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FOREWORD

It is an immense honour for me to write the foreword to the first full volume of the Thompson Rivers University Law Review. It was founded in 2022 by our students, who have done an amazing job bringing it into existence and creating a place for the publication of peer-reviewed works of exceptional quality. It was an enormous task carried out with the enthusiasm and professionalism that have become the hallmarks of TRU law students.

As a published author and peer reviewer, I understand the rigour that is required when evaluating manuscripts for publication. Ours is a fast-paced world where everyone has a keyboard at their fingertips and a "publication" may be nothing more than the dumping of a few hastily jotted lines to a social media platform. To counter-balance this, the art of publishing research in an articulate manner needs to be preserved. I am therefore thrilled to see the first publication of this review.

Legal scholars play a crucial role in the development and preservation of our law and legal system. It is their job to collect, analyze, and criticize knowledge, and to share their findings and possible solutions with readers. Peer reviewers play an important role behind the scenes evaluating manuscripts for originality, relevance, and quality before they can be published. Student editors shepherd this process and carefully edit works before they reach the public. This is a grave responsibility and I applaud their commitment to excellence. While there are more popular, "bite-sized" publications (such as podcasts), traditional legal research continues to form the cornerstone of our knowledge of the law and I hope to see more

submissions of high-quality manuscripts for inclusion in future issues.

Our Faculty of Law is committed to preparing students for successful legal careers and this includes the ability to conduct high-quality legal research. I commend the founding and current editors who created and developed the TRU Law Review as a wonderful addition to the many learning opportunities at TRU Law. This is a significant contribution to TRU and the wider legal community, all of which you undertook as volunteer, extra-curricular work while also very successfully meeting the challenges of our demanding JD program. You can be very proud of what you have achieved and I am, too. May your passion for research and for the TRU Law Review live on in future generations and may this review grow in stature in years to come.

Daleen Millard

Dean and Professor of Law

LETTER FROM THE EDITORS-IN-CHIEF

This inaugural volume of the Thompson Rivers University Law Review (the "TRULR") marks a significant milestone both for our editorial board and the legal community at Thompson Rivers University ("TRU"). Since its inception in 2022, the TRULR has evolved from concept to publication, and we are honoured to have helped bring that vision to life.

The 2024-2025 editorial board is proud to present Volume 1, Issue 1 of the TRULR. This issue features scholarly contributions from current and former TRU faculty, as well as a speech by the Honourable Justice Malcolm Rowe of the Supreme Court of Canada. Together, these works exemplify the journal's dedication to fostering meaningful legal discourse within and beyond our academic community.

The TRULR gratefully acknowledges the foundational work of the editorial boards led by Pardeep Birak & Jack Hayhurst (2022–2023) and Prince Dhillon & Austin Auringer (2023–2024), whose early leadership and dedication made this volume possible.

We are sincerely grateful to the TRU Faculty of Law and administration for their guidance and belief in the TRULR's potential. To our current faculty advisors, Assistant Professor Mark Mancini and Dr. Robert Chambers, and our past advisors, Dr. Robert Diab and Dr. Colton Fehr, thank you for your steadfast support at every stage. A special thanks to Dean Daleen Millard for your enduring commitment to student success. To the authors who contributed their scholarship and the peer reviewers who volunteered their time, the TRULR extends its deepest gratitude. And to the law students at

TRU—thank you for your continued support and engagement. None of this would have been possible without the dedication, resilience, and collaborative spirit of this year's editorial board. We are confident that the TRULR's future rests in capable and committed hands.

Serving as Editors-in-Chief of the TRULR has been an honour. As we publish this inaugural volume, we reflect with pride on the foundation we've helped lay and look ahead with hope to what this law review will become. We share in our founders' vision of the TRULR as an accessible forum for legal scholarship: one that engages with pressing legal and social issues, and offers value to the judiciary, legal professionals, scholars, and students alike. We encourage future students to contribute to this growing project, and we hope that future editorial boards will look back on these early words and be inspired to carry the vision forward with purpose and pride.

With gratitude and respect,

Brittany Bouteiller & Marcus Smith

Editors-in-Chief

Thompson Rivers University Law Review, 2024-2025

KEYNOTE SPEECH

Judicial Authority, Institutional Capacity, Legitimacy

Remarks of the Honourable Justice Malcolm Rowe*

* Malcolm Rowe was appointed to the Supreme Court of Canada in 2016, having served on the Newfoundland and Labrador Court of Appeal (2001-16) and the Superior Court (1999-2001). Before this, he had been head of the provincial public service, a partner with Gowling WLG, a part-time lecturer at the University of Ottawa law faculty, a diplomat and an officer of the legislature. Michael Collins, a former law clerk to Justice Rowe, contributed to research for the lecture.

I. Five Challenges to the Proper Role of the Courts

My purpose is not to address decision-making in any given area of law. Rather, it is to consider the implications if Canada's courts take on an ever-increasing role in policy making. We need to reflect thoughtfully now so that we do not wake up years hence and ask, "How did we get here?"

II. The *Charter* and the Courts

The traditional "bumper sticker" version of the role of courts is that the legislature makes laws, the executive gives effect to those laws and courts adjudicate disputes regarding the application of those laws. Things were always more complicated than that, but it will do as a starting point.

The *Constitution Act, 1982* changed the role of courts vis-à-vis the legislature and the executive in two main respects. First, the *Charter* empowered courts to invalidate laws and governmental actions that infringed *Charter* rights. Second, s. 35(1) constitutionally protected Aboriginal and treaty rights, setting the stage for their more complete recognition by the courts. I will focus on the *Charter*. Section 35(1) is a topic for another day; it engages different principles.

Let me underline the paradigm shift between judging as adjudication versus judging as statecraft. When judges decide a dispute between parties as to the application of legal rights, judges act as adjudicators. But, when judges decide governmental type issues, they engage in statecraft. The business of conducting affairs of state differs fundamentally from the determination of a particular dispute by means of hearing evidence, finding facts, and applying settled law. Yet lawyers, jurists, and scholars tend to see adjudication

and judicial statecraft as similar, whereas they constitute two profoundly dis-similar functions.

While the *Charter* significantly expanded the courts' role, decisions from the formative period of *Charter* jurisprudence established significant limitations on this role. These limitations have endured for several decades, creating a degree of stability. But, increasingly, foundational jurisprudence is being challenged. This has profound implications. I will deal with five ways in which the foundational jurisprudence is being challenged and the possible effects.

A. "Positive" vs "Negative" Rights

The foundational jurisprudence treated *Charter* rights as largely "negative" in that they prohibit the state from interfering with individual liberties, e.g., freedom of religion or to be free from arrest without lawful authority. Two exceptions are the right to vote (s. 3) and official language education (s. 23), where state action is needed to give effect to the rights. This differs from countries where the constitutions set out "positive" rights, e.g., to public health care.

That said, giving effect to "negative" rights can lead to extensions of state activity. For example, courts have ordered that: sexual orientation be added as a protected ground in human rights legislation;[1] sign language interpreters be provided under public health insurance;[2] and employees can bargain collectively.[3] Nonetheless, the rights remain seen as "negative," which is fundamental as to their scope and to the separation of powers with the legislature and executive.

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1 *Vriend v Alberta*, 1998 CanLII 816, [1998] 1 SCR 493.

2 *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327, [1997] 3 SCR 624.

3 *Ontario (Attorney General) v Fraser*, 2011 SCC 20.

B. Unwritten Constitutional Principles

A second limitation relates to unwritten constitutional principles. Where it is unclear which institution of the state has authority to deal with a given issue, the courts have had recourse to underlying constitutional principles, as in the *Secession Reference*[4] where the Supreme Court relied on such principles to determine the circumstances in which a province could secede. In the *PEI Judges Reference*[5] the Court used underlying principles to interpret s. 96 of the *Constitution Act, 1867* to structure the legislature's authority to set judges' salaries. And, in the *Manitoba Language Rights Reference*[6] the Court relied on such principles to order that invalid provincial laws, temporarily, continue to be given effect (a suspended declaration of invalidity).

In each instance, underlying principles were used to define relationships among the institutions of the state, either to answer a question for which the text of the constitution provides no answer (as in the *Secession Reference*) or to interpret the text of the constitution (as in the *PEI Judges Reference*). In no instance have such principles been seen as a source of additional rights.[7]

C. *Charter* Rights are Distinct

A third limitation is that each *Charter* provision has been interpreted as creating a distinct right. This has several implications, including

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4 *Reference re Secession of Quebec*, 1998 CanLII 793, [1998] 2 SCR 217.

5 *Reference re Remuneration of Judges of the Provincial Court (PEI)*, 1997 CanLII 317, [1997] 3 SCR 3.

6 *Reference Re Manitoba Language Rights*, 1997 CanLII 317, [1985] 1 SCR 721.

7 See in particular *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49.

methodological. There is an analytical framework for freedom of religion under s. 2(a), another for the right to vote under s. 3, and another for equality under s. 15(1). Each *Charter* claim must be brought under a specific provision, rather than some combination of rights as occurs in American jurisprudence.[8] When more than one *Charter* right is in issue, the Court analyzes each right individually, rather than fusing two or more rights into a hybrid right with a new scope and a new analytical framework.

Not only have *Charter* rights been interpreted as distinct, but in most instances they do not overlap. For example, freedom of religion has not been recognized as a principle of fundamental justice under s. 7; all freedom of religion claims have been analyzed under s. 2(a).[9] An exception is that rights relating to the administration of criminal justice (s. 7 to s. 14) do overlap. For example, s. 7 protects a "principle against self-incrimination" that overlaps with, but is broader than, the right to silence under s. 11(d).[10]

D. International & Comparative Law

A fourth limitation relates to international law and comparative law. To recall, international law is the law between countries, while comparative law relates to law in other countries. Counsel tend to conflate the two, referring to both as international law. For example, from the perspective of Canada, decisions of the European Court of Human Rights ("ECHR") are comparative law but have been referred

8 See e.g., the American right to privacy: *Griswold v Connecticut*, 14 L Ed 2d 510, 381 US 479 (1965).

9 This issue was discussed to some extent by Rt Hon A. Lamer, concurring, in *B. (R.) v Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115, [1995] 1 SCR 315 at pp 345-347.

10 See e.g., N. R. Hasan, "Three Theories of 'Principles of Fundamental Justice'" (2013) 63:1 *Supreme Court Law Review* at pp 343-361.

to as if they were international law. Another example is the Inter-American Court of Human Rights ("IACHR") that adjudicates matters under the American Convention on Human Rights. As Canada is not a party to either the European Convention on Human Rights or the American Convention on Human Rights, the decisions of the ECHR and the IACHR, to the extent they are relevant at all to Canada, are so as comparative law, not international law.

As well, one needs to bear in mind three key points. First, when the federal Cabinet ratifies a treaty, that creates an obligation vis-à-vis other states that have also ratified the treaty, but it does not change Canadian domestic law. The division of powers between the federal and provincial governments is not affected by treaties. This has been settled law for almost a century.[11] Second, customary international law arises not from treaties, but from the conduct of sovereign states. Customary international law, to the extent that it is relevant to domestic law (which ordinarily it is not) becomes operative in Canada as part of the common law. As such, it is subject to statute law. Finally, while international law has a role in *Charter* interpretation, that role is circumscribed. For example, international law that developed after the adoption of the *Charter* has limited impact on its interpretation. [12]

E. Remedies & Judicial Discretion

A fifth limitation relates to remedies for infringement of the *Charter*. Section 52(1) is a source of authority for courts to declare laws to be invalid to the extent they are inconsistent with the constitution. I do not wish to focus on remedies under s. 52(1), important as they are.

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11 See e.g., Labour Conventions case, *Canada (AG) v Ontario (AG)*, [1937] 1 DLR 673, [1937] UKPC 6.

12 See e.g., *AG Que v 9147-0732 Québec Inc*, 2020 SCC 32.

Rather, my focus is s. 24(1), which confers authority to grant "such remedy as the court considers appropriate and just in the circumstances." This broad remedial authority has been circumscribed in practice. While courts have made orders, issued declarations, and awarded damages, they have not exercised on-going supervisory control over other institutions of the state. As well, the remedies that have been granted are structured by rules and criteria in ways that parallel the granting of remedies in other (non-constitutional) areas of the law.

I would contrast this with governmental authority, which is not structured by such rules and criteria. One can say that a government policy is wise or ill-advised. But, given the absence of rules and criteria, one cannot properly say that government was correct or that it acted in error. Those terms simply don't work for decision-making by governments. They do work for courts, to the extent there is a meaningful framework for the exercise of discretion in *Charter* remedies. Were such a framework absent, courts would exercise wider discretion, more like governments.

III. Reconceiving the Constitution

Increasingly, there are demands, notably by academics, for profound changes to constitutional law. The goal is the transformation of society. Liberal democracy provides means to advance change through free expression and electoral mandates. But, where democratic institutions do not yield results that some desire, increasingly they seek to achieve their goals through the courts.

