**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Lawen Estate v. Nova Scotia (Attorney General)* 2019 NSSC 162
**Date:** 20190524
**Docket:** Hfx No. 470647
**Registry:** Halifax

**Between:**

Dr. Joseph Lawen in his capacity as Executor of the Estate of Jack Lawen

First Applicant

Michael Lawen

Second Applicant

v.

Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia

Respondent

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**Decision**

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**Judge:** The Honourable Justice John P. Bodurtha

**Heard:** November 19, 2018, in Halifax, Nova Scotia

**Decided:** May 24, 2019

**Counsel:** Lawrence Graham, Q.C., for the First Applicant
Victor J. Goldberg, Q.C. and Richard Norman, for the Second Applicant
Edward A. Gores, Q.C. and Jeremy Smith, for the Respondent

**Bodurtha, J.:**

## Background

[1] Jack Lawen ("Jack") of Halifax, Nova Scotia, and his wife had four children: three daughters and a son. All are currently, adult children. His daughters are Catherine El-Tawil, Samia Khoury, and Mary Lawen. His son is Michael Lawen, the Second Applicant.

[2] Jack made a will in 2009. He owned several residential income-producing properties in Halifax. Jack passed away in 2016 and pursuant to the will left $50,000 each to Catherine and Samia and the residue of his estate to Michael.

[3] Jack's brother, Dr. Joseph Lawen, the First Applicant, was named in the will as one of Jack's executors. On May 12, 2016, probate was granted to Dr. Lawen as the sole executor, the other named executor having renounced.

[4] Jack's three daughters commenced two actions in the Supreme Court of Nova Scotia after probate was granted.

[5] The second action is brought pursuant to the *Testators' Family Maintenance Act*, RSNS 1989, c 465 (the "TFMA"). The plaintiffs allege that the Will failed to make adequate provisions for them. This is an application brought by the defendants (the "applicants"[1]) seeking declarations that sections 2(b) and 3(1) of the TFMA violate section 2(a) or section 7 of the *Charter of Rights and Freedoms* (the "Charter").

[6] The will was not contested based on undue influence or lack of testamentary capacity.

## Summary

[7] The applicants seek declarations that sections 2(b) and 3(1) of the TFMA violate s. 2(a) or s. 7 of the Charter. They argue that these TFMA provisions should 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." The Attorney General denies that either of

[1] The testator's brother and executor, Dr. Joseph Lawen, and the testator's son, Michael Lawen. They have public interest standing, pursuant to the decision of Wood J (as he then was): 2018 NSSC 188.

the impugned provisions are unconstitutional but says that if there is any violation of the Charter, it is saved by section 1.

[8] I have found as follows on the central issues:

1. sections 2(b) and 3(1) of the TFMA violate section 7 of the Charter. A testamentary decision is a fundamental personal decision that is protected under section 7;
2. sections 2(b) and 3(1) of the TFMA do not violate section 2(a) of the Charter;
3. having found a section 7 violation, the Attorney General has not identified a pressing and substantial objective that can justify the impugned provisions under section 1 of the Charter; and
4. the applicants do not have standing to advance a section 24 Charter claim.

[9] The appropriate remedy to address the unconstitutionality of sections 2(b) and 3(1) of the TFMA is to read down those sections to exclude non-dependent adult children.

## The Legislation

[10] Subsection 3(1) of the TFMA permits a judge to make an order for "adequate maintenance and support" for a dependant where the testator has not done so:

> 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.

[11] The definitions of "child" and "dependant" appear at s. 2 of the TFMA, which provides, in part:

> 2 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;
>
> (b) "dependant" means the widow or widower or the child of a testator…

[12] To be a "dependant" within the meaning of the definition does not require actual dependency or need. One need only be a child, widow, or widower of the testator.

**The "moral obligation"**

[13] A line of caselaw has held that the obligation imposed by the TFMA rests on moral as well as on legal considerations. The Attorney General cites passages from the discussion of the bill in the House of Assembly in 1956, to the effect that a man who fails to provide for "those who have a claim on him" is likely to be "of unsound mind, or subjected to fraud or undue influence…"[2] The applicants argue, such a statement amounts to setting government up as a "moral arbiter, sanctioning the moral choices a testator makes in determining his or her legacy." As tenuous as a second-hand report of a statement in the House may be, the sentiments it expresses are relevant to the legal framework of the TFMA and other Canadian dependants' relief legislation. In any event, the twin legal and moral aspects of the legislation need no proof from legislative history. They are confirmed by the caselaw.

[14] The spirit in which the TFMA has been applied is apparent from the caselaw. In *Zwicker Estate v Garrett* (1976), 15 NSR (2d) 118, [1976] NSJ No 20 (SC-AD), for instance, MacKeigan CJNS said, for the court:

> 47 The task before this Court is to determine whether the testator failed to make "adequate provision in his will for the proper maintenance and support" of his adult daughter … so as to warrant interference by the Court. The question to be asked is moral, not economic. In ignoring the respondent in his will, was the testator in all the circumstances guilty of a "breach of morality", or a "manifest breach of moral duty"? [Emphasis added.]

[15] In *Tataryn v Tataryn Estate*, [1994] 2 SCR 807, the court considered provisions of the British Columbia *Wills Variation Act* that were substantively

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[2] Attorney General's brief at paras., 14-17, citing newspaper reports. There is no Hansard record of these remarks because it was an opposition bill.

identical to the Nova Scotia legislation. I note, of significance, that the Charter was not argued in *Tataryn Estate*. McLachlin J (as she then was), writing for the court, described the interests protected by the legislation at pages 815-816:

> The two interests protected by the Act are apparent. The main aim of the Act is adequate, just and equitable provision for the spouses and children of testators. The desire of the legislators who conceived and passed it was to "ameliorat[e] ... social conditions within the Province". At a minimum this meant preventing those left behind from becoming a charge on the state. But the debates may also be seen as foreshadowing more modern concepts of equality. The Act was passed at a time when men held most property. It was passed, we are told, as "the direct result of lobbying by women's organizations with the final power given to them through women's enfranchisement in 1916". There is no reason to suppose that the concerns of the women's groups who fought for this reform were confined to keeping people off the state dole. It is equally reasonable to suppose that they were concerned that women and children receive an "adequate, just and equitable" share of the family wealth on the death of the person who held it, even in the absence of demonstrated need.
>
> The other interest protected by the Act is testamentary autonomy. The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it limited that right. The absolute testamentary autonomy of the 19th century was required to yield to the interests of spouses and children to the extent, and only to the extent, that this was necessary to provide the latter with what was "adequate, just and equitable in the circumstances." And if that testamentary autonomy must yield to what is "adequate, just and equitable", then the ultimate question is, what is "adequate, just and equitable" in the circumstances judged by contemporary standards. Once that is established, it cannot be cut down on the ground that the testator did not want to provide what is "adequate, just and equitable". [Emphasis added.]

[16] The court in *Tataryn Estate* distinguished between the “moral” and “legal” norms that inform the determination of what is “adequate, just and equitable” at pages 820-823:

> If the phrase "adequate, just and equitable" is viewed in light of current societal norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are 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. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.

> ….
>
> The legal obligations on a testator during his or her lifetime reflect a clear and unequivocal social expectation, expressed through society's elected representatives and the judicial doctrine of its courts…
>
> …
>
> … The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide "adequate, just and equitable" maintenance and support which is enforced after death.
>
> For further guidance in determining what is "adequate, just and equitable", the court should next turn to the testator's moral duties toward spouse and children. It is to the determination of these moral duties that the concerns about uncertainty are usually addressed. There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area, may not be so great as has been sometimes thought. For example, most 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. <u>While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made</u>... [Emphasis added.]

[17] *Tataryn Estate* confirms that one of the pillars of dependants' relief legislation, as traditionally framed, is a moral obligation. There is no need for actual dependency or financial need, or for a legal obligation of support in the testator's lifetime. The Nova Scotia TFMA exemplifies this tendency. However, as I will discuss below, some jurisdictions have moved away from this *status quo* through legislative reform.

## The Nova Scotia legislation

[18] *Tataryn Estate* has been accepted as good authority in interpreting the Nova Scotia TFMA. Moir J made the point in *Welsh v McKee-Daly*, 2014 NSSC 356:

> [41] Despite the statute's references to maintenance, support, and dependency, it is possible to make an order in favour of an independent son or daughter: *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 and *Zwicker Estate v. Garrett* (1976), 15 N.S.R. (2d) 118 (C.A.). However, the case for an

> independent son or daughter is weaker than that for a dependent child or surviving spouse: *Tataryn* at pages 822-823 and *Zwicker* at para. 38.

[19] The purpose of the TFMA was considered in *Walker v Walker Estate* (1998), 168 NSR (2d) 231, [1998] NSJ No. 235, and *David v Beals Estate*, 2015 NSSC 288. In *Beals Estate*, LeBlanc J said:

> [28] Thus, it is clear that an individual's testamentary freedom—their right to dispose of their property in any way they choose—is an important right that should not be interfered with lightly. However, as the Act recognizes, there are limits.
>
> [29] The Act's purpose was considered by this Court in *Walker*, supra at para. 25:
>
> > The mischief sought to be remedied by the legislation is stated in *Re Allen, Allen v. Manchester* [1922] N.Z.L.R. 218, at page 220, adopted by our Court of Appeal in *Garrett v. Zwicker* at page 127, Salmond, J., stated at page 220:
> >
> > > 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. 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.
>
> [30] Thus, one may lose their right to complete testamentary freedom when they fail to meet their basic legal and moral obligations to their spouse and children. The Act aims to address such transgressions. It provides a limited avenue for relief where a testator has failed to make proper and adequate provision for their spouse and children. Where an applicant shows a "clear case" of inadequate provision, I can order that the applicant be provided for out of the testator's estate, notwithstanding the terms of a will.

[20] In *McIntyre v McNeil Estate*, 2010 NSSC 135, the testator left his estate to his youngest child, and several of the others brought a TFMA proceeding. In making an order under the Act, Forgeron J said:

> [19] In *Garrett v. Zwicker*, *supra*, MacKeigan C.J.N.S. confirmed that a dependant was not required to show actual need in order to qualify for consideration under the Act. "Need" in the context of the legislation is relative to the size of the estate and the strength of other claims…

> …
>
> [51] I find that the Plaintiffs have met the burden upon them. They have established, on a balance of probabilities, that their father, the late James McNeil, died without having made adequate provision in his will for their proper maintenance and support, taking into account all relevant circumstances. The Plaintiffs have established that their father failed to meet his legal and moral obligations. I find that the Plaintiffs have a need for maintenance relative to the size of their father's estate; they have a strong moral claim. This claim can be met, while recognizing the fact that the late Mr. McNeil showed a preference to benefit Marlene Wadman, over and above his other children.

