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ARTICLES

RECODING FAMILY LAW: TOWARD A THEORY OF RELATIONSHIPS OF ECONOMIC AND EMOTIONAL INTERDEPENDENCY IN THE *CIVIL CODE OF QUÉBEC*

*Régine Tremblay**

This article proposes a new conceptual framework for parent-child and adult relationships in the *Civil Code of Québec* based on the theory of relationships of economic and emotional interdependency. It puts forward a new *théorie générale* for relationships in Quebec civil law. It argues that the Code should concentrate on relationships of economic and emotional interdependency, irrespective of their form or of their fulfillment of formalities. Their content and qualities should be the law's object, hence allowing for a functional account of families and personal lives. Doing so would require a recodification of economic and emotional relationships in the Code, to provide a more meaningful legal framework addressing families and personal lives. Fundamentally, the hope is to shift the normative content of family law in Quebec private law from "the family" to relationships, and to take a stance against family law exceptionalism.

Cet article propose une nouvelle approche conceptuelle pour penser les relations parents-enfants et les relations entre adultes dans le *Code civil du Québec*. Cette approche s'inspire de la théorie des relations d'interdépendance économique et émotionnelle, et met de l'avant une nouvelle théorie générale des relations en droit civil québécois. Cette théorie générale soutient que le Code devrait se concentrer sur les relations d'interdépendance économique et émotionnelle, indépendamment de leur forme ou de l'accomplissement de formalités. Le contenu et les qualités des relations devraient être au cœur de l'analyse, permettant ainsi d'adopter une approche fonctionnelle dans la régulation des familles et des relations personnelles. Cette théorie générale nécessiterait une recodification des relations d'interdépendance économiques et émotionnelles dans le Code, afin de fournir un cadre juridique adapté à la réalité des familles et des relations personnelles. Fondamentalement, l'espoir est de déplacer le contenu normatif du droit de la famille en droit privé québécois de « la famille » vers les « relations », et de prendre position contre l'exceptionnalisme en droit de la famille.

* Assistant Professor, Peter A. Allard School of Law (UBC). This article builds on my doctoral research at the University of Toronto Faculty of Law, was funded by the Social Sciences and Humanities Research Council, and has been workshopped multiple times in front of generous colleagues. I am grateful for the comments of Brenda Cossman, Catherine Valcke, Angela Fernandez, Justice Alison Harvison Young, Robert Leckey, Alexandra Popovici, Susan B. Boyd, colleagues at the McGill Faculty of Law and at the Law and Society Association. Thanks also to Elizabeth Jansen and Haley Hrymak for their impeccable research assistance, to the reviewers for their generous, perceptive, and constructive comments, and to the editors of the *McGill Law Journal* for significantly improving this article.

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Introduction

In 1955, the province of Quebec launched an ambitious recodification project.[1] An important aspect of this reform was the complete rethinking of family regulation. Law once conceived and regulated the family as a unitary entity despite its legal inexistence *per se*. The family was homogeneous in the eyes of the law, under the power of a single individual (the husband), and existed in the private domain; there was no Book on the Family in the *Civil Code of Lower Canada* (CCLC). Under this paradigm, the CCLC minimally addressed the family as a unit. 'The family' was not a legal notion in the CCLC, which dealt with one relation of power: the unilateral relationship between the husband and his belongings, which could be humans or property.[2] Through time, this paradigm has significantly changed. Now, one can hardly consider the family as unitary, homogeneous, or as a single unilateral relationship. Yet, whether the family is a 'legal entity' in the *Civil Code of Québec* (Code or CCQ) remains unresolved from a theoretical perspective.

In recent decades, the family began to hold a special place in Quebec civil law. The enactment of a Book on the Family in the *Civil Code of Québec* in 1980 and the inclusion of mandatory mechanisms to protect married spouses in a heteronormative paradigm in 1989 distorted the perception of 'the family' in the Code, making it flirt with legal personality – the family patrimony being a notable illustration of this statement.[3] However, the Code projects a misleading image of 'the family' in law, considering both the entity and its members. Rights, duties, and obligations have been included in the Book because they gravitated around 'the family', yet insufficient attention was devoted to their inscription in civil law, and in the Code. The fact that family law in the Code has been reformed almost every decade since the eighties signals that Quebec society is changing, but that the law, in its current state, lacks the required flexibility to adapt.

Steps taken since 1980 highlight how the family unit supersedes the relationships within that unit. The Code should go back to its essence and consider *relationships* rather than focusing on a non-legal entity identi-

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1 See *An Act respecting the revision of the Civil Code*, SQ 1955, c 47; "Timeline" (last visited 1 March 2022), online: *The Archives of the Civil Code Revision Office*, <digital.library.mcgill.ca/ccro/timeline.php> [perma.cc/6URX-WUYR].

2 John E C Brierley & Roderick A Macdonald, eds, *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 231.

3 See *An Act to establish a new Civil Code and to reform family law*, SQ 1980, c 39; *An Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses,* SQ 1989, c 55.

fied as 'the family'. Most importantly, the Code still hopes to channel behaviour, to be normative, and to rely on a formal account of the family. 'The family' in the Code, given its history and the values it has promoted, bears a strong normative content that is no longer in line with the current needs of citizens nor with basic legal principles. In the context of a long-awaited reform of family law,[4] it is essential to think conceptually about the family, relationships, and civil law.[5] It is necessary to explore alternative readings of 'the family' and to include, in addition to its formal rules, a functional approach to regulating 'families' and relationships of economic and emotional interdependency in the *Civil Code of Québec*.

First, this article proposes a functional approach to the family, families, and relationships in the *Civil Code of Québec*. This approach aims to shift the normative content from 'the family' to meaningful *relationships*—more precisely, relationships of economic and emotional interdependency. The theory of relationships of economic and emotional interdependency attaches legal effects to relationships based on functional criteria rather than formal ones.[6] It focuses on the content of relationships and proposes a formal, organized, and flexible scheme to address relationships. It also allows relationships meeting formal criteria but not sharing the meaningful content and qualities to withdraw from the scheme. Old and new relationships can be included in the Code in a consistent manner which respects the principles of the law of persons (status), obligations, property, and more. Law should concentrate on intimate[7] or privileged[8] relationships of emotional and economic interdependency[9] and their ef-

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4 See Bill 2, *An Act respecting family law reform with regard to filiation and amending the Civil Code in relation to personality rights and civil status*, 2nd Sess, 42nd Leg, Quebec, 2021 (assented to 8 June 2022), SQ 2022, c 22 [*Bill 2*].

5 Dominique Goubau highlighted that *Bill 2* is missing "le génie du droit civil" and reads like an Ontario statute: see Committee on Institutions of the National Assembly of Quebec, "Audition - Me Dominique Goubau, professeur titulaire, Faculté de droit, Université Laval" (2 December 2021) at 00h:34m:39s, online (video): <www.assnat.qc.ca/en/video-audio/archives-parlementaires/travaux-commissions/AudioVideo-92947.html> [perma.cc/W3WD-T7RG].

6 See e.g. *The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation*, by Brenda Cossman & Bruce Ryder, (Ottawa: Law Commission of Canada, 2000).

7 See Alison Diduck, "What is Family Law For?" (2011) 64 Current Leg Probs 287 ("'family' is one way to describe forms or expressions of intimate or private living based upon care and interdependence" at 289. She uses "intimate relationships" to refer to these relationships).

8 See John Eekelaar, *Family Law and Personal Life*, 1st ed (Oxford: Oxford University Press, 2007) at 82ff.

9 This expression is from Cossman & Ryder, *supra* note 6 at 145–46 and was used in Law Commission of Canada, *Beyond Conjugality: Recognizing and supporting close*

fects. This article specifically argues that the Code should target relationships of emotional and economic interdependency rather than, for example, the presence of a child or the fulfillment of formalities (solemnization of marriage). Such an approach would challenge the *Civil Code of Québec*'s understanding of 'the family' on many grounds and would provide a strong theoretical basis for the family in Quebec civil law, something that was not considered in the legislator's most recent family law reforms.[10] By including a theory of relationships of economic and emotional interdependency in the Code, law holds the potential to evolve with time, to adapt to other mechanisms regulating the family, and to embrace fluctuating state objectives and citizen needs.

Second, this article offers a recoding of relationships of economic and emotional interdependency in the Code. With this recoding, there is no need for a Book on the Family; rather, mechanisms affecting intimate relationships should be included in other books, in line with their nature and functions. It is not about eliminating the normative project of the regulation of families, but about shifting it toward a different one, one where 'the family' is one of many ways to be interdependent and one where the qualities of relationships matter more than their form. The proposed model challenges the paradigm of choice and autonomy and suggests engaging with a combination of freedom, autonomy, solidarity, and protection, while acknowledging the issues promoting this combination of values imported in the scheme. Protection limits freedom, and solidarity impedes autonomy. The idea is not to think about these as antipodal, binary, or exclusive. It is rather about striking a balance that best meets the needs and expectations of citizens: a balance between protection and freedom, between solidarity and autonomy. Focusing on relationships allows one to move away from a logic of channelling, a logic of form, a logic where formalities (some could say contract) are the only bases of conjugal status and where title is the most important element when it comes to parent-child relationships. This novel approach has the potential to clarify the underlying elements—functions, nature, status, interdependency—regarding the establishment of adult and adult-child relationships.[11]

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personal relationships, (Ottawa: Minister of Public Works and Government Services, 2001) at 114, 130, 133.

10 See *Bill 2*, *supra* note 4; Bill 12, *An Act to reform family law with regard to filiation and to protect children born as a result of sexual assault and the victims of that assault as well as the rights of surrogates and of children born of a surrogacy project*, 1st Sess, 43rd Leg, Quebec, 2023 (assented to 6 June 2023), SQ 2023, c 13 [*Bill 12*].

11 In this article, I use adult-child and parent-child interchangeably, but the scope of the former is broader than the scope of the latter.

I. Toward a Theory of Relationships in the *Civil Code of Québec*

A strong theory of relationships for family law in Quebec can provide a way to infuse the regulation of families and intimate relationships with a functional approach while respecting the Code's preference for formalism. The Code should regulate specific relationships performing certain identified functions, whether they are formal or not. This would be a move toward a functionally defined 'family' and would challenge the dominant understanding of 'formalism'. Relationships have multiplied in family law since 1955,[12] but have rarely been analyzed on the basis of their content. Relationships have been regulated based on their form, but this is only one of various options available in the toolbox of civil law. Form performs functions. As Justice Abella wrote in her dissenting opinion in *Quebec (Attorney General) v. A*: "the history of modern family law demonstrates [that] fairness requires that we look at the *content* of the relationship's social package, not at how it is wrapped."[13] This article builds on her advice. A different way to mobilize the notion of status in family matters can reinforce a functional approach to family law. 'Status' does not have to be triggered by formal elements only. Status could be triggered by functional elements, or by a *situation juridique* rather than by the accomplishment of formalities. The approach is not flawless and "it reflects the difficulties inherent in building a theory (and practice) that adequately reflects both the social and the individual nature of human beings."[14] It is also compatible with civil law and not a common law theory.

Family law is not just about *formal* unions and *formally* recognized offspring as current family law in Quebec is written. Rather, it is about persons, and in particular, relationships that the state decides to promote, foster, and protect. 'The family' of the Code does not currently reflect the lived experiences of citizens.[15] The relationships that are included in the Code have increased over the years to include same-sex marriage, civil union, blood relations, adoption, and assisted procreation. Yet, numerous other relationships are still absent, notably unmarried spouses,

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12 Adoption, assisted procreation, civil union, etc. were all included in the Code.

13 2013 SCC 5 at para 285 [*Quebec AG v A*] [emphasis in original].

14 Jennifer Nedelsky, "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1:1 Yale JL & Feminism 7 at 8.

15 See Hélène Belleau, "D'un mythe à l'autre : de l'ignorance des lois à la présomption du choix éclairé chez les conjoints en union libre" (2015) 27:1 CJWL 1 at 4; Hélène Belleau, *Quand l'amour et l'État rendent aveugle : le mythe du mariage automatique* (Québec: Presses de l'Université du Québec, 2012) [Belleau, *L'amour et l'État*]; Céline Le Bourdais, Évelyne Lapierre-Adamcyk & Alain Roy, "Instabilité des unions libres : Une analyse comparative des facteurs démographiques" (2014) 55:1 Recherches sociographiques 53 at 69.

step parenting, and romantic or platonic polyamory.[16] It is time for the Code to reach further and address relationships of economic and emotional interdependency based on their content and qualities.

A. *Relationships of Economic and Emotional Interdependency in the* Civil Code*: Adult Relationships*

Quebec being in the midst of reforming the family sections of the Civil Code is an ideal context to offer a new theoretical approach to familial relationships.[17] What are the essential elements of these relationships? What values should animate the regulation of intimacy? In common law, Brenda Cossman, Bruce Ryder, John Eekelaar, and the Law Commission of Canada provided frameworks, albeit in different contexts, to alternatively approach intimate relationship regulation.[18] How can these ideas inspire Quebec civil law?

Despite the present variety of forms of intimate relationships, family law has systematically relied on a formal account of the family to evaluate whether a legal relationship between adults or between adults and children exists. Broadening the *conditions d'existence* of 'familial' relationships and evaluating what substantive qualities comprise them is necessary. Adequately codified rules have the potential to evolve with time and to adapt to society's needs. A theory of relationships of economic and emotional interdependency would integrate family law rules in the Code in a consistent and flexible way and allow for a paradigm shift as to what matters in the regulation of intimate life.

Proposed Framework

To move beyond the current rules-heavy reliance on formality and narrow understanding of what triggers conjugal or adult interdependent status, it is necessary for the proposed framework to predominantly evaluate the qualitative aspects of relationships. The Code should not grant family status and protections based solely on formalities.[19] This is, to some extent, in line with what the *Comité consultatif sur le droit de la*

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16 See generally Erez Aloni, "Registering Relationships" (2013) 87:3 Tul L Rev 573; Erez Aloni, "Deprivative Recognition" (2014) 61:5 UCLA L Rev 1276 at 1280.

17 See *Bill 2*, *supra* note 4; *Bill 12*, *supra* note 10.

18 See Eekelaar, *supra* note 8 at 22–31; Law Commission of Canada, *supra* note 9 at xii–xiv.

19 See Benoît Moore, "La consécration de l'autonomie individuelle" (2015) 40:1 Bull liaison : Fédération des assoc familles monoparentales & recomposées Québec 6 at 7 [Moore, "La consécration"].

famille proposed in its 2015 report. Indeed, the *Comité* proposed[20] to use the definition found under section 61.1 of the *Interpretation Act* (CQLR c I-16) to broaden the spectrum of conjugal relationships in family law. Such a definition allows for the recognition of *de jure* and *de facto* spouses and includes the duration of the relationship between spouses and the presence of a common child as triggering elements for conjugal status. This is a potential option to step away from the superior status traditionally allocated to *de jure* relationships. It suggests that what private law conceives as 'conjugal' should revolve around formalities *and* some qualities of relationships (such as length, presence of a child, residency). However, expanding the definition of conjugality does not account for the multitude of interdependent adult relationships. In fact, conjugality may or may not materialize in an interdependent relationship.

To use the Law Commission of Canada and Cossman & Ryder's terminology, an alternative is to put forward a scheme of 'ascribed status,'[21] albeit 'modified ascribed status,' for the CCQ. Per the Commission, "[a]scription refers to treating unmarried cohabitants as if they were married, without their having taken any positive action to be legally recognized."[22] Formal conjugal relationships would still trigger status, but they would not be the only way to trigger 'privileged' status. Furthermore, such relationships would not necessarily trigger status and produce effects without regard to the actual qualities of the relationships. The modified ascription scheme would not attempt to destroy or undermine habitual religious, cultural, or societal relationships. It is rather about bringing consistency to the regulation of intimate relationships and building upon what is already in the Code.

The *conditions juridiques* set forth in section 61.1 of the *Interpretation Act* need to be expanded and modified. Formal unions—marriage and civil union—should create an interdependent status. *De facto* conjugal relationships meeting certain qualities (such as length, sharing a community of life, sharing a dwelling, etc.) should also create such status. The qualities set forth in section 61.1 of the *Interpretation Act* are a starting point, but social debate and empirical data are essential to determine how interdependency should be legally codified. Furthermore, these relationships would not account for the presence of children. This is not because children do not create interdependency, but rather because interdepend-

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20 See Comité consultatif sur le droit de la famille, *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales* (Québec: Ministère de la Justice du Québec, 2015) at 125. See also *ibid* at 388, recommendation 2.1.2.1 for a definition of "l'union en fait".

21 See Cossman & Ryder, *supra* note 6 at 143–52.

22 Law Commission of Canada, *supra* note 9 at 116.

ency occasioned by the presence of a child should be dealt with through refining the legal status of relationships between adults and children, as I will explain below.

The interdependency status would be presumed for both *de jure* and *de facto* relationships, but the presumption would be rebuttable. The spouses would thus have an ascribed interdependency status. The presumption of interdependency is a legislative choice aimed toward assisting the party likely to be less powerful in proving interdependency. While it may restrict autonomy and freedom, it promotes protection. Interdependency status would thus be automatically recognized. But this would not address the actual content of the relationship. As such, it would be possible to prove a spouse was not in a relationship of economic and emotional interdependency, despite the fact that they were in a conjugal union (*de jure* or *de facto*). To rebut the presumption, the spouse would have to prove, on a balance of probabilities, that the test determining interdependency does not apply to their situation.

The test has two steps. First, if the relationship were to end today, would the emotional and economic well-being of the spouse—assuming they were included in a privileged relationship—be jeopardized? The notion of 'emotional and economic well-being' would need to be refined and developed in consultation with specialists of other disciplines;[23] courts, to some extent, could also shape it, like they have done in the common law for 'marriage-like' relationships.[24] If the answer to this first step is no, the interdependent status does not apply. However, if the answer is yes, the test proceeds to the second step, asking: would a spouse in a similar situation have reasonable expectations that the relationship was one of emotional and economic interdependency? The constitutive elements of economic and emotional interdependency could rely on classical civilian concepts such as *tractatus* (treatment), *fama* (reputation), and actions. The idea here is to suggest a new way to apprehend relationships in the Code, shift how society thinks about them, and determine how to best include them in private law. The approach and the test would need to remain flexible and rely on abstract notions to adapt to the changing needs of families and evolve with societal transformations. The approach and the two-step test represent a balance between solidarity and protection, and autonomy and freedom.

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[23] See Julianna Ivanyi & Régine Tremblay, "Measuring Success of (Family) Law Reforms" in Erez Aloni & Régine Tremblay, eds, *House Rules: Changing Families, Evolving Norms, and the Role of Law* (Vancouver: UBC Press, 2022) 269 at 282–89.

[24] See *Weber v Leclerc*, 2015 BCCA 492 at paras 1–33; *Roach v Dutra*, 2010 BCCA 264 at paras 1–23; *DN v MR*, 2019 BCSC 537 at paras 22–63.

Most situations of adult interdependency would be covered with this proposed test. However, if the qualities and content of relationships are what matter, it is essential not to exclude relationships of emotional and economic interdependency between adults that are not living conjugally. Doing so would defy the purpose of looking at the qualities and the content of relationships, and of focusing on the substantive elements of relationships. As such, adults in relationships of emotional and economic interdependency that are not necessarily perceived as such—because they are not conjugal—could claim interdependency status. The test would allow for 'non-conjugal' adult relationships of economic and emotional interdependency to be considered equivalent to conjugal ones. The same two-step test would be used, but differently. For conjugal relationships, the test is used to rebut a presumption. For non-conjugal relationships, the test is used to claim a status. As such, the person claiming an interdependent status would have to prove, first, that if the relationship were to end or transform, their emotional and economic well-being would be jeopardized. Second, they would have to prove that a person in a similar situation would have reasonable expectations that the relationship was one of emotional and economic interdependency.

The aims of this model are to engage in a much-needed paradigm shift in Quebec family law, increase consistency in the Code and with rules found beyond the Code, attune law to citizens' expectations, and provide the flexibility necessary in an ever-changing field of law.

Applying the Proposed Framework

The following provides some concrete examples of how such an approach would apply to different relationships. Other examples could have been proposed—polyamorous relationships, friends cohabiting—but are not in the interest of concision. The facts of *Quebec AG v. A* are the source of the first example. As summarized by the Supreme Court:

> A and B met in A's home country in 1992. A, who was 17 years old at the time, was living with her parents and attending school. B, who was 32, was the owner of a lucrative business. From 1992 to 1994, they travelled the world together several times a year. B provided A with financial support so that she could continue her schooling. In early 1995, the couple agreed that A would come to live in Quebec, where B lived. They broke up soon after, but saw each other during the holiday season and in early 1996. A then became pregnant with their first child. She gave birth to two other children with B, in 1999 and 2001. During the time they lived together, A attempted to start a career as a model, but she largely did not work outside of the home and often accompanied B on his travels. B provided for all of A's needs and for those of the children. A wanted to get married, but B told her that he did not believe in the institution of marriage. He said that he could possibly envision getting married

> someday, but only to make a long-standing relationship official. The parties separated in 2002 after living together for seven years.[25]

In the proposed framework, A and B are *de facto* spouses, so they would be presumed to be in a relationship of emotional and economic interdependency. For my purposes, let's assume that B tries to withdraw from the relationship of emotional and economic interdependency. Thus, we would begin the analysis by asking the question: should the relationship end, would the emotional and economic well-being of A be jeopardized? B would have the onus of demonstrating these questions are answered in the negative. For example, B could prove that A has a place to live and minimal income to fulfill her basic needs, that she would have moved to Canada anyway, that she could maintain a standard of living, etc. If B's arguments are sufficiently persuasive, the parties would be deemed strangers toward one another in private law. In other words, there would be no interdependency status resulting from their relationship.

However, if A's socio-affective or economic well-being are found to be jeopardized by the relationship's termination, it would be necessary to consider step two by examining the reasonable expectations of the parties. Did A have reasonable expectations that the relationship was one of economic and emotional interdependency? Here too, a presumption would exist in the affirmative, and B would have to negate it. Once again, the criteria would need to be determined after consultation with experts and stakeholders, as should be done with all legislative amendments, but could include questions such as: did the parties have a 'life plan' or shared access to a bank account? The criteria should be functional, flexible and not necessarily chosen in reference to married unions. Some should emanate from the legislature, but judges would adapt these as circumstances go. The parties themselves would adapt these in their dispute resolution negotiations. The idea is to determine the nature of the parties' interdependence and how it affects their economic and emotional decisions. For example, B could demonstrate—using *tractatus*, *fama*, and actions—that the parties were not interdependent. The threshold to meet the test's requirements should not be impossibly high; otherwise, the freedom and autonomy of the parties would be curtailed. However, solidarity between the spouses and the protection of interdependent parties would necessitate that the threshold is in line with the expectations of citizens, mirroring the message sent in other regulatory frameworks and considering the ever-growing privatization of support combined with the shrinking of the welfare state.

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[25] *Supra* note 13 at 62–63.

Let's now repeat the exercise using another situation of interdependency. C and D are 'DINK's (double income, no kid). They behave as a couple, share a place they rent, have similar incomes and pension plans, split bills *pro-rata*, have always seen themselves as financially independent, and more. They have been together for seven years in a situation of intimacy and share economic and emotional aspects of their lives. As *de facto* spouses, the presumption of interdependency would apply to them. However, they may not be legally interdependent where the transformation of the relationship would jeopardize their well-being and where they had legitimate expectations that the relationship was one of economic and emotional interdependency. The parties may agree as to their apparent interdependency status; however, they may also agree that their well-being would not be jeopardized by the termination of the relationship, which entails that they are not interdependent according to the test proposed. C and D will continue their life separately. Ideally, they would share their belongings amicably and make an agreement.

This scheme would also apply to relationships outside of the 'conjugal' paradigm. For these relationships, no presumption of interdependent status would be available. The test would remain the same, but the burden would fall on the person claiming to be in such a privileged relationship. The *Beyond Conjugality* Report provides an example that has been adjusted to which the test may be applied:

> We are thirty-six-year-old twin sisters who have never been married or had children and who live together … Our lives are inextricably linked: aside from being related and having known each other all of our lives, we have co-habited continuously for the last seventeen years (since leaving our parental home), rely on each other for emotional support, and are entirely dependent on each other financially – we co-own all of our possessions and share all of our living expenses. … Yet, because we are sisters, rather than husband and wife, and because we are not a couple in a presumably sexual relationship, we are denied … advantages constructed upon sexist and heterosexist ideas about what constitutes meaningful relationships.[26]

Considering how the proposed approach applies only to private law and in the *Civil Code*,[27] in the event that the twin sisters foresee their partnership ending, would it be possible for them or one of them to claim interdependent status? Obviously, it is not an issue if, despite the transformation of their partnership, they remain on good terms and agree to continue supporting each other, given their expectations that their relationship

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[26] Law Commission of Canada, *supra* note 9 at 119.

[27] This is a blind spot of the article that I want to acknowledge. More time should be devoted to including such a conceptualization in private law outside of the Code, in social laws and public law.

would continue working that way. But, if the sisters' understanding of what they reasonably expect from one another diverges, then the test could help.

We would first apply step one: should the relationship end (and not transform in nature) now, would the emotional and economic well-being of the sister claiming interdependent status be jeopardized? Given the situation they described to the Law Commission, it is likely that the answer to this first question would be yes. Assuming both sisters see the description of their partnership as accurate, elements such as cohabitation (having nowhere to live), explicit emotional support (emotional distress), and financial dependency (economic difficulties) would weigh strongly in favour of answering the first question in the affirmative. If these elements were negatively impacted, the well-being of the sister claiming interdependency status would be jeopardized. Next, we would apply step two: did the claimant have a reasonable expectation that the relationship was one of economic and emotional interdependency? Based on their collaboration, the actions of the parties, their expressed intentions and other criteria still to be determined, the claimant would have to prove on a balance of probabilities that her expectations were reasonable. The interdependency status would thus rely on qualitative elements of relationships, rather than the fulfillment of formalities or their resemblance to an idealized and apparently homogeneous 'conjugal status'. This reframing puts forward a different understanding of relevant intimate statuses in the Code. Such a way of conceptualizing relationships—focusing on function over form in regulating adult relationships and de-centring conjugality as a marker of interdependence—allows for more relationships to be meaningfully recognized and regulated.

B. Relationships of Economic and Emotional Interdependency Expanded: Adult-Child Relationships

What about adult-child relationships? Possibilities for parent-child relationships have also multiplied in recent years. Despite this blooming of possible legal relations between adults and children, Quebec family law remains formal and under-inclusive in its approach to meaningful relationships between adults and children. In some ways, it relies on the fulfillment of formalities.[28] In others, formalities may be lacking.[29] The binary logic underlying filiation also displays a preference for a formal rather than a functional account of meaningful relationships in law. While the

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[28] See arts 111, 113–14, 523 CCQ.

[29] See generally Robert Leckey, "Lesbian Parental Projects in Word and Deed" (2011) 45:2 RJT 315 [Leckey, "Lesbian Parental Projects"].

status/contract debate plays out quite differently when it comes to parent-child relationships, there is a theoretically inconsistent fear of the 'contractual' filiation that is absent when it comes to adult relationships.[30] This fear contributes to making the principles animating the titles of the Code's Book on the Family inconsistent: for adult interdependency, the law operates according to a strong contractual understanding of the union, but contractualizing filiation is unthinkable. This subpart of the article proposes a different approach to regulating parent-child relationships, rooted in a functional account of meaningful relationships and in the importance of recognizing interdependency when it comes to ascribing status. As with adult relationships, it builds on pre-existing principles, but indicates how qualities of relationships should matter over their form, or rather, over the fulfillment of formalities.

To be clear, the claim is not that relationships between adults are similar to those between adults and children, or that the State should regulate adult-child relationships in the same way that it regulates adult interdependency. Scholars have rightly expressed concerns about such an amalgamation.[31] For example, John Eekelaar notes how "[u]nlike intimate partners, children have no choice in the relationship; it is not a relationship between equals."[32] My work claims that parent-child relationships are also relationships of emotional and economic interdependency, that they could operate on the basis of a 'modified ascription model', and that, in some cases, a functional account of relationships would be desirable. In short, relationships between adults and between adults and children are different, yet they can be regulated on the basis of coherent and consistent principles.

Inconsistencies in the Current Framework

Different foundations for filiation

The CCQ still relies on distinct frameworks for maternal and paternal filiation,[33] despite both parties having similar rights, powers, duties, and

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30 An example of this would be former article 541 CCQ, now repealed: "Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null".

31 See Eekelaar, *supra* note 8 ("parent–child relationships should in principle always be open to observation" at 84).

32 *Ibid* at 90 [footnotes omitted].

33 See Régine Tremblay, "Quebec's Filiation Regime, the Roy Report's Recommendations, and the 'Interest of the Child'" (2018) 31:1 Can J Fam L 199 at 228–29 [Tremblay, "Quebec's Filiation Regime"]. See also Comité consultatif sur le droit de la famille, *supra* note 20 at 395, recommendations 3.4–3.5; art 523 CCQ.

obligations. The fundamental element underlying paternal filiation, now called filiation by acknowledgement, is *volonté* (will or intent), while a particular understanding of biology underlies maternal filiation, now referred to as filiation by blood.[34] Quebec's civil law framework focuses on giving birth—i.e. delivery—as the materialization of biology. Biology could be premised on a genetic connection to the child, for instance, but it is not, and is instead in line with the Latin maxim *mater semper certa est* (the mother is always certain). These different foundations for filiation are largely left unquestioned by mainstream legal scholarship and the legislature.[35] The gender biases of these codal rules are demonstrated in various ways, two of which are the most relevant for present purposes: the different paths of arriving at the act of birth and the possibility for a woman to declare who is the 'father.' Since June 6, 2023, these gender bias rules are even codified at article 523, paragraph 1 of the CCQ.

When it comes to filiation by birth, which was formerly known as filiation by blood and through assisted procreation, as per articles 111 CCQ and following, the birth mother (or parent) needs to be identified as such by a third party and her information needs to be transmitted alongside the declaration of birth to the Registrar of Civil Status. This is necessary for an act of birth to be drawn. In the event where no attestation is available, the Registrar of Civil Status can authorize officers to inquire, request health documents, require a letter explaining the reasons why certain documents may not be available, ask for testimonies under oath of two witnesses, and more.[36] Since June 6, 2023, there is even an obligation for the mother or person who gave birth to declare their filiation at article 113.1 CCQ. This demonstrates the importance of the attestation matching the declaration and reflecting 'biology,' and is also disproportionate compared to what is asked for paternal filiation (filiation by acknowl-

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[34] On the different elements animating parent-child relationships in common law and civil law, see Angela Campbell, "Conceiving Parents Through Law" (2007) 21:2 Intl JL Pol'y & Fam 242 at 242–48. In common law, see also Susan B Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility" (2007) 25:1 Windsor YB Access Just 63 at 63–73 [Boyd, "Gendering Legal Parenthood"]. The voluntarist basis of filiation in civil law is not recent or new, but it has never applied to *maternal* filiation. See generally Ambroise Colin, "La protection de la descendance illégitime au point de vue de la preuve de la filiation" (1902) 1 RTD civ 257. Both filiation by blood and by acknowledgement are under filiation by birth.

[35] See Comité consultatif sur le droit de la famille, *supra* note 20 at 395, recommendations 3.4–3.5; *Bill 2*, *supra* note 4, cl 85.

[36] For the guidelines (in French), see "Absence d'un constat de naissance signé par un médecin ou une sage-femme" (last modified 13 July 2022), online (pdf): *Directeur de l'état civil du Québec* <www.etatcivil.gouv.qc.ca/publications/Dir_absence_constat_naissance.pdf> [perma.cc/LN8P-5QK4]. See also art 131 CCQ; *Adoption — 161,* 2016 QCCA 16 at paras 71–72 [*Adoption — 161*].

edgement). Indeed, the father (or parent) field on the act of birth relies on the declaration of the father, or rather, of the man declaring his paternal filiation to the State. He may or may not be the biological father, and the law disregards this fact. Paternal filiation relies mostly on the *intent* to be a father. This betrays an important problem regarding how filiation is conceived and operates in Quebec family law. Paternity is a legal construct that may or may not match a biological situation. However, there is no place for 'filiation as a legal construct' when it comes to maternal filiation. Maternal filiation must mirror certain biological facts.[37]

The requirement that the attestation and declaration of birth correspond as it pertains to maternal filiation, now labelled filiation by blood but anchored in birth, is relatively new. Yet, since 1991, the entrapment of women in their biological functions has only gained momentum. This is paradoxical, to say the least, given the efforts of the Minister of Justice and French Language Simon Jolin-Barrette to *degender* the Books on Persons and Family in the Code and the tendency to use the term 'parents' instead of fathers and mothers. The requirement was introduced with the reform of the Registrar of Civil Status and the *Civil Code of Québec* in 1991. Before, such correspondence was not necessary and attestations of birth were under the purview of public health law.[38] Attestations of birth had a different weight. Germain Brière flagged this issue in 1986. Indeed, when it was proposed that the attestations of birth produced under the *Loi sur la protection de la santé publique* be transferred to the Registrar of Civil Status, Brière noted that

> [l]es déclarations de naissance … faites en vertu de la *Loi sur la protection de la santé publique* acquerraient ainsi une autorité qu'elles n'ont pas actuellement ; exigées essentiellement pour des fins démographiques, ces déclarations constitueraient désormais, vu leur intégration partielle au registre de l'état civil, des moyens de preuves de l'état des personnes. Dans la situation actuelle, ces déclarations ne constituent certainement pas … un mode normal de preuve de l'état civil[.][39]

The attestation of birth was statistical[40] and demographic. It now curiously produces effects on the law of persons which are disproportionate for

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[37] See art 539.1 CCQ (since 2002, it has been legally possible to have two mothers, but art 539.1 CCQ offers a glimpse at how this status is equated with paternal filiation; it has also been possible to a be non-delivering mother through adoption since before 2002). Repeal not in force at the time of publication.

