”⁴⁷ When a doctor removes life support, he or she is enabling the existing threat, such as the underlying disease, to harm the patient. The doctor would thus be “allowing” harm rather than “doing” harm. In contrast, where a doctor administers a harmful drug, he or she is initiating a new threat and thus “doing” harm rather than “allowing” it.

This theory has been broadened to also include neutral or beneficial results.⁴⁸ Any benefits, or what Chief Justice McLachlin calls “health-related purposes”, that might result from something that a doctor does could therefore be analyzed from the existing threat theory. This theory examines where the benefits of withdrawing life support, mainly the easing of suffering and prevention of indignity, come from. Is the doctor initiating this benefit, or is the doctor simply enabling it? In more concrete terms, the benefit from removing life support would be that the patient would die more quickly and

41 *Ibid* at para 49; *HCCA*, *supra* note 11, s 2(1).

42 *Rasouli*, *supra* note 10 at para 154.

43 Hilary Young, “Cuthbertson v Rasouli: Continued Confusion Over Consent-Based Entitlements to Life Support” (9 April 2014) at 20, online: Social Science Research Network <<http://ssrn.com/abstract=2463676>> [Young, “Entitlements”].

44 *Rasouli*, *supra* note 10 at para 66.

45 Philippa Foot, “Killing and Letting Die” in Jay L Garfield & Patricia Hennessey, eds, *Abortion: Moral and Legal Perspectives* (Amherst: University of Massachusetts Press, 1984) 177; Fiona Woollard, “Doing and Allowing, Threats and Sequences” (2008) 89 *Pacific Philosophical Quarterly* 261.

46 Foot, *supra* note 45.

47 Woollard, *supra* note 45 at 263; Philippa Foot, “The Problem of Abortion and the Doctrine of Double Effect” (1967) 5 *Trinity* 5 at 12.

48 Woollard, *supra* note 45 at 263.

avoid multiple surgeries, bedsores, infections, organ failure, and other aggressive life-sustaining procedures.⁴⁹ This type of death is not a new possibility introduced by the doctors; it is an existing possibility that has been enabled by the removal of the life support. Thus, withdrawing life support would be “allowing” and should not be categorized as a health-related purpose. If a doctor wishes to further ease a patient’s suffering through palliative care, then the doctor would be introducing a new possibility or benefit and the act of administering palliative care would then have a health-related purpose.

A particularly relevant example by Warren Quinn was discussed by Fiona Woollard in her article “Doing and Allowing: Threats and Sequences”:⁵⁰

Suppose I have always fired up my aged neighbor’s furnace before it runs out of fuel. I haven’t promised to do it, but I have always done it and intend to continue. Now suppose that an emergency arises involving five other equally close and needy friends who live far away, and that I can save them only by going off immediately and letting my neighbor freeze.⁵¹

Woollard uses this case to explain that, even though the threat of harm was not “already in train,” because the agent had been preventing it until that point, it is still an existing possibility and the failure to fire up the furnace would be considered “allowing”. Likewise, the doctors who are consistently preventing a patient from dying through life-sustaining measures are “allowing” when they cease this prevention.⁵²

Initially, Mr. Rasouli’s life support would presumably have had the purpose of keeping him alive so that he could recover. However, once recovery was no longer a possibility, the treatment could not be said to be accomplishing its purpose.⁵³ The true purpose of withdrawal would be to bring the treatment to an end and cease the infliction of unnecessary harm on Mr. Rasouli.⁵⁴ To do so would enable the existing threat of disease to take its course, with the doctors simply allowing this to happen. Similarly, when doctors attempt to resuscitate patients, they may decide, based on medical expertise, that resuscitation is not going to work and cease trying to apply it. It would be completely impractical to require doctors to obtain consent to cease resuscitation because they could potentially be ordered to continue trying to resuscitate indefinitely. At some point the doctors need to be able to make the call that treatments are not performing their purposes and be able to allow the existing threat of death to occur.

49 Laura Hawryluck, “A Response to “Why Withdrawing Life-Sustaining Treatment Should Not Require ‘Rasouli Consent’” (2012) 6 McGill JL & Health 105 at 106; Arthur Schafer, “A win for families, a loss for common sense”, *The Globe and Mail* (21 October 2013) A11.

50 Woollard, *supra* note 45 at 271.

51 Warren Quinn, “Intentions, and Consequences: The Doctrine of Doing and Allowing” (1989) 98:3 *The Philosophical Review* 287 at 298.

52 Woollard qualifies this part of the theory to encompass only the removal of barriers which are not the agent’s own resources and are in use to prevent or delay the possibility in question. Thus, since life support is the hospital’s resource and the doctors are agents of the hospital, they can remove it to “allow” a possibility to occur. In contrast, an outsider who is not affiliated with the hospital would be “doing” harm if they were to remove the life support: Woollard, *supra* note 45 at 274.

53 *Rasouli*, *supra* note 10 at para 154.

54 Kirkey, *supra* note 5; Hawryluck, *supra* note 49 at 110.

ii. Scheme of the Act

Terms in a statute should not be interpreted in isolation, so it is important to assess the scheme of the Act.⁵⁵ Withdrawal of life support is not specifically mentioned in the definition of “treatment” under the *HCCA*. The implied exclusion maxim assumes that such silence is deliberate because the Legislature would have mentioned withdrawal of life support expressly if it were meant to be included.⁵⁶ However, this maxim has strong critiques and should be applied cautiously.⁵⁷

The second part of the definition of “treatment” specifies a few things that are meant to be included as treatment but may not be typically thought of as such; for example, the definition includes a course of treatment, plan of treatment, and community treatment plan.⁵⁸ Withdrawal of life support is not listed. Unless it were something obviously seen to be treatment, the Legislature would have specified. The courts have decided that withdrawal of treatments in general do not constitute treatment. The common law on withdrawal of life support, though unsettled, also indicates a reluctance to view withdrawal as treatment.⁵⁹ Inclusion of it in the definition of treatment in the *HCCA* would be a significant departure from the common law, which should be clearly expressed by the Legislature.⁶⁰ Justice Karakatsanis identifies that the *HCCA* provides no special provisions to deal with end-of-life decisions.⁶¹ The Legislature would have been clearer if it intended to fundamentally alter the common law to create entitlement to treatment by requiring consent to withdraw life support. The *HCCA* specifically states that it does not affect the common law of consent for anything that does not fall under the definition of treatment, which does not include withdrawing life support.⁶²

Chief Justice McLachlin applies a broad interpretation because the *HCCA* specifies actions which are *not* to be included in the definition of treatment. Under the definition, the *HCCA* excludes actions such as “the assessment or examination of a person,” “the taking of a person’s health history,” “the communication of an assessment or diagnosis,” and “a treatment that in the circumstances poses little or no risk of harm to the person.”⁶³ Therefore, Chief Justice McLachlin states that if withdrawal of life support were meant to be excluded as well, it would have been listed in these exceptions.⁶⁴ However, these exclusions actually further support the narrowing, not the broadening, of the definition of treatment. In the *HCCA*, Parliament has excluded trivial acts from the definition of treatment, showing respect to doctors and limiting patient autonomy where it is appropriate.⁶⁵ All of these listed exclusions, if they were to be considered “treatment”, would require what I will hereafter refer to as “Typical Common Law Consent.” The latter allows patients to grant or refuse consent to treatment that the physician is willing

55 *Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 711*, 2005 SCC 70 at para 18 (available on CanLII).

56 *R(C) v Children’s Aid Society of Hamilton*, [2004] 70 OR (3d) 618 at para 23 (available on CanLII) (Sup Ct J).

57 *65302 British Columbia Ltd v Canada*, [1999] 3 SCR 804 at para 11 (available on CanLII); *Tetreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22 at para 17 (available on CanLII).

58 *HCCA*, *supra* note 11, s 2(1).

59 *Rasouli*, *supra* note 10 at para 53; *Schmitz*, *supra* note 32.

60 *Young*, *supra* note 2 at 95.

61 *Rasouli*, *supra* note 10 at para 141, Karakatsanis J, dissenting.

