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ARTICLES

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NO COUNTRY FOR OLD MEN: RESTRICTIONS ON THE IMMIGRATION OF ELDERLY FAMILY MEMBERS

Péter D. Szigeti[*]

Immigration policies are aimed at young-to-middle-aged people, for good reasons. The exceptions are parental and grandparental immigration programs, designed to reunite yesterday's immigrants and their young children with the (grand)parents who still live in the country of origin. (Grand)parental immigration has been an unquestioned facet of immigration law for the last century and a half. Elderly people are the least threatening immigrants: they rarely commit crimes, they are not conduits for further immigrant family members, and they are unlikely to fundamentally change the culture of the destination state. Yet the last few decades have seen an unprecedented and mostly unremarked assault on parental and grandparental immigration, with some rather shoddy economics as the only reason. Quotas have been lowered, required sponsorship amounts have been raised, health conditions have been made stricter, and family structures have been added to the list of criteria. This article looks at the tightening of immigration rules since the 1970s in three types of immigrant-receiving countries: traditional settler states, modern settler states, and liberal states which seek to discourage immigration. The article concludes that reasons, whether legal, political or economic, are lacking in both quantity and quality. The growing restrictions on elderly immigration are unjust and senseless, and should be reversed.

Les politiques d'immigration sont destinées aux jeunes et aux personnes d'âge moyen, pour de bonnes raisons. Les exceptions sont les programmes d'immigration parentale et grand-parentale, conçus pour réunir les immigrants d'hier et leurs jeunes enfants avec les (grands-)parents qui vivent encore dans le pays d'origine. L'immigration (grand-)parentale est une facette incontestée du droit de l'immigration depuis un siècle et demi. Les personnes âgées sont les immigrés les moins menaçants : elles commettent rarement des délits, elles ne sont pas des intermédiaires pour d'autres membres de la famille immigrés et il est peu probable qu'elles changent fondamentalement la culture de l'État de destination. Pourtant, au cours des dernières décennies, l'immigration parentale et grand-parentale a fait l'objet d'un assaut sans précédent et, pour l'essentiel, sans commentaire, avec pour seule raison des considérations économiques peu convaincantes. Les quotas ont été abaissés, les montants de parrainage requis ont été augmentés, les conditions de santé ont été rendues plus strictes et les structures familiales ont été ajoutées à la liste des critères. Cet article examine le durcissement des règles d'immigration depuis les années 1970 dans trois types de pays d'accueil : les États colonisateurs traditionnels, les États colonisateurs modernes et les États libéraux qui cherchent à décourager l'immigration. L'article conclut que les raisons, qu'elles soient juridiques, politiques ou économiques, manquent à la fois en quantité et en qualité. Les restrictions croissantes imposées à l'immigration des personnes âgées sont injustes et insensées, et devraient être inversées.

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Introduction: What Space for Elderly Immigration?

The last couple of decades have seen a bifurcation of immigration laws and policies, which have been most concisely summarized as "attracting the best and excluding the rest."[1] "The best" are those with "specialized skills and human capital"[2] who "possess remarkable prowess and a proven track record of success in their fields of expertise."[3] Similarly coveted are entrepreneurs and investors, or simply high net worth individuals, who are ready to transfer large portions of their wealth to their new homelands.[4] The excluded comprehend refugees, whose passage to safe Western countries is made as difficult as possible by walls, barbed wire, and other physical obstacles;[5] by countries with little respect for human rights that straddle migration routes;[6] and by restrictive interpretations of refugee protection provisions.[7] The unwanted also include those without higher education credentials and in-demand labour skills, who are excluded by default. And similarly unwanted are those with any sort of criminal record, or those who present any sort of security risk.[8]

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1 Asha Kaushal, "Do the Means Change the Ends? Express Entry and Economic Immigration in Canada" (2019) 42:1 Dal LJ 83 at 85. See generally Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (New York: Cambridge University Press, 2016).

2 Ayelet Shachar, "Selecting by Merit: The Brave New World of Stratified Mobility" in Sarah Fine & Lea Ypi, eds, *Migration and Political Theory: The Ethics of Movement and Membership* (Oxford: Oxford University Press, 2016) 175 at 176.

3 *Ibid* at 177. See also Kaushal, *supra* note 1 at 91–96; Ayelet Shachar & Ran Hirschl, "Recruiting 'Super Talent': The New World of Selective Migration Regimes" (2013) 20:1 Ind J Global Leg Stud 71.

4 See Allison Christians, "Buying In: Residence and Citizenship by Investment" (2017) 62:1 Saint Louis ULJ 51 at 52; Kristin Surak, "Millionaire Mobility and the Sale of Citizenship" (2021) 47:1 J Ethnic & Migr Stud 166 at 166–67.

5 See Moria Paz, "Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls" (2016) 34:1 BJIL 1 at 2–5.

6 See e.g. Thomas Gammeltoft-Hansen & James C Hathaway, "Non-Refoulement in a World of Cooperative Deterrence" (2015) 53:2 Colum J Transnat'l L 235; Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge: Cambridge University Press, 2018) [Ghezelbash, *Refuge Lost*]; David Scott FitzGerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (New York: Oxford University Press, 2019).

7 See Daniel Ghezelbash, "Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees" (2020) 68:3 Am J Comp L 479.

8 See César CG Hernández, "Creating Crimmigration" (2014) 2013:6 BYUL Rev 1457 at 1462–64; Mary Bosworth, Can Immigration Detension Centres Be Legitimate? Understanding Confinement in a Global World, in: Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (New York: Oxford University Press, 2013), at 152; Katja Franco Aas, The Ordered and the Bordered Society: Migration Control, Citizenship and the Northern Penal State, in: Katja

Caught in the middle are family members, who are neither clearly wanted nor unwanted. There has certainly been a rising suspicion regarding family members wanting to immigrate, especially toward spouses and romantic partners.[9] Before the 1950s, all states accepted marriages at face value for immigration purposes as well as for other purposes; after the 1953 US Supreme Court decision, *Lutwak v United States*,[10] only "genuine" marriages concluded for purposes other than immigration were acceptable. The distinction between "true" and "sham" marriages was for a long time unique to the US, but by the early 2000s, it had globalized to Canada, the UK and most European countries.[11] Furthermore, even spouses who are accepted as "genuine" increasingly have to pass language tests and cultural integration tests, similar to economic immigrants.[12]

The attention granted to spouses (and occasionally children[13]) has eclipsed parental and grandparental immigration. There has been some attention given to the question of age in migration in general[14]—but most of that has been directed at refugees and other forced migrants, where it

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Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (New York: Oxford University Press, 2013), at 29.

9 See Helena Wray, "The 'Pure' Relationship, Sham Marriage, and Immigration Control" in Joanna Miles, Perveez Moody & Rebecca Probert, eds, *Marriage Rites and Rights* (Oxford: Hart Publishing, 2015) 141 at 142 ("[s]pousal migrants are now being assessed in similar ways to labour migrants and for the same purposes, to ensure that they will be of value to the host society").

10 See *Lutwak v United States*, 344 US 604 at 622 (1953).

11 See Kerry Abrams, "Family Reunification and the Security State" (2017) 32:2 Const Commentary 247 at 261–64; Péter D Szigeti, "Comparative Law at the Heart of Immigration Law: Criminal Inadmissibility and Conjugal Immigration in Canada and the United States" (2021) 19:5 Intl J Const L 1632 at 1656–58.

12 See generally Karin de Vries, *Integration at the Border: The Dutch Act on Integration Abroad and International Immigration Law* (Oxford: Hart Publishing, 2013) at 1–2; Liav Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (Oxford: Oxford University Press, 2015) at 85–131.

13 Minor children usually migrate with their parents, therefore children as separate family class immigrants mostly appear in transnational adoption cases. See generally Karen Dubinsky, *Babies without Borders: Adoption and Migration across the Americas* (Toronto: University of Toronto Press, 2010); Robert L Ballard et al, eds, *The Intercountry Adoption Debate: Dialogues Across Disciplines* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2015). See also Jamie R Abrams, "Why the Legal Strategy of Exploiting Immigrant Families Should Worry Us All" (2019) 14:1 Harvard L & Policy Rev 101 at 125–48 on Trump's horrible and tragic family separation policy.

14 See e.g. Christina Clark-Kazak, "Introduction: Special Focus on Age Discrimination in Forced Migration Law, Policy, and Practice" (2016) 32:3 Refuge 3 at 3-7; Christina Clark-Kazak, "Introduction: Theorizing Age and Generation in Migration Contexts: Towards Social Age Mainstreaming?" (2012) 44:3 Can Ethnic Stud 1.

is often young migrants who face discrimination, not older ones.[15] Other studies, which have investigated elderly migrants, have looked at the challenges that they have faced after they have been admitted, not at the stage of eligibility or admissibility.[16] The migration of elderly family members is a topic that has received very little attention so far.

In this article, I argue that an atmosphere of suspicion and disfavour towards elderly family members is growing in the legal systems of significant immigration destination countries. The present study will compare the rules for the immigration of parents and grandparents of citizens and permanent residents in three types of immigrant-receiving countries: traditional settler states, modern settler states, and liberal states that try to minimize immigration. Part II lays out this ideal-typical classification and identifies the United States as a traditional settler state; Old Commonwealth countries of immigration (Canada, Australia, New Zealand) as modern settler states; and other Western democratic states as non-immigrant regimes. Part III shows how modern settler states have turned toward welcoming younger immigrants and discouraging elderly immigrants, while Part IV lays out the legal "toolkit" or "playbook" for restricting immigration by elderly relatives. The tools in question include high income requirements, strict sponsorship demands, tiny quota numbers, and restrictive understandings of health requirements and health risks. Part V surveys the alternatives that the states under consideration offer to foreign (grand)parents and their sponsors. Elderly parents may enter as tourists, without rights to residence or to social services; or they can come as investors, if they are wealthy enough to invest huge sums into the destination state's budget or economy. Part VI looks at the stunted justifications for restricting elderly immigration, both in policy discourse and the courts. Courts have been passive and showed deference to legislatures and the executive—here as elsewhere in immigration law. Legislatures and the press have given minimal attention to the question, and, where justifications have been provided, they have been in term of a narrow, back-of-the-envelope type of economic rationalism. Part VII provides

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[15] It is well known that refugees skew young and male, due not least to the physical hardships inherent in making the journey to a country where they can claim asylum: see e.g. Paz, *supra* note 5 at 41. See also Stephanie J Silverman, "'Impostor-Children' in the UK Refugee Status Determination Process" (2016) 32:3 Refuge 30; Jyothi Kanics, "Challenges and Progress in Ensuring the Right to Be Heard and the Best Interests of Children Seeking International Protection" (2016) 32:3 Refuge 18.

[16] See e.g. Kimberly Seibel, "Bureaucratic Birthdates: Chronometric Old Age as Resource and Liability in U.S. Refugee Resettlement" (2016) 32:3 Refuge 8.

a conclusion: "[t]hat is no country for old men... An aged man is but a paltry thing / A tattered coat upon a stick."[17]

I. Historical Policies Regarding the Migration of Elderly Family Members: Three Ideal Types

To set the stage for an in-depth investigation of current-day restrictions on elderly family members, some historical exposition is in order. I shall demonstrate the evolution of immigration laws using three ideal-typical migration regimes, illustrated by examples from five different countries.[18] The five countries are the major English-speaking destinations for immigration today: Australia, Canada, New Zealand, the United Kingdom, and the United States. Four of these countries were settler-colonial states, the great immigration destinations of the 19th and 20th centuries. The fifth, the United Kingdom, was the point of departure for most of the immigrants to the other four countries during the 19th century; it turned into a global immigration destination during the late 20th century.

A. Traditional Settler State Regimes

The first type of migration regime I shall call the "traditional settler state regime." "Populate or perish," the post-1945 Australian immigration policy slogan,[19] encapsulates the ethos of traditional settler states. Traditional settler states sought immigrants with the general goal of populating their country; they expected immigrants to become citizens and settle for life. The traditional settler state regime promotes family-based migration in general and does not create special requirements with regard to

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17 William B Yeats, "Sailing to Byzantium" in William B Yeats, ed, *The Tower* (London: Macmillan, 1928) at 1.

18 As Max Weber defined it, an ideal type is "formed by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena which are arranged according to those one-sidedly emphasized viewpoints into a unified *analytical* construct." Max Weber, "'Objectivity' in Social Science and Social Policy" in Edward Shils & Henry Albert, eds, *The Methodology of the Social Sciences* (Glencoe: The Free Press, 1949) 49 at 90. That is, ideal types are analytical aids constructed from existing phenomena, which serve to accentuate typical traits and aspirations of types of phenomena which are more diverse in reality. Applied to the current article, while there may not be any pure "traditional settler", "modern settler" or "non-immigrant" states, there are many countries whose laws and policies correspond to most of the laws described herein, and whose decision-makers would agree to these descriptions despite some differences and variations.

19 John Lack & Jacqueline Templeton, *Bold Experiment: A Documentary History of Australian Immigration Since 1945* (Melbourne: Oxford University Press, 1995) at xiii.

elderly immigrants. This traditional regime existed in all immigrant-seeking states—all the countries investigated in this study, except for the United Kingdom—until the 1960s and was dismantled or transformed more or less by the 2000s.

The traditional settler state was clearly and openly a racist state-building project, which invited people to become immigrants and then citizens based on their ethnicity.[20] "Unsuitable" ethnicities (East Asians, South Asians, Pacific Islanders, Africans, Afro-Americans, and Afro-Caribbeans) were barred from entering and "suitable" ethnicities (Northern and Western Europeans, and to a lesser extent Jews and Southern and Eastern Europeans), were encouraged to immigrate and bring their extended families. It is well known how the United States excluded Chinese starting in 1882,[21] extended racial exclusions to all Asians in 1917,[22] and, in the 1920s, finally limited all non-Western European immigration through a restrictive quota system, tied to the 1890 ethnic make-up of the US[23] Canada enacted a punitive head tax on Chinese immigrants in 1885,[24] increased the head tax to tenfold its original sum in 1903,[25] and finally barred virtually all Chinese immigration in 1923.[26] South Asian immigration was barred through the "continuous journey regulation," which mandated that immigrants must come to Canada directly from their country of origin, using tickets purchased there.[27] African(-

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[20] See David S FitzGerald & David Cook-Martín, *Culling the Masses: The Democratic Origins of Racist Immigration Policy in the Americas* (Cambridge, Mass: Harvard University Press, 2014) at 1–7 on the history of racist immigration policies in North and South America. For racial exclusions in Australia, see James Jupp, *From White Australia to Woomera: The Story of Australian Immigration* (New York: Cambridge University Press, 2002) at 6–19. For the borrowing of racist exclusionary policies throughout the British Empire and the United States, see Daniel Ghezelbash, "Legal Transfers of Restrictive Immigration Laws: A Historical Perspective" (2017) 66:1 ICLQ 235. For Canada, see generally Triadafilos Triadafilopoulos, "Building Walls, Bounding Nations: Migration and Exclusion in Canada and Germany, 1870–1939" (2004) 17:4 J Historical Sociology 385, 392–403.

[21] See *Chinese Exclusion Act*, Pub L No 47-126, 22 Stat 58 at s 1 (1882). See also Lucy E Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995) at 7ff.

[22] See *Immigration Act of 1917*, Pub L No. 64-301, 39 Stat 874 at 876 (1917).

[23] See *Emergency Immigration Act of 1921*, Pub L No 67-5, 42 Stat 5 at s 2(a) (1921); *Immigration Act of 1924*, Pub L No 68-139, 43 Stat 153 at ss 4, 5, 11(a) (1924).

[24] See *The Chinese Immigration Act*, SC 1885, c 71, s 4.

[25] See *The Chinese Immigration Act*, RSC 1903, c 8, s 6.

[26] See *The Chinese Immigration Act*, RSC 1923, c 38, s 8.

[27] *An Act to Amend the Immigration Act*, SC 1908, c 33, s 1. See also Hugh JM Johnston, *The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* (Vancouver: UBC Press, 2014) at 16–17.

American) immigration was disallowed in 1911.[28] In Australia, the 1901 Immigration Restriction Act gave immigration officers almost limitless freedom to exclude "undesirable" immigrants, primarily meaning non-white immigrants.[29] According to FitzGerald and Cook-Martín, every country in the Americas had some form of racial or ethnic restriction on immigration (usually barring Chinese and Jews), including those that professed an official policy of racial mixing, such as Mexico or Brazil.[30]

At the same time, for the white immigrants who *were* welcomed, family reunification policies were quite generous. From the beginning, the United States created exemptions from inadmissibility rules for the family members of citizens and permanent residents. This included the parents of citizens and permanent residents who were illiterate,[31] or had tuberculosis,[32] or even those who were excludable for prostitution or criminality, with special permission from the Attorney General.[33] Parents were given preference within the quota system, from 1921 all the way up to today.[34] Maurice Brush notes that parental immigration to Canada was allowed from the moment when "family members" were more closely defined in 1910, and was only restricted between 1922–1930 and 1937–1946, when wives and minor children were the only family members who could be legally sponsored.[35] Grandparents have been sponsorable in Canada continuously from 1956 onward.[36] Mary Crock informs us that "[u]ntil December 1989, no restrictions were placed on the grant of residence to the aged parents of Australian citizens or permanent resi-

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28 See Privy Council, *Order-in-Council*, 1324 (12 August 1911).

29 *Immigration Restriction Act 1901* (Cth), 1901/17, s 3(a); Eve Lester, *Making Migration Law: The Foreigner, Sovereignty and the Case of Australia* (New York: Cambridge University Press, 2018) at 120-121, 130-133

30 See FitzGerald & Cook-Martín, *supra* note 20 at 218–21 (on Mexico) and 259–62 (on Brazil).

31 See *Immigration Act of 1917*, supra note 21 at 877.

32 See *Immigration and Nationality Act of 1957*, Pub L No 85-316, 71 Stat 639 at s 6 (1957).

33 See *ibid* at s 5.

34 See *Emergency Immigration Act of 1921*, *supra* note 23 at s 2(d) (1921); *Immigration Act of 1924*, *supra* note 23 at s 6(a)(1) (1924); *Immigration and Nationality Act of 1952*, Pub L No 82-414, 66 Stat 163 at s 203(a)(2) (1952); *8 U.S. Code, Chapter 12 (Immigration and Nationality), Subchapter II (Immigration)*, 8 USC § 1151 (*Worldwide Level of Immigration)* at (b)(2)(A)(i) (2022).

35 Maurice Brush, *Family Migration Study: The Concept of Family Reunion Immigration in the Legislation* 1-2 (CIC study, 1988, on file with author)

36 *Ibid*., 2.

dents."[37] Racial exclusions and liberal family immigration policies were two sides of the same coin.

B. Modern Settler State Regimes

By the 1960s, pressure from Third World states had pushed traditional settler states to get rid of openly racist immigration regulations.[38] The United States abrogated its national origins quota system with the 1965 Hart-Celler Act.[39] Canada introduced a completely race-neutral immigration points system in 1967.[40] Australia abolished its "White Australia" policy in 1973.[41] In lieu of racial exclusions and generous family immigration programs, the now "reformed" or "modern" settler states created skills-based immigration programs that focused on attracting highly skilled workers or high net value individuals. Instead of nation-building, the goal of modern settler states is economic gain and the offset of natural demographic decline through immigration.[42] The ideal immigrant is no longer a family member of a previously settled immigrant but a highly skilled stranger who brings valuable know-how and only their immediate nuclear family members.

The discarding of openly discriminatory immigration policies was not designed to bring in large numbers of persons of colour. Rather, especially US and Canadian legislators hoped that it would result in "more of the same": white European immigrants who would qualify based on skills *or* family connections instead of only their skin colour and place of origin. The United States in particular kept its previous system of preferring family-based immigration. The hope was that "[p]lacing family unification at the center of the new preference structure [would become] a convenient way of creating a system that did not discriminate by country of origin but that would not substantially alter the numbers of admissions."[43] As

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37 Mary Crock, *Immigration and Refugee Law in Australia* (Sydney: Federation Press, 1998) at 84.

38 See FitzGerald & Cook-Martín, *supra* note 20 at 28–30.

39 See Philip E Wolgin, "Re-Forming the Gates: Postwar Immigration Policy in the United States Through the Hart-Celler Act of 1965" in Triadafilos Triadafilopoulos, ed, *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective* (New York: Springer, 2013) 61 at 61.

40 See Triadafilos Triadafilopoulos, "Dismantling White Canada: Race, Rights, and the Origins of the Points System" in Triadafilopoulos, *supra* note 39, 15 at 16.

41 See Gwenda Tavan, "Creating Multicultural Australia: Local, Global and Transnational Contexts for the Creation of a Universal Admissions Scheme, 1945–1983" in *supra* note 39, at 39, 48–49.

42 See Dauvergne, *supra* note 1 at 175.

43 Wolgin, *supra* note 39 at 73.

Rep. Emanuel Celler, the sponsor of the new 1965 Immigration Act testified, "Since the peoples of Africa and Asia have very few relatives here, comparatively few could emigrate from those countries."[44] By having kept family-based immigration policies at the centre of its immigration law, the US immigration system is arguably the last traditional settler state regime.

After it became clear for the modern settler states (Australia, Canada, and New Zealand) that continued immigration will take place from Third World countries, generous family sponsorship programs started to be peeled back. Modern settler states have subtly rewritten their health- and disability-based inadmissibility rules to exclude not only persons suffering from infectious diseases and intellectually disabled persons (as was the case previously, in the traditional model) but anyone who places financial or logistical stress on the healthcare system.[45] As a result, economic immigration streams became the predominant avenues of immigration, and family-based immigration started looking more and more like economic immigration itself.[46] It is hard not to see a touch of racism in these measures. Family-based immigration was supported and encouraged as long as it contributed to the white majority in settler states; but when family-based immigration began to increase minorities of colour, it started being curtailed. With regard to marriage-based immigration and the immigration of mothers based on their children's birthright citizenship ("anchor babies"), the racism involved in opinions and policy changes is well documented.[47] Parental immigration rules have not been examined in such detail, but the changes that took place alongside spousal immigration are quite similar.

There are doubtless other reasons for increasing restrictions on the immigration of elderly family members. The establishment of public wel-

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44 *Ibid* at 74.

45 See *infra* Part IV. 5.

46 See *supra* notes 9–10, 12; Szigeti, *supra* note 11 at 1661–62. See generally Abrams, *supra* note 11.

47 See e.g. Helena Wray, *Regulating Marriage Migration into the UK: A Stranger in the Home* (London: Routledge, 2016) at 41–103 (on the exclusion of South Asian husbands of British citizens in particular, due to racial and gender-based anxieties at 49); see generally Leo R Chavez, *Anchor Babies and the Challenge of Birthright Citizenship* (Stanford: Stanford University Press, 2017) (a genealogy of the concept and term "anchor baby" at 1–5); see Sarah van Walsum, *The Family and the Nation: Dutch Family Migration Policies in the Context of Changing Family Norms* (Newcastle Upon Tyne: Cambridge Scholars Publishing, 2008) at 18-20, 259-260 (on the lack of changes in the regulation of family-based immigration, despite disavowals of early 20th century, openly racist immigration policies and the switch to policies "couched in the terms of nationality rather than in those of race").

fare regimes in high-income states is the most openly stated reason.[48] Arguably, it is unfair to let newly arrived elderly people "hog" social services, welfare payments, and bedspace in publicly funded hospitals, to the detriment of native-born elderly citizens who have funded the same services through a lifetime of tax payments. One can also bring up cultural reasons: living together as multi-generational families is increasingly archaic and uncomfortable for middle- and high-income families in Western countries. Instead, fiscal and migratory policies are geared towards importing careworkers (usually as temporary foreign workers), who will care for elderly people in homes as well as specialized institutions.[49]

As noted above, the regimes described here are ideal types—they do not conform exactly to existing immigration systems in any state. The United States is not completely a traditional settler state: although it has maintained a family-focused immigration system, it has certainly abolished racial distinctions.[50] Although Canada, Australia, and New Zealand are the quintessential modern settler states, some of the rules adopted by them are nevertheless so harsh that they are reminiscent of non-immigrant regimes: the third ideal-typical category that I discuss below.[51]

C. Non-Immigrant Regimes

The third ideal type regime is the one that does not support immigration as a policy goal at all. This comprises the overwhelming majority of states today and throughout the 19th and 20th centuries. As Gerald Dirks remarks, "[i]n this final decade of the twentieth century, only half a dozen countries have comprehensive immigration policies directed at recruiting, selecting, and resettling people who seek to [immigrate to another country]."[52] These countries, if they are liberal democracies, will respect refu-

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48 See Jupp, *supra* note 20 at 152 and accompanying text.

49 See Daphna Hacker, *Legalized Families in the Era of Bordered Globalization* (Cambridge: Cambridge University Press, 2017) at 295–315; Shiri Regev-Messalem, "Stories of Dependency and Power: The Value of Live-In Elder Care in Israel" (2020) 6 Socius 1 at 1–2.

50 See Gary P Freeman, David L Leal & Jake Onyett, "Pointless: On the Failure to Adopt an Immigration Points System in the United States" in Triadafilopoulos, *supra* note 39, 123 at 123. On stalled efforts in U.S. Congress to create a comprehensive skills-based immigration program, see *ibid* at 125–140.

51 According to Catherine Dauvergne, the settler state as such is a vanishing category, because undocumented migration, massive temporary foreign worker programs, and expectations regarding further migration by highly qualified recent immigrants make both "settlement" and a cohesive "settler society" impossible (*supra* note 1 at 4–5, 124–49).

52 Gerald E Dirks, *Controversy and Complexity: Canadian Immigration Policy During the 1980s* (Montreal: McGill-Queen's University Press, 1995) at vii; "Never before has hos-

gees' rights to non-refoulement and transnational families' rights to live together to some extent, but only as much as absolutely required by international law, constitutional norms, or domestic political pressures.[53] As we shall see, that is not very much at all: elderly relatives are often admitted only if there is no other way that they could survive.[54] If they are not liberal democracies, they will often not allow family reunification at all, and their immigration programs will be exclusively short- and medium-term temporary labour programs.[55]

Because these countries are so numerous, and their regulations are so varied in other respects, I will not discuss any "typical" examples. Instead, I will look at "extreme" examples, which illustrate the tensions inherent in aiming to uphold non-discrimination, the right to the family, and other fundamental rights while trying to curtail immigration at the same time. Such examples will come from both domestic courts and international courts; and from states as varied as the United Kingdom, Finland, and even some of the typical settler states described above, whose policies are indistinguishable from those of non-immigrant regimes.[56]

II. Modern Settler States and the Selection of Younger Immigrants

Wanting to attract youthful immigrants is sound economic policy for any state. Recruiting young immigrants "improve[s] the demographic profile (dependency ratio) of the country (e.g., to maintain public pay-as-you-go pension schemes) and thereby increase[s] the country's overall fiscal surplus."[57] Young people are also more likely to successfully adapt economically and socially: they learn new languages fluently, gain socioeconomic success, pick up new, socially encouraged habits, and identify with their new homeland instead of the "old country."[58]

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tility towards immigrants been quite so widespread, and quite so nasty." Dauvergne (The New Politics of Immigration), supra note 1 at 1.

53 See generally FitzGerald, *supra* note 6; Ghezelbash, *Refuge Lost*, *supra* note 6; Ruben Andersson, *Illegality, Inc: Clandestine Migration and the Business of Bordering Europe* (Oakland: University of California Press, 2014).

54 See *infra* notes 152–56 and accompanying text.

55 Anna K Boucher & Justin Gest, *Crossroads: Comparative Immigration Regimes in a World of Demographic Change* (Cambridge: Cambridge University Press, 2018) at 98–101.

56 See *infra* notes 210–246 and accompanying text.

57 Michael J Trebilcock, "The Law and Economics of Immigration Policy" (2003) 5:2 Am L & Econ Rev 271 at 288.

58 See Joseph Schaafsma & Arthur Sweetman, "Immigrant Earnings: Age at Immigration Matters" (2001) 34:4 Can J Economics 1066; Rachel M Friedberg, "The Labour Market Assimilation of Immigrants in the United States: The Role of Age at Arrival" (Decem-

"Young" is, of course, a vague and relative term.[59] In immigration law, "young" and "old(er)" receive meaning through points systems, the primary method for selecting economic immigrant classes.[60] The Canadian Comprehensive Ranking System awards a maximum of one-hundred points for applicants aged between twenty and twenty-nine with a spouse.[61] For every increase in age above the age of twenty-nine, the number of awardable points decreases by five points. This decrease in points stops when applicants reach the age of forty-five. One can conclude, therefore, that forty-five years of age is too old for the Canadian immigration system. Australia likewise grants thirty points for those aged between eighteen and twenty-five, and does not award any points to those older than forty-five.[62] To a certain extent, the decreasing of points for age is offset by the addition of points for more work experience and higher education credentials. Even so, the percentage of immigrants above forty-five years of age is less than a sixth of all immigrants in modern settler states, despite highly skilled immigration streams making up the majority of immigrants. In family-based immigration streams, the definition of "old(er)" is implicit in family relationships: one has to be the parent or grandparent of a qualifying, sponsoring citizen or permanent resident, who is therefore at least eighteen years old (but more likely at least five to six years older, given the income requirements for sponsorship[63]). An immigrating parent is, therefore, at least in their forties, and an immigrating grandparent a generation older.

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ber 1992) at 4–5, online (pdf): Brown University <brown.edu/Departments/Economics/Faculty/Rachel_Friedberg/Links/Friedberg%20Age%20at%20Arrival.pdf>.

59 On vagueness and the ambiguities of age-based distinctions in law: see Timothy AO Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000) at 71–72; Frederick Schauer, *Profiles, Probabilities, and Stereotypes* (Cambridge: Harvard University Press, 2006) at 113–18.

60 See Dauvergne, *supra* note 1 at 174–75.

61 See Government of Canada, "Comprehensive Ranking System (CRS) Criteria – Express Entry" (last modified 11 January 2021), website: *Immigration and Citizenship* <www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/criteria-comprehensive-ranking-system/grid.html>; Cohen Immigration Law firm (canadavisa.com), "Express Entry Draw Results" (last modified 3 August 2023) website: https://www.canadavisa.com/express-entry-invitations-to-apply-issued.html (the required number of points for a successful application is usually around 490 points, and the maximum achievable by any candidate is 600 points).

62 See *Migration Regulations 1994* (Austl), 1994/268, Schedule 6D.1 [*Migration Regulations*].

63 See *infra* notes 92–108 and surrounding text.

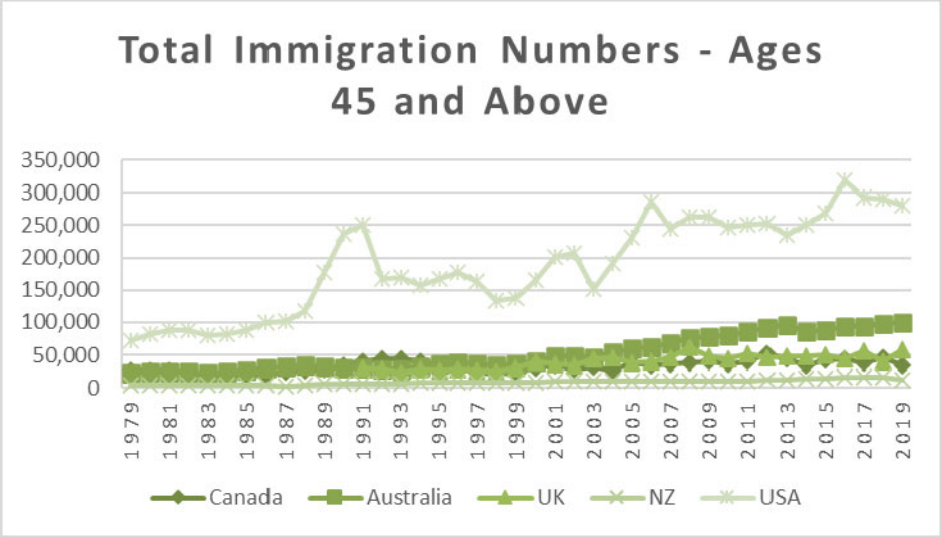

Table 1: Total number of middle-aged and elderly immigrants in Canada, Australia, New Zealand, the United States, and the United Kingdom, 1979-2019.[64]

[64] See "Australia's Permanent and Long-term Arrivals by Age Group(a)(b) - Overseas Arrivals and Departures (OAD): Customised Data Report (Migration, Australia (cat no 3412.0))" Australian Bureau of Statistics; United Kingdom, Office for National Statistics, *Long-term International Migration: Table 2.07, Age and Sex, UK and England and Wales*, (London: Office for National Statistics, 26 November 2020); Statistics Canada, *Estimates of the Components of International Migration, by Age and Sex, Annual* (Table 17-10-0014-01) (Ottawa: Statistics Canada, 28 September 2022); History Office and Library, "Advanced Search" (2022), online: *US Citizenship and Immigration Services* <eosfcweb01.eosfc-intl.net/U95007/OPAC/Search/AdvancedSearch.aspx> (Statistical yearbooks of the Immigration and Naturalization Service); "Permanent & long-term migration by age (Annual-December)" online: StatsNZ Infoshare <infoshare.stats.govt.nz/SelectVariables.aspx?pxID=799cf1b6-d1a1-41aa-b304-2aa3e10ff4e8>; "Yearbook of Immigration Statistics" (last modified 22 June 2022), online: *US Department of Homeland Security* <dhs.gov/immigration-statistics/yearbook>;

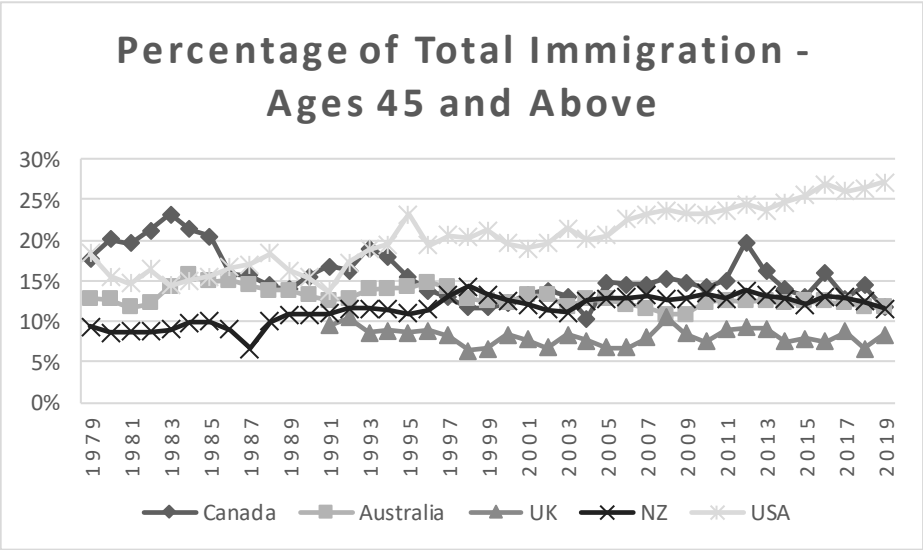

Table 2: Middle-aged and elderly immigrants as a percentage of the total number of immigrants in Canada, Australia, New Zealand, the United States, and the United Kingdom, 1979-2019.[65]

The statistical tables above show the total number of immigrants over the age of forty-five to all five countries investigated, and the ratio of such immigrants compared to all immigrants to these countries. Clearly, the United States is the one country where elderly immigrants have increased both in number and in proportion to all immigration. In Australia, the total number of middle-aged and elderly immigrants has increased, but their proportion has gone down. In Canada, New Zealand and the United Kingdom, the number of over-forty-five immigrants has held steady and the proportion of the group compared to all immigrants has gone down slightly. It is illuminating to contrast the first two tables with Table 3, which presents the proportion of middle-aged and elderly people within the total population of the five countries being investigated. While the number and ratio of elderly immigrants have gone down or stagnated, the ratio of elderly persons in general has risen markedly in all these countries, from below one-third of the population to slightly under half. The absolute decline of middle-aged and elderly immigration is evident; and the *relative* decline of the group is striking.

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[65] See History Office and Library, *supra* note 64; US Department of Homeland Security, *supra* note 64.

