

Resolving Conflicts between Liberty and Equality in Deciding Dependent Relief Claims
in Ontario

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ABSTRACT

This thesis explores the legal principles for dependent relief claims established by the Supreme Court of Canada (SCC) in *Tataryn v. Tataryn Estate* in light of two Ontario Court of Appeal decisions that disagree on the applicability of *Tataryn* in Ontario. The disagreement is in part because in *Tataryn* the Supreme Court of Canada was interpreting British Columbia's *Wills Variation Act (WVA)* and not Ontario's *Succession Law Reform Act (SLRA)*. In this thesis, traditional doctrinal legal research methods will be used to critique the Supreme Court of Canada's decision in *Tataryn v. Tataryn Estate* and advocate for its application in Ontario to balance the conflicting values of the *Charter* in deciding dependent relief claims.

It will be argued that the judiciary has a responsibility to build the common law for dependent relief claims in Ontario in accordance with the Charter values. This means that the Charter value of liberty cannot take priority over the Charter values of equality and human dignity but rather these values need to be balanced when they come into conflict.

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CHAPTER 1 – INTRODUCTION

Definitions

Adequate Support is defined as the legal obligations and the moral obligations owed by the testator to his or her dependents and non-dependents.

Maintenance is defined as the provision made by the testator for the basic needs of his or her dependents.

Family Maintenance Systems are defined as systems that provide judges with wide discretion to vary wills that did not make adequate provisions for maintaining the surviving spouse and children.

A **dependent** is defined as a family member who received support from the deceased before his or her death.

The **disinheritance** of a child reflects the rejection of a child from his or her parent's estate due to his or her identity or special features (i.e., female, homosexual).

Property is either real property, which is rights to land, or personal property, which is rights in any other objects other than land.

Fee Simple Ownership is the absolute ownership of property.

Life Interest Ownership is the right to use and possess the property during one's lifetime.

Testamentary Freedom (Freedom of Disposition) is defined as the testator's right to dispose of his or her property as he or she sees fit.

Section 1.1 – Research Overview

A legal historian and British jurist named Sir Henry Sumner Maine defined testamentary freedom as “the greatest latitude ever given....to the volition or caprice of the individual”.¹ In other words, a person can dispose of his or her wealth as he or she sees fit even if the conditions placed on that disposition are radical or eccentric. This definition points to a legal system that is based on absolute testamentary freedom.

Absolute testamentary freedom was the cornerstone of English law in the eighteenth and nineteenth centuries. This era was the golden age of individualism.² During this time, New Zealand adopted English law, which was based on near absolute testamentary freedom when it became a British colony in 1840.³ The legislator in New Zealand had concerns about the fact that in a near-absolute testamentary freedom legal system the testator could freely abuse his or her testamentary freedom and thus not provide adequately for his or her dependents. New Zealand looked to address this injustice by passing the *Testator’s Family Maintenance Act (TFMA)* of 1900.⁴

New Zealand became the first country to adopt a “flexible restraint on testamentary freedom”⁵, which gave the courts discretion to make a provision out of a will if a testator failed to provide for eligible family members with “adequate provision” for their “proper” maintenance and support.⁶ This Act gave the courts the ability to

¹ H. Maine, *Ancient Law... With Introduction and Notes by... Sir Frederick Pollock... New Edition* (John Murray, 1930).

² Sheena Grattan, “Of lame ducks, black sheep and family bonding” (2020) 51:2 Northern Ireland legal quarterly 198–227.

³ David V Williams, “The Pre-history of the English Laws Act 1858: ‘McLiver v Macky’ (1856)” (2010) 41:3 Law review (Wellington) 361–380.

⁴ Testator's Family Maintenance Act, Statutes of New Zealand, 1900, No. 20
http://www.nzlii.org/nz/legis/hist_act/tfma190064v1900n20374/.

⁵ Joseph Laufer, “Flexible Restraints on Testamentary Freedom: A Report on Decedents’ Family Maintenance Legislation” (1955) 69:2 Harvard law review 277–314.

⁶ Testator's Family Maintenance Act, *supra* note 4.

revise a will if the deceased did not fulfill his or her economic, ethical and moral obligations to his or her family members.⁷ All of the provinces in Canada adopted the New Zealand Law because they supported the aims of the legislation.⁸

The dependent relief legislation that best reflects the aims of the New Zealand legislation is British Columbia's (BC) *Wills, Estates, and Succession Act (WESA)* (previously known as the *Wills Variation Act*). The Supreme Court of Canada (SCC) in *Tataryn v. Tataryn Estate*⁹ is the leading authority in BC on will variation. The main aim of the Act is the adequate, just, and equitable provision for the spouses and children of testators, and the decision intended to foreshadow the modern-day principles of equality¹⁰ that prevailed at the time the decision was made.

The other interest that the Act served to protect is the deceased's liberty interest regarding testamentary freedom. The Act acknowledged that the testator's allocation of his or her estate is done in the best interests of the people closest to him or her. This exercise of his or her testamentary freedom should not be interfered with unless the statute allows for it.¹¹

The Supreme Court explained in *Tataryn* that the determination of what is adequate, just, and equitable must consider both the legal obligations and moral obligations of the testator as of the date immediately before the testator's death. It is the moral obligations of the testator to his or her children that entitle non-dependent children to make legal claims against their parent's estate. In *Tataryn*, the Supreme Court

⁷ *Ibid.*

⁸ Dorota Miler, *Dependants' relief legislation and compulsory portion: limitations of freedom of testation in British Columbia and Germany in comparative perspective*, *Rechtsvergleichung und Rechtsvereinheitlichung* 47 (Tübingen, Germany: Mohr Siebeck, 2017).

⁹ *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807.

¹⁰ *Ibid.* at para 16.

¹¹ *Ibid.* at para 34.

affirmed though that the claims of non-dependent children are subordinate to the claims of spouses and dependent children. It also established that provisions from their parents' estate can only be made for non-dependent children if the size of the estate permits and in the absence of circumstances negating the existence of such an obligation.

The Supreme Court of Canada also established in *Tataryn* that in deciding whether to vary a will the judiciary must perform an objective analysis, which means determining whether the testator was acting according to society's reasonable expectations of what a judicious parent would do in the circumstances as measured by contemporary community standards. This requirement in the Act has allowed BC Courts to prohibit discrimination in wills.¹²

The first objective of this research is to determine whether the application of *Tataryn* allows the judiciary to balance the conflicting values of the Charter in deciding dependent relief claims. The second objective is to determine its applicability in Ontario, as the *Tataryn* authority is based on the Supreme Court's interpretation of British Columbia's (BC) dependent relief legislation. In Ontario, there are two conflicting Court of Appeal decisions that seemingly disagree with each other on the applicability of *Tataryn* in Ontario. This has the potential to create two different lines of case law that are sure to create uncertainty and variability in future dependent relief decisions in Ontario.

¹² See *Grewal v. Litt*, 2019 BCSC 1154 and *Prakash and Singh v. Singh et al*, 2006 BCSC 1545.

Section 1.2 – Significance of Topic

This thesis finds its relevance in the need to find a solution that would allow the judiciary in Ontario to balance the Charter values of equality and human dignity with the Charter value of liberty when these values come into conflict in deciding dependent relief claims in Ontario. Ontario's *Succession Law Reform Act (SLRA)* has the word "support" in it but has not defined what that means. It has given the courts wide latitude to decide its meaning because the remedies awarded will vary based on the case facts and the time period in which the case is being decided.

Part V of the *Succession Law Reform Act (SLRA)* contains provisions for Ontario's dependent relief legislation. In Section 58(1) of the Act, the word "support" could have a narrow or broad meaning for the judiciary in Ontario. A narrow reading of the word means that it only encompasses economic support while a broader reading would be economic support and moral support. The inclusivity of the Act will depend on whether the judiciary adopts a narrow or broad reading of the word "support".

In 2004, the Court of Appeal released its decision in *Cummings v. Cummings*.¹³ The court, which adopted *Tataryn*, chose to accept the broader meaning of "support" to include both economic support and moral support to prevent injustice in adjudicating dependent relief claims. This meant accepting the meaning of "support" that was affirmed by the Supreme Court of Canada in *Tataryn v. Tataryn Estate*, where the court was called upon to interpret British Columbia's *Will Variation Act (WVA)*. Despite the small wording differences between the *SLRA* and the *WVA*, the Court of Appeal in *Cummings* affirmed that *Tataryn* applies in Ontario. This meant that the disposition of an

¹³ *Cummings v. Cummings*, 2004 CanLII 9339 (ON CA).

application under Section 58(1) of the *SLRA* would require the testator to discharge both his or her legal obligations and moral obligations to his or her spouse and children.

In 2016 the Court of Appeal released its decision in *Spence v. BMO Trust*.¹⁴ In this decision, the judiciary adopted a narrow definition of the word “support” and thus interpreted it to mean economic support only. This meant that the testator owes a legal obligation only to his or her dependents, and thus *Tataryn* does not apply in Ontario. Since the testator owed no moral obligation to his or her children, the court ruled that adult independent children could not make dependent relief claims under the *SLRA* and a testator could disinherit his or her child for any reason even if the reasons are discriminatory. The decision of this court was intended to ensure little interference with a testator’s liberty and testamentary rights, and thus it made Ontario a near-absolute freedom jurisdiction.

Before the decision in *Spence*, the common law for dependent relief claims was following the decision in *Cummings* and thus the Charter values of equality, liberty, and human dignity were informing dependent relief decisions in Ontario. This is because the decision in *Cummings* adopted the legal principles established by the Supreme Court of Canada in *Tataryn v. Tataryn Estate*, which is based on its interpretation of British Columbia’s *Wills Variation Act (WVA)*. In *Tataryn*, the Supreme Court acknowledged the legal and moral obligations of the testator and replaced the needs-based test with a judicious parent test. It also endorsed the fact that decisions should consider the social expectations that prevailed at the time the decision was being made. The Supreme

¹⁴ *Spence v. BMO Trust Company*, 2016 ONCA 196 (CanLII)

Court also affirmed that a person's testamentary freedom should only be interfered with so long as the Act permits.

The application of *Tataryn* has made the dependent relief legislation in BC very inclusive, as adult independent children can apply for dependent relief after consideration of competing claims and the size of the estate. The BC judiciary is also prohibiting discrimination in wills on the basis that these wills would not meet the current expectations of contemporary society.¹⁵ Therefore, *Tataryn's* applicability in Ontario needs to be studied because it could be the judicial reform needed to balance the conflicting values of the Charter in deciding dependent relief claims.

Section 1.3 – Research Question

The central question guiding this thesis is whether the adoption of the legal principles established in *Tataryn v. Tataryn Estate*, the leading case on what is “adequate, just and equitable in the circumstances” would balance the conflicting Charter values in deciding dependent relief claims in Ontario. The answer to this question is “yes,” as the judiciary in BC has been applying the legal principles established in *Tataryn* to ensure equality and human dignity to beneficiaries while only interfering with one's testamentary freedom when the testator did not adequately provide for his or her family members. In all the BC cases analyzed in this thesis, the judges in BC remained within the four corners of the Act in interfering with a person's testamentary freedom.

¹⁵ *Ibid.*

Section 1.4 – Thesis Organization

This thesis is divided into five chapters. This thesis includes an introduction and a conclusion. The second chapter provides a historical overview of the flexible restraints on testamentary freedom and an overview of Charter values as an analytical tool. The third chapter makes the case for judicial reform through the application of the *Tataryn* authority in Ontario. The fourth chapter will provide a deeper analysis of how the application of the *Tataryn* authority can make the Charter more meaningful in Wills and Estate laws in Ontario.

CHAPTER 2 – HISTORY OF FLEXIBLE RESTRAINTS ON TESTAMENTARY FREEDOM

Section 2.1 – Introduction

In *Spence v. BMO Trust*, the Court of Appeal made testamentary freedom its starting point in deciding to accept a narrower definition of support. This is not the correct starting point, as flexible restraints on testamentary freedom exist in jurisdictions such as New Zealand and British Columbia. It is important to trace the history of these flexible restraints and examine how they informed dependent relief legislation in both BC and Ontario.

Section 2.2 – Origins of Testamentary Freedom

Testamentary freedom is a fundamental principle of estate law, as it gives testators the unrestricted right to dispose of property upon death.¹⁶ This fundamental principle means that the court must give effect to a testator's intentions.

The origins of testamentary freedom date back to the enlightenment period of the seventeenth century where the natural rights approach was advocated by prominent historical figures and philosophers named Hugh Grotius, John Locke, John Stuart Mill, and Jean-Jacques Burlamaqui.¹⁷ The natural rights approach advocates the fact that testators that have worked so hard to create their wealth should be free of any court or government interference to decide how best to dispose of it upon death.¹⁸

The fact that the testator's unrestricted right to dispose of the property was a natural right is reflected in the following passage:

¹⁶ *In re Estate of Brown (deceased)*, [1934] SCR 324 at 330, 1934 CanLII 49.

¹⁷ J J Burlamaqui, "The Principles of Natural and Politic Law" (1859) 7:9 *The American Law Register* (1852-1891) 576–576.

¹⁸ *Ibid.*

[E]veryone is left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make. He may disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we condemn the course he has pursued. In this respect the law of England differs from that of other countries. It is thought better to risk the chance of an abuse of the power arising from such liberty than to deprive men of the right to make such a selection as their knowledge of the characters, of the past history, and future prospects of their children or other relatives may demand.¹⁹

Sir William Blackstone argued that a testator's property rights expired at death because nature only protects the people that are living and breathing.²⁰ He argued that the right to testamentary freedom and the right to inheritance are all rights that are provided for by the laws and not by nature.²¹

Another justification for testamentary freedom came from utilitarian principles. This perspective was endorsed by the prominent philosopher Jeremy Bentham who is a jurist, economist, and legal reformer.²² Utilitarianism is an ethical theory that holds that actions are morally right if they tend to promote happiness or pleasure. He advocated that testamentary freedom was a civil right and not a natural one.²³ He stated that a testator can achieve the maximum amount of happiness by distributing his or her property as he or she sees fit during his or her lifetime and after death.²⁴

Jeremy Bentham placed great importance on the need for testamentary freedom to be unrestricted, as he placed a lot of weight on the incentive value of testamentary

¹⁹ *Boughton v. Knight* (1873) LR 3 P & D 64 per Sir Henry J Hannen.

²⁰ William Blackstone, *Commentaries on the laws of England: in four books*, with notes selected from the editions of archbold, christian, cole ridge, chitty, stewart, kerr, and others ; and in addition notes and references to all text books ... / by william draper lewis.-- ed (Philadelphia: Geo. T. Bisel, 1922).

²¹ *Ibid.*

²² Ronald C Chester, "Inheritance and Wealth Taxation in a Just Society" (1976) 30:1 Rutgers law review 62.

²³ *Ibid.*

²⁴ *Ibid.*

freedom. He argued that a testator can use his or her testamentary freedom to reward and recognize any conduct that is dutiful and meritorious. This is confirmed in his statement that testamentary freedom is “an instrument of authority, confined to individuals, for the encouragement of virtue and the repression of vice in the bosom of families”.²⁵ Bentham believed that if a testator did not bargain with his or her rights, then those rights would lose some of their value. He argued that if a testator could not distribute his or her property as sees fit then he or she would have less incentive to accumulate wealth and there would be a disincentive for his or her family members to accumulate their wealth.

Libertarianism is another school of thought that endorses the fact that testamentary freedom should be absolute and free of any government-mandated restrictions.²⁶ Milton Friedman endorsed this approach and states that if freedom is put before equality then both will be maximized.²⁷ This is because maximizing economic production requires allowing individuals the freedom to distribute the wealth that they accumulate over their lifetimes as they see fit.²⁸ The individual freedom to distribute property supersedes the need to equalize advancement opportunities for all members of society.²⁹

All of these schools of thought endorse testamentary freedom as a right that should be absolute and one where there is little or no court or government interference. However, the right to testamentary freedom also comes with an obligation to provide

²⁵ Jeremy Bentham, *Principles of the civil code* (W. Tait, 1843) at 337.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

support for family members after death. This is because family members are considered to be the natural recipients of the deceased's property upon his or her death. New Zealand became one of the first jurisdictions to place flexible restraints on one's testamentary freedom.

Section 2.3 – New Zealand's Dependent Relief Legislation

Testamentary freedom was considered to be a cornerstone in English law during the 18th and 19th centuries, which was considered to be the golden age of individualism.³⁰ This law was adopted by New Zealand in 1840 when it became a British colony. It took a women's movement near 1900 to prompt the legislators in New Zealand to reform the laws governing testamentary freedom to prevent men from abusing their testamentary freedom in a way that would increase economic hardships for women.³¹ There were also concerns related to morality, the deserving poor, and self-reliance that drove the need for change in the laws.

The acknowledgement of the need for reforms to the laws governing testamentary freedom reflected a new version of liberalism that accepted the fact that the State could interfere with a person's testamentary freedom. Sir Robert Stout made the first attempt at reforming the laws governing testamentary freedom by introducing the *Limitation on Power of Disposition Bill* in 1896.³² This bill was introduced and seconded based on the view that a man should not be able to exercise his testamentary

³⁰ Grattan, *supra* note 2.

³¹ Rosalind Atherton, "New Zealand's Testator's Family Maintenance Act of 1900 - the Stouts, the women's movement and political compromise" (1990) 7:2 Otago law review 202.

³² 1896 New Zealand Parliamentary Debates (herein NZPD) vol 92, col 585.

freedom in a manner where his wife and children will need to live without any means.³³ This is why Stout proposed a forced heirship scheme where the testator would have to leave one-third of the estate to his wife, one-third to his children, and the remainder would be up to the discretion of the testator.³⁴

Even though the members of parliament (MP) supported the fact that a man should provide for his wife and children so they do not become a charge on the state, the idea of interfering with a man's absolute rights of ownership and the lack of details in the bill led to a discharge of the bill.³⁵ Stout made a second attempt in passing the bill in 1897, but this time the deceased man would be able to decide the allocation for half of his estate instead of one-third.³⁶

Despite efforts to interfere less with a man's testamentary freedom, the parliament rejected the second bill because of the resistance towards the idea of forced heirship.³⁷ The MPs were concerned that a forced heirship scheme could lead to an allocation to a dependent that did not need the money as it was highly possible for the children to be financially better off than the parents at the time of the man's death.³⁸ It could also lead to a double enhancement for some dependents who already received an allocation *inter vivos* and now will also receive an allocation after the testator parent's death.³⁹ Other MPs were also concerned that the second bill did not address

³³ Stout, 1896 NZPD vol 92, col 585-586, seconded by Seddon, 1896 NZPD vol 92, col 586. Even though the proposed bills and the Act would apply to both male and female testators, it was the decisions of the male testators to disinherit their family members that most concerned the legislators and were the main topic of debate.

³⁴ Stout, *Ibid.*

³⁵ Seddon, 1896 NZPD vol 92, col 586.

³⁶ Stout, 1897 NZPD vol 98, col 550.

³⁷ Mackenzie, 1896 NZPD vol 92, col 586; Lawry, *Ibid.* at 586; Lawry, 1897 NZPD vol 98, col 548; Montgomery, 1897 NZPD vol 98, col 547.

³⁸ McLean, 1897 NZPD vol 98, col 549.

³⁹ Montgomery 1897 NZPD vol 98, col 547.

factors such as the specific circumstances of each family, the economic position of the claimant, and whether the claimant was deserving of any benefits.⁴⁰

Robert McNab continued the bill started by Stout by attempting to pass a new bill called the *Testator's Family Provision Out of Estate Bill*.⁴¹ This bill addressed the shortcomings of Stout's bill because it did not restrict testamentary freedom, but it gave the court discretion to award a provision out of the estate for any widow, widowers, and children who were given inadequate maintenance and support.⁴² The supporters of this new proposed bill liked it because it would create a positive duty for the testator to provide for his or her dependents.⁴³

However, McNab's bill did not pass because the MPs wanted safeguards in place to ensure that undeserving children should not be able to make a successful claim.⁴⁴ There were also concerns that a testator may not have left a provision for a child because that child would waste it or refuse to work, and thus it should be the testator and not the court that decides who is worthy of a provision from the estate.⁴⁵ There were also concerns that the bill would lead to more work for lawyers, and their fees would further reduce the value of the estate and the amount available to be allocated to the deceased's family members.⁴⁶

McNab tried again to pass the bill in 1900.⁴⁷ He emphasized this time at the debates the fact that a testator should not be able to leave his or her dependents as a

⁴⁰ Russell NZPD 1897 vol 98, col 546.

⁴¹ McNab, 1898 NZPD vol 102, col 418.

⁴² McNab, *ibid*.

⁴³ Hogg, 1898 NZPD vol 102.

⁴⁴ McLean, *supra* note 38.

⁴⁵ Mackenzie, *supra* note 37.

⁴⁶ Mackenzie, *ibid*.

⁴⁷ 1900 NZPD vol 111, col 503.

charge to the state.⁴⁸ He also pointed out the fact that a wife could make a provision for maintenance while the testator was alive, so why could she not do it upon death.⁴⁹ The main difference in this bill was the addition of the word “adequate” as it meant that the courts would need to consider the dependents’ standard of living at the time of the testator’s death in any variation order.⁵⁰

The objections to this bill were the same as the ones for the previous bills, as MPs felt that the testator rather than the court knew best the children who should be provided for and that a child who wastes money should not be able to make a successful application.⁵¹ However, these concerns were addressed by the proposed bill, as there were disentitling clauses that would prevent such applications from being successful.⁵² The bill was also seen as more favourable to the forced heirship proposals made in the past by Stout, and it also allowed the court to consider the individual circumstances of each case.⁵³ This bill passed, and it read as follows:

Should any person die, leaving a will, and without making therein adequate provision for the proper maintenance and support of his or her wife, husband, or children, the Court may at its discretion, on application by or on behalf of the said wife, husband, or children, order that such provision as to the said Court shall seem fit shall be made out of the estate of the deceased person for such wife, husband, or children: Provided that the Court may attach such conditions to the order made as it shall think fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order under this section.⁵⁴

⁴⁸ McNab, *supra* note 41.