62 *HCCA*, *supra* note 11, s 8(2).

63 *Ibid*, s 2(1).

64 *Rasouli*, *supra* note 10 at para 47.

65 *Young*, *supra* note 2 at 68.

to provide, but does not allow patients to demand treatment that has not been offered by the physician.⁶⁶

Withdrawal of life support would require a very different kind of consent, which law professor Hilary Young labeled as, and which I will hereafter refer to as, “Rasouli Consent.” By categorizing withdrawal as treatment, patients and SDMs would be given authority to demand the continuation of treatment.⁶⁷ That is to say, the patients would have the power to force the doctors to treat rather than just the power to stop them from treating. Therefore, the fact that withdrawal of treatment is not listed along with the other exclusions does not mean that it was intended to be included as treatment, but rather that it is a completely different category than those trivial Typical Common Law Consent issues. Parliament’s failure to mention withdrawal of life support in these relevant sections of the *HCCA* is likely because the Act was not intended to apply to that scenario at all.

Chief Justice McLachlin explains that, in finding that the withdrawal of life support is treatment under the *HCCA*, there is still recourse for physicians through the Board created under Part V of the *HCCA*.⁶⁸ Physicians may ask the Board to overturn an SDM’s decision if the SDM is not acting in accordance with the patient’s prior wishes or best interest, or if any change in prognosis has rendered a prior wish inapplicable. Instead of placing the legal burden on the families to take the disagreement to court, it is up to the physician to bring their concerns to the Board.⁶⁹ The Board is then able to take into account medical benefit as part of its analysis.⁷⁰ For the past 17 years, the Board has been utilized to resolve disagreements over end-of-life decisions and has already handled cases dealing with the withdrawal of life support.⁷¹ If needed, the Board is also subject to judicial review to ensure that it has acted within its mandate and in accordance with the *Charter*.⁷²

However, the ability of the Board to deal with the range of considerations and circumstances that arise in decisions to withdraw life support is quite limited.⁷³ For example, the physician’s professional and ethical interests and resource allocation will not be considered by the Board.⁷⁴ Furthermore, the physician has little recourse where the patient has a prior expressed wish to continue life support.⁷⁵ The Board’s ability to consider a best-interest analysis and medical benefit only arises where there is no prior wish, or where the prior wish is no longer applicable and the patient, if capable, would likely consent because the prognosis has significantly improved.⁷⁶ Unfortunately, the relevant cases would usually involve a physician wanting to withdraw life support because the patient’s prognosis has worsened rather than improved. This is not contemplated within the *HCCA*, likely because the *HCCA* was not intended to cover the situation of treatment withdrawal.

66 *Lavallee, supra* note 35. In *Lavallee*, the word “treatment” in the *Child and Family Services Act* was only applied to Typical Common Law Consent.

67 Young, *supra* note 2 at 54.

68 *HCCA, supra* note 11, s 37(1).

69 *Rasouli, supra* note 10 at para 114.

70 *Ibid* at para 27; Daphne Jarvis, “Canada: The Impact of the SCC Decision in the “Rasouli” Case” (28 October 2013), online: Mondaq Ltd <<http://www.mondaq.com/canada/x/271154/trials+appeals+compensation/The+Impact+Of+The+SCC+Decision+In+The+Rasouli+Case>>.

71 *Rasouli, supra* note 10 at para 102, McLachlin CJ.

72 *Ibid* at para 100.

73 Schafer, *supra* note 49.

74 Young, *supra* note 2 at 93.

75 *Ibid* at 94.

76 *HCCA, supra* note 11, s 36(3).

Other concerns with leaving disputes over withdrawal of life support to the Board include the following:

- The only medical specialists on the Board are psychiatrists and not medical doctors;
- The process is not quick and efficient despite misconceptions to the contrary; and
- There is no corresponding body to resolve disputes in other provinces.⁷⁷

It is unclear how this will apply to provinces like British Columbia, which has very similar legislation to the *HCCA* but does not have the Board to resolve disputes that arise.⁷⁸ The Board was not created to handle disputes over the withdrawal of medically ineffective treatment. It is ill-equipped to do so, and the language of the *HCCA* does not support such an interpretation.

Finally, the *HCCA* articulates when consent is required and outlines the role of SDMs with regard to consent. However, it does not create new causes of action or remedies for failure to obtain consent.⁷⁹ Presumably, a failure to respect Typical Common Law Consent would be subject to common law recourses, such as battery.⁸⁰ Those recourses, though, would not be applicable to Rasouli Consent.⁸¹ Thus, patients and SDMs would have no cause of action if a doctor withdrew life support without consent. This would be true even if withdrawal were considered treatment as there is no common law remedy for simply breaching a statute.⁸²

iii. Purpose of the Act/Intention of Parliament

The *HCCA* and similar statutes arose because many provinces found the common law unsatisfactory with respects to medical decision-making for incapable patients.⁸³ The intention was to codify and modify the common law on this issue.⁸⁴ However, the intention was not to override the common law of consent as a comprehensive scheme, only to provide clarity and a way to acknowledge patient autonomy even when dealing with incapacity.⁸⁵ It is clear that respect for autonomy is an important legislative goal; however, there is no reason to believe that Parliament intended to create a new right for patients to demand treatment. If the *HCCA* was intended to go beyond the typical common law right to refuse treatment by granting a right to insist on continuation of medically ineffective treatment, it would have done so in clearer terms. Justice Karakatsanis points out that there is no evidence in the legislative history that Parliament intended to require consent for procedures the physician was not willing to provide.⁸⁶ If Parliament wanted to create such entitlements, the issue would have most likely been specifically addressed and been present in legislative debate.

Chief Justice McLachlin states that the inclusion of withdrawal of life support as “treatment” is in line with these purposes as it impacts autonomy “in the most fundamental

77 *Jarvis, supra* note 70.

78 *Schmitz, supra* note 32.

79 *Young, supra* note 2 at 80.

80 *Ibid* at 61.

81 See Part III for a common law analysis of Rasouli Consent.

82 *The Queen (Can) v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 (available on CanLII) [cited to SCR].

83 *Rasouli, supra* note 10 at para 133.

84 *Ibid* at para 17.

85 *Ibid* at para 164.

86 *Ibid* at para 165.

way” and goes to the heart of the *HCCA*.⁸⁷ However, the purpose of promoting autonomy is not absolute. The *HCCA* was not meant to give complete control to patients and their SDMs. There is still value in ensuring adequate medical treatment.⁸⁸ The purpose of the *HCCA* is not to allow patients to demand whatever treatment they like. Even Chief Justice McLachlin concedes that it was not intended to impose a requirement to obtain consent for all types of withholding or withdrawal of treatment.⁸⁹ This would be absurd and go against the strong presumption that the Legislature is rational and competent. Any interpretation that results in absurdity should be abandoned. Thus, if the withdrawal of life support is treatment, it must be an exception. It is unlikely that the Legislature would create such an exception without expressly indicating that it was doing so.

The *HCCA* was not intended to overturn basic principles of the common law, and a requirement for consent to withdraw treatment generally has not been recognized in the jurisprudence.⁹⁰ To infer that the withdrawal of life support is treatment brings up complications regarding whether other types of withdrawal should be included, or whether the type of life support could change whether or not consent is required.⁹¹ To make a fundamental change to the common law without specifying the details is against the purposes of the *HCCA*. The *HCCA* should serve to clarify and provide guidance with regard to consent, rather than overturn and complicate it.

B. Plan of Treatment

i. Ordinary Meaning

An argument can be made that withdrawal of life support is included in the definition of “plan of treatment,” which is considered treatment under the *HCCA*. The definition in section 2(1) says that a plan of treatment is “the administration [...] of various treatments or courses of treatment and may, in addition, provide for the *withholding or withdrawal of treatment*.”⁹² At first glance, this definition seems like it could encompass withdrawal of life support. However, Chief Justice McLachlin’s reasoning for withdrawal of life support being a plan of treatment is insufficient and very similar to the flawed “treatment package” approach advanced by the Court of Appeal.

