

COURT OF APPEAL OF ALBERTA

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APPLICANT: YUE SONG

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RESPONDENT: THE LAW SOCIETY OF
ALBERTA

FIAT

STATUS ON APPEAL: RESPONDENT

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Appeal from the Decision of
The Honourable Justice S.L. Kachur
Dated the 12th day of September 2025

J Baptiste
Laurie Baptiste
Case Management Officer
Dated: October 2, 2026

FACTUM OF THE APPELLANT

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PART 1 - FACTS: BACKGROUND AND CONTEXT

A. Procedural History

1. The appellant, Yue (Roger) Song (“**Song**”), filed an application for judicial review¹ alleging: **A)** the respondent, the Law Society of Alberta (the “**LSA**”), is acting *ultra vires* by the adoption and promotion of various postmodern ideologies (the “**Political Objectives**” or “**POs**”) including Critical Race Theory, critical legal theory, and postcolonialism (the “**Theories**”, which are “**Theoretical**”); **B)** the Theories are directly hostile to his Christian faith and to the *Constitution*, including to its embedded principles (including reason, objectivity, the dignity of the individual, the rule of law, liberalism, repugnance for discrimination and stereotype, pluralism, and democracy – collectively, the “**Constitutional Principles**”) and to the “Western” legal system necessary to support it; **C)** the LSA’s POs are being effected through various means (the “**Impugned Conduct**”)² including redefining “competence”³ and “ethics”⁴ to mean compliance with the Theories and mandating “education” to promote such compliance⁵; **D)** the LSA’s objective is to “radically transform” the Canadian legal system, including its laws and the *Constitution*, by substituting its embedded Constitutional Principles and supporting institutions with contradictory, Theoretical, principles and institutions; and **E)** the LSA is pursuing such POs by, *inter alia*, encouraging lawyers to adopt an “agenda” to “dismantle” such principles and institutions by the way they practice law, which political agenda is called “cultural competence” (“**CC**”) – change the lawyer to change the law.

2. These are extraordinary allegations. If true, the LSA is: **A)** violating its primary statutory duty to uphold the rule of law by preserving the independence of lawyers from, most especially, political interference; **B)** interfering with the bar’s duties of loyalty to the *Constitution* and clients; **C)** abusing its statutory powers by appropriating democratic power to itself; and **D)** thereby

¹ Amended Originating Application, filed January 19, 2024 (“**OA**”) (Appeal Record, Parts 1 and 2, filed February 9, 2026 (“**AR**”), pp. 4-14).

² OA, para. 48 (AR p. 22).

³ Professional Development Profile (the “**Profile**”), Certified Record of Proceedings, filed April 8, 2024 (“**CRP**”), pp. 179, Extracts of Key Evidence (the “**EKE**”), p. 205).

⁴ Code of Conduct, Part 6.3 (“**Code 6.3**”), Affidavit of Yue (Roger) Song, filed December 21, 2023 (“**Song1**”), Ex. “G”, pp. 257-262 (EKE pp. 80-84).

⁵ *Rules of the Law Society of Alberta* (the “**Rules**”), Rules 67.2-67.4, and Song1, Ex. “X” (“**The Path**”) (EKE p. 89).

perverting the law away from the Constitutional Principles and towards the “Anti-Constitutional”⁶ Theories.

3. And yet none of these allegations were substantively heard by the lower Court. On September 12, 2025, the Honourable Justice S.L. Kachur dismissed the OA⁷ because, *inter alia*: **A)** these were not questions of law of central importance to the legal system as a whole⁸; **B)** the Court had neither the capacity nor legitimacy to even inform itself as to the LSA’s objectives and political interference, much less to disallow it;⁹ and **C)** evidence of the POs was broadly inadmissible.¹⁰ The alleged constitutional abuses were basically ignored. Worse, the Reasons grant the LSA (and every other statutory delegate in Alberta engaging in abuses similar to those alleged) effective immunity from judicial review. While the judgment relied on numerous errors, only some of which are addressed herein, it raises a more fundamental question. If the judiciary is truly powerless to scrutinize or prohibit the actions of a key statutory delegate within the legal system alleged to be working to subvert the *Constitution*, what is left of its role as the *Constitution’s* “guardian”?¹¹

4. In support of the OA, Song filed two affidavits totalling 1400 pages;¹² an expert report;¹³ and 285 pages of dense, concise, and meticulously cited written argument.¹⁴ For an issue of this magnitude, oral argument was very brief (about 5 hours) and highly generalized, focusing only on some key issues and questions. Song repeatedly emphasized that he was placing heavy reliance on written argument,¹⁵ as repeatedly acknowledged by the Court.¹⁶ However, the Justice failed to summarize, let alone analyze, most of Song’s evidence and argument. Song’s central claim was relegated to a single paragraph within the standard of review analysis where it was characterized as

⁶ OA, para. 15.

⁷ Reasons for Decision of Justice Kachur, dated September 12, 2025 (“**Reasons**”) (AR p. 15-39).

⁸ Reasons, para. 42 (AR p. 21).

⁹ Reasons, paras. 29-30 (AR p. 20).

¹⁰ Reasons, paras. 57-64 (AR pp. 23-25).

¹¹ *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145, p. 169.

¹² Song1 and the Affidavit of Yue Song, filed April 4, 2025 (“**Song2**”).

¹³ Affidavit of Joanna Williams, filed October 27, 2023 (the “**Report**”).

¹⁴ Amended Brief of the Applicant, filed April 7, 2025 (the “**Brief**”), Applicant’s Surreply Brief, filed April 23, 2025 (the “**Surreply**”); the LSA filed its Written Submissions on April 8, 2025 (the “**LSA’s Brief**”).

¹⁵ Appeal Record, Part 3, Transcript of Proceedings, filed January 20, 2026 (“**Tx**”), 11:32-34, 48:23-25, 49:26-27, 110:26-27 and 113:6-7.

¹⁶ E.g. “I know there’s a lot more you want to say ... there is a lot more in your brief ...” at Tx, 60:14-15.

a mere “assertion.”¹⁷ Postmodernism was mentioned once and nowhere explained.¹⁸ Further, many of Song’s specific arguments were badly misconstrued or completely ignored – even where such arguments squarely anticipated the Reasons and therefore “crie[d] out for some explanatory analysis.”¹⁹

5. Song’s case is therefore largely absent from this Honourable Court’s record, which creates a serious barrier to meaningful appellate review. Song has consistently warned that justice requires competence with the Theories, which are “difficult and obscure”²⁰ and clarity as to the objective meaning of jargon (like CC).²¹ It must be understood, *inter alia*: **A)** how and why the Theories reject the Constitutional Principles; **B)** why, “[t]he most important theoretical concept for [CC] is that all experience is constructed”;²² **C)** the implications for our *Constitution* which depends on the rule of law; **D)** what “radical” “transformative agenda” the “culturally competent” lawyer adopts;²³ and **E)** why the rule of law depends on an independent bar, free from political interference.²⁴

6. Song applied twice to the Case Management Officer (“**CMO**”) for permission to file the lower court briefs in this Court (and once to file just excerpts) which applications were denied and then unsuccessfully appealed.²⁵ The CMO confirmed Song may, at least, offer the panel copies of the briefs, which are hereby offered. Song’s comprehensive argument cannot be meaningfully restated within these 33 pages, much less while leaving space to discuss errors. If the panel does not read the Report, the Articles (see para. 9 below) and the briefs, meaningful appellate review is at serious risk. The risk arises primarily from the principle that, to succeed on appeal, errors must have materially affected the outcome.²⁶ So, for example, the panel might conclude, as the CMO anticipated, that Song’s central claims are absent from the Reasons because they were,

¹⁷ Reasons, para. 42 (AR pp. 21-22).

¹⁸ Reasons, para. 24 (AR p. 19).

¹⁹ See discussion below at para. 17.

²⁰ Brief, para. 8; see also OA, para. 16(a) (AR p. 7) and Brief, para. 303.

²¹ Surreply, Section III.

²² Song1, Ex. “RRR”, p. 880 (EKE p. 178).

²³ Song2, Ex. “J”, p. 245 (EKE p. 424).

²⁴ All of such argument is primarily at Brief, pp. 33-53 and 76-166.

²⁵ February 5, 2026, application (denied March 9, 2026); March 19, 2026, application (denied May 7, 2026); appeal to the Honourable Justice J. B. Hawkes (dismissed July 30, 2026); September 3, 2026, application (denied September 25, 2026).

²⁶ Rule 14.75(2) and *Van de Perre v Edwards*, 2001 SCC 60, para. 5

“[un]necessary to address in deciding the application.”²⁷ However, to rest its decision on this basis without having reviewing the briefs, seems to require certain assumptions including that the unaddressed arguments were either irrelevant or lacked merit. Song therefore submits that, if the briefs are not reviewed, meaningful appellate review requires proceeding on the basis that this factum accurately summarizes meritorious arguments that were put to Kachur J. The CMO’s denials were premised on the facts that the LSA was not “denying that certain submissions were made”²⁸ and, having reviewed a draft of this factum, that Song had reasonably summarized “important aspects of the briefs.”²⁹ Apart from bare and vague denials,³⁰ the LSA made no attempt to rebut Song’s argument summarized at paragraphs 1 and 9 to 11 herein. As stated by its counsel, “I do not intend to address those issues.”³¹

7. Finally, the CMO based her denials on the rule that an appeal is not an opportunity to repeat the trial but is to identify and, if necessary, correct errors.³² Song therefore submits that, if this panel intends to exercise its discretion under *Rule* 14.75(1)(c) to decide any issues for itself, justice requires review of any relevant argument from the briefs.

B. Song’s Missing Argument

8. The Brief, Part II.B, demonstrates, *inter alia*: before 2008 continuing professional development (“CPD”) was left to the independent judgment of professionals under *Rule* 3.1-2; Alberta consumers were highly satisfied with legal services; and the LSA had certain core values and strategic goals consistent with its statutory mandate.³³

9. Part II.C (“Strategic Shift”) demonstrates, *inter alia*: **A)** the LSA commissioned an articling survey (the “**Survey**”, which was “**Not Produced**”³⁴ by the LSA) showing 32% of self-selecting

²⁷ CMO’s May 7, 2026, decision, para. 16.

²⁸ CMO’s May 7, 2026, decision, para. 17 and September 25, 2026, decision, para. 15.

²⁹ CMO’s September 25, 2026, decision, para. 11.

³⁰ LSA’s Brief, paras. 62, 93.c, 100, and 129.

³¹ Tx, 61:31-32.

³² CMO’s March 9, 2026, decision, paras. 19 and 25; see also *LaTrace v Warkentin Building Movers Virden Inc.*, 2026 ABCA 25, para. 20

³³ Song had considered including all references to argument, evidence, and caselaw in this Part, but the factum page limit simply does not permit it. Some key references are provided.

³⁴ Song2, Ex. “B”, p. 86 (EKE p. 315); discussed at Reasons, paras. 99, 102, 119 (AR pp. 30-31, 33); “**Not Produced**” herein means a record was relied on by the LSA, as evidenced in the CRP, but was not produced in the CRP. Only a few such deficiencies are addressed in this factum.

respondents reported “discrimination or harassment”³⁵ during articles (see para. 43 below: the Survey evidenced very little); **B**) in late 2019 (on the basis of no discernible evidence, perhaps based only on an assumption³⁶) the LSA fundamentally changed its values and goals so as to adopt and promote the Theories (i.e. the POs) including within its “Regulatory Objectives” (the “**ROs**”, discussed below);³⁷ **C**) the LSA’s President authored a memorandum³⁸ which recommended mandatory CC training based on an assumption and/or the Survey; **D**) “The Path”³⁹ (Not Produced) was selected as mandatory CC training relying on a “**Furlong Report**”⁴⁰ (Not Produced) which itself relied on academic articles⁴¹ (the “**Articles**”, Not Produced); **E**) there was no apparent due diligence on the Path (i.e. was it: created by a trusted organization, accurate, relevant, useful, or Theoretical and, if so, was that consistent with the LSA’s statutory objectives⁴²; or was it sound policy to promote the Theories including the enhanced racial segregation of indigenous Canadians within legal systems characterized by postmodern relativism?⁴³); **F**) the Path was mandated for various reasons (the BLM movement and CC being deemed a “core” competency⁴⁴) neither explained nor supported by evidence, and with no regard to the independence of the bar, the rule of law, the *Constitution*, or whether a “radical” “transformative agenda” to “decolonize”⁴⁵ Canada was

³⁵ All emphasis in this factum is added.

³⁶ CRP, p. 340 (EKE p. 284).

³⁷ Song1, Ex. “B”, p. 62; Ex. “C”, p. 70 (EKE p. 70), Ex. “E”, p. 101 (EKE p. 73).

³⁸ Reasons, para. 99 (AR p. 30); CRP, p. 338 (EKE p. 282).

³⁹ Song1, Ex. “X” (EKE p. 89).

⁴⁰ CRP, p. 398 (EKE p. 298); see Song2, Ex. “A” (EKE p. 305).

⁴¹ Song2, Ex. “A”, p. 62 (EKE p. 312); for the Articles see Song2, Ex. “J” (EKE p. 409) (Parmar, Pooja, Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence, the “**Parmar Article**”), Ex. “K” (EKE p. 441) (Aastha, Madaan, Cultural Competency and the Practice of Law in the 21st Century, the “**Madaan Article**”), Ex. “L” (EKE p. 447) (Tully, L. Danielle, The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering, the “**Tully Article**”); also included in the term “Articles” shall be Song1, Ex. “RRR” (EKE p. 172) (Adams, Travis, Cultural Competency: A Necessary Skill for the 21st Century Attorney, the “**Adams Article**”).

⁴² Trusted organization? Its primary researcher was associated with Nationhood Council House, which invites lawyers to “correct” the “land theft” facilitated by the Constitution “as they go about their livelihoods” (see Song2, Ex. “D” and “E”) (EKE p. 405). Accurate? No, for example, Sir John A. MacDonald did not bring in the *Indian Act*, and it did not contain the clauses stated (see The Path at Song1, Ex. “X”, p. 453 (EKE p. 90) vs. Song2, paras. 18-19, Ex. “Q” and “R” (EKE pp. 303-304)). Theoretical? Yes, see the Report.

⁴³ Brief, Parts IV.B and IV.C.

⁴⁴ CRP, p. 285 (EKE p. 254).

⁴⁵ Song2, Ex. “J”, p. 245 (EKE p. 409).

intra vires; **G**) relying on the Furlong Report and its author, the LSA developed a new competency program (including the Profile which failed “validation” as to its “diversity, equity, and inclusion” and “truth and reconciliation” domains, but such domains were retained based on Furlong’s recommended “interpretation” (Not Produced)); **H**) the LSA acknowledged “competence” may cause confusion as to the Profile’s purpose, so its title does not include that word; **I**) while the LSA claimed the Profile “sets out the competencies that are important to maintain a safe, effective, and sustainable legal practice”⁴⁶ that assertion was nowhere explained or evidenced;⁴⁷ **J**) relying on another doubtful survey⁴⁸ (Not Produced) the LSA released a public “Acknowledgement of Systemic Discrimination” (Not Produced in full, the “**Acknowledgment**”)⁴⁹ which, despite the LSA having been specifically warned that such survey related only to race, acknowledged (without evidence) that Canada’s justice system was also “systemic[ally] discriminat[ory]” on the basis of age, culture, disability, gender, religion, sexual orientation, and socio-economic status; and **K**) amendments to Code 6.3 were adopted in reliance on “considerable empirical and anecdotal evidence” that harassment and discrimination (“**H&D**”) were “prevalent” (Not Disclosed, but included the Survey).

10. By reference to scores of authorities and secondary sources,⁵⁰ Part III.A demonstrates: **A**) Canada’s Constitutional Principles and institutional requirements; **B**) these are interrelated and interdependent (e.g. without political non-interference, the rule of law is compromised and the democratic will is subverted); **C**) the rule of law is the sinew which binds together Canada’s entire constitutional project (as acknowledged in the opening words to the *Canadian Charter of Rights and Freedoms* (the “**Charter**”)); **D**) the rule of law has substantive requirements (there are clear rules which apply equally to all) and institutional requirements (an independent, impartial judiciary, loyal to the *Constitution*, and an independent bar, free of political interference, loyal to the *Constitution* and to the clients’ interests); **E**) lawyers can, in their professional practice, “pervert” the law in many

⁴⁶ CRP, p. 183 (EKE p. 209).

⁴⁷ Brief, para. 84: a selected “task force” came up with the competencies based on their “own expertise” but not, apparently, on the basis of evidence of professional negligence, defalcation, misconduct, etc.

⁴⁸ Song1, Ex. “H”, “I”, “J”, “K” and Song2, Ex. “I”, p. 227.

⁴⁹ Song1, Ex. “N”, p. 338 (EKE p. 85).

⁵⁰ Which are included in the Table of Authorities and indicated with an asterisk.

ways and thereby undermine or destroy the rule of law;⁵¹ **F**) regulation of the bar must therefore be structured to assiduously insulate lawyers from political interference;⁵² and **G**) that the “public interest” is objectively served by the availability to citizens of independent, loyal, resolute, and competent lawyers.

11. Part IV.B.V (“Theories”) demonstrates: **A**) the LSA’s adopted Theories start from the premise that there is no such thing as “the truth”, there is only relative truth based on intersectional perspective, power, and oppression; **B**) the LSA’s Theories reject “grand narratives” like Christianity and the Enlightenment including the Constitutional Principles and the liberal democratic legal order described in para. 10 above; **C**) these things are rejected because they are mere “shams” to oppress racial and other minorities; **D**) incorporating the Theories into Canada’s legal system will necessarily damage if not destroy the rule of law and the *Constitution* (e.g. the Theories reject reason and the claim that words have “objective” meaning); **E**) the LSA refers to such principles and institutions when referencing, *inter alia*, “inequitable principles historically embedded in our systems and institutions”;⁵³ **F**) the Theories prescribe “professional” conduct like “decolonization” and “dismantling systemic inequalities and barriers”⁵⁴ which mean, essentially, that lawyers should destroy such “oppressive” principles (within Canada’s justice system, laws, and *Constitution*) by changing the way they practice law (i.e. by shifting their legal “culture”); **G**) these POs are pursued by the LSA including by *Rules* 67.2 – 67.4, the Path, the Profile, and Code 6.3; and **H**) the LSA’s POs therefore represent an attack on the *Constitution* and, as such, are an “Abuse of Subversive Objectives” (defined in the Brief and used throughout⁵⁵, but absent from the Reasons). In a nutshell:

⁵¹ E.g. in *Roncarelli v Duplessis*, [1959] SCR 121 (“**Roncarelli**”), the Premier perverted the rule of law by pursuing an objective “knowingly foreign” to liquor regulation: religious persecution (para. 42).

⁵² *Canada (Attorney General) v Law Society of British Columbia*, [1982] 2 S.C.R. 307 (“**Canada v LSBC**”), pp. 335-336.

⁵³ Song1, Ex. “N”, p. 339 (EKE p. 86).

⁵⁴ See Parmar Article (EKE p. 409) and Profile indicator 3.2 at CRP, p. 190 (EKE p. 216).

⁵⁵ Defined at Brief, paras. 290-291; argued at Brief, paras. 298, 673 and 718 (Rule 67.4 and the Profile is so broadly worded as to permit an ~), 303, 304, 380 (seeking to undermine the rule of law and other constitutional principles is an ~), 400, 413, 452, 460 (seeking to undermine loyalty to the law is an ~), 537 (seeking to undermine loyalty to the client is an ~), 559 (seeking to deny and degrade the dignity of the individual is an ~), 594 (promoting discrimination and stereotype is an ~), 631 (enforcement of dogma is a ~), 643 (social experimentation is an ~), 708 (Code’s incorporation of Theories is an ~), and 252 (pursuing objectives outside the *Legal Profession Act*, RSA 2000, c L-8 (“**LPA**”) is an ~).

“[t]he LSA’s actions influence lawyer composition and conduct so as to pervert the law in its application and so as to convert the justice system into a legislative entity”⁵⁶ – one which is hostile to the *Constitution*.

PART 2 - GROUNDS OF APPEAL

12. It is respectfully submitted that the Honourable Justice erred in law⁵⁷ by: **A)** misstating the correct legal tests; **B)** failing to apply the correct legal tests; **C)** applying the wrong legal tests including various Invented Principles (i.e. novel principles not recognized in law, see para. 24 below); and **D)** systematically “Failing to Engage” with Song’s case – there was no substantive hearing (see definition at para. 17 below).

PART 3 - STANDARD OF REVIEW

13. As questions of law or extricable questions of law, the standard of review is correctness.⁵⁸

PART 4 - ARGUMENT

A. Misconstruction of the Principles of Justiciability

14. Kachur J. made several errors of law by applying the wrong legal test of justiciability. Arising from an initial failure to distinguish the (legal) questions put to the Court, from the (political) subject matter of such questions, the Justice effectively determined that anything touching on “politics” was non-justiciable and should be ignored. The principles are more nuanced. As set out in *Highwood Congregation of Jehovah’s Witnesses v Wall*, [2018] 1 S.C.R. 750 (“**Highwood**”, para. 34), substantive justiciability⁵⁹ depends on a court having both the constitutional legitimacy and institutional capacity to answer the question(s) put to it. **Legitimacy:** Arising from the constitutional separation of powers, “political” decisions are the legitimate domain only of legislatures and the duly authorized executive⁶⁰ – not the Courts and not, for that matter, the legal profession or its regulator.

⁵⁶ OA, paras. 15-19 (AR pp. 6-8); Brief, para. 185.

⁵⁷ *Housen v Nikolaisen*, 2002 SCC 33 (“**Housen**”), paras. 8, 9, 27 to 36.

⁵⁸ *Housen*, para. 28.

⁵⁹ As opposed to procedural justiciability (standing, ripeness, and mootness - see Lorne M. Sossin & Gerard Kennedy, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 3rd ed (Toronto: Thomson Reuters/Carswell, 2024) (“**Sossin**”) at s. 1.2.).

⁶⁰ *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (“**CAP Reference**”), para. 33; *Operation Dismantle Inc v R*, [1985] 1 S.C.R. 441 (“**Operation Dismantle**”), para. 64; and

This includes matters of social and economic policy,⁶¹ democratic decisions like whether to secede,⁶² and “weighty matters of state ... [like] ... whether the government’s defence policy is sound ...”⁶³ Similarly, deference is owed to statutory delegates in respect for the legislatures’ choice to delegate certain decisions to them.⁶⁴ **Capacity:** Courts are not equipped to answer certain questions including: **A)** matters which are essentially matters of preference, because there is no objective standard which can be applied;⁶⁵ **B)** “polycentric” decisions in which a change has cascading effects (e.g. electoral redistricting⁶⁶); or **C)** determinations of religious doctrine.⁶⁷

15. A question is not, however, rendered non-justiciable because it has political or religious subject matter. *Roncarelli*, for example, was decided because of the religious nature of Duplessis’s objectives. As stated in De Smith’s, “discretion has been described as the ‘hole in the [legal] doughnut,’ but that hole is not automatically a lawless void.”⁶⁸ Rather, the question which is generally not justiciable is whether a policy (or religious) decision is “wise” or “sound”. The Court may not substitute its “... opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed,”⁶⁹ but it may (and often, must) conduct judicial review of that decision. For example, while the Court: **A)** may not “usurp any democratic decision” it may “answer questions as to the legal framework in which the democratic decision is to be taken;”⁷⁰ **B)** may not decide matters of religious dogma it may confirm consistency with rules, natural justice, and *bona fides* (“... the fact that a dispute has a religious aspect does not by itself make it non-justiciable”⁷¹); and **C)** may not (often) review on the standard of correctness, it must

Lord Woolf, et al, *De Smith’s Judicial Review*, 7th ed (London: Sweet and Maxwell, 2013) (“**De Smith’s**”), s. 1-033.

⁶¹ De Smith’s, s. 1-033; see, for example, *CAP Reference* (whether to reduce pension contributions).

⁶² *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (“**Secession Ref.**”), para. 27.

⁶³ *Operation Dismantle*, paras. 63-64.

⁶⁴ *Dunsmuir v New Brunswick*, 2008 SCC 9 (“**Dunsmuir**”), paras. 27 and 48.

⁶⁵ De Smith’s, s. 1-039.

⁶⁶ De Smith’s, s. 1-042.

⁶⁷ *Highwood*, para. 36.

⁶⁸ De Smith’s, s. 1-032.

⁶⁹ *Operation Dismantle*, para. 63.

⁷⁰ *Secession Ref.*, para. 27.

⁷¹ *Highwood*, paras. 36-37.

ensure the decision is *intra vires*, reasonable, legal, fair,⁷² constitutional,⁷³ etc. In fact, while “... the Courts will not question the wisdom of enactments which ... are within the competence of the Legislatures ... it is the high duty of this Court to ensure that the Legislatures do not ... engage in the illegal exercise of power.”⁷⁴ Therefore, non-justiciability applies only if and to the extent⁷⁵ a question put to the Court is beyond its legitimacy and capacity. In *Operation Dismantle*, had the Court been asked to opine on Cabinet wisdom, it would have declined, “however ... this would be to ... fail to focus on the question which is before us ... [which is] not whether the government’s defence policy is sound but whether or not it violates the appellants’ rights under s. 7 of the *Charter* ... This is a totally different question”.⁷⁶ It may be useful to distinguish between (non-justiciable) “primary decision[s] of policy” (or “wisdom”) and (justiciable) “secondary function[s] of probing [justification]” (or “validity”).⁷⁷

16. Kachur J.’s initial error was to fail to consider whether the questions put to her were justiciable.⁷⁸ Song did not question the wisdom of the LSA’s POs⁷⁹; he questioned the LSA’s legal and constitutional jurisdiction to adopt and promote such POs.⁸⁰ These are “purely”⁸¹ legal questions. The Justice failed to distinguish the questions from their subject matter: “... the Applicant is raising political questions about ideological and policy considerations ...”⁸² By the Reasons’ logic, had the LSA adopted Catholicism (instead of the Theories), the Court would be likewise incompetent to intervene, given the religious subject matter.

⁷² *Dunsmuir*, para. 28; De Smith’s, s. 1-035 and 1-041.

⁷³ *Doré c Québec (Tribunal des professions)*, [2012] 1 S.C.R. 395 (“*Doré*”); *Operation Dismantle*, paras. 65 and 68.

⁷⁴ *Amax Potash Ltd. v The Government of Saskatchewan*, 1976 CanLII 15 (SCC), [1977] 2 SCR 576, p. 590.

⁷⁵ *CAP Reference*, para. 35; *Secession Ref.*, para. 28

⁷⁶ *Operation Dismantle*, para. 64 (Wilson J. in dissent, but with the approval of the majority on this point).

⁷⁷ DeSmith, s. 1-035; Sossin, s. 6:8.

⁷⁸ Reasons, paras. 30-37 and 94 (AR pp.15-39).

⁷⁹ Tx, 14:13-14:18; Except in two respects: “treating substance abuse as a problem is critical to recovery” at Brief, p. 118 and Tx, 21:20-21; and to prove his sincere beliefs and desired expression as necessary to support his *Charter* claims. Even here the Court is not asked to agree or disagree with Song. It is asked to determine whether there is objective infringement of Song’s freedom to manifest his sincere beliefs.

⁸⁰ See OA, paras. 15, 18, 35, 36, and 45 (AR pp.4-14) and Tx, 3:14-18.

⁸¹ *CAP Reference*, paras. 33-35.

⁸² Reasons, para. 30 (AR p. 20).

17. Kachur J. also erred by systematically failing to engage with Song’s case. For example, Song put all of the above principles of justiciability to the Court, but they are largely absent from the Reasons. This is an error of law and, in the circumstances, a denial of access to justice:⁸³ there was no substantive hearing of the complaint. It was likewise an error to fail to render reasons that serve their core functions including demonstrating: **A)** the Justice had “seized the substance of the matter” (especially substance which “cries out for ... analysis”⁸⁴); and **B)** the basis for the decision in the context of, *inter alia*, the arguments presented.⁸⁵ The legal errors referred to in this paragraph are referred to, collectively, as a “**Failure to Engage**”.

18. Having determined the Court could not legitimately answer Song’s questions, the Justice next erred by failing to determine whether such questions were the legitimate domain of the LSA. The justiciability of “political questions” starts from the premise that “political” bodies (legislatures, cabinets⁸⁶ or citizens in a referendum⁸⁷) are the legitimate decision makers, so: “the first step is to determine who as a constitutional matter has the decision-making power ...”⁸⁸ Song’s basic complaint was that the LSA was not the legitimate decision maker: “[cultural competence] does not describe legal ‘competence.’ [It] describes legislating.”⁸⁹ Statutory delegates may not rewrite the law or arrogate powers to themselves they were never intended to have.⁹⁰ Kachur J. failed to take this “first step”; to confirm the LSA could legitimately answer the “political” questions she could not. Neither is the LSA a legislative body nor is it within the LSA’s mandate to politically interfere with lawyers.⁹¹ In fact, in response to Song’s complaint that the LSA was illegally arrogating

⁸³ *Evashkow v Melia*, 2025 ONSC 2181, para. 9, *Friends of the Oldman River Society v Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), pp. 76-77; *Pham v Qualified Metal Fabricators Ltd.*, 2023 ONCA 255, para. 24; see also footnote 84.

⁸⁴ *R. v Sheppard*, 2002 SCC 26 (“*Sheppard*”), paras. 1, 5, 28, and 31-33; *R. v M. (R.E.)*, 2008 SCC 51 (“*R. v M.*”), paras. 11, 33, 35, and 43; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (“*Vavilov*”), para. 128.

⁸⁵ *R. v M.*, paras. 16-17, 25 and 57.

⁸⁶ *Operation Dismantle*.

⁸⁷ *Secession Ref.*

⁸⁸ *Operation Dismantle*, para. 63.

⁸⁹ Brief, para. 459; see also paras. 397-406; Reasons, para. 76 (AR p.26), citing Surreply, para. 132; Tx, 3:14-18.

⁹⁰ *Vavilov*, paras. 108-109.

⁹¹ *Canada v LSBC*, pp. 335-336; Brief, paras. 140-178; Tx, 14:37-15:07.

legislative powers to itself, the Reasons seriously aggravated this abuse by confirming, in effect, that such powers remain impressed with the legislatures' privilege.

19. The Justice next erred by purporting to conduct judicial review while simply ignoring the “non-justiciable” subject matter of the LSA’s decisions including, critically, the LSA’s impugned objectives. The Justice relied on the principle that “it is not for this court to second guess the LSA’s determination of what is in the public interest.”⁹² To the contrary, the exercise of all discretion must accord with the purposes of the grant of discretion.⁹³ The Reasons read as if the “ideological and policy considerations”⁹⁴ did not exist – as if the LSA did not, as a matter of fact, have the POs. The LSA’s impugned conduct thus fell into a “lawless void.” This is evident from, *inter alia*: **A)** the Justice’s reference to Code 6.3’s commentary while ignoring its impugned ideological content⁹⁵; **B)** the conclusion that the ROs (which include the POs and expressly contemplate the POs taking priority over the rule of law and access to justice⁹⁶) were “irrelevant”;⁹⁷ **C)** the refusal to consider the POs within the jurisdictional analysis⁹⁸; **D)** and most especially the interpretation of CC as relating solely to “understanding” indigenous people including their “history and issues” and “lived experiences” and to communication skills to better serve indigenous clients⁹⁹ (“**Superficial CC**”), ignoring evidence and argument that CC is jargon which includes, also, a political meaning (see paras. 47 to 49 below). The Justice Failed to Engage with Song’s argument that, to “black box” (i.e. hide from the analysis) the LSA’s impugned objectives in this manner was to conduct a “judicial review by assumption.”¹⁰⁰

20. The refusal to consider the LSA’s impugned objectives is especially glaring given Song’s heavy emphasis on the importance of decoding jargon (i.e. determining its objective meaning) and his several warnings against the “motte-and-bailey fallacy”¹⁰¹: “To effectively review the legality

⁹² Reasons, para. 113, see also paras. 91, 94 (AR p. 32, 29).

⁹³ *Vavilov*, paras. 83, 108, 110, 137 and *Roncarelli*, paras. 40, 41.

⁹⁴ Reasons, para. 30 (AR p.20).

⁹⁵ Reasons, para. 20 (AR p.18); Brief, paras. 705-719.

⁹⁶ Song1, Ex. “E”, pp. 103-104 (EKE, pp. 75-76).

⁹⁷ Reasons, para. 57 (AR pp. 23-24).

⁹⁸ Reasons, para. 94 (AR p. 29).

⁹⁹ Reasons, paras. 101, 112, and 114 (AR pp. 30-32).

¹⁰⁰ *Surreply*, paras. 117-152 and Tx, 7:10-10:4; 114:13-18.

¹⁰¹ Reasonableness includes avoiding logical fallacies: *Vavilov*, para. 104. A motte-and-bailey fallacy swaps an indefensible claim (the bailey) for a defensible one (the motte).

and constitutionality of the LSA's Impugned Conduct this Honourable Court must correctly understand ...[that] ... [CC] ... means the pursuit of a 'transformative agenda' ... the LSA ... invite[s] this Court to view matters in an utterly superficial and misleading way – to accept the motte for the bailey.”¹⁰² The Justice Failed to Engage with these arguments and simply ignored, for all purposes, the impugned “ideological and policy considerations.” The Justice reasoned, in effect, that because she could not question the “wisdom” of the LSA's decisions, neither could she inform herself of such decisions or confirm their “validity”.

21. The Justice therefore also misconstrued *Vavilov*¹⁰³ by making reference to the LSA's objectives and decisions only after stripping them of their (impugned) political and ideological content. A reasonableness analysis includes confirming that the delegate's entire purpose¹⁰⁴ is consistent with the statutory purpose.¹⁰⁵ Song's primary theme was that the POs constituted Abuses of Subversive Objectives, which arguments are substantially absent from the Reasons (a Failure to Engage), and which objectives were left unscrutinized. The Justice neither identified the LSA's “political and ideological” objectives, nor confirmed they were consistent with the statutory grant. They were simply placed in a “black box”, labelled “non-justiciable”, and disappeared from the analysis.

22. It is noteworthy that the Justice came much closer to applying the correct legal test when scrutinizing the LSA's claimed objectives. Here, the Justice identified statutory “purpose” as relevant to her analysis¹⁰⁶, surveyed the LSA's claimed objectives (“to protect and serve the public interest ... [by] the creation of mandatory standards ... ”¹⁰⁷; to “ensure competence”¹⁰⁸; to “rais[e] competence”¹⁰⁹; to “serve the public interest”¹¹⁰; to further “the public interest and the administration of justice ... by promoting cultural competence”¹¹¹; to “promote equality and human

¹⁰² Surreply, paras. 44-48.

¹⁰³ See also below at Part 4.C.

¹⁰⁴ *Vavilov*, *inter alia*, para. 15 re “transparency”.

¹⁰⁵ *Roncarelli*, p. 143; *Vavilov*, para. 108.

¹⁰⁶ Reasons, para. 49 (AR pp. 22-23).

¹⁰⁷ Reasons, para. 95 (AR pp. 29-30).

¹⁰⁸ Reasons, para. 95 (AR pp. 29-30).

¹⁰⁹ Reasons, para. 110 (AR p. 32).

¹¹⁰ Reasons, para. 108 (AR p. 31).

¹¹¹ Reasons, para. 113 (AR p. 32).

rights”,¹¹² etc.) and confirmed such objectives were “valid means by which the LSA can pursue ... the public interest.”¹¹³ Even this limited “validation” was in error: the LSA’s highly generalized framing of its objectives rendered judicial review meaningless¹¹⁴ and there was a broad Failure to Engage with evidence and argument that the LSA’s decisions were otherwise “unreasonable” (see paras. 9 to 11 above and para. 52 below). For example, the LSA’s POs entail the rejection of reason and empiricism¹¹⁵ as oppressive shams; and the record contained no evidence whatsoever to support the LSA deeming CC a “core” competence.¹¹⁶

23. The Reasons (paras. 30 to 37) provide various arguments and purported examples which relate to justiciability (addressed here), evidence (addressed at Part 4.B “Improperly Excluded Evidence” below), or both. *Dunsmuir* states that judicial review relates to “all exercises of public authority.”¹¹⁷ Kachur J. noted, similarly, that judicial review is only available with respect to law or state action. The Justice, however, followed this proposition with the peremptory conclusions that neither: **A)** the assumption of specific objectives including in plans to which the LSA “will have regard for ... when discharging its regulatory functions”;¹¹⁸ nor **B)** the use of statutory authority to implement such plans by means of the Profile and CPD Tool, is law or state action. The Profile and CPD Tool are patently exercises of public authority (see para. 26 below). But, more broadly, if the LSA’s redefinition of legal competence is not “law or state action”, then its most basic functions are immune to judicial review. This is a clear violation of “... *Dunsmuir*’s promise to protect ‘the legality, the reasonableness and the fairness of the administrative process...’”¹¹⁹

24. The “few examples” provided by the Justice do not, however, support the conclusions. Third-party resources, including academic commentary¹²⁰ and the Path, were expressly relied on by the LSA when mandating cultural competence training,¹²¹ drafting and mandating the Profile (including

¹¹² Reasons, para. 124 (AR p. 33).

¹¹³ Reasons, para. 132 (AR p. 35).

¹¹⁴ *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 (CanLII), [2002] 3 SCR 519, para. 22.

¹¹⁵ Brief, paras. 335-380.

¹¹⁶ Brief, paras. 31-33 and 47-53.

¹¹⁷ *Dunsmuir*, para. 28.

¹¹⁸ Song1, Ex. “E”, p. 103 (EKE p.75).

¹¹⁹ *Vavilov*, para. 12.

¹²⁰ The Articles and Song1, paras. 161-162, Ex. “KKK”, Ex. “LLL” (EKE pp. 67, 122, 123); Song2, Ex. “M”; Song1, Ex. “MMM”, Ex. “NNN” (EKE pp. 159, 169).

¹²¹ CRP, p. 279 (EKE p. 248), Song2, Ex. “J” (EKE p. 409), CRP, p. 275 (EKE p.244), Song2, Ex. “A” (EKE p. 305).

defining new “competencies”) and when drafting and mandating new ethical obligations in Code Part 6.3.¹²² These resources were tendered as relevant to the LSA decisions¹²³ subject to judicial review. Kachur J. appears to have reasoned that, because the evidence itself was not “subject to judicial review”¹²⁴, the decisions to which such evidence relates are also not “subject to judicial review.” That is an error of law: the Justice appears to have formulated and applied an entirely novel legal rule (an “**Invented Principle**”).¹²⁵

25. The next example is the proposition that, because the POs are not justiciable, nothing “intertwined with” them is justiciable either¹²⁶ (an Invented Principle). Note first, this is circular. The non-justiciability of the POs was proven by the non-justiciability of the POs. Second, having erroneously “black-boxed” the POs from her analysis, Kachur J. likewise “black-boxed” the Profile and CPD Tool on the basis that Song had claimed they were a means by which the POs were promoted. This is an error (see above) and not an example of why the Profile and CPD Tool are not an exercise of statutory authority.

26. The final example¹²⁷ is the Justice’s application of another Invented Principle to the Profile, that judicial review only relates to wholly mandatory obligations. Judicial review is available for all exercises of public authority including, for example, exemptions,¹²⁸ investigative reports,¹²⁹ benefits,¹³⁰ or authorizations.¹³¹ In any case, the Reasons: **A**) provided no coherent analysis of the Profile’s influence on lawyers (e.g. if the Profile’s competencies are “important to maintaining [safe, effective, and sustainable] legal practice”¹³² how is it not a “checklist”?¹³³ If CC is sufficiently

¹²² CRP, pp. 373 and 183 (EKE pp. 292 and 209).

¹²³ Rule 3.18(2).

¹²⁴ Reasons, paras. 28, 33-34 (AR pp. 19-20).

¹²⁵ See para. 12 and *M.H., Re*, 2006 NSUARB 43, paras. 58 and 110.

¹²⁶ Reasons, para. 34 (AR p. 20).

¹²⁷ Reasons, para 35 (AR pp. 20-21).

¹²⁸ *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44.

¹²⁹ *Democracy Watch v Canada (Attorney General)*, 2026 SCC 28, para. 1.

¹³⁰ *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8; *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 (“**Greater Vancouver**”).

¹³¹ *Alberta’s Free Roaming Horses Society v Alberta*, 2019 ABQB 714 (“**Free Roaming**”); *BC Civil Liberties Assn. v University of Victoria*, 2016 BCCA 162; *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62; *Greater Vancouver*.

¹³² Reasons, para. 11 (AR pp. 16-17).

¹³³ Reasons, paras. 13 and 35 (AR pp. 17, 20-21).

important to justify mandatory education¹³⁴ how can the Profile's associated competencies be optional?); and **B**) Failed to Engage with Song's extensive arguments as to the Profile's pressure on lawyers¹³⁵ including mandatory effects: it guides the LSA's selection of mandatory education;¹³⁶ lawyers must both plan education with reference to the Profile (education is mandatory)¹³⁷ and must practice with competence;¹³⁸ according to the LSA, a failure to maintain the competencies in the Profile renders the lawyer's practice unsafe, ineffective, and unsustainable;¹³⁹ the LPA deems incompetence to be conduct deserving of sanction;¹⁴⁰ and the Profile's competencies are necessarily consistent with Code Part 6.3 and therefore "ac[t] as an interpretive aid."¹⁴¹ The Profile's purported status as "not a checklist" does not render it something other than the exercise of statutory authority.

27. In conclusion, Song argued that the objectives pursued by the LSA were subversive to its statutory duties rendering its decisions Abuses of Subversive Objectives and "... outcomes ... so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning."¹⁴² Kachur J. simply refused to consider those objectives and therefore to substantively hear Song's case. The effect of the Reasons is to leave the LSA free to pursue these or other subversive objectives free of legal oversight. It may be clarifying to consider *Roncarelli*. On the Reasons' logic, Premier Duplessis's extraneous religious purposes (judicial toleration of which would "... signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure ..." ¹⁴³) were actually outside of Justice Rand's competence and were not therefore "subject to judicial review". This is a clear misconstruction of the law of justiciability.

28. These errors patently affected the outcome for reasons which are evident. The Justice failed to conduct a substantive judicial review and failed to grapple with key arguments put forward by Song. Most importantly, the Justice refused to consider Song's central complaint that the LSA is

¹³⁴ Song1, Ex. "DDDD", p. 991.

¹³⁵ Brief, pp. 173-180; Tx, 46:4-48:25.

¹³⁶ CRP, p. 179 (EKE p. 205) and Brief, paras. 680-682.

¹³⁷ Rules 67.1 and 67.2 and Brief, paras. 683-686.

¹³⁸ Rule 3.1-2.

¹³⁹ CRP, p. 179 (EKE p. 205).

¹⁴⁰ LPA, s. 49 and Brief, 687-694.

¹⁴¹ Brief, paras. 701-704.

¹⁴² *Vavilov*, para. 86.

¹⁴³ *Roncarelli*, paras. 28 and 45.

abusing its statutory authority by politically interfering with the independence of the bar thereby undermining the rule of law – leaving the LSA free to do so.

B. Improperly Excluded Evidence

29. “Judicial review” is a broad and varied mechanism whereby the courts ensure public authorities do not overreach their lawful powers.¹⁴⁴ Given the variety of delegates subject to judicial review, the form of judicial review depends on context.¹⁴⁵ As it relates to affidavit evidence, the context includes, critically, whether or not the delegate is a “typical” or “traditional” quasi-judicial tribunal to which parties may tender evidence and arguments following which reasons are provided and against which *certiorari* is sought.¹⁴⁶

30. In that context, affidavits are generally not admissible because they risk converting judicial review into a hearing *de novo*.¹⁴⁷ If an applicant wants evidence on the record, it is tendered at the hearing and thereby forms part of a “discrete and well-defined body of material”¹⁴⁸ which forms the record of proceeding on judicial review.¹⁴⁹

31. In the context of applications like the present one (where: the LSA was not acting in a quasi-judicial capacity, hence, there was no hearing; Song had no opportunity to tender evidence; there was no discrete and well-defined record; and there were no reasons) the general rule is relaxed.¹⁵⁰ In fact, because “the court would almost invariably grant permission to file an affidavit”¹⁵¹ in such atypical applications (including those for prohibition, declarations, and injunctions¹⁵²) the *Rules*

¹⁴⁴ *Dunsmuir*, para. 29.

¹⁴⁵ See, for example, *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, para. 21 and *Vavilov*, paras. 88-90.

¹⁴⁶ *Free Roaming*, para. 25; *CM v Alberta*, 2022 ABKB 716 (“*CM*”), para. 28; *Oleynik v University of Calgary*, 2023 ABCA 265 (“*Oleynik*”), para. 8.

¹⁴⁷ *Alberta Liquor Store Assn v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 (“*Alberta Liquor*”), paras. 42 and 46; *Oleynik*, para. 7.

¹⁴⁸ *CM*, para. 28.

¹⁴⁹ *Rule 3.18(2)(d)*.

¹⁵⁰ *Free Roaming*, para. 25; *CM*, para. 28; *Oleynik*, para. 8.

¹⁵¹ *Oleynik*, para. 8.

¹⁵² Such as the present application: OA, paras. 48(a), (c), (d), 49(a), (b), and 50 (AR pp. 13-14).

were amended in 2022 to expressly permit the filing of affidavits without prior consent¹⁵³. The affidavits tendered by Song¹⁵⁴ were therefore expressly permitted by *Rule* 3.22(b.1).

32. The foregoing and following legal principles were put to Kachur J.¹⁵⁵ but the Justice erred by both Failing to Engage with such arguments and failing to apply such principles. For example, the Justice nowhere considered the distinction between traditional and non-traditional forms of judicial review or *Rule* 3.22(b.1). Rather, the Justice nearly inverted Song’s argument, concluding Song had argued “there is no transcript made of the quasi-judicial proceeding.”¹⁵⁶

33. In any case, the general rule is subject to various exceptions. First, affidavits are permitted to supplement the record where there is “no, or an inadequate record” of proceedings¹⁵⁷ (including where there is no transcript of a quasi-judicial proceeding)¹⁵⁸ such as where there are records or information which were “directly or indirectly before the tribunal” but are absent from the record before the Court.¹⁵⁹ Almost all of the exhibits to Song’s affidavits¹⁶⁰ were records before the LSA, relevant to the Impugned Conduct (or were reasons therefore), but excluded from the LSA’s CRP, including all of the records discussed in this Part 4.B. The affidavits were admissible to supplement the record on this basis. However, the Justice refused to admit them for a few reasons, which were errors of law (**A to F**). (**A**) The CRP was not deficient because, “[t]he LSA’s reasoning process can be deduced from both the record and the context surrounding it.”¹⁶¹ This is an Invented Principle. To the contrary, all records before the tribunal form part of the record before the Court, not just a

¹⁵³ *Rule* 3.22(b.1).

¹⁵⁴ Song1 (EKE p. 43), Song2 (EKE p. 301), Report (EKE p. 5).

¹⁵⁵ Surreply, pp. 53-66.

¹⁵⁶ Reasons, paras. 60-61 (AR p. 24).

¹⁵⁷ *Alberta Liquor*, para. 41; *CM*, para. 27; *Andres v University of Lethbridge*, 2020 ABQB 223, para. 8.

¹⁵⁸ *Alberta College of Pharmacists v Sobeys West Inc.*, 2017 ABCA 306 (“**Sobeys West**”), para. 65.

¹⁵⁹ *Sobeys West*, paras. 25, 70; see also *Alberta Liquor*, paras. 38, 42; *Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654 (“**District Pro-Life**”), para. 21; *Leavitt v Association of Professional Engineers and Geoscientists of Alberta*, 2021 ABQB 983 (“**Leavitt**”), para. 52.

¹⁶⁰ Song1, Ex. “A”, “B”, “C”, “D”, “E”, “F”, “H”, “I”, “J”, “K”, “L”, “M”, “N”, “O”, “R”, “V”, “W”, “X”, “Y”, “CC”, “DD”, “EE”, “GG”, “II”, “VV”, “AAA”, “BBB”, “CCC”, “DDD”, “EEE”, “FFF”, “GGG”, “JJJ”, “KKK”, “LLL”, “MMM”, “NNN”, “000”, “PPP”, “QQQ”, “RRR”, “SSS”, “UUU”, “VVV”, “WWW”, “YYY”, “ZZZ”, and “DDDD”, and Song2, Ex. “B”, “A”, “J”, “F”, “K”, “C”, “N”, “L”, “T”, and “M”.

