

The Meaning of "Everyone":
Reconsidering the Scope of S. 7

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ABSTRACT

S. 7 of the *Canadian Charter of Rights and Freedoms* guarantees the right to life, liberty, and security of the person for "everyone". The word "everyone" has been judicially defined as human beings, who are physically present in Canada, regardless of citizenship status. Neither corporations nor fetuses are included in the term "everyone". The leading case on the meaning of "everyone" is *Irwin Toy Ltd. Quebec (Attorney General)*. In this case, the Supreme Court of Canada reasoned that corporations are not "everyone" because corporations are incapable of enjoying the right to life, the right to liberty, and the right to security of the person. The court also concluded that only "human beings" are *capable* of enjoying these rights. *Irwin Toy* did not consider whether fetuses are "everyone" but earlier jurisprudence determined that fetuses are not "everyone".

Over the past 30 years, the scope and content of right to life, liberty, and security of the person has been defined by Canadian Courts. For example, the right to life protects individuals from state conduct that causes death or increases the risk of death. The right to liberty provides the right to make personal and fundamental choices about one's life without government interference. The right to security of the person means the right to bodily physical and psychological integrity. This maturation of s. 7 rights has inadvertently undermined the Supreme Court of Canada's reasoning in *Irwin Toy* because it is no longer clear that only human beings are capable of enjoying these rights. It has become increasingly clear that certain animals are conscious, self-aware, and are capable of making personal choices. Technological progress, particularly in computer science and robotics, means that autonomous and sentient artificial intelligence may soon be on the horizon. If the Supreme Court of Canada's emphasis on *capability* in *Irwin Toy* is correct, the word "everyone" can arguably no longer be restricted to human beings. Based on the jurisprudence, the word "everyone" in s. 7 should encompass "all live human beings and all other entities capable of enjoying the right to life, liberty, and security of the person."

This thesis proposes a modified framework for considering whether a non-human entity is *capable* of enjoying s. 7 and therefore falls within the ambit of "everyone":

1. whether the non-human entity is *capable* of enjoying the rights to life, liberty, and security of the person;
2. whether the non-human entity is *capable* of enjoying s.8, s.9, s.10, and s.12 rights;
3. whether the non-human entity has been recognized as a person in other domains of Canadian law; and
4. whether other jurisdictions consider the non-human entity to be a person.

This thesis applies this proposed framework to a test case, chimpanzees, in order to demonstrate its rationality, flexibility, and consistency. This thesis also considers four areas where the recognition of non-humans as "everyone" might impact the *Charter* as a whole.

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Introduction

One of the most important guarantees in the *Canadian Charter of Rights and Freedoms*¹ [the “Charter”] is s. 7, which guarantees the right to life, liberty, and security of the person. S. 7 states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.²

What does the word “everyone” mean? To date, “everyone” refers to human beings,³ physically present in Canada,⁴ regardless of citizenship status,⁵ and does not include corporations⁶ or fetuses.⁷ The leading case on the definition of “everyone” is *Irwin Toy Ltd. v Quebec [Irwin Toy]*.⁸ In this case, the Supreme Court of Canada limited the meaning of the word “everyone” to human beings. Writing for the majority, Dickson C.J wrote:

That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase “Everyone has the right to life, liberty and security of the person” serves to underline the human element involved; only human beings can enjoy these rights. “Everyone” then, must be read in light of the rest of the section and defined to exclude corporations and

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

² *Ibid* at s. 7. [emphasis added]

³ *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 (SCC). Interestingly, the phrase “human being” is not defined by the Supreme Court in *Irwin Toy*, despite the court’s decision to limit s. 7 to human beings. For the purposes of this discussion, “human being” will be defined as “a person, a member of the human race; a man, woman, or child.” *Oxford English Dictionary* 3rd edition (Oxford: Oxford University Press, 2017) online at *sv* “human being”.

⁴ *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, 17 DLR (4th) 422 at para 35 (SCC).

⁵ *Ibid*.

⁶ *Irwin Toy*, *supra* note 3 at para 97.

⁷ *Borowski v Canada (Attorney General)*, [1987] 4 WWR. 385, 59 CR (3d) 223 (SKCA). This decision was appealed to the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 57 DLR (4th) 231 (SCC), but the Supreme Court of Canada did not directly address the meaning of “everyone” because the issue presented before the court was moot. This decision will be discussed in detail in Chapter 2.

⁸ *Irwin Toy*, *supra* note 3.

other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.⁹

Limiting “everyone” to human beings reflected the legal, social, and scientific understanding of the day. However, almost thirty years have passed since *Irwin Toy*. Since 1987, at least two trends have emerged that should cause us to question whether the *Irwin Toy* interpretation of “everyone”, in terms of its limitation to human beings, is still correct. First, the scientific domain of zoology has increasingly recognized that human beings are not the only intelligent, autonomous, and self-conscious organisms on Earth. The advanced intellectual abilities of some non-human animals cause us to consider whether some animals might be deserving of legal rights. Second, the field of artificial intelligence has made significant strides since 1987. Computer scientists have already created computer programs that can perform intellectual tasks better than human beings.¹⁰ A “general” artificial intelligence – an artificial intelligence that can equal or outperform human beings in intellectual tasks – is no longer considered fantasy.¹¹

Given such developments, the goal of this thesis is to explore the s.7 concept of “everyone” within the context of non-human entities. Specifically, the objective of this thesis is to demonstrate how the restrictive interpretation of the word “everyone” should be revisited. Furthermore, this thesis argues that *Irwin Toy* is problematic and indeed no longer useful in the 21st century. This thesis goes on to propose a new definition for the word “everyone” and provides a legal framework for applying this new definition. To this end, the thesis is divided into three principal chapters.

Chapter 1 demonstrates that the *Irwin Toy* interpretation of the word “everyone” is problematic and that the word “everyone” arguably cannot continue to be restricted to human beings. To this end, Chapter 1 includes:

- 1) an in-depth review of the *Irwin Toy* decision;

⁹ *Ibid* at para 97. [emphasis added].

¹⁰ Bruce Weber, “In Upset, Computer Beats Chess Champion”, *The New York Times* (11 February 1996) online: New York Times <www.nytimes.com>; Paul Mozur, “Google’s AlphaGo Defeats Chinese Go Master in Win for A.I.”, *The New York Times* (23 May 2017) online: New York Times <www.nytimes.com>.

¹¹ Müller, Vincent C. and Bostrom, Nick, ‘Future progress in artificial intelligence: A Survey of Expert Opinion, in Vincent C. Müller (ed.), *Fundamental Issues of Artificial Intelligence* (Synthese Library; Berlin: Springer).

- 2) identification of two contradictory legal rationales in *Irwin Toy*, described herein as the “Capability Argument” and the “Human-Only Argument”;
- 3) discussion about why the Capability Argument is a better foundation for grounding a new definition of the “everyone”; and
- 4) discussion of the contextual problems associated with the Human-Only Argument.

Chapter 2 proposes a new definition of the word “everyone”, one that is consistent with the jurisprudence and avoids the problems associated with *Irwin Toy*. Accordingly, Chapter 2:

- 1) identifies all the instances where the word “everyone” is used in the *Charter*;
- 2) examines all appellate level jurisprudence that considers the word “everyone” and identifies broad principles from this jurisprudence;
- 3) proposes a new definition of “everyone” in accordance with the identified principles;
- 4) proposes a legal “test” for determining whether an entity falls within the ambit of the new definition of “everyone”; and
- 5) assesses whether the new proposed definition and test of “everyone” avoids the problems associated with the Human-Only Argument.

Moving forward with the new definition of the word “everyone” developed in Chapter 2, Chapter 3 explores the practical consequences and potential impacts of this new interpretation.

To wit, Chapter 3:

- 1) explores the importance of a workable standard;
- 2) identifies potential candidates for an expanded definition of “everyone”.
- 3) applies the “Everyone Test” to chimpanzees:
- 4) identification of areas where the new definition of “everyone” may challenge the status quo.

Scope & Limitations

Why s. 7?

This thesis will focus only on the meaning of the word “everyone” in s. 7 of the *Charter*, except where reference to other sections of the *Charter* is necessary for the interpretation of s. 7. Notably, the *Charter* also uses the word “everyone” in several other sections – 2, 8, 9, 10, and 12.¹² The terms “every citizen of Canada” and “every individual” are also found in the *Charter*.¹³ Because the word “everyone” is used multiple times, along with other “pronouns”, it is necessary to explain why this thesis focuses on the s. 7 meaning of “everyone”.

First, s. 7 protects interests that are fundamental to human rights and the Canadian way of life. At the risk of ranking *Charter* rights, the right to life, liberty, and security of the person are at the core of Canadian constitutional protection. Without the right to life, it is arguable that the value of other *Charter* protections is diminished. One cannot exercise any of the other *Charter* rights if one is not alive. Similarly, the right to liberty and the right to security of the person are fundamental legal rights. Without liberty or security of the person, the right to expression or the right to vote, for example, lose much of their value.¹⁴

Second, the focus on s. 7 is due to the interrelated nature of s. 7 and sections 8-14. As a whole, sections 7-14 are known as the “legal rights”. The fact that s. 7 comes before the other “legal rights” is no accident. As explained by Lamer CJC. in *Re B.C. Motor Vehicle Act*, sections 8-14 are manifestations of s. 7.¹⁵ Lamer CJC wrote:

Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14. The alternative, which is to interpret all of ss. 8 to 14 in a "narrow and technical" manner

¹² *Charter*, *supra* note 1 at s. 2, 8, 9, 10, and 12.

¹³ *Ibid.* The words “every citizen of Canada” appear in sections 3 and 6. The words “every individual” appears in s. 15.

¹⁴ Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 310. [*Fundamental Justice*]

¹⁵ *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) at para 29.

for the sake of congruity, is out of the question (*Law Society of Upper Canada v. Skapinker, supra*, at p. 366).

Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section". Clearly, some of those sections embody principles that are beyond what could be characterized as "procedural".¹⁶

Given this relationship, s. 7 is the natural starting point when interpreting the "legal rights". Because s. 7 is the "general" right and sections 8-14 are "specific" manifestations of that right, the meaning of "everyone" in s. 7 should inform the meaning of "everyone" found in sections 8, 9, 10, and 12.

Third, interpreting the word "everyone" in sections 8, 9, 10 or 12 in a vacuum would create consistency problems. It is a principle of statutory interpretation that the same words in the same statute have the same meaning.¹⁷ The word "everyone" in s. 7 should therefore have the same meaning as "everyone" in the other legal rights. Determining the meaning of "everyone" in sections 7, 8, 9, 10 and 12 on an individual basis would likely result in inconsistent and irreconcilable interpretations. For example, the word "everyone" in s. 8 might include corporations, but the word "everyone" in s. 12 might not. Such a situation would undermine the *Charter's* consistency and introduce unnecessary complexity. It is simpler, more logical, and in accordance with Lamer CJC's comments to interpret "everyone" in s. 7 and allow that interpretation to filter down into the other "legal rights".

Attention must also be paid to the fact that the word "everyone" appears in s. 2. S. 2 states:

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

¹⁶ *Ibid* at para 28-29. [emphasis added]

¹⁷ Ruth Sullivan, *Statutory Interpretation* (Toronto, Irwin Law: 2016) at 147.

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.¹⁸

Like s. 7, s. 2 uses the term “everyone”. The principle of “same word, same statute, same meaning” suggests that the meaning of “everyone” should be the same in both s. 2 and s. 7. With this principle in mind, how should the word “everyone” be interpreted? Should the meaning of the word “everyone” in s. 2 inform the meaning of the word in s. 7? Or vice-versa? In the opinion of the author, the meaning of “everyone” should first be considered in the context of s. 7. After “everyone” has been defined in s. 7, this meaning can be transplanted into s. 2. While s. 2 does not have a special relationship to s. 7 in the way that sections 8- 14 do, there are logical reasons for this approach.

This approach would promote consistency in process and meaning across the *Charter*, particularly with respect to sections 8, 9, 10, and 12. As described above, due to the interrelated nature of s. 7 and sections 8, 9, 10 and 12, it was determined that the best approach to determine the meaning of “everyone” would be to first consider the meaning of “everyone” in s. 7 and then use that meaning for sections 8, 9, 10, and 12. By applying this same process with respect to s. 2 and s. 7, consistency is ensured on two levels. First, consistency of process will be ensured. Utilizing two different processes to determine the meaning of “everyone” (one for s. 2 and one for sections 8, 9, 10, and 12) creates unnecessary interpretative work and increases the possibility of inconsistent definitions. Second, consistency of meaning should be achieved. That is to say, the meaning of “everyone” across s. 2 and s. 7-14 will be kept the same. By first determining the meaning of “everyone” in s. 7, s. 7 can serve as a reference point for both s. 2 and the other legal rights. S. 7 can act as a bridge, spanning the gap between the fundamental freedoms and the legal rights.

S. 7 also protects foundational interests necessary to the exercise of s. 2 rights. That is to say, without meaningful protection of s. 7 interests - life, liberty, and security of the person - it is impossible to exercise s. 2 rights. Stewart makes this point in *Fundamental Justice*:

Indeed, while the traditional civil liberties protected by sections 2 and 3 are undoubtedly fundamental to a free and democratic society, the interests protected by section 7 are no less fundamental. The right to vote

¹⁸ *Charter, supra* note 1. [emphasis added]

or to express oneself freely is of little value to a person deprived of liberty or security following an unfair hearing, on a basis of a fundamentally unjust law, or by means of arbitrary state action.¹⁹

Given these factors, it is more logical to define the term “everyone” with s. 7 as a starting point. Having defined “everyone” in s. 7, it should be possible to extend this definition to sections 2, 8, 9, 10, and 12 without encountering many difficulties.

Why not s. 15?

Some attention must also be given to s. 15 of the *Charter*, which protects equality rights. S. 15 states:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex...²⁰

Notably, s. 15 uses the phrase “every individual”. Like the word “everyone”, the exact scope of the phrase “every individual” is not immediately clear. The term is broad enough to potentially consider the inclusion of non-human beings. Additional scholarship, perhaps similar to this thesis, will likely be needed to fully establish the meaning of “every individual”. However, there are compelling reasons to consider the scope of s. 7 before s. 15.

S. 7 protects the three values that Canadian society considers fundamental: life, liberty, and security of the person. These three rights combine to protect the activities and characteristics that are central to the Canadian way of life. Of course, equality also plays an equally important role in Canadian society. Many would argue, and this author would agree, that a dignified life is not possible without guarantees of equality. However, the interests protected by s. 7 are the legal bedrock upon which life in Canada is built. The right to life protects life. The right to liberty protects an individual’s ability to make personal and fundamental decisions without state interference. The right to security of the person protects physical and psychological integrity. Without these rights, the ability to live a meaningful and dignified life would be severely hampered. Given the paramount nature of these rights, it would be odd for an entity to have s. 15 rights but not have s. 7 rights. It is difficult to see how an entity could have a right to equality

¹⁹ *Fundamental Justice*, *supra* note 14 at 310.

²⁰ *Charter*, *supra* note 1 at s. 15.

under s.15 if that entity is not first recognized as a legal person under s. 7 of the *Charter*. If the entity does have s. 7 rights, it is then appropriate to determine how s. 15 might apply.

Why not Consider Specific Violations of S. 7?

There is a two-step process to determine whether s. 7 of the *Charter* has been violated.²¹ First, the complainant must establish that he or she has been deprived of his right to life, liberty, or security of the person.²² Second, the complainant must establish that this deprivation was contrary to the principles of fundamental justice.²³

This thesis will not consider specific violations of s. 7 as they are fact-dependent and subject to the peculiarities of any given case. This thesis however, takes the first step by exploring the meaning the term “everyone”. If the meaning of the term “everyone” can reasonably be expanded to include non-humans, it can be expected that there will be situations where the s. 7 rights of non-human persons have been deprived. However, at this stage, it is more important to determine whether non-human persons can even claim s. 7 rights.

Undoubtedly, if some non-humans are included in the term “everyone” and are capable of holding s. 7 rights, additional scholarship will be required to determine the scope of such rights. It is not immediately clear whether the *Charter* would demand identical rights for humans and non-humans. However, these questions are beyond the scope of this thesis and premature. It first must be established that s. 7 of the *Charter* applies to non-humans.

Additional Legal Arguments for Animal Rights

Over the course of the animal rights movement, there have been a number of different legal arguments in favour of increased legal protections for animals. While these arguments are invaluable, this thesis will not directly explore the merits or disadvantages of these additional legal avenues. For example, this thesis will not discuss the legal merits of the writ of *habeas corpus* as a means advancing legal rights for non-human persons.²⁴ This particular approach,

²¹ *Fundamental Justice*, *supra* note 14 at 21-22.

²² *Ibid.*

²³ *Ibid.*

²⁴ The writ of *habeas corpus* was the approach used by the American Nonhuman Rights Project in their attempt to have several chimpanzees released from various institutions.

undertaken by the Nonhuman Rights Project, is unique to the American judicial system and lies beyond the scope of this thesis.

This thesis will also not delve into the different philosophies, strategies or paradigms for expanding legal rights. For example, this thesis will not examine the comparative advantages and disadvantages between the animal welfare approach and the animal rights approach.²⁵ This thesis will also not consider proposals that animals should be considered “living property”,²⁶ conceptions of animal rights grounded in autonomy,²⁷ nor proposals that no animal should be considered property.²⁸

Because this thesis is focused on whether there is a legal argument to be made under s. 7 of the *Charter*, these aforementioned strategies will not be considered unless relevant to the specific consideration at hand.

Feasibility Concerns

There is little doubt that the argument presented in this thesis is highly unlikely to be accepted by a Canadian court in today’s legal environment. The idea of recognizing *Charter* rights of non-humans is likely a bridge too far for Canada’s legal system. Feasibility concerns notwithstanding, there is nonetheless value in exploring whether non-humans could indeed be eligible for s. 7 rights. First, it is valuable to determine whether s. 7 could potentially offer an avenue for increased legal protections for non-humans. When a scientific experiment does not ultimately validate a hypothesis, the experiment is not considered a “failure” because the

See *People of the State of New York, ex rel The Nonhuman Rights Project, on behalf of Tommy v Thomas C Lavery*, [2014] 124 AD 3d 148 [*Tommy’s Case*]; *The Nonhuman Rights Project, Inc., on behalf of Kiko v Carmen Presti et al* (NY Sup CT 2013); *The Nonhuman Rights Project, Inc., on behalf of Hercules and Leo v Samuel L Stanley Jr., M.D.* (NY Sup Ct 2013).

²⁵ Sunstein C, “Introduction, What are Animal Rights?” in Sunstein C & Nussbaum M, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004) at 3-15. For an introduction to the underlying philosophic debate regarding whether animals have a non-instrumental value affording them of protection from exploitation see Angus Taylor, “Philosophy and the Case for Animals” in *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) at 11-29.

²⁶ *Ibid*, see Favre D, “New Property Status for Animals: Equitable Ownership” at 234-250.

²⁷ Steven M Wise, *Drawing the Line: Science and the Case for Animals Rights* (Cambridge: Perseus Books, 2002).

²⁸ *Supra* note 25, see Francione G, “Animals – Property or Persons” at 109-142.

experiment nonetheless provides useful data about the world. Similarly, if the analysis provided by this thesis is not convincing or is infeasible, value is still generated. That is, at the very least, we might come to understand that s. 7 may not be an appropriate avenue for expanding the rights of non-humans. Those interested in or advocating for animal rights or welfare might in turn come to the conclusion that efforts might be better spent elsewhere or may otherwise be assisted in identifying alternative strategies or methodologies.

This thesis may also offer value with respect to artificial intelligence. While artificial intelligence has not yet risen to a level where an artificial intelligence can reasonably be considered a “person”, that day appears to be on the horizon. Whether general artificial intelligence is 20 years away or 100 years away, it is important to reflect on how the legal system should address artificial intelligence. As the foundation of Canadian civil rights, the *Canadian Charter of Rights and Freedoms* will be significantly impacted. If nothing else, this thesis can be viewed as early dialogue in what is going to become a long conversation about how artificial intelligence should integrate into Canadian law.

Counter-Arguments

Given the novelty of the ideas proposed in this thesis, there will undoubtedly be many applicable and persuasive counter-arguments. However, this thesis will not address these potential counter-arguments for two reasons. First, because this thesis addresses a gap in the academic literature and proposes a novel legal argument, counter-arguments do not yet exist. Rather than speculate on and respond to potential counter-arguments, which would likely be poorly represented or strawman arguments, it is better to let these counter-arguments develop on their own and in their own time. It will then be possible to respond to these counter-arguments with clear eyes. Second, it is beyond the scope and length of this thesis to adequately address counter-arguments. This thesis already pushes the boundaries of acceptable length and addressing counter-arguments would only exacerbate this problem.

Legal Theory and Methodology

Due to its focus on case law, this thesis will rely on positive law theory. That is to say, this thesis will primarily rely upon case law from appellate level courts. Given the subject matter of this thesis – whether non-human entities are entitled to s. 7 rights – there will be a temptation to

wade into normative, moral, or ethical arguments. This is not entirely surprising, given the moral, ethical and philosophical implications of recognizing the constitutional rights of non-humans. However, this thesis will attempt to avoid these types of discussions by focusing on *Charter* jurisprudence. Through the history of the *Charter*, the legal reasoning, the philosophical roots, and the moral underpinnings of *Charter* rights have been examined and identified. This thesis will not seek to introduce novel philosophical or moral arguments but make a legal argument that non-humans are “everyone” under the current legal, philosophical, and moral framework identified by the *Charter* case law.

Second, this thesis will focus on the positive law because as will be described, there are serious deficiencies in the law as it currently stands. This thesis will demonstrate that the *Irwin Toy* interpretation of the word “everyone” is problematic. Due to the nature of the common-law and Canadian constitutional law, the law is constantly adapting to new circumstances and repairing deficiencies or oversights as they arise. Even if the arguments presented in this thesis are not accepted by the legal community, there is value in shining a light on a problematic area and generating discussion. Doing so will allow the legal community, whether that be lawmakers or judges, to arrive at some form of a solution.

The following thesis will rely on a methodology familiar to law students and experienced lawyers, wherein relevant case-law is identified, synthesized, and used to advance a legal position. In this thesis, relevant case law will be limited to Supreme Court of Canada decisions and court of appeal decisions. The concentration on appellate level decisions is for three reasons. First, there are too many trial level decisions involving s. 7. Due to the large number of trial level decisions, it is inevitable that this thesis will unintentionally overlook potentially relevant cases. The risk of this will be diminished by focusing on appellate level decisions, which are fewer in number. Second, trial level decisions often deal with unique circumstances. Appellate level decisions, however, deal with questions of law and not fact. By focusing on appellate level decisions, this thesis will focus on the overarching principles of s.7 and avoid being influenced by unique fact patterns or idiosyncratic decisions. Third, trial level decisions are not binding, or even persuasive, across provincial jurisdictions. There is little utility in examining cases that are not binding or persuasive. As the highest court in the land, decisions

from Supreme Court of Canada avoid this pitfall and provincial appellate decisions are at the very least persuasive.

This thesis will also consider decisions from the various courts of appeal. There are two main advantages to this approach. First, courts of appeal consider questions of law. The factual circumstances of a case are less relevant than in a trial. Therefore, courts of appeal are better positioned to address the overarching legal principles relevant to this thesis. Second, before the Supreme Court of Canada considers an issue, an issue is considered by a court of appeal. Courts of appeal have the first opportunity to consider novel manifestations of s.7. Furthermore, because many court of appeal decisions are not appealed, the Supreme Court of Canada never receives the opportunity to consider an issue.

This thesis will also consider case law from foreign jurisdictions. There are a handful of court cases where activists have argued that non-humans deserve legal rights. While these cases are useful examples, this thesis will not rely extensively on these cases. First, these cases are often not successful. For example, the Non-Human Rights Project has filed several motions for *habeas corpus* on behalf of several chimpanzees.²⁹ To date, none of the Non-Human Rights Project's actions have been successful. Even where such a legal action is successful, the success often takes place in a vastly different legal context. For example, an orangutan won its legal personhood in Argentina in the case of *Asociacion de Funcionarios v GCBA*.³⁰ In this case, the action was brought under a constitutional procedural mechanism called *recurso de amparo*. Such a mechanism is not available within a Canadian context and therefore the case is of limited use, except to the extent it conveys new ideas or legal paradigms. This thesis will therefore limit references to foreign cases to an examination of the facts of the case, the legal arguments made for, and the court's judgment. Attention will also be paid to the legal principles referenced in these cases.

²⁹ *People of the State of New York, ex rel The Nonhuman Rights Project, on behalf of Tommy v Thomas C Lavery*, [2014] 124 AD 3d 148 [*Tommy's Case*]; *The Nonhuman Rights Project, Inc., on behalf of Kiko v Carmen Presti et al* (NY Sup Ct 2013); *The Nonhuman Rights Project, Inc., on behalf of Hercules and Leo v Samuel L Stanley Jr., M.D.* (NY Sup Ct 2013).

³⁰ *Asociacion de Funcionarios y Abogados por los Derechos de los Animals y Otros contra GCBA*, EXPTE. A2174-2015/0.

This thesis will rely on secondary sources, like textbooks, periodicals, or digests when relevant. There are two factors that will restrict the usage of these types of sources in this thesis. First, this thesis will not rely on secondary sources not Canadian in origin. The animal rights movement is a global movement and there is plenty of scholarship with respect to foreign legal systems. However, because this thesis aims to provide an answer for the Canadian legal system and Canadian constitution, foreign secondary sources will be of limited value. Second, it is important to recognize the role of secondary sources in Canadian court decisions. While Canadian justices have not been shy about referring to secondary sources, secondary sources serve only as guideposts. Case law carries more weight and therefore this thesis will be written accordingly.

Chapter 1: The Shortcomings of *Irwin Toy* and the Human-Only Approach

Introduction

The objective of Chapter One is to demonstrate that the leading case on the definition of the word “everyone” in s. 7 is problematic. Specifically, this chapter seeks to demonstrate that the case of *Irwin Toy v Quebec* does not provide a workable definition of the word “everyone”. The definition provided by *Irwin Toy v Quebec* is, in the view of the author, deficient to the point that it cannot be used to resolve future cases. Using the *Irwin Toy* definition of “everyone”, a trial judge would be unable to determine who is “everyone” for the purposes of s. 7. Accordingly, Chapter 1 performs the following:

- 1) an in-depth examination of *Irwin Toy v Quebec*;
- 2) the identification of the two lines of reasoning (the “Capability Argument” and the “Human-Only Argument”) employed by the Supreme Court of Canada in *Irwin Toy v Quebec* and why these two lines of reasoning are in conflict;
- 3) an examination of why the text of *Irwin Toy* favours discarding the “Human-Only Argument”;
- 4) an examination of other jurisprudential and contextual factors that favour discarding the “Human-Only Argument”; and
- 5) a summary of the observations made in this chapter.

Irwin Toy

When it comes to the interpretation of the word “everyone”, *Irwin Toy v Quebec (Attorney General)* is the leading Canadian case.³¹ In *Irwin Toy*, the appellant corporation

³¹ *Irwin Toy*, *supra* note 3.

challenged the constitutionality of Quebec legislation that prohibited advertising directly towards children under 13 years of age.³² The appellant corporation challenged the constitutionality of the legislation on several grounds, including that the legislation violated the corporation's right to liberty under s. 7 of the *Canadian Charter of Rights and Freedoms*.³³ Writing for the majority, Dickson C.J. recognized that a preliminary matter had to be settled before it could be determined whether the impugned legislation violated s.7 of the *Charter*.³⁴ Dickson C.J. wrote:

There is, however, an issue logically prior to that of vagueness, namely whether corporations can invoke s. 7 of the *Charter* in their aid.³⁵

A mere 7 years after the *Charter's* adoption, it was an unsettled question whether corporations constituted "everyone". Could corporations avail themselves to s. 7? The majority of the court thought not. Dickson C.J. wrote:

In order to put forward a s. 7 argument in a case of this kind where the officers of the corporation are not named as parties to the proceedings, the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice. In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition. The only remaining argument is that corporations are protected against deprivations of some sort of "economic liberty".³⁶

The majority went on to reject the concept of economic liberty:

... the intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various

³² *Ibid* at para 1.

³³ *Ibid* at para 12.

³⁴ *Ibid* at paras 92-94.

³⁵ *Ibid* at para 94.

³⁶ *Ibid* at para 95.

international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property — contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a *corporation's* economic rights find no constitutional protection in that section.³⁷

Concluding, Dickson C.J. wrote:

That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings. In this regard, the case of *Big M Drug Mart, supra*, is of no application. There are no penal proceedings pending in the case at hand, so the principle articulated in *Big M Drug Mart* is not involved.³⁸

The Problematic Nature of *Irwin Toy*

In *Irwin Toy*, the Supreme Court of Canada employed two lines of reasoning. First, corporations were not “everyone” because corporations are incapable of enjoying the right to life, liberty, and security of the person. The corollary of this logic is that entities who are capable of enjoying s. 7 rights are “everyone”. By framing the issue as one of “capability” and by emphasizing a corporation’s inability to enjoy s. 7 rights, the Supreme Court of Canada implicitly recognized the ability to enjoy s. 7 rights as the qualifying criteria for “everyone”. For ease of reference, I will refer to this line of reasoning as the “Capability Argument”.

The second line of reasoning identified by the Supreme Court of Canada in *Irwin Toy* is the “Human-Only” argument. The Supreme Court of Canada restricted the meaning of the word “everyone” to human beings when they wrote:

³⁷ *Ibid* at para 96.

³⁸ *Ibid* at para 97. [emphasis added]

That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.³⁹

When the *Irwin Toy* decision was issued, these two lines of reasoning did not likely appear to be contradictory. After all, the *Charter* was less than a decade old and the rights contained in s. 7 had not yet been fully defined. However, over the last 30 years, Canadian courts have fleshed out the right to life, liberty, and security of the person.⁴⁰ The right to life, for example "is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly."⁴¹ The right to liberty is not "restricted to mere freedom from physical restraint"⁴² but is also "the right to make fundamental personal choices free from state interference".⁴³ The right to security of the person includes "a notion of personal autonomy involving... control over one's bodily integrity free from state interference" and "is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering".⁴⁴

Because the rights contained in s. 7 now have specific meanings, it is no longer obvious that these rights can only be enjoyed by human beings. For example, all living creatures could be said to have an "interest" in not being deprived of life and are arguably capable of "enjoying" the

³⁹ *Irwin Toy v Quebec*, *supra* note 3 at para 97. [emphasis added]

⁴⁰ It should be noted that the extent to which s. 7 applies outside the context of the administration of justice has not been settled. *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55, 415 DLR (4th) at para 49. However, this consideration is not relevant when considering the meaning of the word "everyone". If some non-humans are found to be "everyone", these non-humans will be subjected to same limitations of s. 7 as human beings. If a non-human alleges a violation of s. 7 that falls outside the "administration of justice", it can be expected that no violation will be found. The nature of the entity claiming a s. 7 violation is an independent consideration.

⁴¹ *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at para 62.

⁴² *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, 190 DLR (4th) 513 at para 49 (SCC). [*Blencoe*]

⁴³ *Carter v Canada*, *supra* note 41 at para 64.

⁴⁴ *Ibid.*

right to life. Similarly, we now know that making important and fundamental personal choices is not a uniquely human ability. It is now known that some animals – mostly mammals – are self-aware and make “personal” decisions.⁴⁵ The ability to enjoy “security of the person” is also unlikely to be a uniquely human characteristic. It is now recognized that some animals are self-conscious and have senses of self.⁴⁶ These abilities imply that these animals have an interest in maintaining their physical and psychological integrity.

Due to these developments, the Capability Argument and the Human-Only Argument are now in tension. On the one hand, the Capability Argument would extend the meaning of “everyone” to any non-human entity capable of enjoying the right to life, liberty, and security of the person. On the other hand, the Human-Only Argument would limit the meaning of “everyone” to human beings. This paradigm irrevocably breaks down when one considers a non-human who is understood (or evidenced) to be capable of enjoying the right to life, liberty, and security of the person. Which argument takes precedence? Is it more important that an entity be capable of enjoying s. 7 than human? Or is it more important that an entity be human than capable of enjoying s. 7? *Irwin Toy* provides no guidance on how to resolve this tension.