⁴⁹ *Supra* note 47.

⁵⁰ 1900 NZPD vol 113.

⁵¹ Russell, *supra* note 40.

⁵² Whitmore, 1900 NZPD vol 113, col 614-615.

⁵³ Whitmore, *Ibid.*

⁵⁴ The Hon Col Pitt, 1900 NZPD vol 113, col 614.

The New Zealand bill of 1900 paved the way for other jurisdictions such as Canada to adopt flexible restraints on testamentary freedom. This is because any jurisdiction that observed testamentary freedom abuses could now implement similar laws to the ones passed in New Zealand to ensure that property is not left away from family members. Since the courts could vary wills where the testator did not adequately provide for his or her family members, then it also meant that these people would not become a charge on the state. Furthermore, the bill passed in 1900 also attracted the attention of other jurisdictions because it was based on the principles of equality, family harmony, morality, societal expectations, and testamentary freedom.

Section 2.3.1 – *Allardice v. Allardice Decision*

In 1910 the New Zealand Court of Appeal released its decision in *Allardice v. Allardice*, which is considered to be a landmark precedent-setting case for family protection jurisdiction.⁵⁵ The significance of this decision comes from the court's use of the phrase "moral duty" and the creation of the hypothetical wise and just testator.⁵⁶

The court held that the lack of dependency of adult children on the testator before death is not a bar to bringing a successful application. It said that establishing dependency would make the claim simpler, but it was not absolutely necessary.⁵⁷ In *Allardice*, the court held that "adequate maintenance" was an elastic concept in which adequate support would need to be determined on a case-by-case basis.⁵⁸ The court cited examples where it said that what is considered an adequate provision for the wife of a labouring man with a small estate would be inadequate for the wife of a wealthy

⁵⁵ *Allardice v. Allardice* (1910) 29 NZLR 959.

⁵⁶ *Ibid.*, at 972-973.

⁵⁷ *Ibid.*, at 969.

⁵⁸ *Ibid.*, at 974.

merchant.⁵⁹ The court in *Allardice* endorsed a relative test for “adequate maintenance” that took into account the station in life of the testator and his children as well as their sex, age, health, and any other factors that could affect their economic well being.⁶⁰

The court applied this relative test and accepted the adult daughters’ application.⁶¹ The Court of Appeal awarded a larger provision from the will for the daughters even though they were being maintained and supported by their husbands.⁶² Based on the facts of the case, the court found that the husbands of the daughters may not be able to support them in the future the same way they were at the time of the case.

Allardice was the first case to make “adequate” support a relative concept that will differ based on the facts of the case, and it also established the building blocks for the moral duty test. It also established that the court needs to consider the current standard of living enjoyed by the applicants as well as any contingencies for future support.

Section 2.3.2 – Bosch v. Perpetual Trustee Co. Ltd. Decision

Bosch v. Perpetual Trustee Co Ltd is another landmark 1938 decision where the Judicial Committee of the Privy Council established that in deciding a will variation order under the New Zealand statute the court cannot just consider basic maintenance but rather it must also consider other factors such as the standard of living of the dependents and the size of the estate.⁶³ The court adopted the flexible test, but it is the

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at 973.

⁶¹ *Ibid.*

⁶² *Ibid.*, at 971.

⁶³ *Bosch v. Perpetual Trustee Co Ltd*. [1938] AC 463.

first case to give meaning to the term “proper.”⁶⁴ The court found that a small sum of money left for a child may be sufficient for the “adequate” maintenance but it may be wholly insufficient for his or her “proper” maintenance when considering the child’s station in life.⁶⁵

Section 2.3.3 – *Re Harrison Decision*

Another landmark decision in *Re Harrison* was released in 1962. In this case, the New Zealand Court of Appeal affirmed that a will variation order requires consideration of wider ethical and moral considerations.⁶⁶ In this case, the court considered the merits of a daughter’s claim based on factors such as her stage in life, her circumstances at the time of the testator’s death, the size of the estate, and the competing claims on the estate.⁶⁷ The court also considered the fact that since some of the father’s estate came from the applicant’s grandfather’s money then it follows that the testator did not earn it himself or herself and thus had fewer rights to dispose of it as he or she sees fit.⁶⁸ The court held in this case that a child who is in a financially strong position may still make a successful application because the size of the estate may create a moral obligation for the testator.⁶⁹

In 1981 another precedent-setting case was released by the Court of Appeal in *Little v. Angus*.⁷⁰ In this case, the court applied the moral duty test established in past precedents and incorporated economic, moral, and ethical factors.⁷¹ However, these

⁶⁴ *Ibid.*, at 480.

⁶⁵ *Ibid.*, at 475-476.

⁶⁶ *Re Harrison* [1962] NZLR 6 (CA).

⁶⁷ *Ibid.*, at 13.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Little v. Angus* [1981] 1 NZLR 126 (CA).

⁷¹ *Ibid.*, at 127.

factors would now need to be informed by current community attitudes.⁷² The court reasoned that changing societal attitudes meant that the adult daughters of testators needed to be treated more liberally than in the past.⁷³

Based on this finding, the court concluded that changing social attitudes would need to influence the existence and extent of the moral duties owed by the testator to his or her family members. Therefore, in awarding a provision from the estate the courts would need to consider other non-economic factors such as the size of the estate in determining the award for the adult children of the testator.

Section 2.3.4 – Key Findings from the Case Law of New Zealand’s TFMA of 1900

Based on the case law summarized above, the New Zealand judiciary has attached a broader meaning to the words “support” and “adequate.” The word “support” encompasses both economic support and moral support. The word “adequate” meant more than just basic needs, and thus the courts were required to consider the family member’s current station in life and any contingencies for the future. It was also established that the need to establish dependency is not an absolute requirement, and even a child who is independent and financially wealthy can still make a successful claim because if the size of the estate is large, then it may create a moral obligation for the testator to make a provision for that child. These legal principles have informed the case law developed for dependent relief in both Ontario and BC.

⁷² *Ibid.*

⁷³ *Ibid.*

Section 2.3.5 – Canadian Provinces Response to New Zealand’s TFMA of 1900

The *Testators Family Maintenance Act of 1900* received a warm reception from many provinces in Canada.⁷⁴ The provinces in Canada adopted the New Zealand law largely because they did not support absolute testamentary freedom, and thus they all passed dependent relief legislation that would give the courts wider discretion to vary a will if the testator did not provide adequate support for his or her family members.⁷⁵

Alberta was the first province in Canada to amend its legislation to incorporate dependent relief provisions into its statute law.⁷⁶ Alberta enacted its *Married Women’s Relief Act* in 1910.⁷⁷ Saskatchewan was the next province to incorporate dependent relief provisions in its statute. Saskatchewan introduced its *Dependent Relief Act* in 1910, which was named the *Devolution of and Estates Amendment Act*⁷⁸ and it was based on the New Zealand legislation.⁷⁹

Manitoba adopted its dependent relief legislation in 1919.⁸⁰ It only applied to a testator’s widow and it was included as part of the *Dower Act*.⁸¹ British Columbia enacted a statute with dependent relief provisions in 1920⁸² in the same terms as the New Zealand statute.⁸³ Ontario introduced its *Dependent Relief Act* in 1929⁸⁴ and it was like the New Zealand Act, but it limited the scope of dependents to the testator’s

⁷⁴ Joseph Dainow, “Restricted Testation in New Zealand, Australia and Canada” (1938) 36:7 Michigan law review 1107–1130

⁷⁵ *Ibid.*

⁷⁶ Miler, *supra* note **Error! Bookmark not defined.**

⁷⁷ R.S.A. 1910, c. 18.

⁷⁸ *Devolution of and Estates Amendment Act*, S.S. 1910-11, c. 13.

⁷⁹ Miler, *supra* note 8.

⁸⁰ MS 1919, c 91. S.M. 1919, c. 91.

⁸¹ Miler, *supra* note 8.

⁸² 1920, Statutes of British Columbia, c. 94.

⁸³ Miler, *supra* note 8.

⁸⁴ S.O. 1929, c. 47.

wife or husband, children under the age of 16, or of any age if infirm and unable to earn a living.⁸⁵

The Acts enforced in the 1940s and 1950s in Manitoba,⁸⁶ Nova Scotia,⁸⁷ and New Brunswick⁸⁸ reflected the dependent relief legislation that prevailed in BC.⁸⁹ The Acts that were later introduced in Newfoundland,⁹⁰ the Yukon,⁹¹ the Northwest Territories,⁹² and Prince Edward Island⁹³ permitted the testator's family members to apply for adequate support on both testate and intestate succession.⁹⁴

Section 2.4 – Ontario's Succession Law Reform Act (SLRA)

In this thesis, a case is being made for judicial reform in deciding dependent relief claims in Ontario. Such judicial reform is possible when the legislation provides the judiciary wide discretion to interpret and apply the succession laws that prevail in the province. It will be argued that the *SLRA* does provide this wide discretion to the judiciary.

The *Succession Law Reform Act (SLRA)* was enacted in 1977 in Ontario.⁹⁵ The Act intended to reform the law of testate and intestate succession and consolidated the laws related to estates into one Act.⁹⁶ The *SLRA* was the combination of the *Wills Act*, *the Devolution of Estates Act* (except for the administration of estates provisions), the

⁸⁵ Miler, *supra* note **Error! Bookmark not defined.**

⁸⁶ *Testator's Family Maintenance Act*, S.M. 1946, c 64.

⁸⁷ *Testator's Family Maintenance Act*, S.N.S. 1956, c 8.

⁸⁸ *Testator's Family Maintenance Act*, S.N.B. 1959, c 14.

⁸⁹ Miler, *supra* note **Error! Bookmark not defined.**

⁹⁰ *Family Relief Act*, S.N. 1962, c 56.

⁹¹ *Dependent Relief Ordinance*, O.Y.T. 1962 (1st sess.), c 9.

⁹² *Dependent's Relief Ordinance*, O.N.W.T. 1971 (2nd sess.).

⁹³ *Testator's Dependent's Relief Act*, S.P.E.I. 1974, c 47.

⁹⁴ Miler, *supra* note **Error! Bookmark not defined.**

⁹⁵ *Legislation (1978) 4:3 Commonwealth L Bull 473.*

⁹⁶ A H Oosterhoff, *Succession law reform in Ontario: a section by section commentary on the Succession law reform act, 1977* (Toronto: Canada Law Book, 1979).

Survivorship Act, and the *Dependents' Relief Act*.⁹⁷ The main reforms to this Act were as follows: the equalization of treatment of all children in estate matters, whether they were born inside or outside the marriage.⁹⁸ Similarly, the Act ensured that the rights and obligations of the husbands and wives were equalized.⁹⁹ The Act consisted of the following parts: 1) Part I: A definition section; 2) Part II: Testate Succession; 3) Part III: Intestate Succession; 4) Part IV: Survivorship; 5) Part V: Support of Dependants; and 6) Part VI: Rights of Common Law Spouses and Children.¹⁰⁰

Part V of the *SLRA* makes a provision for the support of dependents in situations where a deceased person was providing support or was legally obligated to provide support before death, but the testator failed to make adequate provisions for proper support of his or her dependents upon death. This provision of the *SLRA* can lead to multiple claims from anyone dependent on the deceased. Section 58(1)¹⁰¹ of the *SLRA* states that if a deceased whether testate or intestate failed to make adequate provision for proper support of his or her dependents then the court on application may order provisions as it considers adequate to be made from the estate for the proper support of the dependents.

The definition of a dependent is provided in s.57¹⁰² of the *SLRA*. According to this definition, a dependent under s.57 of the *SLRA* includes 1) spouses (i.e., including common-law spouses); 2) parents; 3) children; and 4) brothers or sisters of the

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Succession Law Reform Act* (Herein *SLRA*), s. 58(1)

¹⁰² *SLRA*, s. 57.

deceased. There is also a pre-condition that the person seeking relief was being supported by the testator or the testator had a legal obligation to support that person before his or her death.

The basis for determining the legal obligation to dependents is provided for in s. 30 of the *Family Law Act (FLA)*. Section 62 of the *SLRA* provides 19 factors for the courts to consider when determining the appropriate amount and duration of support to be awarded. Based on Section 62¹⁰³ of the *SLRA* the courts are required to consider the circumstances of the applicant, which includes things like current assets, means, age, and health measures available for the applicant to become independent and any agreement between the deceased and the dependent, which included any inter vivos transfers.¹⁰⁴

After the court has determined the proper and adequate support that was not provided by the deceased, sections 68 to 72¹⁰⁵ of the *SLRA* give the court wide discretion when making an award for support. Section 72¹⁰⁶ of the *SLRA* allows the courts to bring back into the estate inter vivos transactions to satisfy a support award. The purpose of s. 72 of the *SLRA* is to claw back into the estate various assets that the deceased may have intentionally given to another party to circumvent or avoid his or her support obligations.

The provisions of the *SLRA* suggest that there is a pre-condition that a family member had to be receiving support from the testator before his or her death. However,

¹⁰³ *SLRA*, s. 62.

¹⁰⁴ Carolyn L Berardino & Robert C Freedman, "Case Comment: 'Tataryn v. Tataryn Estate'" (1994) 52:6 *The Advocate (Vancouver)* 897.

¹⁰⁵ *SLRA*, ss. 68-72.

¹⁰⁶ *SLRA*, s. 72.

the word “support” in the *SLRA* is not clearly defined by the legislators. It has been left up to the judiciary to decide whether the support is economic only or whether it also encompasses moral support. The word “adequate” is also left up to the judiciary, as it could mean basic needs or it could be beyond this to encompass some luxuries. The *SLRA* also states that a judiciary must consider all circumstances in an application before its final disposition, and thus this lends further support to the wide discretion that the judiciary has to consider other factors that are not provided for in section 62. Since some of the factors in section 62 are moral in nature, it gives the judiciary discretion to consider both the legal and moral obligations of the testator in determining adequate support rather than just the legal obligations.

Section 2.4.1 – Key Differences between the Succession Law Reform Act (SLRA) and the Dependents’ Relief Act (DRA)

Based on the overview of *SLRA*, there is wide discretion provided to the judiciary to interpret the Act. It is important now to determine if this was the legislative intent. To do this it is important to briefly summarize the important differences between the 1937 Dependents’ Relief Act (*DRA*) and the current succession laws as provided for in the *SLRA*.

Based on the old *DRA* in Ontario, the provisions of that statute would only apply if a testator died testate.¹⁰⁷ The corresponding section in the *SLRA*, subsection 58(1)¹⁰⁸ was extended so that it could be applied whether the testator died testate or intestate.

To invoke the *DRA*, there was a requirement that the testator did not make a proper provision for the maintenance of his or her dependents. Subsection 1(a)¹⁰⁹ of the *DRA*

¹⁰⁷ R.S.O. 1937, c214, s. 2(1).

¹⁰⁸ *SLRA*, s. 58(1)

¹⁰⁹ R.S.O. 1937, c214, s. 1(a).

defined a dependent as the spouse, children under the age of sixteen, or children over the age of 16 who were not able to earn a livelihood due to illness or infirmity.

In contrast to the DRA, subsection 57(d)¹¹⁰ of the SLRA expanded the groups of persons who can make applications for relief. These groups of persons include:

- Spouse or common-law spouse of the deceased;
- A parent of the deceased;
- A child of the deceased;
- A sibling of the deceased;
- To whom the deceased was providing support or was under a legal obligation to do so before his or her death.

Even though the SLRA expanded the groups of people who can apply for support, there is a condition in the Act that states clearly that a claimant can only apply for relief if that person was receiving support, or the testator had a legal obligation to support that claimant before his or her death.

The DRA was silent on the timeframe at which the circumstances of the claimant and the adequacy of the support provided by the testator needs to be considered. SLRA addressed this uncertainty in subsection 58(3)¹¹¹, which states that these considerations will be determined as of the date of the hearing of the application.

The DRA and the SLRA set out factors that the court must consider in determining the amount and duration of support. The difference is in the number of factors specified by each Act. Sections 7 and 8¹¹² of the DRA list seven factors, while the SLRA refers to seventeen factors in paragraph 62.¹¹³ However, both statutes allow the court to consider other circumstances as it sees fit. The DRA makes this explicit in subsection

¹¹⁰ SLRA, s. 57(d).

¹¹¹ SLRA, s. 58(3).

¹¹² R.S.O. 1937, c214, ss. 7-8.

¹¹³ SLRA, s. 62.

7(g)¹¹⁴ which states the following: “generally [to] any matter that the judge thinks should be fairly taken into consideration” while the wording in the SLRA is “all the circumstances in the application”.¹¹⁵

Section 9¹¹⁶ of the DRA stated that a wife who was living apart from her husband at the time of his death under circumstances that would disentitle her to alimony would also bar her from seeking relief under the Act. The SLRA considers the conduct of both parties, and it is a factor under paragraph 62 rather than a prohibition from claiming under the Act.

The DRA also did not address the consideration of the intentions and wishes of the deceased, while these are implicit in the factors that the court must consider in determining a variation order under the SLRA. There is also a provision in subsection 62(2)¹¹⁷ that allows a court to consider any other evidence it considers to be relevant to the application.

Based on the differences summarized above, the *SLRA* expanded the categories of claimants that can apply for relief, and this is because the Act is remedial. It also increased the number of factors that the courts needed to consider in deciding a dependent relief claim. The courts can also consider any other relevant circumstances not encompassed in the factors but relevant to the issues raised in the case. They can also admit any evidence that is deemed to be relevant and reliable in deciding a dependent relief claim. This historical analysis further supports the wider discretion the *SLRA* gave the courts to decide dependent relief claims in Ontario.

¹¹⁴ R.S.O. 1937, c214, ss. 7(g).

¹¹⁵ SLRA, s. 62.

¹¹⁶ R.S.O. 1937, c214, s. 9.

¹¹⁷ SLRA, s. 62(2).

Section 2.4.2 – SLRA Dependent Relief Case Law

Since this thesis is advocating for judicial reform, then it is important to review past decisions made under the *SLRA* to understand the current state of the succession laws in Ontario. The seminal case for dependent relief in Ontario is the Court of Appeal's decision in *Cummings v. Cummings*. This is because it was the first higher court decision in Ontario to affirm that the Supreme Court of Canada's decision in *Tataryn* applies in Ontario even though the Supreme Court was interpreting the dependent relief legislation of BC.

However, the Court of Appeal also released a decision in *Spence v. BMO Trust* where the court made findings that conflict with those made in *Cummings*. In this decision, the court affirmed that *Tataryn* does not apply in Ontario. As a result, the two seemingly contradictory decisions could lead to two different lines of case law for dependent relief in Ontario, and this has the potential of creating inconsistencies and variability in the decisions made regarding dependent relief claims in Ontario in the future.

In *Cummings v. Cummings*, Justice Blair of the Court of Appeal clarified that the purpose of the *SLRA* is significantly different than the purpose of spousal support under the *Divorce Act* or the *Family Law Act (FLA)*. Justice Blair affirmed that the dependent relief provisions of the *SLRA* are not only meant to provide for the needs of the dependents, but it is also legislation enacted to ensure that the testator's spouses and children receive a fair share of the family wealth. In making this finding, Justice Blair was moving the Act's scope away from a maintenance focus only.

Instead, the focus in determining support would require courts to consider competing interests, which included the testator's desire to leave much of his estate to his children, although those children may very well be adult, wealthy, or financially independent. The importance of the key differences between the *SLRA* and the *Divorce Act* and *FLA* were noted in paragraph 74 of the decision in *Phillips-Renwick v. Renwick Estate* when the court said the following:

The factors listed in [s. 62\(1\)](#) of the [Succession Law Reform Act](#) are similar but not identical to those in the [Divorce Act](#). Previously, it has been judicially noted that support under the [Succession Law Reform Act](#) is not the same as support under the *Family Law Reform Act*: see *Mannion v. Canada Trust Co.* (1982), [1982 CanLII 3343 \(ON SCDC\)](#), 39 O.R. (2d) 609, 140 D.L.R. (3d) 189 (Ont. Div. Ct.). Just as in *Tataryn, supra*, McLachlin J. noted that if the testator has chosen an option that is within the wide range of options that might be appropriate, the court should not interfere lightly but only in so far as the succession statute requires, so does the Supreme Court of Canada in *Miglin, supra* take care to note that the law did not require of an agreement that it strictly adhere to the objectives of spousal support orders listed in [s. 15.2\(6\)](#) of the [Divorce Act](#).¹¹⁸

The paragraph above further supports that the *SLRA* differs from the *Divorce Act* due to the differences in the meaning attached to the word 'support'. The quote from *Tataryn* emphasizes the fact that it is up to the courts to determine whether the option selected by the testator to support his or her family members is appropriate, and this could mean that the support awarded under the *SLRA* could differ from that awarded from the *Divorce Act* when all circumstances are considered by the court.

In *Swire v. Swire*¹¹⁹, the Court affirmed that while utilizing the s. 62 principles, the first step involves a consideration of all the circumstances "from the deceased's point of

¹¹⁸ *Phillips-Renwick v. Renwick Estate*, 2003 CanLII 64219 at para 74.

¹¹⁹ *Swire v. Swire*, [1986] O.J. No. 2023 (Ont. Surr. Ct.) at paras. 84 and 85, *aff'd* (1987), 10 R.F.L. (3d) 399, 24 O.A.C. 147 (Ont. Div. Ct.).

view” as well as the dependent’s circumstances at the time of the hearing. This is the threshold that must be reached before the court can exercise its unfettered discretion.

Justice Blair in *Cummings*¹²⁰ also quoted Lord Romer in *Bosch v. Perpetual Trustee Company* when he said that in every case, the court is required “to place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish husband....”. The court in *Cummings* affirmed that the courts need to consider the moral obligations that the testator had to support a child, but it must also consider society’s expectations of what a judicious person would do in the circumstances of the case.