¹⁶¹ Reasons, para. 62 (AR p. 24).

few records from which reasons can be discerned. Further, this Invented Principle makes for bad judicial policy. A cherry-picked set of records might suggest certain reasons, whereas the full record might suggest something very different. Such was the case here. The records absent from the CRP evidenced and explained the LSA's POs (their exclusion permitted the LSA to argue that the POs were not "supported by the evidence"¹⁶²). The effect of this Invented Principle was therefore to exclude evidence of Song's central complaint. Perversely, given this Invented Principle, the Justice Failed to Engage with Song's argument that, among the records which ought to be admitted, was a "**Reasons Letter**"¹⁶³, which is the closest thing to proper reasons in the evidence. The Reasons Letter formed the basis of extensive argument¹⁶⁴ including as to the LSA's apparent claim of jurisdiction from the Truth and Reconciliation Commission (the "**TRC**"), which claim was analyzed by the Justice¹⁶⁵ but excluded from the evidence. Any discretion necessary to supplement the deficient CRP ought, instead, to have been exercised generously, given the argument (with which the Justice Failed to Engage) that important records were "conspicuously absent" from the CRP and that the LSA "has an interest in ensuring that the contents of the CRP are helpful."¹⁶⁶ Procedural discretion must be sensitive both to the need for the Court to be fully informed and to the delegate's potential conflicting interest in seeing its decisions upheld.¹⁶⁷

34. (B) The Justice excluded many of the records because they were "from third parties" and thus not "subject to" judicial review¹⁶⁸, while others were "created by the LSA."¹⁶⁹ This is an Invented Principle. The record is not limited to things authored by the statutory delegate.

35. (C) Even records created by the LSA were excluded on the basis that they were "duplicative." While it is true that duplicates need not be included in affidavits,¹⁷⁰ a "duplicate" means the same record twice – not a different record that "do[es] not provide any additional information related to

¹⁶² LSA Brief, para. 129.

¹⁶³ Song1, Ex. "EE" (EKE p. 106): letter from the LSA's CEO to Mr. Blackett, dated December 6, 2022.

¹⁶⁴ Brief, paras. 260 – 298.

¹⁶⁵ Reasons, para. 112 (AR p. 32).

¹⁶⁶ Surreply, paras. 65-66.

¹⁶⁷ *JK v Gowrishankar*, 2019 ABCA 316, para. 46.

¹⁶⁸ Reasons, paras. 32-33 (AR p. 20).

¹⁶⁹ Reasons, para. 62 (AR p. 24).

¹⁷⁰ *Oleynik*, paras. 8, 10.

the LSA’s reasoning process”¹⁷¹ (an Invented Principle). While the affidavits did contain some (proper) duplicates, the concept is largely irrelevant (e.g. none of the records referred to in this Part were proper duplicates).

36. (D) The ROs were impliedly excluded because, *inter alia*, they were “not being challenged”¹⁷² (an Invented Principle that records are excluded from the evidence unless they are, themselves, subject to challenge) and because they were “linked to” the purportedly non-justiciable POs (an Invented Principle that evidence of purportedly non-justiciable objectives should be excluded).

37. (E) Having purported to admit (unidentified) portions of Song’s affidavits for the limited purpose of assessing claims under the *Charter* (a second general exception to the general rule¹⁷³) in fact, the Justice later referred to none in her *Charter* analysis, except limited (and purportedly mitigating) references to the Path¹⁷⁴. However, the Justice did not admit the portions that “contain his opinions and argument about the merits of the issues which are not admissible.”¹⁷⁵ As Song argued, with which argument the Justice Failed to Engage, his “sincerely held religious and secular beliefs and desired expression” are necessary evidence in support of his *Charter* ss. 2(a) and 2(b) claims.¹⁷⁶

38. (F) Finally, the Report was excluded,¹⁷⁷ which is discussed below (para. 48). In the context of the *Charter* claim, its exclusion is an error of law because: (F.i) affidavits are permitted to support *Charter* claims; and (F.ii) the Report evidences that the LSA’s POs vilify Christianity, the *Constitution*, and their respective principles as invalid, oppressive social constructs.¹⁷⁸

¹⁷¹ Reasons, para. 62 (AR p. 24).

¹⁷² Reasons, para. 59 (AR p. 24).

¹⁷³ *Bergman v Innisfree (Village)*, 2020 ABQB 661 (“**Bergman**”), para. 46 and *Syncrude v Alberta (Minister of Energy)*, 2023 ABKB 317 (“**Syncrude**”), para. 57.

¹⁷⁴ Reasons, paras. 144-145, 149 (AR pp. 36-37).

¹⁷⁵ Reasons, para. 64 (AR p. 25).

¹⁷⁶ Brief, para. 727 and Surreply, para. 106(c); and see *Mouvement laïque québécois v Saguenay (City)*, [2015] 2 S.C.R. 3, para. 69; *R. v Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 (“**Edwards Books**”), *SL v Commission scolaire des Chênes*, 2012 SCC 7, paras. 2, 24; and *Montréal (Ville) v 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141, paras. 62, 56-81.

¹⁷⁷ Reasons, para. 64 (AR p. 25).

¹⁷⁸ Report; Song 1, Ex. “LLL” (“Dominant Culture”, pp. 813 and 817) (EKE pp. 130-134); “ethnocentrism”, “heterosexism”, “imperialism”, “majority” pp. 814, 817, 819, 827) (EKE pp. 131, 134, 136, 144); Brief paras. 299-380, 538-594, 743-768.

39. A third exception to the general rule (the second is discussed at para. 37 above) is where affidavits provide useful background and context, including to explain specialized jargon and technical material.¹⁷⁹ The Justice both Failed to Engage with Song’s arguments in this respect¹⁸⁰ and failed to cite or apply these principles.¹⁸¹ These failures are particularly problematic given Song’s consistent argument that, “a proper understanding of the LSA’s nomenclature and underlying ideological concepts is critical to understanding the true nature of the LSA’s Impugned Conduct.”¹⁸² As the OA warns, while the Theories “appear, superficially, to embody the values ... of the ... *Constitution* ... [they] are, in fact, subversive to the ... *Constitution* including hostile to those same values ...”¹⁸³ In his Brief Song reiterated the necessity to “carefully consider the details of these foreign objectives which are difficult and obscure. When its nature is understood, its incompatibility with the *Constitution* is clear.”¹⁸⁴ Song warned of the motte-and-bailey fallacy¹⁸⁵ and that the LSA was attempting to “black-box” improper objectives by use of misleading labels.¹⁸⁶ All of these arguments are totally absent from the Reasons – a Failure to Engage (see also paras. 66 and 67 below).

40. As a consequence of the improper exclusion of records, the LSA’s objectives were framed, superficially, as variations of “competence” and “ethics”¹⁸⁷ (the motte) stripped of all subversive and abusive substantive content (i.e. the POs – the bailey).

41. Some examples of important evidence thereby excluded from the record are as follows (**A to G**). (**A**) The CRP contains minutes of many Benchers and committee meetings which show express reliance on certain records which were “conspicuously absent”¹⁸⁸ from the CRP. The failure was so

¹⁷⁹ *Canadian National Railway v Volker Stevin Contracting Ltd.*, 1991 ABCA 287; *Alberta Liquor*, para. 49; *Free Roaming*, para. 26; *Leavitt*, para. 42; *District Pro-Life*, paras. 7, 19-20; *Cold Lake First Nation v Alberta (Tourism, Parks and Recreation)*, 2012 ABQB 579, para. 27; *Bergman*, para. 46; *CM*, para. 27.

¹⁸⁰ *Surreply*, paras. 44-113.

¹⁸¹ *Reasons*, paras. 58-64, 130 (AR pp. 24-25, 34).

¹⁸² *Surreply*, para. 89.

¹⁸³ OA, para.16(a) (AR p. 7).

¹⁸⁴ *Brief*, para. 8.

¹⁸⁵ *Surreply*, para. 23.

¹⁸⁶ *Tx*, 9:34-38.

¹⁸⁷ *Reasons*, paras. 99-132 (AR pp. 30-35).

¹⁸⁸ *Surreply*, para. 65.

frequent that Song defined the term “**Meeting Materials**” for efficiency¹⁸⁹ (see also the Not Produced records above). The CRP was clearly inadequate as the Rules expressly require these records be included.¹⁹⁰ That such Meeting Materials were highly relevant is clear. For example, the LSA excluded from the CRP (and the Justice from the evidence) the Furlong Report which was central to the LSA’s new “competence” program including an express acknowledgment in the Profile.¹⁹¹ The Furlong Report evidences that CC means the advancement of the POs¹⁹² and that no due diligence was done on the Path by Furlong either.¹⁹³

42. (B) The LSA likewise excluded from the CRP (and the Justice from the evidence) the Path itself. As argued by Song (with which argument the Justice Failed to Engage), the LSA instead included in its CRP a deficient “information sheet”¹⁹⁴ (the motte) from which is absent all of the Path’s impugned Theoretical content (the bailey). For example, while the sheet says: (B.i) lawyers will be able to “summarize scientific theories”¹⁹⁵ (the motte); the Path actually contains a lesson in Theoretical relativism (the bailey);¹⁹⁶ and (B.ii) lawyers will be able to “highlight the failure of the Canadian justice system towards Indigenous peoples” (the motte); the Path actually contains a lesson in Postcolonialism (the bailey).¹⁹⁷ Nor does the LSA’s sheet include the Path’s factual accuracy disclaimer.¹⁹⁸ The Justice Failed to Engage with Song’s argument that the Path contained misinformation (see footnote 42 above) and excluded the evidence of same.¹⁹⁹

¹⁸⁹ See, for example, Brief, paras. 35 (re: Meeting Materials absent for the meeting at C-406), 36 (C-402), 37 (C-398), 42 (C-392), 50 (A-273), 55 (C-386), 66 (A-383), 67 (A-242), 69 (C-380), 73 (C-374), 74 (C-371), 78 (C-368), 105 (C-345), and 111 (C-342).

¹⁹⁰ Rule 3.18(2)(d) and (e).

¹⁹¹ CRP, p. 200 (EKE p. 226); see also CRP, pp. 210-220, 254, 275-276, 328, 337, 365, 386, 398 (EKE pp. 229-239, 241, 244-245, 273, 281, 288, 296, 298).

¹⁹² See, especially, the Articles.

¹⁹³ Kachur J. Failed to Engage with Song’s extensive argument that the LSA did no due diligence on the Path to confirm it was created by a trusted organization, accurate, or within the LSA’s jurisdiction: it was none of those things (Brief paras. 37, 48, 47, 50-52, 394-397, 632-634 and Song2 paras. 18-19, Ex. “D”, “E”, “Q”, “R”) (EKE pp. 303-304, 405).

¹⁹⁴ CRP, p. 311.

¹⁹⁵ CRP, p. 316.

¹⁹⁶ Report, pp. 6, 14 (EKE pp. 11, 19); Song1, Ex. “X” p. 454 (EKE p. 91).

¹⁹⁷ Report, pp. 10-13 (EKE 15-18).

¹⁹⁸ Song1, Ex. “X”, p. 453 (EKE p. 90).

¹⁹⁹ Brief, paras. 632-638, Song1, Ex. “X” (EKE p. 89), Song2, paras. 18-19, Ex. “D”, “F”, “Q”, “R” (EKE pp. 303-304)

43. (C) Another key “Meeting Material” excluded is the Survey featured prominently throughout the CRP²⁰⁰ which, purportedly, shows “considerable empirical and anecdotal evidence that discrimination, harassment and bullying remain prevalent in the legal profession”²⁰¹ and “alarming levels of discrimination and harassment in the articling system”.²⁰² As argued by Song (with which arguments the Justice Failed to Engage)²⁰³ when the Survey itself is actually scrutinized it evidences very little (note that the LSA did nothing to assess or weigh it). For example: (i) it failed to establish a baseline (i.e. what levels of reported H&D would be described as “low” or “average”, as compared to “prevalent” or “alarming”); (ii) it failed to define its terms including those which, elsewhere, bear vague and expansive definitions (e.g. “harassment” includes “an incident ... that might reasonably be expected to cause ... offence ... [including] assigning work inequitably”²⁰⁴); and (iii) it failed to confirm whether reported H&D even involved a lawyer. Scrutinizing the Survey likewise reveals no rational connection between its purported findings and the LSA’s decision²⁰⁵ that it was “compelled to act” on the Survey by “create[ing] competence programs ... on Indigenous issues to ... address our obligation arising from the Calls to Action in the Truth and Reconciliation Report”²⁰⁶ (including imposing CC and the Path). The Survey was neither specific to indigenous people nor linked to any (even perceived) lack of CC. The Justice Failed to Engage with Song’s extensive argument on these points. Instead, the Survey’s “findings” were framed only superficially: “the articling survey revealed issues” and “established concerns.”²⁰⁷

44. (D) The Justice also excluded the minutes of a February 4, 2022, Benchers meeting (absent from the CRP) where the LSA set the mandate of committees involved in the work of advancing the POs. The LSA’s CEO, referring to a desire to expand its statutory jurisdiction, stated, “in the meantime, the Law Society continues to utilize the Rules to advance its work where the legislation

²⁰⁰ CRP, 29, 58-59, 72, 77, 208, 210, 234, 238, 338, 354, 372, 382, and 404 (EKE p. 229, 282, 291).

²⁰¹ CRP, 58.

²⁰² Song2, Ex. “A”, p. 13 (EKE p. 306).

²⁰³ Brief, paras. 24 (cross-referencing 349-356), 31-33, 58-59, 69, 86, 113.

²⁰⁴ The Code at Rule 6.3-2 (Song1, Ex. “G”, p. 259) (EKE p. 82).

²⁰⁵ CRP, p. 333 (EKE p. 277).

²⁰⁶ CRP, pp. 338-341 (EKE pp. 282-285).

²⁰⁷ Reasons, paras. 99 and 119 (AR pp. 30, 33).

is outdated.”²⁰⁸ Song relied on this statement as evidence of a disconnect between the LSA’s objectives and those assigned to the LSA by an “outdated” statute.²⁰⁹

45. (E) As stated above, the Justice excluded the ROs notwithstanding that the LSA expressly states it will use them, “as a guide when making regulatory, governance and operational decisions.” The *Rules* make them part of the proper record²¹⁰ but the Justice erroneously failed to apply such *Rule* on the basis of legal errors discussed above and below (see Part 4.C “Misconstruction of Auer”). The ROs are, in fact, highly relevant evidence because, *inter alia*, in them the LSA adopts its POs and expressly admits they may take priority over other objectives like the rule of law and access to justice.²¹¹ In another record excluded by the Justice, the LSA suggested the POs were actually super-priorities.²¹²

46. (F) Another group of excluded records is guidance material relied on by the LSA and provided to lawyers to understand, *inter alia*, “competencies” in the Profile²¹³ and Code Part 6.3. (F.i) Given Song’s recurring theme that the Court must determine the meaning of the LSA’s jargon, few records were as useful to the task as a “glossary” of terms²¹⁴. The glossary itself states: “These terms are crucial to the system of thought that works to combat individual, institutional and systemic racism.” As observed in the Report, “the very fact that a glossary is needed speaks to a project of either introducing new [T]heory-inspired terminology or redefining existing terms.”²¹⁵ Indeed, the glossary reveals many surprising meanings consistent with the LSA’s POs but hostile to the Constitutional Principles, for example, that: **i)** racial prejudice directed at white people “is not considered racism”;²¹⁶ **ii)** “whiteness ... white culture, norms, and values” is a “powerful fiction enforced by power and violence”²¹⁷; **iii)** accordingly, that both “equality” and “liberalism” are

²⁰⁸ Song1, Ex. “ZZZ” (EKE p. 195).

²⁰⁹ Brief, paras. 70-71, 205(a), 252, and 405; Surreply, para. 73.

²¹⁰ *Rule* 3.18(2)(e).

²¹¹ Song1, Ex. “E”, p. 101 and 104 (EKE pp. 73, 76).

²¹² Song1, Ex. “N”, p. 339 (EKE p. 86) (“... Benchers ... centering equity in their governance and decision-making roles...”).

²¹³ CRP, pp. 183, 373 (EKE pp. 209, 292), Song1, Ex. “CCC” p. 736 and Ex. “KKK” p. 802 (EKE pp. 119, 122).

²¹⁴ Song 1, Ex. “LLL”, p. 806 (EKE p. 123).

²¹⁵ Report, p. 9 (EKE p. 14).

²¹⁶ Song1, Ex. “LLL”, p. 831 (EKE p. 148).

²¹⁷ Song1, Ex. “LLL”, pp. 839-840 (EKE pp. 156-157).

concepts which support racial oppression²¹⁸; **iv**) “color-blindness” is oppressive;²¹⁹ **v**) “universalism” (e.g. “we are all the same”) is the oppressive construct of the “protestant,”²²⁰ “white, western, middle-class, straight, male”²²¹; **vi**) rather than agreements to surrender lands, treaties²²² are merely agreements to “share” some interests in land (a claim reiterated in the Path²²³); **vii**) an indigenous person who embraces “white” (i.e. Western) values suffers from “internalized racism”²²⁴; and **viii**) “people of color” lack “ultimate decision-making power”²²⁵.

47. **(F.ii)** The LSA also relied on and provided lawyers with the guidance of academic articles (including the Articles) which define CC. Relying on such Articles, Song made extensive argument that the term bore a (misleading) superficial meaning (the motte: “a type of competence appropriate to Canada’s constitutional structure”) and an obscure, political meaning (the bailey: “hostility to the Constitution” by pursuing the POs).²²⁶ That “cultural competence” is misleading is expressly admitted in the Parmar Article on which the LSA placed heavy reliance,²²⁷ but which it excluded from the CRP: “cultural competence, as currently understood [including “the skills to work more effectively with a diverse range of clients”] is inadequate ... limited and deficient”; “decolonization is more useful than ‘cultural understanding’ when the goal is systemic change.” Parmar urges understanding the term to mean enabling the pursuit of a radical agenda to transform the legal system to address “the foundational violence of colonialism that has shaped ... Canadian laws,” including: “unlearning colonial logics, hierarchies of legal cultures, and the disregard of particular knowledges ...”; “understand[ing] how racial difference works”; moving away from the ... “the rational independent self-reliant individual [which] lies at the heart of [the] narrow approach to ‘cultural competence’”; learning indigenous law and epistemologies; and, most especially, helping build-out indigenous law and legal systems to reify racial segregation.²²⁸ As Song argued, CC thus has a

²¹⁸ Song1, Ex. “LLL”, pp. 813, 826-827 (EKE pp. 130, 143-144).

²¹⁹ Song1, Ex. “LLL”, pp. 810-811 (EKE pp. 127-128).

²²⁰ Song1, Ex. “LLL”, p. 813 (EKE p. 130).

²²¹ Song1, Ex. “LLL”, p. 839 (EKE p. 156).

²²² Song2, Ex. “G” (EKE p. 408).

²²³ Song1, Ex. “LLL”, p. 837 (EKE p. 123); Song1, Ex. “X”, p. 447.

²²⁴ Song1, Ex. “LLL”, p. 824 (EKE p. 141).

²²⁵ Song1, Ex. “LLL”, p. 824 (EKE p. 141).

²²⁶ Brief paras. 33, 416-537, 667; Surreply paras. 23, 45, 100, 152, 169, 181- 188, 192, 196.

²²⁷ CRP, p. 288 (EKE p. 257).

²²⁸ Song 2, Ex. “J”, pp. 230, 232, 235, 237-239, 244-245, 247, 253, 255 (EKE pp. 409, 411, 414, 416-418, 423-424, 426, 432, 434).

political meaning: “for lawyers to [assume] ... the objective of changing the law is to take on the role of the legislature ... an Abuse of Subversive Objectives.”²²⁹ That CC has a Theoretical meaning is obvious from the Articles and especially the observation that: “The most important theoretical concept for [CC] is that all experience is constructed.”²³⁰

48. (G) Finally, the Justice excluded the Report on the grounds that it was: 1) “directed at the merits” (see Part 4.A “Misconstruction of the Principles of Justiciability” above); 2) not “before” the LSA; and 3) not within any recognized exception.²³¹ Song argued: “the Report is a critical roadmap for the Court to understand the LSA’s [POs] because the Theories are opaque and poorly explained ... For example, ... that [CC] includes, ‘unlearning colonial logics [etc.] ... is virtually meaningless without the Report’s overview of postcolonialism. Likewise, the meaning of the Path’s observation that ‘we can look at science and origin stories as simply different ways to describe where we’ve come from’ is seemingly benign (if inaccurate) without the Report’s explanation of the relativistic core of the Theories.”²³² The Justice Failed to Engage with such arguments. In fact, the underlined quote was referenced by the Justice only as evidence that Song enjoyed freedom of conscience. The Report states, to the contrary, that “[i]ronically, the notion of truth as multiple and subjective does not mean that [the] Theories are open to ... intellectual challenge. They are hostile to the expression of alternative viewpoints.”²³³

49. The Justice Failed to Engage with the whole of Song’s motte-and-bailey argument and, in fact, nowhere mentions it. Worse, having determined the POs and evidence of same were not “subject to judicial review”, the Court’s Reasons reproduce the very motte-and-bailey fallacies against which Song warned. For example, CC was framed as bearing only its superficial meanings (Superficial CC – the motte) without any acknowledgment of the impugned “radical” transformative agenda (the bailey). Having refused to inform herself as to the LSA’s impugned objectives by reference to Song’s evidence and argument, the Justice then repeatedly characterized Song’s allegations as to the LSA’s objectives as merely his “subjective interpretations ... and ...

²²⁹ Brief, s. IV.B.ii “The LSA’s Political Objectives – An Attack on Loyalty to the Law” (paras. 381-413).

²³⁰ Song1, Ex. “RRR”, p. 880 (EKE p. 178).

²³¹ Reasons, para. 64 (AR p. 25).

²³² Surreply, paras. 99 and 100; see also Brief, paras. 305 to 311 and Surreply paras. 67, 99-103.

²³³ Report p. 30 (EKE p. 35); see also Brief, s. IV.C.iv, “Illiberalism and Dogma” (paras. 614-638) and the glossary’s treatment of “liberalism” (Song1, Ex. “LLL”, pp. 826-827) (EKE pp. 143-144).

assumptions” which were “not subject to judicial review because there is no factual or legal basis for the claim.”²³⁴ The frequency of that observation demonstrates the importance of these rulings (justiciability and evidence) to the balance of the Reasons.

50. This case required careful scrutiny of the LSA’s impugned objectives and of the meaning of its own words. The foregoing evidentiary errors left the Court largely uninformed about both. As a result, the LSA’s impugned POs (including as manifest in various new professional obligations as to ethics and competence) went unscrutinized and the Reasons fundamentally rely on a logical fallacy.

C. Misconstruction of Auer

51. Kachur J.’s summary and application of the principles for “assessing the vires of subordinate legislation” were substantially in error as they largely ignored *Vavilov*²³⁵. In *Vavilov*, the Court acknowledged “past precedents” might continue to provide supplemental “guidance” (para. 143). *Auer* reviewed past precedents, primarily *Katz*²³⁶, to determine (when reviewing subordinate legislation) what supplemental guidance survived *Vavilov* (para. 31). *Auer* retained all of the *Katz* principles except the threshold question of whether regulations were “irrelevant” etc. because that granted more deference than *Vavilov* permitted (para. 46). The Justice, however, listed the retained *Katz* guidance as “... the principles for assessing the vires of subordinate legislation ...”²³⁷ and then nowhere mentioned or (fully and consistently) applied the *Vavilov* reasonableness standard: reasonable in process (transparency, intelligibility, internal coherence and justification) and outcome (justified in light of factual and legal constraints). *Vavilov*, not *Auer*, provides “the principles”.²³⁸

52. To enhance a “culture of justification in administrative decision making”²³⁹ the reasonableness review is effected by, first, identifying the delegate’s reasons in support of the decision and, second, determining whether the decision was reasonable. Based on the arguments before her (summarized above), Kachur J. should have noted and applied at least the following

²³⁴ Reasons, para. 30, see also paras. 24, 57, 135, 141 and 149 (AR pp. 19-20, 23-24, 35-37).

²³⁵ *Vavilov*.

²³⁶ *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 (“*Katz*”).

²³⁷ Reasons, para. 44 (AR p. 22).

²³⁸ *Vavilov*, para. 89, *Auer v Auer*, 2024 SCC 36 (“*Auer*”), para. 20.

²³⁹ *Vavilov*, paras. 2 and 83.

Vavilov principles (the failure to do so was an error of law): **A**) as to process: **A.i**) reasons should be read holistically and contextually in light of, *inter alia*, context, evidence, policies, and guidelines including interpretive policies; **A.ii**) there must be consideration and weighing of, and no fundamental misapprehension of, the evidence; **A.iii**) reasons must contain internally coherent and rational chains of analyses (no logical fallacies, unfounded generalizations, absurd premises, etc.) of all significant points which lead logically from evidence to conclusions; **A.iv**) conclusions may not be peremptory, there must be transparent justification by analysis of the facts and law which constrain the decision maker including, centrally, statutory purposes; **A.v**) an otherwise reasonable decision cannot stand if it was reached on an improper basis (i.e. on the basis of a flawed reasoning process); and, **B**) as to outcome, some outcomes are so at odds with the statutory language or the legal and factual context that they can never be supported by intelligible and rational reasoning.²⁴⁰ Song's primary argument, that the LSA's jurisdiction categorically excludes political interference which subverts loyalty to the *Constitution* and to the client, was essentially ignored.

53. Kachur J. cited and (consistently) applied almost none of these principles and thereby fell into serious error. In fact, in oral argument the LSA's counsel invited this very error:

THE COURT: ... all I am to do is look at the Act in and of itself and determine whether pursuant to that Act they had the reasonable ability to make that particular rule. Not why they made it, not on what grounds they made it, not with what evidence or -- he used the word evidence or empirical studies they looked at. None of that matters. All it is what did the Act said and is it reasonable from the Act's interpretation that they could pass this action.

*MR. KULLY: Correct ...*²⁴¹

54. While Kachur J. acknowledged that reasons could be deduced from the record, debates, deliberations, statements of policy²⁴² and plans, the Justice failed almost entirely to actually deduce reasons. For example, in relation to Rules 67.2-67.4, Kachur J. noted the LSA's view that the, "... words, scheme and object of the LPA supports an 'expansive construction' of the rule making authority of the LSA."²⁴³ This is not reasons. It reveals no "reasoning process" with which Kachur J. could "develop an understanding."²⁴⁴ It is a peremptory conclusion with no analysis. Reasons

²⁴⁰ *Vavilov*, paras. 85-86, 98-105, 111-112, 122.

²⁴¹ Tx, 80:38 – 81:4

²⁴² Reasons, para. 48 (AR pp. 22-23).

²⁴³ Reasons, para. 78 (AR pp. 26-27).

²⁴⁴ *Vavilov*, para. 99.

analyze statutory words, the absence of words (like “in the public interest”), the scheme of an act, etc. to demonstrate, transparently, that an “expansive construction” is not only supported but sufficiently “expansive” so as to render a specific decision *intra vires*. Identification of the LSA’s *ex post facto* “reasons” about Code 6.3 was similar²⁴⁵. Kachur J. referenced no *Charter* “reasons” whatsoever.

55. Kachur J. did reference “the record” including some basic history, some evidence the LSA relied on, and some objectives the LSA was purportedly pursuing.²⁴⁶ But again, these were not substantive reasons. They were facts, assertions, and decisions without analysis of the question at issue: does the LSA have statutory and constitutional authority to pursue its POs including by means of the Impugned Conduct? For example, in connection with mandatory education, the Survey (evidence) was mentioned, but its relationship to CC (objective) was not. An “obligation” to address “Calls to Action” (jurisdiction) was neither explained nor connected to the *LPA*. The LSA was said to have determined CC to be a “core competence” (decision) without any information as to how that determination was made (analysis) or on what basis (evidence).

56. With respect to the LSA’s jurisdiction to impose mandatory education, the clearest attempt at “reasons” in the evidence was the Reasons Letter (see para. 33 above). As set out above, reasons might also be deduced from statements of policy and plans. The LSA’s policies include the ROs to which the LSA “... will have regard ... when discharging its regulatory functions.”²⁴⁷ But Kachur J. excluded the ROs. Plans would include the LSA’s Strategic Plan, which adopted the POs including a plan to “increase cultural competence.”²⁴⁸ That plan was excluded from the evidence and ignored.

57. With respect to the Reasons Letter, the Justice “found” the TRC’s “Calls to Action” were “not a source of jurisdiction”, indicating Song’s arguments were correct: the LSA committed a legal error when determining its jurisdiction. However, Kachur J. went on to find, “... rather it is a contextual factor that played a role in the LSA’s decision ...”²⁴⁹ Kachur J. thereby erred by

²⁴⁵ Reasons, para. 122 (AR p. 33).

²⁴⁶ Reasons, paras. 99-106 and 118-121 (AR pp. 30-31, 33).

²⁴⁷ Song1, Ex. “E”, p. 103 (EKE p. 75).

²⁴⁸ Song 1, Ex. “C”, p. 70 (EKE p. 70).

²⁴⁹ Reasons, para. 112 (AR p. 32).

“disregard[ing] the flawed basis for the decision and substituting [her] own justification for the outcome ...”²⁵⁰

58. In place of the reasonableness standard described in *Vavilov* and *Auer*, the Justice incorrectly applied what might be called a “*de novo* ‘tolerable’ analysis”. First, Kachur J. concluded her “principles of reasonableness review” section quoting *Auer*: “... reviewing the *vires* of subordinate legislation is ‘fundamentally an exercise of statutory interpretation ...’”²⁵¹. This suggests, as the Reasons bear out, that Kachur J. really viewed her role as conducting a *de novo* analysis. The Justice having selected *Vavilov*’s “reasonableness” standard, the LSA’s reasons should have been at the centre of the review. However, given the misconstruction of *Auer*, reasons were deemed largely irrelevant. For example, the ROs “will not assist the court in determining” whether subordinate legislation “fall[s] under the LSA’s authority.”²⁵² Kachur J. conducted a *de novo* analysis. This is an error²⁵³.

59. Second, the Justice repeatedly described her task as ensuring the subordinate legislation “fall[s] within a reasonable interpretation” of the *LPA*.²⁵⁴ In the context of the Reasons, by “reasonable” the Justice seems to have meant “tolerable”. This is an error. *Vavilov* is clear that “reasonableness” relates to process and outcome – it does not mean “good enough.”²⁵⁵ *Auer* confirms that “reasonableness” relates to the delegate’s decision-making process, not (primarily) to the reasonableness of the rules themselves.²⁵⁶

60. As set out above, Kachur J. misconstrued the reasonableness review as excluding, *inter alia*, analysis of the LSA’s objectives (the POs) to validate that they were: consistent with the statutory objectives assigned by the *LPA*; consistent with the *Charter*; and rationally, legally, and constitutionally pursued.

²⁵⁰ *Vavilov*, para. 96, citing *Delta Air Lines Inc. v Lukács*, 2018 SCC 2.

²⁵¹ Reasons, para. 50 (AR p. 23); but this quote from *Auer* related to “constraints” and follows *Auer*’s earlier reference to the full *Vavilov* reasonableness principles under the title: “How to Conduct a Reasonableness Review ...” at paras. 50-51.

²⁵² Reasons, para. 57 (AR pp. 23-24).

²⁵³ *Vavilov*, para. 83.

²⁵⁴ See, for example, Reasons, para. 71 (AR p. 25).

²⁵⁵ *Vavilov*, para. 11.

²⁵⁶ *Auer*, para. 56.

D. Misconstruction of Charter Principles

61. See para. 37 above. In addition, the Reasons seriously misconstrued Song's *Charter* claims and arguments, *inter alia*: **A**) they Failed to Engage with Song's claim of religious neutrality under *Charter* s. 2(a) ("The LSA has 'intentional[ly]...' created a prejudicial public space by attacking the honesty, integrity, and morality of the '... Protestant male' and by attacking the veracity, integrity, and morality of his ... profoundly held personal beliefs (religious and secular) ...")²⁵⁷; and **B**) they characterized Song's complaint as him being "forc[ed] ... to believe things."²⁵⁸ Song claimed, in essence, that the LSA was: **i**) mandating "education" including asking him questions he must answer "correctly" which answers contradict his sincere subjective beliefs and desired expression; and **ii**) requiring that he demonstrate CC and avoid H&D which "exerts substantial coercion ... to believe ... say he believes ... [and] advocate on behalf of ... " the Theories, all of which interfered with Song's freedom to "entertain the beliefs of his choice ... to declare these beliefs openly ... and to manifest his beliefs ..."²⁵⁹

62. While, as Song argued,²⁶⁰ the delegate's objectives are relevant to the *Charter* ss. 1,²⁶¹ 2(a),²⁶² and 2(b)²⁶³ analysis, the Justice appears to have ignored the LSA's objectives (an error of law) on the basis of her previous rulings on justiciability and evidence: Song was "merely" asserting his "subjective interpretation" and "assumptions".²⁶⁴ Contrary to the assurance that evidence would be admitted "for the limited purpose of assessing the Applicant's *Charter* arguments," it was not – an error of law.²⁶⁵ The *Charter* analysis was fundamentally flawed, as the impugned content (the POs) was ignored.

²⁵⁷ Brief, para. 777; see also OA, para. 44 (AR p. 13), Brief, paras. 771-778, and Tx, 56:20-37.

²⁵⁸ Reasons, para. 135 (AR p. 35).

²⁵⁹ Brief, paras. 769-770.

²⁶⁰ Brief, paras. 733 and 776.

²⁶¹ *Big M*, pp. 352-353; *Hutterian Brethren v Alberta*, 2009 SCC 37, para. 92; *R v Oakes*, [1986] 1 SCR 103 ("*Oakes*"); *Doré*; *R. v Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697 ("*Keegstra*"), para. 62.

²⁶² *R. v Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 ("*Big M*"), paras. 81-82, 88: a purpose to interfere with religious freedom will infringe s. 2(a).

²⁶³ *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, pp. 971-975: a purpose to restrict the content of expression will infringe section 2(b).

²⁶⁴ Reasons, para. 135, 141, and 149 (AR pp. 35-37).

²⁶⁵ Reasons, para. 63 (AR pp. 24-25) (citing *Schulte v Alberta (Appeals Commission)*, 2015 ABQB 17); see also para. 37, above and *Mackay v Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 SCR 357.

63. With respect to the *Charter* analysis of the Profile, see above at para. 26 (the Profile exerted significant pressure on lawyers to (at least outwardly) conform to its “competencies” and was, in fact, “mandatory” in even the strictest sense of the word). Additionally, as applied to the *Charter*, the Justice’s analysis includes an Invented Principle that, provided the Profile was not a “checklist”, its interference was necessarily trivial and insubstantial.²⁶⁶ To the contrary: “coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others”²⁶⁷; substantial interference includes “impeding conduct integral to the practice of a person’s religion;”²⁶⁸ and s. 2(a) is engaged where “religious beliefs or conduct might reasonably or actually be threatened.”²⁶⁹

64. The Justice’s ss. 2(a) and 2(b) analyses contain another, related, Invented Principle: that compulsory statements which contradict one’s conscience do not infringe one’s freedom of conscience or speech provided they are not phrased in the form: “I believe that ...”²⁷⁰. By this principle, it would not infringe Song’s *Charter* freedoms to compel him to answer the question, “what religion is an invalid, oppressive social construct?” with the “correct” answer “Christianity” (see para. 38 above), because the question is not, “what religion do you think is ...” This is not a “generous” interpretation of the *Charter*.²⁷¹ Rather, it is an anemic interpretation which tends to gut fundamental freedoms.

65. Code 6.3 is more obviously “mandatory”,²⁷² which makes its absence from the Justice’s s. 2(a) analysis a serious Failure to Engage. Song argued Code 6.3 itself interfered with his conscience freedoms²⁷³. Its absence from the s. 2(a) analysis is also noteworthy because the Justice had specifically requested, in argument, that Song locate within Code 6.3 any requirements to “have a certain view of the world”, which were duly located: “respect ... dignity” and “recognize ... internal bias.”²⁷⁴ There are others: not “being willfully blind”, “be aware”, “be alert to unconscious biases”,

²⁶⁶ Reasons, para. 142 (AR p. 36).

²⁶⁷ *Big M*, para. 95.

²⁶⁸ *Edwards Books*, para. 99.

²⁶⁹ *Edwards Books*, para. 97.

²⁷⁰ Reasons, para. 146 (“not an affirmation that one believes”) and 149 (AR p. 37).

²⁷¹ Contrary to *Big M*, para. 118.

²⁷² See *Code*, Rule 6.3-1 (“a lawyer must ...”) and *LPA* s. 6(1), 49, *Rule* 85(6)(c).

²⁷³ OA, para. 48 (AR p. 13), see also Brief, pp. 701, 705-719, 769 and Tx, 43:20-46:2.

²⁷⁴ Tx, 44:3-46:2.

“guard against any ... assumption”, etc. Similar references were requested (and located) in the Profile.²⁷⁵ These obligations cried out for analysis.

66. In written argument, the LSA argued it was “difficult, if not impossible” to see how Code 6.3 could infringe s. 2(b). Respectfully, the infringement is obvious. Code 6.3 prohibits expression and is enforced by sanction. It is naked censorship (whether or not justified) and a clear infringement of s. 2(b).²⁷⁶ Song’s response to the LSA’s argument started with the anodyne observation that s. 2(b) “covers all forms of expression except violence,”²⁷⁷ in response to which the Justice seemed to defend the LSA’s proposition: “... whoa, whoa. There is a very broad definition of violence,” not just “physical violence”. This seemed to be an assertion that H&D might be categorically excluded from s. 2(b) protection. This is not correct. The definition of “violence” in law has expanded to include threats of physical violence²⁷⁸ but no further. The LSA aggravated this confusion with the troubling suggestion that, “even if [H&D] ... [is] protected under the freedom of expression ... I will recognize that ... hate speech is protected speech but any limitation on that type of violent speech is justifiable in society regardless of if we apply the *Oakes* test or the *Doré* analysis ...”²⁷⁹ This seemed to be a suggestion that, if not categorically excluded from 2(b) protection, H&D is categorically justified under s. 1. This is wrong. “Government” has the burden to prove s. 1 justification to a “very high degree of probability” with “cogent and persuasive” evidence.²⁸⁰ To automatically justify “any” infringement which is “that type of violent speech” would make a mockery of the *Charter*. Justification would become an exercise in categorical labelling (“this is violent speech”) rather than in reasoning from evidence and legal principles. The danger of such an approach is particularly acute where, as here, the Court Failed to Engage with all evidence and arguments that the LSA was employing misleading categorical labels.

67. The Justice’s s. 2(b) analysis relied, in part, on a variation of the same error, finding that Code 6.3 does not infringe s. 2(b) because the LSA’s purpose was to protect equality and human

²⁷⁵ Tx, 53:30-56:18.

²⁷⁶ *Keegstra*, para. 37.

²⁷⁷ Tx, 50:10-11.

²⁷⁸ *R. v Khawaja*, 2012 SCC 69, para. 70.

²⁷⁹ Tx, 99:34-38.

²⁸⁰ *Oakes*, para. 70-72; see also *JR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 S.C.R. 199, para. 128; note: Kachur J. seems to suggest Song bore the s. 1 burden (Reasons, paras. 134-135, 155-156 (AR pp. 35, 38)).

rights.²⁸¹ This is an error of law including an Invented Principle. It both fails to “analytically separate” the ss. 1 and 2(b) analysis²⁸² and grants an automatic justification to infringements which have as their stated purpose, equality and human rights. Again, the danger of such an approach is particularly acute where, as here, the Court Failed to Engage with all evidence and arguments that the claimed objectives were superficially stated and misleading.

68. Finally, the Justice applied an Invented Principle that ss. 24(1) and 52(1) of the *Charter* provide remedies for *Charter* infringements only once someone is targeted with, and only within, enforcement proceedings.²⁸³ To the contrary, “anyone whose rights or freedoms ... have been infringed or denied may apply to a court of competent jurisdiction to obtain [a just] remedy ...”²⁸⁴

PART 5 - RELIEF SOUGHT

69. Therefore, Song requests that the appeal be allowed and that Kachur J.’s order be set aside, and: **a)** remitting the matter to the lower Court for a new hearing before a different Justice on terms consistent with Rule 1.2; **b)** granting Song costs of the lower Court hearing; **c)** ordering that the LSA shall produce its (full) ROs; **d)** directing that: **d.i)** the Court has capacity, legitimacy, and the duty to review LSA’s Impugned Conduct; and **d.ii)** Song’s tendered affidavits shall be admitted and considered with respect to all relief claimed; **e)** awarding Song costs of the appeal; and **f)** granting such other and further relief as counsel may advise and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2ND DAY OF OCTOBER 2026.

Estimate of time required for the oral argument: 1 day

²⁸¹ Reasons, para. 155 (AR p. 38).

²⁸² *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143, para. 22.

²⁸³ Reasons, paras. 152-153, and 155 (AR pp. 37-38).

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UNDERSTANDING LAWYERS' ETHICS IN CANADA

SECOND EDITION

Alice Woolley

Chapter 2

IN DEFENCE OF ZEALOUS ADVOCACY

1. INTRODUCTION

§2.1 Canadian lawyers play an actively partisan¹ role in asserting the interests of their clients, whether in or outside a traditional court of law. The lawyer's role is properly described as actively partisan because the lawyer seeks to advance the legal interests of his clients even to the point of defeating the interests of others. Moreover, the lawyer seeks to advance his client's interests resolutely;² he may — and should — use procedural and substantive legal rules to achieve what his client wants. The lawyer is constrained by legality, and when advising clients must interpret the law in good faith, but he nonetheless seeks to obtain legal advantages for his client regardless of the cost that obtaining those advantages may impose on other individuals or on the public generally.

§2.2 Perhaps more traditionally, the lawyer's role is also actively partisan because, in courtrooms or like settings, the lawyer acts within an adversarial system, in which he presents his case in opposition to another party or parties. Even in Québec, Canada's only civilian jurisdiction, the conduct of a legal matter is adversarial, not inquisitorial.³

§2.3 The Federation's Model Code of Conduct puts it this way:

In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law ...

The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.⁴

¹ In the first edition I used the word "adversarial". On reflection I think actively partisan is more accurate because adversarialism implies hostility and aggression, and those are not necessary requirements for the lawyer's role (at least not all the time). My point was to communicate the idea that sometimes the lawyer's job requires that the lawyer pursue the client's interests even if at the cost of others, and I think active partisanship better captures that idea.

² In general, Canadian Codes of Conduct refer to lawyers as "resolute" advocates. However, Canadian cases often refer to the lawyer's duty as one of zealous advocacy — *R. v. Neil*, [2002] S.C.J. No. 72 at para. 19, [2002] 3 S.C.R. 631 (S.C.C.). I will use the words "resolute" and "zealous" interchangeably.

³ This is why Québec is often properly described as a "mixed" regime.

⁴ FLS MC, Rule 5.1-1, Commentaries 1 and 3.

In practical terms this means that without entering into doubtful ethical territory a lawyer may advise a corporate client on technical interpretations of the *Income Tax Act*⁵ to allow the client to reduce its tax payments to the greatest possible extent.⁶ A lawyer may advise the client to sue the state in order to require the state to do something, even where the result will be a significant drain on the public fisc, and a majority of the citizenry oppose it. A lawyer may use the evidence available to him to attack the credibility of a witness he believes to be truthful. A lawyer may assert a statute of limitations on behalf of a client to allow the client to defeat payment of a just debt. A lawyer may make legal arguments to a court that he believes would be contrary to the public interest if accepted. A lawyer may argue for interpretations of evidence that he believes to be spurious. A lawyer may — must — stay silent as an innocent man is convicted of a crime the lawyer knows his client committed.⁷

§2.4 There are, of course, many things that a lawyer *cannot* do, as I will discuss in subsequent chapters of this book; the lawyer's role is zealous advocacy within the bounds of legality, not zeal unbounded. As the Federation's Model Code also notes:

The lawyer must discharge this duty [to advocate] by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done.⁸

In addition, what zealous advocacy requires can look quite different depending on the context within which the lawyer is acting; a lawyer as advisor has different duties than the lawyer acting as an advocate in court, and the appropriate zeal of a defence lawyer is different from the appropriate zeal of a

⁵ R.S.C. 1985 (5th Supp.), c. 1.

⁶ Taking into account, of course, the effect of the general anti-avoidance rule and case law that has interpreted it.

⁷ For greater nuance see the discussion of the innocence at stake exception to privilege, Chapter 5, Section 3H.

⁸ FLS MC Rule 5.1-1, Commentary 1. In my view, while the duty of zeal is indeed constrained, this provision of the Model Code is largely disingenuous and unhelpful. I am not sure how, e.g., one can "ask every question, however distasteful" while also being courteous and respectful. Or, alternatively, that a requirement to treat the tribunal — but not anyone else — with courtesy and respect softens the ethically problematic aspect of the lawyer's role very much. I also very much doubt the truthful witness cross-examined to the point where her testimony is no longer believed will judge the attorney who examined her as having used fair and honourable means — or really that any person not steeped in the norms of the legal system would do so. As Monroe Freedman observed, it does not address the hard questions of lawyers' ethics to respond with platitudes or vague exhortations: "we should no longer delude ourselves that the complexities of what constitutes responsible professional conduct in the context of an adversary system can be resolved by syllogistic deductions and vague canons or dogmatic prescripts": (Monroe Freedman, "The Professional Responsibility of the Prosecuting Attorney" (1967) 55 Geo LJ 1030 at 1047). The point of this chapter is to face up to that hard question: can being a fearless advocate, who asks distasteful questions and pursues the interests of his clients even to the point of injuring others, be ethically justified? This addition to the Model Code obfuscates that question rather than answering it.

civil litigator.⁹ Nonetheless, the things that lawyers are permitted and even required to do in acting as a resolute advocate for a client are ethically challenging — they put the lawyer in positions which are *prima facie* morally compromising — and therefore require some explanation and justification.

§2.5 In this chapter, I argue that the lawyer's role as resolute advocate is central to Canadian legal culture, and is legally and ethically justified. Canadian legal culture conceives of the lawyer as resolute advocate for his client's interests, acting if necessary in opposition to the interests of others or the state. Further, the normative principles that underlie the lawyer as resolute advocate within the bounds of legality — the normative structure of the rule of law and the role of lawyers in ensuring access to law — are deeply intertwined with substantive and procedural legal norms in Canada. The premises of resolute advocacy are premises of the legal system as a whole. Finally, I argue that while the ethical arguments against the lawyer as resolute advocate merit serious attention, the ethical arguments for the lawyer as resolute advocate are ultimately more persuasive. In acting as loyal advocates for their clients' interests within the bounds of legality, lawyers do something good, something that ensures the rule of law and that fosters the freedom and democracy on which the Canadian legal system is based.

2. LAWYERS IN CANADIAN LEGAL CULTURE

§2.6 Observers of the legal profession consistently posit the standard conception of the Canadian lawyer as including a commitment to resolute advocacy. Trevor Farrow has said that the dominant model of the lawyer's role is "to advance zealously the client's cause with all legal means; to be personally neutral vis-à-vis the result of the client's cause; and to leave the ultimate ethical, personal, economic, and social bases for the decision to proceed in the hands of the client."¹⁰ Similarly, in 1995 Allan Hutchinson argued that the image of the lawyer as a hired-hand is traditional to the point that it has "remained largely static and unchanged for many decades."¹¹ And, finally, David Tanovich has asserted that "[t]here is no question that historically, the philosophy of lawyering in Canada has largely been driven by principles of partisanship, zealous advocacy, and morally unaccountable representation within the bounds of the law."¹² Each of these authors goes on to critique and ultimately reject the resolute advocacy model. Their arguments against resolute advocacy are addressed in Section 4 of this chapter; for current purposes, however, those arguments serve simply to indicate the clear place in Canadian legal culture of the lawyer as a resolute advocate within the bounds of the law.

⁹ For a discussion of the contextual variation of lawyers' ethical duties, see Alice Woolley, "Context, Meaning and Morality in the Life of the Lawyer" (2014) 17 Legal Ethics 1-22.

¹⁰ Trevor Farrow, "Sustainable Professionalism" (2008) 46 Osgoode Hall L.J. 51 at 63.

¹¹ Allan C. Hutchinson, "Calgary and Everything After: A Postmodern Re-Vision of Lawyering" (1995) 33 Alta. L. Rev. 768 at 770.

¹² David Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 Dalhousie L.J. 267 at 271.

§2.7 The perception of Canadian legal culture put forward by legal academics is also supported by historical examples of Canadian lawyers acting as resolute advocates, even in times when the general culture of Canada could be described as notable for "its reverence for law and order and authority".¹³ A collection of essays on Canadian legal history, *The Promise and Perils of Law: Lawyers in Canadian History*¹⁴ recounts the stories of Arthur Eugene O'Meara¹⁵ and Lionel Cross,¹⁶ who undertook the resolute representation of causes outside the legal mainstream. O'Meara spent years attempting to achieve greater justice for First Nations' clients in British Columbia through assertion of aboriginal title. Cross represented the rights of individuals outside the cultural mainstream, most notably in defending Ernest Victor Sterry, a member of the Rationalist Society ("a 'free thought' group of secularists, atheists and agnostics")¹⁷ from a charge of blasphemous libel. Cross also advocated for the prosecution of KKK members who had persecuted a couple the KKK identified as interracial.