[21] In *Brown v Brown Estate*, 2005 NSSC 271, [2005] NSJ No 405, LeBlanc J reviewed several cases that the Attorney General says illustrate the "societal benefit" of the discretion provided by the TFMA in various situations, such as "a person dying before carrying out an intention to change his or her will"; a case where "a claimant had given a lifetime of steadfastness to a parent, was in poor health, and had greater need than a sibling who inherited a parent's estate"; a case where "two children of the testator had been disinherited on the basis of an incorrect conclusion made by the testator while suffering from narcissistic personality disorder"; and a case where "the claimant had attempted four times, ultimately successfully, to reconcile with his father after a period of estrangement…" The court made adjustments to the testamentary dispositions to reflect work done by the applicant on the testator's farm.

[22] The Attorney General points to *McNeil Estate* and *Brown Estate* as illustrations of "the societal benefit of the TFMA." Certainly, there may be a benefit to allowing non-dependent adult children to make TFMA applications where they have been deprived of an expected inheritance. It does not necessarily follow that this policy decision to permit applications by non-dependent adult children outweighs the testator's freedom to dispose of their estate as they see fit. Nor does it necessarily follow that the policy choice trumps a Charter violation, if testamentary freedom is held to rise to that level. A comparison with equivalent legislation in other Canadian jurisdictions supports the view that this is not an obvious or inevitable policy choice for a Canadian legislature in the present day.

## Comparative dependants' relief legislation

[23] The "moral obligation" originates with the early dependants' relief legislation in New Zealand. Some commentators and law reform commissions have criticized the imposition of a moral duty disconnected from any legal

obligation that existed in the testator's lifetime. Present-day Canadian legislation demonstrates various approaches to the problem, with differing provisions as to who constitutes a "dependant" permitted to bring an application.

[24] In *McAuley v. Genaille*, 2017 MBCA 69, leave to appeal refused, [2017] SCCA No 363, the Manitoba Court of Appeal reviewed the history of the legislation in that province, where the former legislation – which rested on a moral obligation similar to that under the TFMA – had been replaced by a new act that made financial need a prerequisite for an order. The *Dependants Relief Act*, CCSM c D37, defines "dependant" in a way that presumptively requires actual dependency. The definition at section 1 includes spouses; former spouses where there was a maintenance obligation at the time of death; common-law partners in certain circumstances; and children, grandchildren, parents, and siblings who were "substantially dependant" on the deceased at the time of death.

[25] Significantly, then, the Manitoba Act expressly requires the dependant to be in "financial need" before an order can be made: s. 2(1). Justice Pfuetzner said, for the court:

> [34] Previously, under *The Testators Family Maintenance Act*, RSM 1988, c T50, as repealed by the Act, SM 1989-90, c 42 (the TFMA), where the deceased failed to make "adequate provision for the proper maintenance and support" of a dependant, the dependant could apply for "such provision as [the judge] deems adequate" (at section 2(1)). The jurisprudence interpreted this provision as applying not only when a dependant was in need of maintenance, but also on what was considered "moral grounds". As stated by Dickson JA (as he then was) in *Barr v Barr*, 1971 CarswellMan 81 (CA), "the prime purpose of the Act is to enforce a moral duty to make adequate provision for the proper maintenance and support of dependants" (at para. 15).
>
> [35] This interpretation of the purpose of the TFMA sometimes led Manitoba courts to make lump-sum awards to independent adult children, not in financial need, in order to discharge the testator's moral duties...

[26] Justice Pfuetzner went on to review the findings of a report in which the Manitoba Law Reform Commission concluded that the legislation placed too much emphasis on the testator's moral duty and that the function of the legislation "should be to secure reasonable provision for the surviving dependants; it should not be employed to enable a dependant who has no need for maintenance to acquire a share of the deceased's [estate]…" (Manitoba Law Reform Commission, *Report on: The Testators Family Maintenance Act* (Report #63) (Winnipeg: Law

Reform Commission, 1985), cited in *McAuley* at paras. 36-37). Justice Pfuetzner contrasted the old and new legislation:

> [42] The first appellate decision to consider the Act was *Davids v Balbon Estate et al*, 2002 MBCA 83. Huband JA, for the Court, considered the difference between the current and former entitlement provisions, and stated (at paras. 19-20):
>
> > There is an essential difference between *The Testators Family Maintenance Act* and *The Dependants Relief Act*. Under the former, family members for whom the testator had made inadequate provision for their maintenance and support were entitled to advance a claim. Under *The Dependants Relief Act*, in order to qualify, the claimant must be "in financial need," in which case the court may order that reasonable provision be made out of the estate for the maintenance and support of the dependant. It has been suggested that the test under *The Testators Family Maintenance Act* was a subjective one, based on whether the testator had breached a moral duty to make adequate provision for his or her dependants. On the other hand, the test under *The Dependants Relief Act* is an objective one to determine the dependant's financial need.
> >
> > However one may look upon it, the object of the legislation under *The Dependants Relief Act* is to ensure that reasonable provision is made out of the estate for the maintenance and support of a dependant who is in financial need. [emphasis in *McAuley*]
>
> [43] Similarly, in *Lam v Le*, 2002 MBQB 17, Krindle J compared the new legislation to the old, and concluded that, "Under the new legislation, the role of the court is limited to responding to the demonstrated financial needs of a dependant" (at para. 11). Also see *Dickinson v Woodiwiss*, 2008 MBQB 136, where Greenberg J indicated that an applicant had to "establish the threshold of financial need" (at para. 11); and Cameron Harvey & Linda Vincent, *The Law of Dependants' Relief in Canada*, 2nd ed (Toronto: Thomson Carswell, 2006) at 72, where the authors indicate that lack of need will be a bar to relief in Manitoba.
>
> [44] The Manitoba courts have indicated that "financial need" does not simply mean living at a subsistence level. Rather, the courts have determined that reasonable financial need requires consideration of the lifestyle of the dependant and the deceased while the deceased was alive…

[27] The court went on in *McAuley* to summarize the general approaches to dependants' relief found in Canadian legislation (see the Manitoba Court of Appeal decision at paras. 33-44 (reviewing the history of the Manitoba legislation) and paras. 45-58 (reviewing the status of dependants' relief legislation in other Canadian jurisdictions)). Most of the statutes in question made entitlement a

function of "adequate provision" or some similar construction. Justice Pfuetzner said:

> [46] No other Canadian jurisdiction's statute uses the language of "financial need" which appears in the Act. In the majority of Canadian jurisdictions, applicants are entitled to apply for dependants relief from an estate if the deceased does not make "adequate provision" for their proper maintenance or support. For example, in Ontario, the *Succession Law Reform Act*, RSO 1990, c S26 states (at section 58(1)):
>
> > Order for support
> >
> > 58(1) Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.
>
> [47] This language is very similar to that formerly applicable in Manitoba under the TFMA.
>
> [48] The same or comparable language is currently used in Alberta, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut. Similarly, in Saskatchewan, dependants can apply for a "reasonable" amount of maintenance from an estate if the deceased did not make "reasonable" provision for their maintenance. New Brunswick's entitlement provision uses slightly different language, indicating that, if the dependant's "resources" are not sufficient to provide adequately for the dependant, a judge may order an adequate provision out of the estate for the maintenance and support of the dependant. In British Columbia, if adequate provision for a dependant's proper maintenance and support is not made in a will, the dependant can apply for provision out of the estate that is "adequate, just and equitable in the circumstances".
>
> [49] In British Columbia, an application can be brought for a share of the estate on moral grounds regardless of financial need. In reviewing such a claim, the Court will take into account whether the testator acted "fairly" towards family members… [Emphasis added.]

[28] *McAuley* provides an excellent overview of the state of the legislation across Canada. The court in *McAuley* focused its attention on the grounds of entitlement. It is also necessary to consider the definitions of dependent (or whatever operative term is used as a prerequisite for making applications under the legislation). A review of the definition provisions of the various Acts indicates that most legislatures have in fact narrowed the class of people who can bring

dependants' relief applications, specifically by excluding independent adult children.

[29] The Saskatchewan *Dependants' Relief Act*, 1996, SS 1996, c D-25.01, defines a "dependant" as a spouse (or person who the testator lived with in place of a spouse), a minor child, or a child over the age of 18 in defined circumstances. Section 2(1) states, in part:

> (c) a child of a deceased who is 18 years or older at the time of the deceased's death and who alleges or on whose behalf it is alleged that:
>
> (i) by reason of mental or physical disability, he or she is unable to earn a livelihood;
>
> or
>
> (ii) by reason of need or other circumstances, he or she ought to receive a greater share of the deceased's estate than he or she is entitled to without an order…

[30] Similar, though not identical, definitions appear in section 1 of the Yukon *Dependants Relief Act*, RSY 2002, c 56, section 1 of the Northwest Territories *Dependants Relief Act*, RSNWT 1988, c D-4, and *Dependants Relief Act*, RSNWT (Nu) 1988, c D-4. Each of these, like the Saskatchewan provision, restricts the definition of "dependant" as regards children to children under a specified age (between 16 and 19 depending on the jurisdiction) or children who were dependent in the sense of being unable to support themselves.

[31] The Alberta *Wills and Succession Act*, SA 2010, c W-12.2, permits an order by or on behalf of a "family member" (s. 90), and the court may "order that any provision the Court considers adequate be made out of the deceased's estate for the proper maintenance and support of the family member" (s. 88(1)(b)). The relevant considerations (s. 93) are somewhat analogous to those in s. 5(1) of the Nova Scotia TFMA. However, "family member" is defined more narrowly in the Alberta legislation at s. 72(b):

> "family member" means, in respect of a deceased,
>
> (i) a spouse of the deceased,
>
> (ii) the adult interdependent partner of the deceased,
>
> (iii) a child of the deceased who is under the age of 18 years at the time of the deceased's death, including a child who is in the womb at that time and is later born alive,

(iv) a child of the deceased who is at least 18 years of age at the time of the deceased's death and unable to earn a livelihood by reason of mental or physical disability,

(v) a child of the deceased who, at the time of the deceased's death,

(A) is at least 18 but under 22 years of age, and

(B) is unable to withdraw from his or her parents' charge because he or she is a full‑time student as determined in accordance with the *Family Law Act* and its regulations, and

(vi) a grandchild or great‑grandchild of the deceased

(A) who is under 18 years of age, and

(B) in respect of whom the deceased stood in the place of a parent at the time of the deceased's death;

[32] The Ontario *Succession Law Reform Act*, RSO 1990, c S.26, provides at s. 57(1):

"dependant" means,

(a) the spouse of the deceased,

(b) a parent of the deceased,

(c) a child of the deceased, or

(d) a brother or sister of the deceased,

to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death; ("personne à charge")

[33] The order is made under s. 58(1), which allows the court to order "such provision as it considers adequate" where the deceased "has not made adequate provision for the proper support of his dependants or any of them."