In the absence of an appetite for constitutional amendment, such change is sought by giving quite different meaning to existing constitutional provisions. This goes beyond "living tree" interpretation. Rather, it is a re-conception of the constitution, one

that replaces rights conceived of in a traditional liberal way with rights conceived of as a means to societal transformation.

A far greater role for courts in governmental type decisions would involve some combination of five major components, each the flip side of the limitations that I have just described: first, to redefine rights as positive and to include social and economic policy; second, to add to the constitution through unwritten principles with substantive policy content; third, to combine rights so as to create new hybrid rights; fourth, to require that domestic law conform with international and comparative law; and, fifth, to exercise wider discretion in remedies. Each of these would be a major change; combined, the changes would transform the role of courts in society.

A. Positive Social and Economic Rights

First, a redefinition or re-conception of rights is being advanced, whereby what have been seen as negative rights, i.e., the protection of liberties from encroachment by government, into positive rights that call on government to act. Looking to s. 15 and s. 7, courts are being called on to direct government to create a given state of affairs in society.[13] This would involve courts taking decisions that until now have been taken by the legislature or the executive, both as to the content of laws and also the allocation of public resources. This would be a profound change.

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13 For instance, the Climate Justice factum, file no 38663 at para 16, suggests that s. 7 imposes "a positive obligation on governments to act in mitigating climate change. The source of this obligation, as discussed below, arises from international norms, international treaties to which Canada is a signatory, and the jurisprudential requirement that Canadians be protected by the *Charter* in accordance with treaties to which Canada is a signatory."

B. Unwritten Constitutional Principles with Substantive Policy Content

Second, there is increasing advocacy for the recognition of new unwritten constitutional principles. These new principles urged on the courts deal with substantive policy, for example protection of the environment.[14] This is fundamentally different from the unwritten principles that make up parts of our constitutional arrangements that deal with how the institutions of the state relate to one another. An example of this is the constitutional convention that the Cabinet must resign or call an election if it is defeated in the legislature on a matter of confidence.

Unwritten principles recognized to date relate to who gets to decide what. By contrast, unwritten principles now urged on the courts relate to what gets decided. It is as if the *Charter* contained an additional part establishing a positive right to housing, education, health care and the like, along with authority for courts to enforce this. To the extent that such new unwritten principles with substantive policy content are recognized, this would empower, indeed require, courts to exercise governmental functions by giving direction to the legislature and the executive.

The common law is, of course, judge-made law; but it is subject to legislation. By contrast, new unwritten constitutional principles with

14 For instance, Ecojustice factum, Transmountain Pipeline case, file no 38682 at para 18, makes this argument, citing Rt Hon B. McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006) 4 *New Zealand Journal of Public & International Law* at p 149; L.M. Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution" (2015) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* at p 539.

substantive policy content would be superior to legislation. The effect of this would be that more and more governmental-type decisions would be taken by courts. And, as the recognition of such new unwritten constitutional principles would be decided by courts, it would be open to judges to augment their authority at will. Would the appetite for such authority grow ever greater by its feeding?

C. "Compound" Rights

Third, it has been suggested that *Charter* rights have the potential to be augmented in combination, either with other *Charter* rights or with unwritten constitutional principles. I call these "compound" rights, as in combination they would be more than the sum of their parts. For example, it has been suggested that substantive equality be recognized as a principle of fundamental justice under s. 7, overlapping with and extending beyond the reach of s. 15, so that Canadians have "positive rights to fundamental services such as social welfare, health care, and housing." [15] Compound rights conceived in this way would engage the courts in deciding major components of public policy and, ultimately, major questions of public finance.

D. International & Comparative Law

There are on-going efforts to "constitutionalize" international law. This involves sweeping aside constraints that I have already

15 S. Flader, "Fundamental Rights for All: Toward Equality as a Principle of Fundamental Justice under Section 7 of the *Charter*" (2020) *Appeal* at p 58. See similarly K.A. Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2011) 42:3 *Ottawa Law Review* at p 411; D. Wiseman, "The Past and Future of Constitutional Law and Social Justice: Majestic or Substantive Equality?" (2015) 71 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*.

mentioned. It also involves the conflation of international law and comparative law, to which I have referred. And, there is the failure to distinguish conventional international law … established by treaties and relevant to Canada only if we have ratified the treaty in question … from customary international law, which arises from established practices in the conduct of states in their dealings with one another.

It is suggested that we depart from these limitations in several fundamental ways. First, that ratification by the federal Cabinet of a treaty should bind Parliament and provincial legislatures to implement it. Second, ratification by the federal Cabinet should empower Parliament to act even in areas of exclusive provincial jurisdiction. Third, customary international law, to the extent that it is relevant to Canadian domestic law, would be given constitutional status. Finally, Supreme Court jurisprudence as to the limited use that international law can have as an interpretive tool vis-à-vis the constitution would be reversed, such that the meaning of Canada's constitution would change with changes in international law, loosely defined. This goes beyond the constitution as a "living tree, capable of growth and development within its natural limits."

E. Expanded Discretion

Courts are not only urged to take more governmental-type decisions; they are also urged to exercising greater discretion in doing so. This engages several doctrinal and methodological questions. One relates to the scope of *Charter* rights; the broader the scope, the greater the range of state action (or failure to act) that would constitute an infringement. Where there is an infringement, a justification analysis under s. 1 follows. The critical point in such analyses is often the balancing of "deleterious and salutary effects." In this, courts most clearly make policy decisions. Where an infringement is found in the administrative law context, the "balancing" involves "values," a

concept providing even greater scope for ad hoc decision-making by courts.

When what is being considered is "balancing" and "values," it becomes difficult to say in any meaningful way that a court decision was correct or in error, except in a conclusory way. By reference to what is it said to be so? In effect, appellate review comes close to saying no more than the discretion was exercised in a manner that appellate judges approve or disapprove of, depending on one's preferences. That is where we have always been with governments. And, increasingly, that's where we will be with judges, if courts accord themselves more and more authority to take governmental-type decisions and if this authority becomes less and less constrained in its exercise by coherent doctrinal structure and clear, consistent methodology.

IV. Concerns with an Expanded Role

Several objections can be made to an expanded governmental-type role for the courts. First, the exercise of such authority by an institution that is not elected lacks democratic legitimacy. Second, in a liberal democracy, checks and balances on the exercise of governmental authority are fundamental. Yet, no such checks and balances constrain governmental-type decisions taken by courts. A third concern relates to the lack of institutional capacity on the part of courts to properly take governmental-type decisions. I will begin with this third concern.

A. Institutional Capacity

From serving as an officer of the legislature and later as Secretary to Cabinet in Newfoundland, as well as extensive experience relating to the federal government, I understand how decisions are taken to

decide policy and to allocate finances. Those decisions involve complex inter-locking processes engaging senior decision-makers, advised by numerous experts, and subject to searching oversight, by elected officials, by central agencies (like the Department of Finance), by institutions that assist Parliament (like the Auditor-General), by questioning in the legislature, and by commentary and criticism publicly. Major decisions engage considerable institutional capacity, relying on a broad base of expertise, with varied and probing oversight.

Contrast this with the courts. Few judges have any experience or meaningful understanding of government. Counsel are often similarly lacking. There is a reason for this. Lawyers are trained in the resolution of particular legal disputes. But, increasingly, lawyers are calling on judges to make decisions that are governmental in nature. But none of these actors have anything akin to the institutional capacity possessed by government.

Decisions relating to policy, program design, and finances tend to be grid-like, rather than linear. Varying one factor often gives rise to multiple, difficult to ascertain consequences. Do lawyers and judges understand this? With few exceptions, they do not. Yet their confidence abounds.

When what is being considered is a single legislative provision or a specific component of a government program, there is a reasonable prospect that counsel and judges will grasp the implications of what is at issue. But, to have courts reformulate policies, redesign programs and direct public finance would be to have them do something that they are not equipped to do.

An example from the Supreme Court of India is instructive. Because the level of air pollution in Delhi threatened public health, the Court asserted jurisdiction to regulate air pollutants from vehicles

and industries in the city. The Court ended up regulating many aspects of municipal transport. For example, it ordered all public transit vehicles to convert to compressed natural gas.[16] The court also ended up regulating urban planning and which industries were permitted within the city, leading it to order the relocation of tens of the thousands of residents and many businesses.[17] While a dramatic example, this is not an isolated undertaking for the Indian Supreme Court.[18] Is this where courts in Canada should be heading?

Beyond policy and program design, there are financial implications. The courts have taken a narrow view of when financial consequences are to be considered in analyses under s. 1. This is understandable as long as the cost of complying with the courts' orders represent no more than a small fraction of overall expenditures. However, if courts make more governmental-type decisions, the financial implications of those decisions will correspondingly increase. At a certain point, financial trade-offs between competing demands become inevitable. Are not those decisions that should be made by elected officials who can be replaced if the public is unhappy?

And what if the courts direct government to bring about a state of affairs, but government says this cannot be practically achieved? Would courts then assume on-going oversight of governmental

16 A. Bhuwania, "The Case that Felled a City: Examining the Politics of Indian Public Interest Litigation through One Case" (2018) 17 *South Asia Multisdiciplinary Academic Journal* at paras 5-16.

17 Bhuwania at paras 17-45.

18 See e.g., *Board of Control for Cricket v Cricket Association of Bihar and others*, [2015] INSC 61, in which the court reorganized the institutions regulating cricket in India; *The State of Tamil Nadu v K Balu and another*, Civil Appeal Nos. 12164-12166 of 2016, in which it regulated the sale of liquor.

operations to ensure their orders are given effect? These are deep waters.

B. Checks & Balances

Beyond concerns as to institutional capacity, what of checks & balances? Good government is one that is subject to a thorough and well-integrated set of checks and balances on the exercise of its authority. The executive is accountable to the legislature, and the legislature is accountable to the public, who can replace political leaders in the next election.

For profoundly important reasons, judges in Canada are not elected. We have security of tenure. This makes eminently good sense when courts adjudicate particular disputes. But, what if courts make governmental-type decisions? The courts' power to decide is not limited by the checks and balances that apply to the executive and the legislature. Courts decide without such limits, save as they exercise self-restraint. In such circumstances, how judges see their role is critical.

C. Legitimacy

This leads to a third concern, legitimacy. The legitimate exercise of authority by the legislature and the executive is based on electoral mandates. As Lord Reed, President of the UK Supreme Court, wrote in *R (SC) v Secretary of State for Work and Pensions*, politics involves a very different process to adjudication, in that it concerns "the management of political disagreements ... so as to arrive, through negotiation and compromise, and the use of the party political power obtained at democratic elections, at decisions whose legitimacy is accepted not because of the quality or transparency of the reasoning

involved, but because of the democratic credentials of those by whom the decisions are taken."[19]

The legitimate exercise of judicial authority rests on a separate basis. It is based on courts exercising their authority in accordance with settled principles and sound legal methodology. As Neil MacCormick wrote in "Legal Reasoning and Legal Theory," "Judges are to do justice according to law, not to legislate for what seems to them an ideally just form of society."[20]

V. The Courts' Proposed Expanded Role

A key question as to such an expanded role for the courts is whether the *Constitution Act, 1982* was intended to bring this about. I have not addressed that foundational question. Rather, I have focused on three questions. First, do courts have the institutional capacity to properly take governmental-type decisions? Second, is it warranted to have courts take such decisions outside the framework of checks and balances that apply to governments? Finally, can courts legitimately take these types of decisions as opposed to those who have an electoral mandate?

Such concerns are rarely discussed. Why? I see two main reasons. First, to raise these concerns is to make yourself the target of criticism that you oppose societal progress. And second, raising such concerns challenges the cherished belief in a special mission for the legal profession. Neither of these is well-founded. First, maintaining proper institutional roles is a separate question from the content of

19 *R (SC) v Secretary of State for Work and Pensions*, [2021] UKSC 26 at para 169.

20 N. MacCormick, *Legal Reasoning and Legal Theory*, (Oxford University Press, 1978) at p 107.

public policy. Liberal democracy provides broad avenues for societal progress through political institutions. Second, it is both myopic and self-serving to see the legal profession as endowed with moral and intellectual superiority. But, to accept a less heroic role for the legal profession requires a seemly modesty little in evidence today.

VI. Conclusion

With the adoption of the *Charter*, courts took on an additional role, one that to a degree inevitably engages them in statecraft. In fulfilling this additional role, courts should bear closely in mind three considerations: first, the limitations of their institutional capacity; second, the absence of checks and balances that are proper to governmental-type decision-making; and third, whether the legitimacy for taking such decisions needs to be linked to an electoral mandate. Being mindful of these considerations, courts should exhibit the virtue of judicial restraint. Such restraint must be self-imposed, as the judicial role now includes defining its own role.