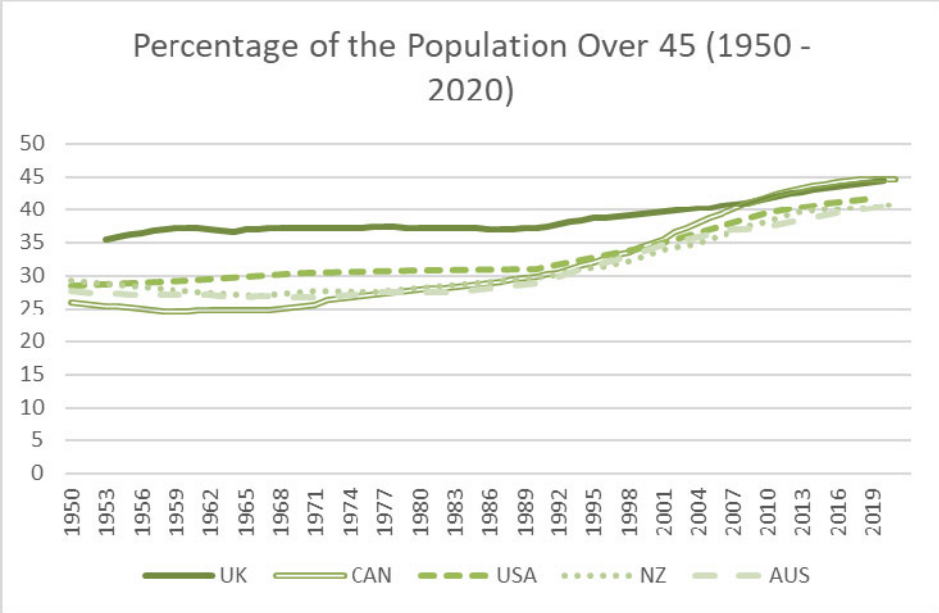

Table 3: Middle-aged and elderly people as a percentage of the total population of Canada, Australia, New Zealand, the United States, and the United Kingdom, 1950-2020.[66]

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[66] See United Kingdom, Office for National Statistics, *Analysis of Population Estimates Tool for UK*, Population Estimates Tables (London: Office for National Statistics, 25 June 2021); "Estimated Resident Population by Age and Sex (1991+) (Annual-Dec) - Table Reference: DPE058AA", online: Statistics New Zealand <infoshare.stats.govt.nz/ViewTable.aspx?pxID=7cc7f290-fdea-437e-9eaa-67eca27108ef>; Australian Bureau of Statistics, *National, State and Territory Population Tables*, Table 1: Change in estimated resident population, by age group and sex, Australia, selected periods to 30 June (Canberra: Australian Bureau of Statistics, 17 March 2022); Statistics Canada, *Population Estimates on July 1st, by Age and Sex* (Table 17-10-0005-01) (Ottawa, Statistics Canada: 28 September 2022); National Center for Health Statistics, "Health, United States – Data Finder" (12 August 2022), online: Centers for Disease Control and Prevention <cdc.gov/nchs/hus/data-finder.htm> (Resident population, by age, sex, race, and Hispanic origin: United States, selected years); Australian Bureau of Statistics, *Australian Historical Population Statistics, 2014*, Table 2.1 Population(a), age and sex, Australia(b) (Canberra: Australian Bureau of Statistics, 18 September 2014); Statistics Canada, *Archived - Estimates of Population, by Age Group and Sex, Canada, Provinces and Territories (x 1,000)* (Table 17-10-0029-01) (Ottawa, Statistics Canada: 19 February 2000); United Kingdom, Office for National Statistics, *Mid-1851 to Mid-2014 Population Estimates for United Kingdom: Total persons, Quinary age groups and Single year of age – estimated resident population*, (London: Office for National Statistics, 6 July 2015; "Yearbook Collection: 1893 – 2012", online: Stats NZ <www.stats.govt.nz/indicators-and-snapshots/digitised-collections/yearbook-collection-18932012#Yearbook-1970-79>.

What is more significant than the simple decrease in the number of elderly immigrants is the structural transformation that immigrant settler states want to welcome. What was previously a self-evident right to be reunited with one's family members in one's new home is becoming more and more an exception and a privilege. Elderly family members are acceptable only as self-supporting tourists or wealthy investor-retirees[67] or if they are lucky enough to be healthy in old age and have well-off descendants.[68] Otherwise, aged parents and grandparents are expected to wither away, perhaps receiving remittances from their children, and perhaps occasionally allowed to visit—but not to unite with—family.

III. The Toolkit of Immigration Restriction for Parental and Grandparental Classes

The regulations that contain the number and type of eligible and sponsorable family members have generally not changed during the last few decades;[69] instead, the modifications to family class immigration have been indirect. Immigration policy has changed through modifications of sponsorship and health-based inadmissibility rules. Nowadays, sponsorship of relatives requires paying high fees,[70] and the sponsored relatives need to be healthy enough not to need healthcare.[71] The unwelcomeness of (elderly) relatives is signaled through quota numbers, income requirements, and intricate definitions of health risks. Each of these tools are rational, and many even traditional, in immigration regulation. While individually reasonable, the cumulative effect is a near-strangulation of immigration by elderly family members: a threefold or fourfold over-

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67 See *infra* part V.

68 See *infra* part IV. 4-5.

69 See *8 U.S. Code Chapter 12 (Immigration and Nationality)*, *supra* note 34 at s 1151(a)(1), 1151(b)(2)(A)(i); see also *Canadian Immigration and Refugee Regulations*, SOR/2002-227, ss 117(1)(c)-(d) [*Can. IRPR*]; Immigration New Zealand, "Operational Manual" (10 October 2022), at F4.30.1, online: *Immigration New Zealand* <www.immigration.govt.nz/opsmanual/#73243.htm> [perma.cc/L3FK-ZQY8].

70 See infra part IV. 4. See also Boris Jancic, "'Just for the Rich': Government Parent Visa Rules Criticized", *New Zealand Herald* (6 October 2019), online: <www.nzherald.co.nz/nz/just-for-the-rich-government-parent-visa-rules-criticised/Y7N3RAEIB737SNG66AMH2IQTDE/> [perma.cc/8HEJ-R3PS]; Lin Evlin, "Australia's New Parent Visa 'Absolutely Unfair' Say Migrant Communities", *SBS News* (17 April 2009), online: <www.sbs.com.au> [perma.cc/ F8QJ-9SRP]; Ben Knight, "How the High Cost of Parent Visas is Leaving Migrant Families Without Support", *ABC News* (2 November 2019), online: <www.abc.net.au> [perma.cc/VZ82-8FTP].

71 See *infra* part IV. 5.

insurance against any type of "economic burden" posed by immigrants or immigrants' families.

In this section, I will describe three types of regulations: (i) sponsorship requirements, which call for the sponsoring (grand)children to assume financial responsibility for their parents' physical welfare and bar the immigrating parents from accessing social services for a period of time; (ii) health-based limitations, which disallow immigration by persons suffering from costly illnesses or disabilities; and (iii) regulations which only allow immigration by elderly relatives if the family conforms to a certain structure, or if immigration is the only option for keeping the elderly relative alive. Some further types of immigration conditions also disproportionately disfavour the elderly—one example is demanding proof of English skills, when learning languages is much harder at a later age.[72] For lack of space, I will not be treating these or any further types of indirect restrictions.

A. Sponsorship and Income Requirements

Family-based immigration relies on the mechanism of sponsorship.[73] The foreign family member has no automatic or independent right to enter the destination country; instead, the citizen or permanent resident family member must decide to sponsor them and initiate the family reunification process. In modern settler regimes, a sponsor must first demonstrate "sufficient income to support the applicant. Next, the sponsor must provide an unconditional undertaking to provide for the financial needs of the applicant ... From the outset, the objective is to ensure that the sponsored member of the family class will not become a burden on the state."[74] The requirement that immigrating family members do not rely on social assistance under any circumstances, is anything but new: as Audrey Macklin notes, it reaches back at least to the 1950s in Canada,[75] but in a

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[72] See e.g. INZ Op. Man., *supra* note 69 at para F4.25.1.

[73] See e.g. *Canadian Immigration and Refugee Protection Act*, SC 2001, c 27, ss 9 (2), 12(1), 13, 13.1, 13.2, 14(2)(e), 45–46 [*Can. IRPA*]; *Migration Act 1958* (Austl), 1958/62, ss 140AA–140ZL [*Aus MA*]; *Immigration Act 2009* (NZ), 2009/51 at ss 48, 55 [*NZ Immigration Act*].

[74] Audrey Macklin, "Public Entrance / Private Member" in Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 241–242.

[75] See *ibid* at 243: "The sponsorship undertaking can hardly be traced to the revival of the neoliberal state. Arguably, its introduction should be attributed to the rise (rather than decline) of the Keynesian welfare state in the post-war era, and a concomitant political decision to exclude immigrant families from membership in it."

more general form to colonial North American regulations against the immigration of "paupers."[76]

One of the first United States statutes to regulate immigration, in 1882, immediately excluded anyone "likely at any time to become a public charge,"[77] and "the language of the exclusion has remained the same for over a century."[78] The first Australian immigration statute, the Immigration Restriction Act of 1901, also copied the United States' formulation to prohibit "entry to 'any person likely...to become a charge upon the public or upon any public or charitable institution.'"[79] Sponsorship rules have nevertheless changed substantially in the shift from traditional to modern settler immigration regimes, despite the statutory language remaining the same.

1. The Comparative Onerousness of Sponsoring Parents

With regard to sponsorship, the United States has remained closest to a traditional settler regime because the public charge prohibition is more *ex post* than *ex ante*. That is to say, although consuls can and do consider whether or not an immigrant is "likely to become a public charge" before admission to the United States, the rules on becoming a public charge operate more as a reason for deportation once it happens. In its only statement on interpreting the phrase "likely to become a public charge", the United States Supreme Court ruled in 1915 that ignorance of the English language, lack of personal funds, or the state of the labour market in the immigrants' destination city do not make someone a likely public charge.[80] The only valid reasons for exclusion were "permanent personal objections accompanying them irrespective of local conditions,"[81] such as being physically or mentally disabled.[82]

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76 See generally Kunal M Parker, *Making Foreigners: Immigration Law and Citizenship Law in America, 1600-2000* (New York: Cambridge University Press, 2015) at 32, 42, 103–107; Aristide R Zolberg, *A Nation By Design: Immigration Policy in the Fashioning of America* (New York: Russel Sage Foundation, 2006) at 42–43, 74–75; Hidetaka Hirota, *Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy* (New York: Oxford University Press, 2017) at 5.

77 See *An Act to Regulate Immigration*, Pub L No 47-376, 22 Stat 214 at s 2 (1882).

78 Joseph Daval, "The Problem with Public Charge" (2021) 130:4 Yale LJ 998 at 1000. See also Hirota, *supra* note 76 at 3, 7.

79 See Jupp, *supra* note 20 at 143.

80 See *Gegiow v Uhl*, 239 US 3 at 8–10 (1915).

81 *Ibid* at 10.

82 See *ibid*.

Later precedents from the United States were also flexible in their approach to sponsorship and the likelihood of becoming a public charge. In 1974, the case of *Harutunian*, the Board of Immigration Appeals (BIA) applied a "totality of the circumstances" test, stating that "the likelihood of a person becoming a public charge ... should take into consideration factors such as an alien's age, incapability of earning a livelihood, a lack of sufficient funds for self-support, and a lack of persons in this country willing and able to assure that the alien will not need public support."[83] *Perez*, decided the same year, added that "the fact that an alien has been on welfare does not, by itself, establish that he or she is likely to become a public charge."[84] A third significant BIA decision is *Martinez-Lopez*, which stated that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge, especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of emergency."[85] That is to say, old age and ill health are certainly factors that should push consular officers towards denying the admissibility of parents and grandparents, but they are only some factors among many, and declarations of support from friends *or* family members can be enough to preclude the determination that one is likely to become a public charge.

This "totality of the circumstances" test was codified as part of the *Immigration and Naturalization Act* in 1996, with the passage of the *Illegal Immigration Reform and Immigrant Responsibility Act*.[86] No specific sums or level of support is mentioned either in the case law or the legislation. The test has been described as offering "at most, a tautological definition of 'public charge'... [such a person] is whoever we determine them to be, by applying a wide range of factors to a specific situation."[87] During the twentieth century, the determination that an alien is likely to become a public charge has been used to exclude between 50 per cent of all would-be immigrants between 1911 and 1920,[88] to just 0.6 per cent between

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[83] *Re Matter of Harutunian*, 14 I & N Dec 583 at 583, 1974 BIA Lexis 9 (US Board of Immigration App 1974).

[84] *Re Matter of Perez*, 15 I & N Dec 136 at 137, 1974 BIA Lexis 75 (US Board of Immigration App 1974).

[85] *Re Matter of Martinez-Lopez*, 10 I & N Dec 409 at 421–22, 1962 BIA Lexis 73 (US Board of Immigration App 1962).

[86] Pub L No 104-208, 110 Stat 3009-674, codified in *8 U.S. Code Chapter 12 (Immigration and Nationality)*, *supra* note 34 at s 1182(a)(4)(B). See also Anna Shifrin Faber, "A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation" (2018) 108:5 Geo LJ 1363 at 1378.

[87] Daval, *supra* note 78 at 1018.

[88] See Faber, *supra* note 86 at 1374.

1951 and 1984.[89] The test is, therefore, capricious to say the least, but offers the opportunity to admit immigrants of modest means if immigration officers interpret the "totality of the circumstances" leniently.

The *ex post* deportation-related aspect of the public charge rule is more significant: permanent residents can be deported after admission if they have become "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of *public* cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense."[90] The public charge rule has been analysed mostly from the perspective of current permanent residents, who may or may not become eligible for deportation because of accessing food stamps or publicly funded healthcare.[91]

By contrast, in modern settler states, the obligation to support one's immigrating relatives has been codified quite precisely, and immigration officers' rights to individually balance different aspects of the immigrant's situation have been eliminated. Immigration regulations determine how much money the sponsor has to earn or hold in order to be entitled to sponsor a relative. Sponsorship also statutorily requires a declaration that the sponsor reimburse the government for any social security expenses that the sponsored relative may incur in a specified time period. On the flip side, inadmissibility for financial reasons is strictly *ex ante*.

In all counties, the obligation to support parents or grandparents –in terms of financial assistance and the duration of such help – is more onerous than the obligation to support other family members. In Canada, since 2014, sponsors have to guarantee their parents' and grandparents' financial independence from the state for twenty years, as opposed to ten years for children and three years for spouses.[92] In Australia, the assurance of support for parents lasts for ten years, as opposed to two or four years for other family members.[93] In New Zealand, the obligation to sup-

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89 See Cori Alonso-Yoder, "Publicly Charged: A Critical Examination of Immigrant Public Benefit Restrictions" (2019) 97:1 Denv L Rev 1 at 8.

90 US, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds* 64:101 Fed Reg 28689 (1999) [emphasis in original].

91 See Daval, *supra* note 78 at 1006; Alonso-Yoder, *supra* note 89 at 7–8; Lisa Sun-Hee Park, *Entitled to Nothing: The Struggle for Immigrant Health Care in the Age of Welfare Reform* (New York: New York University Press, 2011).

92 See *Can. IRPR*, *supra* note 69 ss 132(1)(b), 132(2)(a)–(d); *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 76 (the sponsors are obliged to pay back any social support accessed by their relatives, even if the relationship with the sponsored persons breaks down completely).

93 John Vrachnas et al, *Migration and Refugee Law: Principles and Practice in Australia* (Cambridge: Cambridge University Press, 2005) at 44.

port parents lasts for ten years as well.[94] The United Kingdom's requirement of five years of support and sponsorship is quite light by comparison[95]—but as we shall see, that is because sponsoring adult dependents is close to impossible in any case.[96]

Recently, income requirements have been raised to significantly more than the national average – sponsoring parents and relatives is becoming increasingly a privilege of the rich. Canada is the exception, where sponsors of spouses and children only have to prove the "minimum necessary income" for subsistence in a city of 500,000 or more, as calculated by Statistics Canada, for the last three years before sponsorship: this works out to around CA$33,000 for a household of two, plus CA$7000 to CA$8000 for each additional person.[97] For sponsoring parents or grandparents, though, the required income is 130 per cent of the minimum necessary income:[98] significantly higher, but still below the national average of around CA$55,000.[99] In New Zealand, by contrast, the minimum income necessary to sponsor one's parents was raised in 2019 to *twice* the median income (currently NZ$53,040 per annum) for sponsoring one parent, and *three times* the median income to sponsor both parents.[100]

The Australian solution sidesteps the issue of income levels by demanding that sponsors post a bond for a pre-set amount, depending on the years of required sponsorship and the number of people sponsors. To sponsor parents, the amounts vary from AU$10,000 to AU$20,000, depending on whether a person or an organization is giving the assurance of support, and whether one or two people are being sponsored.[101] Australia is also exceptional in having introduced "contributory visas" for parents: this type of visa requires the sponsor to pay a set amount up front as part

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94 See INZ Op. Man., *supra* note 69 at para F4.35 (b).

95 See UK, Home Office, *Immigration Rules Appendix FM: family members* (22 August 2022, updated 25 February 2016) (London, UK: Home Office, 2016), s E-ECDR 3.2 [*UK IR App FM*].

96 See *infra* notes 152–56 and accompanying text.

97 See *Can. IRPR*, *supra* note 69 ss 2 ("minimum basic income"), 133(1)(j)(i), 134.

98 See *ibid* at ss 133(1)(j)(i)(A)–(B).

99 See Statistics Canada reports on payroll employment, earnings and hours at <www150.statcan.gc.ca/n1/dai-quo/ind1-eng.htm> [perma.cc/SQT5-MGNT].

100 Immigration New Zealand, "Operational Manual Residence: Part 1" (2021) at para 4.40.5, online (pdf): *Immigration New Zealand* <www.immigration.govt.nz/documents/ops-manual/residence.pdf>.

101 See Services Australia, "Bank Guarantee and Term Deposit" (last modified 1 July 2022), online: *Moving to Australia* <www.servicesaustralia.gov.au/bank-guarantee-and-term-deposit-for-assurance-support?context=22051>.

of the visa costs, as a projected, averaged fee for future healthcare costs.[102] Currently, this contribution is AU$43,600 for each parent,[103] which is somewhat less than the median yearly income of AU$52,338.[104] One can sponsor one's parent in instalments, so to speak, by first sponsoring a temporary contributory visa for AU$29,130 and two years later switching to a permanent contributory visa for AU$19,420.[105] Theoretically, one need not pay for the contributory visas, and can instead apply for a "regular" parental immigration visa. However, contributory visas have a current processing period of 12 years;[106] whereas non-contributory visas have a current estimated processing period of *29 years*.[107] This means that contributory visas already take an excruciatingly long time to receive, but non-contributory visas are basically impossible to receive within the lifetime of an aged parent.

2. What Does Sponsorship Cover?

Threshold income amounts and numbers of years are only half the story, however. The meaning of sponsorship itself changes from country to country, from only having to cover social security payments to every sort of expense that may arise with regard to the sponsored relative. Here too, the Canadian regulation is the most lenient. In Canada, sponsorship only "obliges the sponsor to reimburse His Majesty in right of Canada or a province for every benefit provided as social assistance to or on behalf of the sponsored foreign national and their family members ..."[108] "Social assistance" refers to cash transfers and *in specie* benefits such as "food, shelter, clothing, fuel, utilities, household supplies [and] personal requirements," but it crucially does not include publicly funded health

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[102] Vrachnas et al, *supra* note 93 at 70–73.

[103] See Australian Government Department of Home Affairs, "Fees and Charges for Live Visas" (last modified: 13 July 2022), online: *Immigration and Citizenship* <immi.homeaffairs.gov.au/visas/getting-a-visa/fees-and-charges/current-visa-pricing/live> at 19j-viii [AU Home Affairs Fees and Charges for Visas].

[104] See Australian Bureau of Statistics, "Personal Income in Australia, 2014–15 to 2018–19" (16 December 2020), online: *Labour – Earnings and Working Conditions* <www.abs.gov.au/statistics/labour/earnings-and-working-conditions/personal-income-australia/2011-12-2017-18>.

[105] See AU Home Affairs Fees and Charges for Visas, *supra* note 103 at 19k–iii and 19j–i.

[106] See Australian Government Department of Home Affairs, "Visa Processing Times" (last modified: 6 September 2022), online: *Immigration and Citizenship* <immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates> [AU Home Affairs Visa Processing Times].

[107] See AU Home Affairs Visa Processing Times, *supra* note 106.

[108] *Can. IRPR*, *supra* note 69 at s 132(1).

care.[109] In Australia, the "assurance of support" likewise only covers social security payments that the sponsored relative accesses during the sponsorship period.[110] In the United Kingdom, the sponsor must confirm "that the applicant will have no recourse to public funds, *and* that the sponsor will be responsible for their maintenance, accommodation and care."[111] In New Zealand, sponsorship not only means the accommodation and maintenance of the sponsored relative, but also the obligation to pay the costs of repatriation or deportation.[112]

B. Health Risks and Access to Healthcare

Restrictions that limit immigration to those who are healthy date back to 1865 in Canada,[113] 1899 in New Zealand[114] and 1901 in Australia.[115] However, the substantive requirement of good health has also changed near the end of the last century, making it more restrictive for elderly people over time.

1. The Turn to an Economic Model of Immigrant Health

When discussing the state's desire to exclude sick migrants, it is worthwhile to look at two slightly different motivations: the desire to preserve public health by avoiding mass infections carried by travelers ("the medical model"); and the desire to preserve (cheaper) public healthcare by denying access to healthcare for migrants with non-infectious or non-life threatening diseases ("the economic model").[116] The medical model was predominant for traditional settler regimes, which typically only denied entry to persons with infectious or "loathsome" diseases, and permanent mental or physical disabilities. The economic model has been created by modern settler regimes and taken over by at least some non-immigrant regimes. The medical model, the economic model, and the public charge rule overlap to a large extent, but the medical model and the public charge rule together still allow the entrance of elderly people with chronic

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[109] *Ibid* at s 2 ("social assistance").

[110] *Social Security Act 1991* (Austl), 1991/46, s 1061ZZGG.

[111] *UK IR App FM*, *supra* note 95, s E-ECDR 3.2 [emphasis added]. See also *ibid*, s E-ECDR 3.1 (requiring proof of adequate maintenance, accommodation and care).

[112] See *NZ Immigration Act*, *supra* note 7 at s 48(3)(ii)–(iv).

[113] See *An Act Respecting Emigrants and Quarantine*, RSC 1859, c XL, ss 8, 10–11; see also *Immigration Act*, RSC 1906, c 93, ss 26–27.

[114] See *The Immigration Restriction Act 1899* (NZ), 1899/33, 63 Vict 115 at s 3(2)–(3).

[115] *Immigration Restriction Act 1901* (Austl), 1901/17, s 3 (b)–(d).

[116] See Judith Mosoff, "Excessive Demand on the Canadian Conscience: Disability, Family and Immigration" (1999) 26:2 Man LJ 149 at 165, 167.

illnesses or moderate disabilities, as long as they had support from family members or had the means to support themselves.[117] The economic model, however, excludes those who *could* become a burden on the public health system, without actually being "public charges."

Here again, the United States has kept regulations that are closest to the traditional settler state model. The U.S. excludes persons who have "a communicable disease of public health significance,"[118] those who have not been vaccinated against certain preventable diseases;[119] and persons with physical or mental disorders that "may pose, or has posed, a threat to the property, safety, or welfare of the alien or others."[120] No mention is made of healthcare costs or expensive disabilities—those are regulated within the framework of the public charge rule.[121]

Modern settler states and many non-immigrant states have publicly funded general health insurance systems, and preventing immigrants from accessing these systems upon arrival became a political priority from the 1970s onwards. Modern settler states have extended the economic model to cover not only disabilities and acute, contagious diseases, but any health condition that *may likely* cause *excessive* health expenditures, howsoever defined. Canada was the first to change, when in its 1976 Immigration Act, it did away with the crude and ableist language of keeping out "idiots, imbeciles or morons," "immigrants who are dumb, blind or otherwise physically defective," epileptics and those suffering from "any contagious or infectious diseases."[122] The new language, more elegant and bureaucratic, banned persons "whose admission would cause or might reasonably be expected to cause excessive demands... on health or prescribed social services."[123]

"Excessive demand" has a double definition in the Canadian immigration regulations. Firstly, above average costs: "a demand... for which the

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117 See Constance MacIntosh, "Medical Inadmissibility, and Physically and Mentally Disabled Would-be Immigrants: Canada's Story Continues" (2019) 42:1 Dal LJ 125 at 130. See also Mosoff, *supra* note 117 at 157–59; Jennifer S Kain, *Insanity and Immigration Control in New Zealand and Australia, 1860-1930* (Cham, Switzerland: Palgrave Macmillan, 2019).

118 *8 U.S. Code Chapter 12 (Immigration and Nationality)*, *supra* note 34 at s 1182(a)(1)(A)(i).

119 The list currently includes mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, but does not include Covid-19. See *ibid* at s 1182(a)(1)(A)(ii).

120 *Ibid* at s 1182(a)(1)(A)(iii)(I).

121 See *supra* notes 80–91 and accompanying text.

122 See *Immigration Act,* SC 1952, c 42, ss 5 (a)–(c).

123 See *Immigration Act, 1976-1977*, c 52, s 19(1)(a)(ii).

anticipated costs exceed triple the average Canadian per capita health services and social services costs over a period of five [or for long-term diagnoses, ten] consecutive years..."[124] Secondly, increased waiting lists: "a demand... that would add to existing waiting lists and would increase morbidity or the rate of mortality in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents."[125]

Health-based restrictions that are understood as higher than average healthcare costs clearly militate against the immigration of elderly persons in general.[126] It is well known that health expenditures are strongly correlated with age: "annual costs for the elderly are approximately four to five times those of people in their early teens."[127] Even within elderly populations, healthcare costs rise sharply with age: "The oldest group (85+) consumes three times as much health care per person as those 65–74, and twice as much as those 75–84."[128]

Australia followed the turn to the economic model in the 1994 Migration Regulations, whereby a medical officer had to attest that applicants did not need "significant care or significant treatment (or both)," or "care or treatment (or both) involving the use of community resources *in short supply*."[129] By the end of 1995, the criterion about resources in short supply was replaced by a subsection prescribing any health condition that would "prejudice the access of an Australian citizen or permanent resident to health care or community services."[130] From the middle of 2000, the further caveat was added that access and costs are to be calculated "*regardless of whether the health care or community services will actually*

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[124] Currently calculated at CA$25,689 per annum per Canadian: see "Excessive demand on health services and on social services" (last modified 4 October 2022), online: *Government of Canada* <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/medical-requirements/refusals-inadmissibility/excessive-demand-on-health-social-services.html#application>.

[125] *Can. IRPR*, *supra* note 69 at s 1 ("excessive demand")(b).

[126] Exceptions are created for refugees, so as not to violate Canada's obligations: see *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 art 24(1)(b) (entered into force 22 April 1954, accession by Canada 4 June 1969); *Can. IRPA*, *supra* note 73 s 38(1).

[127] Berhanu Alemayehu & Kenneth E Warner, "The Lifetime Distribution of Healthcare Costs" (2004) 39:3 Health Services Research 627 at 627.

[128] *Ibid* at 628.

[129] *Migration Regulations*, *supra* note 62, Schedule 4, clauses 4005(1)(c)(i)–(ii), 4007(1)(c)(i)–(ii) (version in force between July 28 and September 20, 1994; emphasis added).

[130] *Ibid* Regulation 2.15(1)(e)(ii). (version in force between November 1, 1995 and April 1, 1996)

be used in connection with the applicant."[131] The commitment to calculating costs and benefits is replaced with the mere possibility of a certain illness developing in such a way as to later impose costs.

According to the Australian courts, "[t]he 'person' referred to... is not the applicant but a hypothetical person who suffers from the disease or condition which the applicant has. ... It is not a prediction of whether the particular applicant will, in fact, require health care or community services at significant cost to the Australian community."[132] Applicants with serious conditions such as HIV-AIDS, who are themselves dealing well with the illness and are unlikely to impose significant or even any health costs on Australia, still have their applications denied regularly.[133] Since the regulation requires a decision based on probable or possible costs, "rather than on what a person will actually consume, it has become virtually impossible for individuals with serious diseases and conditions...to obtain visas permitting long-term stay in Australia."[134]

New Zealand similarly requires that all immigrants, including elderly immigrants "have an acceptable standard of health"[135] defined as being "unlikely to be a danger to public health; and unlikely to impose significant costs or demands on New Zealand's health services."[136] A medical assessor must decide whether an applicant is likely to impose significant costs on healthcare, set at NZ$81,000.[137] An additional list of severe and chronic medical conditions—some of which are quite common in old age, such as dementia, cardiac diseases, arthritis or cancer—are deemed by

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[131] *Ibid* Schedule 4.1 Clause 4005(1)(c)(ii).(version in force between July 1, 2000 and November 1, 2000, and all subsequent versions; emphasis added). See also Mary Crock & Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Annandale: Federation Press, 2011) at 155–64.

[132] See *Imad v Minister for Immigration & Multicultural Affairs*, [2001] FCA 1011 at para 13.

[133] See *Minister for Immigration and Multicultural and Indigenous Affairs v X,* [2005] FCAFC 209; *Mai v Minister for Immigration & Anor.*, [2016] FCCA 2901. See also *Han v Minister for Home Affairs*, [2019] FCA 331. A strand of Australian cases have questioned the reasonableness of the "hypothetical person's" health assessment, which does not take into account the individual applicant's general conditions. See *Inguanti v Minister for Immigration and Multicultural Affairs*, [2001] FCA 1046 [*Inguanti*]; *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] FCA 1626. Nevertheless, the reasoning of these cases does not seem to have been picked up by courts in later cases, even though the decisions themselves are cited.

[134] Crock & Berg, *supra* note 132 at 164.

[135] See INZ Op. Man., *supra* note 69 at para A4.10 (a).

[136] See *ibid* at paras A4.10(b) (i)–(ii).

[137] See *ibid* at para A4.10.2.

law to impose significant cost or demand, without the chance to prove personal exceptions.[138]

2. Individualized Assessment vs. the Possibility of Excessive Cost

An important question in taking the economic model seriously is whether it is, in effect, just another wealth/income test that is focused on healthcare costs specifically. Is a chronically ill or disabled immigrant who has private health insurance, or just sufficient wealth in general to offset all healthcare costs, still inadmissible? In Australia, as we have seen, the answer is yes. In *Inguanti v Minister for Immigration and Multicultural Affairs*, the sponsor's elderly brother, Mr. Urso "had very significant [sic] intellectual disability and required supervision with personal hygiene and other activities of daily living."[139] Although Heerey J held for the applicants, he did so by disputing the evidence about Mr. Urso's level of disability: he affirmed that "the whole thrust of cl 4005(c) is that the question of whether or not public funds will be incurred in looking after the particular applicant is irrelevant."[140] The fact that Mr. Urso had "A$420,000 held in a trust account for his benefit" and that the sponsor "had a family which comprised of five adult children who would always look after Mr Urso and would always have accommodation available for him,"[141] was irrelevant for the decision.

In New Zealand, the decision to refuse entry to those who can pay for their own care despite their ill health, is baked into the immigration regulations. "The ability of a person or organisation to pay for health services, pharmaceuticals, or residential care...; access to the private health system; ...possession of health insurance [and] [t]he capacity of family, friends, or a charitable organisation to provide care"[142] are all deemed irrelevant for deciding whether an applicant will impose significant costs or demands on health services. Here too, the possibility of sponsoring relatives is denied even for those whose healthcare is assured through private means.

Canadian case-law, by contrast, has affirmed that "without consideration of an applicant's intention and ability to pay for social services, it is

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[138] See *ibid* at para A4.10.1. Significantly, the list includes many conditions which appear almost exclusively in old age (dementia, Alzheimer's disease, Parkinson's disease, cerebral palsy), or which are more likely to develop in old age (cancers, cardiac diseases, musculoskeletal diseases including osteoarthritis, lung diseases).

[139] *Inguanti*, *supra* note 134 at para 4.

[140] *Ibid* at para 11.

[141] *Ibid* at para 7.

[142] See INZ Op. Man., *supra* note 69 at para A4.10.2 (d).

impossible to determine realistically what 'demands' will be made on Ontario's social services."[143] Therefore, "the medical officers must necessarily take into account ... the availability, scarcity or cost of publicly funded services, along with the willingness and ability of the applicant or his or her family to pay for the services."[144] Curiously enough, the "entrance for the rich only" approach taken by Canada is the most humane one by comparison.

C. Immigration as the Ultimate Necessity

Financial and health-based restrictions, as we have seen, are effective at keeping out the "wrong" kind of (elderly) immigrant. For some reason, for some countries, this was not enough, and the immigration of (grand)parents could only be justified if that was the only way for the elderly relative to receive care. This is certainly true of non-immigrant regimes (the United Kingdom, Latvia and Finland are shown as examples below),[145] but New Zealand and Australia have also created similar rules.

A relatively mild version of this type of conditionality is the Australian "balance of family" test. The "balance of family" means that the parent in question has a "greater or equal" number of children who are Australian citizens or residents, than children who are residents of other countries.[146] That is, parents are only allowed to join their Australian children, if they have fewer (or no) children elsewhere who could take care of them. A strict and simplistic numerical count of children determines the right to immigrate to Australia, "even if the Australian child is in a better position to support the parent than her or his siblings overseas, and/or if the parent has lost any rapport with the children overseas."[147]

Other rules police (grand)parents' family structures, to only allow immigration if the parents are uncared for or lonely in specific ways. In

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[143] *Hilewitz v Canada (Minister of Citizenship and Immigration); De Jong v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57 at para 54.

[144] See *ibid* at para 55. See also *Canada (Citizenship and Immigration) v Colaco*, 2007 FCA 282.

[145] See *Angela and Rodney Price v the United Kingdom* (1988), ECHR (Ser A) [*Price*]; *Slivenko v Latvia* [GC], No 48321/99, [2003] ECHR 229 [*Slivenko*]; *Senchishak v Finland* [GC], No 5049/12, [2014] [*Senchishak*]; *BRITCITS v United Kingdom (Secretary of State for the Home Department)*, [2017] EWCA Civ 368 [*BRITCITS*]; *Kugathas v United Kingdom (Secretary of State for the Home Department)*, [2003] EWCA Civ 31 [*Kugathas*]; *Singh v United Kingdom (Secretary of State for the Home Department)*, [2015] EWCA Civ 630 [*Singh*]; see *infra* notes 152–56, 220 and accompanying text.

[146] *Migration Regulations*, *supra* note 62 sec 1.05(2C).

[147] Crock, *supra* note 37 at 84, citing *Re Ramadhar* (IRT 172, 19 June 1991) and *Re Kelley* (IRT 331, 23 September 1991).

New Zealand immigration law, "[a]pplicants under the Parent Category must not have any dependent children"[148] in addition to the sponsoring children—that is, any other children who are under 20 years of age, or between 21 and 24 years of age but reliant upon the parents financially.[149] This rule betrays a fear of "chain migration," whereby the dependent children could then also enter New Zealand, then sponsor a spouse or their other parent, and so on. UK immigration law, by contrast, bans elderly relatives from remarrying or living in a relationship other than with the sponsor's other (grand)parent.[150] The not-so-subtle message is that if there any other children in the world who can take care of the elderly parents, they should be the ones to do so, not the would-be sponsoring children in Australia or New Zealand.

The harshest version of this type of dependency test has entered into force in 2012 in the UK. According to section E-ECDR 2.4 and 2.5 of the UK Immigration Rules, parents and grandparents may only immigrate to the UK if "as a result of age, illness or disability [they] require long-term personal care to perform everyday tasks"[151] *and* they are "unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living."[152] This requires immigrants to effectively prove a negative: why and how it is impossible, or no longer possible, to provide financial and healthcare wherever the (grand)parent is currently living.[153] The applicants have to account for the unavailability of not only close and more distant family members, but also the inaccessibility of a "friend or neighbour; or ... home-help, housekeeper, nurse, carer or care or nursing home."[154] As both professional commentators[155] and would-be sponsors pointed out, this is basically impossible. A

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148 See INZ Op. Man., *supra* note 69 at para F4.30.5.

149 See *ibid* at para F4.20.1 (definition of "dependent child").

150 See *UK IR App FM*, *supra* note 95, s E-ECDR 2.2 ("If the applicant is the sponsor's parent or grandparent they must not be in a subsisting relationship with a partner unless that partner is also the sponsor's parent or grandparent and is applying for entry clearance at the same time as the applicant").

151 *Ibid*, s E-ECDR 2.4.

152 *Ibid*, s E-ECDR 2.5; UK, Home Office, "Family Policy: Adult Dependent Relatives, Version 3.0" (24 January 2022) at 10, online (pdf): *Government of the United Kingdom* <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825698/ Adult-Dependent-Relatives-August-2017ext.pdf>.

153 See UK, Home Office, *Immigration Rules Appendix FM-SE: family members specified evidence* (25 February 2016, updated 22 August 2022) (London, UK: Home Office, 2016), ss 34–37.

154 See Home Office, *Family Policy*, *supra* note 153 at 13.

155 See Colin Yeo, "The Immigration Rules for Adult Dependent Relatives: Out with the Old..." (8 November 2017), online: *Free Movement* <freemovement.org.uk/out-with-the-old/>.

would-be sponsor also has to prove that they would be financially able and willing to take care of their parent within the UK, while proving that it is impossible to find and finance private care for them in the place of residence.

IV. Chipping Away at the Family Class: Parents as Tourists and Investors

Having seen the myriad ways in which elderly dependent relatives are turned away, is there any alternative that modern settler states actually offer to residents who want to be reunited with their parents? The countries under consideration do not exactly forbid foreigners from seeing their adult children or minor grandchildren. Nor do they openly argue that families are "anachronistic," that "friends are the new family," or that globally dispersed Skype-families are the new normal.[156] But they do introduce new visa classes that reclassify elderly relatives as tourists or investors, far away from the expectations of solidarity and settlement that were at the heart of the family class.

"Tourist-type" temporary visas do allow parents to visit their (grand)children but without any protections against deportation or any right to receive publicly funded healthcare. These temporary parental visitor visas also require the parents to reapply for a renewed visa every few years, thereby requiring them to continuously comply with the financial, health, security, and other restrictions that every visa application entails. Canada's "Parent and Grandparent Super-Visa" is a prime example.[157] The "super visa" is "super" because of its extended validity: it may be granted for up to ten years, and it allows the holder to stay in Canada for up to five years continuously without having to leave the country.[158] At the same time, it requires the same amount of financial sponsorship from the Canadian (grand)children as an immigrant visa application would,[159] the same health examination but also the purchase of a Canadian private medical insurance policy that is valid for at least one year, for a coverage value of at least CA$100,000.[160] Furthermore, as with any visitor visa, the

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156 *Cf* Iseult Honohan, "Reconsidering the Claim to Family Reunification in Migration" (2009) 57:4 Political Studies 768 at 775.

157 See "Super Visa (for Parents and Grandparents): About the Document" (last modified 4 July 2022), online: *Government of Canada* < https://www.canada.ca/en/immigration-refugees-citizenship/services/visit-canada/parent-grandparent-super-visa/about.html> [Super Visa]. See also Sharryn Aiken et al, *Immigration and Refugee Law: Cases, Materials and Commentary*, 3rd ed (Toronto: Emond, 2020) at 838–39.

158 See Super Visa, *supra* note 158.

159 See *ibid; Can. IRPR*, *supra* note 69 at ss 2 ("minimum necessary income"), 133(1)(j)(i)(A)–(B), 134; *supra* notes 97–98 and accompanying text.