[38] See Quebec, Ministry of Justice, *Commentaires du ministre de la Justice*, vol 1, (Québec: Les Publications du Québec, 1993) at 84–85 (article 111).

[39] Germain Brière, "Le futur système d'état civil" (1986) 17:1&2 RGD 371 at 388.

[40] See Michèle Rivet, "Le rapport sur l'état civil de l'Office de revision du Code civil" (1974) 15:4 C de D 871 at 873.

women or birthing parents. I suggest that the attestation of birth should be abolished as an element of the law of persons, because it is one reason why the foundational elements of filiation (biology for women, will and intention for men) still differentiates between the parents and is informed by biological ideals. Only the declaration should be relevant for establishing filiation. This is not what the reform did, further entrenching differences between filiation bonds. Indeed, filiation by birth is now either by blood or by acknowledgement, making the issue salient.

There is a second related issue pertaining to the difference between rules for maternal and paternal filiation. It is possible for a man or other parent not to declare their filiation, and, unlike mothers, they have no obligation to do so. In this case, between 1980 and 2022, if the parents were unmarried, the mother could elect not to declare the man as the father of the child.[41] This has been modified by *Bill 2*. The mother can now declare on behalf of the other parent,[42] but there remains no obligation for mothers, fathers, or parents to do so. Such rules do not mean that the mother has no recourse to see paternity established, yet it means that there are hurdles to having it recognized. In contrast, it would be difficult for a birth mother (or person) not to declare her filiation toward the child,[43] and if she wanted to, she would now be in contravention of article 113.1 CCQ. Also, some fields on the declaration of birth and acts of birth may be left blank by choice. For example, single motherhood by choice is an option when it comes to filiation. Moreover, these gender-biased rules may be a reason why Quebec family law refuses to adopt the language of 'parent' exclusively, rather than mother/father/parent,[44] despite the fact that they entail the same effects.

Different rules for different conjugal statuses

Another difference in the nature of filiation rules is directly related to the overreliance on formalities and formal rules in the Second Book of the

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41 See former art 114 CCQ.

42 See art 114 CCQ.

43 On this question, see *Adoption — 161*, *supra* note 36. While blank "father" fields are possible on acts of birth—Quebec estimated the number at around 5% over the last 30 years—there is no such thing as an unknown mother. What is more, the filiation of autonomous mothers remains open to challenge. This is beyond the scope of this article.

44 See *Centre for Gender Advocacy c Attorney General of Quebec*, 2021 QCCS 191 at paras 167–91. While *Bill 2* included "parent" in the First Book of the Code, the Second Book was not modified. There are also downsides, such as the erasure of same-sex parents: Robert Leckey, "L'invisibilité persistante des parents de même sexe en droit familial québécois" (2023) 52:3 RDUS 657. See also Susan B Boyd, "Equality: An Uncomfortable Fit in Parenting Law" in Robert Leckey, ed, *After Legal Equality: Family, Sex, Kinship* (Abingdon: Routledge, 2015) 42.

Civil Code of Québec. Between 1980 and 2022, *de facto* partners were not provided with the same rules to see their filiation established as *de jure* partners. This manifested in two ways and could have negative consequences for certain parents and children. First, in the law of persons, while married parents could declare filiation for one another, unmarried parents could not declare filiation but for themselves.[45] This difference has been attenuated by article 114, paragraph 2 of the Code, but extra steps are still required for *de facto* spouses to prove their union. Second, there was traditionally no presumption of paternity or parentage for unmarried parents—though this has changed with *Bill 2*.[46] To a certain extent, not only does the *Civil Code* rely on a formal understanding of relationships when it comes to relationships between parents and children, it also structures filiation depending on which parent you are (the birthing parent or the other) and according to the type of conjugal relationship you are in.

These examples are not the only ones where a formal understanding of the family prevails despite the lived experiences and the actual relationships at play. *De facto* parents differ from *de facto* partners. While the former label applies to adults acting in fact as parents—such as stepparents or significant adult figures—the latter refers to unmarried couples. *De facto* parents are almost completely left out of the Second Book, except for one provision about the adoption of an adult child and one provision about parental authority.[47] This does not mean that they are absent from the Code,[48] yet they are not formally recognized and have little to no rights and obligations, even if they may voluntarily assume some.[49]

Different rules for different types of filiation

There is a second broad category of issues showcasing the inconsistencies of filial rules. The *Civil Code of Québec* has gradually recognized other possible relationships between adults and children. While at first, the

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45 See art 114 CCQ. *Bill 2*, *supra* note 4, modified this at cl 33.

46 See former art 525 CCQ; *Bill 2*, *supra* note 4, cl 80.

47 See arts 545, 611 CCQ.

48 See e.g. art 32 CCQ.

49 For example, support obligations extend to *de facto* parents under the *Divorce Act,* RSC 1985, c 3 (2nd Supp), ss 2(2), 15.1(1), or in some common law statutes (*Family Law Act,* SBC 2011, c 25, s 147(4)–(5) [*Family Law Act*]). On *de facto* parents in civil law, see generally Benoît Moore, "La notion de 'parent psychologique' et le *Code civil du Québec*" (2001) 103:1 R du N 115; Dominique Goubau, "Quelques réflexions à propos du statut du beau-parent en droit québécois", in *Développements récents en droit familial, Service de la qualité de la profession du Barreau du Québec*, vol 461, (Montréal: Yvon Blais, 2019) 3.

only desirable option was legitimate filiation—the quintessence of a formally accounted-for family—the Code has gradually added filiation by blood, filiation of children born of assisted procreation, and adoption. Since 2023, new categories have been introduced in the Code: filiation by birth and filiation by acknowledgement.[50] Yet, until now, while some elements of filiation flirt with a functionalist account of relationships (possession of status being an obvious example), relationships in the Code between adults and children continue to rely on a formal account of the family. Most importantly, the nature of filial rules varies depending on the 'type' of filiation, as do the underlying principles animating filiation. Some rules are status oriented—status being understood as 'meeting formal requirements' or being 'natural'—and other rules are based on intent.[51] These competing underlying principles animating filial rules highlight the artificial typology of relationships in the Code, which are even more apparent with the amendments made in 2023 by *Bill 12*.[52]

The history of filial relationships in the Code demonstrates the absence of a consistent conceptual model for filial relationships. Once possible relationships between parents and children started multiplying, the Code became disorganized. Elements underlying filiation by blood became mostly biology for women and mostly intent for men. In some cases, biology matters for men too.[53] While there is a common sense belief that contractualizing filiation is problematic,[54] it is how the Code understands filiation of children born of assisted procreation.[55] When reforming 'family law', rules about adoption are rarely addressed and their reform happens separately. This inconsistency in the underlying elements of filiation rules should not be left unaddressed by reformers and scholars.

The evolution of the structure of the Code is also puzzling because it suggests a lack of a solid foundation to the edifice of filiation. The structure of the Code has fluctuated not because of actual changes in the nature of relationships, but because of changes in political views on the family and its members in law. For example, it is sometimes believed that the parental project provided for by article 538 CCQ and assisted procreation

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50 See arts 543–84.1 CCQ; arts 530–37 CCQ.

51 See e.g. arts 530–37 CCQ.

52 See *Bill 12*, *supra* note 10, cls 7–8.

53 See art 535.1 CCQ.

54 See Leckey, "Lesbian Parental Projects", *supra* note 29 at 326–27. See also Anne-Marie Savard, *Le régime contemporain du droit de la filiation au Québec; d'une normativité institutionnelle à une normativité «fusionnelle»* (LLD Thesis, Université Laval, 2011) at 345 [unpublished]; Benoît Moore, "Les enfants du nouveau siècle (libres propos sur la réforme de la filiation)" (2002) 176 Développements récents en dr familial 75 at 86ff.

55 See arts 538–42 CCQ.

were introduced in the Code in 2002. However, the Code included the parental project as early as 1994,[56] and articles dealing with assisted procreation were found in the 1980 version of the Book on Family.[57] At that time, it was clear that assisted procreation was included under the regime of filiation by blood as it was only available in situations mimicking 'natural' reproduction. As such, the parental project did not appear in 2002, but rather the legal *imaginaire* was struck by the political fight 'won' in 2002 by people resorting to non-heterosexual reproduction to create their families. Given the differences between this form of reproduction and the 'natural' model, this type of filiation has been removed from the Chapter 'Filiation by blood' and included in a chapter of its own.[58] It is now back under the Chapter about filiation by birth,[59] but the entire typology of filiation was turned upside down by *Bill 12*.

Proposed Framework and Examples

Until 6 June 2023, there were three types of filiation in the CCQ: filiation by blood,[60] filiation of children born of assisted procreation,[61] and adoption.[62] Paternal and maternal filiations were dichotomized and there was 'second parent' filiation in the hypothesis of assisted reproduction. *Bill 12* muddied the typology of filiation,[63] but a child can nonetheless only have one or two parents, and the Code continues to assume that a child is part of a conjugal family.[64] However, all these ties are filial, have a similar role in law, and share qualities. To the law, these bonds have the same content and produce like effects, and therefore should operate according to consistent principles. Filiation should not be reliant on overly

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56 See art 538 CCQ as it appeared on 1 January 1994.

57 See arts 586, 588 CCQ (1980).

58 See *An Act instituting civil unions and establishing new rules of filiation*, SQ 2002, c 6, s 30.

59 See arts 522–542.37 CCQ.

60 See former arts 523–37 CCQ.

61 See former arts 538–42 CCQ.

62 See former arts 543–84.1 CCQ.

63 How scholarship will make sense of these changes remains to be seen. We are now working with filiation by birth and filiation by adoption. Filiation by birth comprises filiation by blood, filiation by acknowledgement, and filiation of children born of procreation involving the contribution of a third person (reproductive material or surrogacy). See arts 522–41.1 CCQ.

64 The overreliance on the conjugal family is under inclusive and limiting. See generally Natasha Bakht & Lynda M Collins, "Are You My Mother? Parentage in a Nonconjugal Family" (2018) 31:1 Can J Fam L 105; Jessica R Feinberg, "Friends as Co-Parents" (2009) 43:4 USF L Rev 799 (speaking to the American adoption context).

complex typologies[65] or invested with anxieties about how families are conceived. What is important for codified rules is to have a certain level of abstraction, flexibility and consistency. Relationships of emotional and economic interdependency provide these features.

Filiation is a status of interdependency. Instead of favouring types of filiation—maternal, paternal, by birth, by blood, by acknowledgment, of children born of assisted procreation, and adoption—the Code should provide a spectrum with two predetermined categories: reproduction or procreation, and adoption.[66] The Code's emphasis should depart from *who* reproduces and *how* in favour of the fact that there is a child with a relation to a parent. With this approach, no distinction is necessary between maternal and paternal filiation. The law of filiation provides for legal constructs and not for mere biological facts. There is no sound reason to propose opposite foundational elements, such as 'biology' for mothers and intent for fathers; the focus should be primarily on parents. Intent/*volonté* should be the fulcrum for all, and biology can be an element to look at when there are questions surrounding intent. The opposite—i.e. an emphasis on biology—is harder to justify, both theoretically and practically. If 'biology' was the core element promoted, the law would be of limited use and numerous situations where there is a functional parent-child relationship without a biological component would be excluded. One can think of adoption or assisted reproduction as examples.

How would this filiation anchored in intent[67] materialize? As it has been suggested in 2015 by the *Comité consultatif sur la réforme du droit de la famille* (*Comité*), proof of filiation should be renamed *modes d'établissement*. These *modes d'établissement* would remain mostly the same, namely: the act of birth, the possession of status, presumption, and acknowledgement.[68] Some modifications to the rules in the Code for filiation anchored in intent would be necessary. First, the requirement of corroboration between the attestation of birth and the declaration of birth should disappear. This would allow for the declaration of birth—presumably the manifestation of intent for all parents—to be the basis of

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65 See Tremblay, "Quebec's Filiation Regime", *supra* note 33 at 239–40. See also *Bill 12*, *supra* note 10, cls 7, 12, 18.

66 That is, until we discuss filiation *tout court*.

67 A feminist analysis of the notion of intent in parent-child relationships is beyond the purpose of this article, but should be kept in mind. See Boyd, "Gendering Legal Parenthood", *supra* note 34 at 72–73.

68 The *Comité* suggests removing voluntary acknowledgement, which is not a bad idea, but this proposition does not necessarily fit my framework. See Comité consultatif sur le droit de la famille, *supra* note 20 at 396, recommendation 3.8. For the *Comité*'s recommendation on a "*modes d'établissement*" framework, see *ibid* at 395, recommendation 3.3.

filiation under the Chapter 'filiation by reproduction/procreation/birth'. If the State wants to keep an attestation of birth for statistical or demographic purposes as was done before, doing so should not have an influence on relations in private law. In addition, the possibility to declare the other parent should be available to all.[69] Possession of status would remain roughly the same device. It is probably a good idea to suppress the name requirement in the evaluation of what constitutes adequate possession of status, in line with both what the *Comité* proposes and with what the courts are already doing,[70] because spouses and children do not automatically share a common last name anymore. Contrary to what is now suggested in *Bill 2* and what was done with *Bill 12*,[71] the length of the possession of status should remain flexible and be evaluated by judges, on a case-by-case basis. Care could be added to the constitutive elements of *tractatus*. More importantly, a reflection on the important qualities of possession of status should be introduced. To be meaningful, possession of status must be understood as a period of time during which a relationship with particular characteristics emerges. Filiation does not crystallize at birth; it is the result of many things including intention, a formal status (act of birth) and behaviour between an adult and a child. Administratively, it can be seen as crystallizing at birth to facilitate interactions with the State (regarding matters such as health, taxes, and social benefits), but not in private law, and not if the functional approach to relationships is taken seriously. Sadly, most of these elements were overlooked in *Bill 12*.

Presumptions available to heterosexual and non-heterosexual non-birthing *de jure* spouses should be extended to *de facto* spouses; this was done with *Bill 2*. However, it should be clear that a 'conjugal union' between the parents is not mandatory, nor relevant, for filiation to ensue. There would be a new feature to the *modes d'établissement*: both voluntary and involuntary acknowledgement would be contemplated. Voluntary acknowledgement was abrogated in 2023; it was limited in scope and probably overlapped with the "tardy declaration" found at article 130, paragraph 2 CCQ. The tardy declaration is a declaration made more than 30 days after the birth of a child. Voluntary acknowledgement did not need to be abrogated and there should be an inclusion of involuntary acknowledgement as a *mode d'établissement*. This mechanism could be inspired by former article 540 CCQ and allow for responsibility and identity, without parental authority. This *mode d'établissement* would include DNA testing and negative inferences (535.1 CCQ) and it could be relied

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69 See *Bill 2*, *supra* note 4, cl 32 (I would go further and include co-parenting outside of the conjugal model).

70 See e.g. *Droit de la famille — 181478*, 2018 QCCA 1120 at para 62.

71 See *Bill 12*, *supra* note 10, cl 9.

on to tie an adult to a child in the absence of intent. Further, the lock of filiation found in article 530 CCQ would remain relevant; if possession and title match, no claim or contestation can be made. In some cases (such as a parental project), the lock of filiation should apply even if there is only one parent on the act of birth. As I later describe, civil law should aim to reach beyond biparentality when it is necessary, such as when there are multiple relationships of interdependency.

Second, relying on these new imperatives and rules, the structure of the Title on Filiation should be modified. Categorizing the types of filiation depending on how a child was conceived is useless, since established legal ties have the same effects. Indeed, a child could have a 'blood/natural' filiation combined with an 'assisted' one. Categorization based on conception method confuses the foundational elements of filiation by distinguishing them depending on the gender of the parents or the means by which they elected to procreate. As such, civil law should start working with a different dichotomy: filiation by procreation/reproduction/birth[72] and filiation by adoption. How the child is conceived is irrelevant. Assisted reproduction used to be part of filiation by blood, and the theoretical foundations of this choice were stronger back then. In this alternative dichotomy, reproduction would be a residual category. In civil law, a residual category is a way to include all possible situations but for one in a category.[73] As such, reproduction would become a residual category including both all relationships of interdependency that are not adoption and assisted reproduction regardless of its type (medical, home insemination, sexual intercourse). This is a choice based on an opposition that has animated Quebec civil law since the eighties. Recognizing that adoption is a form of reproduction—social reproduction—it appears impossible to have only one type of filiation for now. This does not mean it is not what civil law should aspire to, since the content, qualities, functions, and effects of adoption and other filial bonds are similar.

The third essential element of this approach to filiation is that reproduction/procreation/birth and adoption trigger an interdependency status. Other meaningful relationships between adults and children could also lead to an interdependency status. Indeed, if relationships share the same content, functions, and qualities, they should have similar legal effects.

There are obvious differences to highlight regarding relationships between adults and relationships between adults and children, so some nuances are in order. David Archard identifies a few of these differences: a

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72 One of these words only.

73 For example, 'movable' is a residual category. It means, "[a]ll other property, if not qualified by law, is movable" (art 907 CCQ). Property is either movable or immovable.

relationship between a parent and a child "is one between an independent superior and a dependent subordinate"[74] and "lovers and friends are chosen, whereas a child does not choose her parents."[75] While these differences may oversimplify choice and dependency—for example, the circle of life may render older parents as vulnerable as children—they do resonate more in public and social law than in private law.[76] As John Eekelaar explains, the biggest difference between adult relationships and adult-child relationships is that children are dependent and vulnerable. He writes how "[a]ll actions between parents and children must in principle be open to scrutiny because of children's vulnerability to harm and exploitation."[77] Here again, even if these differences are also part of private law, exploitation and harm resonate with the logic of public law. In private law, adults—especially in a scheme where intention is central—choose, through their actions, to have or build relationships with children. Sometimes, adults do not have a choice. Children likely never choose, but there are mechanisms to protect their interest beyond private law. When relationships are catastrophic and detrimental to the well-being of children, social and public law come into play. The State intervenes and tries to prevent harm to vulnerable minors. This does not mean that relationships between adults and children are automatically disqualified from private law and from interdependency status. These relationships, from a private law perspective, remain relationships of interdependency or dependency with emotional and economic aspects.

As with adult interdependency, the proposed scheme builds on existing rules and allows for parties to claim an interdependency status. It is possible to assume that the current formal scheme fulfills some functions, such as certainty, but that other relationships could be included in the Code on the basis of reproducing similar characteristics. In contrast with adult relationships, it would not be possible to opt-out. As previously explained, the rules of filiation differ depending on the types of filiation and on whether the parent is a birthing person or not. However, generally speaking, the 'regular' rules rely on a mixture of title and possession. Title relies on the act of birth. I propose to have title rely on the declaration of birth and to allow conflicting declarations to be adjudicated by a judge.[78] Detailed modifications to the rules governing the establishment of filiation are suggested above, but what is innovative here is that it would

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74 David Archard, *Children: Rights and Childhood* (London, UK: Routledge, 1993) at 192.

75 *Ibid.*

76 See Eekelaar, *supra* note 8 at 90.

77 *Ibid.*

78 See for example declaratory mechanisms *Family Law Act, supra* note 49, s 31, and *Children's Law Reform Act*, RSO 1990, c C-12, s 13.

be possible to claim a parent-child or adult-child interdependency status on the basis of functional similarity with these rules. While form and rules remain important, other relationships could be included on the basis of being functionally equivalent to current recognized relationships of economic and emotional interdependency.

It is important to point out that interdependency status can develop over the course of a relationship, too. As such, interdependency status would be triggered by the classical dyad of title and possession of status. However, in the event where there is no title, a person could, by relying on modified possession of status, claim interdependency status. To claim this status, the child or the adult (or both) in the relationship would need to demonstrate that they meet the requirements for modified possession of status. Modified possession of status would differ from possession of status on several accounts. Traditional possession of status relies on *tractatus*, *fama* and *nomen* (name). It generally must begin at birth and continue uninterrupted. Its length is variable, but it normally ranges between 16 and 24 months, the latter being what *Bill 12* codified at article 524 CCQ.[79] Modified possession of status would not include *nomen*—as is recognized by leading case law—and would not necessarily begin at birth, with some exceptions aimed at addressing parents trying to exclude other parents. It could start before birth of after birth in specific scenarios, such as in the case of a parental project or step-parenting. The duration of possession of status would need to be informed by data and expertise about meaningful relationship formation. Once modified possession of status is established, the same test as the test to recognize adult interdependency could apply. However, given the fact that the child is likely always the vulnerable party to the relationship, the test should be applied from their standpoint. First, should the relationship end (or transform), would the socio-affective (emotional) and economic well-being of the child be jeopardized? Second, if the answer to the question is yes, would a child in a similar situation have reasonable expectations that the relationship was one of emotional and economic interdependency? Let us apply the test to examples.

The first example is the 'mainstream' hypothesis. The filiation of a child born of a man and a woman in an intimate relationship would be established using mostly existing rules. Both the man and the woman would fill a declaration of birth and would send it to the Registrar of Civil Status. The Registrar would draw an act of birth. One can assume for the purposes of this example that the parents would meet the requirements for possession of status. This child's filiation could not be contested or claimed. As will be explained later, this does not mean another relation-

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[79] See *Droit de la famille — 1528*, 2015 QCCA 59 at para 29.

ship of interdependency could not arise. All in all, for the vast majority of situations, the proposed rules would not change anything.

Relationships with a child born through a surrogacy agreement is the second example. The example has two sub examples: a scenario where everyone agrees as to who are the child's parents, and one where someone disagrees. In a scenario where everyone agrees, the intended parents would both declare birth and meet the requirements for possession of status, with the consequences it entails. In a scenario where the surrogate and the intended parent(s) disagree as to who will be the parent of the child, the surrogate, and the intended parent(s) would declare birth specifying that there is a contestation as to the filiation of the child.[80] The Registrar of Civil Status would not issue an act of birth until the filiation is established through a court declaration. Nothing under these proposed rules would prevent more than two parents from declaring birth, and if these declarations are non-contentious, plurifiliation would easily be included in the Code. If plurifiliation remains excluded from the *edifice* of filiation, it should be done explicitly.

The third example is when a step-parent or child claims interdependency status. While more careful consideration is required for this scenario, different rules would apply depending on who claims the status. A presumption of interdependency for adult-child relationships should play in favour of a child. A step-parent would need to demonstrate modified possession of status. To do so, they would need to prove that, during a period of time to be determined, they treated the child as if it were their own (*tractatus*) and third parties believed or knew that this person assumed the role of parent to the child (*fama*). Once modified possession of status is demonstrated, the test evaluating interdependency would apply. Should the relationship end (or transform), would the emotional and economic well-being of the child be jeopardized? Second, if the answer to the question is yes, would a child in a similar situation have reasonable expectations that the relationship was one of emotional and economic interdependency? If so, interdependency status exists and the relationship between the adult and the child should be understood as a parent-child relationship akin to filiation by reproduction. This relationship could be established while one of the parents of the child and the step-parent are still together and it would not exclude the other parent. The duration of and criteria for modified possession of status should be carefully selected as relationships of interdependency would provide a status and entail legal effects. Special awareness should be given to family violence and coer-

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[80] Specific rules about surrogacy could be found in regulations, allowing for flexibility in the specifics, but continuity and logic in the Code.

cive control before granting such statuses.[81] These effects will be considered in greater detail in the following part.

II. Recoding Relationships: Locating Status and Allocating Effects

The Book on the Family was a historical and contextual necessity. Political choices were made. To ensure family law survives beyond the contemporary period of socio-political changes, it must be better integrated in private law and in the *Civil Code of Québec*. Where do relationships and interdependency statuses fit in the Code? And what are their effects? This section proposes to recode relationships of interdependency and their effects in the *Civil Code of Québec*.

For a theory of relationships of emotional and economic interdependency to work, some recoding is necessary. Recoding is important. In a civil code, structure can send a message as strong as the rules. Recoding can counteract ideas that are currently prevalent[82] and criticized in family law theory, such as family law being "peripheral to the heart of law," "the periphery of private law," "ambiguously situated in an area that is neither entirely private nor entirely public," and of a "policy-oriented essence, which makes [it] local and contingent."[83] Carefully inscribing relationships and families in the Code can show that 'family matters' are an integral part of private law in Quebec and that family law is not exceptional.[84] This section is about locating statuses coherently in the Code and allocating their effects (rights, duties, obligations, responsibilities, and powers).

Recoding the CCQ is further required, because principles now found in the Book on the Family are inconsistent with principles elsewhere in the Code and are overly reliant on a formal understanding of family ties. The Book on the Family bends rules to make them look like they are inte-

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[81] I am grateful to peer reviewer 3 for their insightful comments about family violence, heteronormativity, and the importance of considering coercive control when thinking about family law reform.

[82] See e.g. David Bradley, "A Note on Comparative Family Law: Problems, Perspectives, Issues and Politics" (2005), online (pdf): *Oxford University Comparative Law Forum* <www.ouclf.law.ox.ac.uk> [perma.cc/ HC2M-RC5L].

[83] Maria Rosaria Marella, "Critical Family Law" (2011) 19:2 Am UJ Gender Soc Pol'y & L 721 at 721, 726 [italics omitted].

[84] See Jill Elaine Hasday, *Family Law Reimagined* (Cambridge, Mass: Harvard University Press, 2014) at 15; Janet Halley & Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism" (2010) 58:4 Am J Comp L 753; "Introduction" in Erez Aloni & Régine Tremblay, eds, *House Rules: Changing Families, Evolving Norms, and the Role of Law* (Vancouver: UBC Press, 2022) 3 at 8–9.

grated in the edifice of the Code, but they do not respect basic civil law principles. For example, the family patrimony is not truly a patrimony and rules surrounding marriage contracts are inconsistent with general rules on obligations. Most importantly, the rules are not about actual relationships and their qualities, but about the requisite entry criteria to have a relationship legally recognized, regardless of the actual qualities and content of the relations.[85] This means that citizens in the exact same situation when it comes to the qualities and nature of their relationships are treated differently in private law, despite being similarly treated in other contexts.[86] Family law principles should be flexible and abstract enough to evolve with time, to adapt to new realities, and to be consistent with other fundamental principles found in the *Civil Code of Québec*. Even in the eighties, the members of the Committee on the Law of Persons and Family Law were aware of the risk of inconsistency in the Book on the Family.[87] *Relationships*— as opposed to just marriage, for example—should be better integrated in the Code, from elements that are so fundamental that they cannot be contracted out, to elements that can be the object of a contract, to limitations on ownership rights or claims/*créances*, and more.

A. Locating Status

In Quebec family law, statuses have consistently been triggered by formalities and by a formal account of how relationships can be integrated in the *Civil Code*. The law of persons is undeniably associated with the notion of status. A status entails certain effects a legal subject is not free to contract out of. However, status does not have to depend solely on the accomplishment of formalities, on contractual logic, or on an institution. All this, and more, could trigger a status. Nothing prevents a factual situation from triggering a status. A status—here, one of interdependency—could be triggered by the qualities of a relationship, since a civil status is the "[e]nsemble des qualités inhérentes à la personne, que la loi prend en

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85 See Moore, "La consécration", *supra* note 19 at 7.

86 See Belleau, *L'amour et l'État*, *supra* note 15; Robert Leckey, "Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past" (2009) 15:8 Institute for Reseach on Public Policy (IRPP) Choices 2 at 5–28, online (pdf): <irpp.org/wp-content/uploads/assets/research/family-policy/families-in-the-eyes-of-the-law/vol15no8.pdf> [perma.cc/Z4T7-KBM9].

87 See Claire L'Heureux-Dubé, "La famille – relations d'ordre personnel" in *Codification : Valeurs et langage - Actes du colloque international de droit civil comparé* (Montreal: Conseil de la langue française, Université McGill, Université de Montréal, 1985) at 201–2; Edith Deleury & Michèle Rivet, "Observations sur la première partie du Rapport de l'O.R.C.C sur la famille" (1975) 16:3 C de D 603 at 604.

considération pour y attacher des effets,"[88] or, "[d]ans une acception large, l'état de la personne s'entend de l'ensemble des qualités de la personne que la loi prend en considération pour y attacher des effets juridiques."[89] Status is inherently about *qualities*. The relationship itself, and not its form, should grant the law capacity to regulate it.

This recoding does not claim to be exhaustive. It represents a starting point to launch a discussion as to how intimate and personal relationships of economic and emotional interdependency could be included in the *Civil Code* to provide abstraction, inclusivity, flexibility, and consistency. The best way to highlight the proposed modifications to the structure of the Code is through tables. When explanations are necessary, they can be found under the tables. Modifications are provided in italics.

Figure 1

Livre 1 – Des personnes	Book 1 – Persons
Titre 1 – De la jouissance et de l'exercice des droits civils	Title 1 – Enjoyment and exercise of civil rights
Titre 2 – De certains droits de la personnalité	Title 2 – Certain personality rights
Titre 3 – De certains éléments relatifs à l'état des personnes	Title 3 – Certain particulars relating to the status of persons
Titre 4 – De la capacité des personnes	Title 4 – Capacity of persons

Nothing would change when it comes to the titles of the First Book of the Code, reproduced by figure 1. In terms of structure, it is logical to include interdependency statuses here, as it is the part of the Code concerned with the status of persons. Including family relations in the First Book is not a radical idea, as it would be consistent with what was done prior to the eighties in Quebec[90] and what is done today in the French Civil Code.[91]

Modifications would take place in Title 3 of Book 1 and would look like this:

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88 Léon Roy, *De la tenue des registres de l'état civil dans la province de Québec* (Québec, 1959) at 13.

89 Édith Deleury & Dominique Goubau, *Le droit des personnes physiques*, 5th ed (Cowansville, QC: Yvon Blais, 2014) at para 361.

90 See arts 115–245j CCLC.

91 See arts 143–387-6 C civ.

Figure 2

Titre 3 – De certains éléments relatifs à l'état des personnes	Title 3 – Certain particulars relating to the status of persons
Chapitre I – Du nom	Chapter I – Name
Chapitre II – Du domicile et de la résidence	Chapter II – Domicile and residence
Chapitre III – De l'absence et du décès	Chapter III – Absence and death
Chapitre IV – Des relations d'interdépendance entre adultes	*Chapter IV – Relationships of interdependency between adults*
Chapitre V – Des relations d'interdépendance entre adultes et enfants	*Chapter V – Relationships of interdependency between adults and children*
Chapitre VI – De l'autorité parentale	*Chapter VI – Parental authority*
Chapitre VII – De l'obligation alimentaire	*Chapter VII – Obligation of support*
Chapitre VIII – Du registre et des actes de l'état civil	Chapter VIII – Register and acts of civil status

Except for the new chapters provided in italics, this is in line with the former structure of the Code. It is logical to include these relationships in the Book on Persons, as they include some elements which one cannot contract out of. These elements are both noncommercial and extrapatrimonial in nature, and are profoundly intertwined with the self, the legal subject, and the legal person. Moreover, the family is neither a legal entity nor a legal person, and it is therefore misleading to have a Book on the Family with legal consequences attached to 'the family.'[92] This proposed structure makes it clear that the family is not a legal entity.

The breakdown of the two new chapters of Book 1 would look like this:

[92] While this article is not interdisciplinary in nature, a sociological analysis would enrich my framework.

Figure 3

Chapitre IV – Des relations d'interdépendance entre adultes	*Chapter IV – Relationships of interdependency between adults*
Section I – Relations conjugales	*Section I – Conjugal relationships*
§1. Mariage	*§1. Marriage*
§2. Union civile	*§2. Civil union*
§3. Union de fait	*§3.* De facto *union*
§4. Absence d'interdépendance	*§4. No interdependency*
Section II – Autres relations	*Section II – Other relationships*
Chapitre V – Des relations d'interdépendance entre adultes et enfants	*Chapter V – Relationships of interdependency between adults and children*
Section I – Relations filiales	*Section I – Filial relationships*
Disposition générale	*General provision*
§1. Reproduction	*§1. Reproduction*
§2. Adoption	*§2. Adoption*
§3. Effets	*§3. Effects*
Section II – Autres relations	*Section II – Other relationships*

In Chapter IV, under Section I, the subsection on marriage would include the current articles about marriage and the solemnization of marriage, proof of marriage, nullity of marriage, and extrapatrimonial rights and duties of spouses. It would also include separation from bed and board. Similarly, the rules on the formation, effects, and dissolution of civil unions would be found under the second subsection. The inclusion of the institution of civil union in the Code should be questioned now that marriage is open to same and opposite sex couples and since the proposed framework would include *de facto* unions, but this is beyond the scope of this article.

The third subsection would provide a definition of *de facto* unions and would make clear that this kind of union is similar to marriage and civil unions, and thus triggers an interdependency status. The fourth subsection would contain the test explained earlier. It would provide for spouses whose conjugal unions are not relationships of economic and emotional interdependency to contest the interdependency status. The second section (Section II – Other relationships) would allow for adults in a relationship of economic and emotional interdependency that is not conjugal to claim interdependent status.

