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Disinheritance, Discrimination, and the Case for Including Adult Independent Children in Dependants' Relief Schemes: Lawen Estate v Nova Scotia

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In 2019 a Superior Court in Nova Scotia excluded adult independent children as "Dependants" under Nova Scotia's Testator's Family Maintenance Act*. The decision was based on a finding that testamentary autonomy is a constitutional right protected by s. 7 of Canada's* Charter of Rights and Freedoms*. This article explains why the constitutional decision in* Lawen Estate v Nova Scotia *was incorrect. It also demonstrates why the inclusion of adult independent children in dependants' relief schemes is not only benign in most instances, but may play a role in preventing the perpetuation of discrimination in the private law. This article also contains a brief post-script that discusses the appeal of the* Lawen *decision that was released in 2021 and a reference to a subsequent case commentary on that decision.*

En 2019, une Cour supérieure de la Nouvelle-Écosse a exclu les enfants adultes indépendants en tant que « personnes à charge » en vertu de la Testator's Family Maintenance Act *de la Nouvelle-Écosse. La décision était fondée sur une conclusion selon laquelle l'autonomie testamentaire est un droit constitutionnel protégé par l'article 7 de* la Charte *canadienne des droits et libertés. Dans cet article, nous expliquons pourquoi la décision constitutionnelle dans l'affaire* Lawen Estate c Nova-Scotia *était incorrecte. Nous démontrons également pourquoi l'inclusion des enfants adultes autonomes dans les régimes d'aide aux personnes à charge est non seulement bénigne dans la plupart des cas, mais peut jouer un rôle dans la prévention de la perpétuation de la discrimination en droit privé. Cet article contient également un bref post-scriptum qui traite de l'appel de la décision* Lawen *qui a été publié en 2021 et une référence à un commentaire portant sur une affaire postérieure à cette décision.*

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Introduction

No shortage of news stories, reports, opinion pieces, and studies address whether adult independent children should have the right to challenge a deceased parent's will. The idea is controversial, and many harbor at least a vague unease at the idea of a financially independent adult having the right to contest the carefully considered testamentary wishes of their parent. The most recent and significant manifestation of this unease was the 2019 decision of *Lawen Estate v Nova Scotia (Attorney General)*,[1] where the Nova Scotia Supreme Court excluded adult independent children from making claims under Nova Scotia's *Testators' Family Maintenance Act*,[2] because their inclusion violated the constitutional rights of testators.

1. 2019 NSSC 162 [*Lawen*].
2. RSNS 1989, c 465 [*TFMA*].

In *Lawen*, Justice Bodurtha of the Nova Scotia Supreme Court held that the provisions of the *TFMA* naming "adult non-disabled children" as dependants contravened section 7 of the Canadian *Charter of Rights and Freedoms*[3] pursuant to his finding that testamentary autonomy was a liberty right. He concluded that the deprivation of liberty caused by including adult independent children in the *TFMA* could not be saved under section 1 of the *Charter*. The provision's objective, he held, was "purely moral" in nature and therefore not pressing or substantial. He accordingly read the *Act* down to exclude adult non-disabled children.

The appeal of *Lawen* will likely be heard in early 2021.[4] This article argues that it should be granted for the following reasons:

First, the decision is constitutionally unsound. To achieve his end result, Justice Bodurtha's reasons mis-categorize testamentary autonomy as a liberty interest rather than a property one. His judgement also skips over essential steps of a section 7 analysis, and in his section 1 analysis, the legislative purpose for including one category of claimant is wrongfully distinguished from the others.

Second, the decision is unnecessary. If a court wishes to reflect societal disproval of adult independent children applying for dependants' relief, it may do so in accordance with the highly-discretionary nature of the legislation itself. Other jurisdictions, where adult children are permitted to challenge a parent's will, have adopted and apply restrictive criteria when hearing such claims. In New Brunswick and Saskatchewan, this practice has resulted in a virtual bar on such claims made by adult independent children.

Finally, the decision is harmful. The inclusion of adult children in statutes like the *TFMA* provides the sole legal forum for the scrutiny of a specific type of discrimination within the private law: the use of wills and the legal system to perpetuate discrimination through so called disinheritance clauses. By virtue of the *TFMA*'s discretionary nature and the requirement for judges to apply discretionary powers in accordance with *Charter* values, dependants' relief claims provide a forum for courts to scrutinize and sometimes censure such behavior. A handful of cases in British Columbia are illustrative of this fact.

This article begins with an explanation of the purpose and role of dependants' relief legislation in Canada. Part II reviews and critiques

3. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

4. The Appeal in *Lawen* was heard in February of 2021. A post-script to this article addresses the decision.

the *Lawen* decision with respect to the application judge's constitutional analysis. Part III explains why the decision was unnecessary and what the Court could have done if presented with the *TFMA* claims of Jack Lawen's daughters. It also discusses why the inclusion of adult independent children in dependants' relief legislation is necessary: to guard against the perpetuation of degrading and cruel discrimination by way of estate law.

I. *Dependants' relief legislation*

1. *The Nature and history of dependants' relief claims*

The first dependants' relief statutes were adopted in Canada at the beginning of the 20th century.[5] They allowed for the widows, children (and eventually widowers)[6] of a testator to sue an estate for financial relief if the testator's will failed to provide for the adequate maintenance of his surviving family.[7] These statutes rebuffed the notion of absolute testamentary autonomy.[8]

Prior to dependants' relief legislation, testators could and often did leave the bulk of their estate to their eldest son and provide no financial independence to their widows or remaining children.[9] As noted by Justice McLachlin (as she then was) in *Tataryn v Tataryn Estate*,[10] the original wills variation legislation of British Columbia owed its enactment to those women's groups at the turn of the 20th century who lobbied their provincial government for its adoption.[11] Indeed, dependants' relief is one of the earliest examples of a legislated redistribution of property and

5. These included the Alberta's *Married Women's Relief Act*, SA 1910, c 18 (2nd Sess); Saskatchewan's *An Act to Amend The Devolution of Estates Act*, SS 1910-11, c 13; British Columbia's *Testator's Family Maintenance Act*, SBC 1920, c 94; Ontario's *Dependants' Relief Act*, SO 1929, c 47; Manitoba's *The Testator's Family Maintenance Act*, SM 1946, c 64; New Brunswick's *Testator's Family Maintenance Act*, SNB 1959, c 14; Nova Scotia's *Testator's Family Maintenance Act*, SNS 1956, c 8 [TFMA 1956]; Prince Edward Island's *Testator's Dependants Relief Act*, SPEI 1974, c 47; Newfoundland and Labrador's *Family Relief Act*, SN 1962, c 56; Northwest Territories' *Dependants Relief Act*, ONWT 1971 (2nd Sess), c 5; Yukon's *Dependants' Relief Ordinance 1929*, OYT 1962 (1st Sess), c 9.

6. Both Alberta and Saskatchewan initially restricted access to their statutes to widows. See Cameron Harvey & Linda Vincent, *The Law of Dependant's Relief in Canada*, 2nd ed (Toronto: Thomson Carswell, 2006) at 2.

7. Albert H Oosterhoff et al, *Oosterhoff on Wills*, 8th ed (Toronto: Thomson Reuters, 2016) at 852-853.

8. As Justice of Appeal Ford of the Alberta Supreme Court explained in 1939, "At common law the duty of a husband arising out of the marriage to maintain the wife disappears when the marriage is dissolved either by divorce or death. Before the passing of *The Widows Relief Act* under the title of *The Married Women's Relief Act* in December, 1910, SA, 1910, 2nd sess, ch 18, there was no limitation on the testamentary power of a husband over his property" *Re Rist Estate*, [1939] 1 WWR 518, 1939 CarswellAlta 12 (SC (AD)) at paras 35-36.

9. *Ibid*.

10. (1994), 116 DLR (4th) 193, 1994 CarswellBC 1243 (SCC) [*Tataryn*].

11. *Ibid* at para 10.

wealth, regardless of ownership or title, following family breakdown.[12] According to former Chief Justice McLachlin, the purpose of the *Act* and those like it was to keep dependants "from becoming a charge on the state," but they also represented a "foreshadowing [of] more modern concepts of equality."[13] Family law legislation, informed by this same concept of financial equality between husbands and wives, would be enacted only decades later.[14]

Today every province and territory in Canada has its own form of dependants' relief legislation. Although these acts vary with respect to who may apply for relief and under what circumstances, only Manitoba requires that a claimant be in "financial need" in order to be eligible for relief under its statute.[15] The majority of these acts contain an operating clause that allows for claims where a testator has not "made adequate provision" for his or her dependants.[16] What "adequate provision" means is left up to the broad discretionary authority of the courts with some legislative guidance, such as the factors a court must consider listed in section 5 of the *TFMA*.[17] The provincial or territorial legislature determines who qualifies as a "dependant."

Dependants' relief legislation is the sole source of financial support available to the surviving family of the testator or intestate who find themselves inadequately provided for by that person's estate.[18] With the

12. For a detailed account of what rights married women in Canada had in relation to property at this time and immediately before it, see Constance Backhouse, "Married Women's Property Law in 19th Century Canada" (1988) 6:2 L & Hist Rev 211.

13. *Tataryn*, *supra* note 10 at para 16.

14. Mary Jane Mossman, ed, *Property Law Cases and Commentary*, 4th ed (Toronto: Emond, 2019) at 590-596, 606-616.

15. *The Dependants Relief Act*, SM 1989–1990, c 42, s 2(1).

16. Alberta: *Wills and Succession Act*, SA 2010, c W-12.2, s 88(1); British Columbia: *Wills, Estates and Succession Act*, SBC 2009, c 13, s 60; Manitoba: *The Dependant's Relief Act*, *supra* note 14, s 2(1); New Brunswick: *Provision for Dependants Act*, RSNB 2012, c 111, s 2(1); Newfoundland and Labrador: *Family Relief Act*, RSN 1990, c F-3, s 3(1); Northwest Territories: *Dependants Relief Act*, RSNWT 1988, c D-4, s 2(1); Nova Scotia: *TFMA 1989*, *supra* note 2, s 3(1); Nunavut: *Dependants Relief Act*, RSNWT 1988, c D-4, s 2(1); Ontario: *Succession Law Reform Act*, RSO 1990, c S.26, s 58(1); Prince Edward Island: *Dependants of a Deceased Person Relief Act*, RSPEI 1988, c D-7, s 2; Saskatchewan: *The Dependant's Relief Act*, 1996, SS 1996, c D-25.01, s 3; Yukon: *Dependants Relief Act*, RSY 2002, c 56, s 2; Quebec: Quebec *Code Civil*, Chapter V Arts 684-695. Quebec's scheme is a continuation of family law support obligations owed during the testator's lifetime rather than a true dependants' relief scheme.

17. These factors are discussed below, *infra* note 61. For other examples see s 62(1) of Ontario's *Succession Law Reform Act*, *ibid*.