As laid out by the Ontario Court of Appeal in *Rasouli ONCA*, it could be argued that withdrawal of life-support is ‘integrally linked’ to the administration of palliative care, and is thus part of a “treatment package.”⁹³ Withdrawal of life support is generally followed by palliative care, and since, in one physician’s opinion, it would be “barbaric” to remove life support without supplying palliative care, what the physicians are really proposing is to replace one treatment (life support) with another (palliative care).⁹⁴ Since the administration of palliative care is clearly treatment under the *HCCA* and requires consent, the withdrawal of life support would therefore similarly require consent.

This argument, however, has been criticized.⁹⁵ Chief Justice McLachlin briefly acknowledges that the treatment package argument is overly broad and then proceeds to offer her own reasons for why the withdrawal of life support would be part of a plan

87 *Ibid* at para 68.

88 *Ibid* at para 87.

89 *Ibid* at para 48.

90 *Ibid* at para 53.

91 *Ibid* at para 160, Karakatsanis J, dissenting.

92 *HCCA*, *supra* note 11, s 2(1) [emphasis added].

93 *Rasouli ONCA*, *supra* note 26 at para 52.

94 Andrew B Cooper, Paula Chidwick & Robert Sibbald, “Court Rules that Withdrawal of Life Support is a Plan of Treatment Requiring Consent” (2011) 183:8 CMAJ E467.

95 Young, *supra* note 2.

of treatment.⁹⁶ Unfortunately, her supposedly new rationale is simply a reworded version of the treatment package argument and is subject to the same weaknesses. Chief Justice McLachlin explains that the withdrawal of life support is closely tied to palliative care and that palliative care will inevitably be administered in a case like *Rasouli*, thereby creating a “plan of treatment.”⁹⁷ However, the link between withdrawal of life support and the administration of palliative care is purely a statistical connection and the two are not always bound together.⁹⁸ Justice Karakatsanis acknowledges that the relationship between withdrawal of life support and the administration of palliative care depends on the specific circumstances of each patient.⁹⁹ Palliative care may already have begun before contemplating the withdrawal of life support, and patients or their SDMs may still refuse palliative care regardless of whether their life support is removed.¹⁰⁰ The decision to withdraw life support and the decision to begin palliative care are two separate decisions and consenting to one does not necessitate consenting to the other. It would be arbitrary to say that the requirement for consent to the withdrawal of life support depends on whether or not palliative care preceded the decision.

Another issue with the treatment package approach is that it does not provide a meaningful distinction between the withdrawal of life support and other withdrawals that may be statistically connected to palliative care. An example of this would be when physicians determine that a patient’s chemotherapy is no longer working and they feel that continuing would only cause the patient unnecessary suffering without any therapeutic benefit.¹⁰¹ After ceasing the chemotherapy treatments, the patient will often be provided with palliative care. The Court of Appeal in *Rasouli* decided that the distinction between withdrawal of life support and withdrawal of other treatments, like chemotherapy, is whether or not palliative care and death would follow *imminently*.¹⁰² This is an arbitrary distinction that has no basis in ethics or in medicine.

Whether or not the patient is entitled to demand continuation of ineffective and possibly harmful treatment should not rest on the gap of time between the withdrawal and the administration of palliative care.¹⁰³ The Court also did not address how much time is allowed in order to qualify as “imminent.”¹⁰⁴ Withdrawal of life support does not necessarily lead to death, and when it does, the time it takes can vary.¹⁰⁵ Removal of certain types of life support can result in longer wait times than others. For instance, the removal of a respirator could lead to death quite quickly, whereas the removal of artificial nutrition and hydration could take much longer for death to occur.¹⁰⁶ It would be absurd to require consent for the removal of a respirator and not for the removal of artificial nutrition.

ii. Scheme of the Act

The definition of “plan of treatment” not only includes the “withdrawal,” but also “withholding,” of treatment. Specifically, the definition says that a plan of treatment “may,

96 *Rasouli*, *supra* note 10 at para 66.

97 *Ibid* at para 68.

98 *Ibid* at para 161, Karakatsanis J, dissenting; Young, *supra* note 2 at 75.

99 *Rasouli*, *supra* note 10 at para 161.

100 Young, *supra* note 2 at 75.

101 *Rasouli* ONCA, *supra* note 26 at para 53.

102 *Ibid*.

103 Young, *supra* note 2 at 77.

104 *Rasouli* ONCA, *supra* note 26 at para 53.

105 Deborah Cook et al, “Withdrawal of Mechanical Ventilation in Anticipation of Death in the Intensive Care Unit” (2003) 349 N Engl J Med 1123.

106 Young, *supra* note 2 at 78.

in addition, provide for the withholding or withdrawal of treatment.”¹⁰⁷ As these terms are presented together, it can be assumed that they should be interpreted consistently. If withdrawal of life support can be included in an interpretation of “treatment plan”, then the withholding of life support should be included in the same way. It is clear that withholding life support can be just as integrally linked to palliative care as its withdrawal is. There can also be varying gaps of time between the decision to withhold life support, the administration of palliative care, and death, likely even more so than between life support withdrawal and the administration of palliative care.¹⁰⁸ Surely the Legislature is not saying that physicians would be required to obtain consent in the decision to withhold life support. This would be an absurd result as it would mean that patients or their SDMs would be granted the right to demand life support even when it is not needed and it would not be considered medically useful. By the same logic, consent would be required for “withholding” a kidney transplant, regardless of wait lists or the availability of a suitable kidney.¹⁰⁹ Thus, whether or not withholding life support would be considered part of a plan of treatment must rest on another distinction, and so too should its withdrawal.

iii. Purpose of the Act/Intention of Parliament

Chief Justice McLachlin expresses a concern that, if the withdrawal of life support is not necessarily a “treatment” or a “plan of treatment,” then physicians would have too much discretion to decide whether they want to present the option of withdrawing life support to the patient as a plan of treatment or not. She says this would result in arbitrariness as to when the withdrawal would require consent as physicians could simply change their wording and present elements of a plan of treatment separately in order to avoid the consent requirement.¹¹⁰ This would fundamentally undermine patient autonomy and would not be in line with the purpose of the *HCCA*.

However, the *HCCA* need not be interpreted in such a way as to give physicians such broad discretion. When a physician is taking multiple steps, the overall purpose of the plan, rather than the physician’s whim, should determine whether or not any given withdrawal should be a plan of treatment or part of one. If the overall plan has a health-related purpose, then any withholding or withdrawal included within that plan would be considered part of a plan of treatment requiring consent for the purposes of the *HCCA*. If the plan does not have a health-related purpose, then it would not be considered a plan of treatment for the purposes of the *HCCA* and, thus, those withholdings and withdrawals would not require consent. The purpose of the withdrawal of life support in cases like *Rasouli* is *not* a “health-related purpose,” but rather the purpose is to cease the prolongation of the dying process and the suffering caused by the physician intervention through administering the life support in the first place. Whether or not palliative care is administered afterwards is a separate decision and does not change the purpose of the withdrawal. On the other hand, if a physician wanted to try a new aggressive treatment that was meant to aid in recovery but was incompatible with the patient’s life support, there would be a health-related purpose. The physician would be proposing a plan with the therapeutic purpose of curing the patient and withdrawal of life support could be considered as part of this plan of treatment.

107 *HCCA*, *supra* note 11, s 2(1).

108 John M Luce & Ann Alpers, “Legal Aspects of Withholding and Withdrawing Life Support from Critically Ill Patients in the United States and Providing Palliative Care to Them” (2000) 162 *Am J Respir Crit Care Med* 2029 at 2031.

109 Kirkey, *supra* note 5; Young, *supra* note 2 at 78.

110 *Rasouli*, *supra* note 10 at para 57.