Chapter V, *Relationships of Interdependency between Adults and Children,* would open with a general provision about the equality of children regardless of their circumstances of birth, but it would not include a right to have one's filiation established, as this can hardly be framed as a right and is not enforceable.[93] The rules explained in part I.B. of this article would be found under these subsections and would look like this:

Figure 4

Section I – Relations filiales	*Section I – Filial relationships*
Disposition générale	*General provision*
§1. Reproduction	*§1. Reproduction*
Modes d'établissement	*Modes of establishment*
Déclaration	*Declaration*
Règles générales	*General rules*
Déclarations conflictuelles	*Conflicting declarations*
Possession	*Possession*
Règles générales	*General rules*
Possession modifiée	*Modified possession*
Présomption	*Presumption*
Reconnaissance volontaire	*Voluntary acknowledgement*
Reconnaissance involontaire	*Involuntary acknowledgement*
Actions	*Actions*
Règles générales	*General rules*
Règles particulières à la reproduction assistée (de tous les types)	*Rules specific to assisted reproduction (of any kind)*

The second subsection (see figure 3), on adoption, would mostly use the current rules, which were modified in 2017.[94]

The third subsection of Chapter V, Section 1 (see figure 3)—the section on the effects of filial relationships—would include the mandatory effect of filiation: maintenance. Maintenance does not need to be under-

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93 *Contra* 522.2 CCQ. It is unfortunate that this amendment was integrated to the *Civil Code.*

94 See Bill 113, *An Act to amend the Civil Code and other legislative provisions as regards adoption and the disclosure of information*, 1st Sess, 41st Leg, Quebec, 2017 (assented to 16 June 2017), SQ 2017, c 12.

stood as an attribute of parental authority, and can instead be seen as a patrimonial effect of filiation. It could also arise without parental status. The second section of Chapter V would target other adult-child relationships and would allow claims for interdependency status. It would also include an article on how reproduction is a residual category. The rules about the act of birth found in Book 1 would need to be modified to make clear that there is no need for corroboration between the attestation of birth and the declaration of birth, and to anchor the act of birth in the declaration of birth for all parents.

The Book on Persons would contain three final chapters, two of which would be moved from the former Book on the Family, and one of which is already in the Book on Persons. Chapter VI would be on parental authority, Chapter VII on the obligation of support associated with interdependent statuses (which will be considered in greater detail in the next section), and the last chapter, Chapter VIII, "Register and Acts of Civil Status", would remain unchanged but for the modifications to the articles on the act of birth.

B. Allocating Effects

While integrating relationships of economic and emotional interdependency in the Code would be a welcome change, their recognition must entail legal effects for the status to be meaningful. This subpart first allocates the effects of interdependency statuses and includes them in the current mechanisms found in the Code. To begin, mandatory effects are explored, and effects one can opt in or out of are described after. Second, this subpart considers the consequence of such an understanding on four accounts: consistency within the Code, the shift in the normative project of the regulation of intimate life, consistency with the law outside of the Code, and other practical and theoretical advantages.

Effects

In terms of recoding the effects, some would be found in the Book on Persons, making them mandatory. Mandatory effects would include, in addition to the extrapatrimonial rights and duties associated with interdependency statuses, the obligation of support, parental authority, prior claims on identified property (family patrimony), compensatory allowance, and restrictions to ownership rights or lease agreements (family residence). Other effects or legal mechanisms would be integrated in the book in which they belong. For example, the current effects of marriage or civil union contracts would become part of the Book on Obligations and the Title on Nominate Contracts. To be consistent, it should, at least, be renamed a conjugal contract.

The first group of mandatory effects of relationships of economic and emotional interdependency concern both parent-child and adult-child relationships. Parental authority would roughly remain untouched, but would be moved to the Book on Persons. It makes sense to have parental authority and tutorship in the same book, as they are, to a certain extent, two sides of the same coin. Maintenance, as mentioned above, should be seen as a mandatory effect of filiation. This would clarify that even if parental authority is withdrawn, maintenance obligations continue to exist.

While moving parental authority to the Book on Persons may seem questionable, it is justifiable when one analyzes the current articles on parental authority and its nature. The current Title on Parental Authority contains sixteen articles. These articles mostly concern extrapatrimonial elements of the relationship between a child and an adult. For example, articles 597, 598, and 602 provide for illustrations of the extrapatrimonial nature of parental authority. They read as follows:

597. L'enfant, à tout âge, doit respect à ses père et mère ou à ses parents.	**597.** Every child, regardless of age, owes respect to his father and mother or to his parents.
598. L'enfant reste sous l'autorité de ses père et mère ou de ses parents jusqu'à sa majorité ou son émancipation.	**598.** A child remains subject to the authority of his father and mother or of his parents until his majority or emancipation.
602. Le mineur non émancipé ne peut, sans le consentement du titulaire de l'autorité parentale, quitter son domicile.	**602**. No unemancipated minor may leave his domicile without the consent of the person having parental authority.

Respect, in article 597 CCQ, is undoubtedly extrapatrimonial, as is the authority found in article 598 CCQ and the possibility to leave the domicile (art 602 CCQ). In addition, it is impossible to 'opt out' or contract out of parental authority. Such authority used to be found in the First Book of the CCLC, at a time when it was seen as a *puissance paternelle.* A *puissance* amounted to authority granted by the State to an individual so that this individual had powers over other human beings, children, or women. While it has changed today, it remains, in nature, extrapatrimonial and attached to the status of persons. It should be noted that a power

is generally a prerogative used to act in the interest of another.[95] In terms of its nature, parental authority is about powers and duties.[96]

The second group of mandatory effects is related to relationships of economic and emotional interdependency between adults. As the proposed structure of the First Book shows, conjugal unions should now be comprised of both *de jure* and *de facto* unions. The definition of *de facto* spouse could be in line with definitions outside of the Code for consistency. The effects of marriage, civil union, and *de facto* union would be found in the First Book of the Code. This would include: rights and duties of spouses (art 392 CCQ), name (art 393 CCQ), moral and material direction [of the family] (art 394 CCQ),[97] choice of residence (art 395 CCQ), and contributions to the expenses [of the household] (art 396 CCQ). Article 397 CCQ, which provides that

397. [l]'époux qui contracte pour les besoins courants de la famille engage aussi pour le tout son conjoint non séparé de corps. Toutefois, le conjoint n'est pas obligé à la dette s'il avait préalablement porté à la connaissance du cocontractant sa volonté de n'être pas engagé.	**397.** [a] spouse who enters into a contract for the current needs of the family also binds the other spouse for the whole, if they are not separated from bed and board. However, the non-contracting spouse is not liable for the debt if he or she had previously informed the other contracting party of his or her unwillingness to be bound.

would probably need to be included in the Book on Obligations or in the Title on the Common pledge of creditors (arts 2644 CCQ and ff). Articles 398 and 399 CCQ, concerned with the mandate or representation powers, fit nicely in the current chapter on the mandate, which is Chapter IX of

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95 See Madeleine Cantin Cumyn, "The Legal Power" (2009) 17:3 Eur R of Priv L 345 at 355.

96 Even if she was referring to the former *puissance paternelle,* Groffier-Atala wrote how "[l]a puissance paternelle était définie par la doctrine québécoise récente comme 'l'ensemble des pouvoirs que la loi accorde aux père et mère sur la personne de leurs enfants mineurs pour leur permettre de remplir leurs devoirs de parents'" [footnotes omitted]: Ethel Groffier-Atala, "De la puissance paternelle à l'autorité parentale" (1977) 8:2 RGD 223 at 223. Thinking of the *puissance paternelle* or *autorité parentale* in terms of powers and duties and its attributes in terms of right and duty is theoretically sound.

97 This article would likely need to be modified to remove the reference to "parental authority." Conjugal and filial relationships should be seen independently. While at some point, *puissance maritale* had conjugal and filial connotations, it is time to operate a divide.

the Second Title (nominate contracts) of the Fifth Book (obligations). Article 400 CCQ, discussing the possibility for spouses to apply to the court when they "disagree as to the exercise of their rights and the performance of their duties," could be inserted in different parts of the Code, but the First Book could be good fit. Finally, the compensatory allowance rules should be integrated into the section on unjust enrichment.

When it comes to the family residence and the family patrimony, it is important to ask what exactly articles 401 to 426 CCQ are about and who they should apply to. Does their subject matter concern limitations to the right of ownership? Claims? Prior claims? Limitations to leases? The answer is likely all the above. First, the articles on the family residence limit the legal prerogatives of an owner concerning the family home and movable property serving for the use of the household. Specifically, it prevents one spouse from, "without the consent of the other, alienat[ing], hypothecat[ing] or remov[ing] from the family residence the movable property serving for the use of the household."[98] It would be logical to include these provisions in the Book on Property. There is also an article preventing subleasing or lease termination without the consent of the other spouse.[99] This provision could be integrated within the law of obligations, in the Title on Nominate Contracts and the section about special rules for leases of dwellings.

Second, scholars in Quebec have critiqued the nature and qualification of the family patrimony. While it is essential to balance economic disadvantages at the end of a conjugal relationship, it should not be done through the family patrimony in its current form, because this device does not respect basic civilian principles related to the law of persons, the law of obligations, debtor/creditor law, and property law. The articles on the family patrimony specify how to determine the value of a group of assets, assumed to be common to most couples, and share them in value "regardless of which [of the spouses] holds a right of ownership."[100] For Ernest Caparros, the family patrimony was a *créance égalisatrice*, a claim at the end of the marriage or a matrimonial regime; specifically, an imperative secondary regime (*Régime matrimonial légal impératif*).[101] He was theoretically opposed to the family patrimony and qualified it as a "*virus décodificateur*."[102] He wrote that "une connaissance et une compré-

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98 Art 401 CCQ.

99 See art 403 CCQ.

100 Art 414 CCQ.

101 See Ernest Caparros, "Le patrimoine familial : une qualification difficile" (1994) 25:2 RGD 251 at 266–67.

102 *Ibid* at 267.

hension insuffisantes de notre ordonnancement juridique codifié permettrait d'expliquer que le législateur ait senti le besoin de créer une nouvelle section dans ce livre II du *Code civil du Québec*."[103] If the family patrimony is a claim, it should be codified accordingly. If it is a matrimonial regime, it should be codified as such and be found in the Book on Obligations. While one can be ideologically opposed to Caparros, his legal analyses of the nature and qualification of the family patrimony are accurate. It demonstrates an incredible richness for civil law to be abstract, flexible, and coherent enough so that conservative (Caparros', for example) and liberal views (my own) of the family can be found in the analysis of the same legal devices.

The last mandatory effects are obligations of support. The obligation of support generally targets both adult-child and adult-adult relationships. I suggest extending it to all relationships of economic and emotional interdependency. The possibility of claiming an obligation of support would thus be available to all, though not everyone would be entitled to support. Support would remain subject to guidelines when it comes to children and would rely on a means and needs analysis for other relationships. It would be moved to the First Book, the Book on Persons. While the nature of the obligation of support tends to be under-documented and under-analyzed in civil law—especially since the new Code came into force—Michel Tétrault writes, "[l]'obligation alimentaire est l'expression du concept d'interdépendance et de solidarité entre certains membres de la famille."[104] Now that the contours of the family in law have expanded, and since this work proposes to move family law's basis toward relationships of interdependency, what makes an obligation alimentary? Ethel Groffier, citing French author Jean Pélissier, suggested in 1969, "[c]e n'est pas l'origine familiale ou non d'une obligation qui donne à l'obligation un caractère alimentaire. C'est sa destination. Sont alimentaires toutes les prestations qui ont pour but d'assurer à une personne besogneuse des moyens d'existence."[105] Obligations of support sustain individuals' situations of interdependency. They originate from relationships based on *solidarité* and *interdépendance*. There are some conceptual hurdles to the analysis of support obligations originating from France and published before divorce was possible. Support obligations used to mate-

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[103] *Ibid* at 254.

[104] Michel Tétrault, *Droit de la famille, volume 2 : L'obligation alimentaire* (Cowansville, QC: Yvon Blais, 2011) at 1.

[105] Ethel Groffier, *L'obligation alimentaire en droit de la famille comparé* (Office de révision du Code Civil, 1969) at 3, citing Jean Pélissier, *Les obligations alimentaires* (Paris, 1961) at 2.

rialize in a different context with a different scope.[106] The nature of support obligations is complex, but nothing prevents them from attaching to interdependency status when and if need be. Support obligations are attached to the person. They are rooted in a specific type of relationship. The form of these relationships should matter less (now) than their content (proposed framework). While they raise policy and social concerns, from a private law perspective, it is sound to attach them to relationships of economic and emotional interdependency. Support obligations should be seen as something one cannot contract out of, at least not before or during the relationship. This mandatory effect of interdependency statuses should be located in the First Book of the Code.

The last element to address is the marriage or civil union contract. Quebec has a default regime—the partnership of acquests—applicable to all *de jure* spouses who did not elect for another type of contract to regulate the pecuniary consequences of their unions. The default regime should also apply to *de facto* conjugal relationships, although some adjustments to the rules may need to be made.[107] For now, in order to avoid the problems that have arisen in the context of *de facto* relationships,[108] the default regime should also apply to qualifying non-conjugal adult relationships. Until we have evidence that non-conjugal adults in interdependency relationships do not have an expectation of property division, it is safer to include them in accordance with the proposition that the qualities of relationships take precedence over their type. The scope of the default regime might also need to be revisited and other options could be found in the Code, as it is the case now with the partnership of acquests and separation as to property. Furthermore, whether a default regime is a contract should be debated between experts in the course of further family law reform. We should learn from the past experiences of matri-

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[106] An analysis of the transformation of the articles in the CCLC and the CCQ shows how the obligation has fluctuated. At some point, the wife was not included in the article, but the mother-in-law and father-in-law were. Compare arts 165, 166, 167 CCLC to art 633 CCQ (1980), art 585 CCQ as it appeared on 20 June 1996 and art 585 CCQ as it appeared on 24 June 2002.

[107] This proposition differs from the Roy Report of the *Comité consultatif sur le droit de la famille*, which suggests that the common child is the fulcrum of family law, and proposes to "respect" the autonomy of *de facto* spouses, *supra* note 20 at 58–59, 68–98, 99–104.

[108] See *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83; *Quebec AG v A*, *supra* note 13; Hélène Belleau, "One Myth Leads to Another: From Ignorance of the Laws to the Presumption of Informed Choice among de Facto Spouses" in Erez Aloni & Régine Tremblay, eds, *House Rules: Changing Families, Evolving Norms, and the Role of the Law* (Vancouver: UBC Press, 2022) 213 at 220, 224–25.

monial regime reform[109] and not act in a reactionary fashion. In the *Civil Code of Lower Canada*, matrimonial covenants were found in Book Third ("of the acquisition and exercise of rights of property"), Title Fourth ("of marriage covenants and of the effect of marriage upon the property of the consorts.") Articles regarding conjugal contracts should be recoded in the Book on Obligations, with necessary adjustments.

Conceptual Consequences

What are the broader consequences of this proposed regime on understanding families, individuals, and relationships of economic and emotional interdependency? In summary, such a theory would increase consistency within the Code. The Book on the Family distorts the basic principles of property, persons, and obligations. It uses terminology that is often inadequate and navigates between core concepts in an imprecise manner. Status, intent, and formalities are used in inconsistent ways, yet the very nature of a Code leads jurists to believe the Book on the Family is logical and systematic. It is not. Further, the Code suggests that the family is a legal entity, something it absolutely is not. An approach based on relationships of economic and emotional interdependency infuses the Code with consistency, since it builds upon the notion of status and its mandatory and optional effects. It respects the principles of the law of persons, property, and obligations. It focuses on the nature of relationships, not their form. The family's legal regime should free itself of prejudices and constructs about the form of meaningful relationships and focus on their content.

Second, a theory of relationships of economic and emotional interdependency shifts the normative project of the regulation of intimate life. Having a part of the Code called "The Family" is limiting and operates on a problematic assumption about what a family is and why it matters in private law. The family is bound to further evolve, and peoples' experiences fluctuate. Law regulates familial relationships because of their particular nature and specific challenges. Family law is about a particular kind of interdependency, but nothing prevents this interdependency from materializing in other settings. Private law should not favour one model of intimate organization over another, especially if and when the relationships operate similarly and the effects are equivalent. It should not stifle fulfilling relationships on the basis of what it asserts an ideal family model to be.

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[109] See generally Danielle Burman, "Politiques législatives québécoises dans l'aménagement des rapports pécuniaires entre époux : d'une justice bien pensée à un semblant de justice - un juste sujet de s'alarmer" (1988) 22:2 RJT 149.

Third, such an approach would increase consistency between law inside and outside of the Code. There is an important gap between the conception of the family in social, public, and private law. While it is beyond the purpose of this article, there is also a disconnect between law and other fields (sociology and social work, among others).[110] From a legal standpoint, focusing on relationships of interdependency could narrow these gaps in many ways, the most obvious being the inclusion of *de facto* relationships—between adults, but also between adults and children—in the Code. It would not solve all these inconsistencies, as some relationships would still not be recognized and others will be recognized for the purposes of certain laws but not others, but it would be a start.

There are other theoretical advantages. A theory of relationships of economic and emotional interdependency provides flexibility and abstraction. It holds the potential to adapt with time through changing social practices and evolving judicial intervention. It also helps to reach a balance between exceptional and regular situations. An approach focusing on relationships of economic and emotional interdependency holds the potential to be transformative to family law in the *Civil Code of Québec* and send the message that family law is private law.

Conclusion

This article proposes to shift the normative project of regulating intimate behaviours in the *Civil Code of Québec* from 'the family' to relationships of economic and emotional interdependency. In doing so, it suggests moving away from a strictly formal understanding of meaningful relationships to an amalgamation of form and function. It then explains how this would materialize in the *Civil Code of Québec*, both theoretically and in practice. To do so, Part I presents a theory for adult relationships that could be implemented in civil law and specifically in the *Civil Code of Québec*. The theory of relationships of emotional and economic relationships would centre the regulation of intimacy on the meaningful qualities and characteristics of relationships, rather than focus on their form or whether they fulfill formalities. Subsequently, this work expands this

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[110] In sociology, see Hélène Belleau, Carmen Lavallée & Annabelle Seery, *Unions et désunions conjugales au Québec : Rapport de recherche. Première partie : le couple, l'argent et le droit* (Montreal: Institut national de la recherche scientifique, 2017); Hélène Belleau & Carmen Lavallée *Unions et désunions conjugales au Québec : Deuxième partie : Désunions et parentalité* (Montreal: Institut national de la recherche scientifique, 2020). In social work, see Kévin Lavoie & Isabel Côté, "Tisser une trame relationnelle autour de l'enfant : les affiliations familiales en contexte de gestation pour autrui et de don d'ovules" (2023) 1:239 Dialogue 67. For an example of the disconnect in law, see Carmen Lavallée, Hélène Belleau & Alexandra Rivest-Beauregard, "Tenir lieu de parent au Québec : deux poids, deux mesures ?" (2023) 64:1 C de D 189.

theory to include other relationships, namely adult-child relationships. Part II focuses on how these developments would materialize in the *Civil Code of Québec*, and it offers a draft for recoding the articles on relationships. First, it describes where new and old relationships would be included in the edifice of the Code, and second, it analyzes and recodes the effects of these relationships. Finally, it argues that this new theory and proposed recoding have various desirable conceptual consequences for civil law as a whole, while also making the regulation of intimate behaviours inclusive in Quebec private law. Rethinking the conceptual foundations of family law in private law is fundamental at a time when, yet again, we are awaiting a reform of family law.

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THE MORAL FOUNDATION OF CRIMINAL DEFENCES AND THE LIMITS OF CONSTITUTIONAL LAW

*Colton Fehr**

The Supreme Court of Canada's decision in *R v Khill* provided a novel moral framework for self-defence. Whereas self-defence was previously categorized as a justification, the Court now maintains that it constitutes an excuse in some cases. In other cases, the Court suggests self-defence sits between justification and excuse, captured by a principle I elsewhere call "moral permissibility". The Court's choice to adopt a more robust relationship between the moral principles underlying justification/excuse and self-defence is principled. However, the basis for that conclusion—the application of moral philosophy to the law of criminal defences—applies with equal force to the law of duress and necessity. Unfortunately, the statutory duress defence and section 8(3) of the *Criminal Code* limit the juristic scope of those defences. Although these restrictions may be challenged under section 7 of the *Charter*, this challenge will likely fail as defendants need not be denied a defence. Instead, they will be denied a proper moral assessment of their actions. To instill greater coherency into the law, it is prudent to repeal the statutory duress defence. This approach would allow courts to utilize the broad wording of the new "defence of person" provision to develop the law of self-defence, necessity, and duress in line with the moral philosophy underlying these defences. Constitutionalizing the principles underlying criminal defences can nevertheless serve two broader purposes: mitigating the tendency of courts and counsel to unduly rely upon other less transparent (jury nullification) or heavy-handed (judicial review) legal devices to avoid conviction.

La Cour Suprême du Canada a identifié, dans l'arrêt *R c. Khill*, un nouveau cadre d'analyse moral pour la légitime défense. Alors que la légitime défense était précédemment qualifiée de justification, la Cour soutient dorénavant que, dans certains cas, elle peut constituer une excuse. Dans d'autres cas, la Cour suggère plutôt que la légitime défense se situe entre la justification et l'excuse, ce qui reflète une notion que j'identifie ailleurs comme la « permissivité morale ». La Cour a choisi de baser sa décision sur des principes, en établissant un lien plus robuste entre les fondements moraux qui appuient la justification/l'excuse et la légitime défense. Néanmoins, le raisonnement qui mène à cette conclusion — l'application de la philosophie morale au droit de la défense criminelle — s'applique tout autant aux défenses de contrainte et de nécessité. Malheureusement, la défense de contrainte prévue par la loi et l'article 8(3) du *Code criminel* limitent la portée juridique de ces défenses. Bien que ces restrictions puissent être contestées en vertu de l'article 7 de la *Charte*, une telle contestation risquerait d'échouer puisqu'un accusé ne peut être dépourvu d'une défense. La personne accusée sera, plutôt, privée d'une évaluation morale appropriée de ses actes. Pour assurer une meilleure cohérence législative, il serait donc prudent d'abroger la défense de contrainte législative. Cette approche permettrait aux tribunaux d'utiliser la formulation générale de la nouvelle provision de « défense de la personne » afin de développer les principes juridiques de la légitime défense et des défenses de nécessité et de contrainte, en conformité avec la philosophie morale qui sous-tend ces défenses. Constitutionaliser les principes qui appuient les défenses criminelles peut cependant répondre à deux objectifs plus vastes : atténuer la tendance des tribunaux et des avocats à s'appuyer indûment sur des dispositifs juridiques moins transparents (annulation par le jury) ou à employer des mesures plus draconiennes (contrôle judiciaire) pour éviter la condamnation.

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Introduction

Parliament's passage of the *Citizen's Arrest and Self-Defence Act*[1] altered the moral foundation of self-defence. Whereas the previous laws identified self-defence as a justification,[2] the new laws provide that those who meet the statutory elements of the defence are "not guilty of an offence."[3] Parliament's implicit recognition that self-defence may constitute a justification or excuse accords with the legal scholarship assessing the moral foundations of self-defence. Although a person who repels an aggressor's force to preserve themselves constitutes a clear instance of justification, the justificatory rationale weakens in cases "[w]here the competing interests of the accused and the attacker are equal, or are clouded by other considerations such as provocation, disproportionality or misperceived threats."[4]

In *R v Khill*,[5] the Supreme Court of Canada affirmed that Parliament's omission of the term justification from the new self-defence laws means that self-defence may constitute either a justification or an excuse.[6] As Justice Martin wrote for the majority, in several categories of cases "the defending act is not considered rightful or tolerable by many authors, but guilt can be avoided when the circumstances call into question the voluntariness of the act, which brings it closer to an excuse and the law of necessity."[7] Justice Martin further cited my scholarship contending that self-defence "may accommodate a continuum of moral conduct, including acts that are merely 'morally permissible' where the threat and response meet a reasoned equilibrium."[8] As Justice Martin observes, adopting a continuum of moral principles as the rationale underlying a defence means that in some cases "the defence is neither purely a

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1 SC 2012, c 9 [*CASDA*].

2 See *Criminal Code*, RSC 1985, c C-46, s 34(2) (as it appeared on 1 December 2011, before the *CASDA*, *supra* note 1 came into force).

3 *Criminal Code, supra* note 2, s 34; *CASDA, supra* note 1 at s 34.

4 See Colton Fehr, "Self-Defence and the Constitution" (2017) 43:1 Queen's LJ 85 at 88 [Fehr, "Self-Defense"], citing George P Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978) at 762–63, 769 [Fletcher, *Rethinking*]; John Gardner & François Tanguay-Renaud, "Desert and Avoidability in Self-Defense" (2011) 122:1 Ethics 111 at 113; Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker" (1994) 104:2 Ethics 252 at 256–59; Kent Greenawalt, "The Perplexing Borders of Justification and Excuse" (1984) 84:8 Colum L Rev 1897 at 1907–11.

5 2021 SCC 37 [*Khill*].

6 See *ibid* at paras 47–48, 107.

7 *Ibid* at para 47.

8 *Ibid* at para 48, citing Fehr, "Self-Defence", *supra* note 4 at 102.

justification nor an excuse, instead occupying a middle ground of 'permissibility' between rightfulness and blamelessness."[9]

In my view, the Supreme Court is signalling profound changes to not only the law of self-defence, but also other defences that fit within the excuse/justification dichotomy. If self-defence must be reconceptualized in light of scholarship criticizing its moral foundations, then the same should follow with respect to the law of duress and necessity. Scholars have long maintained that duress and necessity do not fit neatly into the excuse category of defences. Unlike the new self-defence provisions, however, the duress defence is circumscribed as an excuse per section 17 of the *Criminal Code of Canada*.[10] Although duress exists in both statutory and common law form,[11] it would be peculiar to ascribe each form of the defence a different theoretical basis. It would similarly be incongruous to develop duress and necessity within different moral principles given the close relationship between those defences.[12] To address the theoretical issue, it is therefore necessary to alter the moral foundation of the statutory duress defence.

A potential route for achieving this end requires the Supreme Court to continue down a path it abandoned over the last couple decades: constitutionalizing principles of criminal law theory under section 7 of the *Canadian Charter of Rights and Freedoms*.[13] Although the Supreme Court constitutionalized the principle prohibiting any conviction for a morally involuntary act,[14] it has yet to constitutionalize any moral principles forming the basis of justificatory defences. If the moral principles underlying

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9 *Ibid*. Justice Martin's reference to "blamelessness" is curious as the Supreme Court rejected the contention that acts committed under duress are inherently "blameless." Instead, excuses are captured by the idea of "normative" or "moral" involuntariness: see *R v Ruzic*, 2001 SCC 24 at paras 32–47 [*Ruzic*]. As the Court did not explain its departure in language or suggest that it meant to overturn *Ruzic*, I will assume for the purposes of this article that this was an oversight.

10 *Supra* note 2.

11 The statutory defence applies to principals, while the common law version of the defence applies to parties. See *R v Paquette*, [1977] 2 SCR 189, 70 DLR (3d) 129 [*Paquette*].

12 This relationship will be explained in more detail below. See *R v Hibbert*, [1995] 2 SCR 973 at 1017, 99 CCC (3d) 193.

13 Part I of the *Constitution Act, 1982*, being schedule B to the Canada Act 1982 (UK), 1982, c11 [*Charter*]. For a detailed account of the Supreme Court's history constitutionalizing "principles of fundamental justice" relating to criminal justice, see generally Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: UBC Press, 2022). In essence, the Supreme Court constitutionalized several principles of "instrumental rationality" as principles of fundamental justice and has recently shown a decided preference for employing these principles.

14 See *Ruzic*, *supra* note 9.

my continuum of moral conduct qualify as principles of fundamental justice—prohibitions against convicting persons for morally involuntary, morally permissible, and morally innocent conduct[15]—it becomes possible to constitutionally challenge section 17 of the *Criminal Code*. Such a challenge would be meritorious if the limited juristic scope of the duress defence prevented the accused from successfully pleading a defence to justified conduct.

Unfortunately, the statutory duress defence would survive such a constitutional challenge. Although the provision's scope is limited to excuse-based defences, the Supreme Court could label my moral permissibility principle as an excuse. This would help rationalize a perplexing aspect of the statutory duress defence: its wide-ranging threshold of harm for engaging the defence. In its most recent amendment, Parliament lowered the threshold for pleading the statutory duress defence from "grievous bodily harm" to mere "bodily harm."[16] As the latter term encompasses non-severe harm,[17] it is difficult to understand how the duress defence could solely be encompassed by a moral principle claiming a deprivation of an accused's will. If, however, the term "excuse" is broad enough to include "permissible" actions, then this anomaly can be rationalized as a morally permissible act and need not be involuntary in any sense. The presence of proportionality between the harms caused and averted can rationally serve to lower the threat required to engage the duress defence.[18]

It is nevertheless possible for an accused to plead duress in a "rightful" and therefore justified manner. As the language of the statutory duress defence cannot account for such actions, the potential arises for a justified actor to be denied a defence in violation of section 7 of the *Charter*. Although this renders the duress defence philosophically unsound, the *Charter* requires an unconstitutional effect before a constitutional remedy will be applied. As I maintain that the moral principles underlying criminal defences often overlap, it is likely that any justification-based duress defence could still be captured by the moral involuntariness or moral permissibility principles. The statutory duress defence is therefore likely to survive constitutional scrutiny despite the result being philosophically unsatisfying.

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15 See Colton Fehr, "(Re-)Constitutionalizing Duress and Necessity" (2017) 42:2 Queen's LJ 99 at 126–33 [Fehr, "(Re-)Constitutionalizing"].

16 This amendment will be discussed in more detail below.

17 See *Criminal Code*, *supra* note 2, s 2, "bodily harm".

18 The Supreme Court made a similar comment but failed to recognize that a different moral principle underlies the latter form of the duress defence. See *R v Ryan*, 2013 SCC 3 at paras 59–62 [*Ryan*].

To address the theoretical issue, I maintain that Parliament should repeal section 17 of the *Criminal Code*. This approach would allow courts to use the new self-defence or "defence of person" provision to govern instances of self-defence, duress, and necessity. This is possible because the provision applies to "the act that constitutes the offence" as opposed to being restricted to the "use of force."[19] In developing the law in this manner, however, I maintain that courts should abstain from relying upon concepts such as justification and excuse. It is both more coherent and simpler to apply the continuum of moral principles that I maintain underlie criminal defences. The broad wording of the new defence of person laws combined with the ability to constitutionalize the substantive principles underlying the criminal law—an approach pursued more rigorously in Canada than anywhere else in the world[20]—affords a unique opportunity to test the merits of this novel structure for criminal defences.[21]

Employing this approach to criminal defences would mitigate the tendency of courts to rely upon less transparent or heavy-handed legal devices to avoid conviction. By conceptualizing defences within narrow categories, the criminal justice system often overlooks instances where a defence is feasible, leaving it to either the jury to nullify morally unsound charges or judges to apply the constitution to strike down the relevant offence. The former approach is unfortunate because jurors do not give reasons for their decisions, leaving the public questioning why an accused was acquitted. If judges developed the law of defences more robustly, they could supply such moral reasoning. In other cases, judges strike down a law based on its ability to negatively impact some narrow set of actors. Yet, it is probable in some cases to employ the moral principles underlying defences to acquit these accused. A lack of imagination—which derives in part from the rigid categories of defences developed in Canadian law—prevents judges from developing defences in a manner that does not needlessly strike down democratically enacted laws.

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19 See e.g. Kent Roach, "A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions" (2012) 16 Can Crim L Rev 275 at 279–80; Steve G Coughlan, "The Rise and Fall of Duress: How Duress Changed Necessity Before Being Excluded by Self-Defence" (2013) 39:1 Queen's LJ 83 at 115–25; Colton Fehr, "The (Near) Death of Duress" (2015) 62:1/2 Crim LQ 123 at 145–48 [(Fehr, "(Near) Death"].

20 See George P Fletcher, *The Grammar of Criminal Law: American, Comparative, and International*, vol 1 (New York: Oxford University Press, 2007) at 101; Kent Roach, "Mind the Gap: Canada's Different Criminal and Constitutional Standards of Fault" (2011) 61:4 UTLJ 545 at 546; see generally *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 (where the ability to constitutionalize substantive principles of fundamental justice was adopted).

21 Although at least one author has briefly raised the idea of substituting moral principles for the excuse/justification dichotomy, this proposal has not been defended to my knowledge. See Greenawalt, *supra* note 4 at 1913.

The article unfolds as follows. Part I outlines the Supreme Court's definition of the terms "justification" and "excuse" and its prior position that the defences of self-defence, duress, and necessity each fit exclusively into one of these categories. Part II reviews the "continuum of moral conduct" the Supreme Court referenced in *Khill*. I use this conception of defences to illustrate why a person acting under self-defence, duress, or necessity could do so in a morally involuntary, permissible, or innocent manner and how those distinctions impact the prerequisites for pleading a defence. Part III contends that although the moral framework I proffer ought to be constitutionalized, this need not result in a successful constitutional challenge to the term "excuse" in section 17 of the *Criminal Code*. Part IV concludes by advocating for the repeal of the statutory duress defence so that courts may use the new defence of person provision to develop the law in line with the constitutional principles underlying criminal defences. Not only would this approach strengthen the relationship between section 7 of the *Charter* and the substantive criminal law, but it would also render the law of criminal defences more coherent.

I. Justification and Excuse

The Supreme Court did not seriously engage with the meaning of the terms "justification" and "excuse" until it developed a common law necessity defence in *Perka v The Queen*.[22] Citing its then-limited jurisprudence, the Court maintained that the necessity defence's theoretical foundations were "ill-defined and elusive."[23] As Chief Justice Dickson explained, this confusion derived from the fact that the necessity defence can embrace two different forms.[24] Citing Justice MacDonald's reasons in *R v Salvador*,[25] Chief Justice Dickson agreed that the necessity defence "covers all cases where non-compliance with law is excused by an emergency or justified by the pursuit of some greater good."[26]

Chief Justice Dickson further elaborated on the meaning of the terms "justification" and "excuse." In his view, a justification-based defence "challenges the wrongfulness of an action which technically constitutes a crime."[27] Put differently, Chief Justice Dickson maintained that the actions of those who break the law may sometimes be considered "rightful" as "[t]he concept of punishment often seems incompatible with the social

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[22] [1984] 2 SCR 232, 13 DLR (4th) 1 [*Perka*].

[23] *Morgentaler v The Queen*, [1976] 1 SCR 616 at 676–77, 53 DLR (3d) 161 [*Morgentaler*].

[24] See *Perka*, *supra* note 22 at 245.

[25] [1981] 45 NSR (2d) 192, 59 CCC (2d) 521 (NSCA).

