DCLC
Durham Community Legal Clinic
& Access to Justice Hub

Written Submissions to:

Standing Committee on Regulations and Private Bills

of the

Legislative Assembly of Ontario

Re: Bill 201, *Magna Carta Day Act (In Memory of Julia Munro, MPP), 2020*

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About

The Durham Community Legal Clinic (DCLC) is a Community Legal Clinic that provides legal services, information, education, and representation for historically marginalized and low-income residents of Durham Region. DCLC also engages in advocacy and law reform activities, in particular to ensure that our laws properly consider the perspectives of historically marginalized and low-income Ontarians.

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1. Thank you for the opportunity to speak about the significance of the Magna Carta, and how it might be interpreted and perhaps even celebrated by historically marginalized and low-income Ontarians. I hope to do so with particular consideration for access to justice, the rule of law, and the creation of a free and democratic society.

2. The Magna Carta is an unusual[1] thing to celebrate, from a legal perspective.

3. It is more popular among those who would support a republic,[2] rather than a constitutional monarchy,[3] and is therefore a more obvious document to celebrate in the U.S., rather than in Canada or even the U.K.[4]

4. The actual legal significance of the Magna Carta in the U.K. is in fact quite limited.[5] Its legal significance in Canada is even more negligible still. The reasons for this are grounded in the Magna Carta's history.

5. Just months after it was signed on June 15, 1215, it was denounced by Pope Innocent III, in a letter dated on August 24. Under threat of excommunication, it was deemed null and void of all validity, forever.[6]

6. Of course, the Magna Carta was reissued soon after King John's death, by Henry III's regents on Nov. 12, 1216, but it was already a different Magna Carta, with only 37 clauses, instead of the original 63.

7. Important omissions from subsequent versions of the Magna Carta include clauses that refer specifically or implicitly to Jews,[7] who were a target of particular scorn and disdain by the Barons at Runnymede. Within less than a century, there were no Jews left in England.

   This dichotomy can be found throughout an analysis of the Magna Carta, which reflects the interests of wealthy and privileged men, who sought concessions from the King, so that they could further disenfranchise the rest of the population.

8. Despite being reissued numerous times, the Magna Carta really did not gain much legal significance in the U.K. until Henry VIII (1491-1547), where it was reinvented as a symbol of the people against the monarch, but also by the monarch against the papacy. It became a symbol of a balancing of powers. It was then reinterpreted further in the Elizabethan Age, in a futile but fabricated attempt to portray an ancient antiquity of British parliament.[8]

   The question then is, how should we interpret the Magna Carta in Ontario today?

9. Canadian courts have in fact explicitly rejected the Magna Carta as a source of law, specifically because it has been routinely misused by litigants who are disruptive to the justice system.[9] These disruptive activities cost taxpayers a significant amount of

resources, as these unsubstantiated legal arguments are deliberately intended to tie up the court's resources.

10. Does that mean the Magna Carta is entirely irredeemable as a symbol worth celebrating in Ontario? Hardly not. The important emphasis is in the manner of commemoration, and the meanings imbued behind such symbols.

11. Some would have the Magna Carta symbolize the supremacy of the legislature. This rendition would not only be inaccurate, but a highly dangerous interpretation that would undermine the foundations of our democracy. Instead, the Magna Carta is better understood today as a symbol of constraint on the power of the legislature,[10] and in particular on the exercise of power by the executive.[11] The institutions that exercise this constraint is the judiciary, and the basis for which they do so, is the constitution.[12]

12. It is the constitution that is the great concession made by the monarch, and its representatives in our Westminster system. The constitution that created Canada in 1867, and ultimately provided full sovereignty through patriation of our constitution in 1982.[13] The long and tumultuous history of the Magna Carta, and its seemingly ineffective ability to constrain exercises of power, perhaps mirrors our own history in Canada, with slow, incremental and gradual changes, achieving what the violent and tumultuous Rebellions of 1837-1838 could not.

13. Any celebration in Ontario, including the celebration of the Magna Carta, must reflect our own culture, values, and laws. This means that the Magna Carta will have its own distinct understanding in Canada than it does in other countries. Our sovereignty requires it, and our constitution demands it, as a concession from the legislature.

14. To ensure this goal, we provide one single recommendation – the Preamble to Bill 201 should make referenced to our own "Great Charter," the *Charter of Rights and Freedoms*.

    This concession ensures that erroneous understandings of the Magna Carta do not distort the discourse of what it means, or that our esteemed courts are not bombarded with even further by empty invocations of the Magna Carta as a basis for their rights.

15. More importantly, this concession would be the ideal symbolic gesture of the Magna Carta by the legislature, in response to this petition.

Notes

[1] The adjective is deliberately vague and ambiguous, and therefore itself subject to interpretation, much like all symbols are subject to interpretation. It is in the context of providing a reinterpretation of the symbolism of the Magna Carta that these comments are provided.

