

Toronto's 2018 Municipal Election, Rights of Democratic Participation, and Section 2(b) of the Charter

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I. Introduction

In 2018, the City of Toronto's municipal election overlapped with a provincial election that brought a new government to office. While the municipal election ran for a protracted period from May 1 to October 22, the provincial election began on May 9 and ended about four weeks later, on June 7.¹ On July 27, after only a few weeks in office, the provincial government tabled the *Better Local Government Act (BLGA)* and proclaimed the Bill into law on August 14.² The *BLGA* reduced Toronto City Council from 47 to 25 wards and reset the electoral process, mandating that the election proceed under a different concept of representation for City Council.³

The provincial government's reorganization of City Council both ambushed and commandeered an ongoing democratic process. Though municipal reform was not part of its campaign platform, the government reconstituted City Council just a few short weeks after its

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1 Office of the Premier, "Ontario Election on June 7, 2018" (8 May 2018), online: *Ontario Newsroom* <<https://news.ontario.ca/en/release/49542/ontario-election-on-june-7-2018>>

2 SO 2018, c 11 [BLGA].

3 *Ibid*, s 128(3) (providing that the 2018 municipal election "shall be conducted" as if the 25-ward division of the City was "already in effect").

election, and did so without notice or consultation. Neither the City, nor candidates for office, much less the electorate, were warned that the newly elected government intended to restructure Council and recalibrate an ongoing electoral process.⁴

In reforming Toronto City Council during an election, the provincial government upended a democratic process that was carefully planned and structured. Any election is a highly regulated undertaking and, with more than 1.8 million voters, the City of Toronto stages North America's fourth largest municipal election.⁵ Under the *BLGA*, 22 wards and their candidates for office disappeared and the remaining wards almost doubled in size, increasing from an average population of 61,000 to 110,000 per ward.⁶ A glance at the pre-and post-*BLGA* electoral maps readily demonstrates how radically the boundaries changed.⁷ In the face of dramatic and unexpected change, the City Clerk's team had to be nimble in redrawing the electoral map, reissuing ballots, and otherwise managing a complex municipal process.⁸

The *BLGA* bisected an election that was past the midway point of the campaign. The day Bill 5 was announced was also the deadline for municipal candidates to file nomination papers. By then, 544 individuals had declared their candidacy for the offices of Mayor, City Councillor, and School Trustee.⁹ After the *BLGA* was enacted on August 14, candidates had until September 14 to abandon or repurpose their campaigns under the 25-ward model.¹⁰ That left 38 days, from September 14 to Election Day on October 22, for candidates and their teams to restart their campaigns in enlarged and unfamiliar wards, often against a new slate of competitors.

In eliminating nearly half of the City's electoral wards, the *BLGA* undermined the groundwork laid by candidates and their teams, who by then had been campaigning under the 47-ward model for up to three and a half months. Posters and pamphlets prepared at expense were useless, scarce campaign resources spent on non-existent wards were wasted, and door-to-door and other campaign activity was a loss. Some candidates dropped out and others adapted, transferring their campaigns to wards with different boundaries, demographics, and dynamics. In all, candidates for City Council fell from 292 to 242, for a net loss of 50, and

4 "Doug Ford's meddling in Toronto's election was a secret, off the record, backroom decision" (17 September 2018), online: *Ontario NDP* <<https://www.ontariondp.ca/news/doug-ford%E2%80%99s-meddling-torontos-election-was-secret-record-backroom-decision>>; see also Michael Morden, "The Process Around Ontario's Bill 5, which transforms the political process in Toronto, failed to meet the criteria for democratic legitimacy" (4 September 2018), online: *Policy Options* <<https://policyoptions.irpp.org/magazines/higher-standard-required-changes-democratic-bodies/>>.

5 The others are Mexico City, Los Angeles, and New York City. City of Toronto (Election Services), "2018 Municipal Election Report" online (pdf): *Toronto* <<https://www.toronto.ca/wp-content/uploads/2019/07/96b2-2018-Election-Report.pdf>> [*Municipal Report*] at 5.

6 *City of Toronto et al v Ontario (Attorney General)*, 2018 ONSC 5151 [Toronto ONSC] at para 4.

7 See *Municipal Report*, *supra* note 5 at 6; see also DH Toronto Staff, "This is what Toronto's 25-ward electoral map looks like (MAPS)" (19 September 2018), online: *Daily Hive News* <<https://dailyhive.com/toronto/toronto-new-25-electoral-ward-2018>>.

8 *Municipal Report*, *ibid* at 10 (explaining the tasks relating to election readiness under the *BLGA*); *ibid* at 22 (describing the time and effort required to realign the geographic boundaries of each ward); and *ibid* at 26 (explaining the demands of ballot production).

9 *Ibid* at 15 (also showing the breakdown of candidates for each office).

10 *Ibid*. In the uncertainty arising from the emergency litigation, the deadline was extended to September 20 and 21.

156 candidates withdrew.¹¹ Not surprisingly, changing the foundation of the 2018 municipal election upset and confused other participants, including the media and third party campaigners, not to mention the electorate at large.

The unilateral transformation of City Council was high-handed and disrespectful of a process under the *City of Toronto Act, 2006* that established the 47-ward model shortly before the 2018 election.¹² Displacing that model was described as “vindictive and mean-spirited,” as well as “unfair to candidates that ran in good faith, started campaigns, raised funds, and spent money hiring staff, purchasing materials, and renting campaign offices.”¹³ It is not surprising that the legislation provoked immediate and vociferous opposition because it cut City Council almost in half and disrupted a duly constituted election process.

The tension and uncertainty heightened through a cycle of expedited litigation. Shortly after the *BLGA* passed, the City of Toronto and two groups of aggrieved candidates brought applications challenging the *BLGA*’s constitutional validity. The applications were heard together and on September 9, 2018, the application judge invalidated the legislation, restoring the 47-ward electoral map and summarily dismissing the government’s justification for enacting mid-election reforms, as “crickets.”¹⁴ Under notice that the government would re-enact the *BLGA* and invoke the section 33 override to protect the statute from the *Charter*,¹⁵ a panel of the Ontario Court of Appeal (the “stay panel”) stopped the order of invalidity, pending appeal, and the election proceeded under the *BLGA*’s 25-ward model.¹⁶ One year later, the Ontario Court of Appeal (the “appeal panel”) reversed the application judge and upheld the *BLGA*.¹⁷ The Supreme Court of Canada granted the City of Toronto leave to appeal and will hear the appeal on March 16, 2021.¹⁸

Government action that is unfair or contrary to democratic values is not necessarily unconstitutional. In this instance, the top-down substitution of a dramatically different electoral map during an election was unprecedented, but did not reveal a clear pathway to a constitutional challenge. Ultimately, the litigation grounded the challenge in section 2(b),

11 *Ibid.* While the candidates for Mayor did not change (35), candidates for School Board Trustee increased slightly, from 217 to 224.

12 Toronto ONSC, *supra* note 6 at paras 53-54. Pursuant to its authority under the *City of Toronto Act 2006*, SO 2006, c11 (*COTA*), the City initiated the Toronto Ward Boundary Review that led to Council’s adoption of the 47-ward model for City Council. Litigation arising from the proposal ended before the 2018 municipal election was scheduled to begin.

13 Sean Marshall “Why Doug Ford’s plan for 25 Toronto wards is an attack on democracy” (1 August 2018), online: *Marshall’s Musings* <<https://seanmarshall.ca/2018/08/01/why-doug-fords-plan-for-25-toronto-wards-is-an-attack-on-local-democracy/>>.

14 Toronto ONSC, *supra* note 6 at para77. “Crickets” is a colloquial expression that connotes absolute silence or no communication, reflecting the observation that, “in silence, only the crickets are heard”. Here, the application judge used the word sarcastically and as shorthand for his view that the government completely failed to provide evidence that the violation was demonstrably justified.

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

16 *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761 [“stay panel” or “stay reasons”]. On the override, see note 27, *below*.

17 *Toronto (City) v Ontario (Attorney General)*, 2019 ONCA 732 [“appeal panel” or “appeal reasons”].

18 *City of Toronto v Attorney General of Ontario*, 2020 CanLII 23630 (SCC) [*City of Toronto*]. The Supreme Court of Canada granted leave to appeal on March 26, 2020 and the appeal will be heard on March 16, 2021.

maintaining that the *BLGA*'s transformation of City Council and reduction in the number of electoral wards violated the *Charter*'s guarantee of expressive freedom.¹⁹ At the outset, it should be noted that the *BLGA* implicated not one, but two conceptions of entitlement under section 2(b): one that addressed the facial validity of the statute and another that concerned the timing of the *BLGA*'s enactment during an extant municipal election.

This primer on *City of Toronto* addresses misconceptions about these entitlements that led the appeal panel to dismiss the section 2(b) claim. First, a focus on the facial validity of the *BLGA* prompted a positive rights analysis that deflected attention from the statute's impact on electoral expression. As explained below, that analysis did not apply to either of the section 2(b) claims in *City of Toronto*. Second, though freedom from the government's interference with electoral expression is a negative entitlement, the appeal panel failed to apply *Irwin Toy*'s section 2(b) framework, and misconceived the claim in three critical ways.²⁰ A principled analysis of section 2(b) leads instead to the conclusion that the *BLGA*'s alteration of the electoral map during a municipal election violated section 2(b)'s rights of democratic participation.

Finally, the question of a just and appropriate remedy is less straightforward in the unusual circumstances of this appeal. The municipal election took place on October 22, 2018, and a 25-ward Council, as prescribed by the *BLGA*, has been in office since then. Though an order of invalidity is not feasible under section 52(1) of the *Constitution Act*, the government's interference with section 2(b) during the municipal election clearly warrants a remedy.²¹ It is impossible to turn the clock back to the time of the breach, but it is important for the Supreme Court to censure the violation of section 2(b) and vindicate the *Charter*'s rights of democratic participation. In the circumstances, a declaration that the *BLGA*'s enactment and implementation during the 2018 municipal election was an unconstitutional violation of section 2(b) of the *Charter* is a just and appropriate remedy under section 24(1) of the *Charter*. To make the point bluntly, the provincial government's sabotage of an ongoing electoral campaign was constitutionally intolerable and must be censured by the Court.

II. "All that is in issue here is the timing..."²²

While the configuration of a municipal council does not ordinarily raise freedom of expression concerns, the options for a constitutional challenge on other grounds were limited. Under section 92(8) of the *Constitution Act 1867*, the provinces have exclusive jurisdiction, vis-à-vis the federal government, on matters of municipal government, and section 3 of the *Charter*,

19 *Charter*, *supra* note 15, s 91(24). Section 2 of the *Charter* provides that "everyone has the following fundamental freedoms, including... (b) ... freedom of expression."

20 *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy* cited to SCR]. See discussion, *below*. In brief, the appeal panel erred in confusing the *BLGA*'s effects on electoral expression with a right to effective expression; in failing to acknowledge the rights of democratic participation at stake; and in applying the substantial interference test to a claim governed by *Irwin Toy*.

21 At the Supreme Court of Canada, the City continues to seek the *BLGA*'s invalidation, requesting a declaration of invalidity that will be suspended until the next municipal election, when City Council would return to the status quo *ante* of a 47-ward model. *City of Toronto*, *supra* note 18, Factum of the Appellant in the Supreme Court of Canada at para 152.

22 Appeal panel, *supra* note 17 at para 45.

which guarantees democratic rights, does not extend to municipal elections.²³ With those avenues foreclosed, questions about the *BLGA*'s constitutionality gravitated to section 2(b)'s guarantee of expressive freedom and to the doctrine of unwritten constitutional principles.²⁴

The application judge found that the *BLGA* unjustifiably violated section 2(b) and declared the statute to be of no force and effect.²⁵ Specifically, he held that the legislation infringed the section 2(b) rights of candidates because it was enacted during an election campaign; he also concluded that it violated the rights of the electorate because doubling the ward size compromised their right to vote for effective representation.²⁶ The government responded to the application judge's decision by seeking a stay of the order invalidating the *BLGA*, and by introducing Bill 31, the *Efficient Local Government Act, 2018*.²⁷ The purpose of the Bill was to re-enact the legislation and protect it from judicial scrutiny by invoking the legislative override under section 33 of the *Charter*.²⁸

At the stay hearing, counsel for the Attorney General was instructed to advise the judges that the government would not enact Bill 31 if the panel granted an order preserving the *BLGA*'s reorganization of City Council for the municipal election.²⁹ The stay panel made that order on September 19, 2018, pronouncing that it was "not in the public interest" for the election to proceed under the application judge's "dubious ruling."³⁰ Though it was unusual in an interim matter, the panel did not mince words, stating that the lower court ruling was "probably wrongly decided."³¹

Acknowledging that the *BLGA* was "undoubtedly frustrating," as well as "unexpected and alarming," the stay panel described the transformation of the City's electoral map as little more than an "inconvenience" to candidates who still had "considerable time" to "strategically refocus."³² Emphasizing that the *BLGA* did not prohibit expressive activity and that

23 *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, s 92(8), reprinted in RSC 1985, Appendix II, No 5 grants the provinces exclusive jurisdiction over "Municipal Institutions in the Province". The text of the *Charter*, supra note 15, s 3 protects the right of citizens to vote in elections for the House of Commons and legislative assemblies, but not in municipal or other non-parliamentary elections.

24 This paper does not consider whether the *BLGA* violated the evolving doctrine of unwritten constitutional principles. See, e.g. *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385; *British Columbia v Imperial Tobacco Ltd*, 2005 SCC 49.

25 Toronto ONSC, supra note 6 at paras 21, 78 and 85.

26 *Ibid* at para. 20.

27 Bill 31, *An Act to amend the City of Toronto Act, 2006, the Municipal Act, 2001, the Municipal Elections Act, 1996 and the Education Act and to revoke two regulations*, 1st Sess, 42nd Leg, Ontario, 2018 (first reading 12 September 2018) [*Efficient Local Government Act 2018*]. See also, "Explanatory Note" (last visited 24 February 2021), online: *Legislative Assembly of Ontario* < <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-31> >

28 *Ibid*, s 456.1(1) (directing that the *Act* operates notwithstanding s 2 and ss 7-15 of the *Charter*). Section 33, which is known as the override or notwithstanding clause, authorizes legislatures to immunize statutory provisions from sections 2 and 7 to 15 of the *Charter* for a period of five years, after making a declaration explicitly invoking s 33. *Charter*, supra note 15.

29 Stay panel, supra note 16 at para 8.

30 *Ibid* at para 20.

31 *Ibid* at para 10 (explaining that, in the exigent circumstances of the application for a stay, "greater attention must be paid to the merits of the constitutional claim").

32 *Ibid* at para 13.

participants were just as free to engage in electoral activities, the panel described the section 2(b) claim as a “positive entitlement to a particular platform.”³³ Citing *Baier v Alberta*³⁴ and *Delisle v Canada*,³⁵ the judges held that section 2(b) does not include a right to the 47-ward “platform” and found that the *BLGA* did not substantially interfere with expressive freedom.³⁶

Almost a year after the election, a five-member panel of the Ontario Court of Appeal reversed the lower court decision and upheld the *BLGA*.³⁷ Miller JA’s majority reasons adopted a limited conception of section 2(b) and ruled against the guarantee on every issue. He held that by conflating positive and negative rights, the application judge erroneously expanded the scope of section 2(b).³⁸ Miller JA also agreed with the stay panel that section 2(b) does not guarantee an election based on a particular platform, or on the model of City Council that existed when the election began. As well, he rejected any suggestion that section 2(b) includes a concept of effective representation, stating that such a view “wrongly imports the content of s[ection] 3 into s[ection] 2(b)” to circumvent the *Charter*’s failure to protect municipal elections under section 3.³⁹

Significantly, the majority opinion concluded that the *BLGA* did not raise any question of negative entitlement. In reaching that conclusion, Miller JA’s majority reasons all but presupposed that a violation of section 2(b) requires the direct prohibition of expressive activity; as he stated, freedom of expression is respected “in the main” if governments “simply *refrain*” from interfering with it.⁴⁰ Under that view, the *BLGA* did not violate section 2(b) because nothing in the legislation prevented any candidate from “saying anything he or she wished to say on any subject.”⁴¹

In this way, the section 2(b) claim was reframed as a right of “effective” expression, and an affirmative entitlement falling outside the scope of section 2(b).⁴² As Miller JA explained, section 2(b) does not promise that “expression will retain its value,” and did not require the government to maintain the expressive activity of candidates in the 47-ward election campaign.⁴³ The government has no constitutional duty to “promote, enhance, or even preserve the effectiveness of anyone’s political expression,”⁴⁴ and nor is section 2(b) concerned with government action that has the “side effect” of reducing expression’s “likelihood of success.”⁴⁵ Under this analysis, the *BLGA*’s side effects on electoral expression did not constitute a violation of section 2(b).⁴⁶

33 *Ibid* at para 15.

34 *Baier v Alberta*, 2007 SCC 31 [*Baier*].

35 *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 176 DLR (4th) 513 [*Delisle*].

36 Stay panel, *supra* note 16 at paras 15, 13.

37 Appeal panel, *supra* note 17 (MacPherson and Nordheimer JJ.A, dissenting).

38 *Ibid* at paras 40 and 48.

39 *Ibid* at para 77.

40 *Ibid* at para 42 [emphasis in original].

41 *Ibid* at para 59.

42 Toronto ONSC, *supra* note 6 at para. 26. Despite citing *Irwin Toy*, the application judge erroneously applied the substantial interference test under s 2(b) (*ibid* at paras 37, 38). See discussion on this point, *below*.

43 Appeal panel, *supra* note 17 at para 46.

44 *Ibid* at para 43.

45 *Ibid* at paras 41, 43.

46 The majority opinion emphasized and repeated the point. See, e.g. *ibid* at paras 59, 60 (stating that s 2(b) does not guarantee any right to “effective” expressive or to an effective platform and adding that “the efficacy of expression - let alone prior expression - is not guaranteed by s. 2(b)”).

That, in short, is how the appeal panel transformed a claim of freedom from interference with an electoral process into a positive obligation on government to “enable” electoral expression or guarantee its “effectiveness.” As explained below, the question of electoral expression’s efficacy was beside the point because it was sufficient, under *Irwin Toy*’s concept of breach, that the *BLGA*’s transformation of City Council affected rights of democratic participation in an ongoing municipal election.⁴⁷

Finally, Miller JA’s observation that “all that is in issue here is the timing” spotted the key issue while missing the point.⁴⁸ He treated the statute’s timing as constitutionally inconsequential, because the “alleged” impact on expressive freedom would be the same whether the *BLGA* was enacted during or after the election.⁴⁹ Campaign activities that were simply diminished would have been “entirely for nought” if the *BLGA* was passed after the election.⁵⁰ Even so, the timing of the *BLGA* was hardly neutral, because it was impossible for the government to change the electoral map during an election campaign without disrupting electoral expression that is protected by section 2(b).

