

The Canada Summer Jobs Debate and the Democratic Decline

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I. INTRODUCTION

China is entering another phase of restricting its citizens' freedom in the pursuit of a more perfect society.¹ The Chinese government is harnessing the surveillance wizardry of modern technology to discipline those who violate its laws.² By 2020,³ each citizen will be graded according to their willingness to lay aside personal preference in favour of state policy in areas of legal rules, moral norms and business ethics.⁴ "Good" citizens, as defined by the state, are given greater latitude to live their lives by accessing what we, in the West, would consider mundane freedoms such as taking a trip on a plane or a train.⁵ Citizens who face penalties under the system have little recourse, since "the Chinese justice system leaves much to be desired".⁶ Jing Zeng, a researcher at the University of Zurich says, "[t]here

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¹ See Yongxi Chen & Anne S.Y. Cheung, "The Transparent Self Under Big Data Profiling: Privacy and Chinese Legislation on the Social Credit System" (2017) 12:2 J. Comp. L. 356, online: <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3118784_code1441796.pdf?abstractid=2992537&mirid=1>.

² Rogier Creemers, "China's Social Credit System: An Evolving Practice of Control" (May 9, 2018), available at SSRN, online: <<https://ssrn.com/abstract=3175792> or <http://dx.doi.org/10.2139/ssrn.3175792>>.

³ Du Juan, "City's work on social credit to be completed by 2020" *China Daily* (November 27, 2018), online: <<http://www.chinadaily.com.cn/a/201811/27/WS5bfc9fa1a310eff30328b311.html>>.

⁴ Nicole Kobie, "The complicated truth about China's social credit system" *Wired* (January 21, 2019), online: <<https://www.wired.co.uk/article/china-social-credit-system-explained>>.

⁵ Annabel Fenwick Elliott, "China is banning people with bad 'social credit' from using planes and trains" *The Telegraph* (March 19, 2018), online: <<https://www.telegraph.co.uk/travel/news/china-travel-ban-bad-social-credit-from-planes-trains/>>.

⁶ Nicole Kobie, "The complicated truth about China's social credit system" *Wired* (January 21, 2019), online: <<https://www.wired.co.uk/article/china-social-credit-system-explained>>.

are no genuine protections for the people and entities subject to the [social credit] system ... in China there is no such thing as the rule of law.”⁷

This paper reminds us that free and democratic societies, also known as “open” societies, such as Canada, are not immune from the challenges to freedom experienced in totalitarian regimes, or “closed” societies such as China. Karl Popper’s work on the enemies of open society is worth remembering.⁸ Social philosophies that encourage the return to a tribal mentality allure those who struggle with the unease of a world that cannot live up to its moral ideals and “our dreams of perfection”.⁹ The individual citizen in a democratic society (as opposed to a totalitarian society) has a greater personal strain to ensure her own happiness by making her own choices on how to live rather than being dictated to by the tribe or the state.¹⁰ The Irish jurist John Philpot Curran warned in 1790, “It is the common fate of the indolent to see their rights become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime and the punishment of his guilt.”¹¹

Eternal vigilance is the price we must pay for our continued democratic freedom. It is the obligation of every citizen to take seriously their individual responsibility in protecting freedom for all. The obligation to be vigilant is irrespective of partisan loyalty. Everyone in power must be held to account if they are unfaithful to the highest ideals of liberal democracy. The Supreme Court of Canada (“SCC”) observed that “[d]emocracy is a fundamental value in our constitutional law and political culture.”¹² It comprises the “respect for the inherent dignity of the human person ... accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society”.¹³

⁷ Nicole Kobie, “The complicated truth about China’s social credit system” *Wired* (January 21, 2019), online: <<https://www.wired.co.uk/article/china-social-credit-system-explained>>.

⁸ Karl Popper, *The Open Society and Its Enemies* (London: Routledge Classics, 2011).

⁹ *Id.*, at xxxix.

¹⁰ *Id.*

¹¹ John Philpot Curran, “Speech upon the Right of Election for Lord Mayor of Dublin” (1790), quoted in *Bartlett’s Familiar Quotations*. See online: <https://en.wikipedia.org/wiki/John_Philpot_Curran>.

¹² *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 61 (S.C.C.).

¹³ The Supreme Court of Canada quoted *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at 136 (S.C.C.) in *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 64 (S.C.C.).

Vigilance is required not only in cases of blatant oppression, but also when freedom is impugned by government under the guise of good intentions. Such is the case with the Canadian government's 2018 Canada Summer Jobs ("CSJ") policy that required employers, applying for funding to hire students, to attest that they were in agreement with government ideology¹⁴ concerning abortion¹⁵ and discrimination on the basis of sexual orientation. It had the effect of limiting religious groups and individuals from being full participants in a widely available public program. The language of the attestation caused a rigorous protest against the government's imposition on religious charities (among others) and their leadership. Such a protest was an important civic act of vigilance.

This paper will review the CSJ controversy and consider its implications for long-term human rights discourse in Canada. I argue that a liberal democratic government has no ethical or legal authority to demand citizens make a positive declaration that they accept the government's position on any fundamental human life issue ("FHLI") (such as abortion or marriage or end of life) in order to receive a government benefit. The pushback against the government's insistence that its position be agreed with, in order to receive government funding, is a positive sign of civic involvement. Religious charities and other communities exhibited an important act of defiance against a policy that was, in effect, totalitarian, however good the intentions of the government might have been. The religious opposition was an important display of the vigilance that is necessary to ensure that rights for all are buttressed against state hubris. The state has no right to intrude in such areas of personal conscience and it would appear, given the changes made to the 2019 CSJ policy, that the government has recognized it overreached in 2018.

Part II of the paper will discuss the example of China's social credit system as a familiar cog on the totalitarian wheel that demands conformity. It will address the fascination that some liberal democratic politicians

¹⁴ Supporters of the attestation argued that it had nothing to do with beliefs or ideology but was simply a requirement that organizations respect the law. Yet, when organizations requested accommodation for their beliefs while expressing their willingness to abide by all applicable laws, including human rights legislation, the government refused to accept their modified applications. This would suggest that the government had more in mind than compliance with existing law — especially since private actors are not subject to the Charter. See the dissent in *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 423 D.L.R. (4th) 197, 2018 SCC 32, at para. 261 (S.C.C.).

¹⁵ The global rate of abortion worldwide is estimated at 28 per 1,000 women of childbearing age. See Patricia A. Lohr, Mary Fjerstad, Upeka DeSilva & Richard Lyus, "Abortion" (2014) 348 Brit. Med. J.

have with dictatorial regimes. Such admiration, while understandable to some degree, is misplaced. Failure to learn from history or to appreciate our freedoms as enshrined in our constitutional law results in dangerous complacency for the future wellbeing of our country. China stands as an example of where failure to support individual freedom of conscience could lead. Liberal democracies are not immune from falling prey to such totalitarianism.

Part III will discuss the CSJ controversy as a case in point of how a well-meaning government policy had totalitarian overtones that struck at the very heart of the legal protections in the Canadian Charter.¹⁶ It spoke of an attitude that sought to force its worldview on citizens. It lacked respect for the hard fought-for democratic liberties.

Part IV warns against trifling with personal conscience on fundamental human life issues. Greater respect by state actors is needed to ensure that freedom for all is protected in public decision-making. We have an obligation to subsequent generations of Canadians to ensure that there remains freedom for all to disagree on matters of public policy without any fear of retribution. Our freedoms, therefore, are held in trust so that we may hand them off to those who come after us. It is a solemn responsibility.

II. CHINA'S GOOD CITIZEN PROJECT AND LIBERAL DEMOCRATIC FASCINATION WITH TOTALITARIANISM

China's implementation of a "social credit system" for its citizenry was originally meant to rectify the problems, and negative economic effect, of fraud and corruption. However, it has come to be, or at least has the potential to be, a much larger project of ensuring compliance with state ideology.¹⁷ Alexandra Ma¹⁸ noted that those in China with a low social credit score can face a number of impediments to their daily routine

¹⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, which came into force on April 17, 1982 [hereinafter "Charter"].

¹⁷ Rogier Creemers, "China's Social Credit System: An Evolving Practice of Control" (May 9, 2018), available at SSRN, online: <<https://ssrn.com/abstract=3175792> or <http://dx.doi.org/10.2139/ssrn.3175792>> observes that "Party ideology still fundamentally believes in social engineering on the basis of system science, on the malleability and transformability of the individual" (at 26).

¹⁸ Alexandra Ma, "China has started ranking citizens with a creepy 'social credit' system — here's what you can do wrong, and the embarrassing, demeaning ways they can punish you" *Business Insider* (October 29, 2018), online: <<https://www.businessinsider.com/china-social-credit-system-punishments-and-rewards-explained-2018-4#despite-the-creepiness-of-the-system-human-rights-watch-called-it-chilling-while-botsman-called-it-a-futuristic-vision-of-big-brother-out-of-control-some-citizens-say-its-making-them-better-people-already-10>>.

such as being banned from flying or rail transportation; having Internet speed reduced; being banned from the best schools; ineligibility for the best jobs; being denied access to the best hotels; and being publicly shamed as a “bad” citizen on a public blacklist. On the other hand, “good” citizens enjoy a number of perks, ranging from higher ranking on dating websites to discounts on energy bills and better interest rates at banks. China can do this, and more, by virtue of the technological advances that governments now have available to monitor those with whom they have a grievance. States have at their disposal a slew of tools to keep track of citizens’ every move — from the time citizens wake up to the time they lie down to sleep. Driven by the insatiable desire for security and power, technology has advanced so that even one’s thoughts are coming under scrutiny.¹⁹

China plans to have its expansive surveillance system fully operational in 2020, but since 2014 has already been piloting the project in different parts of the country to some success.²⁰ Victor Gevers, a Dutch cybersecurity researcher, recently discovered a Chinese database online that has shocked the privacy sensibilities of the West. The database compiled “real-time data on more than 2.5 million people in western China, updated constantly with GPS co-ordinates of their precise whereabouts. Alongside their names, birthdates and places of employment, there were notes on the places that they had most recently visited — mosque, hotel, restaurant.”²¹ This information is important for a state that demands control over what people do — but even more what they think. As Paul Mozur observes, “China is reversing the commonly held vision of technology as a great democratizer, bringing people more freedom and connecting them to the world. In China, it has brought control.”²²

¹⁹ Mike Elgan, “Mind-reading tech is here (and more useful than you think!)” *Computerworld* (April 7, 2018), online: <<https://www.computerworld.com/article/3268132/emerging-technology/mind-reading-tech-is-here-and-more-useful-than-you-think.html>>.

²⁰ Paul Mozur, “Inside China’s Dystopian Dreams: A.I., Shame and Lots of Cameras” *New York Times* (July 8, 2018), online: <<https://www.nytimes.com/2018/07/08/business/china-surveillance-technology.html>>. Note that there is still some debate as to just how integrated the system will be by 2020. Rogier Creemers points out that the social credit system consists of “fragmented initiatives” that are united by two goals: improving legal and regulatory compliance and developing the financial services industry (at 25).

²¹ Yanan Wang & Dake Kang, “Exposed Chinese database shows depth of surveillance state” *Financial Post* (February 19, 2019), online: <<https://business.financialpost.com/pmn/business-pmn/exposed-chinese-database-shows-depth-of-surveillance-state>>.

²² Paul Mozur, “Inside China’s Dystopian Dreams: A.I., Shame and Lots of Cameras” *New York Times* (July 8, 2018), online: <<https://www.nytimes.com/2018/07/08/business/china-surveillance-technology.html>>.

Under the program, citizens soon recognize that they must comply with the state's expectations or else lose the ability to function normally, even though the surveillance technologies are not yet fully reliable. For example, jaywalkers have their pictures and names placed on billboards next to the crossing.²³ This is to shame the wrongdoers. However, the pictures are not in real time — they are often a couple of weeks old. As well, there are still inaccuracies in matching the name with the picture. However, government propaganda gives the impression that everything is working as advertised. The fact that it is not does not matter; it is the perception that counts. Martin Chorzempa, a fellow at the Peterson Institute for International Economics, explains that “the whole point is that people don't know if they're being monitored, and that uncertainty makes people more obedient”.²⁴

We should not be surprised by the fact that individuality is not prized by totalitarian regimes. It is not uncommon in unitary states to see political opposition — perceived or actual — deemed a threat to “national interests”. Freedom to express one's views and act on them, in such contexts, is permitted only to the extent that those views are in harmony with state policy. While China has embraced the technological and economic prowess of the West, it has not ratified the individual freedoms that liberal democracies have long championed as described in international covenants such as the *International Covenant on Civil and Political Rights*.²⁵ It was once thought that the robust Chinese economy would inevitably lead not only to economic freedom but to political and individual freedom.²⁶ Many still remain optimistic,²⁷ but given China's continued restrictions on human rights, that position has lost some of its lustre.²⁸

²³ *Id.*

²⁴ *Id.*

²⁵ December 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976, accession by Canada May 19, 1976), online: <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>> [hereinafter “ICCPR”].

²⁶ For greater understanding of the complexity of freedom in China, see Edmund S.K. Fung, “The Idea of Freedom in Modern China Revisited: Plural Conceptions and Dual Responsibilities” (2006) 32:4 *Modern China* 453.

²⁷ See David Kinley, “Finding Freedom in China: Human Rights in the Political Economy” (2013) 10:19 *Intl J.H.R.* 142. Kinley opines, at 151, that “it remains to be decided whether for China to eventually ratify [the ICCPR] (as it surely will), [which] would be to assist in the country's smooth transition to a system democratic government combined with a thriving free-market economy”.

²⁸ See Human Rights Watch, “China” in *World Report 2014: Events of 2013* (Bristol: Policy Press, 2014), at 319:

Rapid socio-economic change in China has been accompanied by relaxation of some restrictions on basic rights, but the government remains an authoritarian one-party state. It places arbitrary curbs on expression, association, assembly, and religion; prohibits independent labor unions and human rights organizations; and maintains Party control over all judicial institutions.

In liberal democracies, such as Canada, we are accustomed to a much more vigorous freedom. As with most things in abundance, freedom can be taken for granted. Citizens who have lived their lives in freedom can hardly conceive of a time when such freedom could ever be limited. However, freedom is as fragile as the morning rose. Without proper care it wilts.

China is but one example of what happens when the state dictates ideological positions on how citizens ought to live their lives. It is an extreme illustration but stands as a warning of what *could* happen to any society, including a liberal democracy, given the right circumstances. No country is immune from the possibility of chaos and totalitarianism. That basic fact must be kept in the public consciousness.

The liberal democratic tradition, by its very nature, is slow. It is meant to be slow to allow for deliberation as to the best course to take. Often it is painstakingly difficult to propose and implement government policy in a timely manner. That may seem like a failing, but it is in fact the genius of its design: to allow as many voices as possible in the process. The downside is that democratic politicians are prone to be mesmerized by the personable charisma of dictators and their governing ability to get things done.²⁹ Consider President Donald Trump's approaches with President Putin,³⁰ President Kim Jong Un³¹ and President Xi Jinping.³² In each of these relationships Trump has rejected the traditional approach

The government censors the press, the Internet, print publications, and academic research, and justifies human rights abuses as necessary to preserve "social stability."

²⁹ Canadian Prime Minister Mackenzie King praised Hitler's "efforts to help mankind", noting in his diary after meeting with Hitler in Berlin: "He smiled very pleasantly and indeed has a sort of appealing and affectionate look in his eyes. My sizing up of the man as I sat and talked with him was that he is really one who truly loves his fellowmen, and his country, and would make any sacrifice for their good. That he feels himself to be a deliverer of his people from tyranny." See W.L. Mackenzie King, diary entry for Tuesday, June 29, 1937, in *Library and Archives Canada*, MG26 J. Series 13, Item 18112, online: <<http://www.bac-lac.gc.ca/eng/discover/politics-government/prime-ministers/william-lyon-mackenzie-king/Pages/item.aspx?IdNumber=18112>>.

³⁰ Eugene Rumer, Richard Sokolsky & Andrew S. Weiss, "Trump and Russia: The Right Way to Manage Relations" (2017) 96 Foreign Aff. 12, at 13, observed that Trump "mocked the U.S. intelligence community's warnings about Russian cyberattacks aimed at interfering with the U.S. democratic process and repeatedly praised Putin's leadership. ... It is hard to overstate the lasting damage that such a move would do to the U.S. relationship with Europe, to the security of the continent, and to an already fraying international order."