[26] See *Perka*, *supra* note 22 at 245 citing *Salvador*, *supra* note 25 at 542.

[27] *Perka*, *supra* note 22 at 246.

approval bestowed on the doer."[28] In the necessity context, Chief Justice Dickson cites the example of "the Good Samaritan who commandeers a car and breaks the speed laws to rush an accident victim to the hospital" as an actor "whose actions we consider *rightful*, not wrongful."[29] As this example illustrates, the moral reasoning is driven by a balancing of the seriousness of the crime committed against the important objective achieved by disobeying the law.[30]

The concept of excuse was further defined by Chief Justice Dickson in *Perka* as a wrongful act that results in an acquittal because the circumstances under which the act was performed render the act non-attributable to the actor.[31] Influenced by the work of George Fletcher, Chief Justice Dickson explained that the necessity defence in this form "rests on a realistic assessment of human weakness, recognizing that a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-preservation or of altruism, overwhelmingly impel disobedience."[32] George Fletcher described this understanding of the necessity and duress defences as based on "moral or normative involuntariness."[33] Although the conduct is physically voluntary, it may still be excused if the actor had "no other viable or reasonable choice available."[34]

Chief Justice Dickson nevertheless refused to develop the law of necessity as both a justification and excuse. Citing his reasons in *R v Morgentaler*,[35] Chief Justice Dickson reiterated that "[n]o system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value".[36] Although the *Criminal Code* specifies several instances of justifiable conduct, any further judicial development of justificatory defences "would import an undue subjectivity into the criminal law." This subjectivity would "invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions."[37] For Chief Justice Dickson, this is not "a role which fits well with

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28 *Ibid*.

29 *Ibid* [emphasis in original].

30 See *ibid* at 247–48.

31 See *ibid* at 246.

32 *Ibid* at 248.

33 *Ibid* at 249 citing Fletcher, *Rethinking*, *supra* note 4 at 803.

34 *Perka*, *supra* note 22 at 250.

35 *Supra* note 23.

36 See *Perka*, *supra* note 22 at 248 citing *Morgentaler*, *supra* note 23 at 678.

37 *Perka*, *supra* note 22 at 248.

the judicial function," as "[s]uch a doctrine could well become the last resort of scoundrels" and "a mask for anarchy."[38]

Unfortunately, Chief Justice Dickson failed to explain why statutory authority could not be invoked as the basis for preserving a justification-based necessity defence. Importantly, section 8(3) of the *Criminal Code* allows judges to preserve any "principle of the common law that renders any circumstance a justification or excuse," unless the principle is "altered by or ... inconsistent with ... any Act of Parliament." As the necessity defence is not codified, there was no clear provision with which a justification-based necessity defence would conflict. It was, therefore, arguable that Chief Justice Dickson ought to have invoked the common law jurisprudence he cited to preserve necessity as both a justification and an excuse.

Chief Justice Dickson was nevertheless correct to abstain from using the common law to develop a justification-based necessity defence, as such a position would create an "inconsistency" between the necessity defence and the statutory duress defence. As the Supreme Court later observed in *R v Hibbert*,[39] the "similarities between the [duress and necessity defences] are so great that consistency and logic requires that they be understood as based on the same juristic principles."[40] This position is reasonable as the only significant difference between the defences derives from the nature of the threat. With duress, the threat derives from a third party, while necessity defences are based on threats posed by anything else other than the victim of the crime.[41] As section 17 of the *Criminal Code* clearly states that duress is an excuse, developing necessity or the common law defence of duress with different juristic principles would give rise to an "inconsistency" within the meaning of section 8(3) of the *Criminal Code*. The main obstacle to developing duress and necessity as justificatory defences is therefore the statutory duress defence's insistence that duress is an "excuse."

Three options are available to address this problem. First, Parliament could amend the statutory duress defence by deleting the word "excuse." This would allow courts to use section 8(3) of the *Criminal Code* to develop a more robust conception of the duress and necessity defences. Second, Parliament could repeal the defence and allow the broader language of the new defence of person provision to govern the law of duress and necessity. Finally, and most promising given the laggard pace of criminal

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38 *Ibid*, citing *Southwark London Borough Council v Williams*, [1971] Ch 734.

39 *Supra* note 12.

40 *Ibid* at 1017.

41 See Kent Roach, *Criminal Law*, 5th ed (Toronto: Irwin Law, 2012) at 317.

law reform in Canada,[42] courts could employ section 7 of the *Charter* to challenge the statutory duress defence. If the term "excuse" unduly restricts defendants from pleading a defence, then it must be struck down, which in turn would rid the law of the "inconsistency" currently preventing courts from using the common law to develop these defences coherently. To assess whether this latter option is viable, it is first necessary to explain which moral principles underlie criminal defences and why those principles qualify as "principles of fundamental justice" under section 7 of the *Charter*.

II. The Continuum of Moral Conduct

The continuum of moral conduct referenced by Justice Martin in *Khill* takes its cue from a central feature of criminal defences: proportionality. The conclusion that a person's conduct may be rightful and therefore justified is reasonable in cases where the harm averted is greater than the harm caused. Likewise, the conclusion that a person's conduct is wrongful and therefore may only be excused is logical if the harm caused is greater than the harm averted. But there are many cases where the harm caused and averted are at least roughly proportionate. In those cases, it is better to employ an intermediary moral principle that I call "moral permissibility." As I explain below, this framework is sensible, as there is a direct correlation between the degree of proportionality underlying an act and the stringency with which courts employ the other "evaluative" factors relevant to determining the merits of criminal defences.

A. Moral Involuntariness

The Supreme Court's understanding of the moral involuntariness principle and its relationship with the duress and necessity defences developed over several decades. Beginning with *Perka*, Chief Justice Dickson maintained that a person acts in a morally involuntary manner in circumstances where the threat is so perilous and imminent "that normal human instincts cry out for action and make a counsel of patience unreasonable."[43] A moral involuntariness defence therefore requires the accused to prove that they had no realistic choice but to break the law.[44] However, as excuses by definition provide a defence to wrongful conduct, Chief Justice Dickson explicitly chose not to require that the accused act

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42 See Kathleen Harris, "Experts urge Liberals to update 'embarrassingly bad' Criminal Code" (18 November 2016), online: *CBC* <cbc.ca/news> [perma.cc/GDP5-Y9QX] (citing Stephen Coughlan among other Canadian criminal law scholars).

43 *Perka*, *supra* note 22 at 251.

44 *Ibid*.

legally at the time the necessitous circumstance arose.[45] As he observed, "[a]t most the illegality ... of the preceding conduct will colour the subsequent conduct in response to the emergency as also wrongful."[46]

Chief Justice Dickson nevertheless imposed a further requirement for conduct to qualify as morally involuntary: proportionality between the harm caused and averted.[47] As he explained, "[n]o rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil."[48] Citing Fletcher, Chief Justice Dickson agreed that "if the gap between the harm done and the benefit accrued becomes too great, the act is more likely to appear voluntary and therefore inexcusable."[49] As an example, Chief Justice Dickson cites Fletcher's hypothetical scenario wherein an "actor has to blow up a whole city in order to avoid the breaking of his finger".[50] In those circumstances, Fletcher maintains that it is reasonable for the law to expect the person to endure the harm to himself.[51]

The problems with the Supreme Court's development of the moral involuntariness principle are directly related to Chief Justice Dickson's misreading of Fletcher's description of proportionality's relationship to moral involuntariness. Fletcher observed that utilitarian disproportionality may be relevant if the gap "becomes too great" as such a gulf between the harms caused and averted would render the act "more likely to appear voluntary."[52] Nothing in this description of proportionality's relationship to moral involuntariness *requires* the harms averted and caused be proportionate.[53] Instead, as the Court later hinted in *R v Latimer*,[54] Fletcher was describing a threshold means to dismiss a moral involuntariness claim without assessing whether the harm at issue was sufficiently

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45 See *ibid* at 253–57.

46 *Ibid* at 254.

47 See *ibid* at 252–53 (although Chief Justice Dickson originally required that the harm caused be less than the harm averted, the Supreme Court later only required that the harm caused and averted be proportionate; see *R v Latimer*, 2001 SCC 1 at para 32 [*Latimer*]).

48 *Perka, supra* note 22 at 252.

49 *Perka*, *supra* note 22 at 252 citing Fletcher, *Rethinking*, *supra* note 4 at 804.

50 *Ibid*.

51 See *ibid*.

52 Fletcher, *Rethinking*, *supra* note 4 at 804.

53 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 110.

54 *Supra* note 47 at para 34.

imminent and perilous.[55] Despite this recognition, the Supreme Court continues to maintain that proportionality is inherent to the law of duress and necessity.[56]

It is nevertheless curious that Fletcher chose to include a harm to the hypothetical offender that does not itself engage the other requirements of a moral involuntariness defence. Put differently, it is not clear that a broken finger constitutes a degree of harm that renders one's choice to commit a crime involuntary.[57] Modifying Fletcher's hypothetical scenario to make the accused's choice between blowing up a city and being killed themselves provides a better framing of the tension inherent to including a proportionality requirement in the moral involuntariness defence. The wrongfulness of the act derives directly from the disproportionality inherent to killing many people to preserve the accused's life. Yet the choice facing such an accused now meets the imminence and sufficient peril requirements as the consequence is the most severe and will follow immediately upon refusing to commit the relevant crime.

Although disproportionality renders any excused act inherently wrongful, it is difficult to understand why the *degree* of wrongfulness ought to prevent the defendant from pleading an excuse. Such an approach transforms the basic conception of excuses into a principle based on something other than voluntariness and "more readily analyzable as... [a] justification".[58] This point is well-illustrated by considering the core case of self-defence wherein an innocent accused must kill-or-be-killed in response to threats posed by a non-innocent aggressor. In this case, the accused's actions meet all the requirements of a moral involuntariness defence, as the threat is of imminent peril. They also meet the Court's proportionality requirement.[59] Yet the Court has consistently maintained that the core case of self-defence is a justification connoting rightful conduct.[60] As explained earlier, it is the proportionality factor that drives the justificatory reasoning in a case of self-defence. Requiring that the defendant prove this core element of a justification to plead an excuse is

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55 See *ibid* at para 31. See also George P Fletcher, *Rethinking Criminal Law* (New York: Oxford University Press, 2000) at 803–04.

56 See *Ryan*, *supra* note 18 at para 59.

57 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 121. In my view, the threat would not constitute "grievous" bodily harm. As I explain below, this is the appropriate standard for a moral involuntariness defence.

58 Stephen G Coughlan, "Duress, Necessity, Self-Defence, and Provocation: Implications of Radical Change?" (2002) 7 Can Crim L Rev 147 at 158.

59 See *ibid* at 198–99.

60 See e.g. *Ryan*, *supra* note 18 at para 26.

therefore not sensible as it blurs the line between justification and excuse.[61]

It is nevertheless possible to assuage Chief Justice Dickson's central concern that a duress or necessity defence without a proportionality requirement would "become the last resort of scoundrels" and "a mask for anarchy."[62] This risk is especially concerning given Chief Justice Dickson's conclusion that the illegality of an accused's actions giving rise to a necessitous circumstance is insufficient to bar a moral involuntariness defence.[63] Yet such circumstances are still relevant in considering whether a defence ought to be afforded. This is because the reason a person finds themselves in their precarious position must impact whether the action was reasonably foreseeable. As the Court held in *R v Ryan*,[64] a person cannot plead duress "if they knew that their participation in a conspiracy or criminal association came with a risk of coercion and/or threats to compel them to commit an offence."[65] Although this is an explicit statutory requirement, the Court reasonably maintains that such a fact is also capable of preventing an accused from proving there was "no safe avenue of escape" except to commit the impugned criminal act if they are a party to an offence, and therefore, must rely upon the common law duress defence.[66]

Considering the person's role in bringing about their perilous scenario is also consistent with the new self-defence provisions. The central issue in the *Khill* case turned on the statutory requirement that triers of fact consider the accused's "role in the incident" in determining the merits of any self-defence claim. The defence argued for a narrow interpretation of this term that would require considering only "unlawful, provocative or morally blameworthy conduct on the part of the accused—categories based in the previous legislation."[67] As Justice Martin held for the majority, "Parliament's intent is clear that 'the person's role in the incident' refers to the person's conduct … during the course of the incident, from be-

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61 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 119–20, citing Coughlan, "Implications", *supra* note 58 at 198-99.

62 *Perka*, *supra* note 22 at 248 citing *Williams*, *supra* note 38.

63 See *Perka*, *supra* note 22 at 254–55.

64 *Supra* note 18.

65 *Ibid* at paras 75–77. The requirement that an accused demonstrate that there is no "legal way out" in the necessity context serves a similar function (See *Latimer*, *supra* note 47 at para 30 citing *Perka*; see generally *Latimer* at paras 28–31).

66 *Ryan*, *supra* note 18. For the rationale underlying why accused must plead the statutory defence if a principal, and the common law defence if a party to an offence, see generally *Paquette*, *supra* note 11.

67 *Khill*, *supra* note 5 at para 24.

ginning to end, that is relevant to whether the ultimate act was reasonable in the circumstances."[68] As a result, a claim of self-defence "calls for a review of the accused's role, if any, in bringing about the conflict."[69]

As self-defence, duress, and necessity each consider the reasons why an accused is placed in their perilous circumstance, the possibility of criminals using the law of defences to exploit the criminal justice system is significantly mitigated. Not only will an accused's choice to participate in a criminal organization routinely bar a duress or necessity defence, considering the broader context of the accused's claim of self-defence will allow courts to mitigate concerns about unsavoury actors using force in circumstances where the accused ought to have avoided causing harm altogether. The facts of *Khill* are illustrative.[70] After hearing a noise outside his rural home late at night, the accused grabbed his gun and covertly located the trespasser. Upon confronting the trespasser, the accused mistakenly claimed that the trespasser possessed a gun which he maintained justified killing the trespasser. The Court concluded that the accused's choice to confront the trespasser with a gun in the dark was relevant to determining the merits of his self-defence claim.

A further inconsistency in the law of duress arises from the threshold of harm required to plead the defence. Writing for a unanimous Supreme Court in *Ryan*,[71] Justices LeBel and Cromwell confirmed that it is not necessary for an accused to prove a "grievous" threat of bodily harm. Instead, the Court required only a threat of "bodily harm,"[72] defined in section 2 of the *Criminal Code* as harm which "interferes with the health or comfort of the person and that is more than merely transient or trifling." The Court's position that the duress defence is an excuse based on the concept of moral involuntariness is undefendable given this low threshold of harm. Similar to Fletcher's example of a broken finger, it is difficult to see how a threat of harm that is "more than merely transient or trifling" can engage an accused's ability to choose whether to commit a crime.[73]

To understand the Supreme Court's rationale for maintaining this inconsistency, it is necessary to expand upon its understanding of the term "proportionality." In addition to a utilitarian proportionality requirement, the Court maintained that the moral involuntariness principle requires

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68 *Ibid* at para 74.

69 *Ibid*.

70 *Ibid* at paras 6–14.

71 Although Justice Fish dissented in part, his dissent related only to whether a stay of proceedings was the appropriate remedy in the case.

72 *Ryan*, *supra* note 18 at para 59.

73 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 121.

that the accused meet "societal expectations" with respect to resisting any threat.[74] In *Ryan*, the Court concluded that an accused will fail to satisfy the latter proportionality requirement where "the threat is of insufficient seriousness."[75] It is possible that this understanding of the societal expectation requirement could prevent mere bodily harm from forming the basis of a moral involuntariness defence. This nevertheless raises questions that the Court in *Ryan* did not answer: what qualities render an action insufficiently serious and how do those qualities derive from the moral involuntariness principle?

The societal expectation requirement may more plausibly be understood by interpreting it through the lens of the adjective "moral." As Stanley Yeo observes, the adjective "stipulates that social policy and values form an integral part of [the moral involuntariness] concept."[76] Building on Yeo's work, I elsewhere contend that the term "moral" ought to serve as a screening function with respect to the quality of the emotions that underlie a moral involuntariness claim.[77] This position is sensible if I am correct that utilitarian proportionality does not belong in a moral involuntariness assessment and the threat of harm must always be grievous to engage the moral involuntariness principle. The latter consideration and the other main elements relevant to a moral involuntariness claim (no reasonable avenue of escape and a temporal connection between the threat and harm averted)[78] relate directly to whether the accused adequately feared the threat towards their person and therefore acted "involuntarily." The only plausible way to give the adjective "moral" any meaning is therefore to focus on the quality of the emotions underlying why the accused maintains they have no realistic choice but to commit a crime.

This conception of the moral involuntariness principle is capable of addressing other legitimate concerns. Benjamin Berger maintains that relying on the Supreme Court's understanding of moral involuntariness as a conceptual basis for excuses will allow improper emotions to provide the basis for a defence.[79] As an example, he cites an accused who kills as a re-

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74 *Ryan*, *supra* note 18 at paras 70–74. I include this factor under the heading of proportionality in line with the Supreme Court's development of the duress and necessity defences. The societal expectation requirement may be better thought of as an evaluative factor, but that issue is unnecessary to resolve for present purposes.

75 *Ibid* at para 62.

76 See Stanley Yeo, "Revisiting Necessity" (2010) 56:1/2 Crim LQ 13 at 20.

77 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 115–16.

78 These factors will be described in more detail below.

79 See Benjamin L Berger, "Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences" (2006) 51:1 McGill LJ 99 at 103, 109–111 [Berger, "Emotions"].

sult of the victim's sexual advances, giving rise to "homosexual panic."[80] Yet such an emotional response is itself infected by the view that homosexuality is somehow morally intolerable. As contemporary Canadian values firmly reject this view, it is possible to conclude that an accused cannot plead a moral involuntariness defence in this circumstance as convicting the accused "denounces [their] underlying reasons for succumbing to the pressure and seeks to deter others from fostering such values."[81]

Terry Skolnik further contends that the societal expectation requirement construes proportionality "as a moral judgment of appropriateness rather than as a traditional evaluation of how the strength of the threat … impacts voluntarism."[82] This criticism is again understandable given the Supreme Court's unclear explanation of the societal expectation requirement. Skolnik's legitimate concerns nevertheless fall by the wayside if the societal expectation requirement only ensures the *emotions* underlying the accused's response are appropriate. Under this view, the analysis remains focused on the impact of the threat on the accused's will while the societal expectation requirement ensures that unpalatable emotional responses cannot form the basis of a moral involuntariness claim.

In summary, the Supreme Court's development of the moral involuntariness principle resulted in three main errors. The first is the inclusion of a utilitarian proportionality requirement. Although utilitarian proportionality is a proper requirement for a justificatory version of the duress and necessity defences, it is irrelevant to whether an action qualifies as morally involuntary. Second, the Court failed to rationalize the societal expectation requirement inherent to the moral involuntariness principle. The various criticisms of this aspect of the moral involuntariness principle are nevertheless mitigated if the societal expectation requirement focuses on the acceptability of the accused's emotional response. Under this view, a moral involuntariness assessment must simply be based on a socially tolerable emotion (e.g., fear, love) that deprives the accused of a "realistic choice" but to commit a crime. Finally, the Court's choice to develop the duress and necessity defences exclusively within the moral involuntariness principle is unsustainable given the low threshold of harm permitted to form the basis of the defence. It is simply unclear how harm

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80 *Ibid* at 113 (citing *R v Fraser* (1980), 55 CCC (2d) 503, 26 AR 33 (Vlex) (Alta CA)). Although *Fraser* is a provocation case, Berger correctly maintains that loss of will underlies the duress, necessity, and provocation defences.

81 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 119.

82 Terry Skolnik, "Three Problems with Duress and Moral Involuntariness" (2016) 63:1/2 Crim LQ 124 at 144.

that is merely more than "trivial" is capable of depriving a person of her ability to choose whether to commit a crime.

B. Moral Permissibility

Although the moral involuntariness principle ought not include a utilitarian proportionality requirement or lower the applicable threshold of harm, these adjustments to the duress defence become reasonable when considering the relationship between proportionality and the evaluative factors relevant to the law of defences. As alluded to earlier, the latter factors include the degree of harm threatened, whether a temporal connection exists between the harm threatened and the commission of the crime, and whether the accused was capable of taking any reasonable avenues of escape. These factors are also more generally informed by the accused's broader role in bringing about the circumstances under which it became necessary to commit a crime.[83]

Although the conclusion that the harms caused and averted are proportionate need not impact the stringency with which every evaluative factor is applied, it should have an effect on the ability of the defendant to plead a defence in some cases. The Supreme Court in *Ryan* made a similar observation. As Justices LeBel and Cromwell observed, "[g]iven the different moral qualities of the acts involved, it is generally true that the justification of self-defence ought to be more readily available than the excuse of duress."[84] I see no reason why this statement should not apply with equal force to a justificatory version of the duress and necessity defences. The greater the relative good caused by an accused's actions, the less society can reasonably expect the defendant to labour under extreme pressures before committing a crime.

Applying this rationale, I agree with the Supreme Court in *Ryan* that it is not sensible to maintain a high threshold of harm for the duress and necessity defences in cases where utilitarian proportionality exists. This is sensible as the high threshold of harm is one of the driving factors for excuse-based defences. As the proportionality requirement pushes the defendant towards a justificatory defence, it is unreasonable to expect that they meet the strictest requirement for an excuse-based defence. For an act to be permissible, however, it seems intuitive that the defendant acting under duress or necessity must take any reasonable avenue of escape.

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[83] See e.g. *Ryan*, *supra* note 18 at paras 55–80 (describing the common law requirements for a duress defence); *Latimer*, *supra* note 47 at paras 28–31 (describing the requirements for a necessity defence); *Criminal Code*, *supra* note 2, s 34(2) (describing the factors relevant to a self-defence claim).

[84] *Ryan*, *supra* note 18 at para 26.

This logic follows because avoiding harm entirely is preferable to committing a crime where the interests of the accused and the victim are equal. It is also reasonable to demand that there exists some temporal connection between the criminal act and the harm averted. If the threat is of some distant future harm, it will be possible for the defendant to take action to avoid the need to commit a crime. If this position is persuasive, then the moral permissibility principle is perfectly captured by the Court's current conception of the duress defence. Its insistence that duress is encompassed entirely by the moral involuntariness principle should therefore be replaced with the view that duress may be encompassed by *at least* two moral principles: moral involuntariness and moral permissibility.

A second benefit to adopting the moral permissibility principle is that it can help explain the moral rationale underlying some of the non-core cases of self-defence. As Justice Martin observed in *Khill*, a variety of self-defence scenarios do not clearly connote "rightful" conduct. For Justice Martin, the justificatory rationale dissipates "where the accused uses force against a reasonably perceived threat that does not exist in fact, against an attack that they have provoked, and when the defending act is not proportional or necessary."[85] Justice Martin's implicit endorsement of my view that the moral permissibility principle better captures the moral rationale for these types of defences provides good reason to adopt this principle.[86] For brevity's sake, however, I will not repeat my views concerning how the moral permissibility principle better explains the aforementioned categories of self-defence.[87] Suffice it to say that the principle's ability to rationalize the Supreme Court's duress defence and shed new light on some of self-defence's intractable cases renders it worth preserving.

C. Moral Innocence

The final principle that I maintain underlies justification- and excuse-based defences derives from the Supreme Court's conclusion that some defensive acts are "rightful."[88] As Chief Justice Dickson observed in *Per-*

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[85] *Khill*, *supra* note 5 at paras 47–48, citing Alan Brudner, "Constitutionalizing Self-Defence" (2011) 61:4 UTLJ 867 at 891–95; Fehr, "Self-Defence", *supra* note 4 at 109; Kimberly Kessler Ferzan, "Justification and Excuse" in John Deigh & David Dolinko, eds, *The Oxford Handbook of Philosophy of Criminal Law* (Oxford: Oxford University Press, 2011) 239 at 252–53; Roach, "Preliminary Assessment", *supra* note 19 at 276–77.

[86] See *Khill*, *supra* note 5 at para 48.

[87] For a detailed review, see Fehr, "Self-Defence", *supra* note 4 at 103–19.

[88] See *Ryan*, *supra* note 18 at para 26.

ka, this conclusion arises primarily from a utilitarian balancing of the harms caused and averted by the defendant's actions. Where the harms averted clearly outweigh those caused, the accused's conduct will be a strong candidate for a justification-based defence. In distilling this justificatory rationale into a basic moral principle, I agree with Stephen Coughlan's observation that it would be paradoxical to conclude that a person who acts rightfully is somehow morally blameworthy.[89] In my view, a person who cannot be blamed for committing a crime and acted "rightfully" in the circumstances acts in a morally innocent manner.

The fact that the harm averted clearly outweighs any harm caused by a defendant's criminal conduct is nevertheless insufficient to warrant a defence. As explained earlier, the function of utilitarian proportionality is to *relax* the other evaluative factors relevant to defences, not to do away with them. Chief Justice Dickson's example of an accused who commandeers a vehicle to drive a dying person to the hospital is again illustrative. Presumably, Chief Justice Dickson meant to convey that the defendant stole the vehicle because there were no other clear legal means available to bring the injured person to the hospital. If the defendant knew that an emergency vehicle was readily available or arriving shortly, it seems intuitive that their conduct ought not to be justified. This conclusion is reasonable because the defendant is prioritizing their own desire to be a "hero" over the public good. Stealing a car and driving at high speeds to a hospital is dangerous, and emergency response teams are specifically trained (e.g., medical degrees or paramedical training) and equipped (e.g., medical equipment, sirens) to minimize the chance for further harm to occur in such emergencies. Although the good intentions of the defendant might be relevant at sentencing, the disregard for the lawful alternative should be sufficient to deny a defence.

A duress scenario can also illustrate the tension with requiring the reasonable avenue of escape criterion to be met in instances where the harm averted outweighs the harm caused. In *R v Allen*,[90] the accused was offered a ride home by two other attendees of a party. Upon entering the vehicle, however, the defendant was physically abused and subsequently compelled to commit a series of robberies. During the final robbery, he entered a hotel room and was told that if he tried to escape the kidnappers would "come in shooting and leave no witnesses." While committing the robbery in a non-threatening manner, the defendant was afforded an opportunity to enter a nearby elevator and escape his attackers. The de-

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89 See Coughlan, "Implications", *supra* note 58 at 188.

90 2014 SKQB 402 [*Allen*]. I should disclose that I ghost-wrote the factum in this case challenging the constitutionality of excluding robbery and assault with a weapon from the statutory duress defence.

fendant nevertheless maintained that it was necessary to commit the robbery out of concern for the hotel staff given the threats made by his kidnappers. As such, he committed the robbery and returned to his kidnappers.[91]

The Crown contended that the defendant's decision not to enter the elevator failed to satisfy the reasonable avenue of escape requirement. The trial judge nevertheless granted the defendant a duress defence.[92] As with the constitutional challenge, the trial judge failed to consider how the moral foundations of the defendant's actions ought to have impacted the criteria for pleading a duress defence.[93] It is nevertheless possible to conclude that the defendant's actions were morally involuntary given that there was no reasonable means to escape the threat to the hotel staff. As the duress defence applies equally to threats posed to defendants and third parties,[94] this explanation renders the trial judge's conclusion sustainable. As explained earlier, however, the fact that an act could qualify as "morally involuntary" does not mean it cannot be justified. The defendant's decision to put himself back in the hands of his captors to avoid the potential harm to the hotel staff is an instance of self-sacrifice that ought to render his actions justifiable. In my view, this provides a better explanation of the defendant's actions as it takes into account his full set of moral reasons, not simply the fact that a threat existed to others.

Given the grave nature of the threat in *Allen*, relaxing the threshold of harm was simply not an available means to soften the evaluative factors to account for the harms averted being greater than those caused. The imminence of the threat and close presence of the threatening party further rendered it unmeaningful for proportionality to relax these other key evaluative factors relevant to the duress defence. Thus, despite the moral reasoning being based on justificatory principles, it does not appear that pleading a justification-based duress defence in this scenario gives rise to a legally relevant effect. Given the overlap between the moral involuntariness and moral innocence principles, Allen would be afforded a defence pursuant to either principle. As I will explain when considering the con-

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91 See *ibid* at paras 5–6, 48. I also reproduced some elements of the oral decision that the judge did not report in their judgment.

92 As the application of the duress defence was not a reported decision, I am recalling the Crown's position and judge's conclusion from my involvement in the case.

93 See *Allen*, *supra* note 90 at paras 7, 90. Although the justificatory argument was framed as a breach of the instrumental rationality principles, the trial judge refused to address this aspect of the constitutional challenge given his ruling that the impugned restrictions violated the moral involuntariness principle. For a more detailed review of the instrumental rationality argument, see generally Fehr, "(Near) Death", *supra* note 19.

94 See *Ruzic*, *supra* note 9 at para 54.

stitutionality of the statutory duress defence, the distinct possibility that other justification-based versions of the duress defence will run into a similar dilemma could shield section 17 of the *Criminal Code* from being declared unconstitutional.

The fact that the harm averted clearly outweighs the harm caused nevertheless serves to relax the evaluative factors in more common cases. For instance, a threshold of harm ought not to be imposed when the underlying act is morally innocent. In the self-defence context, defendants have always been allowed to repel unprovoked force with equal force regardless of whether the threat constitutes "bodily harm."[95] The "rightful" nature of the underlying act permits the accused to respond with force to ward off any real or threatened intrusion onto their physical integrity. Similarly, the requirement to take any reasonable avenue of escape is also minimized in the core case of self-defence. The law of self-defence has never required that an accused in this scenario take every reasonable avenue of escape to avoid confrontation. Instead, accused are permitted to stand their ground if they are wrongfully attacked. The proportionality of the harm used, the morally blameworthy state of the victim, and the broader deterrence-based benefits to the socio-legal order render the defensive act justifiable regardless of whether the defendant could have avoided the confrontation.[96]

The context of each case may nevertheless give rise to more difficult challenges. Take an accused who decides to stand their ground vis-à-vis a wrongful attack using proportionate force but does so for racist purposes. Put differently, if the attacker were white, the accused would have retreated, but because the attacker is a minority, the accused decided to act in self-defence. It is difficult to conclude that this person's actions are morally correct given their racist motives for acting in self-defence. If the attacker's threat is grievous, then it is possible to plead moral involuntariness as the wrongness of the act does not categorically prohibit the defendant from pleading a defence. As concluded earlier, however, the societal expectation requirement would bar such a defence as this provides the most plausible meaning to the adjective "moral." In this circumstance, the accused's response is based not on a tolerable emotion such as fear, but on an intolerable emotion that society rightly can hold a person accountable for fostering. As the societal expectation requirement implicitly operates as part of the moral permissibility principle,[97] a similar conclusion ought

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95 See *Ryan*, *supra* note 18 at para 26.

96 See *ibid*.

97 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 120–23. Although I did not explain this point in detail, it is implicit that a person's claim that an action is "permissible" requires that there be no clear moral objection to the conduct at issue.

to follow with respect to any moral permissibility defence thereby denying this accused a defence despite otherwise meeting the requirements for a self-defence claim.

The aforementioned examples are illustrative of the core function of the utilitarian proportionality principle: its ability to explain why certain evaluative factors are relaxed in a variety of circumstances where an accused's conduct is considered "rightful." However, it is important to recognize that utilitarian proportionality itself ought not always be sufficient to establish a defence even in circumstances where conduct might otherwise appear "rightful" or "permissible." Sometimes other factors can be determinative, especially if the emotions underlying those responses are improper or the defendant insisted on breaking the law despite the existence of clearly better alternatives being readily available for avoiding a particular harm. The fluidity of the moral principles underlying the law of criminal defences is desirable as it allows courts to better track the moral reasons for granting or withholding a defence. It nevertheless raises a further question: do these principles provide an improved constitutional framework for determining whether an accused ought to be afforded a defence?

III. The Limits of Constitutional Law

Various legal scholars have observed that the Supreme Court's decision to constitutionalize excuse-based defences logically requires that they also constitutionalize the principles underlying justification-based defences.[98] As morally involuntary actions are "wrongful" and justificatory actions "rightful," it would be incongruous to deny the latter actors constitutional protection given their higher moral standing. A similar rationale ought to apply with respect to a moral permissibility defence given its higher moral claim vis-à-vis a moral involuntariness defence.[99] If my prior work is correct that each principle qualifies as a principle of fundamental justice,[100] the question arises: how would this broader conception of the relationship between fundamental justice and criminal defences impact the statutory duress defence?

Section 17 of the *Criminal Code* provides in relevant part that "[a] person who commits an offence under compulsion by threats of immediate

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98 See e.g. Benjamin L Berger, "A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity" (2002) 39:4 Alta L Rev 848 at 863; Yeo, *supra* note 76 at 16; Brudner, *supra* note 85; Fehr, "(Near) Death", *supra* note 19; Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 101.

99 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 101.

100 See *ibid* at 126–33.

death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a [criminal association]." The provision also provides a list of offences to which an accused is barred from pleading the defence. Despite many of these exclusions clearly violating the moral involuntariness principle,[101] the statutory duress defence was first constitutionally challenged in *R v Ruzic*[102] for requiring any threat of harm to be "immediate" and mandating that the threatening party be "present" when the accused commits the crime.