18. One limited exception to this is the law of Dower where still applicable in Canada's western provinces. See Bruce Ziff, "Whatever Happened to the Law of Dower? It's Alive and Unwell and Living on the Prairies A Case Comment on *Schwormstede v. Green Drop Ltd*. (40 RPR (2d) 1) and *Bank of Montreal v Pawluk* (40 RPR (2d) 18)" (1994) 40 RPR (2d) 44.

exception of Quebec,[19] no jurisdiction in Canada permits a person to sue an estate for spousal or child support.[20] While many jurisdictions permit an application for the division or equalization of property by surviving (and usually married) spouses, the jurisdictions of Prince Edward Island, British Columbia and the Yukon allow for no such applications.[21]

2. *Nova Scotia's* Testators' Family Maintenance Act

The dependants' relief act at issue in *Lawen* was Nova Scotia's *Testators' Family Maintenance Act*. Its operating clause reads as follows:

> 3 (1) Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant.[22]

In 1976, the *TFMA 1956*'s purpose was reviewed by the Nova Scotia Court of Appeal in *Garrett v Zwicker*:

> The Act…is designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty.[23]

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19. See Article 684 Quebec *Civil Code* that provides "Every creditor of support may within six months after the death claim a financial contribution from the succession as support. The right exists even where the creditor is an heir or a legatee by particular title or where the right to support was not exercised before the date of the death, but does not exist in favour of a person unworthy of inheriting from the deceased." [Emphasis added] Art 684 CCQ.

20. While many provisions allow an estate to be bound by a support order, it is not possible to commence a de novo application for support after a person has died. British Columbia's *Family Law Act*, SBC 2011, c 25, ss 170(g)–171; Alberta's *Family Law Act*, SA 2003, c F-4.5, s 80; Saskatchewan's *The Family Maintenance Act*, 1997, SS 1997, c F-6.2, ss 3–8; Manitoba's *The Family Maintenance Act*, RSM 1987, c F-20, ss 10(1)(h), 37(5); Ontario's *Family Law Act*, RSO 1990, c F3, s 34(4); New Brunswick's *Family Services Act*, SNB 1980, c F-2.2, s This was repealed.(6); Nova Scotia's *Parenting and Support Act*, RSNS 1989, c 160, ss 5, 8; Prince Edward Island's *Family Law Act*, SPEI 1995, c 12, s 34(3); Newfoundland and Labrador's *Family Law Act*, RSN 1990, c F-2, s 57.

21. See table Appendix A.

22. *TFMA*, *supra* note 2.

23. The court continued: "The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances." *Garrett v Zwicker*, 1976 CarswellNS 9, [1976] NSJ No 20 (NS CA) at para 19 [*Zwicker*] citing *Re Allen; Allen v Manchester*, [1922] NZLR 218 at 220.

Since its enactment in 1956, only three minor revisions have been made to the *Act*.[24] Indeed, the modern *TFMA*, represents one of the most traditional models of dependants' relief legislation in Canada. This is because it allows only for the widow or widower of the testator or the testator's biological or legally adopted children to make relief claims against the estate. Further, the *Act* applies only to the variation of wills and is not available in the event of an intestacy. With respect to the children of testators, the *TFMA* makes no distinction between the claims of minor children and those of adult, independent children:

> In this *Act*,
>
> (a) "child" includes a child
>
> (i) lawfully adopted by the testator,
>
> (ii) of the testator not born at the date of the death of the testator,
>
> (iii) of which the testator is the natural parent;[25]

In contrast to Nova Scotia, the majority of dependants' relief acts in Canada now allow for claims made by the common-law spouses of testators, and many provide for claims made by non-biological children, not legally adopted by the testator.[26] Furthermore, almost all dependants' relief legislation allows for claims made in the event of an intestacy, providing a financial lifeline to common law spouses and step-children who are usually excluded from intestacy provisions as they are in Nova Scotia.[27] Notably, until the *Lawen* decision, a more popular characteristic the *TFMA* shared with other legislation was its inclusion of adult independent children as dependants.[28]

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24. These include: 1) adding children in-utero at the time of the testator's death as dependants (*TFMA*, *supra* note 2, s 2(a)(ii)); 2) removing a provision that prohibited orders made for a widow "living apart from [the testator] at the time of his death under circumstances which would disentitle her to alimony" (*TFMA 1956*, *supra* note 4, ss 18, 17); and 3) adding registered domestic partners as dependants "[u]pon registration of a domestic-partner declaration, domestic partners, as between themselves and with respect to any person, have as of the date of the registration the same rights and obligations as…a widow or widower under the Testators' Family Maintenance Act" (*Law Reform (2000) Act*, SNS 2000, c 29, s 54(2)(l)). Domestic partnerships in Nova Scotia are voluntary agreements persons in common law relationships may enter into in order to avail themselves of those rights and benefits reserved for married persons. These arrangements are reserved for those couples who actively choose to register and are not imposed as a default scheme as they are in other provinces. See *Vital Statistics Act*, RSNS 1989, c 494, ss 52–59.

25. *TFMA*, *supra* note 2 at s 2.

26. For a comprehensive review of Canada's laws on dependants' relief, see Harvey & Vincent, *supra* note 6.

27. *Intestate Succession Act*, RSNS 1989, c 236; *Young v Jackson Estate*, 2021 NSCA 74.

28. The other statutes that provide for such relief are: New Brunswick's *Provision for Dependants Act*, *supra* note 16, s 1; Newfoundland and Labrador's *Family Relief Act*, *supra* note 16, s 2; British Columbia's *Wills, Estates and Succession Act*, *supra* note 16, s 60; and Saskatchewan's *The Dependant's Relief Act*, *supra* note 16, s 2.

II. Lawen Estate v Nova Scotia (Attorney General)

Jack Lawen executed his will on May 27, 2009. In it, he gifted $50,000 to two of his daughters, Catherine Tawil and Samia Khoury,[29] and directed the residue of his estate to go to his son, Michael.[30] The value of the estate was estimated to be $130,000; however, prior to his father's death, Michael Lawen had conveyed himself over 2 million dollars' worth of real estate owned by his father through a power of attorney that the daughters alleged was no longer valid at the time their brother invoked it.[31] The daughters challenged the validity of those conveyances and made claims for relief under the *TFMA* against their father's estate.[32] Their brother moved for summary judgment on his sisters' application, arguing they lacked standing to challenge the validity of the conveyances as only the executors, their uncles, had standing to do so.[33] The Court found that the sisters had standing, based primarily on their right to make a *TFMA* claim against the estate.[34]

In response, Michael Lawen and one of his uncles who was an executor of the estate commenced their own legal action by way of a *Charter* challenge, seeking the exclusion of adult independent children as dependants under the *Act*. Specifically, they argued sections 2(b) and 3(1) of the *TFMA*,[35] which enumerate adult children as dependants, violated section 2(a) or section 7 of the *Charter*.

The applicants requested that these provisions:

> be read down to "refer only to children to whom a testator owes a legal obligation and not children to whom a testator owes a 'moral obligation.'" In other words, the *TFMA* should not "permit adult non-disabled children to advance applications pursuant to the *TFMA*.[36]

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29. The testator's third daughter Mary was disabled and under government care. It is not clear from the facts of *Tawil v Lawen*, 2016 NSSC 323 at para 3 [*Tawil*] whether she was gifted anything under the will at all.
30. *Ibid*.
31. *Ibid*.
32. *Ibid*.
33. *Ibid* at para 12.
34. *Ibid* at paras 22, 25.
35. *TFMA*, *supra* note 2; these sections read as follows:
    2 In this Act, …
    (b) "dependant" means the widow or widower or the child of a testator;
    Order for adequate maintenance and support
    3 (1) Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant.
36. *Lawen*, *supra* note 1 at para 7.

While Justice Bodurtha rejected the applicants' freedom of conscience claim,[37] he agreed that the *TFMA*'s inclusion of adult independent children as dependants constituted a violation of a testator's section 7 rights and could not be saved under section 1 of the *Charter*. Justice Bodurtha accordingly ordered that the provision be read down to exclude independent adult children from sections 2(b) and 3(1) of the *TFMA* as allowed by section 52 of the *Charter*.[38]

The following sections explain the problems with Justice Bodurtha's sections 7 and 1 *Charter* analyses and demonstrate why the inclusion of adult independent children in dependants' relief legislation is not capable of attracting *Charter* scrutiny, let alone violating any *Charter* right.

1. *The section 7 analysis in* Lawen

a. *Testamentary autonomy as a liberty right*

It is broadly accepted that section 7 of the *Charter* does not protect economic interests.[39] Protection of property was deliberately excluded from the *Charter*'s purview at the insistence of the provinces when it was drafted.[40] This fact has underlined virtually every decision regarding a government's right to interfere with or outright take an individual's property.[41]

Justice Bodurtha acknowledged this point,[42] but he nevertheless held that testamentary autonomy could not be reduced to "a purely economic

37. *Ibid* at para 75; he found that "[a] violation of s. 2(a) cannot simply follow from a finding that a decision is a fundamental personal choice of the kind discussed in the section 7 caselaw. At the very least…'conscience' must mean something analogous to religious belief."

38. *Ibid* at para 121.

39. Peter Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58:2 SCLR 195 [Hogg, "Section 7"].

40. *Reference re ss 193 & 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123, 1990 CarswellMan 206 at para 59 [Prostitution Reference]: "There is also a significant difference in the wording of s. 7 and the Fourteenth Amendment. The American provision specifically protects property interests, while our framers did not choose to similarly protect property rights."

41. Alexander Alvaro, "Why Property Right Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24:2 Can J Political Science 309; Bruce Ziff, "Taking Liberties: Protections for Private Property in Canada" in Elizabeth Cooke, ed, *Modern Studies in Property Law*, vol 3 (Oxford: Hart, 2005) at 347. Notably, when the applicants in *Lawen* first sought declarations of invalidity, Nova Scotia's Attorney General moved for summary judgement against them, claiming, in part, that the applicants' claims were unlikely to succeed and the sections of the *Charter* relied upon by the applicants did not "extend to encompass testamentary dispositions" (*Lawen Estate v Nova Scotia (Attorney General)*, 2018 NSSC 188 at para 13).