Justices MacPherson and Nordheimer dissented from the majority opinion and would have upheld the lower court decision invalidating the *BLGA*. Justice MacPherson’s reasons emphasized that during a campaign the “fundamental rules of a municipal election” — including ward boundaries, spending and donation limits, and nomination criteria — are “fixed in place.”⁵¹ Once a campaign begins, these rules are “no longer in flux.”⁵² As he explained, free expression would be “meaningless” if the terms of the election, “as embodied in the legal framework,” could be upended mid-stream.⁵³ He concluded, therefore, that the *BLGA* “substantially interfered with the right of all electoral participants to freely express themselves within the terms of the election after it had begun.”⁵⁴

In *City of Toronto*, the unusual dynamics of mid-election legislative reform obscured the relationship between the two elements of section 2(b) entitlement. While the statutory claim challenged the constitutionality of the *BLGA*’s transformation of City Council, the electoral claim linked the statute’s impact on the election to section 2(b)’s core values and rights of democratic participation. The confluence of those two entitlements set up the positive-negative rights dichotomy that dominated the Court of Appeal’s analysis. The next section uncouples the two entitlements, explaining that while the *BLGA*’s changes to City Council do not breach section 2(b), the statute’s disruption of the municipal election violated the guarantee’s rights of democratic participation.⁵⁵

47 It can be noted that the application judge’s analysis of s 2(b) was not based on a conception of effective expression but rested, instead, on *Irwin Toy* and the effects branch of the purpose-effects test. Toronto ONSC, *supra* note 6 at para 26.

48 Appeal panel, *supra* note 17 at para 45.

49 *Ibid* (qualifying the impact on expressive freedom as “alleged”).

50 *Ibid*.

51 *Ibid* at para 121.

52 *Ibid*.

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

54 *Ibid* at para 128 [emphasis added]. See also *ibid* at paras 132-33 (explaining why *Baier v Alberta* was not dispositive of the s 2(b) claim). On the substantial interference standard, see discussion *below*.

55 The concept of breach has implications for the question of remedy. Specifically, though a conclusion that the *BLGA* was unconstitutional would result in an order invalidating the statute under s 52(1), a finding that

III. Section 2(b), the 2018 Municipal Election, and the *BLGA*

The Supreme Court of Canada's jurisprudence confirms that freedom of expression is section 2's most diverse guarantee, because it protects all forms and content of expression, with few exceptions, and does so in a variety of settings and contexts.⁵⁶ Many years ago, the Supreme Court's landmark decision in *Irwin Toy* established a low threshold for the question of section 2(b) breach, entrusting virtually all questions about limits on expressive freedom to the section 1 analysis.⁵⁷ Under *Irwin Toy*, any government interference with an attempt to convey meaning is *prima facie* in breach of section 2(b).⁵⁸

Such a generous interpretation has at times raised concerns that the breadth of section 2(b)'s scope might "overshoot" the purposes of the guarantee.⁵⁹ Under *Irwin Toy*'s definition, section 2(b) is potentially unlimited because "[n]early everything people do creates opportunities for expression if 'expression' is viewed expansively enough."⁶⁰ As Justice LeBel acknowledged in *Baier*, such a broad definition invites recourse to doctrines aimed at narrowing the scope of section 2(b), including the concept of platforms and the "delicate distinction between positive and negative rights."⁶¹ That is precisely what happened in *City of Toronto* when the *BLGA*'s plan for representation on City Council was challenged as a breach of expressive freedom.

As Miller JA's majority reasons noted, it was "uncontested" that the provincial government was free to enact the *BLGA* "after an election, even the very next day."⁶² In this regard, the application judge's conclusion that section 2(b) includes the right to "cast a vote that can result in meaningful and effective representation" overshot the mark, stretching the guarantee beyond its legitimate purposes.⁶³ Instead, it was the *BLGA*'s timing, not its reform of Council, that made the constitutional difference: the government could not alter City Council during an election without interfering with electoral expression and rights of democratic participation.

In large part because the litigation focussed on the *BLGA*'s restructuring of City Council, the appeal panel made critical errors in interpreting section 2(b). First, the panel's decision misapplied and expanded the scope of positive rights analysis under section 2(b). Second,

the *BLGA*'s timing interfered with electoral expression required a remedy under s 24(1) of the *Charter*. As discussed below, the only remedy that is feasible at this stage of the appeal is a declaration that the *BLGA*'s enactment during the municipal election unjustifiably violated s 2(b)'s rights of democratic participation.

56 The jurisprudence includes claims arising from statutory prohibitions on expressive activity, civil as well as criminal, the open court principle, access to government property for expressive purposes, and restrictions on expression under the common law (i.e. defamation), among others. In addition, s 2(b) protects freedom of the press and media, including the newsgathering function and journalist-source privilege, and doctrines to address search warrants and production orders against members of the press.

57 *Irwin Toy*, *supra* note 20. See *Ford v Quebec (AG)*, [1988] 2 SCR 712 at 765-66, 54 DLR (4th) 577 [*Ford*] (stating that limits on expressive freedom should be decided under s 1, not s 2(b)).

58 *Irwin Toy*, *ibid* at 969.

59 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344, 18 DLR (4th) 321.

60 *Baier*, *supra* note 34 at para 76 (concurring opinion).

61 *Ibid*.

62 Appeal panel, *supra* note 17 at para 44.

63 *Toronto ONSC*, *supra* note 6 at para 59.

the decision misconceived the negative entitlement by confusing government action affecting expression with a concept of effective expression. Finally, the panel's majority reasons sidelined section 2(b)'s rights of democratic participation and misapplied the substantial interference test.

Freedom's Positives and Negatives

City of Toronto does not present as an archetypal claim under section 2(b) because the *BLGA* neither prohibited nor inhibited expressive activity.⁶⁴ As a result, the appeal panel dismissed the claim, finding that section 2(b) of the *Charter* was not implicated at all. As noted above, Miller JA inferred that a breach of section 2(b) all but requires a prohibition of expressive activity.⁶⁵ To the contrary, *Irwin Toy* confirms that a breach of section 2(b) does not require or depend on an express prohibition.⁶⁶ Although the application judge applied *Irwin Toy* and its effects test, the appeal panel dismissed *Irwin Toy* and turned to a positive rights analysis under *Baier v Alberta*.

At first impression, there is a superficial resemblance between the section 2(b) issues in *City of Toronto* and *Baier v Alberta*, which addressed the constitutionality of a statute preventing school employees from running for office as a school trustee.⁶⁷ In *Baier*, the Court found that school employees challenging their exclusion from candidacy were seeking affirmative access to a statutory platform.⁶⁸ Declaring that affirmative entitlements under section 2(b) are exceptional, the Court applied a positive rights analysis and upheld the statutory exclusion. As Rothstein J explained, granting the claim would effectively constitutionalize eligibility and impose a positive obligation on government to allow school employees to run for office.⁶⁹ In applying a positive rights analysis, the Court paired the emergent concept of a "statutory platform" with *Dunmore v Ontario*'s three-part test for positive rights under section 2(d).⁷⁰

In *City of Toronto*, the appeal panel applied *Baier* because invalidating the *BLGA* to restore the pre-existing "platform" of 47 wards looked like a "positive entitlement to a particular platform."⁷¹ As Miller JA explained, "[g]overnment is not required to take any positive steps to provide or maintain particular platforms to enable anyone's expression."⁷² To that he added,

64 Appeal panel, *supra* note 17 at para 68 (confirming that the complainants were not "prevented" from exercising their freedom of expression).

65 *Ibid* at paras 42.

66 *Irwin Toy* stated that even if the government's purpose was not to restrict or prohibit expression, a court must still decide whether the effect of the government action was to restrict free expression. To explain, the Court stated that a rule against littering or noise that does not overtly prohibit expression may nonetheless affect expressive activity and violate s.2(b) as a result. *Irwin Toy*, *supra* note 20 at 975-76.

67 *Baier*, *supra* note 34 at para 41.

68 *Ibid* at para 36.

69 *Ibid* at para 38.

70 *Dunmore v Ontario*, 2001 SCC 94 [*Dunmore*]; *Baier*, *supra* note 34 at para 27 (stating that the exception to the general rule of no positive rights under s 2 is met where (1) a claim of underinclusion is grounded in fundamental freedoms, not in access to a particular statutory regime; (2) the claimant demonstrates that there has been a substantial interference with activity protected by s 2; and (3) the state must be accountable for the claimant's inability to exercise the fundamental freedom).

71 Appel panel, *supra* note 17 at para 15.

72 *Ibid* at para 47.

in unqualified terms, that a challenge to legislation that modifies a statutory platform is an assertion of a positive right.⁷³

Baier and its statutory platform doctrine are a carve-out from *Irwin Toy* that apply sparingly, in limited and exceptional circumstances. In introducing the concept of a statutory platform under section 2(b), the Court expressed reservations about the positive-negative dichotomy, noting in particular that the distinction is not “always clearly made” and is not “always helpful.”⁷⁴ On that front, *Baier* and *City of Toronto* demonstrate how readily the distinction can be manipulated. Depending on one’s point of view, *Baier*’s school trustees were either seeking affirmative access to candidacy for office, or a negative right to be free from statutory criteria targeting them for exclusion from eligibility. While Rothstein J’s majority opinion treated it as a positive claim, Justice Fish’s dissent took a contrary view, characterizing the provision as an exclusion that targeted school employees.⁷⁵ Meanwhile, Justice LeBel offered yet another perspective in finding the claim outside the guarantee’s remit. In similar fashion, the claim in *City of Toronto* could be conceptualized, alternatively, as an affirmative or positive entitlement to the 47-ward platform, or as a negative right to be free from government interference “in the use of an existing platform.”⁷⁶

The concept of a platform is rarely invoked because the doctrine can narrow the scope of section 2(b), working against the Court’s stated commitments to a generous interpretation and low threshold for breach.⁷⁷ It is striking, too, that *Baier* incorporated *Dunmore*’s onerous substantial interference standard into section 2(b), despite clear differences in approach between sections 2(b) and (d).⁷⁸ Perhaps for those reasons, the statutory platform-*Dunmore* analysis has only been applied once, in *Baier*, and the Court subsequently adopted a cautious approach to positive rights under section 2(b). In *Greater Vancouver Transportation Authority v Canadian Federation of Students* (“*Translink*”), the Court warned that the statutory platform doctrine could transform many section 2(b) entitlements into positive rights claims.⁷⁹ In doing so, Deschamps J admonished that *Baier* should not be misconstrued to apply to all cases in which expression relies, to some degree, on government “support or enablement.”⁸⁰ The next time it was invited to apply *Baier*, the statutory platform doctrine, and *Dunmore*, the Court bluntly stated that “nothing would be gained by furthering this debate,” and applied the *Irwin Toy* methodology instead.⁸¹ As Fish J had observed in *Translink*, “*Baier* rests on its own factual foundation and was not intended to break fresh constitutional ground.”⁸²

73 *Ibid* at para 56.

74 *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1039, 105 DLR (4th) 577 [*Haig*].

75 *Baier*, *supra* note 34. In dissent, Justice Fish characterized the statutory provision as a prohibition and “systematic exclusion” of otherwise qualified persons from participation in an important institution of local governance (*ibid* at para 96).

76 Appeal panel, *supra* note 17 at para 55 (stating the City’s position).

77 See e.g. *Haig*, *supra* note 74; *Native Women’s Assn of Canada v Canada (AG)*, [1994] 3 SCR 627, 119 DLR (4th) 224 [NWAC cited to SCR] (rejecting s.2(b) claims under a positive rights analysis).

78 *Baier*, *supra* note 34 at paras 29, 30.

79 *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 at para 34 [*Translink*].

80 *Ibid*.

81 *Ontario (Public Safety and Security) v Criminal Lawyers’ Association*, 2010 SCC 23 at para 31.

82 *Translink*, *supra* note 79 at para 101 (concurring opinion) [emphasis added].

Under *Baier* and *Translink*, a positive rights analysis applies when legislation creates a platform for expression and selectively excludes certain expressive forms or content from access to the platform.⁸³ As such, the doctrine provides a mechanism that, in limited circumstances, can address underinclusive access to a section 2(b) statutory platform.⁸⁴ That line of analysis did not apply in *City of Toronto* because the hallmark criterion of underinclusive access was not present. The *BLGA* did not limit or prohibit access to any expressive platform, did not purport to regulate or address electoral expression, and was in no way underinclusive of expressive activity. By definition, legislation that does not purport to regulate expression cannot create a statutory platform granting section 2(b) access to some and excluding others.

To compare, the legislation in *Baier* specifically excluded a class of individuals from candidacy, and the “expressive aspects of school trustee candidacy” were sufficient, in the Court’s view, to engage section 2(b) of the *Charter*.⁸⁵ The *BLGA* did not create any platform for expression and was concerned with the composition of City Council, not with matters related to electoral expression.⁸⁶ Therefore, the challenge to the *BLGA* did not fail because the statutory platform doctrine’s requirements were not met, but because constitutionalizing City Council was well outside the scope of section 2(b)’s outermost purposes.⁸⁷

Ultimately, more is at stake in this appeal than the question whether *Baier* and the statutory platform applied to the *BLGA*’s reorganization of City Council. There were concerning doctrinal errors in the lower court decisions that invite correction. For instance, both panels of the Ontario Court of Appeal relied on *Delisle v Canada*, a decision that was overruled by *Mounted Police Association of Ontario v Canada (Attorney General)*.⁸⁸ Even if *Mounted Police* was decided under section 2(d), the Court should confirm that *Delisle* no longer represents the law on positive rights, especially and *a fortiori* under section 2(b)’s guarantee of expressive freedom.⁸⁹ In addition, the lower courts’ reliance on the substantial interference standard was a serious misstep that marginalized and discounted the section 2(b) rights at stake.

These missteps demonstrate the importance of placing strict parameters on *Baier v Alberta*, positive rights analysis, and the statutory platform doctrine under section 2(b). *City of Toronto*

83 *Baier*, *supra* note 34 at para 37 (stating that an underinclusive statutory platform is “the hallmark of a positive rights claim”); see also *Translink*, *supra* note 79 at paras 32, 35.

84 *Translink*, *ibid* at para 30.

85 *Baier*, *supra* note 34 at para 33.

86 Appeal panel, *supra* note 17 at para 55.

87 As *Irwin Toy* found, those purposes are broad and include the promotion of participation in social and political decision-making, the search for and attainment of truth, and the opportunity for individual self-fulfillment through expression (*supra* note 20 at 876). As broadly as they extend, those purposes cannot incorporate a substantive concept of representation without radically altering and extending s 2(b)’s interpretation.

88 *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 14 [*Mounted Police*], listing *Delisle*, *supra* note 35 in “Cases Cited” as overruled, and explaining the Court’s decision to re-consider *Delisle* (*ibid* at para 127). In *City of Toronto* the appeal decision faulted the application judge for overlooking “contrary binding authority”, including *Delisle* (Appeal panel, *supra* note 17 at para 64).

89 Though concerned with s 2(d) and labour relations, *Mounted Police*, *supra* note 88 rejected the analytical construct of *Delisle*, which treated the exclusion of the RCMP from the labour relations scheme as a positive obligations claim (i.e. the right to be included in the statutory scheme). The exclusion was an instance of underinclusion, but the Court decided in favour of the RCMP without relying on the positive-negative dichotomy.

gives the Supreme Court an opportunity to address those errors, reinforce the exceptional nature of the *Baier* doctrine, and place clear boundaries on its scope and application.

***Irwin Toy* and the Purpose-Effects Test**

The appeal panel's conflation of positive and negative entitlements was not limited to the statutory challenge, but also influenced its perception of the claim that the *BLGA* interfered with electoral expression. There, the majority opinion transformed a negative entitlement of freedom from interference with electoral expression into a positive right to effective expression.⁹⁰ In doing so, the majority emphasized that section 2(b) could not impose a constitutional obligation on government to promote, enhance, or preserve the value of the candidates' electoral expression.⁹¹ Yet the appeal panel could only characterize the claim of interference with electoral expression as an affirmative entitlement by confusing efficacy of expression with effects on expression, and failing to apply the effects branch of *Irwin Toy*'s purpose-effects test.

Irwin Toy's analytical framework includes a purpose-effects test requiring the claimant to demonstrate that government action has interfered with expressive activity.⁹² While the purpose-effects test is bypassed in most cases, it plays a role when government action affects expressive freedom without prohibiting it.⁹³ Under that concept of breach, the *BLGA*'s enactment during the municipal election arguably met both branches of *Irwin Toy*'s purpose-effects test. Though the first branch addresses provisions that target expression, a purposeful interference can also occur without an express prohibition on particular content or activity.⁹⁴ In this instance, the provincial government reorganized City Council in the middle of an election, knowing that the *BLGA* would unavoidably have a profound impact on the ongoing electoral process. Replacing the extant model for City Council at a moment of maximum disruption in a municipal election was a misuse of legislative authority that could constitute a purposeful violation of section 2(b).

The *BLGA* also violated section 2(b) under the "effects" branch of the *Irwin Toy* test, which recognizes that government action affecting expressive activity infringes the guarantee. This standard sets no threshold for breach because interfering with freedom is the breach, without regard to its scale, magnitude, or severity.⁹⁵ In this context, enacting the *BLGA* during the 2018 municipal election campaign inevitably impacted electoral expression because it transformed the 47-ward City Council and terminated the 47-ward election, thereby bringing electoral expression *in that election* to a halt. Democratic participation could and would resume, but only under the revised 25-ward model for City Council that was imposed midway through the election.

90 Appeal panel, *supra* note 17 at para 39 (stating that the application judge had expanded the purpose of s 2(b) from a guarantee of freedom from interference with expression, to a guarantee that "government action would not impact the *effectiveness* of that expression") [emphasis in original].

91 *Ibid.* See e.g. paras 34, 39, 41, 43, 46-47, 60.

92 *Irwin Toy*, *supra* note 20 at 978-79 (summarizing the test).

93 *Ibid.* at 972.

94 A blanket prohibition on expression is a purposeful interference that does not target particular activity or content.

95 *Ibid.* at 978-79.

Under that analysis, there can be no doubt that the *BLGA*'s effects on electoral expression infringed section 2(b) of the *Charter*. To compare, *Thomson Newspapers v Canada* found that a 72-hour ban on opinion polls at the end of a federal election had a profound impact on political expression protected by section 2(b).⁹⁶ It is undeniable that transforming the representative foundation of City Council in the middle of an election could only have profound and egregious consequences for electoral expression. Notably, the appeal panel did not dispute or disturb the application judge's findings in that regard.⁹⁷

Nor could it be contested, as explained in the discussion below, that the further requirement of the effects test — that expressive activity align with section 2(b)'s underlying values — was satisfied. Electoral expression and democratic rights of participation are foundational values that define the core of section 2(b)'s commitment to expressive freedom. Had *Irwin Toy* been applied, it would have been difficult, if not impossible, for the appeal panel not to conclude that the *BLGA*'s enactment during the municipal election violated section 2(b) of the *Charter*.