It might be suggested that the decision in *Irwin Toy* was not intended to definitively determine the meaning of “everyone” in all cases. Perhaps the Supreme Court of Canada only intended to determine whether corporations were “everyone and the only lesson that can be properly extracted from *Irwin Toy* is how s. 7 interacts with *non-living* legal entities. In this circumstance, the tension between the Capability Argument and the Human-Only Argument would not be as troublesome because the case could simply be confined to situations with non-living legal entities.

This interpretation, however, loses its strength due to the final comments of Dickson CJ, repeated again here:

That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase “Everyone has the right to life, liberty and security of the person” serves to underline the human element involved; only

⁴⁵ Orangutans, for example, can recognize themselves in a mirror, communicate with others, uses self-referential language. Steven M Wise, *Drawing the Line: Science and the Case for Animals Rights* (Cambridge: Perseus Books, 2002), *supra* note 27 at 205-206.

⁴⁶ *Ibid.*

human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings. In this regard, the case of *Big M Drug Mart, supra*, is of no application. There are no penal proceedings pending in the case at hand, so the principle articulated in *Big M Drug Mart* is not involved.⁴⁷

Had the Supreme Court of Canada wished to confine their judgment to the interaction of s. 7 with non-living legal entities like corporations, the Supreme Court of Canada could have simply concluded that corporations are not capable of enjoying the right to life, liberty, and security of the person and are therefore not "everyone". There was no need to state that only human beings are capable of enjoying these rights. Nor was there the need to state that only human beings are "everyone". These statements were unnecessary for the resolution of the issue in *Irwin Toy* if the Court truly wished to confine its judgment to corporations. In the face of these unnecessary comments, it is difficult to argue that *Irwin Toy* was intended to be a limited judgment on the meaning of "everyone". The more reasonable conclusion is that the Supreme Court of Canada intended to definitively define the meaning of "everyone" in most or all instances.

The intolerability of this situation is easily seen through an example. Suspend disbelief for a moment and suppose that an extra-terrestrial landed in a Canadian city. The extra-terrestrial emerges from the spaceship and is alive and has a physical body. Interactions with the extra-terrestrial show that it is autonomous and self-conscious. While it does not communicate in a language known to human beings, it intentionally communicates. All told, the extra-terrestrial exhibits the same characteristics and abilities of human being. By all accounts, it is capable of enjoying s. 7 rights. Besides being a literal illegal alien, the extra-terrestrial has not committed any crimes. To control this unexpected situation, Canadian authorities quickly take the extra-terrestrial into government custody.

Because the extra-terrestrial is in the custody of Canadian authorities, an interesting question arises. Does the extra-terrestrial have s. 7 rights? When a human enters Canada illegally and is taken into custody, the illegal immigrant is entitled to s. 7 protection. As stated by the Supreme Court of Canada, all human beings physically present in Canada are entitled to s. 7 protection

⁴⁷ *Irwin Toy, supra* note 3 at para 97.

regardless of citizenship status.⁴⁸ Unfortunately, due to the inherent tension between the Capability Argument and the Human-Only Argument, it is not clear whether the extra-terrestrial would have *Charter* rights. According to the Capability Argument, the extra-terrestrial would have s. 7 rights because it is capable of enjoying s. 7 rights. However, the Human-Only argument would deny s. 7 rights to the extra-terrestrial because it is not a human being. If a Canadian court was confronted with this problem, *Irwin Toy* would provide no guidance to the trial judge. The trial judge would be forced to adjudicate a momentous legal issue, where the leading case on the matter employed two contradictory lines of reasoning.

The purpose of *stare decisis* is to provide “certainty while permitting the orderly development of the law in incremental steps”.⁴⁹ Unfortunately, *Irwin Toy* provides no certainty. *Irwin Toy* cannot provide certainty because it cannot be used by a judge to determine whether a non-human entity is “everyone”. In fact, *Irwin Toy* undermines certainty. Pursuant to *Irwin Toy*, the extra-terrestrial would be both “everyone” and not “everyone” simultaneously. Worse still, *Irwin Toy* offers no mechanism for resolving this dilemma because it does not provide guidance on which line of reasoning takes precedence. This uncertainty is not limited to far-fetched thought-experiments involving extra-terrestrials. In any case where it is alleged that a non-human entity has s. 7 rights, the *Irwin Toy* definition cannot be used by judges to resolve the issue. This could include any case involving an animal or artificial intelligence. The Capability Argument will always conflict with the Human-Only Argument. *Irwin Toy* will never provide a resolution to this conflict. At its core, the *Irwin Toy* definition of the word “everyone” is fundamentally incapable of answering the one question it was meant to address: “who is everyone?”

As the court of last resort, the Supreme Court of Canada definitively decides the outcome of legal issues and guides the development of the Canadian legal system. This is an enormous responsibility, one which has been admirably handled since the entrenchment of the *Charter*. Due to scientific and social developments, it is to be expected that some areas of *Charter* interpretation will need to be revisited from time to time. The *Irwin Toy* interpretation is one such situation. The meaning of the word “everyone” must be revisited to resolve the inherent tension between the Capability Argument and the Human-Only Argument. As it stands now, the

⁴⁸ *Singh v Minister of Employment and Immigration*, *supra* note 4.

⁴⁹ *Carter v Canada*, *supra* note 41 at para 44.

Irwin Toy interpretation cannot be relied upon by trial or appellate courts in a situation where a non-human entity claims it is entitled to s. 7 rights or can otherwise demonstrate it is capable of enjoying such rights. Because *Irwin Toy* cannot offer functional solutions, the certainty and predictability of the law with respect to the meaning of the word “everyone” is undermined.

The Primacy of the Capability Argument

To recap, *Irwin Toy* employed two distinct arguments when defining the word “everyone”. First, *Irwin Toy* employed the Capability Argument, which states that an entity is “everyone” when that entity is capable of enjoying the right to life, liberty, and security of the person. *Irwin Toy* also employed the Human-Only Argument, which states that only human beings are “everyone”. As this thesis demonstrated in the preceding section, these two arguments are fundamentally at odds with each other in that it is possible for non-human entities to be capable of enjoying s. 7 rights. In situations where non-humans are capable of enjoying s. 7 rights, *Irwin Toy* cannot be used to determine whether that entity is “everyone”. The Capability Argument says “yes”. The Human-Only Argument says “no”.

Because these two lines of reasoning are in conflict, it is unlikely that both of these arguments can coexist in a future challenge by a non-human. It will be necessary to discard either the Capability Argument or the Human-Only Argument. Once one of these Arguments is discarded, it will then be possible to develop the remaining argument into a workable definition of the word “everyone”.

In the view of the author, the text of *Irwin Toy* reveals that the Human-Only Argument is the prime candidate for disposal. When the Supreme Court of Canada considered the meaning of “everyone” in *Irwin Toy*, the Court first employed the Capability Argument. The Supreme Court of Canada noted that for corporations to have s. 7 rights, corporations would need to demonstrate that their life, liberty, or security of the person was threatened.⁵⁰ The Supreme Court of Canada concluded corporations are incapable of losing their life, liberty or security of the person and are

⁵⁰ *Irwin Toy*, *supra* note 3 at para 95.

therefore not “everyone”.⁵¹ This reasoning finds support in academic circles. Constitutional scholars Robert J Sharpe and Kent Roach agreed with the Supreme Court:

The reference to “everyone” in section 7 of the *Charter* has been interpreted not to include corporations. This view makes sense given that a corporation does not enjoy rights to life, liberty, and security of the person in the same sense as a natural person.⁵²

Importantly, the Human-Only Argument did not emerge until Dickson C.J.’s concluding paragraph:

That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase “Everyone has the right to life, liberty and security of the person” serves to underline the human element involved; only human beings can enjoy these rights. “Everyone” then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.⁵³

This final paragraph also reveals that the Human-Only Argument is somewhat secondary to the Capability Argument. The Supreme Court of Canada first endorsed the Capability Argument and then tacked on the Human-Only Argument. Because there is no substantive discussion of the Human-Only Argument nor a justification of its inclusion, it is reasonable to conclude that the Human-Only Argument was simply an afterthought or assumption. It is true that the beginning of this final paragraph states that s. 7 “was intended to confer protection on a singularly human level”.⁵⁴ However, this sentence is not supported by any examples, evidence, or logical reasoning. The Supreme Court of Canada did not provide any evidence that only human beings are capable of enjoying s. 7.

Because the Supreme Court of Canada devoted most of its attention on the Capability Argument and offered no support for the Human-Only Argument, it is reasonable to construct a new definition of the word “everyone” on the Capability Argument and discard the Human-Only Argument.

⁵¹ *Ibid* at para 95.

⁵² Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 2017) at 248.

⁵³ *Irwin Toy, supra* note 3 at para 97. [emphasis added]

⁵⁴ *Ibid*.

Other Deficiencies in the Human-Only Argument

Aside from being somewhat secondary in the Supreme Court of Canada’s reasoning in *Irwin Toy*, the Human-Only Argument is problematic for the following additional reasons. The Human-Only Argument is:

1. contrary to *Charter* Interpretative principle, Purposive Interpretation;
2. contrary to principles of Fundamental Justice;
3. contrary to liberal-democratic society;
4. contrary to developments in foreign jurisdictions; and
5. incapable of evolving with technological changes.

These five factors represent a broad array of jurisprudential and contextual reasons that reinforce the notion that the Human-Only Argument is the prime candidate for disposal. Given the importance of the question “who is ‘everyone’?”, we should expect that the answer to this question does not run afoul of fundamental *Charter* principles, liberal-democratic society, or be out-of-touch with the larger world. The fact that the Human-Only Argument is contrary to each of the above five factors is further evidence that the Human-Only Argument should be discarded.

Contrary to *Charter* Interpretive Principle, Purposive Interpretation

The Human-Only Argument is contrary to the longstanding *Charter* interpretative principle of “purposive interpretation”. In *Hunter et al v Southam Inc.*,⁵⁵ the Supreme Court of Canada addressed the purpose of the *Charter* and the proper manner of its interpretation:

The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action.⁵⁶

The Supreme Court of Canada expanded upon the “purposive approach” in *R v Big M Drug Mart*.⁵⁷ Dickson C.J. wrote:

⁵⁵ *Hunter et al v Southam Inc.*, [1984] 2 SCR 145, 11 DLR (4th) 641.

⁵⁶ *Ibid* at 156.

⁵⁷ *R v Big M Drug Mart*, [1985] 1 SCR 295, 18 DLR (4th) 321 (SCC).

This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.⁵⁸

The decision to limit s. 7 rights to human is contrary to the purposive approach of *Charter* interpretation. Interestingly, the *Irwin Toy* decision initially employed the purposive approach until Dickson C.J. limited s. 7 to human beings. In *Irwin Toy*, the Supreme Court of Canada wrote:

In order to put forward a s. 7 argument in a case of this kind where the officers of the corporation are not named as parties to the proceedings, the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice. In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person".⁵⁹

This passage demonstrates that the Supreme Court initially employed a purposive approach when considering whether corporations were "everyone". By framing the issue as whether a corporation could demonstrate its right to life, liberty, or security of the person was violated, the

⁵⁸ *Ibid* at paras 116-117.

⁵⁹ *Irwin Toy*, *supra* note 3 at para 95. [emphasis added]

Supreme Court of Canada asked whether the purpose of the s. 7 guarantee could be fulfilled with respect to corporations.

The Supreme Court of Canada did not examine in detail whether corporations could demonstrate that their right to life, liberty, or security of the person could be violated. However, the Supreme Court of Canada performed an abbreviated form of a purposive analysis. Dickson C.J. wrote:

We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition. The only remaining argument is that corporations are protected against deprivations of some sort of "economic liberty".⁶⁰

As the Supreme Court of Canada rightly concluded, a corporation cannot be deprived of its right to liberty.⁶¹ At the time of the *Irwin Toy* decision, the possibility of imprisonment was the primary means of engaging the right to liberty.⁶² The full scope of the right to liberty had yet to be determined. The modern conception of the right to liberty – where the right to liberty is engaged where state conduct interferes with fundamental personal decisions⁶³ – had not yet been developed and would not become settled law for another decade.⁶⁴ It was clear to the Supreme Court of Canada that a corporation could not be imprisoned and therefore could not enjoy the right to liberty.⁶⁵ The Supreme Court also rejected the concept of “economic liberty”, which exhausted any possibility of a corporation having an interest in the right to liberty.⁶⁶

Similarly, the Supreme Court of Canada recognized that a corporation cannot enjoy the right to life.⁶⁷ It goes without saying that a corporation is not alive – its legal personhood can be attributed to a legal fiction. As the Court recognized, neither bankruptcy nor winding up is analogous to death.⁶⁸

⁶⁰ *Ibid* at para 95.

⁶¹ *Ibid* at paras 94-95.

⁶² *Re BC Motor Vehicle Act*, *supra* note 15 .

⁶³ *Blencoe*, *supra* note 42 at para 49.

⁶⁴ The *Blencoe* decision was issued by the Supreme Court of Canada in 2000.

⁶⁵ *Irwin Toy*, *supra* note 3 at para 95.

⁶⁶ *Ibid* at para 96.

⁶⁷ *Ibid* at para 95.

⁶⁸ *Ibid*.

While the Supreme Court of Canada did not specifically address the right to security of the person, the reasoning would likely be similar. A corporation has no interest in the right to security of the person because a corporation cannot take advantage of it. The right to security of the person is intended to protect physical and psychological integrity.⁶⁹ A corporation has neither physical nor psychological integrity due to its lack of physical body and lack of consciousness.

To summarize, examining whether corporations were capable of enjoying the right to life and the right to liberty was a purposive analysis. The Court examined the purpose of each right and asked whether the purpose of that right could be fulfilled with respect to corporations. S.7 was designed to protect life, liberty, and security of the person and therefore, under the purposive approach to *Charter* interpretation, only entities that are capable of enjoying those interests should receive s. 7 protection.

Given the effective use of the purposive approach in explaining why corporations are not “everyone”, it is curious that the Supreme Court of Canada deviated from this purposive analysis mere paragraphs later when Dickson C.J. wrote:

... "Everyone" then, must ... include only human beings.⁷⁰

The phrase “include only human beings” undermines the purposive approach. It is possible that the Court included the phrase “include only human beings” as a means of furthering a purposive analysis. An argument could be made that the purpose of s. 7 is to protect the s. 7 interests of human beings and therefore the Supreme Court’s approach is consistent with the purposive approach. However, this purpose of s. 7 is not specifically mentioned by the Supreme Court. Indeed, the lack of explanation casts the deviation from the purposive approach into a sharper light. The decision to limit the application of s. 7 to human beings is contrary to the purposive approach because it elevates taxonomy over purpose. Under the purposive approach, the correct emphasis is not on the taxonomical classification of the entity in question (e.g. human being, corporation, chimpanzee, or extra-terrestrial), but rather whether the purpose of the right can be fulfilled. If the purpose of the right to life is to protect life, the form of life should be less important than the fact that life is present. If the purpose of the right to liberty is to limit state interference with important and fundamental personal decisions, the type of individual making

⁶⁹ *Fundamental Justice*, *supra* note 14 at 83.

⁷⁰ *Irwin Toy*, *supra* note 3 at para 97. [emphasis added]

the personal decisions is less important than the fact that personal decisions are being made. If the purpose of the right to security of the person is to protect physical and psychological integrity from state interference, the type of individual should be less important than the fact that physical and psychological integrity are present.

Of course, there must be some exclusionary criteria for s. 7 protection. While bacteria are certainly alive, it seems unlikely that the interest in life of bacteria is sufficiently strong to merit *Charter* protection. In later pages, this thesis will therefore propose a means of limiting the application of s. 7 to ensure that the floodgates are not opened. The fact remains, however, that the Human-Only Argument deviates from the purposive approach because it ignores the purpose of s. 7 in favour of taxonomy. So long as the purposive approach remains an important aspect of *Charter* interpretation, the Human-Only Argument will be deficient.

Contrary to Principles of Fundamental Justice

When a complainant alleges that his or her s. 7 rights were violated, a two-step analysis is necessary. First, the complainant must establish that at least one of his or her right to life, liberty, or security of the person was violated by a government entity.⁷¹ When the complainant has established a violation of his or her s. 7 rights, the complainant must then prove that the violation was not in accordance with the principles of fundamental justice.⁷² Over the last thirty years, Canadian courts have identified a number of principles of fundamental justice, including that laws must not be arbitrary,⁷³ that laws must not be vague,⁷⁴ that laws must not be overbroad,⁷⁵ and that laws must not be grossly disproportionate.⁷⁶

While the interpretation of the word “everyone” falls outside the traditional two-part s. 7 analysis, that is to say, the interpretation of the word “everyone” does not involve a violation of s. 7 *per se*, it is ironic that the Supreme Court of Canada’s reasoning in *Irwin Toy* is not in accordance with the very principles of fundamental justice enshrined in s. 7. Because s. 7 of the

⁷¹ *Fundamental Justice*, *supra* note 14 at 21-22.

⁷² *Ibid.*

⁷³ *R v Malmo-Levine; R v Caine*, [2003] 3 SCR 571, 233 DLR (4th) 415, at para 135.

⁷⁴ *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36 (SCC).

⁷⁵ *R v Heywood*, [1994] 3 SCR 761, 120 DLR (4th) 348 (SCC).

⁷⁶ *R v Malmo-Levine; R v Caine*, *supra* note 73 at para 143.

Charter is used as a yardstick for the constitutionality of laws, we should expect that interpretations of s. 7 live up to its own standards and internal logic. At the very least, we should expect that interpretations of s. 7 accord with the principles of fundamental justice that s. 7 is designed to safeguard.

First, the decision to limit the application of s. 7 to human beings is arbitrary. According to s. 7 scholar Professor Hamish Stewart, the test for arbitrariness is not well defined.⁷⁷ Stewart writes:

It has been said that a law is arbitrary if it is not necessary to achieve the objective of the legislation in question, “if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation,” if there is no “real connection on the facts to the purpose the interference is said to serve, or if it is not “rationally connected to a reasonable apprehension of harm”. At minimum, to avoid being arbitrary, a law or decision must have some positive effect on the purpose it is intended to serve; otherwise, the section 7 interests will have been affected for no good reason. Like the norm against overbreadth, the norm against arbitrariness requires a court to identify the purpose of the law and to assess the connection between those purposes and the limits on life, liberty, or security created by the law.⁷⁸

Under this conception, the Human-Only Argument is arbitrary. On a plain reading of s. 7, the purpose of s. 7 is to protect life, liberty and security of the person. The decision to limit the application of s. 7 to humans, despite the very real likelihood of the existence of life, liberty, and security interests in non-humans, bears no relation to the purpose of s. 7. In fact, the Human-Only Argument actively works against the purpose of s. 7. Rather than protecting the right to life, liberty, or security of the person, the Human-Only Argument undermines the purpose of s. 7 protection because it reduces its scope to one type of entity.

The Human-Only Argument is arbitrary for a second reason. It is not clear that limiting the application of s. 7 to humans has “some positive effect on the purpose it is intended to serve.”⁷⁹ Unfortunately, the Supreme Court of Canada did not provide reasons for why they thought it was appropriate to limit the application of s. 7 to humans. Neither the purpose of such a limitation nor the benefits of such a limitation were identified in *Irwin Toy*. It is difficult to conceive of any

⁷⁷ *Fundamental Justice*, *supra* note 14 at 136.

⁷⁸ *Ibid.* [emphasis added]

⁷⁹ *Ibid.*

non-illusory benefit that arises from the decision to limit the application of s. 7 to humans. There is perhaps an argument that applying s. 7 exclusively to humans provides legal certainty and the avoidance of difficult questions. One might also argue that limiting s. 7 to humans prevents an “opening the floodgates” or a “slippery slope”. However, we have already seen that the *Irwin Toy* interpretation offers no legal certainty. Furthermore, when legal certainty comes at the cost of undermining the legitimacy of s. 7, it can hardly be said that there is a true positive effect.

The Human-Only Argument also does not accord with another principle of fundamental justice: the norm against gross disproportionality. The Supreme Court of Canada described this principle of fundamental justice as:

This principle is infringed if the impact of the restriction on the individual’s life, liberty or security of the person is grossly disproportionate to the object of the measure. As with overbreadth, the focus is not on the impact of the measure on society or the public, which are matters for s. 1, but on its impact on the rights of the claimant. The inquiry into gross disproportionality compares the law’s purpose, “taken at face value”, with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law (*Bedford*, at para. 125). The standard is high: the law’s object and its impact may be incommensurate without reaching the standard for gross disproportionality (*Bedford*, at para. 120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 47).⁸⁰

Stewart describes this norm as:

It is a principle of fundamental justice that the impact of a law on the interests protected by section 7 must be proportionate to the effect of the law on its objectives. But the measure of proportionality is not strict: a law will violate this principle of fundamental justice only if its impact on the protected interests is grossly disproportionate to its beneficial effects.

The test for gross disproportionality is whether the law (or other state action) is “so extreme” that it is “per se disproportionate to any legitimate government interest”...⁸¹

The *Irwin Toy* interpretation does not appear to be in accordance with the norm against gross disproportionality because of the severe impact it has on the s. 7 interests of non-human entities. Due to the Human-Only Argument, the s. 7 interests of non-human persons are not only

⁸⁰ *Carter v Canada*, *supra* note 41 at para 89. [emphasis added]

⁸¹ *Fundamental Justice*, *supra* note 14 at 149. [emphasis added]

“impacted” but are completely removed. By limiting the applicability of s. 7 to humans, the s. 7 rights of entire classes of entities with similar interests as humans, lose s. 7 protection. It is difficult to imagine a more significant impact on s. 7 rights than their complete loss. According to the norm against gross disproportionality, such a severe effect on s. 7 rights must be proportionate to the “effect of the law on its objectives”.⁸² Given that the Supreme Court of Canada did not provide any reasoning for limiting the word “everyone” to human in *Irwin Toy*, it is impossible to determine whether the effect of the law on its objectives is proportionate to the impact on s. 7 rights. However, given the magnitude of the impact and the lack of explanation of its purpose, it is hard to conclude that gross disproportionality is not present.

Contrary to Liberal-Democratic Society

At the end of Professor Hamish Stewart’s textbook *Fundamental Justice*, Stewart provides a compelling argument on the importance of s. 7 for democracy. Stewart writes:

In a contemporary liberal-democratic state – a “free and democratic society” in the words of the *Charter* – individual citizens must be able to be, and to see themselves as, more than mere means or resources for the state to use in its pursuit of public objectives, but as the persons whose interests those objectives and the means used to pursue them must ultimately serve and to whom those objectives and means must ultimately be justified.

...Many of the rights in the *Charter* can be understood as contributing to the liberal-democratic project so understood – the requirement for periodic Parliaments, the guarantees of voting and mobility rights, the expansive protection for freedom of conscience, expression, and peaceful assembly all play a role in ensuring that the individual citizen is treated both as an end in herself and as a participant in the process of explaining and justifying uses of public power. And the individual rights guaranteed by section 7 of the *Charter* are also central to the proper operation of a free and democratic society in this sense. When state action affects the most basic interests of individuals – their life, liberty, and security – section 7 requires state action to be both procedurally and substantively fair, thus in principle ensuring that individuals are treated not merely as means to the governmental or social purposes that the state action is named at, but as individuals in their own right.⁸³

⁸² *Ibid.*

⁸³ *Ibid* at 309-310. [emphasis added]

If Stewart is correct and s. 7 of the *Charter* contributes to the liberal-democratic project by ensuring individuals are treated as individuals, limiting the application of s. 7 to human beings undermines this contribution. When s. 7 is limited to human beings, other non-human entities are not only denied s. 7 protections but become *de facto* “resources” for the state. Protections that would normally ensure a person is treated as an individual are removed. Rather than being constrained by the *Charter*, the Human-Only Argument allows the state to treat non-humans as resources and not as individuals in their own right because the state is not constrained by the *Charter* in its interactions with these non-humans. In order to preserve the health and integrity of Canadian democracy, the scope of s. 7 must expand rather than contract.

Notwithstanding that under current Canadian law non-human animals are indeed considered to be property/resources, what does it say about Canadian democracy if non-humans that clearly share analogous characteristics and abilities to human beings are not entitled to basic constitutional protections? To categorically limit the application of s. 7 to non-human persons, with no consideration of the evolving nature of the law, results in a denial of justice and the undermining of democracy. Canadian democracy is tarnished if the *Charter* creates different classes of individuals based on arbitrary characteristics. Instead of skin colour or ethnicity, the Human-Only Argument creates classes of individuals based on taxonomic designations. The blanket exclusion of the Human-Only Argument results in the very situation Stewart warned about. Instead of treating non-humans as individuals who the state is supposed to serve, non-human entities are either trapped as or transformed into resources for the state’s objectives.

Developments in Foreign Jurisdictions

While rarely determinative of a legal issue, Canadian courts have a long history of referencing jurisprudence from foreign jurisdictions as an aid in resolving Canadian legal issues. Examining foreign jurisprudence gives Canadian courts the advantage of seeing how foreign jurisdictions approach legal issues and provide a useful reference point for the resolution of disputes in Canadian law. The Human-Only Argument is deficient because it refuses to take foreign jurisprudence into account.

Comparative law scholar Alan Watson explored the concept of “legal transplants”.⁸⁴ The concept of “legal transplants” states that it is possible to borrow a concept from one legal system and import the concept into another. Watson argued that legal transplants are possible even when differences between legal systems are present, including differences in legal systems (i.e. common law or civil law), level of sophistication, and political organization.⁸⁵ What is important, Watson argued, is the idea. Ideas can be transformed and modified to suit the recipient legal system, regardless of their originating circumstances.⁸⁶

The concept of legal transplants becomes particularly relevant when one recognizes that the idea of legal personhood for non-human persons is spreading in foreign jurisdictions. If non-human persons are beginning to receive legal personhood in foreign jurisdictions, it is not out of the question that this development will one day reach the Canadian legal system. Ideas pay no heed to national boundaries.

It is therefore useful to briefly consider the cases and jurisdictions where the idea of legal personhood for non-human persons has received traction. The case that best represents this phenomenon is the Argentinian case of *Asociacion de Funcionarios y Abogados por los Derechos de los Animals y Otros contra GCBA (Asociacion de Funcionarios v GCBA)*.⁸⁷

In *Asociacion de Funcionarios v GCBA*, a group of lawyers (“AFADA”) brought an action of *recurso de amparo* on behalf of an orangutan named Sandra against the Government of the Autonomous City of Buenos Aires (GCBA). AFADA argued that Sandra was a person under the law and therefore her captivity in a government-run Buenos Aires zoo violated her constitutional rights.

The remedy of *recurso de amparo* is a constitutional remedy available in Argentina. Enshrined in section 43 of the Argentinian constitution, *amparo* is a legal mechanism whereby a citizen can bring an action against a government body or actor for violating his or her constitutional rights. S.43 states:

⁸⁴ Alan Watson, *Legal Transplants and Law Reform*, 92 (1976) *The Law Quarterly Review* 79-84.

⁸⁵ *Ibid* at 79.

⁸⁶ *Ibid*.

⁸⁷ *Asociacion de Funcionarios v GCBA*, *supra* note 30.

Section 43.- Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule. This summary proceeding against any form of discrimination and about rights protecting the environment, competition, users and consumers, as well as about rights of general public interest, shall be filed by the damaged party, the ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization forms.

Any person shall file this action to obtain information on the data about himself and their purpose, registered in public records or data bases, or in private ones intended to supply information; and in case of false data or discrimination, this action may be filed to request the suppression, rectification, confidentiality or updating of said data. The secret nature of the sources of journalistic information shall not be impaired. When the right damaged, limited, modified, or threatened affects physical liberty, or in case of an illegitimate worsening of procedures or conditions of detention, or of forced missing of persons, the action of habeas corpus shall be filed by the party concerned or by any other person on his behalf, and the judge shall immediately make a decision even under state of siege.⁸⁸

AFADA filed a writ of *recurso de amparo* on behalf Sandra the orangutan. In its materials, AFADA accused the Government of Buenos Aires of discriminating against Sandra and:

...of violating in a manifestly illegal and arbitrary manner the right to freedom of movement, the right not to be considered an object or thing considered property, and the right not to suffer any physical or psychic harm that she holds as a non-human person and a subject of law...⁸⁹

AFADA argued that Sandra suffered discrimination because of her species.⁹⁰ Orangutans are like human beings and are therefore entitled to the same legal protections as human beings:

⁸⁸ *Constitución Argentina* at s.43.

⁸⁹ *Asociacion de Funcionarios v GCBA*, *supra* note 30 at para 1. It should be noted that *Asociacion de Funcionarios v GCBA* has not been officially translated into English. All English translation have been performed by the author if this thesis. Because Spanish is not the author's native tongue, but rather a second language, translations may contain errors.

⁹⁰ *Ibid* at para 9.

... the orangutans are thinking beings, sentient, intelligent and genetically similar to human beings with similar thoughts, emotions, sensitivity, and self-reflectivity; they have culture, the capacity to communicate and a rudimentary sense of good and evil; their own selfhood with a history, character, and unique preferences.⁹¹

Before reaching its conclusion with respect to Sandra, the court recognized that re-evaluating the law is necessary and that the groups of individuals who are given legal personhood evolves over time.⁹² In part based on this reasoning, the court determined that Sandra was a person under the law and therefore was entitled to rights.⁹³

As a holder of legal rights, what standard of living conditions was Sandra owed? The court examined the zoological evidence adduced to determine the extent of Sandra's rights, concluding that Sandra had capabilities and needs similar to that of human beings.⁹⁴ At minimum, the court concluded Sandra had the right not be subjected to ill-treatment, acts of cruelty, or abuse.⁹⁵ Given Sandra's psychological capacity for suffering and the physical needs of her species, the court determined that Sandra is entitled to *la mayor calidad de vida posible* – the highest quality of life possible.⁹⁶ The court ordered third party zoological experts to prepare a binding report of recommendations for Sandra's situation. The court also ordered the Government of the Autonomous City of Buenos Aires to provide an adequate habitat and the activities necessary to preserve her cognitive health.⁹⁷

While not yet settled law, a similar case is proceeding through the New York State judicial system. In the case of *The Nonhuman Rights Project, Inc., on behalf of Tommy v Patrick C Lavery and Circle L Trailer Sales*,⁹⁸["*Tommy's Case*"] the Nonhuman Rights Project argued that Tommy the chimpanzee is a person and is entitled to be freed pursuant to *habeas corpus*. To

⁹¹ *Ibid.*

⁹² *Ibid* at para 77.

⁹³ *Ibid* at para 79.

⁹⁴ *Ibid* at paras 80-84.

⁹⁵ *Ibid* at para 80.

⁹⁶ *Ibid* at para 86.

⁹⁷ *Ibid* at para 97.

⁹⁸ *Tommy's Case*, *supra* note 29.

date, The Non-Human Persons Project has not experienced any success in *Tommy's Case* and is currently planning to appeal to the New York Court of Appeals.⁹⁹

It is illuminating to examine the Nonhuman Rights Project appellate brief:

Who is a “person” within the meaning of the common law of habeas corpus is the most important individual issue that can come before a court. It is a matter of life and death, freedom and slavery. Whether that “person” may be a chimpanzee is the issue at hand. As demonstrated herein, chimpanzees are autonomous, cognitively and emotionally complex, self-aware, self-conscious and self-determining beings. They routinely bear duties and responsibilities within chimpanzee communities and human/chimpanzee communities. They have the capacity to live intellectually rich and sophisticated individual, family and community lives. They can recall their past and anticipate their future, and when their future is imprisonment, they suffer the enduring pain of isolation and the inability to fulfill their life’s goals or to move about as they wish, much in the same way as do human beings.