Today there is only one principle approach towards statutory interpretation in Canada, a purposive approach where "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."; Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 SCR 27 ["Rizzo"] at para 21. However, the intention of Parliament isn't always readily ascertained, and is itself subject to interpretation, especially since the legislature is presumed to make legislation consistent with other legislation, including the *Interpretation Act*, RSO 1990, c I.11 (*Rizzo* at para 22), which states,

> 10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

This fair, large, and liberal construction and interpretation ensures that the purposive approach properly ascertains the interests a statute is meant to protect, which requires some consideration of relevant linguistic, historical, political and philosophical contexts (*Hunter et al. v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 SCR 145 at 155; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295 ["*Big M*"] at 117). While courts are rightly wary of a theory of a shifting purpose over time (*Big M* at para 91), that is not to say the degree to which a purpose remains or becomes substantial cannot change over time (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927 at para 48). The application and interpretation of objectives may vary over time, but new and entirely different purposes should not be created (*R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 SCR 731 at para 45).

A contextual analysis, another statutory interpretation tool often used in conjunction with the purposive approach, requires that interpretation occur within the actual social, political and legal context in which it arises (*May v. Ferndale Institution*, 2005 SCC 82 (CanLII), [2005] 3 SCR 809 at para 18; *R. v. Fitzpatrick*, 1995 CanLII 44 (SCC), [1995] 4 SCR 154 at paras 28-32). A contextual analysis should not pre-judge an issue by placing more weight on a value developed at large rather than the context of a specific case, and should recognize that rights and freedoms have different value depending on the context (*Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 SCR 1326 at 46-49, 51-52). Contextual balancing is necessarily more flexible than similar principles in the U.S. (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 SCR 425 at para 190), but the context of rights requires an examination of all relevant factors in light of any essential differences (*R. v. Wholesale Travel*

Group Inc. (sub nom. *Wholesale Travel Group Inc. v. The Queen*), 1991 CanLII 39 (SCC), [1991] 3 SCR 154 at para 149-152). Where the contextual factors provide a matrix of legislative and social facts, the mix of complex contextual social factors may allow the Supreme Court of Canada itself to depart from its own precedents (*Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 SCR 331 at para 47; *United States v. Burns*, 2001 SCC 7 (CanLII), [2001] 1 SCR 283 at para 65; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101 at para 48).

Canadian courts can use external aids of interpretation, including legal texts from other jurisdictions. However, courts do this with some reluctance. Although American law can be used to assist the interpretation of Canadian legislation, it should be done with caution, given the unique Canadian context (*Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 SCR 1031 at para 75). Because Canadian enactment of legislation differs significantly from that of the United States, legislative intent is best ascertained by examining the effect of legislation, and not speeches and declarations, including statements by members of the legislature during its passage (*Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 SCR 486 ["*BC Motor*"] at paras 49-50). Even the United Kingdom, where Canadian common law ultimately originates from, has been differentiated by Canadian courts, especially prior to human rights conventions constraining legislative power (*Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 (CanLII), [2002] 3 SCR 519 at para 132).

In contrast, international law is binding on Canada, and is used to interpret Canadian law (*BC Motor* at paras 30, 63; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038 at paras 23; *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 SCR 313 at paras 57-60; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 69-71; *R. v. Hape*, 2007 SCC 26 (CanLII), [2007] 2 SCR 292 at paras 55-56; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 SCR 391 at para 70; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (CanLII), [2013] 3 SCR 157 at paras 24-27; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 (CanLII), [2014] 3 SCR 176 at paras 53, 55-56). These obligations, which include international instruments that Canada is a party to, have been the basis from departing from American interpretations of rights and the law (*R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697 at paras 39-40, 56, 65-74). Where Canada is not a party, little weight may be provided to an international instrument (*Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (CanLII), [2015] 1 SCR 245 at paras 151, 157-159). The Magna Carta does not form any type of international law, and Canada was obviously not a party to it. It therefore has no interpretive effect on Canadian jurisprudence, as will be illustrated below.

As the celebration of the Magna Carta is itself vague and ambiguous, a linguistic, historical, political and philosophical approach, looking at the actual social, political and legal context in which the celebration arises, is warranted under the forgoing principles of interpretation.

[2] To be differentiated from the "Republican Party" in the U.S., though the party was founded on the basis of republicanism as promoted by Thomas Jefferson's Democratic-Republican Party in the early 1790s, until it splintered in the 1824 elections into the modern Democratic Party and the Whig Party. However, all of these American parties would emphasize the sovereignty of the people and reject monarchy, and celebrate the Magna Carta in this manner. See Article IV of the *Constitution of the United States*; *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) at 18-21, 32, 42-43 (invoking the Magna Carta at 61, but differentiating it from the constitution in the ability to enforce military law, and explicitly rejecting justiciability of the republican character of the United States, but at 23 also repudiating the English notion of enforcing the right of people to "change their form of government as they please for their own welfare" without any mechanism to do so); *United States v. Cruikshank*, 92 U.S. 542 (1876) at 542, 552, (affirming the protection of the people by the state of the right of people to peaceably assemble to meet peaceably for consultation in respect to public affairs); *In re Duncan,* 139 U.S. 449, (1891) at 461 (indicating that a distinguishing feature of the American Constitution is the right of the people to choose their own officers for governmental administration, and are therefore the source of political power, as limited by written constitutions that control against sudden impulses of mere majorities).