Rights of Democratic Participation under Section 2(b)

The section 2(b) claim in *City of Toronto* was unconventional, but that is because the government's interference with an active electoral process was unprecedented. It is accepted that section 3's democratic rights do not apply to municipal elections, and nor do questions of representation and "effective" representation — e.g., the number of wards and Councillors on City Council — fall within the scope of section 2(b). The application judge's attempt to migrate a guarantee of effective representation from section 3 into section 2(b) overreached and did not fall within a principled conception of expressive freedom.

Quite apart from the issue of City Council's composition, section 2(b) extends to the panoply of expressive activity that is engaged in an electoral campaign. However, the appeal panel in *City of Toronto* focussed on what section 2(b) does *not* include and gave little or no weight to what it does include. Having identified three "sound propositions" about section 2(b) — that expressive activity is protected by section 2(b), voting is expressive activity, and voting is therefore protected expression — the panel gave no further consideration to electoral expression and its status under section 2(b).⁹⁸ Against an uninterrupted line of authority centering it in section 2(b)'s rights of democratic participation, the majority opinion made no mention of the status of political expression under section 2(b).⁹⁹ Nor did it acknowledge the voters' right

96 *Thomson Newspapers Co v Canada (AG)*, [1998] 1 SCR 877 at para 127, 159 DLR (4th) 385 [*Thomson Newspapers*].

97 See Appeal panel, *supra* note 17 at paras 35-36. In particular, the panel acknowledged that most candidates had produced campaign materials that were tied to specific wards, that time and money had been invested in campaigning in particular wards, and that time and energy spent earning voter support was lost when allegiance shifted to other candidates who were running in other wards prior to the *BLGA*. The panel found nonetheless that these "side effects" did not rise to the level of a breach and, moreover, were a form of affirmative entitlement.

98 *Ibid* at para 73.

99 See e.g. *Libman v Quebec (AG)*, [1997] 3 SCR 569, 151 DLR (4th) 385; *Thomson Newspapers*, *supra* note 96; *Harper v Canada (Attorney General)*, 2004 SCC 33 [*Harper*]; *R. v Bryan*, 2007 SCC 12; *B.C. Freedom of Information and Privacy Association v British Columbia (Attorney General)*, 2017 SCC 6.

to information and to exercise a right to vote in an informed manner — both of which were placed in great uncertainty when the *BLGA* changed the electoral map and ward boundaries.

The central problem was not that the majority opinion refused to allow section 3's concept of effective representation to cross-fertilize section 2(b). Instead of interpreting these guarantees synergistically, as complementary entitlements that reinforce the *Charter's* commitment to democratic participation, the majority read section 2(b) narrowly against section 3. In doing so, the panel overlooked and neglected the vital role meaningful participation plays under both guarantees. In *Figueroa v Canada*, a case arising under section 3, Iacobucci J emphasized that "the right of each citizen to play a meaningful role in the electoral process" is also sensitive to "the full range of reasons that individual participation is of such importance in a free and democratic society."¹⁰⁰ He added that meaningful participation in the electoral process has intrinsic value that "best reflects the capacity of individual participation in the electoral process to enhance the quality of democracy in this country."¹⁰¹

In addressing restrictions on third party spending limits under section 2(b), *Harper v Canada* confirmed that meaningful participation is a value that informs both guarantees.¹⁰² As Bastarache J explained, meaningful participation is not limited to the selection of representatives under section 3, but includes the right to exercise a vote in an informed manner, to be able to weigh the relative strengths and weaknesses of candidates, and to be reasonably informed of all the possible choices.¹⁰³ In principle, *Harper* followed *Figueroa's* lead, establishing that meaningful participation and the rights of the voting electorate are also an integral part of section 2(b)'s core commitment to participation in democratic process.

In *City of Toronto*, the appeal panel failed to acknowledge that meaningful participation under section 3 overlaps with and informs section 2(b)'s concept of democratic participation. Though meaningful participation is at the heart of section 2(b)'s underlying values, it received no mention or consideration in the appeal panel's majority opinion. Instead, the panel's focus on the electoral expression of candidates for office overlooked the section 2(b) rights of other participants in the electoral process, including campaign teams, third party participants, and the electorate at large.

Section 2(b) is dynamically engaged during election processes, including at the municipal level. In an election campaign conducted over the span of almost six months, expressive activity and participation in civic affairs is heightened across demographics and sectors of the population. While much can change over the course of an election campaign, the rules of democratic engagement are constant: an electoral map; ridings or wards that organize the electorate and establish a scheme of representation; criteria for candidate eligibility; and detailed rules that facilitate and regulate a democratic process to ensure that it is regular, fair, and efficient. As noted, the disruption of these fundamental rules was the foundation of Justice MacPherson's dissenting opinion. It follows from the jurisprudence that the rules of engagement for a duly constituted election cannot be altered during the process, at least not without interfering

100 *Figueroa v Canada (Attorney General)*, 2003 SCC 37 at para 27 [*Figueroa*].

101 *Ibid.*

102 *Harper*, *supra* note 99.

103 *Ibid* at paras 70,-72.

with section 2(b) and damaging the integrity of its democratic values. Far from discouraging that conclusion, section 3 supports and boosts it.

The Court has emphasized and confirmed that a network of synergistic values support section 2(b)'s role in promoting the integrity of democratic processes. The Court's jurisprudence recognizes that these values encompass all participants in the process, including the electorate, as individual voters and as a collective, as well as candidates and their campaign teams, political parties, and third party participants. It is not open to question that the "underlying values" step of *Irwin Toy*'s effects test was readily and amply met in this instance. The appeal panel's failure to include these values in its section 2(b) analysis was a serious deficiency that led to the erroneous conclusion that the *BLGA*'s impact on electoral expression during the 2018 municipal election did not violate the guarantee.

***Irwin Toy* and the Threshold for Breach**

The lower courts, including the application judge and both appellate panels, applied the substantial interference test to the question of breach under section 2(b).¹⁰⁴ This standard is foreign to *Irwin Toy*, is limited to the narrow parameters of *Baier*'s statutory platform doctrine, and did not apply to the negative entitlement arising from the government's interference with electoral expression during an electoral a democratic process.

Historically, the Supreme Court has supported a generous interpretation of section 2(b) and a low threshold for breach, under a conception of entitlement that requires virtually all infringements of expressive freedom to be justified under section 1 of the *Charter*.¹⁰⁵ As already noted, the severity of a violation does not arise under *Irwin Toy* because that is outside its conception of entitlement. *Irwin Toy* instead prescribes that government action affecting expressive freedom that is consistent with section 2(b)'s values violates the guarantee and must be justified under section 1 of the *Charter*. The severity of the interference might inform the section 1 analysis, but does not define or affect the preliminary question of breach under *Irwin Toy*.

The substantial interference test is an exceptional standard that originated in *Dunmore v Ontario*, a decision dealing with positive obligations under section 2(d)'s guarantee of associational freedom.¹⁰⁶ There, the standard formed part of a three-part test to determine whether the government had a positive obligation to take steps enabling the "meaningful association" of disadvantaged agricultural workers excluded from the labour relations scheme. Importing that standard in *Baier* created an elevated and dissonant standard for breach under section 2(b). In dissent, Justice Fish found it "most ironic" that an interpretation designed to broaden the scope of section 2(d) was invoked in *Baier* "for the purpose of *narrowing* the Court's traditionally broad interpretation of the historically and conceptually distinct" guarantee of expressive freedom.¹⁰⁷ Unlike section 2(b), section 2(d) set an exacting threshold for breach, and

104 Toronto ONSC, *supra* note 6 at paras 37-38; Stay panel, *supra* note 16 at para 13; Appeal panel, *supra* note 17 at paras 62-67.

105 *Ford*, *supra* note 57.

106 *Dunmore*, *supra* note 70.

107 *Baier*, *supra* note 34 at para 100 [emphasis in original]. Justice Fish's dissent also explained why he rejected the majority opinion's conception of positive rights and incorporation of the *Dunmore* test in s 2(b).

Dunmore's substantial interference test simply does not align with the underlying assumptions of the section 2(b) jurisprudence.

In *City of Toronto*, all three decision-makers in the Ontario courts applied this standard in error.¹⁰⁸ To begin, the substantial interference test was not engaged under the statutory platform doctrine because the *BLGA* did not raise any question of underinclusive access to an expressive platform. In addition and, more to the point, the test does not apply to government interference with electoral expression, which is a quintessential negative entitlement governed by *Irwin Toy*. Recently, a different panel of the Ontario Court of Appeal stated that “[substantial interference] has no application if the freedom of expression claim asserts a right to be free from government interference.”¹⁰⁹ As *Langenfeld v Toronto Police Services Board* explained, any attempt to incorporate that requirement into claims based on government interference with expressive freedom would place a broad range of potential government action that interfered with freedom of expression — but not substantially — beyond *Charter* review.¹¹⁰

On further appeal, it is imperative for the Supreme Court to confirm that the substantial interference test does not apply to negative entitlements under *Irwin Toy*. In addition, the Court should limit its use under section 2(b), strictly reserving it to unusual circumstances where some are excluded from access to an expressive platform that is extended to others. Even so, the doctrine of statutory platforms and the threshold of substantial interference must be carefully monitored to ensure that negative entitlements are not reinterpreted as positive rights and excluded from section 2(b) for that reason.

IV. Remediating the Breach

The unusual circumstances of *City of Toronto* — mid-election interference with electoral expression and rights of democratic participation, and overlapping entitlements under section 2(b) — led to confusion about the appropriate remedy in this case. The application judge, having found that the *BLGA* unjustifiably breached section 2(b), invalidated the legislation, effectively restoring the 47-ward model.¹¹¹ While the appeal panel dismissed the claim and did not address the question of remedy, the City of Toronto has continued to seek a declaration of invalidity, including at the Supreme Court of Canada.¹¹²

Section 52(1) of the Constitution states that any legislation that violates the *Charter* is of no force of effect.¹¹³ By contrast, section 24(1) of the *Charter* is not aimed at legislation but at government action, stating that anyone whose rights have been violated by government action may apply to the court for relief.¹¹⁴ The panoply of remedies available under section 24(1) extends beyond invalidating legislation and includes declaratory relief.¹¹⁵

108 *Supra*, note 104.

109 *Langenfeld v Toronto Police Services Board*, 2019 ONCA 716 at para. 37.

110 *Ibid* at para 39.

111 *Toronto ONSC*, *supra* note 6 at paras 84-85.

112 See e.g. *supra* note 21.

113 *Charter*, *supra* note 15, s 52(1).

114 *Ibid*, s 24(1).

115 *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 46 [*Khadr*].

At this stage of the appeal, the only feasible remedy is a declaration, pursuant to section 24(1), that implementing the *BLGA* during an election campaign violated the section 2(b)'s rights of democratic participation. The challenge to the *BLGA*'s restructuring of City Council is not well-founded under section 2(b), and Toronto City Council has been operating with the 25-ward model since the 2018 election. The provincial government's interference with an ongoing election campaign is another matter; on that issue, applying *Irwin Toy* leads to the conclusion that the *BLGA*'s enactment during the municipal election violated section 2(b). The government's overreaching in this instance had a profound and egregious effect on a duly constituted election process.¹¹⁶

A remedy to prohibit and prevent the violation of *Charter* rights is just and appropriate under section 24(1). As the Supreme Court has previously noted, declaratory relief is "an effective and flexible remedy" that respects "the responsibilities of the executive and the courts."¹¹⁷ The Court has found that declarations are effective because "there is a tradition in Canada of state actors taking *Charter* declarations seriously" and "[t]he assumption underlying this choice of remedy is that governments will comply with the declaration promptly and fully."¹¹⁸ A declaration in *City of Toronto* is an effective remedy to censure the provincial government's egregious mid-election interference and reinforce section 2(b)'s core value of democratic participation.

V. Conclusion

The City and candidates for office, among others, had just cause for being frustrated by the government's decision to reverse the municipal election underway, and redirect a different election under a transformed plan for City Council. Those who challenged the provincial government's action in court invoked the Constitution to protect autonomy in matters of municipal democracy. The challenge was especially compelling in the circumstances of the legislature's interference with an ongoing election process — without notice or consultation — in which candidates, campaigns, policy debates, and broad-ranging forms of democratic participation were actively engaged.

In hindsight, and with the opportunity of further appeal to the Supreme Court of Canada, the section 2(b) issues arising from these unprecedented events can be placed on a principled plane. The analysis above advances that objective by sorting out two section 2(b) entitlements that became enmeshed in the moment, during urgent and expedited litigation. Though attention focussed on invalidating the *BLGA*, the more viable claim under section 2(b) centres on the government's interference with electoral expression during an election process. Freedom from government interference that terminated the 47-ward election and replaced it with an election based on 25 wards during a campaign is a negative entitlement that falls under *Irwin Toy*'s framework for section 2(b) analysis.

116 Section 2(b) has been the focus and crux of the analysis throughout. It is sufficient, in the context of that discussion, to adopt Justice MacPherson's s.1 analysis, which found that the government's violation of s 2(b) was not justifiable. Appeal panel, *supra* note 17 at para 135 (dissenting opinion).

117 *Khadr*, *supra* note 115 at paras 46-47.

118 *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21 at para 65 [citation omitted].

Had that analysis been applied, the lower courts would have had little difficulty concluding that the *BLGA*'s implementation during the election violated section 2(b) of the *Charter*. That conception of section 2(b) would have led to a finding of unconstitutionality and a remedy that was just and appropriate at the time of the breach. At this stage, vindicating section 2(b)'s rights of democratic participation requires the Supreme Court to grant a declaration that the *BLGA*'s enactment and implementation during the 2018 municipal election constituted an unjustifiable interference with rights of democratic participation protected by section 2(b).

The provincial government's authority to legislate City Council's composition was subject to the Constitution and *Charter of Rights and Freedoms*, including section 2(b)'s guarantee of expressive freedom. In altering the structure of representation for City Council, the government could have enacted the *BLGA* after the election, and done so in compliance with the *Charter*. That timing might have been politically untenable, but the alternative of enacting the legislation during the 2018 municipal election necessarily placed the *BLGA* in conflict with the *Charter*. As a matter of constitutional law, it was not open to the government to change the electoral map during the election and violate section 2(b)'s rights of democratic participation. Had it enacted the legislation and protected it from review, as proposed by Bill 31, the government could be held politically accountable for invoking the section 33 override. The government enacted the *BLGA* during an election process, without regard for the *Charter*, and must now be held legally accountable for its unjustifiable breach of section 2(b)'s rights of democratic participation.

Restricting Freedom of Peaceful Assembly During Public Health Emergencies

Kristopher E G Kinsinger*

I. Introduction

As the second wave of the COVID-19 pandemic in Canada continues, so too does litigation challenging policies intended to slow the spread of the virus. A growing number of claimants have argued that these sweeping public health measures — many of them drastic and previously unimaginable — infringe various provisions of the *Canadian Charter of Rights and Freedoms*.¹ While a significant number of claims have been brought pursuant to protections that support a sustained body of jurisprudence, litigants may yet seek to explore some of the more forgotten sections of the *Charter*, particularly section 2(c)'s guarantee of freedom of peaceful assembly. In an effort to encourage the development of a body of jurisprudence on section 2(c), this article envisions how such *Charter* challenges might unfold.

I begin by considering the general framework that ought to be applied in freedom of peaceful assembly claims, adopting a modified version of Basil Alexander's proposed "substantial interference" test. Following this, I assess when restrictions on freedom of peaceful assembly will be justified pursuant to section 1 of the *Charter* under the framework adopted by the Supreme Court of Canada (the "Supreme Court") in *R v Oakes*.² Though such claims will in all

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

2 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes* cited to SCR].

likelihood be resolved on a case-by-case basis, I argue that restrictions on assemblies which go to the core of section 2(c) — including public demonstrations and religious services — ought to be subject to a more rigorous threshold of justification, even during public health emergencies such as the COVID-19 pandemic.

II. The Section 2(c) Test

The Supreme Court has yet to articulate a framework within which freedom of peaceful assembly claims are to be resolved. The *Charter* challenges that have been commenced during the COVID-19 pandemic (and which will undoubtedly be followed by further litigation the longer this state of emergency lasts) have the potential to define how Canadian jurists understand this largely forgotten freedom. Until recently, there has been very little scholarship on the purpose and scope of section 2(c). Of the few articles written to date on the subject, Basil Alexander's 2018 paper is arguably the most authoritative.³ Alexander explains that Canadian courts have historically assessed assembly-related claims through the lens of section 2(b)'s parallel guarantee of freedom of expression, leading to "stagnation" in section 2(c) jurisprudence:

Rather than undertake a free-standing freedom of peaceful assembly analysis, Canadian judges tend to examine related claims through a freedom of expression lens. This has resulted in the existence of little to no detailed analyses under subsection 2(c) in the modern jurisprudence. In particular, the lack of focus on peaceful assembly raises concerns regarding stagnation of the law and the effectiveness of peaceful assembly as an individual freedom to safeguard demonstrations.⁴

If assemblies such as public demonstrations are to receive robust constitutional protection, Alexander warns, then an independent jurisprudential approach to freedom of peaceful assembly is needed.⁵ To this end, Alexander suggests that the "substantial interference" framework used for freedom of religion and freedom of association claims could be repurposed into a section 2(c) test. Such an analysis will recognize that certain constitutional guarantees are subject to "degrees of infringement," allowing for contextually driven legal results "that better account for peaceful assembly's unique features and character."⁶ Under this test, courts ask whether the interference of the freedom in question is "more than trivial or insubstantial",

3 Basil S Alexander, "Exploring a More Independent Freedom of Peaceful Assembly in Canada" (2018) 8:1 *Western J Leg Studies* 1 [Alexander, "Freedom of Peaceful Assembly"]. See also my 2020 article in a special edition of the *Supreme Court Law Review* on the forgotten fundamental freedoms of the *Charter*, as well as Nnaemeka Ezeani's contribution to the same collection: Kristopher E G Kinsinger "Positive Freedoms and Peaceful Assemblies: Reenvisioning Section 2(c) of the Charter" (2020) 98 *SCLR* (2d) 377 [Kinsinger, "Positive Freedoms and Peaceful Assemblies"]; Nnaemeka Ezeani, "Understanding Freedom of Peaceful Assembly in the Canadian Charter of Rights and Freedoms" (2020) 98 *SCLR* (2d) 351 [Ezeani, "Understanding Freedom of Peaceful Assembly"].

4 Alexander, "Freedom of Peaceful Assembly", *supra* note 3 at 2.

5 *Ibid* at 2-3.