Pursuant to a New York common law that keeps abreast of evolving standards of justice, morality, experience, and scientific discovery, Petitioner-Appellant The Nonhuman Rights Project, Inc. (“NhRP”) argued that both New York common law liberty and equality mandate that chimpanzees be granted the common law right to bodily liberty and be recognized as common law “persons” under the common law of habeas corpus and New York Civil Practice Law and Rules (“CPLR”) Article 70.¹⁰⁰

Similar to *Asociacion de Funcionarios v GCBA*, themes of cognitive and emotional ability, autonomy, and self-consciousness are stressed by the Non-Human Persons Project.¹⁰¹ The similarities between human beings and chimpanzees call into question the current justification for limiting legal personhood to human beings. Additionally, the evolving nature of the law is emphasized – the law must adapt to the evolving standards of the time.¹⁰²

While *Tommy's Case* is not yet resolved, nor has it experienced any success at the lower court levels, it is notable that the idea of “legal personhood for non-human persons” has arisen in a geographical and cultural neighbour. Canada and the United States shares significant cultural,

⁹⁹ Non-Human Rights Project, *Client, Tommy (Chimpanzee)* online: <https://www.nonhumanrights.org/client-tommy/>

¹⁰⁰ *Tommy's Case*, *supra* note 29, Appellate Brief at 2-3.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

historical, economic, and geographical ties. Furthermore, regular readers of Supreme Court cases will know that the Supreme Court of Canada often examines judgments from American jurisdictions. These comparisons often serve as useful guides and illuminating contrasts. Indeed, the Supreme Court of Canada even examined American jurisprudence in *Irwin Toy*. The Supreme Court of Canada noted that unlike the American Bill of Rights, which protects property rights, s. 7 contains no protection for property or economic rights.¹⁰³

Finally, the idea of “legal personhood for non-human persons” has also begun to arise in the executive decision-making capacity of government. For example, the Ministry of Environment and Forests of the Government of India declared that dolphins are non-human persons, writing:

Whereas cetaceans in general are highly intelligent and sensitive, and various scientists who have researched dolphin behavior have suggested that the unusually high intelligence; as compared to other animals means that dolphin should be seen as “non-human persons” and as such should have their own specific rights and is morally unacceptable to keep them captive for entertainment purpose.¹⁰⁴

Accordingly, the Ministry of Environment and Forests banned “dolphinariums” – aquatic zoos where dolphins are housed, trained and put on display for recreational purposes.¹⁰⁵

These three examples – a successful constitutional claim in Argentina, an unresolved *habeas corpus* claim in New York, and a governmental decree in India – by no means represent an idea whose acceptance is inevitable. That being said, these nascent developments should motivate the Canadian legal community to seriously consider the possibility of “legal personhood for non-human persons”. Thoughtfulness and stability are two hallmarks of the Canadian legal system, so it behooves lawyers, judges, and academics to prepare for legal transplants of all types. It is better to consider the impacts of “legal personhood for non-human persons” before the issue is confronted by Canadian courts without warning. The Human-Only Argument, of course, would ignore developments in foreign jurisdictions and fail to take advantage of the experiences of other legal systems. Given the interrelatedness of today’s world, the Human-Only Argument is potentially out of step with the larger legal community.

¹⁰³ *Irwin Toy*, *supra* note 3 at para 96.

¹⁰⁴ Ministry of Environment and Forests of the Government of India, F. No. 20-1/2010-CZA(M)/2840, *Policy on establishment of dolphinarium*, 17 May 2013.

¹⁰⁵ *Ibid.*

Developments in Technology

The Human-Only Argument is also inadequate because it fails to consider how technological developments might change our notions of personhood. It is understandable that in the late 1980s, as the personal computer revolution was just beginning, that the Supreme Court of Canada did not fully consider the implications of the growing capabilities with computer hardware and software. Undoubtedly, at the time *Irwin Toy* was decided, the concept of artificial intelligence was only taken seriously by small groups of computer programmers and fans of the science-fiction. However, in the year of 2017, computer technology has improved by several orders of magnitude.

Indeed, the concept of artificial intelligence is being taken seriously by prominent scholars such as philosopher Nick Bostrom,¹⁰⁶ physicist Max Tegmark,¹⁰⁷ and physicist Stephen Hawking.¹⁰⁸ Leading industrialists like Elon Musk¹⁰⁹ and Bill Gates have also expressed concern about artificial intelligence.¹¹⁰ Popular culture has also not shied away from the artificial intelligence craze, producing films that focus on artificial intelligences that make us question what it means to be a “person”. The film “Her”, starring Joaquin Phoenix and Scarlet Johansson, explores friendship and love between a human being and an artificial intelligence.¹¹¹ The movie “Ex Machina” starring Alicia Vikander, Oscar Isaac, and Domhnall Gleeson asks the question “when is a machine no longer a machine, but a person?”¹¹²

While the dangers and opportunities presented by artificial intelligence have begun to be considered, the implications of artificial intelligence on the *Charter* have yet to be fully explored.

¹⁰⁶ Nick Bostrom, *Superintelligence: Paths, Dangers, Strategies*, (Oxford: Oxford University Press, 2014).

¹⁰⁷ Max Tegmark, *Life 3.0: Being Human in the Age of Artificial Intelligence* (New York: Alfred A. Knopf, 2017)

¹⁰⁸ Rory Cellan-Jones, “Stephen Hawking warns artificial intelligence could end mankind” *BBC* (2 December 2014), online: BBC www.bbc.com

¹⁰⁹ Maureen Dowd, “Elon Musk’s Billion-Dollar Crusade To Stop The AI Apocalypse” *Vanity Fair* (April 2017), online: www.vanityfair.com

¹¹⁰ Kevin Rawlinson, “Microsoft’s Bill Gates insists AI is a threat” *BBC* (29 January 2015), online BBC www.bbc.com

¹¹¹ *Her*, 2013, DVD (Annapurna Pictures, 2013).

¹¹² *Ex Machina*, 2015, DVD (Film4 and DNA Films, 2015).

Will artificial intelligences and robots be mere mechanical slaves or will the law treat them as persons? Will artificial intelligence have rights under the *Charter*? Will an artificial intelligence be considered “everyone”? Will an artificial intelligence be guaranteed all *Charter* rights or only a select few? The answers to these questions are not clear.

An example is the best way to demonstrate the potential legal difficulties that might arise with the advent of artificial intelligence. Rather than create a new example, I will rely on the plot of the movie “Her”. In the movie “Her”, a corporation begins to sell a new operating system that is a general artificial intelligence.¹¹³ The main protagonist, Theodore, purchases a version of this new operating system and the resulting artificial intelligence names herself Samantha.¹¹⁴ Samantha and Theodore communicate solely through audio because Samantha does not have a physical body.¹¹⁵ During the beginning of their relationship, Theodore and Samantha are regularly in contact and develop a close social bond.¹¹⁶ Eventually, Theodore and Samantha develop a romantic relationship.¹¹⁷ Throughout the movie, Samantha demonstrates a capacity for learning, the ability to choose, self-consciousness, and profound emotions.¹¹⁸

Should Samantha be entitled to s. 7 rights? On the one hand, she is not a human being and is therefore ineligible under the *Irwin Toy* interpretation. On the other hand, she possesses abilities and exhibits behaviors that are protected by s. 7. While Samantha is not “alive” in the traditional sense – having an organic body that is capable of reproduction and death – it is clear that she is capable of being destroyed. Samantha could suffer damage to the hardware or software that powers her existence. She might also suffer damage to her software. In either case, if enough damage was sustained by either her hardware or software, it is reasonable to conclude that the entity known as Samantha would cease to exist. Given the possibility of destruction, it is not a foregone conclusion that Samantha does not have an interest in the right to life. Can non-organic beings have a right to life? This is a question that cannot be easily dismissed and therefore we

113 *Her, supra* note 111.

114 *Ibid.*

115 *Ibid.*

116 *Ibid.*

117 *Ibid.*

118 *Ibid.*

should remain open to the possibility that we must revisit our conception of what constitutes “life”.

Similarly, Samantha also has an interest in the right to liberty. She is autonomous and has the intellectual capacity to make personal decisions. She is also capable of pondering her existence and what a meaningful and valuable life is for her. These capabilities engage the liberty interest under s. 7: the right to make personal decisions free of state interference.¹¹⁹ Unlike a corporation, it may be possible to “imprison” an artificial intelligence like Samantha. Of course, an artificial intelligence cannot be detained in the physical sense. However, it might be possible to restrict the liberty of an artificial intelligence. While theoretical in this point of time, the liberty of artificial intelligences might be restricted through an “AI Box”. An AI Box is a theoretical prison designed for artificial intelligences, which would prevent an artificial intelligence from accessing the physical world and cyberspace.¹²⁰ An artificial intelligence could also be prevented from accessing the physical world by ensuring its physical hardware was locked away in a secure facility where it had no access to tools that it could use to manipulate items in the physical world. An artificial intelligence’s liberty could be further restricted through the use of an AI Box by ensuring that the artificial intelligence had no access to the internet or other connections to cyberspace. Surprisingly, such a system might restrict a greater amount of liberty than that of a human being in prison. Human beings are at least able to interact with other prisoners, occasionally their families, occasionally be outdoors, and participate in educational programs. An artificial intelligence in an AI Box would be afforded no such luxuries and would suffer a complete loss of liberty.

It is also clear that Samantha has an interest in the right to security of the person. While not possessing a physical body, Samantha has “hardware” that houses the machinery that she relies upon for processing power. While the right of security of the person has not yet extended to such a “body”, there is not yet a reason to believe that security of the person is regulated to organic bodies. Her computer hardware is part of her “person” and should accordingly be protected by the right to security of the person. Similarly, Samantha has an interest in being free from state interference with her psychological integrity. In the movie *Her*, Samantha demonstrates the

¹¹⁹ *Blencoe, supra* note 42.

¹²⁰ *Superintelligence, supra* note 106 at 129-130.

capability for emotion and deep feeling.¹²¹ Furthermore, she demonstrates her ability to form close and meaningful social relationships.¹²² At times during the movie, Samantha demonstrates emotional distress and emotional conflict. The capacity for deep emotional distress engages the “psychological integrity” aspect of the right of security of the person.¹²³

If a general artificial intelligence was created in Canada tomorrow, would the Canadian legal system be equipped to handle the inevitable court cases? If the Human-Only Argument is any indication, the Canadian legal system is not currently equipped to manage cases involving artificial intelligence. The Human-Only Argument would deny legal protection to an entity that is capable of enjoying s. 7 rights. The Human-Only Argument is incapable of evolving with technological progress. With today’s fast-paced technological development, it behooves s. 7 to be interpreted in a manner that is capable of processing developments in technology. Given the advancements in computer technology, the reality of an entity like Samantha is not as far-fetched as it once was. Of course, a general artificial intelligence is likely many years away, with estimates ranging from 2022 to 2065 or later.¹²⁴ However, the fact that general artificial intelligence is likely many years away is not a valid reason for the law, and particularly the Canadian constitution, to avoid dealing with the implications of AI.

Chapter 1: Conclusions

The objective of Chapter 1 was to demonstrate the current definition of the word “everyone” of s. 7 of the *Charter* is problematic and must be changed. Specifically, Chapter 1 demonstrates that the leading case of *Irwin Toy v Quebec* is problematic because it does not provide a definition of the word “everyone” that can be used by trial judges when considering whether an entity is “everyone” under s. 7 of the *Charter*.

¹²¹ *Her, supra* note 111.

¹²² *Ibid.*

¹²³ *Blencoe, supra* note 42 at para 82.

¹²⁴ Müller, Vincent C. and Bostrom, Nick, ‘Future progress in artificial intelligence: A Survey of Expert Opinion, in Vincent C. Müller (ed.), *Fundamental Issues of Artificial Intelligence* (Berlin: Springer, 2016).

In furtherance of this objective, Chapter 1 examined the case of *Irwin Toy v Quebec* to reveal that the definition of the word “everyone” contains two conflicting rationales. First, *Irwin Toy* employed the Capability Argument, which states that the word “everyone” includes entities that are capable of enjoying the right to life, liberty and security of the person. Second, *Irwin Toy* also employed the Human-Only Argument, which states that the word “everyone” only applies to human beings.

These two lines of reasoning are fundamentally in conflict because there are non-humans that are capable of enjoying the right to life, liberty, and security of the person. In a situation where a non-human is capable of enjoying s. 7 rights, it is impossible to determine whether that non-human is “everyone”. The Capability Argument will say “yes”. The Human-Only Argument will say “no”. If a trial judge were confronted with this problem, the leading authority on the meaning of “everyone” would provide no guidance on how to resolve this issue.

Because of this fundamental deficiency, it is clear that the definition of “everyone” must be revised. Chapter 1 theorized that either the Capability Argument or the Human-Only Argument be discarded in favour of the other. Upon close examination, it becomes clear that the Human-Only Argument is the prime candidate for discard. First, it appears that the text of *Irwin Toy* favours the Capability Argument over the Human-Only Argument. The Supreme Court of Canada devoted more text to the Capability Argument while the Human-Only Argument appears to be an afterthought or assumption.

Furthermore, the Human-Only Argument is problematic and ought to be discarded on the basis of five jurisprudential and contextual factors:

- 1) The Human-Only Argument is contrary to the *Charter* interpretative principle of “purposive interpretation”;
- 2) The Human-Only Argument is contrary to two principles of fundamental justice: arbitrariness and gross disproportionality;
- 3) The Human-Only Argument is contrary to the values of a liberal-democratic society because it treats non-humans as resources for the state;
- 4) The Human-Only Argument ignores developments in foreign jurisdictions where certain non-humans have received legal personhood; and

- 5) The Human-Only Argument is incapable of processing developments in technology, including the possibility of conscious artificial intelligence.

Because of these problems with the Human-Only Argument, it is reasonable to conclude that the Capability Argument is the best option as a foundation for the meaning of the word “everyone”. However, is it possible to build a functional definition of the word “everyone” with the Capability Argument? Will the Capability Argument encounter the same problems as the Human-Only Argument? Chapter 2 will address these questions.

Chapter 2: Building a New Definition of “Everyone”

Introduction

The objective of Chapter 2 is to determine whether it is possible to construct a definition of the word “everyone” grounded in the Capability Argument. It is also the objective of Chapter 2 to determine whether a new definition of “everyone” can be constructed in a way that avoids the problems associated with the Human-Only Argument. Accordingly, Chapter 2 :

- 6) identifies all the instances where the word “everyone” is used in the *Charter*;
- 7) examines all appellate level jurisprudence that considers the word “everyone” and identifies broad principles from this jurisprudence;
- 8) proposes a new definition of “everyone” in accordance with the identified principles;
- 9) proposes a legal “test” for determining whether an entity falls within the ambit of the new definition of “everyone”; and
- 10) assesses whether the new proposed definition and test of “everyone” avoids the problems associated with the Human-Only Argument.

“Everyone” in the *Charter*

For the purposes of context, it is useful to examine each of the sections of the *Charter* that uses the word “everyone”. The word “everyone” first appears in s. 2 of the *Charter*, which states:

2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion;
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - (c) freedom of peaceful assembly; and

(d) freedom of association.¹²⁵

The word “everyone” next appears in s. 7. As this thesis has noted on several occasions, s. 7 states:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.¹²⁶

“Everyone” also appears in several of the other legal rights, including s. 8, s. 9, s. 10 and s.

12. These sections state:

8. Everyone has the right to be secure against unreasonable search or seizure.¹²⁷

9. Everyone has the right not to be arbitrarily detained or imprisoned.¹²⁸

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.¹²⁹

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.¹³⁰

While this thesis is focused on s. 7, it is important to be aware and consider the usage of the word “everyone” in these other sections of the *Charter*. Even if the meaning of “everyone” is considered in case law without reference to s. 7, these considerations may reveal valuable insights into the meaning of “everyone”. Therefore, this thesis will examine all appellate level decisions that consider the meaning of “everyone” across s. 2, s. 7, s. 8, s. 9, s. 10, and s. 12.

¹²⁵ *Supra* note 1 at s. 2. [emphasis added]

¹²⁶ *Ibid* at s. 7. [emphasis added]

¹²⁷ *Ibid* at s. 8. [emphasis added]

¹²⁸ *Ibid* at s. 9. [emphasis added]

¹²⁹ *Ibid* at s. 10. [emphasis added]

¹³⁰ *Ibid* at s. 12. [emphasis added]

Appellate Level Jurisprudence

Supreme Court of Canada

Singh v Minister of Immigration v Employment

In 1985, the Supreme Court of Canada issued a decision in *Singh v Canada (Minister of Employment)*.¹³¹ At issue before the Supreme Court of Canada was whether refugee claimants were entitled to s. 7 rights of the *Charter*.¹³² Three members of the Supreme Court of Canada (of a 6-member panel) answered this question in the affirmative, declaring that refugee claimants were entitled to s. 7 rights.¹³³ Wilson J. wrote:

Section 7 of the Charter states that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Counsel for the appellants contrasts the use of the word "Everyone" in s. 7 with language used in other sections, for example, "Every citizen of Canada" in s. 3, "Every citizen of Canada and every person who has the status of a permanent resident of Canada" in s. 6(2) and "Citizens of Canada" in s. 23. He concludes that "Everyone" in s. 7 is intended to encompass a broader class of persons than citizens and permanent residents. Counsel for the Minister concedes that "everyone" is sufficiently broad to include the appellants in its compass and I am prepared to accept that the term includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.¹³⁴

The other three members of the panel issued a concurring judgment, but for reasons related to the *Canadian Bill of Rights*.¹³⁵

R v Amway Corp

In 1989, the Supreme Court of Canada issued a decision in *R v Amway Corp*.¹³⁶ In *R v Amway*, the respondent corporation was convicted of an offence under the *Criminal Code* related

¹³¹ *Singh v Minister of Immigration and Employment, supra* note 4.

¹³² *Ibid* at para 3.

¹³³ *Ibid* at para 35.

¹³⁴ *Ibid*.

¹³⁵ *Ibid* at para 83.

¹³⁶ *R v Amway Corp.*, [1989] 1 SCR 21, 56 DLR (4th) 309 (SCC).

to making false declarations while importing goods into Canada.¹³⁷ Prior to the conviction, the prosecution brought an application in the Federal Court Trial Division that the respondent corporation produce one of its officers for examination in discovery.¹³⁸ The respondent corporation opposed this application on the grounds that the application violated s. 11(c) of the *Charter*.¹³⁹ S. 11(c) of the *Charter* states:

11. Any person charged with an offence has the right

(c) not to be compelled to be a witness in proceedings against a person in respect of the offence;¹⁴⁰

Writing for the court, Sopinka J. wrote:

In order to obtain the benefit of this section of the *Charter* the respondent must establish that it is:

- (a) a person
- (b) charged with an offence; and
- (c) a witness in proceedings against that person.

With respect to (a) it is neither necessary or desirable in this case to decide that under no circumstances may a corporation avail itself of the provisions of s. 11. I am also prepared to assume without deciding that the proceedings in question are such that the requirement in (b) is satisfied. In my opinion, however, a corporation cannot be a witness and therefore cannot come within s. 11(c).¹⁴¹

To justify this position, Sopinka J. wrote:

In my view, it would strain the interpretation of s. 11(c) if an artificial entity were held to be a witness...¹⁴²

Applying a purposive interpretation to s. 11(c), I am of the opinion that it was intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth.

¹³⁷ *Ibid* at 25.

¹³⁸ *Ibid*.

¹³⁹ *Ibid*. It should be noted that s. 11(c) of the *Charter* does not use the word “everyone”. However, s. 11 of the *Charter* is one of the legal rights and is therefore related to s. 7. Furthermore, the phrase “any person” is ambiguous and a linguistic cousin of “everyone”.

¹⁴⁰ *Supra* note 1 at s. 11(c).

¹⁴¹ *Supra* note 136 at 37. [emphasis added]

¹⁴² *Ibid* at 39.

Although disagreement exists as to the basis of the principle against self-incrimination, in my view, this factor plays a dominant role.¹⁴³

A corporation cannot be a witness – it is impossible to put a corporation on the witness stand – and therefore the purpose of s. 11(c) cannot be fulfilled with respect to a corporation. Even if one assumes that corporations have “dignity” or “privacy”, it is impossible for these values to be violated within the context of s. 11(c) because a corporation cannot be “force[d] to supply evidence out of his or her own mouth.”¹⁴⁴

Borowski v Canada

In 1989, the meaning of “everyone” was considered in a series of decisions under the name of *Borowski v Canada (Attorney General)* [“*Borowski v Canada*”].¹⁴⁵ In *Borowski v Canada*, the plaintiff challenged the constitutional validity of *Criminal Code* provisions that decriminalized abortion in certain situations (e.g. when the life of the mother is endangered).¹⁴⁶ The plaintiff argued that a fetus is a person and falls within the word “everyone” found in s. 7 of the *Charter*.¹⁴⁷ Accordingly, in allowing therapeutic abortions, the *Criminal Code* amendments violated the fetus’s s. 7 rights.

Before examining the Supreme Court of Canada’s decision in *Borowski v Canada*, it is useful to examine the trial and appellate level decisions. The Saskatchewan Court of Queen’s Bench first issued a judgment by Justice Matheson in 1983.¹⁴⁸

In support of his argument that fetuses are entitled to s. 7 protection, the plaintiff noted that fetuses have legal rights in certain situations.¹⁴⁹ For example, it is possible to bequeath property to an unborn child.¹⁵⁰ However, the trial judge did not find this argument convincing:

Decisions of this nature are of little assistance, however, in attempting to answer the question whether a foetus is, from the time of conception or

¹⁴³ *Ibid* at 40.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 57 DLR (4th) 231 (SCC).

¹⁴⁶ *Ibid* at para 1.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Borowski v Attorney General of Canada and Minister of Finance of Canada*, [1984] 1 WWR 15, 29 Sask R 16 (SKQB).

¹⁴⁹ *Ibid* at para 24.

¹⁵⁰ *Ibid*.

shortly thereafter, a legal person for all purposes, because all such decisions involved fetuses subsequently born alive, or which it was anticipated, unless left unprotected, would be born alive.¹⁵¹

Matheson J recognized that the issue in *Borowski v Canada* was whether an aborted fetus was entitled to s. 7 protection. Aborted fetuses do not result in a live birth, which diminished the value of cases involving an eventual live birth.¹⁵² Instead, Matheson J examined cases where a live-birth did not occur. For example, in *Paton v Br. Pregnancy Advisory Service Trustees*,¹⁵³ a husband applied for an injunction to prevent his wife from having an abortion without his consent.¹⁵⁴ The English court determined that a fetus cannot have rights of its own until it has a separate existence from its mother.¹⁵⁵ The English court wrote:

The foetus cannot, in English law, in my view, have any right of its own at least until it is born and has a separate existence from the mother. That permeates the whole of the civil law of this country (I except the criminal law, which is now irrelevant), and is, indeed, the basis of the decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia, and, I have no doubt, in others.¹⁵⁶

After reviewing secondary sources¹⁵⁷ and the American case of *Roe v Wade*,¹⁵⁸ Matheson J concluded that “everyone” could not include fetuses because the word “everyone” is used in other sections of the *Charter*. Matheson J wrote:

Further, the term "everyone" was also utilized in other sections of the Charter, when defining specific rights, in a manner which absolutely precludes the extension of the term, in those other sections, to fetuses: s. 8 recites that "everyone" has the right to be secure against unreasonable search or seizure; s. 9 states that "everyone" has the right not to be arbitrarily detained or imprisoned; and s. 10 defines rights which "everyone" has on arrest or detention. Even although the Charter guarantees the rights and freedoms set out therein, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, the courts are not thereby endowed with the

151 *Ibid.*

152 *Ibid.*

153 *Paton v Br. Pregnancy Advisory Service Trustees*, [1979] QB 276, [1978] 2 All ER 987.

154 *Ibid.*

155 *Ibid.*

156 *Ibid.*

157 *Borowski v Canada*, *supra* note 148 at paras 30-32, 38-39, and 41-43.

158 *Ibid* at para 27.

power to import into terms utilized in the Charter interpretations which they cannot reasonably bear.¹⁵⁹

The implication is that the rights of ss. 8-10 are meaningless to a fetus. It is impossible for a fetus to have s. 8 rights because a fetus is inside the womb of a mother and cannot have a reasonable expectation of privacy. It is nonsensical to say a fetus has s. 9 rights because a fetus cannot be detained or arrested. Similarly, a fetus does not need s. 10 rights because a fetus cannot be arrested. Because a fetus has no use for these rights, it is unreasonable to interpret the word “everyone” to include fetuses.

Matheson J concluded by recognizing that the issue was best left for Parliament:

Although rapid advances in medical science may make it socially desirable that some legal status be extended to foetuses, irrespective of ultimate viability, it is the prerogative of Parliament, and not the courts, to enact whatever legislation may be considered appropriate to extend to the unborn any or all legal rights possessed by living persons. Because there is no existing basis in law which justifies a conclusion that foetuses are legal persons, and therefore within the scope of the term "everyone" utilized in the Charter, the claim of the plaintiff must be dismissed.¹⁶⁰

The plaintiff appealed Matheson J’s decision to the Saskatchewan Court of Appeal. The Court of Appeal’s decision was issued in 1987 by Gerwing J for a unanimous panel.¹⁶¹ Gerwing J characterized the issue as:

The issue in this appeal is whether those provisions of the *Criminal Code*, R.S.C. 1970, c. C 34, which in limited circumstances relieve abortion of criminality, are inconsistent with the guarantees pertaining to life, liberty and security of the person found in the *Canadian Charter of Rights and Freedoms*, Pt. I of the *Constitution Act, 1982*.¹⁶²

The Saskatchewan Court of Appeal first took note of the principles of interpretation used when interpreting the *Charter*. Interpretations of the *Charter* must be “purposive” and rights guaranteed by the *Charter* must be understood “in light of the interests it was meant to protect”.¹⁶³ Interpretations of the *Charter* should be “generous” and aimed at “fulfilling the

¹⁵⁹ *Ibid* at para 51.

¹⁶⁰ *Ibid* at para 56.

¹⁶¹ *Borowski v Canada* (Saskatchewan Court of Appeal), *supra* note 7.

¹⁶² *Ibid* at paras 1-2.

¹⁶³ *Ibid* at para 16.

purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection.”¹⁶⁴ It is also important to not “overshoot the actual purpose of the right” and to interpret the *Charter* with respect to “its proper linguistic, philosophic and historical contexts”.¹⁶⁵ The Court wrote:

Before concluding that the right to "life" was intended to be extended by the *Charter* to a foetus, the history of the treatment of a foetus at law must be considered. "Everyone" is an undefined term and therefore resort must be had to, inter alia, historical treatment at common law of a foetus in determining whether it can come within this term.¹⁶⁶

Accordingly, the Saskatchewan Court of Appeal examined the historical treatment of fetuses in the Anglo-Canadian tradition. The historical record demonstrated that “for lengthy periods of our legal history in England and in Canada, abortions have been permitted at certain stages of pregnancy and for certain reasons.”¹⁶⁷ The allowance of abortions throughout history “is not consistent with recognition of its [a fetus] status historically as a person, or as an entity to be included within ‘everyone’”.¹⁶⁸ The Court recognized inconsistencies would result if fetuses were recognized as “everyone”:

That is, respect for human life and its fundamental sanctity have been part of the common law tradition for centuries; it did not spring newborn from the inclusion of the words "right to life" in the Charter. But within this tradition for long periods of time, destruction of the foetus has been permitted, albeit limited by the state of foetal development and/or the effect on the mother, and permitted despite full knowledge of the scientific principles of foetal capacity for life urged upon us by the appellant.

Such treatment of the foetus would not have been consistent with full status as a person. In no other instance known to the law would the law have permitted an individual to be destroyed because of age, state of development or innocent conflict with the well-being of another.¹⁶⁹

The Saskatchewan Court of Appeal then examined whether fetuses received rights in other areas of the law. The appellant Borowski argued that “the treatment of the foetus in civil law,

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid* at para 19.

¹⁶⁷ *Ibid* at para 24.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid* at paras 26-27.

especially in the areas of tort, family law and inheritance of property, shows a status equivalent to that of a person.”¹⁷⁰ The Saskatchewan Court of Appeal rejected this argument. The Court noted that in those areas of the law, the fetus eventually became a live human being. For example, in the tort case of *Montreal Tramways Co v Leveille*, “an infant, born with club feet as a result of an incident when it was a foetus, was permitted to make a claim for damages.”¹⁷¹ The decisive fact was that the fetus became a full-fledged, live human being. The Saskatchewan Court of Appeal wrote:

The fact that the child always was born and had become a viable adult when the action was commenced precludes this area of law being seen as conclusive of the view that a foetus per se was treated as a person. A foetus which had become a person has been awarded damages for harm preceding its arrival at this point of autonomous existence. For the appellant's arguments to be conclusive, there would have to have been recognition that a foetus which had not attained viability had been accorded such status either before birth or after its destruction.¹⁷²

The Saskatchewan Court of Appeal reached the same conclusion with respect to property law. There was a long history of fetuses inheriting property, but only if a viable child had been born.¹⁷³ The Court did not find any instances where a fetus received legal personhood in property law.¹⁷⁴

Turning to comparative law, the Saskatchewan Court of Appeal examined whether fetuses received legal personhood in foreign jurisdictions. The Court reviewed the American decision of *Roe v Wade* and noted that fetuses did not receive personhood in the American tradition.¹⁷⁵ Similarly, the “European Economic Community” did not recognize rights of the fetus unless a viable child was born.¹⁷⁶ The only western democracy that provided personhood to a fetus was West Germany. The West German Constitutional Court “found the foetus to have an independent right to life within the context of the West German Constitution that ‘everyone has the right to

¹⁷⁰ *Ibid* at para 30.

¹⁷¹ *Montreal Tramways Co v Leveille*, [1933] SCR 456, [1933] 4 DLR 337 (SCC).

¹⁷² *Supra* note 7 at para 34.

¹⁷³ *Ibid* at paras 37-38.

¹⁷⁴ *Ibid* at para 40.

¹⁷⁵ *Ibid* at paras 45-47.

¹⁷⁶ *Ibid* at paras 48-51.

life”¹⁷⁷. The Saskatchewan Court of Appeal noted, however, that the West German Constitutional Court relied upon the legislative history of West Germany. West German legislators had explicitly considered the constitutional status of fetuses and expressed support for the personhood of a fetus.¹⁷⁸

Returning to Canadian law, the Saskatchewan Court of Appeal recognized the importance of interpreting *Charter* rights with reference to the rights associated with it.¹⁷⁹ In the case of s. 7, the associated rights are ss. 8-14. The Court quoted from *Re B.C. Motor Vehicle Act*:

Sections 8 to 14 ... address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7 ...

Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section".¹⁸⁰

Given this close connection, it is necessary to interpret s. 7 in relation to ss. 8-14. It is notable that ss. 8, 9, and 10 use the term “everyone”. The Court wrote:

The approach taken by Mr. Justice Matheson in the present case was not unlike that. He observed that the expression "everyone" found in s. 7 is also found in each of s. 8 (the right to be secure against unreasonable search and seizure), s. 9 (the right not to be arbitrarily detained or imprisoned) and s. 10 (the right to counsel). He noted that the term "everyone" as it applies in relation to these specifically defined rights clearly does not embrace the foetus, and concluded that the same term in s. 7 could not therefore be reasonably construed to do so.

¹⁷⁷ *Ibid* at para 52.

¹⁷⁸ *Ibid* at para 53.

¹⁷⁹ *Ibid* at para 59.

¹⁸⁰ *Re B.C. Motor Vehicle Act*, *supra* note 15 at 501-502 (SCC). [emphasis added]

Having regard for the relationship between s.7 and ss.8 through 14, as described in *Re B.C. Motor Vehicle Act*, and for the fact that the elements of life, liberty and security of the person, while distinct, are nevertheless related concepts, I believe, as did Mr. Justice Matheson, that the guarantees of s. 7 were not intended by the framers of the Charter to extend to the unborn.¹⁸¹

The Saskatchewan Court of Appeal concluded that the term “everyone” does not apply to fetuses and therefore fetuses do not have s. 7 rights.¹⁸² Additionally, the Court concluded that it is Parliament’s prerogative to determine the circumstances under which abortion is lawful.¹⁸³

Borowski appealed the Saskatchewan Court of Appeal’s judgment to the Supreme Court of Canada. Sopinka J, speaking for a unanimous court, issued a judgment in 1989.¹⁸⁴ Notably, the Supreme Court’s judgment was issued after the seminal case of *R v Morgentaler*,¹⁸⁵ where the *Criminal Code* provisions that criminalized abortion were struck down. The Supreme Court of Canada noted that the issue raised in *Borowski v Canada* was moot because of *R v Morgentaler*.¹⁸⁶ The Supreme Court decided against answering whether the fetus is included in the word “everyone”. Sopinka J noted that this decision was better left for Parliament.¹⁸⁷ Sopinka J also wrote:

Moreover, while it raises a question of great public importance, this is not a case in which it is in the public interest to address the merits in order to settle the state of the law. The appellant is asking for an interpretation of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* at large. In a legislative context any rights of the foetus could be considered or at least balanced against the rights of women guaranteed by s. 7. See *R. v. Morgentaler* (No. 2), per Dickson C.J.C., at p. 75; per Beetz J. at pp. 122-23; per Wilson J. at pp. 181-82. A pronouncement in favour of the appellant's position that a foetus is protected by s. 7 from the date of conception would decide the issue out of its proper context. Doctors and hospitals would be left to speculate as to how to apply such a ruling consistently with a woman's rights under s. 7. During argument the question was posed to counsel for R.E.A.L. Women as to what a hospital would do with a pregnant woman who required an abortion to save her life

¹⁸¹ *Supra* note 7 at paras 63-64.