³¹ Oliver Roeder, "How President Trump And Kim Jong Un Went From 'Fury' To 'Love'" (February 26, 2019), online: <<https://fivethirtyeight.com/features/how-trump-and-kim-went-from-fury-to-love/>>; John Delury, "Trump and North Korea: Reviving the Art of the Deal" (2017) 96 Foreign Aff. 46.

³² Reuters, "Trump says he has 'incredible relationship' with Xi" (December 1, 2018), online: <<https://www.reuters.com/article/us-g20-argentina-us-china/trump-says-he-has-incredible-relationship-with-xi-idUSKCN1003SL>>.

common to democratic politicians in favour of a more imperialist approach that resonates with the attitudes of the world's "strongmen".³³

Canadian Prime Minister Justin Trudeau is on record as stating, in 2013 before he took office, "There's a level of admiration I actually have for China. Their basic dictatorship is actually allowing them to turn their economy around on a dime."³⁴ Trudeau and Trump are not alone among Western leaders to have a fascination with China. Former Newfoundland Premier, "Joey" Smallwood, stated in a 1974 documentary, "I went to the People's Republic of China and I was flabbergasted. I was fascinated. I was entranced. I think it's perhaps the most exciting place there is on this earth today."³⁵ Likewise Prime Minister Trudeau appears to be equally "entranced", for he observed that China can say, "we need to go greenest fastest, we need to start, y'know, investing in solar".³⁶

Dictatorships certainly can turn public policy "around on a dime". Opposition is not only ignored but squelched *ab initio* in a dictatorship. There is no need to work on voluntary consensus. Canada's now strained relationship with China is a powerful illustration of the rapid reversals that are possible under a totalitarian regime. After Canada arrested Meng Wanzho, chief financial officer of the Chinese tech company Huawei, in December 2018, China's response was swift and damning. Within days it arrested two Canadian tourists and later sentenced to death a third

³³ Jeffrey Goldberg, "A Senior White House Official Defines the Trump Doctrine: 'We're America, Bitch': The president believes that the United States owes nothing to anyone—especially its allies" *The Atlantic* (June 11, 2018), online: <https://www.theatlantic.com/politics/archive/2018/06/a-senior-white-house-official-defines-the-trump-doctrine-were-america-bitch/562511/?utm_source=twb>; Ishaan Tharoor, "Trump's affinity for dictators over democrats" *Washington Post* (June 12, 2018), online: <https://www.washingtonpost.com/news/worldviews/wp/2018/06/12/trumps-affinity-for-dictators-over-democrats/?utm_term=.5970b98df3668>.

³⁴ CTVNews.ca Staff, "Trudeau under fire for expressing admiration for China's 'basic dictatorship'" *CTV News* (November 8, 2013), online: <<https://www.ctvnews.ca/politics/trudeau-under-fire-for-expressing-admiration-for-china-s-basic-dictatorship-1.1535116>>; "Justin Trudeau's 'foolish' China remarks spark anger", *CBC News* (November 9, 2013), online: <<https://www.cbc.ca/news/canada/toronto/justin-trudeau-s-foolish-china-remarks-spark-anger-1.2421351>>; Note that two years later, Mr. Trudeau suggested that the UK was a country to admire. See, David Aiken, "Asked what country he most admires, Trudeau's answer is no longer China", *Global News* (December 6, 2017), online: <<https://globalnews.ca/news/3899392/trudeau-admires-most-not-china/>>.

³⁵ National Film Board of Canada, "Waiting for Fidel" (1974), at 0:47-1:02, online: <https://www.youtube.com/watch?v=DT_TmGgNB_o>. Richard Gwyn notes that upon retirement from politics Smallwood travelled to China and as Gwyn describes it, "[h]e emerged to pronounce China a 'paradise' with 'no unemployment, no crime, no prostitution, no addiction, no alcoholism.'" Richard Gwyn, *Smallwood: An Unlikely Revolutionary* (Skyhorse Publishing: Kindle Edition, at location 6918).

³⁶ "Justin Trudeau's 'foolish' China remarks spark anger" *CBC News* (November 9, 2013), online: <<https://www.cbc.ca/news/canada/toronto/justin-trudeau-s-foolish-china-remarks-spark-anger-1.2421351>>.

Canadian who was convicted of drug trafficking.³⁷ No longer filled with admiration, Prime Minister Trudeau expressed his concern that China was “acting arbitrarily”.³⁸ That is precisely my point: there is a price to be paid when we trade freedom for efficiency and when we trade individual conscience for totalitarian compliance.

It is not surprising that unrestricted power is seductive, even to liberal democratic politicians, because it is seen as the way to get things done rather than being forced to go through a long process of deliberation and negotiation. In other words, if the state has the “truth” of things, from environmental strategies to purportedly shared social values, then dictatorship may be an effective way to deal with implementing such “truths”. The problem is that, without the democratic rule of law, power dwarfs the ability to appreciate and support basic human rights in the governing process. When power is fuelled with ideological fury there is virtually nothing that can be done to protect freedoms that run counter to the entrenched worldview.

The Dark Ages was a time when citizens had the fear of an angry God instilled in them by church and state institutions that dominated civil society. Over the last 500 years we have experienced a rise of individual freedom that is unparalleled in human history. The ability to live our lives as we see fit, with the only proviso that we do not harm our neighbour, as noted by John S. Mill,³⁹ has resulted in the flowering of liberal democratic institutions.

³⁷ Mike Blanchfield & Giuseppe Valiante, “Canada has asked for clemency in case of B.C. man facing death sentence in China: Freeland”, *The Globe and Mail* (January 15, 2019), online: <<https://www.theglobeandmail.com/politics/article-canada-has-asked-for-clemency-in-case-of-bc-man-facing-death/>>.

³⁸ Canadian Press, “China Rips Trudeau’s ‘Irresponsible’ Criticism of Canadian’s Death Sentence: The PM called out China overturning the punishment for alleged drug smuggler Robert Lloyd Schellenberg”, *Huffington Post* (January 15, 2019), online: <https://www.huffingtonpost.ca/2019/01/15/china-trudeau-death-sentence_a_23643060/>.

³⁹ Introducing his “harm principle”, John S. Mill explained:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part

The individual, being the basic unit of society, has been granted the right to choose his or her own path forward. Individuals have been free to voice their opinions, join or not join associations to further their own goals, and live in harmony with their conscience. As Mill proclaimed, “[o]ver himself, over his own body and mind, the individual is sovereign.”⁴⁰

While the dual authority of church and state has waned, the fingers of the state have grown longer, and its grasp tighter. We see evidence of this impulse in the current debate over whether there is space in the public square for religious groups and individuals who do not accept the prevailing views on fundamental human life issues (“FHLI”) such as marriage, abortion and end of life. The democratic state and its various actors have become less tolerant of accommodating religious individuals and groups who do not accept state ideology on FHLI.⁴¹ There is a sense that public debate on these issues is over. Abortion is seen as a constitutional right; marriage has been redefined; and medical assistance in dying is now law. The world has moved on and there is nothing else to discuss. However, that is not the liberal democratic way when it comes to FHLI upon which reasonable people disagree. We ought always to be open to discuss opinions on FHLI. Within the religious community, for example, debates have been ongoing for millennia and they will not be stopped anytime soon.

Indeed, the SCC points out that “a functioning democracy requires a continuous process of discussion”. Our democratic institutions rest “ultimately on public opinion reached by discussion and the interplay of ideas”.⁴² None of us have “a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live”.⁴³

which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

John Stuart Mill, “Essays on Politics and Society Part I” in John M. Robson, ed., *The Collected Works of John Stuart Mill*, vol. 18 (Toronto: University of Toronto Press, 1977), at 223-24, online: *Online Library of Liberty* <http://oll.libertyfund.org/titles/233#Mill_0223-18_900>.

⁴⁰ John Stuart Mill, “Essays on Politics and Society Part I”, *id.*

⁴¹ Barry W. Bussey, “The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School” (2016) *BYU L. Rev.* 1127, online: <<https://ssrn.com/abstract=2951912>>.

⁴² *Saumur v. Quebec (City)*, [1953] S.C.J. No. 49, [1953] 2 S.C.R. 299, at para. 330 (S.C.C.).

⁴³ *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 68 (S.C.C.).

The federal government's position on the Canada Summer Jobs grant program; the position of professional organizations that refuse to accredit academic programs of religious universities; and the recent decisions of the Supreme Court of Canada that supported government regulators over religious institutions,⁴⁴ are examples of the state limiting religious accommodation on FHLI. Why this is a worrying trend will be discussed in Part IV of this paper.

To suggest that the restriction of rights currently under way in China might find root in a liberal democracy, such as Canada, may seem rather bizarre if not improbable. Further, some may counter that because the state imposes a more "enlightened" or "progressive" view on FHLI, such control is a positive development, not a negative. It is the religious community, stuck on ancient prejudices and axioms, that we must guard against, not the progressive liberal state. These differing points of view will be canvassed in Part IV of this paper, which suggests that any time the state enforces its worldview (on FHLI) on the citizenry is a step too far. First, however, I discuss the recent Canada Summer Jobs controversy as a case in point of how readily a government policy with totalitarian overtones can be imposed by even well-meaning decision-makers in a liberal and democratic society.

III. 2018 CANADA SUMMER JOBS PROGRAM

1. The CSJ Program

The Canada Summer Jobs ("CSJ") program is a discretionary federal government program run by the Skills Employment Branch of the Department of Employment and Social Development Canada ("ESDC").⁴⁵ Since 1997, the CSJ has provided subsidies to small businesses and charities to hire secondary and post-secondary students during the summer months. In 2018, it had a budget of \$216 million.⁴⁶ The experience that students gain from this program is invaluable. In addition to learning work skills, they also earn funds to offset their education expenses. "Not only is this good for

⁴⁴ For example, the SCC decisions in the TWU law school case: *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 423 D.L.R. (4th) 197, 2018 SCC 32 (S.C.C.) and *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33, 423 D.L.R. (4th) 321, 2018 SCC 33 (S.C.C.); and in *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567, 2009 SCC 37 (S.C.C.).

⁴⁵ Affidavit of Rachel Wernick, filed March 27, 2018 in *Right to Life Assn. of Toronto and Area v. Canada* (2018), T-8-18 (FCT), at para. 2.

⁴⁶ *Id.*, at para. 6.

[students], it's good for the broader economy, now and in the years to come," said Prime Minister Trudeau early in his mandate.⁴⁷

Each federal electoral district receives a CSJ budget "depending on available jobs and students and the available funding".⁴⁸ The Members of Parliament ("MPs") allocate the funding to the different applicants within their respective districts. The demand often exceeds the available placements.⁴⁹ The federal government annually sets its own "national priorities and eligibility criteria" to decide which applications get funding.⁵⁰

The small business, not-for-profit and charitable sectors have found this government program very enticing. Indeed, many have come to be dependent on the CSJ grants in order to operate certain programs.⁵¹ Thus, the program assists communities in implementing projects that otherwise would not be feasible.

2. The 2017 Complaint to Government

In the spring of 2017, the Canadian federal government received a complaint from the Abortion Rights Coalition of Canada ("ARCC")⁵² against the use of federal funding for student summer jobs at non-profit groups that advocated against "human rights". ARCC's Executive Director called upon the government not to allow CSJ funding to go to "groups that try to remove human rights with bullying and harassment campaigns".⁵³ "Funding anti-human rights groups does not support communities or teach skills that lead to full-time paid employment with ethical employers", the group maintained.⁵⁴

⁴⁷ Joan Bryden, "Trudeau announces big boost to Canada Summer Jobs program" *The Globe and Mail* (February 12, 2016), online: <<https://www.theglobeandmail.com/news/national/trudeau-gives-big-boost-to-canada-summer-jobs-program/article28740799/>>.

⁴⁸ Affidavit of Rachel Wernick, filed March 27, 2018 in *Right to Life Assn. of Toronto and Area v. Canada* (2018), T-8-18 (FCT), at para. 7.

⁴⁹ *Id.*, at para. 8.

⁵⁰ *Id.*, at para. 9.

⁵¹ This was the comment made to the author by a CSJ grant recipient that conducted athletic summer camps for children. This was further evidenced by organizations that were forced to either reduce or close their programs because funds were denied in 2018 — see, for example, Canadian Press, "N.S. sawmill museum blames closure on Canada Summer Jobs abortion controversy" *CityNews* (June 7, 2018), online: <<https://toronto.citynews.ca/2018/06/07/n-s-sawmill-museum-blames-closure-on-canada-summer-jobs-abortion-controversy/>>.

⁵² Abortion Rights Coalition of Canada (ARCC) News Release, "Grants from Canada Summer Jobs Program Support Political Attacks on Human Rights" (April 10, 2017), online: <<http://www.arcc-cdac.ca/press/ARCC-CDAC-release-apr-10-17-english.pdf>>.

⁵³ ARCC News Release (April 10, 2017), at 1.

⁵⁴ *Id.*

ARCC called on the government to “revise its criteria to make it clear that groups are ineligible if they will use government money to train young people to oppose human rights protected by the Charter and Supreme Court decisions”.⁵⁵ In particular, ARCC depicted the Canadian Centre for Bio-Ethical Reform⁵⁶ (“CCBR”), which had previously received CSJ funding, as “an extremist political organization” that was involved in “offensive campaigns” against abortion in its use of “graphic images of aborted fetuses”.⁵⁷ ARCC urged the government to “permanently and completely stop funding CCBR’s *hateful* campaign against women, trans men and non-binary people, and all other funding that supports anti-human rights organizations”.⁵⁸

The characterization of any opposing or differing views as “hateful” is disingenuous — especially since CCBR forthrightly denounces violence.⁵⁹ Such a position is indicative of a growing tendency to conflate “offence” with actual “harm”.⁶⁰ Unfortunately, this attitude tends to exacerbate divisions rather than promoting a diversity of opinions or practices. Ironically, it is “this seeming open-mindedness” which “inspires its proponents to silence those who offend against it. Certain opinions — namely, those that make the forbidden distinctions — become heretical”.⁶¹

⁵⁵ *Id.*

⁵⁶ See the Canadian Centre for Bio-Ethical Reform (“CCBR”) website, online: <www.endthekilling.ca>.

⁵⁷ ARCC News Release (April 10, 2017), at 1.

⁵⁸ *Id.* (emphasis added).

⁵⁹ Footnote on each webpage. Note that, likewise, there is no evidence that CCBR’s anti-abortion campaigns in any way condemn or target “trans men and non-binary people”, despite ARCC’s assertion in their news release (April 10, 2017, *id.*). However, ARCC’s approach did resonate with the federal government and it bore fruit.

⁶⁰ See, for example, the Public Policy Forum’s report, “Poisoning Democracy: How Canada Can Address Harmful Speech Online”, which has called into question even legal speech. It states that “Co-ordinated harassment” is one of the common forms of “harmful speech” where “[p]eople frequently encounter problematic but legal forms of harassment online, including *offensive* speech and memes, repeated insults, adversarial use of platform complaint processes, and the use of bots or fake accounts to flood their social media feeds” (at 10) (emphasis added) (November 2018), online: <<https://www.ppforum.ca/wp-content/uploads/2018/11/PoisoningDemocracy-PPF-1.pdf>>. The report calls for a “Moderation Standards Council” to ensure the proper regulation of “harmful speech” (at 27). The idea of having a government bureaucracy telling the public how they ought to think brings to mind George Orwell’s observation that “[o]rthodoxy means not thinking—not needing to think. Orthodoxy is unconsciousness”, in George Orwell, *1984* (New York: Harcourt, Brace & World, 1963), at 25.

⁶¹ Roger Scruton, “Is the university a safe space for rational argument” *Mercatornet* (November 14, 2018), online: <<https://www.mercatornet.com/features/view/free-speech-and-universities/21933>>.