6 *Ibid* at 14-15. One of the benefits of such a framework, Alexander argues, is that findings of infringement which play a limited role at the "scope-defining" stage of the s 2(c) test will still be relevant in an ensuing s 1 justification analysis. Note, however, that not all scholars agree with Alexander's proposed substantial interference test. Ezeani, for example, argues that such an appropriate "will remove several activities from the sphere of protection, at least depending on the interpretation that will be given to 'substantial interference' in the context of freedom of peaceful assembly" (Ezeani, "Understanding Freedom of Peaceful Assembly", *supra* note 3 at 374). Indeed, for Ezeani, "even the slightest interference with the sphere of

allowing for a purposive case-by-case analysis to determine whether the *Charter* has been limited.⁷

On this point, it is important to ensure that the *Charter*'s guarantee of freedom of peaceful assembly is construed neither too broadly nor too narrowly. A section 2(c) framework that is overly restrictive will make it difficult for claimants to get beyond the scope-defining stage of the analysis. For example, if section 2(c) only protects protest activity, then any number of other truth-seeking activities (such as public memorials and religious services) will fall outside of its scope. Conversely, the formulation of a test that is excessively permissive may result in most claims being substantively resolved under section 1, allowing judicial actors to resolve disputes which engage largely democratic interests. One of the enduring criticisms of section 2(b) jurisprudence is that the scope of the freedom itself is construed so broadly that virtually any non-violent activity will attract *prima facie* protection. The upshot has been what Jamie Cameron describes as a "formalistic separation of breach and justification which [thins] the freedom principle out to the point of disappearance," as courts engage in a largely policy-driven analysis of whether the content of the expression in question is "worthy" of protection.⁸ Care must be taken to ensure that a similar fate does not befall section 2(c).

It is beyond the scope of this paper to offer a comprehensive assessment of the types of assemblies that could receive protection under section 2(c). At a minimum, it is clear that freedom of peaceful assembly only protects gatherings that consist of two or more participants, since an assembly by definition cannot be comprised of just one person.⁹ Likewise, in order to ensure that nuisance activities such as loitering are not granted constitutionally protected status, the assemblies covered by section 2(c) ought not to include gatherings which serve no unifying purpose around which individuals will seek to associate. It is worth further noting that section 2(c) is subject to an explicit internal restriction: namely, that protected assemblies must be peaceful. As the late Peter Hogg explained, this proviso makes it clear that the scope of section 2(c) excludes violent activities such as riots.¹⁰ As I argue elsewhere, however, this use of the word "peaceful" might also be interpreted more expansively, protecting lawful gatherings from disruption by third parties in the same way that the common law guarantees tenants the "peaceful enjoyment" of their properties. In such cases, hostile exercises of the so-called

freedom of peaceful assembly" by the government will be sufficient to "find a Charter infringement requiring justification" (*ibid*).

7 Alexander, "Freedom of Peaceful Assembly", *supra* note 3 at 12, citing *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 60. The ruling in *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [Hutterian Brethren] also provides a helpful example of the substantial interference test, in which the Court unanimously accepted that a law which required the claimant members of a closed community to have their photos taken to receive drivers' licenses substantially and non-trivially interfered with their sincere religious belief that doing so would contravene the biblical commandment to not make graven images. However, a majority of the Court also held that this interference was justified under s 1, confirming that even substantial limitations of fundamental freedoms can give way to other public objectives.

8 Jamie Cameron, "A Reflection on Section 2(b)'s Quixotic Journey, 1982-2012" (2012) 58 SCLR (2d) 163 at 172-173.

9 Indeed, were this not the case, there would be very little to distinguish the exercise of this guarantee from freedom of expression.

10 Peter W Hogg, *Constitutional Law of Canada: 2016 Student Edition* (Toronto: Thomson Reuters, 2016) [Hogg, *Constitutional Law*] at 44-2. See also Ezeani, "Understanding Freedom of Peaceful Assembly", *supra* note 3 at 370-72 for more on s 2(c)'s requirement that protected assemblies be peaceful.

“heckler’s veto” may even place a positive obligation on state actors to ensure that claimants are able to exercise their section 2(c) entitlements free from coercion or constraint.¹¹

Beyond these base requirements, Alexander’s proposed substantial interference test indicates that activities which go to the core of freedom of peaceful assembly will attract a greater degree of constitutional protection.¹² While Alexander notes that more judicial analysis is needed to determine the sort of gatherings that will constitute “core” assemblies, recent scholarship has identified the facilitation of truth-seeking as one of the core animating purposes of the fundamental freedoms guaranteed by the *Charter*. Derek Ross, for example, argues in a 2020 article that truth-seeking unifies section 2’s distinct guarantees by protecting not only individual interests but also the interests of society in promoting diversity and pluralism, preventing “illiberal regime[s] which [perceive their] leaders’ knowledge as complete and perfect” from “compelling citizens to adopt [the state’s moral] commitments as their own”.¹³ On this point, Ross contends that freedom of peaceful assembly helps to ensure “that voices which could not be heard individually can be amplified and thus effectively conveyed to society at large.”¹⁴ As Ross notes, the activities protected by section 2(c) “serve both the communicators’ needs ... and society’s interests in addressing concerns [related to the advance of truth] that are hidden and unknown.”¹⁵ In other words, peaceful assembly is one of the most important means by which protected minority groups are able to participate in public life. These observations are echoed by Nnaemeka Ezeani in another 2020 paper, remarking that the freedom “applies to dissenting groups who should be within their rights when they assemble for their common purpose, provided they do so peacefully and without trampling on other basic liberties.”¹⁶

Based on the above, I contend that section 2(c) will be engaged when the following conditions are met: first, the claimant must have sought to participate in a gathering of two or more people for a common purpose; second, this gathering must have been peaceful (i.e., non-violent) in nature; and third, interference with this gathering must have been neither trivial nor insubstantial.¹⁷ It is irrelevant whether the assembly in question took place on public or private

11 Kinsinger, “Positive Freedoms and Peaceful Assemblies”, *supra* note 3 at 393-94. The “heckler’s veto” is a term used to describe dissenting voices which are so overpowering that they effectively hold a veto over whether a speaker will be permitted to express themselves. The archetypal example is of a politician who is unable to finish a speech after being drowned out by a heckling member of their audience.

12 Alexander, “Freedom of Peaceful Assembly”, *supra* note 3 at 15-16.

13 Derek BM Ross, “Truth-Seeking and the Unity of the Charter’s Fundamental Freedoms” (2020) 98 SCLR (2d) 63 at 80.

14 *Ibid* at 90.

15 *Ibid* at 91.

16 Ezeani, “Understanding Freedom of Peaceful Assembly”, *supra* note 3 at 365, citing John D Inazu, *Liberty’s Refuge: The Forgotten Freedom of Assembly* (New Haven: Yale University Press, 2012) at 4. In this way, Ezeani explains, peaceful assemblies may be relied on by claimants to further the exercise of other fundamental freedoms guaranteed by s 2 (*ibid* at 363, 366-68). See also Halsbury’s Laws of Canada (online), *Constitutional Law of Canada (Charter of Rights)*, “Fundamental Freedoms: Freedom of Assembly” (VI.3) at HCHR-42 “Freedom of assembly” (2019 Reissue).

17 As I argue at length elsewhere, exercises of the “heckler’s veto” by third parties may result in a positive obligation being placed on state actors to ensure that claimants are able to exercise their constitutional entitlements free from coercion or constraint: see Kinsinger, “Positive Freedoms and Peaceful Assemblies”, *supra* note 3 at 387, 393.

property.¹⁸ Under this test, there is a strong case to be made that public health restrictions on physical gatherings during a pandemic will result in a *prima facie* restriction on section 2(c). In such a scenario, some impacted activities (e.g., public demonstrations, religious services, etc.) will clearly go further to the core of the affected freedom than others (e.g., dinner parties, social gatherings, etc.) and thus result in a greater degree of limitation. That said, it will likely be unnecessary to distinguish too rigidly between these different types of assemblies at the scope-defining stage of the analysis. There is ample room under section 1 to recognize that a higher threshold of justification ought to apply to core exercises of freedom of peaceful assembly, an issue to which I now turn.

III. The Section 1 Analysis for Freedom of Peaceful Assembly

The well-trodden section 1 *Oakes* framework designed to allow governments to demonstrably justify restrictions on *Charter* protections is typically divided into four stages: first, the impugned law must pursue a pressing and substantial objective; second, the law must be rationally connected to this objective; third, the law must impair the *Charter* in question as minimally as (reasonably) possible in the pursuit of its objective; and fourth, the deleterious effects that emanate from the law's restriction of the *Charter* must be proportionate to the salutatory benefits that will result if its objective is achieved.¹⁹ At these latter stages, restrictions on non-core section 2 activities are likely to attract a less rigorous standard of justification under section 1, as the Supreme Court held with regard to freedom of expression in *R v Keegstra*.²⁰ While courts should heed Cameron's warnings against adopting an overly contextual and hence unwieldy justification analysis, the *ratio decidendi* from *Keegstra* has a certain intuitive merit to it, so long as restrictions on core section 2 activities are conversely subjected to a higher justification threshold. In the context of freedom of peaceful assembly, such core activities will largely consist of gatherings that pursue a truth-seeking purpose, including public demonstrations — such as the protests against racial injustice which took place across Canada throughout 2020 — and religious services, the latter of which will also be subject to potential freedom of religion claims under section 2(a). In the remainder of this paper, I apply the four branches of the *Oakes* test to limitations on section 2(c), using restrictions which have been imposed on this freedom during the COVID-19 pandemic as a benchmark.

1. Pressing and Substantial Objective

The first branch of the *Oakes* test requires the government to demonstrate that the objective pursued by an impugned law is “of sufficient importance to warrant overriding a constitutionally protected right or freedom.”²¹ While this initial question is arguably the easiest for

¹⁸ See *ibid* at 387.

¹⁹ *Oakes*, *supra* note 2 at paras 62-72. I am obviously assuming that any proportionality analysis in a s 2(c) claim against COVID-19 restrictions will be resolved under the *Oakes* framework, rather than the parallel s 1 framework for administrative policies and decisions adopted by the Supreme Court in *Doré v Barreau du Québec*, 2012 SCC 12. In any event, where there is a question about which particular framework should apply, the application of either test should lead to the same substantive result, as the Ontario Superior Court indicated in *Christian Medical and Dental Society v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 at paras 60-62.

²⁰ *R v Keegstra*, [1990] 3 SCR 697 at 762, 114 AR 81 [*Keegstra*].

²¹ *Oakes*, *supra* note 2 at 138, citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 352, 18 DLR (4th) 321.

the government to satisfy, its answer will determine the standard by which an impugned law is justified in the remainder of the section 1 analysis. In other words, determining *what* a law's objective is — not just whether that objective itself is pressing and substantial — is crucial, and it is accordingly a question to which section 2(c) claimants challenging COVID-19 restrictions must direct very close attention. Conspiracy theorists notwithstanding, virtually no one disputes that combatting the spread of a virus which has ravaged populations the world over — and which has hit immunocompromised and long-term care populations especially hard — is a pressing and substantial objective.²² That said, the precise legal objectives being pursued in the fight against COVID-19 vary from province to province. Some provincial governments (such as those in the Maritimes, which have enacted harsh restrictions on activities such as interprovincial travel) appear to be pursuing an objective of keeping the number of new cases as close to zero as possible, while others (such as those in Alberta and Saskatchewan, which have sought to avoid onerous restrictions on daily activities) have apparently abandoned the notion that transmission of the virus can be completely curtailed.²³ Governments in provinces such as Ontario fall somewhere between these two extremes, where the objective of COVID-19 restrictions appears to be minimizing virus transmission as much as possible without completely shutting down the provincial economy, thereby suggesting that some transmission of the virus is acceptable, even if the government's precise calculus in this regard is unclear.²⁴ In these cases, acceptable transmission of the virus will likely be assessed with regard to the relative degree of risk posed by certain activities, with lower risk activities being permitted before those that pose a higher risk of transmission.

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- 22 As of the writing of this essay, there are approximately 80,000 individuals living in long-term care homes in Ontario: of these, approximately 11,750 have tested positive COVID-19 ($\approx 14.7\%$ of the total population) and almost 3,000 ($\approx 3.75\%$) have died as a result of the disease. See: Financial Accountability Office of Ontario, "Long Term Care Homes Program: A Review of the Plan to Create 15,000 New Long-Term Care Beds in Ontario" (30 October 2019) at 1, online (pdf): <<https://www.fao-on.org/web/default/files/publications/FA1810%20Long-term%20Care%20Bed%20Expansion%20Analysis/Long-term-care-homes%20program.pdf>>; Government of Ontario, "COVID-19 cases: Long-term care homes" (last visited 7 January 2021), online: COVID-19 Ontario <<https://covid-19.ontario.ca/data/long-term-care-homes>>.
- 23 See, e.g., *Taylor v Newfoundland and Labrador*, 2020 NLSC 125, in which an individual claimant and the Canadian Civil Liberties Association argued, *inter alia*, that Newfoundland and Labrador's COVID-19 travel ban (which effectively prevents non-residents from entering the province) unjustifiably restricts ss 6(1) and 7 of the *Charter*. The Court devoted a considerable portion of its reasons on s 1 to assessing the objective being pursued by the provincial government through the travel ban. The Court found that, because Newfoundland and Labrador has seen a relatively low number of COVID-19 cases, the purpose of the policy was to "protect those in [the province] from illness and death arising from the importation and spread of COVID-19 by travelers" by "[controlling] the spread of COVID-19 from an area of high infection to an area of low infection" (*ibid* at paras 435-36). For a journalistic assessment of those provinces which have enacted comparatively less onerous COVID-19 restrictions, see James Keller, "Provinces with least-strict COVID-19 restrictions this summer saw sharp case spikes in second wave, data show" (1 January 2021), online: *The Globe and Mail* <<https://www.theglobeandmail.com/canada/alberta/article-university-of-oxford-data-show-provinces-with-lax-covid-19/>>.
- 24 Government of Ontario, "COVID-19 response framework: keeping Ontario safe and open" (3 November 2020, updated 23 December 2020), online: COVID-19 Ontario <<https://www.ontario.ca/page/covid-19-response-framework-keeping-ontario-safe-and-open>>. See also Katherine DeClerq, "Ontario premier says he will not make 'snap decision' on lockdowns despite calls from hospitals" (17 December 2020), online: *CTV News Toronto* <<https://toronto.ctvnews.ca/ontario-premier-says-he-will-not-make-snap-decision-on-lockdowns-despite-calls-from-hospitals-1.5235606>>.

2. Rational Connection

As with the first stage of the *Oakes* framework, it is not overly difficult for the government to satisfy the requirement that an impugned law be rationally connected to a pressing and substantial objective. The inquiry at this stage is not whether the law is sufficiently tailored to its objective, but rather whether it is “arbitrary, unfair or based on irrational considerations.”²⁵ In the case of COVID-19 restrictions on peaceful assemblies, this will once again be a question that is likely resolved in the government’s favour. The medical consensus is that COVID-19 spreads in settings where infected individuals are able to transmit the virus through exhaled droplets or aerosols.²⁶ Since individuals may become infected but present no symptoms, gatherings where people are in close proximity with one another are considered to pose a higher risk of transmission; the wearing of personal protective equipment such as face coverings is further believed to help mitigate this risk.²⁷ If it were somehow possible to prevent an entire population from meeting with anyone outside of their respective households for the duration of the virus’s incubation period, then transmission would presumably fall to zero. Such a policy is probably not feasible in Canada and would in any event likely fail at one of the final two branches of the *Oakes* test. The point here is simply that virtually any COVID-19 restriction on physical gatherings, irrespective of its severity, will likely be found to be rationally connected to the objective of minimizing or eliminating transmission of the virus. Claimants would do well to accordingly reduce the time they spend making submissions on this stage of the section 1 analysis and instead focus their attention on the final two branches of the proportionality test, considered below.

3. Minimal Impairment

The main focus of a section 2(c) challenge to COVID-19 restrictions on physical gatherings is likely to be on the “minimum impairment” stage of the section 1 analysis. The key question that is asked at this stage of the *Oakes* test is whether the legislative objective in question can be achieved through a policy that is less restrictive of the engaged *Charter* protections(s).²⁸ Courts are inclined to extend a healthy dose of deference to governments when it comes to questions of minimal impairment: impugned laws must only be found to fall “within a range of reasonable alternatives” in order to survive this stage of the proportionality analysis.²⁹ Courts may not strike down a law simply because they can “conceive of an alternative which might better tailor objective to infringement.”³⁰ However, the test is nonetheless a rigorous one: the impugned law must be “carefully tailored” toward its goals such that there are no other “alternative, less drastic means of achieving the objective in a real and substantial manner.”³¹ This latter question is in part an evidentiary one, and the government must be prepared to explain

25 *Oakes*, *supra* note 2 at 139.

26 Derek K Chu et al, “Physical distancing, face masks, and eye protection to prevent person-to-person transmission of SARS-CoV-2 and COVID-19: a systematic review and meta-analysis” (2020) 395 *Lancet* 1973 at 1973-74.

27 *Ibid*; see also Allyson M Pollock & James Lancaster, “Asymptomatic transmission of covid-19” (2020) 371 *BMJ* 1.

28 *Oakes*, *supra* note 2 at 139; *Carter v Canada*, 2015 SCC 5 at para 102 [*Carter*].

29 *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160, 127 DLR (4th) 1.

30 *Ibid*.

31 *Ibid*; *Hutterian Brethren*, *supra* note 7 at para 55.

whether any “significantly less intrusive measure which appears as effective” was considered, and, if so, why it was ultimately rejected.³²

The evidence regarding community spread of COVID-19 is sparse and evolving. In many instances, cases cannot be traced back to any particular source or setting. This will present a challenge as courts seek to assess whether restrictions on in-person gatherings are minimally impairing.³³ Nevertheless, the data which have been made available are suggestive of possible trends that may influence judicial assessments of the “minimum impairment” question under the *Oakes* test. In Ontario, for example, long-term care facilities have accounted for the highest number of daily outbreaks, followed by workplaces, retirement homes, hospitals, and schools; other outbreak settings, such as weddings and religious services, have recorded lower numbers of outbreaks.³⁴ The inference that one may plausibly draw from these data is that different settings each carry their own unique risk of transmission. One may not find this surprising. Religious assemblies in Ontario, for example, have been required to observe strict building capacity limits since June 2020; in many municipalities, these assemblies were also subject to mandatory face covering bylaws, later superseded by a provincewide face covering mandate.³⁵ Likewise, despite the initial fear of some health professionals, the 2020 protests against racial injustice did not *appear* to result in any COVID-19 outbreaks.³⁶ In cities where many of these demonstrations occurred, public health leaders strongly advised participants to wear face coverings and observe physical distancing guidelines.³⁷ The general medical consensus has

32 *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 119, 159 DLR (4th) 385.

33 For example, Ontario has recorded the following case statistics as of 7 January 2021: 83,634 as a result of close contact (i.e., “an infected person that [an individual was] physically close to”); 38,542 as a result of community spread (i.e., where a positive case cannot be traced to its source); 38,434 from outbreak settings (i.e., where a positive case can be traced to a “shared space or setting”); 4,108 as a result of travel (i.e., where someone has travelled outside of the province within 14 days before their symptoms began); and 257 identified as “other” (i.e., where “[i]nformation on the source of infection is currently pending or unspecified”: Government of Ontario, “COVID-19 case data: All Ontario” (last visited 7 January 2021), online: *COVID-19 Ontario* <<https://covid-19.ontario.ca/data>>.