Nov 13/24

ARTICLES

The Role of Interveners in Constitutional Litigation After *Sharma* and *McGregor*

Colton Fehr*

The appropriate role of interveners in constitutional litigation has proven controversial since the adoption of the Charter. Commentators consistently maintain that the legitimacy of the judiciary hinges upon its willingness to engage with intervener arguments because the adversarial system cannot guarantee that the views of marginalized populations will otherwise be represented. Others express concern that permitting interveners to make submissions as a matter of course would unduly hinder the judiciary's ability to decide cases expeditiously. This criticism is increasingly salient as judges require less help resolving legal disputes due to many foundational interpretations of rights now being settled. The evolving nature of Charter jurisprudence should nevertheless continue to impact judicial willingness to hear from interveners. The structure of analysis under sections 7 and 15 of the Charter in particular make social science evidence often determinative of whether a violation occurred. The difficulties judges face in understanding social science evidence and its prominent role in Canadian constitutional litigation should result in appellate justices exercising their discretion under the Rules of the Supreme Court of Canada or similar provincial legislation to regularly permit interveners to supplement factual records in cases implicating complex social science evidence. Efficiency concerns can be addressed by requiring interveners to submit leave applications explaining why the proposed evidence fills an important evidentiary gap that the interests of justice require to be considered before deciding a constitutional issue.

* Assistant Professor, University of Saskatchewan, College of Law.

I. Introduction

In *R v Sharma*,[1] ("*Sharma*") the Supreme Court of Canada sharply divided on whether various restrictions on the ability of judges to grant conditional sentence orders under section 742.1 of the *Criminal Code of Canada*[2] violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[3] While the case is most notable for its divisive application of the equality right to sentencing law,[4] the majority's brief comments on the appropriate role of interveners in *Charter* litigation also polarized the court.[5] Justices Brown and Rowe observed, for a narrow majority, that they harboured "serious concern with interveners supplementing the [factual] record at the appellate level."[6] Citing the Court's decision in *R v Morgentaler*,[7] they affirmed that "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."[8] In providing submissions, however, interveners must "accept the record as defined by the parties in first

1 *R v Sharma*, 2022 SCC 39 [*Sharma*].

2 *Criminal Code*, RSC 1985, c C-46 at s 742.1.

3 *Canadian Charter of Rights and Freedoms* at ss 7, 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c 11 (UK) [*Charter*].

4 For my initial commentary on the case, see C. Fehr, "Reflections on the Supreme Court of Canada's Decision in *R. v. Sharma*" (2023) 60 Alberta Law Review (discussing the relationship between the right to equality and the substantive criminal law).

5 *Sharma* at paras 75, 205.

6 *Sharma* at para 75.

7 *R v Morgentaler*, 1993 CanLII 158, [1993] 1 SCR 462 at p 463 [*Morgentaler*].

8 *Sharma* at para 75; *R v Barton*, 2019 SCC 33 at paras 52-53 [*Barton*].

instance."[9] This follows because "[i]nterveners creating a new evidentiary record at the appellate level undermines the trial process" which, the majority observed, "is *not* how our system of justice, including constitutional adjudication, is designed to work."[10]

Building on *Sharma*, and two earlier practice directives,[11] the Supreme Court further clarified the role of interveners in appellate litigation in *R v McGregor* ("*McGregor*").[12] Several interveners in *McGregor* sought to overturn a prior Supreme Court precedent.[13] The majority concluded that the interveners' submissions were outside the scope of the appeal as the litigants at no point raised this issue at the lower courts or before the Supreme Court.[14] In so concluding, the majority briefly affirmed that "it is inappropriate for interveners to supplement the evidentiary record at the appellate level."[15] Concurring with the majority, Justice Rowe nevertheless provided a more detailed defence of the Court's approach to interveners. His comments on the issue of whether interveners are permitted to supplement the appellate record are particularly salient as they imply

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9 *Sharma* at para 75; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew*]; *R v Marshall*, 1999 CanLII 666 at para 9, [1999] 3 SCR 533 (SCC); *R v Mabior*, 2012 SCC 47 at para 59.

10 *Sharma* at para 75.

11 Supreme Court of Canada, "November 2021 - Interventions" (November 2021) https://www.scc-csc.ca/parties/arf-lrf/notices-avis/21-11/ [2021 Notice]; Supreme Court of Canada, "March 2017 - Allotting Time for Oral Argument" (March 2017) https://www.scc-csc.ca/parties/arf-lrf/notices-avis/17-03/ [2017 Notice].

12 *R v McGregor*, 2023 SCC 4 [*McGregor*].

13 *R v Hape*, 2007 SCC 26.

14 *McGregor* at paras 21-23, 99-101.

15 *McGregor* at para 24.

a compromise position for engaging with intervener submissions relating to factual records: permitting such submissions with leave under paragraph 59(1)(b) of the *Rules of the Supreme Court of Canada*,[16] and other similar provincial rules.[17] However, Justice Rowe did not elaborate on this specific aspect of his proposal.

A discretion-based approach to determining whether interveners should be permitted to supplement the factual record is prudent. In my view, such discretion should be routinely exercised in constitutional cases. A similar approach proved persuasive during the early days of the *Charter* as a means to aid courts in providing foundational interpretations of *Charter* rights.[18] Although the judiciary requires less help interpreting rights today, more recent judicial experience raises a distinct issue with which courts struggle immensely: interpreting social science evidence. Since the Supreme Court acknowledges that social science evidence frequently drives the conclusion as to whether a rights breach occurred,[19] it should follow that courts ought to be willing to hear arguments from interveners that attempt to fill gaps in the evidential record. This is especially so in criminal law cases, as the typically impecunious litigant is often incapable of providing trial courts with a robust evidentiary record.

The article unfolds as follows. In Part II, I review the conflicting viewpoints on the merits of allowing interveners to supplement the record on appeal. Many of the arguments made by applicants in the

16 *Rules of the Supreme Court of Canada*, SOR/2002-156 [*Supreme Court Rules*].

17 *McGregor* at para 108.

18 I review this history below in Part II.

19 *R v Spence*, 2005 SCC 71 at para 64 [*Spence*].

early days of the *Charter* persuaded the Supreme Court that the interests of justice required substantial intervention despite efficiency concerns. As foundational *Charter* issues became increasingly settled, efficiency concerns resulted in several prominent justices re-emphasizing their opposition to the practice. In Part III, I set out the evolving context within which constitutional litigation takes place in Canadian courtrooms. In particular, I highlight how the structure of constitutional analysis under sections 7 and 15 of the *Charter* ensures that social science evidence will feature prominently in constitutional litigation. I conclude in Part IV by contending that efficiency and fairness concerns should be balanced on a case-by-case basis to determine whether interveners should be permitted to supplement the factual record. As Justice Rowe observes in *McGregor*, this can be done by requiring interveners to seek leave to file supplementary social science evidence.

II. Intervention at the Supreme Court

While judges in Canada today frequently permit interventions, the Supreme Court historically applied a much stricter policy.[20] Many justices were concerned that allowing non-parties to intervene would open a floodgate of "unnecessary litigation that would politicize the judicial process."[21] Justice Beetz's response to a request for

20 R. Sharpe & K. Roach, *Brian Dickson: A Judge's Journey* (University of Toronto Press, 2003) at p 383; *Supreme Court Rules* at ss 55-59.

21 Sharpe & Roach at p 382; T. Morton, "The *Charter* Revolution and the Court Party" (1992) 30 *Osgoode Hall Law Journal* at p 649 (a coalition that "represents a horizontal transfer of power to a new elite, not a vertical transfer of power to the people"); I. Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (University of New York Press, 2002).

intervention by the Canadian Civil Liberties Association (the "CCLA") is illustrative. As he observed, "given the purposes and objectives of the [CCLA], there would hardly be any serious *Charter* case in which the Applicant would not be interested" which would result in the CCLA becoming "more or less [a] permanent[] fixture of the Court."[22] For Justice Beetz, providing such status to interveners would result in the Court being "perceived by the public as some sort of royal commission."[23] Justice Estey was more blunt, suggesting that permitting interveners resulted in the Court "sitting and listening to repetition, irrelevancies, axe-grinding, [and] cause advancement."[24] These and other judges feared that interveners would prejudice the parties to a proceeding "by delaying their case and increasing costs as legal counsel and courts [would] have to deal with the intervener submissions."[25] For these reasons, the early experience with intervention was practically restricted to other government representatives in constitutional cases.[26]

It was only during Chief Justice Laskin's tenure that the Supreme Court began regularly allowing broader non-party submissions in constitutional cases.[27] His successor, Chief Justice Dickson, was also

22 Sharpe & Roach at pp 384-385.

23 Sharpe & Roach at pp 384-385.

24 Sharpe & Roach at p 385.

25 B. Bussey, "The Law of Intervention After the TWU Law School Case: Is Justice Seen to be Done?" (2019) 90 (2d) *Supreme Court Law Review* at p 269.

26 Bussey at p 270; Brodie at pp 22-37.

27 Bussey at p 270; P. Girard, *Bora Laskin: Bringing Law to Life*, (University of Toronto Press, 2005) at p 491; Sharpe & Roach at pp 383-385; *Morgentaler*; *Nova Scotia Board of Censors v McNeil*, 1975 CanLII 14, [1976] 2 SCR 265 (SCC); *Miller and Cockreill v The Queen*, 1976 CanLII 12, [1977] 2 SCR 680 (SCC).

eventually persuaded to permit increasingly more intervention despite dissenting views from other members of the Court.[28] The latter Chief Justice's change of heart arose from a new-found recognition that interveners could be of "great help to the Court" and "vastly change the nature of the representations, and the materials available to the Court in its law-making role."[29] Justice Wilson also supported a more generous approach toward permitting intervener submissions during her tenure on the Court. As she observed, the traditional legal education received by lawyers did not prepare them to litigate the broader social issues inherent to rights litigation.[30] A liberal approach to intervention would ensure a broader set of views were heard, which in turn would provide judges with the diversity of perspectives needed for resolving difficult rights questions. Allowing for broad intervention would also "assist in legitimizing the Court's new role [under the *Charter*] through a more open and accessible court process."[31]

Other organizations that commonly intervene before appellate courts have also influenced the Supreme Court's decision to permit more intervener submissions. The CCLA, for instance, argued that intervention increases the legitimacy of the Court. In its view, "as the entire community will be increasingly affected… by [*Charter*] decisions of the Court, larger sections of the community should be

28 Sharpe & Roach at pp 383-389.

29 Sharpe & Roach at pp 384, 387; B. Alarie & A. Green, "Intervention at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 *Osgoode Hall Law Journal* at p 386.

30 B. Wilson, "Decision-Making in the Supreme Court" (1986) 36:3 *University of Toronto Law Journal* at pp 242-243.

31 Wilson at p 243; Alarie & Green at p 389.

able to participate in the process which produces those decisions."[32] Only a "more inclusive process," the CCLA wrote, would ensure "public respect for both the *Charter* and the Court."[33] Similarly, the Women's Legal Education Action Fund ("LEAF") observed that unduly limiting intervention would "effectively deny the poor and disadvantaged sectors of society, who are least able to initiate the litigation themselves, access to a process which will have a significant impact on their rights."[34] James MacPherson, responding to a query from Chief Justice Dickson, further justified intervention by appealing to the limits of the profession. In MacPherson's view, allowing intervention ensured access to "creative research and thinking that major civil liberties organizations are conducting… that lawyers in private practice may not have the time or skill to prepare."[35]

The internal debate between Supreme Court members and the lobbying undertaken by societal groups initially resulted in the Court granting automatic leave for interested governments and any applicant granted intervener status at the lower court. This approach was nevertheless restricted to the civil context,[36] and eventually

32 Sharpe & Roach at p 386; P. Brayden, "Public Interest Intervention in the Courts" (1987) 66 *Canadian Bar Review* at p 506.

33 Sharpe & Roach at p 386; G. Callaghan, "Intervenors at the Supreme Court of Canada" (2020) 43 *Dalhousie Law Journal* at pp 58-59. For a similar argument relating to the value of participation in the broader democratic balancing that goes into making leave decisions on interventions.

34 Sharpe & Roach at p 387.

35 Sharpe & Roach at p 388.

36 *Ogg-Moss v The Queen*, 1983 CanLII 139, [1984] 2 SCR 171 (SCC).

rescinded altogether due to efficiency concerns.[37] In its place, the Court settled on allowing intervention in any case—including constitutional cases—if the submissions are different from the parties and useful to the Court.[38] Importantly, this approach did not require that interveners raise a distinctive legal argument, a much higher threshold to meet. The submission must simply be unique and considered useful to the justices hearing the particular leave application. In making submissions, however, the Court retained discretion as to whether submissions would be written only (typically ten pages), or whether the intervener would also be allowed to make an oral argument (typically five minutes).[39]

As litigation concerning the interpretation of *Charter* rights settled, several justices renewed their criticism of the Supreme Court's approach towards granting intervener status in constitutional cases. At the turn of the century, Justice Bastarache maintained that "because of the fact that we have lived with the *Charter* for 18 years and we have a lot of experience in interpreting the *Charter*...[t]here isn't the same need there was in 1982 to obtain help from interven[e]rs."[40] Justice Iacobucci made similar comments later that year, querying whether the passage of time required the Court to "[look] at the question [of intervener participation] in different

37 Notice to the Profession, [1984] SCCB 24; *Rules of the Supreme Court of Canada, amendment*, SOR/1983-930; J. Wench, "No Room at the Top: Interest Group Intervenors and *Charter* Litigation in the Supreme Court of Canada" (1985) 43 *University of Toronto Faculty of Law Review* at p 204.