The CCBR's apparently heretical opinions include the belief that it is "self-evident that human beings, by virtue of their humanity, are objectively valuable and deserving of human rights", and that equality requires that "these rights must be respected during the continuum of human life, from its beginning to its natural end".⁶² "Science," says CCBR, affirms that "a whole, distinct, living human being comes into existence at fertilization".⁶³ As a result, CCBR holds that all forms of abortion are wrong.⁶⁴ CCBR "focuses on making the killing of these human beings unthinkable by reaching out to the public, in order to educate people on who the pre-born are and what abortion does to them".⁶⁵ That includes the use of "abortion victim photography as an educational tool" to expose the horrifying injustice of abortion and make the case for human rights for all human beings.⁶⁶

It must be noted that CCBR was openly critical of the Prime Minister and his supporters during the 2015 federal election.⁶⁷ CCBR has also come into conflict with some municipalities around the country. On December 22, 2016, for example, the Alberta Court of Queen's Bench ("ABQB"), held that the City of Grande Prairie's decision not to run CCBR's graphic ads on the city buses was reasonable.⁶⁸ The ABQB held that limits on the publication of the ad⁶⁹ were necessary "to protect the general public, including children, from the harm caused by what many members of the public would view as disturbing expression in an exceedingly public space".⁷⁰

When ARCC made its complaint against CCBR it resonated with the media⁷¹ who were quick to point out the inconsistency between a Liberal

⁶² "About CCBR" (2017), online: <<https://www.endthekilling.ca/about>>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Evan Boudreau, "Graphic pro-life campaign targets Justin Trudeau" *The Catholic Register* (June 13, 2015), online: <<https://www.catholicregister.org/item/20416-graphic-pro-life-campaign-targets-justin-trudeau>>.

⁶⁸ *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, [2016] A.J. No. 1379, 45 Alta. L.R. (6th) 359, 2016 ABQB 734, at para. 84 (Alta. Q.B.), online: <<http://canlii.ca/t/gwqc3>>.

⁶⁹ *Id.*, at para. 5, the Court described the ad on the bus: "Under the first image is the caption '7-weeks GROWING', under the second image the caption states '16-weeks GROWING' and inside the third blank image is the word 'GONE'. To the right of the images is the statement 'ABORTION KILLS CHILDREN' followed by a web address 'ENDTHEKILLING.ca'".

⁷⁰ *Id.*, at para. 81.

⁷¹ Amanda Connolly, "Anti-abortion group got \$56K federal grant from Liberal MP" *iPolitics* (April 12, 2017), online: <<https://ipolitics.ca/2017/04/12/anti-abortion-group-got-56k-federal-grant-from-liberal-mp/>>.

MP giving money to CCBR and Prime Minister Trudeau's election promise to protect reproductive rights. With the media on its heels, the office of Patty Hajdu, Employment Minister, stated that the government would "have a resolution shortly. We will continue advancing gender equality and standing up for a woman's right to choose."⁷² The government noted that giving money to such groups was an "oversight" and that they had "fixed the issue and no such organizations will receive funding from any constituencies represented by Liberal MPs".⁷³ ARCC was not satisfied and demanded that no government funding should go to "political groups that advocate against abortion".⁷⁴

Shortly thereafter, the government announced that it was looking into shutting down all CSJ grants for anti-abortion groups,⁷⁵ not just those administered by Liberal MPs.⁷⁶ The government review of the CSJ program was "fabulous", noted an ARCC spokesperson: "publicly-funded money should be going toward the betterment of society and human rights".⁷⁷ The problem, of course, is that the topic of what is a human right has long been disputed⁷⁸ — especially in the area of the unborn child. Canada has yet to come to a resolution of this issue — as discussed below — even though in practice the medical system has operated as if

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Amanda Connolly, "Government looking to shut down summer job grants for anti-abortion groups" *iPolitics* (April 13, 2017), online: <<https://ipolitics.ca/2017/04/13/government-shutting-down-summer-job-grants-for-anti-abortion-groups-source/>>.

⁷⁶ From all the materials in the press, my personal discussions with MPs and the material from Affidavit of Rachel Wernick, filed March 27, 2018 in *Right to Life Assn. of Toronto and Area v. Canada* (2018), T-8-18 (FCT), it is my understanding that under the CSJ scheme the Ministry of Employment does most of the logistical work for the applications made by small businesses, non-profits and charities that wish to hire students for the summer months. Once the Employment Ministry processed the applications and made recommendations to the MPs, each individual MP had the final say in which projects in their riding got funding. Until ARCC's complaint, it appears to me that the MPs granted funding irrespective of the employers' ideological commitments — available funds and the number of students getting work seemed to have been the MPs' primary concern. However, in response to ARCC's complaint, the government changed the direction of the program. Money would not be going to those groups that advocated against "human rights" as the government and ARCC defined those rights.

⁷⁷ Amanda Connolly, "Government looking to shut down summer job grants for anti-abortion groups" *iPolitics* (April 13, 2017), online: <<https://ipolitics.ca/2017/04/13/government-shutting-down-summer-job-grants-for-anti-abortion-groups-source/>>.

⁷⁸ Paul Dubinsky, Tracy Higgins, Michel Rosenfeld, Jeremy Waldron & Ruti Teitel, "What Is a Human Right? Universals and the Challenge of Cultural Relativism" (1999) 11 *Pace Int'l L. Rev.* 107; Antony Flew, "What is a Right" (1978-79) 13 *Ga. L. Rev.* 1117.

there are no rights of the unborn child.⁷⁹ There is also considerable debate about whether abortion is itself a human right.⁸⁰

The one-sided approach was further emphasized in the next news release from ARCC, which applauded the government for protecting “the rights of women, trans men, and non-binary people when it implements changes to the Canada Summer Jobs program that will make anti-choice organizations ineligible”.⁸¹ The release called on government “to protect *vulnerable* students by auditing the amounts provided to anti-abortion agencies”.⁸²

How students were “vulnerable” was not explained, but presumably it was because they would be exposed to pro-life sentiments by working with pro-life religious entities. Remarkably, the concept of the “vulnerable” student was to find its way into the talking points of government throughout the 2018 CSJ debate. In reality, one would suspect that many of the students who worked (or applied to work) for conservative religious organizations, for example, would have grown up in a religious pro-life culture. Therefore, the emphasis on “vulnerable” students can be seen as more of an aspirational statement — that is, seeking to *change* the enculturated opinions of the religious youth — rather than as a statement of concern about their vulnerability to be exposed to the pro-life position. Religious opinion, after all, does have a profound impact on the abortion debate, especially when religion and nationalism go hand in hand.⁸³

There is also the assumption that students are young and therefore impressionable or susceptible to ideological manipulation. It is worth noting that the CSJ program funds adult students up to 30 years of age. The assertion that such students need state “protection” from wrong ideas is problematic

⁷⁹ Jakob Pichon, “Does the Unborn Child Have a Right to Life - The Insufficient Answer of the European Court of Human Rights in the Judgment *Vo v. France*” (2006) 7 German L.J. 433; Mary Zielgler, “Some Form of Punishment: Penalizing Women for Abortion” (2018) 26 Wm. & Mary Bill Rts. J. 735; Charles I. Lugosi, “Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn from Creation to Natural Death” (2004) 48:2 Saint Louis U.L.J. 425.

⁸⁰ Tatyana A. Margolin, “Abortion as a Human Right” (2007-08) 29 Women’s Rts. L. Rep. 77; William L. Saunders, “Neither by Treaty, Nor by Custom: Through the Doha Declaration, the World Rejects Claimed International Rights to Abortion and Same-Sex Marriage, Affirming Traditional Understandings of Human Rights” (2011) 9 Geo. J.L. & Pub. Pol’y 67.

⁸¹ ARCC News Release, “Pro-choice Group Calls for Audit of Government Funding Given to Anti-abortion Groups” (April 18, 2017), online: <<http://www.arcc-cdac.ca/press/ARCC-CDAC-release-apr-18-17-english.pdf>>.

⁸² *Id.* (emphasis added).

⁸³ A very critical review of religion and nationalism in countries in transition to democracy is found in Fiona Bloomer, Claire Pierson & Sylvia Estrada Claudio, “Abortion discourses: religion, culture, nation” in *Reimagining Global Abortion Politics: A Social Justice Perspective* (Bristol: Policy Press, 2019), at 51-68.

to say the least, as it insults their intelligence and freedom of thought. The argument is clearly emotional rather than logical — and is completely contradicted by simultaneous claims made by ARCC that youth under the age of 18 “have the right to independently access sexual and reproductive health information and services, which must include abortion as it has been deemed a medically required service by every province and territory in Canada”.⁸⁴ In other words, for the ARCC, a child under the age of 18 has no need for parental consent to have an abortion but they are somehow “vulnerable” and in need of protection from those with pro-life views.

3. The 2017 CSJ Debacle

The government’s 2017 effort to remove “anti-abortion” groups from the CSJ program was rushed. Although the 2017 criteria had already been set, and contained no mechanism for denying groups on the basis of their ideology, the government attempted to do exactly that in response to public pressure to act immediately on the “problem”. That hurried approach was to cause significant interruptions and grief as a number of the rejected applicants took the government to court. Ultimately, the government was compelled to settle.

Among the 2017 CSJ applications that were rejected were those of the Canadian Centre for Bio-Ethical Reform (CCBR), Guelph & Area Right to Life and Toronto Right to Life. Those rejections were politically expedient but legally suspect as evidenced by the government’s admission and concessions to settle. At first, the government obfuscated explaining why the funding was denied. It suggested that although their applications were “considered eligible, we are unable to offer you [CSJ] funding, since the demand for funding has exceeded the budget available in your constituency”.⁸⁵

Given the reports in the media, the organizations were of the view that the stated reason for the denial was untrue. They brought Federal Court⁸⁶ applications for judicial review, claiming that the decision was on the basis of irrelevant and unconstitutional considerations; that it was unlawful on administrative law grounds and it limited their section 2(b) Charter right to freedom of expression.

⁸⁴ ARCC, “Position Paper #58, The Injustice and Harms of Parental Consent Laws for Abortion” (2017), at 1, online: <<http://www.arcc-cdac.ca/postionpapers/58-Parental-Consent.pdf>>.

⁸⁵ Notice of Application in *Right to Life Assn. of Toronto and Area v. Canada (Ministry of Employment, Workforce, and Labour) and Arif Virani* (2017) T-766-17 (FCT), at 3.

⁸⁶ FCT File Numbers: T-766-17, T-767-17, T-768-17.

In November 2017, the government settled all three cases by paying to each group the funds they would have received had their applications been accepted. The government also covered their legal costs. Further, the government acknowledged:

The Canada Summer Jobs Program is providing this settlement because the publicly available Applicant's Guide indicated that applications would be assessed against seven criteria (including local priorities) using a scoring guide. However, your clients were denied funding on the basis of a criteria neither set out in the Applicant's Guide nor included in the MP's list of local priorities for 2017.⁸⁷

It is reasonable for any government to limit the activities which it deems inappropriate for its own public policy reasons. Governments are elected to implement policies that they advertise during the election process. Indeed, it would be surprising, given the public feminist and pro-choice positions made by Mr. Trudeau and the Liberal Party during the 2015 election campaign, if their government policies did not support those stated priorities. However, the problem with the government's rejection of the three pro-life groups in 2017 was that the government had no legal basis for doing so within the CSJ program as publicly outlined; that is why it was forced to settle the cases.

The issue of religious neutrality was not directly at play in 2017, although it was implicit — but the issue came into play in 2018. In 2018, as we will see, the government overreached in attempting to exclude groups that engage in activities that violate its ideological positions. Liberal democratic societies are open societies that support diversity of opinions among individuals and groups. In that sense they are free. Freedom comes with responsibilities. We expect restrictions to protect peace and order, thereby allowing the fruits of freedom to be more widely distributed. Limits on the expression of beliefs and opinions are generally not as intense as are limits on actions motivated by such beliefs and actions.⁸⁸ That is due to the increased risk actions have against peace and order.⁸⁹

⁸⁷ E-mail Correspondence with Carol Crosson, lawyer for the applicants, February 5, 2019. It was also reported by Jonathon Van Maren, "Trudeau Government forced to settle with pro-life groups over denial of grant funding", online: <<https://thebridgehead.ca/2017/12/19/trudeau-government-forced-to-settle-with-pro-life-groups-over-denial-of-grant-funding/#>>.

⁸⁸ "The freedom to hold beliefs is broader than the freedom to act on them." *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 36 (S.C.C.).

⁸⁹ As stated by Oliver Wendell Holmes, Jr. in *Schenck v. United States*, 249 U.S. 47, at 52, 39 S. Ct. 247 (1919), "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. ... The question in every case is whether the

When government imposes neutral restrictions on activities without regard to viewpoints, this is generally acceptable. However, when a person is not permitted to be involved in a widely disseminated government program because he holds a “wrong” view then that is not acceptable to our democratic ideals. It runs afoul of our sense of fairness.

Unlike dictatorships, government programming in a liberal democracy can never be based on citizens’ agreement with government ideological worldviews. Free countries require government neutrality. Justice Gascon observed that the democratic imperative of state neutrality in matters of religious beliefs “requires the state to encourage everyone to participate freely in public life regardless of their beliefs”.⁹⁰ While the context of that case dealt with the religious beliefs and practices of a city council, I suggest the same principle applies here.

4. The 2018 CSJ Attestation Debacle

The government was faced with a growing controversy that showed no sign of abatement. It had a prime minister who made known his ardent “feminist”⁹¹ agenda, yet a government program had funnelled significant amounts of money to “anti-abortion” not-for-profit and charitable organizations. Its passionate “pro-choice” supporters demanded that the dissonance be resolved. However, as the first attempt ended in failure, it was clear that the entire CSJ program needed to be retooled.

The retooling of the CSJ 2018 program (discussed below) was announced in mid-December 2017. The government’s attempt to placate supporters was soon met with a public outcry that seemed to get louder with every passing day. Meanwhile, the Prime Minister referred to the

words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”

⁹⁰ *Mouvement laïque québécois v. Saguenay (City)*, [2015] S.C.J. No. 16, [2015] 2 S.C.R. 3, 2015 SCC 16, at para. 75 (S.C.C.).

⁹¹ Justin Trudeau, on Twitter: “I am a feminist. I’m proud to be a feminist. #upfordebate” (September 21, 2015). Also see, Heather Saul, “Justin Trudeau: The rise of the feminist and pro-choice Canadian Prime Minister who wants to legalise marijuana ‘right away’: Trudeau’s Liberal party won the election on Monday” *Independent* (October 20, 2015), online: <<https://www.independent.co.uk/news/people/justin-trudeau-the-self-declared-feminist-and-pro-choice-prime-minister-of-canada-who-wants-to-a6700976.html>>. Trudeau also pledged the Canadian government to spend \$650 million for “sex education and reproductive health initiatives around the world” in response to President Trump’s cut to such programming. See: BBC, “Canada has just countered Trump’s anti-abortion ruling” (March 10, 2017), online: <<https://www.bbc.co.uk/bbcthree/article/ca9d6cd3-5c3c-469a-bb35-9a957f0ca5b9>>.

unrest as simply a “kerfuffle”.⁹² The reorganized CSJ sent a shock wave across the country, as the new application forms were met with confusion and even contempt. The result was the coming together of diverse groups against the government’s ham-fisted approach. Government supporters and detractors, along with secular and religious media, all agreed that the CSJ 2018 program had overstepped the political and legal boundaries of the Canadian Charter. Such a bipolar convergence is a rare phenomenon in Canada’s increasingly divided politics. To understand this development, a review of the government’s 2018 CSJ requirement is necessary.

(a) *The 2018 CSJ Attestation Requirement*

In December 2017, the government released its 2018 CSJ requirements in the *CSJ Applicant Guide*⁹³ and proclaimed its three objectives as “providing work experiences for students; supporting organizations, including those that provide important community services; recognizing that local circumstances, community needs and priorities vary widely”.⁹⁴ The government stressed that these jobs would “take place in an environment that respects the rights of all Canadians”.⁹⁵

To alleviate the “problem” of pro-life groups getting funding, the *Applicant Guide* noted that the applicants were required to attest that:

both the job and the organization’s core mandate respect individual human rights in Canada, including the values underlying the *Canadian Charter of Rights and Freedoms* as well as other rights. These include reproductive rights and the right to be free from discrimination on the basis of sex, religion, race, national or ethnic origin, colour, mental or physical disability, sexual orientation or gender identity or expression.⁹⁶

In the government’s view, this attestation was “consistent with individual human rights in Canada, Charter rights and case law, and the Government of Canada’s commitment to human rights, which include women’s rights and women’s reproductive rights, and the rights of gender-diverse and

⁹² Ryan Maloney, “Trudeau Calls Out Anti-Abortion Groups Angered About Summer Job Funding: A student asked him if he values freedom of speech” *Huffington Post* (January 10, 2018), online: <https://www.huffingtonpost.ca/2018/01/10/trudeau-calls-out-anti-abortion-groups-angered-about-summer-job-funding_a_23330167/>.