34 Ontario recorded the following active outbreaks by setting as of 7 January 2021: 228 in long-term care homes; 241 in workplaces (e.g., farms, retail, etc.); 142 in retirement homes; 68 in hospitals; 103 in group living (e.g., group home, shelter, correctional facility, etc.); 127 in education settings, including child care; 63 in recreational settings, of which 25 were specifically traced to “other recreation” settings such as weddings and religious services: see *ibid* for a more detailed breakdown of these statistics.

35 Ontario Ministry of Health, “COVID-19 Advice: Religious Services, Rites or Ceremonies – Version 2” (21 August 2020), online (pdf): *Government of Ontario* <http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/advice_religious_services.pdf>; see, e.g., The Regional Municipality of Waterloo, by-law No 20-052, *A By-law to Amend bylaw 20-035, A By-law to Require the Wearing of Face Coverings in Enclosed Public Places During the COVID-19 Pandemic* (23 September 2020); *Rules for Areas in Stage 3*, O Reg 364/20, s 2(4).

36 Ashley Legassic, “Health officials say no COVID-19 outbreaks related to Black Lives Matter Protest” (3 July 2020), online: *iHeart Radio* <<https://www.iheartradio.ca/virginradio/victoria/covid-19-updates/health-officials-say-no-covid-19-outbreaks-related-to-black-lives-matter-protests-1.12882662>>. Similar demonstrations in the United States similarly did not result in any substantial uptick in COVID-19 transmission: Matt Berger, “Why the Black Lives Matter Protests Didn’t Contribute to the COVID-19 Surge” (8 July 2020), online: *Heathline* <<https://www.healthline.com/health-news/black-lives-matter-protests-didnt-contribute-to-covid19-surge>>.

37 Chase Banger, “Masks required at Black Lives Matter solidarity march, but health officials worry COVID-19 could spread” (2 June 2020), online: *CTV News Kitchener* <<https://kitchener.ctvnews.ca/masks-required-at-black-lives-matter-solidarity-march-but-health-officials-worry-covid-19-could-spread-1.4965776>>.

been that where such measures are followed, a comparative reduction in the transmission of COVID-19 should be expected. Consequently, it is reasonable to suppose that restrictions on *core* assemblies (e.g., religious assemblies or protests against systemic injustice) that observe these best practices will demand a markedly higher bar for justification under the minimal impairment branch of the *Oakes* test, at least if presented evidence suggests or confirms that these gatherings are not substantially contributing to the spread of COVID-19.

4. Proportionate Effects

Depending on whether COVID-19 restrictions on physical assemblies are found to be minimally impairing, a reviewing court may or may not proceed to the fourth and final stage of the *Oakes* framework, the “proportionate effects” stage. That said, litigants challenging these measures on the basis of section 2(c) should be prepared to make substantive submissions on this branch of the section 1 test, which consists of a holistic assessment of “the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good.”³⁸ As Hogg put it, the question to be asked is “whether the Charter infringement is too high a price to pay for the benefit of the law.”³⁹ This is a comparatively normative undertaking, and as such appropriate deference should be given to the relevant legislature’s assessment.⁴⁰ At the same time, however, courts must also ensure that they remain alive to the impact of the impugned law on claimants: as Abella J noted in her forceful dissent in *Hutterian Brethren*, it is entirely appropriate to ask at the proportionate effects stage “how deeply” the *Charter* protection has been restricted, and “the degree to which the impugned limitation will advance its underlying objective.”⁴¹

As noted above, COVID-19 restrictions on core assemblies will result in a more severe limitation of section 2(c), and as such will require persuasive evidence that the public benefit to be gained from their continuation is worth the cost that is conversely imposed on claimants. As time goes on, the relative deleterious weight of such restrictions will almost certainly increase. This ought not be a controversial argument: a lockdown that prohibits or otherwise severely limits peaceful assemblies for four weeks, for example, will weigh less heavily at the final stage of the proportionality analysis than a potentially indefinite lockdown which has lasted several months. Even if the initial section 2(c) challenges that are brought against such measures do not succeed, at some point it should be expected that the balance will shift in favour of these claimants.

IV. Conclusions

It is difficult to predict how a hypothetical section 2(c) *Charter* challenge against COVID-19 restrictions might unfold. Litigation will undoubtedly turn on the facts of each particular case. That said, there are good reasons to conclude that ongoing restrictions on core activities protected by section 2(c) should attract a higher threshold for justification under section 1.

38 *Carter*, *supra* note 28 at para 122.

39 Hogg, *Constitutional Law*, *supra* note 10 at 38-43; *Hutterian Brethren*, *supra* note 31 at para 77.

40 *R v KRJ*, 2016 SCC 31 at para 790.

41 *Hutterian Brethren*, *supra* note 7 at para 152, citing Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence” (2007) 57 UTLJ 383 at 393.

Indeed, a compelling argument can be made that limitations on core assemblies which observe evidence-based practices shown to reduce the transmission of COVID-19 (such as physical distancing and the wearing of face coverings) may in some cases fail to satisfy the minimal impairment or proportionate effects branches of the *Oakes* test. If governments hope to prevent COVID-19 restrictions on physical assemblies from being overturned, they will need to ensure that they continue to proffer compelling and non-speculative evidence in support of these policies.

“This Charter applies...”: The Supreme Court of Canada’s Fundamental Error in the Trinity Western University decisions

Ian Peach*

I. Introduction

There has been an ongoing battle between Trinity Western University and the Federation of Law Societies of Canada — the national organization of the law societies that govern the legal profession in Canada — over whether Canada’s law societies will recognize JDs from the law faculty that Trinity Western wishes to establish. At the heart of this controversy is the fact that Trinity Western University, as an avowedly Christian, and some might say conservative, university, requires all of its faculty, staff, and students to sign a Community Covenant. Among other things, this Community Covenant prohibits “sexual intimacy that violates the sacredness of marriage between a man and a woman.”¹ A student’s failure to comply with the Covenant could result in disciplinary measures, including suspension and possibly expulsion.² Several law societies, including the Law Society of British Columbia and the (as it was then known) Law Society of Upper Canada, denied accreditation to Trinity Western’s proposed law faculty because of this Community Covenant.

As one would imagine, the conflict between Canada’s law societies and Trinity Western ended up in the courts, ultimately being subject to two decisions by the Supreme Court of

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1 *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 at para 1 [*Law Society of Upper Canada*].

2 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 7 [*Law Society of British Columbia*].

Canada in the summer of 2018. Trinity Western argued that the law societies' decision to deny accreditation of their proposed law school violated section 2(a) of the *Canadian Charter of Rights and Freedoms*.³ In both cases, the majority of the Court, (with concurrences by Chief Justice McLachlin and Justice Rowe) found that the law societies' statutory obligation to uphold and protect the public interest in the administration of justice justified the limitation on religious freedom.⁴

At the heart of these decisions, though, lies a fundamental error, one which the Supreme Court has also made in the past: that of assuming that the law societies were undertaking decisions that engaged the *Charter* at all. A substantive analysis of the law societies' decisions to deny accreditation as a violation of section 2 a) of the *Charter* simply skips over whether the *Charter* is even applicable to the decisions at all. This is true whether one believes that Trinity Western's proposed law faculty should have been accredited or that the law societies acted properly in the public interest in not accrediting it.

Section 32(1) of the *Charter* states: "This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."⁵ Thus, the *Charter* only protects citizens from the actions of *governmental actors* that violate *Charter* rights; it does not protect citizens from the actions of private actors.⁶ As La Forest J observed in *McKinney v University of Guelph*, "[t]he exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected."⁷ The courts, including the Supreme Court of Canada, need to seriously consider this "deliberate choice by the framers of the Constitution. The question of what entities are "government," and whether the *Charter* applies to entities such as law societies, should be a first consideration. Such an approach to understanding the scope of the *Charter's* application in these cases would most likely have simplified the Court's decisions, and provided valuable guidance on the interpretation of section 32 of the *Charter*.

II. The Supreme Court of Canada's *Trinity Western* Decisions

In its *Trinity Western University* judgments, the Supreme Court undertook an extensive analysis of the statutory mandates of law societies. The Court found that statutes governing law societies vest them with the authority to regulate the legal profession (or recognize their pre-existing legal authority to do so) and also vest them with the discretionary authority to consider whether Trinity Western's proposed law faculty, with its Community Covenant, would be inconsistent with the law societies' mandates to protect and promote the public interest. This analysis was appropriate insofar as, in a rule of law culture, all regulated activi-

3 *Ibid* at para 2; *Canadian Charter of Rights and Freedoms*, s 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [the *Charter*].

4 *Ibid* at paras 3, 84-88, 91-104; *Law Society of Upper Canada*, *supra* note 1 at paras 3, 37-42.

5 The *Charter*, *supra* note 3, s 32(1).

6 One can debate the wisdom of the choice of the drafters of the *Charter* in limiting the scope of the *Charter* to government, but that is a debate for another forum. The fact remains that, wise or unwise, the *Charter* only applies to government.

7 [1990] 3 SCR 229 at 262, 76 DLR (4th) 545 [*McKinney*].

ties — whether undertaken by public or private entities — must be consistent with what the law says is allowed; this is as true of a private individual who drives a vehicle without a valid driver's licence as it is of a public authority that acts inconsistently with the duty of fairness under administrative law or the rights and freedoms protected by the *Charter*. Had the law societies acted beyond the scope of the authority vested in them by the statutes creating them, their decisions would have been illegal. However, this was not the issue under consideration. The issue was whether the exercise of the discretion vested in them by their founding statutes is subject to the *Charter*.

The Court's majority thoughtfully discussed the appropriateness of imposing limits on membership in the legal profession based on personal characteristics that are unrelated to merit and ability. It came to the reasonable conclusion that:

[T]here can be no question that the LSBC [Law Society of British Columbia] was entitled to consider an inequitable admissions policy in determining whether to approve the proposed law school. Its mandate is broad. In promoting the public interest in the administration of justice and, relatedly, public confidence in the legal profession, the LSBC was entitled to consider an admissions policy that imposes inequitable and harmful barriers to entry. Approving or facilitating inequitable barriers to the profession could undermine public confidence in the LSBC's ability to self-regulate in the public interest.⁸

The majority thus determined that the law societies were entitled to conclude that equal access to the legal profession, diversity within the profession, and the prevention of harm to lesbian, gay, bisexual, transgender, and queer (LGBTQ) students were all aspects of the public interest that the law societies were obliged to uphold.⁹ The majority also decided that, as the law societies are the governing bodies of a self-regulating profession, their decisions are entitled to deference.¹⁰ In both cases, Justices Côté and Brown dissented, concluding that the only issue the law societies could legitimately consider is whether the individual graduates of the faculty are competent and professional in their conduct, and therefore fit for licensing. Justices Brown and Côté determined that other considerations leading to denial of accreditation led the law societies to exercise their discretion for an improper purpose and, therefore, their decisions were illegal.

III. The Scope of the *Canadian Charter of Rights and Freedoms*

For the Court to engage in a substantive analysis at all misses the more fundamental point that the *Charter* only governs the actions of governmental entities. There have been several Supreme Court of Canada decisions that provide us with guidance on what entities are “government” for the purposes of understanding section 32 and, therefore, the application of the *Charter*. Universities and hospitals have been found not to be “government” for the purposes of understanding the scope of section 32 of the *Charter*. In *McKinney*, La Forest J came to the conclusion that universities, in their collective bargaining, were not within the ambit of section 32, as they were neither governmental entities nor acting on government instruction. In his words:

⁸ *Law Society of British Columbia*, *supra* note 2 at paras 41-47.

⁹ *Ibid* at paras 30-31, 33-34, 39-47; *Law Society of Upper Canada*, *supra* note 1 at paras 19-27.

¹⁰ *Law Society of British Columbia*, *supra* note 2 at para 34; *Law Society of Upper Canada*, *supra* note 1 at para 18.

These actions are not taken under statutory compulsion ... Unless, then, it can be established that they form part of government, the universities' action here cannot fall within the ambit of the *Charter*. That cannot be answered by the mere fact that they are incorporated and perform an important public service. Many institutions in our society perform functions that are undeniably of an important public nature, but are undoubtedly not part of the government. ... And this may be so even though they are subjected to extensive governmental regulations and even assistance from the public purse ... The fact is that each of the universities has its own governing body. Only a minority of its members (or in the case of York, none) are appointed by the Lieutenant-Governor in Council, and their duty is not to act at the direction of the government but in the interests of the university ... The government thus has no legal power to control the universities even if it wished to do so. ... In a word, these are not government decisions.¹¹

In *Stoffman v Vancouver General Hospital*, La Forest J, for himself, Dickson CJ, and Gonthier J, observed that administrative agencies, but not the broader public sector, fall within the definition of 'government':

McIntyre J. ... was of the view [in *Dolphin Delivery*] that the references in s[ection] 32(1) to the "government of Canada" and the "government of each province" could not be interpreted as bringing within the ambit of the *Charter* the whole of that amorphous entity which in contemporary political theory might be thought of as "the state". Instead, they were to be interpreted as references to what has traditionally been thought of as the institutions of government — those bodies and offices upon which the Constitution confers power to make and enforce laws generally applicable across the body politic. ... [As to] subordinate bodies that are created, supported or supervised by government, McIntyre J. clearly countenanced the application of the *Charter* to such bodies by including the "administrative branch" within his definition of the word "government".¹²

However, La Forest J provided guidance on what should be considered the "administrative branch" of government in his judgment, deciding that:

[I]t is crucial ... to bear in mind the difference between ultimate or extraordinary, and routine or regular control. While it is indisputable that the fate of the Vancouver General is ultimately in the hands of the Government of British Columbia, I do not think it can be said that the *Hospital Act* makes the daily or routine aspects of the hospital's operation, such as the adoption of policy with respect to the renewal of the admitting privileges of medical staff, subject to government control.¹³

He then sought to clarify the distinction between "public" (as in "a public service" or "in the public interest") from "governmental", noting

On the basis of the foregoing, I would conclude that the appellant hospital does not form part of government within the meaning of s[ection] 32 of the *Charter*. ... [I]t follows from what I have said above that the provision of a public service, even if it is one as important as health care, is not the kind of function which qualifies as a governmental function under s[ection] 32.¹⁴

Likely, the Supreme Court of Canada's most careful analysis of the scope of section 32 of the *Charter* is in *Eldridge v British Columbia (Attorney General)*.¹⁵ Continuing along the path of his analysis in *Stoffman*, in *Eldridge*, La Forest J, for the Court, provided a carefully considered set of guidelines for determining whether an entity is "government" under section

11 *McKinney*, *supra* note 7 at 269, 272-73.

12 [1990] 3 SCR 483, at 506-07, 76 DLR (4th) 700 [*Stoffman*].

13 *Ibid* at 513.

14 *Ibid*, at 513, 516

15 [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge* cited to SCR].

32 of the *Charter*, finding, in this case, that health care providers are not. La Forest J commented that the *Charter* does not apply to corporations merely because they are incorporated under the authority of a statute; rather, “once brought into being,” he said, they are “completely autonomous from government,” even if governments may desire corporations to serve certain socio-economic policy goals.¹⁶ On the other hand, La Forest J determines that, in some circumstances, private entities can be considered within the scope of “government”, stating that:

McKinney makes it clear, however, that the *Charter* applies to private entities in so far as they act in furtherance of a specific governmental program or policy. In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. ... Two important points must be made with respect to this principle. First, the mere fact that an entity performs what may loosely be termed a “public function”, or the fact that a particular activity may be described as “public” in nature, will not be sufficient to bring it within the purview of “government” for the purposes of s[ection] 32 of the *Charter*. ... In order for the *Charter* to apply to a private entity, it must be found to be implementing a specific governmental policy or program.¹⁷

These judgments make it clear that the scope of the *Charter*’s application is limited. An entity has to be more than something with the authority to make decisions that affect individuals’ lives, or even the authority to enforce its decisions through sanctions against individuals for non-compliance with their decisions for the *Charter* to apply to its actions. Neither is it sufficient that authority is provided to the entity through statute. The fact that an entity serves the public or acts in the public interest in undertaking its activities is also insufficient to trigger the application of the *Charter*. As these judgments make clear, for the *Charter* to apply to an entity, it must be acting under government direction to advance a specific government policy or deliver a specific government program.

IV. The Status of Law Societies in Canada

The legal profession in Canada is a self-governing profession; law societies are therefore private governing bodies, not branches of government. They are not subject to routine or regular control by government. The Supreme Court, in its *Law Society of Upper Canada* decision, referred to the Law Society of Upper Canada as a “public actor”; it did not, however, refer to it as a governmental actor.¹⁸ It is certainly true that the law societies are public actors, as they fulfil the public purposes of ensuring professionalism in the legal profession, and protecting the public interest in the administration of justice. As La Forest J made clear in *McKinney*, however, the mere fact that law societies, like universities, perform “an important public service” does not make them an arm of the governments of the provinces and territories. Neither does the fact that they have been granted the broad, general authority to regulate the legal profession by provincial statutes, as their authorizing statutes do not direct them to implement *specific* governmental policies or programs; they merely empower them to regulate the legal profession in the “public interest,” a term to be defined by the law societies themselves in exercising their regulatory authority.

¹⁶ *Ibid* at para 35.

¹⁷ *Ibid* at paras 42-43 [emphasis in original].

¹⁸ *Law Society of Upper Canada*, *supra* note 1 at para 21.

The Law Society of Ontario has the statutory authority, under the *Law Society Act*, to determine who can be licensed to practice law in Ontario, and to set the conditions for licensing of lawyers.¹⁹ The same is true for statutes establishing all of the law societies across Canada. These statutes similarly give the law societies the discretionary authority to set the conditions for licensing lawyers in their province or territory, consistent with their statutory mandate to protect the public interest. Indeed, the Supreme Court noted this reality in its *Law Society of British Columbia* decision, when the majority commented that “[t]he legal profession in British Columbia, as in other Canadian jurisdictions, has been granted the privilege of self-regulation [and] ... the *LPA* [*Legal Profession Act*] ... manifests the legislature’s intention to ‘leave the governance of the legal profession to lawyers.’”²⁰

The majority judgment then engaged in an extensive discussion of what this principle means in practice. The majority noted that “[a]s the governing body of a self-regulating profession, the LSBC’s determination of the manner in which its broad public interest mandate will best be furthered is entitled to deference.”²¹ It also observed that “in *Green v. Law Society of Manitoba* ... Wagner J. ... repeatedly noted the deference owed to law societies’ interpretation of ‘public interest’: that they have ‘broad discretion to regulate the legal profession on the basis of a number of policy considerations related to the public interest.’”²² The majority then went on to confirm the importance of law societies being self-regulating and independent - factors which inform the need for deference to law society decisions:

... *Green* affirmed a long history of deference to law societies when they self-regulate in the public interest. For many years, this Court has recognized that law societies self-regulate in the public interest ... To that end, where a legislature has delegated aspects of professional regulation to the professional body itself, that body has primary responsibility for the development of structures, processes, and policies for regulation. This delegation recognizes the body’s particular expertise and sensitivity to the conditions of practice. This delegation also maintains the independence of the bar; a hallmark of a free and democratic society [...]²³

The majority summarized its thinking on this issue by stating, “where legislatures delegate regulation of the legal profession to a law society, the law society’s interpretation of the public interest is owed deference. This deference properly reflects legislative intent, acknowledges the law society’s institutional expertise, follows from the breadth of the ‘public interest’, and promotes the independence of the bar.”²⁴

The Manitoba Law Reform Commission described how self-government of professions such as law operates in its 1994 report *Regulating Professions and Occupations*. The report observes that:

Self-governing occupational groups (practitioner administration) are an exception to the general rule of administration of regulation by government. The classic model of self-government represents a delegation by the Legislature of administrative authority to an organization whose officers and directors are elected by practitioners rather than being appointed by government. This organization

19 *Law Society of Upper Canada*, *supra* note 1 at paras 5, 13.