C. Conclusion on Statutory Interpretation

If the *HCCA* was intended to apply to the withdrawal of life support it would have expressly said so. Judging by the ordinary meaning, scheme of the act, purpose of the act, and intention of Parliament, withdrawal of life support should not be included within the definition of treatment or plan of treatment. By inferring otherwise, Chief Justice McLachlin only created unnecessary confusion and arbitrariness. For the above reasons, I submit that the majority decision in *Rasouli* erred in interpreting the definition of “treatment” under the *HCCA* in an overly broad manner. The Court should have determined that the *HCCA* did not apply and whether Mr. Rasouli’s physicians were required to obtain consent before withdrawal ought to have been decided through the common law. Since the ruling currently only applies in Ontario, the rest of Canada may still seek guidance through the common law or the *Charter*.

PART III. COMMON LAW

In this section, I will analyze the common law of consent. The narrow formulation of the SCC decision in *Rasouli* left many unanswered questions for the rest of the country. In a recent article, Professor Young canvasses how *Rasouli* might be applied outside Ontario. She examines those areas that would be the least influenced by the decision and thus most likely to require a common law determination regarding withdrawal of life support.¹¹¹ British Columbia,¹¹² Prince Edward Island,¹¹³ and the Yukon¹¹⁴ have statutes similar to the *HCCA* that require consent for “treatment” or “health care.” It is likely that *Rasouli* would be persuasive in interpreting the law in those jurisdictions.¹¹⁵ However, the connection is less clear elsewhere in Canada. In Manitoba,¹¹⁶ Newfoundland,¹¹⁷ and the Northwest Territories¹¹⁸ the statutes define “treatment” and “health care” in a similar manner but do not require consent for such acts. Conversely, Quebec’s Civil Code¹¹⁹ requires consent for “treatment” but does not define “treatment”. Finally, the statutes in Alberta,¹²⁰ New Brunswick,¹²¹ Nova Scotia,¹²² Saskatchewan,¹²³ and Nunavut¹²⁴ have neither a definition of “treatment” nor a requirement for consent to it. Presumably, the common law of consent would apply in such jurisdictions.¹²⁵

Chief Justice McLachlin did not make a ruling in *Rasouli* with regard to the common law, as her judgment was restricted to the application of the *HCCA*. Justice Karakatsanis, on the other hand, claimed that the *HCCA* did not apply and thus *Rasouli* should be decided in common law. I believe that she correctly concluded that the common law would not place an obligation on Mr. Rasouli’s doctors to obtain consent before

111 Young, “Entitlements”, *supra* note 43.

112 *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181, ss 1, 5.

113 *Consent to Treatment and Health Care Directives Act*, RSPEI 1988, c C-17.2, s 1.

114 *Care Consent Act*, s 3, being Schedule B to the *Decision-Making Support and Protection to Adults Act*, SY 2003, c 21.

115 Young, “Entitlements”, *supra* note 43 at 11.

116 *Health Care Directives Act*, SM 1992, c 33 CCSM c H27, ss 1, 7.

117 *Advance Health Care Directives Act*, SNL 1995, c A-4.1.

118 *Personal Directives Act*, SNWT 2005, c 16.

119 *Civil Code of Quebec*, LRQ, c C-1991, art 11.

120 *Adult Guardian and Trusteeship Act*, SA 2008, c A-4.2; *Personal Directives Act*, RSA 2000, c P-6.

121 *Infirm Persons Act*, RSNB 1973, c I-8.

122 *Personal Directives Act*, SNS 2008, c 8.

123 *Health Care Directives and Substitute Health Care Decision Makers Act*, SS 1997, c H-0.001, as amended by the Statutes of Saskatchewan, 2000, c A-5.3 and 2004, c 65.

124 Nunavut has no relevant legislation.

125 Young, “Entitlements”, *supra* note 43 at 12-14.

removing life support. First, the origin of the common law of consent in the tort of battery does not ground entitlement to treatment.¹²⁶ Second, the more contemporary principle of informed consent does not ground entitlement to treatment either.¹²⁷ Third, Rasouli Consent is fundamentally distinct from Typical Common Law Consent as it is dependent on the evaluation of patient reasoning. Fourth, the jurisprudence dealing with life support has not authoritatively created an exception for Rasouli Consent. Fifth, Rasouli Consent would mark a radical change to the common law notion of consent that should be left to Parliament, rather than an incremental change that the courts would be permitted to make.

A. Battery

The common law of consent to medical treatment originated in the tort of battery, or unwanted touching.¹²⁸ For a physician to administer any treatment that required touching, as most do, consent would be required for it not to constitute battery.¹²⁹ A patient may refuse to consent under almost any circumstances and for any reason, even if doing so would result in his or her death.¹³⁰ This tort only provides patients with the ability to refuse treatment and cannot ground any right to demand treatment that the physician is unwilling to provide (meaning a patient cannot demand to be touched).

One argument for requiring consent for the withdrawal of life support is that doing so would require touching and therefore invoke the tort of battery.¹³¹ In *Golubchuk v Salvation Army Grace General Hospital et al* (“*Golubchuk*”), the Manitoba Court of Queen’s Bench found that consent is not required for withdrawal generally, but since the removal of life support would require touching, consent is required.¹³² If the physicians were asking to simply turn off the machines or cease to supply the required nutrients, there would be no touching. However, presumably, they would want to remove the tubes from the patient’s body and likely administer palliative care to reduce discomfort, all of which would involve touching. Thus, consent should be required to withdraw life support.

The extubation argument seems to be more of a technicality, rather than a meaningful distinction. The withdrawal of other types of treatment would similarly engage this sort of battery. As mentioned earlier, it seems to be widely accepted that a patient cannot demand continuation of a prescription drug if the prescribing physician deems the harms of the drug to outweigh its benefits.¹³³ Patient consent is not required for a physician to withdraw treatment in that case, so should it be required where the drug is being administered intravenously? Technically, the physicians could stop the flow of the drug without touching the patient and leave in the empty IV. The physical interference is not necessary to accomplish the goal, but is used to improve patient comfort and respect patient dignity.¹³⁴ Similarly, when stopping a respirator, extubation is not always performed and there is a lack of consensus on whether it is in the patient’s best interest to do so.

126 *Rasouli*, *supra* note 10 at para 185.

127 *Young*, *supra* note 2 at 63.

128 *Ibid* at 62; Daniel E Hall, Allan V Prochazka & Aaron S Fink, “Informed Consent for Clinical Treatment” (2012) 184 CMAJ 533 at 533.

129 *Rasouli*, *supra* note 10.

130 *Malette v Shulman* (1990), 72 OR (2d) 417 at para 14 (available on CanLII) (CA) [*Shulman*].

131 *Young*, *supra* note 2 at 61.

132 *Golubchuk v Salvation Army Grace General Hospital*, 2008 MBQB 49 (available on CanLII) [*Golubchuk*].

133 *Rasouli*, *supra* note 10 at para 58.

134 *Ibid* at para 162.

Mr. Rasouli's ventilator could be turned off and his nutrition supply cut off without touching him. However, to enhance his comfort and dignity, the physicians could perform other activities that would involve touching, such as extubation and the provision of palliative care. Theoretically, Dr. Salasel, as his SDM, could refuse consent to these further steps, subject to her duties under the *HCCA* to act in her husband's best interests.¹³⁵

Trying to understand withdrawal of treatment solely through the tort of battery leads to arbitrariness.¹³⁶ Consent would be required to withdraw a treatment when touching is involved, but would not be required to withdraw the same treatment if done without touching. Consent would not be required to withhold treatment, but would be required to withdraw the same treatment if to do so would require touching. Although the common law of consent originated with battery, this tort is no longer the primary focus of the common law of consent.¹³⁷ The common law has since evolved to be more patient-centered, focused on promoting patient autonomy and self-determination with a cause of action rooted in negligence.¹³⁸

B. Informed Consent

At the heart of the current common law of consent is the idea that "every human being of adult years and sound mind has a right to determine what shall be done with his own body."¹³⁹ Rather than simply ensuring that they avoid battery, physicians are now required to obtain "informed consent" before administering treatment.¹⁴⁰ This means that they are required to provide a patient or the patient's SDM with all the relevant information concerning a proposed treatment, its risks, the likely outcomes, and any practical alternatives so that the patient can make an informed decision about his or her medical care.¹⁴¹ Failure to do so in accordance with the standard of a reasonable physician opens up a medical caregiver to liability in negligence.¹⁴² Founded on the principles of autonomy and self-determination, a patient's right to decide what happens to his or her body prevails over all other interests when dealing with Typical Common Law Consent.¹⁴³ Therefore, it is said to be very patient-centered, one-sided, and absolute.¹⁴⁴

Under the law of informed consent, a patient may refuse or withdraw consent to treatment for almost any reason.¹⁴⁵ Even if the physicians feel that the refusal would not be in the patient's best interest, the physician cannot override the patient's wishes. The Court has established that this principle extends even when the patient's refusal would almost certainly result in death.¹⁴⁶ Thus, a patient or the SDM may refuse consent to the commencement or continuation of life support, even if death would imminently follow.