See also the 1892 Pledge of Allegiance, which was introduced during the 400th Columbus Day anniversary on 1892 by Francis Bellamy, a Baptist Minister and Christian socialist who championed the rights of working people to the equal distribution of resources (Jeffrey Owen Jones, The pledge: a history of the Pledge of Allegiance, 2010 (New York: Thomas Dunne Books/St. Martin's Press). He is credited with drafting the pledge and its reference to an American republic as a media tactic to promote the schoolhouse flag movement (*Youth's Companion*, September 8, 1892). The salute that accompanied this affirmation of a republic, known as the "Bellamy Salute," was modified on December 22, 1942 by Public Law 77-829, amending the Flag Code (4 U.S. Code § 1, ch. 806, §7, 56 Stat. 1077 at s. 7), due to its similarity to the salute used by belligerents in a global conflict at the same time. Celebrations of Columbus Day are increasingly rarer these days, even in the U.S. (Scottie Andrew and AJ Willingham, "These states are ditching Columbus Day to Observe Indigenous Peoples' Day instead," CNN, Oct. 12, 2020, available at: <https://www.cnn.com/2020/10/12/us/indigenous-peoples-day-2020-states-trnd/index.html>), with some notable exceptions (Donald J. Trump, "Proclamation on Columbus Day, 2020," The White House, Oct. 9, 2020, available at: <https://www.whitehouse.gov/presidential-actions/proclamation-columbus-day-2020/>).

[3] *The Constitution Act, 1867*, 30 & 31 Vict, c 3, s. 9. The only true republican movement in Canadian history is the unsuccessful Canadian Rebellions of 1837-1838, which were considered radically liberal and were certainly influenced and perhaps inspired by the American Revolution. They sought the displacement of both the monarchy and the economic elites of the Château Clique and the Family Compact, who were both associated with contemporary Tories of the time. Republicanism in the Canadian context can therefore be interpreted as a rejection of wealth accumulation among the elite, and even notions of anti-conservatism.

The 1839 *Report on the Affairs of British North America* (Her Majesty's High Commissioner, *Report on the Affairs of British North America* (Durham Report), by Earl of Durham (London: 1839), available at: <https://primarydocuments.ca/report-on-the-affairs-of-british-north-america-durham-report/>) by Lord John Lambton, Earl of Durham and himself a Whig (also known as "Lord Durham"), was commissioned to specifically investigate and report on the rebellions of 1837-1838, and it is credited for the creation of notions of responsible government in what would now be Canada, through the form of parliamentary accountability in the form of a Westminster system of parliamentary democracy. Lord Durham was himself a wealthy British aristocrat, whose family obtained their riches through numerous coal mines, earning £80,000 annually in 1812. In 1833, only years before coming to what is now Canada, Lord Durham was estimated to have employed 2,400 coal miners (Fernand Oullet, "Lambton, John George, 1st Earl of Durham," Dictionary of Canadian Biography, vol. 7 (1988), University of Toronto, available at: <http://www.biographi.ca/en/bio.php?id_nbr=3484>). For greater clarity, it's worth noting that Lord Durham's ancestors, who included the feudal lord Robert de Lambton (d. 1350), would likely have benefited materially in some way from the Magna Carta. The ancestors of the coal miners in his employ, or the many residents in what is now Canada, would not have.

However, without the Durham Report it is unlikely that there would have ever been a union between Upper Canada and Lower Canada, or that Canada would be created as a form of self-government in this way. Of course, Lord Durham was himself appointed Governor General and high commissioner of British North America prior to fulfilling this mandate, so the conception of Canada was itself from the outset opposed to notions of republicanism. Central to this objective was Lord Durham's ability to recast radically liberal republican notions of liberalism and economics as a conflict between two (sic) warring nations (Indigenous people and First Nations were not a consideration in this way at that time), with traditionalistic and modernizing elements,

> "I expected to find a contest between a government and a people: I found two nations warring in the bosom of a single state: I found a struggle, not of principles, but of races; and I perceived that it would be idle to attempt any amelioration of laws or institutions, until we could first succeed in terminating the deadly animosity that now separates the inhabitants of Lower Canada into the hostile divisions of French and English.
>
> …
>
> The English, finding their opponents in collision with the government, have raised the cry of loyalty and attachment to British connexion, and denounced the republican designs of the French, whom they designate, or rather used to designate, by the appellation of Radicals. Thus the French have been viewed as a democratic party, contending for reform; and the English as a conservative minority, protecting the menaced connection with the British Crown, and the supreme authority of the empire.
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> …
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> We are not now to consider the policy of establishing representative government in the North American colonies. That has been irrevocably done; and the experiment of depriving the people of their present constitutional power is not to be thought of. To conduct their government harmoniously, in accordance with its established principles, is now the business of its rulers; and I know not how it is possible to secure that harmony in any other way, than by administering the government on those principles which have been found perfectly efficacious in Great Britain. I would not impair a single prerogative of the Crown; on the contrary, I believe that the interests of the people of these colonies require the protection of prerogatives, which have not hitherto been exercised. But the Crown must, on the other hand, submit to

> the necessary consequences of representative institutions: and if it has to carry on the government in unison with a representative body, it must consent to carry it on by means of those in whom that representative body has confidence."
> [emphasis added]

The Report was rejected by the Tory elite in Upper Canada, but was widely popular among the general population, which given the economic disparities and wealth concentration of the time, was the pre-Confederation equivalent of low-income Ontarians. The Report was ultimately successful in fusing the two colonies into a new nation that was governed by responsible government after it was laid before Parliament on Feb. 11, 1839, and led to the *Act of Union, 1840* (*The British North America Act*, 1840, 3 & 4 Victoria, c. 35 (U.K.)) on July 23, 1840. The Durham Report in 1839 has therefore played a far more significant role in the Confederation of Canada than the Magna Carta.