42. *Lawen*, *supra* note 1 at para 58; the Attorney General raised the example of expropriation to demonstrate the absence of *Charter* protection for property rights. Justice Bodurtha believed this to be a flawed analogy. In his opinion, expropriation "does not involve a choice or decision by the owner of the land, but an act of the state in relation to ownership". This seems an odd way to frame the issue, as it is easy to see how this analogy very much involves a choice or decision by a land owner. The choice is the individual's decision to purchase the home in the first place and to continue to live there. The

or financial interest."[43] He adopted the arguments of the applicants and agreed that testamentary freedom could be distinguished from *inter vivos* decisions concerning property. He held that testamentary freedom "involves 'moral choices which are important to an individual's sense of dignity and autonomy' and is a way to 'reward or sanction family members and friends, influence the lives of progeny, and, for some who are ill or in their latter years, attract the attention, and care, of family and friends.'"[44] Rather than a property interest, Justice Bodurtha characterized testamentary autonomy as a "social interest" and "a fundamental personal choice" protected under the liberty branch of section 7.[45]

In support of this reasoning, Justice Bodurtha cited several Supreme Court of Canada decisions concerning section 7 liberty interests. These included the right to safe, medical abortions,[46] the right to doctor assisted death,[47] and the right to choose medical treatment for one's child.[48] Justice Bodurtha found that, like these examples, testamentary autonomy was an inherently private decision that could "rise to the level of fundamental personal choice of the kind contemplated in the caselaw under s. 7."[49]

An initial problem with this stage of the section 7 analysis in *Lawen* is the incongruence between the Supreme Court of Canada precedent cited and the issue at bar. If anything, by inviting a comparison between the right to a safe abortion and the right to decide the fate of one's property after death, the proprietary nature of testamentary freedom is heightened rather than diminished.

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government's decision to expropriate is its subsequent interference with any decisions the homeowner might make with respect to his property. However, if a clearer example of the Canadian Government's untrammeled right to interfere with an individual's decisions related to their property is required, one need only look to the law of *de facto* expropriation. Indeed, in the leading case, *Mariner Real Estate Ltd v Nova Scotia (Attorney General)*, 1999 NSCA 98, Justice of Appeal Cromwell (as he then was) was asked whether landowners should be compensated for regulation of their land that greatly restricted their ability to build private cottages. Justice Cromwell found that the landowners were entitled to nothing, noting at para 42, "In this country, extensive and restrictive land use regulation is the norm."

43. *Lawen*, *supra* note 1 at para 46.

44. *Ibid*.

45. *Ibid* at paras 46, 60.

46. *R v Morgentaler*, [1988] 1 SCR 30, 1988 CarswellOnt 45.

47. *Carter v Canada (Attorney General)*, 2015 SCC 5 cited in *Lawen*, *supra* note 1 at para 54.

48. *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 1995 CarswellOnt 105. Justice Bodurtha also referenced other decisions that provided slightly less bodily autonomy-focused examples of section 7 interests such as the education of one's children in accordance with one's beliefs or one's choice of residence. However, these latter citations were in reference to dissenting or minority opinions only. Lawen, supra note 1 at para 52 citing dissent in *R v Jones*, [1986] 2 SCR 284, 1986 CarswellAlta 181 and minority in *Godbout c Longueuil (Ville)*, [1997] 3 SCR 844, 1997 CarswellQue 883.

49. *Lawen*, *supra* note 1 at para 61.

Second and more importantly, Justice Bodurtha's reasons fail to sufficiently distinguish the decision-making behind the distribution of property by way of will from the decision-making involved in i*nter vivos* conveyances of property. Even if one accepted the argument that using one's money to punish, manipulate or ingratiate others to one's self or cause goes to the core of a person's autonomy and dignity and thus attracts the protection of section 7, this practice is hardly the province of wills alone. A key example is the use of a conditional, *inter vivos* trust that, absent some contravention of public policy or the rule in *Saunders v Vautier*,[50] can impose conditions upon the beneficiaries through strict instructions to the trustees.[51] *Inter vivos* property conveyances also play a significant role in estate planning and intertwine with decisions related to the drafting of a will and its contents. Colloquially referred to as "will substitutes," these conveyances occur during a testator's lifetime but are geared towards estate planning and distribution.[52] Apart from the reasons attributed to estate planning by Justice Bodurtha, testators often convey their property while alive to avoid probate fees, taxes, or, relevant to the case at bar, challenges to one's will.[53]

Indeed, if the right of testamentary autonomy is a right of a *living* person as Justice Bodurtha held,[54] its distinction from other decisions taken while one is alive that concern one's property becomes even more tenuous. The decision to dispose of property in a will and the decision to dispose of property through an *inter vivos* conveyance are both decisions made by a living person, often with identical goals. Furthermore, if these goals contravene public policy or some other facet of the common law that governs property, courts have the jurisdiction to interfere with the

50. [1841] EWHC Ch J82, Cr & Ph 240, 4 Beav 115 8 (HC). This rule allows beneficiaries of a trust to end it prematurely and received a payout of its capital. This is provided that all of beneficiaries are of the age of majority, have capacity to make this decision and that the trust contains no gift-over and has no other conditions except that the beneficiaries attain a certain age over that of majority. For a recent Supreme Court of Canada decision that involved a consideration of the rule see: *Buschau v Rogers Communications Inc*. 2006 SCC 28 at para 21.

51. See e.g. *Re Ogilvy*, 1966 CarswellOnt 138, 58 DLR (2d) 385.

52. Examples include placing a property in joint tenancy with an adult child, adding a common law spouse to a bank account or investment, or advancing a child's inheritance while the testator is still alive.

53. See Oosterhoff et al, *supra* note 7 at 185.

54. *Lawen*, *supra* note 1 at para 45; in his reasons, Justice Bodurtha concluded that *Hislop v Canada (Attorney General)*, 2007 SCC 10 [*Hislop*], wherein the Supreme Court found that an estate does not have standing to advance a Charter claim, did not apply to the case at bar. This was because "the court's concern [in *Hislop*] was with the claim by the estate, not with the testator's ability to dispose of their assets."

resulting conveyance, whether the gift is made during the life of a testator or after it.[55]

In sum, Justice Bodurtha's reasons fail to sufficiently distinguish decisions to dispose of property by way of will from those decisions executed through *inter vivos* conveyances. Testamentary autonomy remains what it has always been: an interest in maintaining control over one's private property after one dies. It cannot attract protection from section 7 of the *Charter*, as to do so would create, as some have termed it, a "back door" constitutional right to protection of property from state interference.[56]

b. *The principles of fundamental justice?*

The final problem with the section 7 reasoning in *Lawen* is that it provides no analysis on whether testamentary autonomy is inconsistent with the principles of fundamental justice (PFJ), the crucial second step of a section 7 finding.[57] In explanation of this, Justice Bodurtha wrote:

> The applicants say the deprivation of the testator's liberty does not accord with the principles of fundamental justice. However, the applicants rely on a section 1 *Charter* analysis for this aspect of the test. Similarly, the Attorney General makes no reference to the principles of fundamental justice. As a result, I infer the Attorney General accepts if a violation of the liberty interest is found, that violation will not accord with the principles of fundamental justice.[58]

Unfortunately, the inference made by Justice Bodurtha is not in accordance with the basic law concerning section 7 of the *Charter*. In a section 7 challenge, the onus rests on the applicants to prove, on a balance of probabilities, both an infringement of a testator's liberty interest and its inconsistency with a PFJ.[59] It is not open to a court to find a section 7 violation based on a deprivation of liberty without also determining whether the deprivation is in accordance with the PFJ.[60]

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55. Bruce Ziff, "Welcome the Newest Unworthy Heir" 1 ETR-CAN-ART 76; Jane Thomson, "Discrimination and the Private Law in Canada: Reflections on Spence v BMO Trust Co" (2019) 36 Windsor YB Access Just 138.

56. Hogg, "Section 7," *supra* note 39; *Lawen*, *supra* note 1 at para 57 citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 53.

57. *Bedford v Canada (Attorney General)*, 2013 SCC 72 at para 93 [*Bedford*].

58. *Lawen*, *supra* note 1 at para 62.

59. *Prostitution Reference*, *supra* note 41 at para 14.

60. *Bedford*, *supra* note 57 at para 93. Apart from procedural fairness, the three major PFJ as identified by the Supreme Court of Canada are arbitrariness, overbreadth and gross-disproportionality. *Bedford* at para 97.

Given that the purpose attributed by Justice Bodurtha to the impugned provision[61] was to impose "a moral standard on testamentary freedom"[62] by creating obligations owed by testators to their adult independent children, it is difficult to identify with which PFJ the deprivation of liberty at issue is in discord. The effect of the provision is directly connected to its purpose.[63] Likewise, it is clear that the effect of the provision is neither overbroad nor grossly disproportionate to its goal. This is due not only to the tailored and limited connection between the provision's effect and its goal, but also to the wide discretion afforded to a court in determining the claims of adult independent children against an estate. As the Attorney General argued in *Lawen*, a court is under no obligation to issue an order under the *TFMA* following an application.[64] Furthermore, the *TFMA* includes criteria a court must consider prior to making these awards that suggest the awards are tailored to the specific circumstances of each application rather than any general notion of entitlement.[65]

Presumably, the Attorney General's submissions did not include a reference to the PFJ because the Attorney General believed that no interest under section 7 was infringed. Regardless, if we apply the purpose of the impugned provision to a PFJ analysis, it becomes clear that no section 7 violation can be made out.

Unfortunately, the constitutional problems with the *Lawen* decision only deepen with its section 1 analysis, which not only fails to fix the decision's section 7 problems, but also is itself based on a misunderstanding of the basic and sole objective of dependants' relief legislation like the *TFMA*.

2. *The section 1 analysis in* Lawen

The first stage of the section 1 analysis as defined in *R v Oakes* asks whether the objective of impugned legislation relates "to concerns which are pressing and substantial in a free and democratic society."[66] However, the parties' pleadings on this step are not easily discernable in the *Lawen* decision. Justice Bodurtha's reasons suggest that the Attorney General offered two different purposes for the *TFMA*[67] whereas the applicants'

61. As later determined by Justice Bodurtha in his section 1 analysis and explained below.
62. *Lawen*, *supra* note 1 at para 103.
63. If the purpose of the provision is to fulfill the moral obligations of a testator towards adult independent children, and its effect is to allow those children to make support claims against a testator's estate, then one cannot argue that the deprivation caused by the provision is arbitrary.
64. *Lawen*, *supra* note 1 at para 59.
65. *Ibid* at para 99 citing *TFMA*, *supra* note 2.
66. *R v Oakes*, [1986] 1 SCR 103, 1986 CarswellOnt 1001 at para 73.
67. *Lawen*, *supra* note 1 at para 84; Justice Bodurtha notes that the Attorney General argued the *Act* was "intended to enforce testators' moral obligations to make adequate provision for their dependents,"

framing of the issue is not clear and must be inferred by their other section 1 related arguments. [68]

Regardless, as Justice Bodurtha correctly noted, it is not the purpose of the *Act* that is relevant to a section 1 analysis, but that of the impugned provision.[69] On this point, Justice Bodurtha did not accept the purpose identified by the Attorney General to encompass that of the impugned provision. Furthermore, the applicants' section 1 arguments appeared based on what they viewed as the objective of the overall *Act*. [70] Justice Bodurtha therefore supplied his own purpose, concluding that the objective of including adult independent children as dependants under the *TFMA* was "purely moral" in nature.[71] He held that "imposing a moral standard on testamentary freedom" was not pressing and substantial in its objective.[72] In doing so, Justice Bodurtha noted that while laws based on moral grounds or "social policy issues" had been upheld by the Supreme Court of Canada, this one was not tenable given that it limited "fundamental rights."[73]

The problems with Justice Bodurtha's section 1 analysis are threefold. First, as noted above, it fails to establish the principle of fundamental justice with which the liberty violation failed to accord. Second, it wrongly attributes a different objective to the inclusion of adult children as dependents from the objective of the over-all *Act*. Third, a review of constitutional challenges to legislation with similar objectives demonstrates that the purpose of the *TFMA* relates very much to concerns that are considered pressing and substantial in our democratic society.

a. *The PFJ problem*

Recall that in his reasons, Justice Bodurtha declined to identify the PFJ with which the deprivation of testator's liberty failed to accord. Instead

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but also that the Attorney General identified the pressing and substantial objective of the *Act* to be "balancing the legitimate proprietary interests of [a testator's] heirs in respect of family provision... This means balancing the importance of a testator's will with that of ensuring that the financial needs of spouses and children of testators are adequately met." *Ibid* at para 84.