38 Sharpe & Roach at p 389; *Supreme Court Rules* at s 57(1)(b).

39 Sharpe & Roach at p 389.

40 L. Chwialkowska, "Rein in lobby groups, senior judges suggest" *The National Post* (6 April 2000) http://www.fact.on.ca/news/news0004/np000406.htm.

ways."[41] In Justice Iacobucci's view, there was "a tremendous need for something that would be beyond the purely adversarial system" when the *Charter* was first adopted.[42] However, the passage of time resulted in judges receiving a firm legal foundation upon which to base their decisions and therefore no longer requiring the far-reaching submissions of various interveners when deciding a rights issue.[43]

During the period leading up to the Supreme Court's decisions in *Sharma* and *McGregor*, justices of the Court made relatively few comments about the role of interveners in appellate hearings.[44] Most notably for present purposes, the Court refrained from commenting

41 K. Markin, "Intervenors: How Many Are Too Many?" *The Globe and Mail* (10 March 2000) https://www.theglobeandmail.com/news/national/intervenors-how-many-are-too-many/article1037654.

42 Markin.

43 Markin.

44 *Mikisew* at para 40 ("[i]t is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal argument that it ought to have raised earlier in the proceedings but did not"); *Barton* at paras 52-53 ("interveners play a vital role in our justice system by providing unique perspectives and specialized forms of expertise that assist the court in deciding complex issues that have effects transcending the interests of the particular parties before it. […] However, interveners must not overstep their proper role, particularly in criminal appeals. In fairness to the accused, they must not assume the role of third-party Crown prosecutors […] particularly where doing so would widen or add to the Crown's grounds of appeal from an acquittal").

on the increasingly pressing issue directly before it in *Sharma*: whether interveners still "play a vital role" when supplementing the *factual* record.[45] While interveners may always provide novel legal arguments, raising new facts on appeal more directly implicates the efficiency-based arguments raised by earlier judicial commentators on the appropriate role of interveners. At the same time, however, the nature of constitutional adjudication was shifting. As I explain below, reconciling the majority's reasons in *Sharma* and Justice Rowe's reasons in *McGregor* is only possible if viewed through the lens of this shift and the accompanying difficulties appellate courts encounter when deciding constitutional issues that implicate complex social science evidence.

III. Social Science Evidence and the *Charter*

Over the last several decades, commentators have observed a significant increase in the use of social science evidence in Canadian courtrooms. Benjamin Perryman summarizes this development well when he observes that "judicial reference to facts derived from [social science] evidence has transitioned from distrust or hostility to something that is 'firmly established' to the point of being unremarkable."[46] In admitting social science evidence, Perryman is not concerned with the common practice in the United States of relying upon "Brandeis' Briefs" to aid in establishing social facts.[47]

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45 *Barton* at para 52.

46 B. Perryman, "Adducing Social Science Evidence in Constitutional Cases" (2018) 44 *Queen's Law Journal* at p 124; J. Monahan & L. Walker, "Twenty-Five Years of Social Science in Law" (2011) 35 *Law and Human Behavior* at p 80.

47 *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at paras 106-127. A Brandeis brief is a written submission referring to

Instead, he is addressing the use of expert witnesses to provide opinions on social phenomena. While courts in Canada now frequently rely on such evidence, Perryman also observes that courts have understandably become "increasingly guarded against 'junk science' and are demanding that expert evidence be rigorous and reliable, especially when it goes to an issue that is dispositive of a case." [48] Accordingly, courts "have moved from a constitutional jurisprudence that could find… harm on the basis of a brief affidavit of the applicant, to a [constitutional] jurisprudence that frequently relies on, if not requires, massive social science records."[49]

Judges often encounter numerous and conflicting expert witnesses in both criminal and constitutional cases due to the vast amounts of social science evidence submitted during many constitutional challenges.[50] Justice Doherty disparagingly commented on this trend in *R v Abbey*.[51] As he observed, "a deluge of experts has descended on the criminal courts ready to offer definitive opinions to explain almost anything." [52] In his academic writing, Justice Paciocco provides a similarly pessimistic view. Citing the work of Steven Skurka and Elsa Renzella, he agrees that "our courtrooms have

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relevant scientific evidence. Such a brief was first filed in *Muller v Oregon*, 208 US 412 (1908). The evidence is not, however, provided by way of an expert at trial.

48 Perryman at p 124; *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 at para 18.

49 Perryman at p 124.

50 G. Conrad & J. Lazare, "The Lawyer in Context: Toward an Integrated Approach to Legal Education" in R. Sefton-Green, ed, *Démoulages: du carcan de l'enseignement du droit vers une éducation juridique* 38 (Société de Législation comparée, 2015) at pp 50-53.

51 *R v Abbey*, 2009 ONCA 624 [*Abbey*].

52 *Abbey* at para 72.

become 'the showcase for the latest syndromes and theories offered by the scientific community.'"[53] The result often being "a legion of experts" descending on the courts, "all bringing distinct and contrasting points of view on the questions before the court."[54] Judges operating within the limits of the adversarial justice system are therefore left to resolve these competing views before applying the evidence to the issue before them.[55]

The dramatic increase in the use of social science evidence in constitutional cases is concerning because any benefits derived from the increased reliance on social science evidence must be considered alongside its increasing influence on constitutional jurisprudence. In particular, it is notable that "legislative facts"—which include facts established by social science evidence—are increasingly dispositive of constitutional challenges.[56] As the Supreme Court observed in *R v Spence* ("*Spence*"),[57] "[t]he reality is that in many *Charter* cases… [i]t is the legislative facts or social facts that are likely to prove

53 D. Paciocco, "Coping with Expert Evidence About Human Behaviour" (1999) 25 *Queen's Law Journal* at pp 306-307 citing S. Skurka & E. Renzella, "Misplaced Trust: The Courts' Reliance on the Behavioural Sciences" (1998) 3 *Canadian Criminal Law Review* at p 270.

54 J. Lazare, "Judging the Social Sciences in *Canada v Carter (AG)*" (2016) 10:1 *McGill Journal of Law and Health S35* at p 50.

55 A. Young, "Proving a Violation: Rhetoric, Research, and Remedy" (2014) 67 *Supreme Court Law Review* at pp 641-42 ("[w]hen operating within the current legal framework of an adversarial approach to proof, there is greater risk that the legislative fact evidence could lead to a badly informed decision despite the appearance of being fully informed").

56 For the seminal review of this distinction, see K. C. Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 *Harvard Law Review* at pp 402-403.

57 *Spence*.

dispositive."[58] This point is apparent from a general view of the jurisprudence cited in *Spence*,[59] and also more recent jurisprudence concerning issues like the constitutionality of closing safe injection sites,[60] restricting sex work[61] or euthanasia,[62] and the use of solitary confinement.[63] As opposed to deciding whether a general moral principle imposes a duty on the state to provide safe injection sites or access to euthanasia, or whether the state must legalize aspects of sex work or prohibit the use of solitary confinement, the dominant constitutional principles focus on the impact of a law when compared to its objective.[64]

The jurisprudence under the two most popular *Charter* provisions is illustrative. Section 7 of the *Charter* provides that "[e]veryone has

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58 *Spence* at para 64. See also P. Hogg, *Constitutional Law of Canada*, 5:2 (loose-leaf release 2014-1) (Thomson Carswell, 2014) at ch 38, pp 8-9.

59 *Spence* at para 64 citing *R v Sharpe*, 2001 SCC 2; *R v Butler*, 1992 CanLII 124, [1992] 1 SCR 452; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69.

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

61 *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*]; *R v Boodhoo*, 2018 ONSC 7205; *R v Anwar*, 2020 ONCJ 103; *R v NS*, 2021 ONSC 1628; *R v NS*, 2022 ONCA 160; *Canadian Alliance for Sex Work Law Reform v Attorney General*, 2023 ONSC 5197.

62 *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*]; *Truchon c Procureur général du Canada*, 2019 QCCS 3792.

63 *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228; *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243.

64 I have documented this shift from relying on moral philosophical principles to means-ends rationality analysis at book length elsewhere. See C. Fehr, *Constitutionalizing Criminal Law* (UBC Press, 2022).

the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Interpreting the latter phrase, the Supreme Court has developed a variety of principles to restrain state intrusions onto the interests protected by this provision. It has been clear, however, that "three have emerged as central in the recent s. 7 jurisprudence: laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object." [65] These principles generally test a law's means-ends or "instrumental rationality."[66] In their "individualistic form,"[67] they require that a law be declared contrary to fundamental justice if it has an illogical or unduly harsh effect on an individual.[68] After defining a law's objective, evidence of the impugned law's effects deriving from social science evidence can effectively determine whether a constitutional violation is established.

A similar approach may be deduced from the application of section 15 of the *Charter* which states that:

> "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without

65 *Carter* at para 72.

66 *Bedford* at para 107 citing H. Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Irwin Law, 2012) at p 151.

67 I provide a review and broader critique of these principles elsewhere. See e.g., Fehr 2022 at 58-101; C. Fehr, "The 'Individualistic' Approach to Arbitrariness, Overbreadth, and Gross Disproportionality" (2018) 51:1 University of British Columbia Law Review.

68 *Bedford* at paras 110-123.

> discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[69]

The right serves to ensure "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[70] To further this end, section 15 requires the applicant to demonstrate that the challenged law or state action: "(a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[71] The emphasis of the analysis on a law's impact on a social group that is baked into the right to equality provides a clear avenue for social science evidence to drive legal conclusions.

While not objectionable on its own, the ability of social science evidence to be dispositive of a constitutional issue becomes problematic for a separate reason: judges typically lack the expertise necessary to resolve debates between competing experts. In the American context, judges have been described by scholars as lacking "even a minimum acquaintance"[72] with social science evidence and have been observed to interpret social science evidence with

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69 *Charter* at s 15.

70 *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at p 171.

71 *Sharma* at para 27 citing *R v CP*, 2021 SCC 19 at paras 56, 141; *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19-20.

72 P. Sperlich, "Social Science Evidence and the Courts: Reading Beyond the Adversary Process" (1980) 63:4 *Judicature* at p 282.

"incompetence."[73] Similar concerns were raised more recently in Canada by Justice Goudge in his famous inquiry relating to numerous wrongful convictions caused by undue reliance on expert evidence.[74] Other scholars have made similar observations and documented the clear implications of judicial difficulties in interpreting and resolving conflicts inherent to many forms of social science evidence.[75] As Jodi Lazare observes, unfamiliarity with social science methods often results in judges "fall[ing] prey to the 'mystique of science,' and in turn struggl[ing] in their determination of what constitutes expert evidence, ultimately accepting too much potentially unreliable empirical evidence."[76] Lazare further concludes that "limited capacity to critically evaluate social science data in the courtroom means that judges may misinterpret the

73 J. Acker, "Social Science in Supreme Court Criminal Cases and Briefs: The Actual and Potential Contribution of Social Scientists as Amici Curiae" (1990) 14:1 *Law & Human Behaviour* at p 40.

74 Ontario, Ministry of the Attorney General, *Report of the Inquiry into Pediatric Forensic Pathology in Ontario: Policy and Recommendations* (2008) at pp 500-502.

75 I. Binnie, "Science in the Courtroom: The Mouse That Roared" (2007) 56 *University of New Brunswick Law Journal* at 309; R. Sharpe & V.-J. Proulx, "The Use of Academic Writing in Appellate Judicial Decision-making" (2011) 50 *Canadian Business Law Journal* at p 569. See also D. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009) 34:2 *Queen's Law Journal* (describing generally how different forms of bias inherent to expert testimony is likely to lead to skewed results and difficulties interpreting expert evidence).

76 Lazare at p 48 citing *R v Mohan*, 1994 CanLII 80, 1994 2 SCR 9 at para 21; citing *R v Bé-land*, 1987 CanLII 27, 1987 2 SCR 398 at para 434.

evidence or prefer evidence from one witness over another for reasons unrelated to the validity or reliability of the evidence."[77]

The problematic nature of social science evidence driving the application of constitutional rights must also be viewed in light of other evidentiary rules. In particular, there is a distinction when reviewing adjudicative facts—"what the parties did, what the circumstances were, what the background conditions were"—and legislative facts—those relevant to questions of law and policy.[78] For efficiency reasons, adjudicative facts can only be overturned if the appellant establishes that the trial judge committed a "palpable and overriding error."[79] Historically, legislative facts were similarly "entitled to little deference" from appellate courts, which in turn provided judges with significant leeway to overturn legal conclusions based on problematic social science evidence.[80] In *Canada (Attorney General) v Bedford* ("*Bedford*"),[81] however, the Supreme Court held that legislative facts are subject to the same standard of review as adjudicative facts.[82] While I criticize this rule elsewhere,[83] its current status is relevant to determining whether interveners ought to be allowed to challenge legislative facts. Given the difficulties posed by

77 Lazare at pp 48-49.

78 Davis at pp 402-403.

79 *Stein et al. v 'Kathy K' et al. (The Ship)*, 1975 CanLII 146 (SCC), [1976] 2 SCR 802 at p 808. See also *Housen v Nikolaisen*, 2002 SCC 33 at para 10.