⁹³ “Canada Summer Jobs 2018: Creating Jobs, Strengthening Communities: Applicant Guide” (2018) *Service Canada*, at 3, online: <https://www.canada.ca/content/dam/canada/employment-social-development/services/funding/canada-summer-jobs/CSJ2018_applicant_guide.pdf>.

⁹⁴ *Id.*, at 4.

⁹⁵ *Id.*

⁹⁶ *Id.*, at 3.

transgender Canadians”.⁹⁷ In short, the applicants would have to positively state that they “respected” the government’s worldview on the contentious issues of abortion and sexuality. The government did not stop there, adding that it:

recognizes that women’s rights are human rights. This includes sexual and reproductive rights — and the right to access safe and legal abortions. These rights are at the core of the Government of Canada’s foreign and domestic policies. The government recognizes that everyone should have the right to live according to their gender identity and express their gender as they choose, free from discrimination. The government is committed to protecting the dignity, security, and rights of gender-diverse and transgender Canadians.⁹⁸

“The objective of the change”, explained the government:

is to prevent Government of Canada funding from flowing to organization whose mandates or projects may not respect individual human rights, the values underlying the *Charter of Rights and Freedoms* and associated case law. This helps prevent youth (as young as 15 years of age) from being exposed to employment within organizations that may promote positions that are contrary to the values enshrined in the *Charter of Rights and Freedoms* and associated case law.⁹⁹

(b) Problems with the 2018 CSJ Attestation

There were at least four serious problems with the 2018 attestation: first, it was vaguely written, being open to a number of interpretations; second, it appeared to suggest that charities are responsible for applying the Charter in their workplaces as if they were government actors; third, it created a new “values test” for government support; fourth, it referred to abortion as a Charter right when it is not. I will canvass each in turn.

(i) Irrelevant and Vague

Even in an era of hypersensitivity regarding human rights, it is peculiar that the government would require private individuals to attest that they agree with human rights as understood by the government. Requiring such conformity has nothing to do with the three CSJ objectives. It is

⁹⁷ *Id.*

⁹⁸ *Id.*, at 4.

⁹⁹ *Id.*

irrelevant. If a job will provide the student with work experience that will enhance his or her future career, contribute an important community service and meet community needs, then why the emphasis on the government's interpretation of human rights as a prerequisite of receiving money? NDP ethics critic Nathan Cullen rightly observed, "the real test should be whether the funding goes to summer jobs that have a positive purpose".¹⁰⁰ Indeed.

The requirement is also redundant, since federal and provincial human rights legislation already protects employees and volunteers from unlawful discrimination (and, not incidentally, provides exemptions for religious organizations).¹⁰¹ Only within the context of the ARCC complaint and the government's refusal to fund "anti-abortion" groups does the attestation make sense. It is certainly more reminiscent of a totalitarian regime than a liberal democracy.¹⁰² After all, in a democracy, even if citizens do not agree with the government, they nevertheless have a constitutional right to express their disagreement. They should not be subject to penalty for having views that are contrary to the state.¹⁰³

U.S. Supreme Court Justice Robert H. Jackson observed that, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."¹⁰⁴

In a "town hall" meeting Prime Minister Trudeau declared that, "an organization that has the explicit purpose of restricting women's rights

¹⁰⁰ Canadian Press, "NDP Criticizes Liberals Over Abortion Rules For Canada Summer Jobs Program" *Huffington Post* (January 24, 2018), online: <https://www.huffingtonpost.ca/2018/01/24/ndp-slams-liberals-over-abortion-rules-for-canada-summer-jobs-program_a_23342737/>.

¹⁰¹ For example, s. 18 of the *Human Rights Code*, R.S.O. 1990, c. H.19, states that there is no discrimination "where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified", online: <<https://www.ontario.ca/laws/statute/90h19#BK20>>.

¹⁰² Andy Blatchford, "Summer jobs program shows 'totalitarian' tendency: ex-religious freedom envoy" *The Canadian Press* (May 9, 2018), online: <<https://www.cbc.ca/news/politics/summer-job-program-religious-1.4654706>>.

¹⁰³ Andrew Coyne, "Liberals' effort to blackmail churches over abortion opposition backfires" *National Post* (March 26, 2018), online: <<https://nationalpost.com/opinion/andrew-coyne-liberals-effort-to-blackmail-churches-over-abortion-opposition-backfires>>. Coyne observes, "Even if abortion were defined in law as a right, the oddity of upholding that right by trampling others' rights — to conscience, to speech — has been widely observed: it is not against the law to oppose a law."

¹⁰⁴ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, at 642, 63 S. Ct. 1178 (1943).

by removing rights to abortion, the right for women to control their own bodies, is not in line with where we are as a government, and quite frankly, where we are as a society”.¹⁰⁵ He went on to state that citizens are “allowed to have whatever beliefs you like ... but when those beliefs lead to actions determined to restrict a woman’s right to control her own body, that’s where I and I think we draw the line as a country. And that’s where we stand on that.”¹⁰⁶

Fundamentally, no non-profit or religious charity has the capability to restrict or remove any right. They have no such power, legally or politically. Of course, some pro-life groups may want the law on abortion to change, just as pro-choice groups may want abortion to be declared a constitutionally protected right. This is a battle of ideas on morality. Today, due in part to deliberate and effective lobbying, pro-choice groups have the ear of the current government, and were able to spark this entire controversy to begin with (though the outcome was perhaps not what they intended).¹⁰⁷ Tomorrow, however, a different group could gain the ear of a different government, influencing it to make policies that accord with another set of moral beliefs.

These shifts are inevitable: there is a natural ebb and flow that runs throughout the history of liberal democracies, dependent as they are on the inclinations of voters. Laws come and go. Public policy changes. Those who like a particular law want it to remain — they may even want all debates to end once they get their moral position enshrined in law. But debates in a liberal democracy will continue. They must continue in order for society to advance its understanding of what human flourishing means.

¹⁰⁵ See “Trudeau says anti-abortion efforts out of sync with Canadian society” *Global News* (January 10, 2018), online: <<https://globalnews.ca/video/rd/1134112835708/?jwsourc=cl>>.

¹⁰⁶ *Id.* See also, Andrew Lawton, “Commentary: Being pro-life doesn’t mean being anti-rights” *Global News* (January 18, 2018), online: <<https://globalnews.ca/news/3970370/commentary-we-need-to-stop-viewing-the-pro-life-argument-as-being-anti-rights/>>. The Prime Minister’s comments echo the SCC’s assertion that “the freedom to hold beliefs is broader than the freedom to act on them” in *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 36 (S.C.C.).

¹⁰⁷ As the debate raged even ARCC thought it better for the government to step in and change the language. “If there is a confusion in the wording, then that is a problem I think that they should look at and hopefully fix”, said the executive director. “There should be some way of doing it without raising the ire of all these other religious groups.” See “Too far? Abortion rights advocate says pro-choice summer jobs grant policy may miss the mark” *Canadian Press* (January 19, 2018), online: <<https://canoe.com/news/national/too-far-abortion-rights-advocate-says-pro-choice-summer-jobs-grant-policy-may-miss-the-mark>>.

Moreover, it is one thing for a government to cut spending or increase the budget based on partisan values. Citizens expect that sort of “back and forth” in a democracy. It is another to attempt to pass legislation or enact policies that require citizens to personally affirm those values. In contrast to the ebb and flow of public opinion, we have continuity and stability promised by the rule of law. We should be able to rely on the freedoms entrenched in the Constitution regardless of which party is in power.

Indeed, it is never up to government to make its delivery of programs conditional on whether the recipient conforms to certain ideological norms on controversial issues such as abortion. That restriction on government has long been the hallmark of free and democratic societies. In other words, bestowing public benefits is to be neutral — conservatives have the same equal opportunity as non-conservatives; religious or non-religious; gay, lesbian or straight; immigrant or Indigenous. As journalist Brian Platt pointed out, “Although no group is entitled to receive a discretionary government grant, the government is still required to adhere to the Charter in how it administers programs and funding opportunities.”¹⁰⁸

(ii) Government Actors

The Canadian Charter governs the vertical relationship between the citizen and the state. It does not address the horizontal relationship between citizens. This is basic constitutional law. It is, therefore, baffling that the government would even suggest that the CSJ applicants sign an attestation that they are responsible for protecting Charter rights. Simply put, it makes no legal sense. Such a position is a *reductio ad absurdum* of the attempt to make the Charter into something that it is not. It is the government that is responsible for ensuring that it does not violate the Charter by infringing on the Charter rights of the citizens. Citizens and/or charities cannot violate Charter rights because they are not subject to the Charter. The Charter does not restrain the freedom of private individuals and organizations. And though they receive government funding, CSJ applicants are not government agents or actors.

To quote Supreme Court Justices Côté and Brown, whose dissent in the *TWU* 2018 decisions sharply rebuked the majority’s reliance on Charter

¹⁰⁸ Brian Platt, “How the Canada Summer Jobs program became a freedom-of-religion controversy” *National Post* (January 21, 2018), online: <<https://nationalpost.com/news/politics/how-the-canada-summer-jobs-program-became-a-freedom-of-religion-controversy>>.

values:¹⁰⁹ “at the risk of stating trite law, private actors are not subject to the *Charter*”.¹¹⁰ Their clear explanation of this basic understanding of the Charter is worth emphasizing. Section 32 of the Charter limits its application to Parliament, legislatures and to the executive and administrative branches of government. To argue otherwise (as did the federal government in its support for the CSJ attestation) is to expose a “manifestly erroneous understanding of a basic premise ... of our constitutional order”.¹¹¹

The idea that citizens and civic society are somehow government actors and subject to the Charter is a very troubling but emerging theme among some in the publicly-regulated industries. For instance, this idea found prominence in the TWU law school case. The law societies were of the view that their granting accreditation to TWU’s law school would be seen as “condoning” the allegedly discriminatory admissions policies that required students to abide by the traditional sexual moral norms of the school. The SCC sided with the law societies. The majority stated that it was reasonable for the law societies to promote equality by ensuring that they did not accredit TWU and thereby upheld “a positive public *perception* of the legal profession”.¹¹² Chief Justice McLachlin concurred with the majority, explaining that the most compelling objective in not accrediting the school was that the law society not be seen as

¹⁰⁹ The government’s 2018 CSJ program relied on “Charter values” to get around the lack of a positive enumerated constitutional right for abortion. Charter “values” is a highly contested and controversial concept. It is an appeal to the “vibe” of the Constitution — not what the Constitution says but what politicians and activists intuitively think (or hope) it says. Justice Peter Lauwers has observed:

In general usage, “values” are understood to be matters of subjective opinion on which people can differ. But some, perhaps increasingly, many “values” do make moral claims that impose constraints on behaviour and on thinking. In short, some values are treated as correct opinions that people must be constrained by, if not compelled to adopt.

See “Reflections on Charter Values: A Call for Judicial Humility” *Advocates for the Rule of Law* (January 26, 2018), online: <<http://www.ruleoflaw.ca/reflections-on-charter-values-a-call-for-judicial-humility/>>. For more on the “vibe of the thing” see Bruce Pardy, “The Supreme Court’s TWU ruling is a cruel joke played on all Canadians” *National Post* (June 29, 2018), online: <https://nationalpost.com/opinion/bruce-pardy-the-supreme-courts-twu-ruling-is-a-cruel-joke-played-on-all-canadians?video_autoplay=true>.

¹¹⁰ [2018] S.C.J. No. 32, 423 D.L.R. (4th) 197, 2018 SCC 32 (S.C.C.) and *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33, 423 D.L.R. (4th) 321, 2018 SCC 33, at para. 78 (S.C.C.). Justices Côté and Brown further reiterated that “[t]he *Charter* binds state actors ... and *only* state actors. It does not bind private institutions.” (at para. 79). See also *McKinney v. University of Guelph*, [1990] S.C.J. No. 122, [1990] 3 S.C.R. 229, at 262-63 (S.C.C.).

¹¹¹ [2018] S.C.J. No. 32, 423 D.L.R. (4th) 197, 2018 SCC 32 (S.C.C.) and *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33, 423 D.L.R. (4th) 321, 2018 SCC 33, at para. 78 (S.C.C.).

¹¹² *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 423 D.L.R. (4th) 197, 2018 SCC 32, at para. 40 (S.C.C.) (emphasis in original).

endorsing discrimination.¹¹³ During oral argument, the Canadian Bar Association counsel admitted that government authorities would likely be justified in denying tax exempt status to religious organizations so that government is not seen to be condoning discrimination as carried out by such organizations.¹¹⁴

The notion that the government may be implicated if it issues funding or licensing to religious entities seems to be gaining acceptance. As a result, the future of government funding and/or accreditation is bound to become more challenging for religious charities and the government, regardless of what field the religious charity is involved in. Even a cursory glance reveals how odd — not to say, untenable — this argument appears. It is odd because the government regulates all sorts of industries that religious communities are engaged in. For example, religious communities run radio stations. Does the CRTC¹¹⁵ licensing of a Christian radio station mean that it has now endorsed the teachings of the radio station? Exactly what beliefs is it endorsing? The beliefs of the denomination or religious congregation? Or the beliefs of the disc jockey or radio program that may or may not reflect the beliefs and teachings of the religious entity owning and running the station? Or, what about the granting of registered charitable status? If the Canada Revenue Agency Charities Directorate grants charitable status to a religious group, does that mean that the government is condoning the religious beliefs of that charity?

There are some 86,000 charities in Canada. Can it be said that the government is endorsing all the varied and sometimes incompatible religious or non-religious beliefs and practices of each charity? “In a diverse and pluralistic society, this argument must be treated with considerable caution”, noted the British Columbia Court of Appeal (“BCCA”) in the Trinity Western law school case. The BCCA concluded, “[i]f regulatory approval is to be denied based on the state’s fear of being seen to endorse the beliefs of the institution or individual seeking a license, permit or accreditation, no religious faculty of any kind could be approved. Licensing of religious care facilities and hospitals would also fall into question.”¹¹⁶

¹¹³ *Id.*, at para. 137.

¹¹⁴ Transcript of Supreme Court of Canada hearing in *Trinity Western University v. Law Society of Upper Canada*; and *Law Society of British Columbia and Trinity Western University*, vol. 2, at 282-83.

¹¹⁵ Canadian Radio-television and Telecommunications Commission.

¹¹⁶ *Trinity Western University v. Law Society of British Columbia*, [2016] B.C.J. No. 2252, 92 B.C.L.R. (5th) 42, 2016 BCCA 423, at para. 184 (B.C.C.A.).

Further, if government is to be taken as condoning the various beliefs and acts of all organizations it regulates, does that not mean that government will have to become more intrusive? Will it need to evaluate the religious teachings and practices of religious charities to determine what will and will not be accepted?¹¹⁷ Such would surely be a breach of the section 2(a) protections in the Charter, if religious entities were to face reprisals (denial of registered charitable status) because they did not have “acceptable” beliefs. Who then gets to decide, and what measure does the state use to determine whether beliefs and practices are “acceptable”? If we “draw the line” based on “where we are as a society”, what happens to those on the wrong side of the line? At some point we, as a liberal democracy, must ask how far down this road of “condoning” — or conforming — we want to go. Are we not setting ourselves up for a rejection of our liberal democratic principles?

During the heated debate that ensued in the first half of 2018, the ARCC called for the revocation of charitable status of “anti-choice groups”.¹¹⁸ It was no longer enough to remove the pro-life groups from the CSJ funding: it was now necessary that religious groups with the “wrong” views be stripped of all semblance of government “condonation”. The ARCC has become even more vocal¹¹⁹ on this point as a result of the *Canada Without Poverty*¹²⁰ decision that led the government to allow charities more flexibility in public advocacy.¹²¹ They state the change “may be far less beneficial for society in cases where a group’s charity status really needs to be questioned”.¹²² The “values” test is now taking on a more radical tone.