The facts of *Ruzic* illustrate how it is possible for an accused to feel compelled to commit a crime without the threat being imminent or the threatening party present. Ruzic was told that her mother would be harmed if she did not import drugs into Canada from Belgrade. Importantly, this threat was made during the Yugoslav Wars when the region was in a lawless state, rendering police assistance practically useless. The fact that the threatening party was an assassin during the Yugoslav Wars also rendered these threats believable.[103] Despite her actions meeting the other elements of a duress claim, the non-impending nature of the threat and the absence of the threatening party at the time the offence was committed in Canada barred Ruzic's defence. As the Supreme Court concluded, however, Ruzic's circumstances were still morally involuntary[104] as she had no "realistic choice" but to import the drugs into Canada. The credibility and severity of the threat alongside the unique context of the pressures she faced underpinned this conclusion.[105]

After the imminence and presence requirements were severed from section 17 of the *Criminal Code*, the statutory duress defence required only a threat of "death or bodily harm" that the accused reasonably believed would be carried out if the crime was not committed. In addition, several offences remained excluded from the ambit of the defence, as were those

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[101] See Martha Shaffer, "Scrutinizing Duress: The Constitutional Validity of Section 17 of the *Criminal Code*" (1998) 40 Crim LQ 444; Colton Fehr, "The Constitutionality of Excluding Duress as a Defence to Murder" (2021) 44:4 Man LJ 111; *R v Aravena*, 2015 ONCA 250 at paras 61–67 [*Aravena*]; *Allen*, *supra* note 90 at para 90. For an argument that the exclusion of murder is consistent with the moral involuntariness principle, see *R v Willis*, 2016 MBCA 113 at para 167 [*Willis*].

[102] *Supra* note 9.

[103] See *ibid* at paras 2–7.

[104] I contend elsewhere that her defence would actually qualify as morally permissible, but that argument is unnecessary to elaborate for present purposes (See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 122–23).

[105] See *Ruzic*, *supra* note 9 at paras 9–10. It is notable that Ruzic was acquitted by a jury and therefore reasons for the defence were not provided.

defendants pleading duress who belonged to a criminal association.[106] Given the inability of these remaining elements to capture the essence of the moral involuntariness principle,[107] the Supreme Court used the common law to supplement the statutory duress defence. As opposed to an imminence requirement, accused were required to demonstrate that there was no reasonable avenue of escape available.[108] And in place of the presence requirement, the defendant was required to establish a "temporal connection" between the threat and the offence committed.[109] These more lenient elements were further supplemented with both a utilitarian proportionality requirement and the broader requirement that the defendant's conduct meet society's expectations in terms of normal human resistance to threats.[110]

As explained earlier, the inclusion of a utilitarian proportionality requirement in the duress and necessity defences is inconsistent with the Supreme Court's position that excuses connote morally involuntary conduct. Similarly, a threat of mere "bodily" harm is incapable of denying an accused a "realistic choice" of whether to commit a crime. If the word "excuse" were interpreted to mean "morally involuntary," it would become illogical to read in a utilitarian proportionality requirement or relax the threshold of harm for pleading the duress and necessity defences. The inclusion of the word "excuse" in section 17 of the *Criminal Code* would therefore limit the ability of an accused to plead the duress and necessity defences. As this would give rise to the potential for convicting those acting in a morally permissible manner, such a reading of the statutory duress defence would be inconsistent with section 7 of the *Charter*.[111]

Section 17 of the *Criminal Code* may nevertheless be interpreted in a manner that avoids this constitutional issue. Although the common law historically required threats of "grievous" bodily harm,[112] maintaining this requirement is inconsistent with both the current wording of the statutory duress defence and its legislative history. Despite the Supreme Court in *Ryan* not being explicit on this point, it is important that the previous version of the statutory duress defence required proof of a threat of "death

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106 See *Ryan*, *supra* note 18 at paras 43–46. These exclusions will be discussed further below.

107 An action cannot, for instance, be morally involuntary if the person has a clear avenue to escape.

108 See *Ryan*, *supra* note 18 at paras 43–46.

109 *Ibid*.

110 See *ibid* at paras 43–46, 70–74.

111 See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 126–33.

112 *Ryan*, *supra* note 18 at para 59.

or grievous bodily harm."[113] The deletion of the word "grievous" in the latest provision therefore makes it reasonable to conclude that Parliament intended to make the threshold of harm for pleading the statutory duress defence more flexible. The conclusion that proportionality is capable of lessening the harm threshold required for pleading the duress defence might therefore be read into the duress defence. This conclusion is sensible as the variable threshold of harm is difficult to render coherent without a proportionality requirement.

Interpreted in this manner, the Supreme Court's error rests in its suggestion that duress is only encompassed by one moral principle. As I explained earlier, the presence of utilitarian proportionality can result in a duress defence being morally permissible and, in rare cases, even constituting a "rightful" or morally innocent act. Although the latter type of act is surely the basis of a justification-based defence, it is not clear whether a moral permissibility defence could be categorized as an excuse. If it were, section 17 of the *Criminal Code* could be read as adopting two moral principles: moral involuntariness and moral permissibility. The philosophical foundation of the duress defence could therefore be rendered coherent in all but true instances of justificatory duress defences. A similar conclusion would follow for the necessity defence, as this broader understanding of the term "excuse" would allow courts to utilize section 8(3) of the *Criminal Code* to provide a dual moral rationale for the common law defence.[114]

Interpreting the term "excuse" broadly enough to incorporate the moral permissibility principle is nevertheless controversial. Kimberly Kessler Ferzan maintains that any role for the concept of permissibility in the law of criminal defences ought to count as a justification. As she explains, there must be room for justification to include permissible conduct given the broader purpose of the criminal law: to prohibit moral wrongs.[115] As permissible acts are not clearly wrong, it is plausible to label such defences as justifications. On the other hand, Fletcher takes the view that "[a] justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act."[116] He us-

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[113] *Criminal Code*, RSC 1970, c C-34, s 17.

[114] See Part I, *supra*.

[115] See Ferzan, *supra* note 85 at 242. See also Joshua Dressler, "New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and *Rethinking*" (1984) 32:1 UCLA L Rev 61 at 64.

[116] Fletcher, *Rethinking*, *supra* note 4 at 759.

es the etymology of the Latin word "jus" to bolster his view that justifications may only connote "rightful" behaviour.[117]

The problem of classifying the concept of permissibility is not novel. As Kent Greenawalt explains, whether permissible actions are justifications or excuses raises "fundamental questions about the exercise of moral evaluation."[118] Applying different forms of deontological and consequentialist ethics allows moral philosophers to conclude that permissible acts are either wrongful or non-wrongful.[119] The timeless nature of these debates is likely what drove Justice Martin to conclude in *Khill* that little purpose is served by parsing the philosophical foundations of the moral permissibility principle. As she observed, a permissibility rationale simply "suggests the defence is neither purely a justification nor an excuse, instead occupying a middle ground of 'permissibility' between rightfulness and blamelessness."[120]

Although Justice Martin's reasoning is inconsistent with my preferred interpretation of the term "permissible,"[121] it is nevertheless a defendable conclusion, as a justificatory conceptualization of the moral permissibility principle is arguably determinative of the statutory duress defence's constitutionality. To strike down that provision on the proposed basis is tantamount to demanding perfection in moral philosophy from Parliament in circumstances where moral philosophers themselves reasonably disagree about the meaning of a particular term. In my view, using the *Charter* to alter a democratically enacted law in light of such reasonable and persistent disagreement would far exceed the legitimate boundaries of judicial review. This is especially true as I cannot see the defence of any accused individual practically turning on whether the moral permissibility principle is better suited to a justificatory or excusatory rationale.

The fact that an accused may be truly justified when acting under duress nevertheless poses a further problem. The inability to plead a justificatory duress defence might be thought to render the statutory duress defence inconsistent with section 7 of the *Charter*. This potential issue, however, need not result in an unconstitutional *effect* on any defendant. This follows because such an accused may still be able to plead a moral involuntariness or moral permissibility defence despite their conduct being justified. This was the result in the *Allen* case reviewed earlier. More-

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117 See George P Fletcher, "Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?" (1979) 26:6 UCLA L Rev 1355 at 1358–59.

118 Greenawalt, *supra* note 4 at 1904.

119 See *ibid*.

120 *Khill*, *supra* note 5 at para 48.

121 See Fehr, "Self-Defence", *supra* note 4 at 102–03. I broadly concur with Ferzan's view.

over, it is difficult to think of a hypothetical scenario where it is possible to commit an act under duress in a morally innocent manner that fails to meet the requirements of either the moral involuntariness or moral permissibility principles. It is, therefore, unlikely that the incoherence of the statutory duress defence would give rise to a constitutional issue. Although the defence of an accused individual would be based on a watered-down moral rationale, the fact that they still would receive a defence would prevent any finding of a constitutional violation. It would be impossible for the impugned law to engage the threshold interests of "life, liberty, or security of the person" as required under section 7 of the *Charter*.[122]

To explain why the moral foundation of Allen's defence did not impact its availability, it is necessary to return to the relationship between proportionality and the evaluative factors relevant to criminal defences. As explained earlier, proportionality between the harms caused and averted serves to relax the threshold of harm requirement in the duress/necessity context. And where the harm averted clearly outweighs the harm caused, it is reasonable to relax the remaining evaluative factors and simply require that the accused's conduct is "reasonable in the circumstances."[123] Yet an act such as Allen's only appears reasonable because of the extreme circumstances that otherwise sustain a moral involuntariness or permissibility defence. Justificatory versions of duress are particularly susceptible to such overlap given the significant threats that typically form the basis of such defences. Put differently, a high degree of threat will typically be necessary for the threatened harm to outweigh the interests of the innocent victim. If true, there may not be a practical difference between the application of the principles underlying the continuum of moral conduct in some scenarios.

This is not to say that other instances of justified conduct might not be barred by the combined wording of sections 8(3) and 17 of the *Criminal Code*. The term "excuse" incorporated into the necessity defence by virtue of these provisions prevents a justificatory version of the defence from serving any function. As the moral permissibility principle logically requires only the threshold of harm to be relaxed in duress and necessity scenarios, there is no room to relax other evaluative factors in justificatory instances of the necessity defence.[124] For the same reasons expressed in

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[122] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 55; *Charter*, *supra* note 13, s 7 (that section requires that a law deprives a person of a threshold interest (life, liberty, or security of the person) before a law must conform with the principles of fundamental justice).

[123] See Fehr, "(Re-)Constitutionalizing", *supra* note 15 at 123–24.

[124] See Part II, *supra*.

the preceding paragraph, however, I find it difficult to devise a scenario wherein an accused pleading a justification-based necessity defence could not also fit their defence into the moral involuntariness or moral permissibility principles.[125] Resolving this issue is not, however, strictly necessary for determining the constitutionality of the statutory duress defence. This follows because any unconstitutional effect would derive more directly from the word "inconsistency" in section 8(3) of the *Criminal Code*, not the limited juristic basis of the statutory duress defence. Thus, only the former provision would be susceptible to constitutional challenge if a hypothetical accused could be denied a defence as a result of the inability to preserve a justificatory version of the necessity defence.

Although Parliament's choice to label the statutory duress defence an "excuse" does not give rise to a clear constitutional issue, the theoretical issues caused by the defence's limited moral foundation ought not to be ignored. Such an approach would be inconsistent with a primary function of criminal law: communicating the moral quality of a person's actions.[126] This function is important because the law's ability to communicate that a person's actions were innocent as opposed to permissible or morally involuntary impacts the dignity interests of those who plead criminal defences. Put differently, a person who acted "rightfully" and, to a lesser extent, "permissibly," will feel validated by the law, while a person whose actions are normatively involuntary will feel that they committed a wrong – albeit one there is little purpose in punishing.[127] If I am right that the law ought not to abstain from making a full moral assessment of an accused's actions, then it is prudent to think of ways to amend the law of defences to allow for a more coherent development of their philosophical foundations.

IV. Restructuring Defences

Adopting the continuum of moral conduct outlined earlier would allow courts to communicate more clearly with respect to the moral rationale underlying an accused's claim of duress, necessity, and self-defence. To achieve this end, however, it is necessary to either amend or repeal section 17 of the *Criminal Code*. Although amending the provision by deleting the term "excuse" would allow courts to develop a morally coherent duress defence, the statutory duress defence's wording raises other problems. A citizen reading its text would reasonably believe that a threat

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[125] I will discuss one scenario in Part IV, *infra*, where such overlap exists.

[126] See John Gardner, "The Gist of Excuses" in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007) 121 at 133.

[127] See *ibid*.

must be imminent and that the threatening party must be present at the time of the crime, despite these strict requirements being fundamentally altered in *Ruzic*. The fact that many of the excluded offences – such as robbery, arson, and assault with a weapon – are all but certainly inconsistent with at least the moral involuntariness principle also provides an impetus to repeal the statutory duress provision.[128] Courts and scholars even maintain that the most serious excluded offence of murder is likely unconstitutional.[129] Repealing the statutory duress defence is, therefore, prudent as it is misleading in several ways.

If section 17 were to be repealed, the new defence of person provision could serve as a broader catch-all defence for duress, necessity, and self-defence. This follows because, unlike the old law of self-defence, the new provision is not restricted to the "use of force." Instead, it applies to the "act that constitutes the offence" so long as the accused's act is committed for the purpose of defending themselves or another person.[130] The provision further outlines a variety of factors relevant to all three defences that judges must consider in determining whether a defence ought to be granted. These include "the nature of the force or threat," "the extent to which the use of force was imminent," "whether there were other means available to respond to the potential use of force," "the person's role in the incident," as well as a variety of factors relevant to whether the harms threatened and averted were proportional.[131] As Stephen Coughlan contends, the language of this provision is capable of catching all instances of the common law defences of duress and necessity.[132]

Although I agree with Coughlan that the language of the defence of person provision is broad enough to capture the essence of the duress and necessity defences, it is unlikely to apply in narrow instances where the defending act constitutes an omission-based offence.[133] This follows given the narrow language used in section 34(1)(b) of the *Criminal Code*. In other defence provisions, Parliament is explicit about whether the defence applies to both act- and omission-based offences.[134] Relying solely on the defence of person provision's current wording would, therefore, exclude a

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[128] See Shaffer, *supra* note 101 at 472–73; Fehr, "The Constitutionality of Excluding Duress as a Defence to Murder", *supra* note 101 at 134; *Aravena*, *supra* note 101 at paras 85–86.

[129] See Shaffer, *supra* note 101 at 473; Fehr, "The Constitutionality of Excluding Duress as a Defence to Murder", *supra* note 101 at 134. But see contra *Willis*, *supra* note 101.

[130] *Criminal Code*, *supra* note 2, s 34(1)(b).

[131] *Ibid*, s 34(2).

[132] See Coughlan, "Rise and Fall", *supra* note 19 at 118.

[133] See Fehr, "(Near) Death", *supra* note 19 at 145–48.

[134] *Ibid* citing *Criminal Code*, *supra* note 2, ss 16(1), 607(6).

lengthy list of offences from its ambit.[135] Presumably, it would fall to the common law under section 8(3) of the *Criminal Code* to fill such gaps. This would create a similarly awkward divide between common law and statutory defences as currently exists in the context of the duress defence. It would be better if these defences were contained within a single provision by inserting the words "or omission" after the word "act" in section 34(1)(b) of the *Criminal Code*.

Replacing the statutory and common law duress and necessity defences with a modified version of the defence of person provision would be a prudent development as it would simplify the law of defences. Given the moral complexity inherent to criminal defences and the infrequency with which the criminal law is updated via legislation,[136] it is sensible for Parliament to pass legislation that allows courts to develop the law in line with current moral theory. The Canadian experience serves as a cautionary tale. The unwillingness of Parliament to overhaul its law of defences despite it widely being recognized to be out of date resulted in the Supreme Court perpetuating the idea that duress and necessity fit exclusively into the excuse category.[137] Similarly, the law of self-defence was statutorily labelled a "justification" for over a century despite the philosophy underlying that defence consistently being brought into question.[138] Leaving it to courts to ascribe a moral label to each type of defensive act would allow for the criminal law to better keep pace with moral philosophy.

Relying upon a broad piece of legislation to provide the defensive rationale for three of the more common criminal defences nevertheless raises a further question: why not simply rely upon the broader moral principles for all defences? Obviously, determining which acts qualify as defences or are simply relevant to disproving *actus reus* and *mens rea* is outside the scope of this article.[139] It is nevertheless likely that the continu-

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135 For a list of the relevant omission-based offences, see Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 128–30.

136 See Harris, *supra* note 42.

137 See Part I, *supra*.

138 *Ibid*. See *Criminal Code*, 55-56 Victoria 1892, c 29, s 45; *Criminal Code*, RCS 1985, c C-46, s 34(1) as it appeared on 9 March 2013 (both the first *Criminal Code* passed in 1892 and the *Criminal Code* until 2013 had substantively similar self-defence provisions that included justification).

139 Whereas justifications and excuses concern the accused's reasons for committing a crime, procedural defences apply when the state ought to be barred from pursuing a prosecution. Defences such as entrapment, abuse of process, and (as I maintain elsewhere) *de minimis non curat lex* fit into this definition and may well be best explained by appealing to the Canadian constitutional principle of gross disproportionality. See generally Colton Fehr, "Why *De Minimis* is a Defence: A Reply to Professor Coughlan"

um of moral conduct encompasses other defences that broadly fit into the excuse/justification dichotomy. For instance, the Supreme Court has concluded that the mental disorder defence connotes morally involuntary conduct.[140] Although the juristic basis of consent is underdeveloped in Canada, I have argued elsewhere that where consent operates as a defence, it is captured by the moral permissibility principle.[141] If these and other justification- and excuse-based defences fit within the continuum of moral conduct, and the latter principles are constitutionalized, it would be unnecessary to preserve any justification- or excuse-based defences via the legislative process. Instead, courts could use the relationship between proportionality and the other evaluative factors relevant to these defences to determine whether an accused ought to be afforded a defence.

This approach would arguably prove more functional than the current approach to litigating criminal defences. Applying the continuum of moral conduct, it is simply necessary to use the proportionality of the accused's conduct to determine the *prima facie* moral basis of the defence and then pair that moral basis with its corresponding evaluative factors.[142] This is both a simpler and more exacting process than asking whether an act qualifies as a particular type of defence, such as self-defence, duress, or necessity, and then trying to develop the legal criteria for pleading each defence by fitting them into the justification and excuse categories. As this approach has led to endless jurisprudential debate, it may be preferable to skip such discussion and simply let the driving moral factor—proportionality between the harms caused and averted—dictate the strictness of the evaluative factors relevant to the defence.

Relying solely on a continuum of moral conduct is further preferable as the current approach to criminal defences not infrequently results in courts relying upon other less transparent or heavy-handed legal devices to avoid entering a conviction. The former type of gaps that I am thinking of are most regularly exposed during jury trials when a jury decides to nullify a charge. Although the Supreme Court has explicitly endorsed this

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(2021) 67:1 McGill LJ 1; Colton Fehr, "Reconceptualizing *De Minimis Non Curat Lex*" (2017) 64:1/2 Crim LQ 200. I tend to think that automatism, intoxication, and alibi fit into the category of "defences" that really operate to deny that an offence occurred and thus are not truly defences.

140 See *R v Bouchard-Lebrun*, 2011 SCC 58 at para 51.

141 See generally Colton Fehr, "Consent and the Constitution" (2019) 42:3 Man LJ 217.

142 I use the term "*prima facie*" as sometimes an accused will fail to meet the evaluative elements of the defence which would render their conduct criminal.

practice,[143] it is curious that judges do not employ their moral compasses in a similar manner as jurors. A judge's conscience is at least subject to appellate review and, given the requirement that judges provide reasons for their decisions, such a judicial practice renders the moral rationale underlying the verdict knowable.

The Supreme Court's most recent jury nullification case is illustrative. In *R v Krieger*,[144] the accused suffered from severe, chronic pain that was significantly alleviated by marijuana. As such, he grew enough marijuana for himself and others in similar pain who also were not legally allowed to obtain their medicine. Krieger was subsequently charged with possession and trafficking in marijuana contrary to the *Controlled Drugs and Substances Act*.[145] Despite clearly having committed these offences, several jurors stated that they could not in good conscience convict Krieger.[146] The reasoning behind these pleas is broadly as follows: it is not fair to convict a person for consuming and sharing medicine necessary to alleviate a severe medical condition when the state strictly prohibits such use without good reason.

The rationale likely underpinning the jury's nullification of Krieger's charges could readily fit into the continuum of moral conduct. Krieger's decision to alleviate human suffering far outweighs any detriment caused to society by his limited trafficking in marijuana. As Krieger and his colleagues had no legal means to obtain marijuana, it was also reasonable in the circumstances to grow it strictly for medicinal purposes. Put differently, Krieger's conduct fits squarely into the "moral innocence" rationale as the harms averted are clearly greater than the harms caused, and his actions were otherwise a reasonably necessary response to a threat to his and others' physical well-being. It is nevertheless likely that the Supreme Court's inflexible approach to the necessity defence deterred Krieger from pleading necessity. In addition to requiring proportionality between the harm caused and averted, the Court requires an accused to prove that the threat was imminent, perilous, and that there was no reasonable means to avoid the threat.[147]

The Court's leading necessity case is illustrative of the challenges Krieger would have faced. In *Latimer*, the accused maintained that his

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[143] See most recently *R v Krieger*, 2006 SCC 47 at para 27 ("juries are not entitled *as a matter of right* to refuse to apply the law—but they do have the *power* to do so when their consciences permit of no other course") [*Kreiger*].

[144] *Ibid* at para 4.

[145] SC 1996, c 19, ss 4–5 as it appeared on 31 December 2002.

[146] See *Krieger*, *supra* note 143 at para 14.

[147] See *Latimer*, *supra* note 47 at paras 38–40.

daughter's severe cerebral palsy made it necessary to kill her to avoid any further suffering. The Supreme Court concluded that the clear disproportionality between the harm threatened (further suffering) and the harm caused (death) prevented Latimer from pleading necessity.[148] More importantly, the degree of harm threatened was insufficiently imminent and perilous to qualify as morally involuntary.[149] This followed because his daughter's condition did not pose a pressing threat to her life and there were other medical means to alleviate her suffering.[150] Finally, Latimer's defence failed because there were reasonable alternatives to killing his daughter. Not only could he have done more to help his daughter live with her disease, he could have also relied on the aid of a local group home to better manage her pain.[151]

Krieger's defence would readily meet the proportionality requirement and, given the lack of alternatives to treat his condition, he would have no difficulty meeting the imminence and absence of escape elements of the necessity defence. Krieger would nevertheless fail to meet the sufficient peril requirement. As with Latimer's daughter, the accused's condition was not life threatening.[152] Unlike Latimer, however, Krieger could contend that the proportionality element ought to have relaxed the threshold of harm requirement. As I explained earlier, the proportionality principle drives the moral reasoning underlying an accused's defence and, where present, it ought to *at least* relax any threshold of harm requirement. As the "debilitating" effects of Krieger's illness can readily be framed as "bodily harm," I see no reason why he could not have proven that his conduct was morally permissible, even though a more robust analysis of the moral foundations of his defence may well render his conduct morally innocent.

Relying solely on the moral principles underlying defences could also prevent another problematic tendency: judges employing judicial review to strike down laws because they catch conduct that is "instrumentally irrational." As the Supreme Court explained in *Canada (Attorney General)*

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148 See *ibid* at para 40–41.

149 See *ibid* at para 38.

150 See *ibid* at para 38. The Court also observed that consenting to a feeding tube would have allowed Latimer's daughter to take more effective pain medication (*ibid* at para 39).

151 See *ibid* at para 39.

152 See *Krieger*, *supra* note 143 at para 4 (describing the unnamed condition as "debilitating"). As the Court noted in *Latimer*, *supra* note 47 at para 38, "[a]cute suffering can constitute imminent peril, but in this case there was nothing to her medical condition that placed Tracy [Latimer's daughter] in a dangerous situation where death was an alternative."

v Bedford,[153] the principles of fundamental justice require that laws not be arbitrary, overbroad, or grossly disproportionate. In essence, these principles require that laws do not have illogical or unduly harsh effects as they apply to even a single person.[154] Applying these principles in *Bedford*, the Court found that the effects of laws prohibiting sex workers from setting up bawdy houses wherein it is significantly safer to work or from screening clientele in public for signs of intoxication or violence were grossly disproportionate to the nuisance abatement objectives of these laws.[155] Similarly, a law prohibiting sex workers from hiring safety staff was overbroad because the law contradicted its objective of protecting sex workers from exploitation.[156]

In opposing the applicants' *Charter* challenge, the Crown maintained that the laws did not "cause" any of the impugned effects on sex workers. In its view, sex workers "choose" their line of business and therefore they are responsible for any negative effects that accrue from choosing what is an inherently dangerous occupation.[157] In rejecting this line of argument, the Supreme Court concluded that "while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so."[158] Citing the factual findings of the application judge, Chief Justice McLachlin concluded for a unanimous bench that "[w]hether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, [sex workers] often have little choice but to sell their bodies for money."[159] In her view, although these sex workers "may retain some minimal power of choice… these are not people who can be said to be truly 'choosing' a risky line of business."[160]

Chief Justice McLachlin's statement that some sex workers, commonly labelled "survival sex workers,"[161] are deprived of a "realistic choice"

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153 2013 SCC 72 at para 96 [*Bedford*].

154 See *ibid* at paras 111–23 (more specifically, a law is arbitrary if there is no connection between its objective and effects; overbroad if the law catches some conduct that has an effect that is contrary to the law's objective; and grossly disproportionate if the effects of the law are too harsh when compared to the importance of the law's objective).

155 See *ibid* at paras 130–36, 146–59.

156 See *ibid* at paras 137–45.

157 See *ibid* at paras 79–84.

158 *Ibid* at para 86.

159 *Ibid*.

160 *Ibid*.

161 This term is, for present purposes, synonymous with involuntary sex work. For literature describing this term in more detail, see Erica Kunimoto, "A Critical Analysis of Canada's Sex Work Legislation: Exploring Gendered and Racialized Consequences"

whether to engage in sex work tracks the language used in *Perka* and *Ruzic* to describe the moral involuntariness principle.[162] The findings of fact underpinning these conclusions turned on the persistent and serious threats posed to sex workers by both pimps and johns.[163] Yet, if a sex worker has no ability to choose her work, it seems probable (given the "alarming amount of violence" faced by sex workers)[164] that she also has no "realistic choice" whether to commit a safety-based offence such as screening her clientele for signs of danger or work from indoor establishments.[165] Given the important safety objectives underlying a sex worker's decision to break the law and the limited basis for criminalizing aspects of sex work,[166] it is also arguable that her defence would be based in the moral permissibility or moral innocence principle. If true, then those sex workers who commit these offences would have a constitutionally protected defence. It would therefore be inappropriate to conclude that the sex work laws "caused" harm to that category of sex workers.[167]

This conclusion has the potential to substantially alter the analysis in *Bedford*. If the only sex workers who are impacted by the law are those who truly "choose" to partake in sex work, it is possible that the Crown's argument that the sex work laws do not "cause" harm would be persuasive.[168] At the very least, this reframing of the relevant harms seems highly relevant to any potential section 1 argument to uphold the sex work

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(2018) 10:2 Stream 27 at 28 citing Shawna Ferris, "Working from the Violent Centre: Survival Sex Work and Urban Aboriginality in Maria Campbell's *Halfbreed*" (2008) 34:4 English Studies in Canada 123. For literature questioning the usefulness of drawing such a distinction, see Monica O'Connor, "Choice, Agency Consent and Coercion: Complex Issues in the Lives of Prostituted and Trafficked Women" (2017) 62 Women's Studies International Forum 8 at 14–15; Maddy Coy, "This Body Which is Not Mine: The Notion of the Habit Body, Prostitution and (Dis)embodiment" (2009) 10:1 Feminist Theory 61 at 73.

[162] See *Perka*, *supra* note 22 at 250; *Ruzic*, *supra* note 9 at para 29.

[163] See *Bedford*, *supra* note 153 at paras 7–14. The trial judge provided a more detailed account of the evidence, and her findings of fact were ultimately upheld. See generally *Bedford v Canada*, 2010 ONSC 4264.

[164] See *Bedford*, *supra* note 153 at para 64.

[165] See Fehr, *Constitutionalizing Criminal Law*, *supra* note 13 at 98–99; Colton Fehr, *Judging Sex Work: Bedford and the Attenuation of Rights* (Vancouver: UBC Press, 2024) at 133–56 [Fehr, *Judging Sex Work*].

[166] To be clear, I am not suggesting that sex work or any aspect of it can be criminalized because it is "immoral." Such actions may be criminalized to further other criminal law objectives, such as upholding public health and safety.

[167] See Fehr, *Constitutionalizing Criminal Law*, *supra* note 13 at 98–99; Fehr, *Judging Sex Work*, *supra* note 165 at 133–56.

[168] I am not convinced of this point as sex work was legal at the relevant time. The laws therefore impacted someone performing a legal means of employment. See *Bedford*, *supra* note 153 at para 87.

laws, as the laws no longer cause harm to the most vulnerable sex workers but only to those who have the ability to choose whether to exit the profession. Although the Crown did not seriously contend that the laws were justifiable infringements under section 1,[169] including the law of defences within the analysis would have allowed it to potentially remove the harms caused to the most vulnerable and marginalized sex workers impacted by the law. This seems highly relevant to whether the impugned laws struck a proportionate balance between their objectives and their impact on *Charter* interests.[170]

The current structure of criminal defence's inability to simplify the manner in which the moral underpinnings of criminal defences are assessed is likely responsible in part for such observations being overlooked. As opposed to structuring the law of defences to assess scenarios wherein a law may apply in a problematic manner, the Supreme Court decided to employ individualistic means-ends reasoning to challenge the constitutionality of criminal laws. This approach is perplexing for two reasons. First, assessing the reasons of individual defendants for committing an offence is the function of criminal defences. Second, the Court's conception of the instrumental rationality principles requires employing the judiciary's heaviest hand vis-à-vis state legislation: the power of judicial review. In my view, the Court would act more legitimately if it preserved legislation in these types of scenarios by carving out a more robust role for criminal defences under the *Charter* and then considering whether the law gave rise to an unconstitutional effect despite the availability of any criminal defences.

Conclusion

The Supreme Court's interpretation of the new defence of person provision in *Khill* confirmed what moral philosophers have long contended: self-defence may constitute an excuse or justification in readily identifiable scenarios. This recognition opens the door to applying similar understandings of moral philosophy to other defences associated with the terms justification and excuse. Parliament's decision to circumscribe the duress defence under section 17 of the *Criminal Code* as an "excuse" nevertheless prevents courts from using the common law to develop the duress and necessity defences in a coherent manner. Unfortunately, constitutionalizing the moral principles underlying excuse- and justification-based defences is unlikely to result in section 17 of the *Criminal Code* being struck down.

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169 See *ibid* at paras 161–63.

170 See generally Fehr, *Judging Sex Work*, *supra* note 165 for a more detailed review of this argument.

Interpreting the term "excuse" broadly enough to incorporate morally permissible conduct in large part prevents such a result. Although it is possible to plead a truly justificatory version of duress and necessity, it is not clear that any justificatory defence would not also overlap with one or more of the other principles underlying criminal defences. Thus, although section 17 of the *Criminal Code* may result in some accused receiving a poor moral rationale for their defence, they will nevertheless be acquitted, thereby avoiding any possible constitutional challenge.

Constitutionalizing criminal defences may nevertheless serve a broader purpose. Given the strong relationship between the presence of proportionality and the stringency with which the other evaluative factors are applied, it may be simpler to apply these moral principles in determining whether an accused ought to be afforded a defence. Debates about which defence to apply and whether a defence is an "excuse" or "justification" have run their course and proven to cause confusion in the law. Perhaps more importantly, applying broader moral principles also encourages judges to apply defences to scenarios that tend to fall between the cracks of the traditional logic of criminal defences. Adopting a constitutional conception of criminal defences therefore would serve to increase the breadth and coherence of criminal defences, even if that conception is currently incapable of striking down the main provision responsible for judicial inability to develop criminal defences in a coherent manner.

McGill Law Journal — Revue de droit de McGill

LES PRATIQUES DE DÉTENTION DE L'AGENCE DES SERVICES FRONTALIERS DU CANADA : LA RECHERCHE D'INFORMATIONS AU CROISEMENT DE L'EXERCICE DU POUVOIR DISCRÉTIONNAIRE ET DES RÉSEAUX D'ACTEURS

*Louis-Philippe Jannard**

Basé sur une étude empirique des pratiques de l'Agence des services frontaliers du Canada (ASFC) relatives à la détention des personnes non citoyennes, cet article explore deux dimensions interreliées du fonctionnement des frontières, soit la discrétion, qui imprègne l'architecture du droit de l'immigration, de même que les réseaux d'acteurs qui participant, de façon croissante, à leur mise en œuvre. L'intersection de ces dimensions révèle un aspect central du travail qu'implique l'exercice du pouvoir discrétionnaire de détention par les membres du personnel de l'ASFC, c'est-à-dire la recherche et le partage d'informations. En effet, la mise en détention des personnes non citoyennes donne lieu à la collecte de nombreux renseignements auprès de différents acteurs et selon diverses modalités de collaboration. À partir d'entretiens réalisés avec des agentes et agents de l'ASFC, cet article documente les multiples personnes et organisations partenaires qui sont mobilisées dans cette recherche d'informations, illustrant la complexité de l'exercice de ce pouvoir discrétionnaire ainsi que les éléments du contexte organisationnel et social qui l'orientent et le contraignent.

Based on an empirical study of the Canadian Border Services Agency (CBSA)'s practices regarding the detention of non-citizens, this article explores two interrelated dimensions of the border's functioning, namely discretion, which permeates the architecture of immigration law, and the network of actors who increasingly contribute to its operation. These dimensions intersect, and reveal a core aspect of CBSA officers' work in exercising discretionary detention powers: information gathering and sharing. In fact, the detention of non-citizens leads to the collection of large amounts of information from different actors and according to various means of collaboration. Drawing from interviews conducted with CBSA officers, this article documents the numerous individuals and partner organizations involved in this information search, thus illustrating the complexity of exercising this discretion and the organizational and social factors that guide and constrain it.