[34] The Ontario provisions were considered in *Cummings v Cummings* (2004), 235 DLR (4th) 474, [2004] OJ No 90 (Ont. CA), leave to appeal denied, [2004] SCCA No 93. The Ontario Court of Appeal held that the *Tataryn Estate* reasoning governed the Ontario legislation (*Cummings* at paras. 40-52). Blair JA noted one point of distinction between the Ontario act and the British Columbia legislation that was the subject of *Tataryn Estate*:

44 The fact that the British Columbia legislation does not exclude adult independent children was weighed as a factor militating against a "needs only" test by McLachlin J. in *Tataryn*. However, it was only one factor of many, and was not dispositive. In any event, the definition of "dependant" in the *Succession Law Reform Act* is broader than that of its predecessor, the *Dependants' Relief*

> *Act*, and Ontario courts readily applied the "moral duty" analysis to applications under the latter legislation...

[35] In *Spence v BMO Trust Co*, 2016 ONCA 196, however, the Ontario Court of Appeal confirmed that adult independent children are not covered by the Ontario Act. Cronk JA said, for the majority:

> [37] [U]nlike the legislation addressed in *Tataryn*, in Ontario there is no statutory duty on a competent testator to provide in her will for an adult, independent child, whether based on an overriding concept of a parent's alleged moral obligation to provide on death for her children or otherwise: see *Verch Estate v. Weckwerth*, at paras. 43–44, aff'd 2014 ONCA 338, at paras. 5-6, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 288. Adult independent children are not entitled to dependant's relief protection under the SLRA because they do not meet the definition of "dependant" under that statute. Ontario law accords testators the freedom to exclude children who are not dependants from their estate distribution.

[36] The New Brunswick *Provision for Dependants Act*, RSNB 2012, c 111, defines "dependant" as follows at s. 1:

> "dependant" means
>
> (a) the spouse or child of the deceased, and
>
> (b) any other person who is, at the time of the deceased's death, a dependant of the deceased as defined in section 111 of the *Family Services Act*.

[37] A dependant under s. 111 of the *Family Services Act* is simply defined as "a person to whom another has an obligation to provide support under this Part" – that being Part VII (Support obligations, custody and access). Subsection 113(1) requires a parent to provide support "to the extent the parent is capable of doing so … in accordance with need" for a child or for a "child at or over the age of majority who is unable to withdraw from the charge of his or her parents or to obtain the necessaries of life by reason of illness, disability, pursuit of reasonable education or other cause." The basis for an order for maintenance and support is described at s. 2(1) of the *Provision for Dependants Act*:

> 2(1) If a person dies and is survived by a dependant or dependants whose resources, taking into consideration everything to which the dependant or dependants are entitled under a will, on intestacy or otherwise on the death of the deceased, are not sufficient to provide adequately for the dependant or dependants, a judge, on application by or on behalf of any or all of those dependants, may, in the judge's discretion and taking into consideration all the

> circumstances of the case, order that such provision as the judge considers adequate be made out of the estate of the deceased for the maintenance and support of the dependant or dependants.

[38] The Prince Edward Island *Dependants of a Deceased Person Relief Act*, RSPEI 1988, c D-7, defines "dependant" in a manner similar to that in the Manitoba legislation; in particular, the definition includes at s. 1(d)(ii) and (iii):

> (d) "dependant" means
>
> …
>
> (ii) a child of the deceased who is under the age of eighteen years at the time of the deceased's death,
>
> (iii) a child of the deceased who is eighteen years of age or over at the time of the deceased's death and unable by reason of mental or physical disability to earn a livelihood…

[39] The Nova Scotia TFMA, discussed above, most closely resembles the provincial Acts of British Columbia and Newfoundland and Labrador. The British Columbia *Wills, Estates and Succession Act*, SBC 2009, c 13, permits a proceeding to be brought "by or on behalf of the spouse or children," and the court may "order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children" (s. 60). There is no restriction beyond that broad category. Similarly, the Newfoundland and Labrador *Family Relief Act*, RSNL 1990, c F-3, defines "dependant" to mean "the widow, widower or child of the deceased"; there is no age or dependency restriction on the definition of "child." On application by or on behalf of a dependant, the judge may order "that adequate provision shall be made out of the estate of the deceased for the proper maintenance and support of the dependants or 1 of them" (s. 3(1)). The relevant considerations (at s. 5(1)) mainly track those in s. 5(1) of the Nova Scotia TFMA.

[40] It is apparent that not all Canadian jurisdictions regard it as an essential policy that an independent adult child be able to challenge a will on the basis of inadequate provision. In fact, most jurisdictions have narrowed the class of potential applicants to exclude adult children who are not in some form of dependency on the testator. However, Nova Scotia has not amended its legislation to narrow the definition of "dependant".

**The impact of the TFMA on testamentary autonomy**

[41] There is no dispute that dependants' relief legislation such as the TFMA detracts from testamentary autonomy, as McLachlin J. observed in *Tataryn Estate*. She added that "the exercise by the testator of his freedom to dispose of his property … is to be interfered with not lightly but only in so far as the statute requires." (*Tataryn Estate* at page 824). The significance of testamentary autonomy, in the context of testamentary capacity, was noted in *Laramée v Ferron* (1909), 41 SCR 391, where Idington J said at page 409:

> We must be careful not to substitute suspicion for proof. We must not by an extensive doing so render it impossible for old people to make wills of their little worldly goods. The eye may grow dim, the ear may lose its acute sense, and even the tongue may falter at names and objects it attempts to describe, yet the testamentary capacity be ample.
>
> To deprive lightly the aged thus afflicted of the right to make a will would often be to rob them of their last protection against cruelty or wrong on the part of those surrounding them and of their only means of attracting towards them such help, comforts and tenderness as old age needs.

[42] In *Canada Trust Co v Ontario Human Rights Commission* (1990), 69 DLR (4th) 321, 1990 CarswellOnt 486 (Ont CA), the majority cited *Blathwayt v Lord Cawley*, [1976] AC 397 (HL), for the proposition that "[t]he freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law…" (*Canada Trust Co.* at para. 35). The English High Court has observed that "a person may leave his or her assets as he or she sees fit, whether such disposition be unexpected, inexplicable, unfair and even improper … or surprising, inconsistent with lifetime statements, vindictive or perverse … or hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed…" (*Vegetarian Society v Scott*, [2013] EWHC 4097, at para. 23). The South African Supreme Court of Appeal has said that "not to give due recognition to freedom of testation, will … also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away", before discussing the limits on testamentary freedom (*BoE Trust Ltd NO and Another (in their capacities as co-trustees of the Jean Pierre De Villiers Trust 5208/2006)* (846/11) [2012] ZASCA 147, at para. 27).

[43] More recently, in *Spence*, the majority of the Ontario Court of Appeal described testamentary autonomy as "a deeply entrenched common law

principle", adding that "[t]he freedom to dispose of her property as a testator wishes has a simple but significant effect on the law of wills and estates: no one, including the spouse or children of a testator, is entitled to receive anything under a testator's will, subject to legislation that imposes obligations on the testator…" (*Spence* at paras. 30 and 32). Cronk JA spoke of "the robust nature of the principle of testamentary freedom and its salutary social interest dimensions…" (*Spence* at para. 38).

[44] The Attorney General emphasizes that (as the cases above acknowledge) testamentary freedom is not unlimited. As Wright J said in *Drescher v Drescher Estate*, 2007 NSSC 352, "[t]here are a number of situations that regularly come before the courts where the courts will order or sanction a departure from the testator's stated or apparent intentions, e.g., classic *Saunders Vautier* situations, TFMA situations, matrimonial property situations and certain variation of trusts situations." (*Drescher* at para. 32). It does not follow from this, however, that any and all intrusions the legislature chooses to make will be justifiable.

[45] In *Canada (Attorney General) v Hislop*, [2007] 1 SCR 429, 2007 SCC 10, the majority held, *inter alia*, that an estate did not have standing to advance a Charter equality rights claim under s. 15(1), the benefit of which was restricted to an "individual." LeBel and Rothstein JJ remarked that "[i]n the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed." (*Hislop* at para. 73). I do not believe this remark can be extrapolated into a reduction of testamentary freedom to a mere financial matter; the court's concern was with the claim by the estate, not with the testator's ability to dispose of their assets.[3]

[46] The applicants argue that testamentary autonomy has significance beyond the merely commercial. They submit "[t]he exercise of an individual's testamentary freedom is different than an individual's decision to sell his or her house or car, for example, while alive"; it 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." In view of the caselaw from across the common law jurisdictions treating testamentary freedom as a "social interest" that is "rooted in

[3] It should also be noted that the court was particularly concerned with the use of the word "individual" in s. 15(1), while ss. 2 and 7, with which this matter is concerned, each use the word "everyone."

law", it seems unreasonable to reduce testamentary freedom to a purely economic or financial interest.

[47] The issue of whether testamentary autonomy is a constitutionally protected right has not been considered by the courts. In arguing for Charter scrutiny, the applicants say the creation of a statute governing the moral duties involved in will-making is "precisely what the Charter was created to protect citizens from: the tyranny of the majority…" The majority said, in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at page 337 (See also *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, at para. 256):

> What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority".

[48] The applicants correctly point out, as the majority of the Supreme Court of Canada said in *Hislop* at para. 94, "the Canadian Constitution should not be viewed as a static document but as an instrument capable of adapting with the times by way of a process of evolutionary interpretation, within the natural limits of the text, which "accommodates and addresses the realities of modern life"…"

**Section 7**

[49] Section 7 of the Charter provides:

> Liberty
>
> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[50] The majority in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, commented on the scope of the right to liberty under section 7. Bastarache J said:

> 49 The liberty interest protected by s. 7 of the Charter is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting…; to produce documents or testify…; and not to loiter in particular areas... In our free and democratic society, individuals are entitled to make decisions of fundamental

> importance free from state interference. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80, La Forest J., with whom L'Heureux-Dubé, Gonthier and McLachlin JJ. agreed, emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the Charter as a whole and that it protects an individual's personal autonomy [Emphasis added.]:
>
> ... liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.
>
> 50 In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J., speaking for herself alone, was of the opinion that s. 251 of the *Criminal Code* violated not only a woman's right to security of the person but her s. 7 liberty interest as well. She indicated that the liberty interest is rooted in fundamental notions of human dignity, personal autonomy, privacy and choice in decisions regarding an individual's fundamental being. She conveyed this as follows, at p. 166:
>
> > Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.
>
> The above passage was endorsed by La Forest J. in *B. (R.)*, *supra*, at para. 80. This Court in *B. (R.)* was asked to decide whether the s. 7 liberty interest protects the rights of parents to choose medical treatment for their children. The above passage from Wilson J. was applied by La Forest J. to individual interests of fundamental importance in our society such as the parental interest in caring for one's children. [Emphasis added.]