20 *Law Society of British Columbia*, *supra* note 2 at paras 32-33.

21 *Ibid* at para 34.

22 *Ibid* at para 35.

23 *Ibid* at paras 36-37.

24 *Ibid* at para. 38.

is given the power to apply the entry and practice standards of a regime and to prosecute non-practitioners who infringe on the regime's scope of practice or who use the title reserved for practitioners.²⁵

As John Law put it, “[s]elf-regulation has long been considered to be one of the defining attributes or characteristics of a profession, and as law is considered to be the paradigmatic profession, it must, of course, be self-regulating.”²⁶ This self-regulation of professions such as law also has a long history. As the Manitoba report describes it:

Early in the twentieth century, professions began establishing written codes of ethics to entrench this commitment to the public interest. All members of a profession were bound by its code of ethics and could be punished for breaching it. ... This, then, is the model of professionalism which emerged around the turn of the [20th] century and which remains the image of professionalism for many (and perhaps most) people today: high levels of education (almost invariably obtained at a university), a commitment to the public welfare enshrined in a code of ethics and a higher level of dedication to the interests of individual clients or patients than to one's own interests. ... Historically, groups that fit the profile of a profession have been able to argue convincingly that only individuals who have completed the requisite years of university or equivalent education and are engaged in practice are capable of setting and enforcing appropriate standards for practitioners. ... Therefore, they have taken the position that, while government is able to administer regulatory regimes for other occupations, its only option when it comes to professions is to delegate to professionals the power to administer their own affairs. ... Accordingly, professional bodies have typically been granted the authority by legislatures in Canada to set and enforce standards for initial membership in the professional body and for standards of professional conduct after entry.²⁷

In fact, the self-regulation of the legal profession in Canada extends from well before the 20th century. The Legislature of the colony of Upper Canada conferred self-regulating status on the colony's lawyers, ending the supervision of the profession by the Chief Justice of the colony, on July 3, 1797 — long before self-regulation emerged in the legal profession elsewhere in the British Empire.²⁸ As Pearson describes it, “[e]ventually the legal profession across Canada recognized the benefits of self-governance and obtained the status for themselves.”²⁹

V. The Importance of Law Societies' Self-governance to Liberal Democracy

There is a particularly important rationale for the legal profession to be governed by law societies that are independent of government, as a means to protect the fundamental constitutional principle of constitutionalism and the rule of law. As Pearson puts it:

The profession insists it is of the utmost public interest that regulation of the profession be free from state interference because the independence of lawyers protects individuals 'from the state.' If members of the public are left with the perception that lawyers are subject to the control of the state, they will have

25 Manitoba Law Reform Commission, *Regulating Professions and Occupations* (Winnipeg: Law Reform Commission, 1994) at 46.

26 John M Law, “Regulation and the Legal Profession” (2008) 45:5 Alta L Rev 255 at 255.

27 Manitoba Law Reform Commission, *supra* note 26 at 3-4.

28 John Pearson, “Canada's Legal Profession: Self-Regulating in the Public Interest” (2013) 92:3 Can Bar Rev 555 at 557-58.

29 *Ibid* at 560.

no confidence in the ability of lawyers to resolutely pursue legal proceedings against the state. Lawyers should not only act independently, but manifestly and undoubtedly be seen to do so.³⁰

The Federation of Law Societies of Canada notes that the legal profession being independent of government is a central feature of Canada's legal system and the Law Society of British Columbia clearly states that:

The Law Society is independent of the government. It is not a government authority and is not part of the public sector. It is not subject to instructions from government, nor does it receive any public funding. ... A lawyer's role is to provide advice on behalf of a client, sometimes in disputes involving the government or government institutions. It would pose a conflict of interest if the organization that regulated lawyers was directly or indirectly controlled by the government.³¹

As a consequence of the importance of self-regulation to the protection of the principles of constitutionalism and the rule of law, once the statutes establishing the law societies as the profession's regulatory bodies are passed and receive Royal Assent, governments have no role in the regulation of the legal profession; it is entirely a private matter, purposely insulated from government "interference." The bodies that regulate the legal profession, thus, surely must be understood to not be part of "government" for section 32 purposes.

Mysicka, in a C D Howe Institute commentary, observed that, a "key advantage of self-regulation is that it creates an arm's length relationship with the state, providing the SRO [(self-regulated organizations)] with a layer of insulation from more transitory political imperatives that can negatively influence regulatory decision-making."³² The Supreme Court of Canada also found, in its 1982 decision in *Canada (Attorney General) v Law Society of British Columbia*, that:

The independence of the Bar from the state ... is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must ... be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. ... The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.³³

Clearly, in 1982 at least, the Supreme Court of Canada saw law societies, the governing bodies of the legal profession, as private, non-governmental organizations.

VI. The Supreme Court's Confusion on the Status of Law Societies

If we understand law societies to be private entities, independent of the state, logic dictates that their accreditation decisions cannot be subject to *Charter* challenge. As the Supreme Court stated in the *Law Society of Upper Canada*, the decision whether to accredit a law faculty as a route of entry into the legal profession is "a decision falling within the core of the LSUC's

30 *Ibid* at 562.

31 "Lawyer Independence and Self Regulation" (last visited 20 February 2021), online: *Law Society of British Columbia* <<https://www.lawsociety.bc.ca/our-initiatives/rule-of-law/lawyer-independence-and-self-regulation-of-law/>>. See also, Pearson, *supra* note 28 at 563.

32 Robert Mysicka, *Who Watches the Watchmen: The Role of the Self-Regulator* (Toronto: CD Howe Institute, 2014) at 10.

33 [1982] 2 SCR 30 at 335-36, 137 DLR (3d) 1.

(Law Society of Upper Canada's) role as the gatekeeper to the profession."³⁴ It is interesting that in discussing the concept of *Charter* values in his concurring judgment in the *Law Society of British Columbia* case, Justice Rowe noted that, because section 32 of the *Charter* limits its scope to the actions of Parliament and the Government of Canada and the legislatures and governments of the provinces (and territories), the *Charter* does not apply to the actions of private parties.³⁵ At the same time, though, Justice Rowe commented that "[w]here *Charter* rights have been infringed by administrative actors, reviewing courts must determine whether *the state* meets the burden of justifying the infringement according to s[ection] 1," apparently failing to recognize that, because of section 32, the *Charter* did not actually apply to law societies, as they are private parties, not administrative arms of the state.³⁶

Justice Rowe's assumption that the *Charter* applies to law societies reflects previous Supreme Court of Canada decisions, such as *Black v Law Society of Alberta*,³⁷ in which the Supreme Court assumed that in imposing a limitation on the right of lawyers to establish an inter-provincial law firm through the law society's rules, rather than through statute, a law society was subject to the *Charter*. As well, in *Doré v Barreau du Québec*,³⁸ the Court assumed that a freedom of expression challenge to a decision of a law society's disciplinary process had to be addressed substantively because, in enforcing professional responsibility within the legal profession, law societies were exercising statutory discretion.

Justices Côté and Brown, in their dissenting judgment in the *Law Society of Upper Canada* case, also demonstrate confusion over the status of law societies. In their judgment, they describe Trinity Western University as "a private denominational institution, which is not subject to the *Canadian Charter of Rights and Freedoms*" but describe the Law Society of Upper Canada as a "public decision-maker" and a "public regulator."³⁹ Later in their judgment, they state that: "TWU [(Trinity Western University)] is a private institution [and] at the risk of stating trite law, private actors are not subject to the *Charter* ... Therefore, neither the Covenant nor any other aspect of TWU's admissions policies may be found to be 'contrary to s[ection] 15 of the *Charter*', or to any other section of the *Charter*."⁴⁰ They refer to this as a basic premise of our constitutional order, yet they seem oblivious to the fact that law societies, too, are private, not governmental, institutions.⁴¹ Indeed, Justices Côté and Brown actually comment that "the point is this simple. The *Charter* binds state actors, like the LSUC, and *only* state actors."⁴² Again, the fact that law societies exercise a public purpose does not make them part of government, as they do not deliver a *specific* government policy or program; Côté and Brown JJ's characterization of law societies as state actors because they fulfil a public purpose through their regulatory mandate seems clearly an error.

34 *Law Society of Upper Canada*, *supra* note 1 at para 13.

35 *Law Society of British Columbia*, *supra* note 2 at para 167.

36 *Ibid* at paras 168, 175 [emphasis added].

37 [1989] 1 SCR 591, 58 DLR (4th) 317.

38 2012 SCC 12.

39 *Law Society of Upper Canada*, *supra* note 1 at para 56.

40 *Ibid* at para 78.

41 *Ibid*.

42 *Ibid* at para 79 [emphasis in original].

VII. Conclusion

It is quite clear, from the jurisprudence and academic commentary on the history of law societies as self-regulating professional bodies, that law societies are and must be independent regulatory entities. While they are established through legislation, and that legislation mandates them to exercise a public purpose, they are, nonetheless, non-governmental entities because they are not mandated to advance a *specific* governmental policy or program. Equally, we know from the wording of, and jurisprudence on the interpretation of, section 32, that the *Canadian Charter of Rights and Freedoms* only governs the actions of governmental entities.

Thus, it seems to have been entirely unnecessary for the Court to undertake an analysis of the meaning of section 2(a) of the *Charter* in making its decision that the law societies acted legally in refusing to accredit Trinity Western University's proposed law faculty. The Court had a much simpler way to dismiss Trinity Western's challenge to these decisions by using section 32 of the *Charter* - it could and should have decided that a *Charter* challenge was inappropriate. In doing so, it could have ensured that the scope of what is "government" — and therefore what entities section 32 applies to — is clear, consistent, and comprehensible to the legal profession and the courts. To ignore the limited scope of section 32 and assume that, in making administrative decisions about the regulation of the legal profession, law societies are subject to the *Charter* is, unfortunately, to make a fundamental analytical error.

The Common Good and Legal Interpretation: A Response to Leonid Sirota and Mark Mancini

**Stéphane Sérafin, Kerry Sun, and
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I. Introduction

A renewed interest in the moral foundations of legal interpretation in the United States is increasingly reverberating in Canada. For example, on February 22, 2021, Leonid Sirota and Mark Mancini published a post on the *Double Aspect* Blog entitled “Interpretation and the Value of Law” (“*IVL I*”).¹ Although the post itself merely claimed to show “[w]hy the interpretation of law must strive for objectivity, not pre-determined outcomes,”² the timing of the piece implies that it was meant to respond specifically to Josh Hammer, the Newsweek correspondent and constitutional lawyer, who has recently proposed a framework of “common good originalism”³ to correct the perceived failures of the originalist framework applied by Justice Gorsuch of the US Supreme Court in *Bostock*.⁴ This is an argument that Sirota and

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1 Leonid Sirota & Mark Mancini, “Interpretation and the Value of Law” (22 February 2021), online (blog): *Double Aspect* <<https://doubleaspect.blog/2021/02/22/interpretation-and-the-value-of-law/>> [*IVL I*].

2 *Ibid.*

3 Josh Hammer, “Toward a New Jurisprudential Consensus: Common Good Originalism” (18 February 2021), online (blog): *Public Discourse* <<https://www.thepublicdiscourse.com/2021/02/74146/>>.

4 *Bostock v Clayton County, Georgia*, 140 S Ct 1731 (US 15 June 2020).

Mancini appear to perceive as a threat to their preferred paradigm — textualism in statutory interpretation, originalism in constitutional matters — on the grounds that it introduces “substantive political content” into the law.⁵

Since then, Sirota and Mancini have published a further blog post, entitled “Interpretation and the Value of Law II” (“*IVL II*”), which purported to respond to the arguments we advanced in an earlier version of this article.⁶ While the subsequent post clarified our interlocutors’ position on a number of issues, many of our initial arguments remain unaddressed. Separately, our initial response to Sirota and Mancini prompted another comment by Asher Honickman, calling for a more robust contextual approach within an ostensibly positivist, textualist framework.⁷ As Honickman observed, “[t]here is a lively debate afoot in legal circles, both in the United States and now in Canada, on the ‘common good’ and its relation to juristic activity.”⁸

In this article we reprise and elaborate upon our arguments, in light of the subsequent responses by our interlocutors. Specifically, we argue that, to the extent that Sirota and Mancini’s posts in *IVL I* and *II* should be read as a response to Hammer, they misunderstand his position as a threat to originalism. Sirota and Mancini’s proffered critique of “common good originalism” misses the mark, we suggest, because they confuse Hammer’s broadly positivist “common good originalism” with the quite different arguments advanced by Harvard law professor Adrian Vermeule, whom they explicitly criticized in *IVL I* as favouring an approach that “look[s] to extraneous moral and policy commitments as guides for legal interpretation.”⁹ That said, we *also* object to Sirota and Mancini’s characterization of the alternative natural law position they ascribe to Vermeule and others. Whatever else can be said about the ultimate merits of this jurisprudential tradition, proper natural law theories do not constitute a form of legal realism, as Sirota and Mancini appear to believe. That is to say, these theories do not regard legal reasoning or adjudication as mere instruments to achieve “pre-determined outcomes.”

II. Sirota and Mancini: Legal Positivism or Anti-Positivism?

Before getting into what Sirota and Mancini misunderstand about Hammer and Vermeule’s very different arguments, it is worthwhile to first set out the substance of their position so as to avoid any unnecessary confusion. From the outset, there is an apparent tension in the way Sirota and Mancini frame their arguments in both *IVL I* and *II*. As we will explain, this tension arises because they oscillate between an essentially positivist outlook on law, in which the

5 Sirota & Mancini, *IVL I*, *supra* note 1.

6 Leonid Sirota & Mark Mancini, “Interpretation and the Value of Law II” (23 March 2021), online (blog): *Double Aspect* <<https://doubleaspect.blog/2021/03/23/interpretation-and-the-value-of-law-ii/>> [*IVL II*]. For the earlier version of our article, see Stéphane Sérafin, Kerry Sun & Xavier Focroulle Ménard, “The Common Good in Legal Interpretation: A Response to Leonid Sirota and Mark Mancini” (3 March 2021), online (blog): *Advocates for the Rule of Law* <<http://www.ruleoflaw.ca/the-common-good-in-legal-interpretation-a-response-to-leonid-sirota-and-mark-mancini/>>.

7 Asher Honickman, “Law, Liberty and the Pursuit of the Common Good” (8 March 2021), online (blog): *Advocates for the Rule of Law* <<http://www.ruleoflaw.ca/law-liberty-and-the-pursuit-of-the-common-good/>>.

8 *Ibid.*

9 Sirota & Mancini, *IVL I*, *supra* note 1.

“common good” and natural law precepts are presented as *extrinsic* to law and as undermining law’s value-neutral application, and a position that purports to ascribe to law an *intrinsic* “value in ordering relations among individuals in large communities” and aims to preserve its “unique and precious function ... of providing a touchstone for the diverse members of pluralistic communities.”¹⁰

Starting with the positivist aspects of their position, it was clear to us from the substance of *IVL I* that they were operating primarily within this jurisprudential outlook, even if they showed some inclinations towards a perspective that attributed an intrinsic moral value to law. In typical positivist fashion, they wrote, “good law is better than bad law, but law ... is precious quite apart from its substantive merits,” suggesting that this is because it allows individuals to predictably interact with each other in a pluralistic society.¹¹ Law was also said to be “neither sacred nor permanent,” a jab at natural law theories that are historically opposed to legal positivism, or at least at what they ostensibly understand these theories to claim.¹²

Sirota and Mancini subsequently appear to reaffirm this basic positivist commitment in *IVL II*, where they acknowledge that “substantive legislation is of course not neutral—it embodies the commitments of its makers”, adding that the interpreter’s task is:

precisely to give effect to the commitments made by those with the authority to enact legislation and avoid imposing his own. A judge interpreting the law will never be perfectly neutral *in fact*, but an interpreter has no business abusing his position to advance pluralism in law, anymore than he is free to make the law more conservative, more progressive, or anything in between.¹³

Law, then, is to be abstract process, an abstract form, divorced from the particular preferences of those to whom the law applies. Although it is perhaps impossible to achieve this ideal in practice, the law should instead serve only to channel the substantive commitments of the law-giver, which in Sirota and Mancini’s view appears to mean the proper legislative authorities.

This outlook on law is reminiscent of, and broadly compatible with, the views espoused by the foundational English legal positivists going back as far as John Austin. Indeed, it was Austin who asserted that “the existence of law is one thing; its merit or demerit is another.”¹⁴ The implication is that legal rules amount to nothing more, and nothing less, than social facts that can be identified without the need to agree or disagree with their content. As Joseph Raz would later call it, this is the “social thesis,” and in his positivist account it is, or at least was, all that is required for a theory of law to be properly deserving of the label:

A jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence *depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument*.¹⁵

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*

13 Sirota & Mancini, *IVL II*, *supra* note 6 [emphasis in original].

14 John Austin, *The Province of Jurisprudence Determined*, ed by Wilfrid E Rumble (Cambridge, UK: Cambridge University Press, 1995) at 157.

15 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 39-40 [emphasis added].

Or, as the late John Gardner put it, referring to the one and only “distinctive proposition” of legal positivism:

In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.¹⁶

Taken as a description of “legality” in all its senses,¹⁷ the idea that law is reducible to social facts or sources can and has been challenged repeatedly by jurists far more established than we, and it is not our intention to retread those critiques here.¹⁸ In fact, it is not even necessary to do so, given the tension in Sirota and Mancini’s argument to which we have already alluded.