160 See "Super Visa, *supra* note 158.

issuing officers can reject any application based on "your ties to your home country; your family and finances; [and] the overall economic and political stability of your home country."[161] Because visitor visas are temporary, the conditions, the fees, and the administrative procedures have to be kept up and repeated at each new application, resulting in similar costs and fewer rights for those holding a visitor visa.

The Australian Sponsored Family Stream Visitor Visa, a twelve-month temporary family reunification visa, is similar in its design. The Australian Government touts the low application fee (AU$190) and fast processing times ("75% of applications: 20 days; 90% of applications: 30 days") on the informational website of the visa stream[162]—in contrast with the lack of advertisement about the twenty-nine-year waitlist for the Aged Parent Visa.[163] As with the permanent immigration visa, though, "we might ask your sponsor to pay a security bond"[164] and good health and private health insurance are both necessary.[165] The Australian Sponsored Parent (Temporary) Visa is the deluxe version, close to a copy of the Canadian super visa: higher costs (AU$5735 or 11,470), faster processing times (within 6 months for 90 per cent of applicants), longer validity (three or five years).[166] The New Zealand Parent and Grandparent Visitor Visa, which has a three-year validity but only allows up to eighteen months of presence in New Zealand during these three years (and no more than six months continuously), also carries its purpose in its

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161 *Ibid.*

162 "Visitor Visa (Subclass 600), Sponsored Family Stream: Overview" (last modified 1 July 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/visitor-600/sponsored-family-stream#Overview> [Australian Visitor Visa].

163 See "Visa Processing Times: Family Visa Processing Priorities" (last modified 6 September 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates.

164 See Australian Visitor Visa, *supra* note 162.

165 See "Sponsored Family Stream: About this Visa" (last modified 1 July 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/visitor-600/sponsored-family-stream#Eligibility> and "Sponsored Family Stream: Eligibility" (last modified 1 July 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/visitor-600/sponsored-family-stream#Eligibility >.

166 See "(Subclass 870) Sponsored Parent (Temporary) Visa: Overview" (last modified 29 August 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/sponsored-parent-temporary-870#Overview> and "(Subclass 879) Sponsored Parent (Temporary) Visa: About this Visa" (last modified 29 August 2022), online: *Australian Government Department of Home Affairs* <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/sponsored-parent-temporary-870#About>.

name.[167] The United Kingdom is again the exception, having only a flexible General Visitor Visa program and not advertising the visitor visa's alleged suitability for elderly family members.[168]

"Investor-type" parental visas, somewhat like the Australian contributory visas described above,[169] require applicants to prove considerable funds and invest substantial amounts in the destination country, as preconditions to immigration. While "investor immigrant" and "citizenship for sale" programs are increasingly popular worldwide,[170] New Zealand is likely the first country to combine them with family reunification. The general description for the New Zealand Parent Retirement Resident Visa mentions New Zealand family members as a minor precondition but is clearly focused on the financials:

> Your child must be a New Zealand citizen or resident... Your child must live in New Zealand.... You must have NZ $1 million or more to invest in New Zealand for 4 years... You must transfer your investment funds to New Zealand... You must have at least NZ $500,000 [for settlement funds]... You must have an annual income of NZ $60,000 or more... Your partner must meet the requirements of this visa.[171]

Unsurprisingly, the NZ Parent Retirement Resident Visa is not too successful at uniting families: since its introduction in 2012,[172] there have never been more than seventy-eight approved applications in a year, and, in most years, that number has been under a hundred.[173]

Finally, most immigration laws also allow admission into the country under the discretion of the minister, the attorney general, or another

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167 See INZ Op. Man., *supra* note 69 at para V3.110.5.

168 See generally UK, Home Office, *Immigration Rules Appendix V: Visitor* (25 February 2016, updated 22 August 2022) (London, UK: Home Office, 2016).

169 See *supra* notes 102–105 and accompanying text.

170 See Christians, *supra* note 4 at 58–62. See generally Surak, *supra* note 4.

171 See "Information About Parent Retirement Resident Visa" (last modified 2022), online: *New Zealand Immigration* <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/parent-retirement-resident-visa> and "Meeting the Criteria" (last modified 2022), online: *New Zealand Immigration* <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/criteria/parent-retirement-resident-visa?nationality=nationality-CAN&country=residence-CAN>; INZ Op. Man., s*upra* note 69 at paras F3.1–F3.35.20.

172 Richard Bedford & Liangni (Sally) Liu, "Parents in New Zealand's Family Sponsorship Policy: A Preliminary Assessment of the Impact of the 2012 Policy Changes" (2013) 39 NZ Population Rev 25 at 29–31.

173 "Statistics: Residence Decisions by Financial Year" (5 October 2022) at 4, online (pdf): *New Zealand Immigration* <www.immigration.govt.nz/documents/statistics/statistics-residents-decisions-financial-year.pdf>.

high-ranking government official.[174] In Canada, this discretionary power, known as the Minister's Humanitarian & Compassionate (hereinafter: H&C) power, has been used from time to time to grant permanent residence to grandparents who are the *de facto* primary caretakers of their grandchildren.[175] Since *Baker v Canada*, however, H&C decisions have been focused on the best interests of the child (i.e., immigrant or Canadian-born children who would be left without a caretaker, if the caretaking family member were to be deported or rendered inadmissible).[176] H&C powers are therefore not a reliable path to immigration, and I argue that it reinforces the slow loss of rights that elderly family members are facing.

V. Justifying the Restrictions on Elderly Relatives' Immigration

A. (The Lack of) Political Justifications

The political rhetoric of immigration restrictions, or lack thereof, is also curious. The restrictions of asylum-seekers and family-based immigration, in general, have been accompanied by a loud, bitter, and cynical right-wing rhetoric of denouncing "criminal refugees," "queue-jumpers," "anchor babies," "chain migration," "undeserving" welfare-seekers, and the other tropes of the anti-immigration right.[177] The discursive tropes utilized have been microscopic investigations of all emotional and monetary claims by migrants, a baseline of deep suspicion, an expectation of continuous revelations of fraud, and a payoff of disgust, anger, and fear.[178]

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[174] See e.g. *8 U.S. Code Chapter 12 (Immigration and Nationality)*, *supra* note 34 at s 1182(d)(5)(A); Can. IRPA, *supra* note 73 ss 25(1), 25.2(1); *NZ Immigration Act*, *supra* note 73 at ss 61, 378(1); *Aus MA*, *supra* note 73, ss 351, 417.

[175] See e.g. *Gill v Canada (Citizenship and Immigration)*, 2010 CA IRB TA8-01394 [*Gill*]; *Thomas v Canada (Citizenship and Immigration)*, 2019 CA IRB TB8-11311 [*Thomas*].

[176] See e.g. *Gill*, supra note 175 at para 3; *Thomas,* supra note 175 at para 17;*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69–75, 174 DLR (4th) 193 [*Baker*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 34–41.

[177] See generally Rosemary Sales, "The Deserving and the Undeserving? Refugees, Asylum Seekers and Welfare in Britain" (2002) 22:3 Critical Social Policy 456; Katherine Gelber, "A Fair Queue? Australian Public Discourse on Refugees and Immigration" (2003) 27:77 J Austl Stud 23; Matthew Cameron, "From 'Queue Jumpers' to 'Absolute Scum of the Earth': Refugee and Organised Criminal Deviance in Australian Asylum Policy" (2013) 59:2 Australia J Politics & History 241 at 243–44.

[178] See Anne-Marie D'Aoust, "A Moral Economy of Suspicion: Love and Marriage Migration Management Practices in the United Kingdom" (2018) 36:1 Environment & Planning D: Society & Space 40 at 42–43, 45–49; Irene Gedalof, *Narratives of Difference in an Age of Austerity* (London: Palgrave Macmillan, 2018) at 141–167.

None of these tropes have been directed against elderly relatives, and indeed it would be hard to make them stick. Elderly people are highly unlikely to commit crimes, compared to young persons.[179] Parents are also unlikely agents of "chain migration," even without "balance of family"-type rules, as no countries accept sponsorship of adult children. In general, the elderly bring the least amount of risk or danger with them, wherever they migrate. None of this has made the move against elderly immigration any less global, or any less comprehensive.

The rhetoric accompanying the policy changes is an almost invisible but ever so pervasive econocentrism, manifesting in slogans such as "user pays" and "cost-free immigration."[180] The argument is that the sole purpose of any national immigration policy should be financial gain. As Martin Collacott argues in the Canadian context, "it should be emphasized that there is nothing wrong in principle with wanting to bring in one's extended family so that they may benefit from the economic opportunities available... The fact is, however, that immigration policy is supposed to be based on economic benefit to Canada."[181] Economic benefit as a foundation of immigration policy is of course a highly contentious and rather narrow-minded proposition, given the multi-generational and nation-(re)constituting nature of immigration. Nevertheless, this is the policy thought that is gaining ground since the 1990s;[182] and it deems budgetary savings of as little as GB£ ten million/year worthy of implanting draconian restrictions on elderly relatives' immigration.[183]

The arguments based on pure economic rationalism are unconvincing based on several grounds. First and foremost, they fail empirically: statistical studies of elderly immigrants who arrived in Canada before the 2011 restrictions show that average family income for these immigrants' fami-

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[179] See David O Moberg, "Old Age and Crime" (1953) 43:6 J Crim L Criminology & Police Science 764 at 768–69; Herbert C Covey & Scott Menard, "Trends in Arrests Among the Elderly" (1987) 27:5 Gerontologist 666 at 667–68. Current Canadian criminal statistics show that about 20% of all guilty sentences are handed down to defendants above 45 years of age: see "Adult Criminal Courts, Guilty Cases by most Serious Sentence" (last modified 22 October 2022), online: *Statistics Canada* <https://www150.statcan.gc.ca/t1/tbl1/en/cv!recreate.action?pid=3510003101&selectedNodeIds=1D1,3D2,3D3,3D4,3D5,3D6&checkedLevels=1D1,2D1,3D1,4D1,5D1&refPeriods=20180101,20190101&dimensionLayouts=layout2,layout2,layout3,layout2,layout2,layout3,layout2&vectorDisplay= false>.

[180] See Jupp, *supra* note 20 at 141–44, 151–53.

[181] Martin Collacott, *Canada's Immigration Policy: The Need for Major Reform*, 2nd ed (Vancouver: The Fraser Institute, 2003) at 19.

[182] See Antje Ellerman, "Human-Capital Citizenship and the Changing Logic of Immigrant Admissions" (2020) 46:12 J Ethnic & Migration Studies 2515.

[183] See United Kingdom, Home Office, *Changes to Family Migration Rules*, (Impact Assessment), No HO0065, (London: Home Office, 6 December 2012) at 34.

lies is a mere CA$475 less than the average family income of younger immigrant families.[184] "Parents and/or grandparents are no more likely to be a drain on the Canadian social welfare system than other people their age, or other immigrants."[185] Elderly immigrants have also been far from inactive after arrival: over two-thirds find employment, become self-employed, or do household work and childcare for their sponsoring children.[186]

Second, the value of household work and childcare in particular (and the time, money, and energy that this liberates for their active, sponsoring adult family members) is left out of almost every econocentric analysis;[187] and where they are accounted for, they are accounted for badly. Martin Collacott argues that "it is difficult to justify such an arrangement if it costs taxpayers $160,000 in health care costs alone during the lifetime of [the immigrating grandparent] in Canada."[188] In fact, it is not that hard to justify. If an immigrating elderly parent saves its sponsoring children just the minimum wage through household work and saving extra childcare costs (currently CA$28,500 per year), such a parent will bring a net benefit to Canada after less than six years of living with her children, even accepting the CA$160,000 cost in healthcare over her remaining lifetime.

Third, there is no consideration of the remittances that adult children send abroad to ensure their parents' well-being—considerable sums that could be spent in the destination country instead. Conversely, there is no accounting of the sums that parents and grandparents bring with them when they join their descendants: their life savings, which may well be negligible in some cases but considerable in others. Finally, the econocentric analyses miss the very real emotional value of having one's loved ones

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184 See Madine VanderPlaat, Howard Ramos & Yoko Yoshida, "What Do Sponsored Parents and Grandparents Contribute?" (2012) 44:3 Can Ethnic Studies 79 at 85–86.

185 *Ibid* at 86.

186 See *ibid* at 86–90.

187 But see Myra Hamilton, Angela Kintominas & Deborah Brennan, "The Temporary Sponsored Parent Visa, Migrant Grandparents and Transnational Family Life Policy: Brief No. 2" (October 2018) at 1–2, online (pdf): *University of New South Wales Arts* <www.arts.unsw.edu.au> [perma.cc/2ZB2-KJ5Y]; Wei Wei Da, "Transnational Grandparenting: Child Care Arrangements Among Migrants From the People's Republic of China to Australia" (2003) 4:1 J Intl Migration & Integration 77 at 83–94, 96.

188 Martin Collacott, "Canadian Family Class Immigration: The Parent and Grandparent Component Under Review" (November 2013) at 14, online (pdf): *The Fraser Institute* <www.fraserinstitute.org> [perma.cc/ NSH4-4VTQ].

close by and knowing they are well cared for.[189] Econocentrism, as James Jupp summarizes looking at Australia, "is rational but inhumane... [and] incompatible with the family values espoused by the Coalition government."[190]

However, even assuming that one is convinced by the restrictionists, the policy tools erected to combat the economic dangers go beyond all rationality in their *cumulative* harshness. If states are worried about immigrants draining national healthcare systems, why not just prescribe health-based restrictions on immigration? Or, conversely, why not leave behind health-based restrictions and only prescribe private health insurance? If decision-makers are indeed driven by economic rationalism, why lower quota numbers (even for well-off immigrants), or why institute such mindless restrictions as balance of family-rules or limits to elderly immigrants' spouses or dependent children? Having a total lack of arguments, restrictionists currently can only scaremonger using sheer numbers, without giving any reasons *why* the increased number of elderly immigrants would be threatening from any perspective.[191] And yet, further restrictions are still considered from time to time—the New Zealand government deliberated in 2019 whether to deport elderly immigrant parents if their sponsoring children migrated away from New Zealand.[192]

B. (The Lack of) Judicial Justifications: Human Rights, Constitutional Law, and Administrative Law

Challenges to the extreme tightening of elderly immigration before the courts have also been scarce, and always unsuccessful. There have been three types of challenges to the measures described in Part IV above: alleged violations domestic non-discrimination law (often enshrined within the constitution); violations of international human rights law; and violations of administrative law principles, such as clarity, proportionality, and reasonability. All three of these avenues have been overwhelmingly unsuccessful.

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[189] See e.g. James Vo-Thanh-Xuan & Pranee Liamputtong, "What it Takes to be a Grandparent in a New Country: The Lived Experience and Emotional Wellbeing of Australian-Vietnamese Grandparents" (2016) 38:2 Australia J Soc Issues 209.

[190] Jupp, *supra* note 20 at 160.

[191] See e.g. Bob Birrell, "The 2019 Australian Election and the Impending Migrant Parent Deluge" (May 2019), online (pdf): *The Australian Population Research Institute* <www.apo.org.au> [perma.cc/9S52-9V9Q].

[192] See Gill Bonnett, "Cabinet Considered Deporting Parents of Departing Immigrants – Documents", *Radio New Zealand*", *Radio New Zealand* (21 November 2019), online: <https://www.rnz.co.nz/news/political/403779/cabinet-considered-deporting-parents-of-departing-immigrants-documents>.

1. Constitutional Law (and Non-Discrimination Law) on Restrictions on Elderly Immigration

"It is the core and intended function of borders to discriminate."[193] The statement may seem shocking, but in the end it is almost self-evident: immigration law exists to define criteria of selection, and the selection of "worthy" immigrants takes place solely for the benefit of the destination state.[194] Non-discrimination law, by contrast, exists to protect vulnerable and underrepresented groups—groups which often have to be protected *from* administrative measures.

The opposition between non-discrimination and immigrant selection has mostly been resolved in favour of free selection, that is, discrimination, by states. This has been achieved through two avenues: substantively, by only taking discrimination according to race, ethnicity, and religion as "serious" or "true" forms of discrimination; and procedurally, by insulating immigration decisions from constitutional and human rights challenges.

Substantively, racial, ethnicity-based, and religious discrimination have been discussed as practices to be avoided during border controls and security controls by the United States, Canada. and the European Union. However, age has been explicitly mentioned as permissible.[195] Even when discussing the permissibility of discriminatory immigration criteria, age-based discriminatory is naturalized by simply mentioning its existence and its relative benignness compared to racial discrimination, without raising the problematic nature of the age-based discrimination at all.[196] Age-based discrimination is then only discussed as suspect if it is a possible front for religious or racial discrimination.[197] Courts have argued that keeping out the sponsor's family members does not violate the right to a family, because "[the family members] remain free to live with [each oth-

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193 E Tendayi Achiume, "Digital Racial Borders" (2021) 115 AJIL Unbound 333 at 333. See also Dimitry Kochenov, *Citizenship* (Cambridge, Massachusetts: MIT Press, 2019).

194 See Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge, UK: Cambridge University Press, 2008) at 124.

195 See Liav Orgad & Theodore Ruthizer, "Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case" (2010) 26:2 Const Commentary 237 at 238–39, 285–86.

196 *Ibid.* at 285–87.

197 See *ibid*. See also *Trump v Hawaii*, 585 US ___ at 13–15, 26–38 (2018).

er] anywhere in the world that both individuals are permitted to reside."[198]

Procedurally, most states have been careful to insulate their immigration regimes from constitutional challenges, making immigration decisions *de jure* unreviewable. The United States' doctrines of plenary power and consular non-reviewability are the most notorious. According to the so-called plenary power doctrine, "[t]he right to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign nation."[199] Therefore, "[t]he admission of aliens to this country is not a right, but a privilege, which is granted only upon such terms as the United States prescribes,"[200] and "[a]ny procedure authorized by Congress for the exclusion of aliens is due process, so far as an alien denied entry is concerned."[201] Furthermore, the doctrine of consular non-reviewability excludes American courts from hearing claims against consular staff acting abroad, even in violation of American law.[202] Australia has similarly made the acts of "granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa)"[203] a "final and conclusive"[204] decision. The acts "must not be challenged, appealed against, reviewed, quashed or called in question in any court ... and ... is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account."[205]

Although Canadian law does not acknowledge any sort of plenary or exceptional power over immigration, Joshua Blum has argued that the Canadian Supreme Court has nevertheless constructed an analogous doctrine.[206] The "Chiarelli doctrine" is built on *Chiarelli v Canada (Minister of Employment and Immigration)*,[207] *Medovarski v Canada (Minister of Citizenship and Immigration)*; *Esteban v Canada (Minister of Citizenship*

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198 *Kerry v Din*, 586 US 86 at 101 (2015) [*Kerry*]. See also *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at paras 47–48; *Senchishak*, *supra* note 146 at para 54.

199 *Fong Yue Ting v United States*, 149 US 698 at 698 (1893).

200 *United States ex rel Knauff v Shaughnessy*, 338 US 537 at 537 (1950).

201 *Ibid* at 538.

202 See Desirée C Schmitt, "The Doctrine of Consular Nonreviewability in the Travel Ban Cases: *Kerry v Din* Revisited" (2018) 33:1 Geo Immigr LJ 55 at 58–61.

203 *Aus MA*, *supra* note 73, s 474(3)(b).

204 *Ibid*, s 474(1)(a).

205 *Ibid*, s 474(1)(b)–(c).

206 See Joshua Blum, "The *Chiarelli* Doctrine: Immigration Exceptionalism and the *Canadian Charter of Rights and Freedoms*" (2021) 54:1 UBC L Rev 1.

207 [1992] 1 SCR 711, 90 DLR (4th) 289.

and Immigration),[208] and a few other judgments by the Supreme Court of Canada. Together, the cases have erased the relevance of section 7 (right to life, liberty, and security of the person), section 12 (protection from cruel and unusual treatment or punishment) *and* section 15 (equality rights) of the *Canadian Charter of Rights and Freedoms* in the immigration context.[209] "Once a connection to immigration is found, the norms of human rights are replaced by the norms of the border, and the argument for equality becomes non-justiciable."[210]

2. International Human Rights Law on Restrictions on Elderly Immigration

International human rights law has also been unsuccessful as an avenue for challenging immigration restrictions, for reasons similar to constitutional law. Some international human rights instruments explicitly exclude their applicability in an immigration or border control setting.[211] Procedurally, the usual jurisdictional problems involved in litigating breaches of international human rights arise. Domestic fora cannot apply international conventions that have not been incorporated into domestic law;[212] and international fora are usually not granted jurisdiction by the states in question.

Lack of jurisdiction is only part of the problem, as there are at least two international venues which have the power to hear human rights cases against the UK, Australia, Canada, and New Zealand. States that are members of the Council of Europe are parties to the *European Con-*

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[208] 2005 SCC 51.

[209] See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; Blum, *supra* note 205 at 13–47.

[210] Blum, *supra* note 207 at 45–46.

[211] See *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195 arts 1(2)–(3) (entered into force 4 January 1969, ratified by Canada 14 October 1970); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 2(3) (entered into force 3 January 1976, accession by Canada 19 May 1976) [*ICESCR*].

[212] See e.g. the Court of Appeal in England and Wales wrote:

> Australian law does not, however, include a right to challenge a failure to secure the enjoyment of human rights. The domestic law has not incorporated the following relevant treaties to which Australia is a party: the United Nations Convention on the Rights of the Child; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the Convention Relative to the Status of Refugees and its amending Protocol (*"B" v United Kingdom (Secretary of State for the Foreign & Commonwealth Office)*, [2004] EWCA Civ 1344 at para 90).

vention on Human Rights (*ECHR*),[213] and all the other Commonwealth states are parties to the *First Optional Protocol to the International Convention on Civil and Political Rights*, which empowers the Human Rights Committee to hear individual communications from residents of these states.[214]

Substantially, the international case law does not offer much help for elderly family members. The right to be reunited with family members across borders is not explicitly granted by the text of the human rights conventions. Although international human rights instruments protect the right to family life,[215] they also allow for derogations for a wide range of public policy reasons.[216] Finally, "the [European] Convention includes no right, as such, to establish one's family life in a particular country"[217]—and neither do other human rights conventions. The argument is, therefore, the same as in domestic constitutional judgments.[218] In practice, the only claimants who could insist on their right to a family against states' migration laws have been spouses, long-term cohabiting partners, and parents and their dependent children.[219]

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[213] See Council of Europe, CA, *European Convention on Human Rights*, Texts Adopted (1950) at 5 [*ECHR*]; See <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=ntPkDZ3f> for the list of states parties and details about their ratifications.

[214] See *Optional Protocol to the International Convention on Civil and Political Rights*, multilateral, 19 December 1966, 999 UNTS 302 arts 1–5 (entered into force 23 March 1976) UNGA Res 2200A (XXI) and "Status of Ratification Interactive Dashboard: Optional Protocol to the International Covenant on Civil and Political Rights", online: *United Nations Human Rights: Office of the High Commission*. See *Status of Ratification Interactive Dashboard* (last updated 7 October 2022), online: <https://indicators.ohchr.org/> for the list of states parties and details about their ratifications.

[215] See *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 art 16(3); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 23(1) (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]; *ICESCR*, *supra* note 210 art 10(1).

[216] These policy reasons include "national security, public safety... the economic well-being of the country, ...the prevention of disorder or crime, for the protection of health or morals, or... the protection of the rights and freedoms of others," in the language of the *ECHR*. See *ECHR*, *supra* note 212, at art 8(2). See also *ICCPR*, *supra* note 214 art 12(3).

[217] See *Senchishak*, *supra* note 146 at para 54 (the court also cites Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28 May 1985, para. 68, Series A no. 94). See also *Gül v Switzerland* (1996), 1-1996 ECHR 159 (3d) at para 38, 39 YB Eur Conv HR 192; *Boultif v Switzerland*, No 54273/00, [2001] IX ECHR 119 at para 39, 33 EHRR 1179.

[218] *Cf Kerry*, *supra* note 197.

[219] See Alan Desmond, "The Private Life of Family Matters: Curtailing Human Rights Protection for Migrants under Article 8 of the ECHR?" (2018) 29:1 Eur J Intl L 261 at 265–67; Lourdes Peroni, "Challenging Culturally Dominant Conceptions in Human

By contrast, "elderly parents [are] adults who [do] not belong to the core family [if they are not] dependent members of the applicants' family."[220] The degree of dependence that the ECtHR requires echoes British law *avant la lettre*.[221] In *Senchishak v Finland*, a seventy-two-year-old Russian widow overstayed her Finnish visitor's visa and, as an undocumented migrant, moved in with her adult daughter who was a Finnish citizen.[222] Mrs. Senchishak was not only widowed and poor, but also in need of daily care, as she had suffered a stroke two years prior to her move, which left her paralyzed on her right side.[223] The Finnish authorities nevertheless ordered her deportation, and the ECtHR did not find a violation of Article 8 of the ECHR.[224] The Court reasoned:

> Even assuming that the applicant is dependent on outside help in order to cope with her daily life, this does not mean that she is necessarily dependent on her daughter who lives in Finland, or that care in Finland is the only option. As mentioned earlier, there are both private and public care institutions in Russia, and it is also possible to hire external help. ... [T]he applicant's daughter can support her financially and otherwise from Finland... *[T]he Court therefore considers that no such "additional factors of dependence other than normal ties of affection" exist between the applicant and her daughter,* and that there is thus no "family life" between them within the meaning of Article 8.[225]

It is no surprise, then, that challenging British restrictions on the immigration of elderly family members, based on their incompatibility with Article 8 of the *ECHR*, has been unsuccessful.[226] The reasoning of the UN Human Rights Committee is less detailed, but it has similarly found for the state whenever the admissibility of more distant family members, beyond the nuclear family, was brought up.[227]

Rights Law: The Cases of Property and Family" (2010) 4:2 Human Rights & Intl Leg Discourse 241 at 251–163.

220 See Slivenko, *supra* note 146 at para 97. See also *Price*, *supra* note 146.

221 *Cf supra* notes 152–56 and accompanying text.

222 See *Senchishak*, *supra* note 146 at paras 7–10, 37–41, 57.

223 See *ibid* at paras 39–40.

224 See *ibid* at paras 13–20.

225 See *ibid* at para 57 [emphasis added].

226 See *Kugathas*, *supra* note 146 at paras 19–21; *Singh*, *supra* note 146 at paras 24–27; *BRITCITS*, *supra* note 146 at paras 74–76.

227 See *AS v Canada* (1981 twelfth session), HRC Communication 068/1980 at para 5.1; *Sahid v New Zealand* (2003 seventy-seventh session), HRC Communication 893/99 at para 8.2.

3. Administrative Law Principles on the Restriction of Elderly Immigration

Where constitutional claims are unsuccessful or irrelevant, basic principles of domestic administrative law, especially in common law-countries, have sometimes come to the rescue. Landmark common law judgments have allowed courts to disregard or invalidate regulations brought by administrative bodies, including ministers and cabinets, under certain conditions. Regulations are invalid if they exceed the bounds provided by the legislation which authorized their creation;[228] if they are unintelligible or go against the meaning of the authorizing legislation;[229] if the delays in processing applications are unreasonably long;[230] if the regulations are manifestly unjust or exhibit bad faith;[231] or if the procedures they create are fundamentally unfair.[232] Lacking any other options, applicants have been forced to turn to principles of administrative law to challenge the rules that block the immigration of elderly relatives. However, these doctrines are weaker than human rights law: the principle that administrative decisions should be treated with deference is, if anything, a cornerstone of administrative law.[233] Consequently, applicants have also been unsuccessful in challenging restrictions on the immigration of elderly relatives based on administrative law principles.

The 2012 modifications to the UK Immigration Rules, which made immigration by parents and grandparents impossible except in the rarest of cases,[234] was challenged in *BRITCITS v. The Secretary of State for the Home Department*.[235] Sir Terence Etherton MR dismissed all challenges to the immigration rules by stating that the objective of the regulation, "to reduce the burden on the taxpayer for the provision of health and social

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[228] See *Padfield v Minister of Agriculture, Fisheries and Food*, [1968] AC 997 at 998, 2 WLR 924.

[229] See *Associated Provincial Picture Houses Ltd v Wednesbury Corp*, [1948] 1 KB 223 at 229–30, [1947] 2 All ER 680; *Minister for Immigration & Multicultural Affairs v Seligman*, [1999] FCA 117 at paras 54–56.

[230] See *Liang v Canada (Minister of Citizenship and Immigration),* 2012 FC 758 at paras 25, 39-44.

[231] See *Kruse v Johnson*, [1898] 2 QB 91 at 91, 99–100, [1895-9] All ER Rep 105.

[232] See *Baker* v. Canada, *supra* note 176 at paras. 18–-47; *Kioa v. West,* [1985] HCA 81 (Austl) (1985), 159 CLR 550 at 582–83, 593, 612, 632.

[233] See e.g. Michael Taggart, "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" (2005) 55:3 UTLJ 575 at 608–613; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012) at 17–37; *Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159 at para 35; *Baker v. Canada*, *supra* note 176, at para. 53.

[234] See *supra* notes 152–56 and accompanying text.

[235] See *supra* note 146.

care services to those [adult dependent relatives] whose needs can reasonably and adequately be met in their home country,"[236] is fair, reasonable, and has received Parliamentary approval.[237] Nor is it impossible to fulfill, because a debated number of applications (somewhere between 2 and 234) had in fact succeeded between 2012 and 2015.[238] In the judge's words, "[t]rue it is that significantly fewer dependants, including parents, will be able to satisfy the new conditions but that was always the intention."[239]

Ali Vahit Esensoy's case against the Canadian regulations that precluded him from sponsoring his 63-year-old mother went no better.[240] Mr. Esensoy's challenge followed the 2-year suspension of all processing and accepting all parental and grandparental category visas in November 2011, when the backlog faced by Immigration Canada was over 165,000 cases, and the projected waiting times exceeded six years.[241] Mr. Esensoy argued that the suspension exceeded the Minister of Immigration's delegated powers, according to which he may "give instructions ... setting the number of applications ... to be processed in any year."[242] In 2011, the Minister set the number of acceptable applications at zero and thereby suspended Canadians' statutory right to sponsor their parents and grandparents.[243] Esensoy's argument was that "in setting the number at zero, the Minister is effectively nullifying the right to sponsor, which is qualitatively different than setting the number of applications that will be processed."[244] The court disagreed, holding that the Minister "must be permitted the flexible authority to administer the system."[245] There is nothing in the regulations or the statute to preclude the Minister from accepting a minimal number of applicants each year—even one single applicant—and practically speaking, there is no real difference between zero applicants and a single one.[246] During the trial, the Parliament of Canada also accepted an amendment of the statute, affirming that "[f]or greater

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236 *Ibid* at para 58.

237 See *ibid* at paras 56, 71.

238 See *ibid* at para 62.

239 *Ibid* at para 68.

240 *Esensoy v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1343 at paras 1–3.

241 *Ibid* at para 18; Aiken et al, *supra* note 158 at 838–40.

242 *Can. IRPA*, *supra* note 73 s 87.3(3)(c).

243 *Esensoy*, *supra* note 239 at paras.13, 17. See *Can. IRPA*, *supra* note 73 s 13(1).

244 *Ibid* at para 17.

245 *Ibid* at paras 15, 17 quoting *Vaziri*, *supra* note 232.

246 *Ibid* at para 17.

certainty, an instruction given under paragraph (3)(c) may provide that the number of applications... to be processed in any year be set at zero."[247]

Courts in modern settler states are therefore united in their conclusions that the slow and gradual severing of elderly parents and grandparents from family reunification policies is acceptable and does not violate any overarching principles of law.

Conclusion

Starting in the 1970s, most immigrant-welcoming settler states reformulated their immigration laws to get rid of overt racial discrimination, while making family-based immigration more difficult. The immigration reforms have had a heretofore unnoted restrictive effect on the immigration of elderly family members. The tools being used are exceedingly familiar from immigration history: requirements on sponsorship by resident family members; restrictions on the immigration of people who are health risks for the destination country; tight quotas and long processing times. But these tools have been reconfigured in recent decades to be more restrictive, and tailored to serve a narrow-minded econocentrism that claims that immigration policy should only serve fiscal benefits. Quotas have been lowered, minimum income requirements for sponsorship have been raised, and health restrictions have been reconfigured to bar persons whose healthcare will *probably* cost more than the average national's healthcare. Additionally, a range of conditions have been created around the structure of the sponsoring family: parents who wish to migrate may not have dependent children, may not have more children in countries other than the destination state, or may not be in a partnership with anyone other than the sponsors' other parent. Strictest and bluntest of all is the UK's post-2012 policy, which bans the immigration of elderly relatives except when there is literally no other way to keep that family member alive.

What should elderly parents and grandparents in transnational families do, then, if they wish to spend time with their families? Two alternatives to the old-fashioned, long-term immigration route are the tourist route and the investor route. The tourist route allows elderly relatives to visit often, for longer periods, but does not allow them to stay, to work, or to access publicly funded healthcare or social services. It also allows for cancellation and deportation at any moment, and it must be renewed frequently. The investor route is available only to the very rich, who can literally buy entry rights to the destination country—for hundreds of thousands of dollars.

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[247] *Ibid* at paras 20–21; *Can. IRPA*, *supra* note 73 s 87.3(3.2).

Neither domestic courts nor international human rights courts have raised any qualms about these regulations. Nor have journalists, scholars or legislators raised substantial waves about them. Truly, there are much greater injustices taking place in global migration today. But the migration of elderly family members may be the canary in the coal mine: a population whose harms, risks and costs are negligible, and the arguments against them are petty and unconvincing. At the same time, there is little hope that forced migration will decrease in the coming years and decades. Indeed, the Sydney-based Institute for Economics and Peace estimated in 2020 that by 2050, as many as 1,2 billion people will be forced to escape from spiralling resource scarcity and violence erupting due to that scarcity.[248] We have seen that refugees are being denied legal protections, and are being hindered physically, already in almost every way possible.[249] If the disallowance of elderly relatives, who pose no security risks and benefit from the sponsorship of loving families in the destination country, can take place with so little opposition, what hope is there for the forced migrants of tomorrow?

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[248] Institute for Economics and Peace, *Ecological Threat Register 2020: Understanding Ecological Threats, Resilience and Peace* (Sydney, Sept. 2020), at 8-9.

[249] See *supra* notes 5-7.

McGill Law Journal — Revue de droit de McGill

FIVE LINGUISTIC METHODS FOR REVITALIZING INDIGENOUS LAWS

*Naiomi Walqwan Metallic**

Building on the ground-breaking work on the revitalization of Indigenous laws ongoing over the past decade, this article seeks to contribute to our understanding of how Indigenous languages can be used to recover Indigenous laws. It posits that there is not one single linguistic method, but at least five: 1) the 'Meta-principle' method; 2) the 'Grammar as revealing worldview' method; 3) the 'Word-part' method; 4) the 'Word-clusters' method; and 5) the 'Place names' method. Using the Mi'gmaq language to illustrate, the article explains each method and provides examples of how they can be used to inform Indigenous law revitalization. The article also shows that one does not have to be a fluent, first-language speaker to engage with linguistic methods for Indigenous law revitalization, by highlighting the various published resources like dictionaries and lexicons, reference and teaching texts, atlases, and more, that can be harnessed to engage in this work. This makes engaging with the linguistic methods accessible to the many Indigenous peoples who, because of the impacts of colonialism, are only starting to re-learn their Indigenous language. This revelation should give greater confidence to the non-fluent that they too can play a role in the revitalization of both their language and laws.

En s'appuyant sur les travaux novateurs concernant la revitalisation des ordres juridiques autochtones menés au cours de la dernière décennie, cet article cherche à améliorer notre compréhension de la manière dont les langues autochtones peuvent être utilisées pour se réapproprier les ordres juridiques autochtones. Il part du principe qu'il n'existe pas une seule méthode linguistique, mais au moins cinq : 1) la méthode des « métaprincipes » ; 2) a méthode de la « grammaire comme manifestation de la vision du monde » ; 3) la méthode des « mots-parties » ; 4) la méthode des « groupes de mots » ; et 5) la méthode des « noms de lieux ». En utilisant la langue Mi'gmaq comme illustration, l'article explique chacune de ces méthodes et donne des exemples de la manière dont elles peuvent être utilisées pour informer la revitalisation des ordres juridiques autochtones. L'article démontre également qu'il n'est pas nécessaire de parler couramment ou d'avoir pour langue maternelle une langue autochtone pour faire appel à ces méthodes, en soulignant les diverses ressources publiées qui peuvent être utilisées pour ce travail telles que les dictionnaires et lexiques, les textes de référence et d'enseignement, les atlas, et autres. Ces méthodes linguistiques sont ainsi accessibles aux nombreux peuples autochtones qui, en raison des conséquences du colonialisme, commencent à peine à réapprendre leur langue autochtone. Cette révélation devrait donner davantage de confiance à ceux qui ne maîtrisent pas complètement la langue qu'ils peuvent eux aussi jouer un rôle important dans la revitalisation de leur langue et de leurs ordres juridiques.

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> "The role of language in maintaining [our] constitutional and legal order cannot be over-stressed."[1]

Introduction

This paper seeks to contribute to the groundbreaking work conducted over the past decade on the revitalization of Indigenous laws.[2] Starting from the premise that Indigenous laws exist despite being impacted by colonialism[3] and that Indigenous peoples were and are reasoning and reasonable,[4] Indigenous law scholars have been writing about the various resources, methods, and frameworks to support Indigenous nations and communities in "drawing out their laws."[5] This includes describing ways to find law in Indigenous stories, ceremonies, songs, the knowledge and experience of elders, other community members, the land, and more.[6]

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1 James (Sákéj) Youngblood Henderson, "The Mi'kmaw Version of Rooted Constitutionalism" (2021) 1:1 Rooted 26 at 28.