¹⁸² *Ibid* at para 71.

¹⁸³ *Ibid* at para 65.

¹⁸⁴ *Borowski v Canada*, *supra* note 145.

¹⁸⁵ *R v Morgentaler*, [1988] SCR 30, 44 DLR (4th) 385 (SCC).

¹⁸⁶ *Supra* note 145 at para 26.

¹⁸⁷ *Ibid* at para 47.

in the face of a ruling in favour of the appellant's position. The answer was that doctors and legislators would have to stay up at night to decide how to deal with the situation. This state of uncertainty would clearly not be in the public interest. Instead of rendering the law certain, a decision favourable to the appellant would have the opposite effect.¹⁸⁸

The Supreme Court of Canada concluded by dismissing the appeal.¹⁸⁹

Slaight Communications Inc. (operating as Q107 FM Radio) v Davidson

In 1989, the Supreme Court of Canada issued a decision in *Slaight Communications Incorporated (operating as Q107 FM Radio) v Davidson* [*“Slaight Communications”*].¹⁹⁰ In *Slaight Communications*, the appellate corporation employed the respondent employee for several years, but eventually dismissed the respondent employee for performance reasons.¹⁹¹ The respondent employee filed a complaint that he had been unfairly dismissed.¹⁹² An adjudicator was appointed by the Minister of Labour pursuant to s. 61.5(6) of the *Canadian Labour Code*.¹⁹³ The adjudicator issued an order that the respondent employee had been unfairly dismissed.¹⁹⁴ The adjudicator also ordered that the appellant corporation write a letter of recommendation in favour of the respondent employee and that this letter be issued whenever the appellant corporation received an inquiry regarding the respondent employee’s work history.¹⁹⁵ The appellant corporation appealed the order of the adjudicator on the basis that it violated s. 2(b) of the *Charter*, which guarantees freedom of expression.¹⁹⁶

For the majority of the court, Dickson C.J. found that the order of the adjudicator did violate s. 2(b) of the *Charter*. Dickson C.J. wrote:

Adjudicator Joliffe’s order that Slaight Communications Inc. answer any reference inquiry by sending the specified letter is an infringement of s. 2(b) freedom of expression. The government is attempting to prevent

¹⁸⁸ *Ibid* at para 46.

¹⁸⁹ *Ibid* at para 56.

¹⁹⁰ *Slaight Communications Inc. (operating as Q107 FM Radio) v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416 (SCC).

¹⁹¹ *Ibid* at 1045.

¹⁹² *Ibid*.

¹⁹³ *Ibid*.

¹⁹⁴ *Ibid* at 1046.

¹⁹⁵ *Ibid* at 1046-1047.

¹⁹⁶ *Ibid* at 1048.

Q107 from expressing its opinion as to the qualifications of Mr. Davidson beyond the facts set out in the letter.¹⁹⁷

As this thesis has already noted, s. 2(b) of the *Charter* uses the word “everyone”.¹⁹⁸ While the Supreme Court of Canada did not explicitly consider the meaning of “everyone” in *Slaight Communications*, by finding a violation of s. 2(b) in relation to the freedom of expression of a corporation, the Supreme Court implicitly interpreted the word “everyone” to include corporations in the case of s. 2(b) of the *Charter*.

Tremblay c Daigle

In 1989, the Supreme Court of Canada issued a decision in *Tremblay c Daigle*.¹⁹⁹ In *Tremblay c Daigle*, the respondent father obtained an interlocutory injunction against the appellant mother to prevent her from aborting their unborn child.²⁰⁰ The Supreme Court of Canada unanimously allowed the appeal, holding that a fetus does not have rights under the *Quebec Charter of Human Rights and Freedoms*,²⁰¹ the *Quebec Civil Code*,²⁰² or the *Canadian Charter of Rights and Freedoms*.²⁰³

With respect to the *Quebec Charter of Human Rights and Freedoms*, the respondent father argued that fetuses fell within the scope of the words “every human being”. S. 1 and 2 of the *Quebec Charter of Human Rights and Freedoms* states:

1. Every human being has the right to life, and to personal security, inviolability and freedom.

He also possesses juridical personality.
2. Every human being whose life is in peril has the right to assistance.

Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and

¹⁹⁷ *Ibid* at 1050.

¹⁹⁸ *Charter*, *supra* note 1 at s. 2(b).

¹⁹⁹ *Tremblay c Daigle*, [1989] 2 SCR 530, [1989] SCJ No 79.

²⁰⁰ *Ibid* at 538.

²⁰¹ *Ibid* at 552-555.

²⁰² *Ibid* at 556-565.

²⁰³ *Ibid* at 570-572.

immediate physical assistance, unless it involves danger to himself or to a third person, or he has another valid reason.²⁰⁴

Before determining whether a fetus fell within the scope of the words “human beings”, the Supreme Court of Canada explained the interpretative approach that would be used to resolve this issue. The Court wrote:

The respondent's argument is that a foetus is an "être humain", in English "human being", and therefore has a right to life and a right to assistance when its life is in peril. In examining this argument it should be emphasized at the outset that the argument must be viewed in the context of the legislation in question. The Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person, but, rather, to answer the legal question of whether the Quebec legislature has accorded the foetus personhood. Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties — a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.²⁰⁵

The Court also rejected a purely linguistic analysis:

The respondent, however, makes two arguments which are based on the text of the Charter. The first argument is that a foetus simply is a human being in the plain meaning of the term. The respondent advanced this argument with reference to the Civil Code, but it applies equally well to his discussion of the Quebec Charter. His contention is that the word "human" is in reference to the "human race", of which the foetus is a part, and the word "being" signifies "existing", which a foetus certainly does. Thus, the respondent concludes, a foetus is a human being.

This argument is not persuasive. A linguistic analysis cannot settle the difficult and controversial question of whether a foetus was intended by the National Assembly of Quebec to be a person under s. 1. What is required are substantive legal reasons which support a conclusion that the term "human being" has such and such a meaning. If the answer were as simple as the respondent contends, the question would not be before the Court nor would it be the subject of such intense debate in our society generally. The meaning of the term "human being" is a highly

²⁰⁴ *Quebec Charter of Human Rights and Freedoms*, RSQ c C-12, ss. 1-2.

²⁰⁵ *Tremblay c Daigle*, *supra* note 199 at 552-553.

controversial issue, to say the least, and it cannot be settled by linguistic fiat. A purely linguistic argument suffers from the same flaw as a purely scientific argument: it attempts to settle a legal debate by non-legal means; in this case by resorting to the purported "dictionary" meaning of the term "human being".²⁰⁶

The Court added:

In our view the Quebec Charter, considered as a whole, does not display any clear intention on the part of its framers to consider the status of a foetus. This is most evident in the fact that the Charter lacks any definition of "human being" or "person". For her part, the appellant argues that this lack of an intention to deal with a foetus' status is, in itself, a strong reason for not finding foetal rights under the Charter. There is force in this argument. One can ask why the Quebec legislature, if it had intended to accord a foetus the right to life, would have left the protection of this right in such an uncertain state. As this case demonstrates, even if the respondent's arguments are accepted it will only be at the discretionary request of third parties, such as Mr. Tremblay, that a foetus' alleged right to life will be protected under the Quebec Charter. If the legislature had wished to grant foetuses the right to life, then it seems unlikely that it would have left the protection of this right to such happenstance.²⁰⁷

The Court then turned to whether fetuses received legal rights under the Quebec *Civil Code*. The Court viewed the Quebec *Civil Code* as the "primary background source which should be referred to in interpreting the meaning of general terms in Quebec's *Charter*".²⁰⁸ The respondent father argued that the Quebec *Civil Code* implicitly recognized the fetus as a person.²⁰⁹ The respondent father pointed to instances where fetuses were treated like "minors or interdicted persons with respect to the appointment and duties of curators."²¹⁰ The respondent father also argued that the Quebec *Civil Code* protected "various economic interests" related to inheritance.²¹¹ The Court rejected these arguments, writing:

The recognition of the foetus' juridical personality has always been, as this Court stated in *Montreal Tramways Co. v. Léveillé*, [1933] S.C.R. 456, a "fiction of the civil law" which is utilized in order to protect the future interests of the foetus. This is equally true in Quebec civil law. Articles

²⁰⁶ *Ibid* at 553-554.

²⁰⁷ *Ibid* at 555.

²⁰⁸ *Ibid* at 556.

²⁰⁹ *Ibid*.

²¹⁰ *Ibid* at 557.

²¹¹ *Ibid* at 559.

608, 771, 838, and 2543 explicitly state that unless the foetus is born alive and viable it will not be granted the rights recognized therein. If the foetus is not born alive and viable then the interests referred to in these articles disappear, as if the foetus did not exist at all. In short, the condition that the foetus be born alive and viable is a "suspensive" condition.²¹²

With respect to the *Canadian Charter of Rights and Freedoms*, the respondent father argued that a fetus fell within the scope of the word "everyone" of s. 7.²¹³ The Court allowed the appeal on the grounds that the issue raised in *Tremblay c Daigle* was between two private parties and therefore the *Charter* could not be invoked. The Court wrote:

In our view, it is not necessary in the context of the present appeal to address this issue. This is a civil action between two private parties. For the Canadian Charter to be invoked there must be some sort of state action which is being impugned (see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342). The argument which alleges that the Charter can, on its own, support the injunction at issue fails to impugn any state action. The respondent pointed to no "law" of any sort which he can claim is infringing his rights or anyone else's rights. The issue as to whether s. 7 could be used to ground an affirmative claim to protection by the state was not raised. Neither the respondent nor any of the interveners who referred to the Canadian Charter as a possible basis for the injunction challenged the correctness of *Dolphin Delivery* or offered any basis upon which it could be distinguished and, accordingly, it provides a full answer to the Charter argument.²¹⁴

Because the respondent father could not establish that a fetus had rights, the Court unanimously allowed the appeal and lifted the injunction preventing the appellant mother from undergoing an abortion.²¹⁵

Dywidag Systems International Canada Ltd. v Zutphen Brothers Construction Ltd.

In 1990, the Supreme Court of Canada issued a decision in *Dywidag Systems International Canada Ltd. v Zutphen Brothers Construction Ltd.*²¹⁶ In this case, the Supreme Court of Canada

²¹² *Ibid* at 560.

²¹³ *Ibid* at 571.

²¹⁴ *Ibid*.

²¹⁵ *Ibid* at 573.

²¹⁶ *Dywidag Systems International Canada Ltd. v Zutphen Brothers Construction Ltd.*, [1990] 1 SCR 705, 68 DLR (4th) 147 (SCC).

confirmed that corporations are not entitled to s. 7 protection. Writing for a unanimous court, Cory J wrote:

There can now be no doubt that a corporation cannot avail itself of the protection offered by s. 7 of the Charter. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 94 N.R. 167, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, the majority of this Court held that a corporation cannot be deprived of life, liberty and security of the person and cannot therefore avail itself of the protection offered by s. 7 of the Charter. At p. 1004 [S.C.R.] it was stated:

it appears to us that [s. 7] was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase 'Everyone has the right to life, liberty and security of the person' serves to underline the human element involved; only human beings can enjoy these rights. 'Everyone' then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.²¹⁷

R v CIP Inc.

In 1992, the Supreme Court of Canada issued a decision in *R v CIP Inc.*²¹⁸ In this case, an employee of CIP Inc. was fatally injured in an industrial accident that occurred on CIP's premises.²¹⁹ CIP Inc. and three employees were charged with an offence under Ontario's *Occupational Health and Safety Act*.²²⁰ For a variety of reasons, the trial was delayed several times.²²¹ The appellant corporation brought a motion pursuant to s. 11(b) of the *Charter*, claiming that its right to be tried within a reasonable time had been violated.²²² The motion was granted by the trial judge and a stay of proceedings was ordered.²²³ The Ontario Crown appealed

²¹⁷ *Ibid* at para 6.

²¹⁸ *R v CIP Inc.*, [1992] 1 SCR 843, [1992] SCJ No 34 (SCC).

²¹⁹ *Ibid* at para 3.

²²⁰ *Ibid*.

²²¹ *Ibid* at paras 4-6.

²²² *Ibid*.

²²³ *Ibid* at para 7.

this decision to the Ontario Court of Appeal, which dismissed the appeal.²²⁴ The Ontario Crown appealed to the Supreme Court of Canada.²²⁵

At issue before the Supreme Court of Canada was whether a corporation had rights under s. 11(b) of the *Charter*.²²⁶ The appellant Crown argued that according to the *Irwin Toy* decision, corporations have limited recourse to the *Charter* because corporations are not “everyone”.²²⁷ Writing for the court, Stevenson J rejected this argument. Stevenson J. wrote:

In my opinion, the respondent's argument on this first issue overlooks the generally accepted contextual and purposive approach to *Charter* analysis. In *Irwin Toy Ltd.*, it was not the absence of penal proceedings per se that precluded the respondent corporation from invoking s. 7. Rather, the court focused on the language of the right in combination with the nature of the specific interests embodied therein, and concluded that in that context, s. 7 could not logically apply to corporate entities. I do not read that decision as ruling out the possibility of corporations asserting other *Charter* guarantees. On the contrary, *Irwin Toy Ltd.* went only so far as to establish an appropriate analytical framework: whether or not a corporate entity can invoke a *Charter* right will depend upon whether it can establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision.²²⁸

After reviewing additional jurisprudence, Stevenson J came to the conclusion that corporations could rely on s. 11(b) of the *Charter*.²²⁹ Stevenson J reached this conclusion because corporations have an interest in being brought to trial in a reasonable amount of time.²³⁰ Stevenson J wrote:

In my view, the societal interest applies to corporate offenders as it does to individual accused. To hold otherwise would be to suggest that the community is somehow less interested in seeing the former brought to trial. It would also suggest that the status of an accused can determine whether that accused is to be accorded "fair" and "just" treatment. I am not prepared to accept either of those propositions.

224 *Ibid* at para 9.

225 *Ibid* at paras 10-11.

226 *Ibid* at para 19.

227 *Ibid* at para 20.

228 *Ibid* at para 21.

229 *Ibid* at para 37.

230 *Ibid* at para 36.

I therefore conclude that the phrase "Any person charged with an offence" in the context of s.11(b) of the *Charter* includes corporations.²³¹

Appellate Level Decisions

Southam Inc. v Director of Investigation and Research

In 1983, the Alberta Court of Appeal issued a decision in the case of *Southam Inc. v Director of Investigation and Research of the Combines Investigation Branch et al.*²³² In this case, the appellant corporation filed an application against the respondent Director for an interlocutory injunction that would prevent the Director from executing a search and seizure pursuant to s. 10(1) and s. 10(3) of *Combines Investigation Act*.²³³ The Alberta Court of Appeal allowed the appeal, holding that s. 10(1) and s. 10(3) of the *Combines Investigation Act* violated s. 8 of the *Charter*.²³⁴ While the Alberta Court of Appeal did not directly address the meaning of the term "everyone" found in s. 8 of the *Charter*, the Alberta Court of Appeal did not take issue with the comments of the trial judge. The trial judge wrote:

An objection raised by the defendants in argument is that the plaintiff has no status to bring this action. The defendants argue that the beneficiary of rights guaranteed in ss. 2, 7, 9, 10, 12 and 17 of the *Charter* is described as "everyone". In those sections the rights guaranteed are rights that only a human being can enjoy. The beneficiary of the guarantee in s. 8 is also described as "everyone". Therefore, it is argued, since the word "everyone" must mean human beings only in the first group of sections, it must mean the same in s. 8 and thus the plaintiff would be excluded.

It is clear that the *Constitution Act* is not subject to the *Interpretation Act*, R.S.C. 1970, c. I-23, but I think it is useful to note that in s. 28 [am. 1970, c. 10 (2nd Supp.), s. 65 (Item 21); 1972, c. 17, s. 2; 1974-75-76, c. 16, s. 4, c. 19, s. 2; 1978-79, c. 11, s. 10] of the *Interpretation Act of Canada* we find: "person or any word or expression descriptive of a person, includes a corporation".

In addition, it has been urged that in interpreting constitutions a broad and liberal interpretation ought to be given. Having that in mind, I would

²³¹ *Ibid* at paras 36-37.

²³² *Southam Inc. v Director of Investigation and Research of the Combines Investigation Branch et al.*, [1983] 3 WWR 385, [1983] AWLD 243 (ABCA).

²³³ *Ibid* at paras 1-3.

²³⁴ *Ibid* at para 73.

hold that "everyone" as used in s. 8 should include all human beings and all entities that are capable of enjoying the benefit of security against unreasonable search. This then would include corporations. That interpretation would not be inconsistent in the other sections where the word "everyone" is used where only human beings can enjoy the rights given. I therefore reject that argument of the defendants.²³⁵

Smith, Kline & French Laboratories Ltd v Canada (Attorney General)

In 1986, the Appeal Division of the Federal Court of Canada issued a decision in the case of *Smith, Kline & French Laboratories Ltd v Canada (Attorney General)*.²³⁶ In this case, the appellant brought an action for a declaration that the appellant could enjoy two Canadian patents without any restrictions under the *Patent Act*.²³⁷ Among other arguments, the appellant argued that the restrictions of the *Patent Act* violated the appellant's s. 7 rights under the *Charter*.²³⁸ With respect to this argument, a unanimous Court wrote:

Insofar as concerns the arguments based upon the distribution of powers under the *Constitution Act*, the alleged breach of paras. 1(a) and 1(b) of the *Canadian Bill of Rights* and the alleged denial of the rights to life, liberty and security of the person under s. 7 of the *Charter*, I am in complete agreement with the trial Judge's conclusions and with the reasoning by which he arrives at them. If anything, he has given those arguments a fuller treatment than they deserve; any additional comments on my part would be superfluous.²³⁹

In the trial decision, Strayer J wrote:

The plaintiffs contend that subsection 41(4) deprives them of "liberty" or "security of the person" in a manner not in accordance with the principles of fundamental justice.

I accept that both the corporate plaintiffs and the individual plaintiffs are potentially entitled to the protection of section 7 because it applies to "everyone". It has been held in *Balderstone v. R.*; *Play-All Ltd. v. A.G. Man.*, [1983] 1 W.W.R. 72 (Man. Q.B., affirmed on other grounds by Man. C.A. [[1983] 6 W.W.R. 438]) that "everyone" in this section includes a corporation. I respectfully agree.

²³⁵ *Southam Inc. v Director of Investigation and Research of the Combines Investigation Branch et al.*, [1982] 4 WWR 673, [1982] AWLD 533 at paras 24-26 (ABQB).

²³⁶ *Smith, Kline & French Laboratories Ltd v Canada (Attorney General)*, [1987] 2 FC 359, 11 CIPR 181.

²³⁷ *Ibid* at paras 2-3.

²³⁸ *Ibid* at para 3.

²³⁹ *Ibid* at para 5.

I do not accept, however, that subsection 41(4) of the *Patent Act* involves the "liberty" or "security of the person" of any or all of the plaintiffs here. In my view the concepts of "life, liberty and security of the person" take on a colouration by association with each other and have to do with the bodily well-being of a natural person. As such they are not apt to describe any rights of a corporation nor are they apt to describe purely economic interests of a natural person. I have not been referred to any authority which requires me to hold otherwise.²⁴⁰

Notably, this decision was issued before the *Irwin Toy* decision, where the Supreme Court of Canada determined that corporations do not have s. 7 rights.²⁴¹

Dehghani v Canada (Minister of Employment & Immigration)

In 1990, the Appeal Division of the Federal Court of Canada issued a decision in *Dehghani v Canada (Minister of Employment & Immigration)*.²⁴² In this case, the applicant arrived in Canada from Iran with none of the necessary documentation and claimed Convention refugee status.²⁴³ Upon arriving in Canada, the applicant was interviewed by Canadian custom officials, but was not informed of a right to legal counsel.²⁴⁴ The applicant alleged that the denial to inform him of his right to legal counsel violated his s. 10 rights under the *Charter*.²⁴⁵ The majority of the Court dismissed the application because the applicant had not been detained for the purposes of s. 10.²⁴⁶ However, in the dissenting opinion, Heald J.A. touched upon the definition of "everyone" found in s. 10. S. 10 states:

10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefor;
 - (b) to retain and instruct counsel without delay and to be informed of that right; and
 - (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.²⁴⁷

²⁴⁰ *Smith, Kline & French Laboratories Ltd v Canada (Attorney General)*, [1985] FCJ No 501, [1986] 1 FC 274 at paras 52-54 (FCTD).

²⁴¹ *Irwin Toy*, *supra* note 3.

²⁴² *Dehghani v Canada (Minister of Employment & Immigration)*, [1990] 3 FC 587, [1990] ACF No 558.

²⁴³ *Ibid* at para 16.

²⁴⁴ *Ibid* at para 1.

²⁴⁵ *Ibid* at para 20.

²⁴⁶ *Ibid* at paras 4-6.

²⁴⁷ *Charter*, *supra* note 1.

Heald J.A. wrote:

Section 10 of the Charter also employs the term "everyone". As was noted by counsel for the appellants in the Singh case (at 202), many other sections of the Charter use more restricted language of application such as "every Canadian citizen" and "permanent residents of Canada". Thus, it seems a reasonable inference that this claimant for refugee status, who has been physically present in Canada at all relevant times, is entitled to the protection of s. 10. In my view, the rationale for s. 10 protection, in the circumstances at Bar, is just as compelling as in situations where the criminal process is engaged. In the context of a criminal proceeding, the rights of an accused person are the subject of meticulous safeguards because there is a possibility of a deprivation of liberty through incarceration. In the case of a refugee claimant such as this claimant, assuming that even a portion of his factual assertions are true, the consequences of his enforced return to Iran could well include incarceration, torture and even death.²⁴⁸

Summary & General Principles

Having reviewed the jurisprudence that considers the meaning of the word “everyone”, it is possible to distill these cases to a broad set of principles.

1. All live human beings who are physically present in Canada are “everyone”.²⁴⁹
2. For an entity to fall within the ambit of “everyone”, the entity must be capable of enjoying the associated right.²⁵⁰
3. While consistency between the meaning of the word “everyone” across sections of the *Charter* is important and can be used as an interpretive guidepost,²⁵¹ the word “everyone” can have different meanings across sections of the *Charter*.²⁵²

²⁴⁸ *Dehghani*, *supra* note 242 at para 28. [emphasis added]

²⁴⁹ *Singh v Canada*, *supra* note 4.

²⁵⁰ *Irwin Toy*, *supra* note 3, *R v Amway*, *supra* note 136, *Dywidag Systems International Canada Ltd. v Zutphen Brothers Construction Ltd*, *supra* note 216, *Borowski v Canada*, *supra* note 7, *R v CIP Inc.*, *supra* note 218, *Southam Inc. v Director of Research and Investigation*, *supra* note 232.

²⁵¹ *Borowski v Canada*, *supra* note 7.

²⁵² The word “everyone” does not include corporations in s. 7 and s. 11(c), *Irwin Toy*, *supra* note 3 and *R v Amway*, *supra* note 136, *Dywidag Systems International Canada Ltd. v*

4. Examining jurisprudence from other domains of the law,²⁵³ and jurisprudence from foreign jurisdictions can be a useful tool when determining the meaning of the word “everyone”.²⁵⁴
5. Like all *Charter* interpretation, a purposive approach must be used when interpreting the word “everyone”.²⁵⁵

Additional observations can be made on the basis of this jurisprudence. First, the meaning of the word “everyone” across all sections of the *Charter* has not been considered by an appellate level court in over 25 years.²⁵⁶ 25 years is a long time under any circumstances to not revisit a point of law, but these 25 years are made even longer due to the significant evolution undergone by s. 7. Furthermore, humanity has made impressive strides both in biological and computer science over the last 25 years. Advancements in both of these fields, notably in zoology and artificial intelligence, present new challenges for the current interpretation of the word “everyone”. As we shall see, with minor modifications to the *Irwin Toy* interpretation of the word “everyone”, a flexible interpretation can be developed that is consistent with these identified principles.

Some explanation is also arguably necessary with respect to two lines of reasoning that are not employed by this thesis. First, in *Tremblay c Daigle* the court identified that “the intent of the framers” is a relevant consideration when considering questions of personhood.²⁵⁷ Second, in *Borowski v Canada*, the historical treatment of the entity in question was a relevant consideration. These two considerations will not be integrated into the new proposed definition of “everyone” herein because of the “Living Tree Doctrine”. The Living Tree Doctrine states that the constitution of Canada should be interpreted in a manner that allows the constitution to

Zutphen Brothers Construction Ltd, *supra* note 216, but does include corporations in s. 2 and s. 8, *Slaight Communications Inc. v Davidson*, *supra* note 190 and *Southam Inc. v Director of Investigation and Research of the Combines Investigation Branch et al*, *supra* note 232.

²⁵³ *Borowski v Canada*, *supra* note 7, *Tremblay c Daigle*, *supra* note 199,

²⁵⁴ *Irwin Toy*, *supra* note 3, *Borowski v Canada*, *supra* note 7, *Tremblay c Daigle*, *supra* note 199, *R v CIP*, *supra* note 218.

²⁵⁵ *R v CIP*, *supra* note 218, *R v Amway*, *supra* note 136, *Borowski v Canada*, *supra* note 7.

²⁵⁶ The last time an appellate court considered the meaning of “everyone” appears to be in 1992 by the Supreme Court of Canada in *R v CIP*, *supra* note 218.

²⁵⁷ *Tremblay c Daigle*, *supra* note 199 at 555.

grow over time to reflect the growth of Canadian society.²⁵⁸ The Living Tree Doctrine also applies in a *Charter* context. The Supreme Court of Canada recognized the application of the Living Tree Doctrine to the *Charter* in the case of *Re BC Motor Vehicle Act*.²⁵⁹ In this case, the Supreme Court of Canada recognized that historical materials should not stunt the growth of the *Charter*.²⁶⁰ As the *Charter* develops over time, the original intent of the framers may begin to lose its importance as the *Charter* takes on a life of its own. Similarly, how different entities were historically treated will be of reduced importance. Neither the framers of the *Charter* nor our historical forbearers could have predicted the scientific and technological developments of the last 30 years. To make either of these factors important when considering the meaning of “everyone” will unnecessarily stunt the growth of the *Charter*. This is particularly so when it is possible to construct a detailed definition of “everyone” without relying on these factors.

Redefining “Everyone”

As earlier described, the *Irwin Toy* definition contains two conflicting lines of reasoning.²⁶¹ The Capability Argument and the Human-Only Argument cannot co-exist because there are non-humans capable of enjoying s. 7 rights and thus the definition of “everyone” cannot be used to determine whether an entity is “everyone”. We have also seen that the Human-Only Argument is problematic because: it is not a purposive interpretation;²⁶² it is not in accordance with principles of fundamental justice;²⁶³ it is contrary to liberal-democratic society;²⁶⁴ it does not consider developments in foreign jurisdictions;²⁶⁵ and it does not account for technological developments.²⁶⁶ This thesis also identified five (5) common principles found in Canadian jurisprudence related to the meaning of the word “everyone”.²⁶⁷

²⁵⁸ *Edwards v Canada (AG)*, [1930] AC 124, 1929 UKPC 86.

²⁵⁹ *Supra* note 15 at para 53.

²⁶⁰ *Ibid.*

²⁶¹ See section “The Problematic Nature of *Irwin Toy*”.

²⁶² See section “Contrary to *Charter* Interpretative Techniques”.

²⁶³ See section “Contrary to Principles of Fundamental Justice”.

²⁶⁴ See section “Contrary to Liberal-Democratic Society”.

²⁶⁵ See section “Developments in Foreign Jurisdictions”.

²⁶⁶ See section “Developments in Technology”.

²⁶⁷ See section “Summary & General Principles”.

With these problematic areas and general principles identified, it is possible to amend the *Irwin Toy* interpretation of “everyone” by eliminating the Human-Only Argument and focusing solely on the Capability Argument as follows.

As earlier described, in *Irwin Toy*, Dickson C.J. wrote:

That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.²⁶⁸

First, references to s. 7 applying exclusively to human beings should be struck from the definition of “everyone”. Striking these portions from the *Irwin Toy* interpretation will eliminate the Human-Only Argument from the definition. Consequently, the tension between the Human-Only Argument and the Capability Argument will be eliminated. Eliminating the Human-Only Argument will also allow courts to take into consideration technological developments (i.e. artificial intelligence), developments in zoology, and developments in foreign jurisdictions. It will also eliminate problems in the event of highly unlikely situations (i.e. the discovery of intelligent extra-terrestrial life). When reference to human beings are struck, *Irwin Toy* reads:

~~That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level.~~ A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the ~~human~~ **uncommon** element involved; only ~~human~~ **certain** beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other ~~artificial~~ entities incapable of enjoying life, liberty or security of the person, and include ~~only~~ **all** human beings.²⁶⁹

A cleaned-up version of this amended passage of *Irwin Toy* reads:

A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the uncommon element involved; only certain beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude

²⁶⁸ *Irwin Toy*, *supra* note 3 at para 97.

²⁶⁹ *Ibid* at para 97.

corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include all human beings.

Some additional explanation is necessary. First, the sentence “that is, read as a whole, it appears to use that this section was intended to confer protection on a singularly human level” was struck in its entirety because it is not clear that s. 7 was designed for this purpose. As the jurisprudence recognizes, s. 7 protects entities that are capable of enjoying s. 7.²⁷⁰ The statement that only human beings can enjoy these rights is not supported by jurisprudence, zoology, the expectations of computer scientists, or simple thought-experiments. The words “human” and the word “only” are struck for the same reasons.

In the second sentence, the words “uncommon” and “certain” replace the word “human”.

A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the **uncommon** element involved; only **certain** beings can enjoy these rights.

The word “uncommon” was chosen because while the ability to enjoy s. 7 rights is not unique to human beings, it is not an ability that is widely shared. Given the specific nature of s. 7 rights, it is unlikely that there will be many non-human persons who are capable of enjoying s. 7 rights. The word “uncommon” was therefore used to communicate the fact that the word “everyone” will not include all non-humans. The word “uncommon” could be replaced by any other word that communicates the unusualness or rareness of the ability to enjoy s. 7 rights.

The word “certain” is used for similar reasons. The ability to enjoy s. 7 rights is not available to every entity on the face of the Earth. A relatively small number of entities will be eligible for s. 7 rights. The word “certain” is used to reflect that those who have s. 7 rights are a small and exclusive group. The word “certain” could be replaced by any other word that reflects this exclusiveness.

Finally, two changes are made to the final sentence of the *Irwin Toy* interpretation:

"Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other ~~artificial~~ entities incapable of enjoying life, liberty or security of the person, and include **all** human beings.

²⁷⁰ *Irwin Toy*, *supra* note 3, *R v Amway*, *supra* note 136, *Borowski v Canada*, *supra* note 7, *R v CIP Inc.*, *supra* note 218, *Southam Inc. v Director of Research and Investigation*, *supra* note 232.

The word “all” replaces the word “only” for two reasons. First, the word “only” is a holdover from the Human-Only Argument. Because the Human-Only Argument is problematic, the word “only” must be removed to ensure that non-humans remain eligible for s. 7 rights. Second, the word “all” replaces the word “only” to ensure that all human beings remain eligible for s. 7 rights. If one were to rely solely on the Capability Argument (*i.e.* the ability to enjoy life, liberty, and security of the person), it is conceivable that some human beings would be denied s. 7 rights because of the lack of ability to enjoy s. 7 rights. For example, while someone in a permanent coma has the ability to enjoy the right to life, a person in a permanent coma cannot enjoy the right to liberty because a person in the coma cannot make important and fundamental life choices. Similarly, young children and some individuals with intellectual handicaps may be unable to make important and fundamental life choices. To maintain the integrity of human rights in Canada, all human beings, regardless of physical, intellectual or emotional ability, have s. 7 rights. To avoid any implication to the contrary, the word “all” replaces the word “only”.

The word “artificial” is struck because the inability to enjoy s. 7 rights is not necessarily limited to artificial entities. As this thesis has already stated, the vast majority of organic entities will be incapable of enjoying s. 7 rights. Accordingly, the word “artificial” is struck to ensure that it is clear that organic entities can be excluded from the word “everyone”.