135 *HCCA*, *supra* note 11. The physicians would be able to bring it to the Consent and Capacity Board, who would be able to overrule her decision if it was not in accordance with a prior expressed wish. If there was no prior wish, the Board could overturn her decision if it was not in the patient's best interest. Mr. Rasouli did not have an Advanced Directive.

136 Jocelyn Downie, "Unilateral Withholding and Withdrawal of Potentially Life-Sustaining Treatment: a Violation of Dignity Under the Law in Canada" (2004) 20 *J Palliat Care* 143 at 145.

137 *Ibid.*

138 *Ibid*; *Reibl v Hughes*, [1980] 2 SCR 880 (available on CanLII) [*Reibl* cited to SCR].

139 *Ibid* at para 11.

140 *Cojocar v British Columbia Women's Hospital & Health Centre*, 2013 SCC 30 (available on CanLII).

141 Hall, Prochazka & Fink, *supra* note 128.

142 *Reibl*, *supra* note 138.

143 Downie, *supra* note 136 at 146.

144 Young, *supra* note 2 at 57.

145 *Shulman*, *supra* note 130.

146 *Ibid.*

However, this still does not ground an obligation for physicians to provide ineffective treatment simply because the patient has not consented to not being treated.

If a treatment that a patient wishes to have, including life support, has a reasonable expectation of providing benefit, then the physician may be required under the broader duties in negligence and fiduciary duties to provide the treatment as a reasonable physician would.¹⁴⁷ As Justice Karakatsanis explains in the *Rasouli* dissent, physicians still must act in accordance with their standard of care and fiduciary duties.¹⁴⁸ However, this does not extend to cases where the treatment is deemed to be medically unnecessary and ineffective. When considering withholding and withdrawing of treatment, there are many other interests aside from just the patient's choice that must be considered.¹⁴⁹ The Court recognized in *R v Big M Drug Mart Ltd* that autonomy can sometimes be limited by other interests, such as “public safety, order, health or morals or the fundamental rights and freedoms of others.”¹⁵⁰ In cases like *Rasouli*, patient autonomy must be balanced with the professional obligation of physicians and the impact on the broader health care system.

However, a further issue with extending the common law of consent to withdrawal of life support is that the common law presupposes capacity.¹⁵¹ While Typical Common Law Consent can sometimes involve SDMs as well, the fact is that most often *Rasouli* Consent is given by SDMs rather than the patient simply because of the nature of life support. This is a step away from patients exerting their own autonomy.¹⁵² Consider the following statement by Dr. Kumar, an intensive care physician:

I speak to patients about end-of-life issues all the time, and I've never seen anybody, of any faith, ever say, 'If I'm going to die, let it be long and drawn out and painful [...]. It's only ever family members who say, 'This [aggressive care] is what they would have wanted.'¹⁵³

Dr. Kumar's point is that the person making the decision to continue the life support is not the one who has to go through the aggressive treatment and agony of constant surgeries, failing organs, bedsores, and recurring infections.¹⁵⁴

A patient or SDM cannot demand that a physician treat outside his or her professional medical standards of care.¹⁵⁵ This is reflected in the Canadian Medical Association's policy statement that declares “[t]here is no obligation to offer a person medically futile or non-beneficial interventions.” Specifically, with regard to life-sustaining interventions, the policy statement says that, “[f]or situations where there will not be any medical benefit, the intervention is not only generally unsuccessful but also inappropriate, as it may serve only to increase pain and suffering and prolong dying.”¹⁵⁶

147 Young, *supra* note 2 at 63.

148 *Rasouli*, *supra* note 10.

149 Rocker & Dunbar, *supra* note 7 at S54.

150 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 95 (available on CanLII).

151 *Ibid.*

152 Young, “Entitlements”, *supra* note 43 at 21.

153 Kirkey, *supra* note 5; Dr. Kumar resigned after being ordered by the court in *Golubchuk* to continue provision of life support, *supra* note 132. See section D in Part III for further discussion of *Golubchuk*.

154 Kirkey, *supra* note 5.

155 Schafer, *supra* note 49; Rocker & Dunbar, *supra* note 7 at S55.

156 Canadian Medical Association, “CMA Statement on Life-Saving and -Sustaining Interventions”, CMA Policy Statement (December 2013), online: Canadian Medical Association <<http://policybase.cma.ca/dbtw-wpd/Polycypdf/PD14-01.pdf>>.

Doctors have taken an oath to “do no harm” and thus should not administer treatments that are harmful and confer no medical benefit to the patient.¹⁵⁷ For example, physician-assisted suicide is illegal, and even though the Court may soon reconsider this in *Carter v Canada (AG)*, there is no argument that physicians would ever be obligated to assist patients to commit suicide if they did not believe it was in the patients’ best interests.¹⁵⁸ It would be undesirable to require doctors to treat patients against their personal and professional ethics and contrary to the standards of the medical profession.

Nonetheless, Chief Justice McLachlin finds that ethical tensions are inherent to medical practice, as doctors cannot paternally impose life-saving treatment if a patient refuses consent.¹⁵⁹ However, this highlights the distinction between doing and allowing harm. As discussed above, being required to refrain from carrying out one’s professional duties and “allowing” harm to occur is quite different from being required to actively “do” harm to someone in a way that is completely contrary to those duties.

C. Evaluation of Patient Reasoning

Another flaw in extending the common law of consent to Rasouli Consent arises from the absolute nature of Typical Common Law Consent. It is fundamental to the common law of consent, and to respect for patient autonomy, that physicians are not entitled to judge a patient’s reasons for giving or refusing consent.¹⁶⁰ Be it religious, political, superstitious, or even irrational, the patient’s decision, if competent and informed, is final. Even where the patient’s decision would not be in his or her best interest, or would lead to death, a physician must respect it. It would be seen to be paternalistic and would undermine patient autonomy if doctors were only made to respect a patient’s decision when the doctor felt that the patient had a legitimate reason for giving or withholding consent.

On the other hand, making an exception in withdrawal of treatment for Rasouli Consent inherently undermines this key component of patient autonomy. In distinguishing cases of withdrawal of life support from withdrawal of other treatments, it seems to come down to the fact that decisions with respect to life support are exceptionally difficult and laden with emotion.¹⁶¹ Religious and personal values seem to have heightened importance when death is imminent.¹⁶² It is easy to understand and identify with Dr. Salasel’s reasons for demanding that her husband’s life support be continued. We are sympathetic to her situation and find the idea of wishing to hold on to a loved one to be logical. In contrast, if a patient demanded that a physician continue supplying harmful pills simply because he or she liked the taste, the courts would dismiss the demand right away.

Allowing physicians and courts to judge a patient’s reasons for giving or refusing consent does not respect patient autonomy. Although the majority decision in *Rasouli* may have been intended to respect autonomy since Dr. Salasel received the decision she wanted, in fact it was not about what she wanted. The decision was based on what the Court deemed it was *acceptable* for her to want. Would the outcome have been different if Dr. Salasel had

157 Schafer, *supra* note 49.

158 *Carter v Canada (AG)*, 2013 BCCA 435 (available on CanLII) [*Carter*]. In *Carter*, the ruling that physician-assisted suicide is illegal may change, but nonetheless this case does not contain an argument for patients to *demand* physician-assisted suicide where the physician is unwilling to provide it. In fact, there is push from both sides that many safeguards should be in place to ensure that physician-assisted suicide is used only as a last resort when several physicians concur that the patient is in sufficient pain that suicide would be in his or her best interest.