2 "Indigenous law" refers to the specific legal orders of Indigenous peoples, as distinct from "Aboriginal law" which refers to Canadian laws in relation to Indigenous peoples. See e.g., *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5; *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. For examples of legislation relating to Indigenous peoples, see *Indian Act* (RSC 1985, c I-5) as well as numerous other federal and some provincial statutes. In this article, I will be using the umbrella term "Indigenous peoples," which includes First Nations, Inuit, and Métis people, unless the context calls for identifying a particular Indigenous nation, e.g., Mìgmaq, Cree, to mention but a few.

3 See e.g. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 11 [Borrows, *Canada's Indigenous Constitution*]; Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1 at 5–6; Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015–2016) 1:1 Lakehead LJ 16 at 17–18.

4 Hadley Friedland writes about the importance of emphasizing these points in order to counteract long-held societal narratives that Indigenous peoples were lawless and lacked agency to resolve their disputes, see "Navigating through Narratives of Despair: Making Space for the Cree Reasonable Person in the Canadian Justice System" (2016) 67 UNBLJ 270 at 274–75.

5 "Drawing out law" is a phrase frequently used by Indigenous law scholars to refer to the act of identifying values, principles and rules from a variety of sources (e.g., stories, language, observations from nature and ceremonies, etc.) through processes of analysis and interpretation (methods). See e.g. Friedland, *supra* note 3 at 21*;* John Borrows (Kegedonce), *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) [Borrows, *Drawing Out Law*].

6 See e.g. Borrows, *Drawing Out Law*, *ibid*; Friedland & Napoleon, *supra* note 3 at 20–32; Darcy Lindberg, "Miyo Nêhiyâwiwin (Beautiful Creeness) Ceremonial Aesthetics and Nêhiyaw Legal Pedagogy" (2018) 16/17:1 Indigenous LJ 51 at 53; Kerry Sloan, "Dancing the Nation" (2021) 1:1 *Rooted* 17; Eva Ottawa, *Wactenamakanicic e opikihakaniwitc - Comment se manifeste le « droit » coutumier en matière de circulation des enfants chez les Atikamekw Nehirowisiwok de Manawan ?* (LLM Thesis, University of

None of these methods are intended as stand-alone processes for Indigenous law revitalization; rather, they work best when used as mutually reinforcing processes—what Darcy Lindberg calls the "law as weaving approach."[7]

My experiences in learning the Mìgmaq language[8] as a second language learner (still in progress), coming from a family deeply committed to language revitalization,[9] and my experience teaching an Indigenous law methods course at my law school[10] have caused me to reflect on the existing methods of using Indigenous languages to draw out and apply Indigenous law. This has led me to conclude that there is not one single linguistic method but at least five, as well as numerous resources to engage with such methods. I identify these as 1) the "Meta-principle" method; 2) the "Grammar as revealing worldview" method; 3) the "Word-part" method; 4) the "Word-clusters" method; and 5) the "Place names" method.[11] This article explains each method and provides examples of how each can be used to inform Indigenous law revitalization. Many of my examples relate to the Mìgmaq language; however, most if not all of these methods could be employed using any other Indigenous language.

Those normally accustomed to finding law in statutes, regulations, or cases might ask, *"How does one 'find' or 'draw out' laws from a source like*

Ottawa, 2021) [unpublished]; Sarah Morales, "*Stl'ul Nup*: Legal Landscapes of the Hul'qumi'num Mustimuhw" (2016) 33:1 Windsor YB Access Just 103 at 109–10.

7 Darcy Lindberg, "Excerpts from Nêhiyaw Âskiy Wiyasiwêwina: Plains Cree Earth Law and Constitutional/Ecological Reconciliation" (2021) 1:1 Rooted 10 at 11, 13.

8 There are different spellings of Mìgmaq depending on the orthography one is using (*Cf* note 9ff). I am using the Metallic Orthography spelling of Mìgmaq except where another orthography appears in a quoted source. For more on the Metallic Orthography, see Emmanuel N. Metallic, Danielle E Cyr & Alexandre Sévigny, eds, *The Metallic Mìgmaq-English Reference Dictionary*, 1st ed (Saint-Nicholas, QC: Les Presses de l'Université Laval, 2005) at viii [Metallic, Cyr, Sévigny, *Metallic Mìgmaq Dictionary*].

9 My late father, Emmanuel Nàgùgwes Metallic, was a Mìgmaq linguist and historian. My sister, Jessica Metallic, followed in his footsteps, and is a Mìgmaq language teacher in our community. I have been taking private lessons with her since 2018. I have written about my families' commitment to saving our beautiful Mìgmaq language (see Naiomi Metallic, "Becoming a Language Warrior" in Marie Battiste, ed, *Living Treaties: Narrating Mi'kmaw Treaty Relations* (Sydney, NS: Cape Breton University Press, 2016) 241 [Metallic, "Becoming a Language Warrior"]).

10 My law school has been offering an Indigenous law methods course, "Indigenous Law as Practice: Applying Mi'kmaq Legal Traditions" since 2019, modelled upon similar methods courses spearheaded by Professors Hadley Friedland and Val Napoleon and offered by the law faculties at both the University of Alberta and the University of Victoria.

11 These methods merely represent the different ways I have seen Indigenous languages used to draw out law to date; I am not suggesting these are the only ones. There may well be more that come to light in the future.

language?" Of course, finding law in the context of decentralized societies with largely oral cultures will not look the same as finding law in a centralized society, where all law emanates from the sovereign or the state and its courts. This is especially so when we are talking about societies whose legal orders and governance have been denigrated and damaged by colonialism. While an in-depth discussion of the theory of "*What is law?"* is beyond the scope of this paper, it is safe to assert that law is more than merely a collection of "black letter" rules, whether written in statutes or unwritten and accepted by members of a group—what some define as "custom."[12] Only the staunchest of legal positivists take the black-letter view of the nature of law. Rather, many legal philosophers recognize that law can be decentralized and informed by various sources of law (legal pluralists),[13] deeply influenced by the normative principles and values of those making and interpreting the law (interpretivists),[14] and adhered to not simply out of fear of sanction but out of belief in shared normative values (interactionalists).[15]

For our purposes, Ghislain Otis offers a helpful way to think about all legal orders as generally being composed of values, principles, rules, actors, and processes relating to the regulation of a group and the resolution of conflicts within that group or between groups.[16] His explanation of the difference and relationship between values, principles, and rules is especially illuminating to the work of finding law in sources like language, stories, ceremonies, and the like. He describes a "value" as a "quality or characteristic deemed by a given community to be desirable or good."[17] On the other hand, a principle is "a reference standard based on values and on which it is appropriate to regulate an action or a conduct. Thus, the 'principle' presents itself, in a certain way, as the generic normative

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12 See e.g. Borrows, *Canada's Indigenous Constitution*, *supra* note 3 at 51–55; Jeremy Webber, "The Grammar of Customary Law" (2009) 54:4 McGill LJ 579 at 589–90; Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev 869 at 883.

13 See e.g. Webber, *ibid* at 610; Merry, *ibid* at 873; Joseph Raz, "Can There Be a Theory of Law?" in Martin P Golding & William A Edmundson, eds, *The Blackwell Guide to the Philosophy of Law and Legal Theory*, (Malden, Mass: Blackwell Publishing, 2005) 324 at 331.

14 See Ronald M Dworkin, "The Model of Rules" (1967) 35:14 U Chicago L Rev 14.

15 See e.g Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account*, (Cambridge: Cambridge University Press, 2010) at 34; Friedland, *supra* note 3 at 32–33.

16 See Ghislain Otis et al, "Introduction générale : L'étude des systèmes juridiques autochtones et ses enjeux" in Ghislain Otis, ed, *Contributions à l'étude des systèmes juridiques autochtones et coutumiers*, (Quebec: Presses de l'Université Laval, 2018) 1 at 9. For an application of Otis' categories to community interviews with members of Atikamekw of Manawan, see Ottawa, *supra* note 6 at 45–48.

17 Otis, *ibid* at 10 [translated by author].

translation of the ideal embodied by a value."[18] Finally, a "rule" is "a specific prescription applied to a particular situation in order to give practical effect to a principle."[19] Otis further describes that the three concepts are interlinked:

> The triptych 'value, principle, rule' appears in a way as a set of interlocking concepts. For example, in the context of a subsistence economy, the value of respect for life will be able to generate the principle of the sharing of food resources which, in turn, may be embodied in a rule conferring on an individual and his family in need the right to invite themselves to the neighbor's more game-rich hunting territory in order to obtain food.[20]

The methods discussed in this paper allows for the drawing out of values and principles belonging to an Indigenous group based on their language. A group could, in turn, use such values and principles to inform the development of rules, their interpretation, or decision-making.

One does not have to be a fluent, first-language speaker to engage with linguistic methods for Indigenous law revitalization. Persons learning to be second-language speakers, using the various resources that are available, can engage in this work. In some cases, non-speakers can work alongside speakers, assisting in analysis and synthesis of meaning. This realization is important because many Indigenous peoples' relationship to their language, and hence its use for drawing out Indigenous laws, has been harmed by colonialism. On the one hand, it is common to hear leaders and elders emphasize the link between language and culture: "[t]he culture is in the language," is an expression I have heard many times.[21] Consequently, much law resides there too in the form of values and principles, as this paper's introductory quote from Sakej Henderson suggests. On the other hand, many Indigenous peoples, particularly middle-aged and younger generations, do not speak their Indigenous language because of colonial laws and policies that have affected Indigenous language transmission. I have heard many Indigenous people express feelings of shame or inadequacy for not knowing their language, even though it is not their fault. Accordingly, some of these people, when introduced to the idea of using Indigenous languages as a vehicle for law revitalization, assume they are unable to engage in such an exercise.

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18 *Ibid* [translated by author].

19 *Ibid* [translated by author].

20 *Ibid* [translated by author and emphasis added].

21 See Trudy Sable & Bernie Francis, *The Language of this Land, Mi'kma'ki* (Sydney, NS: Cape Breton University Press, 2012), ("[m]any Mi'kmaq would argue that their languages is their culture, the loss of which would be devastating" at 28).

Thus, while Indigenous languages are seen as a rich potential source of Indigenous law,[22] few feel confident in their ability to engage with language for law revitalization because they are not fluent speakers. By demonstrating that first-language fluency is not a strict precondition to engagement, my hope is that more people, especially Indigenous community members who may not yet be speakers in the language, are given confidence to feel they can engage in their community's laws in a meaningful way.

Before describing each linguistic method, in the next section I aim to provide context on the state of Indigenous languages in Canada and provide some history on the preservation of the Mìgmaq language. I do so to illustrate the different resources available to engage with language as a means to draw out law, as well as unpack some of the challenges associated with using these resources.

I. The State of Indigenous Languages in Canada, Existing Language Resources, and their Challenges

Almost "300 distinct languages ... are known to have been spoken" in what is now North America and "[m]any more have disappeared with little trace."[23] According to the Royal Commission Report on Aboriginal Peoples (RCAP), the Indigenous languages spoken in Canada numbers between fifty-three to seventy languages, falling into eleven distinct language families for First Nations, to which must be added Inuktitut, with its several dialects, and Michif, the language of the Métis.[24] RCAP's table identifying the different First Nations language families is reproduced in the Appendix.

Like Indigenous laws,[25] Indigenous languages have been significantly harmed by the intergenerational impacts of colonial laws and policies. Specific laws and policies that have affected language transmission in-

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22 See Mathew LM Fletcher, "Rethinking Customary Law in Tribal Court Jurisprudence" (2007) 13 Mich J Race & L 57 (inherent knowledge through language has "the potential of being the finest source available" at 90).

23 Marianne Mithun, *The Languages of Native North America* (Cambridge: Cambridge University Press, 1999) at 1.

24 See *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol 3 (Ottawa: Supply and Services Canada, 1996) at 564 (the Commission notes that the total actual number of languages is not clear since Indigenous languages have not been standardized and attempts at classification are complicated by the existence of dialects).

25 See Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of Truth and Reconciliation Commission of Canada* (Library and Archives Canada Cataloguing Publication, 2015) at 202–207.

clude residential and day schools,[26] enfranchisement policies that barred First Nations women who married non-status Indian men and their children from residing in their communities,[27] and the Sixties and Millennial scoops.[28]

Numerous Indigenous languages in Canada are now considered "'endangered, with few speakers, although a few others are considered 'viable' in the long term."[29] According to the 2016 Census, Cree (96,575 speakers), followed by Inuktitut (39,770 speakers), and then Anishinaabe/Ojibway (28,130 speakers) are the most spoken languages.[30] Next, for languages with between 5,000 to 15,000 speakers, we have the Oji-Cree, Dene, Innu, Mìgmaq, Atikamekw, Blackfoot, Salish, and Siouian languages. The remaining languages have less than 5,000 speakers. Some only have speakers numbering in the hundreds (Wolastoqey, Kwak'wala, Haida, Tlingit, and Kutenai).[31]

As a percentage of the overall Indigenous population, the number of Indigenous language speakers has been steadily decreasing. In 2016, 15.6% of the population reported being able to conduct a conversation in an Indigenous language. This was down from 2011 when 17.2% were able to conduct a conversation in an Indigenous language,[32] which was down from 21.4% in 2006.[33] The pattern of declining numbers of Indigenous

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26 See *ibid* at 152–58; Canada, Task Force on Aboriginal Languages and Cultures, *Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures*, Catalogue No CH4-96/2005 (Ottawa: Canadian Heritage, 28 June 2005) at 27–29; Helen Raptis & members of the Tsimshian First Nation, *What We Learned: Two Generations Reflect on Tsimshian Education and Day Schools* (Vancouver: UBC Press, 2016).

27 See Task Force on Aboriginal Languages and Cultures, *ibid* at 28; Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (2019) at 249–52.

28 See Truth and Reconciliation Commission of Canada, *supra* note 25 at 137–44; *First Nations Child and Family Caring Society of Canada v Attorney General of Canada*, 2016 CHRT 2 at paras 87–113; *Brown v Canada (Attorney General)*, 2017 ONSC 251 at paras 4–6; Peter W. Choate, "The Call to Decolonise: Social Work's Challenge for Working with Indigenous Peoples" (2019) 49 British J Social Work 1081 at 1094.

29 See Statistics Canada, *Census in Brief: The Aboriginal languages of First Nations people, Métis and Inuit*, Catalogue No 98-200-X2016022 (Ottawa: Statistics Canada, 25 October 2017) at 1 [Statistics Canada, *2016 Census in Brief*].

30 See *ibid* at 2.

31 See *ibid*.

32 See Statistics Canada, *NHS in Brief: Aboriginal Peoples and Language, 2011*, by Stéphanie Langlois, Catalogue No 99-011-X2011003 (Ottawa: Statistics Canada, 08 May 2013) at 4 [Statistics Canada, *2011 NHS*].

33 See Statistics Canada, *2016 Census in Brief*, *supra* note 29 at 3.

language speakers calls for urgent and decisive action to be taken to protect Indigenous languages in Canada from weakening any further. For the project of Indigenous law revitalization through language, these statistics suggest an uphill challenge because of the downward trend of the numbers of people who can convey the knowledge embedded in such languages.

There is cause for some optimism, however, as "the percentage of the [Indigenous] population able to conduct a conversation in an [Indigenous] language declined between 2006 and 2016, the number of [Indigenous] people who could speak an [Indigenous] language increased by 3.1%."[34] To explain, in the 2011 Census, 240,815 people identified that they could speak an Indigenous language,[35] while this number rose to 260,550 in 2016. This surpassed the number of Aboriginal speakers recorded in the 2006 Census, which was 258,000.[36] What appears to account for this rise is a growing number of people learning their Indigenous language as a second language.[37] This demonstrates the success of second-language learning programs and their critical importance in language revitalization, as well as highlights the need for such programs to be adequately funded.

In New Zealand, aggressive language revitalization efforts supported by the New Zealand government, which emphasize second-language education, have brought the Māori language back from the brink of near-extinction.[38] This upswing coincides with a marked increase in the inclusion of Māori words and phrases in New Zealand legislation over the past decades to recognize that there is a relevant and distinctive Māori per-

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34 *Ibid*.

35 See Statistics Canada, *2011 NHS*, *supra* note 32 at 6.

36 See Statistics Canada, *2016 Census in Brief*, *supra* note 29 at 4. See Canadian Heritage & Statistics Canada, *Languages in Canada: 2006 Census*, by Réjean Lachapelle & Jean-François Lepage, Catalogue No CH3-2/8-2010 (Ottawa: Canadian Heritage & Statistics Canada, 2010) at 43.

37 See Statistics Canada, *2016 Census in Brief*, *supra* note 29 at 4.

38 The number of speakers of the language has declined sharply since 1945, but a Māori-language revitalisation effort slowed the decline, and the language has experienced a revival, particularly since about 2015. As of 2015, 55% of Māori adults reported some knowledge of the language; of these, 64% use Māori at home and around 50,000 people can speak the language "very well" or "well". See New Zealand, Ministry of Social Development, "The Social Report 2016: Te pūrongo oranga tangata" (2016) at 179, online: (pdf): *New Zealand, Ministry of Social Development* <www.msd.govt.nz> [perma.cc/75PH-KPJG]. See e.g. Lindsay Keegitah Borrows, *Otter's Journey through Indigenous Language and Law* (Vancouver, BC: UBC Press, 2018).

spective of the law.[39] The New Zealand example shows us that commitment to Indigenous language revitalization and real action that includes second-language education is an effective response to the challenge of Indigenous language decline caused by colonialism. It also shows us that a benefit of such efforts is that the worldviews and laws embedded in Indigenous languages permeate into settler-colonial legal systems.

For decades, Indigenous organizations have been calling on governments in Canada to take active steps to repair the harm of colonial policies on Indigenous languages.[40] However, for much of this time, the picture was largely one of inaction, with territorial governments and a couple of provinces taking some steps while the federal government was relatively inactive on this front.[41] In 2019, however, Canada passed the *Indigenous Languages Act* in response to calls to action from the Truth and Reconciliation Commission and the protection of language rights recognized in the *United Nations Declaration on the Rights of Indigenous Peoples*.[42] Some have been critical that the *Act* does not go as far as it needs to, including little explicit recognition of substantive language rights, such as the right of parents to have their children receive an education in their Indigenous language.[43]

The *Act* does, however, create an Office of the Commissioner of Indigenous Languages who has a mandate to help promote Indigenous languages and support their reclamation, revitalization, and maintenance. This Office promotes public awareness of the diversity and richness of Indigenous languages as well as the negative impact of colonization and

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39 See Briar Gordon, "Reflecting an Indigenous perspective in legislation: the challenge in New Zealand" (Paper delivered at the Commonwealth Association of Legislative Counsel), (2018) 1 Loophole 81 at 91.

40 See Naiomi Metallic, "Les droits linguistiques des peuples autochtones" in Michel Bastarache & Michel Doucet, eds, *Les droits linguistiques au Canada*, 3rd ed (Cowansville, QC: Yvon Blais, 2013) 891 at 897.

41 See *ibid* at 919–87; Metallic, "Becoming a Language Warrior", *supra* note 9 at 247–49; Naiomi Metallic, "Governments' Efforts on Aboriginal Language Revitalization: Largely a Portrait of Inaction" (30 August 2016), online (blog): *National Observatory on Language Rights* <www.openum.ca> [perma.cc/SPT5-5VGP].

42 *Indigenous Languages Act*, SC 2019, c 23, Preamble, paras 1–2. The fact that the TRC and the UN Declaration are impetus for the *Act* are noted, among other drivers, in its preamble.

43 See Karihwakeron Tim Thompson, "Strengthening the Indigenous Languages Act – Bill C-91" (27 February 2019), online (blog): *Yellowhead Institute* <www.yellowheadinstitute.org> [perma.cc/SP4K-FXLA]; Lorena Sekwan Fontaine, David Leitch & Andrea Bear Nicholas, "How Canada's proposed Indigenous Languages Act fails to deliver" (09 May 2019), online (blog): *Yellowhead Institute* <www.yellowheadinstitute.org> [perma.cc/29ZQ-2CLM].

discriminatory government policies on Indigenous languages.[44] The *Act* also foresees mechanisms to ensure adequate, sustainable, and long-term funding for the reclamation, revitalization, maintenance, and strengthening of Indigenous languages. This includes consultation with Indigenous governments, research to inform the provision of funding, and dispute resolution services between the government of Canada and Indigenous groups over funding.[45] The *Act* does not expressly link the relationship between Indigenous languages and Indigenous law, but it does note in the preamble that "Indigenous languages are fundamental to the ... self-determination of Indigenous peoples," which is a related concept.[46] It will be important for the Commission to support and advance projects that simultaneously advance both language and Indigenous law revitalization.

Second-language learning of Indigenous languages and engaging with the methods I describe below is facilitated by there being extensive resources available beyond access to first-language speakers. Similar to how published stories are used as an accessible way to draw out Indigenous law,[47] there is a wide range of publicly available resources on Indigenous languages in Canada, including published and online dictionaries and lexicons, reference texts, atlases, place name databases, and more.[48]

I will describe the written resources relating to the Mìgmaq language to illustrate my point. First, while most Indigenous North American nations were exclusively oral, some groups, including the Mìgmaq, devel-

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44 See *Indigenous Languages Act*, *supra* note 42 at ss 12, 23. The first Commissioner, Ron Ignace, was appointed on June 14, 2021: see Canadian Heritage, News Release, "The First Commissioner and Directors of Indigenous Languages are Appointed" (14 June 2021) online: *Canada* <www.canada.ca> [perma.cc/BRA5-G772].

45 See *Indigenous Languages Act*, *supra* note 42 at ss 7, 24, 26.

46 This link between Indigenous laws and self-government and self-determination can be seen clearly in Gordon Christie's definition of Indigenous law: "'Indigenous law' refers not only to systems of rules or precepts but also to the authority of Indigenous communities and nations to craft their own understandings of law and the particular form and content their legal orders may take on", see Gordon Christie, "Indigenous Legal Orders, Canadian Law and UNDRIP" in Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, (Waterloo, ON: Centre for International Governance, 2019) 47 at 47.

47 See Friedland, *supra* note 3 at 11–13, 32–35; Friedland & Napoleon, *supra* note 3 at 22–26. See also Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725 at 738–39, 748.

48 There are some university library guides on Indigenous language resources. See e.g. "Aboriginal Languages" (last modified 15 September 2022), online: *The University of British Columbia* <www.ubc.ca> [perma.cc/EE66-KCAB]; "Linguistics: Indigenous Languages" (last modified 25 August 2022), online: *University of Manitoba Libraries* <www.umanitoba.ca> [perma.cc/4T8P-WTHU]; "Indigenous Languages" (last modified 12 May 2022), online: *University of Toronto Libraries, Research Guides* <www.utoronto.ca> [perma.cc/48DT-LJ77].

oped symbolic systems.[49] The Mìgmaq developed a system of hieroglyphics or ideographs known as *gomkwejùwìgaqann*, which means "suckerfish writing" referring to the fact that the symbols appear similar to the marks that a suckerfish makes underwater on sand or silt.[50] These symbols were adapted by the French priest Christien Leclercq, who produced prayer books for the Mìgmaq in the seventeenth century, which were eventually published.[51] A dictionary of these symbols was produced in 1999.[52]

By the seventeenth century, priests had also begun to write down the Mìgmaq language using the Roman alphabet. A first book on Mìgmaq grammar was published by Abbé Maillard in 1864 based on his interactions with Nova Scotia Mìgmaq.[53] The missionary Reverend Silas T. Rand published several language resources, including a translation of the Bible in the Mìgmaq language,[54] dictionaries,[55] and transcriptions of Mìgmaq legends.[56] Another prominent priest to contribute to the recording of the Mìgmaq language was Father Pacifique, who worked chiefly among the Mìgmaq of Listuguj.[57] His two most extensive works include a book on

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49 See Mithun, *supra* note 23 at 34.

50 See Metallic, Cyr & Sévigny, *Metallic Mìgmaq Dictionary*, *supra* note 8 sub verbo "gomkwejùwìgaqann". There are few Mìgmaq who are fluent in these symbols today.

51 See Jessica Metallic, "The Development of Multiple Systems for Writing Micmac (Adapted from Watson Williams' "Mi'gmewe'g Gnugwatigng" Draft Copy, 2003)" at Appendix A of *Mìgmewey Dlìsudi* 01, prepared for The First Nations Regional Adult Education Center, Listuguj Campus, Second Edition, 2015 at 126 [*Mìgmewey Dlìsudi*].

52 See Karina Alfarano, Concetta D'Ippolito, Daniella Orbita, and Rosetta Tiro, *Mi'kmaq Hieroglyphics Dictionary,* 1st ed (Toronto: AIL.DIP.ORB.TIP Publishing House Inc., 1999).

53 See *Mìgmewey Dlìsudi, supra* note 51 at 127. The text was published by Joseph Bellenger under the title *Grammaire de la Langue Mikmaque*.

54 See *Mìgmewey Dlìsudi*, *supra* note 51 at 130-134.

55 See Rev Silas Tertius Rand, *A First Reading Book in the Micmac Language: Comprising The Micmac Numerals, and the Names of the Different Kinds of Beasts, Birds, Fishes, Trees, &c. of the Maritime Provinces of Canada, also, Some of the Indian Names of Places, and many Familiar Words and Phrases, Translated Literally into English* (Halifax: Nova Scotia Printing Company, 1875); Rev Silas Tertius Rand, D.D., L.L. D., *Dictionary of the Language of the Micmac Indians, who Reside in Nova Scotia, New Brunswick, Prince Edward Island, Cape Breton and Newfoundland* (Halifax: Nova Scotia Printing Company, 1888).

56 See Rev Silas Tertius Rand, D.D., D.C.L., L.L. D., *Legends of the Micmacs* (New York and London: Longmans, Green and Col, 1894) [Rand, *Legends of the Micmacs*].

57 See *Mìgmewey Dlìsudi*, *supra* note 51 at 134-137.

Mìgmaq grammar[58] and a collection of two thousand five hundred Mìgmaq place names.[59]

In the last half century, there have been several more Mìgmaq language resources produced, many written by or with Mìgmaq speakers. Typically, these resources involve identifying Mìgmaq words, phrases, or grammar, and providing explanations in English. Such resources include a Micmac Teaching Grammar as well as an edited translation of Father Pacifique's Grammar,[60] additional text-based dictionaries,[61] an online dictionary with audio pronunciation,[62] lexicon and apps,[63] teaching textbooks,[64] resource texts on the language and culture,[65] a place name data-

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58 The grammar text is entitled *Leçons grammaticales théoriques et pratiques de la langue micmaque* and was published in 1939. It has been translated to English, transcribed and edited by Bernard Francis and John Hewson, see Bernie Francis & John Hewson, *The Mi'kmaw Grammar of Father Pacifique*, 3rd ed (Sydney, NS: Cape Breton University Press, 2016).

59 See Father Pacifique, *Le pays des Micmacs* (Montréal: La Réparation, 1934). See also E. Nàgùgwes Metallic, "Mìgmaq Literacy down the Ages", written for Mìgmaq Heritage Notes in the *Campbellton Tribune* (13 December 2000) [Metallic, "Mìgmaq Literacy"].

60 See Gilles L Delisle & Emmanuel L Metallic, *Micmac Teaching Grammar* (Ecowi, QC: The Thunderbird Press, 1976); Father Pacifique*, supra* note 59. Both Mr. Metallic and Mr. Francis are Mìgmaq.

61 See Albert D Deblois, *Micmac Dictionary* (Hull, QC: Canadian Museum of Civilization, 1996); Metallic, Cyr & Sévigny *Metallic Mìgmaq Dictionary supra* note 8. The Metallic dictionary is the first Mìgmaw dictionary to be entirely written by a native speaker of the language.

62 See e.g. "Word Categories" (accessed 16 October 2022), online: *Mi'gmaq-Mi'kmaq Online* <www.mikmaqonline.org > [perma.cc/2YGR-CZP7].

63 See e.g. "Aboriginal Language" (last modified 07 January 2022), online: *Atlantic Canada's First Nation Help Desk* <www.firstnationhelp.com> [perma.cc/X9UX-XQKQ], which includes a dictionary, lexicon, as well as links to a number of Mi'kmaq language and story apps.

64 See e.g. *Mìgmewey Dlìsudi*, *supra* note 51; Jessica Metallic, *Mìgmewey Dlìsudi 02,* prepared for The First Nations Regional Adult Education Center, Listuguj Campus, First Edition, 2014; Jessica Metallic, *Mìgmaq Conversations – Supplementary Text*, prepared for The First Nations Regional Adult Education Center, Listuguj Campus, Revised Edition, 2014; The Mi'kmawey Debert Cultural Centre, *Mi'kmawe'l Tan Telikina'muemk: Teaching about the Mi'kmaq*, ed by Tim Bernard, Leah Morine Rosenmeier & Sharon L Farrell (Truro, NS: The Confederacy of Mainland Mi'kmaq, 2015) online (pdf): *Mi'kmawey Debert Cultural Centre* <www.mikmaweydebert.ca> [perma.cc/JB5X-6KEF].

65 See generally Sable & Francis, *supra* note 21; Gespe'gewa'gi Mi'gmawei Mawiomi, *Nta'tugwaqanminen: Our Story: The Evolution of the Gespe'gewa'gi Mi'gmaq* (Halifax: Fernwood Publising, 2016); The Confederacy of Mainland Mi'kmaq, *Kekina'muek (learning)*: *Learning about the Mi'kmaq of Nova Scotia* (Truro: Eastern Woodland Print Communication, 2007) online: *Native Land* <www.native-land.ca> [perma.cc/Q8WP-3Z5U].

base, and an online place names atlas (for Nova Scotia).[66] One can also find several online audio and video recordings of elders and knowledge-holders speaking the language or explaining Mìgmaq concepts in a mix of both English and Mìgmaq.[67] On top of this, some fields, including linguistics, anthropology, and education, offer academic analysis of the language.[68] Indeed, there is a rich array of accessible resources, even for the nonfluent, that can be harnessed to draw out law from the Mìgmaq language. I expect that a similar range of resources exists for other Indigenous languages in Canada. Identifying these types of resources as part of the collection of Canadian law schools' libraries on Indigenous laws in relation to the Indigenous nations located on the territory would facilitate Indigenous law revitalization.[69]

Finally, before embarking on my analysis of the different linguistic methods, I will review some of the general challenges of working with language as part of Indigenous law revitalization. These challenges are realities that those engaging with language to revitalize Indigenous law must consider when interpreting or drawing conclusions. Humility, flexi-

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66 For the Gaspé and the northern part of New Brunswick, the Gespe'gewa'gi Mi'gmawei Mawiomi has been compiling a collection since 2002 (see *ibid* note 65 at 24, 48). However, beyond the findings in the book, they have yet to publish these online. In New Brunswick, Mi'gmawe'l Tplu'taqann Incorporated has published their ongoing place names mapping: see Tom Johnson, "Lnu Place Names in New Brunswick", online: *ArcGIS* <www.arcgis.com> [perma.cc/Q4P8-93KV]. In Nova Scotia, a virtual atlas of Mi'kmaq place names was launched in 2019: see "View the Map", online: *Ta'n Wejisqalia'tiek: Mi'kmaq Place Names* <placenames.mapdev.ca/> [perma.cc/T6VK-3Z8F].

67 An excellent repository for video and audio resources not only for Mìgmaq, but also for Wolostoqey (Maliseet), is the Wabanaki Collection. See online: *Wabanaki Collection* <www.wabanakicollection.com/> [perma.cc/W6NA-PTQ2]. See also Mi'kmawey Debert Cultural Centre, "Elders' Stories" (last visited: 18 October 2022), online: *Mi'kmawey Debert Cultural Centre* <www.mikmaweydebert.ca> [perma.cc/NE9U-ATFB].

68 See e.g. Eleanor Johnson, *Mi'kmaq (The First Master's Thesis in Mi'kmaw)*, (MA Thesis, Cape Breton University, 1992) [unpublished]; Stephanie H Inglis, *Speaker's Experience: A Study of Mi'kmaq Modality* (PhD Thesis, Department of Linguistics, Memorial University of Newfoundland, 2002) [unpublished]; Stephanie Inglis, "400 Years of Linguistic Contact between the Mi'kmaq and the English and the Interchange of Two World Views," (2004) 24:2 Can J Native Studies 389 [Inglis, "400 Years of Linguistic Contact"]; Stephanie Inglis & Eleanor Johnson, "The Mi'kmaq Future: An Analysis" in John D Nichols, ed, *Actes du trente-deuxième Congrès des Algonquinistes, Montréal, 2001*, 32nd ed (Winnipeg: l'Université du Manitoba, 2001) 249; Danielle E Cyr, "Les noms de lieux mi'gmaqs : une toponymie oubliée", *Magazine Gaspésie* 54:1 (Avril - Juillet 2017) 19, online: <erudit.org>.

69 See e.g. Queen's University Library, "Indigenous Laws and Legal Traditions" (last modified 03 October 2022), online: *Queen's University Library – Research Guides – Aboriginal Law & Indigenous Laws* <www.queensu.ca> [perma.cc/PG2F-6GE2] (Queen's University Library currently has a library guide on Indigenous laws and legal traditions while Dalhousie University's Sir James Dunn Law Library is currently compiling such a collection).

bility and openness for discussion, and deliberation on meaning and conclusions will be important here, as it is for other areas and methods of engagement with Indigenous law.[70]

One challenge is the shift in the meaning of words that can occur for a variety of reasons. Such shifts can occur as a result of colonialism. Mìgmaq linguist Emmanuel Nàgùgwes Metallic has written about how the conversion of many Mìgmaq people to Catholicism intersected with the language,[71] including by altering the meaning of words. For example, he explains how the Mìgmaq word "*Mndu*," traditionally standing for the dual concepts of "*Manidu*" which is "the initial creation of us, the world and the cosmos" and "*Minidu*" which is "the sustaining power or force which keeps all of the first creation going and continuing" took on the meaning of 'the devil' in the modern era, showing the Church's success in subverting elements of Mìgmaq spirituality.[72]

Some changes occur simply by shifts in usage.[73] Our language adapted to accommodate concepts, objects, and lifeforms that were introduced by the French and English after contact. We also have a number of "loan words" in Mìgmaq,[74] as well as Mìgmaq words that denote that something was imported. One of my favourite of such words is our word for "cow"—*wenjidìam*—which literally means "a French moose."[75]

Differences in meaning can also arise due to the presence of different dialects of a language. A dialect occurs when members of a linguistic group from one region develop a particular way of speaking that can vary from other members of the group living in another region. Dialectical variations generally take the form of more subtle differences in pronunciation and inflection given to words. For example, Mìgmaq has a northern and a southern dialect. The Gespègewàgi district in the northern extreme

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70 See Borrows, *Canada's Indigenous Constitution*, *supra* note 3 at 35–46; Friedland & Napoleon, *supra* note 3 at 32–41.

71 See the following E. Nàgùgwes Metallic columns written for Mìgmaq Heritage Notes in the *Campbellton Tribune*: "Wicked Stephen" (03 January 2001); "Transference and Conversion" (14 March 2001); and "Sign/Baptism" (04 July 2001).

72 E. Nàgùgwes Metallic, "Of Mndu and Sacrilege", for Mìgmaq Heritage Notes in the *Campbellton Tribune* (07 March 2001).

73 On shifts in kinship terms, "Nukumij no longer means 'grandmother' but now means 'mother-in-law', while the term 'older brother', Njiknam, is quickly replacing Nsi's" (Tuma Young, "L'nuwita'simk: A Foundational Worldview for a L'nuwey Justice System" (2016) 13:1 Indigenous LJ 75 at 95).

74 See E. Nàgùgwes Metallic & Jessica Metallic, *Mìgmaq Conversations – A Primer,* (x, xx, 2001) at 98, "An Introduction to Loan Words," and 104-108. For example, the word for a barn is "laqalàns" from the French, "la grange."

75 See Metallic, Cyr & Sévigny *Metallic Mìgmaq Dictionary*, *supra* note 8 sub verbo "wenjidìam".

of Mìgamàgi (Mìgmaq territory) is characterized by the predominance of (n) inflections, while the southern has a predominance of the (l). Thus, the word for a Mìgmaq person or human being is pronounced *Nnu* in the northern dialect and *Lnu* in the southern dialect.[76] In certain instances, dialectical differences can manifest in groups from different regions using different words for the same concept. For example, in the northern dialect, the word for cat is *gajuèwch*, while it is *miawch* in the southern dialect. Potential confusion caused by differences in dialect is minimized by the fact that many of the modern Mìgmaq-English dictionaries note dialectical differences in terminology.

Even between the fluent speakers from my home community of Listuguj, there can be variations in how different families pronounce some words or which words or expression a family chooses to express an idea. Such variations appear to be normal and simply need to be accepted by those learning and working with the language. A Mìgmaq speaker, in the 1800s, tried to convey as much about the fluidity of the language to the Reverend Silas T. Rand, when he stated, in English: "Always, everything, two ways me speakum."[77]

Turning to challenges in working with written languages, for Mìgmaq, one issue is the existence of multiple writing systems for recording the language. The early priests who recorded the language all varied in their approaches. In the last half century, there have been attempts to regularize this system, but at present, there are four different writing systems being used in different parts of Mìgmàgi.[78] The variations between the systems have to do with things like using phonetic representation of the Roman alphabet versus using a "downsized" system where certain letters can represent more than one sound (e.g., the letter "t" can stand for a "t" or "d" sound depending on its position in a word). Variations can also concern the representation of vowel sounds (e.g., using double vowels to represent long vowels (aa), versus using an apostrophe after the vowel (a'), versus using diacritics (à)), and the way in which the 'schwa' sound—the indefinite vowel sound that exists in Mìgmaq—is represented. Having multiple systems can lead to confusion, though it does not appear that consensus on a writing system across Mìgmàgi will happen anytime soon.[79]

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[76] See *Mìgmewey Dlìsudi*, *supra* note 51 at 19.

[77] See Rand, *Legends of the Micmacs, supra* note 56 at xxxvi.

[78] See *Mìgmewey Dlìsudi*, *supra* note 51 at 3–4.