¹¹⁷ Justice Rowe observed that “The courts have neither legitimacy nor institutional capacity to deal with such [doctrinal] issues, and have repeatedly declined to consider them.” *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, [2018] S.C.J. No. 26, 421 D.L.R. (4th) 381, 2018 SCC 26, at para. 36 (S.C.C.). The state has no place determining doctrinal issues of the religious community.

¹¹⁸ ARCC News Release, “Revoke Charitable Status of Anti-choice Groups, says Pro-choice Group” (January 11, 2018), online: <<http://www.arcc-cdac.ca/press/ARCC-CDAC-release-Jan-11-18-english.pdf>>.

¹¹⁹ ARCC, “Position Paper #80: Why anti-choice groups should not have charitable tax status” (February 2019), online: <<http://www.arcc-cdac.ca/postionpapers/80-Charitable-Tax-Status.pdf>>.

¹²⁰ *Canada Without Poverty v. Canada (Attorney General)*, [2018] O.J. No. 3742, 142 O.R. (3d) 754, 2018 ONSC 4147 (Ont. S.C.J.).

¹²¹ Government of Canada, “Public policy dialogue and development activities by charities”, online: <<https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/federal-government-budgets/budget-2018-equality-growth-strong-middle-class/public-policy-advocacy-activities-charities.html>>.

¹²² ARCC, “Position Paper #80: Why anti-choice groups should not have charitable tax status” (February 2019), online: <<http://www.arcc-cdac.ca/postionpapers/80-Charitable-Tax-Status.pdf>>, at 3.

(iii) The Values Test

As discussed above, the government's concern with the CSJ funding was ostensibly that no group that publicly advocates restrictions on abortion should receive government money.¹²³ But the attestation was much broader than that. It demanded that an organization's "core mandate" be congruent with the government's ideology. That went well beyond the mischief that the government was concerned with. A church that runs a summer youth camp program, for example, may have a "core mandate", or a core principle, that is pro-life. Should a church be denied CSJ funding even though it is not carrying out the public activism that the government and others find so offensive? To take the argument even further, what about a local museum¹²⁴ or a small irrigation company¹²⁵ with no opinion on abortion or sexual identity? Should organizations whose "core mandate" is selling concrete or growing cucumbers be compelled to express a position on moral or social issues entirely unrelated to their business?

The government exhibited an inability to understand why the various religious and even secular groups were so opposed to the attestation requirement. On January 12, 2018, Labour Minister Patty Hajdu stated:

The attestation actually asks organizations that are applying for federal funding, grants and contributions, that their core mandate will not discriminate against Canadian's *Charter of Rights and Freedoms* and a woman's right to choose. That's what we are asking, is that organizations attest that their core mandate does not discriminate against any Canadians whether it's women abortions rights, groups, people that believe in a woman's fundamental right to choose but also people from the GLBTQ community, other kinds of minorities that are typically experiencing discrimination. So, we think this is a fair process. ... many faith groups have absolutely no problem doing this

¹²³ Amanda Connolly, "Government looking to shut down summer job grants for anti-abortion groups" *iPolitics* (April 13, 2017), online: <<https://ipolitics.ca/2017/04/13/government-shutting-down-summer-job-grants-for-anti-abortion-groups-source/>>.

¹²⁴ See Canadian Press, "N.S. sawmill museum blames closure on Canada Summer Jobs abortion controversy" *CityNews* (June 7, 2018), online: <<https://toronto.citynews.ca/2018/06/07/n-s-sawmill-museum-blames-closure-on-canada-summer-jobs-abortion-controversy/>>. Museum volunteer Gerald Comeau protested, "I understand where the government was coming from, but there were other ways of doing it. If you're a surgeon and you want to fix a patient, you don't go in with a chainsaw, you go in with a scalpel ... In my view, (Ottawa) has gone in with a chainsaw."

¹²⁵ See Kelly McParland, "Who would have guessed the Liberals would reopen the abortion debate?" *National Post* (May 3, 2018), online: <<https://nationalpost.com/opinion/kelly-mcparland-who-would-have-guessed-the-liberals-would-reopen-the-abortion-debate>>. Like Comeau, *supra*, McParland described the government's tactics as taking a "cudgel" to the issue.

because their core mandate is actually ... administering ... the word of god, or it's ministering ... spiritual guidance for people. These are the kinds of things, if you look at the core mandates of faith groups, that they talk about. So, we're very comfortable with our approach.

A reporter asked whether her department was "deciding what the core mandate of a church is?" To which she replied:

No, our ministry is saying that, we believe in the Canadian human rights and *Charter of Rights and Freedoms* and that these are fundamental expectations of Canadians ... that we stand up for those rights. And that we ensure that the money that we disburse on behalf of Canadians is not used in a way that violates those hard-won rights.¹²⁶

Using inclusive language of diversity and equality, the government actually excluded the religious community.¹²⁷ As John Ivison observed, "the government's actions have fallen short of its rhetoric. ... [T]here is a hierarchy of rights in this country: at the apex are those rights the Liberals find agreeable, at its base are those they find abhorrent".¹²⁸

Making it a requirement to accept government ideology to receive government funding captured the imagination — and indignation — of the media. Justice Abella noted in the *Loyola High School* case, "[a] pluralist, multicultural democracy depends on the capacity of its citizens 'to engage in thoughtful and inclusive forms of deliberation amidst, and enriched by,'

¹²⁶ On January 12, 2018, Labour minister Patty Hajdu spoke to reporters before a cabinet meeting in London, Ontario. The video of that exchange is found at "Politics News: Hajdu on Summer Jobs funding" *CBC* (January 12, 2018), online: <<https://www.cbc.ca/player/play/1135611459967/>>.

¹²⁷ Lorna Dueck, "Faith-based students should never be denied a summer job" *The Globe and Mail* (March 21, 2018), online: <<https://www.theglobeandmail.com/opinion/article-faith-based-students-should-never-be-denied-a-summer-job/>>. "Smart, ambitious, innovative and religious young Canadians just got kicked to the curb by the Liberal government. Faith-based youth have had their prospects for summer jobs dimmed and their convictions marginalized as all but one Liberal member of Parliament voted Monday night to limit access for summer job grants to those who believe in a pro-choice ethic."

¹²⁸ John Ivison, "No picking and choosing on the Charter, unless it suits Trudeau's Liberals" *National Post* (January 8, 2018), online: <<https://nationalpost.com/opinion/john-ivison-no-picking-and-choosing-on-the-charter-unless-it-suits-trudeaus-liberals>>. Columnist John Ibbitson wrote in *The Globe and Mail*, "[t]his oath is not only offensive; on its face, it's a clear violation of the very Charter rights that it claims to defend ... The government should scrap the odious clause from the application forms where it has popped up, apologize to Canadians for violating their right to freedom of religion and come up with something that doesn't place people in an intolerable moral conflict." See "Liberals must remember their values aren't the only ones that count" *The Globe and Mail* (January 18, 2018), online: <<https://www.theglobeandmail.com/opinion/liberals-values-oath-is-odious-and-kills-jobs/article/37664329/>>.

different religious worldviews and practices.”¹²⁹ To make government programming contingent on agreement with certain “values” was a rejection of the Canadian sense of fair play that supports diversity and inclusion in a pluralist democracy.

The government’s “values test” was reminiscent of Premier Duplessis’s treatment of Jehovah’s Witnesses (“JWs”) in Quebec.¹³⁰ Duplessis was convinced that he was on a righteous cause as he systematically brought charges against JWs for distributing literature that attacked the Roman Catholic Church. The flyer *Quebec’s Burning Hate*, in particular, raised the ire of both the Quebec government and the Catholic Church as it claimed that both were acting in league against JWs. Duplessis “believed that [Jehovah’s] Witness activity in the province was a deliberate assault on values and virtues Quebecers held dear”.¹³¹ Numerous court actions involved JWs charged with violating municipal by-law restrictions against distribution of their literature and with seditious libel.

The SCC was not sympathetic toward Premier Duplessis in the *Roncarelli*¹³² case. That case arose after Premier Duplessis ordered the Quebec Liquor Commission to cancel Mr. Roncarelli’s liquor licence. Duplessis did not think Roncarelli “was worthy of obtaining privileges from the province” because Roncarelli helped Jehovah’s Witnesses obtain bail when they were arrested for distributing their literature.¹³³ Duplessis considered it his duty in “soul and conscience” to take away the licence because “[t]he Sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice.”¹³⁴ The SCC thought otherwise and held Duplessis personally liable for cancelling the licence. He had no authorization to interfere in Roncarelli’s livelihood because he did not agree with Roncarelli’s support of the Jehovah Witnesses. It was an abuse of power. The fact that he thought it was right does not affect the legal effect of the action. “In public regulation of this sort there is no such thing as absolute and untrammelled ‘discretion’”, explained the Court: “that is that action can be taken on any

¹²⁹ She quoted Benjamin L. Berger, “Religious Diversity, Education, and the ‘Crisis’ in State Neutrality” (2014) 29 C.J.L.S. 103, at 115. See, *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, [2015] 1 S.C.R. 613, 2015 SCC 12, at para. 48 (S.C.C.).

¹³⁰ William Kaplan, *State and Salvation: The Jehovah’s Witnesses and Their Fight for Civil Rights* (Toronto: University of Toronto Press, 1989).

¹³¹ *Id.*, at 233.

¹³² *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.).

¹³³ *Id.*, at 135, translated by the author.

¹³⁴ *Id.*, at 137.

ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.”¹³⁵ The same holds true in the case of the CSJ program. Fundamentally, no government funding or licensing or approval, offered to any non-profit, should be tied to coerced statements that are “capricious or irrelevant” to the purposes of the program. This principle was made clear by the SCC.

As the CSJ saga continued, for the first time in living memory, or so it seemed, the media agreed with the indignation coming from the religious community.¹³⁶ The CSJ issue brought about a public consensus against the government’s policy.¹³⁷ *The Globe and Mail* editorial recognized Charter protection for religious communities to dispute the Constitution and court’s interpretation of it. It found the Prime Minister’s position that “arguing against a right is as bad as infringing it” as “chilling”.¹³⁸ The *National Post*’s editorial board observed that the Prime Minister had “lost touch with the fact that there are large numbers of Canadians who think and believe differently than he does”. He did not appear to “value the rights of women of faith who might disagree with him about abortion. And it is no less than disturbing that he would use misinformation as a way to marginalize both women and men of faith.”¹³⁹

¹³⁵ *Id.*, at 140.

¹³⁶ See Charles Lewis, “Restriction on summer jobs funding not the first time religious rights in Canada have been trampled on” *National Post* (March 15, 2018), online: <<https://nationalpost.com/news/religion/federal-restriction-on-summer-jobs-funding-is-not-the-first-time-religious-rights-in-canada-have-been-trampled-on>>.

¹³⁷ For a sampling of media opinions see: Editorial, “In Canada, abortion is a right. But so is criticizing it” *The Globe and Mail* (January 19, 2018), online: <<https://www.theglobeandmail.com/opinion/editorials/globe-editorial-in-canada-abortion-is-a-right-but-so-is-criticizing-it/article37667535/>>; National Post View, “Trudeau uses ‘alternative facts’ on abortion to discriminate against people of faith” (January 19, 2018), online: <<https://nationalpost.com/opinion/np-view-trudeau-uses-alternative-facts-on-abortion-to-discriminate-against-people-of-faith>>; John Ivison, “Trudeau’s stubbornness over summer jobs application defies common sense” *National Post* (January 19, 2018), online: <<https://nationalpost.com/opinion/john-ivison-trudeaus-stubbornness-over-summer-jobs-application-defies-common-sense>>; Rex Murphy, “No summer jobs for you! And other decrees from Bishop Trudeau” *National Post* (January 19, 2018), online: <<https://nationalpost.com/opinion/rex-murphy-no-summer-jobs-for-you-and-other-decrees-from-bishop-trudeau>>; Peter Shawn Taylor, “Are you a loyal Canadian?” *Waterloo Region Record* (January 18, 2018), online: <<https://www.therecord.com/opinion-story/8078109-are-you-a-loyal-canadian/>>.

¹³⁸ Editorial, “In Canada, abortion is a right. But so is criticizing it” *The Globe and Mail* (January 19, 2018), online: <<https://www.theglobeandmail.com/opinion/editorials/globe-editorial-in-canada-abortion-is-a-right-but-so-is-criticizing-it/article37667535/>>.

¹³⁹ National Post View, “Trudeau uses ‘alternative facts’ on abortion to discriminate against people of faith” (January 19, 2018), online: <<https://nationalpost.com/opinion/np-view-trudeau-uses-alternative-facts-on-abortion-to-discriminate-against-people-of-faith>>.

Even *The Toronto Star* Editorial concluded, “the government has overreached on this issue. Instead of focusing on what summer-jobs money would pay young people to do, it has made an issue of what the organizations that apply for the funds believe.”¹⁴⁰

Despite the robust attacks in the press, the government did have supporters.¹⁴¹ Law professor Karen Busby suggested that “[r]eligious organizations and editorial writers have sown confusion” over the CSJ program. In her view, such “concerns are groundless”.¹⁴² The main issue, as she saw it, was whether governments should be funding advocacy projects at all. She rejected the notion that the attestation compelled or impeded expression or religious practices: “[T]he Charter does not require governments to support expressive or religious rights. Governments can, unbound by the Charter, choose the advocacy projects it wishes to support.”¹⁴³

The issue in the CSJ program, however, was not whether governments can decide which advocacy groups to support (they certainly have that freedom, in my view). The concern, rather, was that private individuals and religious communities should not be required to sign on an application form that they endorse the government’s ideological position.¹⁴⁴

Eventually the blistering commentary in the press had its effect in moving the government to address the issues in a more direct manner. In late January 2018, the government issued “supplementary information” saying it only expected compliance in activities, not beliefs or values.¹⁴⁵

¹⁴⁰ Star Editorial Board, “The Trudeau government is over-reaching on abortion and summer jobs” *The Toronto Star* (January 22, 2018), online: <<https://www.thestar.com/opinion/editorials/2018/01/22/the-trudeau-government-is-over-reaching-on-abortion-and-summer-jobs.html>>.

¹⁴¹ Especially among the ARCC such as Joyce Arthur, “The Canada Summer Jobs kerfuffle: Full of sound and fury, signifying nothing” (February 2, 2018), online: <<http://rabble.ca/columnists/2018/02/canada-summer-jobs-kerfuffle-full-sound-and-fury-signifying-nothing>>.

¹⁴² Karen Busby, “Liberals’ summer jobs program controversy on reproductive rights overblown” *Canadian Lawyer* (January 29, 2018), online: <<https://www.canadianlawyermag.com/author/karen-busby/liberals-summer-jobs-program-controversy-on-reproductive-rights-overblown-15238/>>.

¹⁴³ *Id.*

¹⁴⁴ See Barry Bussey, “What the fuss about ticking a box on the Canada Summer Jobs application is about” *Canadian Lawyer* (February 20, 2018), online: <https://www.canadianlawyermag.com/author/barry-bussey/what-the-fuss-about-ticking-a-box-on-the-canada-summer-jobs-application-is-about-15341/#tab_1>.

¹⁴⁵ The government document of January 23, 2018 (“Supplementary Information”, ESDC, online: <<https://www.canada.ca/en/employment-social-development/services/funding/canada-summer-jobs/supplementary-information.html>>) gave the following definitions:

- Organization: This is the entity that is directly applying to use CSJ funding.
- Core mandate: This is the primary activities undertaken by the organization that reflect the organization’s ongoing services provided to the community. It is not the beliefs of the organization, and it is not the values of the organization.

However, the government still refused to change the attestation itself. As a result, many organizations¹⁴⁶ (both religious and secular) chose to forgo government money for student jobs rather than sign on to the government's view on abortion. Others did apply but either left the box unticked, or modified the attestation with a marginal note or letter attached to the written document. They pointed out that they were not subject to the Charter, but would accept their obligations under applicable Canadian law, including human rights legislation. These "modified" applications were promptly rejected.¹⁴⁷ The irony, of course, is that the government demanded respect for the Charter even while they themselves refused to uphold the fundamental freedoms granted in section 2 for freedom of expression and conscience for the applicants who could not sign the attestation. While the government claimed to be protecting diversity, equality and opportunity for student employment, their policy actually discriminated against any applicant who did not hold the same opinion as the government, and thereby shut out over 1,500¹⁴⁸ charities from hiring summer students.