In *Swire v. Swire*¹²¹, the court affirmed that the courts need to determine whether the deceased made adequate provision for his dependents. If the court finds that the deceased failed to make this provision, then it could apply its discretion to order a provision that it considered to be adequate. In *LaPierre v. Lapierre Estate*¹²², the court affirmed that proper and adequate support must be measured throughout the dependent’s anticipated lifetime and not at the time of the testator’s death. This means that the courts must consider both the current standard of living enjoyed by the testator’s family members as well as any contingencies for the future.

In *Re Duranceau*¹²³, which was a case decided under the old *DRA*, the Court of Appeal outlined the test for adequate provision to be whether it is sufficient to enable

¹²⁰ *Cummings v. Cummings Estate*, 2004 CANLII 9339 (Ont. C.A.), quoting with approval Lord Romer in *Bosch v. Perpetual Trustee Company*, [1938] A.C. 463 (P.C.) at pp. 478-479.

¹²¹ *Swire*, *supra* note 119.

¹²² *LaPierre v. LaPierre Estate*, [2002] O.J.No. 1275 at para 25.

¹²³ *Re Duranceau*, 1952 CanLII 102 (ON CA)

the testator's family member to live neither luxuriously nor miserably but rather decently and according to his or her station in life. This is affirmed in the following paragraph of the decision:

Standards of living vary greatly according to the tastes and financial circumstances of the individual. A dependant is not entitled as a matter of law to have such provision made for his or her future maintenance as will ensure a luxurious living. On the other hand, a testator does not make adequate provision for the future maintenance of a dependant by merely making such a provision as will ensure to the dependant the bare necessities of existence. In determining whether or not a testator has made adequate provision for the future maintenance of a dependant the Court must ask itself: Is the provision sufficient to enable the dependant to live neither luxuriously nor miserably, but decently and comfortably according to his or her station in life?

In *Cummings v. Cummings*, the Court of Appeal clarified that in determining the dependent's relief under the *SLRA*, the court cannot just restrict its analysis to the applicant's basic needs, but rather it must also consider the applicant's moral and ethical claims. The court also stated that the statutory factors that a court must consider are moral and should be entrenched as part of a legal claim for support. Justice Blair of *Cummings* also referenced *Re Hull Estate*¹²⁴, which was decided by the Court of Appeal under the old *DRA* to emphasize the fact that the court's consideration of a testator's moral duties to his or her family members is not something new, and it has been considered by previous higher courts dating back to 1943 when *Hull Estate* was decided.

Justice Blair concluded that the need to consider both the legal and moral obligations of the testator is reflected in section 62(1) of the *SLRA*, and only after these

¹²⁴ *Re Hull Estate*, 1943 CanLII 113 (ON CA)

obligations have been thoroughly considered by the court can it dispose of a section 58 application for dependent relief.

It was affirmed in *Stajduhar v. Wolfe*¹²⁵ that the definition of a dependent under the *SLRA* is the spouse or child of the deceased to whom the deceased was providing support immediately before his or her death. The court in *Stajduhar* affirmed that the fact that a person is a spouse or child of the deceased does not automatically create an entitlement to dependent relief. The applicant in the case has the evidentiary burden to prove that the deceased was providing support to the applicant before his or her death and/or was under a legal obligation to provide support to the applicant, immediately before his or her death. It is only after the applicant has met the evidentiary burden that the court will order dependent relief under the *SLRA*.

In *Reid v. Reid*¹²⁶, the court found that the support provided by the testator before his or her death need not be direct financial assistance. The court in *Reid* found that meeting the most basic human needs such as shelter at the time of his or her death represented substantial financial support to his or her children. The testator's act of providing shelter to his or her children was also considered by the court a subtle intention on his or her part to provide support, and thus it met the "dependency" test under the *SLRA*.

It is important to note though that a spouse or child of a testator who was not receiving support from the testator before his or her death can still make a successful application for relief. In *Ivanic v. Ivanic Estate*¹²⁷, a spouse who was not being

¹²⁵ *Stajduhar v. Wolfe*, 2017 ONSC 4954 (CanLII)

¹²⁶ *Reid v. Reid*, 2005 CanLII 20793 (ON SC)

¹²⁷ *Ivanic v. Ivanic Estate*, 2005 CanLII 19805 (ON SC)

supported by the deceased was awarded \$29,004 because it was found that under s. 62(1)(i) of the *SLRA*, she contributed to the acquisition, maintenance, and improvement of the deceased's property. The court in *Ivanic* wanted to ensure that the spouse in this case who had raised the two sons of the marriage on her own did not walk away from the relationship empty-handed if there was a legally justifiable basis for providing otherwise.

In *Quinn v. Carrigan*, the Divisional Court affirmed a lower court decision to award relief to the deceased's non-dependents based on the legal obligations of the testator and the legal claims of the non-dependents. The court in *Quinn* also acknowledged the fact that the non-dependents could have made moral claims against the estate, but even if they did, the Divisional Court would rule that these were met by the relief provided by the lower court for their legal claims.

As a result, the fact that a deceased may have a legal and/or moral obligation to a dependent or a non-dependent is the reason why the courts must identify these claimants and examine their applications. This was affirmed in the Court of Appeal's decision in *Cummings*, which stated the following in paragraph 27 of its decision:

When judging whether a deceased has made adequate provision for the proper support of his or her dependants and, if not, what order should be made under the Act, a court must examine the claims of all dependants, whether based on need or on legal or moral and ethical obligations. This is so by reason of the dictates of the common law and the provisions of sections 57 through 62 of the Act.¹²⁸

Since the Court of Appeal in *Cummings* affirmed that *Tataryn* applies in Ontario¹²⁹ it follows that the non-dependents' claims also needed to be considered in

¹²⁸ *Cummings*, supra note 13 at para 27.

¹²⁹ *Cummings*, supra note 13 at para 40.

the analysis. This is affirmed by the Supreme Court of Canada in *Tataryn* when it stated the following in the paragraph below:

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.¹³⁰

The Divisional Court in *Quinn v. Carrigan* affirmed the Court of Appeal's decision in *Cummings* and formulated a four-step analysis for determining dependent relief under the *SLRA*. This analysis required identifying the dependents, valuing the dependents' claims, identifying the non-dependents, and then balancing the competing claims based on many factors such as the size of the estate, strength of the claims, and intentions of the testator. The court affirmed that adult independent children could make an application for relief under the *SLRA*, but their interests would be subordinate to the interests of dependent spouses and children of the deceased.

However, the Court of Appeal in *Spence v. BMO Trust* provided a seemingly contradictory decision to the one rendered in *Cummings* and *Quinn*, as it affirmed that an applicant is not entitled to any benefits under the *SLRA* if that person is an independent adult child of the testator. This was affirmed in paragraph 37 of the decision on *Spence* when the Court said the following:

I note at this point that, unlike 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 v. Weckwerth*, 2013 ONSC 3018 (Ont. S.C.J.), at paras. 43-44, aff'd 2014 ONCA 338 (Ont. C.A.), at paras. 5-6, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 288 (S.C.C.). **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**

¹³⁰ *Tataryn*, supra note 9 at para 31.

the freedom to exclude children who are not dependants from their estate distribution.¹³¹

The most controversial part of the Court of Appeal's decision in *Spence* came when the Court ruled that even if the father disinherited his daughter for racist reasons the Court could not vary the will. The Court stated that doing so would encroach too much on the deceased's testamentary freedom, and the *SLRA* does not have any anti-discrimination provisions. This is confirmed in paragraph 75 of the decision, which reads as follows:

Absent valid legislative provision to the contrary, the common law principle of testamentary freedom thus protects a testator's right to unconditionally dispose of her property and to choose her beneficiaries as she wishes, even on discriminatory grounds. To conclude otherwise would undermine the vitality of testamentary freedom and run contrary to established judicial restraint in setting aside private testamentary gifts on public policy grounds.¹³²

Based on the case law in Ontario developed for dependent relief before the release of the decision in *Spence v. BMO Trust*, the definition of support encompassed both an economic and moral dimension. The courts relied on moral support to allow adult independent children to make claims for relief under the *SLRA*. The courts also accepted a broader definition of "adequate" as referenced in the Act. The word "adequate" was meant to mean more than just the basic needs and could also include any contingencies for the future. The term "adequate support" encompassed both the legal and moral obligations of the testator to his or her family members. It was also affirmed that the needs-based test would be replaced by the judicious parent test, and

¹³¹ *Spence*, *supra* note 14 at para 37.

¹³² *Spence*, *supra* note 14 at para 75.

the decisions would need to reflect the societal expectations that prevailed at the time the decision was being made.

It is clear that with the decision in *Cummings* being the seminal case the case law in Ontario was developing per the legal principles established by the Supreme Court of Canada in *Tataryn v. Tataryn Estate*, which was a decision that was intended to foreshadow the modern principles of equality. However, the decision in *Spence* has the potential to negate past case law with its finding that *Tataryn* does not apply in Ontario and affirming that testamentary freedom needs to be the starting point of analysis for the courts when flexible restraints exist on it in the provisions of the *SLRA*. The decision will also mean that the value of liberty will always trump the value of equality when deciding dependent relief claims in Ontario when there should be a balance between these two values. Therefore, the judicial reform envisioned is for the judiciary to continue to follow the decision in *Cummings* and apply *Tataryn* in whole and not in part to decide dependent relief claims in Ontario.

Section 2.5 – British Columbia’s Dependent Relief Legislation

To strengthen the argument that Ontario should apply the legal principles established in *Tataryn*, it is important to analyze British Columbia’s (BC’s) dependent relief legislation. This is because the Supreme Court of Canada was attempting to clarify the succession laws that should prevail in BC, given the two different lines of case law that were developing in BC at the time of the decision.

The province of BC adopted New Zealand’s Dependent Relief legislation that was passed in 1900 because its social conditions were similar to the ones that prevailed in New Zealand and because it wanted to prevent abuses of testamentary freedom that

were being observed in BC.¹³³ The province of BC enacted the *Testator's Family Maintenance Act (TFMA)* on April 17, 1920.¹³⁴ The charging section of the Act in BC was the same as the one in New Zealand's *TFMA* of 1900.

The leading case on dependents' relief legislation (*TFMA*) in BC was the Supreme Court of Canada's decision in *Walker v. McDermott*.¹³⁵ This case concerned a dependent relief claim under BC's *TFMA*.¹³⁶ The central provision of the *TFMA* that applied was whether a testator provided proper maintenance and support for a spouse or child. The failure of the testator to do so would mean that the court could intervene and order such a provision as the court thinks is adequate, just, and equitable.

In *Walker*, the testator left an estate valued at \$25,000 to his widow. The applicant in the case was his daughter from a previous marriage. His daughter was an adult and married with two children. She had worked as a stenographer before her marriage. The widow of the testator on her own accord paid the applicant \$1,000 from the estate. The trial judge in the case found that the daughter was entitled to \$6,000 from the estate. This decision was overturned by the BC Court of Appeal and restored by the Supreme Court of Canada with Justice Rinfret in dissent.

The majority and the dissent in *Walker* parted company over the scope of proper maintenance and support within the meaning of the BC statute. Justice Duff wrote for the majority and stated the following in the decision:

What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to

¹³³ Miler, *supra* note **Error! Bookmark not defined.**

¹³⁴ S.B.C. 1920, c. 94.

¹³⁵ *Walker v. McDermott*, 1930 CanLII 1 (SCC), [1931] SCR 94.

¹³⁶ *RSBC* 1924, c 256

the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.¹³⁷

Justice Duff stated that any father in the position of the testator and justly appreciating the situation of his daughter who is a young married woman with many possibilities attaching to her situation would consider the amount left for her to be an adequate provision considering all of her circumstances.¹³⁸ The majority in the Supreme Court also found that the trial judge's order was not unjust and inequitable based on the weighting of the competing claims of the testator's wife and daughter.¹³⁹ The majority in the Supreme Court found that, based on the financial situation of the widow, it was not wrong for her share of the estate to be reduced by the trial judge for the benefit of the adult child. Justice Rinfret, in dissent, would have upheld the decision of the BC Court of Appeal and refused to make an order, given that the testator's daughter was not dependent on the testator since marriage and was not in any need of maintenance.

The decisions that followed the Supreme Court of Canada decision in *Walker* led to two distinct lines of case law. There was one set of decision-makers that interpreted need as a condition precedent for relief while other decision-makers interpreted the Act in terms of ethics, moral duty, and economics. In *Re Dawson*,¹⁴⁰ the court refused to

¹³⁷ *Walker*, *supra* note 135 at para 96.

¹³⁸ *Ibid.*, at para 98.

¹³⁹ *Ibid.*

¹⁴⁰ [1945] 3 D.L.R. 532.

make an award for the benefit of the adult children of the testator on the basis that they failed to meet their evidentiary burden of showing that they required maintenance and support. The court interpreted the principle in *Walker* to mean that the Act does not apply if there is no need on the part of the claimant for maintenance and support. The same position was taken by the courts in *Re Hornett*¹⁴¹ and *Re Harding*.¹⁴²

Other decision-makers interpreted *Walker* to mean that judges must give due consideration to the question of awarding an equitable share of the estate to the spouse and/or children of the testator regardless of their need. This was the decision of the court in *Barker v. Westminster Trust Company*.¹⁴³ The Court in *Barker* observed that the applicant in *Walker* was awarded relief by the Supreme Court of Canada even though her father did not support her for five years, she had been married one year before the death of the testator, and her husband worked in a large company making a good salary with good prospects for the future. In *Walker*, the Supreme Court also found that the stepmother contributed significantly to the growth of the estate over time.

The court in *Barker* concluded that in making this award the Supreme Court in *Walker* interpreted the term “maintenance” to mean something more than “support.” The court in *Barker* found that the Supreme Court, when referring to the father’s responsibilities, could not have referred to the duty to support, as he had not supported his daughter for five years. Therefore, the only responsibility the father owed the daughter was not to disinherit her but rather to ensure that she received an equitable share of his estate upon death.

¹⁴¹ (1962), 33 D.L.R. (2d) 289, 38 W.W.R. (N.S.) 385 (B.C.S.C).

¹⁴² (1973) 6 W.W.R. 229.

¹⁴³ *Barker v. Westminster Trust Co.* [1941] 4 D.L.R. 514.

The court in *Barker* found that two kinds of relief can be granted under the *TFMA*. The first form of maintenance and support is purely a personal allowance to the applicant. The court described this as being like alimony. The second form of “proper maintenance” is ensuring that an equitable share of the estate is left behind for the applicant. The court described this as the relief that is granted in cases of disinheritance like the situation in *Walker*.

In *Re Michalson*¹⁴⁴, the court followed the approach taken by the court in *Barker*. In this case, the daughter was wealthier than her father and thus her father disinherited her, stating that he had provided for her generously throughout her life and, based on her station in life, he felt no obligation to provide for her further. The court awarded the daughter an equitable share of her father’s estate on the basis that it found that the father failed in his moral duty to his daughter, which could have been fulfilled by providing her with a reasonable sum. The two different lines of case law that developed meant that there was a larger potential for inconsistencies and uncertainties in future decisions. It took the Supreme Court of Canada in *Tataryn* to resolve the debate.

Section 2.5.1 – Overview of *Tataryn v. Tataryn Estate*

The seminal case in will variations in Canada is the *Tataryn v. Tataryn Estate*¹⁴⁵ case, which was a case decided by the Supreme Court of Canada. In this case, the Supreme Court of Canada was called upon to clarify the law on will variation orders. In this unanimous decision, the Supreme Court of Canada interpreted British Columbia’s (BC’s) *Wills Variation Act (WVA)*.

¹⁴⁴ 67 (1973) 1 W.W.R. 560.

¹⁴⁵ *Tataryn*, *supra* note 9.

Justice McLachlin affirmed in the decision that the purpose of dependent relief legislation in a province is not only to prevent the dependents of a testator from becoming a charge on the state but also to interpret and apply the Act in relation to the modern concepts of equality.¹⁴⁶ This is affirmed in paragraph 16 which states the following:

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.¹⁴⁷

In *Tataryn*, a father's will was challenged by his dependents. Mr. Tataryn was married to his wife for 43 years, and they had both accumulated an estate worth \$315,000. Mr. Tataryn died at the age of 71, leaving behind his wife and two sons (Edward and John). In his will, Mr. Tataryn left his wife a life estate in the matrimonial home and made her the beneficiary of a discretionary trust of income of the residue of this estate with Edward, his son, as the trustee. He then left Edward with the remainder of the interest in the house and residue as well as a gift of the rental property. He left his son John with nothing.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.* at para 16.

The father did provide a reason for his allocation. He stated in his will that he wanted his wife to be taken care of, but he did not want to transfer the assets outright to his wife, as he was concerned that she would transfer them to John, who is the son whom he disliked. Both his wife and son John filed a claim against the estate.

The trial judge found that, after considering all the evidence before her, she could not establish that Mr. Tataryn was justified in disinheriting his son John. The trial judge made the following orders: 1) revoked the devise of the rental property and gave Mrs. Tataryn a life interest in that property; 2) awarded legacies of \$10,000 to each of his two sons; and 3) directed that upon the death of Mrs. Tataryn, the residue would be divided so that one-third would go to the disinherited son, John, and two-thirds would go to the favoured son, Edward. Mrs. Tataryn appealed the decision of the trial judge to the BC Court of Appeal, as she wanted an award for the entire estate. The Court of Appeal dismissed the mother's appeal. Mrs. Tataryn then appealed the decision of the Court of Appeal to the Supreme Court of Canada and the Supreme Court agreed to hear the case.

Justice McLachlin spoke for the Supreme Court of Canada and stated that the law is unsettled on precisely what consideration should be given by a Court when it is faced with deciding a dependent relief application under the *WVA* in BC. She then focused her attention on clarifying the principles applicable to the interpretation of section 2(1) of the *WVA*.

Section 2(1) of the *WVA* states as follows:

Notwithstanding any law or statute to the contrary, **if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children**, the court may, in its discretion, in an action by or on behalf of the wife,

husband or children, order that the provision that it thinks **adequate, just and equitable** in the circumstances be made out of the estate of the testator for the wife, husband or children.¹⁴⁸

Justice McLachlin acknowledged in *Tataryn* that the language of s. 2(1) of the *WVA* was quite broad. She also clarified that the references to “adequate provision” and “adequate, just and equitable” are not intended to be separate tests for adequate support but rather two sides of the same coin. She stated that the language of the Act allowed for many different interpretations.

Justice McLachlin stated in *Tataryn* that the Act protects the following two interests: 1) adequate, just, and equitable provision for spouses and children of testators; and 2) testamentary freedom. She also rejected the argument to replace the judicious parent and husband or wife test as set out in *Walker v. McDermott* with the needs-based test that prevailed in the earlier years of the Act.

Instead, Justice McLachlin said that if the phrase “adequate, just, and equitable” is viewed based on the current societal norms, much of the uncertainty would disappear. She stated that the yardstick to determine what is **adequate, just, and equitable** for specific circumstances lies in the two types of norms that are expected of testators. The first set of norms is legal obligations, and the second set of norms is moral obligations.

Justice McLachlin defined “legal obligations” as those obligations that are imposed on a person during his or her life. The legal obligations in the context of adequate support could be found in the: 1) *Divorce Act*; 2) family property legislation; and 3) law of unjust enrichment.

¹⁴⁸ *Will Variation Act*, R.S.B.C. 1979, c. 435, s. 2(1).

Justice McLachlin affirmed that moral obligations are found in society's reasonable expectations of what a judicious person would do. This could include providing for a supporting spouse, dependent spouse, dependent child, and a non-dependent child if the size of the estate permits. If the size of the estate does not provide adequately for dependents, then legal obligations need to be prioritized over moral obligations.

The Supreme Court in *Tataryn* found that under the *Divorce Act* and the *Family Relations Act*, Ms. Tataryn would have been entitled to maintenance and share in the family assets had the parties separated. Therefore, at a bare minimum, she is entitled to this much upon the death of her spouse. Based on these findings, the Supreme Court awarded to Ms. Tataryn the matrimonial home and a life interest in the rental property based on the legal obligations of Mr. Tataryn. The Supreme Court then awarded the entire residue to Ms. Tataryn after \$10,000 gifts were paid to both sons. Upon the death of Ms. Tataryn, the Supreme Court stated that the rental property would be distributed as two-thirds to Edward (i.e., preferred son) and one-third to John (i.e., the disinherited child). For the distribution of the rental property, the Supreme Court did give deference to the wishes of the testator. This means that the Supreme Court did not completely override the wishes of the testator in its decision.

Discriminatory wills will be discussed in more depth in Chapter 4. It is important, though, to note that in *Grewal v. Litt*¹⁴⁹, the BC Supreme Court of Appeal awarded relief to four adult independent daughters who only received 1.7% each of a \$9,000,000 estate, while their two brothers received 46% of the estate each. The court concluded

¹⁴⁹ *Grewal*, supra note 12.

that there was gender discrimination in the will and concluded that the will did not meet the social expectations of contemporary society and varied the will to give 15% to each sister and only 20% to each of the two brothers. The court did not give an equal share to all siblings, as it wanted to respect the testamentary freedom of the testator.

Section 2.6 – Charter Values as an Analytical Tool to Resolve the Debate

The origins of “Charter Values” dates back to 1986, when the Supreme Court of Canada released its decision in *R.W.D.S.U., Local 580 v. Dolphin Delivery Incorporated*.¹⁵⁰ The Supreme Court ruled that the Charter has no application to private litigation because Section 32 limits the Charter’s application to the legislative, executive, and administrative branches of government. The Supreme Court rejected the argument that court orders made by the judiciary are a form of state action, and to do so would widen the scope of the Charter application to virtually all private litigation.¹⁵¹ However, the Supreme Court affirmed that the judiciary has a responsibility to apply and develop the principles of common law in a manner that is consistent with the fundamental values enshrined in the Constitution.¹⁵²

The reference to the fundamental values in *Dolphin Delivery* was interpreted by subsequent courts to mean Charter values. In *R. v. Salituro*, the Supreme Court affirmed the need to analyze and change common law rules made by the judiciary to comply with the Charter values when it said the following:

Where the principles underlying a common law rule are out of step with the values enshrined in the Charter, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and

¹⁵⁰ [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 (S.C.C.) [hereinafter “*Dolphin Delivery*”].

