Professional Status and the Freedom to Contract: Toward a Common Law Duty of Non-Discrimination
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A. Overview

Mr. Franklin, an African-Canadian, was refused service at Mr. Evans’ restaurant because of Mr. Franklin’s race. In dismissing Mr. Franklin’s lawsuit for a breach of a duty to provide equal service, the Court of King’s Bench in Kitchener, Ontario, found that the restaurant owner was under no duty to refrain from discrimination. This conclusion was later affirmed by the Supreme Court of Canada, which, in 1940, stated in Christie v. York that “any merchant is free to deal as he may choose with any individual member of the public.” This line of rulings prompted federal and provincial Canadian legislatures to enact human rights codes, which charged human rights tribunals with investigating and adjudicating claims of discrimination in the private sphere. The codes typically enumerate grounds upon which discrimination is forbidden, such as race, gender, and age, and spheres of interaction in which discrimination is forbidden, such as housing, the provision of goods and services customarily available to the general public, and employment. The third chapter in the development of the common law of anti-discrimination was written by the Supreme Court of Canada in Bhadauria, when the Court found that unless otherwise stated in the code, a human rights code does not allow access to the common law, and to common law courts, in order to vindicate rights established by the code. Since none of the codes in Canada explicitly allows for parallel common law adjudication, the Canadian common law has remained almost frozen, with Franklin and Christie as good law.

But were Franklin and Christie correctly decided? Is discrimination allowed under the common law but for when it is forbidden by human rights legislation? Should Bhadauria be interpreted as having authoritatively rejected any and all

1. Franklin v. Evans (1924), 55 O.L.R. 349 [hereinafter Franklin].
3. For an historical account, see W. Tarnopolsky & W.F. Pentney, Discrimination and the Law (Scarborough, ON: Carswell, 1994) ch. 1, 2.
liberty and equality in matters not covered by human rights codes. The paper will consequently, common law courts are not excluded from the task of reconciling upon request.

This paper focuses on the duty to provide equal service upon request. Absent an expression of a desire to purchase the good or service, its provision and a subsequent claim for remuneration falls under the law of restitution. For cases dealing with a possible duty to provide goods and services under the necessity principle, and a reciprocal duty for remuneration for such goods and services even when not requested, see e.g., Ploof v. Putnam, [1899] 5 S.C.R. 104, as referred to in I. A. Hunter, “Human Rights Legislation in Canada: Its Origin, Development and Interpretation” (1976) 15 U.W.O. L. Rev. 21 at 23 and a “solitary beacon” [Re Drummond Wren (1945), O.R. 778, as referred to in D.J. Mullan, “Development in Administrative Law: the 1980-81 Term” (1982) 3 Supreme Court L. R. 1 at 7, n. 25], the common law in Canada did not recognize a full-blown duty to provide equal service. In fact, it could be argued that the Supreme Court in Bhadaura, supra note 5 rejected such a duty. The decision in Bhadaura is analyzed below.

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focus on contractual liberties, but the arguments put forward are consonant with property law analysis as well.\footnote{For an analysis of the legal powers to discriminate based on one’s property rights, see A. Reichman, “Property Rights, Public Policy and The Limits of the Legal Power to Discriminate” in D. Friedman & D. Barak-Erez, eds., Human Rights in Private Law (Oxford: Hart Publishing) [forthcoming].}

Theoretically, this paper will argue that embedded in the common law governing the interaction of non-governmental entities is the notion of interacting in one’s capacity as a member of a profession. When we enter a certain profession, and hold ourselves out as interacting in our professional capacity, we assume a certain host of duties and obligations towards those who wish to purchase the goods and services around the provision of which the profession is organized. Such obligations are akin to obligations which flow from assuming a status: we may not pick and choose among them; either we interact in our professional capacity or not. If one chooses to interact in one’s professional role, and if the profession is organized around the provision of goods and services irrespective of the characteristics of the customers, that is, if the profession is ‘impersonal’, taking such characteristics into account constitutes a breach of one’s obligations. Consequently, a member of the community who relied upon the professional representation and sought to purchase the goods or services provided by the profession only to be rejected because of his or her personal characteristics is entitled to a remedy at law. The harm one suffers by the rejection includes frustration of one’s reliance, but also a dignitary harm, akin to harm suffered in defamation, since through the rejection one’s standing in the community is hurt.

Recognizing that in civil society we may interact as members of a profession, not merely as private individuals, allows us to realize that the common law is greater than private law, without rejecting the corrective nature of the common law. It allows us a better theoretical understanding of the structure of correlative rights and duties owed by individuals and community members towards one another.