As the government tried to regain the narrative on the CSJ issue, the Conservative opposition party decided to apply pressure of its own. On March 19, 2018, it brought forth a non-binding motion that "organizations that engage in non-political non-activist work ... should be able to access Canada Summer Jobs funding regardless of their private convictions and

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- Respect: Individual human rights are respected when an organization's primary activities, and the job responsibilities, do not seek to remove or actively undermine these existing rights.

The CSJ program will not fund organizations whose primary activities:

- involve partisan political activities; or
- do not respect – seek to remove or actively undermine – established individual human rights in Canada.

¹⁴⁶ Interfaith statement on changes to the Canada Summer Jobs Grant Program, signed by more than 80 religious leaders, organizations and institutions, January 25, 2018, online: <<https://www.archtoronto.org/summerjobs/Documents/Interfaith%20statement%20-%20CSJ%20Final%20EN%20signatures.pdf>>.

¹⁴⁷ *The Toronto Star* reported, "A spokesperson for Employment and Social Development Canada, which oversees the program, said any applications with an unsigned or revised declaration, or any groups that 'wrote to the department expressing concern with the new eligibility requirement' were deemed to have incomplete applications." See, Jordan Press, "Faith-based groups in limbo after Trudeau government's changes to summer-job funding applications" *The Toronto Star* (March 17, 2018), online: <<https://www.thestar.com/news/canada/2018/03/17/faith-based-groups-in-limbo-after-trudeau-governments-changes-to-summer-job-funding-applications.html>>.

¹⁴⁸ Brian Platt, "Summer jobs program rejections spike over abortion rights requirement, but applications also rise" *National Post* (March 19, 2018), online: <<https://nationalpost.com/news/politics/summer-jobs-program-rejections-spike-over-abortion-rights-requirement-but-applications-also-rise>>.

regardless of whether or not they choose to sign the application attestation".¹⁴⁹ It was defeated 93 votes for and 207 votes against.¹⁵⁰

The government recognized it had to do something and the polling numbers were not going in its favour.¹⁵¹ Further, it was facing more court action. By the end of 2018, there were 10 different court actions filed against the government.¹⁵² Indeed, "a lamentable state of affairs"¹⁵³ was being visited upon the government.

In time for the 2019 CSJ applications, the government finally agreed to do what many observers had been calling for from the very beginning — remove the offensive attestation requirement.¹⁵⁴ Religious organizations

¹⁴⁹ Vote No. 459 Details, House of Commons, 42nd Parliament, 1st Session, March 19, 2018, online at <<http://www.ourcommons.ca/Parliamentarians/en/votes/42/1/459/>>.

¹⁵⁰ However, the exercise produced some breaking of ranks. Scott Simms, a Liberal MP from Newfoundland, voted in favour of the motion against his party's whip. That vote resulted in him losing the chair of the Fisheries Committee. He was not the only one. Ontario MP David Christopherson of the New Democratic Party voted against his party and suffered as well. His leader, Jagmeet Singh, removed him as vice chair of the Procedure and House Affairs Committee. After a number of Christopherson's colleagues voiced their opposition he was reinstated. Meanwhile, Liberal MP John McKay left the House and didn't vote, and later called the government's CSJ troubles, "a lamentable state of affairs", explaining "[I] have expressed my views both inside and outside caucus in the strongest possible terms." See: Joanna Smith, "N.L. MP Scott Simms removed as fisheries chair after breaking with Liberal party line" *The Canadian Press* (April 19, 2018), online: <<https://www.cbc.ca/news/canada/newfoundland-labrador/scott-simms-removed-from-fisheries-chair-1.4627724>>; Brian Platt, "Pro-choice NDP MP breaks ranks on Summer Jobs vote, slams government for removing right to dissent" *National Post* (March 20, 2018), online: <<https://nationalpost.com/news/politics/pro-choice-ndp-mp-breaks-ranks-on-summer-jobs-vote-slams-government-for-removing-right-to-dissent>>; Laura Stone, "NDP leader Jagmeet Singh backs down from decision to punish MP after outcry from caucus" *The Globe and Mail* (March 27, 2018), online: <<https://www.theglobeandmail.com/politics/article-ndp-mp-criticizes-leader-singhs-punishment-of-fellow-new-democrat/>>; Brian Platt, "Second Liberal MP denounces Summer Jobs abortion-rights clause, says it misrepresents the Charter" *National Post* (April 2, 2018), online: <<http://nationalpost.com/news/politics/second-liberal-mp-denounces-summer-jobs-attestation-says-it-misrepresents-the-charter>>.

¹⁵¹ Shannon Proudfoot, "New poll suggests the Trudeau Liberals went too far with summer job grant policy: Even staunchly pro-choice respondents find denying job money regardless of how it will be spent is unfair, according to a survey by the Angus Reid Institute" *Maclean's* (May 15, 2018), online: <<https://www.macleans.ca/politics/ottawa/student-summer-job-grants-poll/>>.

¹⁵² Filed in Alberta: Remuda Building Ltd. (T-1291-18); Saturn Machine Works Ltd. (T-1292-18); Vantage Trailer Sales Inc. (T-1279-18); A-1 Irrigation & Technical Services (see *Anderson v. Canada (Minister of Employment, Workforce and Labour)*, [2018] A.J. No. 1187, 2018 ABQB 839 (Alta. Q.B.)); Filed in Ontario: WoodSource (T-1278-18); Sarnia Concrete (T-1224-18); Toronto Right to Life (T-8-18) (also see 2018 FC 102); Power to Change (Application for Judicial Review filed 2018-08-06); Adam (T-1274-18); Redeemer University College (T-1277-18).

¹⁵³ Brian Platt, "Second Liberal MP denounces Summer Jobs abortion-rights clause, says it misrepresents the Charter" *National Post* (April 2, 2018), online: <<http://nationalpost.com/news/politics/second-liberal-mp-denounces-summer-jobs-attestation-says-it-misrepresents-the-charter>>.

¹⁵⁴ Chris Selley, "Liberals change policy on summer job funding, but only grudgingly" *National Post* (December 7, 2018), online: <<https://nationalpost.com/opinion/chris-selley-liberals-still-dont-understand-why-they-needed-to-change-summer-job-funding-policy>>.

that opposed the government were relieved¹⁵⁵ but nevertheless wary as to what they might have to face next. It would appear that “[t]he religious community in Canada is now ‘woke’ to the demands being placed by Canada’s elites who seek to enforce their own areligious views on others.”¹⁵⁶

(iv) On the Matter of Abortion

The federal government’s position, underlying its approach to the CSJ attestation, is that there is a “human right” and a “Charter right” to abortion. To be clear, there is no such declared absolute right to abortion, as of yet, in Canadian law.

In its *Morgentaler* (1988) decision¹⁵⁷ the Supreme Court of Canada (SCC) did not declare abortion on demand as a Charter right. The decision consisted of four separate opinions with only one justice — Bertha Wilson J. — stating that there was, in essence, a Charter right to abortion.¹⁵⁸ Even then, Wilson J.’s view was that a right to abortion was not absolute. Justice Wilson was part of the five-justice majority that struck down the *Criminal Code*¹⁵⁹ provision regulating abortion because they held that the Code was too restrictive in limiting access to abortion. In their view, it violated women’s section 7 Charter right to security of the person. There were two justices¹⁶⁰ in the minority who held the Code did not violate the Charter.

Justice Wilson’s opinion went further than the other four justices¹⁶¹ of the majority, stating that not only was the Code violating a woman’s section 7¹⁶²

¹⁵⁵ Brian Platt, “The values test is gone’: Faith groups welcome changes to summer jobs attestation” *National Post* (December 7, 2018), online: <<https://nationalpost.com/news/politics/here-is-what-the-new-canada-summer-jobs-attestation-says>>.

¹⁵⁶ Barry W. Bussey, “The government finally blinks on the summer jobs attestation — or so it seems” *National Post* (December 11, 2018), online: <<https://nationalpost.com/opinion/the-government-finally-blinks-on-the-summer-jobs-attestation-or-so-it-seems>>.

¹⁵⁷ *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

¹⁵⁸ *Id.*, per Wilson J., at 170-71: “Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman’s decision — with the guidance of her physician and within the limits specified in *Roe* — whether to end her pregnancy. *A woman’s right to make that choice freely is fundamental*. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.” (Emphasis added). In analyzing Wilson J.’s decision, McIntyre J. noted at 141-42, “The judgment of my colleague, Wilson J., is based upon the proposition that a pregnant woman has a right, under s. 7 of the Charter, to have an abortion.”

¹⁵⁹ R.S.C. 1985, c. C-46.

¹⁶⁰ McIntyre and La Forest JJ.

¹⁶¹ Dickson C.J.C., and Lamer, Beetz and Estey JJ.

¹⁶² *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 174-76 (S.C.C.).

rights but also her freedom of conscience right under section 2(a).¹⁶³ She nevertheless recognized the state's valid interest in protecting the unborn child. The value on the child's life, in her view, is directly related to the stage of its pre-natal development. The more fully developed the child is, the more the state's interests become "compelling" in protecting the child and, correspondingly, the more diminished the woman's right to abortion. Exactly where that line is, was left to the "informed judgment" of Parliament. In her view, the protection of the fetus "is a perfectly valid legislative objective".¹⁶⁴

The divided Court of 1988 forms part of our historical debate as a country on the vexing question of abortion. It remains contentious. But, as McIntyre J. observed in his dissent, "[t]here has always been clear recognition of a public interest in the protection of the unborn and there has been no evidence or indication of any general acceptance of the concept of abortion at will in our society."¹⁶⁵ In summary, as Professor Shelley A.M. Gavigan stated, "[t]he Supreme Court's decision, profound as it was, did not create a right to abortion for Canadian women, nor did it offer any resolution of the abortion issue."¹⁶⁶ All attempts to address this lacuna that arose after the SCC struck down the *Criminal Code* sections that governed abortion have ended in failure. Abortion remains widely accessible throughout Canada without restriction — but the debate rages on.¹⁶⁷

The current federal government finds this reality objectionable — so much so that no person who advocates a pro-life position is eligible to seek office under the banner of the Liberal Party of Canada.¹⁶⁸ This position is a lawful position to hold. The Charter protects such freedom of

¹⁶³ *Id.*, at 176-80.

¹⁶⁴ *Id.*, at 181.

¹⁶⁵ *Id.*, at 146.

¹⁶⁶ Shelley A.M. Gavigan, "Beyond Morgentaler: The Legal Regulation of Reproduction" (1992) *Articles & Book Chapters*, 98, at 118, online: <http://digitalcommons.osgoode.yorku.ca/scholarly_works/98>.

¹⁶⁷ Paul Saurette & Kelly Gordon, "Arguing Abortion: The New Anti-Abortion Discourse in Canada" (2013) 46:1 *Can. J. Political Science* 157; Tim Den Bok, "There is no 'right' to abortion" *The Interim* (July 30, 2018), online: <<http://www.theinterim.com/issues/abortion/there-is-no-right-to-abortion/>>. Certainly, there is ample legal academic argument for such an absolute right to abortion. For instance, Professor Joanna N. Erdman, in describing the abortion rights activists who were successful in causing P.E.I.'s government to provide and pay for abortion on the island, characterizes "abortion rights as democratic rights: the right to fully and equally participate in, and to benefit from, the institutions of the state, the health care system among them." It is a claim "for reproductive justice"; see Joanna N. Erdman, "Constitutionalizing Abortion Rights in Canada" (2017) 49 *Ottawa L. Rev.* 221; Erdman, "A Constitutional Future for Abortion Rights in Canada" (2016-2017) 54 *Alta. L. Rev.* 727, at 751.

¹⁶⁸ Susana Mas, "Anti-abortion candidates need not apply in 2015, Justin Trudeau says" *CBC News* (May 7, 2014), online: <<https://www.cbc.ca/news/politics/anti-abortion-candidates-need-not-apply-in-2015-justin-trudeau-says-1.2634877>>.

association in section 2(d). Conversely, it is the right of any individual and association to hold the opposite view of the government and support a pro-life position. But — and this comes to the heart of the issue — government has no jurisdiction to enforce its pro-abortion view on anyone who applies for government funding, such as with the Canada Summer Jobs program.

In the event of the SCC having another chance to decide the issue, pro-choice arguments would likely be received positively by some on the Court, but it remains uncertain as to whether the Court would change the current state of the law. That is due to the very contentious nature of abortion and the continued division in public opinion.¹⁶⁹ The Court has shown itself to pay close attention to public opinion. If the Court were to accept the argument that there is an absolute right to abortion it would not be because the Charter says so but because there is an abstract view of the “spirit” or the “vibe” of what the SCC currently sees as the Charter “values” within our current context. In other words, the SCC will have to make a constitutional amendment — as it did with sexual orientation¹⁷⁰ and with the “right to request a physician’s assistance in dying”.¹⁷¹

The SCC, in recent times, is adept in developing the law to meet the societal challenges it faces — especially if there is a near unanimity among legal academics and professionals as to how the law “ought” to be interpreted.¹⁷² Mere plain text of the law, in and of itself, is not necessarily a barrier for the “progressive” court as it interprets what the law ought to mean in the current context. Borrowing the well-known imagery of Lord Sankey,¹⁷³ Chief Justice Richard Wagner interprets the Canadian

¹⁶⁹ See for example the analysis of a pro-life group (“weneedalaw.ca”) of the recent polls: “If you look at the polls that ask whether abortion is permissible (i.e. whether you always support a woman’s choice) the numbers are much closer, with an average of 48% supporting a choice at any point, 46% only supporting sometimes, and 5% unsure.” We Need a Law, “25 Jul 2018 Canadian Opinions On Abortion: Abortion Polls Summarized”, online: <<https://weneedalaw.ca/2018/07/canadian-opinions-on-abortion/>>.

¹⁷⁰ *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.).

¹⁷¹ *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331, 2015 SCC 5, at para. 66 (S.C.C.).

¹⁷² Consider for example the SCC’s 2018 decisions in the Trinity Western University law school cases, *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 423 D.L.R. (4th) 197, 2018 SCC 32 (S.C.C.) and *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33, 423 D.L.R. (4th) 321, 2018 SCC 33 (S.C.C.). The Court disregarded its own precedent and arrived at a politically correct decision. See Barry W. Bussey, “Law Matters but Politics Matter More: The Supreme Court of Canada and Trinity Western University” (2018) 7 Oxford J.L. Religion 559.

¹⁷³ *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, 1929 UKPC 8 (U.K.).

Constitution as “a living tree,¹⁷⁴ it evolves, so that we don’t necessarily keep to the strict definition of a word when it was drafted 150 years ago. We look at it against the backdrop of an evolving society with the perspectives, outlooks, moral values of that society, and the context in which the issue comes up at the time the Court is making its decision.”¹⁷⁵

In short, given that the current federal “feminist” government desires everyone to believe that abortion is, in fact, a constitutional right, despite the SCC never saying so; and, the growing academic opinion that argues such a right exists (and if it doesn’t, it should); and, the growing militancy of pro-abortion advocacy that is willing to challenge any government or civil society that does not see abortion as they do;¹⁷⁶ and, that the SCC has shown itself willing to adapt the law toward the prevailing opinions of our societal elites in academia, the legal profession and the media; then these factors would suggest that if the SCC were asked today as to whether the Charter supports an absolute right to abortion, it is highly conceivable that it would do so.

Should the SCC ever say otherwise — that there is no absolute constitutional right to abortion — then it would be reasonable to expect a legal, political and social firestorm. This is not meant to be dramatic, as it is a realistic description of where we are in litigating controversial social moral norms. For example, during the TWU law school case, Wagner J., as he then was, denied¹⁷⁷ the applications of LGBTQ groups who wanted

¹⁷⁴ See a different take than that of Wagner J. in Bradley W. Miller, “Beguiled by Metaphors: The ‘Living Tree’ and Originalist Constitutional Interpretation in Canada” (2009) 22 Can. J.L. & Jur. 331.