§2.8 Neither O'Meara nor Cross was especially successful in their efforts. While Cross was successful in ensuring the prosecution and conviction of the members of the KKK, Sterry was convicted and imprisoned. O'Meara met with repeated failures in his attempts to advance the cause of First Nations' peoples, even though the specific legal arguments he made were to be successful decades later. Yet over time, as the norms of Canadian legal culture shifted, lawyers taking on the resolute advocacy of outsider causes met, at least sometimes, with greater success than was achieved by O'Meara and Cross. One of the most famous examples is Frank Scott, the McGill professor who undertook various cases challenging government civil rights abuses during the Duplessis era in Québec, most notably his successful representation of Roncarelli in *Roncarelli v. Duplessis*,¹⁸ discussed below.¹⁹

¹³ Graham Parker, "Canadian Legal Culture" in Louis A. Knafla ed., *Law and Justice in a New Land* (Toronto: Carswell, 1986) at 24. Note as well Justice Riddell's objection to the draft of the 1920 CBA Canons of Ethics on the basis that they paid insufficient attention to the lawyer's role as advocate. Justice Riddell, "Suggested Canons of Ethics" in Canadian Bar Association, "Report of the Committee on Legal Education and Ethics" (1919) 4 Report of the C.B.A. 129 at 138, cited in W. Wesley Pue, "'Becoming Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada" in Dale Gibson & W. Wesley Pue eds., *Glimpses of Canadian Legal History* (Winnipeg: Manitoba Legal Research Institute, 1991) Appendix A.

¹⁴ *The Promise and Perils of Law: Lawyers in Canadian History* (Toronto: Irwin Law, 2009).

¹⁵ Hamar Foster, "If Your Life is a Leaf: Arthur Eugene O'Meara's Campaign for Aboriginal Justice" in W. Wesley Pue & Constance Backhouse, eds., *The Promise and Perils of Law: Lawyers in Canadian History* (Toronto: Irwin Law, 2009) at 225.

¹⁶ Susan Lewthwaite, "Ethelbert Lionel Cross: Toronto's First Black Lawyer" in W. Wesley Pue & Constance Backhouse, eds., *The Promise and Perils of Law: Lawyers in Canadian History* (Toronto: Irwin Law, 2009) at 193.

¹⁷ *Ibid.*, at 200.

¹⁸ [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.).

¹⁹ For a more recent example, see Richard Devlin, "'Begun in Faith, Continued in Determination': Burnley Allan (Rocky) Jones and Egalitarian Practice of Law" in Adam Dodek and Alice Woolley, eds., *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) at 181.

§2.9 This is not to suggest that Canadian lawyers as resolute advocates have always been on the side of outsiders, or have always worked to support the evolution of Canadian law towards greater substantive justice. Indeed, for every resolute advocate in support of the cause of an outsider, there has been an opposing lawyer working resolutely to maintain the status quo.²⁰

§2.10 It is also not to suggest that resolute advocacy has always been greeted with enthusiasm by the public at large — O'Meara was the subject of a campaign of public persecution, and arguably Cross was as well. The point is simply to note that it is misleading, culturally speaking, to suggest that for Canadian lawyers "the highest duty of loyalty is owed to what is called the 'protection of the public interest' ... [which] perhaps not inaccurately may be taken to include the state and its systems, as well as its people".²¹ Canadian lawyers owe a duty to the public interest, but Canadian legal culture expects them to fulfill that duty by acting as resolute advocates, even when their advocacy places them in an adversarial relationship with the legal status quo and with what the majority of the citizenry and the state might identify as the "public interest".

§2.11 That Canadian legal culture incorporates the conception of the lawyer as resolute advocate does not, of course, demonstrate that it *should* do so, except insofar as arguments against a deeply rooted cultural practice always have some serious work to do, particularly where that practice can make a claim to being supported by normative considerations. The remaining sections of this chapter will consider the question of whether Canadian lawyers should be resolute advocates or whether, in some way or another, their resolute advocacy for clients should be conceptually qualified.

3. SUBSTANTIVE LEGAL NORMS

A. Introduction

§2.12 The ethical justification for lawyers acting as resolute advocates within the bounds of legality rests on four central premises:²²

1. Rule by law creates a form of social coordination, a system for the settlement of differences so that people can co-exist without violence.

²⁰ See, e.g., Reinhold Kramer and Tom Mitchell, *When the State Trembled: How AJ Andrews and the Citizen's Committee Broke the Winnipeg Strike* (Toronto: University of Toronto Press, 2010).

²¹ Beverley G. Smith, *Professional Conduct for Lawyers and Judges*, 2d ed., looseleaf (Fredericton: Maritime Law Book, 2002) at 17, describing the perspective of the CBA Code which was in effect at the time. Smith himself described the duty as "amongst the highest, if not the highest duty" (at 18 [emphasis in original]).

²² The arguments in this chapter elaborate the position in the first edition, and summarize arguments I make in more detail elsewhere. See, e.g., Alice Woolley, "The Lawyer as Advisor and the Practice of the Rule of Law" (2014) 47 U.B.C. L. Rev. 743-783; Alice Woolley, "The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations" (2015) 65 Univ. of Toronto L.J. 285; Alice Woolley and Trevor Farrow, "Addressing Access to Justice through New Legal Service Providers: Opportunities and Challenges" (2016) 3 Texas A & M L. Rev. 549-579.

It consequently presumes that people are entitled to be self-determining under the law and that the state should not be permitted to avoid its duly owed legal obligations to its citizenry.²³

2. Rule by law, and in particular law's formal and procedural structure, incorporates and reflects respect for the dignity and autonomy of those subject to it.²⁴ It does so in part by ensuring that a person does not suffer adverse legal consequences except where those consequences can be substantively and procedurally justified.
3. The substance and process of law are complex and ambiguous; they cannot meaningfully be accessed without the assistance of counsel. Legal counsel²⁵ are necessary to accomplish the rule of law, to ensure people's freedom to pursue their own conception of the good within the boundaries of legality, and to enjoy the respect for their dignity and autonomy that the law affords.²⁶
4. While the law is complicated and ambiguous, it is not radically indeterminate; it has meaning — or at least a range of meanings — that can be identified apart from the politics of those who read and apply it. Lawyers can ascertain what the law means — or at least the boundaries of reasonable interpretations of the law — in order to assist a client to pursue her choices about how to live, to access the form and procedures of law, and to ensure the lawyer's own conduct remains within the bounds of legality.

None of these premises is uncontroversial,²⁷ and their conceptual validity is further explored in Section 4 of this chapter. This section is more descriptive, and simply indicates the place of these principles in Canadian law.

²³ W Bradley Wendel "Professionalism as Interpretation" (2005) 99 Northwestern U. L. Rev. 1168 at 1184.

²⁴ Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43 Georgia L. Rev. 1-61; Jeremy Waldron, "The Rule of Law and the Importance of Procedure" (October 6, 2010), [NYU School of Law, Public Law Research Paper No 10-73 at 20] online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1688491>.

²⁵ For the purposes of this book, legal counsel are presumed to be lawyers. That may not need to be the case, however; the key point is that these sorts of legal services be provided, not the particular licensure of the person who provides them. See Alice Woolley and Trevor Farrow, "Addressing Access to Justice Through New Legal Services Providers: Opportunities and Challenges" (2016) 3 Texas A & M L. Rev. 249-279.

²⁶ There are, of course, many things that constrain individual behaviour apart from legality and an individual's own personal conception of the good. We live in social structures, and our actions are constrained by ties with family, community, culture and many other things. The lawyer does not, though, claim moral justification for acting as an advocate for the individual against non-legal constraints on personal action. The premise underlying the lawyer as resolute advocate is not, therefore, unconstrained individual autonomy; it is autonomy, legally speaking. Why does individual autonomy in that sense matter? It matters insofar as autonomy is of value in and of itself and also insofar as, if law is a solution to the problem of pluralistic conceptions of the good, respect for individual freedom within the constraints of legality follows inherently from the concept of law itself. See Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 104.

²⁷ Except, perhaps, the argument that the law is complex and requires expertise to be understood, which I think is self-evident.

Substantively, formally and procedurally, Canadian law reflects the rule of law. It treats the individual as entitled to be self-determining under and through the law, and aspires to the forms and processes that ensure the law respects the dignity and autonomy of those to whom it applies. It treats the law as complex and difficult, yet also as meaningful and capable of reasonable interpretation. Finally, it directly endorses the role of the lawyer as resolute advocate for the rights of his client consistent with the rule of law.

B. Rule of Law

§2.13 The idea that the person is entitled to self-determination under and through the law permeates Canadian jurisprudence, and is enshrined in the *Civil Code of Québec*,²⁸ which is said to codify the *res communes* — or common law — of that province. Canadian law requires that no person be subject to the power of the state absent legal authority for that power. It enshrines strong commitments to procedural fairness in dispute resolution, both in the traditional concept of adversarial trials, but also more broadly through the modern regulatory state. Canadian law seeks to conform to the formal requirements of the rule of law: governance by legal rules not arbitrary pronouncements; creating rules that people can comply with; publicity; prospectivity; clarity; consistency between rules over time; and, congruence between the stated rules and official action.²⁹ In short, while it is far from perfect, and in practice often fails to live up to its aspirations, the Canadian legal system, in substance, form and process, believes in and strives to achieve the concept of the rule of law.

§2.14 Perhaps the most famous statement of the significance of the rule of law as a constraint on action against the individual except through the operation of law is *Roncarelli v. Duplessis*.³⁰ Duplessis was the Premier of Québec, and Roncarelli was the owner of a restaurant in Québec, which had been originally owned by his father and licensed continually for 34 years. There were no issues in relation to the operation of the restaurant. However, Roncarelli was a Jehovah's Witness, and had supported Jehovah's Witnesses defending themselves from the campaign of public prosecution that was being used to try to prevent them from proselytizing their faith in Québec.

²⁸ L.R.Q., c. C-1991.

²⁹ See Lon Fuller, *The Morality of Law*, Revised Edition (New Haven: Yale University Press, 1969) at 38-39. That the Canadian legal system has these goals, and achieves them to at least a reasonable extent, is obvious. No legislative drafter or judge aims to be unclear, for example, and a basic principle of administrative law is that no administrative body may exercise powers absent statutory authority. Case law tells us that it is an error of law to articulate one legal test and apply another: *Canada (Director of Investigation and Research v. Southam Inc.*, [1996] S.C.J. No. 116, [1997] 1 S.C.R. 748 at para. 39 (S.C.C.). Legislation is constitutionally suspect where ambiguous or overbroad. See: *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 (S.C.C.); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

³⁰ [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.). See also Claude-Armand Sheppard "Roncarelli v. Duplessis Art 1053 C.C. Revolutionized" (1960) 6 McGill L. J. 75.

In particular, he routinely posted bail for Jehovah's Witnesses who had been arrested for distributing copies of "Watchtower" and "Awake". When Roncarelli's conduct was brought to the attention of the Québec authorities, including Duplessis, his liquor licence was revoked, "forever" ... to warn others that they similarly would be stripped of provincial 'privileges' if they persisted in any activity directly or indirectly related to the Witnesses".³¹ Roncarelli sought judicial review of the revocation, and was successful. The Supreme Court held that the actions against Roncarelli were illegal, and violated the fundamental principle that state action cannot be arbitrary, but must be an exercise of legal authority, duly granted and exercised in good faith:

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.³²

§2.15 In subsequent cases the Supreme Court has further emphasized the significance of the rule of law. In the *Québec Secession Reference*, the Supreme Court reviewed its jurisprudence on the rule of law noting that those cases describe the rule of law as

'a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority'. At its most basic level, the rule of law vouchsafes to the citizens of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.³³

In its administrative law jurisprudence the Supreme Court has consistently emphasized the paramount significance of the rule of law, both in requiring that all state action must be grounded in law, and in underlying the court's

³¹ *Roncarelli, ibid.*, at 133, *per* Rand J.

³² *Ibid.*, at 140.

³³ *Reference re Secession of Québec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 at para. 70 (S.C.C.), citing *Reference re Resolution to Amend the Constitution, 1981*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753 at 805-806 (S.C.C.) [*Patriation Reference*]. In terms of other rule of law principles, such as clarity (against vagueness and overbreadth) see: *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 (S.C.C.); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

constitutional obligation to ensure that state actors have complied with their legal obligations.³⁴ As the Court noted in *Dunsmuir v. New Brunswick*,

By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.³⁵

§2.16 Also noteworthy in showing the significance of the rule of law to Canadian substantive law is the “prescribed by law” requirement of s. 1 of the *Canadian Charter of Rights and Freedoms*. The *Charter* prohibits government actions that violate substantive constitutional rights and that do not constitute “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.³⁶ The “prescribed by law” aspect of s. 1 means that where rights-violating government action is not in some way legally authorized, then no appeal to reason, or to consistency with freedom and democracy, will be sufficient to justify it.³⁷ Statutes, regulation and the common law can create limits “prescribed by law”; however, any legal prescription must be both accessible to the public and intelligible (formulated with sufficient precision), in order to qualify.³⁸ Moreover, a mere government directive or guideline does not constitute a legal prescription,³⁹ and nor does action by government actors which exceeds the legislative authority they have been given. A decision, for example, by a customs official to distinguish between homosexual and heterosexual pornography in applying the law against importation of obscene materials was not authorized by the relevant statute and could not, as a result, be justified.⁴⁰

§2.17 The entire Canadian legal system is premised, therefore, on the idea that it is only through law that decisions affecting the rights, privileges or interests of individuals can be made. A decision without legal authority, of one sort or another, cannot stand. Not all legal authority has to satisfy the s. 1 “prescribed by law” standard — decisions that do not affect

³⁴ See, for example, *Crevier v. Québec (Attorney General)*, [1981] S.C.J. No. 80, [1981] 2 S.C.R. 220 (S.C.C.).

³⁵ [2008] S.C.J. No. 9 at para. 28, 2008 SCC 9 (S.C.C.).

³⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1.

³⁷ *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.); see generally Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 2007) Part 38.7.

³⁸ Hogg, *ibid.* See also *R. v. Nova Scotia Pharmaceutical Society*, [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606 (S.C.C.).

³⁹ To be prescribed by law a directive “must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority”. See: *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] S.C.J. No. 31, 2009 SCC 31 (S.C.C.).

⁴⁰ *Little Sisters Book and Art Emporium v. Canada*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.).

constitutional rights can arise from more informal guidelines and directives, for example. Nonetheless, as the administrative law cases demonstrate, even more generally legality must ground all state action that affects the rights, privileges or interests of the person.

§2.18 The notion of the individual as entitled to self-determination under and through the law, and adherence to the formal and procedural requirements of the rule of law, can also be seen in the commitment of the Canadian legal system to procedural fairness in all government decision-making that affects the rights, privileges and interests of the individual.⁴¹ In administrative law terms, this means that decisions must be made by “a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker”.⁴² More traditionally, what procedural fairness refers to is the judicial model of adversarial trial process. The determination of contested judicial proceedings, and of some administrative proceedings, occurs through an adversarial model, in which each person is entitled to present her case fully, both factually and legally, before a decision is made about how the law applies to her circumstances. The Court has stated that this model is central to respect for personal autonomy and the dignity of the person.⁴³

§2.19 The extent of the commitment to procedural fairness in Canadian law can be demonstrated by considering in more detail one particular procedural doctrine — the case law on the constitutional right to counsel pursuant to s. 7 and s. 10(b) of the *Charter*. The case law on the right to counsel demonstrates the importance we give to the individual in relation to the power of the state, and in particular the dual significance of the individual as self-determining under the law and with entitlements created by law. The cases on the right to counsel also begin to indicate the extent to which the courts directly recognize the role of counsel in mediating between the individual and the legal system.

§2.20 The right to counsel under s. 10(b) of the *Charter* is triggered in any circumstance where an individual is “detained”, a low threshold that includes such things as roadside screening to identify drunk drivers.⁴⁴ Violations of s. 10(b) rights may be saved under s. 1, and have been in

⁴¹ *Cardinal v. Kent Institution*, [1985] S.C.J. No. 78, [1985] 2 S.C.R. 643 at 653 (S.C.C.).

⁴² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 at para. 22, [1999] 2 S.C.R. 817 (S.C.C.).

⁴³ See in general, *R. v. Swain*, where the Supreme Court held that “the principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings” ([1991] S.C.J. No. 32 at para. 35, [1991] 1 S.C.R. 933 (S.C.C.)). See also: *Re B.C. Motor Vehicle Act*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 at 503 (S.C.C.); *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 at 195 (S.C.C.); *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 at 171 (S.C.C.), per Wilson J.

⁴⁴ *R. v. Orbanski*, [2005] S.C.J. No. 37, 2005 SCC 37 (S.C.C.).

roadside screening cases, for example,⁴⁵ but at the same time the courts have been willing to find unjustified right to counsel violations in a broad variety of circumstances. In particular, the Supreme Court has held, consistent with the language of s. 10(b), that the right to counsel includes more than simply the right to be advised that you can speak to a lawyer; it also requires giving the individual a “reasonable” opportunity to exercise her rights.⁴⁶ This means that not only must an individual be advised of the existence of legal aid, but must also, for example, be advised of the existence of 24-hour duty counsel when she expresses concern about being able to contact counsel outside of working hours.⁴⁷ The police “must inform detainees of their s. 10(b) rights *and* facilitate access to those rights where requested, both without delay.”⁴⁸ Waivers of the right to counsel must be clear and unequivocal, with full knowledge about the rights being waived.⁴⁹ Finally, and significantly, the right to counsel is viewed as important by the Court because it allows the individual to exercise her legal rights fully, and to ensure that she is only convicted on a proper legal basis. Counsel can advise the client, for example, on whether there were grounds for detention or for a search and, most importantly, of her right to silence. In the absence of such advice from counsel, statements made to the police are improper, and may be excluded pursuant to s. 24(2).

§2.21 Three features of this jurisprudence stand out. First, the right to counsel is easily triggered and not easily waived. Second, the right to counsel is intended to create some sort of barrier between the individual and the state by, for example, increasing the likelihood that the right to silence will be exercised. Third, the right to counsel is something the state does not simply permit, it is also something the state to some extent facilitates and, where the state fails to do so, the constitutional right to counsel will be found to have been violated. Each of these features demonstrates the extent to which the Canadian legal system views the individual as entitled to be self-determining under the law (free from unwarranted state interference) and through the law – that she must be able to exercise her legal entitlements in accordance with procedural fairness.⁵⁰

§2.22 One of the most notable examples of state facilitation of the individual right to access the law is the case of *New Brunswick (Minister of Health and*

⁴⁵ *Ibid.*

⁴⁶ *R. v. Sinclair*, [2010] S.C.J. No. 35, 2010 SCC 35 (S.C.C.).

⁴⁷ *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233 (S.C.C.); *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173 (S.C.C.).

⁴⁸ *R. v. Taylor*, [2014] S.C.J. No. 50, 2014 SCC 50 at para. 25 (S.C.C.).

⁴⁹ *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233 (S.C.C.); *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173 (S.C.C.).

⁵⁰ The Supreme Court has in the past decade moved to a significantly more limited protection of the right to counsel in its recent history: *R. v. Sinclair*, [2010] S.C.J. No. 35, 2010 SCC 35 (S.C.C.); *R. v. McCrimmon*, [2010] S.C.J. No. 36, 2010 SCC 36 (S.C.C.); *R. v. Willier*, [2010] S.C.J. No. 37, 2010 SCC 37 (S.C.C.). It retains, however, a normative commitment to the ideas described here.

Community Services v. G.(J.),⁵¹ where the Supreme Court held that s. 7 of the *Charter* can give rise to a right to counsel outside of the criminal law context, where proceedings implicate an individual's security of the person, are serious and complex, and the person cannot present her case without the assistance of counsel. In that case, the appellant was attempting to regain custody of her children. The allegations were complex; a three day hearing had been scheduled, with fifteen affidavits, including two expert reports to be presented by the Crown, which was of course represented by counsel.⁵² The Court held that it would take a person with "superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case" and there was no evidence to suggest that the appellant had those qualities.⁵³ In those circumstances, a failure to provide counsel violated s. 7 of the *Charter*.⁵⁴

§2.23 This point should not be overstated, however. Generally speaking the courts are more willing to protect against unwarranted state interference than to facilitate access to justice. Thus, in *R. v. Christie*,⁵⁵ which denied a constitutional challenge to a British Columbia tax levied on legal services, the Supreme Court rejected the argument that there was a general constitutional right to legal services. It did so in part because it characterized the right claimed as generally as possible, as a claim for a "constitutionally mandated legal aid scheme,"⁵⁶ without engaging with the obvious point that the actual constitutional challenge was being brought against a tax on legal services. The tax was not a failure to facilitate access to legal services, it was a direct impediment to the ability of poverty lawyers such as Christie to represent their clients.⁵⁷ The Court, in other words, rejected the claim that there was a general right to counsel which would obligate the government to provide lawyers in all legal proceedings, but did not consider the point that,

⁵¹ [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.).

⁵² *Ibid.*, at para. 79.

⁵³ *Ibid.*, at para. 80.

⁵⁴ Note as well cases that, while not requiring that counsel be provided by the state, have held that it is inconsistent with the requirements of procedural fairness to prevent a person from using counsel in regulatory cases with serious consequences for the rights or interests of that person: *Howard v. Stony Mountain Institution*, [1985] F.C.J. No. 56, [1984] 2 F.C. 642, 19 D.L.R. (4th) 502 (F.C.A.) (appeal quashed on basis of mootness: *Howard v. Stony Mountain Institution*, [1987] S.C.J. No. 91, [1987] 2 S.C.R. 687 (S.C.C.)). Also note the Supreme Court's recent determination that fundamental justice precludes state action that interferes with a lawyer's commitment to his client's cause: *Canada (Attorney General) v. Federation of Law Societies*, [2015] S.C.J. No. 7, 2015 SCC 7 (S.C.C.).

⁵⁵ [2007] S.C.J. No. 21, 2007 SCC 21 (S.C.C.).

⁵⁶ "[T]he logical result would be a constitutionally mandated legal aid scheme for virtually all legal proceedings, except where the state could show this is not necessary for effective access to justice." *Ibid.*, at para. 13.

⁵⁷ Christie's story ends tragically. Unable to continue his practice on Vancouver's downtown East side because of the tax burdens placed on him (the government required him to remit taxes, even when his clients did not pay his fees, as often occurred), he decided to ride his bicycle across the country to raise awareness of the constitutional challenge and the issues of access to justice underlying it. Before his case could be heard by the Supreme Court, Christie was struck by a car and killed.

on the facts of the case, the British Columbia government had erected an actual barrier to legal services. The *Christie* decision is in my view both internally inconsistent and intellectually sloppy, but it nonetheless indicates that the claim of the individual against government intrusion remains stronger, generally speaking, than does the claim to government action on behalf of the individual, even where necessary to exercise legal rights effectively.⁵⁸

§2.24 That is true through the legal system more broadly; Canadian courts have consistently been far more willing to restrict state action than to mandate it, particularly in the context of administrative decision-making. There are, though, sufficient cases where the courts have been willing to require the government to take action, to support the assertion that Canadian law includes the idea of the individual as entitled to make positive claims against the government as well as negative ones. For example, in *Eldridge v. British Columbia (Attorney General)*,⁵⁹ the Supreme Court held that s. 15 of the *Charter* required that provincially funded health care providers offer sign language interpreters to patients who were hearing impaired. Those arguing to uphold the government's policy relied on the position that what was being provided was a government benefit, and argued that s. 15 "does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. Adverse effects only arise from benefit programs ... when those programs exacerbate the disparities between the group claiming a s. 15(1) violation and the general population".⁶⁰ The Court rejected this argument as "impoverished"⁶¹ and held instead that the state was obliged to ensure that people with disabilities were equally able to take part in the benefit that it had provided.⁶²

§2.25 More recently, the Supreme Court of Canada held that the Minister of Health was required to grant an exemption under the *Controlled Drugs and Substance Act* to the Insite supervised injection facility permitting it to continue operating. The Court held that the exemption systems were to prevent the drug laws from applying where "such application would be arbitrary, overbroad or grossly disproportionate in its effects",⁶³ and that the Minister's refusal to grant an exemption to Insite violated fundamental justice:

...Based on the information available to the Minister, this limit is not in accordance with the principles of fundamental justice. It is arbitrary.

⁵⁸ See also *Ontario v. Criminal Lawyers' Association of Ontario*, [2012] S.C.J. No. 43, 2013 SCC 41 (S.C.C.), in which a majority of the Supreme Court rejected the power of the Ontario Court to set the rate of pay for *amici curiae*, and unanimously rejected the ability of the Court to appoint *amici* in fact, in effect, as *de iure* counsel. For a general discussion see Alice Woolley and Jennifer Watson-Hamilton, "Reconsidering *Ontario v. Criminal Lawyers' Association of Ontario*," <<http://abawg.ca/2013/08/30/reconsidering-ontario-v-criminal-lawyers-association-of-ontario/>>.

⁵⁹ [1997] S.C.J. No. 86, [1997] 2 S.C.R. 624 (S.C.C.).

⁶⁰ *Ibid.*, at para. 72.

⁶¹ *Ibid.*, at para. 73.

⁶² See also *Friend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.).

⁶³ *Canada (Attorney General) v. PHS Community*, [2011] S.C.J. No. 44, 2011 SCC 44, [2011] 2 S.C.R. 134 at para. 113 (S.C.C.).

undermining the very purposes of the *CDSA*, which include public health and safety. It is also grossly disproportionate: the potential denial of health services and the correlative increase in the risk of death and disease to injection drug users outweigh any benefit that might be derived from maintaining an absolute prohibition on possession of illegal drugs on Insite's premises.⁶⁴

§2.26 This brief overview of some legal doctrines and cases is not comprehensive, and does not fully capture the complexity of the rights and entitlements of the Canadian citizenry pursuant to law. It also does not discuss the ways in which Canadian law sometimes fails in practice to realize its potential and aspirations. It should indicate, however, the centrality to the Canadian system of laws of this chapter's premises about the rule of law. Canadian law requires that the power of the state not be brought to bear against a person except where that power is justified by law. It aims to achieve an orderly, knowable, predictable and stable legal system within which people may "conduct their affairs."⁶⁵ It requires procedural fairness, including access to a fair system for dispute resolution and — within limits — the right to legal counsel. Whatever the imperfections of its legal system in practice, Canada strives to the accomplishment of the rule of law.

C. Interpretation and the Law

§2.27 An additional premise that underlies the justification of the lawyer's role as resolute advocate is, as noted, that while the law is complex and cannot be reduced to a series of easily articulated rules, it is ultimately meaningful and susceptible to good faith interpretation. While not as pervasively reflected in the jurisprudence as the commitment to maintenance of the rule of law, this premise can also be clearly identified within Canadian jurisprudence. Most obviously, it can be seen in those cases where the Court has expressly articulated the nature of law in relation to the role of counsel, referring to the "complexity and difficulty" of the law, and the need for lawyers to assist lay people in making sense of it.⁶⁶

§2.28 It is also apparent in the leading case on substantive judicial review, *Dunsmuir v. New Brunswick*.⁶⁷ In that case, the Supreme Court engaged directly with the question of the nature of the law's determinacy by articulating the basis on which courts should apply the standards of review to determine the legality of administrative decisions. The Court has two standards of review — correctness and reasonableness. Under correctness review, the Court decides the issue for itself, and then decides if, given the Court's analysis, the administrative decision-maker can be considered to

⁶⁴ *Canada (Attorney General) v. PHS Community*, [2011] S.C.J. No. 44, 2011 SCC 44, [2011] 3 S.C.R. 134 at para. 136 (S.C.C.).

⁶⁵ *Reference re Secession of Québec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 at para. 70 (S.C.C.).

⁶⁶ *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 at 649 (C.A.).

⁶⁷ [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.).

have erred. Under reasonableness review, the Court decides whether the decision falls within the “range of possible, acceptable outcomes”⁶⁸ available to the decision-maker given the nature of the matter to be decided. Deeply imbedded in this case, and in the other substantive judicial review cases from which it follows, is the idea that the meaning of law can be determined, that errors of law by administrative decision-makers can be made, and that even if an administrative decision-maker is properly charged with making a legal decision (such that deference is appropriately given), that deference runs out if the interpretation falls outside of the “range of possible, acceptable outcomes” open to the decision-maker. The idea of a “range of possible, acceptable outcomes” also, though, respects the idea that the law is not so determinate as to be nothing more than a set of rules. As was most clearly articulated by former Chief Justice Dickson in his famous 1979 decision, *Canadian Union of Public Employees v. New Brunswick Liquor Corp.*,⁶⁹ there are many questions of law which do not lend themselves to a single interpretation, but which can be reasonably interpreted in quite distinct ways; in those cases, as long as an interpretation is reasonable, it should stand.

§2.29 The jurisprudence of the Court does not, therefore, treat the law as a set of rules to be identified, but nor does it view the law as wholly indeterminate and contingent. The law can be interpreted, and must be to ensure the rule of law.

D. Lawyers as Resolute Advocates

§2.30 Demonstrating the Canadian legal system’s commitment to the rule of law, and that it rests on an idea of the law as complex but subject to meaningful interpretation, shows how that system reflects the premises of resolute advocacy. It is worth emphasizing, though, that the idea of the lawyer as resolute advocate is also explicitly recognized in Canadian law.

§2.31 The judicial recognition of the lawyer as resolute advocate rests, at first, in the categorization of the lawyer as a fiduciary to his client, and then, more deeply, in the principle underlying all fiduciary obligations: the fiduciary must act in furtherance of the beneficiary’s interests, not his own. In many cases, lawyers have been held liable for breach of fiduciary duty where they have failed to act with loyalty in pursuit of their client’s interests.⁷⁰ In addition, in its decisions on conflicts of interest, the Supreme Court has been unequivocal in emphasizing that the lawyer is a fiduciary

⁶⁸ *Ibid.*, at para. 47.

⁶⁹ [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 (S.C.C.).

⁷⁰ See, e.g., *Strother v. 3464920 Canada Inc.*, [2007] S.C.J. No. 24, [2007] 2 S.C.R. 177 (S.C.C.); *Stewart v. CBC*, [1997] O.J. No. 2271, 150 D.L.R. (4th) 24 (Ont. Ct. (Gen. Div.)); *Hollander v. Stern*, [1994] O.J. No. 2137 (Ont. Ct. (Gen. Div.)); *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] S.C.J. No. 91, [1991] 3 S.C.R. 534 (S.C.C.); *Biggs v. London Loan and Savings Co of Canada*, [1933] S.C.J. No. 17, [1933] S.C.R. 257 (S.C.C.). See also, Alice Woolley, “The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations” (2015) 65 Univ. Toronto L.J. 285.

who owes a strong duty of loyalty to his client.⁷¹ This includes, of course, the requirement that the lawyer not prefer his own interests to those of his client,⁷² but also includes the requirement that the lawyer act as a zealous representative, committed to his client's cause and immune to the temptation to "soft-peddle" representation in order to serve other interests.⁷³ In these cases, the Supreme Court has cited with approval Lord Brougham's strong conception of the lawyer as a zealous advocate for his client:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.⁷⁴

§2.32 In 2015 the Supreme Court connected the lawyer's duty of resolute advocacy to the principles of fundamental justice in s. 7 of the *Charter*. In *Canada (Attorney General) v. Federation of Law Societies of Canada*, the Supreme Court held that money laundering legislation, which imposed reporting requirements on lawyers, violated s. 8 of the *Charter* because it had the potential to infringe solicitor-client privilege.⁷⁵ It also violated s. 7 because a lawyer risked prosecution and imprisonment if not complying with the legislation, with the result that his liberty interests were impaired; further, that impairment was inconsistent with fundamental justice because of the risk to privilege but also because the legislation had the potential to interfere "with the lawyer's commitment to the client's cause."⁷⁶

§2.33 In short, fundamental justice required a lawyer to be a committed advocate for his client's cause. That does not of course mean that every inhibition of lawyer advocacy is constitutionally suspect — there would need to be an impairment of life, liberty and security of the person. Note, however, that the Court was willing to find that impairment only from the effect of the legislation on the lawyer. Further, even without a constitutional claim, the Court's connection of resolute advocacy to fundamental justice shows the centrality of that concept of the lawyer's role to the Canadian legal system.

4. THE ETHICAL JUSTIFICATION

§2.34 The lawyer's role as a resolute advocate is thus both a long-standing feature of Canadian legal culture and one that flows from the norms of our

⁷¹ *R. v. Neil*, [2002] S.C.J. No. 72, [2002] 3 S.C.R. 631 (S.C.C.); *Strother*, *ibid*.

⁷² *Strother*, *ibid*.

⁷³ *R. v. Neil*, [2002] S.C.J. No. 72 at para. 19, [2002] 3 S.C.R. 631 (S.C.C.).

⁷⁴ *Ibid.*, at para. 12, citing from J. Nightingale *Trial of Queen Caroline* (1821), vol. II, The Defence, Part I, at p. 8.

⁷⁵ [2015] S.C.J. No. 7, 2015 SCC 7 (S.C.C.).

⁷⁶ *Ibid.*, at para. 77.

legal system. Substantive legal doctrine in Canada validates the idea of the lawyer as resolute advocate, but also rests on the concepts that make resolute advocacy sensible. This section considers (and rejects) the normative arguments against the lawyer as resolute advocate, and then outlines the broader normative foundations that justify resolute advocacy as a morally legitimate role for the lawyer.

A. Arguments Against Resolute Advocacy

§2.35 For our purposes, the arguments against resolute advocacy can be categorized in three ways. The first, which is the category that appears most commonly in the Canadian literature, is what I will call the “postmodern objection”. Postmodern objectors recognize the argument for resolute advocacy, but argue against any determinate moral obligation, of advocacy or otherwise, that governs lawyer decision-making in all circumstances. They argue instead for contextual- and dialogue-based decision-making that varies according to the circumstances in which the decision is made. The second category has dominated the anti-zeal literature in the United States, and can be described as the “personal morality” objection. The personal morality argument emphasizes the distinction between the lawyer’s role in the legal system and morality, and argues for the primacy of ordinary moral obligations in all circumstances. The third category is the “morality of law” objection. The morality of law objection is premised on the argument that law incorporates and reflects morality, and argues for recasting lawyers’ resolute advocacy in terms of law’s underlying moral claims. I will consider each of these objections in turn.

i. *The Postmodern Objection*

§2.36 Trevor Farrow’s 2008 article “Sustainable Professionalism”⁷⁷ articulates a cogent postmodernist conception of the ethical lawyer.⁷⁸ Farrow’s argument is that resolute advocacy can be justified in terms of principles, lawyer practices and concerns of policy. He suggests, however, that a singular emphasis on zealous advocacy over-simplifies the moral challenge that lawyers are required to resolve in practice. When a lawyer makes decisions there are many things that can make a legitimate claim on his attention, including the interests of the client, the lawyer’s own moral and personal commitments, the concerns of the profession (in, for instance, fostering diversity) and, finally, what will best further the public interest and

⁷⁷ Trevor Farrow, “Sustainable Professionalism” (2008) 46 Osgoode Hall L.J. 51.

⁷⁸ I hasten to emphasize that Farrow does not identify his perspective as post-modern. I characterize it that way because (a) Farrow is not prepared to take a stand on ethical positions that are, in the end, fundamentally contradictory; (b) his emphasis on dialogue, discourse and individual decision-making is embedded in the postmodernist tradition; and (c) I see little foundational difference between his vision of the ethical lawyer and that earlier set out by Allan Hutchinson as a “Postmodern Re-Vision of Lawyering” (Allan Hutchinson, “Calgary and Everything After: A Postmodern Re-Vision of Lawyering” (1995) 33 Alta. L. Rev. 768).

social responsibility. The ethic of the lawyer should not, therefore, be resolute advocacy; it should be "sustainable professionalism" in which the lawyer takes into account all of these inputs and engages in a dialogue, with himself and with others, to determine the right course of action. Ultimately, the goal is to foster deliberation both for the lawyer and between the client and the lawyer, in the spirit of enabling a sustained and engaged discussion that takes seriously a variety of potentially competing interests. This is not simply an exercise in client autonomy or an exercise in moral superiority. It is an exercise in real world, sustainable lawyering.⁷⁹

§2.37 There are several problems with postmodern perspectives on ethical questions. Most obviously, there is a fine line between postmodern ethics and no ethics at all. Farrow describes his approach, for example, as one of sustainable professionalism, and argues for sustainability as a value in itself. But the virtue of sustainability depends on that which is to be sustained — sustained suffering, for example, is not something to be valued or encouraged. For sustainable professionalism to be something worth achieving requires identifying the value of professionalism, not of sustainability — which, in the case of Farrow's article, requires identifying the moral value of each of the elements that he would have the lawyer factor into his decision-making.

§2.38 That question, however, is one that Farrow avoids addressing. He does note the moral claim that different perspectives can make, but he is unprepared to take a stand on the relative merit of these claims, even though the claims are irreconcilable on their own terms. He does not, either, define those matters that can legitimately fall within the lawyer's balancing of his personal moral values, the client's goals and professional interests, or on what basis such a decision would be made. That makes sense in terms of Farrow's theoretical foundations, because the heart of postmodernism is to see ethical questions as not subject to determination based on universally applicable considerations. It leads, however, to the problem that postmodern lawyering ends up being entirely based on the personal moral assessments of the lawyer making the decision, informed perhaps by "discourse", but not subject to any sort of objective assessment.

§2.39 Allan Hutchinson, whose work predates and appears to significantly influence Farrow's, both acknowledges and celebrates this fact:

[Postmodern lawyering] offers no magical guide as to what to do in any specific or conflict situation, because there is none to be given. It is for each person to arrive at an informed and conscientious decision in accordance with their own political and moral lights. The objective is not to chastise lawyers simply because they are corporate lawyers or represent rapists and bigots; it is to encourage each lawyer to take responsibility for the clients they take, and causes they fight for and the tactics they use. In doing so, however, the postmodern lawyer will ensure that these moral and political lights are always brought into play

⁷⁹ Trevor Farrow, "Sustainable Professionalism" (2008) 46 Osgoode Hall L.J. 51 at 100.

and are themselves open to debate and re-consideration. In the postmodern play-book, the goal is not an enforced and impersonal orthodoxy, but a respectful and responsible heterodoxy.⁸⁰

Hutchinson's conclusion though, leads to further questions. Why, for example, should the heterodoxy of the postmodern lawyer be respectful and responsible? Are concepts of "respect" and "responsibility" not just as based in big ideas of morality as, for example, are personal autonomy, liberty and justice? And, if they are not, if all of the moral ideas are simply contingent things that we might or might not want to apply in any given circumstance, then why are the values that we should impose on heterodoxy respectfulness and responsibility, as opposed to other "contingent" values such as autonomy, liberty or democracy? Or, to return to Farrow's model, if we are going to incorporate certain factors as relevant to the lawyer's decision, but make no evaluation of the relative claim each can make in a general sense, why do we try to identify any factors as relevant at all? Why not simply say to the lawyer "good luck with that" and move on?

§2.40 In sum, the problem with postmodernist accounts of the lawyer is that they try to have their ethical cake and throw it to the pigs too. They want to impose values on the lawyer, but only in a sort-of-kind-of-maybe way, one that allows the lawyer — and us — to duck the difficult questions about what we, as a society, think the right thing is for lawyers to do. Or, more individually, they duck the questions about what for the individual lawyer is the right thing to do — which choices will properly merit moral acclaim and which will properly merit moral disapprobation?

ii. *The Personal Morality Objection*

§2.41 Although similarly focused on the lawyer's exercise of individual judgment, the personal morality objection to zealous advocacy is not similarly reluctant to articulate what a lawyer seeking to be ethical should do. The personal morality objection starts from the premise that legality and morality are not co-terminus. There are some things that the law permits, and some that it even requires, that are immoral. The law may permit a landlord to evict a tenant who has only technically violated the lease, and who has nowhere else to go. The landlord who makes that choice may nonetheless be categorized as acting immorally.⁸¹ And so too, the personal morality objectors argue, should the lawyer who helps the landlord to accomplish that eviction.

§2.42 A lawyer is a moral agent, and does not lose his moral agency by virtue of being a lawyer. The professional obligation to be a zealous advocate within the bounds of the law may require the lawyer to assist clients to pursue actions that can be judged as immoral, but to the extent that it does so, the professional obligation does not give the lawyer a moral excuse; it gives the lawyer a moral

⁸⁰ Allan Hutchinson, "Calgary and Everything After: A Postmodern Re-Vision of Lawyering" (1995) 33 Alta. L. Rev. 768 at 781-82.

⁸¹ This would, of course, depend on the totality of the facts and circumstances.

problem which he has to resolve, one way or another. David Luban, the best of those writing from the personal morality objection, argues that while a lawyer may operate under a "presumption in favor of professional obligation" that presumption can be rebutted and, in the end, "when professional obligation then moral obligation conflict, moral obligation takes precedence."⁸² Moreover, these moral obligations take precedence even where the lawyer may have to ignore legal requirements imposed on him as a lawyer: "When serious moral obligation conflicts with professional obligation, the lawyer must become a civil disobedient to professional rules."⁸³ Luban acknowledges that a lawyer is unlikely to make that choice, but his point is to take apart the argument from zealous advocacy that would make that choice unnecessary.

§2.43 The first difficulty with the personal morality objection is that it places an enormous trust in lawyer morality, while placing almost no trust at all in the morality of the laws and legal system within which lawyers work.⁸⁴ Yet individual lawyer morality both reflects and influences the laws and legal system, and cannot be so neatly separated from them.

§2.44 The second and related difficulty with the personal morality objection is that, in contra-distinction to the postmodernist problem, it both does not account for the possibility of deep moral disagreement amongst people, nor acknowledge the extent to which the law exists as a way of allowing people with deep moral disagreements to live in peace together. The personal morality objection does not live in a morally simplistic universe, but it does assert the possibility of universal moral claims on the basis of which lawyers can reliably make ethical decisions. Moreover, it does not give much credit to the possibility that law, as a statement of our actual compromises and joint conclusions on how we will live together, has itself a claim to respect, even where it conflicts with an individual's deeply held moral commitments. It rejects the idea that the rule of law can itself make a moral claim.⁸⁵ It suggests, instead, that "the legal profession can properly regard itself as an oligarchy, whose duty is to nullify decisions made by the people's duly elected representatives".⁸⁶

⁸² David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) at 63. See also: David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ: Princeton University Press, 1988); Gerald Postema "Moral Responsibility in Professional Ethics" (1980) 55 N.Y.U.L. Rev. 63; Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues" (1975) 5 Human Rights 1.

⁸³ *Ibid.*

⁸⁴ Monroe Freedman & Abbe Smith, *Understanding Lawyers' Ethics*, 4th ed. (New Providence, NJ: LexisNexis, 2010) at 47.

⁸⁵ Nigel Simmons, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 66: "a government's compliance with the requirements of the rule of law is not best explained by considerations of instrumental efficacy. Rather, it must be explained by reference to a concern to maintain an intrinsically valuable form of moral association that is embodied in the rule of law ... non-hypocritical compliance with the rule of law can be motivated only by a concern for a particular form of moral association and not by a concern for instrumental efficacy."

⁸⁶ Monroe Freedman & Abbe Smith, *Understanding Lawyers' Ethics*, 4th ed. (New Providence, NJ: LexisNexis, 2010) at 47.

§2.45 The philosopher Jeremy Waldron sets out the problem with both these assertions: that which reduces the significance of our moral disagreements, and that which disregards the achievement of the law. First, while not arguing against moral agreement *per se*, Waldron questions the extent to which moral consensus exists, even within our most basic moral concepts. On matters as apparently obvious as the moral prohibition on rape, serious moral disagreement is still possible with respect to specific issues such as the types of acts consent cannot excuse, mistaken but honest belief in consent, the age of consent and so on.⁸⁷ The function of law (and, Waldron argues, of political institutions which give rise to law) is to provide us with some way of resolving these difficult questions, even when we disagree, and disagree strongly, about the moral perspectives that different answers reflect. Without law, we are left with nothing but our original disagreement and the need to resolve that disagreement with whatever crude and potentially violent means are at our disposal.

§2.46 What follows from Waldron's analysis is the identification of law as something in and of itself worthy of our attention and respect. A lawyer's own personal disagreement with what the law permits or requires speaks to that lawyer's own personal moral values, but the whole point of law is to provide both an actual settlement to controversies over the right way to live, and to allow people the freedom, under and through the law, to live as they like. To ignore the authority of the law based on a personal assessment that a different moral answer is required, is to undermine legality altogether.⁸⁸

iii. *The Morality-of-Law Objection*

§2.47 This response to the personal morality objection leads, though, to the morality of law objection to resolute advocacy. The morality-of-law objector looks to this point and says, "Yes! And the problem with resolute advocacy is that it also does not take the moral compromise of law seriously, but instead engages in legal trickery and tomfoolery, to obtain for clients results that the law does not properly permit." William Simon provides a uniquely rigorous articulation of the morality-of-law objection. Simon argues that lawyers are properly advocates for clients, but they are advocates within the context of ensuring that, in each case, the lawyer takes those "actions that, considering the relevant circumstances of the particular case, seem likely to promote justice".⁸⁹ Simon does not view justice as a moral value existing apart from the law; he views it as part and parcel of the legal

⁸⁷ Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 105.

⁸⁸ *Ibid.*, in general, but see in particular pp. 159-60.

⁸⁹ William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, Mass.: Harvard University Press, 1998) at 138. Although this book comes later, it in large part sets out in more detail the arguments made by Simon a decade earlier in "Ethical Discretion in Lawyering" (1988) 101 Harv. L. Rev. 1083.

system — justice is “legal merit”. Similarly, in the Canadian context, David Tanovich has argued that the obligation of the lawyer is to pursue justice.

Justice can be defined, for the purposes of the lawyering process, as the correct resolution of legal disputes or problems in a fair, responsible, and non-discriminatory manner. This approach to justice has both procedural and substantive elements. The procedural component has both right to a fair and non-discriminatory process that is capable of producing the result demanded by the law. The substantive component involves assessing the merit of the legal claim as seen through the lens of the law properly interpreted. A proper interpretation is one that gives effect to the purpose behind the legal provision and which ensures that the provision is consistent with other substantive legal norms such as equality, fairness, and harm reduction. It is also one that pays special attention to our history of injustice.⁹⁰

On its face, this re-working of resolute advocacy has much to recommend it. It can, arguably, be interpreted as simply a direction for lawyers to do their job well, to get the law right. It takes law seriously, and also provides lawyers with a way of making decisions that they are professionally competent to make.

§2.48 The problem arises, though, when we unpack a little further what is meant by “legal merit” or by the invocation of substantive norms such as “equality, fairness and harm reduction” to guide our legal interpretation. Consider this example:⁹² A lawyer is acting for a mother in a child custody and support dispute. The mother is on welfare. The father is absent much of the time, and suffers from some issues related to mental illness that compromise his fitness as a parent. In a meeting between the lawyer and his client about a week before financial disclosure is required, the client tells her lawyer that she is also working as a prostitute to better financially support herself and her son; her sister is helping with childcare so the son can be looked after while his mother is working. The client tells the lawyer that he cannot disclose her extra work to the father, welfare authorities or the court.

§2.49 What does legal merit require in a case such as this? It clearly does not permit the lawyer to provide false financial disclosure to the court or to the father. It also does not permit the lawyer to disclose the client’s past welfare fraud. The law with respect to false representations and maintenance of these sorts of confidences is clear. But does it permit the lawyer to avoid disclosure altogether by quickly negotiating a generous settlement with the father, one which is nonetheless less advantageous than the father would get if he had full information and went to court? The law permits this result — settlements are a legally recognized way of resolving legal disputes, and no fraud or

⁹⁰ David Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28 Dal. L.J. 267 at 284. [Emphasis in original].

⁹¹ Or why the relevant substantive norms are equality, fairness and harm reduction as opposed to, say, autonomy.

⁹² Given to me by Brent Cotter.

misrepresentation is being used to achieve the settlement.⁹³ But is it consistent with legal merit? Does it achieve equality, fairness and the reduction of harm? There are good arguments for and against this course of action in terms of substantial legal merit, arguments which turn on an assessment of what is in the best interests of the child (which is the applicable legal standard), what the purpose and form of the custody and support laws require, and so on.

§2.50 But that means, I would suggest, that under our system of laws we have also reached the point where the decision as to what to do is properly given to the client — to the person allowed to be self-determining under and through the system of laws — not to the lawyer. If the law permits a course of action, and what constitutes legal merit is contentious, then the decision as to what should be done should be given to the person whose interests are at stake, not to the lawyer. The problem with the morality of law argument is that, in the end, it gives the lawyer the privilege of determining what can be done under and through the law, rather than leaving that privilege where it should be: with the person whose self-determination the law respects and facilitates.