80 *Harper v Canada*, 2004 SCC 33 at para 99 citing *RJR-Macdonald Inc. v Canada (Attorney General)*, 1995 CanLII 64, 1995 3 SCR 199 at paras 285-289.

81 *Bedford.*

82 *Bedford* at paras 51-52.

83 See C. Fehr, *Judging Sex Work: Bedford and the Attenuation of Rights* (UBC Press, 2024) at pp 81-94.

social science evidence, the potential for incorrect legal conclusions is heightened by increasing the deference afforded to findings of social fact by trial judges.[84] Allowing greater opportunity for parties to submit social science evidence on appeal—parties who may have more resources than the often-impecunious applicant—could serve to alleviate any negative impact of the *Bedford* rule.

It may be nevertheless retorted that my argument is contradictory because it relies on judges interpreting more social science evidence to cure the ails created by a judicial inability to interpret social science evidence. Any such objection should be considered in light of the Supreme Court's clear commitment to relying on social science evidence when resolving constitutional issues. It accordingly must be remembered that appellate justices are more numerous—and even more numerous at the apex level—than at the trial level. The more judges interpret social science evidence, the more likely it is that errors will be detected.[85] Where social science evidence proposed by an intervener could plausibly reveal an error, it is therefore prudent for the evidence to be admitted and evaluated by the appellate courts.

As with the early *Charter* litigation, it should be acknowledged that it may come to pass that judges become well-equipped to resolve disagreements arising from social science evidence.[86] As Justices Bastarche and Iacobucci observed, a similar phenomenon arose after

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84 Fehr 2024 at pp 81-94.

85 See Lazare at p 45; Fehr 2024 at pp 88-94.

86 It is notable that scholars have devised a variety of policy proposals to aid in this regard. I summarize these and the vast applicable literature elsewhere. See Fehr 2024 at pp 88-94 (noting the ability of judges to alleviate these difficulties by more broadly relying on Brandeis briefs, mandating relevant legal education, recruiting scientifically trained judges, and other modifications to the adversarial system).

several decades of judicial engagement with *Charter* doctrine.[87] The arguments from an efficiency standpoint for reducing the role of interveners become much stronger in that circumstance. Until that day comes, the dispositive nature of social science evidence in constitutional challenges combined with its less than confidence-inspiring use by the judiciary should require that corrective intervention on constitutional issues relating to the evidentiary record be approached more flexibly. As I explain below, Justice Rowe's reasons in *McGregor* point towards a procedure to facilitate this approach: requiring interveners to submit an application for leave to supplement the factual record.[88]

IV. A Principled Approach to Intervention

As mentioned in the introduction, the categorical statements of Justices Brown and Rowe in *Sharma* should be read in light of the latter justice's concurring opinion in *McGregor*. In his reasons, Justice Rowe built on the existing jurisprudence in two main ways. First, he contended that allowing the interveners in *McGregor* to argue for a new legal framework despite the litigants expressly accepting the relevant framework from a leading Supreme Court decision fell outside the appropriate role of interveners. As Justice Rowe observed, accepting the interveners' approach would mean that "any time a governing precedent is relevant to deciding a case, interveners could insert themselves before this Court to call for it to be overturned, thereby 'piggy-backing' onto the parties' dispute what amounts to a reference on a judicial decision which the interveners wish to

87 Chwialkowska; Markin.

88 *McGregor* at para 108.

overturn."[89] Such an approach risks the Court making "ill-advised decisions, as they would be made without the benefit of lower court analysis, a proper evidentiary record, or submissions from those who would be affected (including vulnerable groups) but who had no notice that the issue would be placed before the Court."[90]

Second, and more importantly for present purposes, Justice Rowe pointed to a principled middle ground for determining whether interveners ought to be permitted to supplement the factual record on appeal. In particular, Justice Rowe concluded that interveners "must not adduce further evidence or otherwise supplement the record *without leave*."[91] In an initial application to intervene in a case, Justice Rowe noted that interveners can seek permission to provide "supplementary legislative facts or contested studies."[92] This is possible under Rule 59(1)(b) of the *Supreme Court Rules* which states as follows: "[i]n an order granting an intervention, the judge may… impose any terms and conditions and grant any rights and privileges that the judge may determine, including whether the intervener is entitled to adduce further evidence or otherwise to supplement the record." Relying on an earlier notice to the legal profession, Justice Rowe nevertheless warns that the "Court, as always, retains a discretion to take any steps it sees fit where an intervener presents new evidence without leave."[93]

The latter approach to intervention was applied strictly in the *Sharma* case. Decided mere months before *McGregor*, the accused

89 *McGregor* at para 101

90 *McGregor* at para 101.

91 *McGregor* at para 108 (emphasis added).

92 *McGregor* at para 108.

93 *McGregor* at para 108 citing 2021 Notice.

challenged the constitutionality of certain restrictions (now repealed) on the use of conditional sentence orders or "jail in the community" provisions.[94] Justices Brown and Rowe for the majority disagreed with the accused's argument that these restrictions violated the right to equality and concluded that there was insufficient evidence to establish that the impugned law created or contributed to a disproportionate impact on Indigenous people.[95] At the Ontario Court of Appeal, a host of interveners provided considerable empirical evidence to establish this point in response to the trial judge's rejection of the equality claim for lack of evidence.[96] In upholding the trial judge's decision, the majority of the Court pointed to their "serious concern with interveners supplementing the record at the appellate level."[97] While this may seem harsh, two facts mitigated the effect of the majority's decision: the challenged laws were all but certainly going to be repealed by Parliament,[98] and the accused was unlikely to serve any further time in prison.[99] The *Sharma* case therefore afforded the majority an opportunity to provide a stern

94 Bill C-5, *An Act to amend the Criminal Code and Controlled Drugs and Substances Act*, 1st Sess, 44th Parl, 2022 at cl 10.2(1) (as passed by the House of Commons 17 November 2022).

95 *Sharma* at paras 66-83. See para 205 for the dissent's disagreement with this view.

96 *R v Sharma*, 2020 ONCA 478 at paras 95-97.

97 *Sharma* at para 75.

98 Bill C-5. The Supreme Court's decision in *Sharma* was decided on 4 November 2022. At that time, Bill C-5 passed through the House of Commons and was awaiting third reading in the Senate.

99 *R v Sharma*, 2018 ONSC 1141 at para 145 (sentencing the offender to an 18-month sentence of imprisonment which would have been served by the time of the appeal).

lesson for future interveners in constitutional cases without prejudicing the applicant.

This lesson was nevertheless properly qualified by Justice Rowe in *McGregor*. While his reasons are brief, Justice Rowe's conclusion that applicants should seek leave from an appellate court before attempting to supplement the record with novel social science evidence should be endorsed. In considering such applications, the broader observations underlying the intervener debate reviewed in Part I provide a set of considerations to balance in deciding when leave to supplement the evidentiary record is appropriate. Judges must first consider the need for judicial economy. Justice Beetz's comments cited earlier are particularly salient as it is inappropriate to turn a judicial hearing into anything resembling a "royal commission." [100] Instead, judges should decide issues properly appearing before them within the confines of the adversarial system of justice. This critique must nevertheless be viewed in light of the changed nature of constitutional litigation and in particular the increasing relevance of social science evidence to constitutional challenges.

Sacrificing the efficiency gained by prohibiting interveners from supplementing the record on appeal may also be necessary to advance a broader goal: protecting the reputation of the justice system. That reputation will be negatively impacted if the strict application of evidentiary rules leads to the perception that relevant parties, such as the CCLA and LEAF, have been denied an adequate voice in constitutional cases. This is especially true to an informed observer who is aware of the institutional limitations that judges face when engaging with social science evidence and other inherent

100 Sharpe & Roach at pp 384-385 citing a letter from Justice Beetz to the Court dated 10 May 1983.

limitations of the adversarial system of justice.[101] Most notably, any concern about fair opportunity will be accentuated when the applicant is impecunious as they likely could not afford to call all of the relevant evidence. Oversights that can be attributed to the different skillsets of trial vis-a-vis constitutional lawyers, or from counsel's relative inexperience with social science evidence,[102] may also warrant leeway when permitting intervention. Finally, in considering whether to grant a leave application, appellate judges should be cognizant of the far-reaching implications of a constitutional decision (as contrasted with scientific evidence relevant only to an individual charge) on individuals who are not before the court on appeal.

V. Conclusion

The judiciary has persistently disagreed about the appropriate role of interveners in appellate litigation since the adoption of the *Charter*. While that debate originally took place within the context of a new bill of rights, the passage of time resulted in much clearer legal doctrine and therefore less judicial demand for intervener submissions. The shifting nature of constitutional jurisprudence

101 Young at pp 641-642 (identifying the limits of the adversarial system in the confines of finding social facts).

102 Wilson at pp 242-243. While she identified lawyers' being ill-equipped to interpret a bill of rights at that time, the same criticism is apparent from a review of legal education and the proper understanding, presentation, and use of social science evidence. Perryman makes this point more directly. See Perryman at p 175 ("[t]here is an important role here, currently under-realized, for law schools and professional development organizations to train future lawyers and current lawyers to become literate and effective consumers of social science research").

nevertheless brought new challenges. The increased relevance and use of social science evidence to constitutional challenges raises the question: are judges now in a similar position as when the *Charter* was adopted due to their struggles interpreting social science evidence? In my view, this question should be answered in the affirmative. Justice Rowe's observation that interveners can apply for leave to supplement the factual record nevertheless provides a useful starting point for balancing the efficiency and fairness concerns relevant to determining the appropriate role of interveners. This is especially necessary for constitutional challenges given the increasingly dispositive nature of social science evidence in those cases and the broader interest of the public in ensuring that constitutional cases are decided with an informed evidentiary record.

Pre-Existing Legal Relationships in Promissory Estoppel Ought Not to Be Understood So Restrictively

Krish Maharaj*

The requirements to raise a promissory estoppel are variously expressed, but a common element to all formulations is the need for a "pre-existing legal relationship" between the parties to the estoppel. What constitutes a "pre-existing legal relationship" is not well-defined, however, and within the scholarship and jurisprudence on promissory estoppel some views on the topic are more restrictive than others. This article identifies questions raised by two of these restrictive interpretations, the first of which is advanced by the Supreme Court of Canada in Trial Lawyers Association of BC v Royal & Sun Alliance Insurance Company of Canada, and the second by K R Handley, a former Justice of the New South Wales Court of Appeal, in his extrajudicial scholarship on the topic. Highlighting these questions is intended to call attention to the respective shortcomings of these restrictive approaches, and to establish the groundwork for a new framework for understanding legal relationships in the context of promissory estoppel, which I will propose in a future article.

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* Dr. Krish Maharaj is an Associate Professor in the Faculty of Law at Thompson Rivers University. He earned his LLB/BCOM at the University of Auckland and his LLM and PhD from The University of British Columbia (UBC). Specializing in the law of obligations and private law relationships, he has a particular emphasis on contracts, equity and trusts, and damages. Admitted to the bar in New Zealand, British Columbia, and Alberta, Dr. Maharaj's approach to teaching and research is informed by his time in practice. Previously a faculty member at the University of Manitoba's Faculty of Law, he was a founding member of both the Desautels Centre for Private Enterprise and Law and the editorial board of the Desautels Review. His work on contracts and promissory estoppel has garnered significant recognition within academia and from the bench and bar.

Dr. Maharaj: "I am grateful to my friend Professor Bruce MacDougall for his thoughtful input on the finer points of estoppel. Any remaining errors and omissions are of course my own."

I. Introduction

Promissory estoppel is variously defined, but an element common to many formulations is the need for a pre-existing legal relationship between the parties to the estoppel (i.e., the promisor and the promisee).[1] What this means in practice and what will count as a pre-existing legal relationship for the purposes of raising promissory estoppel is, however, unclear. There is very clear disagreement on the matter, and several possible positions may be adopted. In this paper I will set out two of these potential positions that favour restrictive interpretations of the pre-existing legal relationship requirement, and thus restricted scope for promissory estoppel, in order to question the underpinnings of each.