¹⁷⁵ “Richard Wagner Holds First News Conference as Canada’s Chief Justice” *Headline Politics* (June 22, 2018), online: *cpac.ca* <<http://www.cpac.ca/en/programs/headline-politics/episodes/62857192>>. Justice Wagner also explained that the SCC has no problem in reversing its previous decisions in order to be up with the times, as the Court sees it. He stated: “When you talk about interpretation, context is paramount. And when you are looking at issues that come up long after the original text has been drafted, as in the Constitution for example, there are principles of interpretation that you apply. ... Take the *Carter* case, for example, on assisted suicide. Many years earlier, when looking at the same facts, the same provision of the *Criminal Code*, under study led to a different decision. And yet it was the same provision of the *Criminal Code*. So, interpretation is in context, and of course, the different decision would be based on different evidence being put before the Court. But, society has evolved, as has medicine. There are moral values that link the majority of Canadians. These are rulings that take context into account as a backdrop to the legal rulings that we arrive at” (at 30:19-31:59).

¹⁷⁶ See Joyce Arthur, “The Canada Summer Jobs kerfuffle: Full of sound and fury, signifying nothing” (February 2, 2018), online: <<http://rabble.ca/columnists/2018/02/canada-summer-jobs-kerfuffle-full-sound-and-fury-signifying-nothing>>.

¹⁷⁷ See *Law Society of British Columbia v. Trinity Western University, et al.*, SCC 37318, July 27, 2017 entry in the case dossier, online: <<https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37318>>. Several religious groups were also denied intervenor status.

to intervene in the case. After a weekend of public outcry on social media the SCC uncharacteristically¹⁷⁸ changed course and allowed all of them in.¹⁷⁹ Such has become the extent of the Court's sensitivity toward public criticism in cases dealing with controversial social issues such as sexual norms.¹⁸⁰ That sensitivity is in keeping with Wagner C.J.C.'s statement that the Court looks at the "evolving society".¹⁸¹ It also explains why the Court would ignore its own *TWU* 2001¹⁸² decision and make the decisions it did in *TWU* 2018.

Not only are the courts leery of such public controversies, so too are the federal politicians who have refused to work on the SCC *Morgentaler* (1988) call to determine where the state's "compelling interest" in the life of the unborn child begins and ends.¹⁸³

IV. THE GRADUAL AND SILENT RISE OF TOTALITARIANISM

"Since the general civilization of mankind", said James Madison, "I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpation."¹⁸⁴

¹⁷⁸ Paula Kulig, "Chief justice's rare order in Trinity Western case ensures 'all voices could be heard'" *The Lawyers Daily* (August 9, 2017), online: <<https://www.thelawyersdaily.ca/articles/4375>>.

¹⁷⁹ See the July 31, 2017 entry in the case dossier, online: <<https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37318>>.

¹⁸⁰ Sean Fine, "Supreme Court justice offers explanation for LGBTQ decision" *The Globe and Mail* (2017), online: <<https://www.theglobeandmail.com/news/national/supreme-court-justice-offers-explanation-for-lgbtq-decision/article35870614/>>. Justice Wagner was quoted as stating, "I would be the last one to give the false impression that I have no consideration for specific groups like the LGBTQ."

¹⁸¹ Richard Wagner Holds First News Conference as Canada's Chief Justice" *Headline Politics* (June 22, 2018), online: *cpac.ca* <<http://www.cpac.ca/en/programs/headline-politics/episodes/62857192>>.

¹⁸² *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772, 2001 SCC 31 (S.C.C.).

¹⁸³ Claire Farid, "Access to Abortion in Ontario: From *Morgentaler* 1988 to the *Savings and Restructuring Act*" (1997) 5 Health L.J. 119, at 125 observes, "While the Court clarified that provisions like s. 251 could not be used to prevent women from having abortions, there was no identification of a governmental responsibility to ensure that women were in fact able to access this procedure ... this decision reinforced the notion that abortion is a health or medical matter." Moira McConnell & Lorene Clark, "Abortion Law in Canada: A Matter of National Concern" (1991) 14 Dal. L.J. 81, at 81, "With the striking down of s. 251, Canadian women now have a liberty, or negative right to control their reproductive capacities. What they lack is a claim, or positive right of access to safe, subsidized and efficient abortion facilities."

¹⁸⁴ James Madison, *Selected Writing of James Madison*, ed. by Ralph Ketcham (Indianapolis/Cambridge: Hackett, 2006), at 144.

The CSJ issue was not a constitutional crisis. Canada was not about to fall because the government imposed its will on the religious community who did not see the world the same way. At best it was evidence of a government not understanding the religious sensibilities of its citizenry. At worst it was evidence of a wilful disregard of the religious community in its quest to satisfy a vocal but supportive interest group. However, concern is warranted as both of these worst and best-case scenarios are reflective of “constitutional rot”.

Constitutional rot has been described, in the American context, as the “decay in the features of our [political] system that maintain it as a healthy republic”.¹⁸⁵ I suggest that similarly, the notion of constitutional “rot” can be applied in any liberal democratic context. It matters not whether we are talking about the American constitutional republic or the Canadian constitutional monarchy. Liberal democracies, of whatever form, are responsible for and are meant to be responsible to the people. When they disregard the individual conscience, they are weakening the health of the political system as a whole. That is never good.

Jack M. Balkin observes that the constitutional rot or “dysfunction” is a problem of “*representation*” such that the political system becomes less “democratic”, less “republican” and becomes increasingly oligarchical.¹⁸⁶ To be democratic, he suggests, is to be responsive to the popular will and popular opinion; republican refers to the representatives being devoted to the public good and being responsive to the public as a whole; and finally his description of oligarchy refers to the representatives being responsive to relatively small groups or individuals rather than to public interests.¹⁸⁷

Balkin observes that the framers of the U.S. Constitution “understood that republics are fragile things. They are easily corrupted, and over time, they are likely to turn into oligarchies or autocracies.”¹⁸⁸ I argue that the longevity of democracies that support basic human rights is, when seen in the panoramic view of human history, but a series of short blips of anomaly in the sea of human despotism. The relative peace and advance of human rights we have experienced since the beginning of the 18th century (battered as it was by the horrendous U.S. Civil War and the world conflicts of the 20th century) is, one could argue, taken for granted today. We are naïve if we think that our current reality of democratic human rights,

¹⁸⁵ Jack M. Balkin, “Constitutional Rot” in Cass R. Sunstein, ed., *Can It Happen Here?* (Dey Street Books: Kindle Edition, 2018), at 19.

¹⁸⁶ *Id.*, at 19.

¹⁸⁷ *Id.*, at 19-20.

¹⁸⁸ *Id.*, at 20.

experienced as it is in countries like Canada, was always the norm or will remain the norm without any internal or external threat. Our enthusiastic optimism that things will continue as always without vigilant effort to maintain the health of our democratic ideals is foolhardy at best. It is like saying the stock market will always go up no matter its dizzying heights.

Consider, for example, what happened with the 1989 fall of communism in Europe. It brought forth a flowering of democracies throughout the former Soviet Union bloc that was of epic significance. As democracy spread worldwide in the wake of the Cold War ending, there was tremendous enthusiasm.¹⁸⁹ However, things have now changed dramatically. Over the last 13 years democracy is in a worrying state of decline around the world. Freedom House, a think tank that has been advocating for democracy since 1941, raises the alarm.¹⁹⁰ “[M]any countries that democratized after the end of the Cold War,” Freedom House reports, “have regressed in the face of rampant corruption, antiliberal populist movements, and breakdowns in the rule of law.”¹⁹¹ But, it doesn’t stop there. They decry, “[m]ost troublingly, even long-standing democracies have been shaken by populist political forces that reject basic principles like the separation of powers and target minorities for discriminatory treatment.”¹⁹²

There is now a “crisis of confidence” in democracies because many citizens express doubts that democracy still serves their interests.¹⁹³ With economic disparities increasing due to the globalization of the world economies, anger has arisen among those who did not gain from the increased wealth. Populist movements have stepped into the breach and are advocating radical solutions to the lack of economic mobility. The illiberal movements from both the left and the right¹⁹⁴ of the political spectrum are creating dissatisfaction with democracy. The very basic civil, political and human rights are being challenged as never before. There is an increased strain on democracies to hold back these winds of strife.

¹⁸⁹ Philip D. Zelikow, “The Suicide of the East? 1989 and the Fall of Communism” (2009) 88 Foreign Aff. 130, at 140, stated, “At supreme moments of crisis in 1989 and 1990, critical choices were indeed made in favor of peace, in favor of nonviolent change. But those choices were made by men groomed from adolescence to be model Communist leaders. The suicide was in the East, not the West. And the suicide was not an act of self-destruction. Theirs was an act of creation.”

¹⁹⁰ Freedom House, “Democracy in Retreat: Freedom in the World 2019”, online: <https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf>.

¹⁹¹ *Id.*, at 1.

¹⁹² *Id.*

¹⁹³ *Id.*, at 2.

¹⁹⁴ Freedom House’s report says very little about the left illiberal movement. However, I suggest that radicals on both the left and the right are a problem for freedom.

It is becoming more precarious when long-established democracies, such as the United States, are also falling victim to extreme political factions. The United States is not simply any democracy but, arguably, is the one free country that did the most for the establishment and support of the democratic wave in the post-1989 era. As Freedom House points out, “[t]he truth is that democracy needs defending, and as traditional champions like the United States stumble, core democratic norms meant to ensure peace, prosperity, and freedom for all people are under serious threat around the world.”¹⁹⁵

Populist movements provide simple and direct answers to very complex problems that citizens have when their country faces a crisis. Such movements are ideologically driven. And, as a result, they purportedly explain every complication to those initiated in its worldview. Their leaders become the superheroes, the deliverers, for such a time as the crisis warranted. Inevitably, the democratic ideals fall victim to the simple answers. The decline of democracy into authoritarianism is but a small, incremental step.

Orwell, the ever-keen observer of authoritarianism, described in his classic *Animal Farm*¹⁹⁶ the brutality of dictatorship. Political movements are volatile. What starts out as a well-intentioned cause for hope can morph into a dictator’s grip on power evaporating all wisps of freedom. When pig Napoleon took control of the farm, four of the “young porkers” rose to their feet in protest only to be met with the “menacing growls” of Napoleon’s dogs. Those four pigs “fell silent and sat down again”.¹⁹⁷ When the authoritarian raises his or her hand for silence on those who protest the injustice of a policy it takes courage to remain standing. But it is that courage that makes freedom possible. Given the rise of technology and the accelerating ability of the state to enforce its will, the prospects of many courageous patriots standing up may be difficult to find.

Squealer, the manipulative pig in Orwell’s tale, informed the animals that with the rise of pig Napoleon to power they had nothing to fear. Their rights were going to be respected. Promised Squealer, “[n]o one believes more firmly than Comrade Napoleon that all animals are equal. He would be only too happy to let you make your decisions for

¹⁹⁵ Freedom House, “Democracy in Retreat: Freedom in the World 2019” online: <https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf>, at 4.

¹⁹⁶ George Orwell, *Animal Farm* (Middlesex: Penguin Books, 1945).

¹⁹⁷ *Id.*, at 49.

yourselves. But sometimes you might make the wrong decisions, comrades, and then where should we be?”¹⁹⁸

How is it that our civic enterprise often drifts into totalitarian nightmare with a dictator so convinced of his righteous position in pursuing the “public interest” that he fears his subjects are incapable of making personal decisions on what they deem best for themselves? The historic record is replete with examples of this phenomena. There is nothing new under the sun. The dictator and his supporting cast of sycophants, who feed his ego and benefit from being part of the dictatorial power regime, consider it indisputable that their ideology is the correct worldview. Such oligarchies have deluded themselves with the notion that their “public service” is a sacrifice of their own wellbeing for the good of the polis. In a strange sort of way, the political perpetrators of the most absolutist dogma become, in their own minds, the victims.

Karl Popper was equally aware, as was Orwell, of the extremist tendencies of reactionary socio-political movements that claim to answer the problems that bedevil the modern world by going back to a form of tribalism. Popper suggests that any attempt of such reactionary social philosophy to beguile us with “historical prophecies” based on their “scientific prediction” is harmful.¹⁹⁹ The success of these social philosophies lies in the fact that “they give expression to a deepfelt dissatisfaction with a world which does not, and cannot, live up to our moral ideals and to our dreams of perfection”.²⁰⁰ Further, he suggests that their revolt against civilization “may be due to the fact that historicism”²⁰¹ itself is, largely, a reaction against the strain of our civilization and its demand for personal responsibility”.²⁰² In other words, democracy expects too much of the individual and the individual is “strained” under the burden of making choices. It is better for the state to take that “burden” from the individual. After all, one would not want the individual to make the “wrong” decision.

¹⁹⁸ *Id.*, at 50.

¹⁹⁹ Karl Popper, *The Open Society and Its Enemies* (London: Routledge Classics, 2011), at xxxvii.

²⁰⁰ *Id.*, at xxxix.

²⁰¹ Karl Popper, *id.*, at xxxvii, defines “historicism” as the various social philosophies that claim: “everybody tries to use his brains to predict impending events ... and that the boundaries between such a prediction and more sweeping historical prophecies are fluid. They assert that it is the task of science in general to make predictions, or rather, to improve upon our everyday predictions, and to put them upon a more secure basis; and that it is, in particular, the task of the social sciences to furnish us with long-term historical prophecies. They also believe that they have discovered laws of history which enable them to prophesy the course of historical events.”

²⁰² *Id.*, at xxxix.

Popper suggests that the political philosophical originator of this reactionary movement against the open — more democratic society — is Plato. As Popper tells it, Plato recognized in ancient Greece that the democratic revolution led to increased pressure on the individual to take personal responsibility for life choices. But, says Popper, Plato's call to return to tribalism "to win back happiness for the citizens" was "hopelessly wrong".²⁰³

Tribalism, ancient as well as modern, relieves the individual from having to struggle over choices. In ancient times the tribal emphasis on pleasing the supernatural divinities meant that the individual knew how to act in any given situation because the religious culture laid out what was "natural", *i.e.*, what was expected. The individual rarely found "himself in the position of [not knowing] how he ought to act. The right way is always determined by taboos, by magical tribal institutions which can never become objects of critical consideration."²⁰⁴

The tribal society is a closed society resembling "a herd or a tribe in being a semi-organic unit whose members are held together by semi-biological ties — kinship, living together, sharing common efforts, common dangers, common joys and common distress".²⁰⁵ Every member of the tribe knows their place and happiness is found in that place as one living organism. I suggest that when we allow the state to tell us how we ought to believe and act on fundamental human life issues, we are entering a closed society. The tribe — made up of our opinion makers, our legislators, our academia — tells us what "right" decisions to make. But that is not properly the domain of government in the context of fundamental human life issues because such matters rest upon axioms and presuppositions about human life on which reasonable people can, and often do, disagree.

The open society, on the other hand, is one with social mobility and open debate. People can (but not always) rise and fall in social status based upon individual effort and merit. There is an abstract quality to the open society in its search for meaning and purpose. People, being individualistic, tend to walk past one another rather than converse together. Indeed, as we consider our 21st century, we live in a time when computer technology makes even the workplace a social thing of the past. We, more than any other previous society, understand just how

²⁰³ *Id.*, at 163.

²⁰⁴ *Id.*, at 164.

²⁰⁵ *Id.*, at 165.

abstract our lives have become. We “live in anonymity and isolation, and consequently in unhappiness. For although society has become abstract, the biological make-up of man has not changed much; men have social needs which they cannot satisfy in an abstract society.”²⁰⁶

Despite our technological advances there still exists a means to develop social groups through virtual reality online. We may not belong to the same “tribal group” as our neighbour but we can contact a tribal member who is in another country or in another suburb. Paradoxically, it is both harder today to live a common life as did the previous tribal societies because technology allows us to be more individualistic; but it is also easier to live a tribal life, despite our democratic individualism, with the advancements of technology to keep in close contact with fellow tribe members. Thus, populism, with the advance of our technology, is just as effective today as it was in the past. And, as we saw with our opening example of the developments in China, technology can be an instrument of the return to the tribal or the closed society.