[51] In *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, the majority confirmed that section 7 should not be interpreted as "frozen, or its content as having been exhaustively defined in previous cases." (*Gosselin* at para. 82).

[52] The applicants argue that the courts have considered "decisional autonomy" as a basis for relief under section 7. In *R v Jones*, [1986] 2 SCR 284, for instance, Wilson J, dissenting, took the view that legislation depriving a parent of "the right to educate his children in accordance with his conscientious beliefs" would violate the liberty interest, (*Jones* at page 321) although the applicants admit that the majority did not specifically decide this point (*Jones* at pages 302-303). The applicants also say the Supreme Court of Canada has found "decisional autonomy" in the right to decide where one lives. In fact, in *Godbout v Longueuil*

*(City)*, [1997] 3 SCR 844, only a minority of the court held that a municipal residence requirement for city employees violated the right to liberty (As noted in *Blencoe* at para. 51). La Forest J, writing for himself, L'Heureux‑Dubé J, and McLachlin J (as she then was), endorsed the view of Wilson J in *Morgentaler* that "the s. 7 liberty interest is concerned not only with physical liberty, but also with fundamental concepts of human dignity, individual autonomy, and privacy." (*Godbout* at para. 65). La Forest J went on in *Godbout* at paras. 66-67:

> The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in *B. (R.)* that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.
>
> The soundness of this position can be appreciated most readily, I think, by reflecting upon some of the intensely personal considerations that often inform an individual's decision as to where to live. Some people choose to establish their home in a particular area because of its nearness to their place of work, while others might prefer a different neighbourhood because it is closer to the countryside, to the commercial district, to a particular religious institution with which they are affiliated, or to a medical centre whose services they require. Similarly, some people may, for reasons dearly important to them, value the historical significance or cultural make-up of a given locale, others again may want to ensure that they are physically proximate to family or to close friends, while others still might decide to reside in a particular place in order to minimize their cost of living, to care for an ailing relative or, as in the case at bar, to maintain a personal relationship. In my opinion, factors such as these vividly reflect the idea that choosing where to live is a fundamentally personal endeavour, implicating the very essence of what each individual values in

> ordering his or her private affairs; that is, the kinds of considerations I have mentioned here serve to highlight the inherently private character of deciding where to maintain one's home. In my view, the state ought not to be permitted to interfere in this private decision-making process, absent compelling reasons for doing so. [Emphasis added.]

[53] Subsequent caselaw has endorsed the view of Wilson and La Forest JJ that "inherently private" decisions, in some circumstances, will trigger s. 7. In *R v Malmo-Levine; R v Caine*, 2003 SCC 74, the majority considered "whether broader considerations of personal autonomy, short of imprisonment, are also sufficient to invoke s. 7 protection." (*Malmo-Levine* at para. 84). The issue was the use of marijuana. Gonthier and Binnie JJ said:

> 85 In *Morgentaler*, *supra*, Wilson J. suggested that liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance", "without interference from the state" (p. 166). Liberty accordingly means more than freedom from physical restraint. It includes "the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference": *Godbout* … at para. 66; *B. (R.)* … at para. 80. This is true only to the extent that such matters "can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence": *Godbout*, supra, at para. 66...
>
> 86 While we accept Malmo-Levine's statement that smoking marihuana is central to his lifestyle, the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle. One individual chooses to smoke marihuana; another has an obsessive interest in golf; a third is addicted to gambling. The appellant Caine invokes a taste for fatty foods. A society that extended constitutional protection to any and all such lifestyles would be ungovernable. Lifestyle choices of this order are not, we think, "basic choices going to the core of what it means to enjoy individual dignity and independence"...
>
> 87 In our view, with respect, Malmo-Levine's desire to build a lifestyle around the recreational use of marihuana does not attract Charter protection. There is no free-standing constitutional right to smoke "pot" for recreational purposes.

[54] In *Carter v Canada (Attorney General)*, 2015 SCC 5, the court held that there was a denial of the right to make a fundamental personal choice free from state interference where a person suffering from a degenerative disease could not receive medical assistance in choosing when to die due to the *Criminal Code* prohibition on aiding and abetting suicide (*Carter* at paras. 64-69).

[55] In *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55, the constitutional issue arose from a federal Department of Justice directive imposing after-hours standby shifts for lawyers working in the Immigration Law Directorate. A labour adjudicator held that the directive infringed the lawyers' right to liberty. That decision was set aside on judicial review by the Federal Court of Appeal. On further appeal to the Supreme Court of Canada, Karakatsanis J said, for the majority:

> 48 The appellant … submits the directive violates the lawyers' s. 7 Charter right to liberty in a way that does not comply with the principles of fundamental justice. The appellant argues that the directive limits the choices the lawyers are able to make about how to lead their private lives, and therefore engages their liberty interests...
>
> 49 The extent to which s. 7 of the Charter applies outside the context of the administration of justice has yet to be settled in this Court... But even assuming s. 7 applies to the relationship at issue here, I would agree with the Federal Court of Appeal that the adjudicator clearly overstated the breadth of the right to liberty protected under s. 7. Section 7 protects a sphere of personal autonomy involving "inherently private choices" (*R. v. Malmo-Levine* … at para. 85, quoting *Godbout* ... at para. 66). However, such choices are only protected if "they implicate basic choices going to the core of what it means to enjoy individual dignity and independence" (*ibid*.).
>
> 50 The directive's incursion into the private, after-work lives of the lawyers does not implicate the type of fundamental personal choices that are protected within the scope of s. 7. *Malmo-Levine* and *Godbout* are clear that not all activities that an individual happens to define as central to his or her lifestyle are protected by s. 7. As examples, *Malmo-Levine* noted that a taste for fatty foods, an obsessive interest in golf and a gambling addiction are not afforded constitutional protection... By analogy, the ability of the lawyers - for two to three weeks per year - to attend operas or piano lessons, or to train for a triathlon without having to keep a pager nearby are not protected by s. 7.
>
> 51 The directive also affects the ability of the lawyers to spend time with their children and families. While on standby, some of the lawyers are unable to visit family or provide the level of attention to their children that they would like to because they must stay within an hour of the office. But again, these consequences do not affect the lawyers' ability to make fundamental personal choices... Instead, the directive requires them, as a condition of their employment, to be potentially less available to their families for, at most, two to three weeks a year. This does not fall within the scope of s. 7.

[56] Accordingly, the directive did not engage the affected lawyers' liberty interests, and therefore did not impact their constitutional rights.

[57] The applicants are correct to submit that the right to liberty "is not limited to the right not to be locked up in jail. It clearly relates to individual values and how an individual orders his or her private affairs." Nevertheless, the scope of liberty under s. 7 remains unclear. The Attorney General argues that it is restricted to "personal liberties related to one's physical autonomy", including "bodily integrity and medical care in the context of physician-assisted suicide." Various statements by the Supreme Court of Canada demonstrates that this interpretation of s. 7 is too restrictive. However, the Attorney General is correct to observe that s. 7 does not protect property or economic rights. Professor Hogg's arguments for a narrow construction, particularly in respect of property rights and freedom of contract, (Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Thomson Reuters, looseleaf) at §47.7(b)) were summarized by Bastarache J in *Blencoe*:

> 53 Professor Hogg … supports a more cautious approach to the interpretation of s. 7 such that s. 7 does not become a residual right which envelopes all of the legal rights in the Charter. Professor Hogg also addresses the deliberate omission of "property" from "life, liberty and security of the person" in s. 7, and states, at p. 44-12:
>
> > It also requires ... that those terms [liberty and security of the person] be interpreted as excluding economic liberty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.
>
> 54 Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom…

[58] In pointing out s. 7 does not protect economic rights, the Attorney General says the applicants are trying to "strain the interpretation of s. 7, to extend it to the economic ability of a testator to not adequately provide for his or her children after death." The Attorney General makes an analogy to expropriation, noting that a person whose property is expropriated has no Charter protection. This analogy is flawed because expropriation, I note, does not involve a choice or decision by the owner of the land, but an act of the state in relation to ownership.

[59] The Attorney General goes on to argue that the TFMA policy justifications should be respected. The Legislature, it is submitted, only provides a discretion to the court to make an order under the TFMA; this is not a direction that dependants must be provided for out of an estate. The Attorney General also points to the various limitations (discussed earlier) on testamentary freedom that exist in the general law. Unfortunately, none of this answers the question of whether a

testamentary freedom is (or, more to the point, can be) the sort of fundamental personal decision contemplated by the Supreme Court of Canada.

[60] The applicants' argument would be stronger had the majority in *Godbout* accepted the minority view that the choice of location of a home is protected by s. 7, or had the majority in *Jones* specifically decided that educating one's children fell into this category. It is not, however, an absurd argument to say that the disposal of one's estate is a fundamental personal choice that is undermined by being subject to a purely "moral" claim by an independent adult child, justified by social expectations of what a judicious person would do (*Tataryn Estate* at pages 820-821). Although, the Supreme Court of Canada found a purely moral claim by an independent adult child, I am mindful that the Charter was not argued in *Tataryn*. It is clear from the review of legislation above that other Canadian legislatures have rejected this as a matter of policy.

[61] From a Charter point of view, the various statements about the potential significance of testamentary autonomy, in my view, support the conclusions that (1) testamentary autonomy is not necessarily a purely economic or property matter, and (2) it can rise to the level of fundamental personal choice of the kind contemplated in the caselaw under s. 7.

**Principles of fundamental justice**

[62] The court reviewed the principles of fundamental justice in *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, 2013 SCC 72 at paras. 93 *et seq*. 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.

**Subsection 2(a)**

[63] Subsection 2(a) of the Charter provides:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion

[64] The Supreme Court of Canada described the test for a violation of s. 2(a) in *Mouvement laique québécois v Saguenay (City)*, 2015 SCC 16:

> 86 In *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at paras. 56-59, the Court developed a test for determining whether freedom of conscience and religion has been infringed. To conclude that an infringement has occurred, the court or tribunal must (1) be satisfied that the complainant's belief is sincere, and (2) find that the complainant's ability to act in accordance with his or her beliefs has been interfered with in a manner that is more than trivial or insubstantial... Such an infringement, where it arises from a distinction based on religion, impairs the right to full and equal exercise of freedom of conscience and religion... The result is discrimination that is contrary to that freedom and to the state's duty of religious neutrality that flows from it.