The first of these two positions is apparent in the Supreme Court of Canada's recent decision in *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada,* (hereinafter *Trial Lawyers*).[2] This position equates a pre-existing legal relationship with a direct (and/or contractual) relationship as between the promisee and promisor, and perhaps a contractual relationship specifically between the parties to the estoppel (i.e., a direct contractual relationship). The second position is advanced by K R Handley, author of *Estoppel by Election and Conduct* and former judge of the New South Wales Court of Appeal. This position is that only a Right-Duty relationship in the Hohfeldian sense qualifies as a

1 B. MacDougall, *Estoppel*, 2nd ed (LexisNexis, 2019) at paras 5.96–5.99.

2 *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 [*Trial Lawyers*].

pre-existing legal relationship for the purposes of raising a promissory estoppel.[3]

This paper will raise more questions than it provides answers to with respect to the justification or rationale for either position, but in the circumstances, I believe this to be appropriate for two reasons. First, there does not appear to be significant support for either position in principle or authority which puts the onus on the proponents of each position. And second, this article is intended as a precursor to a larger work in which I will build on the criticisms outlined in this article and outline an alternative.

II. Direct Connections and Contractual Relations

The parties to the alleged estoppel in the *Trial Lawyers* case were a plaintiff in a motor vehicle accident case, Bradfield, and the defendant's insurer, RSA.[4] In the circumstances, the plaintiff alleged that RSA was estopped from denying coverage under the defendant's motor vehicle policy even though the defendant, Devecseri, had been in breach of their policy at the time of the accident.[5] The plaintiff alleged that RSA was estopped from denying coverage under the policy on the basis that the facts indicating the defendant had been in breach of their policy conditions were discoverable by all parties from the outset, and that RSA had allowed the litigation to continue for three years before taking an off-coverage position. These facts in concert were alleged by the plaintiff to give rise to an implied promise

3 K.R. Handley, *Estoppel by Conduct and Election*, 2nd ed (Sweet & Maxwell/Thomson Reuters, 2016) at paras 13-035–13-036.

4 *Trial Lawyers* at para 18.

5 *Trial Lawyers* at para 12.

that RSA would not deny coverage.[6] The facts in question pertained to the defendant's consumption of alcohol prior to the accident. RSA was apparently ignorant of this fact, but could easily have learned of it soon after the accident, if only RSA had obtained a copy of the coroner's report indicating the presence of alcohol in the defendant's system at the time of the crash.[7] In fairness to the Supreme Court, the argument advanced by the Trial Lawyers Association of British Columbia (TLABC), who had been granted public interest standing to continue the appeal after the actual plaintiff (Bradfield) had settled his claim with RSA, would have been better presented as estoppel by representation rather than promissory estoppel, and I do not disagree with the Court's ultimate conclusion that the promissory estoppel argument must fail overall.[8] As indicated above, however, I disagree with the Court's view that TLABC's promissory estoppel argument ought to fail (in part) because the plaintiff and RSA did not have a pre-existing legal relationship that sufficed to ground promissory estoppel.[9] I also regard the Court's remarks on this point as superfluous and unnecessary to justify the outcome of its analysis, but having been made by the highest court in the country, they ought to be addressed.

The Court's position on the nature of the pre-existing legal relationship requirement appears between paragraphs 37 and 45 of

6 *Trial Lawyers* at para 14.

7 *Trial Lawyers* at para 2. Even RSA appears to concede that the relevant information was easily discoverable soon after the accident; ("... the parties agreed that a coroner's report, available shortly after the accident — and approximately three years before RSA took an off-coverage position — would have provided RSA with evidence of the breach.").

8 *Trial Lawyers* at paras 18–19, 54.

9 *Trial Lawyers* at paras 41–43, 54.

the majority opinion, delivered by Moldaver and Brown JJ. In a concurring minority opinion, Karakatsanis J. also appears to accept this position.[10] The majority position as to what counts as a pre-existing legal relationship is not particularly clear. This is perhaps because the definition is taken for granted in light of existing jurisprudence[11] and because of the majority's focus on explaining that the connection between Bradfield and RSA could not constitute such a relationship. One can nonetheless infer what the Court considers to be a qualifying pre-existing legal relationship for the purposes of promissory estoppel from these remarks, and in particular from the distinction the majority draws regarding the connection between the original plaintiff, Bradfield, and RSA on the one hand, and the connection between RSA and the defendant/insured, Devecseri, on the other.

In the latter connection, the following remarks stand out in particular: [12]

> Promissory estoppel generally requires that the promisor and promisee already have a legal relationship … Trial Lawyers says that Mr. Bradfield, as a third-party claimant relative to Mr. Devecseri's insurance policy, was in a legal relationship with RSA by virtue of s. 258 of the *Insurance Act*.
>
> …
>
> Trial Lawyers submits that this statutory language creates the requisite legal relationship allowing Mr. Bradfield to assert a right of coverage as against RSA, both on his own behalf and by "stand[ing] in the shoes" of Mr. Devecseri's estate (A.F., at para. 102). We agree that s. 258 creates a legal relationship between Mr. Bradfield and

10 *Trial Lawyers* at paras 54–55.

11 *MacDougall* at para 5.98.

12 *Trial Lawyers* at paras 41–43.

> RSA. It grants third-party claimants under an insurance policy a cause of action directly against an insurer, thereby bypassing the insured. **In this way, and to that extent, it ousts the common law rule of contractual privity which would otherwise bar a third-party claimant from suing an insurer on an insurance contract to which the claimant is not a party. Absent s. 258, the third-party claimant's ability to recover funds from an insurer would be "entirely dependent upon the extent to which the insured [here, Mr. Devecseri's estate] chooses to or is able to enforce its contractual rights…**
>
> …
>
> We are, however, far from persuaded that Trial Lawyers accounts correctly for the nature of this relationship or of the rights and responsibilities flowing therefrom, and their implications for the estoppel analysis. **This is because the precise nature of this legal relationship, as determined by the statutory text, permits a claimant to sue the insurer only "upon recovering a judgment" against the insured.** On the facts of this case, this restriction is significant because RSA abandoned its defence of Mr. Devecseri in 2009, three years before Mr. Bradfield obtained his cross-claim judgment against RSA. This is the first obvious difficulty with Trial Lawyers' position: it relies on conduct by RSA that predates the existence of the relevant legal relationship.
>
> [**Emphasis added**]

The foregoing remarks suggest that the majority views the connection between Devecseri and RSA as the only extant legal relationship in the circumstances of this case. They acknowledge that the Ontario *Insurance Act* has the potential to modify this situation in some respects. In the event that an insurer provides a defence, and the plaintiff nonetheless recovers a judgment against the defendant/insured, the plaintiff may bring an action against the insurer directly to recover damages owing (from the defendant) from monies payable under the defendant's contract of insurance pursuant

to the provisions of the *Act*. However, this modification is explained simply as an exception to privity that allows the plaintiff to intrude into the relationship between insurer and insured, and not described as a legal relationship in and of itself.

What is more, the majority specifically rejects the possibility that any qualifying legal relation can exist as between the plaintiff and the insurer prior to judgment, [13] and go so far as to describe any attempt to make an insurer responsible to the injured plaintiff for the way in which the insurer conducts itself following the occurrence of a prima facie insured event and prior to judgment, as an 'absurd attempt to piggy back onto the relationship between insurer and insured'. [14] This suggests that the majority does not accept that a qualifying legal relationship for the purposes of promissory estoppel can arise by virtue of mutual but separate connections between the parties to the estoppel (i.e., the promisor and the promisee) and a third party. To put it more specifically, the majority dismisses the possibility that a qualifying legal relationship may exist between a plaintiff and a defendant's insurer by virtue of their mutual but distinct connections to the defendant/insured as victim and tortfeasor and insured and insurer. This is the case at least until the plaintiff's claim has crystalized into judgment and s.258 of the Ontario *Insurance Act*, and others of its type, apply to grant the plaintiff a direct cause of action against the insurer.

One can summarize the foregoing by saying the majority's position is that the connection between the parties to an alleged promissory estoppel must be direct if it is to count as a qualifying pre-existing legal relationship. Alternatively, or in addition, one could

13 *Trial Lawyers* at para 43.

14 *Trial Lawyers* at paras 37–38.

also summarize the majority position by saying that the connection between the parties to the alleged promissory estoppel must be contractual in nature. The majority's remarks suggest as much given that RSA's "Power" (in the Hohfeldian sense discussed below) as the insurer to affect the defendant/insured's legal interests and its power to affect the plaintiff's legal interests by denying or granting each of them the ability to insist on payment under the defendant Devecseri's motor vehicle policy, by taking an off-coverage position because of Devecseri's breach of the policy, or by waiving that breach, differ only in terms of their source. RSA's Power vis-à-vis Devecseri as the insured clearly arises by virtue of the insurance contract between them, whereas RSA's Power to create a right of recovery or cause of action in the plaintiff arose only by virtue of the *Insurance Act*. In substance though, apart from their source, there is little if anything to distinguish RSA's Power vis-à-vis either plaintiff or defendant, and it is RSA's Power vis-à-vis these parties that defines its putative relationship with either one of them for the purposes of any estoppel and thus the majority's discussion of legal relationships. As such, despite the majority's attempt to distinguish between RSA's connection to Devecseri and the plaintiff by referring to the reciprocal obligations owed by Devecseri and RSA which did not exist between RSA and the plaintiff, [15] it appears that the majority position is that the nature or category of relationship counts for the purposes of the applicability of promissory estoppel quite apart from the way in which the power/relationship may allow one party to affect the other in substance. Certainly, the presence of other reciprocal (and presumably contractual) obligations has never been a requirement for the application of promissory estoppel in the past, and it does not appear plausibly connected to the application of promissory estoppel

15 *Trial Lawyers* at para 37.

in the present either. If the majority is correct, however, it simply raises yet more questions than their position answers.

Having now explained that the majority position in *Trial Lawyers* with respect to the nature of pre-existing legal relationships is that they must be direct as between the promisee and the promisor (the parties to the estoppel), and/or characterized by the existence of mutual/reciprocal obligations and thus apparently contractual in nature, I can now identify and explain the questions these positions raise. The first of these pertains to the majority's apparent insistence that the connection between the promisor and promisee be direct, and the second relates to the majority's apparent insistence that the relationship be contractual in nature.

The majority's rejection of indirect relationships for the purposes of promissory estoppel in *Trial Lawyers* raises certain questions not only as a matter of principle but also with respect to the Court's own prior decisions. The first of these questions is: what difference in principle does it make whether the relationship between the parties to the estoppel arose from direct contact between them or of their mutual volition, rather than indirectly through the agency of a third party, or simply without the active participation of the promisee at all? I have no answer to this question myself, for I cannot see why the promisee's involvement (or lack thereof) in the creation of the relevant relationship ought to be significant.

What is more, I cannot see how the rejection of indirect relationships, or insistence that the parties' relationship arise from direct contact between them, can be reconciled with the Supreme Court's earlier decision in *Mt. Sinai,* where the Court sustained the Quebec Court of Appeal's decision to the effect that a government minister could be promissorily estopped from denying the grant of a hospital permit pursuant to legislation that delegated the relevant

authority to the minister.[16] The majority in *Mt. Sinai* admittedly justified this outcome on a different basis, but there is no suggestion at all in *Mt. Sinai* that the power or discretion delegated to a minister to grant a permit could not be subject to promissory estoppel, or that the relationship between the applicant healthcare provider and the Province could not qualify for the purposes of promissory estoppel being raised, simply because the legislation giving rise to the power or discretion was not created with the applicant healthcare provider's involvement. Furthermore, McLachlin CJ and Binnie J in the minority went so far as to say, "[i]f this were a private law case I would agree that the elements of promissory estoppel are present…", and only demurred from full support for the QCCA's conclusion on promissory estoppel because the stature of the decision maker as the minister and the policy behind the particular statutory provision precluded the application of 'public law estoppel' in this case.[17]

It otherwise did not seem to matter to the majority or minority in that case how exactly the minister's power arose. And I cannot identify any reason in principle as to why the source of the relevant power ought to matter anymore in the context of the interaction between the plaintiff in *Trial Lawyers* and RSA than it would have in *Mt. Sinai*. Both powers arose by statute, the only difference is that the promisor in the former case was a private actor and the promisor in the latter case was effectively the state, but where additional considerations applied to restrict the potential application of

16 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at paras 39–40 [*Mt. Sinai*].

17 *Mt. Sinai* at paras 46–48.

promissory or 'public law' estoppel in *Mt. Sinai*, no such factors appear in RSA's case. [18]

The possibility that pre-existing relationships must be characterized by the existence of reciprocal or mutual obligations, and presumably contractual in nature, to count for the purposes of promissory estoppel, raises the following question: if the relationship must be contractual, how is promissory estoppel not simply a rule of contract variation? The short answer might be that promissory estoppel is now simply a mechanism for contract variation and is not in fact an independent equitable doctrine. If that is the case, it must mean that Canadian contract law accepts detriment as a substitute for consideration for the purposes of making an otherwise bare promise enforceable, or at least that it does so within the context of an otherwise valid subsisting contractual relationship.