68. No purpose of the *Act* is expressly attributed to the applicants' arguments. However, an inference can be drawn from their arguments concerning the rational connection stage of the *Oakes* test. These arguments suggest they believed the *TFMA*'s purpose to be the provision of financial relief for those who can establish need or legal dependency during the life of a testator (*ibid* at para 102). It is not clear which, if either purpose, Bodurtha J. accepted with respect to the *TFMA*. Earlier in his reasons, Justice Bodurtha cited the purpose attributed to the *TFMA* in *Zwicker*, *supra* note 23, (*ibid* at para 19). However, his finding that the inclusion of adult independent children as eligible applicants rendered the Attorney General's overall objective "incoherent" suggests that he agreed with the applicants.

69. *Vriend v Alberta*, [1998] 1 SCR 493, 1998 CarswellAlta 210 at para 11; *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 125; *Lawen*, *supra* note 1 at para 96.

70. *Lawen*, *supra* note 1 at paras 101-102, 109, 115.

71. *Ibid* at paras 85-86, 96.

72. *Ibid* at para 110.

73. *Ibid* at para 96.

he accepted the applicants' arguments that this point could be proven through a section 1 analysis. However, when turning to the next steps of the *Oakes* test, Justice Bodurtha did not accept the applicants' arguments that the provision failed to accord with the remaining steps of the *Oakes* test.[74] Instead, he held that if the objective of imposing a moral standard on testamentary freedom was pressing and substantial, then the means chosen to achieve the objective would be rationally connected, minimally impairing and proportionate in accordance with the *Oakes* test and section 1 of the *Charter*.[75] This finding is remarkable given the close relationship between the proportionality step of the *Oakes* test and the PFJ analysis of section 7.[76] By concluding that the provision was not overbroad, arbitrary or grossly disproportionate in the section 1 portion of his analysis, Justice Bodurtha's reasoning essentially confirms that no violation of section 7 actually took place to necessitate a section 1 analysis in the first place.

b. *A single purpose*

The second problem with Justice Bodurtha's section 1 analysis is the notion that the legislative purpose for including adult independent children as dependants differs from the purpose for including spouses and minor children in the *TFMA*. By stating that the purpose behind including adult independent children is moral, Justice Bodurtha's reasoning infers that the purpose behind including all other dependants is something other than moral. Justice Bodurtha describes the claims of spouses and minor or dependent children as being based on "actual dependency or financial need" or as ones that would attract "a legal obligation of support in the testator's lifetime."[77]

This purpose-based distinction between dependants is untenable for two main reasons. First, neither financial need nor *inter vivos* legal dependency constitutes a mandatory criterion to be met before a court will issue an order under the *TFMA*. Second, this reasoning reflects a common error of conflating the interpretative tools fashioned by Justice McLachlin in *Tataryn* with actual, distinct legal and moral obligations.

Financial need, inter vivos *dependency and the* TFMA

Nova Scotia jurisprudence is clear on the fact that financial need does not determine eligibility, entitlement or even quantum with respect to *TFMA*

74. *Ibid* at paras 101-102, 109, 116.
75. *Ibid* at paras 103, 110, 116.
76. *Bedford*, *supra* note 57 at paras 124-129; *Reference re s 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486, 1985 CarswellBC 398 at para 129.
77. *Lawen*, *supra* note 1 at paras 17, 23.

orders.[78] Spouses can and have made successful claims in Nova Scotia and other jurisdictions with similar statutes without having established financial need.[79] This fact can also be discerned from section 5 of the *TFMA*, which directs a court, when deciding such awards, to consider factors totally unrelated to financial need such as the character and conduct of the claimant, the nature of the relations between the dependant and the testator at time of death, and any services rendered to the testator by the claimant.[80]

Additionally, the ability to bring a claim of support against the testator while living cannot be an eligibility factor of the *TFMA* due to the express exclusion of common law spouses who have not registered as domestic-partners of the deceased,[81] and stepchildren from the *Act*. These claimants are eligible for claims of support against a living testator in Nova Scotia upon family breakdown.[82] For those common law spouses in Nova Scotia whose partner dies intestate or fails to provide for them through a will, their only recourse is to establish a claim in unjust enrichment against the intestate's estate. Such a claim cannot be grounded in financial dependency but instead must prove an uncompensated contribution to the estate itself.[83]

Notably, in the 2020 decision of *LeBlanc v Cushing Estate*, the *TFMA* was found to contravene the section 15 *Charter* rights of a testator's

78. Justice Saunders (as he then was), writing for the Nova Scotia Supreme Court, held that a "claimant need not show actual or urgent need or true dependency in order to succeed" in a *TFMA* application. *Sandhu v Sandhu Estate*, [1999] NSJ No 157, 1999 CarswellNS 134 at para 107 [*Sandhu*]. See also *Welsh v McKee-Daly*, 2014 NSSC 356 at para 55.

79. *Sandhu*, *supra* note 78 at paras 106–107; *Paxman v Saskatchewan (Public Trustee) (1996)*, 14 ETR (2d) 22, 1996 CarswellSask 422 at para 11. See also Dorota Miler, "Does a Will Stand a Chance under the Current Interpretation and Application of Dependants' Relief Legislation in British Columbia?" (2018) 51 UBC L Rev 385 at 395.

80. *TFMA*, *supra* note 2, s 5(1)(a), (c), (g).

81. *Vital Statistics Act*, *supra* note 24, s 53.

82. *Parenting and Support Act*, RSNS 1989, c 160, ss 2(i)(ii), 2(m)(v)–(vi). As noted at the beginning of this article, common law spouses who are not officially registered as domestic-partners and minor step-children are excluded not only from the *TFMA* but also from Nova Scotia's laws of intestacy. The exclusion of common law spouses from Nova Scotia's *Intestate Succession Act*, RSNS 1989, c 236 was recently found to constitute a violation of section 15 rights of common law spouses but nevertheless was saved under section 1 of the *Charter*. See *Jackson Estate v Young*, 2020 NSSC 5 at para 187. In other jurisdictions where such claimants are similarly excluded from intestacy schemes, they are nevertheless able to make dependants' relief claims if a testator dies without a will. See e.g. *Prelorentzos v Havaris*, 2016 ONCA 727; *Deleon v Estate of Raymon DeRanney*, 2020 ONSC 19; *Naiker v Naiker Estate* (1997), 1997 CarswellBC 2522, 19 ETR (2d) 167 (CA); *Renko v Stevens Estate* (1998), 47 BCLR (3d) 7, 1998 CarswellBC 397 (CA). Indeed, it is quite odd to contemplate that although the Supreme Court of Canada has held that one cannot unilaterally terminate one's loco parentis status (with respect to child support and step-children), in Nova Scotia, a testator may effectively do so upon his or her death. See e.g. *Chartier v Chartier*, [1999] 1 SCR 242, 1999 CarswellMan 25.

83. *Kerr v Baranow*, 2011 SCC 10 at paras 31-45.

common law spouse by recognizing only widows or registered domestic-partners as spouses of a testator.[84] Ironically, the ratio of *Lawen* factored into the reasons why the exclusion of common law spouses from the *TFMA* was justified under section 1 of the *Charter*.[85]

Legal versus moral obligations in dependants' relief decisions

The second problem with Justice Bodurtha's purpose-based distinction in *Lawen* is a conflation of interpretive tools with actual terms of art. While dependants' relief decisions often refer to a testator's "legal obligations" and "moral obligations," these terms are simply idiomatic expressions created by Justice McLachlin to describe two major social norms used to interpret and apply dependants' relief legislation.

One of the most significant findings in *Tataryn* was that financial need was not the objective of what was then British Columbia's *Wills Variation Act*.[86] Justice McLachlin instead determined that its purpose was to ensure that the spouses and children of testators were provided for in an "adequate, just and equitable" manner,[87] and that awards made under the statute should be interpreted in accordance with contemporary values and societal expectations.[88] Since financial need was not the determining factor for entitlement or quantum, Justice McLachlin sought to identify "a yardstick" by which to measure and evaluate such claims.[89] After briefly canvassing previous methods used by BC courts[90] she suggested instead that two social norms guide the process, what she called the "legal" and "moral obligations" of testators.[91] In her words, the legal obligations of a testator refer to "the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise."[92] The moral obligations, she explained, "are found in society's

84. *Leblanc v Cushing Estate*, 2020 NSSC 162 [*Leblanc*]. Only those common law spouses who both agree to make a domestic-partner declaration are recognized as Registered Domestic Partnership. *Vital Statistics Act*, *supra* note 24, s 53.

85. For example, the court in Leblanc held that the conclusion in *Lawen* justified narrowing the group of eligible dependants in the *TFMA* rather than expanding it. This was especially so given that the right of testamentary autonomy was already abrogated by the *TFMA* with respect to married spouses, registered domestic partners and the children of the testator. In the court's opinion, the exclusion of common law spouses from the *Act* served to prevent further harm to the constitutional right of testamentary autonomy (*Leblanc*, *supra* note 84 at para 203).

86. RSBC 1979, c 435.

87. *Tataryn*, *supra* note 10 at para 17.

88. *Ibid* at para 15.

89. *Ibid* at para 27.

90. *Ibid*.

91. *Ibid* at para 28.

92. *Ibid*.

reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards."[93]

Neither of these "obligations" are legal in nature except to the extent that they flow from a dependants' relief act. They are simply concepts fashioned by the former Chief Justice to assist a court in determining entitlement and quantum of a dependants' relief claim in conjunction with the specific terms of a particular statute.