[79] See E. Nàgùgwes Metallic, "The Mìgmaq Fully Representational Writing System," for Mìgmaq Heritage Notes in the *Campbellton Tribune* (18 October 2000; Metallic

To make full use of the resources that are available, one has to be comfortable navigating between these different writing systems. However, this exercise can be challenging. For example, second-language learners with English as their first language sometimes struggle with the downsized systems, for example how to properly pronounce letters playing "double-duty" (e.g., "do I pronounce as a "t" or a "d"?").[80] I know that some find this to be a disincentive to learning the language.

Further, many fluent speakers are not comfortable writing or reading Mìgmaq, *in any writing system*, since this was not a skill taught to them as part of their schooling. While these challenges are real, there are resources available that teach us how to navigate between the different writing systems, even the older systems developed by priests.[81] These systems take some effort to learn, but they are keys to unlocking the wonderful knowledge held within the written materials. I am not aware if the challenges of multiple writing systems exist for other Indigenous languages in Canada, though my guess would be probably. If so, then I equally expect that tools to navigate between these systems have also been developed.

The final two challenges are related. The first is the issue that in recording our language and concepts, the early priests may have misunderstood or distorted meaning, especially given widely and deeply held racist beliefs among Europeans about the inferiority of Indigenous people that existed at the time. There were also financial incentives for missionaries to portray the Indigenous peoples as "pagan, barbaric, and uncivilized", as noted by E. Nàgùgwes Metallic: "This is another unfortunate aspect about all missionary activity. Someone was funding it. The trick was to write home to Old France and describe how deplorable the conditions were over here and more monies would be on their way to New France."[82]

"Mìgmaq Literacy," *supra* note 59. See also Metallic, Cyr, Sévigny, *Metallic Mìgmaq Dictionary*, *supra* note 8 at viii.

80 See Memorandum from E. Nàgùgwes Metallic, "A Rational for a Fully Phonetic Representational Mìgmaq Writing System," to Gail Metallic (23 April 2001) (copy with the author).

81 There are six pronunciation or 'phonetic' rules that allows one to know the proper sound to give to a letter in a downsized form: see "The Mìgmaq Fully Representational Writing System," *ibid* and *Mìgmewey Dlìsudi, supra* note 51 at 17-18. For navigating between the writing systems used by the early priests, see "The Development of Multiple Systems for Writing Micmac (Adapted from Watson Williams' "Mi'gmewe'g Gnugwatigng" Draft Copy, 2003)" at Appendix A of *Mìgmewey Dlìsudi, supra* note 51 at 126–144.

82 E. Nàgùgwes Metallic, "The Missionary as Historian," Mìgmaq Heritage Notes in the *Campbellton Tribune* (07 February 2001).

Metallic further cautions to "proceed at your own risk" in engaging with such resources.[83] However, in a follow-up article, he acknowledges and expresses appreciation for the priests who recorded the Mìgmaq language and stories since, "you and I would not be enjoying these literary treasures, if no one had bothered to record them in the last four hundred years."[84] He reserves his highest appreciation, however, "to [our] ancestors, who took the time and patience to relate these marvelous tales for the benefit of all of us today."[85] He further goes on to relate his own process for working with these materials to ensure they reflect a Mìgmaq perspective: "I have a process with these tales. They were written down in English one hundred and fifty years ago in a very different time and a very dated, distinctive, 'Victorian' style of writing. I first translate them into Mìgmaq and then I rewrite them into modern English."[86]

This process illustrates one of the ways in which an Indigenous speaker can mitigate problematic biases or potential distortion of older materials. As noted earlier, there is an increasing number of Indigenous language dictionaries that have been compiled by Indigenous speakers in recent years; using these alongside older materials, comparing meanings, and discarding interpretations that appear informed by prejudice is one way to lessen the potential for distortion. Further, by combining linguistic methods with other methods (the "weaving approach"), such as seeking to validate findings through community-based discussions with elders and knowledge-holders, as happens with the narrative analysis method,[87] we further lessen the risk for misunderstanding and distortion, not just from the original published source but also from those interpreting the source as law.[88]

The second issue is a broader manifestation of the first concern. The worry here is that by translating or explaining an Indigenous legal concept in English, some meaning may be lost as there are no equivalent concepts or ideas in English. In fact, trying to approximate a concept might alter its meaning. Similarly, by writing down the meaning of a concept, one has unduly limited or restricted its potential meaning. The concern is grappled within the following passage of a text by the

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83 See *ibid*.

84 E. Nàgùgwes Metallic, "An Apology and an Appreciation," for Mìgmaq Heritage Notes in the *Campbellton Tribune* (21 February 2001).

85 *Ibid*.

86 *Ibid*.

87 See Friedland & Napoleon, *supra* note 3 at 34–41. See also Hadley Friedland et al, "Porcupine and Other Stories: Legal Relations in Secwépemcúlecw" (2018) 48:1 RGD 153 at 163–68.

88 See Friedland, *supra* note 3 at 23–26.

Gespe'gewa'gi Mi'gmawei Mawiomi, representing the three Mìgmaq First Nations on the Gaspé coast of Québec, about the communities' history and worldview:

> One of our elders recently declared: "You put it in writing, you ruin it." What did he mean? As we will see, in the Mi'gmaq world most things are "beings." Every "thing" exists through cycles of constant transformation. When one talks about these beings, one is always in synchrony with the momentary state, or flux or process, that those beings are in. In other words, when speaking about beings, one has the possibility of being as accurate as possible, given the moment of the narration. If the story is written down, it becomes fixed and fossilized from that moment. Thus, it becomes sort of inaccurate from then on because the written version cannot correspond to any further transformation. Therefore, "If you put it in writing, you ruin it."
>
> However, because we endeavour to invite our non-Mi'gmaq readers to enter our world of thinking, in the hope that they might get the right insights into our culture, we accept that this written portrait of it is probably, for now, the only tool we can offer. But please, try not to forget that our world is in a constant flux. What is written down here might slightly fluctuate when you speak to different Mi'gmaq people from different generations, origin, education and actual state of mind.[89]

If one analogizes this passage to the context of working with English translations of Indigenous words as part of law revitalization, they may find a real risk of losing meaning in the process. However, the benefits of engaging with and sharing this knowledge (i.e., a greater understanding of Indigenous law and language fluency) are worth the gamble.[90] The predicament reminds me of the metaphor of the overturned canoe given by Mìgmaq elder Stephen Augustine to the Truth and Reconciliation Commission. On the subject of regaining our Indigenous laws and knowledge lost to colonialism, Elder Augustine said: "[When we tip a canoe] we may lose some of our possessions... Eventually we will regain our possessions [but] they will not be the same as the old ones."[91] The potential risk of loss of meaning is not to be discounted, but the alternative—not engaging at all (and not regaining our possessions)—is worse. As noted by Friedland, we must find "legitimate ways to work with the non-ideal to advance the important practical tasks of reviving Indigenous laws."[92]

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89 Gespe'gewa'gi Mi'gmawei Mawiomi, *supra* note 65 at 50-51.

90 For a similar discussion on the benefits and challenges of making Indigenous laws more accessible by writing them down but cautioning that steps should be taken to ensure that their flexibility is not lost, see Borrows, *Canada's Indigenous Constitution*, *supra* note 3 at 142–49.

91 Truth and Reconciliation Commission of Canada, *supra* note 25 at 206.

92 Friedland, *supra* note 3 at 13.

Having addressed the various resources and challenges of engaging with Indigenous languages for law revitalization, I will now turn to review the different linguistic methods. My objective is to explain each method and provide a few (non-exhaustive) illustrations of how each method is (or could be) used in practice. Further exploration of how to implement these methods by different Indigenous groups must be left for future papers.

II. Method #1: The Meta-Principle Approach

This method refers to using a word in an Indigenous language that conveys an overarching, normative principle of the Indigenous group. Métis elder and scholar Maria Campbell described this idea as "each word is a bundle," meaning that each word has teachings and tools to draw on.[93] This coincides with Otis' definition of a principle: a reference standard based on values and on which it is appropriate to regulate conduct or action. Principles can be used as an interpretive prism through which to assess other laws, rules, actions, or decisions, or to inform the creation of new rules or decisions. Interpretivist legal philosopher Ronald Dworkin emphasized that all legal orders are undergirded by higher-order (or meta) moral or normative principles that inform the interpretation of rules.[94] It is from Dworkin's work that I have chosen the term "meta-principles" to refer to this approach.

In a 2007 article, US tribal judge and scholar Matthew Fletcher explained this method with reference to philosopher H.L.A. Hart's theory of primary and secondary rules.[95] Hart conceived of "primary rules of obligation" being obligatory rules of conduct that are part of a community's customs or traditions ("obligations" or "duties").[96] Examples could include "rules which require honesty or truth or require the keeping of promises."[97] In other words, there was a moral or normative dimension to these

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93 Maria Campbell shared this idea at a gathering of Indigenous scholars who form the Prairie Relationality Network in a gathering at the Banff Centre, Banff, Alberta, in Fall, 2019. Elder Campbell raised this specifically to address the issue of lack of fluency. She said rather than waiting for everyone to become fluent before drawing on the language, a lot can be learned by seeing each word as a bundle with teachings and tools to draw on. It makes it more accessible to a broader number of people in the community. My thanks to Hadley Friedland for sharing the knowledge gained from Elder Campbell with me.

94 See Dworkin, *supra* note 14 at 29, 45.

95 See Fletcher, *supra* note 22 at 63–65.

96 See *ibid* at 63, citing HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 80–84.

97 *Ibid* at 7.

rules.[98] Enforcement of such rules was maintained on the expectation that community members conform to such rules on pain of facing "hostile or critical reaction" or even "physical sanction"[99] by the community as a whole. Secondary rules are rules of "recognition," which Hart explained as procedural rules for determining when a primary rule is authoritative, when new primary rules can be introduced, when a rule has been broken, and how disputes will be adjudicated.[100] Using Hart's categories, Fletcher proposed that a tribal court "identifies an important and fundamental value identified by a word or phrase in the tribal language" (e.g., a primary rule), and next applies that value to an Anglo-American or intertribal secondary rule in order to "harmonize these outside rules to the tribe's customs and traditions."[101]

Fletcher uses the case of *Navajo Nation v Rodriguez*, from the Navajo Nation Supreme Court in 2004, as his main illustration of the primary rule approach.[102] While the Navajo *Bill of Rights* protects suspects from being "compelled ... to be a witness against themselves," the issue in *Rodriguez* was whether this extended to requiring the tribe's police force to inform suspects taken into custody of their right to remain silent and right to a lawyer (in the U.S. this is called a "*Miranda* warning"). To resolve this question, the tribal judge, who was from the nation and spoke its language, drew upon the Navajo concept of *Hazhó'ógo*, which the judge described as a fundamental tenet of how the Navajo are to approach each other as individuals and relatives, serving as a reminder that patience and respect are due to all.[103] Based on this principle, the judge held that tribal police had an obligation pursuant to *Hazhó'ógo* to give suspects the equivalent of *Miranda* warnings. Fletcher praised this case as a practical method for introducing "customary law into the modern era" in an incremental way, all "without creating much additional confusion as to the application of the law."[104]

Fletcher specifically contemplates the primary rule approach being used by U.S. tribal judges, but there are, in fact, a variety of ways the me-

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98 See Dworkin, *supra* note 14 at 19–22.

99 Fletcher, *supra* note 22 at 7, citing HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 80–84.

100 See *ibid* at 64–65.

101 *Ibid* at 40.

102 2004 Navajo Sup LEXIS 13 1 (Navajo Nation Supreme Court), cited and discussed at 16–20 of Fletcher, *supra* note 22.

103 Navajo courts are required to take the "Fundamental laws of the Diné [Navajo]" into consideration when interpreting Navajo statutory law, see Fletcher, *supra* note 22 at 72–75.

104 Fletcher, *supra* note 22 at 41.

ta-principle approach gets implemented. In Nunavut, the Legislature has included numerous Inuit principles into its law and policies—identified under the broad term of *Inuit Qaujimajatuqangit* (IQ)—to inform the interpretation of those instruments by public servants and courts.[105] IQ refers to "all aspects of traditional Inuit culture including values, worldview, language, social organization, knowledge, life skills, perceptions and expectations."[106] Nunavut courts have also applied IQ independently of their statutory or policy requirements to do so.[107] The province of Nova Scotia has also included the Mìgmaq legal concept *Netukulimk*—that speaks to obligations of land and resource stewardship—as a principle to inform the interpretation of its *Sustainable Development Goals Act*.[108] Indigenous governments, such as Aseniwuche Winewak Nation and the Listuguj Mi'gmaq First Nation, have also incorporated meta-principles into their own laws and policies.[109] In a follow-up article, I explore these examples in depth and provide commentary on the different approaches for these meta-principles' implementation.[110]

A further take-away from the above examples is that the meta-principle approach can involve the participation and collaboration be-

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[105] Laws that reference IQ include: *Legislative Assembly and Executive Council Act*, SNu 2002, c. 5, ss 2(3), 16(2), 40(7); *Nunavut Elections Act*, SNu 2002, c 17, ss 21(1)(f), 22(1), 230(1)(c); *Human Rights Act*, SNu 2003, c 12, s 2; *Wildlife Act*, SNu 2003, c 26, s 8; *Family Abuse Intervention Act*, SNu 2006, c 18 at 1 (in the preamble); *Education Act*, SNu 2008, c 15, s 1; *Official Languages Act*, SNu 2008, c 10, s 22.1. (1); *Inuit Language Protection Act*, SNu 2008, c 17, s 27.1. (1).

[106] Francis Lévesque, "Revisiting Inuit Qaujimajatuqangit: Inuit knowledge, culture, language, and values in Nunavut institutions since 1999" (2014) 38:1/2 Études Inuit Studies 115 at 121.

[107] See *R v Mikijuk*, 2017 NUCJ 2 at paras 17, 46 (sentencing); *R v Anugaa*, 2018 NUCJ 2 at paras 37–44 (applied for stay of prosecution); *R v Itturiligaq*, 2018 NUCJ 31 at paras 62–63, 86, 106–24 (sentencing and *Charter* challenge to statutory minimums); *R v Jaypoody*, 2018 NUCJ 36 at paras 75, 97–99 (bail application); *R v Arnaquq*, 2020 NUCJ 14 at paras 54–56 (sentencing); *R v Iqalukjuaq*, 2020 NUCJ 15 at paras 15, 39 (sentencing).

[108] Bill 213, *An Act to Achieve Environmental Goals and Sustainable Prosperity*, 2nd Sess, 63rd Leg, Nova Scotia, 2019, cls 2, 4 (assented to 30 October 2019), SNS 2019, c 26.

[109] See *Listuguj Mi'gmaq First Nation Law on the Lobster Fishery and Lobster Fishing*, Law No 2019-01, (2019), art 6, enacted and coming into force on June 17, 2019, online (pdf): *Listuguj Mi'gmaq Government* <www.listuguj.ca> [perma.cc/ZQ5A-W754]. The *Listuguj Lobster Law* contains four guiding principles, stated in the Mìgmaq and then explained in English, which are to guide the interpretation and implementation of the law. See also Aseniwuche Winewak Nation, "7 Cree Principles" (last visited 18 October 2022), online: *Aseniwuche Winewak Nation* <www.aseniwuche.ca> [perma.cc/2SE4-J68J].

[110] See Naiomi Metallic, "Six Examples Applying the Meta-Principle Linguistic Method: Lessons for Indigenous Law Implementation," (2022) 73 UNBLJ 133 [Metallic, "Six Examples Applying the Meta-Principle Linguistic Method"].

tween several different actors in the process of identifying, elaborating, and implementing these principles, including non-speakers of the language. This can be seen in the story of the Aseniwuche Winewak Nation in Alberta, who undertook to identify, elaborate, synthesize, and implement seven core Cree principles. [111] The process involved elders, knowledge-holders, and community leaders working with academics and lawyers, each using their different skills and talents to revitalize the community's laws.[112]

III. Method #2: Revealing Worldview through Grammar

I will now turn to another linguistic method for Indigenous law revitalization. It is important to note that, unlike the meta-principle method, these remaining methods are more emergent. Furthermore, these methods are more likely to reveal values than principles or rules. However, they retain rich potential in revealing important meaning that can assist in articulating or bolstering principles and rules. Essentially, these methods are different ways to look at Indigenous languages to see how Indigenous groups think about and organize the world around them. In other words, language, in a variety of different ways, illuminates the worldview of Indigenous peoples. In the words of the Gespe'gewa'gi Mi'gmawei Mawiomi, language is the "custodian of our worldview."[113]

Mìgmaq legal scholar, Tuma Young, provides the following helpful description of an Indigenous worldview:

> An Indigenous worldview is how a particular group of Indigenous people express and experience their relationship with the ecological realities around them: how they view the world they inhabit, the places they shape and are shaped by. Akin to a vision or picture, an Indigenous worldview can also be seen as the *cognitive solidarity* or unifying force of a particular group, though individuals within the group may have differing interpretations of that shared perspective. Essentially, an Indigenous worldview articulates and helps to sustain relationships of place and time between a particular group and its ecology. There are, of course, many different worldviews and as many methods of deriving and adapting them.[114]

Young, like many others, makes the point that Indigenous languages are intimately tied to worldview.[115] But he takes this further to illustrate

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[111] See Aseniwuche Winewak Nation of Canada, *supra* note 109.

[112] See Metallic, "Six Examples Applying the Meta-Principle Linguistic Method", *supra* note 110 at 153–55.

[113] Gespe'gewa'gi Mi'gmawei Mawiomi, *supra* note 65 at 69.

[114] Young, *supra* note 73 at 77–78.

[115] See *ibid* at 93, 95

that, not only can language be used to describe concepts within the worldview, but that language itself encodes the worldview.[116] One place we see this is in the grammar of the language. In other words, the structure of a language can tell us many things about how a society sees the world and relationships within it. As noted by Trudy Sable and Bernie Francis:

> Language is the unique reflection and expression of how cultures structure, give meaning to, and interact with the world. Each language has its own syntax—the grammatical organization of a culture's perception and experience of reality—that best serves their needs. Each language has its own semantics, the ascription of meaning to words and word parts (morphemes) that hold the implicit values and assumptions underlying a culture's worldview.[117]

A culture's implicit values and assumptions revealed in the grammar of the language can, as suggested by Otis, be used in the articulation and delineation of that culture's laws—its principles and rules. I will provide an illustration from the Mìgmaq language.

A key grammatical feature of the Mìgmaq language that distinguishes it from European languages is the fact that it is verb-based and not noun-based, as are many other North American Indigenous languages.[118] How a verb-based language influences worldview is explained by the Gespe'gewa'gi Mi'gmawei Mawiomi:

> While Indo-European languages (western languages) are based on nouns, Mi'gmaq as a language is based on verbs. Languages where nouns are key to describe the world are reflective of cultures that see the world as a fixed and stable universe, in other words as a set of things and objects that can easily be manipulated and used according to one's needs or whims. On the contrary, a language using verbs primarily is the product of a culture that sees the world as a set of processes, made of multiple facets that intersect with each other in a myriad of colours. This leads language philosophers to say that nouns are associated with a static view of the world, while verbs are associated with this dynamic aspect.[119]

Sable and Francis confirm that the nature of the verb-based language reflects a worldview that sees the universe in a state of constant flux:

> The verb is where everything happens; it is the focus of the language with prefixes, infixes and suffixes added to determine gender,

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116 See *ibid* at 80–81.

117 Sable & Francis, *supra* note 21 at 28.

118 See Mithun, *supra* note 23 at 11–12; "Verb-based Languages" (2015), online: *Native Languages of the Americas: Preserving and Promoting American Indian Languages* <www.native-languages.org> [perma.cc/BH5C-WEFK].

119 Gespe'gewa'gi Mi'gmawei Mawiomi, *supra* note 65 at 55.

> tense, plurality, animacy and inanimacy. This focus on the verb, and the "copious" suffixes that can be added to it, allow for extraordinary breadth and creativity of expression. It makes the language adaptable, able to forge new expressions to meet life's shifting and unpredictable realities, *reflecting the nature of the universe as being in a continuous state of flux, ever changing and non-static*.[120]

Sable and Francis provide the example of the words to describe creation—all of which are verbs—to illustrate the concept of flux or fluidity and draw out important observations about how the Mìgmaq see life:

> An excellent illustration of how language reflects the fluidity of Mi'kmaq world view can be seen through the changeable and varied words for the creator principle. The word *Niskam*, was adapted by the missionaries to connote the word "God." There was never one word for Creator in the Mi'kmaw language, but rather a number of different verbs, mostly transitive verbs, that articulated different processes of creation. *Kisu'lkw, ankweyulkw, jikeyulkw, tekweyulkw* were all words for creator.
>
> > *Kisu'lkw*: the one who created us; he, she, it who (or that which) created us
> >
> > *Ankweyulkw*: he, she or it who (or that which) looks after us
> >
> > *Jikeyulkw*: he, she, it who (or that which) watches after or over us
> >
> > *Tekweyulkw*: he, she, it who (or that which) is with us
>
> None of these words were nouns that connoted one central being as a source of creation. They are different *processes* of creation; they can refer to the creator who does all these things, or describe a role or roles in the process of creation. When these words are used, it is understood that the speaker is referring to the creator each time. ... These terms are also present tense indicative meaning that "Creator" or "God" is ongoing. You could never speak of Creator as something that has already happened, such as "When God created the world...." In other words, "God" is a process, a continuously manifesting, creative force.[121]

The Gespe'gewa'gi Mi'gmawei Mawiomi link the Mìgmaq view of the universe being in continuous flux to numerous Mìgmaq values, including the belief in reclaiming and renewing their relationship with the lands they have been dispossessed from:

> This worldview can also be associated with the fact that even if we were deprived from our relationship with large segments of Gespe'gewa'gi [our territory], we contemporary Mi'gmaq believe for certain that the part of the land we are still holding on to can be the connection to our whole territory. We are convinced we can redevel-

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[120] Sable & Francis, *supra* note 21 at 29 [emphasis added].

[121] *Ibid* at 30–31 [footnotes omitted].

> op the link with our whole territory and renew its caretaking. *This belief is linked to the fluid world that is constantly changing without its essence being diminished in any way. As long as there is part of it remaining, it is possible that the whole entity can be renewed.* [122]

They also link this concept to values of rehabilitation and redemption, weaving these findings with similar observations taken from Mìgmaq stories:

> Therefore, in the Mi'gmaq universe everything can take new forms and everything can be reborn out of ashes [citing Ruth Holmes Whitehead's analysis of Mi'gmaq stories involving shape-changing characters]:
>
> > The tricky thing about Shape-Changers is not only do they change their forms; they also change their minds. Thus in stories, there are no eternally Bad Persons, eternal Villains as in the European sense. There are only beings acting according to their nature and according to their whim or emotional state.[123]

Such values—reclamation, renewal, rehabilitation, and redemption—can be harnessed by Mìgmaq to inform the development of their laws. One could imagine these last two values—rehabilitation and redemption—incorporated into laws or processes for dealing with those who cause harm to others.

There are many more elements of Mìgmaq grammatical structure that illuminate the worldview of our people. This includes our categorization of nouns as animate or inanimate,[124] the fact that our language is polysyn-

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[122] Gespe'gewa'gi Mi'gmawei Mawiomi, *supra* note 65 at 61 [emphasis added].

[123] *Ibid* at 61; For additional information on shape-changing's significance in Mìgmaq stories, see Sable & Francis, *supra* note 21 at 33–34.

[124] The Mìgmaq language distinguishes between living (animate) and non-living (inanimate) nouns. Human and animals are the largest and most consistent category of animate beings, and several plants and other natural features of the environment (the sun, stars, clouds, mountains and trees), objects (soap, combs, nets, ropes, brooms) fall into the animate category, while others (rivers, lakes, flowers, rocks, towels, mirrors, brushes) do not. An analysis by Stephanie Inglis suggest that, semantically, the categories connote a sense of "connectedness" or belonging to a greater wholeness" or "oneness" versus "lack of connection" or "disconnection" ("400 Years of Linguistic Contact", *supra* note 68 at 393–94). Trudy Sable & Bernie Francis wrote

> > At the level of semantics, the question of animacy and inanimacy takes deeper significant in trying to determine world view. What criteria are at work in the mind of the Mi'kmaq speaker to intuitively, perhaps unconsciously, designate an object as inanimate or animate? This is also very fluid, even today as new material objects are introduced into the culture, some Mi'kmaq regard them as animate and others as inanimate (*ibid* at 39–40);

See also Gespe'gewa'gi Mi'gmawei Mawiomi, *supra* note 65 at 56.

thetic,[125] our use of pronouns,[126] possessives,[127] locatives,[128] our verb categories and classes,[129] the use of evidential coding in our verbs,[130] and time and tenses.[131]

That grammar is a vital source of Indigenous worldviews has long been known to those who study linguistics.[132] Now, those of us working in

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[125] The relevance of this is explained in the next section. See also Young, *supra* note 73 at 81; Sable & Francis, *supra* note 21 at 28.

[126] Some of the unique features of Mìgmaq pronoun use includes the fact that most pronouns are "bound" (there is a suffix built into verbs that indicates who is speaking to whom and how many – for some discussion on this see Young, *supra* note 73 at 81). Our pronouns also do not distinguish on the basis of sex, e.g., our third person is "they", see E. Nàgùgwes Metallic & Jessica Metallic, *supra* note 74 at 97. In the Mìgmaq language, there is two forms of "we" – an inclusive and exclusive version, see Sable & Francis, *supra* note 21 at 31, 35–36. Trudy Sable & Bernie Francis also discuss how, unlike most Western languages, "the placement of the self in the language structure is not the central feature" (*ibid* at 36).

[127] With kinship terms (father, mother, sister, brother, etc.), there is always a possessive pronominal marker in the word that designates the relationship between the people being spoken of. Hence, there can be no stand-alone word for father, but only words for "my father" (nutch), "your father" (gutch), and "his/her father" (utchl). See generally Sable & Francis, *supra* note 21 (who use this example to support the Mìgmaq view of relationality at 32).

[128] There are suffixes that indicate a relationship of positions, direction or location (e.g., *awti* is the word for road; *awtiktuk* conveys that someone or something is at or on the road). For a brief discussion on this, see Young, *supra* note 73 at 81, who suggests it is another example of emphasis on relationality in Mìgmaq.

[129] "Verbs are divided into three large categories according to meaning: whether they express state, action or thought. In Mi'kmaq each can be developed into at least 15 classes; this amounts to up to 45 verbs, when the structures and the meaning of the root are suitable" (Francis & Hewson, *supra* note 58 at 180 [emphasis in original]). About Mìgmaq verbs, Reverand Silas Tertius Rand observed, "The full conjugation of one Micmac verb would fill quite a large volume" (*The Legends of the Micmacs*, *supra* note 56 at xxxiv).

[130] Young describes this as the "verbal systems code for the relational source of the speaker's and listener's 'knowledge experience', as opposed to the nature of the event. One could say that the L'nuwey language is knowledge-focused or experientially focused, focusing on the action, not on the object or the event being described" (*supra* note 73 at 81). See also Inglis, "400 Years of Linguistic Contact," *supra* note 68 at 397–400.

[131] Trudy Sable & Bernie Francis discuss that Mìgmaq have "no word for time" and how the language has a different sequencing for time than Western languages (*supra* note 21 at 36–39)

[132] Stephanie Inglis suggests that:

> linguistic structures ... are the road maps which can guide us in understanding the cognitive categories and knowledge frames which underlie the Mi'kmaw linguistic structure ... Through the use of functional linguistic analysis, that is the analysis of these bits and pieces of language, we can begin to understand the meaning or semantic frameworks which provide the building blocks for various knowledge patterns Indigenous to specific groups

the revitalization of Indigenous legal orders can connect this to the elucidation and elaboration of laws. Furthermore, fluency is not a prerequisite. Many linguists have analyzed our grammar without being fluent (though they may have become so, or at least quite comfortable in reading and writing the language, in the process). Much grammar can be learned and analyzed from the study of existing published resources. As with all methods, however, discussing any observations taken from the grammar with others who are knowledgeable in the culture and language will be important to grounding or testing any potential findings.

IV. Method #3: Word-Parts (Morphemes)

The next method arises from the fact that many North American Indigenous languages, like Mìgmaq, are polysynthetic.[133] This means that words are made up of multiple word parts or "morphemes."[134] A helpful description of how this works is provided in the introduction to *The Metallic Mìgmaq-English Reference Dictionary*:

> In Algonquian languages, words are constructed from smaller units called word formatives [e.g., word parts]. These formatives are either nominal or verbal. They function in the same way as Lego blocks. They have different shapes and meanings and are assembled into words according to specific rules. The basic formative of a word is called its root. All other types of word formatives must attach to the root. Some of them must appear before the root and are thus called initials or prefixes. Others must appear at the very end of the word just before grammatical agreement and are thus called finals or suffixes. Another set can appear only between the root and a final and are called medials.[135]

The fact that a language is polysynthetic also means that one word can act as a whole sentence.[136] Inglis gives the example of *Pemie'plewinatawijajika'sit*, which means, "S/he, who knows how to do this well, is in the process of moving along very close to the edge (of the shore):

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of people who share a common language ("400 Years of Linguistic Contact", *supra* note 68 at 393).

133 See Mithun, *supra* note 23 at 38. She explains that not all North American languages are polysynthetic (as some early linguist suggested). There are some that are only mildly synthetic.

134 See *ibid*.

135 Metallic, Cyr, Sévigny, *Metallic Mìgmaq Dictionary*, *supra* note 8 at xiii.

136 See Mithun, *supra* note 23 at 38. See also Inglis, "400 Years of Linguistic Contact", *supra* note 68 at 392, which points out that Mìgmaq also has a relatively free word order in sentences, similar to other Algonquian languages.

so close that s/he almost falls in, but because of her/his skill does not."[137] She lists the various word parts that make up the total meaning of the translation as follows:

pemi-	→ in the process
-e'plewi	→ over doing
-natawi	→ ability
-jajik	→ follow along the edge
-a'si	→ reflective
-t	→ [third person: he/she]

The fact that the Mìgmaq have a polysynthetic language system is itself revealing of our worldview. My father would often remind me that it also means that Mìgmaq is a living language, meaning that existing word parts can create new words to adapt to new concepts.[138] As Young has noted, "[t]he L'nuwey [Mìgmaq] language is easy to change and adapt to new situations, a flexibility that reinforces the basic intuition of the L'nuwey worldview: that the sacred spaces of ecology are in constant flux and motion."[139]

Beyond the fact that the language is polysynthetic and that this informs Indigenous worldviews, word-parts themselves can be analyzed to further reveal worldviews. For example, writing about the Anishinaabe language, Lindsay Borrows writes about the morpheme "**de**" which means both "heartbeat" and "centre" and links it to several key words within her language:

> De is at our core. Even at the beginning, at the time of creation, thought, sound, and heart were combined. *Ma**de**we* means "sound." *Mi**de**wewin* is an "Anishinaabe spiritual society." ***De**we'igan* means

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[137] Inglis, "400 Years of Linguistic Contact", *supra* note 68 at 392. The second column denoting grammatical classification has been removed for the reader's ease.

[138] E. Nàgùgwes Metallic and Jessica Metallic provided a list of "Created Words," which they described as words: "[c]onstructed out of already existing Micmac words to denote objects or concepts not originally represented in the Micmac language. The list ... is meant to show that new terms can be created instead of borrowed" (E. Nàgùgwes Metallic & Jessica Metallic, *supra* note 74 at 102–03).

[139] Young, *supra* note 73 at 81. This is consistent with the view of law as living as discussed in Borrows, *Canada's Indigenous Constitution*, *supra* note 3 at 8–11, 35–46. See more generally John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

> "drum." *Ishko**de*** means "fire." *Do**de**m* means "clan." *Ode**n**aniw* means "his/her tongue."[140]

One example that has fascinated me in my own learning of Mìgmaq is the suffix "**-òq**." This suffix, as well as "-aq" are used to represent what is called the "absentive case." Sable and Francis explain that these suffixes in the absentive case are "used to indicate someone whose consciousness is no longer present, and can refer to a person sleeping as well as someone who is physically absent or deceased."[141] To indicate someone is deceased using generic terms (father, mother, etc.), you would add "-aq" to the end of the word. When talking about someone who is deceased, you would add the suffix "-òq" to their name.[142] Thus, the phrase, "*E. Nàgùgwes Metallic-**òq** na Naiomi utch**aq**"* conveys that "E. Nàgùgwes Metallic is Naiomi's late father."

Interestingly, when it comes to nouns, "òq" is also the same suffix you would use to talk about a container. In Mìgmaq, any noun that can be used as a container can simply be designated as such by adding the suffix "-òq." For example:

sismòqon = sugar
sismòqon**òq** = sugar bowl

wasuek = a flower
wasueg**òq** = flower pot

samqwan = water
samqwan**òq** = water bottle

mlagechk = milk
mlageju**òq** = milk bottle[143]

Based on this usage of "òq," my father theorized that the use of "òq" in the context of deceased persons suggests that the Mìgmaq saw the body as merely a container for the soul, reinforcing the Mìgmaq belief in rein-

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140 L Borrows, *supra* note 38 at 4.

141 Sable & Francis, *supra* note 21 at 32.

142 Jessica Metallic, Mìgmaq Grammar Lesson Handout, "Deceased Indicators & Additional Meanings," (unpublished) at 1.

143 *Ibid* at 2.

carnation.[144] While this observation appears most relevant to informing Mìgmaq spiritual values, John Borrows tells us that the sacred can also be a source of Indigenous laws.[145]

The study of word-parts promises to be a rich source of knowledge of the Mìgmaq worldview—as it does for other Indigenous nations—and hence for drawing out law. Furthermore, there are existing resources for identifying word-parts that could be analyzed, including the *Mi'kmaq Word Part Dictionary*.[146]

V. Method #4: Word Clusters/Groups

This method seeks to analyze a group or cluster of related words for patterns, similarities, and/or differences. It can also be used by the speakers of an Indigenous language to reveal features or characteristics of a concept or of an Indigenous worldview or value.

For example, Sable and Francis talk about Mìgmaq colour words as one grouping of words that demonstrates the relational, associative quality of the Mìgmaq language with the environment:

> The relational quality of the language extends to the Mi'kmaw relationship to the environment. A simple demonstration of the inseparable relation between the environment and all things, mental or physical, occurs in the words for colours. Except for the four colours—red, black, white and yellow (also the colours used for the four directions)—all colours are associative or analogized. Even these four, however are thought to have derived from Proto-Algonquian words that associate them with blood (red, *mekwe'k*), light/sunlight/dawn (yellow, *wataptek*), white (*wape'k*) and ash (black, *maqtewe'k*). Other colour terms mean "like the sky" (blue, *musqunamu'k*), "like the fir trees" (forest green, *stoqnamu'k*) and so on... . Thus there is no way to describe the colour of blue and green rocks, or even a dream of blue and green rocks, without ascribing to them a connection, or relation, to the sky and fir trees.[147]

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[144] My father passed this observation on to my sister, Jessica Metallic, who conveyed it to me when teaching me the lesson about deceased indicators. He also speaks to Mìgmaq stories and practices that relate to the belief in reincarnation in some of his Mìgmaq Heritage Notes articles for the *Campbellton Tribune*, including, "Bapkubaluet, The Gambler" (28 February 2001); "Mìgmaq Spirituality: Circle Road Symbolism" (28 March 2001); and "The Practice of Sweat" (18 April 2001).

[145] See Borrows, *Canada's Indigenous Constitution*, *supra* note 3 at 24–28.

[146] See Stephanie Inglis, *Mi'kmaq Word Part Dictionary* (Sydney: University of Cape Breton Press, 2002). See also Metallic, Cyr, Sévigny, *Metallic Mìgmaq Dictionary, supra* note 8.

[147] Sable & Francis, *supra* note 21 at 32–33.

There is a near-limitless number of clusters of concepts we could look at to gain greater insight into the worldview of the Mìgmaq. In addition to colours, Sable and Francis also discuss how family totems and the words for the 12 Mìgmaq months teach us about Mìkmaq relationality.[148]

For a project I was a part of, studying the Mìgmaq meta-principle *Netukulimk*, which conveys concepts of land use, resource stewardship, and redistribution of resources, as well as spiritual and governance components,[149] we thought it would be illuminating to study Mìgmaq words relating to the concept of sharing. From the various available dictionaries, we compiled and analyzed words that speak to the sharing of resources, as well as words for the opposite concept of stinginess. This was done alongside analysis of Mìgmaq stories that speak to resource redistribution and land use.[150] Analysis of our findings is ongoing, but we found over twenty different terms relevant to the idea of sharing and redistributing resources, including specific words for when someone has more than their share (*biamàlêt*), when someone shares their wealth with others (*debìwen*), when someone deprives themselves of their share (*altuàdan*), and when shares are distributed equally among a group (*detpìgedùn*).[151] Notably, we also found that the word for chief or leader (*saqamaw*) literally means "distributor" or "the one who makes certain that everyone receives his/her fair share of community goods regardless of standing, age or gender."[152] At the very least, this clustering shows us that the concept of sharing or redistribution of resources is considered highly important within Mìgmaq culture.

As much as repeated and nuanced usage of a concept within a language can be revealing of worldview, so can the absence of a word for a concept. Referring to an initial study of a cluster of Mìgmaq concepts on

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148 See *ibid* at 34–35.

149 See Unama'ki Institute of Natural Resources, "Netukulimk" (last visited 18 October 2022), online: *Unama'ki Institute of Natural Resources* <www.unir.ca> [peram.cc/XP5H-SCX5]; L Jane McMillan & Kerry Prosper, "Remobilizing *Netukulimk*: Indigenous Cultural and Spiritual Connections with Resource Stewardship and Fisheries Management in Atlantic Canada" (2016) 26 Rev Fish Biol Fisheries 629 at 629, 641, 645.

150 This work was inspired by the "Secwépemc Lands and Resources Law Research Project" undertaken by the Indigenous Law Resource Unit at the University of Victoria and Secwépemc Nation and the Shuswap Nation Tribal Council, see Jessica Asch et al, "Secwépemc Lands and Resources Law Research Project" (2018)), online (pdf): *University of Victoria* <www.uvic.ca> [perma.cc/8GT7-53GX]. See also Friedland et al, *supra* note 87 at 162–69.