¹⁵¹ *Ibid.*, at para 36.

¹⁵² *Ibid.*, at para 39.

legislative action that I have referred to above, then the rule ought to be changed.¹⁵³

The Supreme Court also affirmed in *Hill v. Church of Scientology of Toronto*¹⁵⁴ that the application of Charter values is meant to address a conflict between principles, and thus it requires a more flexible balancing than the Section 1 Oakes test analysis. In *Dagenais v. Canadian Broadcasting Corporation*¹⁵⁵, the court was called to rebalance the principles underlying the common law rule that governed publication bans on Court proceedings. It had been found by the court that the members of the judiciary had emphasized the fair trial rights of the accused over the free expression rights of those affected by the ban. In other words, the rights protected under section 11(d) of the Charter trumped the rights under Section 2(b) when there was a conflict in deciding publication bans. The court rebalanced the common law test for publication bans by adding a requirement for the reviewing judge to determine whether a publication ban was needed to ensure trial fairness and whether the salutary effects of the publication ban outweighed the deleterious effects that would occur on freedom of expression rights.

There has also been a debate about how the analytical tool of Charter values should be applied in interpreting a provision of the Act. In *Hills v. Canada (Attorney General)*¹⁵⁶, the court was called upon to interpret a provision of the *Unemployment Insurance Act*. The main issue, in this case, was whether unemployment benefits could be extended to employees who were not working due to a strike by members of the

¹⁵³ *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654 (S.C.C.) at para 9.

¹⁵⁴ *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 (S.C.C.).

¹⁵⁵ *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.).

¹⁵⁶ [1988] S.C.J. No. 22, [1988] 1 S.C.R. 513 (S.C.C.).

unions. The court found that to interpret the *Unemployment Insurance Act* the values embodied in the Charter must be given preference over an interpretation that would run contrary to them.

However, in *R. v. Clarke*¹⁵⁷, the Supreme Court affirmed the need for Charter values to play a more limited role in interpreting a statute. The court stated that consideration of Charter values only arises if the statute is found to be ambiguous. It then stated that if the statute is unambiguous then the court must give effect to the expressed legislative intent. The court then cautioned tribunals and courts to avoid applying a Charter values analysis to create ambiguity when none exists.

In *Doré v. Barreau du Québec*¹⁵⁸, the Supreme Court affirmed that when applying Charter values the decision-maker must balance the Charter values with statutory objectives. The court affirmed that a decision that disproportionately impairs a Charter guarantee will be considered unreasonable while one that balances the statutory objectives with the protection will be considered reasonable.

In *Doré*, the Supreme Court of Canada also established what is meant by “Charter protections” when it affirmed that it included both Charter rights and Charter values in paragraph 5 of its decision, where it said the following:

We do it by recognizing that while a formulaic application of the Oakes test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. **I see nothing in the administrative law approach which is inherently inconsistent with the strong Charter protection — meaning its guarantees and values — we expect from an Oakes analysis.** The notion of deference in administrative law should no more be a barrier to effective Charter protection than the margin of appreciation is when we apply a full s. 1 analysis.¹⁵⁹

¹⁵⁷ [2014] S.C.J. No. 100, 2014 S.C.C. 28, at para 12 (S.C.C.).

¹⁵⁸ *Doré v. Barreau du Québec*, 2012 S.C.C. 12 (CanLII), [2012] 1 S.C.R. 395.

¹⁵⁹ *Ibid.*, at para 5.

The majority in the Supreme Court of Canada in *Loyola* defined “Charter values” as those values that underpin each right and give it meaning. It affirmed that the Charter values are on par with Charter rights concerning Charter protections when it said the following in paragraph 36 of the decision:

As Aharon Barak explained, the purpose of a constitutional right is the realization of its constitutional values: *Human Dignity: The Constitutional Value and the Constitutional Right* (2015), at p. 144. **In the Doré analysis, Charter values — those values that underpin each right and give it meaning — help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives:** *Hutterian Brethren*, at para. 88; Lorne Sossin and Mark Friedman, “Charter Values and Administrative Justice” (2014), 67 *S.C.L.R.* (2d) 391, at pp. 403-4.¹⁶⁰

In summary, the Charter values analytical framework has been applied by courts to change a common-law rule to bring it in compliance with the Charter values. It has also been applied by the judiciary to select an interpretation that best reflects the Charter values. It has also been applied to make decisions that would balance the Charter values with the statutory objectives.

In *Tataryn*, the Supreme Court affirmed that the statutory objectives of dependent relief legislation are aligned with the Charter values of equality and liberty. Therefore, the issue for this thesis is to find a solution that balances these two Charter values when they come into conflict in deciding dependent relief claims in Ontario. This will ensure that the interpretation of the law for dependent relief in Ontario will be developed in accordance with the Charter values.

¹⁶⁰ *Loyola High School v. Quebec (Attorney General)*, 2015 S.C.C. 12 (CanLII), [2015] 1 S.C.R. 613 at paragraph 36.

Section 2.7 – Conclusion

In this chapter, it was learned that there were two opposing philosophical views concerning dependent relief claims in Ontario. In *Cummings*, testamentary freedom is not a case of all or nothing, and in *Spence*, it is nearly close to all or nothing. The issue becomes how far the scales should be tipped in the direction of individual property rights or the direction of the family. The decision in *Spence* has tipped the scales more to the direction of the property, while the decision in *Cummings* is looking to balance the scales between property and the family. A case will be made for judicial reform in the next chapter, a case that will call for dependent relief claims in Ontario to be informed by the Charter values of equality and human dignity.

CHAPTER 3 – THE CASE FOR JUDICIAL REFORM FOR DECIDING DEPENDENT RELIEF CLAIMS IN ONTARIO

Section 3.1 – Introduction

In this chapter, the two conflicting Court of Appeal decisions on the applicability of *Tataryn* in Ontario and their implications for the moral obligations of a testator and the moral claims of non-dependent children in Ontario will be analyzed and discussed in more depth. The next part of the chapter will discuss the hypothetical scenario in the Court of Appeal decision in *Spence v. BMO Trust* that reduced its precedential value, and the troubling consequences of this decision on the Charter values are also discussed.

Section 3.2 – Conflicting Viewpoints from Two Court of Appeal Decisions on the Application of the *Tataryn* Authority in Ontario

Section 3.2.1 – Cummings v. Cummings Decision

Even though the decision in *Tataryn* was made by the Supreme Court of Canada and thus should be binding on all the courts in every jurisdiction, there is disagreement among the higher courts on its applicability in Ontario. There are two Court of Appeal decisions in Ontario with conflicting viewpoints on whether the legal principles established in the Supreme Court of Canada's decision in *Tataryn* apply in Ontario. This disagreement is because the Supreme Court of Canada was interpreting BC's *WVA* in *Tataryn* and not the *Succession Law Reform Act (SLRA)*, which deals with dependent relief claims in Ontario.

On January 15, 2004, the Ontario Court of Appeal released its decision in *Cummings v. Cummings*.¹⁶¹ In this case, a father's will was challenged by his former

¹⁶¹ *Cummings v. Cummings*, 2004 CanLII 9339 (ON CA).

spouse and dependent children. The Court of Appeal varied the father's will because it found that the father had not fulfilled his moral obligations to his dependents. Justice Blair wrote the decision for the Court of Appeal and supported the need for courts to consider both the legal and moral obligations that a testator owes to his or her dependents by affirming that the Supreme Court of Canada's decision in *Tataryn* applies in Ontario when he said the following in paragraph 40 of the decision:

In my view these questions have been resolved by the decision of the Supreme Court of Canada in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 116 D.L.R. (4th) 193. There, the court held that a deceased's moral duty towards his or her dependants is a relevant consideration on a dependants' relief application, and that judges are not limited to conducting a needs-based economic analysis in determining what disposition to make. In doing so, it rejected the argument that the "judicious father and husband" test should be replaced with a needs-based analysis: see para. 23. **I see no reason why the principles of *Tataryn* should not apply equally in Ontario, even though they were enunciated in the context of the British Columbia Wills Variation Act, R.S.B.C. 1979, c. 435, in which the language is somewhat different from that of the Succession.**¹⁶²

In *Cummings*, Justice Blair acknowledged the differences between Ontario's *SLRA* and BC's *WVA* when he said the following in paragraph 42 of the decision:

[42] There are three differences of note between the British Columbia and the Ontario legislation. First, subsection 58(1) of the Succession Law Reform Act stipulates that if a deceased "has not made adequate provision for the proper support of his dependants", the court may "order that such provision as it considers [page411] adequate" be made, whereas subsection 2(1) of the British Columbia statute uses the language of not making "adequate provision for the proper maintenance and support" permitting the court to order what it considers "adequate, just and equitable in the circumstances". Secondly, the beneficiaries of the British Columbia statute are not limited to dependant spouses and children, whereas that is the case in Ontario. Finally, the British Columbia legislation does not contain the long list of enumerated factors to be taken into account by the court, as found in subsection 62(1) of the Ontario Act.¹⁶³

¹⁶² *Ibid.* at para 40.

¹⁶³ *Ibid.* at para 42.

Justice Blair did not find any differences in the wording of the two statutes to be significant, but instead concluded that both allow courts wide discretion to vary a will, when he said the following in paragraph 43 of the decision:

I do not think the difference in phraseology between the two statutes is significant. The language of ss. 58(1) and 62 of the Succession Law Reform Act is broad enough itself. It provides the court with a discretion that is to be exercised upon a consideration of all the circumstances of the application. Nor am I persuaded that the disparity in language between "adequate" and "adequate, just and equitable in the circumstances" is important.¹⁶⁴

Justice Blair also addressed the fact that adult independent children were included as dependents in the *WVA*, but stated that the definition of a dependent under the *SLRA* could include this category of claimants based on the decisions of previous courts in Ontario that acknowledged the moral duties of a testator when he said the following in paragraph 44 of the decision:

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 Dependents' Relief Act, and Ontario courts readily applied the "moral duty" analysis to applications under the latter legislation: see, for example, *Re Hull Estate, supra*.¹⁶⁵

Justice Blair also emphasized the fact that the list of factors that the courts must consider in a potential will variation order does require the examination of moral factors such as the time that a couple has been together, and the contributions made by the dependents to the deceased's estate when he said the following in paragraph 45 below:

Finally, I do not think the enumerated list of factors the court is required to consider under subsection 62(1) militates against the examination of moral duties. To the contrary, many of the factors outlined invoke such

¹⁶⁴ *Ibid.* at para 43.

¹⁶⁵ *Ibid.* at para 44.

considerations and, as Misener J. noted in *Kipp v. Buck Estate, supra*, 3 reinforce the notion that moral obligations of the deceased cannot be ignored. I note, for example, the provisions in paras. 62(1)(g) (the proximity and duration of the dependant's relationship with the deceased); (h) (contributions made by the dependant to the [page412] deceased's welfare), (i) (contributions by the dependant to the acquisition, maintenance and improvement of the deceased's property and business), (j) (contribution to the deceased's career potential), (k) (legal support obligations by the deceased to other persons), (o) (the claims any other person may have as a dependant), and (r)(ii) (the length of time the spouses cohabited). Thus, in spite of other listed factors that relate, directly or indirectly, to needs and means, the provisions of subsection 62(1) of the Act are not limited to economic considerations alone. Moral considerations are relevant to the exercise. ¹⁶⁶

In *Cummings*, Justice Blair affirmed that the term “adequate support” under the *SLRA* requires a court to examine the claims of all dependents whether based on legal, moral, or ethical obligations. He also affirmed that, in determining the amount of adequate support, a court would need to consider the factors in section 62 of the *SLRA*, which contains both economic and moral considerations. As a result, Justice Blair affirmed that the term “adequate support” for the *SLRA* included both the testator’s legal obligations and moral obligations as defined in *Tataryn* by the Supreme Court of Canada. The Court of Appeal’s decision in *Cummings* has become the seminal case for dependent relief claims in Ontario.

Section 3.2.2 – *Quinn v. Carrigan*

On September 30, 2014, the Divisional Court released its decision for the *Quinn v. Carrigan* case.¹⁶⁷ In this case, Mr. Carrigan accumulated an estate valued at \$2.4 million. He had a wife from whom he was separated for 12 years, two adult independent children, and a common-law spouse for 8.5 years. Mr. Carrigan left everything for his

¹⁶⁶ *Ibid.* at para 45.

¹⁶⁷ *Quinn v. Carrigan*, 2014 ONSC 5682 (CanLII).

wife Mrs. Carrigan and his independent adult children, but he left nothing for his common-law spouse (Ms. Quinn).

The Divisional Court interpreted the Court of Appeal's decision in *Cummings* and applied it to the *Quinn v. Carrigan* case by stating clearly that *Tataryn* applies in Ontario. This was affirmed in paragraph 78 where the Court stated the following:

The principles to apply are laid down in the Supreme Court of Canada's decision in *Tataryn Estate*. **Although the statutory language in British Columbia (from whence *Tataryn* came) is somewhat different from the governing Ontario legislation, the Ontario Court of Appeal is clear that *Tataryn* applies in Ontario.**¹⁶⁸

The Divisional Court further affirmed that courts must consider both the legal and moral obligations of a testator to his dependents in deciding dependent relief claims in Ontario when it said the following in paragraph 80 of its decision:

As stated by the Court of Appeal in *Cummings*:

In short, when examining all of the circumstances of an application for dependants' relief, the court must consider,

(a) What legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and

(b) What moral obligations arise between the deceased and his or her dependants as a result of society's expectations of what a judicious person would do in the circumstances.¹⁶⁹

The Divisional Court also affirmed that adult independent children are entitled to make an application for adequate support if the size of the estate permits it. This was affirmed in paragraph 81 of the decision where the Divisional Court stated the following:

In addition, the court must consider the claims of non-dependant spouses and children and consider the weight to be placed on respect for the

¹⁶⁸ *Ibid.* at para 78.

¹⁶⁹ *Ibid.* at para 80.

autonomy of the testator and his stated intentions reflected in his will and other financial arrangements.¹⁷⁰

The Divisional Court applied the legal principles in *Cummings* and *Tataryn* to vary the will of Mr. Carrigan because it found that he had not fulfilled his moral obligations to his dependents. The Divisional Court's decision in *Quinn v. Carrigan* was also significant because it acknowledged that adult independent children could be dependents for the purposes of the *SLRA*. It also affirmed that adult independent children are entitled to make an application for adequate support if the size of the estate permits, which was affirmed by the Supreme Court of Canada in *Tataryn*.

Section 3.2.3 – *Spence v. BMO Trust*

On March 8, 2016, the Ontario Court of Appeal released its decision for the *Spence v. BMO Trust* decision.¹⁷¹ In this case, the adult daughter of the testator named Verolin asked the court to vary her father's will because she alleged that her father disinherited her from his will for racist reasons, and that violated public policy. The deceased father left his estate to his other daughter named Donna and her sons citing the fact that he did not have any contact with Verolin for several years and she did not show any interest in him.

Justice Cronk wrote for the Court of Appeal and refused to vary her father's will largely because she concluded that Verolin and her sons did not have any legal entitlement to the testator's estate.¹⁷² Justice Cronk based her decision on the fact that terms of the father's will were both unequivocal and unambiguous in gifting the residue of his estate to his daughter Donna and her sons and thus disinheriting his

¹⁷⁰ *Ibid.* at para 81.

¹⁷¹ *Spence v. BMO Trust Company*, 2016 ONCA 196 (CanLII).

¹⁷² *Ibid.* at para 51.

daughter Verolin and her sons. Since the father left a clear gift for his daughter Donna and her sons, then it follows that they are the only ones that were entitled to her father's estate, and not Verolin and her sons.

Justice Cronk also noted that the father's will had no conditions that offended public policy. Justice Cronk concluded that the alleged offending clause in the will could have reflected the sentiments of a bitter father, but it did not contain any language that would lead one to believe that there was any racial discrimination.¹⁷³ The court also concluded that the public policy doctrine cannot be extended to prohibit discrimination because a person's decision to dispose of his or her property is a private one, and thus it lacks a public orientation.¹⁷⁴

Justice Cronk stated that the application judge also erred in basing his decision on extrinsic evidence that is not admissible when the testator's will is clear and ambiguous on its face.¹⁷⁵ This was the case in *Spence*, as the father clearly explained why he wanted his full estate to go to his daughter Donna and her sons, leaving Verolin and her sons with nothing.

Justice Cronk also rejected the application of *Tataryn* in Ontario, stating that a testator has no statutory duty to provide for an adult independent child because that child does not meet the definition of a dependent as per the *SLRA*.¹⁷⁶ In making this finding, Justice Cronk refused to exercise the wide discretion allowed by the *SLRA* to interpret the Act, as a previous Court of Appeal decision affirmed that *Tataryn* applied

¹⁷³ *Ibid.* at para 53.

¹⁷⁴ *Ibid.* at para 71.

¹⁷⁵ *Ibid.* at para 90.

¹⁷⁶ *Ibid.* at para 37.

and thus non-dependent children were entitled to benefits from their parent's estate so long as the size of the estate permits it.

In Ontario, some courts apply a two-part test for dependency. The first part of the test relies on Section 57 of the *SLRA*, which defines a dependent as the testator's spouse, parent, child, brother or sister to whom the deceased was under a legal obligation to support immediately before his or her death. The second part of the test requires the court to determine if the dependent was receiving support or was entitled to receive support from the testator. There are differing viewpoints on the second part of the test.

In paragraph 17 of *Reid v. Reid*,¹⁷⁷ the Divisional Court affirmed the trial court's interpretation of what the term "support" meant for the *SLRA* when it said:

The actual support provided by the testator need not be direct financial support. By providing the most basic of human needs, for example, "shelter", this testator provided substantial financial support to the three applicants all of their lives. The relationship of dependency created due to the above course of conduct by the testator has established to my satisfaction a subtle intention by the testator to provide support for all three applicants.¹⁷⁸

The definition for support above has both a legal and moral element to it, as the factors go beyond purely financial factors. However, in *Re: Estate of Joseph Paul Grieco*, the court found that the moral support provided by a testator did not make the claimant a dependent for the *SLRA* when it said the following in paragraph 62 of its decision:

However, there is little, if any, evidence that following each child completing university, Joe provided monies to either child with any regularity to assist with or pay for essential expenses such as accommodation, food, or clothing. **I am not satisfied that Joe's generous moral support, encouragement, and sporadic gifts of non-essential items qualify as provision of support as**

¹⁷⁷ *Reid v. Reid*, 2008 CanLII 8274 (ON SCDC).

¹⁷⁸ *Ibid.* at para 17.

contemplated and defined by s. 57 of the SLRA. Accordingly, on the evidence before me, I am not satisfied that either Nicole or Mason is a dependant as defined by s. 57 of the SLRA. Accordingly, neither Nicole nor Mason is entitled to bring a dependant's support application under s. 58 of the SLRA.¹⁷⁹

Justice Cronk rejected Verolin as a dependent for the *SLRA* because she was not financially dependent on her father before his death. She also rejected the notion that adult independent children were entitled to any benefits from their father's will based on any moral obligations. This is affirmed in paragraph 37 of the decision which states as follows:

I note at this point that, unlike 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*, 2013 ONSC 3018, 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.¹⁸⁰

Justice Cronk's findings concerning the application of *Tataryn* and in particular the moral duties of a testator contradict the findings of the Court of Appeal in *Cummings* and the Divisional Court's decision in *Quinn*, but she made no mention of these authorities in her decision. This could lead to variability and inconsistencies in decisions made regarding dependent relief claims in Ontario.

The Court of Appeal's decision in *Spence* was sound concerning [the issue of legal entitlement], the refusal to apply the public policy doctrine and the inadmissibility of extrinsic evidence. However, the Court of Appeal in *Spence* failed to perform an

¹⁷⁹ *Re: Estate of Joseph Paul Grieco*, deceased, 2013 ONSC 2465 (CanLII) at para 62.

¹⁸⁰ *Spence*, *supra* note 14.

analysis of the *SLRA* and *WVA* the same way that the Court of Appeal in *Cummings* did. Since the *Cummings* analysis of the two statutes is more credible, *Tataryn* should apply in Ontario and adult independent children should be able to make applications for adequate support when their fathers or mothers fail to adequately provide for them.

In *Spence*, the outcome may have been different if Verolin was allowed to claim adequate support from her father if the court found that her father failed in his moral obligations to her based on the 19 factors in subsection 62(1) of the *SLRA*. As established in *Cummings*, the court would also need to consider both legal and moral factors in deciding whether Verolin's father adequately provided for her in his will.

Section 3.3 – Ontario Courts' Failure to Consider Moral Obligations Means Adult Independent Children Have Unequal Access to Benefits under the SLRA

The *Spence v. BMO Trust* decision affirmed that adult independent children are not entitled to any benefits to their father's or mother's will because they do not meet the definition of a dependent. Section 57 of the *SLRA* defines a dependent to be the deceased's spouse, parent, child, or the brother or sister of the deceased father or mother to whom the deceased owed a legal obligation to provide support immediately before the father's or mother's death. The focus on legal obligations in the statute means that adult independent children are not entitled to any benefits under their father's or mother's will strictly because of their age and lack of financial dependency.

However, the Supreme Court in *Tataryn* affirmed that the judicious parent test should continue to be applied by the courts, and that would require the acknowledgement of the moral obligations a testator owed to his or her dependents. It is the acknowledgement of the moral obligations that would allow adult independent

children to make claims for benefits under their father's or mother's will so long as the size of the estate permits. In Ontario, this was the approach taken in the Divisional Court's decision in *Quinn v. Carrigan*.