Additionally, and contrary to Justice Bodurtha's reasoning, both kinds of obligations are fundamentally moral in nature. Indeed, when explaining a testator's "moral obligations," Justice McLachlin included examples of applicants who could ground their claims firmly on the "legal obligations" pillar of the statute as well as those who could not:

> [M]ost people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow.[94]

A similar rationale is echoed in the decisions of other jurisdictions before and after the *Tataryn* decision. In *Cummings v Cummings*,[95] Justice Blair adopted and applied *Tataryn* even though adult independent children are not eligible for dependants' relief in Ontario.[96] He noted that the enumerated factors in Ontario's *Succession Law Reform Act*[97] were moral in nature. Specifically, Justice Blair described factors used to assess an order of support against a living person under Ontario's family law system, such as "the length of time the spouses cohabited" as informing the "moral obligations" of a testator,[98] even though presumably such factors would assist in discerning the "legal obligations" of a testator.[99]

The recognition that all dependants' relief claims are undergirded with moral norms is certainly evident in Nova Scotia's case law. For example, in *Zwicker* the Nova Scotia Court of Appeal classified the duty to support

93. *Ibid*.
94. *Ibid* at para 31.
95. (2004), 235 DLR (4th) 474, [2004] OJ No 90 (Ont CA) [*Cummings*].
96. *Verch v Weckworth*, 2014 ONCA 338; *Spence v BMO Trust Co*, 2016 ONCA 196 [*Spence CA*].
97. *Succession Law Reform Act*, RSO 1990, c S 26.
98. Specifically s 62(1)(g), (h), (i), (j), (k), (o), r(ii) *Cummings*, *supra* note 95 at para 45.
99. Rodney Hull, "A Turn in The Road of Dependants' Relief Claims in Ontario" (2005) 13 ETR (3d) 24.

dependants as moral, whether the dependant in question is a former spouse or an adult independent child.[100]

When *Tataryn* was first released, the reasoning of Justice McLachlin was subject to criticism by leading scholars on the subject of dependants' relief, in part for the confusion it appeared to cause on this very issue.[101] However, since *Tataryn*, the notion of moral versus legal obligations of testators has become common currency among legal writers, blurring lines between normative tools of interpretation and actual terms of art.[102] Indeed, the terms are often used loosely and confusingly by the judiciary as well, including by the Ontario Court of Appeal in *Cummings* and the Nova Scotia Court of Appeal in *Zwicker*.[103]

While this error is usually immaterial with respect to the application and outcome of most dependants' relief claims, it is problematic in *Lawen* because it is used to justify an untenable section 1 decision. Perhaps a clearer way of viewing Justice McLachlin's reasoning in *Tataryn* is to view the claims of different dependants as simply varying in moral worth. This is likely what Justice McLachlin meant when she noted that the claims of adult independent children "may be more tenuous" than those of former spouses.[104] Regardless, the nature of all claims made under the *TFMA* is legal while the objective of the Act in fulfilling those claims is inherently moral.

c. *A pressing and substantial purpose*

Finally, based on the ubiquitous nature of legislation with an identical objective to that of the *TFMA* and the failed *Charter* challenges to

100. *Zwicker*, *supra* note 22 at paras 42-47.

101. Leopold Amighetti, "Tataryn v Tataryn Estate" (1994–95) 14 E & TJ 277; Carolyn L Berardino & Robert C Freedman, "Tataryn v. Tataryn Estate" (1994) 52:6 Advocate 897.

102. See e.g. Trevor Todd & Judith Milliken, "Disinheriting Adult Independent Children under the B.C. Wills Variation Act" LawNow March/April 2011 at 16; Kathleen Cunningham, "Succession law reform proposals in B.C.: A comparative review" (2007) 27:1 ETPJ at 41. Note: Cunningham's study also wrongly concludes that no dependants' relief statute in Canada other than BC's allows adult children to make claims against the estate (at 42).

103. Justice Blair's reasons waiver between contrasting the needs of the claimants and a testator's moral responsibility to them (with no mention of the word "legal") and listing a variety of factors considered in dependants' relief claims including "not only… needs and means but also…legal and moral or ethical claims." *Cummings*, *supra* note 95 at para 34. In *Zwicker*, *supra* note 23, the Nova Scotia Court of Appeal remarked, "The legal and moral duty to support a wife, infant children or disabled adult children is obviously much stronger than the moral duty to give marginal support to a normal adult child, male or female" at para 43.

104. *Tataryn*, *supra* note 10 at para 31. As noted above, unlike most jurisdictions in Canada, a surviving spouse cannot make a division of property claim against an estate and, if left less than he or she would have received in the event of a separation, must file an application for the variation of the will. *Family Law Act*, SBC 2011, c 25, s 81.

such legislation, it is more than likely that the TFMA's "purely moral objective"[105] passes the first step of the *Oakes* test.

In his discussion on this point, Justice Bodurtha reviewed Supreme Court of Canada precedent on obscenity laws, Sunday closing regulations, and the voting rights of incarcerated Canadians,[106] and concluded that courts should not defer to legislatures on issues of social policy, particularly when fundamental rights are limited by such policies.[107] Starkly absent from this inquiry, however, is any mention or discussion of the law that pervades Canadian society with an objective directly analogous to that of the *TFMA*: family law legislation.

The objective of family law is inherently moral in nature. None of the major legal obligations imposed by family law statutes following family breakdown are based solely on dependency or financial need. Instead they are largely based on what we as a society think members of a family owe one another.[108] This includes the division of property between separated spouses,[109] spousal support[110] and child support.[111] For example, while no legal obligation exists for living parents to provide for children over the age of majority, even if they are disabled adult children,[112] this changes when parents separate. Not only do disabled adult children have a right to receive child support from their separated parents,[113] a legal obligation also exists to support all adult children during their first post-secondary degree.[114] The overarching purpose of all family law legislation, including

105. *Lawen*, *supra* note 1 para 86
106. *Ibid* at paras 87-96.
107. *Ibid* at para 96.
108. It is particularly ironic, then, that Justice Bodurtha's reasons rely on a resemblance to *inter vivos* obligations imposed by family law to distinguish the claims of widows and minor children under the *TFMA* as something other than moral in nature. To identify certain norms as legal and not moral simply because they resemble other laws is circular reasoning, particularly when the *inter vivos* laws in question are themselves based on what many would view as inherently moral considerations.
109. *Quebec (Attorney General) v A*, 2013 SCC 5.
110. *Moge v Moge*, [1992] 3 SCR 813, 1992 CarswellMan 143.
111. *Federal Child Support Guidelines*, SOR/97-175, s 3, 4, 7.
112. *Krangle (Guardian ad litem of) v Brisco*, 2002 SCC 9. An exception to this is a 2018 amendment of Alberta's family law legislation. See s 46(b)(ii) of the *Family Law Act*, SA 2003, c F-4.5.
113. If a "child of the marriage"is deemed "unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life" *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 2(1); *Senos v Karcz*, 2014 ONCA 459. See also Christine Dobby, "Whose Responsibility? Disabled Adult 'Children of the Marriage' under the Divorce Act and the Canadian Social Welfare State" (2005) 20 Windsor Rev L & Soc Issues 41.
114. *Kozak v Moore*, 2020 SKQB 22; *Makdissi v Masson*, 2020 ONSC 343; *Mumtaz v Suhail*, 2019 ONSC 6234. See also Nicholas Bala & David Faour, "When Does Childhood End? Canada's Lengthening Obligation to Support Adult Children" (2014) 33:1 CFLQ 69.

dependants' relief, is, as one commentator has observed, that of "social engineering,"[115] and not simply to keep dependants off the state dole.

At the very least, Justice Bodurtha's review of this issue should have included the lower court decisions concerning section 7 *Charter* challenges to resource-redistributive family law legislation.[116] While none of these short judgements engage in a section 1 analysis, this is only because the section 7 argument in each case was deemed to be a protection of property argument and not one of liberty. As one Court held, "[i]n short, there is no *Charter* right not to pay something such as spousal support."[117] Indeed, the fact that the purpose of such statutes has never been impugned in a reported decision, combined with the low bar in place concerning this step of the *Oakes* test,[118] suggests that the objective of the *TFMA*, like other family law legislation, relates directly to concerns that are considered pressing and substantial in our democratic society.

III. *The case for allowing adult independent children to make claims against a parent's estate*

This paper has argued that the constitutional findings in *Lawen* are incorrect and should be overturned upon appeal. If anything, the decision makes it clear that the removal of adult independent children as dependants from the *TFMA* is not a *Charter* matter but instead a role for the Nova Scotia Legislature. The final portion of this paper argues that, following a successful appeal of *Lawen*, the Nova Scotia government should not remove adult independent children as dependants from the *TFMA* if faced with the question of legislative reform. First, their removal is unnecessary given the broad discretion accorded to courts when faced with these kinds of claims. Second, by keeping them as dependents, Nova Scotia courts will retain a more robust ability to censure the use of wills for purposes contrary to public policy, namely the perpetuation of discrimination through the private law.

1. *A matter of discretion*

The legal obligation imposed upon a testator towards their dependants by the *TFMA* and similar statutes is not absolute in nature and remains subject to the complete discretion of the courts. Each claim is to be determined

115. Paul L Coxworthy, "Case comment: Lawen Estate v Nova Scotia (Attorney General)" (2019) 39:1 ETPJ 44 at 52.

116. *Shaw v Stein*, 2004 SKQB 194; *Thurlow v Shedden*, 2009 SKQB 35; M (CA) v Q (MD), 2014 BCPC 110 [M (CA)]

117. *M (CA)*, *supra* note 116 at para 39.

118. Peter Hogg, *Constitutional Law of Canada*, 2019 Student Edition (Toronto: Thomson Reuters, 2019) at 38-23.

on a case-by-case basis with no concrete indicators of entitlement or quantum. Indeed, this was a large part of the Attorney General's argument in *Lawen*: the provisions in the *TFMA* are discretionary in nature[119] and this discretion has long been used to award adult independent children less than other dependants—if they are awarded anything at all—in Nova Scotia and elsewhere.[120]

Before penning his constitutional findings, Justice Bodurtha reviewed the dependants' relief legislation of other Canadian jurisdictions. His purpose in doing so was to demonstrate that most jurisdictions exclude adult independent children from their dependants' relief acts.[121] Aside from this conclusion being somewhat misleading[122] the review itself failed to discuss how some jurisdictions have dealt with societal unease towards adult independent children's dependants' relief claims without altering their legislation.