B. In Defence of the Lawyer as Resolute Advocate

§2.51 By now the basis for my argument in favour of the lawyer as resolute advocate should be clear. It turns on an assertion of law as something that can make an authoritative claim against our actions, not simply by virtue of the power of the state to enforce it, but because the law, in and of itself, is worthy of our respect and attention. It is the role of resolute advocacy in maintaining the legal system and the rule of law that provides the moral justification and legitimacy for that advocacy. This section sets out the normative basis for that argument. It builds on the early arguments, in Sections 2 and 3, that Canadian legal culture and law supports this concept of legality and of the role of the lawyer as resolute advocacy. Here the analysis is more theoretical — about the normative structure of the rule of law, and the necessity of the lawyer as resolute advocate to accomplish the rule of law in practise.⁹⁴

i. *The Rule of Law*

§2.52 Organizing a society through a system of laws accomplishes two essential ends: it allows social coordination, a system for the settlement of differences so that people can co-exist without violence,⁹⁵ and it allows

⁹³ At least not a fraud or false representation to the husband in the settlement discussions; there may have been one to the welfare authorities.

⁹⁴ This section is adapted from Alice Woolley, "The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations" (2015) 65 Univ. Toronto L.J. 285 and from Alice Woolley and Trevor Farrow, "Addressing Access to Justice Through New Service Providers: Opportunities and Challenges" (2016) 3 Texas A & M L. Rev. 249-279.

⁹⁵ W. Bradley Wendel, "Professionalism as Interpretation" (2005) 99 Northwestern University L. Rev. 1167 at 1184: "the law permits them to do better at realizing their interest in cooperation than they would on their own, and because it is adopted through procedures that meet a threshold standard of fairness and respect for the parties to the normative disputes, the law has

respect for the dignity and autonomy of the person. The law respects people. It acts on the premise that people can understand the world, and can control and monitor themselves and their behaviours;⁹⁶ it treats "ordinary citizens with respect as active centers of intelligence."⁹⁷

§2.53 Law's accomplishment of a peaceful settlement of our disagreements, and its respect for human dignity and autonomy, gives it moral authority. And it is that moral authority which, in turn, justifies the conduct of those – and in particular lawyers – who act to maintain the rule of law, even where their actions would otherwise be seen as morally wrong.

§2.54 This section thus explains how rule by law ensures social settlement and respect for human dignity and autonomy. It explains, in short, the moral authority of the rule of law that underpins the moral justification for lawyers' resolute advocacy.

§2.55 The law achieves social settlement and respect for human dignity and autonomy in part through the substantive norms that it enacts through democratic processes. Those substantive norms provide answers to contentious questions such as the appropriate rules to govern economic activities, interpersonal interactions, and the obligations of the state to the vulnerable. Those norms resolve our moral disagreements. And, they do so through a democratic process in which those subject to law can participate and which consequently can claim legitimacy and authority.

§2.56 The law also achieves social settlement and respect for human dignity and autonomy through its formal and procedural aspects.⁹⁸ Rule by law is a mode of governance in which those governing respect the dignity and autonomy of the governed, the governed recognize the law's legitimacy and authority through attitudes of respect and/or acts of compliance,⁹⁹ and through law people create a form of moral association in which each person may have aspects of her life which are free from interference or domination by others.¹⁰⁰ Actual legal systems will achieve these moral relationships to a greater or lesser extent — and will embody the requirements of the rule of law

authority in the domain of disagreement and precludes practical reasoning on the basis of the reasons that were relevant to the underlying controversy."

⁹⁶ Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43 *Georgia L. Rev.* 1 at 29.

⁹⁷ Jeremy Waldron, "The Rule of Law and the Importance of Procedure" (October 6, 2010), [NYU School of Law, Public Law Research Paper No 10-73 at 20] online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1688491>.

⁹⁸ *Ibid.*

⁹⁹ While the necessary attitude of the governed towards the law — whether they need to comply through respect or merely prudence — can be debated, Waldron persuasively argues that rule by law assumes voluntary compliance rather than enforced compliance.

¹⁰⁰ Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 104. See also Lon Fuller, *The Morality of Law*, Revised Edition (New Haven: Yale University Press, 1969) in which he conceives of law-making as being a bilateral relationship between the governed and governing (throughout, but explained most clearly at 200-24, where he rejects the idea that law can be understood as a "one-way projection of authority" rather than as interactional) (Yale University Press, 1969). David Luban provides an excellent explanation of this aspect of Fuller's theory, David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) at 99-130.

to a greater or lesser extent — but the moral ambition of mutual respect between the governed and governing, and amongst the governed, is a feature of selecting rule by law rather than rule by fiat or force. Further, the extent to which a legal system's structures and processes foster or undermine those moral relationships is a legitimate criterion against which that system may be evaluated.

§2.57 The formal requirements of rule by law reflect the mutuality of the relationship between the governed and the governing by ensuring that the governing create rules that are understandable and capable of being complied with, and the governed then understanding and complying with those rules.¹⁰¹ The people who make law do so on the assumption that people will respect it. They ensure that people can understand the law and that the law is capable of being complied with. People then respect the law by voluntarily complying with its terms. Rule by law depends upon and encourages mutually respectful interactions between the governed and the governing.¹⁰²

§2.58 The formal requirements necessary to ensure that law is understandable include that you be able to figure out what it requires in advance of doing something,¹⁰³ and that it be clear, rather than muddled and confused.¹⁰⁴ The formal requirements necessary to ensure that law is capable of being complied with include that requirement directly (that law “should not command the impossible”¹⁰⁵) and that it be constant over time, rather than subject to constant amendment.¹⁰⁶ Requirements that aim at both making law understandable and making it possible to comply with include: that the law be non-contradictory, avoiding, *e.g.*, having one statute require something which another statute prohibits;¹⁰⁷ that law be prospective;¹⁰⁸

¹⁰¹ David Luban, *ibid.*, at 116 discussing Fuller: “The burden of understanding and complying with rules falls on those whom the rules govern; the reciprocal relationship between governors and the governed places a corresponding burden on the governor to make the rules understood and capable of being complied with.” Luban also helpfully divides Fuller’s *desiderata* into requirements going to clarity, requirements going to ability to comply and those which go to both.

¹⁰² Lon Fuller, *The Morality of Law*, Revised Edition (New Haven: Yale University Press, 1969) at 97. Waldron describes these requirements as formal rather than procedural because “They are formal and structural in their character: they emphasize the forms of governance and the formal qualities (like generality, clarity and prospectivity) that are supposed to characterize the norms on which state action is based”. Jeremy Waldron, “The Concept and the Rule of Law” (2008) 43 *Georgia L. Rev.* 1 at 7.

¹⁰³ Fuller expresses this requirement as that law be published, but as Simmonds fairly points out, the requirement that law be promulgated or published “sits only somewhat uncomfortably with the most obvious features of the common law: such as the fact that a rule may be articulated for the first time in the very case to which it is applied”: Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 160. For his part, Waldron uses the language of publicity, saying that, “The norms should be public knowledge in the sense of being *available* to anyone who is sufficiently interested, and available in particular to those who make a profession of being public norm-detectors — lawyers as we call them — and who make that expertise available to anyone who is willing to pay for it”: Jeremy Waldron, *ibid.*, at 26.

¹⁰⁴ Lon Fuller, *The Morality of Law*, Revised Edition (New Haven: Yale University Press, 1969) at 63.

¹⁰⁵ *Ibid.*, at 77.

¹⁰⁶ *Ibid.*, at 80.

¹⁰⁷ *Ibid.*, at 65-70.

and that there be congruence between rules and official action.¹⁰⁹ Incongruence between law and action may arise because people make mistakes, people cannot identify what the law requires, or because of human wickedness: "bribery, prejudice, indifference, stupidity, and the drive toward personal power."¹¹⁰ When such incongruence occurs, the rule of law breaks down.

§2.59 Rule of law may only be achieved when everyone involved in it acts in good faith, when officials actively strive to do what the law says,¹¹¹ and when people voluntarily comply with it. Indeed, the formal requirements of law allow it to be largely self-applying. Law doesn't work because officials come and *make* people comply with it; officials may have that power, but they exercise it only rarely. Rather, it works because the law is understandable and capable of being complied with, and because people comply with law voluntarily and willingly. Just as congruence shows how the rule of law relies on the good faith engagement of all official actors in the system, voluntary compliance shows how accomplishment of the rule of law depends on the good faith of the citizenry — of the governed.

§2.60 Accomplishment of the rule of law requires the willing participation of us all. It requires a system that respects people enough to assume that they can and will comply with the law, and to enable that compliance; officials willing to make good faith efforts to apply the law faithfully and accurately; and people who act consistently with the trust that the law places in them. And, it is the formal requirements of the rule of law that both presume and enable those good faith efforts by all concerned.¹¹²

§2.61 The procedural requirements of the rule of law speak not to the formal structure of governance by rules, but rather to law in practise, to the need for "impartial administration" and fair procedure when law is applied. Those requirements can operate in tension with the formal requirements — the more process you have the more unpredictable the law may become, insofar as results may vary in individual cases based on how the facts and

¹⁰⁹ *Ibid.*, at 51-62. Fuller discusses the complexities and nuances around retrospective law-making in practice — the contexts in which it may be unavoidable or less problematic, while noting that "while perfection is an elusive goal, it is not hard to recognize blatant indecencies" (at 62).

¹⁰⁹ *Ibid.*, at 81-90. Simmonds would also add a requirement that law be enforced. This is fair insofar as a legal system which enforced no rules would have the same sorts of failures caused by Fuller's befuddled monarch Rex. On the other hand, a legal system can have a certain number of rules that it does not enforce in any real or meaningful way without those rules being less law-like (which would not be true, say, of a law where the law was incongruent with official action). Seat belt laws may not, for example, be enforced very often, but they are a remarkably effective instrument of social change. In general, as discussed with respect to the procedural requirements of the rule of law, law relies far more centrally on voluntary compliance than it does on enforcement. I have not included Fuller's requirement that law be general, because that requirement means only that a legal system have rules, which does not seem to add much (at least not to this discussion). I also do not take up the issue of customary law in this discussion.

¹¹⁰ *Ibid.*, at 81.

¹¹¹ *Ibid.*, at 91.

¹¹² Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43 Georgia L. Rev. 1 at 28.

arguments are presented and understood¹¹³ — but are nonetheless central to accomplishing rule by law, and its respect for human autonomy and dignity, rather than rule through force or by abuse of power.¹¹⁴

§2.62 The most obvious procedural requirement of the rule of law is that it has some system of dispute resolution, some way of applying the law to particular situations and to settle disputes about what the law means.¹¹⁵ That system of dispute resolution must also comply with procedural norms, with hearings before an impartial adjudicator where the participants enjoy due process. The system solves a practical problem — taking abstract norms and applying them to specific circumstances — but it also represents law's moral structure of respect for those to whom it applies, because process ensures respectful attention to that person's point of view:

Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with.¹¹⁶

While the formal requirements of legality emphasize the need for constancy over time, the procedural requirements equally emphasize law's positivity, the ability of people to make law, to control law and, where necessary, to change law. Theoretically, a legal system could exist without a democratically legitimate legislative body, but in practice the existence of such a body to enact and change law is one of the definitive features of the rule of law.¹¹⁷ While constancy over time permits law to be voluntarily complied with (and reliance on voluntary compliance reflects law's moral structure), the simultaneous capacity to change it reflects law's freedom, *our* collective freedom "to have whatever laws we like."¹¹⁸

§2.63 Finally, the application of law in practice and through the courts manifests law's systematicity; the requirement that the principles and precepts of law exist as a system that imposes a structure that constrains argument and interpretation while also permitting evolution over time:¹¹⁹

Legal norms present themselves as fitting together or as aspiring to fit together into a system, each new ruling and each newly issued norm taking its place in an organized body of law which is fathomable by human intelligence.¹²⁰

¹¹³ *Ibid.*, at 9.

¹¹⁴ *Ibid.*, at 11.

¹¹⁵ *Ibid.*, at 20.

¹¹⁶ *Ibid.*, at 23-24.

¹¹⁷ *Ibid.*, at 30.

¹¹⁸ *Ibid.*, at 31.

¹¹⁹ It is not entirely clear whether systematicity is properly characterized as a procedural or formal aspect of legality. I have included it as a procedural aspect because of its intimate relationship to the operation of law and to the system of dispute resolution.

¹²⁰ Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43 *Georgia L. Rev.* 1 at 33. See further, Trevor C.W. Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014).

§2.64 Law's systematicity allows judges to "discover" law: provided a specific norm can be identified or justified within the system as a whole, that norm can be said to be part of the system. It also allows people to interact with the law, to do more than take precepts and apply them to a set of circumstances, but rather to take a position on what the law ought to be given how law works in general, and other relevant criteria.¹²¹ Parties make claims and arguments about the principles and precepts that ought to be applied to their situation given law's existence as a system and form of argument. This iterative aspect of legality means, in turn, that the law does not exist as a set of rules superimposed on the citizenry. Rather, it "pays respect to the persons who live under it, conceiving them now as bearers of individual reason and intelligence"¹²² who can be expected to think about and engage with the legal system that applies to them:

[The law] also respects the dignity of reasoning and even argumentativeness. The individuals whose lives law governs are thinkers who can grasp and grapple with the rationale of that governance and relate it in complex but intelligible ways to their own view of the relation between their actions and purposes and the actions and purposes of the state.¹²³

§2.65 Thus, just as the formal requirements of the rule of law presume and enable the good faith and willing participation of the citizenry, the procedural requirements of the rule of law enable that participation in a different way. Those requirements give people a say in what happens to them and, as well, in the content of the law itself.

ii. Lawyers and the Rule of Law

§2.66 So this, then, is the normative structure of rule by law: a moral relationship between the state and the citizen, and amongst the citizenry, ensured through accomplishment of the formal and procedural requirements of the rule of law.

§2.67 Why does this lead to resolute advocacy? Resolute advocacy has two central features. First, it places decision-making about what is to be done in a legal representation with the client. The lawyer acts to facilitate the client's accomplishment of her ends within the legal system, but it is the client who determines those ends.¹²⁴ Second, resolute advocacy requires the lawyer to interpret and work through the law to achieve the client's goals; the lawyer ensures that the client has full access to legality.¹²⁵ These features both follow from this authority claim for law.

¹²¹ Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43 Georgia L. Rev. 1 at 36.

¹²² *Ibid.*

¹²³ *Ibid.*, at 36.

¹²⁴ What this looks like, in practical terms, is discussed in Chapter 3.

¹²⁵ The lawyer's function is — at its heart — based in the law. The lawyer does not generally act to facilitate the client in accomplishment of her non-legal goals, and to the extent the lawyer does so it is not at all obvious that the norms of resolute advocacy properly apply to her conduct.

§2.68 With respect to the first, if law has the function of resolving disagreements between those to whom it applies, and of constraining, tolerating and encouraging conduct in those to whom it applies, then the decision about how to live within that legal framework lies with the person subject to it. If I am to decide not only how I am to live under and through the law, but also to decide how my neighbour lives under and through the law, then the law has ceased to achieve its essential function. It is not resolving disagreements between my neighbour and me; I am. And similarly for the relationship between the lawyer and the client: if the lawyer decides what the client may, must or should do, instead of simply assisting the client determine what the law permits or requires the client to do, the lawyer will have similarly usurped the law's function in resolving disagreement.

§2.69 With respect to the second, law cannot act as a form of moral association in which each person has "domains of conduct that are genuinely free from the most common and effective forms of coercive interference"¹²⁶ — absent some way to ensure access to legality. Ensuring that each of us has freedom from unlawful coercive interference requires that we have access to some person or system that protects that freedom. The formal and procedural requirements of the rule of law are the systems; the lawyer is the person, the one whose resolute advocacy ensures that the constraints placed upon our actions are only those that the law itself imposes.

§2.70 Although expressed somewhat differently, this idea of the function of legality informed Charles Fried's early defence of the standard concept of the lawyer's role — the lawyer's partisan advocacy for clients. For Fried, the purpose of the lawyer was, in significant part, to ensure "the due liberty of each citizen before the law".¹²⁷ Whether or not Fried's strong concept of the lawyer as zealous advocate follows from the moral association of a system of law is debatable; in my own view, it is just as significant that law can facilitate communities and co-operative endeavours as that it enables the liberty of each citizen. Regardless, the legal system has this role to at least some extent, and lawyers facilitate its fulfillment of that role through their resolute advocacy; without access to resolute advocates that function of legality is impaired.

§2.71 Further, satisfaction of the formal and procedural requirements of the rule of law requires access to a lawyer acting as a resolute advocate. The system of dispute resolution, and its complex procedures, cannot be accessed effectively without an advocate to act on the client's behalf; absent the lawyer's advocacy the client cannot ensure that, in fact, the system treats her appropriately. It is the lawyer who protects the dignity and autonomy of the person. The lawyer also ensures that people do understand the law, that what is clear, consistent, congruent and stable to an expert is all of those things to

¹²⁶ Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 104.

¹²⁷ Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship" (1975-76) 85 Yale L.J. 1060 at 1075.

a person who is not. The lawyer allows the law to be known to a person without institutional knowledge and expertise, and gives that person the information — and the representation — they need to have in order to comply with the law's requirements. As Luban has argued, in articulating the formal requirements of the rule of law, Fuller imagined the lawyer as crucial, as the "architect of social structure" who advises clients about the law and facilitates interactions between a client and others.¹²⁸

§2.72 The most crucial role for a lawyer with respect to the procedural requirements of the rule of law may, however, be with respect to the law's systematicity, the extent to which legal norms fit together and expand within "an organized body of law which is fathomable by human intelligence."¹²⁹ Law cannot be understood without considering its systematic complexity, and law cannot be accessed without having the ability to interact and engage with that systematic complexity, arguing about what its norms are and what its norms mean. If law necessarily governs our interactions through a complex system that respects us as "thinkers who can grasp and grapple with the rationale of that governance and relate it in complex but intelligible ways to [our] own view of the relation between [our] actions and purposes and the actions and purposes of the state,"¹³⁰ then law must also provide us with the people who give us the ability to do those things when we alone cannot. The law must not rely on us as having an intellectual capacity and skill that we do not possess and cannot reasonably attain, but it can rely on some having the necessary intellectual capacity and skill that they then provide to those of us who lack it. And that person must be directed at our interests and needs in undertaking this task; the lawyer provides the skills and knowledge, but he does so in service of the client's own ends.

iii. Lawyers and the Boundaries of Legality

§2.73 The lawyer's role in relation to the substance, form and process of law also means, though, that in representing a client a lawyer must engage in good faith interpretation of the law, and work within the systems of the law as they exist — if the lawyer burns documents that are properly producible in discoveries, for example, then the lawyer has not allowed the client to access the civic compromise of the law, he has helped the client to destroy it.

§2.74 This leads to the other assertion that underlies the claim in favour of resolute advocacy, which is that the law is sufficiently complex that it requires the assistance of a lawyer, yet is also sufficiently capable of meaningful interpretation that the lawyer can provide assistance to the client.

¹²⁸ David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) at 104.

¹²⁹ Jeremy Waldron "The Concept and the Rule of Law" (2008) 43 *Georgia L. Rev.* 1 at 3.

¹³⁰ *Ibid.*, at 36.

The first of these premises is self-evident.¹³¹ The second is more difficult, and requires demonstrating that the law is something that precludes certain interpretations as unreasonable, as falling outside the “range of possible, acceptable outcomes”.¹³² Further, it requires doing so in light of law’s systemacity, the fact that it creates a “culture of argument”, a system for reasoned analysis through which norms can be contested and established rather than simply a set of rules.¹³³ In short — how can a culture of argument create a determinate constraint on lawyer’s conduct?¹³⁴

§2.75 Academic commentators in the United States have considered this issue extensively following the disclosure of the memorandum prepared by lawyers in the Office of the Legal Counsel to enable the George W. Bush administration to interrogate detainees in a way that would, under traditional definitions, be considered torture. This chapter does not address the problem of the torture memos, but it does rely on their critics’ insights to address the argument against law as a meaningful constraint on lawyer conduct.¹³⁵

§2.76 Those insights include the observation that the indeterminacy in law must not be overstated. Law’s indeterminacy is “of a special and limited sort — moderate, not global indeterminacy”.¹³⁶ Indeed, the goal of law is always to reduce obscurity, not to increase it: “Even when great judges with subtle, Promethean minds write opinions, their opinions had better contain no secret teachings, no buried allusions, no symbolism, no allegory, no thematic

¹³¹ To demonstrate this point I opened a copy of the *Income Tax Act* to a random page and found the following provision, which ably illustrates it:

Where, otherwise than by virtue of a deemed disposition under paragraph 148(2)(b), an interest of a policyholder in a life insurance policy is disposed of by way of a gift (whether during the policyholder’s lifetime or by the policyholder’s will), by distribution from a corporation or by operation of law only to any person, or in any manner whatever to any person with whom the policyholder was not dealing at arm’s length, the policyholder shall be deemed thereupon to become entitled to receive proceeds of the disposition equal to the value of the interest at the time of the disposition, and the person who acquires the interest by virtue of the disposition shall be deemed to acquire it at a cost equal to that value.

(*Income Tax Act*, R.S.C. 1985, c. 1, s. 148(7)).

¹³² *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 at para. 47, 2008 SCC 9 (S.C.C.).

¹³³ Jeremy Waldron, “The Concept and the Rule of Law” (2008) 43 *Georgia L. Rev.* 1 at 20.

¹³⁴ Parts of this subsection are taken from Alice Woolley, “The Lawyer as Advisor and the Practice of the Rule of Law” (2014) 47 *U.B.C. L. Rev.* 743-783.

¹³⁵ For analysis of the torture memos see David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) and Bradley Wendel in various articles including: W. Bradley Wendel, “Professionalism as Interpretation” (2005) 99 *Northwestern University L. Rev.* 1167; W. Bradley Wendel, “Legal Ethics and the Separation of Law and Morals” (2005) 91 *Cornell L. Rev.* 67; W. Bradley Wendel, “Virtue and Vice in Legal Advising” (2013) 30 *New Eng. J. of Crim. and Civ. Confinement* 25; W. Bradley Wendel, “Deference to Clients and Obedience to Law: The Ethics of the Torture Lawyers (A Response to Professor Hatfield)” (2009) 104 *Northwestern University L. Rev. Colloquy* 58; W. Bradley Wendel, “The Torture Memos and the Demands of Legality” (2009) 12 *Legal Ethics* 107. See also Michael Hatfield, “Fear, Indeterminacy and the American Lawyering Culture” (2006) 10 *Lewis & Clark L. Rev.* 511.

¹³⁶ David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) at 197.

subtleties.¹³⁷ Or, to put it in formal rule of law terms, one of the central features and goals of the rule of law is clarity — that the norms it imposes be ascertainable. If law were radically indeterminate it would fail to be law at all.

§2.77 Lawyers and judges conduct themselves as if the law were reasonably ascertainable.¹³⁸ While they may note the difficulty or complexity of a particular issue, and they may disagree about the outcome appropriate to a specific case, lawyers and judges do not sit immobilized by the impossibility of articulating defensible legal claims. As noted earlier, the Supreme Court of Canada has gone so far as to opine — consistently over decades — that some legal questions have “correct” answers, such that an administrative decision-maker who fails to provide them is subject to judicial reversal.¹³⁹

§2.78 While the Supreme Court’s position on the existence of correctness has to be understood in its legal context — that is, as a statement about the relationship between courts and administrative decision-makers in deciding certain questions — it illustrates the basic point that the indeterminacy in law ought not to be overstated.¹⁴⁰ As Benjamin Zipursky puts it:

A judge, lawyer, or legal scholar aiming to answer a legal question — including, for example, a law clerk writing a memorandum to a judge — is capable of characterizing what is interpretively fairly well settled, clearly not at all well settled, and what lies in between.... We shall later address the question of whether — as a legal positivist would maintain — there is really a basis for thinking such a ‘good report’ would reflect truth about the law. But it remains the stuff of treatises, Restatements, practitioner guides, law review notes (at least in their opening Parts), and the daily memoranda of associates, law clerks, and in-house lawyers.¹⁴¹

§2.79 In articulating the lawyer’s duties in the face of law’s moderate indeterminacy, David Luban and Bradley Wendel rely on the concept of an interpretive community, “comprised of judges, lawyers, scholars, and interested citizens who have learned to differentiate between legal and nonlegal reasons” as constraining lawyer’s advice, although not necessarily constraining lawyer advocacy in court.¹⁴² The law may be open to a range of

¹³⁷ *Ibid.*, at 194.

¹³⁸ Benjamin C. Zipursky, “Practical Positivism versus Practical Perfectionism: The Hart-Fuller Debate at Fifty” (2008) 83 N.Y.U. L. Rev. 1170 at 1186.

¹³⁹ See, e.g., *CUPE v. New Brunswick Liquor Corp.*, [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 (S.C.C.); *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.).

¹⁴⁰ Milan Markovic has suggested that the idea of a constraining interpretive community overstates the amount of professional agreement on the law; however, Markovic himself suggests that there are arguments that it is not “professionally respectable to assert” (Milan Markovic, “Advising Clients After Critical Legal Studies and the Torture Memos” (2011-12) 114 W. Va. L. Rev. 109 at 152).

¹⁴¹ Benjamin C. Zipursky, “Practical Positivism versus Practical Perfectionism: The Hart-Fuller Debate at Fifty” (2008) 83 N.Y.U. L. Rev. 1170 at 1186.

¹⁴² W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2009) at 196. See also Kevin H. Michaels, “Lawyer Independence: From Ideal to Viable Legal

interpretations, but the boundaries of that range are ascertainable to the ordinarily competent lawyer assessing the situation in light of her professional community.¹⁴³ The role of the lawyer is, therefore, to act within that range on behalf of her client. As Kate Kruse has emphasized, the lawyer doing so must maintain a focus on the client's needs and objectives, and must facilitate "interaction between the norms inherent in the law and their clients' values", but the point here is that the lawyer can find meaningful guidance from the law, understood in accordance with the norms of his professional community.¹⁴⁴

C. The Ethical Life of the Resolute Advocate

§2.80 What, though, of the various examples given at the beginning of this chapter, and the suggestion that at the very least a lawyer who, for example, tries to make a truthful witness look like a liar, or invites a finder of fact to draw an inference from evidence the lawyer knows is untrue, has done something that is morally doubtful? The point of this section has been to demonstrate that the morality of an action taken within a professional role is simply not assessed at the level of the act itself. What needs to be morally justified is, instead, the professional role. What has been offered here is that sort of moral justification. The role of the lawyer is morally justified, because of the moral authority and legitimacy of legality and the rule of law, and because achieving the rule of law requires lawyers acting as resolute advocates. What this means, is that any action that is required by the lawyer's role as a resolute advocate within the bounds of legality is also morally justified.

§2.81 That does not make the life of the lawyer morally uncomplicated. The tension between personally felt moral obligation and professional role is real, and cannot be reduced simply by the assertion of the moral justification for the role. To use an example given by the philosopher Timothy Chappell, suppose the officer of a wrecked ship decides, when faced with a full lifeboat, that his obligations as an officer require him to actively prevent other survivors from climbing aboard. His actions help to contribute to the death of those survivors, but protect the lives of the people on board, which would otherwise have been endangered. Let's assume, as well, that the officer is correct in his assessment of what his role requires, and that a moral justification for the role of ship's officer can be given. As Chappell notes, it would nonetheless show a comprehensive failure to understand the situation to address the officer's

Standard" (2010) 61 Case W. Res. L.R. 85 at 119 — "the test of compliance with the professional judgment element of Rule 2.1 is not an exercise in hindsight. The question is whether the attorney's interpretation was grounded in the standards of the professional community, not whether the attorney got the 'right' answer as measured by a subsequent court decision or other ruling on the matter."

¹⁴³ W. Bradley Wendel, "Professionalism as Interpretation" (2005) 99 Northwestern University L. Rev. 1167 at 1193 and 1191-92

¹⁴⁴ Kate Kruse, "The Jurisprudential Turn in Legal Ethics" (2011) 53 Ariz. L. Rev. 493 at 528-29.

subsequent remorse and guilt by saying “why are you so upset? You did what your role requires.”¹⁴⁵ The existence of a role justification does not eliminate the moral complexity that the role brings with it.

§2.82 The task of the lawyer, as discussed with respect to integrity, in Chapter 1, is to learn to live with that moral complexity, as best as he can. Or, to put it more positively, to strive to find a meaningful life — one in which, through his work or otherwise, he has the capacity for “loving something (or a number of things) worthy of love, and being able to engage with it (or them) in a positive way.”¹⁴⁶ Being a lawyer may be a constituent part of a meaningful life, or it may exist alongside it, but either way the moral complexity of the lawyer’s role is part of what he has to incorporate into the accomplishment of meaning.¹⁴⁷

§2.83 As will be apparent throughout the remainder of this book, there are many ways in which a lawyer can manage this moral complexity, and reduce the moral tension that the role of the lawyer creates. While lawyers are constrained to act as resolute advocates for their clients, they have discretion when choosing their clients. Further, determining what a client wants — what are her ends, in fact — is in itself a complicated exercise, and a lawyer can legitimately engage in serious discussion with his client about what is an appropriate course of action within the constraints of the law. A mistake sometimes made by lawyers is to assume that they know what their client wants, and that their client wants every advantage the law permits.¹⁴⁸ Finally, the lawyer does in some circumstances have the opportunity to withdraw from representation, including where the client persists in instructing the lawyer to violate the lawyer’s ethical obligations.

§2.84 These aspects of the lawyer’s role — the challenge of respecting his own moral agency while zealously advocating for his client’s within the bounds of legality — are taken up in the next chapter.

¹⁴⁵ Timothy Chappell, “Bernard Williams” *Stanford Encyclopedia of Philosophy*, online: <<http://plato.stanford.edu/entries/williams-bernard/>>.

¹⁴⁶ Susan Wolf, *Meaning in Life and Why it Matters* (Princeton: Princeton University Press, 2010) at 129.

¹⁴⁷ For further discussion of maintaining an ethical life in the lawyer’s role, see Alice Woolley, “Context, Meaning and Morality in the Life of the Lawyer” (2014) 17:1 *Legal Ethics* 1-22; Alice Woolley, “Michelle’s Story: Creativity and Meaning in Legal Practice” in Adam Dodek and Alice Woolley, eds., *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) at 186; Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton: Princeton University Press, 2008). Note that Markovits’s conclusion is that it is not possible for a lawyer to achieve an ethical — well-lived — life as a lawyer, that lawyers are necessarily “tragic villains”.

¹⁴⁸ See generally Monroe Freedman & Abbe Smith, *Understanding Lawyers’ Ethics*, 4th ed. (New Providence, NJ: LexisNexis, 2010) at 53-55; Katherine R. Kruse, “Beyond Cardboard Clients in Legal Ethics” (2010) 23 *Geo. J. Legal Ethics* 103.

§3.81 Further, what lawyers tell their clients has a significant legal effect, allowing those clients to avoid criminal or civil consequences on the grounds that they were “acting on the basis of legal advice”. For example, a client engaged in aggressive tax planning can reduce the likelihood that she will have to pay penalties if she obtains in advance a legal opinion that the tax plan has a reasonable chance of success.¹⁴⁰ As the Supreme Court of Canada has held, legal advice may be a shield for legal consequences and may be one even if the advice turns out to be bad or wrong.¹⁴¹ David Luban has suggested that it is lawyer-client interactions in the context of advising that in fact constitute legality, that the rule of law does not arise from judicial determinations — what Ronald Dworkin called “Law’s Empire” — but rather from “law’s landfill, the dregs of legal authority contained in the millions of lawyer-client conversations on which our actual legal civilization is erected.”¹⁴²

§3.82 This section discusses the obligations of lawyers as advisors and counsellors: the legal and ethical duties that govern legal advice, and the extent to which the lawyer may counsel a client on matters that extend beyond law — about, for example, the social, policy or moral implications of different courses of action.

A. Advising¹⁴³

§3.83 Various legal sources address lawyers’ duties when advising clients: the law society codes of professional conduct and disciplinary decisions enforcing the requirements of those codes; case law assessing liability for lawyers alleged to have given negligent advice; and, other legal mechanisms sanctioning lawyers for improper advice, most notably under the *Income Tax Act*. This section reviews the obligations arising from each of those sources.

i. Law Society Codes of Conduct and Disciplinary Decisions

§3.84 A lawyer’s advice must be competent. As noted earlier, in all aspects of the lawyer’s practice, including advising, she must “provide a quality of service at least equal to that which lawyers generally expect of a

¹⁴⁰ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 163(2); cases hold that a taxpayer is much less likely to be found to have been grossly negligent where the taxpayer has received legal advice that the tax plan works.

¹⁴¹ *Fulowka v. Pinkerton’s of Canada Ltd.*, [2010] S.C.J. No. 5, 2010 SCC 5 (S.C.C.). In that case an action against the government in negligence was unsuccessful in part because the government had relied on legal advice. The Court held that it was not relevant that the legal advice was wrong, and that it would only be “rarely” (at para. 89) that liability in negligence would arise for a government actor following legal advice.

¹⁴² David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) at 160.

This discussion is adapted from Alice Woolley, “The Lawyer as Advisor and the Practice of the Law” (2014) 47 U.B.C. L. Rev. 743-783.

competent lawyer in a like situation.”¹⁴⁴ In the particular context of advising, the lawyer must provide an opinion based on “sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer’s own experience and expertise.”¹⁴⁵

§3.85 Although discipline for the provision of incompetent advice is relatively rare,¹⁴⁶ lawyers have occasionally been sanctioned on that basis. In *Re Epstein*, the Law Society of British Columbia fined a lawyer \$7,500 for providing erroneous advice as a consequence of his failure to read the results of a title search properly.¹⁴⁷ In a number of real estate cases, in which lawyers became embroiled in unlawful mortgage schemes, the misconduct findings against the lawyers were based on their failure to provide competent advice to their lender clients.¹⁴⁸

§3.86 Law societies have, however, been reluctant to discipline lawyers for a single instance of poor advising. In *Nova Scotia Barristers’ Society v. MacIsaac*, the Barristers’ Society affirmed the requirement that advice be competent, but declined to find that the lawyer had provided incompetent advice simply because he had misread the terms of the *Probate Act*.¹⁴⁹ The Barristers’ Society held that a single mistake did not constitute incompetent advising.¹⁵⁰

§3.87 A lawyer must also ensure that the advice she provides is free from a disqualifying conflict of interest — that is, there must not be a “substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person.”¹⁵¹ In the context of advising, this means that a lawyer may not provide advice to a client where the lawyer’s

¹⁴⁴ FLS MC, Rule 3.2-1, Commentary 2; NB CPC Chapter 3, Rule; Que. CPC Rules 21 and 22 require the lawyer to provide competent and quality services. In Ontario, LSUC RPC Section 3.2-1, Commentary 2 states only that an “otherwise competent lawyer may still occasionally fail to provide an adequate quality of service”; AB CC Rule 2.02(1), Commentary; BC CPC Rule 3.2-1, Commentary 2.

¹⁴⁵ FLS CPC, Rule 3.2-2, Commentary 2; NB CPC Chapter 4, Commentary 2; LSUC RPC Section 3.2-2, Commentary 2; AB CC Rule 2.02(2), Commentary; BC CPC Rule 3.2-2, Commentary 2.

¹⁴⁶ As noted by Michael Trebilcock, “A review of formal disciplinary proceedings before law societies across Canada over the last number of years would likely reveal that these processes overwhelmingly focus on cases of dishonest or unethical behaviour or the most egregious forms of professional delinquency, and not on failures to meet acceptable standards of professional competence”: Michael J. Trebilcock, “Regulating the Market for Legal Services” (2008) 45 *Alta. L. Rev.* 215-232 at para. 23 (footnote 32 and accompanying text).

¹⁴⁷ [2011] L.S.D.D. No. 46, 2011 LSBC 12.

¹⁴⁸ See, e.g., *Law Society of Upper Canada v. Mattis*, [2008] L.S.D.D. No. 96, 2008 ONLSHP 105; *Law Society of Upper Canada v. Lang*, [2008] L.S.D.D. No. 4, 2008 ONLSHP 2; *Law Society of Upper Canada v. Goldstein*, [2008] L.S.D.D. No. 116, 2008 ONLSHP 111; *Law Society of Upper Canada v. Yat*, [2007] L.S.D.D. No. 31, 2007 ONLSHP 43.

¹⁴⁹ [2001] L.S.D.D. No. 1, 2001 NSBS 2.

¹⁵⁰ See also *Nova Scotia Barristers’ Society v. Richey*, [2002] L.S.D.D. No. 30.

¹⁵¹ FLS MC Rule 3.4-1, Commentary 2; NB CPC Chapter 6 (does not directly incorporate the substantial risk test); Que. CPC Rule 71 (does not directly incorporate substantial risk test); LSUC RPC Section 3.4-1, Commentary 1; AB CC Rule 2.04(1), Commentary 1; BC CPC Rule 3.4-1, Commentary 1.

personal circumstances or representation of another client materially and adversely affect the ability of the lawyer to provide proper advice.¹⁵² The Federation's Model Code provides as an illustrative example of a disqualifying conflict, a lawyer advising both a business and an employee of the business, where the interests of the business and employee are directly adverse.¹⁵³

§3.88 Disciplinary decisions have found conflicts that impair a lawyer's ability to advise a client, and have imposed sanctions, where lawyers advise clients with whom they are having a sexual relationship.¹⁵⁴ As noted by the Law Society of Upper Canada: "The sexual/romantic relationship had the significant potential of jeopardizing the member's ability to provide [objective, disinterested, professional]... advice. It also had the significant potential of inhibiting the client from challenging or even questioning the advice being given..."¹⁵⁵

§3.89 When advising clients, lawyers must not "knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct" and must not instruct "the client on how to violate the law and avoid punishment".¹⁵⁶ The commentaries to the Federation's Model Code warn the lawyer against becoming the dupe of a client,¹⁵⁷ and further advise the lawyer to be vigilant in avoiding "becoming involved with criminal activities such as mortgage fraud or money laundering."¹⁵⁸ They require the lawyer to "make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer."¹⁵⁹

§3.90 Disciplinary decisions have addressed the prohibition on assisting a client to act unlawfully in the context of advising. In *Law Society of Upper Canada v. Sussman*, the Law Society disciplined a lawyer for advising a client to disobey a court order granting access to the client's child to the child's father.¹⁶⁰ The Law Society noted that the child was not in any

¹⁵² FLS MC Rule 3.4-1, Commentary 3; NB CPC Chapter 4, Commentary 1; LSUC RPC Section 3.4-1, Commentaries 3-4; AB CC Rule 2.04(1), Commentary; BC CPC Rule 3.4-1, Commentaries 3-4.

¹⁵³ FLS MC Rule 3.4-1, Commentary 11(b).

¹⁵⁴ See, e.g., *Law Society of Upper Canada v. Hunter*, [2007] L.S.D.D. No. 8, 2007 ONLSHP 27; *Law Society of Upper Canada v. Joseph*, [2003] L.S.D.D. No 34.

¹⁵⁵ *Hunter*, *ibid.*, at para. 43.

¹⁵⁶ FLS MC Rule 3.2-7; NB CPC Chapter 4, Commentary 7; (only references fraud, crime or dishonesty; does not refer to illegal conduct); Que. CPC Rule 14 (references unlawful or fraudulent, not dishonest); LSUC RPC Section 3.2-7; AB CC Rule 2.02(1); BC CPC Rule 3.2-7 (only references fraud, crime or dishonesty; does not refer to illegal conduct).

¹⁵⁷ FLS MC Rule 3.2-7, Commentary 1; NB CPC Chapter 4, Commentary 8; LSUC RPC Section 3.2-7, Commentary 1; AB CC Rule 2.02(1), Commentary; BC CPC Rule 3.2-7, Commentary 1.

¹⁵⁸ FLS MC Rule 3.2-7, Commentary 2; NB CPC Chapter 4, Commentary 8(b); LSUC RPC Section 3.2-7, Commentary 2; AB CC Rule 2.02(1), Commentary; BC CPC Rule 3.2-7, Commentary 2.

¹⁵⁹ FLS MC Rule 3.2-7, Commentary 3; NB CPC Chapter 4, Commentary 8(c); LSUC RPC Section 3.2-7, Commentaries 3-3.2; AB CC Rule 2.02(1), Commentary; BC CPC Rule 3.2-7, Commentary 3.

¹⁶⁰ [1995] L.S.D.D. No. 17.

imminent risk or danger, and that Sussman did not take steps to vary the Court Order; he simply advised his client not to obey it, which was improper:

...There can be no behaviour more disruptive to our system of justice and more likely to bring its administration into disrepute than a lawyer, while representing a party to a dispute, counselling his or her client to disobey the clear, unequivocal terms of a Court Order.¹⁶¹

§3.91 In *Law Society of Upper Canada v. Curtis*, the Court dealt with similar allegations, but found that the lawyer had not actually advised her client to disobey a court order with respect to access to a child.¹⁶² In the course of its reasons, the Law Society noted that a lawyer would only be justified in advising a client to disobey the law in exceptional circumstances — where “the elements of reasonable and honest belief of there being imminent risk of danger to a Child ... coexist with the requirement that there be an immediate application to a court to have the issues determined forthwith.”¹⁶³

§3.92 Lawyers have other ethical obligations that relate specifically to advising. Rule 3.2-2 of the Federation’s Model Code requires that the lawyer “be honest and candid” in advising the client, and that she advise the client “of all information known to the lawyer that may affect the interests of the client”.¹⁶⁴ Further, the lawyer’s advice must be “open and undisguised” and must state what the lawyer actually thinks “about the merits and probable results”.¹⁶⁵ The Federation’s Model Code’s commentaries conclude with a blunt admonition that the lawyer’s advice may not always be what the client wants to hear:

Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client’s perspective, or may have concerns about the client’s position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.¹⁶⁶

§3.93 A lawyer advising a client in accordance with her ethical obligations must thus provide competent advice, untainted by a disqualifying conflict of interest, and that does not assist the client to act unlawfully. The lawyer must

¹⁶¹ *Ibid.*

¹⁶² [1993] L.S.D.D. No. 216, 1993 CanLII 1183.

¹⁶³ *Ibid.* For a discussion of the circumstances around the *Curtis* case see Janine Benedet, “Feminist Lawyering: Insiders and Outsiders” in Adam Dodek & Alice Woolley, eds., *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) at 111-25.

¹⁶⁴ See similarly: NB CPC Chapter 4; Que. CPC Rule 37; LSUC RPC Section 3.2-2 including Commentaries 1.1-1.2; AB CC Rule 2.02(2); BC CPC Rule 3.2-2.

¹⁶⁵ *Ibid.*

¹⁶⁶ FLS CPC Rule 3.2-2, Commentary 3; AB Rule 2.02(2), Commentary; BC CPC Rule 3.2-2, Commentary 3. Ontario does not incorporate this commentary.

present the advice to the client through the lawyer's actual perceptions of the law, and how it applies to the client's case.

§3.94 The codes do not explicitly state that a lawyer's advice to a client must provide an objectively reasonable assessment of the law. They make it clear that the advice must be honest and candid, and based on "adequate consideration of the applicable law,"¹⁶⁷ but they do not expressly state that the lawyer's honest, *i.e.*, her *subjective* assessment of the law, must be *objectively* reasonable. That is, they do not apparently address the risk that arises where a client wants a particular outcome, and the lawyer manipulates the law, stretching it beyond its reasonable boundaries, to provide the advice that will support the outcome the client seeks. The risk is that a lawyer will provide the colloquial "CYA" opinion, which is effective in allowing the client to say, "I acted on legal advice", even if the legal advice is bogus. That lawyer does not make a mistake; she rather manipulates the law to her client's advantage.

§3.95 In the United States, this risk became a reality in the famous case of the torture lawyers of Washington, in which lawyers at the Office of the Legal Counsel provided highly dubious advice to enable various aspects of the Bush administration's war on terror, including torture.¹⁶⁸ When the conduct of those lawyers was challenged, it was held that the honesty and candour rules do no more than prevent a lawyer from offering advice that the lawyer knows to be false, or to the accuracy of which the lawyer is consciously indifferent. That high standard was characterized as allowing lawyers "to make entirely stupid, disingenuous and asinine arguments that normal people with functioning moral consciences would not make."¹⁶⁹ The ethics opinion about the torture lawyers suggests that, in the United States, so long as the lawyers have some minimal belief in what they are saying, they foster their clients' interests, and they are not in some sort of conflict of interest, the objective inadequacy of the advice is irrelevant, ethically speaking.¹⁷⁰

§3.96 The Canadian codes arguably allow for a similar interpretation here. To impose a different standard — to suggest that the codes require a lawyer to provide objectively reasonable advice, even if doing so is not in the client's interest — requires some basis for believing that, if it came to, it a

¹⁶⁷ FLS CPC, Rule 3.2-2, Commentary 2; NB CPC Chapter 4, Commentary 2; LSUC RPC Section 3.2-2, Commentary 2; AB CC Rule 2.02(2), Commentary; BC CPC Rule 3.2-2, Commentary 2.

¹⁶⁸ See W. Bradley Wendel, "Legal Ethics and the Separation of Law and Morals" (2005) 91 Cornell L. Rev. 67; David Luban, "The Torture Lawyers of Washington" in *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007). For a Canadian example, see the discussion of Edgar Schmidt's litigation against the federal government in Alice Woolley, "The Lawyer as Advisor and the Practice of the Rule of Law" (2014) 47 UBC L Rev 743-783. The Federal Court (Trial Division) has released a judgment in the *Schmidt* case, but it does not address the obligations of lawyers when advising clients. See *Schmidt v. Canada (Attorney General)*, [2016] F.C.J. No. 227, 2016 FC 269 (F.C.).

¹⁶⁹ Jack Balkin discussing the decision that the lawyers of the Office of the Legal Counsel, who wrote the torture memos, had not engaged in professional misconduct, quoted in Milan Markovic, "Advising Clients After Critical Legal Studies and the Torture Memos" (2011-12) 114 W. Va. L. Rev. 109 at 111.

¹⁷⁰ *Ibid.*

law society would interpret the Canadian codes differently. While Canadian courts often take a different approach from the United States, the Canadian law governing lawyers is heavily influenced by American law.¹⁷¹

§3.97 As noted, the Canadian codes require that lawyers' opinions be competent, including that they provide an "adequate consideration of the applicable law". That standard has, however, only ever been applied to lawyers whose advice hurt their clients, not to lawyers whose advice helped their clients. Further, there are real issues that would make a law society legitimately reluctant to subject legal opinions to competence review, absent a client complaint. Lawyers need to be focused on assisting their clients, without a concern about unwarranted regulatory interference; there is a risk that third parties who do not like what the client did on the basis of advice could complain to the law society as a low-cost alternate to suing the client. In addition, the lawyer-client advising relationship is subject to solicitor-client privilege. While law societies can pierce privilege, they are properly reluctant to do so. The standard for demonstrating incompetence when advice hurts a client is not appropriate for regulating advice that helps a client.

§3.98 Where the advice benefits a client, it may be possible to interpret the rules to suggest that the incompetence rules apply, but that incompetence will be demonstrated only when the advice is based on an assessment of the law that is unreasonable to the point of showing a wilful or reckless disregard for the content of the law. These standards are desirable (and discussed again in Subsection 6(A)(iv), below), but it is not especially clear from the rules that they are the standards that do apply; the risk noted here, of bad advice that benefits the client, is one that the rules simply do not squarely address.

§3.99 Additionally, the code provisions are somewhat opaque as to when we would consider a client's action unlawful, such that the lawyer's advice assisting the accomplishment of that action is improper. Is advising a client about how to breach a contractual obligation so as to optimize the client's business position assisting the client to engage in "illegal conduct"? Or, is it only certain sorts of illegality that a lawyer may not assist a client to commit? The case law and the examples in the codes of conduct tend to suggest that illegality relates to conduct that is *malum in se* rather than conduct that is merely *malum prohibitum*, but the language of the codes does not make that distinction clear.¹⁷² For the most part, the codes also do not

¹⁷¹ W. Wesley Pue, "In Pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers", (1995) 33 Alta. L. Rev. 730; W. Wesley Pue, "Common Law Legal Education in Canada's Age of Light, Soap and Water" (1995) 36 Man. L.J. 654-688.

¹⁷² *Malum in se* being conduct that is bad in itself; *malum prohibitum* being conduct that is prohibited, although it may not be inherently bad. Note that in *Sussman* the lawyer directed the client to violate a court order, which constitutes contempt of court, a serious violation of the rule of law and conduct that is *malum in se*. Further, in *Curtis* the Court suggests that improper advice would arise where a lawyer advises a client to violate a court order without immediately seeking to have the court order overturned.

address the difference that may exist between simply providing information to a client, that the client may or may not use for an unlawful purpose, and actually assisting a client in the accomplishment of that unlawful purpose. The Alberta version of the Federation's Model Code does address this point, suggesting that the mere provision of information to a client does not constitute assisting in the accomplishment of an unlawful act.¹⁷³ Other codes do not offer this clarification.