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Introduction

À partir d'une étude empirique des pratiques de l'Agence des services frontaliers du Canada (ASFC) relatives à la détention des personnes non citoyennes[1], cet article explore deux dimensions importantes et interreliées du fonctionnement des frontières, soit la discrétion, qui imprègne l'architecture du droit de l'immigration[2], de même que les réseaux d'acteurs qui participent, de façon croissante, à leur mise en œuvre[3]. Ces deux dimensions peuvent de prime abord sembler séparées, avec, d'un côté, le garde-frontière, présumé autonome et détenteur de nombreux pouvoirs discrétionnaires ainsi que, de l'autre, une multitude d'acteurs assumant aujourd'hui divers aspects de la mise en œuvre des politiques d'immigration. Cependant, elles se rejoignent de façon évidente dans ce qui se présente comme un aspect central du travail qu'implique la détention des personnes non citoyennes : la recherche et le partage d'informations.

Si la délégation de « vastes pouvoirs discrétionnaires »[4] est aujourd'hui généralisée dans de nombreux domaines d'intervention publique[5], le droit de l'immigration se caractérise depuis longtemps par son aspect discrétionnaire, qui lui permet de s'adapter rapidement aux impératifs politiques et économiques du moment[6]. Kelley et Trebilcock décrivent la *Loi*

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1 Cet article découle d'une recherche doctorale financée par le Conseil de recherches en sciences humaines du Canada. Certains passages sont tirés de la thèse, voir Louis-Philippe Jannard, *L'exercice du pouvoir discrétionnaire au prisme du contrôle des indésirables : une étude des pratiques de détention de l'Agence des services frontaliers du Canada*, thèse de doctorat en droit, Université du Québec à Montréal, mars 2023, en ligne (pdf) : <archipel.uqam.ca> [perma.cc/VD9F-VUKF].

2 Voir Sharryn J Aiken et al, *Immigration and Refugee Law* : *Cases, Materials, and Commentary*, 2e éd, Toronto, Emond, 2015 à la p 126; Catherine Dauvergne, « Les conséquences d'une nouvelle politique de la peur : le droit à la croisée des chemins entre sécurité et migration » dans François Crépeau, Delphine Nakache et Idil Atak, dir, *Les migrations internationales contemporaines* : *une dynamique complexe au cœur de la globalisation*, Montréal, Presses de l'Université de Montréal, 2009, 370 à la p 372; Ninette Kelley et Michael Trebilcock, *The Making of the Mosaic*: *A History of Canadian Immigration Policy*, 2e éd, Toronto, University of Toronto Press, 2010 aux pp 356–57, 428.

3 Voir Camille Hamidi et Mireille Paquet, « Redessiner les contours de l'État : la mise en œuvre des politiques migratoires » (2019) 83 Lien Soc & Politiques 5 à la p 9; Anna Pratt, *Securing Borders*: *Detention and Deportation in Canada*, Vancouver, UBC Press, 2005 à la p 185 [Pratt, *Securing Borders*].

4 Patrice Garant, *Droit administratif*, 7e éd, Montréal, Yvon Blais, 2017 à la p 12.

5 Voir généralement Pierre Issalys et Denis Lemieux, *L'action gouvernementale* : *précis de droit des institutions administratives*, 4e éd, Montréal, Yvon Blais, 2020.

6 Kelley et Trebilcock, *supra* note 2 à la p 116.

sur l'immigration et la protection des réfugiés (*LIPR*)[7] comme une « loi squelette » [notre traduction][8] qui met en place de grandes balises et délègue de vastes compétences réglementaires à l'exécutif. Selon ces auteurs, la *LIPR* confie également de nombreux pouvoirs aux fonctionnaires de première ligne[9], qui disposent ainsi d'une grande latitude dans la mise en œuvre des politiques migratoires[10]. De plus, si les tribunaux ont longtemps été réticents à examiner les actions de l'exécutif et de l'administration publique[11], le contrôle judiciaire de toute décision découlant de la *LIPR* demeure aujourd'hui soumis à une demande d'autorisation[12], un processus décrit comme étant « entièrement opaque » [notre traduction][13] et sujet à de nombreuses critiques[14].

Le gouvernement et l'administration publique disposent donc d'importants pouvoirs en matière d'élaboration et de mise en œuvre du droit de l'immigration et des politiques qui en découlent. Cela ne signifie toutefois pas qu'il s'agit là des seuls acteurs qui y participent. Par exemple, en matière économique, l'incessante recherche d'un meilleur arrimage entre les personnes candidates à l'immigration et les besoins du marché du travail a conféré aux employeurs une grande influence dans le processus de sélection, ne serait-ce qu'en raison de l'importance accordée aux offres d'emploi par les grilles de pointage[15]. En ce qui concerne les

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7 LC 2001, c 27 [*LIPR*].

8 *Supra* note 2 à la p 425.

9 Cette expression, une traduction de l'expression anglaise « *street-level bureaucrats* » inventée par Michael Lipsky, désigne les personnes qui ont pour travail l'octroi de services, de bénéfices ou de sanctions aux membres du public, comme les enseignantes et enseignants, les employées et employés des administrations responsables des services sociaux, les juges ou les membres des forces policières (voir Michael Lipsky, *Street-Level Bureaucracy*: *Dilemmas of the Individual in Public Services*, 2e éd, New York, Russell Sage Foundation, 2010 à la p 3).

10 Voir toutefois Karine Côté-Boucher et Ariane Marie Galy, « La zone grise : les mutations du secret aux frontières canadiennes et américaines » (2020) 118 Cultures & Conflits 89 à la p 103. Ces autrices soulignent que le pouvoir discrétionnaire dont disposent les gardes-frontières a subi des transformations importantes en conséquence de l'automatisation de la prise de décision.

11 Voir Kelley et Trebilcock, *supra* note 2 à la p 465.

12 Voir *LIPR*, *supra* note 7, art 72(1).

13 Aiken et al, *supra* note 2 à la p 182.

14 Dans le cadre de la détermination du statut de réfugié, voir par ex Sean Rehaag, « Judicial Review of Refugee Determinations: The Luck of the Draw? » (2012) 38:1 Queen's LJ 1; Sean Rehaag, « Judicial Review of Refugee Determinations (II): Revisiting the Luck of the Draw » (2019) 45:1 Queen's LJ 1.

15 Au fédéral, il existe deux grilles de pointage distinctes qui interagissent dans la sélection des résidents permanents dans la catégorie immigration économique. La première est prévue par le *Règlement sur l'immigration et la protection des réfugiés* et accorde

mesures qui relèvent du contrôle des frontières à proprement parler[16], la participation d'autres acteurs semble liée, du moins en partie, au déploiement de la frontière au-delà des limites géopolitiques des États. Ce phénomène consiste en une multiplication des points de contrôle en amont de l'arrivée de personnes considérées comme présentant un certain nombre de risques, telles que celles qui migrent de façon irrégulière et celles qui veulent demander le statut de réfugié[17]. La prévention de ces arrivées exige la collaboration d'acteurs qui sont dispersés le long de ces points de contrôle, notamment par le biais de la collecte et du partage d'informations[18].

Au Canada, les fonctionnaires de l'ASFC conservent tout de même un rôle crucial, notamment en raison des nombreux et importants pouvoirs qui leur sont délégués (par exemple : fouille, saisie, arrestation et détention)[19]. Leurs pratiques quotidiennes demeurent cependant largement méconnues, à l'exception des travaux de quelques autrices et auteurs, dont Karine Côté-Boucher[20], qui mettent notamment en lumière une reconfiguration de leur pouvoir discrétionnaire dans le contexte de l'automatisation de la prise de décisions, automatisation qui est rendue

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10 points sur 100 à un « emploi réservé » (DORS/2002-227, arts 76–83 [*RIPR*]). La deuxième est prévue par instructions ministérielles dans le cadre du programme Entrée express et accorde 200 points sur 1200 à un tel emploi (voir « Critères du Système de classement global (SCG) – Entrée express » (dernière modification le 9 novembre 2022), en ligne : *Gouvernement du Canada* <canada.ca> [perma.cc/GT9N-THK2]). Quant à l'immigration économique temporaire, certains programmes exigent une offre d'emploi pour qu'un permis de travail soit délivré.

16 Je divise dans cet article les politiques migratoires en deux catégories. La première comprend les programmes d'immigration qui visent la sélection ou l'inclusion de personnes migrantes, de façon permanente ou temporaire. La deuxième comprend les mesures de contrôle des frontières qui visent leur exclusion (contrôle aux frontières, renvoi, détention).

17 Pour une discussion plus détaillée sur ce point, voir la sous-section B de la Partie II ci-dessous.

18 Voir Sharon Pickering et Leanne Weber, « Policing Transversal Borders » dans Katja Franko Aas et Mary Bosworth, dir, *The Borders of Punishment*: *Migration, Citizenship, and Social Exclusion*, Oxford, Oxford University Press, 2013, 93 à la p 95; Pratt, *Securing Borders*, *supra* note 3 à la p 186.

19 Voir *LIPR*, *supra* note 7, arts 15(3), 55, 139(1), 140(1). Voir aussi *Loi sur les douanes*, LRC 1985, c 1 (2e supp), arts 98–105 (qui délègue des pouvoirs similaires).

20 Voir Karine Côté-Boucher, « The Paradox of Discretion: Customs and the Changing Occupational Identity of Canadian Border Officers » (2016) 56:1 Brit J Crim 49 [Côté-Boucher, « The Paradox of Discretion »]; Karine Côté-Boucher, *Border Frictions*: *Gender, Generation and Technology on the Frontline*, New York, Routledge, 2020 [Côté-Boucher, *Border Frictions*].

possible par l'accumulation toujours croissante de renseignements au sujet des personnes qui traversent la frontière[21].

Le personnel de l'ASFC est responsable de l'application de plusieurs lois et règlements, entre autres en matière de douanes et d'immigration. Le présent article découle d'une recherche qui s'intéresse aux pratiques des fonctionnaires de l'ASFC relatives à la détention des personnes non citoyennes découlant de l'application du droit de l'immigration. Elle s'insère dans une série d'études qui font des pratiques quotidiennes de différents acteurs un point de départ privilégié pour l'étude de la mise en œuvre des mesures de sécurité frontalière[22], mais aussi des programmes d'immigration de façon générale[23]. De nature exploratoire, elle vise entre autres à documenter ces pratiques de manière à comprendre ce qu'elles impliquent comme travail au quotidien. Elle se démarque donc des recherches qui portent sur les conditions de détention ou sur les effets de la détention sur les personnes détenues[24]. Cet article répond à cet objectif en mettant l'accent sur un aspect de ce travail qui, au cours de la recherche de terrain, s'est révélé être d'une importance centrale pour la détention : la collecte et l'échange de renseignements.

Les entretiens qui constituent le corpus principal de cette recherche ont été réalisés entre février et juin 2019. Avec l'autorisation de la haute direction de l'ASFC, j'ai rencontré dix-neuf membres du personnel de cette organisation dans les régions administratives du Québec (Q), du

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21 Des changements similaires se constatent d'ailleurs à d'autres endroits et pour d'autres manifestations du contrôle de populations marginalisées (voir par ex Vincent Dubois, *Contrôler les assistés : genèses et usages d'un mot d'ordre*, Paris, Raisons d'agir, 2021).

22 Voir Karine Côté-Boucher, Federica Infantino et Mark B Salter, « Border Security as Practice: An Agenda for Research » (2014) 45:3 Security Dialogue 195.

23 Voir par ex Camille Hamidi et Mireille Paquet, « Redessiner les contours de l'État : la mise en œuvre des politiques migratoires » (2019) 83 Lien Soc & Politiques 5; Sule Tomkinson et Jonathan Miaz, *Au cœur des politiques d'asile : perspectives ethnographiques* (2019) 38:1 Politique & Soc 3.

24 Voir par ex Janet Cleveland, Véronique Dionne-Boivin et Cécile Rousseau, « L'expérience des demandeurs d'asile détenus au Canada » (2013) 46:1 Criminologie 107; Janet Cleveland et Cécile Rousseau, « Psychiatric Symptoms Associated with Brief Detention of Adult Asylum Seekers in Canada » (2013) 58:7 Can J of Psychiatry 409; Hanna Gros, « Invisible Citizens: Canadian Children in Immigration Detention » (2017), en ligne (pdf) : *University of Toronto Faculty of Law International Human Rights Program* <ihrp.law.utoronto.ca> [perma.cc/6N92-DGFD]; Hanna Gros et Yolanda Song, « "No Life for a Child": A Roadmap to End Immigration Detention of Children and Family Separation » (2016), en ligne (pdf) : *University of Toronto Faculty of Law International Human Rights Program* <ihrp.law.utoronto.ca> [perma.cc/XDN3-B5P4]; Hanna Gros et Paloma Van Groll, « "We Have No Rights": Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada » (2015), en ligne (pdf) : *University of Toronto Faculty of Law International Human Rights Program* <ihrp.law.utoronto.ca> [perma.cc/TAJ7-QRMZ].

Grand Toronto (GT) et du Pacifique (P) pour des entrevues semi-dirigées. Les personnes rencontrées occupaient des postes de « première ligne » : agent des services frontaliers et surintendant dans les points d'entrée (frontières terrestres et aéroports), agent d'exécution de la loi et superviseur dans les bureaux intérieurs[25], agent d'audience et gestionnaire dans les Centres de surveillance de l'immigration (CSI). Pour des fins d'anonymisation, je réfère aux participantes et participants à l'aide de pseudonymes épicènes. J'indique également leur région d'appartenance (Q, GT ou P) de même que le type de bureau dans lequel elles et ils travaillent (« pf » pour poste frontalier, « bi » pour bureau intérieur), plutôt que leur poste précis. À ce corpus s'ajoutent une revue de la littérature scientifique sur le contrôle des frontières de même qu'une revue de la documentation officielle (directives administratives, rapports d'évaluation de programmes, rapports annuels sur le rendement).

La première partie de cet article présente le fonctionnement du régime juridique encadrant la détention aux fins de l'immigration, tel qu'il se donne à voir à travers les textes juridiques et administratifs, en insistant sur les pouvoirs délégués au personnel de l'ASFC. La deuxième partie examine les conceptions juridiques et sociologiques du pouvoir discrétionnaire, révélant la complexité que peut receler ce qui se présente sur le plan formel comme une simple décision relative à la détention. Elle met également l'accent sur l'importance de la prise en compte du contexte institutionnel pour comprendre l'exercice d'un tel pouvoir. Elle esquisse à ce titre un portrait des réseaux d'acteurs et de partenaires engagés dans la recherche et le partage de renseignements aux fins du contrôle des frontières au Canada. Enfin, en s'appuyant sur les propos de participantes et participants à la recherche, la troisième partie complète ce portrait des stratégies de collecte et d'échange d'information. Elle illustre ainsi l'influence de ces acteurs et partenaires sur l'exercice du pouvoir discrétionnaire de détention de même que leur participation au contrôle des personnes non citoyennes de façon générale.

I. La détention des personnes non citoyennes au Canada

La *LIPR* met en place trois régimes distincts de détention dans le contexte de l'immigration : le régime principal, le régime s'appliquant aux « étrangers désignés » ainsi que celui lié aux certificats de sécurité[26]. Cet

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[25] Comme leur nom l'indique, les bureaux intérieurs sont les bureaux qui se situent non pas aux frontières, mais à l'intérieur du pays. Ils regroupent par exemple les employés chargés des mesures comme le renvoi et les investigations, de même que les employés qui participent à différents types d'audiences devant la Commission de l'immigration et du statut de réfugié (CISR).

[26] *LIPR*, *supra* note 7, arts 55 (1)–55(3), 81.

article s'intéresse aux pratiques qui sous-tendent la mise en œuvre du premier de ces régimes, qui sont notamment encadrées par la *LIPR* et le *Règlement sur l'immigration et la protection des réfugiés* (*RIPR*). À ces deux instruments s'ajoutent plusieurs politiques administratives, au premier chef les chapitres *ENF 20* et *ENF 34* du manuel d'exécution de la loi, qui explicitent les critères législatifs et réglementaires et prévoient leurs modalités d'application[27].

Les pouvoirs d'arrestation et de détention, qui dans les termes de la *LIPR* sont délégués à « l'agent »[28], se modulent en fonction du statut de la personne non citoyenne et du moment où l'on procède à la détention. Au moment de l'arrivée, toute personne non citoyenne[29] peut être détenue pour deux motifs : soit lorsque l'agent estime que la détention est « nécessaire afin que soit complété le contrôle »[30] — le contrôle étant la procédure à laquelle toute personne qui entre au Canada doit se soumettre — ou quand « [l]'agent […] a des motifs raisonnables de soupçonner »[31] que la personne est interdite de territoire[32] pour certains motifs considérés comme graves. Ces motifs incluent, entre autres, le risque à la sécurité, l'atteinte aux droits humains, ou encore la criminalité organisée. À tout

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27 Voir Immigration, Réfugiés et Citoyenneté Canada, *ENF 34* : *programme de solutions de rechange à la détention* (Guide opérationnel), Ottawa, 22 juin 2018, en ligne (pdf) : *Gouvernement du Canada* <canada.ca> [perma.cc/WGA9-GHGX] [IRCC, *ENF 34*]; Immigration, Réfugiés et Citoyenneté Canada, *ENF 20* : *détention* (Guide opérationnel), Ottawa, mise à jour le 23 mars 2020, en ligne (pdf) : *Gouvernement du Canada* <canada.ca> [perma.cc/6MEX-N6JR] [IRCC, *ENF 20*] (cette source a été mise à jour le 16 janvier 2023, mais l'article s'appuie sur la version du 23 mars 2020 qui était en vigueur au moment où l'étude a été effectuée).

28 Agence des services frontaliers du Canada, *Délégation de pouvoirs et désignations d'agents par le ministre de la Sécurité publique et de la Protection civile en vertu de la Loi sur l'immigration et la protection des réfugiés et du Règlement sur l'immigration et la protection des réfugiés*, par l'honorable Ralph Goodale, Ottawa, mise à jour le 11 septembre 2019, en ligne : *Agence des services frontaliers du Canada* <cbsa-asfc.gc.ca> [perma.cc/4NFU-4TWA] (les titulaires des pouvoirs délégués par la *LIPR* sont précisés par cet instrument émis par le ministre de la Sécurité publique et de la Protection civile).

29 La *LIPR* prévoit différents statuts pour les personnes non citoyennes. Trois sont pertinents aux fins de l'application du régime de détention : le résident permanent, titulaire de la résidence permanente; la personne protégée, à qui l'asile a été conféré, par exemple un réfugié; l'étranger, qui n'est ni un citoyen ni un résident permanent (*supra* note 7, arts 2(1), 95(2)).

30 *Ibid*, art 55(3)(a).

31 *Ibid*, art 55(3)(b).

32 Les interdictions de territoire se divisent en différents motifs, assez variés (ex. : sécurité, criminalité organisée, motifs financiers, motifs sanitaires, fausses déclarations), qui sont des raisons pouvant justifier le refus d'une demande d'immigration ou le retrait d'un statut. Leur application se module en fonction du statut de la personne non citoyenne (voir *ibid*, arts 33–42, 44(1)).

moment de son parcours migratoire (c'est-à-dire à l'arrivée au Canada ou après), une personne qui possède la résidence permanente ou une « personne protégée » (une personne à qui l'on a conféré l'asile) ne peut être arrêtée et détenue qu'après l'émission d'un mandat d'arrestation, et ce, pour deux motifs[33]. Le fait de présenter un danger pour la sécurité publique, par exemple avoir été reconnu coupable d'un crime violent, constitue le premier motif[34]. Le deuxième motif vise les situations où l'agent considère que la personne représente ce qui est communément appelé un « risque de fuite », autrement dit qu'elle ne se présentera pas pour une procédure prévue par la *LIPR*, par exemple son renvoi[35]. Dans les deux cas, l'agent doit également avoir des « motifs raisonnables de croire » que la personne visée par le mandat est interdite de territoire. Enfin, un « étranger qui n'est pas une personne protégée » peut être arrêté et détenu à tout moment pour ces mêmes deux motifs, sans qu'un mandat d'arrestation soit nécessaire[36]. Dans ce dernier cas, un troisième motif de détention s'ajoute. Il s'agit de la situation où, de l'avis de l'agent, l'identité de la personne non citoyenne n'a pas été prouvée (par exemple, la personne aurait voyagé avec de faux documents et n'aurait pas ses documents d'identité avec elle). Le *RIPR*[37] et la documentation administrative précisent les critères d'application de ces motifs de détention[38] de même que le processus de prise de décision à suivre[39].

Cette première décision fait ensuite l'objet d'un « examen par la direction »[40]. Les directives administratives prévoient en effet qu'un supérieur de l'agent ayant procédé à l'arrestation examine la décision, entre autres pour s'assurer qu'elle est « légalement autorisée »[41]. Le dossier fait également l'objet d'un « examen de la qualité »[42], par lequel on s'assure qu'il comprend tous les éléments requis (par exemple, que tous les formulaires nécessaires sont remplis et que les motifs de détention sont bien précisés).

Lorsque l'ASFC choisit de détenir une personne, il revient à la Section de l'immigration (SI) de la Commission de l'immigration et du statut de réfugié (CISR) de contrôler « les motifs justifiant le maintien en dé-

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33 Voir *ibid*, art 55(1).

34 Voir *ibid*.

35 *Ibid*.

36 *Ibid*, art 55(2).

37 *Supra* note 15, arts 244–49.

38 Voir IRCC, *ENF 20*, *supra* note 27 aux pp 16–23.

39 Voir IRCC, *ENF 34*, *supra* note 27.

40 IRCC, *ENF 20*, *supra* note 27 à la p 44.

41 *Ibid*.

42 *Ibid* à la p 45.

tention » dans les 48 heures suivant le début de la détention ou, après cette période, dans les meilleurs délais possibles[43]. Si la détention se prolonge, la SI procède à un nouveau contrôle de ces motifs sept jours après le premier contrôle, puis une fois tous les trente jours[44].

Une fois la décision initiale de détention confirmée par la direction, le dossier est transféré à un agent d'audience, qui présentera la position de l'ASFC lors du contrôle des motifs de détention devant la SI[45]. Entre les audiences, la prise en charge du dossier dépend de chaque cas particulier : l'agent d'audience peut, par exemple, assurer le suivi de certaines démarches tandis qu'un agent d'exécution de la loi peut mener une enquête sur l'identité ou faire les démarches nécessaires au renvoi. Un agent de liaison communautaire, quant à lui, peut évaluer la faisabilité et coordonner la mise sur pied d'une solution de rechange à la détention (SRD)[46].

Pendant l'année 2019-2020, l'ASFC a détenu 8 825 personnes[47]. Parmi celles-ci, on retrouvait deux enfants seuls, ainsi que 136 autres qui accompagnaient leurs parents[48]. Alors que la durée moyenne de détention était de 13,9 jours, la durée médiane était d'un jour, indiquant qu'au moins la moitié des détentions étaient de courte durée[49]. En ce qui concerne les motifs de détention, 85,1 % des personnes détenues l'ont été pour risque de fuite, 6 % pour risque de fuite et danger, 6,4 % pour iden-

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43 *LIPR*, *supra* note 7, art 57(1).

44 Voir *ibid*, art 57(2).

45 Voir Immigration, Réfugiés et Citoyenneté Canada, *ENF 3* : *enquêtes et contrôle de la détention* (Guide opérationnel), Ottawa, mise à jour le 29 avril 2015 à la section 13.5, en ligne (pdf) : *Gouvernement du Canada* <canada.ca> [perma.cc/4CT5-HWC3] (cette source a été mise à jour le 2 mars 2022, mais l'article s'appuie sur la version du 29 avril 2015 qui était en vigueur au moment où l'étude a été effectuée).

46 Selon l'ASFC, l'objectif d'une SRD est de libérer la personne tout en atténuant la menace qu'elle pose par l'imposition de diverses conditions. Elle permet également de garder un certain contrôle sur la personne (voir IRCC, *ENF 34*, *supra* note 27 à la p 6).

47 Voir « Statistiques annuelles sur les détentions, 2012 à 2022 » (dernière modification le 25 octobre 2022), en ligne : *Agence des services frontaliers du Canada* <cbsa-asfc.gc.ca> [perma.cc/Z88N-ZYYY] [« Statistiques annuelles »]. La pandémie de COVID-19 ayant eu d'importants impacts sur les pratiques de détention de l'ASFC, je prends donc comme dernière année de référence l'année financière 2019-2020. Parmi ces impacts, on compte entre autres une diminution du nombre de personnes détenues, une augmentation de la durée moyenne de détention et un recours accru aux établissements correctionnels provinciaux.

48 L'ASFC établit une distinction entre les enfants détenus et hébergés. Alors que les premiers font l'objet d'une ordonnance de détention, les enfants qui sont désignés par l'ASFC comme étant hébergés dans un CSI ne font pas l'objet d'une telle ordonnance. Ils y accompagnent leurs parents ou tuteurs légaux.

49 « Statistiques annuelles », *supra* note 47.

tité, 3 % aux fins du contrôle, 0,7 % pour danger et 0,7 % pour des interdictions de territoire présumées[50].

II. Le contrôle des frontières, entre pouvoir discrétionnaire et réseaux d'acteurs

La mise en détention des personnes non citoyennes et le travail qu'elle exige se situent au croisement de deux aspects centraux du fonctionnement des frontières : son aspect discrétionnaire, dont les pouvoirs délégués au personnel de l'ASFC, ainsi que la contribution de nombreux acteurs.

A. L'exercice complexe de pouvoirs discrétionnaires, au carrefour de multiples influences

Juridiquement, les pouvoirs de détention délégués à l'agent sont qualifiés de discrétionnaires. Dans le contexte canadien, la Cour suprême précise que « la notion de pouvoir discrétionnaire s'applique dans les cas où le droit ne dicte pas une décision précise, ou quand le décideur se trouve devant un choix d'options à l'intérieur de limites imposées par la loi »[51]. En d'autres termes, devant une série de faits donnés, la personne à qui est délégué le pouvoir peut choisir entre différentes options; le droit ne dicte pas une décision précise — la notion de choix est ici centrale. Dans le cas de la détention, l'agent peut choisir de détenir ou de ne pas détenir un individu. Il peut également opter pour l'imposition de conditions ou d'une autre solution de rechange à la détention[52]. Différentes options s'offrent à lui, toujours à l'intérieur des balises posées par la *LIPR*. Les principes généraux du droit administratif[53], qui indiquent par exemple quelles procédures suivre pour respecter l'obligation d'équité procédurale, de même que le droit constitutionnel, notamment la *Charte des droits et libertés de la personne*[54], guident aussi l'agent.

Ce point de vue nous renseigne toutefois peu sur la façon dont, à l'intérieur de ces balises, les membres du personnel de l'ASFC exercent leurs pouvoirs de détention et prennent leurs décisions. Appliqué au con-

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50 *Ibid*.

51 *Baker c Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 RCS 817 au para 52, 174 DLR (4e) 193 [*Baker*].

52 Voir *LIPR*, *supra* note 7, art 56(1). Voir aussi IRCC, *ENF 34*, *supra* note 27.

53 Voir par ex Paul Daly, *Understanding Administrative Law in the Common Law World*, Oxford, Oxford University Press, 2021 aux pp 124–40.

54 Partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11.

texte de la détention des personnes non citoyennes, il ne nous dit pas, par exemple, comment l'agent soupèse les différents facteurs juridico-administratifs, ni de quelles façons il récolte et évalue les informations nécessaires à cette décision. Cette dimension de l'exercice de pouvoirs discrétionnaires relève, sous l'angle du droit, de l'expertise du décideur administratif envers laquelle les tribunaux font généralement preuve de déférence, sauf dans certains cas précis[55].

La sociologie de l'action publique permet de plonger plus avant dans l'étude de l'exercice de pouvoirs discrétionnaires, notamment grâce aux perspectives ouvertes par les écrits qui s'inscrivent dans la foulée des travaux de Michael Lipsky[56]. De manière synthétique, cette approche place les fonctionnaires de première ligne au cœur de la mise en œuvre des politiques publiques, et ce, en raison des multiples contradictions, imprécisions ou silences qui émergent de règles générales lorsque ces fonctionnaires doivent les appliquer à des cas particuliers. Les lois et les politiques qui en découlent ne s'appliquent pas de façon mécanique; leur mise en œuvre est toujours le résultat d'actions faites par des êtres humains. C'est par ces actions que le système juridique se confronte à la réalité des situations qu'il entend régir et qu'émergent non seulement les ambiguïtés du droit, mais qu'elles sont aussi « résolues en pratique » [notre traduction][57]. La traduction du droit en actions (qui visent par exemple à appliquer des politiques et des programmes) implique en effet que les « acteurs légaux » [notre traduction] tels que les avocats, les juges, mais aussi les fonctionnaires, interprètent le droit et fassent des choix quant à son application[58]. Au-delà de l'aspect formel de la délégation de pouvoir, la discrétion découle ainsi également des exigences de la mise en œuvre des politiques publiques et, à travers celles-ci, du droit. Par les choix qu'ils font, les fonctionnaires de première ligne décideraient donc en dernier ressort du contenu des politiques publiques. Ils se présentent alors comme des « traducteurs de politiques publiques » [notre traduction][59] qui, par leurs pratiques quotidiennes, donnent un sens concret à des politiques qui demeurent jusque-là plus abstraites.

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55 Voir notamment *Canada (Ministre de la Citoyenneté et de l'Immigration) c Vavilov*, 2019 CSC 65 aux para 28, 53–64.

56 Voir notamment *supra* note 9.

57 Voir Keith Hawkins, « The Use of Legal Discretion: Perspectives from Law and Social Science » dans Keith Hawkins, dir, *The Uses of Discretion*, Oxford, Clarendon Press, 1992, 11 à la p 12.

58 *Ibid* à la p 11. Voir aussi Thierry Delpeuch, Laurence Dumoulin et Claire de Galembert, *Sociologie du droit et de la justice*, Paris, Armand Colin, 2014 à la p 167.

59 Voir Côté-Boucher, Infantino et Salter, *supra* note 22 à la p 198.

C'est donc au moment de leur application que les ambiguïtés des règles deviennent visibles[60]. Les sources de ces ambiguïtés sont multiples. La première se trouve dans le travail d'interprétation exigé par la mise en œuvre des règles[61]. La Cour suprême reconnaît d'ailleurs qu'il « n'est pas facile d'établir une distinction entre l'interprétation et l'exercice du pouvoir discrétionnaire » et que « l'interprétation de règles de droit comporte un pouvoir discrétionnaire étendu pour ce qui est de clarifier, de combler les vides juridiques, et de choisir entre différentes options »[62]. Il est généralement admis que tout texte législatif ou réglementaire comporte une certaine part d'indétermination[63], ne serait-ce qu'en raison du caractère général d'un énoncé qui vise à encadrer diverses situations[64].

Une deuxième source d'ambiguïtés émerge parfois de la surabondance de règles qui s'avèrent pertinentes dans une situation donnée. Ainsi, plutôt que d'encadrer plus étroitement l'action des fonctionnaires, cette multiplicité de règles aurait pour effet, dans certains cas, d'accroître leur marge de manœuvre, en leur permettant par exemple de choisir parmi différentes règles qui peuvent être contradictoires[65]. La complexité engendrée par la coexistence de règles découlant de plusieurs programmes a notamment été documentée dans le cas du travail douanier effectué par les membres du personnel de l'ASFC[66].

La troisième source d'ambiguïtés résulte des réalités du travail de mise en œuvre du droit par les fonctionnaires de première ligne. Des objectifs flous, ou alors trop vastes pour être atteints avec des ressources limitées, peuvent engendrer des zones d'incertitude. Ces dernières renvoient aux fonctionnaires le soin de s'approprier ces objectifs et de dé-

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60 Voir Guy Rocher avec la collaboration éditoriale de Yan Sénéchal, *Études de sociologie du droit et de l'éthique*, 2e éd, Montréal, Thémis, 2016 à la p 29.

61 Voir John Bell, « Discretionary Decision-Making: A Jurisprudential View » dans Hawkins, dir, *The Uses of Discretion*, Oxford, Clarendon Press, 1992, 89 à la p 97; Pierre Thévenin, « Le droit hors de compte. L'aiguillage managérial de la discrétion policière » (2016) 40:2 Déviance & Soc 165 aux pp 173–74.

62 *Baker*, *supra* note 51 au para 54.

63 Voir généralement Issalys et Lemieux, *supra* note 5; Gérard Timsit, *Archipel de la norme*, Paris, Presses universitaires de France, 1997.

64 Voir Pierre Noreau, « Comment la législation est-elle possible? Objectivation et subjectivation du lien social » (2001) 47:1 RD McGill 195 à la p 201; Thévenin, *supra* note 61 à la p 171.

65 Voir Patrick Hassenteufel, *Sociologie politique de l'action publique*, Malakoff (France), Armand Colin, 2021 à la p 99; Lipsky, *supra* note 9 à la p 14.

66 Voir Côté-Boucher, « The Paradox of Discretion », *supra* note 20 aux pp 59–60.

cider, en fonction des ressources disponibles, de quelle façon les mettre en œuvre[67].

Dans cette perspective, une décision discrétionnaire formelle en cache souvent plusieurs autres, puisqu'il faut résoudre ces ambiguïtés qui résultent du contexte de mise en œuvre des règles. Ainsi, « ce qui à première vue peut paraître comme une décision discrétionnaire unique nécessite bien souvent une série plus complexe de décisions » [notre traduction][68]. L'« espace d'appropriation »[69] des fonctionnaires de première ligne s'en trouve d'autant plus étendu.