One such jurisdiction is that of neighbouring New Brunswick, where claims by adult independent children against their parents' estates are permitted under the province's *Provision for Dependants Act*.[123] Since the New Brunswick Court of Appeal's 1995 decision in *Currie v Currie (Estate)*,[124] no PFDA claim made by an adult independent child in New Brunswick has been successful.[125] In *Currie*, Justice Bastarache of the NBCA (as he then was) held that adult children claimants had to demonstrate "a special need or other special claim" in order to be eligible for dependants' relief in New Brunswick.[126] Examples cited by Justice Bastarache included:

> a disability on the part of an adult child, an assured expectation on the part of an adult child, or an implied expectation on the part of an adult child, arising from the abundance of the estate or from the adult child's treatment during the testator's lifetime.[127]

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119. *Lawen*, *supra* note 1 at para 59.
120. *Zwicker*, *supra* note 23 at paras 15-17 citing *Bosch v Perpetual Trustee Co Ltd* at 20-21; *Cross v Currie Estate* (1987), 1987 CarswellNS 91, 28 ETR 113 (SC) at para 27 [*Cross*] citing *Pontifical Society for the Propagation of the Faith v Scales* (1962), 107 CLR 9, [1962] HCA 19 at 19.
121. *Lawen*, *supra* note 1 at para 40.
122. Prior to the decision in *Lawen*, exactly half of Canada's provinces permitted dependant relief applications by adult, independent children (see various acts, *supra* note 24).
123. RSNB 2012, c 111.
124. [1995] NBJ No 305, 166 NBR (2d) 144 (QB) [*Currie*]. When *Currie* was decided, the *Act* was operating under its former version: RSNB 1973, c P-22.3.
125. See e.g. *Robicheau v McGibbon*, [1995] NBJ No 356, 165 NBR (2d) 255 (QB); *Spinney v Spinney Estate*, 1995 CarswellNB 444, [1995] ANB No 367 (QB); *Lawrence v Johnston Estate*, [2000] NBJ No 105, 2000 CarswellNB 92 (QB); *Holland v Holland Estate* (2000), [2000] NBJ No 426, 231 NBR (2d) 50 (QB); *Branch v Branch Estate*, 2004 NBQB 258.
126. *Currie*, *supra* note 124 at para 25.
127. *Ibid* at para 21 citing *Price v Lypchuk Estate* (1987), 11 BCLR (2d) 371, 1987 CarswellBC 43

In addition, Justice Bastarache held that whether a testator had neglected his or her adult children when they were minors was not a relevant factor in considering the testator's moral obligations towards them at the time of his or her death.[128] The effect of the *Currie* decision was the New Brunswick Court of Appeal's adoption of the "moral obligation" norm from *Tataryn* and the determination of what it meant in New Brunswick. In the New Brunswick Court of Appeal's opinion, the standard for ordering relief for adult independent children is very high, requiring a set of circumstances that could very well attract a separate legal claim against an estate altogether, such as unjust enrichment or promissory estoppel.

Saskatchewan is another province which takes a similarly restrictive approach to such claims: adult children who are deemed physically and mentally able and fiscally independent must demonstrate that they have "sacrificed [themselves] for the parent in question" in order to be granted relief under Saskatchewan's *Dependants' Relief Act*.[129]

Unlike New Brunswick or Saskatchewan, Nova Scotia is inconsistent in its handling of *TFMA* orders that concern adult independent children. Older cases tend to follow the more generous approach adopted in *Tataryn*, although many of them pre-date that decision. In these cases, adult independent children were awarded relief under the version of the *TFMA* in force at the time where testators were found to have been neglectful or abusive towards them and/or failed to have financially provided for them while they were minors. Additionally, and perhaps equally important, the estates in these cases were deemed large enough that a *TFMA* award would not prejudice the financial circumstances of other beneficiaries.[130]

However, more recent Nova Scotia Supreme Court decisions have denied the claims of adult independent children. Judges have held these individuals have no automatic entitlement to a testator's estate, particularly when reliable evidence before the Court explained why they were left little or nothing by the testator.[131] Some decisions, in dismissing such applications, have alluded to similar criteria to those listed in *Currie*.[132]

(CA).

128. *Ibid* at para 24.

129. *Dependants' Relief Act*, 1996, SS 1996, c D-25.01; *Ross v Redl Estate*, 2010 SKCA 59 at para 10.

130. See e.g. *Corkum v Corkum* (1976), 1976 CarswellNS 184, 74 DLR (3d) 700 (SC(AD)); *Zwicker*, *supra* note 23; *Hart (Guardian ad litem of) v Hart Estate* (1993), 1993 CarswellNS 86, 1 ETR (2d) 92 (SC); *Walker v Walker Estate*, 1998 NSSC 55; *Schofield Estate v Schofield* (1988), 1988 CarswellNS 297, 84 NSR (2d) 404 (CA); *Harvey v Powell Estate* (1988), 1988 CarswellNS 81, 30 ETR 143 (SC(TD)), affd (1989), 1989 CarswellNS 77, 36 ETR 100 (CA); *Re Joudrey Estate* (1989), 1989 CarswellNS 73, 32 ETR 227 (SC(TD)); *Kuhn v Kuhn Estate* (1992), 1992 CarswellNS 104, 46 ETR 150 (SC(TD)); *Baird v Baird Estate*, [2001] NSJ No 209, 2001 CanLII 5604 (SC).

131. See e.g. *Irving v Irving Estate*, 2016 NSSC 188; *White v White Estate*, 2007 NSSC 254.

132. *Welsh v McKee-Daly*, 2014 NSSC 356 at para 63.

Still other decisions in Nova Scotia contain elements of both *Currie* and *Tataryn*, as they consider facts that would give rise to special claims on the part of the adult child as well as poorly perceived behavior on the part of a testator.[133]

This variety of reasoning highlights a point made in the most oft cited case concerning adult children and the *TFMA*. In *Currie*, Bastarach J.A. referenced the Nova Scotia Court of Appeal's decision in *Zwicker*, noting that the NSCA recognized "the necessity of reviewing old cases with a critical eye because of the need to adapt the exercise of judicial discretion to present social norms."[134] It may be that the present social norms of Nova Scotia have shifted away from awarding *TFMA* claims to adult children. It was certainly open to whichever court heard the *TFMA* application of Jack Lawen's daughters to exercise its discretion in accordance with those norms.

In addition to being relatively benign in nature, it is further argued that the inclusion of adult independent children in dependants' relief legislation is important as it may assist in preventing the use of wills to perpetuate discrimination through the private law.

2. *Discrimination and dependants' relief claims*

The use of one's will to punish, coerce and otherwise keep family members in conformity to one's own worldview is an unfortunate but time honoured tradition in the realm of estate law.[135] Challenges to testamentary conditions restricting a beneficiary's decision to marry, choice of religion, or the religion or ethnicity of a beneficiary's spouse have been the subject of court challenges for at least three hundred years.[136] These challenges have been largely unsuccessful, with the notable exception of modern day Canada. Canadian jurists have pioneered the application of the common law public policy doctrine to void conditions and gifts in wills

133. See e.g. *McIntyre v McNeil Estate*, 2010 NSSC 135 where the testator was found to have been abusive towards his children but also benefited from services rendered by them that went above and beyond those expected from a child (at paras 30, 49). See also *Redmond v Redmond Estate* (1996), 1996 CarswellNS 441, 14 ETR (2d) 262 (SC); *Cox v Nova Scotia (Public Trustee)* (1983), 1983 CarswellNS 307, 56 NSR (2d) 657 (SC(TD)); *Miller v Rankin Estate* (1986), 1986 CarswellNS 194, 72 NSR (2d) 441 (SC (TD)); *Brown v Brown Estate*, 2005 NSSC 271.

134. *Currie*, *supra* note 125 at para 17.

135. Indeed, Justice Bodurtha's characterization of testamentary autonomy may simply be a softer way of stating this fact (*Lawen*, *supra* note 1 at para 46).

136. *Thomson*, *supra* note 55 at 142. See also S Grattan & H Conway, "Testamentary Conditions in Restraint of Religion in the Twenty-First Century: An Anglo-Canadian Perspective" (2005) 50 McGill LJ 511.

that perpetuate forms of discrimination such as racism, sexism, religious intolerance or homophobia.[137]

However, one facet of estate law recently held to be immune to public policy scrutiny is the practice of "disinheriting" an adult child for discriminatory reasons,[138] such as the child's sexual orientation, their gender, or some other immutable, personal quality that offends the testator.

The reason why traditional applications of public policy may be inapplicable to these particular scenarios stems from the 2016 Ontario Court of Appeal decision of *Spence v BMO Trust Co*.[139] In that case, a judge of Ontario's Superior Court voided an entire will after finding the motivations of the testator in making it, contravened public policy.[140] The uncontested evidence suggested the testator had left nothing to his adult daughter because she had conceived a child with a man of a different race.[141] The decision was overturned by the Ontario Court of Appeal. In her reasons, Justice of Appeal Cronk noted that in Ontario, adult independent children were not eligible for dependants' relief and therefore held no entitlement to their parents' estates.[142] This lack of entitlement factored into the Ontario Court of Appeal's finding that an unconditional clause in a will that simply stated a child was "disinherited"—even for expressly discriminatory reasons—could never be subject to a public policy review. As Justice Cronk explained:

> Absent valid legislative provision to the contrary, the common law principle of testamentary freedom thus protects a testator's right to unconditionally dispose of her property and to choose her beneficiaries as she wishes, even on discriminatory grounds.[143]

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137. *Thomson*, *supra* note 55. Notably, public policy has been used by the courts to censure discrimination in wills because the Charter and provincial and federal human rights legislation have both been found to be inapplicable to that area of the law. *University of Victoria Foundation v British Columbia (Attorney General)*, 2000 BCSC 445 at para 14; *Spence CA*, *supra* note 96 at paras 125-126. If the decision in *Lawen* is upheld, we will have the ironic finding that testamentary autonomy itself attracts *Charter* protection but the use of it to discriminate against others remains immune to *Charter* scrutiny.

138. The use of scare quotes indicates that technically there is no such thing as disinheriting a child in Canada. Apart from discretionary dependants' relief schemes in each province, testators have no legal testamentary obligations to any family member. However, the term is used here to describe the act of leaving an adult child nothing by way of one's will due to some perceived transgression on the part of the child.

139. *Spence CA*, *supra* note 96.

140. *Spence v BMO Trust Co*, 2015 ONSC 615 [*Spence SC*].

141. This reason was not expressly stated in the will, but it was accepted by the trial judge with the assistance of affidavit evidence (*ibid* at paras 44-45).

142. *Spence CA*, *supra* note 96 at para 37.

143. *Ibid* at para 75.