§3.100 They also do not explain what it means to instruct a client about how to act unlawfully and escape punishment. The codes do not, presumably, prevent a lawyer from advising a client about how to minimize the negative consequences of an illegal act already performed (e.g., by not speaking to the authorities when questioned about suspected participation in a criminal offence). But how do we distinguish between that sort of permissible advice, and impermissible advice that instructs the client about how to act unlawfully and escape punishment? In general, the codes could be clearer about how to distinguish between defensible and indefensible advice provided to a client whose actions will be, or have been, unlawful. As discussed further in Subsection 6(A)(iv), the codes ought to be interpreted (or clarified) consistently with the express direction in the Alberta Code. While a lawyer ought not to assist a client in committing an unlawful act, and must act with due diligence in ascertaining that she is not assisting in unlawful activities,¹⁷⁴ she should be free to provide her clients with an honest and objectively accurate assessment of the law as it applies to their conduct, either past or proposed, whether or not those clients may use that advice for an unlawful purpose, or have acted unlawfully in the past.

ii. Case Law – Negligence and Third Party Liability

§3.101 The common law of negligence creates some additional clarity for the lawyer's duties when advising clients. As noted earlier, the Supreme Court of Canada established the general standard for lawyer negligence in *Central Trust Co. v. Rafuse*,¹⁷⁵ stating that a lawyer's advice must be "that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor."¹⁷⁶ The Court in that case considered whether the lawyers acted negligently when, in advising their clients, they failed to discover that the mortgage being taken by their clients was in fact void as contrary to s. 96(5) of the *Companies Act*.¹⁷⁷ The Court concluded that negligence was established. While a lawyer need not know "all the law applicable to the performance of a particular legal service" the lawyer must know enough of the law "to perceive the need to ascertain the law on

¹⁷³ Rule 2.02(10), Commentary.

¹⁷⁴ See, in particular, FLS CPC Rule 3.2-7, Commentary 3.

¹⁷⁵ [1986] S.C.J. No. 52, [1986] 2 S.C.R. 147 (S.C.C.).

¹⁷⁶ *Ibid.*, at para. 58.

¹⁷⁷ *Ibid.*, at para 55; *Companies Act*, R.S.N.S. 1967, c. 42.

however, that lawyers do not let the actions of the law societies in this respect inhibit their appropriately zealous representation of their clients, and that law societies become more cognizant of the serious problems that are raised by this type of regulatory action. In jurisdictions outside of Ontario, following the lead of Brown J.A.'s dissent in *Groia* would, in my view, be a significant improvement on current approaches.

D. Criticizing Judges and the Legal System

§4.155 Law societies and courts seem somewhat more hesitant to discipline or otherwise sanction lawyers for being critical of judges or the legal process, perhaps because they understand that zealous advocacy may require such criticisms from time to time. In addition, courts and regulators are sensitive to the need for public engagement with the adequacy of our public legal institutions, and the important role of lawyers in fostering that engagement.

§4.156 The codes of conduct note that, in general, legal decisions are subject to public scrutiny and analysis by anyone, including lawyers, and that lawyers have a duty to seek to improve the administration of justice. Since, however, judges have only a limited ability to defend themselves, lawyers are directed to avoid criticism that “is petty, intemperate or unsupported by a *bona fide* belief in its real merit”. In addition, lawyers are directed to avoid criticism in cases in which they were involved, where that criticism could be perceived as partisan rather than objective, and are directed to defend the judiciary from unwarranted criticism by others.²⁷⁸

§4.157 The leading case on the discipline of lawyers for incivility to judges or courts is *Doré v. Barreau du Québec*.²⁷⁹ In 2001, Gilles Doré had appeared before Boilard J. in the Superior Court of Québec seeking a stay of proceedings against his client, or that his client be released on bail. Justice Boilard's treatment of Doré in that application was improper. He characterized Doré as impudent, his arguments as “idle quibbling” and his application as “totally ridiculous”.²⁸⁰ After the hearing, Doré did three things. First, he wrote an extremely angry and personally abusive letter to Boilard J.:

you made comments about me that were both unjust and unjustified, scattering them here and there in a decision the good faith of which will most likely be argued before our Court of Appeal. ...

If no one has ever told you the following, then it is high time someone did. Your chronic inability to master any social skills (to use an

²⁷⁸ FLS MC Rule 5.6-1, Commentary 3; NB CPC Chapter 20, Commentary 4; LSUC RPC Section 5.6-1, Commentary 3; AB CC Rule 4.06(1), Commentary; BC CPC Rule 5.6-1, Commentary 3. Que. CPC Rule 111 directs a lawyer not to act in a manner that is “detrimental to the administration of justice”; Rule 12 allows a lawyer to criticize a “legal provision, contest the interpretation or application thereof, or seek to have it repealed, amended or replaced”.

²⁷⁹ [2012] S.C.J. No. 12, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.).

²⁸⁰ *Ibid.*, at para. 9.

expression in English, that language you love so much) which has caused you to become pedantic, aggressive and petty in your daily life, makes no difference to me; after all, it seems to suit you well. ...

Your legal knowledge, which appears to have earned the approval of a certain number of your colleagues, is far from sufficient to make you the person you could or should be professionally. Your determination to obliterate any humanity from your judicial position, your essentially non-existent listening skills, and your propensity to use your court — where you lack the courage to hear opinions contrary to your own — to launch ugly, vulgar, and mean personal attacks not only confirms that you are as loathsome as suspected, but also casts shame on you as a judge, that most extraordinarily important function that was entrusted to you. ...

Worst of all, you possess the most appalling of all defects for a man in your position: You are fundamentally unjust. I doubt that that will ever change.²⁸¹

§4.158 Second, he wrote a letter to the Chief Justice requesting that he not appear before Boilard J. again. Third (and a month later), he complained about Boilard J. to the Canadian Judicial Council. Justice Boilard was reprimanded.

§4.159 For his part, after receiving Doré's letter, Boilard J. made a complaint against Doré to the Barreau du Québec, who decided that Doré was guilty of professional misconduct on the basis of incivility; Doré had violated the requirement that he act with "objectivity, moderation and dignity".²⁸² Doré challenged that decision through to the Supreme Court of Canada. The Supreme Court upheld the Barreau's decision. It emphasized the importance of lawyers' expressive rights, and the need for public criticism of public institutions, but also the importance of lawyer civility. The Court held that while lawyers were not required to be "verbal eunuchs" and had a right and (perhaps) a duty to "speak their minds freely", they are nonetheless constrained "to do so with dignified restraint", a restraint that Doré failed to achieve.²⁸³

We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them

²⁸¹ *Ibid.*, at para. 10.

²⁸² *Ibid.*, at para. 60.

²⁸³ *Ibid.*, at para. 68.

with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like eunuchs. They not only have a right to speak their minds verbally, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.²⁸⁴

§4.160 Other comments made by lawyers that have been found to violate law society requirements include describing a judge as a "bigot" in a letter to opposing counsel²⁸⁵ and comments that judges are too political, have "ties to the Conservative Party" and that such political ties prevent judges from being "tree shakers".²⁸⁶ In the latter case, *Nova Scotia Barristers' Society v. Morgan*,²⁸⁷ the law society declined to discipline the lawyer because the comments were made in his capacity as a mayor, not as a lawyer.²⁸⁸

§4.161 In *Law Society of Alberta v. Engel*,²⁸⁹ the disciplinary panel declined to sanction a lawyer who criticized an investigation into police misconduct as "purposefully flawed". The panel noted that the comments of the lawyer were well informed, that it had not been demonstrated that the comments by the lawyer were untrue, that the lawyer had an honest belief in the truth of the comments, and that, in any event, the comments were neither "extreme or inflammatory" nor "abusive or offensive or unprofessional".²⁹⁰

§4.162 Similarly, in *Law Society of Yukon v. Kimmerly*²⁹¹ the Law Society declined to discipline the lawyer acting as Minister of Justice who said that a judge had been "silly" and had brought the judiciary and courts into "disrespect" when the judge had placed a coat over the Territory's coat of

²⁸⁴ *Ibid.*, at paras. 66 and 68.

²⁸⁵ *Histed v. Law Society of Manitoba*, [2007] M.J. No. 460, 2007 MBCA 150 (Man. C.A.).

²⁸⁶ *Nova Scotia Barristers' Society v. Morgan* (2010) NSBS 1 (CanLII), Complaint, paragraph 1(iii) and 1(v). See also *Law Society of Upper Canada v. Botiuk*, [2015] L.S.D.D. No. 175, 2015 ONLSTH 143, in which a lawyer was sanctioned for unsubstantiated accusations directed toward the judge and opposing counsel (essentially accusing the judge of disregarding the law and facts, and bullying the lawyer); See also *Law Society of Upper Canada v. Botiuk*, [2015] L.S.D.D. No. 63, 2015 ONLSTH 55.

²⁸⁷ *Ibid.*

²⁸⁸ The Nova Scotia Barristers' Society did not clearly explain the basis for this distinction, which seems *prima facie* inconsistent with the general principle that lawyers can be disciplined for personal as well as professional misconduct. It may be that, as personal misconduct, the behaviour did not warrant discipline, but the NSBS simply does not explain its decision in this respect. In a case also involving a lawyer acting outside his professional capacity the Law Society of Alberta agreed to allow Ezra Levant to resign from membership in the Society rather than proceeding with a complaint about Levant's criticism of the Human Rights Commission: "Law Society of Alberta accepts Ezra Levant's resignation despite 2 complaints still pending", CBC News, March 2, 2016.

²⁸⁹ [2008] L.S.D.D. No. 173.

²⁹⁰ *Ibid.*, at para. 71.

²⁹¹ [1988] L.S.D.D. No. 1. Note that in that case the lawyer was, like Morgan, arguably not acting in his capacity as a "lawyer". That aspect of the situation was not commented on by the panel.

arms that had been hung by the government in the courtroom. The Law Society said that

It is the task of this Committee to balance the competing priorities; on the one hand the member's obligation to so conduct himself as to not harm the standing of the legal profession generally or bring the administration of justice into disrepute and on the other his freedom to make fair and reasonable comment in the exercise of his right to speak out.²⁹²

In that context the Committee found that the comments were not conduct deserving of censure.

§4.163 Traditionally, courts have also had the power to discipline lawyers for inappropriate comments about judges and the legal system through the contempt offence of "scandalizing the court". In the leading decision of *R. v. Kopyto*,²⁹³ however, the Ontario Court of Appeal held that that offence as then understood was unconstitutional. Kopyto had been convicted of scandalizing the court for saying a judgment was "a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it."²⁹⁴ He had also said that there was no useful recourse to "this charade of the courts in this country which are warped in favour of protecting the police".²⁹⁵ Justice Cory described these comments as

... in the poorest possible taste. It was no more than the whining of an unhappy loser. It was unreasonable, unprofessional and unworthy of even the most marginal and most recent member of the profession. It was, in a word, disgraceful.²⁹⁶

Nonetheless, he vacated Kopyto's conviction for having made them. Cory held that courts are properly subject to "comment and criticism" and are not "fragile flowers that will wither in the hot heat of controversy".²⁹⁷ As a consequence, the only sort of conviction for contempt that could be upheld would be of the nature of *sub judice* — that is, statements which "demonstrate a clear and present danger to the administration of justice"²⁹⁸ in an ongoing proceeding. Houlden J.A. would have gone further and eliminated entirely the idea of an offence of scandalizing the court, while Dubin J.A. would have narrowed the offence, found Kopyto not guilty of it, and maintained its constitutionality.

§4.164 Subsequent to *Kopyto* a lawyer has been convicted of contempt for statements in court; however, the case had the rather extraordinary facts of the lawyer urging those in attendance at court to attack a sheriff arresting the lawyer's client, while at the same time the lawyer shouted out allegations of

²⁹² *Ibid.*, at 5.

²⁹³ [1987] O.J. No. 1052, 62 O.R. (2d) 449 (Ont. C.A.).

²⁹⁴ *Ibid.*, at para. 7.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*, at para. 21.

²⁹⁷ *Ibid.*, at para. 33.

²⁹⁸ *Ibid.*, at para. 85.

misdeeds and corruption about the judge.²⁹⁹ The lawyer was found to have been suffering from a mental disorder at the time.

§4.165 The conservative approach taken in most of the cases in this area should be followed in all cases in which a lawyer has criticized the judge or legal system. Unless a lawyer has created a risk of prejudice to the administration of justice in an ongoing proceeding, contempt and disciplinary proceedings against that lawyer are inappropriate. On this basis I would argue that *Histed v. Law Society of Manitoba*,³⁰⁰ the bigot case, was wrongly decided. Describing a judge as a bigot to another lawyer in a professional communication, even in private, is troubling. However, it may also be understood as a short hand way of explaining the nature of the lawyer's concern with the selection of a particular judge to handle a racially sensitive civil proceeding. Since the comments were made only to another lawyer, it is difficult to see what prejudice to the administration of justice could arise from them being made; without such a risk of prejudice, discipline for making the statements is overbroad and, again, creates the risk of inappropriately suppressing the lawyer's zealous advocacy.

§4.166 In addition, discipline of lawyers for incivility toward judges and courts raises the same concern with regulation of incivility towards other lawyers, insofar as it can lead regulators to miss or ignore other more significant issues with the lawyer's conduct. With respect to *Doré*, while the outrageous nature of the letter he wrote may have warranted a regulatory response, it is also the case that had he written the nicest possible letter to Boilard J. his conduct would have been an improper violation of his professional duties. Our system of justice rests on the premise that the justice it discharges will be both public and impersonal. A judge's life need not be monastic, but the intermixing of the public and impersonal resolution of a case with a personal and private correspondence between participants about that case, even after the fact, undermines the ability of the system to achieve the necessary impartiality. In *Doré's* situation, the matter on which he was acting was still before the court. Justice Boilard was presiding over a related trial.³⁰¹ If *Doré* had sent a praising but also private and personal letter about Boilard J.'s actions in court, there would be reason to be concerned about the propriety of that action, and its effect on the fair administration of justice.³⁰² Would the Crown counsel appearing on the prosecution who later learned about the existence of the letter of praise continue to be confident that the

²⁹⁹ *R. v. Cram*, [1994] B.C.J. No. 2258, 99 B.C.L.R. (2d) 127 (B.C.S.C.).

³⁰⁰ *Histed v. Law Society of Manitoba*, [2007] M.J. No. 460, 2007 MBCA 150 (Man. C.A.).

³⁰¹ *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12, [2012] 1 S.C.R. 395 at para. 15 (S.C.C.).

³⁰² In the United States see *Re Gleason*, 2012 U.S. App. LEXIS 21248, U.S.C.A. 11th Cir. (2012), in which the Court held that a lawyer had acted improperly because of his uncivil conduct before a judge but also because of the conciliatory letter and bottle of wine he subsequently sent to that judge. It must be noted, though, that the impropriety in that case arose in part because disciplinary proceedings before the Court were pending against Gleason. See <<http://www.ca11.uscourts.gov/unpub/ops/201211433.pdf>>.

case would be decided on the merits? Surely in a matter before the courts we expect that the communication between judges and lawyers about that matter – whether with regard to its substance or with regard to how the judges and lawyers are conducting themselves – will occur transparently in open court or in communications seen by all counsel. This is a basic requirement of natural justice.³⁰³

§4.167 Yet at no point does the Supreme Court address this aspect of Doré's conduct.³⁰⁴ This omission is unfortunate, because the facts of the case provided an opportunity for the Barreau and the Court to illuminate the question of when the private dealings between lawyers and judges undermine the justice system's impartiality. Doré's exclusive focus on civility denied the Barreau and the Supreme Court the opportunity to appreciate the existence of that issue, or to illuminate it in any way. They missed it altogether.

§4.168 In sum, then, courts and regulators ought to continue to be cautious in their regulation of lawyer criticisms of judges and courts, and to continue to take into account the need for public commentary and criticism of the legal system, and for the role of lawyers as advocates. If anything, an even greater sensitivity to these concerns would be warranted. Courts and regulators ought also to consider in any civility case the extent to which the incivility reveals deeper and more substantive misconduct by the lawyer, and ensure that those issues are addressed.

6. CONCLUSION

§4.169 Zealous advocacy requires that lawyers provide competent and effective representation of a client's legal interests, knowing the law and how to apply it, investigating the client's case and employing their skills to obtain the best possible outcome in each case. Fulfilling that ethical duty challenges the lawyer's skills and intellect. It also requires nuanced understanding of the way advocacy operates in particular contexts, such as examinations for discovery, and of the constraints on zeal that arise from time to time, such as in *ex parte* applications or with respect to the provision of relevant adverse authority. The pervasive ethic of advocacy also poses challenges to regulators faced with lawyers who have a poor grasp of good manners and whose behaviour makes the life of everyone in the legal profession more unpleasant than it needs to be. In the end, though, the paramount importance of the lawyer's duty to his client remains clear, and the lawyer's constant orientation should be towards ensuring that duty is fulfilled.

³⁰³ See, e.g., *International Woodworkers of America v. Consolidated-Bathurst Packaging Ltd.*, [1990] S.C.J. No. 20, [1990] 1 S.C.R. 282 (S.C.C.).

³⁰⁴ This is probably because Doré had no incentive to point out other bases for finding that he had engaged in professional misconduct while the Barreau was equally unlikely to point out inadequacies in its own judgment. It is nonetheless somewhat surprising that no judge on the Court independently identified this issue.

The Independence of the Bar as a Constitutional Principle in Canada

PATRICK J. MONAHAN

A. INTRODUCTION

It is widely understood and accepted that an independent legal profession, like an independent judiciary, is a fundamental premise of the Canadian legal system. The independence of the Bar has been recognized as essential to the maintenance of the rule of law and the proper functioning of the administration of justice, as well as being one of the hallmarks of a free and democratic society. Its roots can be traced back to thirteenth century England.¹

Each province and territory in Canada recognizes the self-governing status of the legal profession² through the establishment of an autonomous regulatory body with powers to, amongst other things, control entry to the profession, establish and enforce standards of professional conduct, and undertake discipline of its members.³ Yet, these various statutory regimes are potentially subject to amendment or repeal by

¹ See Lederman, "The Independence of the Judiciary" (1956) 34 Canadian Bar Review 769 at 776-78.

² Note that the regulation of the legal profession is regarded as falling under provincial jurisdiction, through provincial regulation of the professions included in provincial regulation of "property and civil rights" in s. 92(13) of the Constitution Act, 1867 as well as part of its authority over the "administration of justice" in s. 92(14); see *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113 at paras. 38-42 (*Mangat*).

³ See for example the *Law Society Act*, R.S.O. 1990, c. L.8; *An Act Respecting the Barreau du Québec*, R.S.Q. c. B-1; *Legal Profession Act*, R.S.A. 2000, c. L-8; *Legal Profession Act*, R.S.P.E.I. 1988, c. L-6.1.

the respective Legislatures of the provinces and territories. Thus the question arises as to the extent to which the autonomous and independent status of the legal profession can be said to be a constitutional as opposed to a statutory imperative in Canada. This paper attempts to respond to this important question.

The paper will review a variety of written and unwritten elements of the *Canadian Constitution* that provide constitutional protection for the principle of the independence of the Bar. I first explain the different possible meanings that can be ascribed to the term "independence of the Bar." I then argue that the *Constitution* assumes and in some cases expressly requires the independence of the legal profession, in the sense of safeguarding legal counsel's ability to act as an independent, competent, loyal and fearless advocate on behalf of his clients. I also consider a broader meaning of the concept of the "independence of the Bar," namely, the self-governing and autonomous status of the legal profession as a whole. Although I conclude that the *self-governing* status of the profession is not a constitutional requirement in Canada, I do argue that the legal profession's *independence from government* is a fundamental precept of the Canadian constitutional order. In this sense, there would appear to be constitutional limits on the extent to which the executive branch of government could attempt to assume direct regulatory control over the legal profession.

B. UNDERSTANDING "INDEPENDENCE OF THE BAR"

Although the term "independence of the Bar" is frequently referred to in judicial opinions and legal commentary, its meaning varies with the context in which it appears. In considering the constitutional sources for the concept, it is useful to distinguish between two different senses in which the term "independence of the Bar" is often utilized.

On one narrower interpretation, the "independence of the Bar" is used to refer to the freedom of individual lawyers to give advice to their clients or to act on their clients' behalf in a way counsel believes is justified by the objective situation, rather than having their advice tempered by matters that counsel does not regard as a proper consideration. Thus, this first use of the concept of independence refers to the lawyer's ability to provide effective representation of clients in litigious as well as non-litigious matters without improper external pressure.

It should be recognized that a lawyer's independence can be compromised not only by improper external pressures brought to bear by government or others, but also by a failure of the lawyer to take a sufficiently independent stance in regard to his or her client's own interest. This interpretation of the term "independence of the Bar" is captured in the following commentary by the late Professor Archibald Cox:⁴

The "independent lawyer" owes his client a duty of loyalty, but he or she also stands somewhat apart, partly because a degree of detachment enables the lawyer to serve the client best but also partly because the lawyer's calling carries a professional obligation also to serve other, larger, and more diffuse interests than the client immediately recognizes and which the client may even prefer to disregard. A modest statement of this ideal was found in old Canon 32 entitled "The Lawyer's Duty in its Last Analysis," where we used to speak of ourselves as "ministers of the law" obligated to render no service and give no advice "involving disloyalty to the law ... or deception or betrayal of the public."

Likewise, the Chief Justice of Ontario Advisory Committee on Professionalism has characterized "independence" as one of the "building blocks" of professionalism.⁵ The Advisory Committee identifies independence as connoting the ability of the lawyer to exercise professional judgment with respect to a particular client and the obligation to avoid conflicting interests that may affect the lawyer's loyalty to the client. This requirement of autonomy is said to flow from "the professional's distinctive relations of trust and authority with clients ... and his or her need to exercise independent discretionary judgment."⁶

There is, however, a second and somewhat broader sense in which the term "independence of the Bar" is sometimes employed. This broader view refers to the independence of the profession as a whole and its sta-

⁴ See Archibald Cox, "The Conditions of Independence for the Legal Profession" in *The Lawyer's Professional Independence: Present Threats/Future Challenges* (American Bar Association, 1984) at 53.

⁵ Chief Justice of Ontario Advisory Committee on Professionalism, Working Group on the Definition of Professionalism, "Elements of Professionalism" (October 2001, revised December 2001 and June 2002) at 4-5 ["Elements of Professionalism"], online: www.lsuc.on.ca/media/third_colloquium_jim_varro.pdf.

⁶ Robert Gordon, "Can Lawyers' Professional Values be Saved? Are They Worth Saving" (October 1999), quoted in "Elements of Professionalism," *ibid.* at 4.

tos as a self-governing profession. Professor Cox describes this broader interpretation of the term "independence of the Bar" as follows⁷:

By independence of the legal profession we also mean freedom from government control. In this sense an "independent legal profession" is self-governing. Its members, bound together by a common special training and tradition, set conditions for entry and standards of conduct and impose discipline upon incompetent or wayward members. This is the tradition that we have inherited from the English bench and bar, adapted to a much more diverse profession performing many different societal functions than the English barrister, and applied through very different institutional structures and in an altogether different milieu.

Professor Cox favoured the independence of the Bar in both the narrow and the broad conceptions described above. In fact, Cox was of the view that individual lawyers would be in a position to provide independent and effective advice to their clients (the narrow conception) only if the profession as a whole was independent and self-governing (the broad conception). At the same time, Cox believed that the legal profession would be able to retain its freedom from outside control only if it cultivated in its members a high sense of public obligation over and above the pursuit of the client's self-interest. He favoured strengthening and spreading amongst the ranks of the profession the ideal of the lawyer as a follower of an independent public calling.⁸

Note that Professor Cox referred to the institutional independence of the legal profession as involving "freedom from government control." There are obviously a variety of ways in which such freedom can be achieved. In Canada, this has traditionally been embodied in provincial statutes that delegate the power of self-government to the legal profession through an autonomous body with authority to regulate the profession in the public interest. But, as discussed below,⁹ there may well be other ways—not involving self-regulation—in which independence from government control can be protected.

⁷ Cox, above note 4 at 53-54.

⁸ The Chief Justice of Ontario Advisory Committee on Professionalism also identifies this broader meaning attributed to the term independence, referring to it as "including a high degree of autonomy from external control other than those imposed by self-regulation." See "Elements of Professionalism," above note 5 at 4.

⁹ See discussion under Institutional Independence and Self-Regulation below.

The functions of self-governing associations can themselves be classified in two broad categories: "regulatory" and "representative."¹⁰ Regulatory functions involve control over such matters as entry standards and training, rule making, monitoring and enforcement, complaints and discipline. Representative functions include representation in areas such as defence of the principles of the rule of law, the independence of the judiciary and the independence of the legal profession, promoting access to justice, providing advice on policy issues for government, and promoting public understanding of the citizen's legal rights. In Canada, both regulatory and representative functions have been conferred on the legal profession's self-governing bodies, with no requirement that the bodies exercising these functions be segregated from each other."

C. INDEPENDENCE AND EFFECTIVE REPRESENTATION

1) Introduction

Lawyers have an ethical obligation to provide independent advice and representation to their clients. This obligation is recognized in codes of conduct developed by the legal profession in Canada,¹² as well as internationally.¹³ The provision of independent advice and representation has a number of distinct aspects, including the duty to act as an advocate who will "fearlessly raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case."¹⁴ Independence also entails a duty to maintain loyalty to the interests of the client and to avoid conflicts of interest. As the Supreme Court of Canada concluded in *R. v. Neil*, "[t]he value of an independent bar is diminished unless the lawyer is free from conflicting

¹⁰ The distinction between representative and regulatory functions is drawn from Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report* (December 2004) at 10 [Clementi, *Final Report*].

¹¹ In contrast, in England under the *Access to Justice Act 1999* professional bodies are required to distinguish between regulatory and representative functions and to set them out separately in the annual practicing certificate fee.

¹² See, for example, the *Law Society of Upper Canada Rules of Professional Conduct*, Rules 2.01 and 4.01 and the *Canadian Bar Association Code of Professional Conduct*, Chapter XXII, Rules (a) and (b).

¹³ See the *International Code of Ethics of the International Bar Association*, Rule 3; online: Center for the Study of Ethics in the Professions of the Illinois Institute of Technology: http://ethics.iit.edu/codes/coe/International_Bar_Association_88.html.

¹⁴ *Randall v. Worsley*, [1969] 1 A.C. 191 at 227 (U.K. H.L.).

interests."¹⁵ Lawyers also have a duty to keep client information confidential, which enables the lawyer to render effective professional service to the client.¹⁶

There have been a variety of statements by Canadian courts, including the Supreme Court of Canada, which have recognized that the independence of the Bar plays a critical and indispensable role in the effective administration of justice and the maintenance of the rule of law. For example, in *Canada (Attorney General) v. Law Society of British Columbia*,¹⁷ the Supreme Court of Canada, in a unanimous judgment written by Estey J., made the following reference to the importance of the independence of the legal profession:

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.

In *Andrews v. Law Society of British Columbia*,¹⁸ Justice McIntyre took this one step further by pointing out that the independence of the legal profession plays an essential role in the administration of justice. As officers of the court, lawyers must assist the judiciary in the fair and effective resolution of disputes:¹⁹

It is incontestable that the legal profession plays a very significant—in fact, a fundamentally important—role in the administration of justice, both in the criminal and the civil law.... I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the

¹⁵ *R. v. Neil*, [2002] 3 S.C.R. 631 at para. 13 (Binnie J. for a unanimous Supreme Court of Canada).

¹⁶ See the *Canadian Bar Association Code of Professional Conduct*, above note 12, c. 4.

¹⁷ [1982] 2 S.C.R. 307 at 336 [Jabour].

¹⁸ [1989] 1 S.C.R. 143 [Andrews].

¹⁹ *Ibid.* at 187–88.

whole legal system would be in a parlous state. In the performance of what may be called his private function, that is, in advising on legal matters and in representing clients before the courts and other tribunals, the lawyer is accorded great powers not permitted to other professionals ... By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.

Similarly, the Supreme Court of Canada in *Pearlman v. Manitoba Law Society Judicial Committee* noted that the decision by provincial legislatures to provide a self-governing structure for a profession is ultimately designed to protect clients or third parties by ensuring that only qualified practitioners are licensed to practice in a given professional area. Mr. Justice Iacobucci, who delivered the unanimous opinion of the Supreme Court, noted the particular importance of an autonomous legal profession to a free and democratic society:

Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state.

On this view, the self-governing status of the professions, and of the legal profession in particular, was created in the public interest.²⁰

2) Independence of the Bar and the Charter

The right to effective assistance of counsel has been constitutionally guaranteed through a number of provisions of the *Charter*, particularly sections 7, 10(b), and 11(d).²¹ In particular, the right to effective assistance of counsel has been recognized as a "principle of fundamental justice" for purposes of section 7 of the *Charter*.²² This means that whenever the interests of "life, liberty or security of the person" protected by section 7 are engaged, individuals have a right to effective representation by

²⁰ [1991] 2 S.C.R. 869 at 887 (*Pearlman*), quoting from the *Report of the Professional Organizations Committee* (1980).

²¹ See generally David M. Tanovich "Charting the Constitutional Right of Effective Assistance of Counsel in Canada" (1994) 36 C.L.Q. 404.

²² See *R. v. G.D.B.*, [2000] 1 S.C.R. 520 at para. 24.

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²² See *R. v. G.D.B.*, [2000] 1 S.C.R. 520 at para. 24.

counsel. Further, effective assistance of counsel is necessary for a fair trial as guaranteed by section n(d) of the *Charter*.²³ The right to "retain and instruct counsel" under section 10(b) has been interpreted broadly as protecting the solicitor-client relationship.²⁴

The value attached to the effective assistance of counsel in the context of a criminal trial was ably articulated by Justice Doherty in *R. v. Jarrisse* as follows:²⁵

The importance of effective assistance of counsel at trial is obvious. We place our trust in the adversarial process to determine the truth of criminal allegations. The adversarial process operates on the premise that the truth of a criminal allegation is best determined by "partisan advocacy on both sides of the case": *U.S. v. Cronin*, 104 S. Ct. 2039 (1984), per Stevens J. at p. 2045. Effective representation by counsel makes the product of the adversarial process more reliable by providing an accused with the assistance of a professional trained in the skills needed during the combat of trial. The skilled advocate can test the case advanced by the prosecution, as well as marshal and advance the case on behalf of the defence. We further rely on a variety of procedural safeguards to maintain the requisite level of adjudicative fairness in that adversarial process. Effective assistance by counsel also enhances the adjudicative fairness of the process in that it provides to an accused a champion who has the same skills as the prosecutor and who can use those skills to ensure that the accused receives the full benefit of the panoply of procedural protections available to an accused.

Where counsel fails to provide effective representation, the fairness of the trial, measured both by reference to the reliability of the verdict and the adjudicative fairness of the process used to arrive at the verdict, suffers. In some cases the result will be a miscarriage of justice.

Although perhaps already encompassed by the concept of effective assistance of counsel, the courts have also expressly recognized that solicitor-client privilege is a "principle of fundamental justice" that is constitutionally protected under sections 7 and 8 of the *Charter*.

²³ *Lavallee, Rachel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 at para. 65.

²⁴ *R. v. Hurlingham*, [1995] 2 S.C.R. 206 at para. 14.

²⁵ (1995) 102 C.C.C. (3d) 35 (Ont. C.A.) at 57. This passage was adopted by the Supreme Court of Canada in *R. v. G.D.B.*, above note 22 at para. 25.

For example, in *R. v. McClure*,²⁶ the Supreme Court of Canada considered the reach of solicitor-client privilege. Mr. Justice Major, who wrote the judgment of a unanimous Supreme Court of Canada, noted that solicitor-client privilege is fundamental to the justice system in Canada. In his view, the integrity of the administration of justice depends upon the unique role of the solicitor, who provides legal advice to clients within this complex system. At the heart of the privilege lies the concept that people must be able to speak candidly with their lawyers so as to enable their interests to be fully represented. In *McClure*, an individual who had been charged with sexual offences against eleven former students sought production of confidential records from a number of the complainants, including information regarding the allegations that had first been made by one of the complainants to her solicitor. The accused claimed that his right to make full answer and defence would be compromised by denying him access to this confidential material. The question that arose was whether the solicitor/client privilege attached to the records in question should give way to an accused's right to make full answer and defence and, if so, under what circumstances.

In holding that the circumstances did not justify invading the solicitor-client privilege and that the litigation file should therefore remain sealed, the Court noted that solicitor-client privilege had a unique status within the legal system. Indeed, the relationship of confidence between a client and his or her lawyer stretches beyond the parties and is integral to the workings of the legal system itself. This was sufficient to distinguish the solicitor-client privilege from other kinds of privilege such as those attaching to spousal communications or the informer privilege. Mr. Justice Major noted that previous cases, including *Smith v. Jones*,²⁷ had recognized that solicitor-client privilege is of fundamental importance:

The solicitor-client privilege has long been regarded as fundamentally important to our judicial system. Well over a century ago in *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), at p. 649, the importance of the rule was recognized:

The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be

²⁶ [2001] 1 S.C.R. 445 (*McClure*).

²⁷ [1999] 1 S.C.R. 455.

properly conducted by professional men. It is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, ... to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence ... that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. (paragraph 32)

Mr. Justice Major went on to conclude that solicitor-client privilege qualifies as a principle of fundamental justice under section 7 of the *Charter*. While solicitor-client privilege is not absolute, he concluded that the occasions when it should yield are rare and that the test is a stringent one. The circumstances in the present case did not justify setting aside the privilege and, therefore, the trial judge should not have ordered the litigation file of the complainant produced to the accused.

Subsequently, in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*,²⁸ the Supreme Court of Canada considered whether search procedures prescribed by section 488.1 of the *Criminal Code* constituted an unreasonable search under section 8 of the *Charter*. The basis of the challenge was that section 488.1 would require the production of materials possibly protected by solicitor-client privilege without providing adequate protection for the privilege. Madam Justice Arbour, writing for six members of the Court,²⁹ held that solicitor-client privilege is a principle of fundamental justice and a civil right of supreme importance in Canadian law. Therefore, in her view, the usual exercise of balancing privacy interests and the requirements of law enforcement was

²⁸ Above note 23.

²⁹ Chief Justice McLachlin and Justices Iacobucci, Major, Bastarache, and Binnie concurred in Arbour J.'s judgment finding s. 488.1 unconstitutional. Although Justice LeBel, with whom Justices L'Heureux-Dubé and Gonthier concurred, dissented on the constitutionality of s. 488.1, the dissent did not disagree with the majority's characterization of the importance of solicitor-client privilege. See, in particular, the extract from Justice LeBel's judgment below at note 37.

not particularly helpful because the privilege is a positive feature of law enforcement and not an impediment to it. In her view, solicitor-client privilege must remain as close to absolute as possible to retain its relevance. Since section 488.1 did not minimally impair solicitor-client privilege, it amounted to an unreasonable search and seizure contrary to section 8 of the *Charter*.

Similarly in *Wilder v. Ontario Securities Commission*,³⁰ the Ontario Court of Appeal considered proceedings brought by the Ontario Securities Commission (OSC) to discipline Mr. Wilder, a securities lawyer acting on behalf of a corporate client. In the course of his professional duties, Mr. Wilder had written a letter to the OSC setting out certain facts on behalf of his client. It was later alleged by the OSC that these facts were misleading and the OSC sought to reprimand Mr. Wilder under the *Securities Act*. Mr. Wilder argued that the OSC's power to reprimand should be interpreted as not applying to lawyers acting in their professional capacity because, *inter alia*, this would be an intrusion into the Law Society's power of regulation.

Both the Divisional Court and the Court of Appeal rejected this submission on the basis that tribunals such as the OSC have the power to enforce the terms of their enabling statute against all persons equally, including lawyers. However, in the course of its discussion, the Court of Appeal noted that the powers of the OSC were subject to the maintenance and protection of solicitor-client privilege. Speaking for the court, Mr. Justice Sharpe held that, on a case by case basis, the OSC is required to give appropriate consideration to solicitor-client privilege, which is a fundamental value of our legal system:

The OSC, like any other public body exercising statutory authority, must ensure on a case-by-case basis that the substantive legal right to solicitor-client privilege is respected. In my view the OSC must exercise particular caution where it decides to proceed against both the lawyer and the lawyer's client. Such a situation creates an inherent danger that the lawyer will have to reveal the client's confidence in order to mount a full defence. The OSC should avoid creating a dynamic where the lawyer is placed in the dilemma of either forgoing the right to defend his or her own interests or harming the interests of the client by disclosing privileged information. In such a case, it may well be that

³⁰ (2001), 53 O.R. (3d) 519 [Wilder].

the OSC will have to decide to forgo proceeding against the lawyer or, at a minimum, ensure that adequate steps are taken to ensure that the proceedings are conducted in a fashion that fully respects the procedural rights of the lawyer and the substantive legal rights of the client. Failure to do so could well result in a situation where it would not be in the public interest to continue the proceedings against both the lawyer and the client. (paragraph 34)

3) Independence of the Bar as an Underlying Constitutional Principle

Is it possible to characterize the right of access to effective assistance of independent legal counsel as an underlying constitutional principle which applies more generally in Canadian law, and not just in the specific contexts of sections 7, 8, 10(b), and 11(d) of the *Charter*?³¹

In fact, there is judicial support for just such an expansive application of this concept. Of particular significance is the litigation surrounding the constitutionality of the *Proceeds of Crime (Money-Laundering) Act, 2000*.³² This legislation created the Financial Transactions and Reports Analysis Centre of Canada and empowered it to gather information concerning money-laundering, including "suspicious transactions," and to share this information with domestic and international law enforcement agencies. Regulations enacted pursuant to this legislation made legal counsel subject to the requirements of the Act, including the requirement to report suspicious transactions to the Centre. It was argued that certain provisions of the legislation imposed duties on legal counsel that were unconstitutional because they violated the protected right of an "independent bar." The Federation of Law Societies of Canada brought an application for declarations that certain provisions were unconstitutional and, further, sought an order for interim relief exempting legal counsel from the operation of the regulations until the hearing of an application on the merits.

In granting the application for interlocutory relief, Mr. Justice Cullity of the Ontario Superior Court noted that the legislation clearly im-

31 In *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, the Supreme Court of Canada recognized that there are at least four such underlying constitutional principles: federalism, democracy, constitutionalism and the rule of law, and protection for minority rights. However this list was not exhaustive.

32 S.C. 2000, E-17.

plunged upon and altered the traditional relationship between solicitors and their clients.³³ In his view, the legislation did not merely override a lawyer's ethical duty of confidentiality, but struck at the lawyer's duty of loyalty and the client's privilege against self-incrimination, as well as the principle that lawyers should be independent of government. Justice Cullity noted that the duty of loyalty was affected not only by the obligation to make secret reports to government about a client's transactions, but also because of the inevitable involvement of the lawyer's personal interests and potential liability to severe penalties for non-compliance. Justice Cullity noted that the relationship between lawyers and their clients is of fundamental importance to the rule of law and that there is a public interest in maintaining the lawyer/client relationship as one characterized by independence, loyalty, and confidentiality:

The position of the Federation is that the legislation constitutes such an exceptional and direct attack on the solicitor-client relationship that its effects outweigh the undoubted injury to the public interest that would result from the grant of the temporary exemption requested. In agreeing with this position, I am influenced by my judgment of the fundamental importance to a federal democratic society of the issues at stake—affecting as they may do the administration of justice and the rule of law—the emphasis that has been given in previous cases, in this jurisdiction and elsewhere, to the value of the incidents of the professional relationship that will be overridden by the legislation, the severity of the harm that will have been inflicted if the legislation is ultimately held to be unconstitutional and, in particular, its immediate effect in imposing obligations to which penal sanctions are attached (paragraph 51)

Courts in a number of other provinces also granted relief from the operation of this legislation against lawyers on a temporary basis, noting the significant impact that the legislation would have on solicitor-client privilege.³⁴

33 *Federation of Law Societies of Canada v. Canada (Attorney General)* (2002), 57 O.R. 13d 383.

34 See *Federation of Law Societies of Canada v. Canada (Attorney-General)*, [2001] A.J. No. 1697 (Q.B.); *Federation of Law Societies of Canada v. Canada (Attorney-General)*, [2002] S.J. No. 200 (Q.B.); *Law Society of British Columbia v. Canada (Attorney-General)*, [2002] D.L.R. (4th) 736 (B.C.C.A.); *Federation of Law Societies of Canada v. Canada (Attorney-General)*, [2002] N.S.J. No. 199 (S.C.).

(ions without intimidation, hindrance, harassment or improper interference" (section 10); and that "[g]overnments shall recognize and respect that all communications and consultation between lawyers and their clients within their professional relationship are confidential" (section 22). Further, the UN *Basic Principles* refer to guarantees for the functioning of lawyers outside of the adjudicative or litigation context.⁴²

To the same effect is the *Code of Conduct for Lawyers in the European Union*, adopted by the Conseil des Barreaux de l'Union Européenne in 1988 (and amended in 2002) as a statement of the "common rules which apply to all lawyers from the European Economic Area whatever Bar or Law Society they belong to in relation to their cross border practice"⁴³ (section 1.3.1). The EU *Code of Conduct* states that a "free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society (section 1.1). The Code identifies "Independence" as a "General Principle" that applies to all members of the profession: "The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge" (section 2.1.1).

Confidentiality is recognized by the *Code of Conduct* as a "primary and fundamental right and duty of the lawyer" and the Code notes further that the lawyer's obligation of confidentiality "serves the interests of the administration of justice as well as of the client" and that it is therefore "entitled to special protection by the State" (section 2.3). The Code also states expressly that independence of lawyers "is necessary in non-contentious matters as well as in litigation" (section 2.1.2).

Thus, to the extent that legislatures or governments seek to undermine the essential nature of the lawyer-client relationship, including counsel's ethical obligations of loyalty, advocacy, and confidentiality,

42 For example, principle 22 states that "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential." This is significant, as it indicates that limiting the protection for a lawyer's independence to the specific contexts of sections 7, 8, 10(b), and 11(d) of the *Charter* would be unduly narrow and inappropriate.

43 Council of the Bars and Law Societies of the European Union, *Code of Conduct for Lawyers in the European Union*, 28 October 1988, as amended 28 November 1998 and 6 December 2002, online: www.ccbe.org.

there would be a strong basis for challenging the validity of such legislation or government action. As Mr. Justice Cullity stated in the *Federation of Law Societies of Canada* case, the rule of law is recognized as the cornerstone of our democratic form of government. Just as the rule of law requires an independent judiciary, it also requires an independent legal profession in the sense that lawyers must be a position to give independent legal advice to their clients free from government control or other improper external pressure. In my view, any attempt by government's to undermine the essential features of the lawyer-client relationship must therefore be subjected to very careful scrutiny. As Jack Giles Q.C. concluded in his consideration of this issue:⁴⁴

The principle of an independent bar, like the principle of an independent judiciary, is an idea that has a fundamental constitutional character. This is so because where it is interfered with all other constitutional rights including the rule of law itself are placed in jeopardy.

It is simply inconceivable that a constitution which guarantees fundamental human rights and freedoms should not first protect that which makes it possible to benefit from such guarantees, namely every citizen's constitutional right to effective, meaningful and unimpeded access to a court of law through the aegis of an independent bar.

D. INSTITUTIONAL INDEPENDENCE AND SELF-REGULATION

1) Introduction

As noted earlier, the term "independence of the Bar" is sometimes used not only to refer to the independence of individual lawyers, but in a broad, institutional sense that applies to the legal profession as a whole. This expansive, institutional conception refers to the self-governing status of the legal profession through the various professional bodies established or recognized under provincial and territorial law. With this perspective in mind, is there a basis for concluding that the self-governing status of the legal profession is itself constitutionally protected?

There is certainly support for recognizing the self-governing status of the legal profession as a fundamental feature of the Canadian constitutional order. For example, over two decades ago Justice Finlayson

⁴⁴ Jack Giles, Q.C., "The Independence of the Bar" (2001) 59 *The Advocate* 549. See also R. Millen, above note 36.

described the independence of the legal profession from government control as essential for the protection of individual rights;⁴⁵

The legal profession has a unique position in the community. Its distinguishing feature is that it alone among the professions is concerned with protecting the person and property of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment by the state. The protection of rights has been an historic function of the law, and it is the responsibility of lawyers to carry out that function. In order that they may continue to do so there can be no compromise in the principle of the freedom of the profession from interference, let alone control, by government.

More recently, in *Labelle v. Law Society of Upper Canada et al.*,⁴⁶ Justice McKinnon suggested that the self-governing status of the legal profession represented a "conventional constitutional requirement designed to maintain a free society." Thus, while representatives of the public as well as the Attorney General have a role to play in the governance of the profession, "those voices should not be capable at any time to control the proceedings of Convocation, by outvoting those benchers who are elected by the members of the Bar." Otherwise, in Justice McKinnon's view, the "constitutional imperative of an independent bar would be rendered meaningless."

In considering this question, it is once again important to begin by clarifying its terms. First, in considering the "self-governing" status of the legal profession, it is appropriate to note that the self-governing bodies in the provinces and territories undertake both "representative and "regulatory" functions.⁴⁷ To the extent that professional bodies wish to engage in representative functions, these would appear to be

⁴⁵ G.D. Finlayson, "Self-Government of the Legal Profession—Can it Continue?" (1985) *Advocates Society Journal* 11.

⁴⁶ (2001), 52 O.R. (3d) 398 at paras. 30 and 37 (S.C.J.). Note that while the Court of Appeal dismissed an appeal from this decision, it did not entirely accept the interpretation of Justice McKinnon of the statutory provision in the *Law Society Act* under consideration in the case. See (2001), 56 O.R. (3d) 413 (C.A.).

⁴⁷ As noted above, "representative" functions include representation in areas such as defence of the principles of the rule of law, the independence of the judiciary and the independence of the legal profession, promoting access to justice, providing advice on policy issues for government, and promoting public understanding of the citizen's legal rights.

constitutionally protected by virtue of *Charter* sections 2(b) and 2(d), which guarantee "freedom of expression" and "freedom of association" respectively. In particular, the *Charter's* guarantee of "freedom of association" includes the "freedom to establish, belong to and maintain an association."⁴⁸ Such an association, once formed, would be entitled to advance and defend the principles of the rule of law, the independence of the judiciary and the legal profession, promote access to justice, provide policy advice to government, and promote public understanding of citizens' legal rights.⁴⁹

However, it is evident that those commentators who have argued that the self-governing status of the legal profession is a constitutionally protected principle have been primarily concerned with the regulatory (rather than the representative) functions undertaken by the profession's institutional bodies. These regulatory functions include the power to control such matters as entry standards and training, rule making, monitoring and enforcement, complaints, and discipline.

Certain courts and commentators who have discussed this issue have tended to equate the legal profession's independence with its status as a self-governing profession. This is the understanding of professional independence assumed by Justice McKinnon in *Labelle*, when he suggested that the regulation of the profession must be assigned to institutional bodies elected by and controlled by the legal profession itself. However, it is also possible to conceive of "independence" in somewhat narrower terms, as simply requiring that the legal profession be free from control by the executive branch of government. On this second, narrower conception, regulation of the legal profession by statutory or judicial bodies is permissible, provided that such oversight bodies are themselves independent of the executive arm of the state. It is this alternative notion of independence that is reflected in Justice Finlayson's proposition that "there can be no compromise in the principle of the freedom of the profession from interference, let alone control, by government."

From this perspective, self-governing professions are by definition independent, but not all independent professions need be self-governing. Rather, the key criterion for assessing independence of a profession

⁴⁸ *Professional Institute v. N.W.T.*, [1990] 2 S.C.R. 367 at 402.

⁴⁹ All of these activities would be constitutionally protected pursuant to sections 2(b) and/or 2(d) of the *Charter*.

is the extent to which the profession is free from direct government control

To anticipate the discussion below, I will suggest that the independence of the legal profession in this narrower sense is an underlying constitutional principle in Canada; it is the *independence* of the profession that is constitutionally protected, but not necessarily its "self-governing status." Indeed, a proper understanding of the existing institutional arrangements for regulation of the legal profession indicates that self-government is by no means absolute, and that the profession is already subject to a number of significant controls by bodies or institutions external to the profession itself. Thus, it follows that these arrangements could be modified by the legislature in the future, provided that the resulting regulatory structure preserved the independence of the profession from the executive branch of government.