[65] The applicants say s. 2(a) is not limited to religious practices, ideas, and beliefs, but extends to "non-theistic systems of belief and morality." They say the TFMA interferes with "profoundly personal beliefs that govern one's perception of oneself and the moral choices which one makes."

[66] In *Big M Drug Mart* at pages 346-347, the majority discussed the antecedents that came to associate the concepts of freedom of religion and freedom of conscience, and said:

> Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Charter. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. [Emphasis added.]

[67] The applicants point to several decisions that they say point to a distinction between freedom of conscience and freedom of religion. In her concurring

judgment in *Morgentaler* at pages 175-176 – a case principally concerned with section 7 – Wilson J said:

> In my view, the deprivation of the s. 7 right with which we are concerned in this case offends s. 2(a) of the Charter. I say this because I believe that the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience. I do not think there is or can be any dispute about that. The question is: whose conscience? Is the conscience of the woman to be paramount or the conscience of the state? I believe, for the reasons I gave in discussing the right to liberty, that in a free and democratic society it must be the conscience of the individual. Indeed, s. 2(a) makes it clear that this freedom belongs to "everyone", i.e., to each of us individually…

[68] The theory and significance of freedom of conscience and religion was considered once again in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, where Rowe J, in a concurring judgment, said:

> 209 The "freedom of conscience and religion" guaranteed by s. 2(a) is an essential part of life in Canadian society. From the most faithful believer to the most convinced atheist, it protects our right to believe in whatever we choose and to manifest those beliefs without fear of hindrance or reprisal. This freedom shields our most personal beliefs -- among those that speak to the core of who we are and how we choose to live our lives -- from interference by the state. Given the diversity of beliefs in our society and the manner in which those beliefs are manifested, the breadth of this freedom has the potential to create friction. Resolving this friction in a manner that reflects the purpose of s. 2(a) is, on occasion, a necessary exercise.

[69] The Attorney General says this supports the view that "conscience and religion" are a unified concept.

[70] The Federal Court commented on freedom of conscience in *Roach v Canada (Minister of State for Multiculturalism and Citizenship)* (C.A.), [1994] 2 FC 406, [1994] FCJ No 33, where the issue was whether a requirement for a new citizen to swear an oath to the Queen violated freedom of conscience. Linden JA, dissenting in part, cited Wilson J's comment in *Morgentaler* that the phrase "'freedom of conscience and religion' should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning." (*Morgentaler* at page 179, cited in *Roach* at para. 45). Justice Linden said:

> 45 … It seems, therefore, that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong, not necessarily founded on any organized religious principles. These are serious matters of conscience. Consequently the appellant is not limited to challenging the oath or affirmation on the basis of a belief grounded in religion in order to rely on freedom of conscience under paragraph 2(a) of the Charter. For example, a secular conscientious objection to service in the military might well fall within the ambit of freedom of conscience, though not religion. However, as Madam Justice Wilson indicated, "conscience" and "religion" have related meanings in that they both describe the location of profound moral and ethical beliefs, as distinguished from political or other beliefs which are protected by paragraph 2(b).
>
> 46 In my view, with respect to both freedom of conscience and freedom of religion, the appellant will have to show that the burden imposed on him by the oath is more than trivial or insubstantial. As Dickson C.J. wrote in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at page 759:
>
> > The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial.
>
> The impact of a law or government action on freedom of conscience or religion has been called a "coercive burden" in cases such as *Edwards Books*, *supra*. In *Edwards Books*, *supra*, Chief Justice Dickson was discussing the state-imposed cost of Sunday-closing legislation on retailers who for religious reasons observe a sabbath or day of rest other than Sunday.
>
> 47 A similar analysis should be employed in assessing any interference with freedom of conscience. This would require a claimant to show that his or her conscientiously held moral views might reasonably be threatened by the legislation in question, and that the coercive burden on his or her conscience would not be trivial or insubstantial. [Emphasis added.]

[71] The majority did not appear to disagree with these remarks. Justice MacGuigan was “in agreement with his reasons for striking out the appellant's declaration in relation to the freedom of conscience and religion …, except that in my opinion the oath of allegiance could not be even a trivial or insubstantial

interference with the appellant's exercise of those freedoms." (*Roach* at para. 2). *Roach* was cited, along with Wilson J's *Morgentaler* comments, in *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579, for the proposition that "[t]he limited jurisprudence in this area suggests that freedom of conscience may be broader than freedom of religion…" (*Christian Medical Society* at para. 115).

[72] The constitutional scholar Bruce Ryder, writing in the Supreme Court Law Review in 2005, discussed the idea of "conscience" (Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005), 29 SCLR (2d) 170):

> 61 When do beliefs become matters of conscience for constitutional purposes? Not all beliefs or opinions can qualify as matters of conscience; otherwise, freedom of conscience would become the freedom to disregard all laws with which we disagree. As a Scottish court stated when a fox-hunter challenged a law prohibiting hunting animals with dogs, freedom of conscience cannot "give individuals a right to perform any acts in pursuance of whatever beliefs they may hold." Yet the spectre of anarchy should not be invoked to deny protection entirely to practices grounded in non-religious conscience. Freedom of conscience, for the purposes of section 2(a), ought to embrace comprehensive non-religious belief systems that have the kinds of significance in the lives of believers analogous to the significance of religion in the lives of the devout. [Emphasis added.]

[73] The Attorney General says *Big M Drug Mart* and *Morgentaler* go no further than protecting manifestations of non-belief. The words "conscience and religion" form a "single integrated concept" (*Big M Drug Mart* at para. 120) linked to state attempts "to compel belief or practice – such as compelling pregnant women to carry a pregnancy to term based on religious beliefs." As such, the protection extends to non-belief, but not to "every decision that a person could make that involves his or her conscience, in the sense of a person's inner feeling of rightness." The applicants reply that they do not say all personal beliefs are constitutionally protected, but that "conscience involves strong personal convictions which contain moral qualities or considerations, and which relate to a sense of self or something larger."

[74] Further, the Attorney General says, the decisions in *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras. 56-59 and *Mouvement laique Quebecois v Saguenay (City)*, 2015 SCC 16 at para. 86 "clearly link freedom of conscience to beliefs and religion." In short, the Attorney General's position is that freedom of conscience encompasses "non-religious belief systems that have the kinds of

significance in the lives of those persons, analogous to the significance of religion in the lives of the religiously devout." The statutory declarations in this case do not suggest anything of that nature. Moreover, the Attorney General says, the "TFMA's concept of adequately providing for dependents out of an estate does not constitute a religion being imposed on non-believers."

[75] In arguing that the TFMA provisions violate freedom of conscience, the applicants essentially say no more than the testator's "moral decision" should be regarded as a matter of conscience. Whether or not "conscience" stands apart from "religion", this is insufficient as a basis for asserting a right under s. 2(a). 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, as the Attorney General argues, "conscience" must mean something analogous to religious belief. In my view, the applicants s. 2(a) Charter challenge with respect to subsections 2(b) and 3(1) of the TFMA must fail.

**Section 1**

[76] Section 1 of Charter provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[77] The framework for a section 1 analysis is set out in *R v Oakes*, [1986] 1 SCR 103, where Dickson CJC said at pages 138-140):

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd., supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart*

> *Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".
>
> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. [Emphasis added.]

[78] The applicants maintain that the Charter violations cannot be saved by section 1. They submit that section 7 violations will rarely be justifiable. Having found a violation of section 7 and not subsection 2(a), my section 1 analysis will proceed on that basis.

[79] In *R v DB*, 2008 SCC 25, the majority said, *per* Abella J:

> 89 This Court has previously noted that violations of s. 7 are seldom salvageable by s. 1. In *Re B.C. Motor Vehicle Act*, at p. 518, Lamer J. observed that "[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like." Wilson J., who concurred in the judgment, declared: "I cannot think that the guaranteed right in s. 7 which is to be subject only to limits which are reasonable and justifiable in a free and democratic society can be taken away by

> the violation of a principle considered fundamental to our justice system" (p. 531 (emphasis in original))…

[80] In other words, section 7 violations are particularly difficult to justify under section 1.

**Pressing and substantial objective**

[81] In *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, McLachlin CJC said for the majority at para. 23, citing *UFCW, Local 1518 v KMart Canada Ltd*, [1999] 2 SCR 1083):

> At the end of the day, people should not be left guessing about why their Charter rights have been infringed. Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process. As this Court has stated, the objective "must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective": per Cory J. in *U.F.C.W., Local 1518, supra,* at para. 59..." [Emphasis added]

[82] Determining the objective of the legislative measure in question "involves interpretation and construction and calls for a contextual approach…" (*Sauvé* at para. 20). The Chief Justice added, in *Sauvé*:

> 23 ... A court faced with vague objectives may well conclude, as did Arbour J.A. (as she then was) in *Sauvé No. 1*, *supra*, at p. 487, that "the highly symbolic and abstract nature of th[e] objective . . . detracts from its importance as a justification for the violation of a constitutionally protected right". If Parliament can infringe a crucial right such as the right to vote simply by offering symbolic and abstract reasons, judicial review either becomes vacuously constrained or reduces to a contest of "our symbols are better than your symbols". Neither outcome is compatible with the vigorous justification analysis required by the Charter. [Emphasis added.]

[83] In *Vriend v Alberta*, [1998] 1 SCR 493, the impugned legislative act was the omission of sexual orientation from the protected grounds in a human rights statute. There was some ambiguity as to the objective. It was suggested that moral considerations were an element. Cory and Iacobucci JJ said, for the majority:

> 113 Against this backdrop, what can be said of the objective of the omission? The respondents submit that only the overall goal of the Act need be examined and offer no direct submissions in answer to this question. In the Court of

> Appeal, absent any evidence on this point, Hunt J.A. relied on the factum of the respondents from which she gleaned several possible reasons why, when the matter was debated by the Alberta Legislature in 1985 and considered at various other times, a decision was made not to add sexual orientation to the IRPA. Some of these same reasons appear in the factum that the respondents have submitted to this Court and include the following:
>
> > · The IRPA is inadequate to address some of the concerns expressed by the homosexual community (e.g. parental acceptance) (paragraph 57);
> >
> > · Attitudes cannot be changed by order of the Human Rights Commission (paragraph 57);
> >
> > · Despite the Minister asking for examples which would be ameliorated by the inclusion of sexual orientation in the IRPA (e.g. employment), only a few illustrations were provided (paragraph 57);
> >
> > · Codification of marginal grounds which affect few persons raises objections from larger numbers of others, adding to the number of exemptions that would have been needed to satisfy both groups (paragraph 66).
>
> 114 In my view, although these statements go some distance toward explaining the Legislature's choice to exclude sexual orientation from the IRPA, this is not the type of evidence required under the first step of the *Oakes* test. At the first stage of that test, the government is asked to demonstrate that the "objective" of the omission is pressing and substantial. An "objective", being a goal or a purpose to be achieved, is a very different concept from an "explanation" which makes plain that which is not immediately obvious. In my opinion, the above statements fall into the latter category and hence are of little help. [Emphasis added.]