There are jurisdictions outside of Ontario that acknowledged that the duty to support dependents is a moral one regardless of whether the child is dependent or independent. In *Garrett v. Zwicker*, the Nova Scotia Court of Appeal stated the following:

"Support" it has been held,' said the learned Chief Justice, 'at all events in the case of a widow, does not mean merely having a supply of food and clothing. It means, it has been held, such kind of maintenance as the widow during the life of her husband has been accustomed to. The matter that should be considered, both as to widow and children, is how she or they have been maintained in the past. A child, for example, that has been living on a father's bounty could not be expected to begin the battle of life without means. **A child, however, who had maintained her or himself, and had perhaps accumulated means, might well be expected to be able to fight the battle of life without any extraneous aid. But even in such a case, if the fight was a great struggle, and some aid might help, and the means of the testator were great, the Court might, in my opinion, properly give aid.** The whole circumstances have to be considered. Even in many cases where the Court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the Court alter the testator's disposition of his property. The first inquiry in every case must be what is the need of maintenance and support; and the second, what property has the testator left.¹⁸¹

The Nova Scotia Court of Appeal also stated that the claims of adult independent children need to be considered against the claims of other dependents and the size of the estate when it said the following:

The dependant claimant need not, however, show need in the sense of actual want in order to qualify for consideration under the Act, and need not show actual dependency upon the testator. The need is relative, relative to the extent of the estate and the strength of other claims.¹⁸²

¹⁸¹ *Garrett v. Zwicker*, 1976 CanLII 1981 (NS CA) at para 18.

¹⁸² *Ibid* at para 40.

In a more recent Court of Appeal decision in *Nova Scotia (Attorney General) v. Lawen Estate*, the Court overturned the Nova Scotia Supreme Court decision to deny adult independent children benefits from the TFMA strictly because their claims were moral. Instead, the Court of Appeal affirmed the fact that adult independent children are entitled to make moral claims because of moral obligations owed to them by their fathers or mothers when it said the following in paragraph 32 of its decision:

The suggestion that claims by non-dependent adult children (or spouses by necessary implication) are “purely moral” suggests they do not merit consideration and are an unjustified fettering of a testator’s autonomy. It ignores the very fact that a moral claim emerges from the moral obligations of the testator during their lifetime.¹⁸³

Some legal scholars argue that a child does not ask to be born, so the blood relationship creates a moral obligation to support a child regardless of his or her needs.

This argument is captured in the following statement:

As old-fashioned as it may sound, the tie of blood and the responsibility it engenders to offspring is ample reason for protection of all children from disinheritance. **It is this tie that forms the moral obligation to children above and beyond the simple demands of support.**¹⁸⁴

Other legal scholars argue that the strength of the relationship that grows over time creates a reasonable expectation for inheritance on the part of the child and thus grounds the entitlement to inheritance on moral grounds rather than on need or financial dependency.¹⁸⁵ The strength of the relationship between the father and child could have been the reason why he or she got an education and is well off financially and the reason why he or she went along with growth plans to increase family wealth.¹⁸⁶ As a

¹⁸³ *Nova Scotia (Attorney General) v. Lawen Estate*, 2021 NSCA 39 (CanLII) at para 32.

¹⁸⁴ Chester, *supra* note 22.

¹⁸⁵ Deborah A Batts, “I didn’t ask to be born: the American law of disinheritance and a proposal for change to a system of protected inheritance” (1990) 41:5 *The Hastings law journal* 1197-1270 at 1253.

¹⁸⁶ *Ibid.* at 1197.

result, his or her obedience to the father creates a moral obligation on his part to ensure that he or she gets a fair share of the family's assets regardless of need and financial dependency.¹⁸⁷

There is also research that shows that the parent/child relationship is most important to the public's conception of the right to inherit, and this right has very little to do with need.¹⁸⁸ It has been long-established that the family was seen as the natural recipient of the estate, and thus there is a natural expectation of inheritance. This is summarized in the following statement: "The core thread of fixity is the continuing relationship between parents and children. This remains at the core even in complex families...the parent-child relationship is both predictable and privileged, as is seen very clearly in relation to inheritance".¹⁸⁹

Other scholars argue that a father or mother may disinherit his or her child, not because of need or lack of financial dependency but rather it could be for discriminatory reasons related to the child's identity. Kreiczler-Levy and Meital Pinto are legal scholars who argue that when a child is denied a bequest because of his or her special features (i.e., age, race, gender, sexual orientation) he or she is being denied the bequest because of his or her identity.¹⁹⁰ These legal scholars say that discriminatory bequest motives violate the public policy because they infringe on one's dignity, self-respect, and family belongingness, and thus these testators' wills should not be legally enforced by

¹⁸⁷ *Ibid.*

¹⁸⁸ Dot Reid, "From the Cradle to the Grave: Politics, Families and Inheritance Law" (2008) 12:3 *The Edinburgh law review* 391–417.

¹⁸⁹ *Ibid.* at 400.

¹⁹⁰ Shelly Kreiczler Levy, & Meital Pinto, "Property and Belongingness: Rethinking Gender-Based Disinheritance" (2011) 21:1 *Tex J Women & L* 119–152.

the courts because it will perpetuate discrimination in society and thus cause more public harm.

Therefore, for the courts to balance the conflicting Charter values of equality and liberty, they must acknowledge the moral claims of adult independent children and allow them to make claims for adequate support. The courts have wide discretion to make these claims subordinate to the claims of other dependents and spouses, and any entitlement can be based on whether the size of the estate permits or not. Since the identity of a child is multi-dimensional, it is necessary to include adult independent children as claimants so that any form of discrimination in wills can be prohibited based on the judicious parent test in *Tataryn*.

Section 3.4 – Spence v. BMO Trust: The Hypothetical Scenario Reduced Its Precedential Value

As stated earlier, the Ontario Court of Appeal in *Spence* provided sound reasons to support their decision to allow the appeal on the grounds of inapplicability of the public policy doctrine given a lack of any offensive conditions in the will, and the application judge's reliance on inadmissible extrinsic evidence. As a result, Justice Cronk did not have to consider a hypothetical scenario where Verolin was disinherited by her father for racist reasons. In other words, what if Mr. Spence said that he is not leaving anything to his daughter, Verolin, because she had a child by a white man?

Justice Cronk ruled that the bequest would nonetheless be valid because it reflects the testator's intentional, private disposition of his or her property, which is a hallmark of testamentary freedom. Justice Cronk stated that doing so would encroach too much on the father's or mother's testamentary freedom, and the dependent relief legislation in Ontario currently does not have any anti-discrimination provisions. In short,

a father's or mother's liberty rights take priority over his or her children's rights to equality. This is confirmed in paragraph 75 of the decision, where she said:

Absent valid legislative provision to the contrary, the common law principle of testamentary freedom thus protects a testator's right to unconditionally dispose of her property and to choose her beneficiaries as she wishes, even on discriminatory grounds. To conclude otherwise would undermine the vitality of testamentary freedom and run contrary to established judicial restraint in setting aside private testamentary gifts on public policy grounds.¹⁹¹

Justice Cronk affirmed in her decision that a father or mother can disinherit his or her child for any reason even if the reasons are discriminatory. Since Justice Cronk affirmed that a father or mother owes no moral obligations to his or her child, then it follows that if his or her will contains discriminatory language on its face then it would still be enforced by the courts because it did not violate the *SLRA*, which ties the definition of a dependent to the legal obligations the father or mother owed his or her child before his or her death. However, the fact that the courts are permitted to probate a will with discriminatory language on its face is an open endorsement by the courts for testators to use their wills to perpetuate discrimination.

This Court of Appeal's decision in *Spence* also affirmed that conceptual tools such as the Charter of Rights, public policy doctrine, and *Ontario's Human Rights Code* could not be applied to prohibit discrimination in wills. Therefore, the area of private law governing the private wills of testators is now an area of private law where there is no protection from discrimination.

The Ontario Court of Appeal's endorsement of discrimination should reduce its precedential value, as courts will be reluctant to follow a decision that endorses the fact that the Charter's value of liberty should prevail over the Charter's value of equality

¹⁹¹ *Spence*, *supra* note 14 at para 75.

when these values come in conflict with one another in private law governing the wills of fathers or mothers.

The courts in Ontario will likely look to balance these conflicting values of the Charter by applying *Tataryn* and acknowledging the moral obligations of the testator. This was the case in *Poitras Estate v. Poitras*. In paragraph 47 of the decision, the court acknowledged the deeply entrenched common law right to testamentary freedom based on *Spence* when it said:

In making his 2013 will, Gilles was exercising his freedom to dispose of his property as he saw fit and this testamentary autonomy should not be lightly interfered with. **A testator's freedom to distribute his property as he chooses is a deeply-entrenched common law principle (see *Spence v. BMO Trust Company*, 2016 ONCA 196 at para. 30).** At the same time, the legislature has placed limits on this power to ensure that a deceased person has made adequate just and equitable provisions for his dependants.¹⁹²

This court relied on *Spence*, which affirmed that adult independent children were not entitled to any benefits from their father's or mother's will. However, this decision deviated from *Spence* when this court affirmed that some legal duties are owed to adult independent children based on *Tataryn* and said the following:

Sometimes legal duties can be owed to adult, independent children where they have made significant contributions to the estate. In this case, however, there was no evidence of financial contributions or other material benefits flowing to Gilles from his children (see *Tataryn v. Tataryn Estate*, [2004] 2 S.C.R. 807 at para. 29, 30)¹⁹³

It is important to note that even though the court in *Poitras* quoted *Tataryn* above, it is the SLRA that allows the courts to consider the financial and non-financial contributions of dependents to the estate in subsections 62(h)(i) in determining the

¹⁹² *Poitras Estate v. Poitras*, 2016 ONSC 5049 (CanLII) at para 47.

¹⁹³ *Ibid.*, at para 49.

amount of relief that should be provided to the claimant. The court in *Poitras* also explicitly acknowledged the fact that adult independent children can make claims for relief when it said the following in paragraph 50 of its decision:

By comparison, the claims of independent, adult children are more tenuous but if the size of the estate permits, some provision for children ought to be made (*Tataryn, supra, para. 31*)¹⁹⁴

The paragraph above from the court in *Poitras* supports the fact that the decision in *Spence* is not authoritative with respect to its findings related to the *SLRA* and the applicability of *Tataryn* in Ontario. This decision is a clear endorsement of the decision in *Cummings*, which stated clearly that the Supreme Court's decision in *Tataryn* applies in Ontario.

Section 3.5 – Conceptual Tools that Cannot Be Applied to Prohibit Discrimination in Wills in Ontario

Section 3.5.1 – Charter of Rights and Freedoms

In *Spence*, the Court of Appeal in Ontario stated that the Charter of Rights and Freedoms could not be extended to prohibit discrimination in a will because it does not involve any state action, when it said the following in paragraph 74 of its decision:

In these hypothetical circumstances, neither Ontario's Human Rights Code, R.S.O. 1990, c. H.19 nor the Charter of Rights and Freedoms would apply to justify court interference with the testator's intentions. The Human Rights Code, of course, ensures that every person has a right to equal treatment with respect to services, goods and facilities without discrimination based on race and other enumerated grounds. **The Charter pertains to state action. Neither reaches testamentary dispositions of a private nature.**¹⁹⁵

The court also stated that the fact that the court's act of probating a will does not expand the public policy exemption such that the Charter is engaged. This is because

¹⁹⁴ *Ibid.*, at para 50.

¹⁹⁵ *Spence, supra* note 14 at para 74.

Mr. Spence's will is a private act of personal expression and not state action. The court also stated that in probating a will it is determining whether it is formally valid and whether the testator was of sound mind, and thus it is not looking for proof that the will is non-discriminatory.¹⁹⁶

The decision in *Spence* also affirmed that the current *SLRA* does not have any anti-discrimination provisions and thus it will require legislative reform to give effect to the equality provision of the Charter when it said the following in paragraph 124 of its decision:

Second, I address the proposed extension of the public policy exception to testamentary freedom as a matter of principle. There is no law in Ontario that entitles Verolin to share in her father's estate. No law has deprived her of any right. **The Charter value of equality that she asserts does not afford her such an entitlement. Ontario could choose to legislate to give effect to the value of equality in estates, but it has not done so.**¹⁹⁷

In *Spence*, the Court of Appeal affirmed that there is no protection from discrimination in the area of private wills either through the common law or legislation. The fact that there are no anti-discriminatory provisions in the *SLRA* could be argued to be an omission on the part of legislators in Ontario, and this could attract Charter scrutiny based on Section 15 of the Charter. This is because it is the State that is responsible for ensuring that individuals are protected from discrimination that could hurt their dignity and sense of self-worth. This was affirmed by the Supreme Court of Canada in *Vriend v. Alberta*, where the Supreme Court of Canada stated the following in paragraph 103 of its decision:

Even if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination.

¹⁹⁶ *Ibid.*, at para 129.

¹⁹⁷ *Spence*, *supra* note 14 at para 124.

Thus the adverse effects are particularly invidious. This was recognized in the following statement from Egan (at para. 161):

The law confers a significant benefit by providing state recognition of the legitimacy of a particular status. The denial of that recognition may have a serious detrimental effect upon the sense of self-worth and dignity of members of a group because it stigmatizes them Such legislation would clearly infringe s. 15(1) because its provisions would indicate that the excluded groups were inferior and less deserving of benefits.

This reasoning applies a fortiori in a case such as this where the denial of recognition involves something as fundamental as the right to be free from discrimination.¹⁹⁸

Even though it was established that an omission on the part of the state can attract Charter scrutiny, the Supreme Court of Canada in *Dolphin Delivery*¹⁹⁹ affirmed that the Charter does not apply to private activity. It established clearly that the purpose of the Charter was to invalidate laws that infringe the Charter rights guaranteed to all Canadians, so its purpose is to govern the relationship between the individual and the state. The Supreme Court of Canada also stated that private disputes or relationships between individuals are best left to be addressed by the provincial human rights codes, other statutes, and common law remedies.

This is affirmed in paragraph 30 of the decision, which states the following:

The automatic response to a suggestion that the Charter can apply to private activity, without connection to government, will be that a Charter of Rights is designed to bind governments, not private actors. That is the nature of a constitutional document: to establish the scope of governmental authority and to set out the terms of the relationship between the citizen and the state and those between the organs of government. **The purpose of a Charter of Rights is to regulate the relationship of an individual with the government by invalidating laws and governmental activity which infringe the rights guaranteed by the document, while relationships between individuals are left to the regulation of human rights codes, other statutes, and common law remedies, such as libel and slander laws.** Furthermore, s. 32(1) specifically states that the Charter applies to “the Parliament and government of

¹⁹⁸ *Vriend v. Alberta*, 1998 CanLII 816 (S.C.C.), [1998] 1 SCR 493 at para 103.

¹⁹⁹ *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (S.C.C.), [1986] 2 SCR 573.

Canada in respect of all matters within the authority of Parliament” (emphasis added). It is governmental action which is caught, not private action.²⁰⁰

In *Vriend*, it was determined by the Supreme Court of Canada that the Charter did apply to the Human Rights Code in Alberta because it is legislation that governs the relationship between individuals and the government. In this case, the Supreme Court of Canada found that the State could not create a legislative scheme that prohibited discrimination on some constitutionally prohibited grounds (i.e., race, colour, creed) and not on other constitutionally prohibited grounds (i.e., sexual orientation).

The fact that the *SLRA* does not have any anti-discrimination provisions is not an omission on the part of the State because there is no positive duty on the State to prohibit all discrimination by private actors. If this duty existed, then it would negate the need for provincial Human Rights Codes that are created to prohibit discrimination between private actors. Therefore, the conceptual tool of the Charter of Rights and Freedoms cannot be applied by courts to prohibit discrimination in wills.

It is important to note that the Charter could be invoked in the future to protect the liberty rights of the testator in Ontario. This is because there are provisions in the *SLRA* that protect a person’s right to testamentary freedom. This means that the *SLRA* could be subject to Charter scrutiny since it would be considered state action. The Nova Scotia Court of Appeal weighed in on the issue of constitutional protection for the liberty interests of a testator in *Lawen Estate*. The Nova Scotia Court of Appeal concluded that testamentary autonomy could come under the liberty protections of section 7 of the Charter, but a robust evidentiary record would be required for that to happen.²⁰¹

²⁰⁰ *Ibid.*, at para 30.

²⁰¹ See *Nova Scotia (Attorney General) v. Lawen Estate*, 2021 NSCA 39 at paras 45-47.

Section 3.5.2 – Human Rights Code

Part 1 of the *Ontario Human Rights Code* states the following:

Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.²⁰²

It is clear that Ontario's Human Rights Code only guarantees equal treatment for services. It does not provide any protection to a child who has been disinherited by his or her father or mother for discriminatory reasons. The question then becomes: Is this an omission on the part of the legislature that could be subject to Charter scrutiny under Section 15 of the Charter? Is the situation here the same as the one in *Vriend* where the *IRPA* was found to be subject to the Charter due to an omission? The answer here is no.

In the Supreme Court of Canada's decision in *Vriend v. Alberta*, Alberta's human rights legislation (*IRPA*) was subject to the Charter because it omitted sexual orientation as a prohibited ground of discrimination. The Supreme Court of Canada held that such a legislative scheme creates an impermissible distinction that is discriminatory and cannot be saved under Section 1 of the Charter.

Justice Cory of the Supreme Court of Canada rejected the respondents' assertion that omitting references to sexual orientation in the human rights legislation did not create any impermissible distinction. Justice Cory stated that there were two distinctions made in the *IRPA*. The first one can be seen as relatively easy, as there is a distinction made between homosexuals who are not protected by the law and other

²⁰² Human Rights Code, RSO 1990, c H.19.

groups of individuals who are protected by the law.²⁰³ The second distinction is much more difficult to see. The human rights legislation gave homosexuals and heterosexuals equal access to bring forward claims on the prohibited grounds listed in the legislation. However, the legislation protected the heterosexuals on the grounds of discrimination they would most likely experience but did not do so for homosexuals who were most vulnerable to discrimination based on sexual orientation.²⁰⁴

After establishing that the legislation made a distinction, Justice Cory now needed to address whether the distinction was discriminatory or not. Justice Cory held that the exclusion of sexual orientation sends a clear message to all Albertans that it is permissible and possibly acceptable to discriminate against individuals based on their sexual orientation.²⁰⁵ Justice Cory concluded that this problematic assertion together with the fact that there was no recourse under the current legislation for homosexuals experiencing discrimination based on sexual orientation constituted discrimination on the ground of sexual orientation, which was contrary to s. 15(1) of the Charter.

Justice Iacobucci performed the s.1 test under the Charter, which is applied to determine whether the violation can be saved under s.1. Justice Iacobucci stated that since the exclusion of sexual orientation is not aligned to the overall purposes of the *IRPA*, it could not be considered a pressing and substantial objective.²⁰⁶ He also stated that the exclusion was not rationally connected to the purpose of the legislation.²⁰⁷ Justice Iacobucci also reasoned that the under-inclusiveness of the *IRPA* did not meet

²⁰³ *Vriend, supra* note 198 at paras 81-82.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*, at para 101.

²⁰⁶ *Ibid.*, at 116.

²⁰⁷ *Ibid.*, at 108.

the Oakes minimal impairment requirement because the exclusion of sexual orientation amounted to total rather than minimal impairment of the appellant's rights. He also could not find any salutary benefits that would outweigh the harm caused to homosexuals who had no recourse under the legislation to bring forward any allegations of discrimination based on sexual orientation. Therefore, Justice Iacobucci found that the failure to prohibit discrimination based on sexual orientation could not be saved under s.1 of the Charter. Justice Iacobucci stated that the remedy for this situation would be to read sexual orientation into the *IRPA*. He stated that this is the best remedy considering that the Alberta legislature's decision to exclude sexual orientation was inconsistent with democratic principles.

Ontario's *Human Rights Code* is not making any distinctions by expressly limiting the applicability of equality guarantees to services, goods, and facilities that are open to the public.

The Court of Appeal in *Spence* also affirmed that the *Human Rights Code* in Ontario does not reach the private dispositions of private citizens because it only prohibits discrimination related to "services, goods, and facilities based on race and other enumerated grounds".²⁰⁸ Therefore, the situation with Ontario's *Human Rights Code* is not the same as the situation related to Alberta's *IRPA*.

The fact that a child cannot file an application with the Human Rights Tribunal of Ontario (HRTO) claiming discrimination from his or her father's or mother's will is not problematic at all because the *Human Rights Code* cannot possibly give equality guarantees in all areas of private activity. As a result, the *Human Rights Code* cannot

²⁰⁸ *Spence*, *supra* note 14 at para 74.

be applied to prohibit discrimination in wills in Ontario. This is not the solution to the problems raised in this thesis.

Section 3.5.3 – Public Policy Doctrine

The history of subjecting private discrimination in wills to public policy doctrine scrutiny dates to 1888 in Canada. The leading case on this issue at that time was *Kimpton v. CPR*.²⁰⁹ In this case, the Superior Court of Quebec voided a clause in a testator's will that provided for a substitutionary gift-over²¹⁰ in favour of beneficiaries that professed the Protestant religion. The court reasoned that this clause contravened Quebec's public policy. In Quebec, the public policy doctrine was tied to the freedom of religion, which was guaranteed under chapter 74 of the Revised Statutes of Canada. Therefore, this substitutionary gift-over constituted an impermissible restriction on one's conscience.

In 1939, the Ontario High Court of Justice held that a restrictive condition in a will that sought to exclude any of the testator's grandchildren who married a non-Catholic from inheriting his or her estate could not be voided because it did not involve any question of public morality.²¹¹ However, in 1945, the Ontario Supreme Court ruled in *Drummond Wren* that the restrictive covenant registered against a parcel of land that prohibited its sale to "Jews or persons of objectionable nationality" was void because it was contrary to public policy.²¹² This was a landmark decision because it was the first common law decision that held that discrimination was contrary to public policy. In the

²⁰⁹ *Kimpton v. CPR* (1888) MLR 4 SC 338 [Kimpton] at 340.

²¹⁰ A substitutionary gift-over occurs when the testator includes provisions to allow for an alternate beneficiary to substitute a preferred beneficiary.

²¹¹ *Re Curran*, [1939] OWN 191, 1939 CarswellOnt 167 (H Ct J) [Cited to Carswell] at para 3.

²¹² *Re Drummond Wren*, [1945] OR 778, 1945 CarswellOnt 62 (H Ct J) [*Wren* cited to Carswell] at para 12.