159 *Shulman*, *supra* note 130.

160 *Ibid.*

161 *Rasouli*, *supra* note 10 at para 174.

162 *Ibid* at 196.

given different reasons for wanting her husband's life support continued? If Mr. Rasouli had previously expressed a wish to continue life support simply because he knew it would torment the doctors, would the case have even gone to the SCC? Extending Rasouli Consent to the common law would create far too much uncertainty. It would create a situation where consent would be required for withdrawal of some treatments and not others, or even for some patients and not others who were receiving the same treatment, based purely on the patients' reasons. The requirement of consent should not depend on how good or reasonable the decision-maker views the patient's reasons to be.¹⁶³

As Young explains, Rasouli Consent under common law would not grant a right to consent, but would grant simply an opportunity to propose a rational argument for why one should be allowed a treatment that is not recommended.¹⁶⁴ Patients are already afforded this, as doctors should and do consult with families and SDMs before withdrawing life support.¹⁶⁵ However, physicians' practice of consulting with loved ones should not go so far as to become part of the common law of consent. Whereas refusing consent to treatment is an absolute principle, demanding treatment should require justification. Both refusing consent and demanding treatment should not fall under informed consent.¹⁶⁶ Allowing an opportunity for treatment that should require justification to be treated the same as the definitive legal principle that treatment can be refused would cause a lack of certainty and predictability in the common law of consent.

D. Cases on Life Support

Although the general application of the common law of consent does not ground Rasouli Consent, courts have struggled when specifically considering withholding and withdrawing life support and life-saving measures. There is no clear consensus; however, there seems to be a reluctance on the part of the courts to acknowledge a right for patients and their SDMs to demand life support to continue once physicians have determined that it is no longer beneficial to the patient. Even the SCC's majority decision in *Rasouli* confined itself to legislation and refused to extend Rasouli Consent to the common law.

Canadian courts appear to find it within a physician's decision-making capacity to withhold life-support through the issuance of a do-not-resuscitate ("DNR") order without consent. In *Lavallee*, the Manitoba Court of Appeal ruled that a physician does not require consent to place a DNR order on a patient's file.¹⁶⁷ This case involved an infant who had no hope of meaningful recovery, but the mother refused to accept the physician's recommendation for the DNR order. The Court clearly summarized its position refusing to require consent for DNR orders:

[N]either consent nor a court order in lieu is required for a medical doctor to issue a non-resuscitation direction where, in his or her judgment, the patient is in an irreversible vegetative state. Whether or not such a direction should be issued is a judgment call for the doctor to make having regard to the patient's history and condition and the doctor's evaluation of the hopelessness of the case.¹⁶⁸

Several decisions regarding withdrawal of life support have expressed similar reasoning. In *Sweiss v Alberta Health Services*, the Alberta Court of Queen's Bench ruled that a

163 Young, *supra* note 2 at 89.

164 *Ibid.*

165 Jarvis, *supra* note 70; Schafer, *supra* note 49; Hall & Rocker, *supra* note 3 at 1429.

166 Young, *supra* note 2 at 70.

167 *Lavallee*, *supra* note 35.

168 *Ibid.*

physician acting within his duty for the best interest of his patient does not need to acquire consent to withdraw life support.¹⁶⁹ However, an injunction was granted so that the family could obtain a second opinion as to whether the life support was in fact useless and that withdrawal would be in the patient's best interest.¹⁷⁰ Likewise, in *Rotaru v Vancouver General Hospital Intensive Care Unit*, the British Columbia Supreme Court did not allow the patient's daughter to demand continuation of life support when the physicians had determined that withdrawal was in the patient's best interest.¹⁷¹ The court stated that "the love for her mother [...] is not enough to ground an order to treat Ms. Priboi in a manner which is contrary to [the physician's] clinical judgment."¹⁷² The SCC in *Children's Aid Society of Ottawa-Carleton v MC* also determined that consent was not required for medical practitioners to withdraw life support. This case involved an infant with severe birth defects and no chance of survival. However, the court recommended that, until the law is clarified on the issue, physicians first seek a court order.¹⁷³

Unfortunately, the suggested approach of first seeking a court order may not be effective. *London Health Sciences Centre v K(R)* involved a wife who initially disagreed with her husband's physicians' plan to withdraw life support.¹⁷⁴ The physicians went to the Ontario Court of Justice to ask to be granted immunity from all liability for withdrawing the treatment. The court refused to grant immunity, but did not make a ruling as to whether the wife's consent was required under common law.

Golubchuk is the only Canadian case where the court definitively stated that consent to withdraw life support was required under the common law because it involves touching.¹⁷⁵ As a result of this ruling by the Manitoba Court of Queen's Bench, three intensive care physicians who were working with Mr. Golubchuk resigned from the hospital. They did so because they felt that continuing to subject a patient to life support once it no longer conferred a benefit was "tantamount to torture" and that forcing doctors to do so violated their ethical and professional duties.¹⁷⁶

It is noteworthy that the United Kingdom has authoritatively denied an obligation for physicians to obtain consent for the withdrawal of life support. The leading United Kingdom case is *Airedale NHS Trust v Bland*, in which the House of Lords ruled that the withdrawal of life support from a patient in a persistent vegetative state with no prospect of recovery did not require consent. The court found that the principle of sanctity of life was not absolute, as it does not allow treatment where patients refuse life-saving treatment, forcible feeding of inmates on hunger strikes, or life-sustaining treatment that would only prolong suffering. The House of Lords specifically acknowledged that withdrawal would involve touching the patient, but that this does not negate the physician's legal ability to do so.¹⁷⁷

169 *Swiss v Alberta Health Services*, 2009 ABQB 691 (available on CanLII).

170 *Ibid.*

171 *Rotaru v Vancouver General Hospital Intensive Care Unit*, 2008 BCSC 318 (available on CanLII) [*Rotaru*].

172 *Ibid* at para 18.

173 *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 (available on CanLII) [cited to SCR].

174 *London Health Sciences Centre v K(R)* (1997), 152 DLR (4th) 724 (available on CanLII) (ONSC) [cited to DLR].

175 *Golubchuk*, *supra* note 132. Flaws in the treatment package and battery arguments used by this court have already been addressed.

176 Jamie Komarnicki, "Two more doctors resign over life-support case", *The Globe and Mail* (17 June 2008) online: <<http://www.theglobeandmail.com/news/national/two-more-doctors-resign-over-life-support-case/article674697>>.

177 *Airedale*, *supra* note 2.

The law around life support in Canada remains unsettled. As the Canadian cases discussed above were not decided by the SCC, they are not authoritative outside of their respective jurisdictions. These cases do, however, show a tendency among judges across the country to respect a physician's judgment with regard to withholding and withdrawing life support.

E. Incremental Changes

Courts are able to make incremental changes to the common law; however, significant expansion to the law should be left to the Legislature.¹⁷⁸ This is especially true where there are complex and significant implications and ramifications to changes. In a democratic country, it is proper for the elected officials to make such decisions after consultation and debate with the public. Changing the common law so as to include a requirement for consent to withdraw life support should not be within the authority of the courts. Doing so would be a significant departure from how the common law of consent is currently viewed, not an incremental change.¹⁷⁹ The amount of inconsistency and uncertainty that would arise from such a ruling would be problematic.