The United Counties of Northumberland and Durham, a historic county between 1850 to 1974 that gave way to the Region of Durham under the *The Regional Municipality of Durham Act, 1973*, SO 1973, c. 78 (See *Re Town of Durham and Regional Municipality of Durham et al.*, 1974 CanLII 607 (Div Ct); 1975 CanLII 324 (ONCA); leave to appeal to SCC dismissed, whereby the Town of Durham, founded in Grey County in 1842, opposed the naming of the Region with the same name). It was named in part after Lord Durham and his contributions towards the foundational notions of the Canadian form of constitutional monarchy, and it was chosen by the residents above the alternatives of McLaughlin, Pickering and Oshawa (Durham Immigration Portal, "History of Durham Region," available at: <https://www.durhamimmigration.ca/en/moving-to-durham-region/history-of-durham-region.aspx>).

[4] Modern notions of republicanism have been resoundingly rejected by courts in Ontario, in the context of the Oath of Allegiance, the practice of which pre-dates Confederation. When the *Québec Act, 1774*, 14 Geo III c 83 was enacted by the Parliament of Great Britain following the Seven Years' War (also known as the French and Indian War by the British colonists, despite the latter constituent failing to properly benefit from the allegiance and support of the British Crown) and the transfer of Lower Canada to Britain under the Treaty of Paris 1763 (The definitive Treaty of Peace and Friendship between his Britannick Majesty, the Most Christian King, and the King of Spain. Concluded at Paris the 10th day of February, 1763. To which the King of Portugal acceded on the same day), the Oath of Allegiance was modified to remove religious references previous found in the *Test Act* (*Test Act* of 1673, 25 Car. II. c. 2, "An act for preventing dangers which may happen from popish recusants," in Statutes of the Realm: Volume 5, 1628-80, ed. John at 782-785, available at: <http://www.british-history.ac.uk/statutes-realm/vol5/pp782-785>). This *Québec Act, 1774* revoked the Royal Proclamation of 1763, which sought to assimilate French-Canadians under English rule, and instead preserved the French civil, religious, and cultural traditions, allowing the Roman Catholic Church to legally collect tithes, and re-establishing the seigneurial system of paying dues (It also arguably revoked the Magna Carta, to the extent that it would have existed on these shores; *Calder et al. v. Attorney-General of British Columbia*, 1973 CanLII 4 (SCC), [1973] SCR 313 at 395, but note that the Court also describes the Proclamation as "a remarkably

enlightened attitude towards the Indians of North America," a conclusion that likely would not be repeated today; The Truth and Reconciliation
Commission of Canada, "Honouring the Truth, Reconciling for the Future," 2015, available at: <http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf>).

Low-income French speaking colonists were not entirely happy with paying dues and taxes, but were less displeased than the "British Party" that sought to assimilate them. In this way, the *Quebec Act, 1774* also has more legal significance to the history and creation of modern Canada than the Magna Carta. This Oath, affirming the constitutional monarchal nature of Canada and the common law notion of the monarch as the repository of English sovereignty even pre-Norman conquest, was introduced in the very first parliamentary session following Confederation, in *An Act respecting Aliens and Naturalization*, 31, V, c 66 (1869). The unintended effects of *Québec Act, 1774* may have been the dominance of French civil, religious, and cultural traditions in unexpected ways, for example, requiring the Supreme Court of Canada to intervene in the election of a member to Parliament due to undue influence of certain parish priests, including sermons and threats (*Brassard et al. v. Langevin*, 1877 CanLII 23 (SCC), 1 SCR 145 ["*Brassard*"]).

Modern challenges to the Oath of Allegiance, which can be found today under s. 24 of the *Citizenship Act* (RSC 1985, c C-29), have been justified under s. 1 of the *Canadian Charter of Rights and Freedoms* (*Constitution Act, 1982*, Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 (the "*Charter*") as a reasonable infringement of s. 2(b) rights (*McAteer et al. v. Attorney General of Canada*, 2013 ONSC 5895 at paras 62-64),

> "Her Majesty the Queen in Right of Canada (or Her Majesty the Queen in Right of Ontario or the other provinces), as a governing institution, has long been distinguished from Elizabeth R. and her predecessors as individual people. Thus, for example, Canada has divided sovereignty, with both the federal and provincial Crowns represented by the Her Majesty. …despite the words used in our constitutional practice, there has never been a literal dicing or replication of the Queen. …the Crown as a symbol of the constitutional monarchy is not generally conceived as an arbitrary authority. In fact, "[t]he Queen is only at the head of the dignified [i.e. formal] part of the Constitution. The Prime Minister is at the head of the efficient [i.e. political] part. W. Bagehot, *The English Constitution* (1st edn. 1877) (New York: Cosimo Classics, 2007), at 296…"