BC case of *Mindlin v. Hurshman*,²¹³ the court voided a condition placed by the testator in his or her will that a gift to his or her son or daughter would be redirected to a charitable organization if at the time of his husband's or wife's death his son or daughter remained married to a "Jew." In this case, the court ruled that any attempt to fracture a marriage was contrary to public policy.

It would take another 40 years until the Ontario Court of Appeal would weigh in on whether discrimination in private law could contravene public policy. In the 1990 case of *Canada Trust Co. v. Ontario Human Rights Commission*, the Ontario Court of Appeal ruled that certain conditions to awarding a scholarship were contrary to public policy and thus voided the restrictions that were based on the human rights grounds of race, colour, creed, ethnic origin, and sex.

According to Justice Tarnopolsky in *Canada Trust*, it was the public nature of charitable trusts that made them subject to the doctrine of public policy. He distinguished bequests to family members as being private and thus stated that they would not be subject to the public policy doctrine. This finding became a very important consideration in the Court of Appeal's decision in *Spence v. BMO Trust Company*.

In *Spence v. BMO Trust Company*, the Ontario Court of Appeal laid out the following situations where public policy may be invoked to void conditions of a testamentary gift:²¹⁴

The fact that Eric's residual bequest imposes no conditions or stipulations is significant. The courts have recognized various categories of cases where public policy may be invoked to void a conditional testamentary gift. **These include cases involving: i) conditions in restraint of marriage and those that interfere with marital relationships, e.g., conditional bequests that seek to induce celibacy or the separation of married couples; ii) conditions that**

²¹³ (1956), 6 DLR (2d) 615, 1956 CarswellBC 235 (SC) [*Hurshman* cited to Carswell].

²¹⁴ *Spence*, *supra* note 14 at para 55.

interfere with the discharge of parental duties and undermine the parent-child relationship by disinheriting children if they live with a named parent; iii) conditions that disinherit a beneficiary if she takes steps to change her membership in a designated church or her other religious faith or affiliation; and iv) conditions that incite a beneficiary to commit a crime or to do any act prohibited by law.

For example, in *McCorkill v. McCorkill Estate*,²¹⁵ the court decided that testamentary dispositions that contravene the Criminal Code (RSC 1985, c C-46) in Canada were void for public policy reasons because they would cause harm to the public. In *Murley Estate v. Murley*,²¹⁶ the Court voided a condition in a testamentary gift based on religious affiliation, as it found that this condition was void for public policy reasons. In *Fox v. Fox Estate*,²¹⁷ the deceased named his wife the executrix under his will. The executrix, or the mother, withheld income for her son because he married a non-Jew. The court viewed the mother's behaviour as being mala fides and contrary to public policy.

In support of the decision not to vary Mr. Spence's will, the Ontario Court of Appeal in *Spence* cited the concurring reasons of Justice Tarnopolsky in *Canada Trust*, who stated the following in paragraph 45 of the decision:

A finding that a charitable trust is void as against public policy would not have the far-reaching effects on testamentary freedom which some have anticipated. **This decision does not affect private, family trusts.** By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts. ... It is [the] public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination. Only where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void.²¹⁸

²¹⁵ *McCorkill v. Streed*, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased, 2014 NBQB 148 (CanLII), upheld on appeal *McCorkill Estate v. McCorkill*, 2015 CanLII 14497 (NB CA).

²¹⁶ *Murley Estate, Re*, 1995 CanLII 10513 (NL SC).

²¹⁷ *Fox v. Fox Estate*, 1996 CanLII 779 (ON CA).

²¹⁸ *Spence*, *supra* note 14 at para 45.

Based on the decision in *Canada Trust*, there is a clear acknowledgement that the public-private divide is the reason why equality guarantees from discrimination in wills can be channelled to charitable trusts, but the same protections do not apply to the private wills of testators.

Section 3.5.3.1 – Concurring and Dissenting Decisions on the Application of the Public Policy Doctrine

The courts in the past have affirmed that the public policy doctrine should be applied to promote racial harmony and equality. In *Re Drummond Wren*,²¹⁹ Justice Mackay stated that discrimination in property law based on race, religion, and ethnicity would be a threat to national unity and harmony in Canada when he said that nothing could “be more calculated to create or deepen divisions between existing religious and ethnic groups”²²⁰ in Ontario or Canada. This position taken by Justice Mackay was adopted and affirmed by Justice Tarnopolsky in *Canada Trust* who applied it to the law of trusts when he said that, “the promotion of racial harmony, tolerance, and equality is clearly and unquestionably part of the public policy of modern-day Ontario”.²²¹ Therefore, any discriminatory conditions (i.e., restraint on religion) in one’s will would go against the goal of promoting racial harmony, since these conditions would be grounded on the belief that a class of individuals should be treated as inferior because of their special features (i.e., race, colour, creed, gender, sexual orientation).

²¹⁹ *Re Drummond Wren*, 1945 CanLII 80 (ON SC).

²²⁰ *Ibid.*, at para 20.

²²¹ *Canada Trust Co. v. Ontario Human Rights Commission (C.A.)*, 1990 CanLII 6849 (ON CA) at para 96.

Some legal scholars argue that the doctrine of public policy could be applied to override clauses in private dispositions without having any kind of public anchor.²²² To make this argument the law of contracts is referred to. The premise here is that a contract between private individuals can be considered illegal and legally unenforceable on public policy grounds if the terms are deemed to be injurious to the public. This includes the terms of contracts, including religious and racial discrimination.

Grattan and Conway also argued that public policy doctrine channels constitutional protections into the entire realm of private law.²²³ They argue that private dispositions within private law are not immune from public policy doctrines and judicial interference. Therefore, the courts do not need any public anchor to invoke the public policy doctrine to strike out conditions in a will that perpetuates discrimination. In taking this position Grattan and Conway did not support the position taken by Justice Tarnopolsky in *Canada Trust*.

Harding argued that the courts are public institutions themselves and thus must always be sensitive to the applicable public policy and constitutional norms when adjudicating purely private matters.²²⁴ He argued against the notion that the non-discrimination norms should not apply to testamentary dispositions. Instead, he said that non-discrimination norms affect all gifts and trusts, which include those that discriminate for a valuable purpose. Harding argued that the courts do more harm to the public by condoning discrimination, and thus the courts need to apply the public policy doctrine to

²²² Shelly Kreiczler Levy, "Religiously inspired gender-bias disinheritance - what's law got to do with it" (2010) 43:3 *Creighton law review* 669-692.

²²³ Sheena Gratten & Heather Conway, "Testamentary Conditions in Restraint of Religion in the Twenty-First Century: An Anglo-Canadian Perspective" (2005) 50 *McGill LJ* 511-552.

²²⁴ Matthew Harding, "Some Arguments against Discriminatory Gifts and Trusts" (2011) 31:2 *Oxford J Legal Stud* 303-326.

strike out terms and conditions that exclude individuals because of their special features to ensure the collective good of the public.

Other scholars hope that the courts will be persuaded that discrimination in any civilized society, even if confined to private affairs, is contrary to public policy because they offend the fundamental ideals of human dignity, equity, and equality. If the courts find that the conditions contained in a will communicate disdain or intolerance towards a protected group or a particular faith rather than preserve one's faith, then this should be viewed as engaging the public interest.²²⁵

There is also the argument that imposing conditions on the restraint of religion cannot be seen as justified based on the common law principle of testamentary freedom. This is because the testator is imposing his or her beliefs on his or her beneficiaries and thus is perpetuating his or her prejudices. This means that to get his or her inheritance the beneficiary will have to act as per the testator's religious convictions even if these are counter to his or her conscience.

This assertion was confirmed in *Murley Estate*²²⁶ where the court invalidated a clause that the heir remains in a mainstream Christian church and thus could not belong to any lesser religious organization because that would mean that the heir is not a real Christian. The court found that any provision in the will that restricts the religious affiliation of a person was contrary to public policy and is thus void on those grounds.

Public policy has also been viewed as a tool that should only be applied by the courts where the harm to the public or community is substantially incontestable.²²⁷

²²⁵ Angela Campbell "I Do, I Will" (2014) 47:2 UBC L Rev 367–398.

²²⁶ *Murley Estate*, Re, 1995 CanLII 10513 (NL SC).

²²⁷ *In Re Estate of Charles Millar, Deceased*, 1937 CanLII 10 (S.C.C.), [1938] SCR 1.

Discrimination does not meet this definition because many legal scholars have cited cases that show that the common law has tolerated discrimination in the disposition of property by gift or trust on the prohibited grounds of sex, nationality, social class, and religion.²²⁸ The courts have reasoned that if a restrictive condition in a will is anchored into a tolerable testamentary goal then it will likely not be voided based on the public policy doctrine.²²⁹ However, there has to be compelling proof of the tolerable testamentary rationale for the conditions to survive judicial scrutiny.

The trial decision of *Re Drummond Wren* was not appealed, but a similar issue was considered by the Ontario Court of Appeal in *Re Noble and Wolf*.²³⁰ This case involved a restrictive covenant that would prevent the sale of vacation property to non-Caucasians. The court rejected the decision in *Re Drummond Wren* after considering the application of the public policy doctrine. The court found that the removal of racial discrimination must be a natural outgrowth of human interactions and not a change imposed by the courts. As a result, the court refused to revoke the restrictive covenants. However, this decision was overturned by the Supreme Court of Canada²³¹ which found that the covenant as drafted did not run with the land. Therefore, the conditions were void for uncertainty. The Supreme Court of Canada did not consider the public policy doctrine in its decision.

There is also the argument that the operation of equality and non-discrimination norms should not be applied to limit one's private autonomy in the law of gifts and

²²⁸ Harding, *supra* note 224.

²²⁹ Campbell, *supra* note 225.

²³⁰ Noble et al. v. Alley, 1949 CanLII 13 (ON CA).

²³¹ Noble et al. v. Alley, 1950 CanLII 13 (S.C.C.), [1951] SCR 64.

trusts.²³² This argument is grounded in this principle of transactional equality, which only considers the normative position of one of the sides to the private dispute, and that is the natural rights of the beneficiaries to inherit property upon the death of a testator. The proponents of this approach argue that the common law right of the testator needs to be respected, and this means a testator is free to choose the terms and conditions for the disposal of his or her property. These proponents also argue that the courts violate the personal autonomy of the testator when they refuse to facilitate privately created dispositions that lack a public character. In making this claim the proponents of this approach support the Court of Appeal's decision in *Canada Trust*.

There is also the argument that a testator has full freedom to dispose of his or her property as he or she sees fit while he or she is alive.²³³ If this is the case, then why does this right change at the time of death? The argument here is that testamentary freedom should allow a testator to select his or her beneficiaries upon death. This is a major argument in favour of testamentary freedom, because in this context it is being argued that this freedom is a logical extension of an owner's freedom to dispose of his or her property as he or she sees fit while he or she is alive.

The arguments for and against the application of the public policy doctrine come down to the public/private divide. This is because public policy doctrine can only be applied to prohibit discrimination in wills in the charities context because of their public orientation. Since the Charter of Rights and Human Rights Code cannot be applied to

²³² Lorraine E Weinrib, & Ernest J Weinrib, "Constitutional values and private law in Canada" (2001) 43 *Human rights in private law*.

²³³ J. Talpis, "Religious Inheritance Laws by the Front and Back Doors in Quebec" (2015) 35:1 *ETPJ* 64.

prohibit discrimination in wills for all contexts, the public policy doctrine provides some protection from discrimination in the public space.

However, the portrayal of charitable trusts as public institutions could be a distorting characterization.²³⁴ This is because charitable trusts also have a private character, since they are privately established, privately operated, and also privately funded. Therefore, if the public policy doctrine channels constitutional protections for charities, then it should also apply to the private wills of testators; otherwise, discrimination will be perpetuated through the private wills of testators.

The increase in discrimination will cause harm to the public, and thus the public policy doctrine should be engaged. However, the long history of the public policy doctrine supports the fact that the courts are very reluctant to apply it to prohibit discrimination in wills, and the lack of success in applying it renders it an ineffective conceptual tool for the courts.

Therefore, even if it can be argued that the common-law rule prohibiting the application of the public policy doctrine should be changed to reflect the Charter value of equality, the only thing this would do is create some mechanism for courts to prohibit discrimination in wills. However, it would not reduce discrimination, since there are very few instances over history where this tool was successfully applied to prohibit discrimination in wills. As a result, the public policy doctrine is not a viable solution for the problems identified in this thesis.

²³⁴ Matthew Harding, “Charitable Trusts and Discrimination: Two Themes” (2016) 2:1 Can J Comp & Contemp L 227–260.

Section 3.6 – The Troubling Consequences of the Ontario Court of Appeal’s Decision in *Spence v. BMO Trust*

The Court of Appeal’s decision in *Spence* concluded that 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. However, this conclusion is based on the court’s discretion to interpret the word ‘support’ to mean economic support only. The court refused to apply its broad discretion to consider support to mean both economic support and moral support. The failure of the court to acknowledge the moral obligations of the testator to his dependents and non-dependents meant that adult independent children are not worthy of any benefits from their father’s will because of their age and lack of financial dependency.

The Court of Appeal’s in *Spence* decision deviated from a previous Court of Appeal decision in *Cummings* that affirmed that *Tataryn* applied in Ontario and a Divisional Court decision in *Quinn* that affirmed that adult independent children are entitled to make claims for adequate support so long as the size of the estate permits. The courts in both *Cummings* and *Quinn* applied the broad discretion afforded to them by the *SLRA* to interpret the word ‘support’ to mean both economic support and moral support. This meant that courts would need to consider dependent relief claims from both the dependents and non-dependents of the testator.

The *SLRA* outlines many factors that a court must consider in awarding dependent relief, but it also allows a court to consider all of the circumstances of the application. The Court of Appeal in *Cummings* affirmed that this includes assessing the moral claims of adult independent children. The Court of Appeal in *Cummings* also

affirmed the standard to be applied in assessing moral claims when it quoted Justice McLachlin who said the following in *Tataryn*:

The language of the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking (Interpretation Act, R.S.B.C. 1979, c. 206, s. 7), means that the Act must be read in light of modern values and expectations. What was thought to be adequate, just and equitable in the 1920s may be quite different from what is considered adequate, just and equitable in the 1990s.²³⁵

In *Tataryn*, Justice McLachlin connected the need to make orders in light of contemporary standards to the concept of contemporary justice when she said the following:

Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice.²³⁶

It is clear from the legal principles established by the Supreme Court of Canada in *Tataryn* that the adequacy of testamentary dispositions should be considered in reference to contemporary community standards, and the modern concepts of equality. This means that the modern concepts of equality should inform the interpretation of the Act.

However, this is not the position taken by the Court of Appeal in *Spence* who stated that it will take legislative reform to give effect to the value of equality when it said the following in paragraph 124 of the decision.

Second, I address the proposed extension of the public policy exception to testamentary freedom as a matter of principle. There is no law in Ontario that entitles Verolin to share in her father's estate. No law has deprived her of any right. **The *Charter* value of equality that she asserts does not afford her**

²³⁵ *Cummings*, *supra* note 13 at para 49.

²³⁶ *Tataryn*, *supra* note 9 at para 15.

such an entitlement. Ontario could choose to legislate to give effect to the value of equality in estates, but it has not done so.²³⁷

The Court of Appeal in *Spence* then affirmed that in deciding dependent relief claims in Ontario one's right to liberty should trump one's right to equality when these rights come in conflict with one another when it said the following:

Absent valid legislative provision to the contrary, the common law principle of testamentary freedom thus protects a testator's right to unconditionally dispose of her property and to choose her beneficiaries as she wishes, even on discriminatory grounds. To conclude otherwise would undermine the vitality of testamentary freedom and run contrary to established judicial restraint in setting aside private testamentary gifts on public policy grounds.²³⁸

This means that the testators in Ontario are free to disinherit their children even if the reasons are discriminatory. However, in BC, the judiciary has interpreted discrimination-based disinheritances to offend community standards. In *Prakash and Singh v. Singh*, the deceased mother left most of her estate to her sons and very little to her daughters. The sons each received \$260,000 while the daughters received \$10,000 each. Justice Rice varied the mother's will so that each child received an equal share of the estate and stated the following reason for doing so in paragraph 58 of the decision:

In modern Canada, where the rights of the individual and equality are protected by law, the norm is for daughters to have the same expectations as sons when it comes to sharing in their parents' estates. That the daughters in this case would have this expectation should not come as a surprise. They have lived most of their lives, and their children have lived all of their lives, in Canada.²³⁹

In *Peden v. Peden*, the BC court concluded that it was the son's sexual orientation that led to his father to him being excluded from sharing equally in his estate with his other two heterosexual sons. The court varied the will to provide an equal share

²³⁷ *Spence*, *supra* note 14.

²³⁸ *Ibid* at para 75.

²³⁹ *Prakash*, *supra* note 12.

to the son. In doing so it observed that “homosexuality is not a factor in today’s society justifying a judicious parent disinheriting or limiting benefits to his child.”²⁴⁰

In BC, the courts are giving effect to the value of equality by applying the community standards test to prohibit discrimination in wills. In applying this standard, the judiciary in BC does consider discrimination as a factor in awarding dependent relief. The Court of Appeal in *Cummings* interpreted the *SLRA* and affirmed that this standard applies in Ontario. Contrary to the findings of the Court of Appeal in *Spence*, there is no need for legislative reform to give effect to the Charter value of equality rather it requires the judiciary in Ontario to apply the community standards test as established in *Tataryn* when there is discrimination present in a will.

In *Tataryn*, it was also established that the courts should only interfere with a person’s testamentary freedom if the Act permits it. This means that the courts should not completely override the wishes of the testator, but rather dependent relief claims should be informed by both the equality and liberty provisions of the Charter.

The need to balance the conflicting values of the Charter in private law disputes was clearly articulated by L’Heureux-Dubé J. in *M. (A.) v. Ryan*,²⁴¹ albeit in her dissenting opinion (but not on this point) where she said the following:

In many cases, the exercise of discretion, through the making of an order, for example, will not constitute direct state action and therefore cannot be subject to the same constitutional scrutiny as legislation or the acts of state officials. **Where this occurs, this Court has nonetheless found that the exercise of discretion must adequately reflect the values underlying the Charter...**

The fact that the discretion exercised here involves procedural entitlements in a civil dispute between private parties rather than a criminal trial does not fundamentally alter the analysis. **There are a number of civil cases involving private parties which found that the discretionary powers granted by**

²⁴⁰ *Peden v. Peden, Smith et al.*, 2006 BCSC 1713 (CanLII) at para 55.

²⁴¹ *M. (A.) v. Ryan*, 1997 CanLII 403 (SCC), [1997] 1 SCR 157.

statute or a common law rule must be exercised in a manner which comports with the values underlying the Charter: RWDSU v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573, per McIntyre J. at p. 603, Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, per L'Heureux-Dubé, dissenting, at pp. 71 and 92; Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130. In such cases, however, the balancing of values may be somewhat more flexible than in those involving the state as a party: Hill, supra, per Cory J., at paras. 94 and 97. In the appeal before us, the appellant is thus entitled to challenge the exercise of discretion by the trial judge and the Court of Appeal on the grounds that they did not reflect an appropriate balance of Charter values.²⁴²

It is clear from the dissenting opinion above that the judiciary must exercise their discretionary powers in accordance with the Charter values even if the dispute falls into the area of private law. The *SLRA* gives broad discretionary powers to the judiciary in Ontario to award dependent relief. As a result, the members of the judiciary in Ontario in applying their discretionary powers must order dependent relief claims by balancing the conflicting values of the Charter. This means that liberty cannot automatically trump equality and vice versa in awarding dependent relief claims in Ontario.

It is also important to note that the Court of Appeal in *Spence* is also not authoritative on anything to do with the *SLRA* because Verolin did request leave for extension of time for applying for relief under the *SLRA* for her and her sons, but this request was denied by the trial judge. The trial judge ruled that the “applicants did not meet the test for leave” and that he would have “denied the claim for dependent's support and interim costs”.

The decision in *Spence* is troubling because it affirmed that the *Charter of Rights, Human Rights Code*, and public policy doctrine cannot be extended to prohibit

²⁴² *Ibid* at paras 63-64.

discrimination in wills. This meant that the *SLRA* as the only legal forum for which discriminatory wills can be varied by the courts. However, the Court of Appeal in *Spence* affirmed further that it would take legislative reform to give effect to the equality provision of the Charter and thus this meant that testators would be free to disinherit their children even if those reasons were discriminatory. As a result, if the Court of Appeal's decision in *Spence* is followed in the future by other courts, then it will mean that testators will have the courts' permission to use their wills to perpetuate discrimination in Ontario.

Therefore, the Court of Appeal's decision in *Cummings* should be considered the seminal case for dependent relief in Ontario. This is because this court has interpreted the *SLRA* in a manner that ensures that future dependent relief decisions will be informed by a balance of both the Charter value of equality and the Charter value of liberty. The continued applicability of *Tataryn* in Ontario will mean that the courts will need to consider the claims from both dependents and non-dependents while at the same time respecting the wishes of the testator. It will also mean that the judiciary in Ontario can apply the community standards test to prohibit discrimination in wills. The *Cummings* precedent will also ensure that the judiciary in Ontario will be building the common law for dependent relief in Ontario in accordance with the Charter values.

Section 3.7 – Conclusion

In this chapter, the leading authority on will variation, *Tataryn v. Tataryn Estate*, was discussed with a focus on the legal principles established by the Supreme Court of Canada. It was argued that the application of these legal principles in deciding

dependent relief claims would allow the judiciary to balance the conflicting values of the Charter in deciding dependent relief claims.

There were two Court of Appeal decisions that were reviewed. Both had conflicting findings concerning the applicability of *Tataryn* in Ontario. It was argued that the Court of Appeal Decision in *Cummings* should be followed in Ontario because it would lead to a balance of the conflicting Charter values. On the other hand, the Court of Appeal's decision in *Spence* would perpetuate discrimination because that decision excludes non-dependent children from making moral claims against their parent's estate and it allows testators to freely disinherit their children for any reason even if that reason is discriminatory.