151 See Metallic, Cyr, Sévigny, *Metallic Mìgmaq Dictionary*, *supra* note 8 sub verbo "biamàlêt", "debìwen", "altuàdan", "detpìgedùn".

152 *Ibid* sub verbo "saqamaw".

traditional justice, Tuma Young comments on the absence of or unlikeness to similar European concepts of justice:

> At first glance, some of these words seem unrelated to any Eurocentric legal system or ethos, but this is precisely the point: the words tell us, if we know how to listen, about a different "law and order" worldview in which the goal of justice is not individual punishment or retribution but the restoration of communal balance and harmony.[153]

Not only is a study of the meaning of words in a cluster revealing of worldview, but so, too, can the study of how a grouping of words is used / employed by members of the Indigenous group. Young also examines a cluster of Mìgmaq kinship terms and how these are fundamental to teaching relationality. He notes that these are central to establishing a point of relationship between individuals upon first meeting:

> First, when meeting either another L'nu or a stranger, L'nu need to establish a point of relationship. The easiest and quickest way is to determine any family connection. Often the first question is, "Wenik n'nki'kuk?" ("Who are your parents?") If the parents are not known to the questioner, other possible connections are explored; for example, "Do you know so-and-so from your reserve?" The purpose is to establish a point of reference so that a relationship can be developed between the participants.
>
> If and when some kind of relationship has been established, the second part of the greeting "ceremony" begins. This is the establishment of a foundational point in the relationship so that any future meetings can have a reference that will be used to renew the relationship. Up to a generation ago, it was considered very rude to introduce another person by name rather than clarifying the person's relationship to you: "This is my sister, my brother, my mother, father, aunt, uncle, godchild, grandmother, etc." This was done to properly locate and respectfully welcome the individual into a network of relationships.[154]

Young also discusses how the use of kinship terms is essential to helping children learn roles and responsibilities within a community:

> Although the use of kinship terms is fundamental to the interaction of all L'nu people, their use is specifically designed to help children learn their roles and responsibilities — and to appreciate the depth and breadth of help and support available to them. The L'nu believe that if you know how you are related to others, you will know how to honour and respect them — and, by logical extension, their family, belongings and property.[155]

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[153] Young, *supra* note 73 at 95.

[154] *Ibid* at 94.

[155] *Ibid*.

These examples show us clustering can be a very fruitful as well as accessible method to reveal worldview from which can be identified deep normative commitments, both in the form of values and principles.

VI. Method #5: Place Names/Toponymy

Our last linguistic method is one that also intersects with methods for finding 'natural law' or 'land-based' law.[156] In this regard, this method resonates with John Borrows' observation that "laws may be regarded as literally being written on the earth."[157] In linguistics, the study of naming geographical places is called toponymy.[158] This method recognizes that Indigenous groups have different approaches to naming the geography around them and that their naming practices can reveal much about their worldview. As summarized by Sable and Francis, "Mi'kmaw place names also tell of the features of the landscape, historical events and important resources, and acted as a mnemonic device to help people find their way."[159] The Gespe'gewa'gi Mi'gmawei Mawiomi refer to the study of place names as "hearing—and listening to—what our landscape has to say through the words of its language."[160]

To understand how important meaning can be drawn from Indigenous place names, it first serves to appreciate the four main European naming practices. These practices do little to illuminate the significance of a place to those naming it. The Gespe'gewa'gi Mi'gmawei Mawiomi summarizes these as follows:

> The first one [is to add] the adjective New or Nouveau/Nouvelle, followed by the name of a country or city already in existence in Europe [...] That is how the Europeans named Nouvelle-France, Nouvelle-Orléans, New England and New York. Their second technique, especially for the French, was to name a place by the name of a saint. Thirdly, they named some places by the name of a famous city in Europe, namely London, Athens, Paris; a famous person, as in Georgetown, Williamsburg, Pittsburg; or else by the name of the persons who "owned" the place. Their fourth technique was more direct: they simply asked their bilingual Aboriginal guides to translate the Aboriginal names into French or English. This is how, for example, the ancient Mi'gmaq name *Ne'si'jig Wijig'tultijig*, meaning "three siblings," became Les Trois Soeurs in Percé; and *Maqta-*

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156 See Borrows, *Canada's Indigenous Constitution*, *supra* note 3 at 28–35. See also Morales, *supra* note 6 at 111.

157 Borrows, *Canada's Indigenous Constitution, supra* note 3 at 29.

158 See *ibid* at 32–35.

159 *Supra* note 21 at 42.

160 Gespe'gewa'gi Mi'gmawei Mawiomi, *supra* note 65 at 27.

> *wapgsgeg*, meaning "black rocks," became Black Cape/Caps Noirs in New Richmond.[161]

On the other hand, Mìgmaq naming practices are many, and can convey much information about the significance and use of a place to the Mìgmaq. Both the Gespe'gewa'gi Mi'gmawei Mawiomi and Sable and Francis, identify and illustrate these practices.[162] Drawing on these resources, I provide the following enumerated list with some examples:

1. Many Mìgmaq place names can be descriptive of the physical characteristics of Mìgmaq territory, including rivers and mountains. For example, the Mìgmaq name for Rivière Bonaventure (an Acadian place name on the Gaspé Peninsula) is *Waqametgug*, which means "pristine watercourse, clear river."[163] The name for Cole Harbour, Nova Scotia, is *Wanpa'a*, meaning "calm water."[164]

2. Other Mi'gmaq place names are based on fish, game, tree species, berries, metals and rocks found at that location. For example, *Gaqpesawègadi* is the Mìgmaq name for St. Omer, a village on the lower Gaspé peninsula, which means "the smelt-gathering place."[165] An island in the Shelburne River in Nova Scotia is called *Penatkuk*, which means "bird nesting place."[166]

3. Place names could also be descriptive of other activities occurring at a location. Two such examples from Nova Scotia include *Wiaqajk* for Margaree, Nova Scotia, meaning the "mixing place," suggesting a place where ochre was blended, and *Pankweno'pskuk* for Gabriel Falls, meaning "lice-picking falls" or literally, "where they hunt one another's head [for lice]".[167]

4. Some place names refer to portage routes and cardinal directions. An example of a reference to portage routes is the name for the Avon River Forks, at Hants County, Nova Scotia, *Pesikitk,* which means "to flow splitwise." This refers to the fact that the tide passes up near Windsor and divides off into the St. Crois river.[168] For a place name denoting direc-

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[161] *Ibid* at 28.

[162] See *ibid* at 27–29; see also Sable & Francis, *supra* note 21 at 51.

[163] Gespe'gewa'gi Mi'gmawei Mawiomi, *supra* note 65 at 27–28.

[164] Sable & Francis, *supra* note 21 at 52.

[165] Metallic, Cyr, Sévigny, *Metallic Mìgmaq Dictionary*, *supra* note 8 sub verbo "Gaqpesawègadi".

[166] Sable & Francis, *supra* note 21 at 52.

[167] *Ibid*.

[168] See Mi'kmaq Place Names, *supra* note 66, citing Silas Rand English to Micmac Dictionary A, MMP-N (1919) at 67.

tions, the Mìgmaq name for Pointe du Sud, a county in the Gaspé region, is *Etpêdèsnuk*, which means "to or pointing to the south."[169]

5. Some place names refer to beings that lived in specific locations, including mythological figures. For example, *Megwèjidewàgik* is one of a few names the Mìgmaq called Newfoundland and literally means "the land of the red people," referring to Beothuks and alludes to their extensive use of red ochre.[170] The name for Middle River, in Sheet Harbour, Nova Scotia, is *Kukwesue'katik*, meaning "haunt of the giants."[171] *Kukwes / Gugwech* refers to legendary cannibal giants in Mìgmaq mythology and many stories reference them.[172]

6. Some Mìgmaq place names are based on historical facts or events. The Forillon National Park in the Gaspé is called *Onmatjoqonei Gwesawei*, which means "suffering point," referring to the fact that an old Mìgmaq woman was ill for a very long time at that location.[173] A rock located near Tabusintac, New Brunswick, is called *Batkwedègnùj* and "this legendary and historic rock marks the spot where, during the Mìgmaq-Mohawk wars, the chieftain leading the Mohawk warriors was smashed on the rock and killed, effectively ending aggressions between the two nations."[174]

7. Another place-naming practice in Mìgmaq are names that compare two similar places, usually close to one another, one being qualified as being small compared to the other. Two examples from the Gaspé include *Mtnn* (Matane) and *Mtnnji'j* (Small Matane) and *Gesgapegiag* (Cascapedia river) and *Gesgapegiaji'j* (Small Cascapedia river).[175] The Gespe'gewa'gi Mi'gmawei Mawiomi have used this naming practice to demonstrate the direction from which their ancestors would have first moved into their territory, since comparing one landmark to another logically implies having encountered the comparator first:

> Our Mi'gmaq geographical names study suggests that some of our ancestors explored the interior territory, using the waterways, be-

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169 Metallic, Cyr, Sévigny, *Metallic Mìgmaq Dictionary, supra* note 8 sub verbo "êtpêdèsnuk".

170 See *ibid* sub verbo "Megwèjidewàgik".

171 Sable & Francis, *supra* note 21 at 52.

172 See Metallic, Cyr, Sévigny, *Metallic Mìgmaq Dictionary*, *supra* note 8 sub verbo "Gugwech". For some stories referencing the *Kukwes*, see Ruth Holmes Whitehead, *Stories from the Six Worlds: Mi'kmaw Legends* (Halifax: Nimbus Publishing Limited, 2006) at 75–82, 115–21, 122–33.

173 See Gespe'gewa'gi Mi'gmawei Mawiomi, *supra* note 65 at 28.

174 Metallic, Cyr, Sévigny, *Metallic Mìgmaq Dictionary*, *supra* note 8 sub verbo "Batkwedègnùj".

175 See Gespe'gewa'gi Mi'gmawei Mawiomi, *supra* note 65 at 28.

> ginning from Berthier-sur-Mer near Montmagny. At Berthier-sur-Mer, there is indeed a location name Micami, most probably a mispronunciation of the word Mi'gma'gi, [f]rom there through Rivière du Sud and then the St. John River [the *Welastuk* – 'fine flowing and unobstructed' river], they could access Rivière Verte, and travelling upstream on it, they would have reached the head of the Restigouche River or *Welastuguj* in Mi'gmaq [smaller version of the *Welastuk*], which leads to the Bay of Chaleur. Later on, this same group would have explored the Miramichi River and its watershed, naming it the *Welastugujij*, meaning "smaller or younger than Restigouche."[176]

8. Finally, some place names can also have legends associated with them. The Gespe'gewa'gi Mi'gmawei Mawiomi relate the name *Matapegiaq*, the Matapedia River in Quebec, recorded by Father Pacifique:

> At Matapedia, the river joins the Restigouche [River]. The section where both rivers meet is designated as [Mawatigel] "The Meeting of the Waters." A legend exists describing how, at one time, the river was flowing directly to the sea. However, the Restigouche River was asking to have as a spouse the small river (Matapedia). It asked Gluscap, the Mi'gmaq God for everything that is good to get what she wanted. As he was standing on top of the Sugarloaf [Mountain], with his wand, he touched a rock wall. From it fell a large chunk in the Restigouche River that became an island. The bigger river then rushed to grab her newly engaged partner. Since then, both rivers began flowing together.[177]

There are many more places in Mìgmàgi, like this one, that are associated with stories and legends of Gluskap, a mythical figure who created the Mìgmaq people and taught them how to live. One such legend tells the story of the Tidal Bore on the Petitcodiac River, which is located in southeastern New Brunswick and characterized as having a brown mud floor and brown waters:

> When Gisu'lk, the Great Creator, first made mother earth, the Petigotiag river ran clear, and on that river was a peaceful community of many different plants and animals, each one doing its part to keep the community happy and healthy. Then, one day, a giant eel appears and terrorizes the happy community. The community members meet and decide to ask Gluskap for help, so they send a messenger, the turtle, to seek out Gluskap. Upon hearing of the community's plight, Gluskap tells Turtle that he will not fight the eel himself, but instead give one of the community members the power to fight the eel. Gluskap says that this chosen community member must be strong willed and have the determination to fight a powerful enemy, or the eel will prevail. When Turtle returns to the

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[176] *Ibid* at 13. See also E. Nàgùgwes Metallic, "What's in a Place Name? Part Two," for Mìgmaq Heritage Notes in the *Campbellton Tribune* (29 November 2000).

[177] Gespe'gewa'gi Mi'gmawei Mawiomi, *supra* note 65 at 29.

> Petigotiag, there is a community meeting. Turtle tells the community of Gluskap's decision not the kill the eel but give one of them the power to fight the monster. Then Turtle asks for a volunteer to fight the eel. The room is silent because everyone knows that fighting the eel could be deadly. Then, reluctantly, a lobster steps up and says that he will fight the eel. With that, the lobster grows in size and strength and makes his way down the river towards Hopewell Rocks to meet the eel. The next morning, the fight begins, it rages on for days, as they fight, they move up and down the river, splashing and roiling the water, churning up the sediment, making the water reddish brown. After three days, Lobster wins the fight, the eel slinks away into the Bay of Fundy and the community returns to its happy, peaceful ways. When Gluskap hears of Lobster's victory, he comes to the community to join the celebration. During the celebration, Gluskap decrees that in remembrance of this valiant fight of good over evil, a wave will travel up the Petigotiag river twice a day, and the water will keep its reddish brown colour.[178]

Such legends can provide both a wealth of knowledge about the Mìgmaq worldview as well as the landscape. For example, this story not only explains the origins of the physical characteristics of the river and tidal bore, but also teaches lessons about the power of community, bravery, and dedication, among other important teachings.

As these various naming practices, and illustrations of them, show us, there is a rich amount of information encoded in the words Mìgmaq used to describe their territory, including where they went and when, what they did in those places, who was at those places, and how those places factored into their history and mythology. Such place names are being used as evidence of use and occupation of lands in support of Aboriginal title claims and negotiations.[179] Further, the knowledge embedded in such place names can also convey important information about relationship, and responsibilities, to the land.[180] Indigenous governments can use this to inform community-led impact assessments of proposed natural resource projects, or a community's land or watershed stewardship plans, to give but a couple of examples.[181]

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[178] This story was recounted by Mìgmaq elder, the late Gilbert Sewell to Tom Johnson, GIS Coordinator for Mi'gmawe'l Tplu'taqnn Incorporated. I extend my gratitude to Tom for sharing this story with me and giving me permission to share it.

[179] See André Bourcier, "Aspects linguistiques de la preuve par tradition orale en droit autochtone" (2000) 41:2 C de D 403 at 416–19.

[180] For a discussion of this in relation to Hul'qumi'num Mustimuhw, see Morales, *supra* note 6 at 111–13.

[181] See e.g. the Treaty, Lands & Resources Department Tsleil-Waututh Nation, "Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal" (for an overview of Tsleil-Waututh Nation principles, see 52–55 and the map at 23), online (pdf):

Mìgmaq are certainly not the only Indigenous groups with such kinds of naming practices, nor are they the only ones to have access to atlases, place name databases and other place name resources.[182] Further, while not published, many Indigenous communities involved in land claim negotiations with governments have undertaken traditional use studies (T.U.S.) which may well include place names (as well as other valuable) information. Some may have even used geographic information systems (G.I.S.) to map their placenames.[183] All such resources could certainly be harnessed to engage with this method.

Conclusion

This paper has sought to explain and illustrate five different methods for engaging with Indigenous languages to support the revitalization of Indigenous peoples' legal orders. Terms within Indigenous languages can present concepts that suggest normative standards regulating conduct (meta-principles). A collection of terms analyzed as a group (clusters) can illustrate nuances within an Indigenous concept, distinguishing it from European concepts and revealing important aspects of the Indigenous worldviews. Further, linguistic features—like grammar and word parts—can also tell us about the values of an Indigenous group, which can inform the principles and rules within the group's legal order. Finally, the Indigenous group's names for the landscape and its associated stories can elaborate upon Indigenous peoples' relationship with the land and waters, how and when they used it, the significance of such usage to their worldview, and more. My aim has been to show that the information encoded in language is rich and that it can inform the workings of an Indigenous legal order.

I have also endeavoured to show that this rich information is more accessible than most assume. It is not necessary to be a fluent first-language speaker to unlock the treasures to be found in Indigenous languages. There is a significant amount of published resources—like dictionaries, lexicons, reference and teaching texts, atlases, and more—that can be harnessed to learn and work with Indigenous languages. What is needed to draw out law from language is commitment and patience to learn and work with all resources available. Becoming a second-language

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Sacred Trust Initiative Tsleil-Waututh Nation <www.twnsacredtrust.ca> [perma.cc/L234-3F6X].

[182] For further examples, see Christina Gray & Daniel Rück, "Reclaiming Indigenous Place Names" (09 October 2019), online: *Yellowhead Institute*, <www.yellowheadinstitute.org> [perma.cc/8M43-S39K].

[183] See e.g. Gespe'gewa'gi Mi'gmawei Mawiomi, *supra* note 65 at 29–30 (discussion of their own place names databank).

speaker can go hand-in-hand with work to uncover the law that is coded in the language. My hope is that this revelation will inspire others who, like me, did not grow up speaking their Indigenous language, yet remain committed to Indigenous law revitalization. There exists a wonderful opportunity for Indigenous individuals to regain their language while also supporting their communities and nations in regaining their laws.

Appendix

Aboriginal Languages in Canada by family, from *Royal Commission Report,* Vol 3 at 565.

TABLE 6.1
Aboriginal Languages in Canada

Family	Language	Family	Language
Aleut-Eskimo	Inuktitut	Wakashan	Nootka
[Isolate]	Tlingit		Nitinat
[Isolate]	Haida		Kwakiutl
Athapaskan	Dogrib		Bella Bella (Heiltsuk)
	Hare (North Slavey)		Kitanat-Haisla
	Beaver	Tsimshian	Tsimshian
	Sekani		Nisga'a
	Sarcee (Sarsi)	Gitksan	
	Tsilhoqot'in	Siouan	Lakota - Dakota
	Carrier (Wet'suwet'en)		Nakota (Assiniboine, Stoney)
	Chipewyan	Iroquoian	Seneca
	Slavey (South Slavey)		Cayuga
	Yellowknife		Onondaga
	Kutchin (Gwich'in or Loucheux)		Mohawk
	Kaska		Oneida
	Tahltan		Tuscarora
[Isolate]	Kutenai	Algonquian	Blackfoot
Salishan		Algonquian	
Interior	Lillooet	*Cree*	Cree
	Shuswap		Montagnais-Naskapi-Attikamek
	Thompson (Ntlakyapamuk)Algonquian		
	Okanagan	*Ojibwa*	Ojibwa
Salishan			Odawa (Ottawa)
Coastal	Songish		Algonquin (Algonkin)
	Semiahmoo		Saulteaux
	Cowichan	Algonquian	
	Comox	*Eastern*	Delaware
	Sishiatl (Sechelt)		Abenaki
	Bella Coola		Mi'kmaq
	Squamish		Maliseet

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LE TÉLÉTRAVAIL TRANSFRONTALIER FACE AUX DÉFIS DE COORDINATION DES RÈGLES DE CONFLIT ET DES NORMES MINIMALES D'EMPLOI

*Naivi Chikoc Barreda**

Le travail à distance effectué au moyen des technologies de l'information et des communications met en question le fondement traditionnel des règles cherchant à identifier la loi applicable aux contrats internationaux de travail. Dans un environnement virtuel, l'exécution de la prestation de travail défie les frontières nationales, employeurs et employés opérant désormais dans un marché numérique et global. La dématérialisation de l'activité favorise la mobilité transfrontalière des télétravailleurs, intensifiant ainsi les difficultés dans la recherche d'un régime juridique qui s'applique de façon cohérente au rapport de travail potentiellement soumis à une diversité de lois. Le présent texte propose une réflexion comparative sur la réponse fournie par le droit international privé et par les règles qui délimitent unilatéralement le domaine territorial de la *Loi sur les normes du travail* au Québec. Sous un regard critique, nous soulignons les contradictions résultant d'une application non coordonnée de ces régimes. Pour remédier aux incohérences, nous défendons la voie de leur articulation, en justifiant sa pertinence d'un point de vue téléologique et en présentant les moyens techniques de sa réalisation.

Remote work conducted via information and communication technologies questions the traditional foundation of the rules determining the law applicable to international employment contracts. In a virtual environment, the performance of work defies national borders, with employers and employees operating in a digital and global marketplace. The dematerialization of work encourages the cross-border mobility of teleworkers, thus intensifying the difficulties in finding a legal regime that applies consistently to an employment contract potentially subject to multiple laws. This paper offers a comparative reflection on the response provided by private international law and by the rules that unilaterally define the territorial scope of the *Act Respecting Labour Standards* in Quebec. From a critical perspective, we highlight the contradictions resulting from an uncoordinated application of these regimes. To address the inconsistencies, we advocate the articulation between them from a teleological point of view and propose the technical means of its implementation.

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Introduction

Malgré le retour progressif au travail en présentiel après la fin de l'urgence sanitaire, le travail à distance, au moyen des technologies de l'information et de la communication, s'inscrit dans l'avenir du marché du travail[1]. Même si les prévisions sur l'évolution du phénomène à l'échelle internationale demeurent incertaines, la pandémie de COVID-19 a démontré que dans une économie fortement mondialisée, la distance géographique entre l'employeur et l'employé n'est plus un obstacle à l'exécution de l'activité. On a assisté à l'émergence d'une « culture du management » selon laquelle les frontières ne peuvent s'ériger en barrière pour accéder aux talents[2]. Certains employeurs ayant fait du télétravail une modalité prioritaire d'emploi ont fait la promotion d'une politique « *work from anywhere* »[3] qui mise sur l'autonomie, la flexibilité et la convivialité *start-up* tant prisée des nomades numériques[4]. Dans ce marché virtuel global, non seulement les entreprises se font concurrence en quête de la main-d'œuvre nécessaire, mais aussi les États entre eux, afin d'attirer les travailleurs étrangers à s'y installer pour exercer leurs activi-

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1 Voir Marc Malenfer, « Télétravail : perspectives post-Covid » (2022) 446:1 Futuribles 25; Statistique Canada, *Travail à domicile : productivité et préférences*, par Tahsin Mehdi et René Morissette, nº de catalogue 45-28-0001, Ottawa, Statistique Canada, 1 avril 2021; Suzy Canivenc et Marie-Laure Cahier, *Le travail à distance dessine-t-il le futur du travail?*, Paris, Presses des Mines, 2021 aux pp 27–42, en ligne (pdf) : *La Fabrique de l'industrie* : *laboratoire d'idées* <la-fabrique.fr/> [perma.cc/JF7W-7UFT].

2 Voir Pradeep Kar, « Remote First: Let's Hit The Home Run », *Business World* (24 mars 2021), en ligne : <businessworld.in> [perma.cc/W7RZ-UACS].

3 Voir Prithwiraj (Raj) Choudhury, « Our Work-from-Anywhere Future: Best practices for all-remote organizations » (2020) 98:6 Harvard Bus Rev 58 [Choudhury, « Work-from-Anywhere »]; Jeegar Kakkad et al, « Anywhere Jobs: Reshaping the Geography of Work » (2021), en ligne (pdf) : *Tony Blair Institute for Global Change* <www.institute.global> [perma.cc/DP9S-ASZK]; European Foundation for the Improvement of Living and Working Conditions et International Labour Office, *Working anytime, anywhere*: *The effects on the world of work* (Rapport de recherche), par Jon Messenger et al, Luxembourg, Publications Office of the European Union, 2017, en ligne (pdf) : *Eurofound* <www.eurofound.europa.eu> [perma.cc/S3R6-DU93].

4 Le « nomade numérique » est une personne qui télétravaille depuis plusieurs États successivement, sans qu'il soit possible de déterminer un seul lieu habituel de travail (voir Gérard Valenduc et Patricia Vendramin, « Le travail dans l'économie digitale : continuités et ruptures » (2016) Institut syndical européen Document de travail 2016.03 à la p 32, en ligne (pdf) : *European Trade Union Institute* <www.etui.org> [perma.cc/M53L-A57P]; Sumati Ahuja, Natalia Nikolova et Stewart Clegg, « Identities, Digital Nomads, and Liquid Modernity » dans Andrew D Brown, dir, *The Oxford Handbook of Identities in Organizations*, Oxford (R-U), Oxford University Press, 2020, 864 à la p 874). Le terme « workation » décrit assez bien ce phénomène, qui suscite un intérêt croissant dans le monde du travail (voir Bryan Lufkin, « Is the great digital-nomad workforce actually coming? », *BBC* (15 juin 2021), en ligne : <bbc.com> [perma.cc/J4E6-96CN]; Meredith Turits, « Could a 'workcation' change how you think? », *BBC* (20 mars 2020), en ligne : <bbc.com> [perma.cc/N4RF-NSA4]).

tés. La pandémie a été le laboratoire qui nous a permis d'observer ce mouvement vers lequel convergent actuellement une multitude d'États et de régions du monde ayant conçu des programmes spéciaux d'immigration pour attribuer une résidence temporaire à ceux voulant combiner travail, qualité de vie et expérience de dépaysement[5].

Plusieurs enquêtes et articles de presse témoignent d'une ouverture des entreprises canadiennes au recrutement international des télétravailleurs, notamment pour remédier à la pénurie de main-d'œuvre locale dans certains domaines, ainsi qu'aux politiques « *work from anywhere* », pour accroître leur attractivité et dynamiser leur organisation[6]. Le Canada serait par ailleurs un pays de destination pour des travailleurs hautement qualifiés, empêchés de demeurer sur le territoire des États-Unis pour des raisons migratoires. Grâce à un partenariat avec le gouvernement du Canada, des agences canadiennes se chargent du « *nearshoring* » de ces travailleurs[7], en vue d'obtenir pour eux un statut de résident canadien qui leur permettrait, à la fin d'un processus accéléré d'immigration, de renouer leur lien contractuel avec l'employeur américain[8].

Les conséquences de ces pratiques sur le plan juridique peuvent entraver leur développement. L'incertitude sur le sort du contrat et

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5 Voir Lauren Razavi, « The Great Migration: Remote Work, Digital Nomads and the Future of Citizenship » (8 décembre 2021), en ligne : *Tony Blair Institute for Global Change* <www.institute.global> [perma.cc/AK3W-BHG7].

6 Voir Jared Lindzon, « How to stay connected with staff allowed to work anywhere in the world », *The Globe and Mail* (6 septembre 2022), en ligne : <theglobeandmail.com> [perma.cc/FM2X-8TM7]; PwC, « Tendances en matière d'emploi à distance et outre-frontière : le Canada est-il prêt? » (novembre 2021), en ligne (pdf) : *L'Institut national de la paie* <paie.ca> [perma.cc/ALM5-AG7T]; Karim Benessaieh, « Du télétravail à la "télémigration" », *La Presse* (20 septembre 2021), en ligne : <lapresse.ca> [perma.cc/ZQC7-2KLX]; Kelsey Rolfe, « 'Work from home' defined the pandemic, but the future is 'work from anywhere' », *Financial Post* (14 septembre 2021), en ligne : <financialpost.com> [perma.cc/MV79-CE5L].

7 Le « *nearshoring* » fait référence à la délocalisation du travailleur vers une destination géographiquement proche du lieu d'établissement de l'employeur qui exerce le contrôle de l'activité (voir Koen De Backer et al, « Reshoring: Myth or Reality? » (2016) OECD Science, Technology and Industry Policy Papers No 27 à la p 7, en ligne (pdf) : *OECD iLibrary* <www.oecd-ilibrary.org> [perma.cc/2VHD-P8P6]). La situation du télétravailleur dans une région partageant le même fuseau horaire et, en général, les avantages en termes de proximité territoriale et culturelle facilitent la communication et les liens de collaboration au sein de l'équipe et, surtout, l'exercice du pouvoir de direction de l'employeur (sur les différences avec les formes traditionnelles de délocalisation du travail, voir *ibid* aux pp 7–8).

8 Voir l'exemple de la compagnie MobSquad, filiale de Digital Nova Scotia, ayant des établissements à Vancouver, Calgary, Toronto et Halifax, dont les services sont décrits sur son site Internet (« How it works For US Companies », en ligne : *MobSquad* <mobsquad.io> [perma.cc/2QKN-LT9A]; Choudhury, « Work-from-Anywhere », *supra* note 3 à la p 62).

l'absence d'articulation entre les normes ayant vocation à le régir constituent des « *regulatory frictions* »[9] qui réclament des solutions adaptées. Pour affronter ces enjeux, on pense immédiatement aux règles de droit international privé, qui ont pour mission spécifique de résoudre le conflit de lois potentiellement applicables à une situation transfrontalière en ayant recours aux critères de rattachement les plus appropriés selon la nature du rapport de droit. Les règles de conflit portant sur le contrat de travail international désignent le régime gouvernant la formation, l'exécution et la cessation du contrat, y compris les dispositions impératives ayant pour but de protéger le travailleur en tant que « partie faible » du rapport de travail[10]. Cependant, ce système aspirant à appréhender de façon unitaire le contrat individuel de travail se voit concurrencé par le régime statutaire établissant les conditions minimales d'emploi. L'application de ce dernier dans un contexte transfrontalier suit une démarche propre, détachée du processus ordinaire des conflits de lois. Ainsi, ces deux ensembles normatifs semblent opérer en vase clos, chacun établissant pour lui-même des critères de rattachement qui ne sont pas toujours convergents et qui peuvent se contredire mutuellement. L'analyse de l'application au télétravail transfrontalier des règles de conflit de lois (I) et du régime établissant les normes minimales d'emploi au Québec (II) nous conduira à aborder sous un angle critique le rapport entre ces méthodes, dans l'objectif de démontrer le besoin de coordination entre elles (III).

I. La loi applicable au télétravail transfrontalier

Cette section traitera des règles de droit international privé relatives au contrat de travail (la méthode conflictuelle), en commençant par la réception de l'autonomie de la volonté dans la détermination de la loi applicable au contrat, pour ensuite présenter les enjeux du rattachement objectif eu égard au télétravail transfrontalier.

A. Le choix de la loi applicable et ses limites

Le régime conflictuel du contrat de travail en droit québécois est façonné sur le modèle de la *Convention de Rome de 1980 sur la loi appli-*

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[9] Les termes sont empruntés à Prithwiraj Choudhury qui les utilise dans un autre sens pour référer aux limitations légales à la mobilité, incluant notamment les exigences pour obtenir des visas et pour accéder aux bénéfices publics offerts au niveau fédéral ou régional (Prithwiraj (Raj) Choudhury, « Geographic Mobility, Immobility, and Geographic Flexibility: A Review and Agenda for Research on the Changing Geography of Work » (2022) 16:1 Academy Management Annals 258 aux pp 273–74).

[10] Voir Fausto Pocar, « La protection de la partie faible en droit international privé » (1984) 188 Rec des Cours 339.

cable aux obligations contractuelles[11], celle-ci étant à son tour à l'origine du règlement Rome I[12], ce qui témoigne du rapprochement entre les systèmes québécois et européen. La faculté de désigner la loi applicable au rapport d'emploi dérive du principe général de l'autonomie de la volonté conflictuelle reconnu à l'article 3111 CcQ. Le choix de la loi applicable à un contrat international de travail peut soit être contenu dans une clause expresse du contrat, soit être déduit d'une façon certaine des termes convenus. Le recours à cet instrument permet d'affronter les aléas d'une relation de travail particulièrement propice à l'internationalisation, en neutralisant l'« effet surprise » des mobilités transfrontalières du télétravailleur. Or nous verrons que l'efficacité de cet outil d'anticipation contractuelle peut être frustrée par l'unilatéralisme des normes minimales d'emploi[13].

Reconnaissant le caractère déséquilibré du rapport de travail qui place les parties en situation d'inégalité réelle dans l'exercice de leur liberté contractuelle, le *Code civil du Québec* impose des restrictions à la désignation du droit applicable. La loi choisie sera respectée dans la mesure où elle ne prive pas le travailleur de la protection offerte par la loi qui serait applicable en l'absence de désignation par les parties. De cette façon, on garantit au travailleur un seuil minimal de protection qui sera déterminé par la loi de l'État où il accomplit habituellement son travail ou, à défaut, par celle de l'État du domicile ou de l'établissement de l'employeur[14]. Cette restriction comporte la nécessité de procéder à un exercice de comparaison des résultats de l'application des lois en cause à la situation concrète, l'autorité saisie du litige devant constater une privation effective des droits du travailleur. Dans cette perspective, la loi choisie par les parties sera confrontée aux « dispositions impératives » de la loi qui serait appelée à résoudre le litige à défaut de choix[15].

Le contenu de ces dispositions varie selon les ordres juridiques, mais on peut identifier en droit comparé un noyau dur de règles qui interviennent dans le contrat de travail dans un objectif de protection des employés. Issues de sources diverses (législations, règlements, jurisprudence,

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11 CE, *Convention de Rome de 1980 sur la loi applicable aux obligations contractuelles (version consolidée)*, [1998] JO, C 27/34 [*Convention de Rome*]; Québec, Ministère de la Justice, *Commentaires du ministre de la Justice* : *le Code civil du Québec*, t2, Québec, Publications du Québec, 1993 aux pp 1987–88.

12 CE, *Règlement (CE) Nº 593/2008 du Parlement européen et du Conseil du 17 juin 2008 sur la loi applicable aux obligations contractuelles (Rome I)*, [2008] JO, L 177/6.

13 Voir « La portée territoriale de la *Loi sur les normes du travail* », ci-dessous.

14 Voir art 3118, al 1 CcQ.

15 Voir Gérald Goldstein, « Commentaire sur l'article 3118 C.c.Q. » dans *Commentaires sur le Code civil du Québec (DCQ),* Yvon Blais, 2011 au para 555 (Référence).

conventions collectives, usages), ces règles touchent notamment au salaire minimum, à la rémunération des heures supplémentaires, au temps du travail, aux congés payés, à la protection contre le harcèlement et les disparités de traitement, et à la rupture du contrat de travail[16]. À ces règles s'ajoutent les dispositions spécifiques qui encadrent le recours au télétravail, les conditions pour y accéder et y mettre fin, ainsi que les conséquences pour les parties en ce qui concerne la prise en charge des coûts associés à son organisation, la protection de données, la déconnexion du travail, le respect de la vie privée du salarié, etc. Les réglementations spéciales traitant de ces aspects se sont multipliées depuis l'irruption de la pandémie[17].

Lorsque la règle de conflit objective désigne comme applicable au contrat de travail une loi canadienne, les dispositions impératives à examiner comprennent les standards de protection minimale établis par la loi provinciale compétente ou par le *Code canadien du travail*[18], dans le cas des employés opérant dans des secteurs relevant de la compétence fédérale. Or, la désignation du droit applicable ne se limite pas aux normes d'origine législative, elle englobe également les règles de *common law* portant sur l'objet du litige, en vigueur dans les provinces autres que le Québec. Ainsi, devant une action en réparation de dommages pour congédiement injustifié qui aurait été régie par le droit ontarien à défaut de choix, un tribunal québécois devra considérer le régime de la *common law* qui accorde au travailleur le droit d'obtenir un montant supérieur à celui fixé par les normes minimales d'emploi de l'Ontario. Pour que cette protection

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16 Voir Martin Franzen et Joachim Wutte, « Article 8 Rome I » dans Gralf-Peter Calliess et Moritz Renner, dir, *Rome Regulations*: *Commentary*, Kluwer Law International, 3e éd, 2020, 231 à la p 238; Jean-Philippe Lhernould et Sandra Limou, « Le travail à l'étranger : Détachement et expatriation : quelles règles appliquer? » (2019) 73 Liaisons sociales, Les thématiques 5 à la p 13. Ces règles d'ordre public sont au centre de la relation contractuelle employeur-employé. En ce qui concerne les règles de droit public, l'analyse de leur intervention dans les rapports internationaux de travail demeure en dehors de la présente étude, mais il convient de mentionner les observations des professeurs Mario Giuliano et Paul Lagarde sur l'article 6 de la *Convention de Rome* (*supra* note 11), antécédent direct de l'article 3118 CcQ, à l'effet que « [l]es dispositions impératives auxquelles les parties ne peuvent déroger sont non seulement les dispositions relatives au contrat de travail proprement dit, mais également les dispositions telles que celles concernant l'hygiène et la sécurité des travailleurs qui sont qualifiées dans certains États membres de dispositions de droit public » (CE, *Rapport concernant la convention sur la loi applicable aux obligations contractuelles*, [1980] JO, C 282/1 à la p 25), ce qui illustre la large portée de la règle de conflit sur les contrats de travail.

17 Voir International Labour Organization, « Teleworking arrangements during the COVID-19 crisis and beyond » 2nd Employment Working Group Meeting under the 2021 Italian Presidency of the G20, avril 2021 à la p 11, en ligne (pdf) : *International Labour Organization* <www.ilo.org> [perma.cc/6GRJ-KW38].

18 LRC 1985, c L-2.

puisse être écartée par une clause du contrat, il doit s'en dégager une intention claire à cet effet, toute ambiguïté devant s'interpréter en faveur du salarié[19]. La clause doit se conformer au minimum statutaire prévu, autrement celle-ci sera dépourvue d'effets et le salarié pourra demander la protection maximale, en réclamant des dommages et intérêts suivant la *common law*[20]. Cet exemple illustre l'étendue de la référence aux dispositions impératives de la loi objectivement applicable. Il démontre également que les règles limitatives du choix de loi au sens de l'article 3118 CcQ empruntent des formes variables d'impérativité, en imposant les conditions de validité de la renonciation conventionnelle au « *reasonable notice of termination* » et en se substituant aux normes minimales d'emploi pour garantir au travailleur un meilleur niveau de protection, en cas de non-respect de celles-ci.