Dans le cas de la détention des personnes non citoyennes, cela met en lumière la complexité que peut receler une « simple » décision de détention. Les directives administratives[70] permettent de « déconstruire » une décision de détention en quatre décisions, chacune exigeant un certain nombre d'informations sur lesquelles l'agent doit se prononcer, donnant ainsi une certaine idée de cette complexité. L'agent doit d'abord statuer sur l'identité de la personne, ce qu'il fait à partir de renseignements comme les noms, la date et le lieu de naissance, la citoyenneté ou tout autre statut, les noms des parents, les données biométriques, les itinéraires empruntés ou les documents de voyage utilisés. L'impossibilité de récolter et corroborer ces informations peut d'ailleurs constituer un premier motif de détention. Dans cette situation, des éléments comme la crédibilité ou le niveau de collaboration de la personne sont d'autres facteurs qui entrent en ligne de compte[71]. La deuxième étape consiste à déterminer l'admissibilité de la personne, c'est-à-dire à établir si elle a le droit d'entrer ou d'être présente au Canada et, si oui, à quelles conditions. Les renseignements recherchés aux fins des interdictions de territoire sont aussi diversifiés que le sont les motifs de ces interdictions[72]. Dans l'éventualité où l'agent a des motifs raisonnables de croire (ou de soup-

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67 Voir Pierre Lascoumes et Patrick Le Galès, *Sociologie de l'action publique*, Malakoff (France), Armand Colin, 2018 à la p 35; Lipsky, *supra* note 9; Tony Evans, *Professional Discretion in Welfare Services*: *Beyond Street-Level Bureaucracy*, Abingdon (R-U), Routledge, 2016 à la p 3.

68 Hawkins, *supra* note 57 à la p 38.

69 Lascoumes et Le Galès, *supra* note 67 à la p 35.

70 Voir IRCC, *ENF 20*, *supra* note 27; IRCC, *ENF 34*, *supra* note 27; Immigration, Réfugiés et Citoyenneté Canada, *ENF 1* : *interdiction de territoire* (Guide opérationnel), Ottawa, mise à jour le 4 septembre 2013, en ligne : *Gouvernement du Canada* <canada.ca> [perma.cc/64KX-VCQD] [IRCC, *ENF 1*]; Immigration, Réfugiés et Citoyenneté Canada, *ENF 4* : *Contrôles aux points d'entrée* (Guide opérationnel), Ottawa, mise à jour le 5 juillet 2023, en ligne : *Gouvernement du Canada* <canada.ca> [perma.cc/DV6A-LM6B] [IRCC, *ENF 4*].

71 Voir *RIPR*, *supra* note 15, art 247(1); IRCC, *ENF 20*, *supra* note 27 aux pp 21–23.

72 Voir par ex IRCC, *ENF 1*, *supra* note 69 aux pp 36–50.

çonner) que la personne est interdite de territoire[73], elle peut être détenue. Dans ce cas, les motifs les plus fréquents sont respectivement le risque de fuite et le danger pour la sécurité publique. Les personnes interdites de territoire ne sont toutefois pas toutes détenues. La troisième décision porte en effet sur le niveau de risque que présente la personne et la possibilité de l'atténuer par le recours à une SRD[74]. Les informations permettant d'évaluer le risque de fuite sont très variées : antécédents migratoires, comportement, crédibilité, liens avec le Canada, présence de parents ou amis, etc.[75] Quant au motif de danger, celui-ci se déduit notamment d'antécédents criminels ou de comportements violents, de problèmes de santé mentale ou de « tendances criminelles »[76]. Si l'agent décide de détenir une personne non citoyenne, il doit, enfin, choisir le lieu de détention. Cette décision se prend à l'aide du formulaire d'*Évaluation nationale des risques en matière de détention*, une grille de pointage qui permet de déterminer, selon les critères établis, si la personne sera détenue dans un CSI ou dans un établissement correctionnel provincial[77]. Ces critères comprennent la nature de l'interdiction de territoire, le temps écoulé depuis que certains types d'infractions ont été commis ou depuis une condamnation, le nombre d'actes criminels commis impliquant des menaces ou considérés violents et le fait d'avoir commis un acte criminel « de violence grave ». L'occurrence d'un incident grave au cours de l'arrestation ou de la détention, ou une tentative d'évasion influence également le choix du lieu de détention, tout comme l'appartenance à un groupe considéré comme vulnérable ou le fait d'être soumis à un mandat d'arrestation non exécuté[78].

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73 Certains motifs d'interdiction de territoire peuvent être constatés directement par l'agent de l'ASFC, alors que d'autres seront prononcés à la suite d'une enquête menée par la SI (voir *LIPR*, *supra* note 7, arts 44(2), 55(1)–(3); *RIPR*, *supra* note 15, arts 228–29).

74 Cette décision comporte une évaluation dont les ressorts sont décrits (voir IRCC, *ENF 34*, *supra* note 27 aux pp 20–26). Le *RIPR* prévoit aussi certains critères à prendre en compte lorsque sont constatés des motifs de détention, dont certains comme la durée écoulée depuis le début de la détention ou les retards sont toutefois moins pertinents au moment de la décision initiale de détention (*supra* note 15, art 248).

75 Voir IRCC, *ENF 20*, *supra* note 27 aux pp 19–20.

76 *Ibid* aux pp 22–23.

77 Ce formulaire n'est pas disponible publiquement, mais pour une brève description de celui-ci, voir « Normes nationales de détention liée à l'immigration » (dernière modification le 20 juillet 2023) à la section 6.1.4, en ligne : *Gouvernement du Canada* <cbsa-asfc.gc.ca> [perma.cc/TSD7-5JFM].

78 IRCC, *ENF 20*, *supra* note 27 aux pp 40–43. Les groupes considérés comme vulnérables sont, entre autres, les femmes enceintes, les personnes mineures, les personnes ayant un trouble médical ou une déficience grave et les personnes à mobilité réduite (voir *ibid* aux pp 28–29).

À cette complexité décisionnelle[79] s'ajoute le fait que le travail des fonctionnaires se déroule toujours dans un contexte organisationnel et institutionnel particulier dont la prise en compte est essentielle pour comprendre comment ils exercent leurs pouvoirs discrétionnaires[80]. Le décideur administratif, lorsqu'il exerce un tel pouvoir, n'est pas pleinement autonome à l'intérieur de l'espace discrétionnaire aménagé par les balises du cadre juridique. Le contexte dans lequel il se trouve oriente et contraint la façon dont il le met en œuvre[81].

Entre autres éléments qui composent ce contexte, on compte le fait qu'une décision donnée s'inscrit bien souvent dans une suite de décisions prises par d'autres acteurs, qui œuvrent parfois dans d'autres organisations[82]. Lipsky parle ainsi de l'interdépendance des décisions dans une « chaîne de traitement » [notre traduction][83] des cas. Le fait de se reposer sur le travail des autres — notamment, comme nous le verrons, en ce qui a trait à la recherche d'informations — permet de simplifier la prise de décision dans la mesure où le contexte organisationnel impose des limites aux ressources qui peuvent être consacrées à un cas particulier. Anna Pratt propose donc de concevoir l'exercice du pouvoir discrétionnaire non pas comme une seule décision, mais plutôt comme le résultat de multiples décisions, prises à différents moments et par diverses personnes, de manière cumulative[84]. Dans le cas de la détention, les multiples décisions impliquent notamment la participation de superviseurs (par exemple, pour l'examen des décisions de détention) et de collègues (par exemple, pour la confirmation d'un rapport d'interdiction de territoire ou du choix de l'établissement de détention). De façon plus générale, Karine Côté-Boucher et Ariane Marie Galy montrent comment une information consignée par un garde-frontière lors d'un passage particulier de la fron-

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79 Sans m'étendre sur ce point, je soulignerais par ailleurs que les participantes et participants à la recherche m'ont indiqué de façon générale que la mise en œuvre du droit de l'immigration constitue une tâche complexe, notamment en raison de ses nombreuses zones grises, qui laissent place à la discrétion des agentes et agents.

80 Voir Bell, *supra* note 61 à la p 92.

81 Voir Hawkins, *supra* note 57 à la p 38; Vic Satzewich, *Points of Entry*: *How Canada's Immigration Officers Decide Who Gets In*, Vancouver, UBC Press, 2015 aux pp 54–55.

82 Voir Hamidi et Paquet, *supra* note 3 à la p 9; Hassenteufel, *supra* note 65 aux pp 93–95.

83 *Supra* note 9 à la p 129.

84 Voir Anna Pratt, « Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act » (1999) 8:2 Soc & Leg Stud 199 à la p 218. En guise d'exemples, voir aussi Alexandra Hall, « Decisions at the Data Border: Discretion, Discernment and Security » (2017) 48:6 Security Dialogue 488 à la p 491; David Moffette, « Propositions pour une sociologie pragmatique des frontières : multiples acteurs, pratiques spatio-temporelles et jeux de juridictions » (2015/2016) 59/60 Cahiers recherche sociologique 61 à la p 71 [Moffette, « Sociologie pragmatique des frontières »].

tière peut se répercuter en d'autres temps et d'autres lieux, en faisant circuler certains soupçons de façon virtuelle, via les bases de données. Ainsi, elles notent que « laisser entrer ou non, exclure ou inclure, mettre aux arrêts ou procéder à une saisie sont des décisions maintenant morcelées en série »[85]. Comme nous le verrons, il en est de même pour des informations consignées par d'autres acteurs et rendues disponibles de différentes façons.

B. L'importance centrale des réseaux d'acteurs dans le contrôle des frontières : l'exemple de la collecte et de l'échange d'informations

La collaboration d'autres acteurs et d'organisations partenaires représente un aspect central de la mise en œuvre du droit et des politiques d'immigration[86]. Camille Hamidi et Mireille Paquet soulignent ainsi que la mise en œuvre de ces politiques « n'est plus de l'unique ressort de l'administration étatique » et qu'elle est « le plus souvent effectuée dans des contextes interorganisationnels »[87]. Conséquemment, « bien que les fonctionnaires demeurent des joueurs importants, il [serait] maintenant impossible de saisir l'action publique sans élargir le regard à d'autres acteurs »[88]. C'est notamment le cas en matière de détention.

À certains égards, cette situation n'est pas unique sur le plan historique. Au Canada, par exemple, des entreprises ou des sociétés privées ont pu jouer un rôle certain dans le recrutement des personnes immigrantes au tournant du vingtième siècle[89]. Aujourd'hui, au Canada comme ailleurs, les exemples d'acteurs non étatiques directement ou indirectement impliqués dans la mise en œuvre des politiques d'immigration sont légion : employeurs[90], organismes non gouvernementaux et communautaires[91], avocats[92], forces militaires et groupes de sécurité privée[93], or-

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85 Côté-Boucher et Galy, *supra* note 10 à la p 99.

86 Voir Pratt, *Securing Borders*, *supra* note 3 à la p 185.

87 Hamidi et Paquet, *supra* note 3 à la p 9.

88 *Ibid* à la p 12.

89 Voir Kelley et Trebilcock, *supra* note 2 aux pp 121–34, 141–42.

90 Voir par ex Sid Ahmed Soussi, « Les flux du travail migrant temporaire et la précarisation de l'emploi : une nouvelle figure de la division internationale du travail? » (2013) 8:2 R multidisciplinaire sur emploi, syndicalisme & travail 145.

91 Voir par ex Yasmine Bouagga et Raphaëlle Segond, « Négocier des voies de passage sûres : comment les acteurs non étatiques participent à la gestion des frontières » (2019) 83 Lien Soc & Politiques 82 à la p 98; Nicolas Fischer, « Une frontière "négociée" : l'assistance juridique associative aux étrangers placés en rétention administrative » (2009) 22:87 Politix 71.

92 Voir par ex Anne-Marie D'Aoust, « Réunification familiale et gestion de la migration par mariage au Canada : l'avocat comme acteur dans l'économie morale du soupçon »

ganisations internationales[94]. Différents acteurs sont également parfois engagés dans cette mise en œuvre à la faveur de crises diverses[95].

En ce qui concerne les mesures de contrôle des frontières plus spécifiquement, il est utile de replacer cette participation d'autres acteurs dans le contexte d'une diffusion ou d'un dispersement de la frontière en amont et en aval des limites géographiques des États[96]. Depuis le début des années 1990, certains types de migrations internationales, entre autres les migrations dites irrégulières et les migrations forcées, suscitent nombre d'inquiétudes pour les États de destination qui ont adopté plusieurs dispositifs afin d'empêcher ces personnes d'arriver sur leur territoire. S'ajoutent à ces dispositifs d'autres mesures qui visent à expulser certaines personnes déjà présentes. Ce déploiement de la frontière en amont et en aval des limites territoriales fait que son contrôle se transforme et implique de nouveaux acteurs[97]. L'autorité « se disperse » alors dans des « réseaux ou chaînes d'acteurs » [notre traduction][98] qui interviennent dans le contrôle des frontières à différents moments, notamment avant et après l'arrivée des personnes jugées indésirables aux limites extérieures des États de destination. Comme le remarque Moffette, « si les frontières se retrouvent en plusieurs lieux et moments, il en découle qu'elles dépendent d'un nombre d'acteurs dont le travail ne se limite pas à la douane ou la sécurité frontalière »[99]. La frontière se laisse alors voir comme un « ensemble de pratiques d'acteurs dispersés »[100] (plutôt que comme un lieu géographique précis). Cette dispersion de l'autorité, bien qu'elle concerne une caractéristique considérée comme centrale de la souveraineté des États — le contrôle des frontières — peut se comprendre également à la lumière des changements qui affectent la gouvernance des

(2018) 15 Champ pénal; Sule Tomkinson, « Trois nuances de l'expertise stratégique : le rôle des avocats dans la procédure d'asile » (2019) 38:1 Politique & Soc 99.

93 Voir par ex Pickering et Weber, *supra* note 18.

94 Voir par ex Pauline Brücker, « Le guichet du HCR, entre standardisation bureaucratique et ethos humanitaire : le cas du HCR-Caire » (2019) 38:1 Politique & Soc 129.

95 Voir par ex Karine Côté-Boucher, Luna Vives et Louis-Philippe Jannard, « Chronicle of a "crisis" foretold: Asylum seekers and the case of Roxham Road on the Canada-US border » (2023) 41:2 Environment & Planning C: Politics and Space 408.

96 Voir Côté-Boucher, Infantino et Salter, *supra* note 22 à la p 196.

97 Voir Pickering et Weber, *supra* note 18 à la p 93.

98 *Ibid* à la p 94.

99 Moffette, « Sociologie pragmatique des frontières », *supra* note 84 à la p 64.

100 *Ibid* à la p 77.

États néolibéraux[101], entre autres dans des domaines qui relèvent de la sécurité[102].

En matière de contrôle des frontières, Pickering et Weber proposent donc le concept de « contrôle transversal des frontières » [notre traduction] pour comprendre ces pratiques qui se déploient à la fois au-delà ainsi qu'à l'intérieur des limites géographiques des États[103]. Afin d'accomplir leur objectif d'exclusion et d'expulsion des personnes non citoyennes jugées indésirables, ces pratiques dispersées d'acteurs eux-mêmes dispersés géographiquement et temporellement nécessitent inévitablement un certain degré de coordination. Cela me semble expliquer, du moins en partie, l'importance accordée au partage d'informations, et ce, bien que ces réseaux puissent eux-mêmes être traversés par des luttes d'influence entre les acteurs qui les composent, ce qui peut nuire à l'efficacité de cette coordination[104]. De plus, la logique de prévention des arrivées indésirables qui prévaut impose la nécessité d'anticiper ces « risques » avant qu'ils ne se concrétisent aux limites de l'État. Cette évaluation ne peut se faire qu'à l'aide de technologies de production et de partage d'informations[105]. Par ailleurs, le traitement automatisé de ces informations, s'il n'a pas entrainé une diminution de l'espace discrétionnaire dont dispose le personnel de l'ASFC[106] a, du moins, causé sa reconfiguration. Les effets de cette nouvelle façon de procéder, notamment par le biais de programmes de ciblage, se font également sentir dans le contexte européen[107].

Au Canada, la mise en œuvre des programmes d'immigration de même que l'application des mesures de contrôle des frontières reposent, en effet, en partie sur la participation d'une diversité d'acteurs. Ainsi, bien que l'ASFC (par le biais du ministère de la Sécurité publique et de la

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101 Voir Pickering et Weber, *supra* note 18 à la p 94.

102 Voir généralement Lucia Zedner, *Security*, Abingdon, Routledge, 2009 à la p 49.

103 *Supra* note 18 aux pp 93–94 (traduction de « *transversal policing of borders* »).

104 Voir Didier Bigo, « Du panoptisme au ban-optisme : les micro-logiques du contrôle dans la mondialisation » dans Pierre-Antoine Chardel et Gabriel Rockhill, dir, *Technologies de contrôle dans la mondialisation* : *enjeux politiques, éthiques et esthétiques*, Paris, Kimé, 2009, 59 aux pp 59–60.

105 Voir Pratt, *Securing Borders*, *supra* note 3 à la p 186.

106 Voir Côté-Boucher, « The Paradox of Discretion », *supra* note 20; Ian Kalman, « "Don't Blame Me, It's Just the Computer Telling Me To Do This": computer attribution and the discretionary authority of Canada Border Services Agency officers » (2015) Max Planck Institute for Social Anthropology Document de travail No 166 aux pp 12, 16, en ligne (pdf) : *Max-Planck-Institut für ethnologische Forschung* <eth.mpg.de> [perma.cc/VPV9-3LV4].

107 Voir par ex Hall, *supra* note 84.

Protection civile[108]) soit responsable des contrôles aux points d'entrée et de l'application des mesures d'exécution de la loi (par exemple la détention et le renvoi), plusieurs autres intervenants y participent aussi. Faire une description détaillée de l'ensemble de ces réseaux serait trop long aux fins de cet article. Je présente donc d'abord, à partir d'une revue de la littérature scientifique et de la documentation officielle, un aperçu des modalités de collaboration qui concernent un aspect particulier de ces « pratiques d'acteurs dispersés », soit la collecte et l'échange d'informations. Je complète ensuite ce portrait à l'aide des données produites par la recherche de terrain.

Les mesures de contrôle des frontières peuvent se diviser en deux types. D'une part, il y a les mesures préventives[109], parfois dites d'interdictions[110], qui s'exercent en amont de l'arrivée des personnes non citoyennes. D'autre part, il y a les moyens qui se déploient sur le territoire de l'État de destination pour en expulser les personnes jugées indésirables, qui sont appelés « mesures d'exécution de la loi » dans le langage du droit de l'immigration canadien.

Au Canada, les mesures préventives s'insèrent dans le cadre d'une « stratégie des frontières multiples », partagée avec les États-Unis[111]. Cette stratégie vise à multiplier les points de contrôle entre le pays de départ et le continent nord-américain, « de façon à identifier et intercepter les voyageurs illégaux et indésirables le plus loin possible de l'Amérique du Nord » [notre traduction][112]. Ces points de contrôle font appel à la contribution de nombreux partenaires. Leur efficacité repose sur la capacité à identifier les personnes non citoyennes indésirables avant leur arrivée, ce qui exige la collecte, l'analyse et le partage de renseignements. Anna Pratt affirme ainsi que « dans cette quête pour la sécurité, il y a un besoin sans cesse renouvelé d'améliorer les technologies de production et de partage d'informations » [notre traduction][113].

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[108] Voir *LIPR*, *supra* note 7, art 4(2).

[109] Voir François Crépeau et Delphine Nakache, « Controlling Irregular Migration in Canada: Reconciling Security Concerns with Human Rights Protection » (2006) 12:1 IRPP Choices 3 à la p 12.

[110] Voir Andrew Brouwer et Judith Kumin, « Interception and Asylum: When Migration Control and Human Rights Collide » (2003) 21:4 Refuge 6 à la p 19, n 3.

[111] « Déclaration d'entente mutuelle sur l'échange d'information » (dernière modification le 19 février 2003), en ligne : *Gouvernement du Canada* <canada.ca> [perma.cc/BP3F-UUFH].

[112] Efrat Arbel et Alletta Brenner, « Bordering on Failure: Canada-US Border Policy and the Politics of Refugee Exclusion » (novembre 2013) à la p 25, en ligne (pdf) : *Peter A Allard School of Law* <commons.allard.ubc.ca> [perma.cc/Z52N-EGHF].

[113] Pratt, *Securing Borders*, *supra* note 3 à la p 186.

Immigration, Réfugiés et Citoyenneté Canada (IRCC) est responsable de l'octroi des visas et des autorisations de voyage électroniques qui permettent d'effectuer un premier filtrage de ces « indésirables » et qui visent notamment à prévenir l'arrivée de personnes qui demandent l'asile[114]. Les informations soumises par les voyageurs qui présentent ces demandes font alors l'objet de vérifications dans des bases de données canadiennes existantes[115]. Elles sont par exemple soumises au système d'identification en temps réel de la Gendarmerie royale du Canada (GRC), ce qui permet de « déceler les dossiers de criminels connus, d'anciens demandeurs d'asile, de personnes expulsées antérieurement et d'anciens candidats à l'immigration »[116]. De plus, dans le cadre de certaines de ces demandes, le Canada échange ces informations avec les autorités d'autres pays, dont les États-Unis[117] et les autres membres du Groupe des cinq pour les migrations, soit le Royaume-Uni, l'Australie et la Nouvelle-Zélande[118]. En guise d'illustration, un rapport d'évaluation de programme d'IRCC indique qu'en 2017,

> le Canada envoyait aux États-Unis des requêtes de renseignements biométriques sur les demandeurs de [résidence temporaire provenant de certains pays], les candidats à la réinstallation et les demandeurs d'asile présents au Canada, ainsi que des requêtes de renseignements biographiques sur tous les étrangers qui présentaient une demande de visa de résident temporaire (y compris les demandeurs de permis d'études ou de travail), de résidence permanente ou de réinstallation de l'étranger[119].

Lorsque les requêtes correspondent à des entrées dans les bases de données américaines, les autorités canadiennes obtiennent alors des infor-

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[114] Voir Christopher G Anderson, « Out of Sight, Out of Mind: Electronic Travel Authorization and the Interdiction of Asylum Seekers at the Canada–US Security Perimeter » (2017) 47:4 American Rev of Can Studies 385 aux pp 394–95, 398; Crépeau et Nakache, *supra* note 109; *LIPR*, *supra* note 7, art 4(1).

[115] Voir Anderson, *supra* note 114 à la p 397.

[116] Immigration, Réfugiés et Citoyenneté Canada, *Évaluation de l'initiative de biométrie (état stable) et de l'initiative d'échange de renseignements en matière d'immigration (ERI) entre le Canada et les États-Unis*, nº de référence E4-2017, octobre 2019 à la p 2, en ligne (pdf) : *Gouvernement du Canada* <canada.ca> [perma.cc/D6PH-HGPA] [IRCC, *Évaluation de l'initiative de biométrie*].

[117] Voir Anderson, *supra* note 114 à la p 395; Pratt, *Securing Borders*, *supra* note 3 à la p 196.

[118] Voir Gill Bonnet, « How the Five Eyes countries share immigration data », *Radio New Zealand* (30 décembre 2020), en ligne : <rnz.co.nz> [perma.cc/TP4Q-2YGK]; IRCC, *Évaluation de l'initiative de biométrie*, *supra* note 116 à la p 4.

[119] IRCC, *Évaluation de l'initiative de biométrie*, *supra* note 116 à la p 3. Les renseignements biométriques qui font l'objet de ces requêtes sont les photographies et les empreintes digitales. Les renseignements biographiques, quant à eux, incluent notamment le nom, la date et le pays de naissance, et la nationalité.

mations concernant entre autres « l'identité, […] le statut juridique dans un autre pays, les antécédents criminels, l'emploi, les antécédents de voyage »[120].

Les compagnies aériennes constituent un deuxième groupe de partenaires dans la mise en œuvre de cette stratégie. Par exemple, leur personnel ou les compagnies privées de sécurité qu'elles engagent doivent s'assurer, avant l'embarquement, que les voyageurs possèdent les documents requis, et ce, sous peine d'amendes[121]. Les listes de passagers sont par ailleurs soumises d'avance à l'ASFC, qui les analyse et peut y repérer des personnes interdites de territoire ou considérées comme des voyageurs « à risque élevé »[122], ce qu'elle indique en retour aux compagnies aériennes, qui leur refuseront l'embarquement[123].

L'ASFC dispose également d'un réseau d'agentes et d'agents de liaison en poste à l'international dont le mandat, assez varié, comprend entre autres la collecte et l'échange de renseignements[124]. Pour ce faire, ces fonctionnaires travaillent avec plusieurs partenaires aux échelons local, national et international[125]. Diverses opérations outre-mer impliquent également d'autres branches de l'appareil fédéral, comme la GRC et le Service canadien du renseignement de sécurité (SCRS)[126].

Lorsqu'échouent ces mesures d'interdiction, ou lorsqu'une personne non citoyenne déjà présente au Canada devient interdite de territoire et doit être renvoyée[127], l'ASFC peut également faire appel à divers parte-

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120 *Ibid* à la p 20.

121 Voir Efrat Arbel, « Bordering the Constitution, Constituting the Border » (2016) 53:3 Osgoode Hall LJ 824 aux pp 840–41; Pratt, *Securing Borders*, *supra* note 3 à la p 202.

122 Agence des services frontaliers du Canada, *Rapport sur les résultats ministériels 2018-2019*, par L'Honorable Bill Clair, nº de catalogue PS35-9F-PDF, Ottawa, 2019 à la p 7, en ligne (pdf) : *Publications du gouvernement du Canada* <publications.gc.ca> [perma.cc/4AVM-PEGZ].

123 Voir Anderson, *supra* note 114 à la p 397.

124 Voir Kathy Thompson, « Cahier de transition du premier vice-président 2019 : direction générale de la politique stratégique (DGPS) » (dernière modification le 9 janvier 2020), en ligne : *Agence des services frontaliers du Canada* <cbsa-asfc.gc.ca> [perma.cc/23LL-UTBU].

125 Voir Arbel et Brenner, *supra* note 112 à la p 30.

126 Voir par ex Brigitte Bureau, « La lutte – pas si discrète – du Canada contre les migrants irréguliers », *Radio-Canada* (11 mars 2020), en ligne : <ici.radio-canada.ca> [perma.cc/Y2VL-DZAN]; Brigitte Bureau et Sylvie Robillard, « Le côté secret de l'opération canadienne contre les migrants », *Radio-Canada* (21 mai 2019), en ligne : <ici.radio-canada.ca> [perma.cc/WM64-QNEM].

127 Il existe plusieurs cas de figure, allant d'une personne titulaire d'un visa touristique qui demeure au Canada après la période autorisée à une personne qui perd sa ré-

naires. Les directives administratives portant sur les interdictions de territoire présentent certains des acteurs du réseau qui peuvent être sollicités pour documenter un motif d'interdiction donné : des forces policières au Canada ou à l'étranger, le SCRS, et des collègues travaillant dans d'autres unités (comme l'unité sur les crimes de guerre). Sont également contactés des ambassades et consulats étrangers, des individus identifiés par le biais de témoignages et déclarations, et les autorités provinciales[128]. Comme indiqué plus haut, les personnes qui demandent l'asile au Canada font l'objet de vérifications par le biais d'échanges de renseignements avec les autorités d'autres pays et avec la GRC. En ce qui concerne les forces policières (qui sont, tel que mentionné plus bas, considérées comme des partenaires importants de l'ASFC), Moffette montre que divers corps de police communiquent fréquemment avec l'ASFC pour confirmer le statut d'une personne interpellée[129]. Si ces vérifications révèlent que la personne est sans statut, elle peut alors être remise à l'ASFC. De plus, les policiers doivent également exécuter les mandats d'arrestation émis par l'ASFC[130]. Ils ont notamment accès à ces informations par le biais du *Centre d'information de la police canadienne*, qu'ils peuvent consulter au moment d'une interpellation. Une personne visée par un tel mandat sera transférée à l'ASFC à la suite de son arrestation par la police[131].

Enfin, en ce qui concerne la détention plus précisément, les directives administratives indiquent par exemple qu'en cas de détention pour identité, l'ASFC devra, dans le cadre de ses investigations, demander des renseignements à d'autres organisations (IRCC, la GRC, les gouvernements étrangers), aux membres de la famille, ou encore recourir à des expertises linguistiques[132]. La détention d'une personne pour motif de danger pour la sécurité publique peut donner lieu à la consultation des corps policiers ou

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sidence permanente à la suite d'une infraction criminelle, en passant par la personne qui ne respecte pas les conditions prévues par son permis de travail ou d'études.

128 Voir IRCC, *ENF 1*, *supra* note 70 aux pp 36–50.

129 Voir David Moffette, « Immigration Status and Policing in Canada: Current Problems, Activist Strategies and Abolitionist Visions » (2021) 25:2 Citizenship Studies 273 aux pp 279–80 [Moffette, « Immigration Status and Policing »].

130 Voir *LIPR*, *supra* note 7, art 142.

131 Voir Moffette, « Immigration Status and Policing », *supra* note 129 à la p 279. En ce qui a trait aux bases de données, différents autrices et auteurs soulignent que les informations qui y sont consignées peuvent ne pas l'être systématiquement, être partielles, voire erronées. De plus, les niveaux d'accès peuvent varier selon les personnes et leurs fonctions (voir Bigo, *supra* note 104 à la p 60; Côté-Boucher et Galy, *supra* note 10 à la p 100).

132 Voir IRCC, *ENF 20*, *supra* note 27 aux pp 22–23.

des services correctionnels[133]. De plus, la fonction de gardiennage dans les CSI est assumée par des employés d'entreprises privées de sécurité. Ces gardes consignent quotidiennement des informations au sujet des personnes détenues, renseignements pouvant contribuer aux décisions qui concernent les modalités de la détention[134]. Certaines SRD, comme la gestion de cas et la surveillance dans la communauté, reposent aussi sur l'implication soutenue de partenaires et l'échange de renseignements[135]. Dans le cadre de cette SRD, ce sont des organismes communautaires qui prennent en charge la gestion des cas de personnes remises en liberté dans la collectivité. En plus de procéder à l'évaluation de la faisabilité de la remise en liberté, et donc d'avoir un impact direct sur cette décision, ces organismes communiquent des renseignements à l'ASFC sur une base régulière au sujet des personnes qui participent à ce programme.

III. La recherche d'informations en contexte de détention : de multiples sources, de multiples formes de collaboration

La détention des personnes non citoyennes, qui s'inscrit dans une suite de décisions relevant plus généralement du contrôle des frontières, exige ainsi un important travail de recherche et de partage d'informations. Ce travail se révèle être une composante essentielle des pratiques administratives relatives à la détention et repose en grande partie sur la collaboration de différentes personnes et institutions partenaires de l'ASFC. Par les informations qu'elles fournissent ou par les évaluations qu'elles entreprennent, elles contribuent également, de façon plus ou moins directe selon les cas, à l'exercice du pouvoir discrétionnaire de détention. C'est du moins ce qu'en disent les participantes et participants à la recherche au sujet de ces modalités de collaboration, lesquelles sont décrites dans cette section à partir de leurs propos.

A. La personne non citoyenne

De l'avis de Sam, « dans les cas [de détention] qui traînent en longueur, c'est habituellement parce que la personne ne collabore pas. Et qu'elle entrave par exprès notre capacité à obtenir de l'information à son sujet » [notre traduction][136]. Cet extrait met en lumière deux éléments

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133 Voir *ibid* aux pp 17–19.

134 Voir Camille Bonenfant-Martin, *La détention des personnes migrantes au Centre de surveillance de l'immigration de Laval : analyse des mécanismes de la mise en œuvre de la gouvernementalité sécuritaire de l'immigration*, mémoire de maîtrise en science politique, Université du Québec à Montréal, 2018 [non publié] aux pp 103–04.

135 Voir IRCC, *ENF 34*, *supra* note 27 aux pp 7–12.

136 Entrevue de Sam, Bureau intérieur, Pacifique (2019) [Sam, Pbi].

cruciaux. Le premier corrobore l'importance de l'information pour la mise en œuvre de mesures de contrôle des frontières. Le deuxième est que, dans cette recherche d'informations, la collaboration des personnes non citoyennes demeure centrale. Ce niveau de collaboration figure d'ailleurs parmi les critères que le personnel de l'ASFC ou les commissaires de la CISR doivent prendre en considération dans leurs décisions de détention[137], illustrant son caractère essentiel pour la mise en œuvre du droit et des politiques d'immigration[138].

Dans ce contexte, les personnes non citoyennes constituent en quelque sorte les premiers partenaires de l'ASFC, bien que, souvent, ce partenariat leur soit imposé et que ses conséquences soient contraires à leurs intentions (par exemple, refus d'admission, renvoi du Canada). Cette collaboration a lieu, entre autres, lorsqu'un membre du personnel de l'ASFC interroge une personne non citoyenne et tente d'obtenir ou de corroborer des renseignements qui serviront à confirmer son identité, à statuer sur une éventuelle interdiction de territoire et à déceler s'il existe des motifs de détention. Dans cet exemple d'une entrevue avec une personne déjà présente au Canada, dont la présence a été dénoncée à l'ASFC, Max explique les différents éléments que l'on cherche à établir, illustrant du même coup la série de décisions dans laquelle peut s'inscrire une décision de détention ainsi que la multitude de sources utilisées à cette fin :

> Donc, la première chose que l'on doit établir dans nos entrevues, c'est qui est la personne. Alors elle confirme l'information avec laquelle j'arrive, qu'elle est l'individu dont j'ai reçu les renseignements. On lui demande de nous dire verbalement son identité et, idéalement, de fournir un document de voyage ou tout autre document qui peut confirmer son identité. On lui demande de confirmer qu'elle n'est pas citoyenne canadienne et qu'elle n'est pas résidente permanente. Ce sont les premières étapes que l'on doit absolument suivre. Après ça, on essaie de déterminer comment elle est arrivée

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137 Voir *RIPR*, *supra* note 15, art 248(d).