[84] The Attorney General points to the passages of *Tataryn Estate* and *Zwicker Estate*, mentioned earlier, for the proposition that the TFMA is intended to enforce testators' moral obligations to make adequate provision for their dependents. The pressing and substantial objective, the Attorney General says, "may be characterized as balancing the legitimate proprietary interests of his or her 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." None of this adequately demonstrates the objectives or purpose to be achieved by the legislature choosing to include non-dependent adult children within the category of potential applicants. To the extent that the Attorney General has identified a purpose or objective, it is the purpose of the legislation as a whole. But the TFMA as a whole is not under attack. No one suggests that the entire Act should be struck down.

[85] If testamentary freedom is an aspect of liberty under s. 7, it is difficult to see how a "pressing and substantial objective" that would justify setting it aside could be rooted in the "proprietary interest" of a non-dependent adult child of a testator. The Attorney General has not identified a coherent objective to be achieved by extending TFMA coverage to non-dependent adults. This conclusion is bolstered by a consideration of the uncertain position of "moral" considerations in Charter analysis.

**Morality, policy, and the Charter**

[86] There has been relatively little consideration of the place of morality under the Charter. The Supreme Court of Canada has not expressly held that "purely moral" objectives, like that of the TFMA, cannot constitute pressing and substantial objectives.

[87] In *R v Butler*, [1992] 1 SCR 452, the issue was whether the *Criminal Code* definition of "obscenity" violated the right to freedom of expression under s. 2(b) of the Charter. Justice Sopinka, for the majority, noted that earlier obscenity legislation had been aimed at suppressing the "immoral influence" of obscene materials. He continued at pages 492-493:

> I agree with Twaddle J.A. of the Court of Appeal that this particular objective is no longer defensible in view of the *Charter*. To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. D. Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991), 1 C.R. (4th) 367, at p. 370, refers to this as "legal moralism", of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the Charter.
>
> On the other hand, I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society. As Dyzenhaus, *supra*, at p. 376, writes:
>
> > Moral disapprobation is recognized as an appropriate response when it has its basis in Charter values.
>
> As the respondent and many of the interveners have pointed out, much of the criminal law is based on moral conceptions of right and wrong and the mere fact that a law is grounded in morality does not automatically render it illegitimate. In

> this regard, criminalizing the proliferation of materials which undermine another basic Charter right may indeed be a legitimate objective. [Emphasis added.]

[88] Gonthier J, concurring in the result, also discussed the moral dimension. He said at pages 521-522:

> In his reasons, Sopinka J. rules out the possibility that "public morality" can be a legitimate objective for s. 163 of the Code and, while admitting that Parliament may legislate to protect "fundamental conceptions of morality", he goes on to conclude that the true objective of s. 163 is the avoidance of harm to society.
>
> In my opinion, the distinction between the two orders of morality advanced by my colleague is correct, and the avoidance of harm to society is but one instance of a fundamental conception of morality.
>
> First of all, I cannot conceive that the State could not legitimately act on the basis of morality. Since its earliest Charter pronouncements, this Court has acknowledged this possibility. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Dickson J. (as he then was) wrote for the Court at p. 337 (*Butler* at 521-522):
>
> > Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

[89] Justice Gonthier cited the *European Convention on Human Rights* and decisions of the European Court of Human Rights in support of the principle that morality could justify prohibition of obscene materials. However, he said, "[n]ot all moral claims will be sufficient to warrant an override of Charter rights… Two dimensions are important here, which allow one to distinguish between morality in the general sense and "fundamental conceptions of morality"." (*Butler* at 522-523) He said at pages 523-524:

> First of all, the moral claims must be grounded. They must involve concrete problems such as life, harm, well-being, to name a few, and not merely differences of opinion or of taste. Parliament cannot restrict Charter rights simply on the basis of dislike; this is what is meant by the expression "substantial and pressing" concern.
>
> Secondly, a consensus must exist among the population on these claims. They must attract the support of more than a simple majority of people. In a pluralistic society like ours, many different conceptions of the good are held by various segments of the population. The guarantees of s. 2 of the Charter protect this pluralistic diversity. However, if the holders of these different conceptions agree that some conduct is not good, then the respect for pluralism that underlies s. 2 of

> the Charter becomes less insurmountable an objection to State action... In this sense a wide consensus among holders of different conceptions of the good is necessary before the State can intervene in the name of morality. This is also comprised in the phrase "pressing and substantial".
>
> The avoidance of harm caused to society through attitudinal changes certainly qualifies as a "fundamental conception of morality". After all, one of the chief aspirations of morality is the avoidance of harm. It is well grounded, since the harm takes the form of violations of the principles of human equality and dignity. Obscene materials debase sexuality. They lead to the humiliation of women, and sometimes to violence against them. This is more than just a matter of taste. Without entering into the examination of the rational connection, some empirical evidence even elucidates the link between these materials and actual violence. Even then … as is reiterated by my colleague in his reasons, scientific proof is not required, and reason and common experience will often suffice.
>
> Furthermore, taking into account that people hold different conceptions about good taste and the acceptable level of sexual explicitness, most would agree that these attitudinal changes are serious and warrant State intervention (civil liberty groups who advocated that this Court strike down s. 163 of the Code concede that harm can justify State intervention, but they deny that any harm flows from obscene materials; that is a different question).

[90] In *Sauvé*, the appellants challenged a provision of the *Canada Elections Act* that barred some prisoners from voting. The Crown conceded that the provision violated the right to vote under section 3 of the Charter, but claimed the violation was justified under section 1. In addressing rational connection, McLachlin CJ said, for the majority:

> 44 Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter... It also runs counter to the plain words of s. 3, its exclusion from the s. 33 override, and the idea that laws command obedience because they are made by those whose conduct they govern. For all these reasons, it must, at this stage of our history, be rejected. [Emphasis added.]

[91] The majority held that the provision was not justifiable; in summary, "the government's stated objectives of promoting civic responsibility and respect for the law and imposing appropriate punishment" were "capable in principle of justifying limitations on Charter rights. However, the government fails to establish proportionality, principally for want of a rational connection between denying the vote to penitentiary inmates and its stated goals." (*Sauvé* at para. 19).

[92] In dissent, Gonthier J took the view that Parliament was entitled to deference in dealing with the right to vote "because we are dealing with

"philosophical, political and social considerations", because of the abstract and symbolic nature of the government's stated goals, and because the law at issue represents a step in a dialogue between Parliament and the courts." (*Sauvé* at para. 8). The Chief Justice, speaking for the majority, rejected this view. She said:

> 9 I must, with respect, demur. The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.
>
> 10 The Charter distinguishes between two separate issues: whether a right has been infringed, and whether the limitation is justified. The complainant bears the burden of showing the infringement of a right (the first step), at which point the burden shifts to the government to justify the limit as a reasonable limit under s. 1 (the second step). These are distinct processes with different burdens. Insulating a rights restriction from scrutiny by labeling it a matter of social philosophy, as the government attempts to do, reverses the constitutionally imposed burden of justification. It removes the infringement from our radar screen, instead of enabling us to zero in on it to decide whether it is demonstrably justified as required by the Charter. [Emphasis added.]

[93] The Chief Justice elaborated on the proper application of deference on a section 1 review:

> 12 At the s. 1 stage, the government argues that denying the right to vote to penitentiary inmates is a matter of social and political philosophy, requiring deference. Again, I cannot agree. This Court has repeatedly held that the "general claim that the infringement of a right is justified under s. 1" does not warrant deference to Parliament... Section 1 does not create a presumption of constitutionality for limits on rights; rather, it requires the state to justify such limitations.
>
> 13 The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights. This case is not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote — one of the most fundamental rights guaranteed by the Charter — and Parliament's denial of that right. Public debate on an issue does not transform it into a matter of "social philosophy", shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral

> interests, to safeguard the right to vote guaranteed by s. 3 of the Charter. [Emphasis added.]

[94] The majority thus accepted that "[w]hile a posture of judicial deference to legislative decisions about social policy may be appropriate in some cases, the legislation at issue does not fall into this category." (*Sauvé* at para. 15). This was on account of the relationship of the legislation in issue to "the foundations of the participatory democracy guaranteed by the Charter..." (*Sauvé* at para.15). The majority also rejected the submission that "the philosophically based or symbolic nature of the government's objectives in itself commands deference." (*Sauvé* at para. 16).

[95] In *Vriend*, where the challenge was to the scope of human rights legislation and specifically the omission of sexual orientation as a protected ground, the majority said:

> 115 In his reasons for judgment, McClung J.A. alludes to "moral" considerations that likely informed the Legislature's choice. However, even if such considerations could be said to amount to a pressing and substantial objective (a position which I find difficult to accept in this case), I note that it is well established that the onus of justifying a Charter infringement rests on the government... In the absence of any submissions regarding the pressing and substantial nature of the objective of the omission, the respondents have failed to discharge their evidentiary burden, and thus, I conclude that their case must fail at this first stage of the s. 1 analysis.

[96] *Butler* indicates that a Charter violation will not be justified by an objective that amounts to enforcing "the conventions of a given community…" (*Butler* at page 492). Morality can, however, be the basis for legislating "for the purposes of safeguarding the values which are integral to a free and democratic society." (*Butler* at page 493). In this case, the difficulty for the Attorney General is that the objective of the specific legislative act that is impugned here – allowing a non-dependent adult child to advance a claim against an estate for "adequate provision" – rests on a moral justification. It is clear from decisions such as *Sauvé* that, while there may be circumstances in which the courts will defer on "social policy" issues, that will not automatically be the case. Especially, on a decision to limit fundamental rights.

[97] As noted above, in my view, the Attorney General has not identified any pressing and substantial objective that is served by the specific inclusion of non-

dependent adult children in the class of "dependants" eligible to apply under the TFMA.

**Rational connection**

[98] The Attorney General says the TFMA is rationally connected to its goals, essentially by the flexibility given to the judge to make determinations of what constitutes "adequate provision" in specific circumstances, and to admit the evidence relevant to that determination.