2) Understanding Self-Government as a Policy Choice in the Public Interest

It is important to begin this discussion by considering the reasons why the legislature might deem it appropriate to confer self-governing powers on a professional body. The relevant considerations are set out in Chief Justice McRuer's landmark *Royal Commission Inquiry into Civil Rights*.⁵⁰ Chief Justice McRuer identified a "profession" as a calling whose effective pursuit depends on confidence of two kinds: first, the personal confidence of the client in the technical competence of the practitioner; second, the confidence of the public at large in the integrity and ethical conduct of the profession as a whole. Justice McRuer noted that a profession requires a high standard of technical skill and achievement and involves confidence being reposed in the professional. Therefore, high standards of ethical conduct must prevail.

Chief Justice McRuer was of the view that the granting of self-government to a profession could only be justified as a safeguard to the public interest. Self-governing powers are not conferred to give or reinforce a professional or occupational status. In his view, the relevant question was not whether practitioners of a particular occupation desired the power of self-government but, rather, whether self-government

⁵⁰ *Royal Commission Inquiry into Civil Rights: Report No. 1* (Queens Printer, 1968) Vol. 3, Section 4, "Self-Governing Professions and Occupations" [McRuer].

was necessary for the protection of the public. Given this premise, the determination of the extent and nature of self-governing powers to be conferred on professional bodies was a matter for the State. Indeed, in his view, the "granting of self-government is a delegation of legislative and judicial functions."⁵¹ Thus, McRuer recommended that the governing boards or councils of various professions, including the Law Society, include members of the public appointed by the Lieutenant Governor in Council, that certain regulations made by a self-governing body be subject to approval by the Lieutenant Governor in Council, and that there be judicial appeals from disciplinary decisions made by self-governing bodies. Significantly, the *Law Society Act* was amended in 1970 to incorporate Chief Justice McRuer's recommendations, with the legislature providing for the appointment of non-lawyers as benchers and appeals to Divisional Court on matters of discipline.

In designing this regulatory structure, it is evident that the legislature was attempting to balance a number of competing policy goals. One important goal is that the regulation of the legal profession be structured in such a way as to nourish and support the independence of the judiciary, the rule of law and the proper administration of justice. But these are certainly not the only objectives that will be regarded as relevant to the legislature's definition of the public interest—additional objectives include the promotion of access to justice for all sectors of the community, the protection and promotion of consumer interests, and the promotion of competition.⁵² These policy goals are not necessarily inconsistent with continued self-governance of the legal profession; however, it must be acknowledged that there is some tension between achieving these goals and allocating regulatory functions to institutional bodies controlled exclusively by the legal profession.⁵³ Indeed, it is to protect these competing policy interests that the legislature has empowered third parties to "supervise," if not scrutinize Law Societies.

When considering judicial statements endorsing the importance of the self-governing status of the legal profession, it is interesting to note that many of these judicial comments have described the self-governing character of the legal profession in terms similar to that set forth

⁵¹ *Ibid.* at 1162.

⁵² For a discussion of these objectives in the context of professional regulation, see Clementi, *Final Report*, above note 10 at 15-17.

⁵³ *Ibid.*

by Chief Justice McRuer. That is, while courts have endorsed the self-governing status of the legal profession, they have described this as a policy choice made by the legislature based on the legislature's determination of the public interest. Moreover, they have recognized that the self-governing status of the profession must be subject to certain external controls or limits to ensure that the variety of competing interests is balanced appropriately.

For example, in the *Jabour* case, in which Mr. Justice Estey had made reference to the independence of the Bar from the State as "one of the hallmarks of free society," he also described the self-governing status of the legal profession as a matter of public policy within the discretion of the legislature. In Justice Estey's view, the reason that the legislature decided to confer self-governing powers on the legal profession had to do with the unusual nature of legal services, the fiduciary position of the solicitor, and the fact that clients are not in a position to make a meaningful assessment of the quality or worth of legal services. At the same time, he noted that conferring powers of self-government on a profession raised the potential for a conflict of interest between the interests of the profession and that of the public as a whole. Justice Estey noted that it is typically the case that provincial legislatures will impose safeguards to ensure that powers of self-government are not exercised in a manner contrary to the public interest. He emphasized that these are all matters to be weighed and determined by the legislature:

The general public is not in a position to appraise unassisted the need for legal services or the effectiveness of the services provided in the client's cause by the practitioner, and therefore stands in need of protection. It is the establishment of this protection that is the primary purpose of the Legal Professions Act. Different views may be held as to the effectiveness of the mode selected by the Legislature, but none of the parties here challenged the right of the province to enact the legislation. It is up to the Legislature to determine the administrative technique to be employed in the execution of the policy of its statutes. I see nothing in law pathological about the selection by the provincial Legislature here of an administrative agency drawn from the sector of the community to be regulated. Such a system offers some immediate advantages such as familiarity of the regulator with the field, expertise in the subject of the services in question, low cost to the taxpayer as the administrative agency must, by the statute, recover its own expenses without access

to the tax revenues of the Province. On the other hand, to set out something of the other side of the coin, there is the problem of conflict of interest, an orientation favourable to the regulated, and the closed shop atmosphere. In some provinces some lay Benchers are appointed by the provincial governments; in other provinces the Attorney General is seized with the duty as an ex officio Bencher of safeguarding the public interest; a right of appeal from decision affecting members is given to the Court; and the confirmation by the Provincial Executive, the Lieutenant Governor in Council, of all regulations adopted by the Society as a prerequisite to their validity. *It is for the Legislature to weigh and determine all these matters and I see no constitutional consequences necessarily flowing from the regulatory mode adopted by the province in legislation validly enacted within its sovereign sphere as is the case here.* [at 335, emphasis added].

Later in this judgment he returns to this theme, pointing out that it is up to the province to make a determination of the appropriate controls to be imposed on the self-governing powers of the legal profession:

The uniqueness of position of the Barrister and solicitor in the community may well have led the province to select self-administration as the mode of administrative control over the supply of legal services throughout the community. *Having said all that, it must be remembered that the assignment of administrative control to the field of self-administration by the profession is subject to such important protective restraints as the taxation officer, the appeal to the courts from action by the Benchers, the presence of the Attorney General as an ex officio member of the Benchers and the legislative need of some or all of the authority granted to the Law Society. In any case this decision is for the province to make.* [at 336, emphasis added].

Similarly, in the *Pearlman* case, Justice Iacobucci noted that the legislature was the ultimate source of self-government power and that the legislature must therefore remain ultimately responsible for the way in which these powers are conferred and exercised. He described the decision to make a profession a self-governing one as a "matter of public policy":

In the government of the professions, both public and professional authorities have important roles to play. When the legislature decrees, by statute, that only licensed practitioners may carry on certain functions, it creates valuable rights. *As the ultimate source of those rights, the*

legislature must remain ultimately responsible for the way in which they are conferred and exercised. Furthermore, the very decision to restrict the right to practise in a professional area implies that such a restriction is necessary to protect affected clients or third parties. The regulation of professional practice through the creation and the operation of a licensing system, then, is a matter of public policy: it emanates from the legislature; it involves the creation of valuable rights; and it is directed towards the protection of vulnerable interests. [at 886-87, emphasis added].

More recently in *Law Society of New Brunswick v. Ryan*,⁵⁴ the Supreme Court of Canada considered the appropriate standard of review to be applied on a judicial review of a decision of a discipline committee of the Law Society of New Brunswick. The Supreme Court of Canada in a unanimous judgment written by Mr. Justice Iacobucci, concludes that courts should defer to the expertise of the discipline committee and, therefore, that a standard of reasonableness *simpliciter* ought to be applied when the courts are called upon to review such decision. In the course of his analysis, Justice Iacobucci had occasion to consider the purpose of New Brunswick's *Law Society Act*. He noted that a major objective of the Act is to create a self-regulating professional body with the authority to set and maintain professional standards of practice. This, in turn, required that the Law Society perform its paramount role, which was to protect the interests of the public. Quoting from an academic study of the legal profession,⁵⁵ he referred to self-governing status as being a "privilege" that had been granted to professional organizations "only in exchange for, and to assist in, protecting the public interest with respect to the services concerned."⁵⁶ Later in his judgment he indicates that it is appropriate for courts to defer to decisions made by a discipline committee of the Law Society on the basis that this gives effect to the legislature's intention to protect the public interest by "allowing the legal profession to be self-regulating."⁵⁷

This discussion reinforces the point that granting self-governing status to the legal profession is to be regarded as a policy choice made by the legislature and, further, that such status is granted with a view to

54 [2003] 1 S.C.R. 247 (Ryan).

55 David A.A. Stager & Harry W. Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990).

56 Ryan, above note 54 at para. 36.

57 Ibid. at para. 40.

ensuring that the profession acts to protect the public interest. The "public interest" includes a variety of competing values, including, in particular, the consumer's interest in obtaining information about legal services, encouraging competition between legal service providers, and ensuring accountability for the services provided. There is a clear implication that follows from this line of analysis: if the legislature were to determine that the existing self-governing arrangements were no longer protecting the public interest, in principle it should be open to the legislature to restrict or impose greater limitations on self-governing powers than had previously been the case, provided that these modified arrangements are consistent with the independence of the judiciary, the maintenance of the rule of law, and the proper administration of justice.

3) **The Independence of the Legal Profession: Distinguishing "Self-Government" from "Independence of Government"**

The self-governing status of the legal profession is sometimes described in absolute terms, as though the profession is completely autonomous of all external state controls. However, it is obvious that the legal profession is subject to extensive forms of regulation from various bodies external to the profession itself. What is distinctive about these external bodies is that they are generally independent of government. Thus a more precise way of understanding the existing independence of the legal profession is that it involves independence from the direct control of the executive branch of government.

The first such external body exercising control over the legal profession is the courts. The courts exercise regulatory authority over the profession on the basis that lawyers are officers of the court and are therefore subject to the court's supervisory jurisdiction. For example, in *MacDonald Estate v. Martin*,⁵⁸ the Supreme Court of Canada considered the appropriate standard to be applied in deciding whether a law firm should be disqualified from continuing to act in litigation by reason of a conflict of interest. In the course of his judgment, Mr. Justice Sopinka noted that codes of professional conduct enacted by provincial law societies represent an important statement of public policy with respect to the conduct of barristers and solicitors. Since the legal profession is self-governing, when the governing body enacts rules of professional

⁵⁸ [1990] 3 S.C.R. 1235.

conduct on behalf of those it represents, these rules must be taken expressing the collective views of the profession as to the appropriate standards to which the profession should adhere. However, Just Sopinka noted that the courts have their own independent jurisdiction over barristers and solicitors and, while courts will be guided by the standards of the profession, they are not bound to apply such standards.

A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example, *Law Society of Manitoba v. Giesbrecht* (1983), 24 Man. R. (2d) 228 (C.A.). The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy. The statement in Chapter V should therefore be accepted as the expression by the profession in Canada that it wishes to impose a very high standard on a lawyer who finds himself or herself in a position where confidential information may be used against a former client. The statement reflects the principle that has been accepted by the profession that even an appearance of impropriety should be avoided.

An illustration of the power of the courts to regulate the conduct of solicitors in relation to their clients is found in Rule 57.07(1) of the *Rules of Civil Procedure*,⁵⁹ which provides as follows:

- 57.07(1) Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
- (a) disallowing costs between the solicitor and client or directing the solicitor to repay to the client money paid on account of costs;
 - (b) directing the solicitor to reimburse the client for any costs that the client had been ordered to pay to any other party; and
 - (c) requiring the solicitor personally to pay the costs of any party.

⁵⁹ Rule 57.07(1) was enacted by the Ontario government in 1984, through regulation (Reg. 560/84, made pursuant to the *Courts of Justice Act*, 1984, S.O. 1984, c. 3).

Rule 57.07 was challenged on the basis that it represented an unconstitutional interference with the independence of the Bar. The Supreme Court of Canada dismissed the constitutional challenge on the basis that the applicant had failed to advance a sufficient factual foundation to support the claim.⁶⁰ Subsequent courts have applied the rule and ordered costs against solicitors in appropriate cases.⁶¹ While questions relating to the proper interpretation of Rule 57.07 have arisen from time to time, it has been regularly applied by the courts and there can be little doubt as to its validity.⁶² Thus, regulation of the conduct of solicitors in relation to their clients by the courts does not appear to be inconsistent with the independence of the legal profession. Furthermore, administrative bodies also have the power to regulate the conduct of solicitors and impose sanctions in appropriate cases.⁶³

More generally, under the *Constitution Act, 1867*, the legislature has broad jurisdiction to regulate the legal profession.⁶⁴ This includes, for example, establishing the qualifications necessary for the exercise of a profession, and providing various requirements in relation to the practice of law. Indeed, the Law Society of Upper Canada is itself a creation of provincial statute.⁶⁵ From its earliest inception, there were significant statutory controls or limitations imposed on the powers of the Society. For example, under the original statute the judiciary exercised authority as "visitors," who had oversight powers over the Law Society in relation to the formulation of rules and regulations. The first rules of the Law Society adopted in 1797 recited that they were made "under the inspection and with the approbation of the judges of the province as visitors."⁶⁶ Similarly, both the attorney-general and the solicitor-general were benchers of the Law Society when it was first created and in the early nineteenth century it was common for either the attorney-general

⁶⁰ *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086.

⁶¹ See, for example, *Young v. Young*, [1993] 4 S.C.R. 3; *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, [1998] O.J. No. 527 (Gen. Div.).

⁶² P. Perelli, "Ordering a Solicitor Personally to Pay Costs" (2001) 25 Adv. Q. 103.

⁶³ See *Wilder*, above note 30.

⁶⁴ See *Mangat*, above note 2 at paras. 38-42.

⁶⁵ See *An act for the better regulating the Practice of Law*, 37 Geo. 3 (1797), c.43 (U.C.).

⁶⁶ Mark Orkin, *Professional Autonomy and the Public Interest: A Study of the Law Society of Upper Canada* (doctoral thesis, Osgoode Hall Law School of York University, 1971) at 58-59.

or the solicitor-general of the day to serve as the treasurer of the Law Society.⁶⁷

These kinds of controls continue to be in effect today. As noted in the earlier discussion of the *Jabour* case, in each province, including Ontario, the legislature has provided for significant controls over the Law Society, including the fact that the powers of the Law Society are set forth and limited by statute, the provincial government appoints a number of benchers, certain regulations of the Law Society are subject to approval, and the attorney general is generally a bencher *ex officio* with a mandate to uphold the public interest.⁶⁸

Thus, while the legal profession is certainly self-governing, its regulatory powers are subject to external controls and limits. What seems fundamental and constant, however, is the extent to which the legal profession has remained independent of the executive branch of government. As already explained, such independence from the executive is fundamental, since government control would compromise the freedom of lawyers to advocate fearlessly on behalf of their clients in the face of government action.

67 Despite innumerable amendments to its governing statute, the Law Society has consistently been subject to some degree of external oversight by the attorney general and the judiciary. See J. Bosschart, "Lawyers and Lawmakers: A Statutory History of the Law Society Act, the Barristers Act and the Solicitors Act, 1785-1993" (1994) 28 *Gazette* 171, for a more detailed historical perspective.

68 Indeed, the level of external oversight of any given law society varies by jurisdiction. In Ontario, the *Law Society Act*, R.S.O. 1990, c. L.4 gives the Lieutenant Governor in Council the option of appointing up to 8 non-members as benchers to improve accountability and support the attorney general in his role as "guardian of the public interest in all matters" (s. 13). Alberta has adopted similar measures, but also requires that an annual report be presented to the legislature for review according to the *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 5(4). Saskatchewan's *Legal Profession Act*, S.S. 1990-91, c. L-10.1 requires not only legislative review of the society's new rules and amendments, but empowers the legislature to declare a rule *invalid* if it is "beyond the powers delegated by the Legislature or ... prejudicial to the public interest" (see s. 91). Finally, in Quebec, the Office des Professions du Québec is empowered by the *Professional Code*, R.S.Q. C-26 to not only oversee the Barreau's activities, but to ensure that every professional order takes the necessary steps to conform to the provisions of its governing statute.

4) International Comparisons

It is also relevant to consider the experience of other jurisdictions with a shared commitment to the independence of the judiciary and the maintenance of the rule of law, as well as relevant international norms and experience.

The UN *Basic Principles on the Role of Lawyers*⁶⁹ contains a number of references to the roles of professional associations of legal practitioners, as well as appropriate procedures for disciplining members. These provisions are as follows:

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external influence ...

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national laws and custom and recognized international standards and norms ...

28. Disciplinary procedures against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

These provisions reinforce the importance of maintaining the independence of the legal profession from government. At the same time, they indicate that, provided such independence is maintained, there is no reason why regulatory power over lawyers should be vested exclusively in bodies controlled by the legal profession itself. Thus, Principle 28 provides that discipline may be imposed on lawyers by a disciplinary committee established by the legal profession, but also by "an independent statutory authority, or before a court." Similarly, Principle 24 refers to codes of professional conduct being established by the legal profession through its appropriate organs, "or by legislation." In both cases, the underlying requirement seems to be that the executive arm of government not possess direct regulatory authority over the legal profession.

⁶⁹ Above note 41.

To the same effect is the *Code of Conduct for Lawyers in the European Union*,⁷⁰ section 1.2.2 of which provides: "The particular rules of each Bar or Law Society arise from its own traditions. They are adapted to the organization and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures and to its national legislation." [emphasis added]

Recent jurisprudence from the European Court of Justice confirms that Member States retain the power to regulate the legal profession to a very considerable degree. In fact, the Clementi Review commissioned a legal opinion on the precise issue of whether Community law, international norms or the European Convention on Human Rights require the involvement of the legal profession in the regulation of lawyers. The legal opinion provided by the firm Slaughter and May concluded that there was no requirement for self-regulation of this kind.⁷¹ Slaughter and May's review of the jurisprudence of the European Court of Justice as well as the actual practice of member states, indicated that Member States may play a substantial, direct role in regulating the legal profession. However, Slaughter and May also distinguished "State control" from "government control," concluding that the independence of lawyers from government may be regarded as a fundamental principle that would likely be recognized by the European Court of Human Rights.⁷²

the independence of lawyers is generally regarded as a fundamental principle and one that would likely be upheld by the European Court of Human Rights. State involvement and regulation of the legal profession seems to have been accepted to some degree and therefore it is really the detail of the system which would determine whether human rights were violated. *Provided that the regulatory body was demonstrably independent of government and the system provided robust safeguards to prevent executive interference with the regulatory body's functions so that lawyers were objectively free to carry on their profession regardless of governmental influence, we do not foresee any viable human rights challenge.* [emphasis added]

In formulating his own recommendations for reform of the regulation of the legal profession in England and Wales, Sir David Clementi

⁷⁰ Above note 43.

⁷¹ See Slaughter & May, "The Application of EU and other International Norms to the Regulation of the Legal Profession," in Clementi, *Final Report*, above note 10, Appendix 2.

⁷² Slaughter & May, *ibid.* at para. 14.

In his 2004 *Final Report* concluded that it was important that regulation of the legal profession be independent of government; however, at the same time, he considered it necessary to ensure that there was appropriate oversight from a statutory body independent of the legal profession in order to safeguard consumer and other public interests. As he put it:⁷³

The Terms of Reference [establishing this Review] include the word "independent" twice. I infer that the first reference calls for independence of the legal profession from outside influences, particularly from Government, and that the second reference call for a regulatory framework which is independent in representing the public and consumer interest of those being regulated. ... [R]epresentatives of the legal profession have drawn my attention most often to the first reference. I judge that both are important.

The Clementi *Final Report* recommended that front-line regulatory functions continue to be exercised by professional bodies established and controlled by the legal profession, but that there be consistent oversight by a statutory Legal Services Board (LSB). In fact, Clementi proposed that regulatory powers would be vested by statute in the LSB, which would then delegate such powers to the "front-line regulators" upon demonstration that the professional bodies met minimum standards set forth by statute.⁷⁴ Thus, in all cases there would be consistent oversight from the statutory regulator. Moreover, Clementi recommended that jurisdiction to deal with consumer complaints be removed from professional bodies and be transferred to a single independent consumer complaints body called the Office for Legal Complaints.⁷⁵ The Government has indicated that it intends to act upon the Clementi recommendations and a Draft Legal Services Bill incorporating the main elements of his Report has been referred to a Parliamentary Committee for pre-legislative scrutiny.⁷⁶ These reforms are similar to those pursued in other jurisdictions recently, where the self-governing status

⁷³ Clementi, *Final Report*, above note 10 at para. 5.

⁷⁴ *Ibid.* at paras. 53-58. In particular, Clementi indicated that bodies exercising "regulatory" functions ought not to also exercise "representative" ones.

⁷⁵ *Ibid.* at paras 34-46.

⁷⁶ See Lord Falconer of Thoroton, "The Regulation of Legal Services in England and Wales" (written ministerial statement, 24 May 2006).

of the profession has been modified while independence from the executive branch of government has been preserved.⁷⁷

5) Conclusion

As described in the previous section of this paper, the independence of the Bar is a recognized constitutional principle both in Canada and internationally. However, the term "independence" in an institutional sense requires that the legal profession be independent of government but not necessary "self-governing." The critical requirement is that lawyers retain the ability to act independently of government and are thus in a position to advocate fearlessly on behalf of their clients and act in accordance with their ethical obligations of loyalty and confidentiality. But, as Slaughter and May concluded in their analysis of this issue, there is no such thing as the right to be a "non-state-regulated lawyer."⁷⁸

E. THE INDEPENDENCE OF THE BAR AS A CONSTITUTIONAL PRINCIPLE

There can be no doubt but that the independence of the legal profession is a recognized constitutional principle in Canada. A variety of rights guaranteed by the *Charter* require or assume the effective assistance of counsel. The effective assistance of counsel has been recognized as a "principle of fundamental justice" for purposes of section 7 of the *Charter*; this means that whenever the rights of "life, liberty and security of the person" protected under section 7 are engaged, access to independent counsel cannot be denied. Similarly, solicitor-client privilege has been recognized as a principle of fundamental justice for purposes of both sections 7 and section 8 of the *Charter*. Section 10(b) of the *Charter* expressly protects the right to retain and instruct counsel upon arrest or detention, while the right to a fair trial protected by section 11(d) requires the participation of independent legal counsel.

Indeed, protection for the role of independent counsel is a constitutional principle of general application, extending beyond the context of

⁷⁷ For example, in the territory of Queensland, Australia, even control over disciplinary matters has been removed from the law society and delegated to a "Legal Complaints Commissioner." However, the tribunals appointed to deal with questions of discipline are charged with acting in the public interest and are themselves independent from government influence.

⁷⁸ Slaughter and May, above note 71 at para. 14.

these particular *Charter* rights. In fact, numerous courts and respected commentators have recognized that access to effective and independent legal counsel is a necessary underpinning for the independence of the judiciary as well as the preservation of the rule of law. This linkage was recognized by the drafters of the *Constitution Act, 1867*, when they required that judges of the Superior Courts be appointed from amongst members of the Bars of the provinces. This was designed to ensure that the courts remained independent of government control, and this could only be achieved if Canada continued to possess an independent legal profession.

In considering whether the institutional independence of the legal profession as a whole is constitutionally protected, it is important to distinguish "independence" from self-government. The statutory regimes in the provinces and territories generally accord a considerable degree of self-government to the legal profession's governing bodies. But these governing bodies are themselves creations of statute, and their powers are already limited in a number of important respects. In addition to being regulated by the courts and certain administrative bodies, the statutory regimes regulating the legal profession require the participation of non-professionals in governance. However, as I have emphasized, the legal profession can be "independent" of government without necessarily being "self-governing." What is fundamental to our constitutional order is the preservation of the independence of lawyers from direct control by executive government, coupled with external controls that do not compromise the lawyer's ethical duties of loyalty and confidentiality.

The courts have recognized that the rule of law and the independence of the judiciary are fundamental constitutional principles. This paper has argued that a third related constitutional principle is the independence of the legal profession. As the Supreme Court of Canada has explained, "the public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally."⁷⁹ By recognizing and affirming the independence of the Bar, we provide the foundation necessary to underpin judicial independence and uphold the rule of law.

⁷⁹ *Id.*, above note 17 at 335-36.

De Smith's Judicial Review

7th Edition

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In some jurisdictions, the grounds of judicial review have come to be codified in statute,⁹⁰ but as yet that has not been considered necessary here as there is thus far no quarrel that the incremental development of the common law has satisfactorily fashioned a balance between the need for efficiency and the need to prevent abuses of power.

1-031

JUSTICIABILITY: THE LIMITS OF JUDICIAL REVIEW

Judicial review has developed to the point where it is possible to say that no power—whether statutory, common law or under the prerogative⁹¹—is any longer inherently unreviewable. Courts are charged with the responsibility of adjudicating upon the manner of the exercise of a public power, its scope and its substance.⁹² As we shall see, even when discretionary powers are engaged, they are not immune from judicial review. Discretion has been described as the “hole in the [legal] doughnut”,⁹³ but that hole is not automatically a lawless void. Nevertheless, there are certain decisions which courts cannot or should not easily engage. Courts are limited (a) by their constitutional role and (b) by their institutional capacity.

1-032

Limitations inherent in the courts’ constitutional role

The principle of the separation of powers confers matters of social and economic policy upon the legislature and the executive, rather than the judiciary. Courts should, therefore, avoid interfering with the exercise of discretion by the legislature or executive when its aim is the pursuit of policy.⁹⁴ It is not for judges

1-033

⁹⁰ e.g. in Australia: Administrative Decisions (Judicial Review) Act 1977 ss.5–7; in South Africa: Promotion of Administrative Justice Act, 2000; in Trinidad and Tobago: Judicial Review Act No.60 of 2000 s.5(3); in Barbados: Administrative Justice Act 1980. See further R. Ramlogan, *Judicial Review in the Commonwealth Caribbean* (2007). The EU Parliament has recently proposed codifying principles of good administration within EU institutions: see Committee on Legal Affairs, *Procedure of the European Union with recommendations to the Commission on a Law of Administrative* (2012/0024(INI)).

⁹¹ On the sources of public power, see Ch.5.

⁹² See Ch.11; J. Jowell, “What Decisions Should Judges Not Take?” in M. Andenas and D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (2009), Ch.9; A. Kavanagh, “Judging Judges under the Human Rights Act: Deference, Disillusionment and the ‘War on Terror’” [2009] P.L. 287.

⁹³ R. Dworkin, *Taking Rights Seriously* (1977), p.82.

⁹⁴ See, e.g. *R. v Secretary of State for Trade and Industry Ex p. Lonrho Plc* [1989] 1 W.L.R. 525 at 536 (Lord Keith: “These provisions [that the Secretary of State may act against a proposed merger after a report by the Monopolies and Mergers Commission has so advised to Parliament and the Secretary of State acts by a draft order laid before Parliament] ensure that a decision which is essentially political in character will be brought to the attention of Parliament and subject to scrutiny and challenge therein, and the courts must be careful not to invade the political field and substitute their own judgment for that of the Minister. The courts judge the lawfulness not the wisdom of the decision”); *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40; [2004] 1 A.C. 816 at [70] (Lord Nicholls: “The more the legislation concerns matters of broad social policy the less ready will be a court to intervene”); *R. (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813; [2003] 1 W.L.R. 2623 at [63]–[64] (Laws L.J.: “A very considerable margin of discretion must be accorded to the Secretary of State. Difficult questions of economic and social policy were involved, the resolution of which fell within the province of the executive and the legislature rather than the courts”), reversed on appeal: [2005] UKHL 29; [2005] 1 W.L.R. 1681; *R. v*

to weigh utilitarian calculations of social, economic or political preference.⁹⁷ Courts will not, therefore, make decisions on: whether site A or B is suitable for the location of a new airport;⁹⁸ whether the United Kingdom should engage in a programme of nuclear disarmament;⁹⁹ whether there should be investment in a significant nuclear power programme;¹⁰⁰ whether the programme to produce Trident nuclear warheads should be abandoned;¹⁰¹ whether there should be further regulation on the environmental effects of crop-spraying;¹⁰² or whether the British invasion of Iraq in 2003 was justified in international law.¹⁰³

1-034

Speaking extra-judicially shortly before becoming a member of the Supreme Court, Lord Sumption argued that the "tendency of the courts to intervene in the making of 'macro policy' has become more pronounced in recent years", with "the whole process ... unduly influenced by the degree of judicial aversion to the policy in question"¹⁰⁴—an assessment rejected as conflating government and legislature "to suggest that both ought to be equally immunised by the democratic credentials from judicial oversight".¹⁰⁵

Secretary of State for Education and Employment Ex p. Begbie [2000] 1 W.L.R. 1115 at 1131 (Laws L.J., stating that less intrusive judicial review should apply to decisions in the "macro-political field"); see further 11-086.

⁹⁷ Dworkin's definition of policy: R. Dworkin, "Political Judges and the Rule of Law" (1978) 64 *Proceedings of the British Academy* 259. On his distinction between "principle" and "policy", see *Taking Rights Seriously* (1977), pp.82-87. Sometimes the term used is "political question", especially in the USA.

⁹⁸ *Essex CC v Ministry of Housing and Local Government* (1967) 66 L.G.R. 23 (it would be quite futile to impugn the government's decision that Foulness should be developed as the third London airport, merely by contending that the decision was unreasonable or that Cublington was more suitable), cf. *R. (on the application of Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2516; [2003] J.P.L. 583 (decision to exclude Gatwick airport from consultation about expansion of air transport capacity in SE England was unreasonable).

⁹⁹ *Chandler v DPP* [1964] A.C. 763 at 798 (Lord Radcliffe said, that this was an issue of "policy" and that "the more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of the country to acquire, retain or house nuclear armaments depends upon an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make this issue a matter for judge or jury").

¹⁰⁰ *R. (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin); [2007] Env. L.R. 29 (a government review which, on the basis of a short period of consultation, recommended reversing the government's policy against nuclear power, was flawed for illegality; the consultation was not sufficient by the standards of the Aarhus Convention art.7 (UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters); despite being a matter of "high policy", the review was so deficient in content and form that its process was "manifestly unfair").

¹⁰¹ *R. (on the application of Marchiori) v Environment Agency* [2002] EWCA Civ 3; [2002] Eu. L.R. 225.

¹⁰² *Secretary of State for Environment, Food and Rural Affairs v Davons* [2009] EWCA Civ 664; [2009] 153(27) S.J.L.B. 29: this fell within a "difficult social and technical sphere in which a balance must be struck between the competing interests of the individual and the community as a whole".

¹⁰³ *R. (on the application of Lintel) v Prime Minister* [2008] UKHL 20; [2008] 1 A.C. 1356. Lordingham noting at [8] the "restraint traditionally shown by the courts in ruling on what has been called high policy—peace and war, the making of treaties, the conduct of foreign relations".

¹⁰⁴ J. Sumption, "Judicial and Political Decision-making: the Uncertain Boundary" [2011] J.R. 301, para.12.

¹⁰⁵ S. Sedley, "Judicial Politics" (2012) 34 *London Review of Books* 15 ("executive government exercises public powers which are created or recognised by law and have legal limits that it is the courts' constitutional task to patrol").

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The constitutional status of the judiciary should not, however, excuse the courts from any scrutiny of policy decisions. Courts are able, and indeed obliged, to require that decisions, even in the realm of "high policy"¹⁰⁴ are within the scope of the relevant legal power or duty,¹⁰⁵ and arrived at by the legal standards of procedural fairness.¹⁰⁶ The courts display reserve in impinging upon the substance of policy decisions, but even here they may legitimately intervene if the decision is devoid of reason and not properly justified.¹⁰⁷ Judges always possess the capacity to probe the evidence and assess whether the reasons and motives for decisions are *rationality related to their aims*. As will be shown in the chapters that follow, public law has rapidly advanced recently from a "culture of authority" to a "culture of justification".¹⁰⁸

1-035

Thus even where the courts recognise their lack of relative constitutional capacity to make the primary decision of policy, they should nevertheless not easily relinquish their secondary function of probing the quality of the reasoning and ensuring that assertions are properly justified. As Lord Nicholls said in *Ghaidan v Godin-Mendoza*¹⁰⁹ in respect of national housing policy:

1-036

"Parliament has to hold a fair balance between the competing interests of tenants and landlords, taking into account broad issues of social and economic policy. But, even in such a field, where the alleged violation comprises differential treatment based upon grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification".

In addition, it should be borne in mind that under the Human Rights Act 1998 no public authority may interfere with Convention rights and even Parliament is expected to abide by their terms.¹¹⁰ When adjudicating on the scope of interference with Convention rights, therefore, the courts need not defer to the executive on the ground of their responsibility to Parliament. Nor need they defer

1-037

¹⁰⁴ *R. v Secretary of State for the Home Department Ex p. Everett* [1989] Q.B. 811 (Taylor L.J.), such as making treaties, dissolving Parliament, mobilising the armed forces. See 3-034.

¹⁰⁵ On notion of "target duties", see 5-064; *R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498; [2007] 104 (22) L.S.G. 31 at [46] (Rodley L.J. considered that very broad latitude is given to the executive in deciding what makes for the "peace, order and good government" of a colony but that the executive must be open to challenge on grounds of jurisdictional error or malpractice or if the subject matter "is manifestly not the peace, order or good government of the colony").

¹⁰⁶ See, e.g. *R. (on the application of Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2516; [2003] J.P.L. 583; *R. (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 Admin. In other jurisdictions, see: *Peters v Davidson* [1999] 2 N.Z.L.R. 164 (New Zealand) and *Operation Dismantle v The Queen* [1985] 1 S.C.R. 441 (Canada).

¹⁰⁷ A. Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) Harv L.R. 16, 97-106 (the former President of the Israeli Supreme Court does not admit that any decisions are inherently non-justiciable for this reason).

¹⁰⁸ The words of the late Professor Etienne Mureinik describing the transformation in post-apartheid public law in South Africa: "A Bridge Too Far: Introducing the Interim Bill of Rights" (1994) 10 S. African J. of Human Rights 31. See further 11-004.

¹⁰⁹ *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 at [19].

¹¹⁰ See Ch.13; and A.L. Young, "Is Dialogue Working Under the Human Rights Act 1998?" [2011] P.L. 773.

THE NATURE OF JUDICIAL REVIEW

to Parliament on the ground that it is elected;¹¹¹ though deference to elected members may be legitimate on the ground that they, rather than the court, are better equipped at deciding particular questions requiring an assessment of the public interest.¹¹² The courts possess the legitimacy to guard the invasion of those rights that now form the basis of our constitutional democracy.

Limitations inherent in the courts' institutional capacity

- 1-038 In respect of the institutional capacity of the courts, there are some decisions which they are ill-equipped to review—those which are not ideally justiciable or, in other words, “not amenable to the judicial process”,¹¹³ or indeed those which are better able to be determined by other bodies, including Parliament.

Matters which are in essence matters of preference

- 1-039 These include decisions which cannot be impugned on the basis of any objective standard because their resolution is essentially a matter of individual (including political) preference. Where the Secretary of State had the power to decide whether the expenditure of local authorities had been “excessive” and to penalise

¹¹¹ *R. v Inland Revenue Commissioners Ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617 at 644 (Lord Diplock: “It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central governments is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge”). This view towards judicial deference on constitutional grounds is shared by Lord Steyn, “Deference: A Tangled Story” [2005] P.L. 346; J. Jowell, “Judicial Deference and Human Rights: A Question of Competence”, in P. Craig and R. Rawlings (eds), *Law and Administration in Europe, Essays in Honour of Carol Harlow* (2005), p.67; Jowell, “Judicial Deference: Servility, Civility to Institutional Capacity” [2003] P.L. 592. In respect of “common law” rights the courts may presume that Parliament did not intend to abrogate the right unless clearly enunciated—“the principle of ‘legality’ (on which see 5-036). cf. *Rehman v Secretary of State for the Home Department* [2001] UKHL 47; [2003] 1 A.C. 153 at [62] (Lord Hoffmann contended that matters of national security “must be made by persons whom the people have elected and whom they can remove”).

¹¹² See, e.g. in relation to local authorities: *R. v Brighton Corp Ex p. Tilling (Thomas) Ltd* (1916) 85 L.J.K.B. 1552 at 1555 (public transport licensing); *Sagnata Investments Ltd v Norwich Corp* [1971] 2 Q.B. 614 (amusement arcade permit); *Cumings v Birkenhead Corp* [1972] Ch. 12 (local educational policy); *Cannock Chase DC v Kelly* [1978] 1 W.L.R. 1 (allocation of tenancies of council houses); *Pickwell v Camden LBC* [1983] Q.B. 962 (allocation of salaries and wages even though strike still in progress). But note the caution expressed in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167 at [17] (HL found unpersuasive the submission of the Secretary of State that the decision-maker and the court should assume that the immigration rules adopted by the responsible minister and laid before Parliament “had the imprimatur of democratic approval and should be taken to strike the right balance between the interests of the individual and those of the community”). In *R. (on the application of Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437; [2012] Q.B. 394 (on the lawfulness under EU law and Convention rights of delegated legislation banning the sale of tobacco from automatic vending machines) the CA accepted, with different nuances, that “the involvement of the legislature is a factor favouring a broader margin of appreciation than would be appropriate to a purely executive decision” (Lord Neuberger of Abbotsbury M.R. at [211] [214]), though this was not inevitably the case when all the relevant factors were taken into account (Arden L.J. at [151] [155]).

¹¹³ *Council for the Civil Service Unions v Minister for the Civil Service* [1985] 1 A.C. 374 at 418 (Lord Roskill).

JUSTICIABILITY: THE LIMITS OF JUDICIAL REVIEW

them if it had been, the House of Lords held that decision not suited to judicial determination because of the lack of "objective criteria" by which to determine the content of excessive expenditure.¹¹⁴ Following the events of September 2001, the Government sought to derogate from ECHR art.5 on the ground specified in art.15 that there was a "public emergency threatening the life of the nation". The majority of the House of Lords held this to be a "pre-eminently political question", on the ground that it involved a prediction of what people around the world would do. The basis of this view was less that it was a question which lay, constitutionally, with the executive, than it required a judgment which admitted of no objective challenge.¹¹⁵ In *R. (on the application of Wheeler) v Office of the Prime Minister* the claimant sought judicial review of the Government's decision not to hold a referendum on whether the United Kingdom should ratify the Treaty of Lisbon. Dismissing the claim, the Divisional Court doubted whether the correctness of the Government's assessment that the Lisbon Treaty was materially different from the Constitution Treaty (in respect of which a referendum had been promised) was justiciable as that "depends on political perspective and political judgment", adding: "At best, it is a matter to be approached on a *Wednesbury* basis; and on that basis we are far from persuaded that the assessment is an unreasonable one on a *Wednesbury* basis".¹¹⁶ In *R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)*, Lord Rodger of Earlsferry took the view that it is not for the courts to substitute their view for that of the Foreign Secretary advising Her Majesty in Council that executive legislation was for the "peace, order and good government" of the British Indian Ocean Territories.¹¹⁷

¹¹⁴ *R. v Secretary of State for the Environment Ex p. Hammersmith and Fulham LBC* [1991] 1 A.C. 521 at 593, 597 (Lord Bridge); *Buttes Gas v Hammer* [1982] A.C. 888 (Lord Diplock, in a case involving relations with a foreign state, said that the court has "no justiciable or manageable standards by which to judge" the issue. To attempt such review, he said, the court would be in a "judicial no-man's land"); *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] 1 A.C. 112 at 193 (the court should exercise its jurisdiction with the "utmost restraint" in cases involving "questions of social and ethical controversy"); *Airedale NHS Trust v Bland* [1993] A.C. 789 at 891 (Lord Mustill); *Roberts v Hopwood* [1925] A.C. 578 at 606–607 (Sumner L.J.); S. Sorabjee, "Decisions of the Supreme Court in *S.R. Rommai v Union of India*" (1994) 3 S.C.C. (Jour) 2.

¹¹⁵ *R. v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68 (Belmarsh detainees case). Lord Hoffmann, dissenting, held firmly that the events did not amount to a threat to the nation's life (which he considered included not only in the physical sense but in the sense of its entire cultural fabric, including its attachment to values of civil liberty).

¹¹⁶ *R. (on the application of Wheeler) v Office of the Prime Minister* 2008 EWHC 936 (Admin); [2008] 2 C.M.L.R. 57 at [37].

¹¹⁷ *R. (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61; [2006] 1 A.C. 453 at [130] ("it is not for the courts to declare the law invalid on that ground. Once they enter upon such territory they could very easily get into the area of challenging what is essentially a political judgment, which is not for the courts of law"). And see further D. McGoldrick, "The Boundaries of Justiciability" (2010) 59 I.C.L.Q. 981 (considering recent decisions on justifiability in the sphere of foreign affairs, international relations, defence and national security).

THE NATURE OF JUDICIAL REVIEW

Matters in relation to which the court lacks expertise

- 1-040 A second institutional limitation of the courts is lack of relative expertise.¹¹⁸ Particularly as the review of fact, or the merits of a decision, is not routinely permitted in judicial review,¹¹⁹ there are some matters which are best resolved by those with specialist knowledge.¹²⁰ Connected with the issue of expertise is that of risk-assessment.¹²¹
- 1-041 National security was often said to be an area in which the courts should not readily intervene, not merely because the executive possess prime constitutional responsibility in this area, but because they may be best placed to assess, through their network of informers, the risk of the dangers involved.¹²² However, here too the court will no longer unquestioningly accept the say-so of the executive or other experts, and will properly intervene if the decision is based on a material mistake of fact,¹²³ is incompatible with Convention rights contrary to the Human Rights Act 1998,¹²⁴ or is otherwise illegal or irrational, or is affected by procedural impropriety.¹²⁵ In recent years the courts have frequently been called upon to adjudicate on the legality of legislation and executive decisions designed to protect national security through a variety of means, including: preventative

¹¹⁸ See, e.g. *R. v Secretary of State for the Home Department Ex p. Swati* [1986] 1 W.L.R. 477; *R. v Chief Constable of the Merseyside Police Ex p. Calveley* [1986] 1 Q.B. 424; *Pulhofer v Hillingdon LBC* [1986] A.C. 484; *R. v Secretary of State for Social Services Ex p. Stitt* [1990] C.O.D. 288; *R. (on the application of W) v Thorford Youth Services* [2002] EWHC 1252; [2002] 166 T.P. 453 at [40] (Sedley L.J.: "A youth court has expertise which a higher court lacks"); *R. (on the application of Legal Remedy UK Ltd) v Secretary of State for Health* [2007] EWHC 1252 (Admin) (court wary of "donning the garb of policy maker" in challenge to restructuring of postgraduate medical training).

¹¹⁹ On precedent fact, see 4-051; on mistake of fact, see 11-041.

¹²⁰ See, e.g. *R. v Higher Education Funding Council Ex p. Institute of Dental Surgery* [1994] 1 W.L.R. 242 (Sedley J. considered the question of rating the research of a university department not amenable to review on the ground of lack of the court's expertise); cf. *R. (on the application of Wooder) v Feggetter* [2002] EWCA Civ 554; [2003] Q.B. 219 at [40] (Sedley L.J. doubted whether he would necessarily reach that decision again). Lack of expertise on the part of the Administrative Court is one reason for the insistence that claimants use alternative means of legal challenge where they exist: 16-016.

¹²¹ See, e.g. *R. (on the application of Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606; [2002] Q.B. 1391; *R. v Secretary of State for the Home Department Ex p. Turgut* [2001] 1 All E.R. 719 at 729 (Simon Brown L.J.: "The court is hardly less well placed than the Secretary of State himself to evaluate the risk once the relevant material is placed before it"); *X v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68 (assessment of whether there was a public emergency threatening the life of the nation was "pre-eminently political in character, to be made by the executive and Parliament").

¹²² See further A. Tompkins, "National Security and the Role of the Court: a Changed Landscape?" (2010) 126 L.Q.R. 543.

¹²³ See 11-041. First instance judicial control over some decisions relating to national security—including decisions to deport or exclude a person from the United Kingdom or deprive a person of his or her British citizenship—are made by the Special Immigration Appeals Commission (SIAC), a superior court of record; appeals on points of law only lie to the Court of Appeal: Special Immigration Appeals Commission Act 1997. The Proscribed Organisations Appeal Commission (POAC), a superior court of record created by the Terrorism Act 2000, Sch.2, hears appeals against decisions of the Secretary of State not to de-proscribe organisations believed to be involved in terrorism.

¹²⁴ See, e.g. *X v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68 (preventive detention for non-nationals, designed for purposes of national security, was not sufficiently justified under the terms of ECHR art.15).

¹²⁵ In relation to procedural fairness, see 8-007.

detention without charge or trial of non-nationals (who could not be deported)¹²⁶ suspected of involvement in terrorism under the Anti-terrorism, Crime and Security Act 2001 s.23;¹²⁷ "control orders" made under the Prevention of Terrorism Act 2005 s.1;¹²⁸ "TPIM notices" under the Terrorism Prevention and Investigation Measures Act 2011 s.2 (the replacement for control orders);¹²⁹ deportation orders on grounds of national security;¹³⁰ deprivation of citizenship under the British Nationality Act 1981 s.40 and exercise of prerogative power to exclude a person from the United Kingdom;¹³¹ exclusion of "the public" from an inquest on grounds of national security;¹³² prohibitions on persons in the UK financial sector from entering commercial transactions or relationships;¹³³ and asset freezing orders.¹³⁴ The result has been described as "a complex case law that accommodates significantly more intensive scrutiny that [sic] is commonly

¹²⁶ In light of European Court of Human Rights jurisprudence, the Secretary of State (and any court reviewing a proposed deportation) of a non-national must not deport if there is a real risk that the actions of overseas authorities would subject the person to torture, inhuman and degrading treatment or punishment (ECHR art.3) or deprive him of liberty contrary to art.5 (*Chahal v United Kingdom* (1997) 23 E.H.R.R. 413); or that there was a real risk that a person's trial overseas would use evidence obtained by torture contrary to art.6 (*Abu Qatada v United Kingdom*, *Othman v United Kingdom* (2012) 55 E.H.R.R. 1).

¹²⁷ *X v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68; and in subsequent proceedings before the European Court of Human Rights, see *A v United Kingdom* (2009) 49 E.H.R.R. 29. Preventative detention was replaced with control orders.

¹²⁸ See, e.g. *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45; [2008] 1 A.C. 385; *Secretary of State for the Home Department v MB and AF* [2007] UKHL 46; [2008] 1 A.C. 440; *Secretary of State for the Home Department v E and another* [2007] UKHL 47; [2008] 1 A.C. 499; *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 A.C. 269; *BX v Secretary of State for the Home Department* [2010] EWCA Civ 481; [2010] 1 W.L.R. 2463; *BG v Secretary of State for the Home Department* [2011] EWHC 1478 (Admin); [2011] 1 W.L.R. 2917; *Secretary of State for the Home Department v CB and another* [2012] EWCA Civ 418; [2012] 1 W.L.R. 3259. Control orders were made against 52 individuals.

¹²⁹ *Secretary of State for the Home Department v BM* [2012] EWHC 714 (Admin); [2012] 1 W.L.R. 2734.

¹³⁰ *AB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 A.C. 110; *R. (on the application of BB (Algeria)) v Special Immigration Appeals Commission and another* [2011] EWHC 336 (Admin); [2012] Q.B. 146; *W (Algeria) and other v Secretary of State for the Home Department* [2012] UKSC 8; [2012] 2 A.C. 115; *R. (on the application of Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546; [2012] Imm.A.R. 381, esp. [83]–[88] (setting out principles to be applied).

¹³¹ *R. (on the application of GI) v Secretary of State for the Home Department* [2011] EWHC 1975 (Admin); [2012] 1 W.L.R. 2568; *IR (Sri Lanka) v Secretary of State for the Home Department* [2011] EWCA Civ 704; [2012] 1 W.L.R. 232.

¹³² *R. (on the application of the Secretary of State for the Home Department) v Inner West London Assistant Deputy Coroner and others* [2010] EWHC 3098 (Admin); [2011] 1 W.L.R. 2564.

¹³³ *Bank Mellat v Her Majesty's Treasury (No.2)* [2011] EWCA Civ 1; [2012] Q.B. 101.