Justice Cronk reasoned that because Ontario courts possessed no mechanism to vary the distribution of gifts in a will under such circumstances, an interference with the wording of the will that generated no relief for the complainant constituted an unwarranted intrusion upon the principle of testamentary freedom.[144]

I have argued elsewhere that the decision in *Spence* effectively provides permission for testators in Ontario to actively use their wills to perpetuate discrimination. While discrimination between members of a family is not normally subject to judicial review, instructions in a will are. A will is a legal document that often requires review and approval by courts for matters of probate or construction. The use of the private law to perpetuate discrimination and promote cruelty and degradation should, at the very least, be open to judicial examination and review. [145]

But what if Veroline Spence had qualified as a dependant under Ontario's *Succession Law Reform Act*?[146] Would the Ontario Court of Appeal's decision have been different? An examination of the law on discretionary orders and *Charter* values, and a review of what has actually occurred when this issue has arisen in other jurisdictions, reveals that it may well have been. Given this fact, the case for the inclusion of adult independent children in dependants' relief schemes becomes clear.

a. Charter *values, discretionary authority and dependants' relief legislation*

Charter values are a somewhat nebulous concept, but they have been described by the Supreme Court as "those values that underpin each [*Charter*] right and give it meaning."[147] Examples range from values that mimic the rights they underpin such as equality, privacy and liberty to more abstract but fundamental ideas such as human dignity.[148] Since the case of *Dolphin Delivery Ltd v RWDSU, Local 580*,[149] the Supreme Court of Canada has maintained the need for judges to interpret and apply the common law in accordance with *Charter values*. As explained by Justice L'Heureux-Dubé in her dissent (but not on this point) in *M(A) v Ryan*,[150]

144. Ibid at para 85.
145. *Thomson*, *supra* note 55.
146. At trial, she applied for an extension of the time period for applying for a dependants' relief claim under Ontario's *Succession Law Reform Act*, RSO 1990, c S-26 on behalf of her son but was denied this request by the superior court (*Spence SC*, *supra* note 140 at paras 3-5). She did not appeal this finding (*Spence CA*, *supra* note 96 at para 22).
147. *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 36 [*Loyola High School*].
148. Mark S Harding & Rainer Knopff, "'Charter Values' vs. Charter Dialogue" (2013) 31:2 Nat'l J Const L 161 at 162.
149. [1986] 2 SCR 573, 1986 CarswellBC 411.
150. *M (A) v Ryan*, [1997] 1 SCR 157, 1997 CarswellBC 99 at paras 63-64 [*Ryan*].

this obligation is also entailed in the judicial exercise of discretionary authority by way of statute:

> In many cases, the exercise of discretion, through the making of an order, for example, will not constitute direct state action and therefore cannot be subject to the same constitutional scrutiny as legislation or the acts of state officials. Where this occurs, this Court has nonetheless found that the exercise of discretion must adequately reflect the *values* underlying the *Charter*…
>
> The fact that the discretion exercised here involves procedural entitlements in a civil dispute between private parties rather than a criminal trial does not fundamentally alter the analysis. There are a number of civil cases involving private parties which found that the discretionary powers granted by statute or a common law rule must be exercised in a manner which comports with the values underlying the *Charter:* …In such cases, however, the balancing of values may be somewhat more flexible than in those involving the state as a party[.]

While the Supreme Court has held in *Bell ExpressVu Ltd Partnership v Rex*[151] that *Charter* values may only be used to interpret and apply statutes in the event of an ambiguity,[152] discretionary orders made under statutes like the *TFMA* represent a completely different scenario. Ordering dependants' relief is not a matter of interpreting a statute, but of applying the broad discretion accorded by that statute.[153]

Given the precedent set out by Justice L'Heureux-Dubé in *Ryan*, *Charter* values must inform any decision related to a dependants' relief claim. Specifically, *Charter* values such as equality and human dignity should be considered in those cases that involve allegations of discrimination. Of course, when faced with such a claim, a court must also consider competing *Charter* values such as privacy or common law principles like testamentary freedom. The point is not that equality and dignity should always trump testamentary autonomy or privacy, but that the former values must not be automatically trumped simply because this is an area of private rather than public law. The key, as referenced by Justice L'Heureux-Dubé in *Ryan*, is that all these values be balanced accordingly in the context of the matter at issue.[154]

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151. 2002 SCC 42.

152. Peter Hogg, *Constitutional Law of Canada*, 5th edition supplemented (Toronto: Thomson Carswell, 2007) Vol II s 37.2(b) at 37-29 [Hogg, "2007"]

153. Notably, there is no need to resort to the findings of the Supreme Court in *Loyola High School*, *supra* note 147 or *Doré v Québec (Tribunal des professions)*, 2012 SCC 12, as those decisions refer to the use of *Charter* values with respect to discretionary decisions taken by administrative decision-makers rather than judges.

154. *Ryan*, *supra* note 150 at para 64.

This notion appears to be borne out by the case law on the subject. In a handful of reported dependants' relief decisions, discrimination based on sex or sexual orientation has factored into a will variation. All of these cases were heard in British Columbia where the vast majority of will variation claims by independent adult children in Canada are made. They demonstrate that courts, when exercising their discretion under section 60 of British Columbia's *Wills, Estates and Succession Act*[155] or the Province's former *Wills Variation Act*,[156] consider discrimination a relevant and determinative factor in the decision to vary a will.

b. *The BC cases*

The most recent case involving discrimination and dependants' relief is *Grewal v Litt*, wherein British Columbia's Supreme Court significantly altered a set of mirror wills that left ninety-four per cent of a multi-million dollar estate to the testators' two adult sons and the remaining six per cent to their four adult daughters.[157] In that case, Justice Adair found the parents had failed in their moral obligation to their adult independent daughters.[158] Notably, discrimination based on sex was not the sole reason behind the ruling. The judgement also found that the daughters had contributed to their parents' business while growing up and had cared for them in their old age despite the cruel and unfair treatment the daughters had received from their parents in return.[159] However, discrimination played a significant role in affirming the Court's decision to vary the wills.[160]

A similar ruling occurred in *Prakash v Singh*,[161] where the daughters of a testatrix were left token gifts while her sons were left the majority of her estate. In that case, the Court held that the testatrix "viewed the [Indo-Fijian] tradition as binding upon her testamentary choices, or at least highly influential."[162] In varying the will, the judgement stated: "In modern Canada, where the rights of the individual and equality are protected by law, the norm is for daughters to have the same expectations as sons when it comes to sharing in their parents' estates."[163]

In *Peden v Peden Estate*,[164] the BC Supreme Court varied a will after finding that one of the testator's three sons, who had cared for both of his

155. SBC 2009, c 13.
156. *Wills Variation Act*, *supra* note 86.
157. 2019 BCSC 1154 at paras 5-7 [*Grewal*].
158. *Ibid* at para 210.
159. *Ibid* at paras 173-190
160. *Ibid* at para 155.
161. *Prakash v Singh*, 2006 BCSC 1545 [*Prakash*].
162. *Ibid* at para 41.
163. *Ibid* at para 58.
164. *Peden v Peden Estate*, 2006 BCSC 1713 [*Peden*].

parents and his maternal grandmother in their ill health, had received a much smaller gift than his brothers because of his sexual orientation.[165]

In reaching its decision in *Peden*, the Court cited the 1984 case of *Patterson v Lauritsen*,[166] wherein the Court accepted evidence by way of solicitor's notes that proved the testatrix had chosen to exclude her son from her will because he was gay and addicted to drugs. In varying the will, the Court concluded that the testator's suspicion that her son was addicted to drugs was "unfounded" and held that "homosexuality is not a factor in today's society justifying a judicious parent disinheriting or limiting benefits to his child".[167]

c. *What the BC cases tell us*

While the BC cases provide some insight into the issue of discrimination and dependants' relief claims by an adult independent child, they must be assessed in the context of that province's dependants' relief jurisprudence. Unlike New Brunswick or Saskatchewan, British Columbia courts lean towards adult children's default entitlement to inheritance rather than requiring that a child prove extraordinary circumstances in order to succeed in his or her application.[168]

Additionally, in all the BC cases, the discrimination identified by the courts was not expressly stated on the face of the will. In other words, these were not cases of a will explicitly perpetuating discrimination like Justice Cronk's hypothetical example in *Spence*.[169] Instead, in these cases, the motivations of the testator were held to be discriminatory in nature and proven so by evidence outside of the testator's will. Such a finding, however, is not permissible in most Canadian jurisdictions. Absent legislative amendment, extrinsic evidence of a testator's motivations or "true intention" is inadmissible.[170] Therefore, outside jurisdictions like BC, the use of dependants' relief legislation to curb discrimination in estate law will likely only occur in cases of express, explicit discrimination on the face of the will. It seems clear, however, that if implicit discrimination can

165. *Ibid* at para 55.
166. *Patterson v Lauritsen* (1984), 58 BCLR 182, 1984 CarswellBC 381 (BCSC) [*Patterson*].
167. *Ibid* at paras 3, 5.
168. Miler, *supra* note 79 at 396-397.
169. Justice Cronk described a clause that "facially offend[ed] public policy" (*Spence CA*, *supra* note 96 at para 72).
170. These include matters of probate, if the will contains a latent ambiguity or if the testator made a gift to someone she knew was deceased at the time the gift was made. Oosterhoff et al, *supra* note 7 at 490. This is why in *Spence CA*, *supra* note 96, the evidence of the testator's racist motivations was inadmissible under Ontario's estate law regime (at para 110). British Columbia has amended its estate legislation to expand the admissibility of extrinsic evidence for the purpose of proving a testator's intention. *Wills, Estates and Succession Act*, SBC 2009, c 13, s 62.

factor into an adult child's dependants' relief claim, explicit discrimination by way of a disinheritance clause should do so as well.

With these differences accounted for, a few observations about the role that discrimination has played in this kind of dependants' relief claim can be made.

First, when engaging with the discrimination issue, none of the BC decisions expressly reference a legal authority or influence outside of the provincial dependants' relief scheme. [171] However, it can be inferred that the Court in each of these cases—even the 1984 case of *Patterson*—applied its discretion under the legislative scheme in accordance with *Charter* values such as equality and human dignity. In *Grewal*, the Court labeled discrimination based on sex as "unacceptable," to the extent that it was at issue, and found that the testators had failed their moral duty to their daughters.[172] In *Prakash*, discrimination based on sex was found to be out of step with "the moral norms of our Canadian society,"[173] where "the rights of the individual and equality are protected by law."[174] In *Peden*, the Court simply cited Justice Spencer's pronouncement in *Patterson* that homophobic-motivated discrimination is out of step with current societal norms.[175]

Second, and relatedly, it is very clear that prior to ordering a will variation, the Courts engaged in a balancing of competing *Charter* values as well as other policy concerns including testamentary autonomy.[176] Even where discrimination was found, the variance order did not categorically override the testator's wishes. In both *Grewal* and *Prakash*, the Court sought to honour the testators' wishes so far as possible. The orders in these decisions still resulted in unequal divisions between female and male

171. In *Grewal*, *supra* note 157, the applicant daughters alleged that they were discriminated against on the basis of sex which they said was "contrary to public policy" but the court did not engage with this express argument (para 137).

172. *Ibid* at para 207.

173. *Prakash*, *supra* note 161 at para 57.

174. *Ibid* at para 58.

175. *Peden*, *supra* note 164 at para 55 citing *Patterson*, *supra* note 166 at para 5.