[99] The Attorney General submits that the TFMA "was carefully designed to meet the objective of balancing the legitimate proprietary interest of testators and the legitimate interests of their heirs in respect of family provision." This is said to be demonstrated by the identification of a non-exhaustive list of relevant considerations in s. 5. Each of these considerations, the Attorney General says, "is connected to the TFMA's purpose of balancing the legitimate proprietary interest of testators and the legitimate interests of their heirs in respect of family provision." Additionally, the judge is given evidentiary powers in ss. 5(2) and (3). The evidence provisions, the Attorney General suggests, reflect "serious consideration to the issues of having sufficient information and evidence before a judge to allow the judge to make assessments of the factors under s. 5(1)."

[100] As with the "pressing and substantial objective" aspect of the analysis, the Attorney General is essentially arguing to justify the existence of the TFMA as a whole, not to defend the specific impugned provision.

[101] The applicants say the impugned provisions are overbroad. They deny there is a rational connection "between the TFMA's extension to non-dependent adult children and the legislation's objective." They cite *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, where the Supreme Court of Canada held that a hate speech provision barring speech that "exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground." Rothstein J said, for the court:

> [92] Thus, in order to be rationally connected to the legislative objective of eliminating discrimination and the other societal harms of hate speech, s. 14(1)(b) must only prohibit expression that is likely to cause those effects through exposure to hatred. I find that the words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(b) are not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups. The manner in which they infringe freedom of expression cannot be

> justified under s. 1 of the Charter and, consequently, they are constitutionally invalid.
>
> [93] It remains to determine whether the words "ridicules, belittles or otherwise affronts the dignity of" can be severed from s. 14(1)(b) of the Code, or whether their removal would transform the provision into something which was clearly outside the intention of the legislature. It is significant that in the course of oral argument before this Court, the Attorney General for Saskatchewan endorsed the manner in which the words "ridicules, belittles or otherwise affronts the dignity of" were read out in *Bell*. I accept his view that the offending words can be severed without contravening the legislative intent.

[102] The applicants argue the same reasoning should be applied here. Their theory is that the TFMA is overbroad by virtue of its allowance of claims by non-dependent adult children, who are not required to establish need or dependency to succeed on a TFMA application. As such, they say, the legislation as drafted is overbroad, and therefore fails the rational connection stage of the analysis.

[103] The Attorney General characterizes the purpose of the legislation as being "to prevent hardships and correct injustices, by balancing the legitimate proprietary interest of testators and the legitimate interests of their heirs in respect of family provision." If the legislative objective of imposing a moral standard on testamentary dispositions is in fact a pressing and substantial one, then the means chosen are rationally connected to the objective. Allowing non-dependent adult children to apply under the TFMA is rationally connected to imposing a moral duty on testators to make "adequate provision" for those children. Once again, it is the lack of a clearly defined pressing and substantial objective that is decisive.

**Minimal impairment**

[104] The question at the minimal impairment stage of the *Oakes* test was set out by Karakatsanis J for the majority in *R v KRJ*, 2016 SCC 31:

> [70] The question at this second stage is whether the 2012 amendments are minimally impairing, in the sense that "the limit on the right is reasonably tailored to the objective" (*Carter*, at para. 102). It is only when there are alternative, less harmful means of achieving the government's objective "in a real and substantial manner" that a law should fail the minimal impairment test (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), [2009] 2 S.C.R. 567, at para. 55).

[105] The Attorney General notes that the Legislature has not imposed a mandatory inheritance scheme akin to that found in the *Intestate Succession Act*,

RSNS 1989, c 236. The TFMA, it is argued, goes no further than to give the judge discretion to order adequate provision for proper maintenance and support of a dependant based on all the relevant circumstances.

[106] In support of its minimal impairment argument, the Attorney General cites the remarks of Hallett J (as he then was) in *Levy v. Levy Estate* (1981), 50 NSR (2d) 14, [1981] NSJ No 555 (SCTD), contrasting the rights of a surviving spouse under the *Matrimonial Property Act* with the less expansive powers under the TFMA:

> 59 I feel something should be said about the provisions in the *Matrimonial Property Act* that allow a surviving spouse to apply for equal division in addition to the right taken by will or on intestacy. The Legislature has, in effect, authorized a court to remake a testator's will upon an application made by a surviving spouse for equal division. Prior to its enactment, a surviving spouse could apply under the *Testators' Family Maintenance Act* for proper maintenance if her husband had not made adequate provision in his will for her and the court could order that proper maintenance be paid to the dependent out of the estate.
>
> 60 The Legislature has now extended the court's right to interfere beyond just the need for maintenance in such a way as to drastically interfere with a testator's intention as to the disposition of his property following his death as evidenced by his will…

[107] The Attorney General also refers to the 1976 discussion of the TFMA's moral obligation in *Zwicker Estate*, where MacKeigan CJ noted that not all dependents have equal moral claims. A testator, he said, is entitled "to discriminate among his children, giving one more than another, for good reason or no apparent reason, so long as he commits no "manifest wrong" in failing to give one the minimum that is "proper maintenance and support" in the circumstances…" (*Zwicker Estate* at para. 42). Thus, he reasoned, "[t]he 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." (*Zwicker Estate* at para. 43). He noted that the language of the Nova Scotia Act as it then was specifically made it a relevant consideration on an application for a variation of an original TFMA order that, for instance, "an unmarried or disabled daughter of the testator … has married or ceased to be disabled" or "a disabled son of the testator who has ceased to be disabled." (*Zwicker Estate* at para. 43, citing s. 6(2) of the TFMA as then drafted). Although the TFMA definition of "dependant" was "not restricted to children who might qualify for maintenance under the *Divorce Act*, … namely, those under age or "unable" to provide for themselves," s. 6 appeared "to place a wife and children

dependent in fact in a preferred position under the Nova Scotia Act." (*Zwicker Estate* at para. 44).

[108] The Attorney General argues the point of citing these cases, as well as *White v White Estate*, 2007 NSSC 254, is to "demonstrate that courts treat adult children differently from, for example, an infant, stating that there must be some special claim or justification for intervention by the Court under the TFMA." According to the Attorney General, in applying the TFMA courts have followed "the principle that the Court must not, except in plain and definite cases, restrain a person's ability to dispose of his or her estate as he or she pleases." This, they submit, answers the applicants' claim that "the TFMA does not allow a testator to have the peace of mind that his or her last wishes will be respected."

[109] The applicants say the impugned provisions fail to minimally impair testamentary freedom by virtue of their application to a wider range of people than necessary to accomplish the government's objective. In *Whatcott*, for instance, the court held that prohibiting speech that "ridicules, belittles or otherwise affronts the dignity of" its subject not only failed at the rational connection stage, but also on minimal impairment, by virtue of overbreadth:

> [109] Restricting expression because it may offend or hurt feelings does not give sufficient weight to the role expression plays in individual self-fulfillment, the search for truth, and unfettered political discourse. Prohibiting any representation which "ridicules, belittles or otherwise affronts the dignity of" protected groups could capture a great deal of expression which, while offensive to most people, falls short of exposing its target group to the extreme detestation and vilification which risks provoking discriminatory activities against that group. Rather than being tailored to meet the particular requirements, such a broad prohibition would impair freedom of expression in a significant way.
>
> [110] The Saskatchewan legislature recognized the importance of freedom of expression through its enactment of s. 14(2) of the Code. To repeat, that provision confirms that "[n]othing in subsection (1) restricts the right to freedom of expression under the law upon any subject." The objective behind s. 14(1)(b) is not to censor ideas or to legislate morality. The legislative objective of the entire provision is to address harm from hate speech while limiting freedom of expression as little as possible.
>
> [111] In my view, once the additional words are severed from s. 14(1)(b), the remaining prohibition is not overbroad. A limitation predicated on expression which exposes groups to hatred tries to distinguish between healthy and heated debate on controversial topics of political and social reform, and impassioned rhetoric which seeks to incite hatred as a means to effect reform. The boundary will not capture all harmful expression, but it is intended to capture expression

> which, by inspiring hatred, has the potential to cause the type of harm that the legislation is trying to prevent. In that way, the limitation is not overbroad, but rather tailored to impair freedom of expression as little as possible.

[110] As with the rational connection stage, if the objective of imposing a moral standard on testamentary freedom and allowing applications to be brought by non-dependent adult children, is in fact a pressing and substantial one, then it is not clear how the impairment could be reduced. The failure is with the objective itself, not with the manner in which it is pursued. However, this is not how the Attorney General has described the objective.

**Proportionality**

[111] In *Crouch v Snell*, 2015 NSSC 340, McDougall J said:

> [167] The requirement of proportionality is the fourth and final step in the *Oakes* analysis. The Supreme Court of Canada in *Lucas*, *supra* at para. 88, stated:
>
> > It is at this stage that the analysis can be undertaken to determine whether an appropriate balance has been struck between the deleterious effects of the impugned legislative provisions on the infringed right and the salutary goals of that legislation. When freedom of expression is at issue, it is logical that the nature of the violation should be taken into consideration in the delicate balancing process. …
>
> [168] Hogg elaborates at 38-43:
>
> > Although this fourth step is offered as a test of the means rather than the objective of the law, it has nothing to do with means. The fourth step is reached, it must be remembered, only after the means have already been judged to be rationally connected to the objective (second step), and to be the least drastic of all the means of accomplishing the objective (third step). What the requirement of proportionate effect requires is a balancing of the objective sought by the law against the infringement of the Charter. It asks whether the Charter infringement is too high a price to pay for the benefit of the law.

[112] The Attorney General cites Hogg's opinion that the fourth step "is really a restatement of the first step, the requirement that a limiting law pursue an objective that is sufficiently important to justify overriding a Charter right… If the objective is sufficiently important, and the objective is pursued by the least drastic means, then it must follow that the effects of the law are an acceptable price to pay for the benefit of the law…" (Hogg at §38.12). This view – that the fourth step is redundant – is not the position of the Supreme Court of Canada, having

been rejected in *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, as Hogg acknowledges:

> The point is a subtle one, but perhaps it can be captured in this way: a legislative objective may, *in principle*, be sufficiently important to justify limiting the claimants' right (step 1), but the least drastic means of accomplishing the objective may still have too drastic an effect on the claimants' rights for the law to be a reasonable limit under s. 1 (step 4). In that case, step 4 would in fact be decisive in denying s. 1 justification to the impugned law. I have emphasized "in principle", because an alternative way of analyzing this case is to say that the objective is not *in fact* important enough to justify limiting the claimants' rights – in which case step 4 would not be reached (and nor would steps 2 and 3).