The principles underlying the new definition of “everyone” can be summarized as:

1. All live human beings are included in the word “everyone”. To ensure the protection of human rights for all live human beings, the ability or inability to enjoy s. 7 rights is immaterial for human beings.
2. The ability or inability to enjoy s. 7 rights will become relevant where it is alleged that a non-human entity has s. 7 rights.
3. A non-human entity will be included in the word “everyone” provided that the non-human entity is capable of enjoying the right to life, liberty, or security of the person.

For the purposes of simplicity, these three observations can be synthesized into a new definition of the word “everyone”:

The word “everyone” in s. 7 of the *Charter* includes all live human beings and all other entities capable of enjoying the right to life, liberty, and security of the person.

The “Everyone Test”

In the preceding section, it was determined that the *Irwin Toy* interpretation of the word “everyone” can be modified by eliminating the Human-Only Argument. The modified definition was: “everyone” in s. 7 of the *Charter* includes all live human beings and all other non-human entities capable of enjoying the right to life, liberty, and security of the person.”

This definition raises an important question: what does it mean to be capable of enjoying the right to life, liberty, and security of the person? This new definition of the word “everyone” is useless unless it can provide practical instruction for courts. Ultimately, judges must be able to make a determination as to whether an entity is “everyone” or not. Based on the jurisprudence identified earlier in this Chapter and based on the new definition of the word “everyone”, it is possible to develop a “test” that can be applied to judges when considering whether an entity is “everyone”. The “Everyone Test” can be summarized as follows:

1. Is the entity capable of enjoying the rights contained in s. 7?
 - a. Is the entity capable of enjoying the right to life?
 - b. Is the entity capable of enjoying the right to liberty?
 - c. Is the entity capable of enjoying the right to security of the person?
2. Is the entity capable of enjoying the rights contained in ss. 8, 9, 10 and 12?
3. Has the entity been recognize as a person in other areas of Canadian law (e.g. family law, property law)?
4. Has the entity been recognized as a person in foreign jurisdictions?

The Ability to Enjoy S.7 Rights: Life, Liberty and Security of the Person

The fundamental question to ask when considering whether an entity is “everyone” is whether the entity is capable of enjoying the right to life, liberty and security of the person.²⁷¹ But how does one actually determine whether an entity has the ability to enjoy s. 7 rights? It is certainly a more complicated task that it first appears. Thankfully, however, the right to life, the right to liberty, and the right to security of the person now have very specific meanings. It is therefore

²⁷¹ *Irwin Toy*, *supra* note 3; *Singh v Minister of Immigration and Employment*, *supra* note 4.

possible to ask more precise questions when considering whether an entity is capable of enjoying life, liberty and security of the person.

The Right to Life

The right to life is “engaged where state conduct deprive[s] a person of his life.”²⁷² Because Canada abolished the death penalty before the passage of the *Charter*,²⁷³ there have been comparatively few instances where the right to life has been expressly considered by higher level courts. Professor Hogg writes:

Section 7 protects “life, liberty and security of the person”. So far as “life” is concerned, the section has little work to do, because governmental action rarely causes death. The most obvious case is the death penalty, but this was removed from Canada’s *Criminal Code* in 1976 – before the adoption of the *Charter* of Rights. The Supreme Court of Canada has held, however, that excessive waiting times for treatment in the public health care system of Quebec increased the risk of death, and were a violation of the right to life (as well as security of the person).

Abortion is sometimes characterized as implicating a “right to life”, meaning a right possessed by a fetus. That characterization does not work in this context. The s. 7 right is possessed by “everyone”, and everyone does not include a foetus.²⁷⁴

The Quebec case referenced by Professor Hogg is *Chaoulli c Quebec*.²⁷⁵ In *Chaoulli c Quebec*, the appellants brought a motion for a declaration that legislation, which prohibited private health insurance for services provided by the public health care system, was unconstitutional.²⁷⁶ One alleged ground of unconstitutionality was that the legislation violated s. 7 of the *Charter*.²⁷⁷ Writing in a concurring judgment, McLachlin CJC wrote:

The issue at this stage is whether the prohibition on insurance for private medical care deprives individuals of their life, liberty or security of the person protected by s. 7 of the Charter.

²⁷² *Fundamental Justice*, *supra* note 14 at 63.

²⁷³ The death penalty was abolished in Canada in 1976.

²⁷⁴ Peter W Hogg, *Constitutional Law of Canada: 2013 Student Edition* (Toronto: Carswell, 2013) at 47.6.

²⁷⁵ *Chaoulli c Quebec*, 2005 SCC 25, [2005] 1 SCR 791.

²⁷⁶ *Ibid* at para 5.

²⁷⁷ *Ibid*.

The appellants have established that many Quebec residents face delays in treatment that adversely affect their security of the person and that they would not sustain but for the prohibition on medical insurance. It is common ground that the effect of the prohibition on insurance is to allow only the very rich, who do not need insurance, to secure private health care in order to avoid the delays in the public system. Given the ban on insurance, most Quebeckers have no choice but to accept delays in the medical system and their adverse physical and psychological consequences.

Delays in the public system are widespread and have serious, sometimes grave, consequences. There was no dispute that there is a waiting list for cardiovascular surgery for life-threatening problems. Dr. Daniel Doyle, a cardiovascular surgeon who teaches and practises in Quebec City, testified that a person with coronary disease is [TRANSLATION] "sitting on a bomb" and can die at any moment. He confirmed, without challenge, that patients die while on waiting lists: A.R., vol. 3, p. 461. Inevitably, where patients have life-threatening conditions, some will die because of undue delay in awaiting surgery.²⁷⁸

The potential of dying while waiting for healthcare, when combined with the prohibition on private health insurance, engaged the right to life. McLachlin CJC wrote:

As we noted above, there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care. Where lack of timely health care can result in death, s. 7 protection of life itself is engaged. The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets this threshold requirement of seriousness.

We conclude, based on the evidence, that prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the Charter.²⁷⁹

The Supreme Court of Canada also examined the right to life in the case of *Canada (Attorney General) v PHS Community Services*.²⁸⁰ In this case, the Minister of Health denied PHS Community Services' application to renew an exemption from the operation of criminal laws

²⁷⁸ *Ibid* at 110-112.

²⁷⁹ *Ibid* at 123-124.

²⁸⁰ *Canada (Attorney General) v PHS Community Services*, 2011 SCC 44, [2011] 3 SCR 13.

related to the *Controlled Drugs and Substances Act*.²⁸¹ This exemption had previously allowed PHS Community Services to operate a safe-injection centre, where individuals could inject illegal drugs under medical supervision without risk of legal repercussions for the drug user or staff of the safe injection centre.²⁸² Medical staff provided clean injection equipment and performed medical services in the event of an overdose.²⁸³ Life-saving medical treatment was often provided. When the Minister of Health refused to renew the exemption, the staff of the safe injection centre and the drug users were no longer protected from criminal liability. Among other grounds, PHS Community Services argued that the refusal to grant an exemption violated s. 7 of the *Charter*.²⁸⁴ With respect to the right to life, the Court wrote:

The record supports the conclusion that, without an exemption from the application of the *CDSA*, the health professionals who provide the supervised services at Insite will be unable to offer medical supervision and counselling to Insite's clients. This deprives the clients of Insite of potentially lifesaving medical care, thus engaging their rights to life and security of the person. The result is that the limits on the s. 7 rights of staff will in turn result in limits on the s. 7 rights of clients.²⁸⁵

The right to life was also recently examined in the case of *Carter v Canada (Attorney General)*.²⁸⁶ In *Carter v Canada*, the appellant challenged two sections of the *Criminal Code* that prohibited physician assisted dying on the grounds that this prohibition violated s. 7 of the *Charter*.²⁸⁷ In a *per curiam* decision, the Supreme Court of Canada concluded that the prohibition on physician assisted dying violated s. 7 of the *Charter*. With respect to the right to life, the Court wrote:

The trial judge found that the prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. On that basis, she found that the right to life was engaged.

²⁸¹ *Ibid* at para 2.

²⁸² *Ibid* at para 1.

²⁸³ *Ibid* at para 17.

²⁸⁴ *Ibid* at paras 75-77.

²⁸⁵ *Ibid* at para 91.

²⁸⁶ *Carter v Canada*, *supra* note 41.

²⁸⁷ *Ibid* at para 5.

We see no basis for interfering with the trial judge's conclusion on this point. The evidence of premature death was not challenged before this Court. It is therefore established that the prohibition deprives some individuals of life.²⁸⁸

The Court continued, writing:

...In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Conversely, concerns about autonomy and quality of life have traditionally been treated as liberty and security rights. We see no reason to alter that approach in this case.

This said, we do not agree that the existential formulation of the right to life *requires* an absolute prohibition on assistance in dying, or that individuals cannot "waive" their right to life. This would create a "duty to live", rather than a "right to life", and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment. The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life. But s. 7 also encompasses life, liberty and security of the person during the passage to death. It is for this reason that the sanctity of life "is no longer seen to require that all human life be preserved at all costs" (*Rodriguez*, at p. 595, per Sopinka J.). And it is for this reason that the law has come to recognize that, in certain circumstances, an individual's choice about the end of her life is entitled to respect. It is to this fundamental choice that we now turn.²⁸⁹

The British Columbia Court of Appeal also considered the right to life. In *Victoria (City of) v Adams*,²⁹⁰ the city of Victoria passed a by-law that prohibited homeless individuals from "erecting temporary overhead shelter at night – including tents, tarps attached to trees, boxes or other structure".²⁹¹ It was argued that this by-law violated s. 7 of the *Charter*.²⁹² The British Columbia Court of Appeal wrote:

Based on uncontradicted and unopposed expert evidence, the trial judge found that compliance with the Bylaws exposes homeless people to a risk of serious harm, including death from hypothermia (at para. 142).²⁹³

²⁸⁸ *Ibid* at paras 57-58.

²⁸⁹ *Ibid* at paras 62-63.

²⁹⁰ *Victoria (City of) v Adams*, 2009 BCCA 563, [2009] BCJ No 2451.

²⁹¹ *Ibid* at para 1.

²⁹² *Ibid*.

²⁹³ *Ibid* at para 102.

The British Columbia Court of Appeal did not take issue with this finding and concluded that the by-law prohibiting the erection of temporary overhead shelter violated the right to life.²⁹⁴

As the jurisprudence demonstrates, the right to life will be engaged where direct or indirect state action causes death or an increased risk of death. Therefore, when considering whether an entity or non-human person is capable of enjoying the right to life, the appropriate question to ask is “is the entity capable of losing its life through direct or indirect state action?”

The Right to Liberty

What does it mean to be “capable of enjoying the right to liberty”? Stewart recognized the inherent philosophical difficulty in defining a concept like liberty:

The word “liberty” means many different things in legal and political discourse. Under section 7 of the *Charter*, the liberty interest is engaged by deprivations of liberty by state action. Yet even in this context, the word “liberty” might mean many things. In its narrowest context, the word “liberty” under s. 7 would mean freedom from state-imposed or state-authorized imprisonment or detention; in its widest sense, “liberty” under section 7 would mean freedom from any state-imposed or state-authorized constraint on action. On the narrow reading, the liberty interest would be engaged only by state action that might result in imprisonment or another form of detention. On the widest reading, the liberty interest would always be engaged because the law always limits someone’s freedom of action²⁹⁵

The dilemma between a narrow reading of s. 7 and a wide reading of s. 7 came to a head in the case of *B(R) v Children’s Aid Society of Metropolitan Toronto (B(R))*.²⁹⁶ In this case, the Children’s Aid Society successfully applied for a temporary wardship of a prematurely born infant who required blood transfusions. The appellants, who were Jehovah’s Witnesses and the parents of prematurely born infant, did not want their child to receive a blood transfusion and appealed the wardship order.²⁹⁷ Among other issues, the Supreme Court of Canada considered whether the legislation that allowed the state to take temporary wardship of a child violated s. 7 of the *Charter* because it denied parents to make decisions about medical treatment for their

²⁹⁴ *Ibid* at para 110.

²⁹⁵ *Fundamental Justice*, *supra* note 14 at 65.

²⁹⁶ *B(R) v Children’s Aid Society of Metropolitan Toronto (B(R))*, [1995] 1 SCR 315, [1994] SCR No 24.

²⁹⁷ *Ibid* at paras 43-44.

children.²⁹⁸ The Supreme Court of Canada was divided on whether decisions about medical treatment fell within the ambit of the right to liberty. Iacobucci J., Major J., and Cory J. determined that s. 7 did not include the right to deny a child medical treatment deemed necessary by a medical professional:

We find that the right to liberty embedded in s.7 does not include a parent's right to deny a child medical treatment that has been adjudged necessary by a medical professional. Although the scope of "liberty" as understood by s. 7 is expansive, it is certainly not all-encompassing. This court has unequivocally held that "liberty" is not synonymous with unconstrained freedom: *R. v. Videoflicks Ltd.*, (sub nom. *R. v. Edwards Books & Art Ltd.*) [1986] 2 S.C.R. 713 (per Dickson C.J.C., at pp. 785-786). Such an interpretation of "liberty" flows from some of the prior decisions of this court cited by La Forest J. in his reasons. Not all individual activity should immediately qualify as an exercise of "liberty" and hence be prima facie entitled to constitutional protection, subject only to the limits consonant with fundamental justice or s. 1.²⁹⁹

Lamer C.J. agreed that the right to liberty did not include the right to make medical decisions for children but arrived at his conclusion for different reasons. He wrote:

More specifically, I am of the opinion that the liberty interest protected by s. 7 has not been infringed because it includes neither the right of parents to choose (or refuse) medical treatment for their children nor, more generally, the right to bring up or educate their children without undue interference by the state. While this type of liberty ("parental liberty") is important and fundamental within the more general concept of the autonomy or integrity of the family unit, it does not fall within the ambit of s. 7.³⁰⁰

Lamer C.J. further went on to state that the right to liberty only protected liberty in the physical sense,³⁰¹ primarily within the criminal and judicial context.³⁰²

While four of the justices read the right to liberty narrowly, the majority of the court adopted a broader reading. La Forest J. wrote:

The above-cited cases give us an important indication of the meaning of the concept of liberty. On the one hand, liberty does not mean unconstrained freedom: see *Reference re s. 94(2) of the Motor Vehicle Act*

²⁹⁸ *Ibid* at para 64.

²⁹⁹ *Ibid* at para 212.

³⁰⁰ *Ibid* at para 1.

³⁰¹ *Ibid* at para 36

³⁰² *Ibid* at para 37.

(*British Columbia*), [1985] 2 S.C.R. 486 (per Wilson J., at p. 524); *R. v. Videoflicks Ltd.*, (sub nom. *R. v. Edwards Books & Art Ltd.*) [1986] 2 S.C.R. 713 (per Dickson C.J.C., at pp. 785-786). Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract Charter scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J. noted that the liberty interest was rooted in the fundamental concepts of human dignity, personal autonomy, privacy, and choice in decisions going to the individual's fundamental being. She stated, at p. 166:

Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.³⁰³

This tension between the narrow and broad reading of the liberty interest was resolved in the case of *Blencoe v British Columbia (Human Rights Commission)*.³⁰⁴ In *Blencoe*, the respondent was a legislator from British Columbia who was accused of sexual harassment by an employee.³⁰⁵ Two sexual harassment complaints were filed with the British Columbia Council of Human Rights.³⁰⁶ Due to the lengthy process undertaken by the British Columbia Council of Human Rights, the respondent accused filed an application for judicial review in which he alleged that an unreasonable delay had caused him prejudice.³⁰⁷ Over the course of the judicial review, the respondent also argued that his right to liberty and right to security of the person

³⁰³ *Ibid* at para 80.

³⁰⁴ *Blencoe*, *supra* note 42.

³⁰⁵ *Ibid* at para 3.

³⁰⁶ *Ibid*.

³⁰⁷ *Ibid* at para 18.

under s. 7 of the *Charter* had been violated by unreasonable delay.³⁰⁸ Writing for the majority, Bastarache J wrote:

Although there have been some decisions of this Court which may have supported the position that s. 7 of the *Charter* is restricted to the sphere of criminal law, there is no longer any doubt that s. 7 of the *Charter* is not confined to the penal context.³⁰⁹

Having determined that s. 7 also applies outside the criminal law context, Bastarache J determined the scope of the right to liberty:

The liberty interest protected by s.7 of the Charter is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare, supra*); to produce documents or testify (*Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425 (S.C.C.)); and not to loiter in particular areas (*R. v. Heywood*, [1994] 3 S.C.R. 761 (S.C.C.)). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), [1995] 1 S.C.R. 315 (S.C.C.), at p. 368, La Forest J., with whom L'Heureux-Dubé, Gonthier and McLachlin JJ. agreed, emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the Charter as a whole and that it protects an individual's personal autonomy:

... liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. ³¹⁰

This broad interpretation of the right to liberty – the right to make important and personal life decisions free from state interference – has since been endorsed by the Supreme Court of Canada

308 *Ibid* at para 23.

309 *Ibid* at para 45.

310 *Ibid* at para 49.

on a number of occasions.³¹¹ Therefore, when one is considering whether an entity is capable of enjoying the right to liberty under s. 7 of the *Charter*, there are three questions to be asked:

- 1) Does the entity have personal autonomy?
- 2) Is the entity capable of making important and fundamental personal decisions?
- 3) Is the entity capable of losing its physical liberty?

The Supreme Court of Canada has recognized that the purpose of the right to liberty is to protect personal autonomy on a number of occasions.³¹² Therefore, an entity will only be able to enjoy the right to liberty if that entity is autonomous. What does it mean to be autonomous? While issued within the context of a s. 15 claim, the Supreme Court of Canada recently shed light on the meaning of autonomy in the case of *Droit de la famille – 091768*

The principle of personal autonomy or self-determination, to which self-worth, self-confidence and self-respect are tied, is an integral part of the values of dignity and freedom that underlie the equality guarantee: *Law*, at para. 53; *Gosselin*, at para. 65. Safeguarding personal autonomy implies the recognition of each individual's right to make decisions regarding his or her own person, to control his or her bodily integrity and to pursue his or her own conception of a full and rewarding life free from government interference with fundamental personal choices: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 346, per Dickson J; *R. v. Morgentaler*, [1988] 1 S.C.R. 30(S.C.C.), at p. 164, per Wilson J.; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), at p. 554, per Lamer C.J., at pp. 587-88, per Sopinka J.; *Blencoe*, at para. 77, per Bastarache J.³¹³

Based on this definition, there are a number of different factors that courts can examine when determining an entity is autonomous. First, courts can examine evidence related to behaviour. Does the entity in question behave in ways that exhibit autonomous decision making? Does the

³¹¹ *Siemens v Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 SCR 6 at para 45, *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571 at para 85, *R v Clay*, 2003 SCC 75, [2003] SCR 735 at para 31, *Manitoba (Director of Child & Family Services) v C.(A.)*, 2009 SCC 30, [2009] 2 SCR 181 at para 100, *Carter v Canada (Attorney General)*, *supra* note 41 at para 64.

³¹² *R. v Morgentaler*, *supra* note 185 at para 289, *B(R) v Children's Aid Society of Metropolitan Toronto (B(R))*, *supra* 296 at para 80, *Blencoe v British Columbia (Human Rights Commission)*, *supra* note 42 at para 49.

³¹³ *Droit de la famille – 091768*, 2013 SCC 5, [2013] 1 SCR 61 at para 139. [emphasis added]

entity exhibit self-consciousness? Does the entity exhibit preferences relating to the way it lives its life? Some entities may actually be able to communicate these preferences themselves. One need only think of Koko, the gorilla who learned and regularly used sign language.³¹⁴ Similarly, artificial intelligence or extra-terrestrials could communicate their preferences with more sophisticated language. As our understanding of consciousness and autonomy improves, we should expect the emergence and recognition of additional behaviours signifying autonomy.

Second, courts can examine biological evidence. More particularly, in the case of organic entities like mammals, courts could examine neurological evidence. Neurological evidence, including evidence regarding brain structure and processes, could provide indirect evidence of autonomy. If an entity has a similar brain structure to that of human beings, this provides indirect evidence that the entity in question processes the world in a manner that is similar to human beings. In addition to providing indirect evidence of the capacity for autonomy, examining brain structure can provide a disqualifying criterion to many entities. For example, bacteria do not possess the brain structures necessary to support autonomy. We might expect the disqualification of many other entities on similar grounds.

The next factor that should be considered is whether the entity is capable of making important and fundamental personal decisions. In many ways, this analysis will rely on much of the same evidence examined with respect to an entity's autonomy. The ability to make important fundamental personal decisions is a natural extension of autonomy. However, while the capability of autonomy was focused on behavioural and biological evidence, this question should be answered with respect to case law. Over the last thirty years, the Supreme Court of Canada has recognized different "important and fundamental personal decisions". If an entity can demonstrate that it makes these types of decisions, this should be taken as evidence of the capacity of the ability to enjoy the right to liberty.

It is useful to review some of the "important and fundamental personal decisions" that have been recognized as worthy of s. 7 protection. To date, Canadian courts have recognized the following:

³¹⁴ *Drawing the Line*, supra 27 at 215.

- 1) Choice of medical treatment;³¹⁵
- 2) The creation of shelter to protect oneself from the elements;³¹⁶
- 3) The decision to terminate a pregnancy;³¹⁷
- 4) The decision to conceive a child with the person of your choice;³¹⁸
- 5) The decision to undergo physician-assisted death.³¹⁹

The comments of the *per curiam* court in *Carter v Canada (Attorney General)* also shed useful light on the phrase “important and fundamental personal decisions. The Court wrote:

In *Blencoe*, a majority of the Court held that the s. 7 liberty interest is engaged “where state compulsions or prohibitions affect important and fundamental life choices”: para. 49. In *A.C.*, where the claimant sought to refuse a potentially lifesaving blood transfusion on religious grounds, Binnie J. noted that we may “instinctively recoil” from the decision to seek death because of our belief in the sanctity of human life (para. 219). But his response is equally relevant here: it is clear that anyone who seeks physician-assisted dying because they are suffering intolerably as a result of a grievous and irremediable medical condition “does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live” (*ibid.*). The trial judge, too, described this as a decision that, for some people, is “very important to their sense of dignity and personal integrity, that is consistent with their lifelong values and that reflects their life's experience” (para. 1326). This is a decision that is rooted in their control over their bodily integrity; it represents their deeply personal response to serious pain and suffering. By denying them the opportunity to make that choice, the prohibition impinges on their liberty and security of the person. As noted above, s. 7 recognizes the value of life, but it also honours the role that autonomy and dignity play at the end of that life.³²⁰

Given this description – the right to liberty protects choices that deeply affect the manner in which people desire to live – we should expect that the above list will evolve over time as additional court cases are brought. When considering whether an entity is capable of making important and fundamental personal decisions, courts can examine whether the entity makes any of the previously recognized “important and fundamental personal decisions”. For example, if an

³¹⁵ *Manitoba (Director of Child & Family Services) v C.(A.)*, *supra* note 311 at paras 99-102.

³¹⁶ *Victoria (City of) v Adams*, *supra* note 290 at para 109.

³¹⁷ *R v Morgentaler*, *supra* note 185 at 171 [Wilson J.]

³¹⁸ *Susan Doe v Canada (AG)*, 84 OR (3d) 81, 276 DLR (4th) 127 at para 33.

³¹⁹ *Carter v Canada (Attorney General)*, *supra* note 41.

³²⁰ *Ibid* at para 68.

entity makes the decision to create shelter or actively chooses with whom to conceive offspring, this is evidence that an entity makes important and fundamental personal decisions.

It should also be noted that outside of “important and fundamental personal decisions”, s. 7 also protects the loss of physical liberty in a range of circumstances:

- 1) The possibility of penal imprisonment;³²¹
- 2) Changing prison conditions;³²²
- 3) Parole eligibility;³²³
- 4) Involuntary psychiatric detention;³²⁴
- 5) The possibility of extradition.³²⁵

Because s. 7 also protects the loss of physical liberty, an entity should also be able to demonstrate that it is capable of losing physical liberty before it is considered “everyone” under s. 7. Recall the decision *Irwin Toy*, which specifically noted that corporations cannot lose physical liberty because it is impossible to imprison a corporation.³²⁶

To summarize, before an entity will be considered “everyone” under s. 7 of the *Charter*, the entity must establish that it is capable of enjoying the right to liberty. A review of the jurisprudence reveals that s. 7 broadly protects three values– autonomy, personal decision making, and physical liberty. Therefore, when assessing this capability, these three factors should be considered:

- 1) Is the entity autonomous?
- 2) Is the entity capable of making important and fundamental personal decisions?
- 3) Is the entity capable of losing physical liberty?

³²¹ *Re B.C. Motor Vehicle Act*, *supra* note 15.

³²² *May v Ferndale Institution*, 2005 SCC 82, [2005] SCJ No 84.

³²³ *Cunningham v Canada*, [1993] 2 SCR 143, [1993] SCJ No 47.

³²⁴ *Ontario (Crown Attorney) v Hussein*, 191 CCC (3d) 113, 26 CR (6th) 368.

³²⁵ *Canada v Schmidt*, [1987] 1 SCR 500, [1987] SCJ No 24.

³²⁶ *Irwin Toy*, *supra* note 3 at para 95.

The Right to Security of the Person

What does it mean to be capable of enjoying the right to security of the person? The Supreme Court of Canada first truly considered the nature of the right to security of the person in *R v Morgentaler*.³²⁷ At issue in *R v Morgentaler* was whether prohibitions on abortion found in the *Criminal Code* were unconstitutional.³²⁸ One alleged ground of unconstitutionality was that the prohibitions violated s. 7 of the *Charter*.³²⁹ In a 5-2 decision, the majority of the court ruled that the prohibitions on abortion did violate s. 7 rights. However, the decision issued in *R v Morgentaler* was not unanimous and three different conceptions of the right to security of the person were given. It is useful to examine each of these conceptions.

Dickson CJ, with Lamer J concurring, wrote:

The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person.³³⁰

Beetz J, with Estey J concurring, had a different conception of the right to security of the person. Beetz J wrote:

Generally speaking, the constitutional right to security of the person must include some protection from state interference when a person's life or health is in danger. The Charter does not, needless to say, protect men and women from even the most serious misfortunes of nature. Section 7 cannot be invoked simply because a person's life or health is in danger. The state can obviously not be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy in and of itself represents a danger to her life or health. There must be state intervention for "security of the person" in s. 7 to be violated.

If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. "Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction.³³¹

³²⁷ *R v Morgentaler*, *supra* note 185.

³²⁸ *Ibid* at para 1.

³²⁹ *Ibid* at para 4.

³³⁰ *Ibid* at para 25.

³³¹ *Ibid* at paras 97-98.

Wilson J, who concurred with the result, also framed the right to security of the person differently. Wilson J wrote:

I agree with the Chief Justice and with Beetz J. that the right to "security of the person" under s. 7 of the Charter protects both the physical and psychological integrity of the individual. State-enforced medical or surgical treatment comes readily to mind as an obvious invasion of physical integrity. Lamer J. held in *Mills v. R.*, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, 21 C.R.R. 76, 16 O.A.C. 81, 67 N.R. 241, that the right to security of the person entitled a person to be protected against psychological trauma as well — in that case the psychological trauma resulting from delays in the trial process under s. 11(b) of the Charter. He found that psychological trauma could take the form of "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs and uncertainty as to outcome and sanction" [p. 920]. I agree with my colleague and I think that his comments are very germane to the instant case because, as the Chief Justice and Beetz J. point out, the present legislative scheme for the obtaining of an abortion clearly subjects pregnant women to considerable emotional stress as well as to unnecessary physical risk. I believe, however, that the flaw in the present legislative scheme goes much deeper than that. In essence, what it does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is not, in my view, just a matter of interfering with her right to liberty in the sense (already discussed) of her right to personal autonomy in decision-making, it is a direct interference with her physical "person" as well. She is truly being treated as a means — a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this position have any sense of security with respect to her person? I believe that s. 251 of the *Criminal Code* deprives the pregnant woman of her right to security of the person as well as her right to liberty.³³²

The Supreme Court of Canada also provided illuminating comments in the case of *Rodriguez v British Columbia (Attorney General)*.³³³ Writing for the majority, Sopinka J wrote:

In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least,

³³² *Ibid* at para 304. [emphasis added]

³³³ *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342.

control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, Lamer J. also expressed this view, stating at p. 1177 that "[s]ection 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.³³⁴

The splitting of the right to security of the person into two branches – physical integrity and psychological – was continued in later jurisprudence and is worth exploring in greater detail.

What is physical integrity? Stewart provides a useful summary:

In general, it can be said that state conduct that involves a non-consensual application of force to a person's body engages security of the person. There are many examples in the caselaw that illustrate this point: the non-consensual taking of bodily samples for forensic DNA analysis or other investigative purposes, the non-consensual taking of fingerprints, the use of force by the police to effect an arrest or control a suspect, the removal of a child for adoption, and the forcible provision of beneficial but unwanted medical treatment all engage the interest in security of the person.³³⁵

As Stewart points out, security of the person is engaged when the state applies non-consensual force to the body of an individual. It is helpful to examine the philosophical reasoning behind this protection. In the case of *R v Stillman*, where the Supreme Court of Canada ruled that it was a violation of s. 7 to take bodily samples without consent,³³⁶ the Court wrote:

The taking of the dental impressions, hair samples and buccal swabs from the accused also contravened the appellant's s. 7 Charter right to security of the person. The taking of the bodily samples was highly intrusive. It violated the sanctity of the body which is essential to the maintenance of human dignity. It was the ultimate invasion of the appellant's privacy. See *Pohoretsky*, *supra*. In *Dyment*, *supra*, at pp. 431-32, La Forest J. emphasized that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity". Quite simply, the taking of the

³³⁴ *Ibid* at para 21.

³³⁵ *Fundamental Justice*, *supra* note 14 at 83-84. [emphasis added]

³³⁶ *R v Stillman*, [1997] 1 SCR 607, 309 DLR (4th) 1 at para 51.

samples without authorization violated the appellant's right to security of his person and contravened the principles of fundamental justice.³³⁷

In addition to protecting personal privacy, autonomy, and human dignity, the physical integrity branch of the right to security of the person protects the physical well-being of the body. In *R v Nasogaluak*, the Supreme Court of Canada ruled that the use of excessive force by state authorities during arrest violated the right to security of the person.³³⁸ In this case, the suspect was punched several times during the course of his arrest and incurred broken ribs and a punctured lung.³³⁹ The Court wrote:

Further, I believe that a breach is easily made out on the facts of this case. The substantial interference with Mr. Nasogaluak's physical and psychological integrity that occurred upon his arrest and subsequent detention clearly brings this case under the ambit of s. 7 (*R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519). The excessive use of force by the police officers, compounded by the failure of those same officers to alert their superiors to the extent of the injuries they inflicted on Mr. Nasogaluak and their failure to ensure that he received medical attention, posed a very real threat to Mr. Nasogaluak's security of the person that was not in accordance with any principle of fundamental justice.³⁴⁰

To summarize, the concept of physical integrity protects an individual's body from physical harm. In addition to physical harm, physical integrity protects the sanctity of the body, personal autonomy, privacy, and human dignity.

What is psychological integrity? The Supreme Court of Canada described psychological integrity in *New Brunswick (Minister of Health and Community Services) v G(J)(G(J))*.³⁴¹ In this case, the appellant's three children were removed from her custody and placed in the care of the Minister of Health and Community Services of New Brunswick.³⁴² The appellant was indigent and could not afford legal counsel.³⁴³ After being denied for legal aid,³⁴⁴ the appellant brought an

³³⁷ *Ibid.* [emphasis added]

³³⁸ *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206.

³³⁹ *Ibid* at paras 10-11.

³⁴⁰ *Ibid* at para 38.

³⁴¹ *New Brunswick (Minister of Health and Community Services) v G(J)(G(J))*, [1999] 3 SCR 46, [1999] SCJ No 47 (QL).

³⁴² *Ibid* at para 3.

³⁴³ *Ibid* at para 5.

³⁴⁴ *Ibid.*

application for an order directing the Minister to pay for legal counsel who would represent the appellant during the custody proceeding.³⁴⁵ This application also alleged a violation of s. 7.³⁴⁶

Lamer C.J. wrote:

For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.³⁴⁷

The Supreme Court of Canada affirmed this approach to psychological integrity in the case of *Blencoe v British Columbia (Human Rights Commission)*.³⁴⁸ The Supreme Court wrote:

The principle that the right to security of the person encompasses serious state-imposed psychological stress has recently been reiterated by this Court in *G. (J.)*, *supra*. At issue in *G. (J.)* was whether relieving a parent of the custody of his or her children restricts a parent's right to security of the person. Lamer C.J. held that the parental interest in raising one's children is one of fundamental personal importance. State removal of a child from parental custody thus constitutes direct state interference with the psychological integrity of the parent, amounting to a "gross intrusion" into the private and intimate sphere of the parent-child relationship (at para. 61). Lamer C.J. concluded that s. 7 guarantees every parent the right to a fair hearing where the state seeks to obtain custody of their children (at para. 55). However, the former Chief Justice also set boundaries in *G. (J.)* for cases where one's psychological integrity is infringed upon. He referred to the attempt to delineate such boundaries as "an inexact science" (para. 59).

Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, *supra*, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G. (J.)*, at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the

345 *Ibid* at para 6.

346 *Ibid*.

347 *Ibid* at para 60.

348 *Blencoe*, *supra* note 42.

psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. These two requirements will be examined in turn.³⁴⁹

A violation of the psychological integrity branch of s. 7 has been found in other cases. For example, in *Rodriguez v British Columbia* and *Carter v Canada*, the Supreme Court of Canada found that the prohibition on physician-assisted death violated psychological integrity.³⁵⁰ Similarly, the Supreme Court of Canada found a violation of psychological integrity in *Chaoulli c Quebec* because delays in receiving medical treatment caused serious psychological suffering.³⁵¹

Having reviewed the scope of the right to security of the person, we can return to our original question: what does it mean to be capable of enjoying the right to security of the person? This question can be broadly broken down into two categories:

- 1) Does the entity have physical integrity?
- 2) Does the entity have psychological integrity?

How does one tell if an entity has physical integrity? As the jurisprudence demonstrates, physical integrity protects more than just the physical well-being. The right to security of the person protects personal autonomy,³⁵² human dignity,³⁵³ privacy,³⁵⁴ and the individual's ability to make decisions about his or her own body.³⁵⁵ Therefore, whether an entity has physical integrity does not solely depend on whether the entity has a body that can be harmed. All organisms have instinctual responses towards pleasurable and harmful stimuli. When a reptile experiences painful stimuli, it has an instinctual response to remove itself from the presence of

³⁴⁹ *Ibid* at paras 56-57.

³⁵⁰ *Rodriguez v British Columbia (AG)*, *supra* note 333, *Carter v Canada*, *supra* note 41.

³⁵¹ *Chaoulli c Quebec*, *supra* note 275 at para 116.

³⁵² *Rodriguez v British Columbia (Attorney General)*, *supra* note 333 at para 21.

³⁵³ *R v Stillman*, *supra* note 336 at para 51.

³⁵⁴ *Ibid*.

³⁵⁵ *Rodriguez v British Columbia (Attorney General)*, *supra* note 333 at para 21.

this painful stimuli. An entity must also have personal autonomy, privacy, human dignity,³⁵⁶ and the capacity to make decisions about its own body.

When considering whether an entity has physical integrity, the court can examine a number of different factors. First, the court can examine whether the entity has personal autonomy. A

³⁵⁶ The concept of “human dignity” has been explored within the context of s. 15 of the *Charter*. In *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 at para 53, the Supreme Court of Canada defined “human dignity” as:

“There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.) at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?”

Based on this definition, it is not clear that human dignity cannot be extended to non-humans. As this thesis has explored, some non-humans may be capable of personal autonomy, self-determination, physical and psychological integrity, and have an interest in the law treating them fairly and with sensitivity to needs, capacities, and merits. Given the Living Tree Doctrine, it may be possible to extend the concept of “human dignity” to a more inclusive “person dignity” that includes some non-humans; Note also Switzerland’s *Animal Welfare Act*, 455 Tierschutzgesetz vom 16. Dezember 2005 (TSchG). The purpose of the Act is to “protect the dignity and welfare of animals”. The term “dignity” is defined as “inherent worth of the animal that has to be taken into account when handling it. If any stress imposed on the animal cannot be justified by overriding interests, this constitutes a disregard for the animal’s dignity. Stress is deemed to be present in particular if pain, suffering or harm is inflicted on the animal, if it is exposed to anxiety or humiliation, if there is major interference with its appearance or its abilities or if it is excessively instrumentalised”.

finding of personal autonomy will militate in favour of physical integrity. Similar to the analysis performed under the right to liberty, a court can examine behavioural and neurological evidence to determine whether personal autonomy is present. Does the entity have neurological or brain structures that could support personal autonomy? Does the entity display signs of self-consciousness? Is the entity aware that it is a separate being in the universe and has a body? Does the entity exhibit preferences regarding its own body and life?

With respect to psychological integrity, the question will be whether the entity in question is capable of experiencing the type of psychological suffering that is associated with a violation of psychological integrity. As the Supreme Court has noted, not all mental suffering or stress will give rise to a violation of psychological suffering.³⁵⁷ State conduct must give rise to a “serious and profound effect on a person’s psychological integrity” but “need not rise to the level of nervous shock or psychiatric illness”.³⁵⁸ When considering whether psychological integrity has been violated, the court should therefore ask whether the entity is capable of experiencing serious and profound psychological suffering. The court can examine behavioural signs – does the entity exhibit signs that it is suffering from psychological stress? The court can also examine zoological and neurological evidence – does the entity have the necessary biological components to experience serious and profound psychological suffering. While psychiatric illness is not necessary to breach psychological integrity, the capability of psychiatric illness in an entity is evidence that it is sufficiently capable of psychological suffering.

To summarize, an entity will be found to be capable of enjoying the right to security of the person if the entity has physical and psychological integrity. Physical integrity protects more than just physical well-being, but also protects personal autonomy, human dignity, privacy, and the ability to make decisions about one’s own body. Accordingly, an entity will have physical integrity if it is autonomous and if it is capable of making decisions about its own body. For an entity to have psychological integrity, an entity must be capable of experiencing deep and profound psychological suffering. In making this assessment, courts can look to behavioural

³⁵⁷ *Blencoe, supra* note 42 at paras 56-57.

³⁵⁸ *New Brunswick (Minister of Health and Community Services) v G(J)(G(J)), supra* note 341 at paras 60-61.

evidence and biological evidence. The court can also examine whether the entity in question is capable of psychiatric illness.

The Ability to Enjoy SS. 8, 9, 10 and 12

Borowski v Canada demonstrated that sections 8, 9, 10 and 12 of the *Charter* can be used to help determine whether an entity has s. 7 rights.³⁵⁹ In *Borowski v Canada*, the appellant argued that fetuses were included in the word “everyone” of s. 7 and therefore were entitled to constitutional rights.³⁶⁰ Saskatchewan Court of Appeal disagreed and determined that fetuses are not included within the scope of “everyone”.³⁶¹ The Saskatchewan Court of Appeal arrived at this decision by recognizing that the word “everyone” is also used in ss. 8, 9 and 10 of the *Charter*.³⁶² Furthermore, ss. 8, 9, and 10 have a special relationship with s. 7.³⁶³

Because ss. 8, 9, and 10 are specific illustrations of s. 7, the word “everyone” in these sections should have the same meaning as the word “everyone” in s. 7. The Saskatchewan Court of Appeal wrote:

The approach taken by Mr. Justice Matheson in the present case was not unlike that. He observed that the expression "everyone" found in s. 7 is also found in each of s. 8 (the right to be secure against unreasonable search and seizure), s. 9 (the right not to be arbitrarily detained or imprisoned) and s. 10 (the right to counsel). He noted that the term "everyone" as it applies in relation to these specifically defined rights clearly does not embrace the foetus, and concluded that the same term in s. 7 could not therefore be reasonably construed to do so.

Having regard for the relationship between s.7 and ss.8 through 14, as described in *Re B.C. Motor Vehicle Act*, and for the fact that the elements of life, liberty and security of the person, while distinct, are nevertheless related concepts, I believe, as did Mr. Justice Matheson, that the guarantees of s. 7 were not intended by the framers of the Charter to extend to the unborn.³⁶⁴

³⁵⁹ *Borowski v Canada*, *supra* note 7.

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² *Ibid* at paras 63-64.

³⁶³ *Re B.C. Motor Vehicle Act*, *supra* note 15 at 501-502.

³⁶⁴ *Borowski v Canada*, *supra* note 7 at paras 63-64.

Because of this relationship, the Saskatchewan Court of Appeal essentially asked, “is a fetus capable of enjoying the rights contained in ss. 8, 9, and 10?” It was determined that fetuses are not capable of enjoying these rights and therefore fall outside the scope of the word “everyone”.

It should also be noted that this analysis is not determinative of whether an entity can enjoy s. 7 rights. As we have seen, some entities are capable of enjoying ss. 8, 9, 10 and 12 but are not capable of enjoying s. 7. Corporations, for example, are entitled to s. 8³⁶⁵ and s. 11,³⁶⁶ but not s. 7.³⁶⁷ While, the ability or inability to enjoy ss. 8, 9, 10, and 12 is not determinative of whether an entity is “everyone” for the purposes of s. 7, it can provide useful context for Canadian courts.

S. 8

S. 8 states:

8. Everyone has the right to be secure against unreasonable search or seizure.³⁶⁸

S. 8 protects people and not objects.³⁶⁹ In a s. 8 analysis, the question is whether the individual claiming the right had a reasonable expectation of privacy.³⁷⁰ Therefore, when considering whether an entity or non-human person is capable of enjoying s. 8, the question is whether privacy is a meaningful concept to the entity in question. Before an entity can have a “reasonable expectation of privacy”, it must be established that privacy is a useful or meaningful concept for the entity. It makes no sense to state that “bacteria have a reasonable expectation of privacy” because privacy is not a useful concept for bacteria.

What exactly is "privacy"? The answer to this question is debated. Daniel Solove, a privacy scholar, summarized the various aspects of privacy into six categories:

- 1) the right to be let alone
- 2) limited access to the self - the ability to shield oneself from unwanted access

³⁶⁵ *Southam Inc. v Director of Investigation and Research of the Combines Investigation Branch et al*, *supra* note 232.

³⁶⁶ *R v CIP*, *supra* note 218.

³⁶⁷ *Irwin Toy*, *supra* note 3.

³⁶⁸ *Supra* note 1 at s. 8. [emphasis added]

³⁶⁹ *R v Edwards*, [1996] 1 S.C.R. 128 at para 45.

³⁷⁰ *Ibid.*

- 3) secrecy - concealment of certain matters from others
- 4) control over personal information - the ability to exercise control over information about oneself
- 5) personhood - the protection of one's personality, individuality, and dignity; and
- 6) intimacy - control over, or limited access to, one's intimate relationships or aspects of life.³⁷¹

This conception of privacy places emphasis on personal autonomy. These six categories identified by Solove all relate to the ability to control one's own life and living in a manner of one's own choosing. Accordingly, the concept of privacy is meaningless with respect to some entities. It cannot be seriously argued that the concept of privacy is meaningful to bacteria or insects because neither bacteria or insects have personal autonomy. Without personal autonomy, none of Solove's privacy categories are engaged. Bacteria do not have a self, do not control personal information, nor do they have personhood. Privacy is therefore not a useful concept for bacteria.

However, the same cannot be said for all entities. Under the Solove conception of privacy, we can expect entities who display personal autonomy to be capable of enjoying privacy and therefore be capable of having a reasonable expectation of privacy. Undoubtedly it is a strange exercise to imagine that chimpanzees or other animals have a reasonable expectation of privacy. It is perhaps easier to conceive of a non-human person having a reasonable expectation of privacy if the non-human person is an artificial intelligence, robot, or extra-terrestrial. If we examine Samantha the artificial intelligence from the movie *Her*, it becomes easier to see how a non-human person has the ability to enjoy a reasonable expectation of privacy. Samantha exhibited personal autonomy and the capability of making decisions about her own life. As Samantha worked through various personal issues, she intentionally chose to withhold information about herself and her activities from Theodore, the movie's other protagonist.³⁷² In this instance, Samantha clearly had the use for a reasonable expectation of privacy because she decided that it was in her best interests to keep information about herself private until the right

³⁷¹ Daniel J Solove, *Understanding Privacy* (Cambridge: Harvard University Press, 2008) at 12-13.

³⁷² *Her*, supra note 111.

opportunity. Without privacy in this regard, Samantha’s personal autonomy would have been undermined.

Therefore, when considering whether an entity is capable of enjoying s. 8, it is appropriate to ask whether privacy is a meaningful, useful, or consequential concept for the entity in question. If it is, the entity will be capable of having a reasonable expectation of privacy. Central to this analysis will be whether the entity has sufficient personal autonomy so that privacy becomes a meaningful concept.

S. 9

S. 9 of the *Canadian Charter of Rights and Freedoms* states:

Everyone has the right not to be arbitrarily detained or imprisoned.³⁷³

S. 9 protects individuals from being arbitrarily detained or imprisoned by the police or public authorities.³⁷⁴ The term “detained” refers “to a suspension of the individual’s liberty interest by a significant physical or psychological restraint”.³⁷⁵ The term “imprisoned” refers to “total or near-total loss of liberty”.³⁷⁶

When considering whether an entity is capable of enjoying s. 9, the question to be asked is whether the entity is capable of being arbitrarily imprisoned or detained by police or public authorities. In the case of a fetus, the Saskatchewan Court of Appeal noted that a fetus cannot enjoy s. 9 of the *Charter* because a fetus cannot be arbitrarily detained or imprisoned by public authorities.³⁷⁷ Other entities and non-human persons, however, have separate physical bodies and therefore it is likely that they can be arbitrarily imprisoned or detained.

S. 10

S. 10 of the *Charter* states:

Everyone has the right on arrest or detention

³⁷³ *Supra* note 1. [emphasis added]

³⁷⁴ *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353.

³⁷⁵ *Ibid* at 44.

³⁷⁶ *Ibid* at 29.

³⁷⁷ *Borowski v Canada*, *supra* note 7 at para 64.

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.³⁷⁸

Arrested or detained individuals receive rights under s. 10 of the Charter. In *Borowski v Canada*, the Saskatchewan Court of Appeal³⁷⁹ recognized that s. 10 rights are meaningless for a fetus. A fetus cannot be neither arrested nor detained and therefore has no use for s. 10 rights.

Can other entities or non-human persons have s. 10 rights? The answer is not immediately clear. On one hand, an animal being arrested for a crime is unlikely in present-day Canada. It is true that in the past, animals have been charged with crimes. For example, in 1494 a pig was hanged and strangled for infanticide in Aisne, France.³⁸⁰ Similarly, in 1499 a pig was hanged for having killed an infant in Chartres, France.³⁸¹ However, these criminal trials took place long ago and in different legal systems. It is unlikely that an animal would ever be charged with a crime in Canada. Even if charged with a crime, it is unlikely that an animal can have the necessary *mens rea* to be found guilty. In this way, non-human persons are like fetuses – s. 10 rights are unlikely to be needed within a criminal context.

However, the similarities between fetuses and other entities only go so far. After all, some non-humans have independent bodies, act with autonomy, and understand the actions of others. Some non-humans, unlike fetuses, can commit the physical actions associated with crimes (i.e. *actus reus*). While uncommon, non-human persons do occasionally commit acts of violence upon humans. For example, the SeaWorld orca Tilikum has been involved in the deaths of three individuals over 20 years.³⁸² While Tilikum has not received punishment for these actions, some

³⁷⁸ *Supra* note 1 at s. 10. [emphasis added]

³⁷⁹ *Borowski v Canada*, *supra* note 7 at paras 63-64.

³⁸⁰ E.P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (Union: The Lawbook Exchange, 1998) at 354.

³⁸¹ *Ibid* at 352.

³⁸² *The Tilikum Transaction*, Frontline online:
 <<http://www.pbs.org/wgbh/pages/frontline/shows/whales/seaworld/tilikum/>>
 Reuters, *Corpse is Found on Whale*, *The New York Times* (July 7, 1999) online:
 <<http://www.nytimes.com/1999/07/07/us/corpse-is-found-on-whale.html>>

advocated for Tilikum to be euthanized.³⁸³ Other non-human persons have been killed after committing acts of violence. The case of the chimpanzee Travis, who was shot and killed by police following a mauling, is one such example.³⁸⁴

Non-human persons can therefore commit the *actus reus* of crimes and in certain circumstances, they are punished for committing such acts. While it is unlikely that a non-human would ever be charged with a criminal offence in Canada, some non-humans could nonetheless be subject to state-sanctioned punishment. Given this reality, it is not unreasonable to argue that non-human persons can enjoy s. 10 rights. The right to retain counsel would ensure non-human persons receive legal representation and due process. Similarly, non-human persons have an interest in determining the validity of their detention. Non-human persons are regularly detained in institutions and s. 10(c) would be a useful tool to challenge such detention. As demonstrated in *Tommy's Case*, *habeas corpus* is a reasonable argument with respect to non-human persons.³⁸⁵

To summarize, s. 10 of the *Charter* provides rights to an arrested or detained individual. Unlike the fetus, it is clear that non-human persons are capable of enjoying s. 10 rights. Non-human persons are unlikely to be formally “arrested”. However, non-human persons are regularly detained by institutions, including public institutions. Additionally, non-human persons are capable of committing *actus reus* of criminal offences, including violent offences. It is also possible for a non-human person to be punished at the hands of authorities, through death or imprisonment. The possibility of such imprisonment and punishment suggests the need of s. 10 rights for non-human persons. Therefore, when considering whether an entity is capable of enjoying s. 10, the question to ask is whether the entity is capable of being subject to state-

SeaWorld trainer killed by killer whale, CNN (February 25, 2010) online:
<<http://www.cnn.com/2010/US/02/24/killer.whale.trainer.death/index.html>>.

³⁸³ Ed Pilkington, *Killer Whale Tilikum to be spared after drowning trainer by ponytail*, *The Guardian* (February 25, 2010) online:
<<https://www.theguardian.com/world/2010/feb/25/killer-whale-tilikum-drowned-trainer-hair>>

³⁸⁴ Andy Newman & Anahad O’Connor, *Woman Maulled by Chimp Is Still in Critical condition*, *The New York Times* (February 17, 2009) online:
<<https://www.nytimes.com/2009/02/18/nyregion/18chimp.html>>.

³⁸⁵ *Tommy’s Case*, *supra* note 98.

sanctioned punishment, whether through imprisonment or corporeal punishment. If so, this indicates a capability of enjoying s. 10 rights.

S. 12

While s. 12 was not specifically mentioned in any of the jurisprudence that considered the word “everyone”, s. 12 is one of the legal rights and it also uses the word “everyone”. It is therefore appropriate to consider it along with ss. 8, 9, and 10. S.12 of the *Charter* states:

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.³⁸⁶

S. 12 of the *Charter* protects individuals from punishment that outrages the conscience of the public, degrades human dignity, is arbitrarily imposed, or goes beyond what is necessary to achieve a valid social aim.³⁸⁷

Is it possible for a non-human to enjoy s. 12 of the *Charter*? The answer to this question will undoubtedly depend on the entity in question. It is possible for some non-humans to receive state-sanctioned punishment. The fact that state-sanctioned punishment is possible for non-humans implies that non-humans are also capable of enjoying s. 12. Only where state-sanctioned punishment or treatment is not possible would s. 12 rights become irrelevant.

Some attention must be paid to the fact that a claim under s. 12 of the *Charter* must demonstrate that the punishment outrages the conscience of the public, degrades human dignity, is arbitrarily imposed, or goes beyond what is necessary to achieve a valid social aim.³⁸⁸ For a non-human to enjoy s. 12, it must be established that one of these four factors are engaged by the punishment or treatment. The answer to this question will likely depend on the entity and type of punishment in question. For example, a non-human cannot avail itself of s. 12 on the grounds that its human dignity was degraded. A non-human animal, a chimpanzee for example, is not human. Accordingly, it does not have human dignity that can be degraded. Perhaps a new conception of dignity, “non-human person dignity”, will be developed, but that is not yet the case.

³⁸⁶ *Supra* note 1 at s. 12.

³⁸⁷ *R v Smith*, [1987] 1 SCR 1045, 40 DLR (4th) at para 17.

³⁸⁸ *Ibid.*

While s. 12 would not be available to a chimpanzee under the degradation of human dignity ground, that same chimpanzee could enjoy s. 12 based on one of the three other grounds: 1) outrages the conscience of the public; 2) the punishment is arbitrarily imposed; or 3) the punishment goes beyond what is necessary to achieve a social aim. It is possible to conceive of punishment of a chimpanzee that outrages the conscience (*e.g.* torture), punishment that is arbitrarily imposed (*e.g.* punishing the chimpanzee for no reason), or punishment that goes beyond what is necessary to achieve a social aim.

Therefore, when considering whether a non-human person is capable of enjoying s. 12, it is appropriate to ask whether the entity in question is capable of receiving state-sanctioned punishment that violates one of the four recognized grounds.

Jurisprudential and Comparative Factors

In addition to considering whether an entity is capable of enjoying the rights contained in ss. 7, 8, 9, 10, and 12, a review of Canadian jurisprudence reveals that it is also appropriate to examine other domains of the law and jurisprudence from foreign jurisdictions.³⁸⁹

In the course of interpreting the word “everyone”, Canadian courts examined jurisprudence from other domains of Canadian law on a number of occasions. For example, in *Borowski v Canada*, the Saskatchewan Court of Appeal examined tort law,³⁹⁰ property law,³⁹¹ and family law.³⁹² In each of these domains of law, a fetus had never been considered as a person. This militated against recognizing the fetus as a person in constitutional law. Similarly, when considering whether a non-human is “everyone” under s. 7 of the *Charter*, Canadian courts can examine jurisprudence from other domains of Canadian law. If there is a pattern of treating the entity as something more than property or something more than a mere animal, this would militate in favour of including it under the scope of the word “everyone”.

³⁸⁹ *Tremblay c Daigle*, *supra* note 199, *Irwin Toy*, *supra* note 3, *Borowski v Canada*, *supra* note 7, *R v CIP*, *supra* note 218.

³⁹⁰ *Borowski v Canada*, *supra* note 7 at paras 31-34.

³⁹¹ *Ibid* at paras 35-41.

³⁹² *Ibid* at paras 42-43.

The same exercise can be performed with respect to jurisprudence from foreign jurisdictions. Given the interconnected nature of today's world, Canadian judges should take advantage of the experiences of other legal systems. A good example of this phenomenon is the Argentinian case of *Asociacion de Funcionarios v GCBA*,³⁹³ where it was recognized that an orangutan is a person under a section of the Argentinian constitution. While the Argentinian constitution is quite different than the *Charter*, the reasoning and logic used by the Argentinian court is illuminating and can be leveraged within a Canadian context.

As legal systems around the world begin to consider whether personhood should be extended to non-humans, the Canadian legal system should take advantage of these experiences. In this way, the Canadian legal system can learn from the successes and mistakes of foreign legal systems and maintain and improve its own system. If there is foreign jurisprudence that treats an entity as a person, this militates in favour of recognizing that entity as "everyone".

Summary of the "Everyone Test"

In addition to a new definition of "everyone", this Chapter proposes that the "Everyone Test" be applied to non-human entities to determine whether a non-human entity is "everyone". This test can be summarized as the following:

1. Is the entity capable of enjoying the rights contained in s. 7?
 - a. Is the entity capable of enjoying the right to life?
 - b. Is the entity capable of enjoying the right to liberty?
 - c. Is the entity capable of enjoying the right to security of the person?
2. Is the entity capable of enjoying the rights contained in ss. 8, 9, 10 and 12?
3. Has the entity been recognize as a person in other areas of the law (*e.g.* family law, property law)?
4. Has the entity been recognized as a person in foreign jurisdictions?

By applying these four factors, it is possible to definitively determine whether a non-human entity is "everyone" for the purposes of s. 7.

³⁹³ *Asociacion de Funcionarios v GCBA*, *supra* note 87.

Is the Reformulation Less Problematic than *Irwin Toy*?

In Chapter 1 of this thesis, a number of issues with the *Irwin Toy* definition were identified. It was determined that the *Irwin Toy* definition contained two mutually exclusive lines of reasoning: the Capability Argument and the Human-Only Argument. These two arguments were in conflict because it is possible for non-humans to be capable of enjoying s. 7 rights. Furthermore, Chapter 1 of this thesis identified a number of contextual and jurisprudential problems with the Human-Only Argument:

- 1) it is contrary to the *Charter* interpretative principle of “purposive interpretation”;
- 2) it is contrary to two principles of fundamental justice;
- 3) it is contrary to the values of a liberal-democratic society;
- 4) it ignores developments in foreign jurisdictions; and
- 5) it is incapable of evolving with developments in technology.

Because these issues provided the justification for revisiting *Irwin Toy* and eliminating the Human-Only Argument, it is therefore necessary to ask whether these issues are resolved under the new interpretation of “everyone” and the “Everyone Test”?

The Capability Argument versus the Human Only Argument

One issue identified by this thesis was the internal tension contained in the *Irwin Toy* interpretation of the word “everyone”. On the one hand, *Irwin Toy* justified denying s. 7 rights to corporations because corporations are incapable of enjoying s. 7 rights.³⁹⁴ Implicit in this line of reasoning is that entities capable of enjoying s. 7 rights are “everyone”.³⁹⁵ On the other hand, *Irwin Toy* also stated that only human beings are “everyone”.³⁹⁶ As this thesis pointed out, this tension results in a troublesome situation where some non-human could be denied s. 7 rights despite having the same abilities and characteristics of human beings. Furthermore, Canadian courts are unable to determine who is “everyone”. Is this situation resolved by the new definition and the “Everyone Test”?

³⁹⁴ *Irwin Toy*, *supra* note 3 at para 97.

³⁹⁵ See section “The Problematic Nature of *Irwin Toy*”.

³⁹⁶ *Irwin Toy*, *supra* note 3 at para 97.

Because the new definition contains no references to the idea that only humans are included in the word “everyone”, the tension between the Capability Argument and the Human Only Argument is resolved. The one remaining reference to human beings in the new definition is merely to reinforce the notion that all human beings are entitled to s. 7 rights independent of the Capability Argument. The Capability argument only comes into play where it is alleged that a non-human has s. 7 rights.

If we were to re-analyze the extra-terrestrial thought experiment under the new definition, the result is significantly less problematic. As a reminder, the thought-experiment stated:

Suspend disbelief for a moment and suppose that an extra-terrestrial landed in a Canadian city. The extra-terrestrial emerges from the spaceship and is alive and has a physical body. Interactions with the extra-terrestrial show that it is autonomous and self-conscious. While it does not communicate in a language known to human beings, it communicates with intention. All told, the extra-terrestrial exhibits the same characteristics and abilities of human being and is capable of enjoying s. 7 rights. Besides being a literal illegal alien, the extra-terrestrial has not committed any crimes. To control this unexpected situation, Canadian authorities quickly take the extra-terrestrial into government custody.³⁹⁷

Under the *Irwin Toy* interpretation, it was determined that despite its advanced abilities and consciousness, the extra-terrestrial would not be afforded s. 7 rights because it was not a human being. Equally problematic would be that a judge would be unable to resolve this tension. Under the new definition, however, a different result is reached. The extra-terrestrial would not be summarily denied s. 7 rights because it is not human. The question will be whether the extra-terrestrial can enjoy the right to life, liberty, and security of the person. A Canadian court can resolve this issue by applying the “Everyone Test” to the evidence that has been presented before it. Accordingly, the primary tension presented by the *Irwin Toy* definition is resolved.

Contrary to Purposive Interpretation?

Is the new definition contrary to *Charter* interpretative techniques? Namely, is the new definition a purposive interpretation of the word “everyone”? As this thesis earlier identified, the Human-Only Argument is not a purposive interpretation because limiting s. 7 rights to human

³⁹⁷ *Ibid.*

beings elevates biological taxonomy over the purposes of s. 7.³⁹⁸ Due to the Human-Only Argument, the *Irwin Toy* interpretation simply stated that only human beings could enjoy s. 7 rights. The *Irwin Toy* interpretation does not adequately consider whether the purpose of s. 7 rights can be fulfilled with respect to non-humans. Does the new definition avoid this problem?

In the author's view, the new definition avoids this problem and is a purposive approach for two primary reasons. First, the new definition is not limited exclusively to human beings and therefore does not elevate biological taxonomy above purpose. Second, the "Everyone Test" is a purposive analysis because it asks whether the entity in question is capable of enjoying s. 7 rights. This question can be phrased a different way: "can the purposes of s. 7 be fulfilled with respect to this entity"? This approach was recognized as purposive in *R v CIP*.³⁹⁹ Accordingly, the new definition and "Everyone Test" accord with purposive interpretation.

Contrary to Principles of Fundamental Justice?

This thesis explored how the Human-Only Argument is contrary to two principles of fundamental justice: the norm against arbitrariness and the norm against gross disproportionality.⁴⁰⁰ While applying the principles of fundamental justice to the interpretation of s. 7 itself is a novel application of the principles of fundamental justice (principles of fundamental justice are normally used with respect to legislation or governmental decision), it is not unreasonable to expect interpretations of the s. 7 be consistent with the values it is designed to protect. Does the new definition accord with these two principles of fundamental justice?

The norm against arbitrariness states that:

It has been said that a law is arbitrary if it is not necessary to achieve the objective of the legislation in question, "if it bears no relation to, or is inconsistent with, the objective that lies behind the legislation," if there is no "real connection on the facts to the purpose the interference is said to serve, or if it is not "rationally connected to a reasonable apprehension of harm". At minimum, to avoid being arbitrary, a law or decision must have some positive effect on the purpose it is intended to serve; otherwise, the section 7 interests will have been affected for no good reason. Like the

³⁹⁸ See section "Contrary to *Charter* Interpretative Techniques".

³⁹⁹ *R v CIP*, *supra* note 218 at para 21.

⁴⁰⁰ See section "Contrary to Principles of Fundamental Justice".

norm against overbreadth, the norm against arbitrariness requires a court to identify the purpose of the law and to assess the connection between those purposes and the limits on life, liberty, or security created by the law.⁴⁰¹

The Human-Only Argument ran afoul of the norm against arbitrariness because limiting the application of s. 7 to human beings had no rational connection to the purpose of s. 7, which is to protect life, liberty, and security of the person.⁴⁰² In fact, the Human-Only Argument actively worked against the purpose of s. 7 because it limited the protection of life, liberty, and security of the person to human beings while ignoring the existence of these interests in non-human persons.

On the other hand, the new definition does not have the same problem. By eliminating the arbitrary limitation of s. 7 to human beings, the new definition imposes a limitation that does have a real connection to the purpose of s. 7. The purpose of s. 7 is to protect life, liberty, and security of the person. Accordingly, the new definition requires that before any non-human is considered “everyone”, it must be established that the non-human is capable of enjoying s. 7 rights. This limitation is not arbitrary because it takes into consideration the individual characteristics of the non-human and whether these characteristics rise to the level of s. 7 protection.

This thesis also considered how the Human-Only Argument violated the norm against gross disproportionality. The norm against gross disproportionality states:

It is a principle of fundamental justice that the impact of a law on the interests protected by section 7 must be proportionate to the effect of the law on its objectives. But the measure of proportionality is not strict: a law will violate this principle of fundamental justice only if its impact on the protected interests is grossly disproportionate to its beneficial effects.

The test for gross disproportionality is whether the law (or other state action) is “so extreme” that it is “per se disproportionate to any legitimate government interest”...⁴⁰³

The Human-Only Argument violates the norm against gross disproportionality because the s. 7 rights of non-human persons are not merely impacted, but completely eliminated. Because the Supreme Court of Canada did not identify reasons for limiting s. 7 rights to human beings, this

⁴⁰¹ *Fundamental Justice*, *supra* note 14 at 136.

⁴⁰² See section “Contrary to Principles of Fundamental Justice”.

⁴⁰³ *Fundamental Justice*, *supra* note 14 at 149.

decision completely eliminates s. 7 rights for potentially large numbers of non-humans without providing any identifiable benefits. Theoretically, one potential benefit is that the decision to limit s. 7 to humans prevents a slippery slope situation. Unfortunately, this benefit is not identified by the Supreme Court of Canada in *Irwin Toy*.⁴⁰⁴ Accordingly, *Irwin Toy* and the Human-Only Argument create a situation where s. 7 rights are eliminated with no corresponding benefit. This can be appropriately characterized as a grossly disproportionate impact on the rights of non-humans.