A full review of Popper’s analysis of Plato is beyond the scope of this paper but a key takeaway is that the appeal to tribalism (as we see in the populist movements today and the allure of state use of surveillance to enforce ideology) is not new but of ancient origin; it rejects individual freedom while at the same time claiming to support it. Plato, says Popper, was “the pioneer of the many propagandists who, often in good faith, developed the technique of appealing to moral, humanitarian sentiments, for anti-humanitarian, immoral purposes”.²⁰⁷ The underlying principle that Plato and his modern intellectual heirs have found most effective is not to fight against, but take advantage of, the basic human inclination to be a part of a larger movement that brings meaning to life while at the same time expressing support for individualism, equalitarianism, faith in reason and love of freedom.²⁰⁸ The closed, tribal society is deemed good for the individual because the individual has “no certainty, no security in life, when everything is in flux”.²⁰⁹

When government, as in the CSJ controversy, takes upon itself the mission to ensure that its worldview is accepted by its citizenry, it is moving itself toward a closed society.

By contrast, the liberal democratic project is to ensure that each person in society is given the maximum amount of freedom to decide for themselves what it takes to flourish and to do it. This proposition is with

²⁰⁶ *Id.*, at 166.

²⁰⁷ *Id.*, at 188.

²⁰⁸ *Id.*, at 187.

²⁰⁹ *Id.*

the proviso that they do so in a manner that maintains civil peace. That means of course that one is responsible to ensure that while one is enjoying his or her freedom, it is done in a manner that interferes as little as possible, if at all, with one's neighbour. A society that does not allow for that is not free. Liberal democracies are not perfect; they are bound to disappoint the democratic project. Winston Churchill observed, "[m]any forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time."²¹⁰

The genius of liberal democracy is its ability to stabilize political and social disappointment. Professor Stephen Holmes observes that "much of modern politics is about promising, disappointing, and managing the negative consequences of bitter disappointments".²¹¹ The management of disappointment is crucial for the survival of the body politic because it is the only system that allows the democratic project to continue. Holmes agrees that liberal democracy has an "uncommon facility at mitigating the fallout of political discontent". This prevents "civic frustrations in the face of unpopular policies and deteriorating conditions from engendering violent confrontations between lethally armed and ideologically polarized citizens or between infuriated citizens and the forces of public order".²¹² It is in the blood-soaked streets that authoritarianism finds its birth. Therefore, managing political disappointment in the leadership and democratic institutions is of utmost importance for freedom.

The CSJ controversy was to some a tempest in a teapot. They wondered "why all the fuss?"²¹³ However, the failure to recognize what was at stake is a miscalculation of the importance of the issue to those concerned, and, more generally, to our free and democratic society. It is no small "fuss" to ask a religious person to sign a document that advocates for ideologies with which neither he nor his organization agrees. It goes to the very core of his identity and the identity of the organization he represents.

²¹⁰ Winston Churchill, speech, House of Commons, November 11, 1947, online: <https://api.parliament.uk/historic-hansard/commons/1947/nov/11/parliament-bill#column_207>.

²¹¹ Stephen Holmes, "How Democracies Perish" in Cass R. Sunstein, ed., *Can It Happen Here?: Authoritarianism in America* (New York: HarperCollins, 2018) (Dey Street Books: Kindle Edition, 2018), at 388-89.

²¹² *Id.*

²¹³ Karen Busby, "Liberals' summer jobs program controversy on reproductive rights overblown" *Canadian Lawyer* (January 29, 2018), online: <<https://www.canadianlawyermag.com/author/karen-busby/liberals-summer-jobs-program-controversy-on-reproductive-rights-overblown-15238/>>.

Such a person faces a painful dilemma: either she must sign a document that violates her conscience and the principles of her institution, or she must forego funding, knowing that as a result there may be scores of young people who will not be able to work at or attend the summer program. Some will say that she and the religious community can still operate — it is not as if religious freedom is removed. Fair enough, but as the U.S. Supreme Court commented in *Trinity Lutheran*, “that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which [the applicant] is otherwise fully qualified”.²¹⁴ Simply put, that is not who we are as a liberal democracy living in a country that protects its citizens with religious scruples from state-sponsored discrimination.

That is what the CSJ debacle showed us — there was a decay in the features of our political system that were meant to keep a healthy polis. Our government was not showing a healthy respect for individual religious freedom and that is to our collective shame as the rights that were affected were not simply the rights of the religious but the rights of all citizens. The media firestorm understood that while the issue was over the CSJ and the religious communities today, if left unchecked the same government attitude of moral superiority could easily be applied to another group on another occasion involving a very different matter.

The Churchill quote noted above continues, “there is the broad feeling in our country that the people should rule, continuously rule, and that public opinion, expressed by all constitutional means, should shape, guide, and control the actions of Ministers who are their servants and not their masters”.²¹⁵ The rulers in a liberal democracy are not the rulers for their own interests; nor for those who ideologically harmonize with them; nor for the interests of the oligarchy. They are responsible for the good of the whole. When government leaders do not follow through on their responsibility in this regard, they put the entire polity in disrepute.

Professor Jack M. Balkin reminds us of what any astute student of history is already aware: when government rules only for the benefit of the few that keep them in power, then “the general public feels abandoned” and “loses faith in the political system”. The loss of faith is never good in any

²¹⁴ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, at 2022 (2017). See discussion in Derek Ross, “Childcare, Summer Jobs, and Religious Discrimination in Canada” *The Canadian Bar Association* (January 17, 2018), online: <<https://www.oba.org/Sections/Constitutional,-Civil-Liberties-and-Human-Rights-L/Articles/Articles-2018/January-2018/Childcare-Summer-Jobs-Religious>>.

²¹⁵ Winston Churchill, speech, House of Commons, November 11, 1947, online: <https://api.parliament.uk/historic-hansard/commons/1947/nov/11/parliament-bill#column_207>.

context — but in the political context such loss leads to a democracy’s demise. “This leads to the rise of demagogues”, warns Balkin, “who flatter people with promises that they will make everything right again”.²¹⁶

When government officials deflected any criticism of their CSJ attestation requirement rather than admitting their misstep, they declared that any confusion was the fault of the religious community. At stake was not simply the religious freedom rights of those who could not sign on the attestation — it was an affront to the rights of all.

Every citizen has the right not to be forced to agree with a worldview to which they do not subscribe. Former Chief Justice Brian Dickson’s oft-quoted comment is applicable here: “A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.”²¹⁷

It has been suggested that the CSJ program is simply a voluntary government program in which no one is forced to take part. The government has public policy objectives to implement and the CSJ program, with its established criteria, is meant to carry out the government objectives. That is true. But it is not the role of government to limit a citizen’s ability to participate in government programming because she does not agree with government ideology. In other words, every citizen has a right to participate in government programming that she pays for through her taxes. As Dickson C.J.C. noted, freedom of religion means a person has the “right to declare religious beliefs openly and without fear of hindrance or reprisal” including the “right to manifest religious belief”.²¹⁸ Of course, there are reasonable limits on that freedom, namely those that are “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”, but otherwise “no one is to be forced to act in a way contrary to his beliefs or his conscience”.²¹⁹

Making religious communities sign on to an attestation that they do not agree with in order to receive CSJ funding is a manipulation unbecoming of a liberal democracy. It denies its most basic requirement to allow citizens to decide for themselves how they ought to live their lives within the confines of a free and democratic society. To suggest, as did the government, that opposing the government’s position on abortion and sexuality is a denial of human rights, is without merit.

²¹⁶ Jack M. Balkin, “Constitutional Rot” in Cass R. Sunstein, ed., *Can It Happen Here?* (Dey Street Books: Kindle Edition, 2018), at 21.

²¹⁷ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 94 (S.C.C.).

²¹⁸ *Id.*

²¹⁹ *Id.*, at para. 95.

It is without merit because first, religious freedom to decide on the fundamental human life issues is of the most basic determinants of freedom that is recognized the world over.²²⁰ Every person and religious community in Canada is free to hold and practice religious pro-life views and traditional sexual norms. The international documents on this are abundantly clear. For example, in 1981 the United Nations declared, “No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.”²²¹

Second, at issue is a difference of worldviews. The ARCC and the current federal government do not hold pro-life views. Those religious organizations that oppose the government and ARCC are not opposing human rights but are rather supporting human rights.²²² These are ideological and philosophical differences on the basic questions of life. Rather than belittle those views it is the role of government in a liberal democracy such as Canada to respect those views. As noted above, these are issues that reasonable people can disagree on. Justice Gascon in *Mouvement laïque québécois v. Saguenay (City)* declared that not only

²²⁰ Derek H. Davis, “The Evolution of Religious Liberty as a Universal Human Right”, online: <https://web.archive.org/web/20080201105738/http://usinfo.state.gov/dd/eng_democracy_dialogues/religion/religion_essay.html/>. Davis outlines the “Four Pillars” of religious freedom among nation states around the world:

1948, United Nations (UN) Universal Declaration of Human Rights

1966, The International Covenant on Civil and Political Rights (1966)

1981, UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

1989, Vienna Concluding Document

See also Derek H. Davis, “The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief” (2002) 2 B.Y.U. L. Rev. 217.

²²¹ Article 2 of the UN, “Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief”, Proclaimed by General Assembly resolution 36/55 of 25 November 1981, online: <https://web.archive.org/web/20080301185630/http://www.unhchr.ch/html/menu3/b/d_intole.htm>. Canada acceded to the ICCPR in 1976. (See Canada, “Human rights treaties”, online: <<https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/treaties.html>>.)

²²² Derek Ross & Sarah Mix-Ross, “Labelling pro-life views as ‘anti-Charter’ is wrong – and sets a dangerous precedent” *CBA National Magazine* (January 2, 2019), online: <<http://www.nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/labelling-pro-life-views-as-%E2%80%99anti-charter%E2%80%99-is-wron>>. These authors observe that the pro-life communities “seek to secure protection of the law – including the right to life and security of the person enshrined in the *Charter* – for the pre-born. They advocate for freedom of expression, association, and conscience – all *Charter* guarantees – for those who hold minority viewpoints.” It is worth noting that the *UN Convention on the Rights of the Child*, which Canada ratified in 1991, quotes the *Declaration of the Rights of the Child* (1924/59), which asserts: “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*” (emphasis added).

does the state have a “role in promoting diversity and multiculturalism”, it has a “duty of religious neutrality ... based on a democratic imperative. The rights and freedoms set out in ... the *Canadian Charter* reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs”.²²³ In that case, the SCC dealt with the practice of city officials using the Lord’s Prayer as part of the city council’s opening ceremonies. The SCC ruled against that practice as it violated the democratic imperative of religious neutrality. The state could not be seen to favour one religious view over another as if it had a religious position to take.

It is a reasonable observation that the use of an attestation as was required in the 2018 CSJ program was a more egregious violation of religious neutrality than that in the *Saguenay* decision. It involved the government actually demanding a demonstrative statement of agreement with its policies on abortion and its views on “Charter values”. The government was not neutral. It took a position on a moral view that it expected those applying for money to agree to. The Charter stands against this.

Third, the offence taken by the ARCC and the government against the religious communities that hold different views does not entitle them to deny government programs that are open to all. There is no right not to be offended in Canada. There is no declaration from any court that there exists a constitutional right for a party not to be affronted by the views and lifestyles of others. It is preposterous. To quote Dickson C.J.C. again, “[w]hat may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of ‘the tyranny of the majority’.”²²⁴ The B.C. Court of Appeal likewise observed, “there is no *Charter* or other legal right to be free from views that offend and contradict an individual’s strongly held beliefs. ... Disagreement and discomfort with the views of others is unavoidable in a free and democratic society.”²²⁵

²²³ [2015] S.C.J. No. 16, [2015] 2 S.C.R. 3, 2015 SCC 16, at para. 75 (S.C.C.).

²²⁴ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at para. 96 (S.C.C.).

²²⁵ *Trinity Western University v. Law Society of British Columbia*, [2016] B.C.J. No. 2252, 92 B.C.L.R. (5th) 42, 2016 BCCA 423, at para. 188 (B.C.C.A.).

V. CONCLUSION

If there is a lesson to be learned from the federal government's attestation requirement on the 2018 CSJ program, it is that liberal democracies are not immune from stepping aside from liberal democratic principles of fair play and recognition of the basic human rights of all citizens. While garbed in the eloquent language of human rights and Charter rights, governments can still implement policy that disregards those basic principles.

When Prime Minister Trudeau dismissed the controversy as a mere "kerfuffle",²²⁶ his comments revealed a misunderstanding of both the importance of religious groups in the fabric of Canadian society, and the strength of religious convictions. Nothing is worth more than religious conscience to the religiously convicted. Political dictates, if contrary to spiritual beliefs, cannot nor will not be followed, money or no money.²²⁷

The "kerfuffle" lit up Canadian editorial rooms around the country. People from all political stripes recognized the basic democratic principle at play: no one must ever be forced to affirm that they agree with a government ideology on fundamental human life issues whether that issue is abortion, marriage, end of life or basic sexual norms. Even if a person agrees with the government on such issues, they ought not to be pressured to state their agreement. Government may dictate taxes, but it cannot dictate beliefs.

Even if we afford the federal government the benefit of the doubt that they did not intend to deny religious organizations and charities with pro-life views the ability to apply for CSJ funding, they did not properly word the attestation to provide for that. It was poorly drafted. However, and this is where the problem lies, the government was intent on requiring all applicants to sign the attestation to receive the money despite it being ambiguously worded. It wanted and encouraged pro-life religious communities to sign a document that they could not sign with a clear conscience.

When the government issued supplementary information re-defining the words "core mandate" to mean "core activities" it expected the religious communities to sign up. They could not understand why the religious communities would not. The government was dumbfounded. Were the

²²⁶ Ryan Maloney, "Trudeau Calls Out Anti-Abortion Groups Angered About Summer Job Funding: A student asked him if he values freedom of speech" *Huffington Post* (January 10, 2018), online: <https://www.huffingtonpost.ca/2018/01/10/trudeau-calls-out-anti-abortion-groups-angered-about-summer-job-funding_a_23330167/>.

²²⁷ Barry W. Bussey, "The Liberals don't get why religious Canadians refuse to submit to their political dictates" *National Post* (March 22, 2018), online: <<https://nationalpost.com/opinion/the-liberals-dont-get-why-religious-canadians-refuse-to-submit-to-their-political-dictates>>.

religious just being obstructionists? No, the problem goes deeper. Words and their definitions may be, in the government's view, malleable for political purposes. But they are not treated so lightly within religious communities. Words have meaning. They are meant to have meaning and convey a message. The entire religious domain concerns itself with words and their meanings. The same is true for many non-religious, but conscience-observing, individuals.

"Core mandate" does not mean "activities". Rather, as the online Cambridge Dictionary states, a "mandate" is "to give official permission for something to happen".²²⁸ Religious communities see their "core mandate" as being ordered by their sacred texts and their respective religious authorities. When government proclaimed that such "core mandates" had to be compliant with or "respecting" the government's moral understandings of the world it struck at the very heart of what it meant to be religious. For that reason, over 1,500 religious charities refused to accept the government's attempt to redefine the words. The coalition of some 80 Christian, Jewish and Muslim religious leaders were not convinced by the government's wordsmithing. They requested that the attestation be changed from "core mandate" to "core activities". Government inflexibility to do so was telling. It sent a signal that the religious conscience was not even worth the effort to amend the requirement.

The cavalier attitude that was exhibited by the government during the 2018 Canada Summer Jobs debate was evidence of constitutional rot. The government concerned itself primarily with the issues raised by the abortion rights activists at the expense of the religious sensibilities of those individuals and charities that carried out a significant amount of CSJ work. In other words, only those groups that were aligned with government ideology on the fundamental human life issues were successful in obtaining the public policy they wanted. The religious community's plight was picked up by the media as a worthy cause to champion and it had results. The 2019 attestation did not contain the offensive provisions that the 2018 attestation did.

One hopes that the change of heart is due to the realization that a liberal democratic government cannot be successful in fulfilling the promises of a free and democratic society unless the rights of all its citizens are respected. The cynic would say that changes were made for 2019 because it is an election year. May it not be so.

²²⁸ *Sub verso* "mandate", Cambridge Dictionary, online: <<https://dictionary.cambridge.org/dictionary/english/mandate>>.