Previous attempts in Canada to challenge this Oath on similar or other republican-type arguments encountered a comparable level of success. See, for example, *Heib (Re)*, 1979 CanLII 2693 (FC); *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*, 1994 CanLII 3453 (FCA), [1994] 2 FC 406; *Roach v. Canada (Secretary of State)*, 2007 CanLII 17373 (ON SC). See also, *Giolla Chainnigh v. Canada (Attorney General)*, 2008 FC 69 (CanLII) in a different context, of the Canadian Forces. But contrast with *Ishaq v. Canada (Citizenship and Immigration)*, 2015 FC 156 (CanLII), [2015] 4 FCR 297; aff'd 2015 FCA 212, where the objection was not the content of the Oath but the manner by which the individual was compelled to take it, in light of s. 19(2) of the *Citizenship Regulations*, SOR/93-246 and s. 13.2 of Citizenship and Immigration Canada policy manual, "CP 15: Guide to Citizenship Ceremonies." The court found the policy to be unconstitutional, without making a determination on whether it infringed on s. 2(a) of the *Charter*. Allowing symbolic affirmations of Canada's constitutional monarchy, with

wide latitude as to its interpretation and application within a multicultural context, is therefore consistent with the court's approach to this type of affirmation.

[5] Only three clauses of the Magna Carta are in force in the U.K. today (BBC News, "Magna Carta unpicked," Sept. 28, 2012, available at: <https://www.bbc.com/news/magazine-19761919>).

Clause 1 defends the freedoms and rights of the English Church, as confirmed by Pope Innocent III. This clause arguably has little meaning after Church of England broke away from the authority of the Pope, and provided final authority in doctrinal and legal issues with the monarchy under King Henry VIII. This started with a series of legislation (*Supplication against the Ordinaries, 1532,* 3rd Legislative Session of the Reformation Parliament*,* Jan. 15-May 14, 1532, available at: <http://www.henryviiithereign.co.uk/1532-supp-against-ord.html>; *Act of Conditional Restraints of Annates of 1532* (23 Hen 8 c 20); *The Ecclesiastical Appeals Act 1532* (24 Hen 8 c 12); *The Ecclesiastical Licences Act 1533* (25 Hen 8 c 21); *Treasons Act 1534* (26 Hen. 8. c. 13)), and culminated in the *Act of Supremacy 1534* (26 Hen. VIII c. 1) and *See of Rome Act 1536* (*An Act extinguishing the authority of the bishop of Rome* (28 Hen.8 c. 10)). Queen Mary I repealed some of these reforms, but Queen Elizabeth's Second Act of Supremacy (*The Act of Supremacy 1558* (1 Eliz 1 c 1) restored them once more, also restoring the Oath of Supremacy instituted by King Henry VIII. This ecclesiastic independence was therefore achieved not through the Magna Carta, but by the powers of the sovereign. Ironically, Henry VIII was himself named Defender of the Faith (*Fidei Defensor*) by Pope Leo X for his publication of the Defence of the Seven Sacraments (*Assertio Septem Sacramentorum*) in 1521.

Clause 13 defends the ancient liberties and free customs of the City of London. This arguably has little legal significance today in light of the numerous trade agreements that the U.K. is party to, and the City of London must abide by. Despite the withdrawal of the U.K. from the European Union, the U.K. continues at this time to participate in the European Union Customs Union (EUCU) and the European Single Market.

Clauses 39 and 40 maintain the right to trial by jury. Alexander Hamilton, the American statesman and lawyer, considered the jury the essential safeguard of free government, describing it in the *Federalist Papers* as "a defence against the oppressions of an hereditary monarch, [and] a barrier to the tyranny of popular magistrates in a popular government" ("The Judiciary Continued in Relation to Trial by Jury", *The Federalist No. 83*, May 28, 1788, available at: <https://founders.archives.gov/documents/Hamilton/01-04-02-0246>). However, George Makdisi theorizes the origins of this system can be found in the Mediterranean and North Africa. The close ties between Norman England and Norman Sicily would support this, especially between the feudal barons and nobles who travelled and lived between the two, as well as the greater similarities than Anglo-Saxon antecedents such as the use of ordeals or duels or Roman and cannon law (George Makdisi, "The Islamic Origins of the Common Law," *North Carolina Law Review 77* (1999) at 1676-1695, available at: <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=3823&context=nclr>). In this interpretation, a celebration of the Magna Carta could be said to be a celebration of "Sharia

law," in particular the Maliki school of jurisprudence. The cultural and ethnic syncretism and even multicultural nature of Roger II's kingdom is well established (Hubert Houben, Roger II of Sicily: A Ruler between East and West, (2002) Cambridge University Press; William Tronzo, The Cultures of His Kingdom: Roger II and the Cappella Palatina in Palermo, (1997) Princeton University Press; Nathaniel A. Miller, "Muslim Poets Under a Christian King: An Intertextual Reevaluation of Sicilian Arabic Literature Under Roger II (1112–54)," *Mediterranean Studies 27:2, 28:1* [Parts 1, 2] (2019, 2020)), as is the Eurocentric historical revisionism that occurred during the colonial era to erase or minimize non-European influences on Western history (James Morris Blaut, The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History, (1993) The Guilford Press; Lauren Benton, Law and Colonial Cultures: Legal Regimes in World History, 1400–1900, Cambridge University Press (2002) at 52-54; George Gheverghese Joseph et al., "Eurocentrism in the social sciences," *Race & Class 31:4* (1990)). A celebration of the Magna Carta that seeks to reverse this tyrannical approach to imposing one culture's supposed dominance over all other people would indeed be consistent with modern values in Ontario.