It was also argued that it is not legislative reform but rather judicial reform that is needed in Ontario. The *SLRA* does not need anti-discriminatory provisions, as it provides the courts with wide discretion to consider many factors to vary a will. This means that if there is a gender bias or racial bias in the will, then the courts can consider this factor and various other factors to correct the inequality while not completely reversing the wishes of the testator.

The *SLRA* also gives courts wide discretion to limit the claims of non-dependent children so that they are subordinate to the claims of dependents, and any benefits awarded can be made contingent on the size of the estate. Therefore, there is no reason to exclude non-dependents from making claims against their parent's estate. Since identity is multi-dimensional (i.e., race, colour, creed, sex, sexual orientation) it is important to include non-dependents as a separate category of claimants so that discrimination can be condemned and not encouraged in Ontario.

CHAPTER 4: APPLYING THE LEGAL PRINCIPLES OF THE SUPREME COURT OF CANADA'S DECISION IN *TATARYN* TO BALANCE THE CONFLICTING CHARTER VALUES IN DECIDING DEPENDENT RELIEF CLAIMS IN ONTARIO

Section 4.1 – Introduction

This chapter begins by applying the Charter Values analysis in Chapter 2 to balance the conflicting values for dependent relief claims in Ontario. It is also argued that Charter protections apply to both Charter rights and Charter values. This is followed by dissenting opinions about the effectiveness of the application of *Tataryn* to decide dependent relief claims and the decision to allow non-dependent children to make moral claims. This is then followed by a review of the cases where it is shown that the *Tataryn* authority is being applied effectively by the BC judiciary in balancing the conflicting Charter values. The final section will outline a made-in-Ontario solution for the application of *Tataryn* in Ontario.

Section 4.2 – Rebalancing the Charter Values in Dependent Relief Claims in Ontario

As argued in the previous chapter, dependent relief claims in Ontario as per the decision in *Spence* means that dependent relief claims will be informed by the Charter's value of liberty, as a testator's testamentary freedom is given priority over his or her beneficiaries' right to equality and human dignity simply because it is the private law that governs the wills of testators. Since testators are non-state actors and the decisions they make regarding the disposition of their property do not require any state action, then it follows that the Charter does not govern these testators.

However, based on the SCC's decision in *Dolphin Delivery*, the judiciary has a responsibility to build the common law principles in private law following the Charter values. In *Tataryn*, it was established that one of the purposes of dependent relief was

equality, so this means that the judiciary has a responsibility to ensure his or her decisions related to dependent relief claims are informed by the Charter value of equality. It is not being argued here that the Charter value of equality should take priority over the Charter value of liberty but rather that they should be balanced.

As a result, the Charter value of equality should inform dependent relief decisions in Ontario. Section 15 of the Charter reflects the provisions of equality, and it states the following: “Every individual is equal before the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.”²⁴³

Justice L’Heureux-Dube wrote for the majority in the Supreme Court’s decision in *Egan* the finding that the provisions of the Canadian Pension Act violated Section 15 for limiting such rights to opposite-sex couples when she stated the following about the section’s force:

Equality, as that concept is enshrined as a fundamental human right within s. 15 of the Charter, means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity. In a similar vein, I refer to the words of Wilson J. in *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229, at p. 387 (dissenting, but not on this point):

It is, I think, now clearly established that what lies at the heart of s. 15(1) is the promise of equality in the sense of freedom from the burdens of stereotype and prejudice in all their subtle and ugly manifestations. However, the nature of discrimination is such that attitudes rather than laws or rules may be the source of the discrimination. [Emphasis added.]²⁴⁴

²⁴³ Charter of Human Rights and Freedoms, CQLR c C-12.

²⁴⁴ *Egan v. Canada*, 1995 CanLII 98 (S.C.C.), [1995] 2 S.C.R. 513.

In the case of *Law v. Canada (Minister of Employment and Immigration)* the SCC reinforced the need to reinforce legal dignity as a right. Justice Iacobucci described the purpose of Section 15 as follows:

(4) In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.²⁴⁵

Reaume's work linked discrimination with dignity when she said the following:

In order, then, to find violations of s. 15, we should look for distributive criteria which, in distributing the concrete benefit with which they are concerned in a particular way, thereby fail to accord equal respect to all persons as bearers of dignity, as persons of equal moral status. Legislation that conveys the implication that the members of a particular group are of lesser worth, not full members of society, violates dignity.²⁴⁶

It will also be argued that a person's liberty to dispose of his or her property as he or she see fit should only be interfered with so long as it is permitted by the Act. This assertion supports the Charter value of liberty. The definition of liberty is summarized in paragraph 85 of *R. v. Malmo-Levine; R. v. Caine*, which states the following:

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 v. Longueuil (City)*, [1997 CanLII 335 \(SCC\)](#), [1997] 3 S.C.R. 844, at para. 66; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995 CanLII 115 \(SCC\)](#), [1995] 1 S.C.R. 315, at para. 80. This is true only to the extent that such matters "can properly be characterized as

²⁴⁵ *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (S.C.C.), [1999] 1 S.C.R. 497.

²⁴⁶ Denise G. Reaume, "Discrimination and dignity" (2003) 63:3 Louisiana law review 645.

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”²⁴⁷

This definition of liberty not only considers one’s physical liberty but also reflects the fundamental concepts of human dignity, individual autonomy, and privacy. Since private dispositions of property reflect these fundamental concepts, the judiciary needs to limit the Court’s interference with a person’s testamentary freedom.

As stated in Chapter 2, the *SLRA* gives the judiciary wide discretion to consider all the circumstances in an application and factors that it considers to be relevant to the disposition of an application. The judiciary can also consider any other evidence that would be relevant to the case in deciding a dependent relief claim. Since the case law in Ontario has been developed in accordance with the legal principle established in *Tataryn*, the judicious parent test and the need to consider contemporary societal expectations can be applied by the courts to balance the conflicting Charter values.

Given the wide discretion allowed by the *SLRA*, the courts in Ontario would be within their jurisdiction to consider discrimination in wills as a factor, or discrimination could be prohibited because it would not satisfy the judicious parent test and it cannot be said to be in accordance with the expectations of contemporary society. Before the decision in *Spence*, it was accepted by the courts to identify the non-dependents of the testator and then determine any legal or moral obligations the testator owed these non-dependents. The courts would then need to consider any competing interests and the size of the estate to provide relief to these non-dependents. It is argued here that the courts should continue to do this despite the findings of the Court of Appeal in *Spence*.

²⁴⁷ *R. v. Malmo-Levine; R. v. Caine*, 2003 S.C.C. 74 (CanLII), [2003] 3 S.C.R. 571 at para 85.

Section 4.3 – Dissenting Opinions on the Supreme Court of Canada’s Decision in *Tataryn*

The Supreme Court of Canada’s decision in *Tataryn* has received mixed reviews since it has been released. There has been widespread criticism that the decision in *Tataryn* gives courts wider discretion to vary wills and thus this will lead to variability and unpredictability in the dependent relief decisions made in a province.²⁴⁸ This is because there are no clear guidelines to determine the legal and moral obligations that a testator owes to his or her family members.²⁴⁹ There are also no precise guidelines for determining the amount of support that should have been provided to the testator’s family members. It is also clear from the dependent relief legislation that a testator has obligations to provide support to his or her family members, and thus this puts severe limitations on the testator’s testamentary freedom.

The Supreme Court decision in *Tataryn* was also incompatible with previous decisions made by the BC Court of Appeals. In *Bell v. Roy Estate*,²⁵⁰ the BC Court of Appeal heard that a testator disinherited her daughter because she did not visit her often and did not provide her with any comfort or support. The BC Court of Appeal dismissed the appeal and stated that the reasons provided by the testator for disinheriting her child must be accurate and not necessarily morally acceptable. The BC Court of Appeal also stated that the applicant had the burden of proof to show that the reasons provided were not accurate.

²⁴⁸ Dorota Miler, “Does a Will Stand a Chance Under the Current Interpretation and Application of Dependents’ Relief Legislation in British Columbia?” (2018) 51 University of British Columbia Law Review 391–410.

²⁴⁹ *Ibid.*

²⁵⁰ *Bell v. Roy Estate*, 1993 CanLII 1262 (BC CA), <<http://canlii.ca/t/1db71>>.

The approach in *Bell* was followed in the BC Court of Appeal decision in *Kelly v. Baker*²⁵¹. The Court of Appeal, in this case, dismissed the appeal and stated that the testator's reasons for disinheriting his children need not be reasonable. The Court of Appeal stated that the law merely requires valid reasons that are based on facts and reasons where there is a logical connection to the act of disinheritance.

Critics of the decision in *Tataryn* also argued that the decision caused more uncertainty concerning what constitutes the moral obligations of a testator, and thus this uncertainty had the potential to lead to inconsistencies in decisions.²⁵² The decision was also criticized for the fact that it will lead to more litigation in the future from family members who would apply for more support.²⁵³

Critics of the decision have also argued that it was difficult to determine precisely what was meant by the terms, concepts, and principles related to the morality that should guide a testator in determining the amount of support to provide to his or her family members. These critics point to references to the following concepts: 1) current societal norms; 2) society's reasonable expectations; 3) contemporary community standards; 4) unequivocal social expectation; 5) contemporary standards, and 6) modern values and expectations. Since these concepts were vague in the way they were defined, there were concerns that those decisions would become more uncertain, as courts could have different interpretations of these concepts and thus apply them differently, which could mean inconsistent decisions.

²⁵¹ *Kelly v. Baker*, 1996 CanLII 1596 (BC CA), <<http://canlii.ca/t/1f07p>>.

²⁵² From the Law Reports" (1995) 14:4 ETPJ 277.

²⁵³ *Ibid.*

In the *Tataryn* decision, the Supreme Court also stated that the legislation should be read in light of the modern values and expectations²⁵⁴ and current societal norms,²⁵⁵ but stated that, since these values and expectations can change over time, the courts would not be bound by the earlier views and rewards.²⁵⁶ Based on a review of the cases decided after 1994, a legal scholar named Dorota Miler affirmed that the BC Courts would not ignore past case law in favour of deciding cases based on the expectations of contemporary society that prevailed at the time a decision was made.²⁵⁷ This means that the judiciary continued to rely on past case law to make decisions rather than making decisions based on the societal expectations that prevailed at the time of the decision. In other words, they did not apply the Supreme Court of Canada community standards test to make decisions.

Section 4.4 – Objections to *Tataryn*'s Inclusion of Non-Dependent Children to Make Dependent Relief Applications

Perhaps the most controversial aspect of the Supreme Court of Canada's decision in *Tataryn* is the decision to allow adult independent children to make applications for adequate support if the size of the estate permits. This is based largely on the argument that parents have a moral duty to provide for their independent adult children. This has led to the formulation of a moral duty test in some jurisdictions that now needs to be considered by judges in deciding whether to alter a testator's will. BC is a province in Canada that requires the application of the moral duty test.

²⁵⁴ *Tataryn*, *supra* note 9 at para 15.

²⁵⁵ *Ibid.*, at paragraph 28.

²⁵⁶ *Ibid.*, at paragraph 15.

²⁵⁷ D. Miler, *Dependants' relief legislation and compulsory portion: Limitations of freedom of testation in British Columbia and Germany in comparative perspective*. Mohr Siebeck. More complete citation

However, the moral duty test has received widespread criticism. This test has been described as a gloss imposed upon the statute that allows judges to rely on rhetoric rather than the words of the Act to alter wills based on their subjective assessment of what is fair rather than the considerations of maintenance and support.²⁵⁸ This test is also seen as an unjust encroachment to the testamentary freedom of the testator, as it widens the testator's duties upon death beyond what was ever intended by the legislators.²⁵⁹

Critics also argue that the courts have gone beyond their proper sphere and are guilty of judicial activism.²⁶⁰ This is because the moral duty that a testator owes his or her family members will be left to the discretion of the judge rather than any consistent standard.²⁶¹ This is echoed in the following quote:²⁶²

Emphasising the testator's moral duty leads to a judicial free for all. Alternatively one might say, in a free adaption of the words of John Selden, that with such judicial power a testator's moral duty will vary according to the conscience of each individual judge, and as that is narrower or longer, so is the duty.

This judicial activism is seen as problematic because it results in uncertainty and thus is contrary to the rule of law in that members of the public are not able to organize their affairs according to the plain words of the Act. The fact that courts can ignore past precedents and make decisions based on their assessment of the community values that prevail at the time of the decision will lead to unsatisfactory outcomes. This is echoed in the following statement: "Unforeseeable interpretations of statutes and

²⁵⁸ S. Grattan "Of lame ducks, black sheep and family bonding" (2000) 51 N Ir Legal Q 198.

²⁵⁹ *Ibid.*

²⁶⁰ Albert H Oosterhoff, "Succession Law in the Antipodes: Proposals for Reform in New Zealand" (1996) 16:3 Est & Tr J 230–256.

²⁶¹ *Ibid.*

²⁶² *Ibid.* at 236.

departures from the precedent amount to the application of unpromulgated law. This can lead to loss of public confidence in the judicial system”.²⁶³

Critics also argue that with no general agreement or legal rules to guide courts on the relevant moral and ethical considerations, the courts are transforming the law and altering wills based on ethical considerations rather than economic considerations.²⁶⁴ This will only serve to make the Court’s jurisdiction out of control.²⁶⁵ It will also mean that the judges applying the Act will be, “galloping madly off in the wrong direction”.²⁶⁶

This argument is supported by many other scholars who question whether the law can enforce conventional morality. These scholars do not feel that morality can be objectively interpreted in predictable ways by the courts.²⁶⁷ As a result, they feel that importing morality as a standard for deciding whether to alter a will may lead to decisions that lack clarity and consistency.²⁶⁸ These scholars argue that predictability in decisions can be achieved by requiring the same standards of certainty and clarity that are demanded in the general law of obligations.²⁶⁹ This would require a guiding principle that is anchored in corrective justice rather than distributive justice.²⁷⁰

Critics also argue that restrictions on testamentary freedom for spouses and dependent children could be justified, but restrictions to accommodate adult children

²⁶³ R. Fisher. *New Zealand Legal Method-Influences and Consequences* (2001).

²⁶⁴ D. F. Dugdale, “Framing Statutes in an Age of Judicial Supremacism” (1997) 9 *Otago L Rev* 603.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.* at 604.

²⁶⁷ Richard Sutton, & Nicola Peart, “Testamentary Claims by Adult Children - The Agony of the Wise and Just Testator” (2001) 10:3 *Otago L Rev* 385–410.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

breach the legal principles that regulate society and the conventional right to property principles.²⁷¹ This is captured in the following viewpoint:²⁷²

The willingness of the courts to award adult financially independent children further provision from their deceased parent's estate is not justifiable in terms of the personal right to support nor does it comply with conventional property principles. It is thus in breach of the general legal principles which have regulated our society for most of this century.

Other critics argue that the law concerning the moral obligation to provide for independent adult children has no symmetry with the inter vivos support obligations of testators and encroaches too much on a testator's testamentary freedom.²⁷³ This is because when a testator is alive he or she can freely take property he or she owns away from his or her adult independent children with no risk of challenge or interference from the courts.²⁷⁴ However, upon death, the testator has to fulfill moral obligations to his or her independent adult children, and thus the failure to do so could mean that the courts will alter his or her will.²⁷⁵ As a result, if a testator does not have a legal obligation or moral obligation to support his or her independent adult children during his or her lifetime, then there is no principled basis for imposing these duties after death.²⁷⁶

There is also the argument that any moral obligation to children ends when they become adults. It has been traditionally viewed that the parents have a moral and legal responsibility of getting their children to the stage of adulthood and providing them with the means necessary to live a successful life through their efforts. The belongingness

²⁷¹ Nicola Peart, "Towards a Concept OF Family Property in New Zealand" (1996) 10:2 International journal of law, policy, and the family 105–133.

²⁷² *Ibid.* at 122.

²⁷³ RD Oughton (ed) *Tyler's Family Provision* (2nd ed, Professional Books Limited, Oxford, 1984).

²⁷⁴ J. Caldwell, *Family protection claims by adult children: what is going on?* / by John Caldwell (2008).
Need more complete citation

²⁷⁵ *Ibid.*

²⁷⁶ Bill Atkin, *Report of the Working Group on Matrimonial Property and Family Protection* (Family Law Bulletin, 1989).

argument for providing for independent adult children has also received much criticism. This is because it is seen as a form of judicial forced heirship that has no normative justification.²⁷⁷ This type of forced heirship is seen as a dramatic shift in the purpose of the Act, and this shift should only be made by Parliament and not by the courts.²⁷⁸

In *Lawen Estate v. Nova Scotia (Attorney General)*,²⁷⁹ testamentary freedom was given constitutional protection for the first time in Canada's history.²⁸⁰ The court in *Lawen* found that testamentary freedom is a fundamental personal decision that should be protected under the liberty aspect of section 7 of the Charter of Rights and Freedoms ("Charter").²⁸¹

In this case, Justice Bodurtha made a finding that the two provisions of the *TFMA* were unconstitutional to the extent that they allowed non-dependent adult children to claim support under the Act²⁸². Justice Bodurtha acknowledged that some important benefits could be gained in allowing non-dependent adult children to make a claim under the *TFMA*, but in his view, the benefits do not outweigh the testators' testamentary freedom to dispose of their estate as per their discretion and wishes²⁸³.

After reviewing many Supreme Court of Canada decisions²⁸⁴ that addressed section 7 of the Charter, Justice Bodurtha stated that testamentary decisions could be

²⁷⁷ R. Sutton & N. Peart. "Testamentary Claims by Adult Children-The Agony of the Wise and Just Testator" (2001) 10 Otago L Rev 385 at 403-404.

²⁷⁸ *Ibid.*

²⁷⁹ *Lawen Estate v. Nova Scotia (Attorney General)*, 2019 NSSC 162 (CanLII).

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Blencoe v. British Columbia (Human Rights Commission)*, 2000 S.C.C. 44; *Gosselin v. Quebec (Attorney General)*, 2002 S.C.C. 84; *R v. Jones*, [1986] 2 S.C.R. 284; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; *R v. Morgentaler*, [1988] 1 S.C.R. 30; *Carter v. Canada (Attorney General)*, 2015 S.C.C. 5; and *Association of Justice Counsel v. Canada (Attorney General)*, 2017 S.C.C. 55.

fundamental personal choices²⁸⁵. However, the provisions of the *TFMA* could undermine these choices by considering claims of independent adult children that are purely moral²⁸⁶. Justice Bodurtha eventually concluded that testamentary freedom and autonomy are not restricted to purely economic, or property, matters but rather are a fundamental personal decision that should be protected under the liberty aspect of section 7 of the Charter²⁸⁷.

The Nova Scotia Supreme Court's decision was appealed to the Nova Scotia Court of Appeal, and the appeal decision was released on May 19, 2021. The appeal was allowed, and the Nova Scotia Supreme Court decision was reversed.

The Court of Appeal acknowledged that the application judge distinguished *Tataryn Estate* and the cases that followed the decision, since those decisions did not consider the Charter. The Court of Appeal stated that this was accurate but reinforced the need to consider *Tataryn* based on the moral claims of the claimants. A reason why the Charter has likely not been considered in these decisions is that testamentary freedom was always considered to be a property right and not a liberty right, and the property rights of owners were excluded in Canada's Charter of Rights and Freedoms in 1982.²⁸⁸ The Court of Appeal also stated that the application judge did not reveal in his reasons the situations in which testamentary autonomy would not necessarily be a purely economic or property matter.

²⁸⁵ *Lawen Estate*, *supra* note 279.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ A. Alvaro, "Why property rights were excluded from the Canadian Charter of Rights and Freedoms" (1991) *Canadian Journal of Political Science/Revue canadienne de science politique* 309–329.

The Nova Scotia Court of Appeal also rejected the application judge's references to the fact that claims of the adult independent children are purely moral, and these claims are not worthy of recognition. The Nova Scotia Court of Appeal affirmed the application of *Tataryn* in Nova Scotia by stating that the moral claims of adult independent children arise from the moral obligations of the testator when it said the following in paragraphs 31 and 32 of the decision:

As can be seen from this passage, **a moral claim of an independent child arises from a moral duty that a testator has toward their spouse or children, which may arise from a myriad of circumstances.** Section 5 of the Act, as set out above, is intended to provide structure to a judge's consideration of any claim against the estate.

The suggestion that claims by non-dependent adult children (or spouses by necessary implication) are "purely moral" suggests they do not merit consideration and are an unjustified fettering of a testator's autonomy. It ignores the very fact that a moral claim emerges from the moral obligations of the testator during their lifetime.²⁸⁹

In this decision, the Nova Scotia Court of Appeal injected some balance into the debate by showing that testamentary freedom should not be the starting point, as it is restricted, given that before the decision there were provisions that allowed adult independent children to apply for relief. The issue is whether further erosion of testamentary freedom would be justified with the acknowledgment of the moral obligations the testator owes to his or her children. The Nova Scotia Court of Appeal answered "yes" to this question by affirming that moral claims come from the moral obligations of the testator. It also affirmed that recognizing claims of adult children is not an extreme step, and it will also not mean that the testamentary rights of a testator will not be respected.

²⁸⁹ *Nova Scotia (Attorney General) v. Lawen Estate*, 2021 NSCA 39 (CanLII) at paras 31-32.

The Court of Appeal also concluded that the application judge erred in invoking section 7 of the Charter because he failed to do any analysis of whether the deprivation of the testator's liberty would accord with fundamental justice. The Court of Appeal relied on the Supreme Court of Canada's decision in *Charkaoui v. Canada* (Citizenship and Immigration) to affirm the need to consider fundamental justice in a section 7 analysis.

The Court of Appeal also stated repeatedly in the decision that the application judge relied on a lack of a robust evidentiary record to conclude that there was any section 7 breach of the Charter. The decision allows independent adult children to bring an application under the *TFMA* for a provision from the estate. The leave to appeal from this decision was refused by the Supreme Court of Canada in January 2022.