¹³⁴ *Ahmed and others v Her Majesty's Treasury (JUSTICE intervening) (Nos 1 and 2)* [2010] UKSC 2 and [2010] UKSC 5; [2010] 2 A.C. 534 (Terrorism (United Nations Measures) Order 2006 (SI 2006/2657) and the Al-Qaida and Taliban (United Nations Measures) Order 2006 (SI 2006/2952) were ultra vires the United Nations Act 1946: in the former, "reasonable suspicion" provision went further than was necessary to expient to comply with UN Security Council measures and in the latter there was a denial of fundamental rights of access to a judicial remedy. The Terrorist Asset-Freezing (Temporary Provisions) Act 2010 and subsequently the Terrorist Asset-Freezing etc Act 2010 were enacted to provide the necessary powers to implement the UN Security Council measures. For EU law iterations, see *Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] 1 A.C. 1225; *Othman v Council of the European Union* (T 318/01) [2009] E.C.R. II-1627.

found in practice in judicial review".¹³⁵ Questions of national security also arise in proceedings other than CPR Pt 54 claims for judicial review, including civil claims for damages¹³⁶ and applications for habeas corpus.¹³⁷

Matters which are polycentric

- 1-042 A third limitation on the court's institutional capacity occurs when a legal challenge is made on substantive grounds to a matter which is "polycentric"—where the decision-taker has broad discretion involving policy and public interest considerations. The limitation does not apply where the alleged flaw is one of procedural impropriety¹³⁸ or a failure to discharge a general duty, such as the public sector equality duty.¹³⁹

Most "allocative decisions"—decisions involving the distribution of limited resources—fall into the category of polycentric decisions. If the court alters such a decision, the judicial intervention will set up a chain reaction, requiring a rearrangement of other decisions with which the original has interacting points of influence.¹⁴⁰ Thus where it was alleged that the proposals of the Boundary Commission resulted in an "excessive disparity" between the number of electors

¹³⁵ House of Lords Constitution Committee, *Terrorism Prevention and Investigation Measures Bill*, 19th Report of 2010, 12, HL Paper 198, para.15.

¹³⁶ See, e.g. *Al Rawi and others v Security Service and others (JUSTICE and others intervening)* [2011] UKSC 34; [2012] 1 A.C. 531 (in tort claims, "closed material procedure" held to be a departure from fundamental features of common law fair trials); *Tariq v Home Office* [2011] UKSC 35; [2012] 1 A.C. 452 (close material procedure could be used in the Employment Tribunal); the Justice and Security Act 2013 now permits use of this procedure in civil litigation generally.

¹³⁷ *Rahmatullah v Secretary of State for Defence and another (JUSTICE intervening)* [2012] UKSC 48; [2012] 3 W.L.R. 1067.

¹³⁸ See, e.g. *R. (on the application of Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin); [2011] Eq.L.R. 481, [96] ("however pressing the economic problems, there was no 'overriding public interest' which precluded consultation or justifies the lack of any consultation" in relation to government decision to shut down national programme for refurbishing schools); *R. (on the application of Rahman) v Birmingham City Council* [2011] EWHC 944 (Admin); [2011] Eq.L.R. 705 (decision to end funding to voluntary agencies providing legal advice to ethnic minorities and disabled people unlawful because they had been made without due regard to public sector equality duties).

¹³⁹ Equality Act 2010 s.149 and the Equality Act 2010 (Specific Duties) Regulations 2011 (SI 226/2011).

¹⁴⁰ *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 at 411 (Lord Diplock: decisions involving "competing policy considerations", involving "a balancing exercise which judges by their upbringing and their experience are ill-qualified to perform"). See L. Fuller, "The Forms and Limits of Adjudication" (1978-79) 92 Harv. L.R. 395, who likens a polycentric problem to that of a spider's web: "A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but rather create a different complicated pattern of tensions. This would certainly occur, for example, if the double pull caused one or more of the weaker strands to snap." These words were quoted in *R. v Secretary of State for the Home Department Ex p. P* [1995] 1 All E.R. 870 (Neill L.J.; non-statutory power establishing a scheme to provide compensation for criminal injuries was held not justiciable because it involved "a balance of competing claims on the public purse and the allocation of economic resources which the court is ill equipped to deal with"); J. Allison "Fuller's Analysis of Polycentric Disputes and The Limits of Adjudication" (1994) C.L.J. 367; A. Le Sueur, "Justifying Judicial Caution: Jurisdiction, Justiciability and Policy", Ch.8 in B. Hadfield (ed.), *Judicial Review: A Thematic Approach* (1995); A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L.R. 1281, 1288; J. King, "Institutional Approaches to Judicial Restraint" (2008) 28 O.J.L.S. 409; J. King, "The Pervasiveness of Polycentricity" [2008] P.L. 101.

in each constituency and the "electoral quota" (as required by the Rules), it was held that this was a question on which the courts should be reluctant to decide, there being "more than one answer", particularly since any adjustment to the boundaries would necessitate other compensating adjustments to the proposals (a typical polycentric problem, although not directly referred to as such).¹⁴¹

Another typical polycentric decision is one involving the allocation of scarce resources among competing claims.¹⁴² As will be discussed in Chapter 5, courts are asked to determine (a) whether the cost of a project is material to a decision; (b) whether the cost of a project is too high, or (c) too low.¹⁴³ The first issue to decide when these claims are made is whether the alleged duty is a mere "target duty" (such as to provide for the needs of children or the disabled in general) or an enforceable duty (to provide a particular service to the claimant). Once it has been decided that there is a duty to be engaged, or that a power is being neglected or ignored, should it then be for the courts to dictate how the resources ought to be allocated between the fulfilment of that duty and other competing responsibilities? In *R v Cambridge DHA Ex p. B (No.1)*, the decision of a hospital not to provide expensive treatment to a child with cancer was upheld by the Court of Appeal.¹⁴⁴ Similarly: the House of Lords refused to interfere in a decision of a chief constable to deploy his resources in a manner that gave only partial and sporadic protection to exporters at risk of disruption of their trade from animal rights protesters;¹⁴⁵ a local authority system for allocating housing was held not to be inherently absurd or arbitrary.¹⁴⁶

1-043

One of the reasons why a polycentric decision is not ideally amenable to judicial review is that the re-allocation of resources in consequence of the court's judgment will normally involve the interests of those who were not represented in the initial litigation. Yet it should not always be assumed that the legislature always possesses an institutional capacity superior to that of the courts to take into account a wide variety of interests. In *Huang*,¹⁴⁷ the House of Lords acknowledged that in some areas the determination of policy by the legislative or executive branch is institutionally no better than that of the courts. Their

1-044

¹⁴¹ *R v Boundary Commission for England Ex p. Foot* [1983] Q.B. 600.

¹⁴² J. King, "The Justiciability of Resource Allocation" (2007) 70 M.L.R. 197; E. Palmer, "Resource Allocation, Welfare Rights—Mapping the Boundaries of Judicial Control in Public Administrative Law" (2006) 20 O.J.L.S. 63; S. Fredman, "Positive Rights Transformed: Positive Duties and Positive Rights" [2006] P.L. 498.

¹⁴³ See 5-134.

¹⁴⁴ *R v Cambridge DHA Ex p. B (No.1)* [1995] 1 W.L.R. 898 at 906 (Sir Thomas Bingham M.R.: "Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which a court can make"); R. James and D. Longley, "Judicial Review and Tragic Choices: *Ex p. B*" [1995] P.L. 367.

¹⁴⁵ *R v Chief Constable of Sussex Ex p. International Traders Ferry Ltd* [1999] 2 A.C. 418; also *R. (on the application of Pfizer Ltd) v Secretary of State for Health* [2002] EWCA Civ 1566; [2003] 1 C.M.L.R. 19 (CA upheld decision to provide the drug Viagra to a limited category of patients); K. Syrett, "Impotence or Importance? Judicial Review in an Era of Explicit NHS Rationing" (2004) 67 M.L.R. 289; cf. *R. (on the application of Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392; [2006] 1 W.L.R. 2649 (policy on funding breast cancer treatment with an unlicensed drug called Herceptin was irrational); K. Syrett, "Opening Eyes to the Reality of Scarce Health Care Resources? *R. (on the application of Rogers) v Swindon PCT and Secretary of State for Health*" [2006] P.L. 664.

¹⁴⁶ *R. (on the application of Ahmad) v Newham LBC* [2009] UKHL 14; [2009] P.T.S.R. 632.

¹⁴⁷ *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167.

THE NATURE OF JUDICIAL REVIEW

Lordships distinguished between a case which concerns established housing policy¹⁴⁸—where the result represented “a considered democratic compromise”, and where all parties were represented in the debate and where the issue involved the allocation of finite resources—and the situation in immigration policy where those elements were not present. In the latter case, the courts have far less institutional reason to be diffident about intervening in order to protect the rights or interests of those who were not represented in the decision-making process.

Prosecution decisions have also been described as polycentric.¹⁴⁹ In *R. (on the application of Corner House Research) v Director of the Serious Fraud Office*, the House of Lords reiterated that the courts should be slow to interfere in prosecutorial decisions outside of exceptional cases.¹⁵⁰ One of the reasons given by Lord Bingham in support of that proposition was, quoting a judgment of the Supreme Court of Fiji “The polycentric character of official decision-making in such matters including policy and public interest considerations are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits”.¹⁵¹ With respect, the concept of polycentricity does not justify judicial abstinence on the ground that the decision involves taking into account a number of different considerations. The essence of the polycentric problem is the fact that it has interacting points of influence described above, and is therefore not easily amenable to an either/or, or yes/no decision. Nevertheless, the deference to the Director’s decision in *Corner House* was ultimately based less on polycentricity than the fact that it involved government policy in the area of national security (albeit ignoring the implications of such an approach for the rule of law).

1-045

Furthermore, budgetary decisions are not, invariably regarded by the courts as matters for the authority alone. The matter depends upon the relevant statute and context. While in *R. v Gloucestershire CC Ex p. Barry*,¹⁵² the House of Lords held that the authority was entitled to take into account its limited resources when it considered whether it could fulfil “needs”, in *R. v Sussex CC Ex p. Tandy*,¹⁵³ the House of Lords took the opposite view in holding that the authority could not take its limited resources into account in considering whether it could provide “suitable education”. As we shall see further when we consider these issues in greater detail in Chapters 5 and 11, so much in public law depends upon the context.¹⁵⁴

¹⁴⁸ As in *Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 A.C. 465.

¹⁴⁹ *Sharma v Antoine and others* [2006] UKPC 57; [2007] 1 W.L.R. 780; *R. (on the application of Cityhook (Cornwall) Ltd v Office of Fair Trading* [2009] EWHC 57 (Admin); [2009] A.C.D. 41 (quoting passages from the 6th edn of this work with approval).

¹⁵⁰ [2008] UKHL 60; [2009] 1 A.C. 756; see further R. Hopkins and C. Yeginsu, “Storm in a Teacup: Domestic and International Conservatism from the Corner House Case” [2008] J.R. 267; J. Jowell, “Caving In: Threats and the Rule of Law” [2008] J.R. 273.

¹⁵¹ [2008] UKHL 60; [2009] 1 A.C. 756, [31].

¹⁵² [1997] A.C. 206.

¹⁵³ [1998] A.C. 714.

¹⁵⁴ See 5-134; 11-001–11-012. See, e.g. *R. (on the application of A) v Croydon LBC* [2009] UKSC 8; [2009] 1 W.L.R. 2557, where the question of whether a child is “in need” was considered non-justiciable, and see *R. (on the application of McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33; [2011] P.T.S.R. 1266, where Barry was doubted in the context of a fiercely divided Supreme Court over the question of needs assessment in the context of community care). And see T. Dyke, “Judicial Review in an Age of Austerity” [2011] J.R. 202.

Boundaries of Judicial Review: The Law of Justiciability in Canada

3rd Edition

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§ 1:1 BOUNDARIES OF JUDICIAL REVIEW: LAW OF JUSTICIABILITY IN CANADA

Melville Weston¹

The practical wisdom embodied in the common law is that much of what we agree to in our day-to-day lives does not result in a contract. Where there is no [...] obligation known to law, there is no justiciable interest and no cause of action.

Justice Malcolm Rowe²

In this chapter, we introduce the concept of justiciability and discuss its role in defining the scope of judicial review in Canada. Following this, an outline of the organization of this book will be provided.

II. DEFINING JUSTICIABILITY

§ 1:2 Overview

In order to commence a study of justiciability, it is of course first necessary to define the parameters of this term. Most observers agree that justiciability relates to the subject matter jurisdiction (*ratione materiae*) of a court. Justiciability is a requirement, at least implicitly, of every matter that comes before a court in Canada. However, as courts have sought to define the boundaries of justiciability, differing approaches to its nature and scope have emerged. Geoffrey Marshall summarized the dilemma of defining justiciability in the following terms:

Justiciability, when openly used in its appraising sense, refers, then, to the aptness of a question for judicial solution. But what is to be understood by such a solution? Is it a matter of decisions by persons with certain status? Decision by certain set of rules? Or decision in certain conditions and with certain specifiable results - finality, for example? The notoriously difficult or, some might add, pointlessness of this question, if it is to be answered in terms of criteria historically suggested in the courts, lies in

[Section 1:1]

¹M. Weston, "Political Questions" (1925) 38 Harv. L. Rev. 296 at 299, cited by Wilson J. in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at 466 [hereinafter *Operation Dismantle*].

²*Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Ago*, 2021 SCC 22, 163 O.R. (3d) 719 (note) (S.C.C.) at para. 24.

the potential lack of agreement between criteria developed for different purposes.

Implicit in this, and as will be explored in this book, is that justiciability is concerned with the propriety of the courts adjudicating a particular claim. But within this, this can be defined with respect to either particular procedural considerations—such as the appropriateness of the plaintiff (standing) or timing of the dispute (mootness and ripeness). More narrowly, however, justiciability can be confined in its conceptualization to substance: the ability of the court to adjudicate on the subject matter raised in a particular piece of litigation.

Even within these parameters, however, as Patrick Macklem and Craig Scott have emphasized, it is neither possible nor desirable to impose precise limitations on terms such as justiciability, which are contingent on legal, political and historical contexts:

"Justiciability" is a deceptive term because its legalistic tone can convey the impression that what is or is not justiciable inheres in the judicial function and is written in stone. In fact, the reverse is true: not only is justiciability variable from context to context, but its content varies over time. Justiciability is a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its changing character and evolving capability.¹

Keeping this contextual approach in mind, justiciability may be defined, either procedurally or substantively, as a set of largely judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable. While this is hardly set in stone, the quote from Justice Rowe at the beginning of this chapter is a reminder that centuries of wisdom of the common law has recognized that vast swaths of human interaction are, quite prudently, beyond the purview of the courts. The criteria used to make the determination as to whether a particular matter is

[Section 1:2]

¹G. Marshall, "Justiciability" in A. Guest (ed.), *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961) at 269.

²P. Macklem and C. Scott, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 U. Pa. L. Rev. 1 at 27.

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justiciable pertain to several factors, notably: (1) the capacities and legitimacy of the judicial process; (2) the constitutional separation of powers; and (3) the nature of the dispute before the court, including the nature and text of the legal instruments as the basis of the dispute.

History, text, and constitutional considerations inform these criteria. Even so, they cannot be reduced to purely objective assessments. They invariably contain a set of normative preferences. For example, how one sees the capacity and legitimacy of a court will depend on whether one views judicial review as exclusively devoted to "dispute resolution" through adjudication or whether one includes the articulation of "public values" (or, at least, "public guidance" vis-à-vis the law) as a proper function of the judicial process as well. Justiciability concerns loom large in the dispute resolution approach because it is premised on an adversarial presentation of issues and parties with a live stake in the outcome of a concrete dispute. Therefore, where a plaintiff would not be directly affected by litigation, or an issue becomes moot, or is not yet ripe, the nature of the judicial process would suggest such matters should be considered non-justiciable. The public values approach, by contrast, requires simply an important issue with different interpretations well-argued before the Court and consequently, defects of standing, ripeness, and mootness would present less of an obstacle to the judicial process. Justiciability thus may expand or contract depending on the values infusing an understanding of judicial review.³ Traditionally, judicial review has been understood in the dispute resolution model in Canada, with some notable exceptions (e.g., references). Increasingly, however, the courts' role in determining and disseminating public values has been recognized, even if the overwhelming majority of cases still have a plaintiff who would be directly affected and a dispute that is ripe and not moot.

In attempting to define justiciability, Canadian courts have rarely expressed broader concerns for the nature of judicial review. Rather, many have simply turned to the dictionary as a point of departure for the meaning of justiciability. For example, in *Pim v. Ontario (Minister of Environment)*, the Ontario Divisional Court turned to the *Oxford English Dictionary*, which defined "justiciable" as something which is amena-

³For a discussion of these two approaches in the American context, see E. T. Lee, "Deconstitutionalizing Justiciability: The Example of Mootness" (1992) 105 Harv. L. Rev. 605 at 626-28.

ble to jurisdiction or triable in a Court.⁴ In *South Centre Merchants Assn. Ltd. v. Halifax (City)*, Tidman J. of the Nova Scotia Supreme Court referred to *Black's Law Dictionary* (5th ed., 1979), which defined justiciability as a "term [that] refers to real and substantial controversy which is appropriate for judicial determination . . ." and to the *World Book Dictionary*, 1981 edition, which defined "justiciable" as "subject to jurisdiction or trial in a court of law . . ." Is being "amenable" to judicial determination different than being "appropriate" for judicial determination? Both definitions imply the need for a normative judgment as to a matter's suitability for judicial determination.⁵ By contrast, "appropriate for judicial determination" in the sense of "subject" to jurisdiction appears to call for a positive assessment—in other words, the fact that a court has deemed a matter to be justiciable is what renders it justiciable.

Interestingly, in *Thorson v. Canada (Attorney General)*,⁷ a landmark case on public interest standing which included the first important usage of "justiciability" by the Supreme Court of Canada, the term was left undefined. This is likely because the issue in that case—whether a statute offended the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*—was clearly substantively justiciable. In *Finlay v. Canada (Minister of Finance)*, Le Dain J., without the benefit of a dictionary but citing *Thorson* as authority, stated that justiciable meant simply "appropriate for judicial determination."⁸

The Supreme Court of Canada began to turn its mind more to the content of justiciability, from a substantive perspective, in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*. Chief Justice Dickson stated that, "An inquiry into justiciability is, first and foremost, a normative in-

⁴*Fin v. Ontario (Minister of Environment)* (1978), 23 O.R. (2d) 45 (Ont. Div. Ct.).

⁵*South Centre Merchants Assn. Ltd. v. Halifax (City)*, 1994 CarswellNS 83, [1994] N.S.J. No. 439 (N.S. S.C.). In *Nova Aqua Salmon Ltd. Partnership (Receiver of) v. Non-Marine Underwriters, Lloyd's London*, 1996 CarswellNS 38, [1996] N.S.J. No. 38 (N.S. S.C.), Tidman J. resorted to an earlier edition of *Black's Law Dictionary* (4th Ed., 1968), 1004, which defined justiciability as "proper to be examined in courts of justice".

⁶By normative, we refer to a subjective determination based on a defined set of principles, standards, beliefs and priorities.

⁷*Thorson v. Canada (Attorney General)* (1974), [1975] 1 S.C.R. 138 (S.C.C.) [hereinafter *Thorson*].

⁸*Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.) at 632 [hereinafter *Finlay*].

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quiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue. . . .⁹

Whether in the normative or positive sense, "appropriateness" has emerged as the most common proxy for justiciability. In *Saskatoon Criminal Defence Lawyers Assn. v. Saskatchewan*, the Saskatchewan Court of Queen's Bench (as it then was) held, "An issue is justiciable if it raises a question that may properly come before a court and which is appropriate for decision."¹⁰ In *Assn. of Stop Construction of Rafferty Alameda Projects Inc. v. Saskatchewan (Minister of Environment & Public Safety)*, that same court stated, "A justiciable issue is defined as one which consists of a real and substantial controversy which is appropriate for judicial determination as distinguished from a dispute which is hypothetical or one of abstract character."¹¹

Appropriateness, from both procedural and substantive perspectives, not only includes both normative and positive elements, but also reflects an appreciation for both the capacities and legitimacy of judicial decision-making. Professor Thomas Cromwell (later Justice Cromwell of the Supreme Court of Canada) summarized this approach to justiciability in the following terms:

The justiciability of a matter refers to its being suitable for determination by a court. Justiciability involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication in light of these factors. *This appropriateness may be determined according to both institutional and constitutional standards. It includes both the question of the adequacy of judicial machinery for the task as well as the legitimacy of using it.*¹² [Emphasis added.]

While it is helpful to develop the criteria for a determination of justiciability, including factors such as institutional capacity and institutional legitimacy, it is necessary to leave the content of justiciability open-ended. This was underscored by Justice Rowe, writing for a unanimous Supreme Court, in *Highwood*

⁹*Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.) at 90-91 [hereinafter *Auditor General*].

¹⁰*Saskatoon Criminal Defence Lawyers Assn. v. Saskatchewan*, [1984] 3 W.W.R. 707 (Sask. Q.B.).

¹¹*Assn. of Stop Construction of Rafferty Alameda Projects Inc. v. Saskatchewan (Minister of Environment & Public Safety)*, 1988 CarswellSask 86, [1988] S.J. No. 292 (Sask. Q.B.).

¹²T. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 192.

Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall:

There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter[. . .] In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute."¹³

We cannot say all the reasons why a matter may be (non-)justiciable. While justiciability will contain a diverse and shifting set of issues, in the final analysis, all one can assert with certainty is that there will always be, and always should be, a boundary between what courts should and should not decide, and further, that this boundary should correspond to predictable and coherent principles. As Galligan concludes, "Non-justiciability means no more and no less than that a matter is unsuitable for adjudication."¹⁴

§ 1:3 Justiciability: A Substantive or Procedural Doctrine?

Justiciability is often conflated with standing.¹ Standing, the subject of Chapter 3 (§§ 3:1 et seq.), is a civil procedure doctrine that addresses the question of *who* is entitled to bring proceedings to a court and thus can fairly be described as a "boundary of judicial review". More narrowly, however, justiciability relates to *what* such people may ask a court to

¹³*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750 (S.C.C.) at para. 84, citing the previous edition of this book at 294.

¹⁴This is the definition adopted in D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1990) at 241.

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¹This confusion is in part one of terminology. In the U.S., standing is one of the doctrines, along with mootness and ripeness, grouped under the rubric of justiciability. See L. Tribe, *American Constitutional Law*, 2d ed. (Mineola, New York: Foundation Press, 1988) at 67, 107-11. In Canada, by contrast, justiciability is generally, but not always understood as a separate inquiry into the subject matter of the litigation. As such, all these doctrines are considered in this book.

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appropriate way to address mootness on appeal. Because the issue was raised at the hearing and Mr. Borowski incurred significant unnecessary expense, this was taken into account when determining costs (discussed in the next subsection).

At times, appeal courts will choose to schedule a motion to strike an appeal on grounds of mootness in conjunction with a hearing on the merits should it consider that to be the most efficient course of action.⁴ However, this does not affect the fact that a motion to quash a moot appeal remains the appropriate course of action.

§ 2:19 Mootness—Special Costs Considerations

Particular considerations may also arise with respect to costs of proceedings dismissed on grounds of mootness. For most rationales considered as bases to dismiss proceedings in this book, the inappropriateness of bringing the proceeding is at some level attributable to the plaintiff. Typical costs consequences should accordingly follow. (It may well be that a significant number of claims discussed in this book were nonetheless brought in the public interest in good faith, which may be a pragmatic reason not to award costs, but this is because of rules surrounding costs in public interest litigation generally, and not because of issues of justiciability *per se*.⁵)

Where the Court has declined to hear a case on the grounds of mootness, the question of costs may arise. *Borowski* provides little guidance as to how costs are to be addressed. The Attorney General in that case had applied for an adjournment following the striking down of the abortion provision that Mr. Borowski challenged. This motion was denied. Sopinka J. noted that the proper course would have been to bring a motion to quash either in lieu of, or subsequent to, the request for adjournment. As this was not done, Sopinka J. concluded that the appellant had been put to the “needless” expense of preparing and arguing the case before the Supreme Court. In the circumstances, Sopinka J. ordered the Attorney General to pay Borowski’s costs from the time of the motion to adjourn was

⁴See, e.g., the concurrent consideration of mootness and merits in *E.S. v. Joannou*, 2017 ONCA 655, 416 D.L.R. (4th) 466 (Ont. C.A.).

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⁵Discussed in depth in Chris Tollefson, Darlene Gilliland and Jerry DeMarco, “Towards a Costs Jurisprudence in Public Interest Litigation” (2004) 83:2 Can. Bar Rev. 473.

decided forward.² This holding suggests that if a party intends to raise mootness as a basis for dismissing a claim or an appeal, it should do so in a timely fashion and in the appropriate procedural fashion to minimize the costs to the other parties. Otherwise, as in *Borowski*, they may be burdened with the appellant's costs should the mootness argument succeed at a later point.

The more typical approach to costs is illustrated in *Provincial Crane Inc. v. AMCA International Ltd.*³ In that case, an issue had become moot by reason of "supervening events" out of the control of the parties. After deciding the matter was moot, the Court entertained arguments with respect to costs. Each side argued that the other should bear the costs of the proceeding. The Court held that, as there was enough evidence to justify commencement of the action by the plaintiff, each side should bear its own costs. This 'justified action' test was confirmed and employed by R.C. Boswell J. of the Ontario Superior Court of Justice in *Golda Developments Inc. v. Dawe*:⁴ "the plaintiff must satisfy the court on a balance of probabilities that it had a *bona fide* cause of action, that it was not frivolous or vexatious and that there was some justification for commencement of the claim."⁵

This result is sensible where the case has become moot due to factors outside the control of the parties; however, this may encourage parties to proceed to a hearing on mootness rather than simply abandon an action as most provincial Rules of Civil Procedure provide that, where a plaintiff discontinues an action against the defendant, the defendant is entitled to costs unless the court orders otherwise.⁶

§ 2:20 Subject Matters that are Inherently Political

CUPE v. HMQ illustrates how, if a proceeding raises inherently political matters, it is unlikely that the Court will allow an entire trial to take place, but instead elect to resolve the matter expeditiously. The plaintiffs in this action brought a

²*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.).

³*Provincial Crane Inc. v. AMCA International Ltd.*, 1990 CarswellOnt 369 (Ont. H.C.).

⁴*Golda Developments Inc. v. Dawe*, 2008 CarswellOnt 3120 (Ont. S.C.J.). See also *Gianopoulos v. Olga Management Ltd.*, 2004 CarswellOnt 4328 (Ont. S.C.J.).

⁵*R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385 (S.C.C.).

⁶*R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385 (S.C.C.) at para. 28.

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claim against the Ontario government regarding sale of shares in a Crown corporation. The plaintiffs alleged that the sale was motivated by improper purposes, including a desire to enrich supporters of the governing party. What Cavanagh J. relied upon to strike the claim was the fact that the claim rested on policy decisions—whether to sell shares in a Crown corporation—that were the proper purview of the legislatures, not the courts.¹ After reminding himself of the high standard to strike out a claim under Rule 21 of Ontario's *Rules of Civil Procedure*, he concluded:

[66] When I read the Claim generously and assume the facts pleaded in the Claim to be true, I conclude that:

- a. It is plain and obvious that the plaintiffs have not pleaded facts that plausibly support the conclusion that the impugned conduct and decisions were not in respect of core policy matters that were authorized by the *Electricity Act, 1998*.
- b. It is plain and obvious that the plaintiffs have not pleaded facts that plausibly support the conclusion or inference that the Ministers acted in bad faith in engaging in the impugned conduct and making the impugned decisions in respect of the sale of shares of Hydro One.

[67] Th[e] claims made in this action are not justiciable and, for this reason, the Claim should be struck out and the action should be dismissed.

In *Tanudjaja v. Canada (Attorney General)*, the Court of Appeal for Ontario was divided on the propriety of deciding the justiciability of an alleged right to housing under the *Charter* on a motion to strike. Pardu J.A., writing for the majority, agreed that the motions judge appropriately struck the claim for its being non-justiciable. In her view, it was clear based on the pleadings that the claim raised political rather than legal issues given that “there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless”.² The fact that no specific law was challenged, as the applicants were seeking

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¹*R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385 (S.C.C.), in particular, para. 65. See also *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.) at, in particular, paras. 79, 87.

²*Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, 128 O.R. (3d) 161 (Ont. C.A.) at para. 33, leave to appeal refused 2016 CanLII 9613 (S.C.C.).

recognition of a free-standing right to housing, underscored the non-justiciable nature of the claim. She noted the particular difficulties this would pose for s. 1 analysis as "the diffuse and broad nature of the claims here does not permit an analysis under s. 1 of the *Charter*."² Feldman J.A. dissented. Notwithstanding what she acknowledged were challenges the applicants would face, "it [was] neither plain nor obvious that the[ir] claims are doomed to fail"³ and evidence could help them make out their claim, unlike previous decisions such as *Gosselin v. Québec (Procureur général)*,⁴ where claimants were unsuccessful.

§ 2:21 Cases that Affect the Political Process

Cases that affect the political process, such as through affecting the internal affairs of Parliament, are likely to be resolved at a very early motion, as the justiciability concerns are likely to be apparent on the face of pleadings. For instance, in *Penikett v. R.*,⁵ the Yukon Supreme Court considered challenges brought by the Premier and Government of the Yukon Territory, alleging that the process that led to the Meech Lake Accord violated the *Charter*. The Yukon Supreme Court answered certain legal questions posed by the Government of Canada in accordance with then-Rule 34 of the *Yukon Supreme Court Rules*, permitting resolution of legal questions that will substantially resolve actions. Though it disagreed with *how* the trial court answered the questions, the Yukon Court of Appeal nonetheless agreed that they could be answered on such a preliminary motion.⁶ (For more discussion of the substance of these determinations, see § 7:4.) This is not altogether surprising: the issue in this petition was fundamentally about

²*Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, 123 O.R. (3d) 161 (Ont. C.A.) at para. 32, leave to appeal refused 2015 CarswellOnt 9613 (S.C.C.).

³*Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, 123 O.R. (3d) 161 (Ont. C.A.) at para. 43, leave to appeal refused 2015 CarswellOnt 9613 (S.C.C.).

⁴*Gosselin v. Québec (Procureur général)*, 2002 SCC 84, (sub nom. *Gosselin v. Québec (Attorney General)*) [2002] 4 S.C.R. 429 (S.C.C.).

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⁵*Penikett v. R.* (1987), 43 D.L.R. (4th) 324 (Y.T. S.C.), reversed *Penikett v. R.* (1987), 45 D.L.R. (4th) 108 (Y.T. C.A.) at 118-120, leave to appeal refused [1988] 6 W.W.R. (xix) (note) (S.C.C.).

⁶*Penikett v. R.* (1987), 45 D.L.R. (4th) 108 (Y.T. C.A.) at 118-120, leave to appeal refused [1988] 6 W.W.R. (xix) (note) (S.C.C.).

G. UNWRITTEN CONSTITUTIONAL PRINCIPLES

§ 6:12 Generally

H. POLITICAL TRUSTS

§ 6:13 Generally

I. INTERGOVERNMENTAL AGREEMENTS

§ 6:14 Generally

II. NON-JUSTICIABLE POLICY DISPUTES

§ 6:15 Generally

III. NON-BINDING GUIDELINES, MANUALS, SOFT LAW

§ 6:16 Generally

IV. DOCUMENTS THAT ADDRESS THEIR OWN JUSTICIABILITY

§ 6:17 Generally

V. CONCLUSION

§ 6:18 General

I. POLITICAL QUESTIONS

A. INTRODUCTION

§ 6:1 Generally

Issues are sometimes resolved by judicial process which might have been resolved by political processes, and justice is often contrasted with politics, not because it is even *prima facie* expected that political decisions will be unjust, but because there are characteristic (though disputed) differences between the ways in which decisions may be reached . . . But what does this contrast amount to, and are there some types of disputes which are inherently suited to one sort of decision rather than another?

Geoffrey Marshall¹

It is the prerogative of a sovereign Parliament to make its intention known as to the role the courts are to play in interpreting, applying and enforcing its statutes. While the courts must determine the meaning of statutory provisions, they do so in the name of seeking out the intention or sovereign will of Parliament, however purposively, contextually or policy-oriented may be the interpretative methods used to attribute such meaning. If, then, the courts interpret a particular provision as having the effect of ousting judicial remedies for entitlements contained in that statute, they are, in principle, giving effect to Parliament's view of the justiciability of those rights. The rights are non-justiciable not because of the independent evaluation by the court of the appropriateness of its intervention, but because Parliament is taken to have expressed its intention that they be non-justiciable.

Chief Justice Brian Dickson²

In the previous chapters, we have explored areas where the boundaries of judicial review turned on the capacity of courts to hear and decide disputes that were not "live" in one sense or another. In this chapter, we consider the boundaries, if any, where live disputes raise political questions, or concern policy preferences. To put it another way, while the previous chapters have analyzed when courts will decline to adjudicate due to procedural concerns, this chapter (and the two that follow) address areas where courts may not tread upon substance.

The "political questions" doctrine has a chequered history and uncertain status in Canada. To be found non-justiciable, political questions must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process.

However, the common law suggests that a court should not allow actions to be immune from review lightly.³ Political questions, therefore, must demonstrably be unsuitable for

[Section 6:1]

¹G. Marshall, "Justiciability" in A. Guest (ed.) *Oxford Essays in Jurisprudence* (London: Oxford University Press, 1961), 265.

²*Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.) at 91-92 [hereinafter *Auditor General*].

³See for a discussion of this common law principle, *Hamilton City*

adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdictional spectrum.⁴

Often justiciability has been viewed as a strict test with a simple yes or no answer. This method has meant that courts have held many cases of public discretionary decision making to be nonjusticiable and so have refused to investigate whether the decision makers in question have exceeded the scope of their discretion. Such an approach thus ignores the rule of law illustrating the importance of approaching justiciability as a spectrum rather than a black-or-white decision.⁵ To put it another way, courts must not conflate whether a matter is *per se* justiciable with giving decision-makers considerable deference regarding said matter.⁶

As with ripeness and mootness, the doctrines of justiciability discussed thus far, the political nature of a matter raises two related dilemmas for courts. The first is the dilemma of institutional capacity. Courts are designed to make pronouncements of law. Arguably, they accomplish this goal more effectively and efficiently than any other institution could.

Where the heart of a dispute is political rather than legal, however, courts have no particular advantage over other institutions in their expertise, and may well be less effective and efficient than other branches of government in resolving such controversies, as the judiciary is neither representative of the political spectrum, nor democratically accountable. For this reason, a discussion of the justiciability over disputes rooted in or including political or policy disputes shades into a discussion of justiciability over legislative bodies and the legislative

Council v. Waikato Electricity Authority, [1994] 1 N.Z.L.R. 741 (New Zealand H.C.). See also Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) at 177.

⁴See, for example, *R. v. Kruger* (1977), [1978] 1 S.C.R. 104 (S.C.C.) at 109 per Dickson J. (as he then was) ("... Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis. . .").

⁵Lorne Sossin, "The Unfinished Project of *Roncarelli*: Justiciability, Discretion and the Limits of the Rule of Law" (2010) 55 McGill L.J. 661.

⁶Gerard J. Kennedy & Mary Angela Rowe, "*Tanudjaja v. Canada (Attorney General)*: Distinguishing Injusticiability and Deference on Motions to Strike" (2015) 44 Adv. Q. 391.

process itself. That aspect of justiciability will be the focus of Chapter 7 (§§ 7:1 et seq.).

While most observers would agree that courts have neither the institutional capacity nor the legitimacy to decide certain kinds of political questions, few share any precise sense of where the boundary between political and legal questions should be drawn.

While jurisdictions such as the United States have developed a rich jurisprudence on "political questions," the application of this doctrine in Canada has given rise to scant attention and relatively little scrutiny. One of the few Supreme Court decisions to have considered the doctrine as such, *Operation Dismantle Inc. v. R.*,⁸ rejected its application (at least as developed in American jurisprudence) in Canada. Based on this decision, Peter Hogg concluded bluntly, "Whatever the position in the United States, it is clear that there is no political questions doctrine in Canada."⁹

It is fair to say that there is no political questions doctrine in Canada in the sense that there is in the United States. However, while the Supreme Court of Canada has chosen to distance itself from certain aspects of the American jurisprudence on the "political questions" doctrine, it has nonetheless knit together various threads from common law and its own Constitutional principles into a distinctly Canadian approach to the justiciability of "political questions". The resulting quilt creates a threshold of justiciability which all cases brought before a court must meet in order to be adjudicated. This evolving standard merges centuries of case-law on Crown prerogative powers and Parliamentary supremacy with the comparatively newly minted *Charter of Rights and Freedoms*¹⁰ principles regarding the scope of judicial review. The resulting mixture, as the discussion below illustrates, has yet to fully cohere. Justiciability issues too often are discussed, if at all, as an af-

⁷For a summary, see T. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs* (Princeton: Princeton University Press, 1992); M. Redish, "Abstention, Separation of Powers, and the Limits of the Judicial Function" (1984), 94 Yale L.J. 71; and F. Scharpf, "Judicial Review and the Political Question: A Functional Analysis" (1966), 75 Yale L.J. 517.

⁸*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) [hereinafter *Operation Dismantle*].

⁹P. Hogg, *Constitutional Law of Canada*, 5th ed. (Looseleaf Edition - 2010) (Toronto: Carswell, 2007) at 33-14.5.

¹⁰Part I of the *Constitution Act, 1982*, being Schedule B of the Canada Act 1982, (U.K.), 1982, c.11 [hereinafter *Charter*].

§ 6:1 BOUNDARIES OF JUDICIAL REVIEW: LAW OF JUSTICIABILITY IN CANADA

terthought, to justify or further bolster a result reached for other reasons, and as a result, coherence has been elusive in this jurisprudence.

This analysis is divided into four parts. In the first part, we review the "political questions" doctrine in comparative perspective. After this discussion of justiciability in Anglo-American jurisdictions, we explore the evolving "political questions" doctrine in Canadian law, including the judicial restraint over determining the wisdom of government action.¹ In the second section, we examine the justiciability of policy disputes. Then, in the third section, we look at the distinction between law and policy in the context of soft law. Finally, in the fourth section, we address a recent phenomenon that is slowly becoming more commonplace: documents that address their own justiciability.

This section will focus in particular on issues concerning the courts' legitimacy and their motivations for demarcating the limits of judicial review.

B. ANGLO-AMERICAN APPROACHES TO POLITICAL QUESTIONS

§ 6:2 Overview

In this part, we examine the roots of Canada's "political questions" doctrine, which may be principally traced to the United States, Australia and the U.K. These Anglo-American jurisdictions share a common foundation in recognizing that certain political authority may be immune from judicial review, but each has developed a unique approach to the placement of this boundary and each has situated its treatment of "political questions" within the broader context of its particular separation of powers doctrine.

§ 6:3 American approach to political questions

The American "political questions" doctrine, while unique to the "checks and balances" of the U.S. separation of powers doctrine, did not develop out of a vacuum. As with the other common law jurisdictions, its origins may be traced to early English common law. Some American legal historians have traced the doctrine to the fifteenth century case, *The Duke of York's*

¹For a discussion on whether or not Canada needs a political questions doctrine, see: D. Geoffrey Cowper, Q.C. & Larne Sousa, "Does Canada Need a Political Questions Doctrine?" (2002) 16 S.C.L.R. 343.

Claim to the Crown.¹ As the style of cause suggests, the Duke of York attempted to seek the imprimatur of the Court for his ascension to the throne. The Court declined to render a decision, cautioning that resolving the blood line of the King was not a proper subject for adjudication.²

The American Constitution represented a break with this common law heritage, but, in establishing the judiciary as a separate and independent branch of government, the Constitution similarly protected certain executive action from judicial interference. According to Article III of the U.S. Constitution, federal courts (including the Supreme Court) could only adjudicate matters which constituted a "case or controversy."³ This indicated that the drafters of the Constitution intended

[Section 6:3]

¹*Duke of York's Claim to the Crown* (1460), 5 Rotuli Par. 375 [hereinafter *Duke of York*]. See C. Post, *The Supreme Court and Political Questions* (New York: Da Capo Press, 1969).

²In *O'Donoghue v. Canada* (2003), 109 C.R.R. (2d) 1 (Ont. S.C.J.), affirmed 2005 CarswellOnt 951, [2005] O.J. No. 965 (Ont. C.A.), Reuleau J. (as he then was), found the issue of the requirement that the monarch be Anglican not to be a justiciable question in a Canadian court, on the grounds that the *Act of Settlement* requires that Canada and Great Britain share the rules of succession, with this requirement being integrated into the Canadian constitution; "If the courts were free to review and declare inoperative certain parts of the rules of succession, Canada could break symmetry with Great Britain, and could conceivably recognize a different monarch than does Great Britain. In fact, Canada could arguably reanimate the debate regarding the heir to the throne, an argument that was resolved by the *Act of Settlement*. This would clearly be contrary to settled intention, as demonstrated by our written Constitution, and would see the courts changing rather than protecting our fundamental constitutional structure" (para. 29).

With respect, we are not persuaded that the issue was not justiciable. Insofar as Mr. O'Donoghue alleged that the *Charter* was violated, we are of the view that the question posed must be capable of being answered. Having said that, we are equally persuaded that the structure of the Canadian constitution clearly warranted dismissal of his claim as a matter of substance. As such he raised no "serious" issue to be tried. This illustrates that a *Charter* claim impugning other elements of Canada's constitutional order is very likely to be dismissed on the merits, even when a justiciable issue is raised, and even when that constitutional provision sits "uncomfortably" with modern values: see *Reference re Roman Catholic Separate High Schools Funding*, (sub nom. *Reference re Bill 30, an Act to amend the Education Act*) [1987] 1 S.C.R. 1148 (S.C.C.) at 1197, discussing the constitutional requirement to fund Catholic schools in Ontario; see also *Adler v. Ontario*, [1996] 3 S.C.R. 609 (S.C.C.).

³("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . to Controversies . . ." U.S. Const. art. III, s.2.).

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Supreme Court set out the distinction between justiciable and non-justiciable questions in *Miller v. Secretary of State for Exiting the European Union*.⁴² This case considered the scope of the Crown prerogative power in relation to the U.K.'s plan to leave the European Union. The majority observed,

It is worth emphasising that nobody has suggested that this is an inappropriate issue for the courts to determine. It is also worth emphasising that this case has nothing to do with issues such as the wisdom of the decision to withdraw from the European Union, the terms of withdrawal, the timetable or arrangements for withdrawal, or the details of any future relationship with the European Union. Those are all political issues which are matters for ministers and Parliament to resolve. *They are not issues which are appropriate for resolution by judges, whose duty is to decide issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society.*⁴³ [Emphasis added.]

The status of the "political questions" doctrine in the U.K. thus remains somewhat in flux. There was a long-standing common law rule regarding the non-reviewability of certain Crown prerogative powers. However, the courts appear to be moving away from this approach towards a philosophy based more upon a question of how "purely political" the subject matter of a particular dispute appears to be, and whether the dispute can be grounded in a particular legal text or doctrine. In this sense, this appears to be in general alignment to the evolution of the Canadian jurisprudence to which we now turn.

C. CANADA'S POLITICAL QUESTIONS DOCTRINE & PURELY POLITICAL MATTERS

§ 6:6 Generally

As noted above, the first case to squarely address the "political questions" doctrine in the *Charter* era was *Operation Dismantle*. Wilson J., writing for herself in concurring reasons, concluded that the matter was justiciable but that the allegations contained in the claim (that Canada's agreement to test US missile systems on its territory would increase the risk of a Soviet attack on Canada), taken as true, did not amount to a violation of section 7 of the *Charter*.

⁴²*Miller v. Secretary of State for Exiting the European Union*, [2017] UKSC 5 (U.K. S.C.).

⁴³*Miller v. Secretary of State for Exiting the European Union*, [2017] UKSC 5 (U.K. S.C.) at para. 3. See also Alex Powell, "Miller/Cherry and the Justiciability of Prerogative Powers" *Trinity College Law Review* (2020) online: <https://trinitycollegelawreview.org/miller-cherry-and-the-justiciability-of-prerogative-powers/>.

In the course of her reasons, Wilson J. discussed the "political questions" doctrine at some length and concluded that it would not be appropriate to decline to decide the matter before her because it raised a dispute with political dimensions.¹ After reviewing the American and English jurisprudence on "political questions", Wilson J. held,

Accordingly, if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the effect of the appellant's action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellant's rights under s. 7 of the Canadian *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts . . . While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question"; see Martin H. Redish, "Abstention, Separation of Powers, and the Limits of the Judicial Function", 84 *Yale L.J.* 71 (1984). . . .² [Emphasis added.]

Wilson J.'s first claim—that a court cannot relinquish its jurisdiction because a matter is "inherently non-justiciable" was rejected by the majority, as Dickson J. (as he then was) dismissed the claim precisely on that basis.³ However, Wilson J.'s second conclusion—that a court cannot relinquish its jurisdiction because a matter raises a political question—enjoyed the support of the majority.

Still, this did not entirely settle the issue for two reasons. In

[Section 6:8]

¹Wilson J. also decided that it was of no consequence that the power exercised by Canada impugned in *Operation Dismantle* flowed from a Crown prerogative. As the Federal Court of Appeal explained in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 379 D.L.R. (4th) 737 (F.C.A.): "[63] Whether the question before the Court is justiciable bears no relation to the source of the government power"

²*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at 472.

³*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) Dickson J. stated, "I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the Courts" (at 459).

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the course of her reasons, Wilson J. appeared to leave open the possibility that certain "moral and political" matters lay beyond the competence of a court to resolve. Further, Wilson J. did not clearly reject the American political questions doctrine, as it has been developed by American courts. Rather, she took issue with an approach to the American political questions doctrine which invited courts to decline jurisdiction over matters with political consequences based on prudential grounds alone. In other words, while she rejected Alexander Bickel's urging for a prudential based political questions doctrine in *The Passive Virtues*, her decision is not inconsistent with the U.S. Supreme Court's articulation of the political questions doctrine in *Baker* (that where the Constitution assigned a matter to another branch of government, or where there existed no judicially manageable standards, jurisdiction over the matter should be declined).

Thus, while Wilson J.'s conclusion seems to suggest the American doctrine of "political questions" has no application in Canadian Constitutional law, her discussion of *Baker* and other American cases in *Operation Dismantle* does not support this conclusion. For this reason, Wilson J.'s reasons in *Operation Dismantle* should be construed narrowly, as holding merely that, in *Operation Dismantle*, the claim raised a legal issue and therefore did not constitute a "political question" which justified declining jurisdiction on grounds of non-justiciability.

Paradoxically, *Operation Dismantle* represents the leading authority for the proposition that Canadian courts do not recognize a "political questions" doctrine (once again, in the sense of the prudential approach to the American political questions doctrine),⁴ as well as a leading authority for the proposition that certain types of political questions are not appropriate for

⁴For a detailed consideration and rejection of the American "political questions" on the basis of *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), see *Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393 (B.C. S.C.) at 424 [hereinafter *Dixon*] per McLachlin C.J.S.C. (as she then was) ("The question before me is which of these two views should prevail: the view that the courts should not enter on the question of electoral reapportionment because it is essentially a political matter, or the view that the courts cannot avoid their duty to pronounce on a constitutional violation, no matter how political the issue or how difficult the problem of fashioning remedies. The Supreme Court of Canada has rejected the proposition that the Court should decline to embark upon *Charter* questions because they involve political questions. In *Operation Dismantle Inc. v. R.* (1985), 18 D.L.R. (4th) 481, [1985] 1 S.C.R. 441 (S.C.C.), which involved a challenge to the defence policy of the Government of Canada under s. 7 of the *Charter*, Wilson, J. in her separate concurring opinion (with which the majority agreed

judicial determination and a court should decline jurisdiction over them under Canadian law. This latter proposition underscored the Canadian Supreme Court's approach in *Auditor General*.⁶

In *Auditor General*, pursuant to an investigation into certain acquisitions by Petro-Canada, the office of the Auditor General requested production of documents from a cabinet minister. The minister refused. In response, the Auditor General sought to compel disclosure and challenge the refusal in Federal Court. Dickson C.J., writing for a unanimous Supreme Court, held that the Auditor General could not subject the refusal of the minister to produce the requested documents to judicial review. He interpreted the *Auditor General Act* as expressly providing for a political rather than legal remedy for non-disclosure.⁶ Dickson C.J. emphasized in the *Auditor General* case that the concern of the Court in an analysis of justiciability is to enforce the intention of Parliament, not to independently establish the appropriate boundaries for judicial intervention.⁷ This is analogous to the American Supreme Court's caution in *Baker* that the Court could justify declining to hear a matter on "political questions" grounds only where the Constitution made clear that another branch of government had been entrusted with resolving the dispute at issue. Though, in *Auditor General*, Dickson C.J. reached this conclusion as a result of *statutory* rather than *constitutional* interpretation—the relevant legislation authorized only non-judicial remedies in the circumstances of the case.

Perhaps ironically, Dickson C.J. found support for this approach in Wilson J.'s reasons in *Operation Dismantle*, which had categorically rejected the application of the American "political questions" doctrine. Dickson C.J., however, focused

on this point) held the political questions doctrine to be inapplicable to Canadian constitutional law. . . .").

⁶*Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.). This case is discussed in greater detail in Chapter 7 (§§ 7:1 et seq.).

⁷The *Auditor General Act* authorized the Auditor General to report to Parliament on the course and conduct of its investigations. This "reporting" power was held to constitute a political remedy to non-disclosure, as it would subject the minister in question to account to Parliament for the refusal to comply with the Auditor General's request. *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.) at 98-104.