[113] The Attorney General cites *McNeil Estate* and *Brown Estate* (both summarized above) as cases illustrating the supposed social benefits of the TFMA. Clearly there is a benefit to non-dependent adult children who have (for instance) been of assistance to the testator and feel they should be provided for in the will. The Attorney General's argument, then, is that the TFMA reconciles testamentary freedom and "proper maintenance" of dependants, the latter concept meaning that:

> the deceased should not be permitted to leave, without proper support, persons who stand in a certain familial relationship to him or her… It also considers the social responsibility of the deceased to the state. The deceased should provide proper maintenance to his or her dependants in order that they will not have to be supported from public funds.

[114] As such, the Attorney General argues that "relative need" is a proportionate impact on the Charter rights in question.

[115] The applicants submit that any benefits of the impugned TFMA provisions are outweighed by its deleterious effects. They emphasize that the beneficial effect of the law is assessed "in terms of the greater public good": *Carter v Canada (Attorney General)*, 2015 SCC 5 at para. 122. The majority in *KRJ* stated that social benefits that are "marginal and speculative" will not be sufficient (*KRJ* at para 92). The applicants say the benefits of extending TFMA coverage to non-dependent adults are "nominal, if not non-existent" while the deleterious effects are "significant":

> … In violating freedom of conscience and liberty rights, the TFMA substantially infringes on a testator's ability to make private, moral, and conscientious choices that implicate their dignity and independence. By allowing support claims from

> adults who do not need support, the TFMA unnecessarily overrides personal and fundamental choices, while offering no significant discernable benefits. In addition … the TFMA spawns uncertain and costly litigation and family discord (Second applicant's brief at 23).

[116] None of these arguments are particularly helpful or illuminating in a constitutional context. Once again, however, if the objective of imposing a moral standard on testamentary dispositions is a pressing and substantial one, then this appears to be a proportional way to do it.

**Section 1 conclusion**

[117] In summary, if the objective of the limitation on testamentary rights is accepted as a pressing and substantial one; the TFMA provisions satisfy the other steps of the *Oakes* test. However, in my view, the justification fails at the first step: the Attorney General has not set out a pressing and substantial objective for the specific aspect of the legislation that is under attack. The Attorney General has not identified a pressing and substantial objective to be achieved by expanding coverage under the TFMA to non-dependent adults. The section 7 violation cannot be justified under section 1 of the Charter.

**Section 52**

[118] The Applicants say that the impugned provisions of the TFMA are unconstitutional and should be read down pursuant to s. 52 of the *Constitution Act, 1982* to exclude TFMA actions brought by non-dependent adult children. Section 52 of the *Constitution Act, 1982* states:

> Primacy of Constitution of Canada
>
> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[119] In *Schachter v Canada*, [1992] 2 SCR 679, the Supreme Court considered the appropriate remedies under Section 52 for a Charter breach that is not justified under section 1. Lamer C.J. held at pages 695-696:

> A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the

> *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the *Charter* extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [*Charter*] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.
>
> The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. The courts have always struck down laws only to the extent of the inconsistency using the doctrine of severance or "reading down". Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared.

[120] In *Schachter, supra*, Lamer C.J. found "courts have always struck down laws only to the extent of the inconsistency using the doctrine of severance or 'reading down.'" According to Lamer C.J., by neutralizing only the offending portion, and sparing the rest of the law, this remedy interferes with the role of the legislature as little as possible. The impugned provisions under the TFMA can be provided an interpretation that is constitutional by reading down the definition of dependant in the TFMA to exclude non-dependent adult children.

[121] I find in these circumstances, reading down is the appropriate and effective remedy for the Charter breach. The definition of “dependant” in subsections 2(b) and 3(1) of the TFMA can be read down to exclude non-dependent adult children from the operation of these sections.

**Section 24**

[122] Section 24 of the Charter states:

> Enforcement of guaranteed rights and freedoms
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[123] The Applicants seek remedies under both s. 52 and s. 24 but acknowledge a remedy under both sections is rare.

[124] In *Constitutional Remedies in Canada*, 2nd ed (Toronto, ON: Canada Law Book, 2016) at page 5-19, Kent Roach notes:

> The Supreme Court of Canada has made it clear that standing under s. 24(1) of the Charter is distinct from standing under s. 52(1). In 1989, they held that Borowski did not have standing under s. 24(1) to challenge an absence of protections for fetuses because "he alleges that the rights of a foetus, not his own rights, have been violated". The court also held that Borowski no longer had discretionary public interest standing or standing under s. 52 for the very reason that the abortion law he challenged had been struck down in its 1988 Morgentaler decision.
>
> The words of s. 24(1) seem to contemplate granting standing only to people whose own rights have been infringed or denied. This follows from the personal nature of s. 24(1) remedies which can be contrasted with the more systemic remedies that are available under s. 52(1) when legislation is challenged by a public interest litigant as unconstitutional. Unlike the test for discretionary public interest standing, s. 24(1) grants a person who has had his or her own Charter rights infringed standing as of right. This approach makes sense when it is recognized that s. 24(1) remedies will generally respond to the personal and particular circumstances of those whose rights have been violated, whereas s. 52(1) remedies will generally produce remedies that invalidate or change laws as they affect everyone.

[125] The Applicants were granted public-interest standing by the Court, which permits them to challenge the provisions of the TFMA as public-interest litigants under s. 52(1) (*Lawen Estate v Nova Scotia (Attorney General)*, 2018 NSSC 188).

[126] In *Grant v Winnipeg Regional Health Authority et al*, 2013 MBQB 194 (appealed 2015 MBCA 44), Brian Sinclair died in the Winnipeg Health Sciences Centre after having waited without attention from hospital staff for some 34 hours. The plaintiff, Brian Sinclair's sister and the administrator of his estate, appealed two orders, with one of the issues on appeal being whether the plaintiff had standing to sue for the deceased's Charter rights where the alleged breaches caused his death.

[127] The court stated:

> [7]...I, however, agree with the Master that the decisions of the Supreme Court of Canada in *Canada (A.G.) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, and the

> Ontario Court of Appeal in *Giacomelli Estate v. Canada (Attorney General)*, 2008 ONCA 346, [2008] O.J. No. 1687, are clearly determinative.
>
> [8] The language used by the Supreme Court of Canada in *Hislop*, could not be clearer. At para. 73 it stated:
>
> > …we conclude that estates do not have standing to commence s. 15(1) Charter claims. In this sense, it may be said that s. 15 rights die with the individual.

[128] In the appeal decision (*Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44), the Manitoba Court of Appeal ultimately granted the administrator public-interest standing and agreed with the trial judge on personal standing and stated:

> [44] It is well established that the language of s. 24(1) of the Charter only provides remedies to individuals whose "own" rights have been infringed and not those of some third party[...]
>
> [45] The plaintiff appropriately concedes that simply being a family member, as well as administrator of Mr. Sinclair's estate, does not give her a sufficient personal interest to challenge the alleged unconstitutional actions against Mr. Sinclair […]. To advance the Charter claim she requires an extraordinary basis, coming from either a statute or the common law.
>
> […]
>
> [54] The concept of a cause of action for a breach of a Charter right leading to a remedy pursuant to s. 24(1) of the Charter is a "new endeavour" where the law is still maturing (*Ward* at paras. 21, 33). The Manitoba legislature has not re-examined the survival legislation in Manitoba in light of developments in the law, like the coming into force of the Charter, the *Ward* decision and the different approaches taken in other jurisdictions in the modern era regarding which causes of action survive death. It is not for the judiciary to say whether the legislature should engage in law reform on this issue or not. What can be said, however, is that the law in Manitoba currently is that, unless a personal representative meets the common law criteria of public interest standing, no Charter claim can be brought on behalf of a deceased for the benefit of his or her estate.

[129] Subsection 24(1) of the Charter provides remedies to individuals whose "own" rights have been infringed and not those of a third party. Neither Applicant in the case at bar have claimed that their own rights have been infringed, therefore, neither applicant meets the requirements for standing to bring a s. 24 claim.

**Retroactivity**

[130] The Applicants in this case seek a remedy which extends back to the point when Jack's testamentary freedom was violated. They rely on *Hislop* where the court held that courts "generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling": *Hislop*, *supra* at para. 86. They submit a retroactive remedy would avoid the granting of a "hollow victory" where a successful applicant does not benefit from the remedy that they brought about: *Ibid* at para. 116.

[131] In addition, the Court in *Hislop* stated:

> 117 Achieving an appropriate balance between fairness to individual litigants and respecting the legislative role of Parliament may mean that Charter remedies will be directed more toward government action in the future and less toward the correction of past wrongs. In the present case, the Hislop class' claim for a retroactive remedy is tantamount to a claim for compensatory damages flowing from the underinclusiveness of the former CPP. Imposing that sort of liability on the government, absent bad faith, unreasonable reliance or conduct that is clearly wrong, would undermine the important balance between the protection of constitutional rights and the need for effective government that is struck by the general rule of qualified immunity. A retroactive remedy in the instant case would encroach unduly on the inherently legislative domain of the distribution of government resources and of policy making in respect of this process.

[132] This judgment creates a “substantial change” in the law. This is the threshold that must be met to allow me to consider a prospective or retroactive remedy (*Hislop*, paras. 99 and 107). Some of the factors to be considered include “reasonable or in good faith reliance by governments” on the law, or “the fairness of the limitation of the retroactivity of the remedy to the litigants”, and “whether a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources” (*Hislop*, para. 100). In this case, and conceded by the applicants, there is no evidence of bad faith, unreasonable reliance or conduct that is clearly wrong on behalf of the government. Based on these factors, I see no reason to make a retroactive or prospective remedy; a declaration is sufficient and will provide the successful applicants with the benefit of the ruling (*Hislop*, para. 86).

[133] The applicants are public-interest litigants challenging the constitutionality of the TFMA and they have been successful with respect to that challenge. This is not a “hollow” victory (*Hislop*, para. 116). As a result of the judgment there will be no change in the distribution of assets from what is specified in Jack’s will based on a claim by some of his adult children under the TFMA.

**Conclusion**

[134] I conclude that:

a. sections 2(b) and 3(1) of the TFMA infringe upon testamentary autonomy and violate the right to liberty guaranteed by s. 7 of the Charter and the infringement is not justified under s. 1;

b. sections 2(b) and 3(1) of the TFMA do not violate s. 2(a) of the Charter; and

c. the applicants do not have standing to advance a s. 24 Charter claim.

[135] I make the following declarations:

a. sections 2(b) and 3(1) of the TFMA are inconsistent with the Constitution of Canada and are of no force and effect to the extent that "dependants" includes non-dependent adult children; and

b. sections 2(b) and 3(1) of the TFMA will be read down to exclude non-dependent adult children from the operation of those sections.

[136] If the parties are unable to agree on costs, I will receive written submissions within 30 calendar days of this decision.

Bodurtha, J.