176. Notably, in none of the reported BC decisions were the reasons for a testator's discrimination attributed to religion. Instead, "traditional values," in some cases attributed to a specific culture, were referenced: *Grewal*, *supra* note 157 at para 155; *Prakash*, *supra* note 161 at paras 14, 41. Given that that the jurisdiction of the court to vary a will derives from a statute, a sufficient nexus to attract the protection of the *Charter* may be engaged: Hogg, "2007," *supra* note 152, Vol II sections 37.2(b)(g) ps. 37–2, 37–24. If an application is made to vary a will because it expressly discriminates against an adult child on the basis of religious belief, a court may have to consider not only the discrimination perpetuated by the will, but also whether an order to vary it would violate the section 2(a) *Charter* right of the testator. Indeed, the use of religious wills might attract this issue in those jurisdictions that permit adult independent children to challenge their parents' wills. See Jeffrey Talpis, "Religious Inheritance Laws by the Front and Back Doors in Quebec" (2015) 35:1 ETP J 64 at 78-80.

children, but less so than originally dictated by the terms of the wills.[177] In *Peden*, a life estate was made an outright gift but was otherwise not adjusted.[178] In *Patterson*, the excluded child was given a share equal to those of his siblings even though his financial need was much greater than theirs.[179]

Finally, in all the BC cases reviewed, the decision to vary a will was based on additional factors beyond the testator's discriminatory motivations. In every case, the claimant personally cared for their parents or enriched them financially without compensation and were found to have had legitimate expectations of inheriting from their parents' estates.[180]

The BC cases reveal that while disinheritance based on discrimination can and does play a role in the decision to vary a will in favour of an adult child, such decisions have always been supported by additional factors and have never resulted in a complete override of a testator's wishes. In short, these cases demonstrate judicial discretion in accordance with *Charter* values, in the balanced manner described by Justice L'Heureux-Dubé in *Ryan*.

d. *Holding space for judicial scrutiny*

Outside of BC, no dependants' relief decisions involving discrimination as the motivation for disinheritance have been reported. The closest was the Saskatchewan case of *Grams v Grams Estate*.[181] A pleading for a will to be proven in solemn form included a public policy argument by the testator's son, who alleged he was left out of his father's will because he was gay. This was not a dependants' relief application, but a request for the will to be set aside, similar to what happened at the trial level in *Spence*. In ordering the probate trial, the Court in *Grams* made the following remarks:

> [I]t seems appropriate to also observe that the Supreme Court of Canada has directed that the values found in the *Canadian Charter of Rights and Freedoms*…must be considered when analyzing and considering common law principles. …
>
> Dependency is currently the only reason set by the Legislature for setting aside a will on the application of a child: The Dependants' Relief Act, 1996, SS 1996, c D-25.01.

177. *Grewal*, *supra* note 157 at paras 205-208; *Prakash*, *supra* note 161 at paras 62-65.
178. *Peden*, *supra* note 164 at para 63.
179. *Patterson*, *supra* note 166 at para 7.
180. *Peden*, *supra* note 164 at paras 10-24; *Patterson*, *supra* note 166 at paras 1-2; *Prakash*, *supra* note 161 at paras 34-38; *Grewal*, *supra* note 157 at paras 173-190.
181. *Grams v Grams Estate*, 2015 SKQB 374, leave to appeal to SKCA refused, 2016 SKCA 12 [*Grams*].

> My function in Stage 1 is to determine if there is a genuine issue to be tried. In my view, there is a foundation for the argument that a will which ignores a child because of the child's sexual orientation will be set aside."[182]

Recall that in Saskatchewan, adult independent children technically qualify as dependants under the *Dependants' Relief Act*. The application judge's reasons, though almost certainly unintentionally, highlight again the sole route available to claimants like Bruce Grams to have the discrimination leveled against them through the use of estate law, in the wake of the Ontario Court of Appeal's decision in *Spence*.[183]

In her reasons in *Spence*, Justice Cronk alluded to the fact that if the legislature wanted to prevent disinheritance for discriminatory reasons in private wills, it could reform its legislation accordingly.[184] This is not necessary in regions where adult children can bring dependants' relief claims because those jurisdictions, by including adult children as dependants, have effectively done just that. Claims brought pursuant to a statute with such vast discretionary authority must be considered and applied in accordance with *Charter* values. This means courts must consider the equality and dignity of an adult child along with the testamentary autonomy of the deceased parent. In this way, the inclusion of adult independent children in dependants' relief schemes provides a forum for the scrutiny of a specific type of discrimination within the private law.

While this use of dependants' relief can deliver an actual financial remedy in response to discrimination, financial compensation is not the most important relief that such claims can provide to these children. As the BC cases demonstrate, a finding of discrimination is not solely determinative of a variation claim, nor is it capable of completely trumping the testamentary autonomy of a testator. Given the very strict criteria in Saskatchewan and New Brunswick's dependants' relief legislation, even if discrimination is proven in accordance with the evidence laws in those jurisdictions, a claimant may ultimately be unsuccessful in having a will varied.

Instead, the most important relief is a court of law's public condemnation of discrimination perpetuated by a purportedly lawful document, regardless

182. *Ibid* at paras 23-25.

183. The Ontario Court of Appeal's decision in *Spence CA*, *supra* note 96 was released after the decision in *Grams*, *ibid*. *Grams* ultimately settled and the trial never proceeded. While the Ontario Court of Appeal's decision is not binding on other Canadian jurisdictions, it is nonetheless highly persuasive given that leave to appeal *Spence* was refused by the Supreme Court of Canada. See *Verolin Spence, et al v BMO Trust Co*, 2016 ONCA 196, leave to appeal to SCC refused, 36904 (2016-06-09).

184. *Spence CA*, *supra* note 96 at para 85.

of whether financial relief is ultimately obtained by the adult child, This in and of itself is a crucial aspect of the administration of justice and the maintenance of its repute. Indeed, the expressive effect of state action can be just as important as its tangible, material consequences.[185]

When adult independent children are removed as dependants from statutes like the *TFMA*, a court's ability to scrutinize and pronounce upon the use of a will to perpetuate discrimination is hampered. Notably, a case has recently been reported in British Columbia where a party intends to argue that the ratio of *Lawen* should be applied to exclude adult independent children from the variation of wills in BC [186]

Conclusion

> In most cases, testators give a great deal of anxious consideration to the final disposal of their worldly goods. They know better than any other where kindness came from and where insults came from; and above all else, it is their property to be given as they wish, restricted only to the extent required by law.The Court must be cautious, indeed, before they interfere with such an historic and basic right.[187]

Testamentary autonomy is a "deeply entrenched common law principle"[188] and a significant right recognized by Canada's Supreme Court as worthy of protection and respect.[189] It is not, however, a *Charter* right. While there may be legitimate societal unease with the ability of independent adult children to challenge a parent's will, no aspect of the *Charter* can preclude such applications where permitted by statute. In explaining this point, this paper has sought to demonstrate why the decision in *Lawen Estate v Nova Scotia* was not only wrong, but also unnecessary and even harmful.

In *Lawen*, Justice Bodurtha of the Nova Scotia Supreme Court held that the inclusion of adult independent children as dependants in the *Testators' Family Maintenance Act* constituted a violation of a testator's section 7 right to liberty that could not be saved under section 1 of the *Charter*. This paper has reviewed how the section 7 and section 1 analyses of the

185. Elizabeth S Anderson & Richard H Plides, "Expressive Theories of Law: A General Restatement" (2000) 148:5 U Pa L Rev 1503. For an examination of both the necessity and the challenges of recognizing expressive harm in Canadian law see Ashleigh Keall, "Conceptions of Harm in the Canadian Constitutional Adjudication of Religious Freedom" (PhD Dissertation, UCL 2020), copy on file with author.

186. A recent BC case has allowed the amending of pleadings to include a similar Charter challenge to the inclusion of adult independent children in its wills legislation. See: *Jean-Richard-Dit-Bressel v Carr*, 2020 BCSC 946.

187. *Cross*, *supra* note 120 at para 22.

188. *Spence CA*, *supra* note 96 at para 30.

189. *Tataryn*, *supra* note 10 at para 33.

decision suffer from significant problems, including a failure to provide any PFJ analysis and a fundamental misunderstanding as to the purpose and objective of dependants' relief legislation in Canada.

The removal of adult independent children from the *TFMA* is not a *Charter* issue but a decision only the government of Nova Scotia can make. However, this paper has argued that removing these children from the statute is unnecessary to address popular concerns connected to their *TFMA* claims, whereas their continued inclusion provides a forum to scrutinize a particular form of discrimination perpetuated by private wills.

First and foremost, removing adult independent children from dependants' relief statutes is unnecessary, as demonstrated by other jurisdictions with similar laws. Any societal unease with adult independent children's dependants' relief claims can be reflected in a strict, interpretive approach by courts. This has been the approach in Saskatchewan and New Brunswick, where adult independent children are almost always unsuccessful in their applications to vary a deceased parent's will.

Second and more importantly, disallowing adult independent children's dependants' relief claims may prove harmful. Given the Ontario Court of Appeal's decision in *Spence*, the inclusion of adult children as dependents is crucial in providing the only means for a court to examine and denounce the practice of discriminatory disinheritance in Canada. Courts are obligated to apply the discretionary authority of dependants' relief in accordance with *Charter* values. While such an application requires a careful balance of various competing values, the values of equality and human dignity require a court to, at the very least, consider and pronounce upon discrimination perpetuated through a will. The jurisprudence is multifaceted, and no reported decision in Canada has ever resulted in a complete overriding of testamentary autonomy in favour of the applicant child due to discrimination. However, these decisions also show how the inclusion of adult children in dependants' relief schemes can both assist those who are subject to this kind of discrimination and provide the opportunity for a court to denounce it in a public forum.

In 2011, British Columbia radically overhauled both its family and estate legislation. During this process, various actors lobbied for the removal of adult independent children from its wills variation scheme. Wally Opal, the Attorney General at that time, cited discrimination against female children as a main incentive for keeping adult independent children as dependants under its legislative scheme.[190] If faced with a similar decision,

190. Bethany Lindsay, "Here's why B.C. lets judges rewrite unfair wills," CBC News (24 July 2019), online: CBC News <www.cbc.ca/news> [perma.cc/XM37-TSKT].

I believe the government of Nova Scotia should follow the example of its BC counterpart. Indeed, given the recent outcome in *Leblanc v Cushing Estate*,[191] and in the interests of promoting such values as equality and dignity, the Nova Scotia government should consider not only keeping adult children as dependants under the *TFMA*, but also extending such relief to the common law spouses and step-children of testators as well.

Post Script

The Appeal in *Lawen* was heard in February of 2021. It was allowed and the respondents' Notice of Contention was dismissed, both from the bench. Written reasons were released three months later.[192] The Nova Scotia Court of Appeal provided only brief reasons for its decision with respect to the constitutional aspects of the appeal. Justice Farrar, writing on behalf of the court, rejected Justice Bordutha's s. 7 findings based on the absence of an evidentiary record in the case. The judgment also raised the interesting question as to whether "public interest standing confers any greater right to assert a claim on behalf of estates generally than an individual estate would have"[193]—although the NSCA declined to answer it.[194]

191. *Leblanc*, *supra* note 84.
192. *Nova Scotia (Attorney General) v Lawen Estate*, 2021 NSCA 39
193. *Ibid* at para 80.
194. For a detailed commentary on the appeal decision see Jane Thomson, "Nova Scotia (Attorney General) v. Lawen Estate: A Case Comment" (2021) 41 ETPJ 21.