⁸*Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.) at 91-92.

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instead on those aspects of *Operation Dismantle* leaving open the possibility of a Canadian "political questions" doctrine:

As I noted in *Operation Dismantle Inc. v. The Queen* (1985), 18 D.L.R. (4th) 481 at p. 494, [1985] 1 S.C.R. 441, 13 C.R.R. 287, justiciability is a "doctrine . . . founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes", endorsing for the majority the discussion of Wilson J. beginning at p. 494. Wilson J. took the view that an issue is non-justiciable if it involves "moral and political considerations which it is not within the province of the courts to assess": p. 499.⁶

In *Auditor General*, the Court held that it had no jurisdiction to review the Auditor General's complaint. While Dickson C.J. never referred to this as a "political question," it is difficult to read *Auditor General* as anything other than an endorsement of such a doctrine. Dickson C.J. makes a point of tracing the origins of such a doctrine to English common law and the supremacy of Parliament:

The most basic notion of justiciability in the Canadian legal process is that referred to in *Pickin* (*British Railways Board v. Pickin* (1974), A.C. 765), and inherited from the English Westminster and unitary form of government, namely, that it is not the place of the courts to pass judgment on the validity of statutes. Of course, in the Canadian context, the constitutional role of the judiciary with regard to the validity of laws has been much modified by the federal division of powers as well as the entrenchment of substantive protection of certain constitutional values in the various Constitution Acts, most notably that of 1982. There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.⁷

This decision also demonstrates the link between the "politi-

⁶*Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.) at 90. It is worth noting that the statement attributed to Wilson J. is not entirely accurate. She did not state that issues are non-justiciable if they involve "moral and political considerations. . ."; rather, this is how she interpreted Viscount Radcliffe's remarks in *Chandler v. Director of Public Prosecutions*, [1962] 3 All E.R. 142 (U.K. H.L.). The passage from *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at 465 in which this remark is found follows a quote from Radcliffe's reasons and reads as follows: "In my opinion, this passage makes clear that in Lord Radcliffe's view these kinds of issues are to be treated as non-justiciable not simply because of evidentiary difficulties but because they involve moral and political considerations which it is not within the province of the courts to assess."

⁷*Canada (Auditor General) v. Canada (Minister of Energy, Mines &*

cal questions" doctrine and the "alternative grounds" doctrine, discussed in Chapter 4 (§§ 4:1 et seq.) as part of the ripeness analysis. Because a political process already existed which was expressly intended to resolve such disputes, it would be inappropriate to devote judicial resources to duplicating this function.¹⁰ On this aspect of the judgment, however, it is important to highlight Dickson C.J.'s caveat that this finding may well have been different had the *Charter* been invoked to challenge the action of the executive.¹¹ This is a corollary of Dickson C.J. basing his conclusion solely on statutory interpretation grounds. Statutes must comply with the *Charter* so an attempt to restrict judicial review of statutory power, when that statutory power does not comply with the constitution, is constitutionally invalid.

The fact that the *Charter* has modified the judiciary's "appreciation" of its own role in Canada's constitutional scheme is further demonstrated in the Supreme Court's discussion of the justiciability of "political questions" in *Reference re Canada Assistance Plan (Canada)*.¹² In the *CAP Reference*, the Supreme Court was asked to resolve a dispute between three provinces (represented by British Columbia) and the federal government

Resources), [1989] 2 S.C.R. 49 (S.C.C.) at 91.

¹⁰Moreover, it was not that the political process was the only forum which could resolve the dispute, but rather that it constituted an adequate "alternative ground" to dispose of the dispute. See discussion of "alternative grounds" in §§ 4:14, 4:16. On the "alternative grounds" approach, Dickson C.J. held on page 103, "In this case, it is reasonable to interpret s. 7(1)(b) as the Auditor General's only remedy for claimed denials of s. 13(1) entitlements not only because the text is conducive to such an interpretation but also because, in the circumstances, a political remedy of this nature is an adequate alternative remedy. The Auditor General is acting on Parliament's behalf carrying out a quintessentially parliamentary function, namely, oversight of executive spending pursuant to parliamentary appropriations. Where the exercise of this auditing function involves the Auditor General in a dispute with the Crown, this is in essence a dispute between the legislative and executive branches of the federal government. Section 7(1)(b) would seem to be the means by which Parliament itself retains control over the position it wishes to take in such a dispute."

¹¹After concluding that the Court was declining to review the executive action in the circumstances, Dickson C.J. asserted at 109-10, "I cannot over-emphasize that this is not a *Charter* case. . . . The above analysis shall not be taken to detract from the fundamental principle that the courts should not readily decline to grant remedies for rights recognized by the laws of Canada."

¹²*Reference re Canada Assistance Plan (Canada)*, (sub nom. *Reference re Canada Assistance Plan (British Columbia)*) [1981] 2 S.C.R. 525 (S.C.C.) [hereinafter *CAP Reference* (S.C.C.)].

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over the federal government's limiting of transfer payments under the former Canada Assistance Plan ("CAP").

Under CAP, each province entered into a separate agreement with the federal government pursuant to which the federal government agreed to share the cost of social assistance on a 50/50 basis. Responding to the fiscal crisis of the late 1980s, the federal government unilaterally altered the agreement between it and the three "have" provinces, placing a limit on its contribution to social welfare spending in those provinces. This resulted in a disproportionate share of the burden of funding CAP falling to those provinces. The matter was referred to the B.C. Court of Appeal, which held that the unilateral modification to the agreement with the province was invalid. This decision was appealed to the Supreme Court of Canada. In the Supreme Court, the Attorney General for Canada argued that the dispute was a political matter and should not be heard by the Court. Sopinka J. explained,

While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. See *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 90-91, and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 362. *In considering its appropriate role the court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.*¹⁹ [Emphasis added.]

Sopinka J. held that because a form of contract between the provinces and the federal government was at issue, the matter before him had the requisite "sufficient legal component" to render it justiciable. The Court proceeded to answer the questions posed in the Reference in the federal government's favour, upholding the validity of the unilateral limitation on CAP and reversing the B.C. Court of Appeal. This is discussed in further detail below in the context of the discussion of intergovernmental agreements.

¹⁹Reference re Canada Assistance Plan (Canada), (sub nom. Reference re Canada Assistance Plan (British Columbia)) [1991] 2 S.C.R. 526 (S.C.C.) at 545.

In *Finlay v. Canada (Minister of Finance)*,¹⁴ the Supreme Court further reflected on the criteria for declining to decide a matter on "political questions" grounds. The applicant, Finlay, was a welfare recipient under Manitoba's social-assistance scheme. Due to an earlier overpayment, the province deducted a percentage of his allowance over a period of time. The province operated its welfare program with substantial financial support from the federal government under CAP and the federal government used this financial leverage to encourage the provinces, through conditions attached to the grants, to develop welfare and social assistance programs according to certain standards. These conditions were imposed by statute. Finlay contended that the federal payments were illegal, since the provincial plan breached certain sections of CAP.

The case first reached the Supreme Court on the issue of standing. Le Dain J., speaking for a unanimous Court, held that Finlay met the test for discretionary public interest standing, a component of which is that the claim must raise a serious question and be justiciable. Commenting on whether the issue before it was political rather than legal, Le Dain J. held the Court should not "decline to determine it [the case] on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government".¹⁵ In the result, Finlay was granted discretionary public interest standing.

This passage from *Finlay* suggests that prudential reasoning does not have a significant part to play in the application of the "political questions" doctrine. In other words, it would appear not to be open to a court to decline to hear a matter because the political dimensions it raises could be more effectively considered by another branch of government.

Summarizing the law in this area, we are of the view that the fact that another branch of government might do a better job of reviewing a decision, or has greater insight into the basis of a decision, are not, without more, proper grounds for declining jurisdiction.¹⁶ However, the fact that another branch of government has been provided jurisdiction over the matter's

¹⁴*Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.) [hereinafter *Finlay*].

¹⁵*Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.) at 632.

¹⁶On this point, see *Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393 (B.C. S.C.) at 426: "There is no question that the process of electoral districting is first and foremost the task of Legislature; nor any

resolution (*Auditor General*), or the fact that a matter does not have a sufficient legal component (*CAP Reference* (S.C.C.)), or that the moral and political considerations of the case make it inappropriate for a court to decide (*Operation Dismantle*) all will be proper grounds for a declining to decide matters on justiciability grounds.

This line of Supreme Court case law was applied by the Alberta Court of Queen's Bench (as it then was) in *Brown v. Alberta*.¹⁷ In *Brown*, the Chairperson of the Canadian Committee for a Triple E Senate sought an order declaring that the provisions of the Canadian constitution providing for the appointment of senators by the Governor General-in-Council are contrary to democratic principles, and that to conform with the principles of democracy in Alberta, senators must be selected in a manner consistent with the processes of the *Alberta Senatorial Selection Act*. Brown argued that the Senate is a major constitutional issue in Canada, and that this matter consequently deserved judicial pronouncement. After reviewing the cases discussed above, Paperny J. (as she then was) concluded:

That the court has no role in the issue as framed should have no bearing on the current debate on Senate selection and reform. Informed, open and vigorous debate is vital to a democratic society. However, the same democratic principles that encourage and protect debate also demand that a court remain uninvolved unless proper legal issues are placed before it.¹⁸

The scope of what is "purely political" was at issue in the set of

question that the balancing of the disparate interests and considerations involved in a process that affects the root of one of our most basic political institutions renders it a task best undertaken by our elected representatives. However, the mere fact that the Legislature is better suited to weigh the myriad factors involved in electoral apportionment, does not remove from this Court the ultimate responsibility of weighing the product of the exercise of the Legislature's discretion against the rights and freedoms enshrined in the Charter and from examining the justification for any infringement that the courts are required to undertake under s. 1. This is not merely a question of the separation of powers and the authority of the Legislature to act: the right to vote is entrenched in our Constitution and is of such importance that it is above the override powers in *Charter* s. 33. If in giving substance to this right to vote, the Court interprets s. 3 as granting to citizens the right to a certain degree of proportionate representation, then Legislative efforts must be measured against this standard and if they fall short, be declared unconstitutional.¹⁹

¹⁷*Brown v. Alberta*, 1998 ABQB 665, (sub nom. *Brown v. Canada* (Attorney General)) 225 A.R. 333 (Alta. Q.B.), affirmed 1999 ABCA 256, (sub nom. *Brown v. Canada* (Attorney General)) 244 A.R. 86 (Alta. C.A.) [hereinafter *Brown*].

¹⁸*Brown v. Alberta*, 1998 ABQB 665, (sub nom. *Brown v. Canada*

constitutional challenges brought by Quebec lawyer Guy Bertrand, discussed in Chapter 4 (§§ 4:1 et seq.) in the context of ripeness. This saga illustrated how the substantive legal (or non-legal) nature of the issues raised remains relevant even when considering the "procedural" elements of justiciability.

The relationship between the democratic principle and the scope of judicial review was revisited by the Supreme Court in the *Reference re Secession of Quebec*, also discussed in Chapter 4 (§§ 4:1 et seq.).¹⁹ In that case, the federal government had referred three questions for consideration by the Court regarding the possibility of Quebec seceding from Canada.²⁰ The Government of Quebec declined to participate in the reference and the Supreme Court appointed an *amicus curiae* to present arguments on Quebec's behalf. The *amicus curiae* argued, inter alia, that the reference questions were not justiciable as they raised political questions that could only be resolved through political processes (i.e. a referendum in Quebec on the question of secession followed, if successful, by negotiations with the rest of Canada to form a new partnership).

The Court referred to its earlier remarks in the *CAP Reference* and concluded that there existed two circumstances where the Court could decline to intervene based on the political nature of the questions referred:

- (1) if to do so would take the Court beyond its own assess-

(Attorney General)) 225 A.R. 338 (Alta. Q.B.), affirmed 1999 ABCA 256, *cert. nom.* Brown v. Canada (Attorney General)) 244 A.R. 86 (Alta. C.A.) at para. 48. See also *Amoco Canada Petroleum Co. v. Propant Systems Ltd.*, 2001 ABCA 110, 91 Alta. L.R. (3d) 13 (Alta. C.A.) at para. 46, leave to appeal refused 2002 CarswellAlta 522 (S.C.C.).

¹⁹*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.) (hereinafter the *Secession Reference*).

²⁰The federal government referred three questions to the Supreme Court on September 30, 1996. These questions were: Question 1: Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? Question 2: Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? Question 3: In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada? See Order in Council P.C. 1996-1497.

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ment of its proper role in the constitutional framework or our democratic form of government; or

- (2) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.²¹

The Court proceeded to articulate something approaching a political questions test: (1) First, the Court is to determine if there is a legal question posed, if not, the matter should be dismissed; (2) If there is a legal question, the Court must then consider whether that legal question has a significant extralegal component. If not, the question should be answered. (3) If the question does have a significant extralegal component, and the Court can answer the question narrowly, severing the extralegal aspects of the question, then it should answer the question; however, if the extralegal component cannot be severed, then the Court should decline to answer the question.²² This last category of cases where a question that raises a legal issue is inextricably bound up with extralegal components is new to Canadian law. It addresses the large middle ground between matters which are purely political on the one hand, and matters which raise a sufficiently legal question on the other. It provides a means of dealing with, what the Court had earlier referred to in the context of the *Manitoba Language Rights Reference*, a matter which "combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity."²³

In the *Secession Reference*, the Court applied this test and determined that, while the questions posed by the federal government raised significant extralegal issues, these could be, in the Court's view, severed from the legal issues. The Court elaborated,

As to the "proper role" of the Court, it is important to underline, contrary to the submission of the *amicus curiae*, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the U.S. "political questions" doctrine

²¹*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.) at para. 26.

²²*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.) at paras. 26-28.

²³*Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (S.C.C.) at 728, cited in the *Secession Reference*, at para. 1.

therefore has no application. The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. . . . As to the legal nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference, the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.²⁴

In this way, the Court determined that adherence to the Constitutional principle of democracy required a "clear majority" on a "clear question" in order to establish the people of Quebec's democratic will on the issue of secession. However, the precise extent of the majority and the precise nature of the question were political questions which could only be resolved through the political process. Similarly, once the democratic will of the people of Quebec were established in compliance with the legal framework outlined, the rest of Canada would have a legal obligation to negotiate the terms of secession with the government of Quebec. However, the nature and outcome of such negotiations are political matters left to political actors to resolve. With respect to these issues, the Court emphasized.

The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so.²⁵

This attempt to distinguish between the legal and political aspects of questions is fraught with difficulty. How the clarity of a referendum question could be ascertained, for example, without assessing the content of that question is hard to imagine. This is problematic from the perspective of the rule of law—despite the fact that the Court cited the rule of law as an

²⁴*Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (S.C.C.) at paras. 27-28.

²⁵*Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (S.C.C.) at para. 100.

unwritten constitutional principle in its decision.²⁶ The rule of law has many characteristics but one of them is reasonable legal predictability, or, as the Court noted in the *Patriation Reference*, "a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority".²⁷ Such certainty seems to be lacking from the framework the Court laid down in the *Secession Reference*.

In other words, these distinctions do not make sense from the standpoint of legality; they do, however, have logic when viewed from the standpoint of politics. The Court had been thrust in the heart of a complex and sensitive political imbroglio. Their decision offered all sides something important, while leaving the crucial issues to be decided through political negotiation. This decision appears rooted in precisely the sort of prudential aspects believed to underpin the American doctrine of political questions, which the Court had foresworn against in *Operation Dismantle*. Such prudential or pragmatic considerations may have an element of inevitability when essentially political disputes which nonetheless have an important legal component are brought before the Court, especially in the context of a reference. We do not dispute that there is a difference between the realm of law and the realm of politics. But there is going to be overlap in certain cases. At times—and the *Secession Reference* was a clear example—there is going to be significant overlap. This was particularly illustrated notably through positing a fiction that certain matters are inherently legal (i.e. the clarity of a referendum question) while other matters are inherently political (i.e. the content of a referendum question). The uncertainty that followed the *Secession Reference*, though understandable, served neither the development of the law of justiciability nor the integrity of the Court.

These decisions seemed to open the door to significantly broader judicial intervention in the political process. If a dispute can be couched in terms of constitutional law, or "legality" more broadly, Canadian courts will be loath to decline to

²⁶ *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (S.C.C.) at paras. 70-78.

²⁷ *Reference re Amendment to the Constitution of Canada*, (sub nom. Resolution to amend the Constitution, Re) [1981] 1 S.C.R. 753 (S.C.C.) at 805-806. See also Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 210-29, discussed in Hamish Stewart, "The Role of Reasonableness in Self-Defence" (2003) 16 Can J.L. & Juris. 317 at 333-334. See also Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) [16th impression, 1962].

adjudicate, even if extra-legal matters (i.e. political questions) are raised in the process. Does this render illusory the protection of the political process from judicial interference? This question will be addressed in the following sections.

D. PREROGATIVE POWERS AND ORDERS-IN-COUNCIL

§ 6:7 Generally

While, as noted above, the trend in justiciability jurisprudence has moved away from a concern with the source of executive authority and instead focuses on the subject-matter of that authority, the two issues are not always easily distinguished. Prerogative powers consist of those powers afforded to the Crown (and, by extension, the executive branch of government) by the common law.¹ Executive action relating to foreign affairs is cited as a classic example of a prerogative power. The concerns which must factor into such decisions are not amenable to either the rules of evidence or the adversarial process, including ideological preference, geopolitical strategy and safeguarding the public interests from internal and external threats.² This power would appear to meet the threshold of a "political question" unsuitable for judicial determina-

[Section 6:7]

¹See P. Hogg, *Constitutional Law of Canada*, 6th ed. (Looseleaf Edition - 2010) (Toronto: Carswell, 2007), at 1.9.

²Another category of government action which is typically immune from judicial review is that taken in response to a national emergency. As Lambert J.A. asserted in concurring reasons in the British Columbia Court of Appeal's decision in *Reference re Canada Assistance Plan (Canada)* (1990), (*sub nom.* *Reference re Canada Assistance Plan*) 71 D.L.R. (4th) 99 (B.C. C.A.) at 120 [hereinafter *Cap Reference* (B.C. C.A.)], reversed 1991 CarswellBC 188 (S.C.C.). "For the reasons given by Chief Justice Dixon of the High Court of Australia in *South Australia v. Australia*, as I have set them out under the heading in these reasons, "The Nature of a Federal Provincial Agreement", it is my opinion that questions arising from any assertion by Canada that a national emergency required the enactment of certain legislation might be essentially non-justiciable. Such questions might be wholly political and, as such, they might be susceptible only to political remedies. This assertion was not addressed in the Supreme Court's reasons in this case (reversing the Court of Appeal). It does, however, enjoy support in earlier decisions on actions of the Canadian government during wartime. See, for example, *Co-operative Committee on Japanese Canadians v. Canada (Attorney General)*, [1947] 1 D.L.R. 577, [1947] A.C. 87 (P.C.). akin to questions of national emergency are those of public safety. One such question was touched upon in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 103, [2012] 4 F.C.R. 538 (F.C.A.), affirmed 2013 SCC 36 (S.C.C.), which dealt with the question of whether a decision by the

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in our view, the rule of law requires that a court issue declaratory relief, at the very least.

A similar challenge arises in questions around the justiciability of advice from a Premier or Prime Minister on the dissolution of a legislature or Parliament. This context was considered in *Democracy Watch v. British Columbia (Lieutenant Governor)*,²⁶ The British Columbia Court of Appeal heard an appeal from a Chambers judge ruling that the Premier's advice to the Lieutenant Governor to dissolve the legislature was not justiciable. In affirming that ruling, Fisher J.A., writing for the Court, stated, "The chambers judge described 'a political question' as one that raises issues that are 'multi-faceted, require controversial and open-ended consideration of the public interest, and do not engage the application of legal rules or principles': at para. 66. His reasons make it quite clear that he considered the question of the Premier's advice on dissolution to be purely political in nature. I see no error in his finding."²⁷ The justiciability of dissolution and prerogation is discussed in more detail in Chapter 7 (§§ 7:1 et seq.), but as to whether a Premier's advice can be considered "purely political" it is not difficult to imagine circumstances where the rule of law could be implicated in such advice. Here, as in *Black*, a contextual rather than categorical analysis would seem preferable.

E. CHALLENGES TO THE WISDOM OF GOVERNMENT ACTION

§ 6:8 Generally

The requirement that a claim raise a legal rather than political dispute arises from the long-standing common law and constitutional prohibition on courts adjudicating the wisdom or desirability of government action.

This principle flows from the doctrine of Parliamentary sovereignty. It was succinctly set out by Dickson J. (as he then was) in *Amax Potash Ltd. v. Saskatchewan*:¹ "The Courts will not question the wisdom of enactments . . . but it is the high duty of this Court to insure that the Legislatures do not

²⁶*Democracy Watch v. British Columbia (Lieutenant Governor)*, 2023 BCCA 404, [2023] H.C.J. No. 2125.

²⁷*Democracy Watch v. British Columbia (Lieutenant Governor)*, 2023 BCCA 404, [2023] H.C.J. No. 2125 at para. 79.

[Section 6:8]

¹*Amax Potash Ltd. v. Saskatchewan* (1976), [1977] 2 S.C.R. 576 (S.C.) at 590.

transgress the limits of their constitutional mandate and engage in the illegal exercise of power."² A similar point was made in *Operation Dismantle*, where Wilson J. confirmed that, while cabinet decisions could be reviewed under the *Charter of Rights*, the wisdom of a government's legislative and policy choices could not be made the subject of a legal claim.³ In *CAP Reference* (S.C.C.), Sopinka J. stated this position in broader terms: "if a statute is neither ultra vires nor contrary to the Canadian *Charter of Rights and Freedoms*, the courts have no jurisdiction to supervise the exercise of legislative power."⁴

The rationale for this judicial restraint is two-fold. First, as a nondemocratic (some would say anti-democratic) institution, courts do not have the resources or expertise to competently establish what policy or law best advances the public interest. Second, the legitimacy of judicial decision-making is more difficult to sustain where it appears that a judge is substituting her preferences for those of the legislative or executive branches. This latter point was conveyed by Sopinka J. in the context of section 7 of the *Charter* in *Rodriguez v. British Columbia (Attorney General)*:⁵

[T]he court must be conscious of its proper role in the constitutional makeup of our form of democratic government and not seek to make fundamental changes to long-standing policy on the basis of general constitutional principles and its own view of the wisdom of legislation. On the other hand, the court has not only

²This passage was cited in *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.) at 496-497 per Lauder J. (as he then was). In assessing whether the entrenchment of the *Charter* altered this doctrine, Lauder J. stated at 496, "In neither case, be it before or after the *Charter*, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments. In both instances, however, the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution."

³*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at 472.

⁴See *Reference re Canada Assistance Plan (Canada)*, (sub nom. *Reference re Canada Assistance Plan (British Columbia)*) [1991] 2 S.C.R. 525 (S.C.C.) at 567. See also *Turner v. Canada* (1992), 93 D.L.R. (4th) 628 (Fed. C.A.), leave to appeal refused (1993), 148 N.R. 238 (note) (S.C.C.), in which an action was brought alleging that several Ministers induced Parliament to enact legislation which retroactively deprived an accused of a defence in another action. The Supreme Court held that this was not a justiciable claim, as Turner was attacking Parliamentary sovereignty, not the validity of the legislation. The court emphasized that Parliamentary sovereignty was not open to judicial review.

⁵*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.).

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the power but the duty to deal with this question if it appears that the *Charter* has been violated The principles of fundamental justice leave a great deal of scope for personal judgment and the court must be careful that they do not become principles which are of fundamental justice in the eye of the beholder only.⁶

Underlying this rationale lies the separation of powers among the branches of Canadian government. According to that doctrine, the judiciary is responsible for ensuring the validity of government action, while the legislative and executive branches have responsibility for the wisdom of government laws and policies. Where the judgment of the legislative or executive branch is called into question, it falls to the electorate and the democratic process to resolve such disputes (at least once every 5 years, according to the Constitution).

The distinction between the wisdom and validity of government action can be a fine line in some cases. This is exemplified by *Dixon v. Canada (Somalia Inquiry Commission)*.⁷ In *Somalia Inquiry*, the decision by the federal cabinet to close down an Inquiry into the Canadian army's conduct in Somalia was challenged on administrative law grounds by a former military officer who was not given the opportunity to testify (and thereby clear his reputation). The Federal Court trial judge reviewed the Order in Council terminating the Inquiry and held it was *ultra vires* on three grounds: 1) it did not comply with section 31(4) of the *Interpretation Act* which requires an order in council which reduces the Mandate in clear terms; 2) it violated the rule of law by requiring the impossible of the Commissioners and by placing them in a position where they cannot obey the law; and 3) it breached the rule of law by not respecting the Commissioners' independence. They were entitled to determine how to investigate their Mandate and when their investigation was sufficient to support findings in their report. Russell J. approached the dispute as a legal one involving the rule of law and the independence of an investigative tribunal.

On appeal, the Federal Court of Appeal reversed this

⁶*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.) at 589-590.

⁷*Dixon v. Canada (Somalia Inquiry Commission)* (1997), (sub nom. *Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*) 149 D.L.R. (4th) 269 (Fed. C.A.), leave to appeal refused (1998), (sub nom. *Dixon v. Commission of Inquiry into the Deployment of Canadian Forces to Somalia*) 226 N.R. 400 (S.C.C.) [hereinafter *Somalia Inquiry*].

decision. The Court of Appeal held that the terms of reference of a public inquiry, as well as the scope of the commissioners' responsibilities, were political matters. Marceau J.A. held,

It may well be that the refusal of the Governor in Council to extend the life of the Commission for the entire period requested by the Commissioners was motivated by political expediency, but that is simply not the business of the Court. It is a well-established principle of law and a fundamental tenet of our system of government, in which Parliament and not the Judiciary is supreme, that the courts have no power to review the policy considerations which motivate Cabinet decisions. Absent a jurisdictional error or a challenge under the Canadian Charter of Rights and Freedoms, where Cabinet acts pursuant to a valid delegation of authority from Parliament, it is accountable only to Parliament and, through Parliament, to the Canadian public, for its decisions.⁸

The Federal Court of Appeal further held that once the trial judge had satisfied herself that the decision was rendered in accordance with the relevant legislation (i.e. the inquiry was set up pursuant to the relevant sections of the Inquiries Act), the application for judicial review should have been dismissed "on the basis that there were no other justiciable issues raised." Marceau J.A. emphasized,

... the policy considerations which motivated the Governor in Council's decision to put an end to the life of the Somalia Inquiry by June 30, 1997 may have been debatable or perhaps even suspect. But, it is a debate that a court of law, properly confined to its adjudicative role, ought not to have considered.⁹

Courts must reiterate this point often because they remain the recourse of last resort for groups which have unsuccessfully challenged the wisdom of government in other fora. For example, in *East York (Borough) v. Ontario (Attorney General)*,¹⁰ a coalition of citizen groups and municipal governments challenged under both the *Charter* and the *Constitution Act*,

⁸*Dixon v. Canada (Somalia Inquiry Commission)* (1997), (sub nom. *Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*) 149 D.L.R. (4th) 268 (Fed. C.A.) at 279-280, leave to appeal refused (1998), (sub nom. *Dixon v. Commission of Inquiry into the Deployment of Canadian Forces to Somalia*) 226 N.R. 400 (S.C.C.).

⁹*Dixon v. Canada (Somalia Inquiry Commission)* (1997), (sub nom. *Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*) 149 D.L.R. (4th) 268 (Fed. C.A.) at 281, leave to appeal refused (1998), (sub nom. *Dixon v. Commission of Inquiry into the Deployment of Canadian Forces to Somalia*) 226 N.R. 400 (S.C.C.).

¹⁰*East York (Borough) v. Ontario (Attorney General)* (1997), 34 O.R. (2d)

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1867 the province's unilateral decision to amalgamate various municipalities into a "megacity" of Toronto. Borins J. (as he then was) dismissed the claim, holding:

It is not the role of the Court to pass on the wisdom of legislation. Specifically, it is not for the court to determine whether the megacity will be good, or bad, for the inhabitants of Metro Toronto. In considering the constitutionality of legislation, the question is not that of policy, reasonableness or expediency, but of legal competence.

In recent years, Courts have continued to express particular unease when confronted with challenges to decision of government that reflect clear policy preferences, particularly around public spending. For example, in *Canadian Bar Assn. v. British Columbia*,¹² where the Canadian Bar Association (CBA) sought to establish a constitutional right to legal aid in civil justice settings (also discussed in Chapter 3 (§§ 3.1 et seq.) on standing), Chief Justice Brennan held:

In the case at bar, there is no challenge to a specific governmental decision, act, or statute. The case cannot be characterized as raising an issue with respect to the limits of statutory, administrative, or executive authority. The challenge is to the funding, content, administration, operation, and effect of an entire public program that invokes various federal and provincial statutes, ministries, agencies, and non-governmental entities and actors. . . . What the plaintiff effectively seeks in the case at bar is to have the court conduct an inquiry on the subject of civil legal aid, define a constitutionally compliant civil legal aid scheme, order the defendants to implement such a scheme, and oversee the process to ensure compliance.¹³

789 (Ont. Gen. Div.), affirmed (1997), (sub nom. *East York (Borough) v. Ontario*) 36 O.R. (3d) 733 (Ont. C.A.), leave to appeal refused [1998] 1 S.C.R. vii (S.C.C.).

¹²*East York (Borough) v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 789 (Ont. Gen. Div.) at 797, affirmed (1997), (sub nom. *East York (Borough) v. Ontario*) 36 O.R. (3d) 733 (Ont. C.A.), leave to appeal refused [1998] 1 S.C.R. vii (S.C.C.). See also *Hogan v. Newfoundland (Attorney General)* (1998), 156 D.L.R. (4th) 139 (Nfld. T.D.) at 144.

¹³*Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, [2007] 1 W.W.R. 331 (B.C. S.C.), additional reasons 2007 BCSC 182, [2007] 5 W.W.R. 381 (B.C. S.C. [In Chambers]), affirmed 2008 BCCA 82, [2008] 5 W.W.R. 952 (B.C. C.A.), leave to appeal refused (2008), 390 N.R. 331 (note) (S.C.C.). For commentary, see Lorne Sossin, "The Unfinished Project of *Stancovski v. Duplessis*: Justiciability, Discretion, and the Limits of the Rule of Law" (2010) 35 McGill L.J. 661 at 670-686.

¹⁴*Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, [2007] 1

Similarly, in the recent *Deskin v. Ontario*,¹⁴ Backhouse J., for the Ontario Divisional Court, considered a challenge to a decision of the Ontario government to end funding for programs that taught skills to severely autistic young adults. She held that, apart from *Charter* claims, the issues raised were non-justiciable. Nothing in any governing legislation obliged the government to continue funding the programs. Accordingly, “[a]bsent bad faith or an improper purpose, the funding decisions of the government are ‘political’ (i.e., policy-based and discretionary), not judicial or ‘quasi-judicial’, and do not attract judicial review”.¹⁵ She cited significant case law noting that the government is not obliged to continue funding programs—even if they affect a small number of people who rely on them—as doing so is quintessentially political.¹⁶ Such decisions are ultimately “purely political”¹⁷ or “policy”¹⁸ decisions that do not attract judicial review, except for *Charter* compliance. Funding decisions which are taken pursuant to statutory or regulatory authority, however, typically will be justiciable, particularly if

W.W.R. 331 (B.C. S.C.), additional reasons 2007 BCSC 182, [2007] 5 W.W.R. 331 (B.C. S.C. [In Chambers]), affirmed 2008 BCCA 92, [2008] 6 W.W.R. 262 (B.C. C.A.), leave to appeal refused (2008), 390 N.R. 381 (note) (S.C.C.) at paras. 47, 49. See also *MacLaren v. British Columbia (Attorney General)*, 2018 BCSC 1753, [2018] B.C.J. No. 3387 (B.C. S.C.) at paras. 32-40, reversed on other grounds *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241, 41 B.C.L.R. (6th) 47 (B.C. C.A.), varied *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27, 470 D.L.R. (4th) 289 (S.C.C.).

¹⁴*Deskin v. Ontario*, 2023 ONSC 5584, [2023] O.J. No. 4401 (Ont. Div. Ct.) [hereinafter *Deskin*].

¹⁵*Deskin v. Ontario*, 2023 ONSC 5584, [2023] O.J. No. 4401 (Ont. Div. Ct.) at para. 59.

¹⁶*Deskin v. Ontario*, 2023 ONSC 5584, [2023] O.J. No. 4401 (Ont. Div. Ct.) at paras. 62-77, citing, e.g., *Wise Elephant Family Health Team v. Ontario (Minister of Health)*, 2021 ONSC 3350, [2021] O.J. No. 3154 (Ont. Div. Ct.); *Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation)* (1991), 2 O.R. (3d) 716 (Ont. Div. Ct.), leave to appeal refused 1991 CarswellOnt 3368 (Ont. C.A.); *Bowman et al. v. Her Majesty the Queen*, 2019 ONSC 1064, [2019] O.J. No. 746 (Ont. Div. Ct.); *Children's Aid Society of Huron-Perth v. Ontario (Ministry of Children and Youth Services)*, 2012 ONSC 5388, 298 O.A.C. 342 (Ont. Div. Ct.); *Shah v. Ontario*, [2000] O.T.C. 600, [2000] O.J. No. 2840 (Ont. S.C.J.); *Kuki v. Ontario (Ministry of Training, Colleges, and Universities)*, 2013 ONSC 5574, [2013] O.J. No. 3956 (Ont. S.C.J.); *Metropolitan General Hospital v. Ontario (Minister of Health)* (1979), 25 O.R. (2d) 699 (Ont. H.C.).

¹⁷*Deskin v. Ontario*, 2023 ONSC 5584, [2023] O.J. No. 4401 (Ont. Div. Ct.) at para. 76.

¹⁸*Deskin v. Ontario*, 2023 ONSC 5584, [2023] O.J. No. 4401 (Ont. Div. Ct.) at para. 78.

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the argument is that a statutory or regulatory discretion was exercised arbitrarily or for improper purposes.¹⁰

While "policy, reasonableness or expediency" would appear beyond the purview of the courts, there remain settings where courts are permitted, even required, to adjudicate upon the merits of government action. Indeed, in *Deskin*, Backhouse J. held that she was obliged to review government action for *Charter* compliance, even though she held that the government did indeed comply with the *Charter*. And the most prominent setting where courts need to review the merits of government action is section 1 of the *Charter*.

§ 6:9 "Second Guessing" Government Decisions under section 1 of the *Charter*

Deference to the democratic process poses special problems in the context of section 1 of the *Charter*. This section would appear to require the judiciary to adjudicate the very questions typically bound up in the "wisdom" of legislation. Section 1 provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out herein subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Wilson J. asserted in *Operation Dismantle* that section 1 provides sufficient discretion to the Court to take the place of a more formal "political questions" doctrine:

Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review.¹

Central to the section 1 analysis is a decision as to the

¹⁰See *Teala Motors Canada ULC v. Ontario (Ministry of Transportation)*, 2018 ONSC 5062, 144 O.R. (3d) 701 (Ont. S.C.J.) at para. 36.

[Section 6:9]

¹*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at 518. In *Auditor General, Dickson C.J.* clarified that this approach to justiciability is limited to *Charter* adjudication (*Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.) at 91).

purpose of the impugned legislation and the importance of this purpose. This follows the application of the *Oakes* test, which provides that a limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. By its nature, this invites the courts to opine upon the appropriateness of policy decisions even if, practically, the courts almost always accept the purposes as pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied relating to the "proportionality" of the rights limitation vis-à-vis the governmental purpose: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all section 1 cases, the burden of proof lies with the government to show on a balance of probabilities that the violation is justifiable.

Determining the importance of a law's objective perhaps is not identical to adjudicating the wisdom of legislation, but it inherently involves the court judging the "political" means that the government has employed. However, this is not to say the judges are asked or authorized to supplant their views for those of the government. This distinction is articulated by Barry Strayer (as he then was) in the following terms:

Such is the role now assigned to the Courts by the *Charter*. But it is an oversimplification to equate these decisions with political decisions taken by the legislature. The Courts in exercising their power under s.1 are not free to impose their views on the whole range of state activity as to what objectives are important and what means suitable for their achievement.²

For example, consider the Supreme Court's reasoning on section 1 in the context of two freedom of expression cases dealing with "hate speech," *R. v. Keegstra*,³ and *R. v. Zundel*.⁴ In *Keegstra*, the Court considered a challenge to section 319 of the *Criminal Code*, which created the offence of "hate speech." The

²Barry Strayer, *The Canadian Constitution and the Courts: the function and scope of judicial review*, 2nd ed. (Toronto: Butterworths, 1983), 234.

³*R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.) [hereinafter *Keegstra*].

⁴*R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.) [hereinafter *Zundel*].

Court easily found that the measure infringed the freedom of expression under section 2(b) of the *Charter*. The Court divided 4-3 on the application of s.1 to the law in question. The majority upheld it as a reasonable limit, emphasizing the importance of the goal of promoting ethnic and racial harmony. The majority held that the objective of the legislation was of "enormous importance and of such magnitude as to justify the severe response of criminal prohibition."

In *Zundel*, the Court considered the constitutionality of section 181 of the *Criminal Code* which established an offence for uttering falsehoods. After finding that the provision violated section 2(b) of the *Charter*, the Court turned to the analysis under section 1. The majority of the Court concluded that the purpose of this law, which dated back several centuries, was to protect the reputation of "great men of the realm" and that this objective was not "pressing and substantial" within the terms of the *Oakes* test. In other words, the objective of the law was not worth overriding a *Charter* right to promote or preserve.

Determining whether a law is or is not worth overriding a *Charter* right calls upon the Court to consider many of the elements that are constitutive of the "wisdom" of legislation - these are variations on a single theme: does the law further the public interest in a reasonable fashion?⁶ Here, courts are caught on the horns of a dilemma. They must at once defer to and supervise political decision-making.⁷ In *Vriend v. Alberta*,⁸ Iacobucci J. attempted to distinguish between the judicial and legislative functions under section 1 in the following terms:

In any event, although this Court has recognized that the Legislatures ought to be accorded some leeway when making choices between competing social concerns (see e.g. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Egan*, supra, per Sopinka J.), judicial deference is not without limits. In

⁶For further discussion of this point, see P. Hogg, *Constitutional Law of Canada*, 5th ed. (loose-leaf Edition + 2010) (Toronto: Carswell, 2007), at 12-6.

⁷Eric Colvin has written on the source of this dilemma. He argues, "Any claims which the judiciary can make to an 'inherent domain' must be claims about means rather than ends. The judiciary should have some special expertise in matters of institutional process. The judiciary may also have certain limited powers to review governmental decisions of social policy. There is, however, no constitutional basis within the Western democratic tradition for the judiciary to claim any area of substantive policymaking as its exclusive preserve." Section 7 and the Canadian *Charter of Rights and Freedoms* (1989) 68 Can. Bar Rev. 565 at 575.

⁸*Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.).

Eldridge, supra, La Forest J. quoted with approval from his reasons in *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 44, wherein he stated that "the deference that will be accorded to the government when legislating in these matters does not give them an unrestricted licence to disregard an individual's *Charter* rights". This position was echoed by McLachlin J. in *RJR Macdonald*, supra, at para. 136:

... care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution is difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.⁸

The line between government's "subjective" choices about policy and the judiciary's "objective" determinations regarding law may be too simplistic, however. Both branches of government clearly make important judgments regarding the wisdom of government action. The difference is that the legislative branch justifies its intervention by recourse to its democratic mandate while the judicial branch justifies its intervention by recourse to constitutional principles and legal rules. Wilson J. recognized this distinction in *Operation Dismantle*:

[b]ecause the effect of the appellant's action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellant's rights under s. 7 of the Canadian *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts.⁹

How then should we interpret Wilson J.'s reference in *Operation Dismantle*, in obiter, to section 1 of the *Charter* being the

⁸*Friend v. Alberta*, [1993] 1 S.C.R. 493 (S.C.C.) at 561.

⁹*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at 472.

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appropriate juncture at which to consider issues of justiciability? This is a puzzling statement, and one which the Court has not commented on since in any detail. Wilson J. appears to have viewed justiciability not in the jurisdictional sense (as section 1 may only be reached if a *Charter* violation is found, which necessarily implies that the Court has already deemed the matter within its jurisdiction), but in the sense of shaping the proper approach to judicial review. In other words, section 1 represented for Wilson J. an appropriate venue for analyzing the relationship between the judiciary and the political process.

In *Newfoundland (Treasury Board) v. N.A.P.E.*,¹⁰ the Supreme Court re-affirmed the notion that section 1 of the *Charter* is an appropriate forum in which to 'second-guess' governmental actions, even in the area of governmental budgetary choices, an area that could readily be considered as policy-based and 'political' as any. In addressing the issue of whether the Court was appropriately equipped to resolve a question under section 1 pertaining to budgetary policy, Binnie J. was decisive in his views, even when ultimately deferring to the government on the merits of the s. 1 analysis:

A few preliminary points should be emphasized. Marshall J.A. noted that the s. 1 case is essentially about budgets and that the making of a budget is a quintessentially political activity. However, these facts do not immunize the budget choices from *Charter* review. The notion that there are inherently "political" questions beyond the courts' jurisdiction was emphatically rejected in *Operation Dismantle Inc. v. The Queen*.

If an individual's *Charter* right or freedom is violated by the state, it is no answer to say the violation was driven or is justified for political reasons. Indeed forms of state discrimination that are undertaken for political reasons are among the most odious, as the recent history of parts of the world from South Africa to the Balkans can attest.¹¹

A similar issue arose in Ontario in relation to a controversial bill which imposed wage controls on certain public servants. In *Ontario English Catholic Teachers Assoc. v. His Majesty*,¹² the Court found the legislation, which overruled the collective

¹⁰*Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381 (S.C.C.).

¹¹*Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381 (S.C.C.) at paras. 80-81 [references omitted].

¹²*Ontario English Catholic Teachers Assoc. v. His Majesty*, 2022 ONSC 6653, (sub nom. *Ontario English Catholic Teachers Assn. v. Ontario (President of the Treasury Board)*) 165 O.R. (3d) 1 (Ont. S.C.J.) [hereinafter *Catholic Teachers*].

bargaining process, violated the applicants' s.2(d) freedom of association and collective bargaining rights. Koehnen J. turned to the s.1 analysis. With respect to whether Ontario had a pressing and substantial objective in imposing the wage restraint, Koehnen J. found the evidence did not support the existence of a fiscal crisis (as was present in *N.A.P.E.*) or urgent need for restraint, and noted in this regard, other policies pursued by the same government which deprived it of significant revenues (such as cancelling a license plate fee). While referencing the caution with respect to deference to policy choices in *Vriend* and *N.A.P.E.*, he held that deference must be to evidence-based policy decisions, and not mere "assertions":

Those explanations are critical for four reasons. First, because courts conduct the s. 1 inquiry in the context of a commitment to uphold *Charter* rights. Second, because s. 1 requires that any limitations on *Charter* rights be reasonable. That is to say it must be rationally explained, not merely asserted. Third, because s. 1 requires that any limitations on *Charter* rights be "demonstrably" justified. This requires governments to demonstrate why the infringement is necessary. *Charter* rights should not be violated simply because a government find it more convenient to pursue a particular policy by breaching *Charter* rights rather than complying with them. Fourth, the beneficiaries of *Charter* rights are often politically vulnerable or unpopular. There are segments of the public that are hostile to unions and feel that their power should be reduced. That could provide a political motivation to do just that. Without requiring governments to explain with some degree of cogency why *Charter* rights must be infringed, it is too easy for governments to breach the *Charter* rights of the vulnerable or the politically unpopular under the guise of fiscal prudence.

The business of government ought ordinarily to be pursued within the confines of the *Charter*. Breaching a *Charter* right should require something more than a simple preference to proceed in a particular way for political convenience. It should require some level of explanation for why it is necessary to breach the *Charter* right. If governments act in a manner that is inconsistent with their explanation for why a *Charter* breach is needed, they should at least be required to explain the inconsistency. If no explanation is required, governments are free at any time to breach *Charter* rights on economic grounds. Requiring these explanations does not have judges acting as finance ministers. It has finance ministers acting in compliance with constitutional requirements. *Judicial deference is owed to cogent explanations*

that justify Charter infringements. Deference is not owed to simple assertions.¹³ [Emphasis added]

On this basis, Koehnen J. found Ontario had not met its burden under s.1, and struck down the legislation. *Catholic Teachers* also reveals a procedural alternative to judicial commentary on the merits of legislative choices – requiring evidence-based justification beyond the mere assertion of a policy preference.¹⁴ This seems the consequence of s. 1 requiring that, for limits on Charter rights to be upheld as reasonable, they be “demonstrably” justified. At the same time, many justifications for Charter rights are of a more philosophical nature, such as preserving egalitarian ideals in the healthcare system¹⁵ or seeking to live in a society with racial and ethnic harmony, as discussed in *Keegstra*.¹⁶

Even considering this issue of deference, however, s. 1 analysis invites the courts to, at least to some extent, evaluate the “wisdom” of legislative policy choices. Does the fact that section 1 invites this sort of analysis obviate the need for a political questions doctrine in Canada? Here, Wilson J.’s judgment in *Operation Dismantle* appeared to conflate two related but distinct judicial functions: the first is the exclusion of certain

¹³*Ontario English Catholic Teachers Assoc. v. His Majesty*, 2022 ONSC 6658, (sub nom. *Ontario English Catholic Teachers Assn. v. Ontario (President of the Treasury Board)*) 165 O.R. (3d) 1 (Ont. S.C.J.) at paras. 292-293 [citations omitted].

¹⁴This requirement also may arise at the minimal impairment stage of the *Oakes* analysis. See, for example, *Working Families Ontario v. Ontario*, 2021 ONSC 4076, (sub nom. *Working Families Ontario v. Ontario (Attorney General)*) 155 O.R. (3d) 545 (Ont. S.C.J.), additional reasons 2021 ONSC 6178 (Ont. S.C.J.). In that case, considering legislative restrictions on third party advertising, which the Superior Court found inconsistent with s.2(b) freedom of expression rights, the Court concluded Ontario had not met its burden to demonstrate the legislation was a reasonable limitation. Morgan J. explained, “There is no justification or explanation anywhere in the Attorney General’s record as to why the doubling of the pre-election regulated period was implemented. This lack of explanation has to be taken seriously. As counsel for the Canadian Civil Liberties Association points out, the subject of electoral design is one in which the incumbent government has a structural conflict of interest in that its interest in self-preservation may dominate its policy formulation.” (para. 73)

¹⁵See, e.g., the concurring opinion of Feenon J.A. in *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2022 BCCA 245, 473 D.L.R. (4th) 1 (B.C. C.A.), leave to appeal refused *Cambie Surgeries Corporation, et al. v. Attorney General of British Columbia, et al.*, 2023 CarswellBC 909 (S.C.C.).

¹⁶*R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.).

types of political matters from judicial scrutiny as a means of defining the scope of judicial review; the second is the question of deference to legislative choices as a means of defining the scope of valid legislative or executive action.

Both types of analysis require a respect for the separation of powers in Canada, however the bifurcation of that analysis can lead to anomalous results—for example, a court could only reach the section 1 inquiry if it has already deemed the subject matter suitable for adjudication, which presupposes that it cannot be a dispute based merely on the wisdom of legislation or government action. However, the nature of the section 1 inquiry may put the wisdom of government action squarely before the Court. In other words, having arrived at s. 1, a matter is substantively justiciable. But the concerns underlying the separation of powers can be relevant during s. 1 analysis (and indeed, in determining whether *Charter* rights are even limited in the first place).

§ 6:10 Remedial Discretion

Although Canadian courts have the option of questioning the rationale behind governmental action through the section 1 analysis, it has become evident that even within this *Charter*-mandated jurisdiction, Canadian Courts are not comfortable with the perception that its policy dictums may supersede those of the elected government. In *Khadr v. Canada (Prime Minister)*,¹ for example, the Supreme Court of Canada held that, even where it finds the government to have committed a *Charter* violation, it will retain the discretion not to order a remedy that will interfere in a political sphere (in the case of *Khadr*, the Crown prerogative over foreign relations).²

Canadian citizen Omar Khadr was detained by the United States at Guantanamo Bay since he was apprehended as a minor in Afghanistan in 2002. The following year, Khadr was visited by two Canadian intelligence services, CSIS and DFAIT, who questioned Khadr about the war crimes charges laid against him and shared the product of those interviews with American authorities. In 2004, Khadr was interviewed a second time by DFAIT. This time, DFAIT conducted the interview

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¹*Khadr v. Canada (Prime Minister)*, 2010 SCC 3, (sub nom. *Canada (Prime Minister) v. Khadr*) [2010] 1 S.C.R. 44 (S.C.C.) [hereinafter *Khadr*].

²This principle had been previously introduced as well, in *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 (S.C.C.).