I take no position on whether acceptance of detriment as a substitute for consideration would be a good or bad thing, especially given that detriment is already accepted as an alternative to consideration by our largest common law neighbour, the United States. [19] However, I would question whether such a change was fully thought out by the majority in *Trial Lawyers*, and whether it would be broadly accepted given the general reticence courts in Canada have demonstrated with respect to similar changes to the consideration requirement for contractual variation. [20] If observers conclude that

18 *Mt. Sinai* at para 48.

19 S.L. Martin, "Kill the Monster: Promissory Estoppel as an Independent Cause of Action" (2016) 7:1 *William & Mary Business Law Review* at p 4.

20 *NAV Canada v Greater Fredericton Airport Authority Inc.*, 2008 NBCA 28; *Rosas v Toca*, 2018 BCCA 191; *Khan v Shaheen Investment Inc.*, 2022 ONSC 3033. Two major attempts have been made in this respect, namely *Greater Fredericton* in New Brunswick and *Rosas v Toca* in

such a change was not fully thought out or intended, I suggest that the majority's remarks in *Trial Lawyers* with respect to privity, and the importance of mutuality of obligations between promisor and promisee, should not be accorded any weight with respect to the requirements for a qualifying pre-existing legal relationship. Whether these remarks by the majority in *Trial Lawyers* will have any ongoing significance is still to be seen.

III. Right-Duty Relations Only: Right or Wrong?

As mentioned above, K R Handley, author of *Estoppel by Election and Conduct* and former judge of the New South Wales Court of Appeal, has taken the position that only a Right-Duty relationship in the Hohfeldian sense qualifies as a pre-existing legal relationship for the purposes of raising a promissory estoppel. [21] Much like the majority's position on pre-existing legal relationships in *Trial Lawyers* discussed in the preceding section, Handley's position also raises more questions than it answers in principle and in light of existing authority. To make sense of these concerns I will first explain Hohfeld's schema of jural relations, and then turn to the questions Handley's position raises.

A. Hohfeld's Schema

Wesley Newcomb Hohfeld's work titled *Fundamental Legal Conceptions* disambiguates the term "right" and establishes a framework for understanding the various senses in which the term "right" is used, and the situation of the opposite party (or parties)

British Columbia, but neither has gained much traction outside of their province of origin, or even full acceptance within their province.

21 Handley at paras 13-035–13-036.

affected by these various categories of right.[22] This framework is encapsulated in the following table that pairs each sense of the term right with its "jural correlative" that describes the situation of the party opposite the holder of the right ("Right Holder"), and thus defines the legal relationship between each pair.

Jural Correlatives

Right	Privilege	Power	Immunity
Duty	No Right	Liability	Disability

The top line of each of the above tables contains the four distinct senses in which Hohfeld argued the term "right" was used.[23] These concepts can be described or thought of as the beneficial or positive aspect of a pair.[24] The bottom line of the first table contains the concept regarded by Hohfeld as the opposite position from the term above it.[25] By contrast, the bottom line of the second table contains the concept that must necessarily describe the position of some opposite party (Party B) if Party A is to have the benefit of the concept immediately above it.[26] For example, if Party A is to have a Power then some person (i.e., Party B) must have a Liability (i.e., be liable to being affected by said Power).[27] Of the four relationships above the

22 W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1964).

23 Hohfeld at pp 35–36.

24 Hohfeld at pp 35–64.

25 Hohfeld at pp 35–64.

26 Hohfeld at pp 35–64.

27 Hohfeld at pp 50–51.

most relevant for present purpose are: Right-Duty, Immunity-Disability, and Power-Liability.

There are clearly a number of senses in which the term "right" can be understood, but in Hohfeld's schema, the term Right is narrowly defined as being equivalent to a "claim" in the sense of being some assertion that necessarily demands or requires action or abstention from some other person. [28] Duty is the correlative of Right in this sense, because in order for any such claim to be meaningful or valid it must, it seems, be mirrored by a coextensive obligation that requires the opposite party to act, or to refrain from acting, in accordance with the claim of the Right Holder. [29]

Such an obligation may clearly be either positive or negative, but must in any event be mandatory. [30] This aspect of Duty is essential to the Hohfeldian conception of Right ("claim rights"), which it helps to define, and helps to distinguish this sense of the general term "right" from what may be called "liberty rights", which Hohfeld describes as Privileges. [31] Privileges, such as the "right to free speech", differ from Rights proper in Hohfeld's schema in the sense that no other party is obliged to assist a party with said "right of free speech" (Party A) to speak, or to refrain from interfering with Party A's exercise of free speech. [32] One can, for instance, speak over Party A freely, even though Party A's "right to free speech" (that is their Privilege to speak

28 Hohfeld at pp 36–38.

29 Hohfeld at p 38.

30 Hohfeld at p 38.

31 Hohfeld at pp 38, 42–43.

32 Hohfeld at pp 38–41. Hohfeld gives an odd example to do with eating shrimp, but I think the example of speech makes the case more clearly.

freely) may be defeated.[33] Correspondingly, Party A is at liberty to keep trying to speak because their Privilege of free speech means that they are not under any Duty not to speak, and others who may oppose Party A's speech are in a position of "No Right" vis-à-vis Party A's speech because they cannot seek to prevent Party A's speech or sanction it through the legal system. By contrast, a property-holder's Right to the possession of their property cannot be defeated by contrary action (such as a party speaking over Party A) in the same way.[34] Any other party must comply with the property-holder's claim to possession by abstaining from interference with the property.[35]

This particular Right is clearly negative in the sense of not requiring a third party to take steps to protect the property-holder's interest, but it is nonetheless mandatory in the sense that it is a claim with which others must comply and which they cannot treat with indifference like a hypothetical rude conversationalist speaking over another and disregarding their liberty right or "Privilege" of free speech. Power and Immunity differ from the narrow sense in which Right is defined above, in that neither requires of the opposite party any action or inaction. They do not give rise to a corresponding enforceable duty on the part of the Right-Holder's opposite.[36] Power refers to an ability to affect the legal interests of the opposite party unilaterally, examples of which include the ability to convey property interests without the active participation of the other party, to make another party one's agent or to revoke that status, and even the ability to make a contractual offer which creates a power in the offeree to

33 Hohfeld at pp 38–41.

34 Hohfeld at p 38.

35 Hohfeld at pp 38–39.

36 Hohfeld at pp 7–8.

accept and thereby create new Rights and Duties where none had existed before.[37]

Another more immediately relevant example of a Power in the Hohfeldian sense from the *Trial Lawyers* decision discussed above, is the ability RSA had to waive the defendant/insured Devecseri's policy breach in *Trial Lawyers* and to thereby allow Devecseri's estate to maintain a right to coverage under his policy that it would otherwise not have had, which is for all intents a Hohfeldian Power because it was within RSA's control and allowed RSA to unilaterally affect a change in Devecseri's legal interests. Immunity is effectively the inverse of Power in that it entails no specific ability to affect the legal interests of another, but instead allows the Right-Holder freedom from the control or Power of another as regards some legal interest. Legislation that renders certain property exempt from the claims of creditors, for instance, creates an immunity on the part of the party whose property can no longer be seized to satisfy the claims of their creditors.[38] So too, do limitations statutes whose fundamental purpose is to allow a party to resist attempts by others to exercise a Power they may have otherwise had to bring a suit against them.

B. The Problems with Handley's Position

If the view that the parties' pre-existing legal relationship must be contractual in order for promissory estoppel to arise appears unsustainable in light of the discussion in Section II above, Handley's view that the relationship must fall specifically within the Hohfeldian category of Right-Duty does not fare any better. Handley argues that until the 1980s, promissory estoppel had only ever applied to Right-Duty relations as defined by Hohfeld, and that as a matter of

37 Hohfeld at pp 51–52, 55.

38 Hohfeld at pp 7–8.

precedent that is all it should apply to.[39] Whether this assertion is factually correct is open to question, as noted by Robertson, but regardless of its accuracy up until the 1980s, the law has evidently since moved on.[40]

What is more, even if the jurisprudence had not moved on prior to the 1980s, this would not indicate that there is or was no principled reason as to why promissory estoppel could not have applied to jural relations other than Right-Duty prior to then. All that alleged fact would indicate is that the jurisprudence may not yet have had the occasion to do so. There is also no obvious reason in principle as to why a promissory estoppel could not arise from a promise or assurance made in the context of another Hohfeldian jural relation such as a Power-Liability relationship as opposed to a Right-Duty relationship, and there are notable instances of this having occurred in Canada, Australia, and England. One such notable example is the British Columbia Court of Appeal's decision in *Granville Savings and Mortgage Corp. v. Sharet Investors Ltd*. ("*Sharet*"),[41] which appears to fall into the Power-Liability category of Hohfeld's schema, and coincidentally appears analogous to the relations present in *Trial Lawyers*.

The circumstances of *Sharet* involved two parties (a first and second mortgagee) that had competing security interests in the same property, namely the land and hotel belonging to their common debtor.[42] The second mortgagee took steps to enforce its security

39 Handley at para 13-036.

40 A. Robertson, "Three Models of Promissory Estoppel" (2013) 7 *Journal of Equity* at pp 233–235.

41 *Granville Savings and Mortgage Corp. v Sharet Investors Ltd.*, (1988) BCJ No 2712, 1988 CarswellBC 1459 [*Sharet*].

42 *Sharet* at paras 1–2.

interest in the land and obtained an order nisi of foreclosure and the appointment of a receiver manager for the hotel.

The second mortgagee also discussed the matter of proceeds from the hotel operation with the first mortgagee, and the first mortgagee's right to seek the appointment of their own receiver and to assert priority over funds generated by the hotel and collected by the receiver.[43] As a consequence of these discussions, the second mortgagee undertook to grant the first mortgagee priority over the funds from the hotel operation collected by the receiver on the understanding that the first mortgagee would not take legal action to establish their priority over the funds.[44] Subsequently, all funds collected by the receiver were held in an account pending determination of entitlement to the funds. That determination was the subject of this case.[45] In the circumstances, the Court unanimously held that a promissory estoppel arose in favour of the first mortgagee who had refrained from taking steps to assert their priority over the funds.[46] The Court's rationale for this conclusion was expressed as follows by Anderson JA, who accepted the first mortgagee's position with respect to an estoppel having been raised, and rebuffed the second mortgagee's reply that promissory estoppel was inapplicable because of the absence of a legal relationship between the parties:[47]

> In my opinion, there was a pre-existing legal relationship between the first mortgagee and the second mortgagee. That relationship was, in my opinion, that at all times, assuming that the second mortgagee was entitled to all the funds held by the receiver, that the

43 *Sharet* at paras 1–2.

44 *Sharet* at para 2.

45 *Sharet* at paras 1–2.

46 *Sharet* at para 2.

47 *Sharet* at para 2.

> first mortgagee could at any time pursuant to its first mortgage by appointment or by court order obtain the appointment of its own receiver and obtain priority over the funds. In those circumstances it cannot be said that there was not a pre-existing legal relationship between the parties.
>
> It follows from the above that a promise was made by the second mortgagee to the first mortgagee and the first mortgagee is entitled to rely on that promise and receive priority over the funds in the hands of the receiver. I would allow the appeal and order that the receiver pay over all such funds to the first mortgagee.

It is notable that the parties to the estoppel in *Sharet*, like the parties to the alleged estoppel in *Trial Lawyers*, were connected via their separate and distinct relations with a third party: their common debtor. It is also notable that the relationship between the first and second mortgagee, which the BCCA accepted as sufficient for the purposes of establishing a promissory estoppel, was neither contractual nor of the Right-Duty variety. Instead, it is evident that relations between the first and second mortgagees was one of Power-Liability because throughout the period of the receivership the first mortgagee had the ability to unilaterally affect the legal relations or interests of the second mortgagee by taking steps to appoint their own receiver for the administration of the debtor's property and to thereby displace the priority of the second mortgagee's claim to the funds generated by the debtor's hotel.[48]

In addition to *Sharet*, if provincial appellate authority is not enough to dismiss Handley's position at least as far as Canada is concerned, there is also the Supreme Court's decision in *Mt. Sinai* mentioned above.[49] As I noted when contrasting *Mt. Sinai* with the

48 *Sharet* at para 1.

49 *Mt. Sinai*.

Court's decision in *Trial Lawyers,* the important aspect of the relationship between promisor and promisee in *Mt. Sinai,* which could have attracted the application of promissory estoppel but for the *sui generis* public law context, was the (promisor) minister's power delegated under statute to grant or withhold the relevant hospital permit from the (promisee) applicant healthcare provider.[50] It follows that the nature of this relationship in Hohfeldian terms must be Power-Liability, much like the relationship in *Sharet*. Of course, one may counter that Handley is simply not concerned with Canada and does not purport to be describing our law. However, examples of promissory estoppel applying to pre-existing legal relationships belonging to Hohfeldian categories of jural relation other than Right-Duty also exist in Australia and England, including *The Commonwealth of Australia v Verwayen* [51] (limitation defence - Immunity-Disability), *The Commonwealth v Clarke* [52] (limitation defence - Immunity- Disability), *Robertson v Minister of Pensions*[53] (discretion to determine pension eligibility - Power-Liability), and *Anaconda Nickel Limited v Edensor Nominees Pty Ltd & Gutnick*[54] (power to withdraw from agreement subject to satisfactory due diligence report - Power-Liability).