This may explain why the court in *Rasouli* decided to determine the case based on the legislation. The problem, however, was that the statutory interpretation was flawed and the Legislature did not intend to implicate the withdrawal of life support in the *HCCA*. Without the issue being clearly presented by the Legislature, Canadian citizens are deprived of the necessary debate, public consultation, and overall legislative process that forms the basis of democracy. As it is a relatively modern issue because of the development of medical technologies and the shifted focus towards patients' roles in end-of-life decisions, there has yet to be sufficient debate and research on the implications of allowing patients to remain on life support indefinitely when it is ineffective or even harmful.¹⁸⁰ Ideally, Parliament should take initiative and address this issue through public debate. Then, once a democratic decision has been made, it should state so *clearly* in the legislation.¹⁸¹

PART IV. CHARTER

Charter challenges present another avenue that may be pursued in the courts to create a requirement for consent prior to withdrawal of life support. This approach has been advanced by counsel in prior cases, in several different ways, but has yet to be fully addressed by judges. Thus, there is no precedent that excludes the possibility that withdrawing life support without consent could violate a patient's *Charter* rights.¹⁸²

Regardless of the particular *Charter* right that has been allegedly infringed, there are certain initial barriers to overcome in order to bring such a claim. Only Parliament, legislatures, governments, and government actors who have been given delegated authority are subject to *Charter* scrutiny, and, therefore, anyone advancing a claim must show that doctors fall into one of these categories.¹⁸³ The *Charter* likely does not apply to doctors because they are independent contractors who owe an individual duty of care to a patient, unlike hospitals, which are government agents. This was touched upon in

178 Young, *supra* note 2 at 69.

179 As discussed above in Part III.

180 Young, *supra* note 2 at 61.

181 *Ibid* at 71.

182 Glen Rutland provides a useful overview of some possible approaches to a *Charter* claim with respect to withdrawing life support. See Glen Rutland, "Futile or Fruitful: The *Charter* and the Decision to Withhold or Withdraw Life-Sustaining Treatment" (2009) 17 Health LJ 81 at 82.

183 *Ibid* at 96; *Charter*, *supra* note 13.

Eldridge v British Columbia (“*Eldridge*”), where the court stated that the *Charter* applied to the hospital’s decision, but the question of whether the *Charter* applies to the decisions of individual doctors providing medical care was not considered.¹⁸⁴

Other case law in the medical field has presented further challenges for anyone hoping to place a *Charter* obligation on doctors. In *Chaoulli v Quebec (AG)*, the SCC ruled that there is no constitutionally protected right to health care.¹⁸⁵ This has been qualified somewhat in later cases which assert that a “core” treatment can be a *Charter* right. In *Auton (Guardian ad litem of) v British Columbia (AG)*, a new treatment for autism was not considered important enough to create a constitutional obligation to provide it.¹⁸⁶ On the other hand, a successful *Charter* claim was advanced in *Eldridge* to require sign language interpreters for medical visits.¹⁸⁷ It was determined that it was medically necessary for patients to understand their doctors in order for them to receive proper care. It remains vague as to what is necessary and what is not. Whether life support can be successfully argued to be necessary remains to be seen. In *Rodriguez v British Columbia (AG)*, the SCC ruled that there were no *Charter* violations in the prohibition of assisted suicide.¹⁸⁸ As both of these cases deal with a claimed right to control the way one dies by artificial means, it may be difficult for the court to assert that one is not a *Charter* right, while the other is.

On a more practical note, the time and money required to follow through with *Charter* litigation could be particularly burdensome on the type of plaintiffs involved in these cases. Glen Rutland, author of “Futile or Fruitful: The *Charter* and the Decision to Withhold or Withdraw Life-Sustaining Treatment”, points out that the majority of relevant situations would likely be time-sensitive because the individual in question is facing the withdrawal of life-sustaining interventions.¹⁸⁹ The patient or their SDM would have to be granted an injunction to prevent the doctors from acting before the litigation has completed. Even if that is accomplished, the patient may succumb to his or her underlying illness, despite the life support, before the termination of the lengthy multi-year litigation process. At such time, the motivation for SDMs and family members to continue spending money advancing the claim may significantly decline. Many people faced with the burdens of caring for a critically ill loved one may not be financially capable of pursuing this type of litigation.

PART V. POLICY CONSIDERATIONS AND PROPOSALS

SDM consent is not often an issue because SDMs and doctors will usually reach a consensus. However, when a dispute does arise, many policy reasons exist for leaving the decision to withdraw life support in the hands of doctors rather than SDMs. These reasons include decreased conservatism and objective consideration of patient’s best interests. Furthermore, many of the concerns over doctors making such an important decision can be addressed by simple proposals to improve end-of-life care in hospitals, such as consideration of patient’s wishes and adequate consultation and communication with the patient’s family and loved ones.

184 *Eldridge v British Columbia*, [1997] 3 SCR 624 (available on CanLII) [*Eldridge* cited to SCR].

185 *Chaoulli v Quebec (AG)*, 2005 SCC 35 (available on CanLII).

186 *Auton (Guardian ad litem of) v British Columbia (AG)*, 2004 SCC 78 (available on CanLII).

187 *Eldridge*, *supra* note 184.

188 *Rodriguez*, *supra* note 9.

189 Rutland, *supra* note 182 at 95.

A. Decreased Conservatism

Before *Rasouli*, it was typical practice for physicians to err on the side of caution when considering commencement of life support for a patient.¹⁹⁰ If there was a chance of recovery, even a very slim one, the physician would begin administering life support knowing that he could later withdraw the treatment if there turned out to be no hope of recovery. There is concern that by limiting a physician's ability to withdraw life support once it has commenced, physicians will be less likely to begin life support in borderline cases.¹⁹¹ Not only are there issues with resource allocation, but the physician may feel that the chance of recovery is so slim that it would not be in the patient's best interests to risk making him suffer on life support for years if the SDM refuses consent to withdraw.

B. Objective Consideration of Patient's Best Interests

Where a patient is not in a position to exercise his or her autonomy, in the common law the focus shifts from the patient's wishes to his or her best interests. For example, in an emergency a patient may be treated without consent. In some situations, the physician may be authorized by the court or by parents to treat a patient without consent even where there is no emergency.¹⁹² When continuing life support only serves to prolong a painful dying process, the focus should likewise shift to the best interests of the patient, rather than to the family's interest of holding on to false hope¹⁹³ or the SDM's wish to avoid the guilt associated with having to choose to end or withhold life support for a loved one.¹⁹⁴ Not only do doctors possess the medical expertise required to determine the likelihood of a treatment's success, but they also are less likely to be conflicted by complicated emotions during end-of-life decisions.¹⁹⁵ Thus, having the doctor make the decision can take some of the moral pressure off of the SDM and allows the doctor to make a more objective decision that is in the best interest of the patient.

Thus, it would be logical for doctors to make objective decisions using a best-interest analysis about the end of life, just as they do about the beginning of life. A fetus at the beginning of life is dependent on its mother to sustain itself; whereas a patient at the end of life may be dependent on medical devices. The law concerning what stage a fetus becomes a living human being remains murky and, consequently, there is no clear legal limit on when a woman can have an abortion.¹⁹⁶ By refusing to decide when life begins, the courts have essentially left it open to the doctors to decide when to perform an abortion on an individual basis. Women have a legal right to seek an abortion at any time, but doctors can, and often do, refuse on medical grounds.¹⁹⁷ When it comes to

190 Kirkey, *supra* note 5.

191 *Ibid.*

192 Judith Areen, "The Legal Status of Consent Obtained from Families of Adult Patients to Withhold or Withdraw Treatment" (1987) 258:2 JAMA 229.

193 Rotaru, *supra* note 171.

194 Jenny Way, Anthony L Back & J Randall Curtis, "Withdrawing Life Support and Resolution of Conflict with Families" (2002) 325 BMJ 1342 at 1345.

195 Douglas B White et al, "Are Physicians' Recommendations to Limit Life Support Beneficial or Burdensome?" (2009) 180 Am J Respir Crit Care Med 320 at 323 [White et al, "Physicians' Recommendations"].

196 The legal restrictions on abortion were struck down in 1988: *R v Morgentaler*, [1988] 1 SCR 30 (available on CanLII) [cited to SCR].