Le test comparatif de l'article 3118 CcQ consacre ainsi l'application de la loi la plus favorable au salarié, laissant la place à l'autonomie de la volonté lorsque la loi choisie offre au travailleur une protection majeure ou équivalente à celle prévue par les dispositions impératives émanant de la loi objectivement applicable. Le choix de la loi ontarienne dans un contrat de travail interprovincial exécuté au Québec n'est donc pas nul et ne contrevient pas à l'article 93 de la *Loi sur les normes du travail* (LNT)[21], car le mécanisme protecteur de l'article 3118 CcQ tend justement à éviter que le travailleur soit privé des droits plus favorables issus de la loi locale[22].

Il convient de noter que le degré d'impérativité exigé par l'article 3118 CcQ n'est pas celui associé aux lois de police de la *lex fori* ou d'un État tiers étroitement connecté au litige[23]. Même si, dans la plupart

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19 Voir *Nemeth v Hatch Ltd*, 2018 ONCA 7 au para 12; *Amberber v IBM Canada Ltd*, 2018 ONCA 571 aux para 44–46.

20 Voir *Machtinger c HOJ Industries Ltd*, [1992] 1 RCS 986 aux pp 999–1000, 91 DLR (4e) 491. Il en résulte un « implied term » d'élaboration jurisprudentielle qui intègre dans le contrat le droit au délai-congé raisonnable en vertu de la *common law* (voir Geoffrey England, Peter Barnacle et Innis M Christie, *Employment Law in Canada*, 4e éd, LexisNexis Canada, 2005 aux para 14.27, 14.93 et 14.94).

21 RLRQ c N-1.1 [LNT].

22 La décision dans *Pelletier c. Aisa Corporation* à l'effet contraire méconnaît la dimension transfrontalière du contrat qui justifie l'application de l'article 3118 alinéa 1 C.c.Q. sur ce point (2011 QCCRT 0142 aux para 46–48 [*Pelletier*], requête en révision judiciaire refusée, *Aisa Corporation c Commission des relations du travail*, 2012 CanLII 105289, AZ-51187128 (SOQUIJ) (CS Qc)).

23 Voir arts 3076, 3079 CcQ. L'impérativité interne empêche les parties de déroger à la règle de droit au moyen d'une stipulation contractuelle, alors que l'impérativité internationale oppose deux volontés normatives : d'une part, la loi choisie par les parties ou déterminée par le rattachement objectif et, d'autre part, la loi de police appartenant à un autre État. La supériorité de la seconde sur la première ne repose pas sur son carac-

des cas, les règles protectrices des travailleurs sont non seulement impératives en droit interne mais aussi sur le plan international, leur intervention dans le rapport contractuel se fait d'ordinaire par le biais de la règle de conflit spéciale, sans besoin de recourir au mécanisme exceptionnel des lois de police. Cela s'explique par le fait que le champ d'application territorial des lois de police en la matière coïncide généralement avec le critère principal utilisé par l'article 3118 CcQ pour restreindre le choix de la loi, soit le lieu où le travailleur accomplit habituellement ses fonctions[24]. Lorsque cette convergence fait défaut, l'employé pourrait, en effet, faire valoir les lois de police du for ou étrangères pour obtenir la protection non conférée ni par la loi choisie ni par la loi applicable à défaut de choix[25].

B. La règle de conflit objective

Le deuxième alinéa de l'article 3118 CcQ désigne la loi applicable au contrat de travail lorsque les parties ont omis de le faire expressément ou implicitement. Deux facteurs de rattachement sont établis par la règle de conflit objective, selon que le salarié exécute son travail depuis un lieu habituel ou non. Dans le premier cas, c'est cet État qui fournira le régime juridique applicable, alors que, dans le deuxième, le contrat sera soumis à la loi de l'État où l'employeur a son domicile ou son établissement. Si ce dernier possède des établissements dans des États différents de celui où la compagnie est incorporée[26], la règle de conflit ne précise pas lequel des rattachements est à retenir. La solution devra alors être recherchée dans le principe de proximité sous-jacent, ce qui impliquera de sélectionner l'État du domicile ou de l'établissement qui matérialise le lien de rattachement le plus étroit avec la situation concrète.

Le caractère habituel du lieu du travail au sens de la règle de conflit n'exclut pas la mobilité transfrontalière pendant la durée de l'emploi. Ce critère n'est donc pas incompatible avec l'exécution d'une partie du travail depuis plusieurs États, dans la mesure où ces déplacements n'empêchent

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tère d'ordre public interne, mais sur sa finalité d'intérêt public (social, politique, économique) qui mérite d'être respectée dans la situation internationale.

24 Le caractère spécial de cette règle de conflit intègre déjà les préoccupations à la base du mécanisme des lois de police (voir Geneviève Saumier, « Le droit international privé et le travail international » dans Service de la formation continue du Barreau du Québec, *Développements récents en droit des affaires internationales* : *le travail international*, vol 304, Cowansville (QC), Yvon Blais, 2009, 197 à la p 209 [Saumier, « Le droit international privé »]).

25 Voir « L'articulation au sein de l'approche territoriale », ci-dessous.

26 Le Code civil accueille la théorie de l'incorporation pour déterminer le domicile de la personne morale, qui sera celui de son siège statutaire (voir art 3083, al 2 CcQ).

pas l'identification d'un État depuis lequel le travailleur accomplit ses activités de façon prépondérante[27]. Un contrat de travail exécuté sous une modalité hybride, combinant une présence majoritaire dans les bureaux de l'entreprise et un certain temps de travail au domicile du travailleur situé en territoire frontalier, ne devrait donc pas avoir d'impact sur le facteur de rattachement principal. En revanche, lorsque le temps de travail est réparti équitablement entre plusieurs pays, sans qu'on puisse déceler un centre principal d'exécution des activités, le parcours du travailleur manque de la stabilité nécessaire à la détermination d'un seul et unique lieu habituel de travail. Ce cas de mobilité transfrontalière visé par la règle de conflit comprend sans difficulté le phénomène du nomadisme numérique, où le rattachement à la *lex loci laboris* devient artificiel face aux modifications successives du lieu de travail, la loi applicable étant dans ce cas celle du pays d'origine de l'employeur (domicile ou établissement).

Lorsque le télétravail en dehors des frontières du pays de l'employeur constitue la modalité principale d'exécution du contrat, la détermination du « lieu habituel de travail » peut devenir problématique. Dans cet environnement, les barrières spatiales entre les deux parties semblent s'effacer grâce à des outils technologiques capables de générer une « présence virtuelle » du travailleur dans les locaux de l'employeur, tout en assurant l'exercice par celui-ci de son pouvoir de direction. La dimension virtuelle de l'activité et la mobilité de l'employé suscitent deux difficultés importantes qui mettent en question les fondements de ce rattachement classique.

La première difficulté a trait à la pertinence même d'un critère de désignation qui se fonde sur la situation géographique de l'ordinateur à partir duquel le télétravailleur s'acquitte principalement de ses obligations.

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[27] La jurisprudence de la Cour de justice de l'Union européenne, en interprétation du lieu habituel de travail comme critère de compétence, apporte un éclairage important à cet égard, faute de jurisprudence québécoise en la matière. Lorsque le juge est confronté à des situations impliquant des travailleurs mobiles ayant effectué leur travail sur le territoire de plusieurs États, il fera une analyse globale des éléments factuels du litige afin de déterminer le pays avec lequel le « travail présente un rattachement significatif » (*Koelzsch c État du Grand-Duché de Luxembourg*, C-29/10, [2011] Rec CE I-1634 au para 44); celui « à partir duquel le travailleur s'acquitte principalement de ses obligations à l'égard de son employeur » (*Mulox IBC Ltd c Geels*, C-125/92, [1993] Rec CE I-4099 au para 24); ou celui où se trouve le « centre effectif de ses activités professionnelles » (*Rutten c Cross Medical Ltd*, C-383/95, [1997] Rec CE I-70 au para 23). Pour une étude récente sur l'application de ce critère au télétravail, voir Guillermo Palao Moreno, « Teletrabajo internacional: dificultades que suscita la determinación de la jurisdicción competente » dans Alfonso Ortega Giménez et Lerdys Saray Heredia Sánchez, dir, *Teletrabajo y derecho internacional privado : problemas y soluciones*, Navarre (Espagne), Aranzadi, 2023, 183 aux pp 196–203.

L'ancrage territorial du *home office* du salarié ne présenterait pas un lien de proximité suffisamment étroit avec le contrat de travail lorsque l'employeur ne déploie pas d'activité économique sur ce territoire. C'est pour ce motif que certains auteurs préconisent l'utilisation de la clause d'exception, qui permettrait de rattacher la relation de travail à la loi de l'établissement de l'employeur à partir duquel celui-ci exerce son pouvoir de contrôle et auquel est destinée la prestation virtuelle de travail[28]. Le mécanisme prévu par l'article 3082 CcQ peut se révéler utile pour écarter un rattachement inadapté à la réalité du télétravail pratiqué à l'initiative du salarié depuis un territoire étranger aux intérêts économiques de l'employeur. Cependant, le recours à cette « exception » pour résoudre au cas par cas le défaut de proximité démontre précisément la nécessité de repenser le bien-fondé de la solution générale dans ce contexte.

La deuxième difficulté résulte de la circulation géographique du télétravailleur pendant la durée du contrat. On ne réfère pas ici aux nomades numériques, hypothèse que nous avons abordée dans le cadre du rattachement spécialement prévu par l'article 3118 CcQ pour les situations où il n'existe pas de lieu habituel de travail. Nous évoquons en ce moment les conséquences d'un changement de domicile du salarié sur la détermination de la loi applicable au contrat. Si les parties ont convenu de la continuation de l'activité depuis la nouvelle résidence du travailleur, la localisation du contrat sera fixée dans cet État une fois que l'exécution du travail aura acquis un caractère habituel au sens de la règle de conflit. Or, l'enjeu est de savoir si une modification unilatérale du domicile du salarié entraînera un changement de la loi applicable lorsque l'employeur ignore la mutation opérée, en a eu simplement connaissance ou manifeste clairement son opposition à celle-ci. Une réponse affirmative à cette question menacerait la prévisibilité comme fondement des règles de conflit contractuelles, la loi applicable devant normalement répondre aux attentes légitimes des parties au stade de la conclusion du contrat ou ultérieurement, en cas de modifications convenues entre elles.

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[28] Voir Sophie Robin-Olivier, « La mobilité internationale du salarié » (2005) 5 Dr Soc 495 aux pp 498–99; Jean-François Cesaro, « La sécurité juridique et l'identification de la loi applicable » (2006) 7/8 Dr Soc 734 au para 20; Ángela Martín-Pozuelo López, « El teletrabajo y el Derecho Internacional Privado: el régimen particular del teletrabajo transnacional » dans Tomás Sala Franco, dir, *El teletrabajo*, Valence, Tirant lo Blanch, 2020, 101 aux pp 116–18; Giovanni Orlandini, « Il rapporto lavoro con elementi di internazionalità » (2012) Università degli Studi di Catania Facoltà di Giurisprudenza, Centro Studi di Dirito del Lavoro Europeo "Massimo D'Antona" Document de travail 137/2012 à la p 21. Cette solution avait déjà été envisagée par la Commission européenne (voir CE, *Livre vert sur la transformation de la Convention de Rome de 1980 sur la loi applicable aux obligations contractuelles en instrument communautaire ainsi que sur sa modernisation*, [2002] JO, C 6/54 à la p 40).

La particularité de la règle de conflit relative aux contrats de travail c'est qu'au-delà de la prévisibilité, elle est censée remplir un objectif de protection du travailleur, ce qui implique la nécessité de maintenir la séparation entre les rattachements subjectif et objectif conçus par l'article 3118 CcQ. Or, une fixation contractuelle du lieu de travail qui empêcherait de considérer le lieu effectif depuis lequel le travailleur accomplit son activité éclipserait la distinction entre les deux critères, en laissant entre les mains de l'employeur le pouvoir de neutraliser l'effet protecteur du rattachement objectif. La difficulté est en quelque sorte inédite, les situations traditionnelles de mobilité ne comportant pas de problèmes majeurs sous l'angle de la prévisibilité[29]. Que l'employé soit temporairement transféré vers un autre État, ou qu'il se déplace dans plusieurs États pour exécuter ses fonctions, c'est l'employeur qui l'envoie outre-frontière. Par conséquent, c'est lui qui définit le périmètre territorial au sein duquel sera ultimement fixé le lieu habituel de travail. On voit ainsi que protection et prévisibilité ne sont pas des valeurs opposées dans un contexte ordinaire de mobilité des travailleurs.

Le respect des attentes contractuelles, en général, et le caractère essentiellement volontaire du télétravail qui se dégage uniformément en droit comparé[30], en particulier, militent en faveur d'une solution compatible avec le fondement de prévisibilité dont on ne saurait dépouiller la règle de conflit sur le contrat de travail. Deux décisions serviront à illustrer ce positionnement. Dans un arrêt du 27 novembre 2013 opposant une société britannique et un salarié qui télétravaillait depuis son domicile en France tout en se rendant aux bureaux de son employeur à Londres une fois par semaine, la Cour de cassation française a fixé le lieu habituel de travail au Royaume-Uni. Elle a considéré que la tolérance dont le travailleur avait bénéficié ne pouvait autoriser une dérogation aux termes du

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29 Le rattachement objectif à la *lex loci laboris* est satisfaisant du point de vue de la sécurité juridique, les deux parties au contrat pouvant prévoir les règles censées gouverner leurs droits et obligations réciproques (voir Roberta Clerici, « Quale *favor* per il lavoratore nel Regolamento Roma I? » dans Gabriella Venturini et Stefania Bariatti, dir, *Nuovi strumenti del diritto internazionale privato* : *Liber Fausto Pocar*, vol 2, Milan, Giuffrè Editore, 2009, 215 à la p 217).

30 Voir par ex *Accord-cadre sur le télétravail*, CES, UNICE, UEAPME et CEEP, 16 juillet 2002, point 3; *Real Decreto-ley 28/2020, de 22 de septiembre, de trabajo a distancia* (Espagne), 23 septembre 2020, nº11043, arts 5–8; *Régimen legal del contrato de teletrabajo 2020* (Argentine), 14 août 2020, n°27555, arts 7–8; *Ley 21.220 Modifica el código del trabajo en materia de trabajo a distancia* (Chili), 26 mars 2020, n°21.220, arts 152 quáter G–I; *Arbeitsvertragsrechts-Anpassungsgesetz* (Autriche), 2021, § 2h (2); *Misure per la tutela del lavoro autonomo non imprenditoriale e misure volte a favorire l'articolazione flessibile nei tempi e nei luoghi del lavoro subordinato* (Italie), 22 mai 2017, nº81, art 19.

contrat, en l'absence d'une entente claire entre les parties pour modifier la localisation du lieu de travail[31].

La deuxième décision que nous mentionnerons à titre illustratif ne contient pas d'analyse de droit international privé mais de droit substantiel uniquement. La Cour suprême de la Colombie-Britannique a estimé qu'un employé autorisé à télétravailler depuis son lieu de résidence en Alberta avait été congédié par une compagnie britanno-colombienne pour juste cause, en raison d'un déménagement non autorisé vers le Mexique[32]. D'une part, l'employé invoquait sa liberté de mouvement dans le cadre du contrat, en vertu de la clause qui lui permettait de télétravailler depuis son domicile sans restriction territoriale précise. D'autre part, il s'appuyait sur sa capacité de remplir ses responsabilités depuis le Mexique. La Cour n'a pas retenu ces deux arguments, car la décision concernant la relocalisation d'un employé vers un État différent de celui prévu dans le contrat demeure une prérogative de l'employeur dans l'exercice de son pouvoir de direction. Même si cette affaire n'est pas un exemple de situation purement interne, le raisonnement suivi par la Cour sert à illustrer que, dans les rapports initialement rattachés à un seul ordre juridique[33], le changement transfrontalier du domicile d'un télétravailleur qui n'est pas autorisé par l'employeur peut recevoir une réponse directe, d'ordre substantiel, qui permet d'évacuer en amont la problématique du conflit de lois.

II. La portée territoriale de la *Loi sur les normes du travail*

La *Loi sur les normes du travail* encadrant les conditions minimales à respecter dans les rapports individuels et collectifs de travail au Québec contient une disposition expresse qui établit ses critères d'application territoriale. Ils distinguent selon que le travail a été effectué dans la province, en dehors de celle-ci ou à la fois au Québec et hors Québec. Nous analyserons la jurisprudence sur l'applicabilité de cette législation provinciale aux demandes relatives aux contrats de travail exécutés par des salariés depuis leur domicile, tantôt situé au Québec, tantôt situé ailleurs.

A. Le travail au Québec

Pour définir sa portée territoriale, la LNT commence par exiger l'exécution du travail dans la province. Dans un souci de protection, le lé-

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[31] Voir Cass soc, 27 novembre 2013, [2013] Bull civ 294, nº 12-24.880.

[32] Voir *Ernst v Destiny Software Productions Inc*, 2012 BCSC 542.

[33] Le litige a été tranché conformément au régime des « wrongful dismissal actions » applicable dans les provinces canadiennes de *common law*.

gislateur a voulu étendre le bénéfice des conditions minimales de travail de façon uniforme à l'ensemble des travailleurs accomplissant leurs activités sur le territoire du Québec, indépendamment de l'origine de l'employeur. Les autorités chargées de l'application de la loi ont eu l'occasion de préciser leur conception du lieu où est effectué le travail au sens de l'article 2 LNT dans quelques décisions portant sur des plaintes pour congédiement injustifié introduites par des télétravailleurs à domicile sur le fondement de l'article 124 LNT. Sans surprise, il s'agit du territoire où se situe le domicile du salarié et à partir duquel il accomplit ses fonctions. Ainsi, dans l'affaire *McGinnity*, une employée embauchée par une entreprise du Nouveau-Brunswick pour travailler depuis sa résidence à Montréal dans la rédaction de textes promotionnels pour les médias est couverte par le domaine territorial de la LNT. Les déplacements à deux moments ponctuels vers le siège social de l'employeur au Nouveau-Brunswick n'ont pas eu d'incidence sur la localisation du lieu du travail[34].

Pour les mêmes motifs, lorsque le télétravailleur accomplit ses tâches pour une entreprise québécoise depuis son domicile à l'extérieur de la province, en se présentant aux bureaux de son employeur au Québec de façon occasionnelle pour de brèves rencontres, son recours pour congédiement injustifié demeure en dehors du domaine de la loi. Ce fut le cas dans l'affaire *Holm* de 2008, concernant un télétravailleur domicilié au Massachusetts, intégré à une équipe qui fournissait des services financiers à des clients en Europe, en Inde, en Australie, aux États-Unis et au Canada, sous la supervision d'un groupe ayant son siège social à Montréal et des filiales aux États-Unis[35]. Invoquant la protection contre le congédiement injustifié offerte par la LNT, le plaignant soutenait une interprétation novatrice selon laquelle, « avec les nouvelles technologies, le lieu à partir duquel l'employé exécute son travail est secondaire et doit donc être apprécié différemment pour l'applicabilité de l'article 2 de la Loi »[36]. La réponse de la Commission des relations du travail a été catégorique. Tout en admettant que « les technologies aient permis d'abolir la distance dans le cadre d'une prestation du travail »[37], elle s'en tient à une interprétation littérale de l'article 2 LNT, en considérant que cette disposition exige une exécution « réelle, voire physique » du travail au Québec[38], ce qui s'est traduit par le rejet de la demande du travailleur.

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34 Voir *McGinnity c Onboardly Media inc*, 2018 QCTAT 2649 [*McGinnity*].

35 Voir *Holm c Groupe CGI inc*, 2008 QCCRT 492 [*Holm*].

36 *Ibid* au para 30.

37 *Ibid* au para 31.

38 *Ibid* au para 35.

Dix ans après, le même argument a été avancé au soutien d'une plainte pour congédiement injustifié introduite par une télétravailleuse qui remplissait ses obligations depuis son domicile à Calgary, dans le cadre d'un contrat de représentante aux ventes conclu avec une compagnie montréalaise[39]. Quoique la conclusion du Tribunal administratif du Travail (TAT) rejoigne celle de la Commission des relations du travail dans *Holm*[40], le raisonnement suivi ne se montre pas insensible à l'argument selon lequel « l'évolution des moyens technologiques permet l'exécution de son travail de partout dans le monde », qu'il juge « séduisant » et pouvant mériter l'attention du législateur dans une future réforme législative[41]. Ce constat, en harmonie avec l'évolution du travail à l'ère de l'économie numérique, n'a pas empêché le TAT de confirmer l'interprétation de l'article 2 LNT exigeant un rattachement physique avec le Québec pour justifier l'application des règles protectrices invoquées.

B. Le travail hors Québec

L'accomplissement du travail intégralement à l'extérieur du Québec place le travailleur en dehors de la protection de la LNT, à moins de démontrer qu'il est domicilié ou résident dans la province et que son employeur a sa résidence, son domicile, son entreprise, son siège ou son bureau au Québec[42]. Le principe étant celui de l'application territoriale de la Loi aux employés exécutant leurs fonctions dans la province, cette situation revêt un caractère spécial au sein de l'article 2 LNT. L'examen de la jurisprudence révèle que les critères mentionnés alternativement dans la disposition sont examinés au regard du véritable employeur du plaignant, compte tenu des éléments factuels caractérisant la relation de travail, indépendamment des liens de propriété ou d'actionnariat qui rattacheraient l'entité à d'autres personnes morales. Cette conclusion s'entend sous réserve de la théorie de l'osmose permettant d'assujettir à la LNT une autre entité à laquelle l'employeur nominatif serait intégré, au point de ne former qu'une seule entreprise, en raison de l'imbrication des structures et du caractère interchangeable des moyens de production[43].

La Loi vise ainsi l'employeur jouissant d'une capacité de gestion indépendante, qui exerce avec autonomie la direction des activités du salarié.

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39 Voir *Trainor c Fundstream inc*, 2018 QCTAT 5714 [*Trainor* QCTAT].

40 *Supra* note 35.

41 Voir *ibid* aux para 20–24.

42 Voir LNT, *supra* note 21, art 2(2).

43 Voir par ex *Commission des normes du travail c Micros System Inc*, 2009 QCCS 6083 aux para 39–46 [*Micros*].

La décision *Tardif* constitue à cet effet une référence importante dans l'interprétation du paragraphe 2 de l'article 2 LNT[44]. Un résident québécois qui exécute son travail en Ontario, pour une entreprise ontarienne, filiale d'une société ayant son siège social à Montréal, n'est pas couvert par le domaine territorial de la Loi. Dans les faits, c'est la filiale ontarienne qui organisait l'ensemble des opérations, versait le salaire et fournissait l'équipement pour l'exécution des tâches, sans qu'aucun lien n'ait jamais existé entre le salarié et la compagnie mère québécoise, même si le contrat de travail avait été signé dans les bureaux de cette dernière[45]. Dans cette affaire, la « confusion » des employeurs selon la théorie de l'osmose a été rejetée[46].

Quant aux éléments de rattachement de l'employé au Québec, concrétisés dans l'exigence du domicile ou de la résidence, ils sont interprétés conformément aux articles 75 et suivants du Code civil. La résidence, notion de fait, peut faire l'objet d'une modification lorsque l'employé s'installe dans un nouvel État afin d'accomplir sa prestation de travail. Cependant, les déplacements pour les fins de l'emploi pendant une période donnée n'auraient, en principe, pas d'impact sur le domicile du salarié, à moins de démontrer une intention de permanence dans le nouveau lieu de résidence[47]. Cette hypothèse semble conçue pour protéger les travailleurs québécois assignés temporairement par leurs employeurs en dehors de la province pour exécuter un projet déterminé[48]. Dans un contexte de télétravail, elle couvrirait également les nomades numériques embauchés par des employeurs québécois et conservant leur domicile dans la province, pour autant qu'ils n'aient pas fixé leur principal établissement à l'étranger[49]. L'employeur aurait toujours la possibilité de démontrer l'élément intentionnel justifiant le changement de domicile, ce qui entraînerait la perte de la condition de salarié visée par le deuxième paragraphe de l'article 2 LNT.

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44 Voir *Tardif c Compagnie Abitibi-Consolidated du Canada*, 2004 QCCRT 645 [*Tardif*], requête en révision judiciaire rejetée, *Tardif c Québec (Commission des relations du travail)*, 2005 CanLII 27487, AZ-50327016 (SOQUIJ) (CS Qc).

45 Voir *ibid* aux para 33–38.

46 Voir aussi *Lavoie c Biscuits Leclerc ltée*, 2010 QCCRT 75 aux para 6–10; *Charette et Entreprises P Bonhomme ltée*, 2016 QCTAT 2390 aux para 60–68 [*Charette*]; *Lacasse c Portraits Magimage inc,* 2001 CanLII 59226 aux para 35–37, AZ-50099384 (SOQUIJ) (Commissaire du travail Qc).

47 Voir par ex *Laguë et Québec (Ministère des Relations internationales),* 1999 CanLII 31709 à la section II, au point 3, AZ-50061490 (SOQUIJ) (Commissaire du travail Qc).

48 Voir Québec, Assemblée nationale, *Journal des débats de la Commission permanente du travail et de la main-d'œuvre*, 31-4, vol 21, nº129 (12 juin 1979) à la p B-5530.

49 Voir art 76 CcQ.

C. Le travail à la fois au Québec et hors Québec

Une troisième situation relevant du champ d'application de la LNT concerne le travail exécuté « à la fois au Québec et hors du Québec », effectué « pour un employeur dont la résidence, le domicile, l'entreprise, le siège ou le bureau se trouve au Québec »[50]. Bien que la disposition ne fasse pas expressément mention de la proportion que doit représenter le travail au Québec par rapport à l'ensemble des activités de l'employé, la jurisprudence a précisé à plusieurs reprises que la partie du travail accomplie au Québec doit être significative ou substantielle pour qu'un employé puisse prétendre au bénéfice de la LNT. Par conséquent, des visites ou des séjours occasionnels au Québec ne constituent pas la réalisation effective d'une prestation de travail dans la province[51]. Dans ces circonstances, le travailleur sera traité comme s'il avait intégralement travaillé en dehors du Québec, ce qui détermine son exclusion du domaine de la LNT, à l'exception des cas où il maintiendrait son domicile ou sa résidence au Québec[52].

La condition additionnelle relative à l'employeur, que l'on peut résumer comme étant l'exigence d'exploiter une entreprise dans la province, a été interprétée dans quelques décisions concernant des salariés travaillant à titre de représentants ou d'agents de ventes pour le territoire du Québec. Les employeurs, qui n'avaient pas de place d'affaires au Québec au sens matériel du terme, ont été considérés avoir constitué un bureau ou un établissement dans le domicile du salarié depuis lequel ce dernier exécutait principalement ses services[53], ou plus génériquement dans la province du Québec, en raison de la vente et de la promotion des produits pour une clientèle locale[54]. Le fondement de l'analyse concluant à l'exploitation d'une entreprise repose sur l'idée qu'« [e]xercer une entreprise au Québec, au sens de la *Loi sur les normes du travail*, veut dire [...] qu'un employeur exerce au Québec, sur une base continue, et présentant un certain caractère de permanence, des services ou du travail *par l'intermédiaire d'un ou*

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50 LNT, *supra* note 21, art 2(1).

51 Voir *Brown c IAMGold Corporation*, 2020 QCTAT 4859 aux para 20–25 [*Brown*], pourvoi en contrôle judiciaire à la CS, 200-17-031929-219 (20 janvier 2021); *Holm*, *supra* note 35 au para 34; *Trainor* QCTAT, *supra* note 39 au para 23; *Charette, supra* note 46 aux para 57–58; *Tardif*, *supra* note 44 au para 37; *Romeo c WE Canning Inc* (1998), AZ-98144574 (SOQUIJ), 1998 CanLII 27410 (Commissaire du Travail Qc).

52 Voir LNT, *supra* note 21, art 2(2).

53 Voir *Boisvert c Marnier-Lapostolle Chile Spa*, 2018 QCTAT 4718 au para 18 [*Boisvert*].

54 Voir *Pelletier*, *supra* note 22 aux para 4–5, 49; *Ladouceur c Almico Plastics Canada Inc* (1990), AZ-90143023 (SOQUIJ) aux pp 12–13, 1990 CanLII 10914 (arbitre : Émile Moalli) [*Ladouceur*].

plusieurs employés » [nos italiques][55]. Quoique sans expliciter ses motifs, dans l'affaire *Micros*, la Cour arrive à la même conclusion, en considérant qu'une compagnie américaine avait établi un bureau au Québec dans la résidence d'un salarié qui exécutait ses fonctions en régime de télétravail. En tant que « regional sales director », l'employé était en l'espèce chargé de desservir une clientèle américaine et québécoise, aussi bien depuis son domicile qu'en se rendant aux États-Unis. Pour sa part, l'employeur avait défrayé les coûts de connexion à Internet ainsi que ceux associés à l'installation des lignes téléphoniques[56].

Avec la progression du télétravail à l'échelle mondiale et la diversification des tâches susceptibles d'être exécutées sous cette modalité, on pouvait s'attendre à ce qu'un télétravailleur domicilié dans un État donné soit embauché par une entreprise ayant son siège social et ses places d'affaires dans d'autres territoires, pour rendre ses services au profit d'un secteur du marché géographiquement éloigné de l'espace physique de travail. C'est ce qui s'est produit dans l'affaire *Marchetta* concernant une télétravailleuse ayant rendu l'entièreté de ses services de soutien financier à une clientèle américaine. Dans une première décision du 18 mai 2021 (*Marchetta* TAT-1), le tribunal avait statué en faveur de l'applicabilité de la LNT à l'employée, laquelle avait rempli ses obligations à la fois depuis son domicile au Québec et en se rendant chez des clients aux États-Unis[57]. Sur le fondement de l'arrêt *Boisvert*[58], on a estimé que l'employeur avait créé un établissement au domicile de l'employée au Québec[59]. Ce raisonnement fut révisé le 15 novembre 2021, dans une décision (*Marchetta* TAT-2), confirmée par la Cour supérieure, qui introduit une nouvelle ligne interprétative[60].

La deuxième décision du TAT affirme que, dans les circonstances de l'affaire, attribuer un établissement à l'employeur dans la résidence du salarié constitue un vice de fond méritant révision. Après avoir reproduit

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55 *Brunet c Loeb Ltd* (1983), AZ-83141420 (SOQUIJ) à la p 14, [1983] TA 818 (Commission des normes du travail Qc). Cet extrait est repris dans l'ouvrage de Jean-Louis Dubé et Nicola Di Iorio (*Les normes du travail*, Sherbrooke, Éditions Revue de Droit Université de Sherbrooke, 1987 à la p 40) qui est à son tour cité dans les affaires *Ladouceur* (*supra* note 54 à la p 12) et *Commission des normes du travail c. Aisa Corporation* (2010 QCCQ 7045 au para 6).

56 Voir *Micros, supra* note 43 aux para 10–18, 30.

57 Voir *Marchetta c Visual Training Solutions Inc*, 2021 QCTAT 2402 [*Marchetta* TAT-1].

58 *Supra* note 53.

59 Voir *Marchetta* TAT-1, *supra* note 57 au para 11.

60 Voir *Marchetta c Visual Training Solutions Inc*, 2021 QCTAT 5451 [*Marchetta* TAT-2], conf par *Marchetta c Tribunal administratif du travail*, 2023 QCCS 3254 [*Marchetta* CS], autorisation de pourvoi à la CA accordée, *Marchetta c Petros 724 inc*, 2023 QCCA 1276.

la citation doctrinale selon laquelle un employeur étranger est censé exploiter une entreprise au Québec par l'entremise de ses salariés, le TAT apporte une nuance importante : « [i]l va de soi que les services dispensés ou le travail des employés doivent viser le territoire québécois »[61]. En réalité, l'association entre marché ciblé et lieu de travail, qui allait de soi en 1987 lorsque ces propos ont été publiés, n'est pas transposable au contexte numérique, où les services accomplis dans un État peuvent traverser instantanément les frontières par le réseau et se répercuter sur un marché distinct. La précision est de taille, compte tenu de la dissociation géographique que les moyens technologiques peuvent opérer avec immédiateté entre le travail et le marché auquel celui-ci est destiné. Trois arguments fondamentaux ont été avancés par la décision *Marchetta* TAT-2. Le premier est celui relatif à l'absence d'activité économique de l'employeur au Québec, ce qui distinguait le litige de l'affaire *Boisvert*[62]. Le deuxième réside dans l'impossibilité d'accorder à la LNT une portée extraterritoriale[63]. Enfin, le TAT souligne un troisième élément :

> Dans son cas de figure, il n'y a aucune différence entre elle [la télétravailleuse] et celle d'un salarié de l'entreprise demeurant aux États-Unis et œuvrant sur ce territoire. En aucun temps, pourrions-nous soutenir que la LNT s'applique à ce dernier. Conclure autrement équivaudrait à rendre applicable la LNT à tout employeur partout dans le monde dès qu'un de ses salariés réside au Québec[64].

Chacun des arguments mériterait une réflexion approfondie qu'il nous est impossible d'aborder dans le cadre de ce texte. Cela ne nous empêchera toutefois pas de noter que si, comme l'affirme le TAT en guise de conclusion, l'absence de ciblage du marché québécois efface les différences entre la télétravailleuse québécoise et les salariés travaillant dans les locaux de l'entreprise aux États-Unis, pourquoi ne pas avoir directement localisé le lieu d'exécution du télétravail aux États-Unis? La distinction entre la deuxième hypothèse (travail hors Québec) et la troisième (travail à la fois au Québec et hors Québec) conserverait-elle sa pertinence dans ce type de situations? Si la réponse à cette question était négative, il n'y aurait pas de raison pour ne pas retenir cette conception du « lieu habituel de travail » au sens des règles de droit international privé.

On ne connaît pas combien de fois l'employée s'est déplacée aux États-Unis pour rencontrer des clients. Il semble que cela a eu peu d'importance face au constat de l'inexistence d'activités économiques de l'employeur au Québec. Cependant, quelle aurait été l'issue du litige si l'employée avait

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61 *Ibid* au para 16.

62 S*upra* note 53; *Marchetta* TAT-2, *supra* note 60 au para 18.

63 *Ibid* au para 20.

64 *Ibid* au para 21.

rendu ses services intégralement depuis son domicile au Québec (en ne faisant aucun voyage aux États-Unis)? À s'en tenir à l'interprétation territorialiste du lieu de travail défendue dans *Holm*[65] et *Trainor*[66], madame Marchetta aurait bénéficié de la protection de la LNT, l'argument du marché local ne trouvant sa place que dans le cadre d'un travail partagé entre le Québec et un autre territoire. Or, la ligne de division qui sépare la zone de protection de la zone grise où tout dépend de la destination économique du télétravail semble, à la lumière de cet exemple, arbitraire. Si des déplacements occasionnels hors Québec ne sont pas exclus par la première hypothèse prévue par l'article 2 LNT[67], combien de voyages à l'extérieur sont-ils nécessaires pour tomber en dehors de la LNT? Une chose semble indiscutable : le maintien d'une conception « réelle, voire physique »[68] du lieu de travail oblige l'interprète, en cas de mobilité transfrontalière du télétravailleur, à considérer des éléments autres que le fait d'avoir un employé dans la province, pour déterminer si l'employeur y exploite effectivement une entreprise. La seule présence du *home office* du télétravailleur au Québec, rendue équivalente à un bureau de l'employeur, supprimerait la distinction entre ces deux exigences (travail et exploitation d'une entreprise) expressément prévues par le législateur[69].

III. Le rapport entre les méthodes de désignation de la loi applicable

Un examen comparatif des deux procédés de désignation de la loi applicable au contrat de travail exposés révèle des différences notables de fonctionnement. En délimitant sa propre application dans l'espace, la *Loi sur les normes du travail* utilise une méthode unilatérale. En revanche, le droit international privé recourt à la méthode bilatérale de la règle de conflit, dont les facteurs de rattachement peuvent conduire au droit québécois ou à un droit étranger. Le rapport qu'entretiennent ces deux méthodes nécessite d'être clarifié. Si le contentieux entourant l'application de la LNT témoigne d'une absence de dialogue entre les deux, la voie de l'articulation devrait prévaloir, pour ne pas vider la règle de conflit de sa fonction protectrice.

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65 *Supra* note 35.

66 *Supra* note 39.

67 Voir *McGinnity*, *supra* note 34.

68 *Holm*, *supra* note 35 au para 35.

69 Voir *Marchetta* CS, *supra* note 60 aux para 113, 133.

A. La séparation des méthodes

Dans la jurisprudence analysée, les critères qui définissent le domaine territorial de la LNT sont traités de façon indépendante de toute analyse de conflit de lois. Les autorités chargées de son application suivent ainsi une démarche unilatérale, acceptant ou refusant de recevoir la plainte du travailleur selon que la situation satisfait ou non aux critères établis par l'article 2 LNT. Le fondement de cette solution résiderait dans le respect de la volonté expresse du législateur, exprimée dans les limites du principe constitutionnel qui empêcherait d'accorder une efficacité extraterritoriale à une loi provinciale[70]. Un tel procédé correspond à une approche statutaire du conflit de lois en matière de contrats de travail qui part de la législation substantielle pour déterminer son étendue dans l'espace. Or, la Cour suprême du Canada a confirmé à plusieurs reprises que les règles de droit international privé contenues dans le Code civil intègrent les exigences constitutionnelles de proximité qui encadrent la compétence législative provinciale en matière de droits civils[71]. La séparation entre les méthodes conduit à des disparités qui remettent en question l'efficacité de la politique de protection présidant aux deux ensembles normatifs.