138 Rappelons également que la collaboration relève d'une obligation prévue par la *LIPR*, qui établit que « [l]'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis » (*supra* note 7, art 16(1)). Au sujet de la collaboration dans le contexte précis de la détention, voir par ex *Ali v Canada* (*Minister of Public Safety and Emergency Preparedness*), 2017 ONSC 2660; *Canada* (*Sécurité publique et Protection civile*) *c Lunyamila*, 2016 CF 1199. Voir aussi Commission de l'immigration et du statut de réfugié du Canada, *Directives numéro 2 du président : détention*, mise à jour le 29 avril 2021, Ottawa, septembre 2010 aux para 2.5.2, 3.1.9, en ligne : *Commission de l'immigration et du statut de réfugié du Canada* <irb.gc.ca> [perma.cc/3HT2-ANT2][CISR]; Jared Will, « Domestic and International Standards and the Immigration and Refugee Board's Guideline on Detention » (février 2018) aux pp 13, 37–39, en ligne (pdf) : *United Nations High Commissioner for Refugees* <unhcr.ca> [perma.cc/4G9R-FE5Q].

> au Canada. Confirmer qu'il s'agit bien de l'information qu'on a dans nos systèmes, si elle est arrivée légalement. Si elle n'est pas entrée légalement, on essaie de savoir comment elle est entrée au Canada. Ensuite on essaie d'obtenir des preuves d'interdiction de territoire. Donc, si elle est restée après l'expiration de son statut au Canada, c'était quand la dernière fois qu'elle est entrée? A-t-elle fait une demande pour rester plus longtemps? Si c'est le cas, quel a été le résultat de cette demande? Pourquoi n'est-elle pas partie à l'expiration de son statut au Canada? A-t-elle les fonds nécessaires pour subvenir à ses besoins ici? A-t-elle des antécédents criminels et, si oui, lesquels? Et lui demander de nous donner des détails à ce sujet, pour essayer de corroborer les informations que nous avons obtenues par nos investigations avant de l'interviewer. En gros, on essaie de leur donner l'opportunité de corroborer les preuves que nous avons déjà ou de toute interdiction de territoire sur laquelle nous avons enquêté jusqu'à ce point dans l'entrevue. Cette entrevue peut durer de 20 minutes jusqu'à deux heures. Mais c'est difficile d'entrer dans les détails parce que ça dépend vraiment de la ou des interdictions de territoire que l'on cherche… Ou, souvent, on cherche des preuves de plusieurs interdictions de territoire. Et, durant cette entrevue, idéalement, établir la probabilité qu'elle se présente pour de futures procédures avec l'ASFC, pour le renvoi, s'il y a des préoccupations de danger et, encore, établir l'identité. C'est ce que l'on essaie de faire dès le départ [notre traduction][139].

Robin[140] et Alex[141] affirment également que les entrevues avec les personnes non citoyennes offrent la possibilité d'obtenir plusieurs informations. Certains considèrent que de bonnes compétences en cette matière sont essentielles pour être en mesure de bien faire leur travail[142]. Cela est signe de l'importance de ces entretiens. Comme l'affirme Jamie,

> [u]ne grande partie de ce qu'on fait est interviewer. L'aspect le plus important de notre travail, c'est l'entrevue, c'est de parler avec des personnes. Et c'est seulement en parlant à des personnes, en parlant à assez des personnes que tu peux développer tes compétences et tes habiletés pour évaluer les risques, tes habilités pour prendre de bonnes décisions. Et ça prend du temps. Mais, je dirais, la compétence la plus importante avec laquelle on travaille, ici, c'est d'être capable de parler aux personnes [notre traduction][143].

Ces compétences permettent non seulement d'obtenir des renseignements et de prendre de « bonnes décisions », mais aussi de tirer des informations

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139 Entrevue de Max, Bureau intérieur, Pacifique (2019) [Max, Pbi].

140 Entrevue de Robin, Poste frontalier, Grand Toronto (2019) [Robin, GTpf].

141 Entrevue d'Alex, Bureau intérieur, Québec (2019) [Alex, Qbi].

142 Voir Alex, Qbi; Max, Pbi.

143 Entrevue de Jamie, Poste frontalier, Pacifique (2019) [Jamie, Ppf].

du langage corporel des personnes interviewées. Candide, Robin et Max[144] indiquent que des renseignements sont tirés du comportement de la personne, par exemple des signes d'agressivité, et que ces informations vont entrer en ligne de compte dans certaines décisions, entre autres au sujet des modalités de la détention. Une personne qui adopte un comportement agressif pourrait par exemple être détenue dans un établissement correctionnel plutôt que dans un CSI.

À cet égard, d'autres informations sont littéralement tirées du « corps » des personnes non citoyennes, comme des tatouages que l'on associe à une organisation criminelle[145] ainsi que, pour certaines catégories de personnes non citoyennes, des données biométriques comme la photographie et les empreintes digitales[146].

B. L'entourage de la personne détenue

Les proches de la personne détenue, comme sa famille, ses amies et amis, les organismes communautaires qu'elle fréquente ou ses avocates et avocats, constituent un groupe d'interlocuteurs supplémentaires auprès desquels le personnel de l'ASFC obtient des informations. Celles-ci serviront surtout à réviser les modalités de l'incarcération, comme le choix de l'établissement de détention en raison des éléments de vulnérabilité qu'elles indiquent[147].

De plus, des personnes de l'entourage sont parfois sollicitées dans la mise sur pied d'une SRD, par exemple si elles désirent agir comme garantes. Lors des audiences de contrôle des motifs de détention, elles sont appelées à témoigner[148] et vont fournir des informations dont se servent les agentes et agents d'audience pour évaluer la faisabilité de la SRD, c'est-à-dire déterminer si le plan soumis sera à même de mitiger ou diminuer le niveau de risque que pose la personne. La teneur de ces renseignements se révèle parfois être d'une importance centrale dans la prise de décisions. Des agentes et agents d'audience ont rapporté des cas où, alors que l'on pensait recommander une SRD, le témoignage d'un garant potentiel a fait en sorte que l'on a finalement préconisé le maintien en détention, en raison par exemple de contradictions entre ce témoignage et celui de la personne détenue.

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144 Entrevue de Candide, Bureau intérieur, Québec (2019) [Candide, Qbi]; Robin, GTpf; Max, Pbi.

145 Voir Entrevue d'Angel, Bureau intérieur, Pacifique (2019) [Angel, Pbi]; Jamie, Ppf.

146 Voir *Évaluation de l'initiative de biométrie*, *supra* note 116 aux pp 1–2.

147 Voir Candide, Qbi.

148 Voir CISR, *supra* note 138 au para 3.3.2.

Dans les cas de détention pour motif d'identité, on communique également avec des membres de la famille pour faire parvenir des documents d'identité ou confirmer certains renseignements[149]. Ces personnes peuvent aussi être sollicitées lorsque l'on soupçonne un risque de fuite, pour justement évaluer le risque que la personne se présente ou non pour son renvoi[150].

Lorsque la personne détenue est représentée, l'avocate ou l'avocat intervient dans ces échanges pour relayer l'information auprès du personnel de l'ASFC. Les personnes rencontrées décrivent leurs relations avec les avocates et avocats de façon généralement positive, bien qu'il y ait quelques fois des situations plus conflictuelles. Ainsi, sur le plan de l'échange d'informations, certains seraient réticents à collaborer avec le personnel de l'ASFC, d'autres plus ouverts, de l'avis de Sam[151].

C. Les collègues de l'ASFC

Les autres unités de l'ASFC représentent une autre source importante d'informations et la recherche de terrain a mis en lumière les nombreuses manières dont les renseignements circulent entre ces divers départements.

De premiers échanges entourent l'arrivée des personnes non citoyennes. Les données récoltées lors de ces échanges sont colligées de multiples façons avant d'être analysées et diffusées au sein de l'ASFC. Cet exercice s'inscrit dans les nombreux efforts, décrits précédemment, qui sont déployés pour prévenir l'arrivée des personnes jugées indésirables. Les équipes de renseignement transmettent ainsi différentes informations aux équipes des points d'entrée, par exemple au sujet de « groupes d'intérêts » pour l'ASFC[152]. Ces informations proviennent parfois d'autres pays :

> On va avoir de l'info, des fois, de notre équipe de renseignements, qui vont nous dire qu'ils ont eu de l'info d'un pays : « [b]on, voici telles personnes, on pense qu'ils vont quitter vers le Canada, sont un groupe de trente », par exemple. On va comme les attendre, si on veut[153].

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149 Voir Robin, GTpf; Entrevue de Lou, Poste frontalier, Pacifique (2019) [Lou, Ppf]; Jamie, Ppf; Entrevue de Louison, Poste frontalier, Québec (2019) [Louison, Qpf]; Sam, Pbi; Entrevue de Camille, Québec, Poste frontalier (2019) [Camille, Qpf].

150 Voir Lou, Ppf.

151 Sam, Pbi.

152 Voir Camille, Qpf.

153 Entrevue de Claude, Bureau intérieur, Québec (2019) [Claude, Qbi].

Aux points d'entrée, il arrive que les systèmes informatiques dirigent automatiquement une personne vers le contrôle secondaire par exemple en raison d'un « historique [négatif] avec les services d'immigration » qui exige certaines vérifications[154]. D'autres sont aussi dirigées vers le contrôle secondaire par le programme de ciblage de l'ASFC[155] :

> [U]n exemple très, très, très banal peut être quelqu'un qui, qui vient ici, qui est à [sa] première entrée au Canada, qui n'a pas de billet de retour, qui vient d'un pays dont la citoyenneté est pas son pays de naissance, qui a un parcours étrange pour se rendre au Canada depuis son pays de résidence. Ça peut sonner quelques cloches[156].

De plus, au moment de l'arrivée, les équipes des points d'entrée communiquent avec certains de leurs collègues lorsqu'un dossier suscite des interrogations particulières. Il peut s'agir de questions relatives à des sujets aussi divers que l'identité, des crimes de guerre, des enfants à risque ou l'actualité internationale, et dont les réponses aideront par exemple à corroborer les informations données par la personne non citoyenne[157]. Dans certains cas plus complexes, les collègues des bureaux intérieurs peuvent suggérer des éléments de preuve à récolter ou des questions à poser aux personnes non citoyennes[158]. Jamie donne un exemple des formes que peut prendre cette collaboration :

> À un certain point, dans ces cas, on communique constamment avec nos agents d'audience […]. Quand on travaille sur ce type de dossier, c'est une communication constante. Donc, on va présenter les preuves à mesure qu'on les reçoit, que ce soit de soumettre les entrevues, toute preuve documentaire, toute autre preuve que l'on a reçue. Et les agents d'audience, leur évaluation se fait en continu, sur la base des preuves que l'on a fournies. […] Au bout du compte, la décision reste la nôtre. Si on veut envoyer une personne, si on sent qu'on a les motifs d'envoyer quelqu'un pour une enquête d'interdiction de territoire, les agents d'audience nous conseillent

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154 Louison, Qpf. Sur le contrôle secondaire, voir IRCC, *ENF 4, supra* note 70 aux pp 35 et s. Aux points d'entrée, le contrôle des personnes peut se faire en deux étapes. Il y a d'abord la ligne d'inspection primaire où sont faites de premières vérifications. Si des vérifications plus poussées sont nécessaires ou si un document doit être émis (par exemple un permis de travail ou d'études), les personnes sont dirigées vers le contrôle secondaire.

155 Voir Agence des services frontaliers du Canada, *Évaluation du Programme de ciblage de l'Agence des services frontaliers du Canada* (dernière modification le 13 mai 2016), en ligne : <cbsa-asfc.gc.ca> [perma.cc/MCL8-FUS5].

156 Louison, Qpf.

157 Voir Sam, Pbi; Camille, Qpf.

158 Voir Angel, Pbi; Sam, Pbi.

> sur ce qui pourrait renforcer le dossier […]. S'il y a un manque de preuve, ils vont nous le dire [notre traduction][159].

Une fois qu'il est décidé que la personne non citoyenne sera détenue, les informations récoltées au point d'entrée sont transmises aux équipes des audiences, qui doivent présenter la position de l'ASFC devant les commissaires de la SI. À l'étape du premier contrôle des motifs de détention (dans les 48 heures), Sacha affirme devoir parfois communiquer avec le point d'entrée pour obtenir des informations additionnelles, lorsque les notes ne sont pas assez détaillées[160]. Cette personne donne en exemple un dossier où il est simplement indiqué que la personne non-citoyenne demande le statut de réfugié, sans mentionner si elle a demandé l'asile dès son arrivée ou si elle l'a fait après avoir essayé de se faire admettre comme touriste, nuance qui peut avoir un impact sur l'appréciation de sa crédibilité[161].

Deux personnes travaillant aux audiences soulignent le fait qu'il est parfois difficile de joindre le ou la collègue qui a procédé à la détention initiale dans un point d'entrée. En effet, alors que les agentes et agents d'audience travaillent généralement selon un horaire de semaine (du lundi au vendredi, de 8 h à 16 h), l'horaire des agentes et agents des points d'entrée s'étale sur sept jours et sur une plage horaire plus étendue. Si ces échanges peuvent se produire sur une base régulière selon certains[162], il arrive que cela soit plus rare[163].

L'obtention d'informations se fait parfois par le biais des agentes et agents de liaison en poste à l'étranger, notamment au sujet de routes empruntées (par exemple les dates de passage ou les pays traversés) ou de documents de voyage utilisés dans d'autres pays (comme le nom et le numéro de passeport)[164]. Alex explique qu'il est parfois plus facile d'obtenir les renseignements recherchés, selon les personnes en poste et les contacts qu'elles établissent avec des partenaires locaux :

> Certains agents de liaison sont merveilleux, et ils ont de très bons contacts et ils peuvent vous trouver n'importe quoi. Certains agents de liaison sont un peu moins intégrés, je suppose. Peut-être qu'ils n'ont pas les contacts ou peut-être qu'ils ne souhaitent pas avoir les contacts [notre traduction][165].

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159 Jamie, Ppf.

160 Voir Entrevue de Sacha, Bureau intérieur, Québec (2019) [Sacha, Qbi].

161 Voir *ibid.*

162 Voir Entrevue de Billie, Poste frontalier, Grand Toronto (2019) [Billie, GTpf].

163 Voir Louison, Qpf.

164 Voir Claude, Qbi; Alex, Qbi; Jackie, GTbi.

165 Alex, Qbi.

Autrement, la gestion du dossier d'une personne en détention peut impliquer plusieurs membres du personnel de l'ASFC, qui doivent s'échanger des informations sur une base régulière. Le dossier d'une personne détenue pour le motif d'identité exige, par exemple, que l'agent d'exécution de la loi mène une investigation pour tenter d'établir l'identité. Cette enquête peut inclure une entrevue avec la personne détenue, une recherche sur les médias sociaux, une recherche dans des bases de données canadiennes ou étrangères, ou l'envoi de requêtes à un agent de liaison en poste à l'étranger. L'agent d'exécution communique ensuite les résultats de son enquête à l'agent d'audience, qui peut lui suggérer des pistes d'investigation[166]. Une détention qui se prolonge parce que le renvoi est retardé peut déboucher sur la mise sur pied d'une SRD qui exigera la collaboration de l'agent de liaison communautaire et de l'agent d'audience[167]. Enfin, le personnel des CSI communique aux agents responsables du dossier d'immigration des informations relatives au déroulement de la détention comme, notamment, le comportement de la personne.

D. Les corps de police

« Vous savez, on travaille vraiment bien ensemble » [notre traduction][168]. C'est sur ces mots que Charlie conclut ses propos sur la collaboration entre l'ASFC et les forces policières, des relations fréquemment décrites de manière positive par les participantes et participants :

> En général, elles sont très bonnes. On a d'excellentes relations de travail avec eux. Il s'agit surtout d'apprendre aux agents à quel moment nous contacter à propos d'individus qu'ils pensent être d'intérêt pour nous. Mais, pour la plupart, on a de très bonnes relations avec nos agences partenaires pour nous contacter lorsqu'elles pensent avoir une personne d'intérêt pour nous [notre traduction][169].

À leur avis, les forces policières constituent un partenaire important de l'ASFC. Sacha qualifie d'ailleurs le Service de police de la Ville de Montréal (SPVM) de principal partenaire de l'ASFC dans la région du Québec[170]. Comme l'indique Jackie[171], cette collaboration prend plusieurs formes, comme l'échange d'informations ou l'appui tactique qu'apportent

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166 Voir Sacha, Qbi; Alex, Qbi.

167 Voir Entrevue de Charlie, Bureau intérieur, Grand Toronto (2019) [Charlie, GTbi]; Entrevue de Sydney, Bureau intérieur, Grand Toronto (2019) [Sydney, GTbi].

168 Charlie, GTbi.

169 Max, Pbi.

170 Sacha, Qbi.

171 Entrevue de Jackie, Bureau intérieur, Grand Toronto (2019) [Jackie, GTbi].

les forces policières lorsque l'ASFC fait un raid pour lequel on évalue que les risques sont élevés. En ce qui concerne la recherche d'informations plus spécifiquement, des personnes interviewées dans les trois régions m'ont rapporté que les services de police portent certains cas à leur connaissance :

> Les cas qu'on va avoir aussi, c'est ceux qui sont… c'est […] des gens qui ont disparu, qui sont arrêtés par la police lors d'une interception de route et qui sont transférés à l'agence[172].
>
> On reçoit, on gère tous les appels de la police. Donc, disons qu'un policier fait un contrôle routier, simplement pour vérifier les plaques, et qu'il fait une recherche avec le nom, et qu'il y a un mandat, ou la personne n'a pas de document d'identité sur elle ou quelque chose comme ça. Alors nous allons recevoir l'appel et nous irons nous occuper de la police [notre traduction][173].
>
> Très souvent, ce qui arrive est que les étrangers ont attiré l'attention de la police, disons, pour un vol à l'étalage, et qu'on détermine que leur statut au Canada est expiré [notre traduction][174].

À cet égard, certaines personnes m'ont rapporté qu'une de leur tâche est d'être « de garde » pour les cas qui sont signalés à l'ASFC par différents partenaires, dont les corps policiers, qui appellent par exemple pour des personnes qui sont visées par un mandat d'arrestation émis par l'ASFC ou que les policiers n'arrivent pas à identifier.

Comme vu plus haut, une deuxième forme de collaboration consiste en l'accès, pour le personnel de l'ASFC, à la base de données de la GRC qui contient des informations relatives aux infractions criminelles commises au Canada, le *Centre d'information de la police canadienne*[175]. De même, pour les personnes dont on prélève les données biométriques, des vérifications se font automatiquement par le biais du système d'identification en temps réel de la GRC, qui fournit des renseignements sur les antécédents criminels ainsi que sur l'historique migratoire au Canada[176].

De plus, les forces policières fournissent des documents qui servent de preuves dans le cadre d'enquêtes portant sur des interdictions de territoire ou dans le contexte du contrôle des motifs de détention[177]. Charlie m'a rapporté un exemple où des preuves fournies par les forces de police

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172 Sacha, Qbi.

173 Jackie, GTbi.

174 Max, Pbi.

175 Voir Jackie, GTbi; Max, Pbi; Louison, Qpf.

176 Voir IRCC, *Évaluation de l'initiative de biométrie*, *supra* note 114 à la p 2.

177 Voir Sacha, Qbi.

avaient permis de justifier la détention[178]. Dans le cas d'une SRD, l'ASFC peut aussi solliciter des renseignements sur des personnes qui se proposent comme garantes, afin d'évaluer leur fiabilité.

Cette collaboration semble considérée comme étant mutuellement bénéfique. D'un côté, les signalements et les preuves fournies par les corps policiers facilitent le mandat d'exécution de la loi de l'ASFC. De l'autre, le renvoi de personnes criminalisées soutient les objectifs de lutte contre le crime des forces policières. Sacha décrit les avantages mutuels de cette collaboration :

> Mais le plus gros partenaire, veut, veut pas, c'est le SPVM, parce que […] bon, on obtient des documents, on a des ententes de partage d'informations. On obtient des documents de leur part pour nos enquêtes. Mais je dis ça aussi parce qu'ils ont un certain avantage, dans certains cas, presque, à travailler avec l'agence, parce qu'ils ont des — puis là c'est quelque chose que je me suis fait dire, là, mais — ils ont, veut, veut pas, des personnes qui sont sur la rue qui vont par exemple faire partie d'un gang criminel, mais c'est à répétition. Une fois qu'ils sont remis en liberté par Justice, ils reviennent au même endroit, puis ils recontinuent […]. Fait que, veut, veut pas, je pense que le SPVM est content, à un moment donné, quand ils savent qu'il y a un renvoi qui est fait d'un membre d'un gang de rue. Là, ils sont comme : « OK, on a comme la paix pour un certain temps avec cet individu qui, finalement, se recriminalise constamment ». Fait que c'est ça, je pense que, quand même, il y a un certain avantage, probablement, pour eux. Mais oui, pour nous, c'est un partenaire. On est régulièrement contactés aussi par le SPVM lorsqu'ils interceptent quelqu'un, qu'ils font une vérification, puis que la personne a pas de statut. Des fois ils font une vérification avec nous parce qu'ils sont pas capables d'identifier l'individu. Donc, ils vont demander : « Est-ce qu'on a quelqu'un dans le système sous ce nom-là ? ». Puis souvent c'est comme ça en fait que ça arrive : « Oui, puis il s'est pas présenté, il est mandat pour nous [l'ASFC] »[179].

E. D'autres institutions gouvernementales

L'ASFC travaille avec de nombreux autres partenaires gouvernementaux, fédéraux comme provinciaux. Par exemple, Alex et Max m'ont affirmé avoir communiqué dans certains cas avec différentes agences afin de vérifier ou récolter des informations : le ministère des Affaires

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178 Charlie, GTbi.

179 Sacha, Qbi.

étrangères, Passeport Canada ainsi que des agences provinciales qui délivrent des documents d'identité, comme des permis de conduire[180].

La plus importante de ces agences partenaires semble être IRCC qui, dans le cadre des demandes qui lui sont présentées, amasse déjà plusieurs informations et avec qui l'ASFC partage certaines bases de données. Différents cas de figure m'ont été présentés. Les agentes et agents peuvent obtenir les formulaires soumis dans le cadre de demandes d'immigration et qui contiennent des informations concernant les membres de la famille d'un demandeur : cela permet parfois d'établir l'identité d'une personne à partir d'informations fournies par une autre[181]. Ils communiquent également avec des agentes et agents d'IRCC qui ont préparé des rapports sur de « faux mariages, des mariages de convenance »[182] et le personnel d'IRCC signale parfois des cas paraissant problématiques à l'ASFC afin qu'elle fasse de plus amples vérifications[183].

Parmi les partenaires provinciaux, les services de protection de la jeunesse interviennent parfois dans certains dossiers, par exemple pour faire une évaluation de l'intérêt supérieur de l'enfant. Une personne interviewée m'a ainsi rapporté un cas où ces services ont eu un impact décisif sur la décision de placer un enfant en détention avec son parent, alors détenu pour des raisons de criminalité, plutôt que de le loger dans une famille d'accueil[184].

Les autorités carcérales constituent un dernier partenaire gouvernemental important. Elles transmettent par exemple des renseignements qui sont utilisés pour justifier le maintien en détention en vertu de la *LIPR* lorsqu'une personne non citoyenne termine une peine d'emprisonnement. Ces informations concernent les détails sur les infractions commises[185], les gens qui ont visité la personne, ou des évaluations au sujet du potentiel de récidive[186]. Dans le cas d'une SRD, les agentes et agents de l'ASFC communiquent également avec les autorités carcérales pour s'assurer que les conditions imposées par la SI correspondent à ce qui a été prévu lorsque la personne est sortie de l'établissement correctionnel[187].

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180 Alex, Qbi; Max, Pbi.

181 Voir Alex, Qbi.

182 Sacha, Qbi.

183 Voir Claude, Qbi; Alex, Qbi.

184 Voir Billie, GTpf.

185 Voir Sacha, Qbi.

186 Voir Charlie, GTbi.

187 Voir Sacha, Qbi.

F. Les autorités d'autres pays

L'ASFC déploie différentes stratégies de collaboration avec les autorités d'autres pays dans sa quête d'informations. La première repose sur des ententes d'échange de renseignements, qui donnent accès aux contenus de différentes bases de données, comme mentionné plus haut. Plusieurs personnes rencontrées m'ont rapporté faire des vérifications régulières dans des bases de données états-uniennes[188]. Les directives administratives suggèrent par exemple la consultation du *National Crime Information Centre*[189] en cas de « préoccupations de l'agent ou [de] préoccupations à l'égard de la sécurité publique »[190].

Sacha précise que l'ASFC profite d'une « meilleure collaboration » avec les pays du Commonwealth lorsqu'il s'agit d'obtenir des informations relatives à l'historique migratoire[191]. Comme décrit plus haut, le Canada fait partie du Groupe des cinq pour les migrations qui, parmi plusieurs types de renseignements, partage des informations concernant l'immigration ou les antécédents criminels. Dominique illustre de la façon suivante l'impact que les renseignements obtenus de cette manière peuvent avoir sur la prise de décisions :

> [L]'agent va obtenir un certain nombre d'éléments de risque, admettons là on va faire la dactyloscopie[192], puis admettons on va trouver que : « ah, criminalité [dans un pays donné], possession d'une arme à feu en vue de commettre un crime dans les cinq dernières années, voies de fait », ou quelque chose de même. La personne pourrait être inadmissible pour sa demande de refuge, [en raison] de la criminalité, des antécédents [dans un pays donné]. On va décider de la détenir parce que, admettons, on a un certain nombre de risques[193].

Les autorités consulaires peuvent être contactées pour corroborer ou infirmer des informations soumises par les personnes non citoyennes[194]. Les agentes et agents de l'ASFC contactent également les autorités judiciaires d'autres pays pour obtenir des preuves au sujet d'infractions criminelles

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188 Voir Claude, Qbi; Sacha, Qbi; Alex, Qbi; Jackie, GTbi; Max, Pbi, Louison, Qpf.

189 Le *National Crime Information Centre* est une base de données gérée par le *Federal Bureau of Investigation* (FBI) qui rassemble des informations relatives à la criminalité et aux personnes portées disparues (voir « National Crime Information Center (NCIC) », en ligne : *Federal Bureau of Investigation* <le.fbi.gov> [perma.cc/EK7D-L6ZH].

190 IRCC, *ENF 20*, *supra* note 27 à la p 34.

191 Sacha, Qbi.

192 La dactyloscopie consiste en une analyse des empreintes digitales.

193 Entrevue de Dominique, Poste frontalier, Québec (2019) [Dominique, Qpf].

194 Voir Jackie, GTbi; Alex, Qbi.

commises à l'étranger, qui peuvent motiver une interdiction de territoire ou soutenir des motifs de détention[195].

Autrement, les gouvernements étrangers communiquent parfois avec les autorités canadiennes pour transmettre certains renseignements. Les autorités états-uniennes peuvent aviser l'ASFC lorsqu'elles soupçonnent qu'une personne fuyant la justice américaine est présente au Canada[196]. De plus, certains pays rapportent occasionnellement que des passeports ont été volés. L'ASFC diffuse alors cette information dans les points d'entrée afin de pouvoir « faire des vérifications » lorsqu'une personne voyageant avec l'un de ces passeports arrive au Canada[197].

G. Autres sources d'informations

La totalité de ce travail de recherche ne repose pas que sur les stratégies de collaboration présentées ici. Les agentes et agents de l'ASFC consultent également une diversité de sources qui ne dépendent pas de partenaires. Certains ont parfois recours à des sources en libre accès, par exemple des articles de journaux[198] ou des bases de données juridiques accessibles au public telles que CanLII[199]. Des informations sont aussi tirées des médias sociaux et servent entre autres à confirmer ou à infirmer des renseignements déjà récoltés[200].

De plus, les agentes et agents reçoivent de l'information du grand public, par le biais de dénonciations anonymes concernant des personnes présentes au Canada[201]. Une situation concrète qu'Alex a donnée en exemple est celle d'une personne dénoncée parce qu'on la soupçonnait d'avoir frauduleusement obtenu son statut de réfugié[202].

Enfin, l'ASFC recourt parfois à des expertises, de différents spécialistes, notamment pour établir l'identité. Charlie mentionne différents exemples, dont l'analyse de la voix et des inflexions pour déterminer la nationalité[203].

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195 Voir Jamie, Ppf.

196 Voir Sacha, Qbi.

197 *Ibid*.

198 Voir Dominique, Qpf; Robin, GTpf.

199 Voir Dominique, Qpf; Robin, GTpf; Angel, Pbi.

200 Voir Sacha, Qbi; Alex, Qbi ; Max, Pbi.

201 Voir Sacha, Qbi; Max, Pbi.

202 Alex, Qbi.

203 Charlie, GTbi.

Conclusion

Les résultats présentés permettent de documenter des pratiques administratives de l'ASFC relatives à la détention qui demeurent encore méconnues. Ils illustrent dans un premier temps la complexité que peut receler ce qui se présente sur le plan formel comme une simple décision. D'une part, le choix de détenir ou non une personne non citoyenne s'inscrit dans une série de décisions relatives au contrôle des frontières (identité, interdiction de territoire, détention, modalités de la détention). D'autre part, chacune de ces décisions comprend un ensemble d'éléments sur lesquels les décideurs doivent se prononcer : choix des règles pertinentes à appliquer, interprétation des règles, fiabilité des informations récoltées, poids à accorder à chacune d'elles, etc.

Ma recherche révèle également que l'exercice du pouvoir discrétionnaire de détention exige un important travail de collecte et de partage d'informations, qui repose sur la collaboration de nombreux acteurs et organisations partenaires. Ces multiples formes de collaboration laissent voir en retour un autre aspect de la complexité inhérente à la mise en œuvre de ce pouvoir. En effet, si cette recherche prend comme point de départ l'importance de s'intéresser aux pratiques quotidiennes des fonctionnaires de première ligne pour comprendre la mise en œuvre du contrôle des frontières, elle permet de constater le rôle crucial qu'y jouent les réseaux d'acteurs. Elle laisse également voir l'une des façons dont le contexte institutionnel peut avoir un impact sur les décisions discrétionnaires des fonctionnaires de l'ASFC. Par le biais de multiples stratégies de collaboration, divers acteurs et partenaires influencent toutes ces décisions de façon directe ou indirecte, et ce, même s'ils ne disposent pas formellement de pouvoirs en matière de détention ou d'interdiction de territoire.

Une première forme de collaboration consiste à porter des cas à la connaissance de l'ASFC. Ces signalements enclenchent alors un processus d'enquête qui peut ultimement mener au renvoi de personnes déjà présentes au Canada et, par le fait même, à leur détention. Les participantes et participants ont rapporté à cet égard l'importance de la collaboration des forces policières, mais aussi d'autres organisations comme IRCC, ou alors de la transmission d'informations, de façon anonyme, par des particuliers.

Une deuxième forme de coopération concerne les stratégies de collaboration qui visent à faciliter l'accès à des informations, notamment par des bases de données (corps policiers, gouvernements du Groupe des cinq pour les migrations) ou par des processus réguliers d'échange de renseignements (compagnies aériennes ou de transport). Les informations rendues ainsi disponibles peuvent parfois avoir une importance centrale dans la prise de décision, par exemple s'il s'agit d'informations relatives à des

antécédents criminels qui justifieront une interdiction de territoire et la détention pour motif de danger pour la sécurité publique.

Une troisième et dernière forme de collaboration se rapporte au fait de fournir des renseignements à la demande de l'ASFC, renseignements qui justifieront des interdictions de territoire ou qui appuieront des motifs de détention. La personne non citoyenne (et indirectement son entourage) constitue à cet égard le premier partenaire, bien que la collaboration résulte parfois de la contrainte. Dans le cas particulier de la détention pour motif d'identité, le fait de fournir des informations permet parfois la remise en liberté. D'autres informations serviront à l'ajustement des modalités de la détention ou à la mise en place d'une SRD. Des institutions fédérales ou provinciales de même que les corps policiers fournissent des informations de cette manière. Dans ce cas, des évaluations faites par les services correctionnels quant au potentiel de récidive se voient parfois accorder un poids important dans l'évaluation des risques. Des évaluations entreprises par des organismes communautaires dans le cas de la GCSC peuvent aussi avoir un impact direct sur la recommandation de remise en liberté. Il en est de même pour les services de protection de la jeunesse, dont l'évaluation de l'intérêt supérieur de l'enfant peut être décisive dans la décision de placer la personne mineure en détention.

On constate ainsi le rôle névralgique que jouent les partenariats dans cette quête d'informations, ce qui illustre le caractère incontournable des réseaux d'acteurs et de partenaires dans la mise en œuvre des mesures de contrôle des frontières. Plutôt de n'être que le déguisement de l'arbitraire du souverain, la discrétion qui imprègne le droit et les politiques d'immigration se présente donc comme le point d'entrée d'une multitude d'influences. Les frontières, mises en œuvre au quotidien par des fonctionnaires de première ligne, sont alors également le produit des efforts combinés de plusieurs acteurs, qu'ils soient étatiques ou non, canadiens comme étrangers. Les frontières se concrétisent de plusieurs façons, à partir de plusieurs lieux et par les actions de plusieurs acteurs. Ces conclusions rejoignent celles de Karine Côté-Boucher et Ariane Marie Galy, qui affirment qu'« il faut souligner à quel point ces contrôles répondent peut-être moins fréquemment qu'on le pense à des décisions souveraines quant à l'entrée sur un territoire qu'à un ensemble hétéroclite de processus décisionnels plus ou moins mal imbriqués et parfois même contradictoires »[204].

De surcroît, il faut noter à ce titre que la collaboration aux fins de la recherche et du partage d'informations ne constitue que l'un des éléments du contexte institutionnel et social qui peuvent orienter et contraindre

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[204] *Supra* note 10 à la p 105.

l'exercice du pouvoir discrétionnaire de détention. Certains éléments transparaissent dans les résultats présentés ici, par exemple l'importance des entrevues et des interactions avec les personnes non citoyennes ou l'influence des contraintes matérielles comme la disponibilité de collègues qui travaillent selon des horaires différents. La mise en lumière de ces éléments témoigne de l'importance de la recherche empirique auprès des acteurs qui se trouvent en première ligne pour comprendre la complexité inhérente au contrôle des frontières et à l'exercice de pouvoirs discrétionnaires.

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