That tension arises because, for them, the neutral application of law, and indeed law itself, is to be justified on the basis of an overarching value commitment: the function of ensuring some degree of social cohesion in a pluralistic society. As Sirota and Mancini wrote to conclude the first section of *IVL I*:

But for law to fulfil its function, indeed to be law at all, it must have a fixed content independent of the views and preferences of those to whom the law applies. To the extent this understanding of law is now considered unorthodox, we hope to correct the record.¹⁹

And, as they again affirmed in *IVL II*, this time drawing explicitly on the work of Lon Fuller:

For us, as for Fuller, what matters is “the inner morality of law”, or its “artificial reason” as Coke put it — the morality or reason of legal craft and technique, which ensures that law is intelligible to all those subject to it, simply because they are thinking, reasoning human beings, and which is inherent in the enterprise of governing through law, properly understood, rather than emanating from some benevolent ruler whom the “[s]ubjects will come to thank”. Our interlocutors’ focus is less on form and more on the content of the law; the reason they appeal to is more substantive than the one on which we focus.²⁰

Taken together, the above excerpts thus point to Sirota and Mancini’s partial endorsement of an anti-positivist view of the law in both *IVL I* and *II*. They do so by asserting that the law ultimately serves valuable “functions”, and further contains within it a certain kind of “inner morality”.

The trouble, of course, is that this view of law is in tension with their broader argument that rests on positivist foundations. In contrast to that argument, they advance here a particular idea of the rule of law that prescribes a minimum content for legal norms to qualify as “law”, which does *not* correspond to an approach that allows judges or anyone else to apply the

16 John Gardner, “Legal Positivism: 5½ Myths”, in *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012) 19 at 19.

17 It should be noted, as Gardner points out, that the proposition may be understood as defining “legal” validity only in the sense of *lex* and not *ius*. Legal positivists need not deny that in the sense of *ius*, that is, “the second moralized sense of ‘valid law’, laws may be more or less valid depending on the extent to which they exhibit legality, and hence depending on their merits”: *ibid* at 52. See also John Finnis, “The Truth in Legal Positivism”, in *Philosophy of Law: Collected Essays*, vol 4 (Oxford: Oxford University Press, 2011) 174 at 184-86.

18 For an especially apposite critique of the “social fact” thesis, see John M Finnis, “On the Incoherence of Legal Positivism” (2000) 75:5 *Notre Dame L Rev* 1597.

19 Sirota & Mancini, *IVL I*, *supra* note 1.

20 Sirota & Mancini, *IVL II*, *supra* note 6.

law in an absolutely neutral fashion. Rather, the value or social utility of law remains subject here to a particular normative framework — a form of rule utilitarianism — which is incompatible with the truly value-neutral perspective on law and legal interpretation characteristic of legal positivism. Even if these commitments relate to the formal or procedural qualities of the rule of law, in Gardner’s words, they still imply that legal validity is determined “according to [a norm’s] formal *merits*.”²¹ And so long as this is the case, a judge called upon to apply the law will be required to ask not only whether the law was *authoritatively enacted*, as for instance by the competent legislative authorities, but also whether it is worthy of application in the first place.

To illustrate Sirota and Mancini’s oscillating conception of law, let us consider what would happen under their view if a legislature were to enact a statute — an “illiberal” statute — that undermined this function and threatened pluralism, perhaps even at the level of the legal system as a whole. Would a judge be expected “to give effect to the commitments made by those with the authority to enact legislation and avoid imposing his own [values]?”²² Or would a judge be allowed to disregard what the statute says, and to appeal instead to what amount from a positivist perspective to “extraneous moral and policy commitments” if this allows him to uphold the function of the broader legal system?²³ Sirota and Mancini are silent on this issue, at least as far as we can surmise.²⁴

Our point, we hasten to add, is not that the belief that whether a statute is undesirable (or even “illiberal”) should allow a judge to adopt an unfaithful interpretation of that statute. It is simply that, on Sirota and Mancini’s own terms, the “value” of law and the need to avoid judicial activism would appear to be contingent on the character of the political forces in society. With a “liberal” legislature, the law would be valuable because it serves as a “touchstone” of pluralism; with an “illiberal” legislature, it would lack such value because it would undermine pluralism. Either way, it is significant that this purported “value of the law” derives from and is dependent upon sociopolitical factors *extrinsic* to law itself, at least when viewed through a truly value-neutral framework.²⁵

Now, if we are being charitable to the two authors, it appears to us that there is a relatively easy solution to the dilemma of the “illiberal legislature” while remaining consistent with a neutral conception of law. This solution is the one offered by Raz’s social thesis or Gardner’s sources thesis as outlined above: the law remains the law, independent of its content, while the choice of what content actually goes into it is a matter of politics, and thus ostensibly for the

21 Gardner, *supra* note 16 at 30 [emphasis added].

22 Sirota & Mancini, *IVL II*, *supra* note 6.

23 Sirota & Mancini, *IVL I*, *supra* note 1.

24 It is no answer to simply say that a judge can apply principles “in a largely neutral and consistent fashion” (Honickman, *supra* note 7) or in a manner that avoids “abusing his position to advance” his personal preferences (Sirota & Mancini, *IVL II*, *supra* note 6). While we agree that judges should strive for neutral application of the law in the sense of being consistent and eschewing personal preferences, Sirota and Mancini stray beyond the mere claim that judges should be neutral in this sense. Their claim is more ambitious, as illustrated most starkly when they critique “common good originalism” for drawing on *extra-legal* considerations, even if its proponents seek to source their interpretations from the constitutional text itself. Thus, the real question at issue here is what qualifies as *law*.

25 Sirota & Mancini, *IVL I*, *supra* note 1.

legislatures, not the courts, to address.²⁶ Such legislatures could adopt a substantive content that reflects a commitment to the maximization of social utility or aspects of the “rule of law”, just as easily as they could adopt laws with discriminatory effects. To quote Austin again, on this view, what the law is, is one thing; its merit or demerit is another.

But this is a rather different assertion than the one Sirota and Mancini appear intent on making, especially in *IVL I*: namely, that the law is *itself* grounded in utility or “valuable functions” while somehow still remaining neutral in content.²⁷ Only the Austinian assertion can reasonably claim to amount to a purely descriptive approach, and so can presumptively avoid reliance on “extraneous moral and policy commitments,” as Sirota and Mancini ostensibly understand these terms, when interpreting the meaning of any particular legislative enactment or constitutional provision. A commitment to the value-neutrality of the legal positivist approach thus extracts a price. It requires them to abandon the claim that law has any intrinsic value at all, much less any intrinsic value as “a touchstone” for pluralism.²⁸ This is perhaps why Sirota and Mancini appeared to resile partly, though not completely, from their commitment to value-neutrality in *IVL II*. Nonetheless, adopting this approach would, in its broad strokes at least, be compatible with the idea of “common good originalism” that Hammer now seeks to advance.

III. Originalism and the Common Good

Armed with this understanding of what a truly “value-neutral” approach to law should strive toward, it is a bit surprising that Sirota and Mancini should feel compelled to react as they do to Hammer’s proposed “common good originalism”, at least if we take their own commitment to neutrality at face value. In our view, their misgivings are likely due to a misapprehension of Hammer’s proposal that conflates it with the common good constitutionalism advanced most notably by Adrian Vermeule. Hammer draws inspiration from Vermeule’s work, but his approach also appears to depart from it significantly. Unlike Vermeule, he sets out an approach that remains entrenched in the more established and better understood method of constitutional interpretation favoured by American conservatives, namely, originalism.

This last feature, to us at least, is clear from the articles in which Hammer expounds his proposed theory, even if Sirota and Mancini are correct to note that his project possesses a “political valence.”²⁹ To quote one choice excerpt, which we take to be representative of the core *legal* claim he is advancing:

26 Of course, a positivist framework does not strictly speaking require that legislatures wield an exclusive law-making authority either. If a given legal system recognizes the authority of judges to (also) make law, then this authority can and should be recognized from a positivist perspective. See Gardner, *supra* note 16 at 37-42.

27 Sirota & Mancini, *IVL I*, *supra* note 1.

28 *Ibid.*

29 Sirota & Mancini, *IVL II*, *supra* note 6. While Mancini and Sirota would likely deny that their project aims to advance any substantive political commitments, their own emphasis on the “function” of law belies this claim, at least if we understand “politics” to be “the activity of attending to the general arrangements of a set of people whom chance or choice have brought together.” Michael Oakeshott, “Political Education” in *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Fund, 1991) 43 at 44.

Fortunately, such a method of constitutional interpretation is not merely legitimate — it is the most authentic of all forms of originalist jurisprudence. That's because it is anchored in the prescribed aims of the Constitution's Preamble, the Constitution's "statement to explain 'whither we are going.'" While the Declaration of Independence — Abraham Lincoln's "apple of gold" around which the Constitution was but a surrounding "frame of silver" — is undoubtedly important in constitutional interpretation, the geopolitical circumstances in July 1776 were quite different from those during the 1787 Constitutional Convention. The leading draftsmen of both documents, moreover, were also very different. It is rather curious, then, that the Preamble has been so readily ignored in constitutional interpretation. Common good originalism seeks to rectify this mistake.³⁰

The focus in the above passage, then, remains squarely on the text of the US Constitution, and particularly on what that text enacted. The Constitution, the legal instrument *positively enacted* by the constitutional assemblies, is given the place of honour at the interpretive table. The question that follows is simply what exactly *is* included *in* that document — or, what perhaps amounts to the same thing, how it should be *authentically read*. Hammer suggests that the Preamble of the US Constitution provides us with a set of interpretive clues — i.e., a context — within which the rest of its provisions should be read. That these textual clues are geared towards a certain set of values that Hammer associates with "common good" conservatism is beside the point: he is sourcing his interpretation from the constitutional text itself, not some extraneous well of moral values.

If we are being good positivists here, then none of this should bother us in the least. Indeed, the notion of "contextual enrichment" — the idea that the context of an utterance or text can assist in fixing meaning — is familiar to originalist theorists,³¹ and Hammer can readily be read as arguing that the historical context of its enactment imbued the US Constitution with certain moral, philosophical, and metaphysical presuppositions that should guide the interpretation and/or construction of the text.³² At worst, what Hammer's theory signals is the possibility of a disagreement over what the text of the US Constitution means, even abstracted from external sources. Simply put, he is saying that the "common good" in "common good originalism" can be traced to the text of the Constitution itself. And that is on all fours with the kind of inclusive legal positivism Sirota and Mancini have espoused, in which judges may "engage in moral and practical reasoning" where "invite[d]" to do so by "constitution-makers and legislators."³³

This suggests that there are in fact two ways of objecting to Hammer's argument, the first being to simply claim that his common good-inflected interpretation of the US Constitution is not, in fact, supported by the constitutional text. Such an argument may well prevail, though it is not in our view clear that this is the case. Certainly, Sirota and Mancini have offered no arguments to support this contention in either *IVL I* or *II*, nor, more importantly, have they offered

30 Hammer, *supra* note 3.

31 See, e.g. Lawrence B Solum, "Communicative Content and Legal Content" (2013) 89:2 Notre Dame L Rev 479 at 488; Randy E Barnett & Evan D Bernick, "The Letter and the Spirit: A Unified Theory of Originalism" (2018) 107:1 Geo LJ 1 at 34. See also Lawrence B Solum, "The Interpretation-Construction Distinction" (2010) 27:1 Const Commentary 95.

32 For discussion of "presupposition", the idea that communicative content can be "provided by an unstated assumption or background belief that is conveyed by what is said," see Lawrence B Solum, "Originalist Methodology" (2017) 84:1 U Chicago L Rev 269 at 289-90.

33 Sirota & Mancini, *IVL I*, *supra* note 1.

arguments against such a reading of the *Canadian* Constitution. The lack of such arguments regarding the US Constitution is all the more surprising given that the libertarian strands of thought they ostensibly favour were present in American jurisprudence from the early days of the Republic, and so might reasonably be taken to have been enshrined, to some extent, in the US text. In Canada, by contrast, it would be very difficult to support the view that our constitutional order is founded on anything like this kind of thinking. This is especially so as our Constitution — both unwritten and written — contains far more references to precisely the type of “common good” espoused by Hammer than could ever be amassed in favour of such a view in the United States. As Professor Bradley Miller (as he then was) has pointed out, for example, elements of a non-aggregative conception of collective interests — i.e., an idea of the common good — can be discerned in Canadian jurisprudence even in such places as the test for the granting of an interlocutory injunction.³⁴

The second way of objecting to Hammer’s arguments, by contrast, is to fall back on a direct challenge to the values that Hammer suggests are to be found in the text of the US Constitution, and to defend instead the particular, libertarian-influenced vision of constitutionalism that Sirota and Mancini appear to prefer. Suffice it to say, this is not an option of which either author will likely want to admit availing themselves, though they appear to have moved in this general direction in *IVL II*. To follow this argument properly would mean resolving the tensions implicit in Sirota and Mancini’s own framework, by favouring the overarching value of law as a necessary element of a functioning pluralistic democracy. It would also mean abandoning legal positivism, and certainly the value-neutral application of law, entirely. What it would seek to show is that their preferred reading of the US Constitution — or of the Canadian one, for that matter — must prevail because it is the only one that allows for the proper operation of a constitutional order, and of the rule of law, at least in a modern Western democracy. Constitutionalism, they could say, requires adherence to a form of rule utilitarianism. And this is where their argument would start to look a lot more similar to the very kind of instrumentalist thinking with which they brand Vermeule’s “common good constitutionalism.”

IV. Natural Law and Common Good Constitutionalism

We turn, now, to the last point that should be made in response to Sirota and Mancini’s argument, which was likely meant to target Vermeule’s common good constitutionalism,³⁵ and not Hammer’s “common good originalism”. By contrast to Hammer’s approach, this is indeed one in which the “moral principles that would guide this endeavour are those drawn, above all, from the Catholic natural law tradition,”³⁶ as Sirota and Mancini correctly surmise. What this means is that the US Constitution, or indeed the Canadian Constitution, *qua* positive legal enactment, is not the ultimate fount of legal normativity. Rather, because both are part of the

34 Bradley W Miller, “Justification and Rights Limitations” in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2008) 93 at 104, citing *Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, 38 DLR (4th) 321 [*Metropolitan Stores* cited to SCR].

35 Adrian Vermeule, “Beyond Originalism” (31 March 2020), online: *The Atlantic* <<https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/>>.

36 Sirota & Mancini, *IVL I*, *supra* note 1.

positive law, they are posterior to, and must ultimately be understood *through*, the underlying principles of natural law.

There is a lot to unpack here, and more than a few misapprehensions about the natural law tradition to clarify. To begin, the main point we would urge in response to Sirota and Mancini's argument is this: any natural law theory deserving of the name is *not* a framework that "look[s] to *extraneous* moral and *policy* commitments as guides for legal interpretation,"³⁷ but rather one that seeks to understand the law's own, deeper rationality *from within*. In our view, this essential point underscores why it is important to distinguish the natural law approach from the one that Hammer favours, in which the principles of natural law — or something like them — are understood to have been incorporated into the Constitution by its framers. On Hammer's account, these principles derive their authority from, and should thus ultimately be understood through, the positive legal enactment. Here, the situation is instead reversed. Natural law precedes, and more importantly *grounds*, the normativity of the posited Constitution, as well as the whole of the positive law. The Constitution cannot make sense as a work of reason without recourse to natural law principles — that is, without reference to the law's inner morality, or so natural law theorists claim. From this perspective, these principles are every bit a part of the *law*, just as much as any legal text, rule or doctrine.

We see here that the typical contemporary view of natural law, as a thing somehow apart from the positive law, yet justifying departure *from* the positive law, is largely a caricature. Indeed, most natural law theorists have rarely focused on that putative role of natural law in any meaningful way,³⁸ and to the extent that they have, the use of natural law as a justification for setting aside positive law has almost always been severely constrained. What natural law most properly concerns itself with instead is the exposition, interpretation, and application of the positive law, which, again, proponents take as only capable of making sense when understood in the context that natural law principles provide. This being so, it follows that the form of positive law — its text, rules, and doctrines — is central to the natural law tradition, which, properly understood, has never held that natural law has direct and unmediated application to any given society.³⁹ To the contrary, it is only upon *this* text, and *these* rules and doctrines, that natural law can have any juridical force whatsoever. Positive law and natural law are reciprocally interrelated; within human relationships, each presupposes the other. Natural law reflects an idea of reason immanent in positive law and lends it intelligibility; while in making its general precepts more specific, positive law realizes and makes concrete the otherwise abstract elements of natural law.⁴⁰

In this regard, it is instructive to identify a few possible symptoms of the confusion about the natural law tradition we have diagnosed. First, in ascribing to Vermeule's "common good constitutionalism" a desire to "impose some pre-determined set of values onto the law," the authors also quote a description of his approach as one that would "involve officials reading vague clauses in an openly morally infused way ... to reach *determinations* consistent with the

37 *Ibid* [emphasis added].

38 See John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford: Oxford University Press, 2011) at 364-66.

39 For a summary of the relation between natural law and human law, see John Goyette, "On the Transcendence of the Political Common Good" (2013) 13:1 National Catholic Bioethics Q 133 at 138-46.

40 Saint Thomas Aquinas, *Summa theologiae*, vol I-II, q 91, a 3; q 95, a 2 [ST].

common good.”⁴¹ However, it should be understood that as Vermeule and others working in the natural law tradition use it, the term “determination” does not refer to fixing a preordained outcome. This is because the tradition sees the principles of natural law as *under-determined* in many cases; they do not offer self-executing commands or policy commitments. Rather, “determination” (*determinatio*) refers to a mode of relation between natural law and positive law, in which the latter is understood to be a concretization or specification of the former, which supplies sound, general principles of practical reasoning.⁴² Far from demanding that judges superimpose a pre-determined outcome, the idea of specification calls for a respectful attitude toward other institutional actors involved in the “creative yet bounded role” of concretizing vague criteria.⁴³

Second, it is a gross distortion to regard natural law theory, including the specific, Dworkinian version championed by Vermeule, as an extrinsic imposition on the scheme of positive law.⁴⁴ Pace Sirota and Mancini, the aspiration of natural law theorizing is not to embed pre-determined outcomes into the law, but to construe the law itself as permeated by reason.⁴⁵ Such an outlook, we suggest, puts into sharp relief the positivist’s preconception of the law as a mere instrumentality of the will of some law-giver.⁴⁶ And in deprecating as a subjective “policy preference” this aspiration to elaborate the reason *in* the law, Sirota and Mancini’s position on this point appears to echo a key refrain of the Critical Legal Studies movement, which questions the very idea that the law may “display, though always imperfectly, *an intelligible moral order*.”⁴⁷ From the perspective of the CLS movement, the law is not constituted by reason but by will; and as such, the law can only ever reflect the radical contingencies of the wills that brought it into being. Sirota and Mancini’s apparent assertion to this effect, combined with

41 Sirota & Mancini, *IVL I*, *supra* note 1 [emphasis added]. Sirota and Mancini source this quotation from a forthcoming paper on common good constitutionalism, even though in the paper the term “determination” is properly used to refer to the natural law concept of *determinatio*. See Conor Casey, “Common Good Constitutionalism’ and the New Battle over Constitutional Interpretation in the United States” (2021) Public Law (forthcoming in 2021), available on SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725068>.