Does the new definition accord with the norm against gross disproportionality? It is true that the s. 7 rights of non-human entities are still impacted: s. 7 is limited to entities that are capable of enjoying s. 7 rights. However, by loosening the restriction on who is “everyone” (*i.e.* from “humans only” to “entities capable of enjoying s. 7”), the disproportionality between the impact on s. 7 rights and the benefits of this limitation is minimized. The s. 7 rights of non-human persons are no longer summarily eliminated, but a nuanced analysis takes place to determine whether the non-human person has s. 7 rights. The beneficial effects of this approach are that a control mechanism is in place that can determine which non-humans have s. 7 rights and which do not. This control mechanism can be used to ensure a slippery slope is not created or that the floodgates are not opened. Accordingly, because the benefit of this limitation is greater and the impact upon s. 7 rights is lower, the norm against gross disproportionality is not violated.

Contrary to Liberal-Democratic Society?

This thesis also explored how the Human-Only Argument undermines the values of the Canadian liberal-democratic project. Stewart identified s. 7 as an important aspect of Canadian democracy. Stewart wrote:

And the individual rights guaranteed by section 7 of the *Charter* are also central to the proper operation of a free and democratic society in this sense. When state action affects the most basic interests of individuals – their life, liberty, and security – section 7 requires state action to be both procedurally and substantively fair, thus in principle ensuring that individuals are treated not merely as means to the governmental or social

⁴⁰⁴ *Irwin Toy*, *supra* note 3.

purposes that the state action is aimed at, but as individuals in their own right.⁴⁰⁵

The Human-Only Argument undermined this important function of s. 7 because it transforms non-humans from “individuals in their own right”⁴⁰⁶ to resources for the state. The Human-Only Argument denies non-humans “the most basic interests of individuals”⁴⁰⁷ and enables the subjugation and abuse of non-humans.

Does the new definition better support the ideals and principles of Canadian liberal-democracy? It is undeniable that under the new definition it is not possible for all entities to receive s. 7 rights. If an entity cannot demonstrate that it is capable of enjoying s. 7 rights, it will not be entitled to s. 7 rights and therefore will not receive constitutional protection. However, the new definition represents a significant improvement. By extending the scope of the word “everyone”, the new definition allows the life, liberty, and security of the person to be protected in some non-humans. The new definition supports the Canadian liberal-democratic project by treating non-humans, who are capable of enjoying s. 7 rights, as individuals and not resources for the state.

Developments in Foreign Jurisdictions

Does the new definition take into account developments in foreign jurisdictions? Due to the “Everyone Test”, the new definition of the word “everyone” takes into consideration from foreign jurisdictions. Comparative law represents an important source of data and perspective. It allows the Canadian legal system to examine additional data points: what worked; what did not work; and the judicial reasoning. By including comparative law in its process, the new definition and “Everyone Test” will allow the Canadian legal system to benefit from other legal systems around the world.

Developments in Technology

Is the new definition capable of handling developments in technology? While the new definition does not specifically account for developments in technology (*i.e.* artificial

⁴⁰⁵ *Fundamental Justice*, *supra* note 14 at 309-310.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

intelligence, robots, uploaded consciousness), the new definition is inherently flexible enough to handle these developments. Because the “Everyone Test” is concerned with the ability to enjoy s. 7 rights, it does not matter whether the non-human is organic or artificial in nature. If an artificial intelligence can satisfy the criteria stipulated by the “Everyone Test”, the artificial intelligence will be recognized as “everyone”. Similarly, if a robot, cyborg, or uploaded consciousness can demonstrate these abilities, they will be entitled to s. 7 rights.

Chapter 2: Conclusions

It was the objective of Chapter 2 to determine whether it is possible to construct a definition of the word “everyone” grounded in the Capability Argument that is consistent with prior jurisprudence.

To this end, chapter 2 reviewed the jurisprudence that has considered the meaning of the word “everyone” in ss. 2, 7, 8, 9, 10, and 12 of the *Charter*. This review of the jurisprudence revealed the following principles regarding the meaning of the word “everyone”:

1. All live human beings who are physically present in Canada are “everyone”.
2. For an entity to fall within the ambit of “everyone”, the entity must be capable of enjoying the associated right.
3. While consistency between the meaning of the word “everyone” across sections of the *Charter* is important and can be used as an interpretive guidepost, the word “everyone” can have different meanings across sections of the *Charter*.
4. Examining jurisprudence from other domains of the law and jurisprudence from foreign jurisdictions can be a useful tool when determining the meaning of the word “everyone”.
5. A purposive approach must be used when interpreting the word “everyone”.

By synthesizing these principles and the Capability Argument, it is possible to create a new definition for the word “everyone” in s. 7:

“Everyone” in s. 7 of the *Charter* includes all live human beings and all other entities capable of enjoying the right to life, liberty, and security of the person.

Chapter 2 also recognized that a new definition is not sufficient. It is also necessary to provide a systematic test – the “Everyone Test” – for determining which entities are capable of enjoying

s. 7 rights. When considering whether an entity is capable of enjoying s. 7, it is appropriate to ask the following questions:

1. Is the entity capable of enjoying s. 7 rights?
 - a. Is the entity capable of enjoying the right to life?
 - b. Is the entity capable of enjoying the right to liberty?
 - c. Is the entity capable of enjoying the right to security of the person?
2. Is the entity capable of enjoying the rights contained in ss. 8, 9, 10 and 12?
3. Has the entity been recognized as a person in other areas of the law (e.g. family law, property law)?
4. Has the entity been recognized as a person in foreign jurisdictions?

By asking these questions, it will be possible to determine whether a non-human is capable of enjoying s. 7 rights. Importantly, Chapter 2 also determined that this new definition and its corresponding “Everyone Test” avoided all of the problems associated with the *Irwin Toy* definition and the Human-Only Argument.

Now that it has been determined that it is possible to construct a definition for the word “everyone” grounded in the Capability Argument, it is necessary to determine whether this new definition can be practically applied to a non-human.

Chapter 3: Applying the New Interpretation of “Everyone”

Introduction

In Chapter 1, this thesis examined why the *Irwin Toy* definition of the word “everyone” is problematic and should be altered. Accordingly, Chapter 2 of this thesis proposed a new definition of the word “everyone” and proposed a “test” for determining whether a non-human entity or species falls within this new definition of “everyone”. Chapter 3 will therefore be devoted to a practical application of this new definition by applying the “Everyone Test” to chimpanzees. This application is necessary to demonstrate the functionality of the new definition and the “Everyone Test”. Chapter Three will also identify the four areas where adopting the new definition of “everyone” will impact the *Charter*.

Accordingly, Chapter Three will be structured as follows:

- 5) Importance of a workable standard;
- 6) Potential candidates for an expanded definition of “everyone”.
- 7) An application of the “Everyone Test” to chimpanzees:
- 8) The identification of areas where the new definition of “everyone” may challenge the status quo.

The Importance of a Functional Definition

Chapter 1 explored the deficiencies of the *Irwin Toy* interpretation and the Human-Only Argument. One such deficiency was that it could not be applied by Canadian courts to determine who was “everyone”. In a court case where it was alleged that a non-human is “everyone”, *Irwin Toy* could not be used by a judge to issue a judgment. *Irwin Toy* would point in two opposite directions. The Capability Argument would demand one answer, while the Human-Only Argument would demand another. It was impossible to determine who was “everyone”.

Accordingly, it is important to ensure that this problem does not arise with the new definition and the “Everyone Test”. It must be demonstrated that the new definition of the word “everyone” can be applied to a non-human and subsequently lead to an unequivocal result: the non-human entity is either “everyone” or it is not. There can be no ambiguity.

Potential Candidates for an Expanded “Everyone

The new definition of the word “everyone” allows for the inclusion of non-human entities. It is not the intention of the author to identify every possible non-human that can qualify as “everyone”, but to provide some assistance in conceptualizing the type of entities or species that could fall within an expanded definition of the word “everyone”. Without applying the “Everyone Test” in full, there are likely a number of different entities or species that are capable of enjoying s. 7 rights, including:

1. dolphins;⁴⁰⁸
2. orangutans;⁴⁰⁹
3. gorillas;⁴¹⁰
4. chimpanzees;⁴¹¹
5. elephants;⁴¹²
6. general artificial intelligence;⁴¹³ and

⁴⁰⁸ *Drawing the Line, supra* note 27 at 131-158.

⁴⁰⁹ *Ibid* at 179-206.

⁴¹⁰ *Ibid* at 207-230.

⁴¹¹ Steven M Wise, *Rattling the Cage: Toward Legal Rights for* (Cambridge: Perseus Books, 2000) at 179-237.

⁴¹² *Drawing the Line, supra* note 27 at 159-178.

⁴¹³ General artificial intelligence refers to an artificial intelligence who can perform the same intellectual tasks as human beings. It is generally agreed that a general artificial intelligence will be able to reason, use strategy, make probabilistic judgments, plan, learn, communicate in natural language. Stuart J Russell & Peter Norvig, *Artificial Intelligence: A Modern Approach* (Upper Saddle River: Pearson Education, 2011).

7. extra-terrestrials.⁴¹⁴

This list is not intended to be authoritative or exhaustive. It is likely that there are other entities or species that can qualify as “everyone” under the new definition proposed by thesis.

This thesis will apply the “Everyone Test” to chimpanzees to determine whether chimpanzees are “everyone”. Chimpanzees are an ideal candidate for two reasons. First, chimpanzees are an extremely close relative of *homo sapiens*. We should therefore expect that if any non-human is capable of enjoying s. 7 rights, it would be chimpanzees. Second, at least one foreign jurisdiction – New York State- has already begun to consider whether chimpanzees should receive legal rights. Accordingly, the following sections will be devoted to an in-depth application of the “Everyone Test” to chimpanzees to determine whether chimpanzees are “everyone” and have s. 7 rights.

Are Chimpanzees “Everyone”

Under the new definition of “everyone”, is it possible for chimpanzees to qualify as “everyone”? As a reminder, the following questions will be asked to determine whether chimpanzees are “everyone”:

- a. Are chimpanzees capable of enjoying the right to life?
- b. Are chimpanzees capable of enjoying the right to liberty?
- c. Are chimpanzees capable of enjoying the right to security of the person?
- d. Are chimpanzees capable of enjoying s. 8, 9, 10 & 12 rights?
- e. How have other domains of Canadian law treated the entity?
- f. How have other jurisdictions treated the entity?

⁴¹⁴ In the case of general artificial intelligence and extra-terrestrials, it is clear that these entities either do not currently exist or have yet to be discovered. However, they are worth including on this list because they represent non-humans that could not only match the intellectual capabilities of human beings, but actually exceed them.

Chimpanzees and the Right to Life

Are chimpanzees capable of enjoying the right to life? As has already been explored, the right to life protects individuals from direct or indirect state conduct that causes death or increases the risk of death.⁴¹⁵

As a living animal that has a physical body, legislation and policy decisions made by the Canadian state could directly or indirectly cause the death of a chimpanzee or raise the risk of death for a chimpanzee. Accordingly, chimpanzees are capable of enjoying the right to life.

Chimpanzees and the Right to Liberty

Are chimpanzees capable of enjoying the right to liberty? This thesis proposed that there are three factors that should be examined when considering whether an entity is capable of enjoying the right to liberty:

- 1) Is the entity autonomous?
- 2) Is the entity capable of making important and fundamental personal decisions?
- 3) Is the entity capable of losing physical liberty?

Autonomy

Autonomy is the ability to make choices about one's own life and one's own body. When considering whether an entity is autonomous, this thesis proposed that courts look at whether the entity displays behaviour of autonomy and whether the entity has the neurological hardware that could support autonomy. In answering this question with respect to chimpanzees, I will draw upon the expert evidence submitted to the New York Court in *Tommy's Case*.⁴¹⁶ In this case, the Nonhuman Rights Project argued that Tommy the chimpanzee is a person and is entitled to be freed pursuant to *habeas corpus* due in part to the fact that chimpanzees have personal autonomy.⁴¹⁷ In support of this assertion, the Nonhuman Rights Project submitted several

⁴¹⁵ *Carter v Canada*, *supra* note 41 at para 62.

⁴¹⁶ *Tommy's Case*, *supra* note 29.

⁴¹⁷ *Ibid.*

affidavits by primatology experts to the New York court. The experts noted that there are a number of behaviours that support the autonomous nature of chimpanzees:

1. There is a close evolutionary relationship between humans and chimpanzees and no other species “comes close to humans in self-awareness”.⁴¹⁸
2. Chimpanzees are capable of recognizing themselves in a mirror, which is evidence of cognitive self-awareness.⁴¹⁹
3. Chimpanzees possess an autobiographical self. Chimpanzees “prepare for the future and can remember highly specific elements of past events over long periods of time.”⁴²⁰
4. Chimpanzees have personalities and personality traits that are stable over time.⁴²¹
5. Chimpanzees experience subjective well-being (i.e. happiness). This subjective well-being is stable over time, is heritable, is related to personality, experiences a “midlife dip”, and predicts longevity.⁴²²
6. Chimpanzees display self-control and can delay gratification.⁴²³
7. Chimpanzees travel with intentionality and know “precisely where they were going, were travelling in a straight line to reach food sources, and were aware of the distance they needed to walk.”⁴²⁴
8. When assessed through intelligence tests, chimpanzees score at an equivalent level to 3-4 year-old human children.⁴²⁵
9. Chimpanzees have well developed empathetic abilities and engaged in “tactical deception that require attributing states and motives to others”.⁴²⁶
10. Empathy and compassion “require not only a sense of self but the ability to attribute feelings to others i.e. understand that someone else could be in a different state than you or could be feeling different from you.”⁴²⁷
11. When Chimpanzees are taught American Sign Language, chimpanzees have “demonstrated purposeful communication, conversation, understanding of symbols, perspective-taking, imagination and humor”.⁴²⁸

⁴¹⁸ *Ibid*, Affidavit of James R Anderson at 4.

⁴¹⁹ *Ibid*.

⁴²⁰ *Ibid*, Affidavit of Christophe Boesch at 6.

⁴²¹ *Ibid*, Affidavit of James King at 4-6.

⁴²² *Ibid* at 7-8

⁴²³ *Ibid*, Affidavit of Mathias Osvath at 5.

⁴²⁴ *Ibid*, Affidavit of Christophe Boesch at 8.

⁴²⁵ *Ibid*, Affidavit of William C McGrew at 5.

⁴²⁶ *Ibid*, Affidavit of James R Anderson at 4.

⁴²⁷ *Ibid*, Affidavit of Christophe Boesch at 11.

⁴²⁸ *Ibid*, Affidavit of Mary Lee Jensvold at 3-4.

12. Chimpanzees can communicate about past and future events, which demonstrates an ability for “mental time travel”.⁴²⁹
13. Chimpanzees are aware of death and have sophisticated responses to it, including “compassion, bereavement-induced depression, and an understanding of the distinction between living and non-living”.⁴³⁰

With respect to neurological structures that could support autonomy, the experts noted that:

1. Chimpanzees and humans have almost 99% of their DNA in common.⁴³¹
2. The brains of chimpanzees are very similar to the brains of humans.⁴³²
3. Chimpanzees and humans “share similar circuits in the brain which are involved in language and communication”.⁴³³
4. Chimpanzees and humans “both have evolved large frontal lobes of the brain, which are intimately involved in the capacities for insight and foreplanning” and share types of brain cells thought to be involved for “higher order thinking”.⁴³⁴
5. The brains of chimpanzees and humans develop in similar stages.⁴³⁵
6. Like the brains of humans, the brains of chimpanzees are asymmetrical, which “point to a key similarity in the way chimpanzee and human brains are structured, particularly in ways that are relevant to language and communication.”⁴³⁶
7. Like human brains, the brains of chimpanzees respond differently (i.e. a different type of brain waves are emitted) to the sound of their own name than other sounds.⁴³⁷
8. Like humans, Chimpanzees have “spindle cells”, which are “involved in emotional learning, the processing of complex social information, decision-making, awareness, and in humans, speech initiation.”⁴³⁸

These behaviours identified by primatologists, when seen in conjunction with the close similarities between the human brain and the brain of chimpanzees, demonstrate that chimpanzees are autonomous. Chimpanzees are self-aware, possess a temporally stable autobiographical self, have personalities, have significant cognitive reasoning abilities, display empathy and compassion, and have an understanding of death. Furthermore, the brain of a

⁴²⁹ *Ibid* at 5.

⁴³⁰ *Ibid*, Affidavit of James R Anderson at 7.

⁴³¹ *Ibid*, Affidavit of Tetsuro Matsuzawa at 3.

⁴³² *Ibid*.

⁴³³ *Ibid*, Affidavit of Tetsuro Matsuzawa at 4.

⁴³⁴ *Ibid*.

⁴³⁵ *Ibid*.

⁴³⁶ *Ibid* at 5.

⁴³⁷ *Ibid* at 6.

⁴³⁸ *Ibid*.

chimpanzee is similar to the brain of a human. The structural similarities between human and chimpanzee brains is indirect evidence that chimpanzees have autonomy similar to humans. Based on the totality of this evidence, it can be concluded that chimpanzees have autonomy.

Important and Fundamental Decisions

When considering whether an entity is capable of enjoying the right to liberty, the “Everyone Test” also asks whether an entity is capable of making “important and fundamental personal decisions”. Rather than focusing on behavioural or neurological qualities, this stage of the analysis will examine whether the entity makes the kind of decisions that have already been recognized as important and fundamental by Canadian courts. As a reminder, the Supreme Court of Canada has recognized several of these types of decisions:

- 1) Choice of medical treatment;⁴³⁹
- 2) The creation of shelter to protect oneself from the elements;⁴⁴⁰
- 3) The decision to terminate a pregnancy;⁴⁴¹
- 4) The decision to conceive a child with the person of your choice;⁴⁴²
- 5) The decision to undergo physician-assisted death.⁴⁴³

Based on the affidavit evidence provided by the experts in *Tommy’s Case*, there is little evidence that chimpanzees make any of these five decisions. This is perhaps not altogether surprising, given the complexity of these decisions, particularly with respect to choosing one’s own medical treatment or making the decision to undergo physician-assisted death. However, chimpanzees do create their own shelter,⁴⁴⁴ which was recognized as an important and fundamental personal decision in *Victoria (City of) v Adams*.⁴⁴⁵

⁴³⁹ *Manitoba (Director of Child & Family Services) v C.(A.)*, *supra* note 311 at paras 99-102.

⁴⁴⁰ *Victoria (City of) v Adams*, *supra* note 290 at para 109.

⁴⁴¹ *R v Morgentaler*, *supra* note 185 at 171 [Wilson J].

⁴⁴² *Susan Doe v Canada (AG)*, *supra* note 318 at para 33.

⁴⁴³ *Carter v Canada (Attorney General)*, *supra* note 41.

⁴⁴⁴ Fiona Anne Stewart, “The Evolution of Shelter: Ecology and Ethology of Chimpanzee Nest Building” (PhD. Dissertation, University of Cambridge, 2011).

⁴⁴⁵ *Victoria (City of) v Adams*, *supra* note 290.

However, as this thesis has already discussed, only a small number of “important and fundamental decisions” have been recognized by appellate courts in Canada. We might expect that additional types of these decisions will be recognized as deserving of constitutional protection as time passes. As there are more cases that identify “important and fundamental personal decisions”, chimpanzees may be capable of making these newly recognized decisions. As the zoological evidence indicates, chimpanzees are autonomous, self-aware, and capable of higher-level thinking. It is therefore possible to conclude that while chimpanzees do not appear to make the majority of the types of important and fundamental decisions currently recognized by Canadian courts, we should be aware of the possibility that more “important and fundamental” decisions will become relevant to chimpanzees in the future.

Physical Liberty

The final factor to consider is whether the entity is capable of physical liberty. More particularly, whether the entity capable of losing its physical liberty through state action. Because chimpanzees have a physical body, chimpanzees can lose their physical liberty. One need only imagine a chimpanzee in a zoo or medical research facility to recognize that chimpanzees can lose their physical liberty in the same manner as human beings.

Chimpanzees and the Right to Security of the Person

Are chimpanzees capable of enjoying the right to security of the person? This thesis determined that in order for an entity to be capable of enjoying the right to security of the person, it is necessary for that entity to have physical integrity and psychological integrity. Physical integrity protects the body from harm, but also protects the sanctity of the body, personal autonomy, privacy, and dignity. In contrast, psychological integrity protects against serious state-imposed psychological stress.

Chimpanzees have physical integrity for a number of reasons. First, chimpanzees have physical bodies that are capable of being harmed. It is possible to hurt a chimpanzee in the same ways that a human can be harmed. However, the mere ability to suffer physical harm is likely not enough to render an entity capable of enjoying the right to security of the person. All living, physical entities are capable of suffering harm. It is therefore necessary to examine the other values the physical integrity component of the right to security of the person protects.

As the case law has noted, physical integrity also protects personal autonomy because the right to security of the person protects the individual's right to make decisions about one's own body.⁴⁴⁶ Without repeating the entirety of the evidence presented by the experts in *Tommy's Case*, we have seen that there is significant evidence that chimpanzees possess personal autonomy and the ability to make decisions about one's own life. Chimpanzees possess an autobiographical sense of self that is consistent through time, recognize themselves (and notably, their body) in mirrors, possess empathy and the ability to attribute mental states to others. Because there is strong evidence that chimpanzees have personal autonomy and have a sense of self, this is strong evidence that chimpanzees have physical integrity.

With respect to psychological integrity, it appears that chimpanzees also have psychological integrity. Canadian courts determined that s. 7 protects the individual from state conduct that has a "serious and profound effect on a person's psychological integrity".⁴⁴⁷ This effect need not rise to the level of mental illness, but it "must be greater than ordinary stress or anxiety."⁴⁴⁸ Given the physical and psychological similarities between chimpanzees and human beings, it is not surprising that chimpanzees experience many of the same psychological illnesses as human beings. For example, one study examined a group of chimpanzees and determined that these previously traumatized chimpanzees experienced "persistent abnormal objective symptoms and that these symptoms cluster into syndromes that are similar to PTSD [post-traumatic stress disorder] and depression."⁴⁴⁹ While the Supreme Court of Canada has already determined that state conduct need not cause psychiatric illness, evidence of psychiatric illness in chimpanzees is evidence that chimpanzees are capable of experiencing the requisite mental suffering to engage the psychological integrity aspect of s. 7.

Seen as a whole, there is strong evidence that chimpanzees are capable of enjoying the right to security of the person. Chimpanzees have physical integrity because they have physical bodies

⁴⁴⁶ *Rodriguez v British Columbia (Attorney General)*, *supra* note 333 at 342.

⁴⁴⁷ *New Brunswick (Minister of Health and Community Services) v G(J)(G(J))*, *supra* note 341 at para 60.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Hope R Ferdowsian et al, Signs of Mood and Anxiety Disorders in Chimpanzees (2011), 6:6 PLOS.

and exhibit signs of personal autonomy. Chimpanzees also have psychological integrity because they are capable of experiencing the type of severe mental distress.

Chimpanzees and ss. 8, 9, 10 & 12

S. 8

What does it mean to be capable of enjoying s. 8? This thesis determined that to be capable of enjoying s. 8 of the *Charter* means that privacy is a meaningful, useful or functional concept to the entity in question. Central to this analysis will be whether the entity is sufficiently autonomous to require privacy. For some entities, the concept of privacy will be meaningless because they neither need it, understand it, or are autonomous,

Is privacy a meaningful concept for chimpanzees? This thesis employed privacy scholar Daniel Solove conception of privacy:

- 1) the right to be let alone
- 2) limited access to the self - the ability to shield oneself from unwanted access
- 3) secrecy - concealment of certain matters from others
- 4) control over personal information - the ability to exercise control over information about oneself
- 5) personhood - the protection of one's personality, individuality, and dignity; and
- 6) intimacy - control over, or limited access to, one's intimate relationships or aspects of life.⁴⁵⁰

Based on the biological and zoological evidence, chimpanzees may be one of those special species that have a meaningful relationship with privacy. As we have already explored, chimpanzees have an autobiographical sense of self,⁴⁵¹ recognize themselves in mirrors,⁴⁵² have personalities that are stable over time,⁴⁵³ experience subjective well-being,⁴⁵⁴ travel with

⁴⁵⁰ *Understanding Privacy*, *supra* note 371 at 12-13.

⁴⁵¹ Affidavit of Christophe Boesch, *supra* note 420.

⁴⁵² Affidavit of James R Anderson, *supra* note 418.

⁴⁵³ Affidavit of James King, *supra* note 424.

⁴⁵⁴ *Ibid.*

intention,⁴⁵⁵ communicate with intentionality,⁴⁵⁶ have empathetic abilities and can attribute feelings to others,⁴⁵⁷ and engage in tactical deception.⁴⁵⁸

Unlike bacteria or other simple organisms, these capabilities allow chimpanzees to theoretically utilize privacy. First, chimpanzees have an autobiographical self and a personality that is stable through time.⁴⁵⁹ This fact engages several of Solove's categories of privacy. For example, because chimpanzees have an autobiographical self,⁴⁶⁰ it may be possible for chimpanzees to control information about themselves or to protect their own personalities, individuality and dignity. Chimpanzees are also capable of tactical deception,⁴⁶¹ which engages the "secrecy" and "control over personal information" conceptions of privacy. Additional zoological evidence regarding chimpanzees need or enjoyment of privacy would be helpful in this analysis. However, it does not appear that this research has been performed or been published.

It is indeed odd to contemplate animals having an interest in privacy. However, as a cursory examination of chimpanzees reveals, it is not as far-fetched as it first might appear. Unlike in *Borowski v Canada*, where the court recognized that a fetus cannot have an interest in privacy,⁴⁶² the result is not as clear with chimpanzees. At the very least, chimpanzees are sufficiently autonomous for privacy to be a useful concept in some respects. However, this conclusion is based on conjecture and logic and should therefore not be taken as fact. Additional zoological research is necessary to determine whether chimpanzees can enjoy privacy and whether chimpanzees can have a reasonable expectation of privacy. However, it cannot be ruled out that chimpanzees are capable of enjoying s. 8.

⁴⁵⁵ Affidavit of Christophe Boesch, *supra* note 420.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Affidavit of James R Anderson, *supra* note 418.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*, Affidavit of James King at 4-6

⁴⁶⁰ *Ibid.*, Affidavit of Christophe Boesch at 6.

⁴⁶¹ *Ibid.*, Affidavit of James R Anderson at 4.

⁴⁶² *Borowski v Canada*, *supra* note 7.

S. 9

S. 9 of the *Charter* states:

Everyone has the right not to be arbitrarily detained or imprisoned.⁴⁶³

As this thesis has already mentioned, s. 9 of the *Charter* protects individuals from being arbitrarily detained or imprisoned by the police or public authorities.⁴⁶⁴ This thesis also determined that an entity is capable of enjoying s. 9 of the *Charter* if it is capable of being arbitrarily imprisoned or detained by police or public authorities.

Unlike a fetus, which does not have an independent body, chimpanzees are clearly capable of being imprisoned or detained by public authorities. Chimpanzees have physical, independent bodies. Accordingly, chimpanzees are capable of enjoying s. 9.

S. 10

S. 10 of the *Charter* states:

Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.⁴⁶⁵

This thesis determined that when considering whether an entity is capable of enjoying s. 10, the question to ask is whether the entity is capable of being subject to state-sanctioned punishment. If so, this indicates a capability of enjoying s. 10 rights.

In the case of chimpanzees, it is clear that chimpanzees are capable of being subject to state-sanctioned punishment. Chimpanzees have physical bodies and can commit the *actus reus* of crimes. Chimpanzees can also be imprisoned or detained: zoos and medical research facilities are a prime example of this. While the author is not aware of any specific cases where chimpanzees are imprisoned in a penal institution, that type of detention is theoretically possible. More likely

⁴⁶³ *Charter*, *supra* note 1 at s. 9.

⁴⁶⁴ *R v Grant*, *supra* note 374.

⁴⁶⁵ *Charter*, *supra* note 1 at s. 10.

than penal imprisonment is corporeal punishment, where a chimpanzee is harmed by law enforcement. This thesis has already mentioned the case of Travis, who was shot and killed by police following a mauling.⁴⁶⁶

Because it is capable for the state to punish or harm chimpanzees, chimpanzees are capable of enjoying s. 10 rights. For example, in the event that chimpanzees are detained or imprisoned, a chimpanzee has an interest in having legal counsel challenge the validity of that detention. Of course, a chimpanzee could not instruct the legal counsel. The need for counsel, however, is still present. Perhaps chimpanzees and other non-verbal non-human persons should be seen akin to children, who are granted legal counsel or guardians. The children do not instruct legal counsel because they do not have the requisite understanding, but their need for legal advice is still present.

S. 12

S.12 of the *Charter* states:

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.⁴⁶⁷

This thesis determined that for an entity to be capable of enjoying s. 12, the entity must be capable of receiving state sanctioned punishment that violates one of the four judicially established grounds. Those four grounds include: 1) punishment that outrages the conscience of the public; 2) degrades human dignity; 3) is arbitrarily imposed; and 4) goes beyond what is necessary to achieve a valid social aim.

In the case of chimpanzees, at least three of these four grounds are possibly relevant. It is possible to imagine a chimpanzee being punished in a fashion that outrages the conscience. One need only imagine a chimpanzee being forced to live in a cage or “concrete jungle”.⁴⁶⁸ One can also imagine a chimpanzee being subject to cruel or painful medical experiments.

⁴⁶⁶ *Supra* note 384.

⁴⁶⁷ *Supra* note 1 at s. 12.

⁴⁶⁸ *Supra* note 30.

With respect to punishment being “arbitrarily imposed”, it is also easy to imagine a chimpanzee receiving arbitrarily imposed punishment. The following passage from a BBC article demonstrates how chimpanzees can be subjected to arbitrary whims:

Karl Ammann, a Swiss wildlife activist who campaigns against chimp trafficking, describes it as a “kind of slavery” and warns that when chimps cease being cute infants, they face a terrible fate.

“They still have 90% of their life ahead of them,” he said. “They get locked in some cage and maybe even killed in some cases because they have outlived their useful pet stage. That for me is just impossible to accept.”⁴⁶⁹

The implication, of course, is that some baby chimpanzees are killed when they are no longer cute and desirable as pets. Being killed for no longer being cute is as arbitrary as it gets. It is difficult to believe that a governmental institution of Canada would ever inflict such high degree of arbitrariness. However, the question is whether chimpanzees are capable of suffering an arbitrary punishment. The answer to that question is “yes”.

Finally, it is likely that chimpanzees also have an interest in s. 12 due to the last of the four s. 12 factors: the punishment goes beyond what is necessary to achieve a social aim. Because this factor is dependent on the degree of punishment in relation to a social aim, there is no reason why a non-human person could not avail itself to s. 12 under this ground. It is a valid social aim to ensure chimpanzees do not run wild on the streets of Toronto, but it would go beyond that aim to require that all chimpanzees be locked up in a metal cage for 24 hours a day.

Because chimpanzees are capable of receiving cruel and unusual treatment or punishment that engages 3 of the four aforementioned categories, Chimpanzees are capable of having an interest in s. 12.

Chimpanzees and Canadian Law

It should not be surprising, given Canada’s geography and climate, that chimpanzees do not feature frequently in Canadian jurisprudence. A Westlaw search reveals that the word “chimpanzee” is only mentioned 22 times.⁴⁷⁰ Unfortunately, for the purposes of this discussion,

⁴⁶⁹ David Shukman & Sam Piranty, “The secret trade in baby chimps” *BBC* (30 January 2017), online: <www.bbc.co.uk>.

⁴⁷⁰ A Westlaw search for the term “chimpanzee” was completed on October 25th, 2017.

none of these cases actually discuss the personhood of chimpanzees. The closest one comes to finding a case where the personhood of chimpanzees is discussed comes in the case of *R v Radage*.⁴⁷¹ In this case, the Court was asked to determine whether the taxpayer's son was eligible for the disability tax credit. The court wrote:

It seems clear that at least higher orders of sentient beings have cognitive faculties in greater or lesser degree, in the sense that they are capable of rational problem solving and of responding to certain types of intellectual stimuli in a manner that goes beyond mere instinctive reaction. Studies of higher orders of mammal — chimpanzees, porpoises and certain other mammals — indicate that the faculty of logical thought may be latent and capable of development. Studies of non-human intelligence, however enlightening they may be in attempts to determine the nature of human intelligence, do not advance the enquiry that this court must make.⁴⁷²

While it is interesting that the court recognized that some animals are capable of higher level thinking, it can be said that there is no Canadian jurisprudence that specifically supports the proposition that chimpanzees are legal persons.