Investigating the common law of anti-discrimination is not a mere theoretical endeavour, pertaining to the law as it stood in the 1940s. It carries practical consequences for contemporary adjudication because currently not all human rights codes cover every ground of discrimination. For example, to date little protection has been available against discrimination on the grounds of physical appearance (in cases where the appearance does not qualify as a medical disability).\footnote{For a discussion of the shortcomings of the current regime see D. Réaume, “Of Pigeon Holes and Principles: A Reconsideration of Discrimination Law” (Paper presented to the Learned Society, June 1999) [unpublished, manuscript with author].}

Furthermore, the existence of a common law duty to refrain from taking into account the group-based characteristics of a person expressing a desire to purchase certain goods or services affects other areas of law, beyond the common law. Recently, in Vriend v. Alberta,\footnote{Vriend v. Alberta, [1998] 1 S.C.R. 493 [hereinafter Vriend].} the Supreme Court of Canada was faced with a case where a provincial human rights code, the Alberta Individual’s Rights Protection Act,\footnote{IRPA, supra note 4. The Human Rights, Citizenship and Multiculturalism Act, 1980, R.S.A. 1980, c. H-11.7, which replaced the IRPA on September 6 1996, also did not include protection against discrimination on the grounds of sexual orientation.}
was silent with respect to discrimination on the grounds of sexual orientation. The Court did not consider the availability of the common law to address discrimination, and had to engage in constitutional analysis of the legislative silence, analysis which resulted in judicial ‘reading in’ of the missing ground into the code. Such a constitutional course is problematic; it would appear that it should be taken, if at all, as a last resort. Prior to declaring legislative silence, or a statute which protects some, but not all, forms of discrimination unconstitutional, and prior to effectively amending that statute through ‘reading in’, the court ought to be satisfied the legislative silence be considered as discriminatory. In other words, the existence of a common law duty to refrain from discrimination in certain circumstances, also affects, under a principled approach, recourse to constitutional causes of action.

14. The facts of Vriend revolved around discrimination in employment, but the Court expanded Mr. Vriend’s standing to challenge the absence of protection against discrimination on the grounds of sexual orientation in all spheres covered by the Code, including the provision of goods and services customarily available to the general public. The Court found that discrimination in employment is indistinguishable from other types of discrimination for the purposes of the constitutional challenge, and subsequently found the legislative silence in all spheres to be discriminatory. This paper will focus on discrimination in the provision of goods and services, a sphere covered by the Code. It should be noted, however, that the duty to refrain from considering the group-based characteristics of an applicant or an employee in certain positions is similar in nature to the duty to refrain from taking these characteristics into account in the provision of goods and service customarily available to the general public (see A. Reichman, Taking Constitutional Structures Seriously (S.J.D. dissertation, University of Toronto, 2000) ch. 1). It should also be recalled that Vriend involved a summary dismissal of Mr. Vriend, a teacher at Kings College, a private, Christian institution, on account of his sexual orientation. Therefore, Mr. Vriend could have filed a suit for unjust dismissal, and claimed that he was fired without just cause; that is, he could have argued that his sexual orientation does not qualify as a ‘just cause’. (For cases dealing with just cause see R.S. Echlin & M.L.O. Certosimo, Just Cause: The Law of Summary Dismissal in Canada, looseleaf (Aurora, ON: Canada Law Book, 1999) ch. 16; D. Harris, Wrongful Dismissal, looseleaf (Scarborough, ON: Carswell, 1999) at 3-58). Elsewhere I suggest that even if Mr. Vriend had been given adequate notice, the College could be held under an obligation to demonstrate that it did not consider group-based characteristics that are irrelevant to the nature of the position (See Reichman, ibid. at ch. 3). The fact that in Mr. Vriend’s case the College could have, in all likelihood, demonstrated that the sexual orientation of a teacher could be relevant for a Christian institution, is the exception; had Mr. Vriend been employed in a commercial, rather than a religious, institution, it would have been difficult to demonstrate that his sexual orientation is a relevant consideration.

15. F. C. DeCoste, “The Separation of State Powers in Liberal Polity: Vriend v. Alberta” Case Comment (1999) 44 McGill L.J. 231; T. Macklem, “Vriend v. Alberta: Making the Public Private” Case Comment (1999) 44 McGill L.J. 197; Reichman, supra note 14 at ch. 3. The problematic nature of Vriend is also reflected in the debate that followed Vriend in the Alberta legislature, where the ruling party was able to shirk its responsibility to amend the statute, since the Supreme Court had effectively assumed responsibility. See Alberta, Legislative Assembly, Debates (2,6,7,8,21 April 1998) at 1329-31, 1339-40, 1356-57, 1396-99, 1442, 1549.