42 See Adrian Vermeule, “Deference and Determination” (2 December 2020), online (blog): *Ius & Iustitium* <<https://iusetiustitium.com/deference-and-determination/>>.

43 See *Pong Marketing and Promotions Inc v Ontario Media Development Corporation*, 2018 ONCA 555 at para 48, per Miller J.A.

44 Whether Dworkin himself should properly be considered a natural law theorist is controversial. See María Lourdes Santos Pérez, “Dworkin and the Natural Law Tradition” in Francisco José Contreras, ed, *The Threads of Natural Law: Unravelling a Philosophical Tradition* (Dordrecht: Springer, 2013) 211. See also Ronald A Dworkin, “Natural’ Law Revisited” (1982) 34:2 U Fla L Rev 165 (writing that his theory has been characterized as a natural law theory by his critics and discussing whether this characterization is accurate).

45 Ernest J Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1988) 97:6 Yale LJ 949 at 1016; *ST*, *supra* note 40, vol I-II, q 90, a 3; q 92, a 2; and q 96, a 5 (explaining that law is a work of reason). The idea that the law is animated by reason and a “moral concept of law [that] gives juridical law its brain,” rather than being a purely empirical phenomenon à la the social thesis, is shared by natural law theories generally, including the liberal thought of Immanuel Kant. See Patrick Capps & Julian Rivers, “Kant’s Concept of Law” (2018) 63:2 Am J Juris 259.

46 Weinrib, *ibid* at 955 (“In the positivist conception, a legal reality is brought into existence by an act of will that transforms into law that which is otherwise not law.”).

47 Roberto Mangabeira Unger, “The Critical Legal Studies Movement” (1983) 96:3 Harv L Rev 561 at 565 [emphasis added].

their characterization of natural law perspectives as “pursu[ing] external policy goals”, is all the more surprising in light of their own appeals to Fuller’s “inner morality of law” in *IVL II*.⁴⁸

Finally, it should also be clear from the foregoing that an orientation toward the “common good” does not imply that the jurist “wants to upturn settled jurisprudence” or is “skeptical about aspects of constitutional law that have been taken as a given for generations,” as Sirota and Mancini claim.⁴⁹ While a full exposition is beyond the scope of this essay, we observe that this charge overlooks that the common good itself calls for constraints on the judicial role. Contrary to claims that it “regards separation of powers as passé,”⁵⁰ the constitutional principle of separation of powers may well be justified by the fact that the distinct governmental powers — executive, legislative, and judicial — “are well-placed to identify *different aspects of the common good*.”⁵¹ The common good prompts reflection upon the distinct domain of each branch of the state, a domain that is constituted not by external considerations of “efficiency,” welfare-maximization, or aptness to promote a libertarian-influenced vision of the state, but by stable features intrinsic to the nature of each type of power.⁵² In short, the powers are distinct because they are each directed to the common good in different ways.

From this perspective, the legislative and judicial powers must remain separate in virtue of their distinct natures and not thanks to any utilitarian calculation. This is entirely consistent with an orthodox view: that it is in the nature of the judicial power “to say what the law is,” not what it should be.⁵³ Conversely, the common good is hardly inimical to “the authority of democratic institutions.”⁵⁴ In fact, “the common good requires an institution that has the capacity to change the law” when reason dictates, and the well-formed legislature can be taken as legislating for the common good of the community.⁵⁵ It makes intelligible the need to respect legislative authority because “[t]he legislature responds to *reasons* to change that law” and its capacity to legislate is not exercised arbitrarily, but is the expression of a reasoned choice to change the law for the common good.⁵⁶

As we will now set out to explain in the last part of this article, the above insight explains why juristic invocations of the “common good” are well within the mainstream of Canadian jurisprudence.

48 Sirota & Mancini, *IVL II*, *supra* note 6.

49 Sirota & Mancini, *IVL I*, *supra* note 1.

50 *Ibid.*

51 N W Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018) at 51 [emphasis added].

52 See *ibid* at 51-56. Perhaps the best example of this type of external approach to law is law and economics. See generally Richard A Posner, *Economic Analysis of Law*, 9th ed (New York: Wolters Kluwer, 2014).

53 *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 at 367, 9 DLR (4th) 161 quoting *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) at 177 [emphasis added]. See also *Vriend v Alberta*, [1998] 1 SCR 493 at para 136.

54 Sirota & Mancini, *IVL I*, *supra* note 1.

55 Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012) at 120.

56 *Ibid* at 123-24 [emphasis added].

V. The Common Good in Legal Interpretation

We have already referred to the case law on interlocutory injunctions, where the Supreme Court of Canada emphasized that laws “enacted by democratically-elected legislatures ... are generally passed for the common good.”⁵⁷ To acknowledge the common good’s relation to interpretation is to break no new ground either, much less to introduce extraneous concepts into the law.⁵⁸ As distinguished Canadian jurists have observed, “legislating is reasoned activity,”⁵⁹ and the object of legislation is “to secure the common good.”⁶⁰ This insight also brings to light one truth in the oft-abused notion of “purposive interpretation,” namely, that all legislation is promulgated to fulfill an end — a *telos* — that is intelligible to reason. In the apt description of Professor Richard Ekins, legislators reason from “relatively abstract ends” toward “more particular states of affairs that are more attractive elaborations of the more abstract ends,” culminating in “a complex scheme of means-end relations, which the legislature may choose, in which case it acts *intending the means and the ends*” reflected in the legislative proposal.⁶¹

From this teleological outlook on the essential nature of legislation, it follows that the point of interpretation is to understand the legislature’s *reasons* for acting.⁶² The focal inquiry is not what the legislature *said*, but what it *did*. Or, put differently, the object of interpretation “is not to interpret words but to interpret language use.”⁶³ Hence, as Justice Brown and others have explained, “[s]tatutory interpretation entails discerning *legislative intent*” — the legislature’s reasoned plan to alter the law — by examining the form in which that act is communicated, that is, “the words of [the] statute in their entire context.”⁶⁴ To interpret is to inquire about the reason the legislature chose the specific *means*, the specific *determinatio*, it adopted in pursuit of the ultimate common good.

In practice, the interpreter’s reflection on the common good serves to avoid the insipid literalism that undermines legislative intent. Consider, for example, *R v Jarvis*, a case concerning the interpretation of the voyeurism offence under the *Criminal Code*.⁶⁵ Whereas the majority of the Ontario Court of Appeal concluded from the dictionary definition of the word “privacy” that a high school was too public to be covered by the provision, Justice Huscroft

57 *Metropolitan Stores*, *supra* note 34 at 135, per Beetz J. See also *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9.

58 We would observe that, despite our interlocutors’ contentions to the contrary, they have failed to cite any Canadian jurisprudence to support their position that the concept of the common good is “extraneous” to the law or a purely political notion.

59 *R v Walsh*, 2021 ONCA 43 at para 133, per Miller J.A. (dissenting) [*Walsh*].

60 *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 146, per Côté and Brown JJ. (dissenting), quoting Richard Ekins, “Legislation as Reasoned Action” in Grégoire Webber et al, eds, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge, UK: Cambridge University Press, 2018) 86 at 92.

61 Ekins, “Legislation as Reasoned Action”, *ibid* at 100 [emphasis added].

62 Ekins, *The Nature of Legislative Intent*, *supra* note 55 at 136-37.

63 Richard Ekins, “Objects of Interpretation” (2017) 32:1 Const Commentary 1 at 2.

64 See *British Columbia v Philip Morris International, Inc.*, 2018 SCC 36 at para 17 [emphasis added]. See also, *R v Paterson*, 2017 SCC 15 at para 31; *Rogers Communications Inc v Voltage Pictures, LLC*, 2018 SCC 38 at para 20; *Keatley Surveying Ltd v Teranet Inc.*, 2019 SCC 43 at para 95, per Côté and Brown JJ. (dissenting); *Canada Post Corporation v Hamilton (City)*, 2016 ONCA 767 at para 36, per Miller J.A. (“Acts of legislation are, paradigmatically, reasoned plans enacted either to change or confirm existing legal rights and obligations of persons”).

65 *R v Jarvis*, 2017 ONCA 778 [*Jarvis*].

dissented and approached the voyeurism provision from the standpoint that “Parliament can be taken to have made a reasoned choice for the common good.”⁶⁶ In contrast to the majority’s literalist view, he treated the provision as a reasoned act of lawmaking intended to promote an aspect of the common good, namely, the human goods of personal and sexual integrity.⁶⁷

While the divergence between the majority and dissent in *Jarvis* might be rationalized as a mere difference in the “application of the principles of statutory interpretation,”⁶⁸ this would miss the fundamental point: it was precisely his recognition of the legislature’s role in realizing the common good that prompted Justice Huscroft to discern, in the provisions at issue, a reasoned plan to protect certain human goods. In framing the legislation as a reasoned choice of specific means to that end, he was led to conclude that the majority’s interpretation of the word “privacy” was overly literal because it was “both under- and overinclusive when considered in terms of the choice Parliament has made — the good that s. 162(1) is intended to protect.”⁶⁹ What Justice Huscroft’s reasoning in *Jarvis* reveals, in our view, is a perspective on the nature of legislative intent — one that takes the legislature as making reasoned choices for the common good and the legislative act as “grounded in an intelligible chain of reasoning.”⁷⁰ Properly understood, this standpoint is not an interpretive, but a *pre*-interpretive precept that directs the interpreter in framing the object of interpretation and thereby informs his or her implicit approach to selecting the focal text at issue and situating it in a broader context.⁷¹

Our point here is not that a court may override the terms or the finitude of a statute.⁷² In truth, legislation is inherently constrained by its terms, and no human law-giver can conceivably grant benediction to the common good across the whole of human affairs. Rather, our point is that the legislature’s reasoned choice is rendered intelligible by the idea of the common good, an aspect of which is the *telos* of all laws.⁷³ The task of the judge, acting *in* the common good, is to understand and give effect to the legislature’s specific chosen means, the *determinatio*, that is illuminated *by reflection on* the common good.⁷⁴ Such a modest conception of the

66 *Ibid* at para 123, per Huscroft J.A. (dissenting).

67 See *ibid* at paras 124-28, 132-33, per Huscroft J.A. (dissenting). The Supreme Court of Canada allowed the appeal: *R v Jarvis*, 2019 SCC 10, rev’g 2017 ONCA 778. Regrettably, however, the Court’s majority judgment indulged in a literalism of its own, by asserting that the words “reasonable expectation of privacy” meant that Parliament intended to incorporate the *Charter* jurisprudence on s. 8 privacy rights to “inform the content and meaning of these words” (*ibid* at para 56), per Wagner C.J. But as Justice Rowe, in concurrence, observed, this “would be to apply a meaning intended to substantiate a breach of an individual’s fundamental rights by a state actor to the inverse context of subjecting a citizen to criminal sanction” (*ibid* at para 95), per Rowe J. (concurring). In fixating on the words, the majority overlooked that the voyeurism provision contributed to an altogether different aspect of the common good than the *Charter* right.

68 Honickman, *supra* note 7.

69 *Jarvis*, *supra* note 65 at para 124.

70 Ekins, “Legislation as Reasoned Action”, *supra* note 60 at 97.

71 See Anya Bernstein, “Before Interpretation” (2017) 84:2 U Chi L Rev 567 (explaining that before interpretation occurs, the interpreter must arrive at an identification of the object of interpretation and the background which makes its contours visible).

72 See Ekins, *The Nature of Legislative Intent*, *supra* note 55 at 250-54 (“it is unsound to abandon the legislature’s intended meaning (and hence its lawmaking act) in preference for either the further end or ends for which the legislature acts, commonly termed the statutory purpose”).

73 See, e.g. *Jarvis*, *supra* note 65 at para 123, per Huscroft J.A. (dissenting), citing Ekins, *The Nature of Legislative Intent*, *supra* note 55 at 246-47.

74 See *Walsh*, *supra* note 59 at para 171, per Miller J.A. (dissenting).

judicial role belies the charge that promoting the common good necessarily implies that “it is legitimate to impose [one’s] respective hierarchy of values on society through judicial and administrative fiat.”⁷⁵

Nor is it necessary for us to deny our interlocutors’ demurrer that legislative activity may on occasion be “directed at the private benefit of law-makers ... or at entrenching outright bigotry.”⁷⁶ The premise that legislating is reasoned activity is not an empirical claim of legislative infallibility, but rather the adumbration of an inquiry into “the central case of the legislature.”⁷⁷ Far from detaching our legal understanding from reality, attending to the central case serves to elucidate the activity of legal interpretation and its underlying logic.⁷⁸ As Honickman rightly observes, many interpretive canons presuppose the existence of a “rational lawgiver,”⁷⁹ and this suggests that there is value in taking the law’s own perspective — which takes the legislature as intending to act for the common good — in seeking to understand the law.⁸⁰

Returning to the allegation that common good jurisprudence is extrinsic to our legal traditions, we may also look to the constitutional law “taken as a given for generations” to find a basis for rejecting this claim.⁸¹ It is arguable, we venture to say, that the enigmatic and celebrated judgment of Justice Rand in *Saumur v City of Quebec* represents an implicit endorsement of the tradition of natural law theorizing.⁸² In an evocative passage, Rand J seems to invoke the idea of specification or determination of the “original freedoms” by the positive law embodied in “the creation of civil rights.” To quote:

Strictly speaking, *civil rights arise from positive law*; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and *the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates.* What we realize is the residue inside that periphery. Their significant relation to our law lies in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them ...⁸³

In his suggestion that the “original freedoms” are “the primary conditions of ... community life within a legal order,” Rand J gestures toward something akin to principles of natural law,⁸⁴ which by virtue of their primacy and generality have “a unity of interest and significance extending equally to every part of the Dominion.”⁸⁵ It is through the determination or “cir-

75 Sirota & Mancini, *IVL I*, *supra* note 1.

76 Sirota & Mancini, *IVL II*, *supra* note 6.

77 See Ekins, *The Nature of Legislative Intent*, *supra* note 55 at 121.

78 See Grégoire Webber, “Asking Why in the Study of Human Affairs” (2015) 60:1 *Am J Juris* 51.

79 Honickman, *supra* note 7.

80 Honickman also contends that because “our ‘lawgivers’ are incorporeal entities,” they “cannot, strictly speaking, exhibit ‘reason’ beyond their enactments.” *Ibid.* However, this objection overlooks the possibility that legislative intent is “the *collective* intent of the legislature as *jointly* expressed in the legislative act” as well as “the typical conception of a legislature as an institution which acts only through the *corporate* legislative expression of its membership” found in the jurisprudence. *Frank*, *supra* note 60 at paras 133-34, per Côté and Brown JJ. [emphasis added].

81 Sirota & Mancini, *IVL I*, *supra* note 1.

82 *Saumur v City of Quebec*, [1953] 2 SCR 299, 4 DLR 641 [*Saumur* cited to SCR].

83 *Ibid* at 329 [emphasis added].

84 *Ibid.*

85 *Switzman v Elbling*, [1957] SCR 285 at 306 per Rand J, 7 DLR (2d) 337.

cumscription of these liberties” by the creation of concrete “civil rights against defamation, assault, false imprisonment and the like,” that the common good is “realize[d] ... inside that periphery.”⁸⁶ Needless to say, the outcome and constitutional valence of the *Saumur* case refute the insinuation that natural law theory is nothing more than an artifice for anti-pluralist views.

Furthermore, our consideration of the concept of the common good in interpretation, taken with our broader arguments outlined above, refutes Sirota and Mancini’s suggestion that an appeal to the common good amounts either to a “sort of ‘living tree’ for conservatives” or to a “limited, well-understood, and innocuous” concept that simply changes the “emphasis in textual interpretation.”⁸⁷ Simply put, the dichotomy that they seek to establish between a principled, text-centred approach to constitutional and statutory interpretation, on the one hand, and the values intrinsic to legislative activity, on the other, is one that cannot be sustained when viewed through the lens of natural law theory. As we have explained, the natural law perspective rejects the dualistic assumption that the only repository of juridical values lies in the text and that any reference to extra-*textual* values — including the “inner morality of the law” that Sirota and Mancini seem to embrace — is necessarily extra-*legal*. It matters little, moreover, that even among those who subscribe to the natural law tradition, there have been and continue to be debates about the nature and content of the “common good.”⁸⁸ The meaning of concepts such as the “rule of law” or “liberty” are likewise deeply contested and continue to be a perennial subject of academic debate; yet, the apparent interminability of the debates is hardly taken to preclude the invocation of those terms in legal discourse.

VI. Conclusion

It is, of course, not our intention to convince our interlocutors of the ultimate merits of our position on the intellectual rigour and teachings of theories of natural law. Still, we hope to have shown that there is much to misapprehend but little to fear from the concept of the common good. What this understanding of the natural law tradition should underscore, moreover, is that appeals to natural law principles do not amount to a form of legal realism — as Sirota and Mancini appear to believe. Law, on this reading, is not simply what judges do,⁸⁹ nor is it naked power. Quite the contrary, as one recent post by Arizaga in our view cogently argues, it is in fact legal positivism that rests on a commitment to law as power.⁹⁰ And the caricature of natural law as allowing for the effacement of positive legal orders on a whim is just that — a caricature, founded on a resolutely modern misunderstanding.

86 *Saumur*, *supra* note 82 at 329.

87 Sirota & Mancini, *IVL II*, *supra* note 6.

88 See *ibid* (“it is important to emphasize that the idea of the ‘common good’ ... has been put to very different uses by very different people”); Honickman, *supra* note 7 (“[t]he ‘common good’ is invariably articulated in vague or indeterminate language”).

89 See Allan Beever, “The Declaratory Theory of Law” (2013) 33:3 *Oxford J Leg Stud* 421 at 425-26, 439-44. See also William Blackstone, *Commentaries on the Laws of England: Book 1 of the Rights of Persons*, ed by David Lemmings (Oxford: Oxford University Press, 2016) at 53: “the law, and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law” [emphasis in original].

90 Rafael de Arizaga, “Notes on the Ius Commune – Part I: The Hydra of Legal Positivism” (23 February 2021), online (blog): *Ius & Iustitium* <<https://iusetiustitium.com/notes-on-the-ius-commune-part-i-the-hydra-of-legal-positivism/>>.

To inhabit a world of law is not to view it as the product of a disordered miscellany of individual wills, but to engage in the juristic enterprise of understanding its moral unity. What the natural law tradition avers, at its core, is that positive law is infused with a deeper meaning, with a deeper significance, than can be conferred as a contingent choice of some legislative or judicial will. In other words, it is to see the ensemble of legal doctrine as a whole painting and not merely “nothing but a smear of pigments.”⁹¹ In this sense, the natural law framework is perhaps the only way in which any legal text, rule, or doctrine can be truly intelligible as the product of reason and properly given the weight which it justly deserves.

91 Roger Scruton, *The Soul of the World* (Princeton: Princeton University Press, 2014) at 40.