[6] "Bulla Innocentii Papae III. pro rege Johanne, contra barones. (In membr.) 1216. 151.," Aug. 25, 1215, Anagni, Italy, *British Library Cotton MS Cleopatra E I, ff. 155-156,* available at: <https://www.bl.uk/collection-items/the-papal-bull-annulling-magna-carta>. The legal basis for this determination was that King John signed this under military duress, and therefore violated equitable principles of duress. Chapter 61 of the 1215 Magna Carta created a security clause allowed the barons to choose 25 representatives to enforce the agreement, by seizing King John's property until he complied, to "distrain" him. The requirement of physical force or the threat thereof remained an essential element of the defence of duress until the late 20th c. (John D. McCamus, The Law of Contracts, Irwin Law (2005) at 367). The American case of *Morrill v. Amoskeag Savings Bank*, 90 N.H. 358 (1939) stated,

> Duress, under the early common law, might consist in threats as well as in the use of actual force, but only four kinds of threats were regarded as of sufficient gravity to permit one to avoid the consequences of his acts. These were threats of loss of life, of loss of limb, of mayhem, and of imprisonment.

All of these factors would have been present with the barons at Runnymede, their armies assembled close at hand, and with the demands of what would become Chapter 61.

The jurisdiction exercised by the *Curia Regis* at the time of the Magna Carta already maintained the characteristics that we currently associate with equitable principles, a petition for interference, and remedies outside the ordinary system of justice (WS Holdsworth, "The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor," *The Yale Law Journal 26:1* (1916) at 3). King John's petition to the Pope, and the Pope's interference, would therefore be consistent with contemporary legal principles, especially under the divine right of kings (Philip B. Kurland, "Curia Regis: Some Comments on the Divine Right of Kings and Courts to Say What the Law Is," *Arizona Law Review 23* (1981)). It was only after this time that a more regular system of law emerged, with writs *de cursu* pursued by litigants (*ibid*). It may be possible to make an analogy between the demands made by the barons in 1215 as a precursor to these writs. Following the Second Baron's War (1264–1267), demands of this nature likely resulted in petitions to King Edward I's Lord Chancellor (the

"Keeper of the King's Conscience") turning into the Court of Chancery, to be differentiated from the Court of Common Pleas, which did not involve the king. However, the formulaic nature of these writs and their resulting injustices also necessitated the maintenance of principles of equity. While the *Judicature Acts* (*Ontario Judicature Act*, 1881 44 Vic c 6 once again fused these functions, they also abridged many of the broader rights to a jury, as found in Clauses 39-40 of the Magna Carta.

A more recent English Court of Appeal decision in *Halpern v. Halpern* (Nos. 1 and 2), [2007] EWCA Civ 291, [2008] 1 Q.B. 195 involved an inheritance dispute within an Orthodox Jewish family also illustrates the notion of duress. The dispute was initially referred to a "Beit Din," a rabbinical court used in modern practice of Judaism to solve civil disputes. This institution and its use stretch back hundreds of years, including to the time of the Magna Carta, and is based on a statement of Rabbi Tarfon in the Babylonian Talmud ("Talmud Bavli"), Gittin 88b:

> With regard to any place where you find gentile courts ["agoriot"], even if their laws are like Jewish laws, you may not attend them, as it is stated: "Now these are the ordinances which you shall set before them" (Exodus 21:1). It is derived from here that one may go to court only before them, i.e., Jewish judges, and not before gentiles. Alternatively, it is derived that one may go to court before them, i.e., ordained judges, and not before ordinary people. Since we are not ordained judges, how can you perform a distinctly judicial act?

Rabbinical commentators such as Rashi (Shlomo Yitzchaki) describes Jews who go to secular courts as those who "profanes the name of G_d, and gives honor to the name of idols," while Rambam (Maimonides) states in Mishneh Torah, Hilchot Sanhedrin 26:7 that it is akin to someone who has "blasphemed and raised a hand against the Torah of Moses" (Omar Ha-Redeye, "Orthodox Jews in Civil Legal Disputes in Canada," Slaw, Jan. 15, 2017, available at: <http://www.slaw.ca/2017/01/15/orthodox-jews-in-civil-legal-disputes-in-canada/>; Rabbi Yaacov Feit, "The Prohibition Against Going to Secular Courts," *The Journal of the Beth Din of America*, available at: <http://jlaw.com/Articles/ProhibitionSecularCourts.pdf>; *Popack v. Lipszyc*, 2016 ONCA 135; note, however, that some exceptions do exist.). In *Halpern*, the parties agreed prior to the decision to hand over or destroy all related documents, but one of the parties claimed they entered into this agreement based on religious pressure by one of the rabbis involved. The destruction of the documents made restitution impossible, which would have resulted in the transfer of £2.4 million. The court acknowledged that duress is similar to undue influence when it does not involve physical threats, but involves improper pressure, and relied on *Erlanger v. New Sombrero Phosphate* ([1878] 3 App. Cas. 1218 at 1278-79) to affirm the need for equitable principles to be applied flexibly (without making any determination of duress in the case). Canadian courts have similarly adopted this principle in their application of equity, while ensuring the party seeking relief uses due diligence to address the inequity before the court (*In re Hess Manufacturing Company*, 1894 CanLII 14 (SCC), 23 SCR 644; *Proprietary Mines Limited v. MacKay*, 1939 CanLII 87 (ONCA); *Kupchak v. Dayson Holdings Ltd.*, 1965 CanLII 497 (BCCA); *Louie v. Lastman (No. 2)*, 2002 CanLII 45061 (ONCA); see *contra*, where the court will not be *so* flexible as to create a contract for the parties, *Re Dominion Combing Mills Ltd.*, 1930 CanLII 397 (ONCA)).