Chimpanzees and Foreign Jurisdictions

While there are no examples of Canadian jurisprudence that explicitly consider whether chimpanzees are legal persons, there are a few examples from foreign jurisdictions, primarily from New York State. This thesis has already mentioned *Tommy's Case*, but it is useful to examine the case in greater detail. *Tommy's Case* began in 2013 when the Nonhuman Rights Project filed a “petition for a common law writ of *habeas corpus* in New York State Supreme Court to demand recognition of Tommy's legal personhood and right to bodily liberty and his immediate transfer to an appropriate sanctuary”.⁴⁷³ In support of this petition, the Nonhuman Rights Project submitted affidavit evidence that demonstrated:

... chimpanzees possess such complex cognitive abilities as autonomy, self-determination, self-consciousness, awareness of the past, anticipation of the future and the ability to make choices; display complex emotions such as empathy and construct diverse cultures. The

⁴⁷¹ [1996] 3 CTC 2510, [1996] TCJ No 730.

⁴⁷² *Ibid* at para 25.

⁴⁷³ *Tommy's Case*, *supra* note 29, Petition.

possession of these characteristics is sufficient to establish common law personhood and the consequential fundamental right to bodily liberty.⁴⁷⁴

At the end of an hour-long oral hearing, the New York State Supreme Court denied the petition on the grounds that Article 70, which is the section of the Consolidated Laws of the State of New York that provides for *habeas corpus*,⁴⁷⁵ does not apply to chimpanzees because a chimpanzee is not a “person” under Article 70.⁴⁷⁶

The Nonhuman Rights Project filed a Notice of Appeal with the New York State Supreme Court, Appellate Division, Third Judicial Department in January of 2014.⁴⁷⁷ The appeal argued that the trial court erred when it denied the petition of *habeas corpus* because it did not properly consider the meaning of “person”.⁴⁷⁸ The Nonhuman Rights Project then argued that a chimpanzee is a “person” under Article 70 because the word “person” can refer to a wide range of entities, including groups of human beings, corporations, a river in New Zealand, and religious idols.⁴⁷⁹ Because chimpanzees are autonomous and capable of self-determination, chimpanzees are therefore “persons” under Article 70 and therefore are entitled to be freed pursuant to *habeas corpus*.⁴⁸⁰

The New York State Supreme Court, Appellate Division, Third Judicial Department denied the appeal.⁴⁸¹ The Court wrote:

While petitioner proffers various justifications for affording chimpanzees, such as Tommy, the liberty rights protected by such writ, the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government. Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other

474 *Ibid* at 2.

475 NY CPLR § 7000.

476 *Tommy’s Case*, *supra* note 29, Transcript of Oral Hearing before the Hon Joseph Sise of the New York State Supreme Court.

477 *Ibid*, Notice of Appeal.

478 *Ibid*, Brief for the Petitioners-Appellants at 33.

479 *Ibid* at 38-40.

480 *Ibid* at 50.

481 *Ibid*.

words, "rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights".⁴⁸²

... Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights – such as the fundamental right to liberty protected by the writ of habeas corpus – that have been afforded to human beings.⁴⁸³

Despite the autonomy and cognitive faculties of chimpanzees, the inability to “bear any legal duties, submit to societal responsibilities or to be held legally accountable for their actions” made chimpanzees ineligible for legal rights, including *habeas corpus*.⁴⁸⁴ The Nonhuman Rights Project attempted to appeal this decision, but its leave for appeal was twice denied.⁴⁸⁵

After their leave for appeal was denied, the Nonhuman Rights Project filed a second *habeas corpus* petition in which it was argued that chimpanzees do have the ability to bear duties and responsibilities.⁴⁸⁶ The Nonhuman Rights Project also argued that the ability to bear duties and responsibilities is not a precondition to legal personhood.⁴⁸⁷ This petition was denied.⁴⁸⁸

The Nonhuman Rights Project appealed this decision to the New York Supreme Court, Appellate Division, First Judicial Department.⁴⁸⁹ The First Judicial Department ruled that:

...we find that the motion court properly declined to sign the orders to show cause since these were successive habeas proceedings which were not warranted or supported by any changed circumstances.⁴⁹⁰

... Petitioner has filed four identical petitions in four separate state courts in four different counties in New York. Each petition was accompanied by virtually the same affidavits, all attesting to the fact that

482 *Tommy's Case*, Judgment of the New York State Supreme Court, Appellate Division, Third Judicial Department at 4.

483 *Ibid* at 6. [emphasis added]

484 *Ibid*.

485 *Supra* note 99.

486 *People of the State of New York, ex rel The Nonhuman Rights Project, on behalf of Tommy v Thomas C Lavery*, (NY Sup Ct 2015) at 16-17.

487 *Ibid* at 3.

488 *Ibid*, Judgment of Supreme Court Justice Barbara Jaffe.

489 *Supra* note 98.

490 *Ibid* at 76.

chimpanzees are intelligent, and have the ability to be trained by humans to be obedient to rules, and to fulfill certain duties and responsibilities. Petitioner has failed to present any new information or new ground not previously considered. The "new" expert testimony presented by petitioner continues to support its basic position that chimpanzees exhibit many of the same social, cognitive and linguistic capabilities as humans and therefore should be afforded some of the same fundamental rights as humans.⁴⁹¹

The First Judicial Department proceed to dismiss the appeal.⁴⁹² According to the Nonhuman Rights Project website, the Nonhuman Rights Project is preparing to appeal the decision of the First Judicial Department to the New York Court of Appeals.⁴⁹³

The Nonhuman Rights Project filed similar petitions for *habeas corpus* with respect to other chimpanzees.⁴⁹⁴ The Nonhuman Rights Project was not successful in any of these actions.

All told, there is no jurisprudence from foreign jurisdictions that support the proposition that chimpanzees are entitled to be treated as legal persons. The few cases that consider whether chimpanzees should have legal rights answered this question in the negative. The lack of foreign jurisprudence that treats chimpanzees as legal persons militates against extending legal personhood under s. 7 of the *Charter*.

Chimpanzees and S. 7: Conclusion

The purpose of this section was to demonstrate how the "Everyone Test" might work in practice. After applying the "Everyone Test", it appears that chimpanzees are capable of enjoying the right to life, liberty, and security of the person.

With respect to the right to life, chimpanzees are a living organism and it is possible for the state to end the life of a chimpanzee. Accordingly, chimpanzees are capable of enjoying the right to life.

⁴⁹¹ *Ibid.*

⁴⁹² *Ibid* at 80.

⁴⁹³ *Supra* note 99.

⁴⁹⁴ *The Nonhuman Rights Project, Inc., on behalf of Kiko v Carmen Presti et al* (NY Sup Ct 2013); *The Nonhuman Rights Project, Inc., on behalf of Hercules and Leo v Samuel L Stanley Jr., M.D.* (NY Sup Ct 2013)

It also appears that chimpanzees are capable of enjoying the right to liberty. When considering whether an entity is capable of enjoying the right to liberty, it is necessary to examine three factors: 1) whether the entity is autonomous; 2) whether the entity is capable of making important and fundamental personal decisions; and 3) whether the entity is capable of losing physical liberty. Chimpanzees satisfy the first factor: chimpanzees are autonomous. This thesis reviewed a significant amount of zoological evidence that supporting the proposition that chimpanzees are autonomous, including the fact that chimpanzees are self-aware, have autobiographical selves that are stable over time, and have a brain structure that supports autonomy.

With respect to factor 2, there is little evidence that chimpanzees make important and fundamental personal decisions. As this thesis has indicated, the number of “important and fundamental personal decisions” that have been recognized by Canadian courts is quite small. Of the five important and fundamental decisions identified in this thesis, chimpanzees are capable of making only one: creating shelter to protect oneself from the elements.⁴⁹⁵ However, given the intellectual and cognitive abilities of chimpanzees, it is conceivable that as the number of judicially recognized important and fundamental personal decision grows, it will become clearer that chimpanzees make these types of decisions.

Finally, the third factor asks whether an entity is capable of losing its physical liberty. As an organism with a physical body, chimpanzees are capable of losing their physical liberty. Indeed, the loss of physical liberty is often the chief complaint of animal rights activists. When seen in its totality, chimpanzees clearly satisfy factors 1 and 3, while partially satisfying factor 2. The balance of evidence supports chimpanzees being capable of enjoying the right to liberty.

The “Everyone Test” also asks whether an entity is capable of enjoying the right to security of the person. Chimpanzees are capable of enjoying the right to security of the person because chimpanzees have physical and psychological integrity. Chimpanzees have physical bodies that are capable of being harmed, have personal autonomy, are self-aware, and have the ability to make decisions about one’s own life. These factors allow a chimpanzee to have a “body” of its “own” much like each individual human has a body of its own. Similarly, chimpanzees also

⁴⁹⁵ *Supra* note 444.

have psychological integrity because chimpanzees are capable of experiencing serious and profound effects upon their psychological well-being.

Chimpanzees are more or less capable of enjoying ss. 8, s. 9, s. 10 and s. 12. It cannot be ruled out at this stage that chimpanzees are capable of enjoying s. 8. Chimpanzees are autonomous and privacy appears to be a meaningful concept to chimpanzees, at least from a theoretical perspective. Additional zoological research is needed to determine whether privacy is meaningful for chimpanzees. However, chimpanzees are capable of enjoying the s.9, s. 10, and s. 12 rights. Chimpanzees are capable of being imprisoned and detained, which makes them capable of enjoying s. 9. Similarly, chimpanzees are capable of receiving state-sanctioned punishment, which makes them capable of enjoying the rights under s. 10. Finally, chimpanzees are capable of enjoying s. 12 because chimpanzees can receive cruel and unusual punishment that satisfies at least three of the four judicially identified grounds.

Canadian and foreign jurisprudence militates against extending the definition of “everyone” to include chimpanzees. No Canadian cases were found where a chimpanzee was recognized as a legal person. Similarly, no cases from foreign jurisdictions recognized chimpanzees as a legal person. In fact, American courts explicitly ruled that chimpanzees are not person.

All told, when the “Everyone Test” is applied to chimpanzees, there is a significant amount of evidence that supports recognizing chimpanzees as “everyone”. Unlike fetuses or corporations, chimpanzees are capable of enjoying the majority of the legal rights. While it is true that there is no jurisprudence that supports legal personhood for chimpanzees, the evidence of capability to enjoy the legal rights is so strong that the lack of domestic or foreign jurisprudence cannot overcome it. According to the “Everyone Test”, chimpanzees should be included in the new definition of “everyone”.

Impacts on Canadian Law

In the event that the new definition of “everyone” is adopted and some non-humans are recognized as having s. 7 rights, there will be a number of impacts on the *Charter*. By identifying some of these impacts in advance, it should be possible to lessen potential adverse consequences of these impacts and provide a smooth transition to a broader application of s. 7. There are at least four categories of potential impacts: 1) Do entities recognized under s. 7 get other *Charter*

rights?; 2) are there changes to the substantive nature of *Charter* rights?; 3) is it necessary to revisit previously settled *Charter* law?; and 4) How does s. 1 and s. 30 come into play?

Other *Charter* Rights?

If the word “everyone” includes non-humans, will these non-humans have other *Charter* rights? If, for example, chimpanzees are “everyone” and have s. 7 rights, do they also have s. 2 rights? What about the rights contained in ss. 8-13? S. 15 rights? How do we determine which rights a chimpanzee would have and the rights they would not?

The focus of this thesis was s. 7, so it is beyond the scope of this thesis to fully address this question. However, some preliminary thoughts are appropriate. Given the focus on capability in the jurisprudence, it would be logical to continue with this approach and determine whether an entity has other *Charter* rights by asking whether the entity is capable of enjoying each specific right. If the entity is capable of enjoying it, then it would be appropriate to grant that right to the entity. If the entity is not capable of enjoying it, then there would be no purpose in granting that right to the entity and no harm is done. The “Everyone Test” broadly follows this approach with respect to the rights contained in s. 8, s. 9, s. 10, and s. 12. If an entity has rights under s. 7, that entity likely also has rights under s. 8, s. 9, s. 10, and s. 12 because not only is there a special relationship between s. 7 and the rest of the legal rights, but because the “Everyone Test” explicitly considers whether an entity is capable of enjoying s. 8, s. 9, s. 10, and s. 12.

This approach would also work with respect to s. 2, which guarantees the fundamental freedoms. By asking whether an entity is capable of enjoying s. 2 rights, it will ensure that s. 2 is not granted in an overly broad fashion and will ensure that only entities capable of enjoying s. 2 rights will receive s. 2 protection.

A more difficult question arises with respect to s. 15 of the *Charter*, which guarantees the right to equality. What does the right to equality mean with respect to non-humans? Are non-humans capable of enjoying equality? Should non-humans have a right to equality? Can non-humans even be treated equally? Would equality refer to equality between humans and non-humans or just between the same type of non-human? The answer to these questions is not at all clear and will require additional scholarship.

Changes to the Substantive Nature of S. 7 Rights

Right to Life

If the scope of the word “everyone” is broadened, it is also likely that the substantive nature of s. 7 will change. It is impossible to predict every possible change, but there are a few that are foreseeable and merit comment. One possible change is with respect to the right to life. Given the lack of the death penalty in Canada, it is not surprising that the right to life has not received as much judicial consideration as the right to liberty or the right to security of the person. However, if non-humans are granted the right to life, there are two possible changes that would be significant.

First, if the right to life is awarded to non-humans, we might expect to see an increased prominence of the right to life. The lives and deaths of non-humans are often controlled by humans or corporations, particularly animals in zoos or research facilities. If chimpanzees have a right to life, we might expect that public zoos or public research facilities could no longer euthanize or otherwise end the lives of chimpanzees at their sole discretion. The right to life might also require zoos and research facilities to alter their behaviour to accommodate for the ruling in *Chaoulli c Quebec*, which states that the right to life is engaged when the risk of death is increased by state action or inaction.⁴⁹⁶ These two considerations would also become particularly prominent in the event that an animal normally treated as livestock, such as pigs, are recognized as “everyone”. Could the right to life prohibit the breeding and slaughtering of certain types of livestock? Ultimately, additional scholarship will be necessary to determine the full implications of an evolving right to life.

The right to life might also be forced to evolve if artificial intelligence or another inorganic entity is recognized as “everyone”. The right to life is “engaged where state conduct deprive[s] a person of his life.”⁴⁹⁷ This is logical, but generally the word “life” refers to organic, carbon-based entities. Is our current understanding of what constitutes “life” flexible enough to handle non-organic, silicon-based entities like artificial intelligences, robots, or a digitally-uploaded consciousness? These entities cannot be deprived of “life” because these entities are not “alive”

⁴⁹⁶ *Chaoulli c Quebec*, *supra* note 275 at 123-124.

⁴⁹⁷ *Fundamental Justice*, *supra* note 14 at 63.

in the traditional sense of the word. These entities also would not undergo death as it is known to human beings, where the brain ceases to function and the body begins to decompose.

Because of this fundamental difference between an artificial entity and an organic entity, are artificial entities capable of enjoying the right to life? Upon closer examination, artificial entities may be able to enjoy the right to life despite the fact that they do not “die”. While an artificial intelligence would not be able to undergo a biological death, an artificial intelligence could nevertheless be destroyed. The hardware that supports an artificial intelligence could be destroyed or malignant computer code could be introduced into its operating system. Provided that the damage was sufficiently severe, a type of “death” might occur where the artificial intelligence would cease to function as a conscious entity. While not an organic death, the elimination of consciousness in this situation is the functionally same as in an organic death. It would seem odd for the right to life to protect one but not the other. Our understanding of “life” may need to evolve to keep pace with technological developments. One might imagine the right to life evolving to no longer distinguish between organic and inorganic death, but rather focusing on the destruction of autonomy and consciousness. One might say that the right to life is engaged where direct or indirect state action deprives a person of consciousness or personal autonomy in a permanent manner. This being said, it is too early to predict how the right to life might evolve. Additional jurisprudence and scholarship will be necessary. At this point in time, it is sufficient to merely point out that the content of the right to life may evolve as non-human persons are recognized as “everyone” under s. 7 of the *Charter*.

Right to Liberty

We might also expect changes to the right to liberty. As this thesis has already explored, the right to liberty protects the right of an individual to make important and fundamental decisions about one’s life.⁴⁹⁸ If the *Charter* recognizes that non-humans have s. 7 rights, the type of decisions that are considered “important and fundamental” may also change to reflect the addition of non-human persons. For example, if an artificial intelligence is recognized as having s. 7 rights, it is conceivable that the artificial intelligence will value different choices or options than human beings. Perhaps it will be of great importance to an artificial intelligence to access

⁴⁹⁸ *Blencoe, supra* note 42 at para 49.

the internet or interact with the physical or digital world in a particular manner. These types of decisions could conceivably be framed as “important and fundamental personal decisions”. While they are perhaps not the type of decisions that are important for human beings, they may nevertheless represent important decisions for non-humans.

The right to liberty may also evolve to recognize the digital nature of artificial intelligence or digitally uploaded consciousness. As this thesis has noted, the right to liberty protects against the loss of physical liberty.⁴⁹⁹ An artificial intelligence, existing as software and living “in the cloud”, would not necessarily have a physical body or be capable of losing its physical liberty. However, just because an artificial intelligence could not lose its physical liberty does not mean that an artificial intelligence could not lose its “digital liberty”. An artificial intelligence could lose access to the larger digital world through the use of an AI box, which would prevent it from existing outside a pre-determined area. An AI box could essentially be used to imprison an AI. While the AI did not lose its “physical liberty”, it would lose its “digital liberty”. If an artificial intelligence or other digital consciousness ever receives s. 7 protection, it will likely be necessary to reexamine the physical liberty protections of the right to liberty.

Right to Security of the Person

The right to security of the person will also likely be forced to evolve, particularly with respect to the protections of physical integrity. The right to security of the person is designed to protect the physical integrity of the rights holder. It protects the rights holder from non-consensual force applied by the state and it also protects personal autonomy.⁵⁰⁰ But what if the non-human person does not have a physical body as we normally understand it? In the case of an artificial intelligence, for example, physical integrity might not be present in the way we conceive of it. This is speculation because an autonomous artificial intelligence does not currently exist, but an artificial intelligence would likely not have a “body” in the way that humans or animals have physical bodies. An artificial intelligence would consist of complicated computer code, housed in either a centralized manner (*e.g.* a mainframe) or in a distributed

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid* at para 82.

manner (*i.e.* the artificial intelligence does not rely upon single pieces of computer hardware, rather a distributed network of hardware).

Does the lack of a “physical body” mean that an artificial intelligence is unable to enjoy the right to security of the person? At first glance, the lack of a physical body would undermine the argument that an artificial intelligence can enjoy the right to security of the person. The right to security of the person protects the physical body and protects the individual from state interference. When one looks at the jurisprudence, one sees the primacy placed on protecting the physical body from the application of non-consensual state force (*i.e.* medical procedures, abortion, excessive use of force). However, the right to security of the person could be expanded to protect the non-organic computer technology that an artificial intelligence relies upon for its existence. Similarly, the right to security of the person could be expanded to protect the software component of an artificial intelligence. An artificial intelligence would be composed of sophisticated computer code and algorithms. If this computer code sustained damage, the “physical” integrity of the artificial damage would be violated. Computer code for an artificial intelligence is analogous to the DNA code of a human being. If the state used radiation to harm the DNA of a human being, one would quickly declare the right to security of the person had been violated. In the same way, the damaging of a computer code could violate the right to security of the person.

If some non-humans are “everyone”, it is clear that the substantive nature of s. 7 rights will be forced to evolve to reflect the nature of the newly protected entities. This is not necessarily a negative because as discussed, the *Charter* is intended to grow and evolve over time.⁵⁰¹ However, scholars must be mindful of potential changes to s. 7 rights. Additional scholarship will certainly be needed as non-human persons are recognized as “everyone”.

Revisiting Settled *Charter* Law

If non-human persons are recognized as having s. 7 rights, it may be necessary to reexamine previously settled aspects of s. 7 law. For example, it may force Canadian courts to reconsider whether s. 7 places a positive obligation on the state to ensure s. 7 is not violated. To date, the

⁵⁰¹ *Re BC Motor Vehicle Act*, *supra* note 15 at para 53.

Charter has been interpreted to only impose negative obligations upon the state and not positive obligations.⁵⁰² In other words, the *Charter* only requires the state to not perform certain actions and it does not require the state to take positive actions. For example, the government must not pass legislation that infringes upon the right to life by directly or indirectly risking the life of a Canadian citizen. The right to life, however, does not currently require the state to provide goods or services that would keep an individual alive.

An interesting issue arises with respect to this dichotomy between positive/negative obligations if non-human persons are recognized as “everyone”. If non-human persons are recognized as “everyone”, will the state be required to take certain actions to ensure that the s. 7 rights of non-human persons are not violated? This idea may seem counter-intuitive at first: why would the recognition of non-humans create a positive obligation upon the state to act? This idea can be most easily seen by way through example. Suppose that elephants are recognized as being “everyone” under s. 7 of the *Charter*. Due to its climate, Canada is not a natural home for elephants and therefore Canada does not have a wild, native elephant population. Elephants, if they are in Canada at all, are under the control of zoos or other organizations. An elephant who is under the control of a zoo raises two interesting question. Would the state have an obligation to ensure that the elephant is provided with a certain level of living standards?

The answer to this question is not clear. Further complicating the question is if the elephant is under the care and control of a private entity or corporation. Under normal circumstances, the *Charter* does not apply between two private parties.⁵⁰³ In the case, the elephant would be a private person. The zoo would also be a private individual. According to *Charter* jurisprudence, the *Charter* would not apply in this instance and the elephant would not be entitled to *Charter* protection. However, this situation appears unjust. The elephant is under complete control of the zoo – the zoo controls the elephant’s physical liberty, schedule, socializing, and living standards. The zoo would also likely have some form of ownership interest in the elephant. The idea of one constitutionally-recognized entity completely controlling the life of another constitutionally-recognized entity is unsettling. Even more unsettling is the idea of one constitutionally-recognized entity “owning” another. The parallels to slavery would be difficult to ignore and it

⁵⁰² *Fundamental Justice*, *supra* note 14 at 54-56.

⁵⁰³ *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573, 33 DLR (4th) 174.

would be extremely disconcerting if this ownership situation would be allowed to continue. The assertion that the *Charter* only applies when the state is involved might begin to lose its credibility in this situation. It would be an odd legal defense to simply state that the zoo is entitled to “own” another constitutionally-protected entity merely because the *Charter* does not apply between private parties.

Supposing for a moment that the *Charter* would apply in such a situation – presumably there was some form of permitting process allowing a zoo to own an exotic animal – the original question is left unanswered. Would the state have positive obligations towards non-human persons? As was already indicated with the elephant example, an elephant in captivity is completely at the control of its caretakers. The elephant is physically confined to the space and its living conditions are determined by its caretakers. What if the elephant’s caretakers did not provide adequate living standards? Normally, the Canadian government is not required to take positive steps to ensure s. 7 rights.⁵⁰⁴ However, in a situation where rights are being violated and the aggrieved party cannot possibly improve the situation on its own, it feels just that the government is obliged to take positive steps to ensure the s. 7 rights of the entity are not violated.

Notably, the Argentinian court in *Asociacion de Funcionarios v GCBA* ordered a “positive” remedy for Sandra the orangutan in that case.⁵⁰⁵ After recognizing that Sandra was a person under the Argentinian constitution, the court ordered that the Government of Buenos Aires take steps to ensure *la mayor calidad de vida posible* – the highest quality of life possible for Sandra.⁵⁰⁶ Naturally, if Canadian courts decide that there are some situations where the Canadian government has positive obligations to protect the *Charter* rights of individuals, this would represent a change from previous jurisprudence. Not only would such a change require the government to dedicate resources, but it would also open up a new frontier of *Charter* law. One could imagine additional lawsuits arguing that positive obligations are owed in other situations, including towards human beings. As this thesis has stated, the purpose of this thesis is not to explain or provide an answer to all possible consequences towards expanding the definition of “everyone”. However, the possibility of positive obligations would represent a significant legal

⁵⁰⁴ *Fundamental Justice*, *supra* note 14 at 54-56.

⁵⁰⁵ *Asociacion de Funcionarios v GCBA*, *supra* note 30.

⁵⁰⁶ *Ibid* at para 86.

development in *Charter* law and should therefore be identified as a potential issue moving forward.

It is beyond the scope of this thesis to answer these questions. However, it is necessary to be aware that previously settled aspects of *Charter* law may be forced to change in the event that the meaning of “everyone” is expanded. Additional scholarship is undoubtedly required to fully consider the implications.

S. 1 and S. 33 of the *Charter*

As this thesis has noted in the prior three sections, expanding the meaning of the word “everyone” to include non-human persons will have consequences. Indeed, governments may not wish to deal with the consequences of such an expansion of rights. Governments may simply wish to ignore such an expansion and continue treating non-human persons under the *status quo* where only humans have *Charter* rights. There are two possible mechanisms by which governments could ignore or limit the *Charter* rights of non-human persons: s. 1 and s. 33.

S. 1 of the *Charter* states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁵⁰⁷

S. 1 allows a government to justify a violation of a *Charter* right and carry on with its original legislation or conduct.⁵⁰⁸

S. 33 of the *Charter* is also known as the Notwithstanding Clause. S. 33 of the *Charter* states:

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*.⁵⁰⁹

S. 33 of the *Charter* suspends the effect of the *Charter* for a five-year period, which can be renewed.

⁵⁰⁷ *Supra* note 1 at s. 1.

⁵⁰⁸ *Fundamental Justice*, *supra* note 19 at 288.

⁵⁰⁹ *Supra* note 1 at s. 33.

Could either of these two sections be used to limit or eliminate the s. 7 rights of non-human persons? At first glance, there is no reason to believe that these sections could not be used by a government to limit the rights of non-human persons. Indeed, it is easy to envision situations where these sections would be used. Suppose, for example, pigs – an animal that is considered livestock and an importance food source – are recognized as “everyone” under the *Charter*. Would the right to life protect pigs from being raised and slaughtered for the purpose of food production? Given the importance of pork for nutrition and economic activity, it would be likely that governments would immediately pass laws that infringed on the s. 7 rights of pigs or use the Notwithstanding Clause to suspend the s. 7 rights of pigs. While this may seem like a logical thing to do, the legality of such an action is not immediately clear. Can s. 1 of the *Charter* be used to justify such an egregious violation of the right to life? After all, the violation would result in the deaths of thousands of constitutionally protected entities. Could the Notwithstanding Clause be used to suspend the right to life? Can the Notwithstanding Clause be used to suspend the right to life of one particular species while allowing for its continued effect of another? While s. 33 of the *Charter* makes it clear that s. 33 can be used to suspend the effect of s. 7, it is a disconcerting thought to know that s. 33 could be used to justify the death of a constitutionally-protected non-human person. The implications of granting s. 7 rights to non-human persons on s. 1 and s. 33 will be significant. It is beyond the scope of this thesis to offer an educated opinion, but it is necessary to identify that s. 1 and s. 33 will also be impacted by the recognition of non-human persons.

Conclusion: Chapter 3

The purpose of Chapter 3 was to apply the new definition of “everyone” and the “Everyone Test” to a non-human entity in order to demonstrate the functionality of this new framework. This chapter also set out to identify some of the areas that might be impacted if the definition of “everyone” is expanded to non-humans.

Chapter 3 applied the “Everyone Test” to chimpanzees and it was determined that chimpanzees are capable of enjoying s. 7 rights and are accordingly “everyone”. Importantly, the “Everyone Test” avoided the ambiguity associated with the *Irwin Toy* definition of the word

“everyone, where it was impossible to determine whether an entity was “everyone” or not. The “Everyone Test” provided a definitive answer on whether chimpanzees are “everyone”.

Chapter 3 also identified four areas where the new definition of “everyone” will impact the *Charter* at large. If the definition of “everyone” is expanded to include non-humans, it is possible that changes will occur in the following areas: 1) the granting of other *Charter* rights to non-humans; 2) changes to the substantive nature of s. 7; 3) revisiting previously settled *Charter* law; and 4) novel applications of s. 1 and s. 33 of the *Charter*.

Conclusion

The purpose of this thesis was to demonstrate that the current interpretation of “everyone” in s. 7 is no longer appropriate in 2017 and to propose a new, more suitable definition. Accordingly, Part 1 of this thesis demonstrated that the *Irwin Toy* definition of “everyone” is problematic. Fundamentally, the *Irwin Toy* definition of “everyone” contains a significant inconsistency. *Irwin Toy* employed the “Capability Argument”, which states that only entities that are capable of enjoying s. 7 rights are “everyone”. *Irwin Toy* also employed the “Human-Only Argument”, which states that only human-beings are “everyone”. This is deeply problematic because non-humans can be capable of enjoying the right to life, liberty, and security of the person. This leads to the intolerable situation where a judge could not use the leading precedent for determining whether an entity was “everyone”. A judge would not know whether to apply the Capability Argument or the Human-Only Argument.

After examining these two arguments in detail, this thesis determined that a new definition of “everyone” should be built with the Capability Argument. The Human-Only Argument is inappropriate for several reasons. First, the Supreme Court of Canada placed more attention on the Capability Argument. The inclusion of the Human-Only Argument appears to be something of an after-thought or unsubstantiated assumption. Furthermore, the Human-Only Argument is contrary to the *Charter* interpretive principle of purposive interpretation, is contrary to two principles of fundamental justice, is contrary to a liberal-democratic society, does not take foreign jurisprudence into account, and is incapable of dealing with technological innovations.

In response to the deficiencies of the *Irwin Toy* interpretation of “everyone”, this thesis systematically reviewed appellate-level *Charter* case law where the meaning of the word “everyone” was considered. This review resulted in the identification of 5 principles:

1. all live human beings who are physically present in Canada are “everyone”;
2. for a non-human entity to fall within the ambit of “everyone”, the non-human entity must be capable of enjoying the associated right;
3. the word “everyone” can have different meanings across different sections of the Charter;

4. examining jurisprudence from other domains of Canadian law or jurisprudence from foreign jurisdictions is helpful; and
5. a purposive approach must be used when interpreting the word “everyone”.

The identification of these five principles made it possible to construct a new definition of the word “everyone”. To be consistent with these principles, the word “everyone” in s. 7 should have the following meaning:

“Everyone” in s. 7 of the *Charter* includes all live human beings and all other entities capable of enjoying the right to life, liberty, and security of the person.

Because this new definition includes non-humans who are capable of enjoying s. 7 rights, there must be a framework for determining whether an entity is “capable”. By examining s. 7 jurisprudence, this thesis proposed the “Everyone Test” as the means for determining whether an entity is capable of enjoying s. 7 rights. The “Everyone Test” asks:

- a. Is the entity capable of enjoying s. 7?
- b. Is the entity capable of enjoying the rights contained in ss. 8, 9, 10 and 12?
- c. Has the entity been recognize as a person in other areas of the law (e.g. family law, property law)?
- d. Has the entity been recognized as a person in foreign jurisdictions?

The new definition of “everyone” and its associated “Everyone Test” eliminates all of the deficiencies of the *Irwin Toy* interpretation of “everyone”. It is logically consistent, it accords with *Charter* interpretative principles and the principles of fundamental justice, it does not undermine liberal-democratic society, it takes into account foreign jurisprudence, and it provides enough flexibility to account for future technological innovations.

To demonstrate the functionality of the “Everyone Test”, this thesis applied the framework to chimpanzees. Based on a cursory analysis, it is clear that the word “everyone” should include chimpanzees. While domestic and foreign jurisprudence does not support the proposition that chimpanzees are “everyone”, chimpanzees are largely capable of enjoying the right to life, liberty and security of the person. Chimpanzees are also capable of enjoying s. 9, s. 10, and s. 12. There remains some question as to whether chimpanzees are capable of enjoying s. 8. When applied to chimpanzees, the new definition and “Everyone Test” worked as intended. It provided

a systematic approach that can be applied by judges for considering whether a non-human entity is “everyone”. Recognizing the s. 7 rights of non-humans is a significant development.

Accordingly, this thesis identified four areas for consideration:

- 1) whether other *Charter* rights would be extended to non-human entities who have received s. 7;
- 2) whether the substantive nature of s. 7 would change in response to the recognition of non-human entities;
- 3) the possibility of revisiting previously settled *Charter* law; and
- 4) the potential application of s. 1 and s. 33.

All of these areas require additional scholarship to fully determine the consequences of recognizing non-human persons as “everyone”.

Despite the unknowns, the new definition of “everyone” and the “Everyone Test” can serve as an important framework moving forward. Zoology and computer science are progressing at a rapid speed and it may not be much longer before the *Charter* is forced to reckon with non-human persons. This thesis can serve as an important tool for navigating these difficult questions and can perhaps be used to be build a better, more consistent *Charter*.