It is clear from the analysis in *Lawen* that the Nova Scotia Supreme Court attempted to tip the scales towards the direction of individual property rights rather than the direction of the family by giving testamentary freedom constitutional protection for the first time. However, the Court of Appeal in Nova Scotia overturned the decision, tipping the scales back towards family and thus achieving more balance between the two directions. Since the Nova Scotia Court of Appeal affirmed the restrictions that allow adult independent children to apply for relief in Nova Scotia, it will be very difficult for another court to grant constitutional protection for liberty. This is because the starting point will have to be the restrictions on testamentary freedom, and it was affirmed that allowing adult independent children to make claims for relief based on *Tataryn* is an erosion of testamentary freedom that is justified, given that the court can restrict the

reward given to adult children through considerations of competing interests and the size of the estate.

Section 4.5 – Applying *Tataryn* to Balance the Conflicting Charter Values in Deciding Dependent Relief Claims in Ontario

In BC, the courts have been interpreting their dependent relief legislation in a way that balances the two conflicting values of the Charter. The courts consider many factors when deciding to vary a will and will only interfere with a testator's testamentary freedom when the provisions of the statute have been violated. The variation orders do not reflect a complete reversal of the allocation determined by the testator. They are modified to achieve the objectives of the dependent relief legislation in BC. There will be cases reviewed here to demonstrate that the BC judiciary is interpreting dependent relief legislation in a way that balances the conflicting values of the Charter.

On October 23, 2006, the BC Supreme Court released its decision in *Prakash and Singh v. Singh et al.*²⁹⁰ In this case, Mrs. Singh made her will in 1999 and left \$10,000 each to each of her three daughters and the residue equally to her two sons (\$260,000 each). The two eldest daughters brought an application under BC's WVA for adequate support. The two brothers supported their mother's allocation and disputed the application brought forward by the sisters.

Justice Rice acknowledged that the cultural norm for Indo-Fijians is that the sons rather than the daughters inherit the bulk of their parents' estates. However, Justice Rice stated that in modern Canada, the daughters will have a reasonable expectation of sharing in their parents' estate equally with their brothers. This is confirmed in paragraph 58 of the decision, which reads as follows:

²⁹⁰ *Prakash and Singh v. Singh et al*, 2006 BCSC 1545 (CanLII).

In modern Canada, where the rights of the individual and equality are protected by law, the norm is for daughters to have the same expectations as sons when it comes to sharing in their parents' estates. That the daughters, in this case, would have this expectation should not come as a surprise. They have lived most of their lives, and their children have lived all of their lives, in Canada.²⁹¹

Justice Rice then referred to *Tataryn* and in particular the definition of moral claims provided by the Supreme Court of Canada. The definition of moral claims is grounded in society's reasonable expectations of what a judicious person would do in the circumstances by reference to contemporary community standards.

Based on this definition of moral claims, Justice Rice concluded that the mother's will did have a gender bias, and this form of discrimination offended community standards and thus concluded that a will variation was needed. After weighing all the evidence, Justice Rice concluded that a substantial increase in the gift to the daughters was needed to eliminate the effect of discrimination.

Before deciding on a revised allocation scheme, Justice Rice acknowledged that the courts must act with caution when interfering with a person's testamentary freedom, especially when the claimants are adult independent children. To determine the allocation, Justice Rice considered other factors, such as the financial position of the children, level of financial support provided to their mother, relationship with their mother, and other non-financial contributions. In the end, Justice Rice decided not to order an equal distribution. Instead, each of the two daughters would receive 20% of the estate while the two brothers would share equally in the residue of the estate. Therefore, the decision did not reverse the mother's allocation in its entirety but just

²⁹¹ *Ibid.*, at paragraph 58.

enough to ensure that the will was aligned to the modern-day community standards that prevailed in Canada.

On July 17, 2019, the BC Supreme Court released its decision in the *Grewal v. Litt* case.²⁹² In this case, the parents had an estate valued at \$9 million, but they only left \$150,000 cash to each of their four daughters and the residue to be shared equally by their sons. The daughters brought an application under the *Wills, Estate, and Succession Act (WESA)* asking for a will variation and that all children get an equal share of the estate. The daughters were alleging gender discrimination based on Sikh tradition.

Justice Adair concluded that there was never any equality of treatment concerning the parents' treatment of the daughters and sons. She also found that the cultural norms followed by the parents were a factor in the preferential treatment given to the sons over the daughters. Justice Adair stated that the issue before her was not whether a variation in the will was needed but rather it was more about the extent of the re-allocation needed to make the will conform to community standards.

Justice Adair quoted Justice McLachlin in *Tataryn* when she said the following:

. . . Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. **It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires.**²⁹³

²⁹² *Grewal v. Litt*, 2019 BCSC 1154 (CanLII).

²⁹³ *Ibid.*, at para 119.

This quote reinforces the fact that Justice Adair wanted to provide a fair and equitable distribution to the sons and daughters while only interfering with the testator's will only to the extent that it was allowed by Act. Justice Adair also outlined the following factors a Court needed to consider in deciding a will variation when she said:

In the post-*Tataryn* era, the following considerations have been accepted as informing the existence and strength of a testator's moral duty to independent children:

- relationship between the testator and claimant, including abandonment, neglect and estrangement by one or the other;
- size of the estate;
- contributions by the claimant;
- reasonably held expectations of the claimant;
- standard of living of the testator and claimant;
- gifts and benefits made by the testator outside the will;
- testator's reasons for disinheriting;
- financial need and other personal circumstances, including disability, of the claimant;
- misconduct or poor character of the claimant;
- competing claimants and other beneficiaries:²⁹⁴

Justice Adair found that the size of the estate was large enough to increase the size of the gifts to the daughters without overturning completely their parents' testamentary freedom. Justice Adair stated that an equal division of the estate may not be the only fair result. To decide the allocation, Justice Adair considered factors such as the reasonable expectations of the daughters for an inheritance, contributions to the estate, relationship with parents, and personal circumstances.

After considering all these factors, Justice Adair concluded that the parents did not fulfill their moral obligations to their daughters. As a result, 60% of the estate was awarded to the four daughters equally and the residue was awarded to the two sons equally. In this decision, Justice Adair wanted to correct the allocation caused by gender

²⁹⁴ *Ibid.*, at para 134.

discrimination while at the same time balancing the testamentary freedom rights of the parents.

On November 20, 2006, the BC Supreme Court released its decision in the matter of *Peden v. Peden*.²⁹⁵ In this case, the deceased had three sons and one of them was homosexual. The two heterosexual sons were given outright gifts while the homosexual son only got a life estate, meaning he would receive any income generated from investments held in trust for him.

Justice Groves acknowledged that the plaintiff in the case dedicated a significant amount of time to care for his sick family members, which included his father. Despite his sacrifices and devotion to his family, his father did not provide for an equal share of the residue that was provided to his siblings. Justice Groves concluded based on the evidence before him that the real reason the plaintiff did not get an equal share of the residue was because of his sexual orientation.

Justice Groves applied *Tataryn* and the need to interpret the Act in light of “society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards.”²⁹⁶ Based on this standard, Justice Groves concluded that a will variation was needed as “homosexuality is not a factor in today's society justifying a judicious parent disinheriting or limiting benefits to his child.”²⁹⁷ This led to Justice Groves granting the plaintiff an equal share of the residue.

²⁹⁵ *Peden v. Peden*, Smith et al., 2006 BCSC 1713 (CanLII).

²⁹⁶ *Tataryn*, *supra* note 9 at para 28.

²⁹⁷ *Ibid.*, at para 55.

This is another case where the judge considered other factors (i.e., caregiving) in deciding an appropriate allocation for the independent adult child who was disinherited due to his sexual orientation. Justice Groves also stayed within the four corners of the Act in interfering with the father's testamentary freedom.

On November 29, 2010, the BC Supreme Court released its decision in *Werbenuk v. Werbenuk Estate*²⁹⁸. The BC Supreme Court applied the guidance from *Tataryn v. Tataryn Estate*²⁹⁹ to vary a father's will because his will provided for his only son and excluded his four daughters. The court found that there was both racial bias and gender bias in the will and thus this will was varied because it did not meet contemporary moral standards. The finding that there was racial and gender bias in the will is confirmed in paragraph 12 of the decision, which reads as follows:

The evidence of all of the daughters indicates that their **father was a hard and rigid man who ruled his family, and especially the women, with an iron fist. He was a racist whose will and personality dominated his family.** He was self absorbed and ordered his wife and daughters about as if they were brought into being merely to satisfy his needs, without regard to their emotional well being. Their evidence provides stark testament to the fact that the father, on frequent occasions, resorted to and engaged in harsh and brutal corporal and other punishments. He ruled those who lived with him and those who incurred his wrath by predictable resort to violence and the threat of violence. **The father emotionally abused his wife and daughters on a regular basis and engaged in regular assaults upon their bodies as a form of punishment and, ultimately, as a form of ruling by terror.**³⁰⁰

To support his decision, Justice Wong stated that the father did not act as a judicious parent because his reasons were untrue and irrational, and the father did not consider the needs and contributions of the daughters. This is confirmed in paragraph 49 of the decision, which states the following:

²⁹⁸ *Werbenuk v. Werbenuk Estate*, 2010 BCSC 1678 (CanLII).

²⁹⁹ *Ibid* at paragraph 19.

³⁰⁰ *Ibid.*, at paragraph 12.

Based on the evidence I find that the testator father in disinheriting his daughters did not act judiciously as a parent. His reasons for disinheriting his daughters were untrue and irrational. He did not give due consideration to his daughters' respective circumstances and needs. **In favouring his only son, he also overlooked the contributions of his daughters to the well being of himself and his wife during their lifetimes.**³⁰¹

Justice Wong also stated that a judicious parent would also attempt to make amends with his family members through his will if he treated those children unfairly or was abusive towards them. This is confirmed in paragraph 50 of the decision, which reads as follows:

In addition where a parent has treated a child unfairly in terms of earlier parental abuse, I would think a judicious parent, after objective reflection, would recognize a moral obligation to make amends for it through the provisions of his will.³⁰²

Justice Wong concluded that the testator's will did not conform with modern contemporary standards; these standards are provided in paragraph 55 below:

Modern contemporary standards would reject the testator's declared intention to disinherit his daughters. Moreover, the defence ordinarily given to the wishes of the testator should not apply in this case in light of the testator's treatment of his daughters during his lifetime and the irrational and untrue nature of the reasons advanced by the testator in paragraph 6 of his will.³⁰³

Justice Wong varied the will so that each of the children received an equal share of their father's estate. In deciding this allocation, Justice Wong considered other factors such as personal financial situation, contributions to the family, and personal needs.

On September 11, 1997, the BC Supreme Court released its decision in *Willott v. Willott Estate*³⁰⁴. In this case, the BC Supreme Court applied *Tataryn*³⁰⁵ to vary a mother's will because the Court found that she had not fulfilled her moral obligations to

³⁰¹ *Ibid.*, at paragraph 49.

³⁰² *Ibid.*, at paragraph 50.

³⁰³ *Ibid.*, at paragraph 55.

³⁰⁴ *Willott v. Willott Estate*, 1997 CanLII 3439 (BC SC), <<http://canlii.ca/t/1f4zr>>.

³⁰⁵ *Ibid.*, at paragraphs 57, 59 and 72.

her disabled child by not making an adequate provision for him in her will. Based on the facts of the case, the estate, which was worth \$500,000, was left in whole to the deceased's sister. The deceased neglected to provide any support for her disabled child, who was unable to work and survived on a very small amount of disability pension that he received due to his mental illness.

The BC Supreme Court ruled that the state-paid disability benefits are the bare minimum and that the parent had a moral obligation to provide a higher provision in her will for support for her child's benefit. This is confirmed in paragraph 74 of the decision, which reads as follows:

I find on the whole of the evidence that Iris Willott did not make adequate provision for the proper maintenance and support of her son, and did not discharge her moral obligation to him. Lot 1 will provide accommodation for him should he chose to live there or, if he chooses to sell that property, I find it will provide him with enough money to purchase other suitable accommodation. His benefits under the regulations to **Disability Benefits Program Act** will cover his house insurance, taxes, fuel, water, hydro, garbage and basic telephone expenses (s. 5 Schedule A). In addition, benefits will provide him and his wife with medical and dental coverage, eye care, prescriptions and home support. But the monthly amount of \$608 which he will then receive (assuming he and his wife are together) is not sufficient, I find, to maintain him to the standard which was reasonable given his own circumstances at the time of his mother's death and the other factors the court is required to consider when dealing with **Wills Variation Act** actions, including the size of the estate.³⁰⁶

Justice Downs varied the mother's will so that the entire residue would be granted to the son. The residue would be held in trust for the benefit of the son during his lifetime following which it is to be distributed following the provisions of the mother's will. In making this decision, Justice Downs considered the severity of the child's disability and his personal needs throughout his lifetime.

³⁰⁶ *Ibid.*, at paragraph 74.

In summary, the decisions above support the fact that the BC Court's interpretation and application of *Tataryn* best balance the conflicting Charter values of equality and liberty. This is because the decisions prohibit discrimination in wills, but in deciding a more equitable distribution to the will, the judges consider many other factors. The decisions also do not lead to a complete overturn of the testators' wishes, and the judicial interference with a person's testamentary freedom is completely within the provisions of the BC dependent relief legislation. Therefore, in Ontario, the judicial reform envisioned should begin with adopting the approach taken by the BC judiciary in deciding dependent relief claims.

Section 4.6 – Implementing the Supreme Court of Canada's Decision in *Tataryn* in Ontario

The approach that should be taken to implement the legal principles established in *Tataryn* has already been established by Ontario's Divisional Court in *Quinn v. Carrigan*.³⁰⁷ The Divisional Court implemented the decision using a four-step analysis. The first step of the analysis is to identify the testator's dependents. This would include the testator's spouse and dependent children. After identifying the dependents, the Divisional Court stated the need to identify their reasonable claims to support from the estate.

The second step of the analysis requires valuing the dependents' claims. This would require the judiciary to determine the legal entitlement for support based on the need from the estate. This part of the analysis also requires determining the moral claims of the dependents and assigning a monetary value to these moral claims.

³⁰⁷ *Quinn*, *supra* note 167.

The third step of the analysis requires determining the legal and moral claims of non-dependents. The Divisional Court recognized in this step the claims of adult independent children to their parent's estate. In this case, the daughter had a legal entitlement to the estate, and this legal entitlement satisfied their moral claims. The Divisional Court affirmed the fact that adult independent children's claims could be both legal and moral. This would support the need to create a new category of claimants for the SLRA.

The fourth step requires balancing the competing claims by taking into account factors such as the size of the estate, the strengths of the claims, and the intentions of the deceased to arrive at a judicious distribution of the estate. In *Quinn*, the Court of Appeal stated that the size of the estate is a relevant factor to determining the entitlement of non-dependents from the estate.

The strength of the claims should give priority to the claims of the spouse and dependent children over the claims of non-dependent children. Therefore, it is completely unnecessary to exclude adult independent children from claiming benefits from their parent's estate, since it will only be permitted if the size of the estate permits and their claims are subordinate to the claims of other dependents.

The courts can also determine, based on the percentage of the estates allocated to their dependents and non-dependents, the intentions of the testator. However, the courts were cautioned not to completely override the wishes of the testator and only to the point allowed by the statute. *Quinn* interpreted this as including both legal and moral factors. This direction from the Divisional Court is consistent with the direction provided by the Supreme Court in *Tataryn*.

This decision was affirmed recently by another Divisional Court on June 4, 2021, in the matter of *Earl v. McAllister*.³⁰⁸ Since the *Quinn* decision relies heavily on the findings of the Court of Appeal in *Cummings*, it follows that the *Cummings* authority has more precedential value than the Court of Appeal's decision in *Spence* in Ontario.

The four-step analysis in *Quinn* should be adopted in Ontario because it is based on the legal principles established in *Tataryn*. It also acknowledges the legal and moral claims of dependents and non-dependents while balancing these entitlements with the intentions of the testator. Therefore, the application of this four-step method will also ensure that dependent relief claims in Ontario will be decided in a manner that balances the two conflicting values of the Charter. The implementation of this four-step analysis will also not be costly to implement, since it has been applied to Ontario cases after the release of the decision in *Quinn*.

It is also important to note that Section 62 of the SLRA outlines 19 factors that the courts can consider in determining the fairest and most equitable judicious distribution of the estate. As stated by *Cummings*, some of these factors are moral and thus need to be considered to determine the moral claims of dependents and non-dependents.

Section 4.7 – Conclusion

In this chapter, the objections to the effectiveness of *Tataryn* in deciding dependent relief claims were outlined, and the arguments against the inclusion of adult independent children were also considered.

³⁰⁸ *Earl v. McAllister*, 2021 ONSC 4050 (CanLII).

Based on a review of a series of cases decided in BC, it was argued that the judiciary acknowledged the gender or racial bias in wills and then remedied them by considering multiple factors. The BC judiciary also remained within the four corners of the Act in interfering with the testator's testamentary freedom. The decisions did not completely reverse the wishes of the testators, and thus this balanced the conflicting Charter values.

The objections to the inclusion of non-dependent children were addressed by the four-step analysis established by the Divisional Court in *Quinn*. In this decision, it is clear from this analysis that the claims of independent adult children are subordinate to the claims of dependent spouses and children. The claims of non-dependent children are also contingent on the size of the estate, and their claims must be balanced with the intentions of the testator. Therefore, it is unnecessary to exclude them.

Even though the BC statute provides wider discretion to the courts to vary wills, this is needed to achieve the objectives of the dependent relief legislation. Contrary to the findings of the Court of Appeal in *Spence*, the reform needed is not a legislative reform but rather a judicial reform.

Based on the Charter value analysis performed in chapter 2, the Court of Appeal's decision in *Cummings* should remain the seminal case for dependent relief claims in Ontario because it is based on the legal principles established by the Supreme Court of Canada in *Tataryn*. This is because it will allow the judiciary to interpret the *SLRA* in accordance with the Charter values of equality, human dignity, and liberty. Since the court's interpretation of the *SLRA* in *Cummings* is more aligned to the values embodied in the Charter, then it must be given preference over the interpretation of the

SLRA in *Spence*, which is contrary to those Charter values. The decision in *Cummings* also provides the best balance of the Charter values when they come in conflict in deciding dependent relief claims.

CHAPTER 5 – CONCLUSION

Section 5.1 – Findings and Recommendations

The purpose of the legal principles established by the Supreme Court of Canada was to ensure that adequate support was provided by the testator while at the same time interfering with a person's testamentary freedom only so long as the Act allowed for it. It is argued in this thesis that the *Tataryn* authority balances the conflicting Charter values that come in conflict when deciding dependent relief claims.

This is because a judge interpreting the Act must understand the intentions of the testator. This can normally be inferred from the allocations of the estate made to his or her dependents. Then, if there is a gender bias or racial bias in the will, the judges consider many factors in deciding how to remedy the discrimination in the will. The will variation order does not always lead to a complete reversal of the testator's wishes, as the judges will provide detailed reasons on the provisions of the Act that allows them to change the original allocation made by the testator. This careful consideration by the judiciary ensures that both Charter values are balanced in making the final order.

The application of *Tataryn* also allows adult independent children to make applications for relief. This is because the moral claims of non-dependent children arise from the moral obligations of the testator. However, the claims of non-dependent children are subordinate to the claims of the testator's spouse, and dependents and any benefits to non-dependent children will be given only if the size of the estate permits. This means that if a non-dependent child is disinherited or if there is inadequate support due to his or her age or lack of financial dependency, then that child is entitled to make a support application, provided that the size of the estate permits and the competing

interests are balanced by the judiciary. The inclusion of non-dependents allows for the judiciary to ensure equality, but these interests can be restricted to a small amount, and thus the wishes of the testator are also considered, meaning that liberty is also considered.

It has also been argued that the decision in *Spence* is the judiciary's failure to build the common law for dependent relief claims in Ontario in accordance with the Charter value of equality. The decision made Ontario an absolute testamentary freedom jurisdiction. The decision did not attempt to balance the conflicting Charter values. This is because the decision failed to acknowledge the moral claims of non-dependent children that come from the moral obligations of the testator. The decision also stated that there were no conceptual tools that the Court could apply to prohibit discrimination in wills, and thus affirmed that a testator is free to disinherit his child for any reason even if the reasons are discriminatory. It has been argued in this thesis that this finding has reduced the precedent value of this authority.

The Ontario courts are following another Court of Appeal decision in *Cummings*, which acknowledges the moral obligations of the testator and affirmed that *Tataryn* applied in Ontario. The Divisional Court in *Quinn* followed *Cummings* and developed a four-step analysis for courts that consider the interests of both dependents and non-dependents while at the same time balancing the intentions of the testator. *Quinn* has been affirmed by another Divisional Court decision released in 2021.

It has also been argued that there is no need for any legislative reform to remedy the imbalance in consideration of the Charter values. There is a need here for judicial reform, as the *SLRA* gives courts wide discretion to decide dependent relief claims. This

means the courts can consider multiple options for a revised allocation in the will to meet the needs of dependents and non-dependents while at the same time honouring the wishes of the testator.

Section 5.2 – Areas for Future Research

In this thesis, a four-step analysis for deciding dependent relief claims in Ontario was recommended as the solution to balancing the conflicting values of the Charter in deciding dependent relief claims. This analysis requires the judiciary to consider both the legal obligations and moral obligations of the testator. The legal obligations need to be considered first, and these obligations can be quantified relatively easily; however, the moral claims are much more difficult to quantify. Therefore, future research should focus on developing more guidelines for the judiciary on how to quantify the moral claims of dependents and non-dependents.

Section 5.3 – Contributions to the Literature

The major contribution to the literature from this thesis is the need for all jurisdictions in Canada to consider whether their dependent relief legislation balances the Charter values that come into conflict when deciding dependent relief claims. This thesis also called for judicial reform and not legislative reform because dependent relief legislation gives courts wide discretion to decide support claims. The merits of *Tataryn* were also analyzed in thick detail to argue that this is the reform that needs to be put in place to ensure that the conflicting values of the Charter are balanced in deciding dependent relief claims. The experience in Ontario suggests that the implementation of *Tataryn* in full in a province will not require a radical change to implement, and given the four-step analysis already established in Ontario, it will not be costly to implement.

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