[7] Clauses 10 and 11 explicitly refer to Jews, specifically debts owed by the Barons at Runnymede, and dissolving any interest that may accrue after death. The wife of someone who owes money to a Jew (the woman could not own property herself), would be absolved of that debt. A third clause insists that debts should be paid from liquid assets and not land, which appears to e an attempt to prevent the king from acquiring more territory through Jews in his employ (Jonathan Romain, "Magna Carta's three Jewish clauses," The JC, Sept. 4, 2014, available at: <https://www.thejc.com/magna-carta-s-three-jewish-clauses-1.56652>.
The main reason why subsequent versions of the Magna Carta had these clauses omitted was not due to any egalitarian type of enlightenment, but due to their disempowerment and disenfranchisement. In fact, Henry III forced Jews in England to wear a distinctive badge in 1218 (John Victor Tolan, "The first imposition of a badge on European Jews: the English royal mandate of 1218," The character of Christian-Muslim encounter (2015)), which were followed by significant levies to address a mounting debt. He passed the *Statute of Jewry, 1253*, which sought to further segregate and control Jews. His son, King Edward I, issued the *Statute of the Jewry, 1275*, outlawing the collection of interest by Jews, and *Edict of Expulsion 1290*, forcibly removed Jews from England (Barnett D. Ovrut, "Edward I and the Expulsion of the Jews," *The Jewish Quarterly Review 67:4* (1977); Joe Hillaby, "London: the 13th-century Jewry revisited," *Jewish Historical Studies 32*, (1990-1992); R. Malcolm Hogg, "Jews, Guardians, and Magna Carta, Clause 11," *Law and History Review 4:2* (1986)).

[8] See Ian Holloway, "Why we should care about Magna Carta," Canadian Lawyer, Jun. 17, 2015, available at: <https://www.canadianlawyermag.com/news/opinion/why-we-should-care-about-magna-carta/273252>, who attributes much of this reinvention to Sir Edward Coke, Chief Justice of the King's Bench; New World Encyclopedia, "Magna Carta," available at: < https://www.newworldencyclopedia.org/entry/Magna_Carta#The_Tudors>.

[9] The sentinel case in this area is *Meads v. Meads*, 2012 ABQB 571, where Justice Rooke points to the Magna Carta at paras 101, 125-127, 228, 326 327, 385-387, 407-408 as indicia of what he terms "Organized Pseudolegal Commercial Argument [OPCA] Litigants" (see also, Omar Ha-Redeye, "Freemen Arrive at the Ontario Court of Appeal," Slaw, May 12, 2019, available at: <http://www.slaw.ca/2019/05/12/freemen-arrive-at-the-ontario-court-of-appeal/>;Sandra Shutt, "The 'scourge' of unrepresented litigants," Canadian Lawyer, Jan. 7, 2013, available at: <https://www.canadianlawyermag.com/news/general/the-scourge-of-unrepresented-litigants/268842>). Justice Rooke also notes at para 127 that at least some of the litigants who utilize these approaches of invoking the Magna Carta have also had a history of complaints of racism and anti-Semitism (See *Warman v. Warman*, 2005 CHRT 36; *Warman v. Warman*, 2005 CHRT 43). While it may be easy to dismiss these litigants as "radically liberal republicans," they are in fact illustrative of the inability or difficulties of the general public in obtaining accurate, accessible and cost-effect legal information. It also highlights the risk of the Magna Carta being coopted and being misused, without the proper qualification in this Bill.
[10] This is particularly important where a statute or enabling provision is ambiguous, or allows for retroactive interpretation of legislation. The Supreme Court of Canada in *Ford v. Quebec*

(Attorney General), 1988 CanLII 19 (SCC), [1988] 2 SCR 712 indicated that in such circumstances a narrower interpretation is the proper one.

[11] There is no such thing as absolute and untrammelled exercise of executive power in Canada (*Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121 [*Roncarelli*] at 140, 142). The discretion exerted by the executive need not rise to the level of a breach of public duty for it to be an abuse of power, but can include acting for reasons and purposes unrelated to proper administration, or to intentionally punish a constituent or resident (*ibid* at 137, 141; *Shields v. Vancouver (City)*, 1991 CanLII 1162 (BC SC)). This type of conduct may even give rise to a claim in tort for abuse of public office, but this should be used sparingly by the courts to avoid straying into the area of political decision-making and becoming the arbiters of the personal thought processes of public officials (*Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619 (CanLII) at paras 1-2). However, that does not preclude those same public officials from reflecting on their own exercise of power that falls below this high threshold, but may still resemble an overly exuberant exercise towards vulnerable and low-income populations.
The law should ideally constrain the exercise of administrative or executive discretion in the legislation itself.