197 Chris Kaposy, "Improving Abortion Access in Canada, Health Care Analysis" (2008) 18:1 Health Care Anal 17.

end-of-life decisions, the law has also neglected to provide a definition of “death” and leaves determining “death” to doctors.¹⁹⁸

C. Patient’s Wishes

Although patients and their SDMs should not be entitled to demand the continuation of life support, the interests and wishes of the patient and his or her family should indisputably be taken into account.¹⁹⁹ Justice Karakatsanis suggests physicians employ certain processes, such as providing notice, ensuring reasonable accommodation, and exploring alternative institutions that may be willing to provide the treatment.²⁰⁰ These improvements should not be seen as a burden to the health care system because reductions in patient-physician conflict improve both quality and efficiency of decision-making. Less conflict leads to compliance with doctor recommendations, shorter ICU times, and less use of some life support measures.²⁰¹ Also, there is less chance of the physician’s decision being challenged in court if the patient’s wishes are taken into account.

Unfortunately, critically ill patients are often reluctant to discuss end-of-life care, as they find it threatening to contemplate such situations.²⁰² Doctors can provide an impartial analysis of the condition and prognosis of the patient but have limited insight into the personal and emotional aspects of end-of-life decisions. Advance Directives or Living Wills are seen as valuable tools to determine what the patient would have wanted, but many patients do not have them.²⁰³ Furthermore, when Advance Directives are present, they are still subject to interpretation and cannot cover all situations that might occur. Also, wishes can change as one approaches death. Studies show that enhancing relationships between physicians, patients and families may be a better solution.²⁰⁴

D. Family Consultation & Communication

One of the main fears of allowing doctors to withdraw life support without consent is that they will make such decisions unilaterally without consulting family members. This is a legitimate concern, since the requirement of informed consent would inherently require more communication than its counterpart.²⁰⁵ Doctors may be less motivated to explain the situation or ask for the family’s input if consent is not required. This would be an undesirable result because a patient’s loved ones often feel that they are more familiar with the patient’s values and beliefs, and thus better able to determine the patient’s best interests.²⁰⁶

198 *The Canadian Bioethics Companion*, “Chapter 3: End of Life Issues”, online: An Online Textbook for Canadian Ethicists and Health Care Workers <<http://canadianbioethicscompanion.ca/the-canadian-bioethics-companion/chapter-3-end-of-life-issues>>. There are few exceptions to this. In Manitoba, death is defined by its Vital Statistics Legislation as cessation of brain function: *Vital Statistics Act*, CCSM c V60.

199 Jarvis, *supra* note 70; Schafer, *supra* note 49; Hall & Rocker, *supra* note 3 at 1429.

200 Rasouli, *supra* note 10 at para 201.

201 Richard I Hall, Graeme M Rocker & Dawnelda Murray, “Simple Changes can Improve Conduct of End-of-Life Care in the Intensive Care Unit” (2004) 6 Can J Anesth 631 at 634.

202 Thomas J Prendergast & Kathleen A Puntillo, “Withdrawal of Life Support” (2002) 288 JAMA 2732 at 2734.

203 Douglas B White et al, “Life Support for Patients without a Surrogate Decision Maker: Who Decides?” (2007) 147 Ann Intern Med 34 at 37 [White et al, “Life Support”].

204 Daren K Heyland et al, “What Matters Most in End-of-life Care: Perceptions of Seriously Ill Patients and their Family Members” (2006) 174:5 CMAJ 1 at 6.

205 Franco A Carnevale et al, “The Moral Experience of Parents Regarding Life-Support Decisions for their Critically-Ill Children: A Preliminary Study in France” (2006) 10:1 JCHC 69 at 78.

206 White et al, “Physicians’ Recommendations”, *supra* note 195 at 322.

In France, it is common that the physician, rather than the family, maintains authority over life-support decisions for children. In 2006, a study titled “The Moral Experience of Parents Regarding Life-Support Decisions for their Critically-Ill Children: A Preliminary Study in France” found that the most fundamental shortcoming that interviewed parents identified regarding their child’s medical care was the lack of information given to those parents about their dying child.²⁰⁷ Many were unhappy with the doctors’ insufficient communication and indicated that this was an important consideration they would like to see improved. This concern was rated as being even more important to them than the doctors’ clinical skills. Although this study was preliminary and more research is needed, it does highlight doctor-family communications as an area that could be targeted in order to avoid possible problems associated with doctors making important end-of-life decisions.

There are already recommended safeguards and procedures in place to ensure life support is not withdrawn without taking steps to reach a consensus with the patient’s family and SDM. For example, the Canadian Critical Care Society recommends several steps when considering withdrawing life support, including: establishing consensus with medical colleagues that continuation would be inappropriate, erring on the side of continuation if there is any uncertainty, recognition of non-medical facts (such as patient hopes and fears, attitudes to life and death, religious beliefs), extended discussion with family members, attempts to transfer the patient to another institution, and mediation.²⁰⁸ Ultimately, however, the Canadian Critical Care Society asserts that the reasonable physician has no obligation to comply with a patient or SDM’s desire to continue life support that confers no benefit to the patient.²⁰⁹

Reasonable accommodation should be made prior to withdrawal of life support to address family members’ concerns, such as delays for social, personal, or spiritual closure, or if a relative is traveling to say goodbye. Families are more directly impacted by the outcome of withdrawal than the doctors or hospitals,²¹⁰ and the families are the ones who will experience the emotional and practical consequences of the decision.²¹¹ Physicians should be better trained to inform patients and SDMs of the patient’s condition and prognosis, as well as the rationale and timing of the withdrawal of life support. Without explanation, withdrawal can come across as abandonment, or families might suspect that the motives have more to do with money than the patients’ best interests.²¹² In the 2006 study of parents of critically ill children, the parents who received proper information felt more respected and better prepared for the withdrawal than parents who received little information.²¹³

For any proposed improvement of end-of-life care to be successful, research needs to be done in order to better understand where care is lacking and how to get physicians to comply with recommendations. Studies show that the current recommendations are not always complied with. Increasing accountability, implementing review panels, or establishing ethics committees could be helpful in addressing this concern.²¹⁴

207 Carnevale et al, *supra* note 205 at 74.

208 Rocker & Dunbar, *supra* note 7.

209 *Ibid* at 557.

210 White et al, “Physicians’ Recommendations”, *supra* note 195 at 322.

211 J M Appel, “Mixed Motives, Mixed Outcomes: When Accused Parents Won’t Agree to Withdraw Care” (2009) 35 J Med Ethics 635 at 635.

212 E Gedge, M Giacomini & D Cook, “Withholding and Withdrawing Life Support in Critical Care Settings: Ethical Issues Concerning Consent” (2007) 33 J Med Ethics 215 at 216.

213 Carnevale et al, *supra* note 205 at 75.

214 White et al, “Life Support”, *supra* note 203 at 38; Areen, *supra* note 192 at 234.

CONCLUSION

The Supreme Court of Canada's majority decision in *Rasouli* found that the withdrawal of life support constituted treatment as defined under the *HCCA* and thus required doctors to obtain consent before withdrawing. I believe that this was a mistaken interpretation of the *HCCA* and that the requirement for Rasouli Consent is not currently supported through legislation or through the common law in Canada. The Driedger approach to statutory interpretation of the *HCCA* and the current common law of consent only provide for refusal of proposed treatments, rather than demand of treatments that are not recommended. There are potential *Charter* claims, but historically the Court has been reluctant to grant *Charter* rights to demand health care.

There is still uncertainty as to how *Rasouli* will affect provinces outside of Ontario that have different legislation and lack Ontario's Consent and Capacity Board to resolve disputes. However, I contend that it would be undesirable for the courts to attempt to extend this ruling to such provinces through further statutory interpretation or through the common law. When life support is no longer serving its intended purpose and only prolonging the dying process, it is appropriate for physicians to be able to withdraw the treatment. Respect for patient autonomy should not extend so far as to allow patients and SDMs to demand continuation of an ineffective and potentially harmful treatment that their physician is no longer willing to provide. Patients should be able to seek life support, and possibly other end-of-life care options, but doctors need to be able to place realistic limits on those requests based on their medical expertise.