Given the foregoing, I ask: how exactly can Handley's position be sustained? If it were correct, then one would have to conclude that *Anaconda v Edensor* was wrongly decided simply because it involved

50 *Mt. Sinai* at paras 76, 96, 100.

51 *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 (Australia).

52 *The Commonwealth v Clarke* [1994] 2 VR 333 (Australia).

53 *Robertson v Minister of Pensions* [1949] 1 KB 227 (United Kingdom).

54 *Anaconda Nickel Limited v Edensor Nominees Pty Ltd & Gutnick* (2004) 50 ACSR 679 (Australia) [*Anaconda*].

a promisor providing an assurance with respect to the exercise of power arising from a contract, rather than a right arising from a contract.[55] For myself, I cannot grasp what possible difference the Hohfeldian classification of a 'contractual right' could make to the applicability of promissory estoppel in principle, but it is for proponents of Handley's position to provide such an explanation. I simply question whether they can explain how the distinction between Right and Power in that case, or Right and any other Hohfeldian category, is in fact one with a difference as far as promissory estoppel is concerned.

IV. Conclusion

In this paper I have set out to question the correctness of the views described above with respect to what may count as a pre-existing legal relationship for the purposes of promissory estoppel. One may ask what is gained by raising such questions without suggesting any potential answers. My purpose herein has been to highlight the deficiencies of the majority view in *Trial Lawyers*, and the alternative view propounded by K R Handley and others with respect to the Right-Duty categorization of jural relations, as a precursor to expounding my own view of the pre-existing legal relationship requirement in a piece to follow this one. In the meantime, I hope that interested parties do not interpret the pre-existing relationship requirement as strictly as either of these camps would suggest. If nothing else, I have explained that there are good reasons not to.

55 *Anaconda* at paras 5–8; Robertson at pp 234–235.

BOOK REVIEW

Paul Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law*

Blair Major*

* Blair Major is an Associate Professor at the Thompson Rivers University Faculty of Law, where he teaches on law and religion, Administrative law, and Constitutional law. He also writes in the areas of law and religion, legal theory, constitutional law, and international human rights. His scholarship appears in various Canadian academic law journals and edited volumes.

I. Introduction

In his book, *A Culture of Justification: Vavilov and the Future of Administrative Law*, Paul Daly takes on the monumental task of explaining the development of judicial review in Canadian administrative law. The author aims to "explain and place in historical context the Supreme Court of Canada's decades-long struggle to bring coherence to Canadian administrative law, describing the new framework elaborated in *Vavilov*[1] and discuss the likely legacy of the *Vavilov* decision."[2] Overall, Daly achieves his stated goal. He sets out a high-level synopsis of the history and evolution of administrative law in Canada, which helps make sense of the landmark *Vavilov* decision and its achievements. The book also positions us well to predict future developments in this complex area of law. Daly's book would be helpful to anyone trying to gain a broader understanding of administrative law and understand the meaning and future directions of the law of judicial review post-*Vavilov*.

The arc of Daly's book is logical and straightforward. In the first chapter, Daly describes the historical development of judicial review of administrative decisions. His description looks at the jurisprudence, as well as some of the basic theoretical concepts through which readers can understand the evolution of judicial review, as discussed below. While the overview of the early history provided in the first chapter is cursory, Daly's analysis deepens as it approaches *Vavilov*. The second chapter focuses on the period between the 1970s and 2008, during which the Court issued the

1 *Canada (Minster of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*].

2 P. Daly, *A Culture of Justification*: *Vavilov and the Future of Administrative Law* (UBC Press, 2023) at p 4.

Dunsmuir decision.[3] At the close of the second chapter, Daly addresses *Dunsmuir* and its doctrinal structure. This is followed by a critical analysis of *Dunsmuir* and its jurisprudential progeny (what scholars sometimes refer to—for better or worse—as "the *Dunsmuir* decade") in the third chapter.

The foundations of administrative law explored in the first three chapters of Daly's book ground the fourth chapter, which describes the *Vavilov* decision. Daly calls the *Vavilov* decision the "big bang" which, aside from being a tidy bit of hyperbole, indicates that *Vavilov* marks a break with the past and the beginning of a new line of jurisprudence. Daly explains the changes introduced by *Vavilov,* which both preserved and augmented what came before. Daly discusses how trial and appellate courts in Canada have taken up and implemented the new *Vavilov* framework in the fifth chapter. This offers an excellent summary and initial evaluation of the changes made by *Vavilov* and whether the decision achieved the clarity and simplicity that the Court was looking for. The sixth and final substantive chapter is forward-looking: Daly discusses some of the questions that *Vavilov* did not resolve, which will need to be addressed by the judiciary. This final chapter forecasts future developments in administrative law and judicial review, in terms of both scholarship and future litigation.

II. Daly's Argument

Daly does much more than simply describe the doctrinal terms of the evolution of judicial review in Canada. He also offers a set of terms and concepts that work as a 'key' to help unlock and make sense of the doctrine and its evolution. This theoretical key is laid out in the

3 *Dunsmuir v New Brunswick*, 2008 SCC 9.

first two chapters. There are two elements identified by Daly.[4] First, there are three core concepts at the heart of the law of judicial review: jurisdiction, deference, and legislative intent.[5] Second, and perhaps more importantly, Daly describes three "fault lines" that mark the attitudes of judges and lawyers regarding the evolving principles of administrative law: deference/non-deference, form/substance, and reason/authority.[6] These binary attitudes are used to explain different postures and decisions taken at different times in the course of the development of the law of judicial review. The three core concepts and the three fault lines are deployed throughout the book to comment on different decisions and stages of development in the evolution of judicial review.

Daly argues that in the early phase of administrative law the courts took a highly formalist approach to the authority of administrative decision makers. This early approach centred on the jurisdiction of administrative agencies and the courts. In the second phase, the early formalist approach was inverted. This turn began with the Supreme Court of Canada *CUPE v NB Liquor* decision, which shifted attention away from questions of jurisdiction and prescribed a judicial posture of deference toward administrative decision makers.[7] According to Daly, the *Dunsmuir* decision completed the inversion.[8]

Daly argues that *Dunsmuir* failed because its reasons vacillated between the fault lines described earlier. It was "neither firmly

4 Daly at p 17.

5 Daly at pp 31-36.

6 Daly at pp 36-39.

7 *CUPE v NB Liquor Corp.*, [1979] 2 SCR 227, 97 DLR (3d) 417.

8 Daly at p 64.

formalist nor firmly substantivist in its approach to the standard of review." [9] The Court's approach to the application of the reasonableness standard in *Dunsmuir* was poorly designed, which led to it being applied in a "slipshod" way. Subsequent courts would sometimes prescribe deference and yet still embark on a probing and critical analysis of the decision.[10] In short, "the combination of a presumption of deference with heavy reliance on authority rather than reason in the application of the reasonableness standard was poorly designed, leading to morally suboptimal outcomes."[11]

With this as the background, Daly argues that the Court in *Vavilov* sought to rectify the deficiencies in the approach to judicial review set out in *Dunsmuir*. *Vavilov* achieved simplicity and clarity regarding the selection of the standard of review by crystalizing a categorical approach. The categorical approach rides on the back of a "wafer thin" idea of institutional design, which is fundamentally a formal and authority-based conception of the will of the legislature, [12] according to Daly. He argues the categorical approach can create absurdities when distinguishing the role of the courts in judicial review versus appellate review (when there is a statutory right of appeal).[13]

Regarding the application of the reasonableness standard, Daly was much more optimistic about the standard set in *Vavilov*. *Vavilov* clarified that reasonableness is fundamentally deferential in orientation and focused on reason. In a way, the formal *yin* of the

9 Daly at p 63.

10 Daly at pp 85-89.

11 Daly at p 82.

12 Daly at pp 95-96.

13 Daly at pp 96-104.

standard of review analysis is balanced by the substantive *yang* of the application of the reasonableness standard. The former is formalistic and authority-based while the latter is deferential and reason-based. The framework provided by the Court for conducting a judicial review of an administrative decision on the reasonableness standard places the reasons of the decision maker front and centre. This change, according to Daly, has undoubtedly strengthened judicial review and raised the bar for administrative decision makers.[14] The "lower courts have heard one of the messages of *Vavilov* loud and clear: the need for a decision maker to demonstrate responsive justification in order to gain deference."[15] This produces a positive "culture of justification."[16] A reasonable decision is not only justifiable, but it also must be *justified*. This irons out several troubling features of the *Dunsmuir* jurisprudence, including the particularly irksome dictum that instructed courts to give deference to the reasons that were *or could have been* offered by an administrative body, which effectively enabled courts to defer to an administrative decision maker even where they did not provide reasons to justify their decision.[17]

The structure provided by *Vavilov*, in Daly's view, represents a compromise reached by the judges on the Court who would fall on either side of the deference/non-deference, reason/authority, and form/substance fault lines.[18] Daly argues that these fault lines remain in the *Vavilov* decision, saying that the compromise merely "papers

14 Daly at pp 105-112.

15 Daly at p 130.

16 *Vavilov* at para 14.

17 Daly at pp 77-82.

18 Daly at pp 95, 119-121.

over" them. He also notes that the compromise reached in *Vavilov* has its limits, which can be seen in some of the ways that the decision enables greater judicial intervention. The two examples he gives are the strictness of applying reasonableness review to issues of statutory interpretation[19] and the discretion given to the judiciary not to remit a matter back to the decision maker if it fails reasonableness review.[20]

On balance, however, Daly seems supportive of the majority decision in *Vavilov*, arguing that "[a]s long as the correctness categories are narrowly confined and the standard of reasonableness is applied in the inherently deferential manner set out by the majority, *Vavilov* is better suited to contemporary judicial review, with its broad reach into all aspects of public administration, than the hands-off approach. If some decision makers have to up their game, so be it."[21]

The judicial output of the lower courts following *Vavilov* bears this out. *Vavilov* has, indeed, simplified the selection of the standard of review and provided clear guidance for conducting reasonableness review. Although the compromise struck in the new framework is not perfect—there are numerous doctrinal and theoretical questions and tensions that Daly raises throughout his analysis—it seems to be working fine for now. In Daly's words, "[t]he compromise between form and substance, deference and nondeference, and reason and authority *has held so far*."[22]

19 Daly at pp 112-116, 130-132.

20 Daly at pp 117-119, 150-151.

21 Daly at p 120.

22 Daly at p 153, emphasis added.

III. Response to Daly's Description, Analysis, and Argument

Overall, Daly's work is excellent. In particular, his book provides a clear and accurate description of administrative law in Canada. His story gives expression not only the doctrines but also the attitudes and commitments at play in the jurisprudence. The core concepts and "fault lines" that he uses as a key to understanding the law of judicial review are faithful to and accurately portray the dominant narrative in the administrative law scholarship and jurisprudence. If anything, Daly is perhaps *too* faithful to this dominant narrative, which may have a detrimental effect on how the story unfolds into the future.

My primary criticism of Daly's book is that at times it seems to be working at cross-purposes. While he encourages us in the concluding chapter to support *Vavilov*,[23] at times he appears to undermine the stability and clarity that *Vavilov* brings. Daly explained in great detail how the law of judicial review prior to *Vavilov* was a revolving door of failed frameworks. Attitudes and camps emerged amongst the judiciary. These differing camps assailed each other through their decisions. At times, there was even a sense of judicial revolt.[24] This helps us understand the mess that the Court set out to clean up in *Vavilov*. The fact that *Vavilov* may just have succeeded, albeit imperfectly, is impressive. This is echoed in Daly's words: "[w]hatever one's personal views about where administrative law should be placed in relation to the form/substance, deference/nondeference, and reason/authority fault lines, it is clear that with *Vavilov*, the Supreme Court of Canada may have achieved what many observers thought would be impossible, namely,

23 Daly at pp 177-180.

24 Daly at pp 89-91.

developing a stable general framework for Canadian administrative law."[25] Despite its glowing endorsement, Daly's discussion of *Vavilov*, as well as his discussion of the jurisprudence that has subsequently applied the *Vavilov* framework, insists on tracing the old terms of the debate and the old fault lines into the new terrain that *Vavilov* established. By doing so, Daly unfortunately preserves these old rivalries and risks allowing them to continue to frustrate the law of judicial review.

But Daly would seem to want to have it otherwise. His closing words in the book encourage us all to support *Vavilov.* Although some may disagree with the compromise reached in *Vavilov*, this may be our best chance to entrench a framework for administrative law that can provide a durable solution to what previously seemed unsolvable.[26] We would do well to heed Daly's advice, to put behind us the old gripes and issues that divided the courts and the scholarship, and step into something new.

25 Daly at p 178.

26 Daly at p 180.