However, the courts recognize that statutes cannot reasonably spell out every relevant factor, or identify every irrelevant, bad faith, or abusive consideration (*C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 (CanLII), [2003] 1 SCR 539 at para 29). No law can provide unlimited and arbitrary power for any purpose, as administrative discretion still requires good faith in discharging a public duty (*Roncarelli* at 140). Even where the executive or governmental authority has been provided immunity through statute, the courts can conclude that actions could not have been acted in good faith (*Chaput v. Romain*, 1955 CanLII 74 (SCC), [1955] SCR 834 at 844). Evidence of actual malice or an intent to harm is not required to rebut a presumption of good faith, as this would be contrary to the fundamental objective of the law protecting the public (*Finney v. Barreau du Québec*, 2004 SCC 36 (CanLII), [2004] 2 SCR 17 ["*Finney*"] at para 40). This can be interpreted broadly to include conduct that is seriously careless or reckless (*ibid* at 39). Examples of bad faith include actions that are so markedly inconsistent with the legislative context that a court cannot conclude they were performed in good faith (*Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61 (CanLII), [2004] 3 SCR 304 at para 27). Important in this context is to emphasize that it is the courts that constrain the power of the executive, and the abuse thereof, and therefore most closely align to the symbolic meaning of the Magna Carta in this context.

[12] A more contemporary example of this type of constraint since *Brassard* would be *Galati v. Harper*, 2014 FC 1088; 2016 FCA 39; 2016 CanLII 47514 (leave to appeal SCC ref'd), where an application for judicial review brought to the Federal Court challenged the appointment of a Supreme Court of Canada justice, on the basis that ss. 5,6 of *Supreme Court Act*, RSC 1985, c S-26 does not allow the appointment of a Federal Court or Federal Court of Appeal judge to the Supreme Court of Canada. The largely circular nature of these relationships, between the

judiciary and the executive, best exemplifies the control on the excess of power that the judiciary can provide.

[13] The *Statute of Westminster, 1931* (UK), 22-23 George V, c 4 on Dec. 11, 1931 provided full legal autonomy, beyond the self-rule provided in 1867. Its origins are in the Imperial Conference of 1926, where Lord Balfour provided the suggestion for full autonomy for all Dominions (Inter-Imperial Relations Committee, "Imperial Conference, 1926," at 3, available at: <https://www.foundingdocs.gov.au/resources/transcripts/cth11_doc_1926.pdf>). His more famous statement, the Balfour Declaration of 1917, has been likened as the Magna Carta of the Jewish people, because it was incorporated into Mandate for Palestine (Michael Freund, "Fundamentally Freund: Balfour and the Jewish Magna Carta," The Jerusalem Post, Nov. 3, 2017, available at: <https://www.jpost.com/opinion/fundamentally-freund-balfour-and-the-jewish-magna-carta-513233>). However, it was only really with patriation of the constitution with the *Canada Act 1982 (UK)*, 1982, c 11 that Canada truly became independent. Even this was only really possible after the *Re: Resolution to amend the Constitution, 1981* CanLII 25 (SCC), [1981] 1 SCR 753, where the Court affirmed an unwritten dimension to the constitution and established there was no legal barrier to patriation due to lack of cooperation from the provinces. The competing interests of the provincial and federal legislatures was only resolved by the adjudication by the Court, the ultimate arbiter of power and its delineation in Canada. Contemporary political issues in Canada which have been likened to tensions with the Magna Carta include:

- Bill C-59 (41-2), *An Act to implement certain provisions of the budget tabled in Parliament on April 21, 2015 and other measures*
- The Canadian Senate Expense Scandal (Office of the Auditor General of Canada "Senator's Expenses," Report of the Auditor General of Canada to the Senate of Canada, June 2015, available at: <https://sencanada.ca/media/210975/agreport-senatorsexpenses2015-e.pdf>; See also, *R. v. Duffy*, 2016 ONCJ 220
- Political party financing and advertising used improperly

(Errol Mendes, "We're a nation desperately in need of a Magna Carta moment," iPolitics, Jun. 15, 2015, available at: <https://ipolitics.ca/2015/06/15/were-a-nation-desperately-in-need-of-a-magna-carta-moment/>).

The best example in contemporary politics though would be the interaction between *Bill 5 - Better Local Government Act, 2018* and *Bill 31, Efficient Local Government Act, 2018*, Schedule 1 (see *City of Toronto et al v. Ontario (Attorney General)*, 2018 ONSC 5151; 2018 ONCA 761; 2019 ONCA 732 at para 8; 2020 CanLII 23630 (appeal to SCC pending).
See also, Legislative Assembly of Ontario, "Office Report of Debates (Hansard), No. 20," 1st Session, 42nd Parliament, Sept. 12, 2018, at 833-834, available at: <https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2018/2018-09/12-SEP-2018_L020.pdf>; Legislative Assembly of Ontario, "Office Report of Debates (Hansard)" No. 25," 1st Session, 42nd Parliament, Sept. 20, 2018, at 1077 available at: <https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2018/2018-12/20-SEP-2018_L025.pdf>. Section 33 is not a loophole.