Bien que l'article 3118 CcQ et l'article 2 LNT partagent le lieu habituel de travail comme point d'ancrage principal du rapport employeur-salarié, ils s'éloignent quant à la place attribuée à ce critère en cas de mobilité transfrontalière, ainsi que dans la configuration des autres facteurs de rattachement. Le droit international privé admet le choix de la loi appelée à gouverner le contrat de travail, dans la mesure où elle se révèle plus favorable au salarié que la loi désignée objectivement. L'autonomie de la volonté conflictuelle remplit ainsi un objectif de politique législative essentiel, en ayant pour effet de rehausser le seuil de protection conféré au travailleur. En revanche, la LNT ne contemple pas cette possibilité, ce qui entraînerait, dans une perspective statutaire, l'inefficacité du choix de loi si aucun des trois scénarios prévus par l'article 2 LNT n'est rencontré.

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70 Voir Québec, Assemblée nationale, *Journal des débats*, 31-4, vol 21, nº16 (10 avril 1979) (« [a]u chapitre II, qui détermine le champ d'application de la loi, celui-ci est étendu à l'ensemble de la compétence du gouvernement québécois sur l'ensemble de son territoire » à la p 734 (Pierre-Marc Johnson)).

71 Voir *Spar Aerospace Ltée c American Mobile Satellite Corp*, 2002 CSC 78 au para 55; *Club Resorts Ltd c Van Breda*, 2012 CSC 17 au para 21. Dans *Hocking c. Haziza*, la Cour d'appel affirme pour sa part que « [l]es règles de droit international privé énoncées au *Code civil du Québec* constituent un régime complet en cette matière, incluant l'équivalent en droit québécois de la notion du "lien réel et substantiel" propre aux juridictions de *common law* » (2008 QCCA 800 à la p 10, n 14). Voir aussi Serge Gaudet, « Le livre X du Code civil du Québec : bilan et enjeux » (2009) 88:2 R du B can 313 aux pp 316–20.

Les affaires *Brown*[72] et *Trainor*[73] illustrent cette discordance de rattachements. Dans les deux cas, une clause du contrat désignait le droit québécois comme applicable au rapport juridique[74]. Dans les deux cas, les employés avaient saisi en vain les autorités québécoises en invoquant la protection de la LNT contre le congédiement injustifié par des employeurs québécois. Ayant accompli leurs activités en dehors de la province, ces travailleurs n'ayant ni domicile ni résidence au Québec ont vu leurs plaintes rejetées.

Comme nous l'avons mentionné auparavant, le lieu habituel du travail au sens de la règle de conflit objective ne change pas en raison de l'exécution partielle de la prestation depuis un État différent. Logiquement, la proportion du temps de travail effectuée dans cet autre lieu ne doit pas être de nature à modifier le centre de gravité du contrat. En revanche, une répartition du temps de travail entre le Québec et un autre territoire (hormis les cas des voyages sporadiques) tomberait sous l'empire de l'article 2 LNT, qui conditionne l'application de la LNT à la présence de l'employeur dans la province, à travers son domicile, sa résidence, son entreprise ou son bureau. L'affaire *Marchetta* en fournit une bonne illustration, la difficulté d'attribuer à l'employeur une finalité d'entreprise sur le territoire québécois ayant déterminé la non-application de la LNT[75]. Sous l'angle du droit international privé, la solution aurait pu nonobstant conduire à l'application de la loi québécoise. Le *home office* situé au domicile de la télétravailleuse aurait pu représenter la localisation prépondérante du lieu de travail pour les fins de l'article 3118 CcQ.

Encore à défaut de choix, la règle de conflit désigne comme applicable la loi du pays d'exécution habituelle du travail lorsque le travailleur est assigné temporairement à l'étranger. Cette hypothèse peut entrer dans le domaine de la LNT, à condition que l'employeur puisse être rattaché au Québec et que le travailleur y maintienne son domicile ou sa résidence. Or, ces règles en apparence convergentes peuvent aboutir à des résultats incohérents dans le contexte du télétravail transfrontalier. À la différence du salarié temporairement transféré par son employeur vers un lieu de travail distinct, la mobilité du télétravailleur obéit dans la plupart des cas

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72 *Supra* note 51.

73 *Trainor* QCTAT, *supra* note 39.

74 Cette information n'est pas mentionnée dans *Trainor* QCTAT (*supra* note 39), mais dans la décision rendue par la Cour du banc de la Reine de l'Alberta, à laquelle s'est adressée la salariée après le rejet de sa plainte par le TAT (voir *Trainor v Fundstream Inc*, 2019 ABQB 800). Les parties avaient signé un « Sales Representative Agreement » contenant une clause d'élection de la loi québécoise (*ibid* au para 7 (clause 12 du contrat)).

75 *Marchetta* CS, *supra* note 60 aux para 114–23.

à une demande du salarié, en quête de conditions de travail flexibles. Ni le domicile ni la résidence du salarié ne sont considérés par la règle de conflit de lois, avec pour conséquence l'assujettissement du contrat de travail à la loi de l'État étranger depuis lequel le télétravailleur québécois accomplit habituellement ses activités, malgré l'absence d'une volonté de permanence dans ce lieu. L'hypothèse de l'assignation temporaire prévue par l'article 3118 CcQ deviendrait donc inapplicable, quoique le télétravailleur puisse bénéficier de la LNT. En cas de déplacements transfrontaliers continus qui rendent inopérants les deux premiers facteurs de rattachement de l'article 3118 CcQ, seul le nomade numérique domicilié au Québec et travaillant pour un employeur québécois pourra bénéficier de la protection de la LNT. À nouveau se manifeste le contraste avec l'article 3118 CcQ, qui désignerait le droit québécois comme applicable à un contrat de travail entre ce même employeur et un télétravailleur nomade domicilié en dehors de la province.

B. L'articulation des méthodes

Les conséquences de la fracture entre les deux systèmes se traduisent par des lacunes de réglementation pouvant placer le travailleur transfrontalier dans une zone de non-droit, alors que, isolément interprétés, les deux ensembles de règles sont animés d'un même objectif de protection. La voie de l'articulation des méthodes requiert l'utilisation de mécanismes capables de mettre en dialogue les deux régimes étudiés. Le rapprochement des règles d'applicabilité analysées peut commencer par une compréhension commune du lieu habituel où s'accomplit le télétravail, en correspondance avec la dématérialisation qui en fait toute sa singularité. Une telle démarche interprétative peine toutefois à s'accommoder d'un système structuré autour d'une conception territoriale de ce facteur de rattachement. L'articulation étant nécessaire dans tous les cas, nous présenterons les instruments permettant d'atteindre la cohérence dans le traitement du télétravail transfrontalier.

1. Le rapprochement par l'abandon de l'approche territoriale

La nécessité de substituer le dialogue des méthodes à la séparation se justifie dans un double objectif : l'adaptation à la réalité du contrat de travail international et la protection du travailleur. Le besoin d'adaptation se fait sentir de manière particulièrement intense dans le contexte étudié, où la dimension numérique et mobile de l'activité se confronte au territorialisme du facteur de rattachement traditionnel, axé sur l'espace physique de travail. Contrairement à ce que l'on attend d'un travail exécuté en présentiel, le lieu où se situe le télétravailleur perd de sa pertinence juridique. L'emplacement de l'ordinateur qui lui permet d'exécuter l'activité est insuffisant à caractériser le rapport de droit, ce lieu ne traduisant pas l'intégration du télétravailleur dans un milieu re-

présentatif du point d'ancrage du contrat. Afin de remédier au défaut de proximité entre la situation et l'État depuis lequel le télétravailleur accomplit ses tâches, deux options sont ouvertes. La première a été abordée lors de l'analyse de la règle de conflit objective. Il s'agit de l'utilisation de la clause d'exception[76] pour évincer le rattachement au lieu du travail, en le remplaçant par le lieu d'établissement de l'employeur qui dirige les activités, en raison des liens plus étroits qu'il entretient avec le rapport contractuel. Nous évaluerons maintenant une deuxième proposition qui cherche à obtenir le même résultat d'une façon directe, sans les aléas d'un mécanisme exceptionnel et discrétionnaire comme la clause échappatoire. Cette solution entend corriger en amont l'absence de proximité, en agissant sur le facteur de rattachement lui-même au stade de son interprétation pour les fins de sa localisation dans l'espace. Dans cet objectif, on préconise une interprétation dynamique de la notion relative au lieu d'exécution du travail, commune à la règle de conflit et à l'article 2 LNT, en syntonie avec le tournant numérique qui transforme le monde du travail.

Dans la décision *Unifor* de 2021, le TAT s'est ouvert à une conception renouvelée de l'« établissement » au sens de l'article 109.1 g) du *Code du travail*[77] pour y intégrer les télétravailleurs à domicile[78]. L'effet utile de l'interdiction d'utiliser les services d'un salarié de l'établissement où la grève ou le lock-out a été déclaré pour remplir les fonctions d'un salarié faisant partie de l'unité de négociation concernée serait menacé par une approche territorialiste de l'établissement qui ne tient pas compte des prestations de travail exécutées à distance, au moyen des technologies de l'information et des communications. C'est sur ce fondement que le TAT a créé la notion d'« établissement déployé », fondée sur « la nature même du télétravail », qui comporte l'accomplissement de l'activité par le biais d'outils technologiques permettant de maintenir l'unité de gestion dans l'exploitation de l'entreprise et le lien de subordination caractérisant la relation employeur-salarié[79]. Il en résulte un jugement d'équivalence entre le travail sur place, au sein des murs de brique de l'établissement, et le travail à distance, au sein de ses murs virtuels. L'interprétation est

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76 Voir art 3082 CcQ.

77 RLRQ c C-27.

78 Voir *Unifor, section locale 177 c Groupe CRH Canada inc*, 2021 QCTAT 5639 [*Unifor*], pourvoi en contrôle judiciaire accueilli par *Groupe CRH Canada inc c Tribunal administratif du travail*, 2023 QCCS 1259, autorisation de pourvoi à la CA accordée, *Unifor, section locale 177 c Groupe CRH Canada inc*, 2023 QCCA 972. La pertinence du concept d'« établissement déployé » a cependant été confirmée par la Cour supérieure, en contrôle judiciaire, dans l'arrêt *Coop Novago c. Syndicat des travailleuses et travailleurs de la Coop Lanaudière – CSN* (2023 QCCS 1539).

79 *Unifor*, *supra* note 78 aux para 148–53.

essentiellement téléologique, en ce sens qu'elle se justifie par la nécessité de répondre à l'objectif des dispositions anti-briseurs de grève visant à préserver l'équilibre des rapports de force entre l'employeur et les salariés faisant partie de l'unité de négociation[80].

Est-ce que la finalité de la LNT, qui est de fournir un cadre juridique impératif des conditions minimales de travail afin de protéger l'employé, et celle poursuivie par la règle de conflit de lois, orientée vers la recherche de la loi la plus favorable à l'employé, justifient d'adopter une approche évolutive du lieu d'exécution du télétravail, inspirée de la notion d'établissement déployé que l'on vient d'exposer? La réponse courte est « ça dépend ». Dans l'optique du principe de proximité qui sous-tend le droit international privé, la possibilité d'extrapoler les principaux arguments soulevés dans la décision *Unifor* ne fait pas de doute. En effet, l'espace physique où s'effectue le télétravail est sans incidence sur l'unité de gestion de l'activité et sur le pouvoir de direction que l'employeur continue d'exercer à distance. Ces aspects ne changent pas en raison de l'exécution du travail en dehors de l'État où se situe l'établissement — au sens matériel — de l'employeur. Cependant, la dimension transfrontalière de la relation de travail commande de mieux préciser la localisation dans l'espace des facteurs de rattachement pertinents.

À première vue, la notion d'« établissement déployé » adoptée par le TAT admettrait une double lecture permettant à la fois de localiser l'établissement de l'employeur au domicile du salarié et celui-ci à l'établissement du premier. Si la distinction n'a pas de conséquence dans une situation purement interne comme celle visée par la décision *Unifor*, dans les rapports transfrontaliers, le facteur géographique compte. La perte de signification du lieu physique du travail au profit d'une conception déterritorialisée de cet espace comporte la nécessité d'adopter une lecture unidirectionnelle de la notion d'établissement déployé. Par conséquent, c'est le télétravailleur qui est intégré à l'établissement de l'employeur et non ce dernier au domicile du premier. Cette lecture est par ailleurs celle qui véhicule le véritable sens de la décision, qui est de centraliser tous les employés autour d'un seul et même établissement (celui de l'usine de Joliette)[81] et non de multiplier les établissements de l'employeur en autant de télétravailleurs qu'il y en aurait sur le terri-

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80 Voir *ibid* aux para 166–71.

81 Le TAT affirme que « dans la mesure où l'"établissement" de l'Employeur se déploie pour permettre l'exécution du travail par des salariés en télétravail à partir de leur domicile et sous l'autorité de l'Employeur, *au même titre que s'ils s'étaient trouvés à l'usine de Joliette*, il convient de retenir que ces salariés exécutent leur travail dans l'"établissement" » [nos italiques] (*ibid* au para 150).

toire[82]. L'effet de la notion d'« établissement déployé » est ainsi de générer une « force centripète », non « centrifuge » : le télétravailleur travaille dans l'établissement (il est attiré vers celui-ci), mais le *home office* n'est pas un autre établissement de l'employeur.

En appliquant cette analyse aux faits de l'affaire *Marchetta*, la conclusion serait que l'employée travaillait aux États-Unis et que l'employeur ne possédait pas d'établissement au Québec. Suivant l'approche statutaire, la LNT deviendrait par conséquent inapplicable, sur le fondement de l'absence de travail dans la province. Sous le prisme du droit international privé, la loi régissant le contrat serait celle de l'État américain correspondant à l'établissement de l'employeur qui exerce la direction des activités, en tant que lieu d'exécution du travail au sens de l'article 3118 CcQ. On voit dans cet exemple que si la convergence des solutions est atteinte, le résultat n'est pas satisfaisant du point de vue substantiel, la protection contre le congédiement injustifié n'étant pas garantie dans les juridictions américaines, où prédomine le « at-will employment ». Par contre, si le domicile de l'employée avait été localisé dans un pays moins protecteur, le résultat de cette conception lui aurait été favorable. Cette interprétation permettrait de déjouer les stratégies des entreprises cherchant à délocaliser le travailleur pour obtenir une main-d'œuvre à coût réduit. Les divergences normatives dans la protection des télétravailleurs sont, en effet, de nature à conférer à l'employeur un avantage concurrentiel dans le marché global des prestations numériques[83], qui peut être utilisé par celui-ci pour échapper aux réglementations de son pays d'origine[84].

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82 Cette interprétation s'impose d'autant plus que c'est l'unité de l'établissement qu'il faut démontrer pour prouver la violation de l'article 109.1(g) du *Code du travail* (*supra* note 77).

83 Voir Richard Baldwin et Jonathan I Dingel, « Telemigration and Development: On the Offshorability of Teleworkable Jobs » (2021) National Bureau of Economic Research Document de travail 29387 aux pp 20–21, en ligne : *National Bureau of Economic Research* <www.nber.org> [perma.cc/A2EM-74ZW].

84 Voir Elena Ferrari et al, *The impact of teleworking and digital work on workers and society*: *Special focus on surveillance and monitoring, as well as on mental health of workers*, Luxembourg, Parlement Européen, Policy Department for Economic, Scientific and Quality of Life Policies, 2021 à la p 95; Martín Pozuelo-López, *supra* note 28 aux pp 109–10; Antonio Lo Faro, « Politiche comunitarie e diritto internazionale » dans Lorenzo Gaeta et Paolo Pascucci, dir, *Telelavoro e diritto*, Turin, Giappichelli, 1998, 213. Dans ce sens, le télétravail transfrontalier s'inscrirait dans la vieille pratique du *dumping social* en contexte de mondialisation, laquelle se nourrit du territorialisme des réglementations en droit du travail (voir Reynald Bourque, « La régulation des normes du travail à l'ère de la globalisation » (2007) 4:2 Reg@rds sur travail 2; Pierre Verge, « Mondialisation et fonctions du droit du travail national » (1999) 40:2 C de D 437).

Le traitement différencié des deux hypothèses, qui impliquerait de distinguer entre les contenus des lois en cause pour décider de l'opportunité d'interpréter le facteur de rattachement « lieu du travail » sous un angle physique ou dématérialisé, est difficile à justifier dans l'état actuel du droit. L'introduction d'une interprétation dynamique du lieu habituel de travail se heurterait par ailleurs à la configuration de la règle de conflit et de l'article 2 LNT, dont la pierre angulaire est le lieu d'exécution du travail, entendu dans un sens territorial et non virtuel. C'est sur cette prémisse que se construisent les différentes hypothèses envisagées, relatives à l'assignation temporaire et les autres formes de mobilités. Dans le cas des télétravailleurs réclamant la protection de la loi du pays depuis lequel ils exécutent physiquement l'activité, la nouvelle interprétation ferait échec à la politique de protection de l'article 3118 CcQ. Dans l'attente d'une modification législative afin de concevoir un facteur de rattachement adapté à la dématérialisation du travail, sans compromettre la fonction protectrice de la règle de conflit, la solution devrait être recherchée dans des formes d'articulation compatibles avec les moyens techniques existants au sein de l'approche territoriale.

2. L'articulation au sein de l'approche territoriale

La conception statutaire, qui rompt les ponts avec le système conflictuel, crée un régime d'applicabilité parallèle qui a pour effet de soustraire les normes minimales d'emploi québécoises au domaine de l'article 3118 CcQ. Si l'on excluait de la règle de conflit de lois sur les contrats internationaux de travail le régime de base touchant aux aspects essentiels de la relation contractuelle, tels que le salaire minimum, le temps de travail et le recours contre le congédiement illégal ou injustifié, on lui retirerait le cœur de la protection des travailleurs[85]. Ce raisonnement contredirait la mission spécialement attribuée par le législateur à l'article 3118 CcQ, qui est de conférer aux travailleurs, au minimum, le droit de préserver la protection offerte par la législation locale du lieu du travail et, au maximum, le droit d'obtenir la protection de la loi choisie

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[85] Sur l'intégration de ces règles impératives dans le domaine de la loi applicable au contrat de travail, voir Uglješa Grušić, *The European Private International Law of Employment*, Cambridge (R-U), Cambridge University Press, 2015 (« [t]he minimum standard should be set by the law of the country, home or foreign, which is both sufficiently closely connected with the employment contract and legitimately interested in regulating it and whose application the parties can reasonably expect » à la p 42). Voir aussi, sur le domaine de la règle de conflit en matière de contrats de travail, inclusif de ces aspects, Olaf Deinert, *International Labour Law under the Rome Conventions*: *A Handbook*, Baden-Baden, Munich et Oxford (R-U) : Nomos, CH Beck et Hart, 2017 aux pp 261–318, 330–61.

pour régir le contrat, si elle est plus favorable à leurs intérêts. Loin de s'opposer à la *Loi sur les normes du travail* et aux législations équivalentes, la règle de conflit ainsi comprise s'harmonise pleinement avec l'objectif des normes minimales d'emploi, qui est précisément d'établir un plancher législatif de protection et non de plafonner les droits des travailleurs en les empêchant d'invoquer le bénéfice de lois plus protectrices[86].

De la compatibilité téléologique entre les deux ensembles normatifs témoignent les articles 93 et 94 LNT, qui s'inscrivent dans la philosophie sous-jacente au test comparatif entre les lois ayant une vocation à gouverner le contrat de travail selon l'article 3118 CcQ. L'article 93 LNT interdit les conventions ayant pour effet de déroger aux normes minimales d'emploi québécoises, dans le sens d'une diminution de la protection des travailleurs. Pour sa part, l'article 94 LNT permet de les écarter lorsque cela a pour effet de conférer au salarié « une condition de travail plus avantageuse ». On y découvre l'équivalent en droit interne de la règle de conflit conçue pour les rapports internationaux de travail. Cette synergie de finalités milite en faveur de la coordination et non de la séparation des deux régimes juridiques lorsque vient le moment de définir leur application dans l'espace. De cette lecture conciliatrice découle que l'article 93 LNT ne prohibe aucunement le choix par les parties d'une loi autre que la LNT. Son caractère d'ordre public en droit interne n'empêche pas la validité des clauses conventionnelles plus avantageuses au salarié. Sur le plan international, la règle de conflit prend le relais de cette fonction de garantie, en écartant l'application de la loi choisie conventionnellement, *seulement* lorsqu'elle prive le travailleur d'une protection prévue par la loi objectivement applicable. Le principe de la coordination ayant été justifié sur un plan téléologique, il convient maintenant d'aborder les moyens de traiter les divergences entre les critères de rattachement bilatéraux de l'article 3118 CcQ et les règles unilatérales d'applicabilité contenues à l'article 2 LNT.

Le droit international privé québécois adopte la tradition continentale fondée sur la méthode savignienne qui résout le conflit de lois en ayant recours à la règle de rattachement bilatérale, élaborée en fonction du type de relation juridique qui en fait l'objet, tout en aménageant l'intervention de techniques directes de réglementation, à titre d'exception. Il n'est pas nécessaire de superposer un système concurrent basé sur la territorialité des lois pour décider de la portée à accorder à une règle comprise dans le

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86 Indépendamment de leur diversité, l'ensemble des lois provinciales canadiennes établissant des normes minimales d'emploi partagent l'objectif de créer « a minimum floor of rights » (Stéphanie Bernstein, « Canada » dans Minawa Ebisui, Sean Cooney et Colin Fenwick, dir, *Resolving Individual Labour Disputes*: *A comparative overview*, Genève, International Labor Office, 2016, 63 à la p 67).

domaine d'application de la règle de conflit. Le système conflictuel contient déjà les rattachements visant à déterminer cette portée[87] et les mécanismes de dérogation pouvant être mobilisés pour l'étendre ou la réduire. C'est donc *à l'intérieur* de ce cadre méthodologique que devront trouver leur place les lois ayant une vocation d'application différente de celle que la règle de conflit leur a assignée. Deux mécanismes nous aideront à comprendre les rapports entre l'article 3118 CcQ et l'article 2 LNT : les lois de police et les lois autolimitées. Ces deux procédés interagissent différemment avec l'ordre juridique normalement applicable en vertu de la règle de conflit. Nous examinerons maintenant si les normes minimales d'emploi au Québec constituent des lois de police de la *lex fori*, des lois autolimitées ou les deux à la fois.

Les lois de police ont vocation à gouverner le rapport juridique de façon impérative en raison de leur objectif de protection des intérêts publics de l'État qui en est l'auteur. Ces intérêts publics comprennent également ceux de certaines catégories de cocontractants estimés vulnérables par rapport à la « partie forte » de la relation juridique, qui détient le pouvoir de décider du contenu du contrat[88]. Pour accomplir leur finalité d'intérêt public, la loi de police s'autoassigne un champ d'application nécessaire dans l'espace, en fixant, explicitement ou implicitement, le lien devant exister entre la situation et l'État dont elle émane[89]. Par exemple, le régime québécois du bail résidentiel qui cherche à protéger les locataires revendique son application aux contrats de bail portant sur les logements situés au Québec. Étant donné que, dans les rapports internationaux, ce contrat peut être régi par une loi choisie par les parties ou, à défaut, par la loi de la résidence ou de l'établissement du locateur[90], les dispositions

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87 Le critère de proximité qui fonde la règle de rattachement est respectueux de la sphère d'efficacité territoriale des lois provinciales autorisée par ce principe constitutionnel (voir Claude Emanuelli, *Droit international privé québécois*, 3e éd, Montréal, Wilson & Lafleur, 2011 au para 398). Le raisonnement basé sur la territorialité des lois n'est pas en adéquation avec les règles de droit international privé, une matière dont l'objet principal est de traiter les situations transfrontalières (voir Geneviève Saumier, « The Recognition of Foreign Judgments in Quebec - The Mirror Crack'd? » (2002) 81:3 R du B can 677 aux pp 715–17).

88 Voir H Patrick Glenn, « Droit international privé » dans *La réforme du Code civil : Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires*, vol 3, Sainte-Foy (QC), Presses de l'Université Laval, 1993, 669 à la p 680. Pour une synthèse sur le sujet en droit européen, voir Patrick Kinsch, « Le rôle du politique en droit international privé : cours général de droit international privé » (2019) 402 Rec des Cours 9 aux pp 154–64.

89 En ce qui concerne les normes d'application nécessaire (lois de police), l'exigence d'un lien de proximité entre celles-ci et le rapport de droit qu'elles entendent régir tient déjà compte des limites constitutionnelles à la portée extraterritoriale des lois provinciales (voir Emanuelli, *supra* note 87 au para 389).

90 Voir arts 3111–13 CcQ.

protectrices interviennent immédiatement, en écartant ces critères de rattachement inadaptés pouvant conduire à la loi d'un autre État.

En matière de contrats de travail, le régime qui établit les conditions minimales d'emploi répond à la définition téléologique des lois de police, compte tenu des intérêts fondamentaux qu'il entend préserver. Or son application n'obéit pas toujours au mode de fonctionnement des lois de police, car pour accomplir son objectif, il n'a en général pas besoin de déroger à la règle de conflit. Celle-ci contient déjà un rattachement adapté à cette finalité, lequel converge essentiellement vers celui réclamé par cette législation spéciale pour remplir sa fonction de protection. Lorsque ces critères ne sont pas convergents, la loi de police peut intervenir pour étendre son application aux hypothèses non couvertes par la règle de conflit. Un exemple de cette discordance serait celui d'un télétravailleur embauché par une entreprise québécoise, ayant exécuté 70 % du temps de travail à son domicile à New York et 30 % à Montréal. À défaut de choix, la loi new-yorkaise (loi du lieu habituel de travail) s'appliquerait au contrat de travail, tandis que celui-ci serait visé par l'article 2 paragraphe 1 LNT. Le télétravailleur pourrait alors se placer sous le couvert de la LNT au titre des lois de police du for[91]. Il en irait de même si la loi new-yorkaise avait été choisie par les parties, car l'article 3118 alinéa 1 CcQ n'aurait pas permis d'atteindre le résultat voulu, le lieu habituel du travail étant l'État de New York. Cette intervention dérogatoire de la loi de police s'entend toujours sous réserve de l'application de la loi la plus favorable au travailleur, qu'elle soit désignée par les parties ou par la règle de conflit objective[92].

Qu'en est-il lorsque la règle de conflit désigne comme applicable au contrat de travail l'ordre juridique auquel appartient la loi de police? Le principe est que celle-ci s'applique comme n'importe quelle autre disposition de la *lex contractus*, sauf si elle constitue une règle autolimitée. Les lois autolimitées sont celles dont l'application est conditionnée au respect de critères particuliers qui définissent leur domaine d'application maxi-

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91 Voir art 3076 CcQ.

92 La loi de police protectrice d'une partie faible n'a pas à être d'application immédiate, car elle admet de s'effacer devant la loi normalement applicable qui a déjà pris en charge cette protection. Ce qui est « nécessaire » du point de vue de l'État auteur d'une loi de police est la réalisation de l'objectif fixé par le législateur (et non l'application de la disposition à tout prix) (voir Benjamin Remy, *Exception d'ordre public et mécanisme des lois de police en droit international privé*, Paris, Dalloz, 2008 aux pp 198–99). Dans la même veine, Vincent Heuzé considère que « la sauvegarde des politiques législatives en cause implique que leur efficacité soit, non pas seulement menacée, mais véritablement contredite par la loi désignée par cette règle de conflit » (« Un avatar du pragmatisme juridique : la théorie des lois de police » (2020) 1 Rev crit dr int privé 31 au para 49).

mal dans l'espace[93]. L'élément clé ici est l'adjectif « maximal », qui le différencie du champ d'application « minimal » inhérent aux lois de police. La décision sur la conséquence à accorder à une règle d'applicabilité territoriale, comme délimitant une sphère d'action minimale ou maximale, est une question d'interprétation téléologique de la loi en question. La disposition autolimitée a une volonté négative d'application, en refusant d'appréhender les rapports juridiques tombant en dehors des critères qu'elle établit, lesquels sont conçus par référence à un contexte social, politique ou économique exclusivement local[94]. Par exemple, la *Loi sur la protection du territoire et des activités agricoles*[95], qui interdit le morcellement des terres destinées à des fins agricoles, refuserait de s'appliquer à la vente d'une ferme située au Mexique, dans le cas où les parties auraient choisi le droit québécois dans une clause du contrat de vente. En raison de son objectif de sauvegarder l'intérêt étatique dans le maintien de l'intégrité du territoire agricole québécois, cette loi serait à la fois une loi de police et une loi autolimitée, qui fixe son domaine minimal et maximal d'application territorial. En effet, elle s'applique si l'immeuble vendu est une terre agricole au Québec, en dépit de la loi étrangère choisie par les parties, mais elle n'intervient pas si l'objet de la vente est situé hors Québec, même si la loi québécoise est applicable au contrat.

À la lumière de ces enseignements méthodologiques, nous pensons que les dispositions contenues dans la *Loi sur les normes du travail* devraient s'interpréter comme ayant une vocation minimale, non maximale, d'application. Elles seraient ainsi des lois de police du for non autolimitées. Les critères d'application expressément prévus par l'article 2 LNT n'ont pour effet que de fixer un seuil minimal d'intervention. Cette législation déroge à la loi étrangère applicable en vertu de l'article 3118 CcQ, dans la mesure où cette dernière ne prévoit pas une protection équivalente[96]. Lorsque la loi québécoise est l'ordre juridique appelé à gouverner

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93 Voir Stéphanie Francq, « Unilateralism » dans Jürgen Basedow et al, dir, *Encyclopedia of Private International Law*, vol 2, Cheltenham (R-U), Edward Elgar Publishing, 2017, 1779 à la p 1788.

94 Selon Pierre Mayer, une règle matérielle serait autolimitée dans deux situations fondamentales : lorsqu'elle défend un intérêt purement collectif ou lorsqu'elle protège des intérêts privés sur la base de circonstances spécifiques, généralement économiques, qui ne se vérifient que par rapport au système juridique dont elles sont issues (« Les lois de police étrangères » (1981) JDI 277 à la p 344).

95 RLRQ c P-41.1.

96 Voir Gérald Goldstein et Ethel Groffier, *Droit international privé*, par Paul-A Crépeau, t 2, Cowansville (QC), Yvon Blais, 2003 aux pp 649–50 (en accordant la primauté à la loi choisie par les parties qui est plus avantageuse pour le salarié, l'article 3118 CcQ « reflète donc l'idée qu'il est inopportun d'utiliser, en principe, le mécanisme des règles d'application nécessaire »). Voir aussi Saumier, « Le droit international privé », *supra* note 24 à la p 208.

le rapport de travail, la LNT en fait partie et ne refuse pas de s'appliquer au-delà des hypothèses décrites à l'article 2 LNT. Autrement, l'autolimitation de ces dispositions protectrices impacterait négativement la position juridique du travailleur en situation transfrontalière, en lui retirant un bénéfice normatif lorsque son application dérive de la règle de conflit[97]. Ainsi, dans la situation faisant l'objet de la décision *Trainor*[98], où les parties avaient inclus une clause contractuelle choisissant le droit québécois comme applicable, la LNT pouvait intervenir au titre de la *lex contractus*[99]. Pour ce qui est de l'affaire *Marchetta*[100], la télétravailleuse

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97 D'un point de vue méthodologique, une règle de conflit à caractère substantiel (comme celle de l'article 3118 CcQ) cherche un objectif de justice matérielle qui ne dépend pas de la volonté d'application de la loi désignée comme applicable (voir Gérald Goldstein, « L'interprétation du domaine d'application international du nouveau Code civil du Québec » Les Journées Maximilien-Caron, présenté à la Faculté de droit de l'Université de Montréal, 13 et 14 mars 1992, dans *Le nouveau Code civil* : *interprétation et application*, Montréal, Thémis, 1993, 81 à la p 124). La question de l'autolimitation de la loi choisie par les parties a été examinée dans l'arrêt *Bourdon c Stelco Inc* (241 DLR (4e) 266, 2004 CanLII 13895 (CA Qc) [avec renvois aux DLR]), portant sur l'applicabilité de l'article 74 de la *Loi sur les régimes de retraite* de l'Ontario (LRO 1990, c P.8), choisie dans une clause contractuelle insérée dans un plan de retraite, à l'égard de certains employés d'une compagnie ontarienne travaillant au Québec au moment de la liquidation du régime. Le jugement de la Cour d'appel, rendu à la majorité, a considéré que les mots « *en Ontario, un participant à un régime de retraite* » de l'article 74 devaient s'interpréter de façon limitative, comme se rapportant uniquement aux membres du régime de retraite résidant en Ontario (voir *ibid* aux para 135, 139). Le raisonnement suivi dénote une démarche d'analyse purement statutaire. En considérant que la clause contractuelle se limitait à soumettre l'interprétation du régime convenu à la loi ontarienne, on accueillait l'allégation de l'employeur à l'effet que la loi ne régissait pas la substance des droits, mais seulement l'interprétation du contrat. La majorité semble ainsi nier l'existence d'un choix de loi (voir *ibid* aux para 105–06), contrairement au juge en chef Morin, dissident (voir *ibid* aux para 74–75), sans pour autant référer au critère de rattachement pertinent à défaut de choix. On se place ainsi directement sous l'égide de l'approche statutaire pour exclure les employés travaillant au Québec du domaine territorial de la loi ontarienne, en s'attachant à la teneur littérale de la disposition. En revanche, l'opinion dissidente qui accordait aux appelants le bénéfice de l'article 74 en question, malgré sa restriction territoriale, se fondait sur le respect du choix de loi permis par la règle de conflit québécoise, lequel aurait été anéanti par une interprétation limitative de la disposition ontarienne. Au-delà de l'argument de l'autonomie de la volonté, l'analyse que nous préconisons dans ce texte est de refuser l'autolimitation des lois en matière de contrats de travail sur le fondement de l'objectif de protection poursuivi par l'article 3118 CcQ, cristallisé à la fois dans le principe de faveur, qui permet de choisir par convention une loi plus avantageuse pour le salarié, et dans le rattachement à la *lex loci laboris*, applicable à défaut de choix.

98 *Supra* note 39.

99 Voir art 3118, al 1 CcQ. Encore fallait-il qualifier le contrat de représentante aux ventes qui avait été conclu entre les parties comme un contrat de travail au sens de l'article 3118 CcQ. Pour des illustrations jurisprudentielles où ce problème de qualification a été discuté pour les fins de la règle de compétence juridictionnelle de l'article 3149 CcQ, voir *Chung c Merchant Law Group*, 2020 QCCS 398 au para 15; *Sanche c*

aurait pu aussi bénéficier de la protection contre le congédiement injustifié de l'article 124 LNT, car le Québec, province de son domicile, apparaissait comme le lieu d'exécution principal de la prestation de travail[101]. Voici deux exemples de jurisprudence où les rattachements subjectif et objectif de la règle de conflit justifiaient l'application des normes minimales d'emploi québécoises.

Conclusion

Nous avons examiné, dans une perspective comparative, la façon dont les règles de droit international privé et la *Loi sur les normes du travail* au Québec appréhendent le télétravail accompli depuis un État distinct de celui où l'employeur a son établissement. En pleine expansion à l'échelle mondiale, ce phénomène est tout d'abord confronté à la prépondérance d'un facteur de rattachement de nature territoriale qui ne correspond pas à la réalité mobile et numérique qui le caractérise. Le critère classique centré sur le lieu physique depuis lequel s'accomplit la prestation de travail place les parties sous l'égide d'un ordre juridique qui peut se révéler insuffisamment connecté avec le rapport contractuel. Ce défaut d'adaptation commun aux deux régimes étudiés ne cache cependant pas les divergences des critères de rattachement au sein même de l'approche dominée par le territorialisme du lieu du travail. Il peut même les aggraver, comme le montre l'exemple du télétravailleur domicilié au Québec qui fournit ses services à un employeur étranger depuis son domicile et en se déplaçant à l'extérieur de la province, lequel n'est pas visé par la LNT, alors que la règle de conflit désigne le droit québécois comme applicable. La localisation stable du *home office* au Québec, suffisante pour rattacher le contrat de travail à la loi québécoise en droit international privé, n'implique pas nécessairement l'exploitation d'une entreprise dans la province au sens de l'article 2 LNT.

Cette absence de coordination n'est évidemment pas exclusive aux hypothèses de télétravail transfrontalier, mais ses effets perturbateurs se manifestent de façon plus marquante dans ce contexte. La dématérialisation de l'activité et la liberté de mouvement ainsi favorisée font de la mobilité une situation ordinaire. Le passage du travail en présentiel au télétravail transfrontalier, le changement transfrontalier du domicile du télétravailleur, les déplacements transfrontaliers fréquents ou le nomadisme

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DWL Inc, 2002 CanLII 30078 aux para 13–20, AZ-50129218 (SOQUIJ) (CS Qc); *Desroches c Karatbars International GMBH*, 2021 QCCS 5626 au para 16; *Yunes c Garland Canada inc*, 2004 CanLII 20728 aux para 20–27, 2004 CarswellQue 1862 (WL Can) (CS Qc).

[100] Voir *Marchetta* TAT-2, *supra* note 60.

[101] Voir art 3118, al 2 CcQ.

numérique décrivent des degrés divers de mobilité qui mettent à l'épreuve la cohérence des solutions juridiques. Notre position est celle qui défend la voie de l'articulation entre la règle de conflit de lois et les règles d'applicabilité territoriale contenues dans la LNT. Un peu d'ingénierie méthodologique est nécessaire pour construire les canaux de communication entre les deux régimes au sein du droit international privé, lequel fournit les outils nécessaires à l'articulation. Nous considérons que le principe de faveur partagé par ces deux ensembles de règles autorise la conclusion à l'effet que les normes minimales d'emploi constituent des lois de police non autolimitées. Leur application à l'encontre de la loi choisie par les parties ou de la loi objectivement rattachée au lieu habituel de travail ne s'imposera que si ces dernières n'offrent pas une solution protectrice équivalente pour le travailleur. Lorsqu'elles font partie de la loi gouvernant le contrat de travail selon l'article 3118 CcQ, ces dispositions devraient s'appliquer à titre ordinaire, ce qui implique de refuser leur autolimitation aux hypothèses prévues par les règles d'applicabilité unilatérales. Une autre solution serait contraire à la finalité de protection des travailleurs qui anime les deux régimes.

PROFESSIONAL CARDS

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