16. In order to avoid confusion it should be stated that this paper does not advocate constitutional judicial review of the common law. Retail, Wholesale and Department Store Union v. Dolphin Delivery, [1986] 2 S.C.R. 573 [hereinafter Dolphin Delivery] and McKinney v. University of Guelph, [1990] 3 S.C.R. 229 preclude such review, and for good reasons (see Reichman, supra note 14 at ch. 2). The thrust of the argument here is that in deciding the constitutionality of the legislative silence, the court cannot ignore the common law background, in order to fully capture the legal effect of such silence.
It is therefore important to discern whether indeed such a duty exists, or whether Franklin is correct that none exists.

The structure of this paper, then, will be as follows. First, the contours of Bhadauria will be outlined, in order to determine preliminary access to the common law and to common law courts, and in order to assess whether the Canadian common law has formally denied the existence or development of a duty to refrain from discrimination. The common law principle of freedom of contract, or more specifically, the freedom not to contract, will then be closely examined, and exceptions to the general rule sketched. The third stage of the analysis will put forward possible rationales that could justify the exceptions. The conclusion will suggest that revisiting the common law in its entirety reveals that those providing goods and services customarily available to the general public are, and ought to be, under an obligation to provide equal service, that is, not to take into consideration the group-based characteristics—such as race, gender, religion or sexual orientation—of prospective customers.

B. A Human Rights Code, the Common Law and the Preliminary Hurdle of Bhadauria.

As mentioned above, the availability of the common law in an age of human rights legislation has been questioned by the Supreme Court in Bhadauria. It is therefore necessary to address the holding(s) of the Court in detail, in order to determine the effect of the presence of a human rights code on the common law.

Bhadauria reached the Supreme Court with a strong judgment by the Court of Appeal for Ontario.17 Wilson J.A. (as she then was) concluded that the common law had evolved to the point of recognizing a new tort of discrimination. She relied on the Ontario Human Rights Code as “evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights.”18 The Supreme Court, per Laskin C.J., reversed. Although the reasoning of the Court, spanning less than 12 pages, eludes clear summary, four somewhat overlapping justifications were put forward by the court for its decision.

The first reason put forward by the Court in Bhadauria is that the Human Rights Code is a comprehensive code, fully occupying the field of those grounds it protects, such as racial equality. Therefore, the common law, to the extent it could have been

17. (1979), 27 O.R. (2d) 142 (C.A.). The facts of Bhadauria were as follows. Mrs. Bhadauria, a highly qualified mathematician of East Indian origin with seven years of teaching experience, was not offered an interview by Seneca College, allegedly because of her ethnicity (or colour). Although letters were sent to her by the College in response to her repeated applications—some ten in number, in the period between 1974 and 1978—no reason was provided why an interview was never scheduled. Mrs. Bhadauria claimed before a court of general jurisdiction “a breach of a duty not to discriminate against her and also [a] breach of s. 4 of the Ontario Human Rights Code, as amended. She claimed damages for being deprived of teaching opportunities at the College in which she was still interested and for being deprived of an opportunity to earn a teaching salary. Moreover, she suffered mental distress, frustration, loss of self esteem and dignity, and lost time as a direct result of repeatedly applying for advertised positions for which she was denied the opportunity to compete.” Ibid. at 143.
18. Ibid. at 150.
developed to address issues governed by the Code, can no longer apply.\textsuperscript{19}

Second, the Court stressed that the \textit{Human Rights Code} put in place an administrative scheme of enforcement. The Code did not provide for a civil cause of action, whether by way of venue election or otherwise. It was reasoned that opening the gates of the common law courts to torts modelled on the Code would frustrate the legislative design of enforcement, especially since such a cause of action, as developed by the Court of Appeal, did not include a duty to exhaust the administrative venue. In other words, the second reason provided by the Court focuses on the institutional design implemented by the Code. In that context, the Court noted (at page 187) that under the administrative scheme established by the Code “it is difficult to envisage any wider appeal” of the tribunal’s decisions to the common law courts, suggesting that courts of general jurisdiction would still be available should concerns of abuse of administrative discretion arise.

The third point the decision makes is that a tort of discrimination would be “a species of an economic tort new in its instance and founded, even if indirectly, on a statute enacted in an area outside a fully recognized common law duty … [A] refusal to enter into contract relations or perhaps, more accurately a refusal to even consider the prospect of such relations has not been recognized at common law as giving rise to any liability in tort?”\textsuperscript{20} In other words, the Supreme Court found that it is the Code which created the rights in question. Thus, the Court of Appeal’s reading of common law rights as being informed by the Code was rejected. The Supreme Court could be read to say that the two are separate regimes. As a result, \textit{Bhadauria} can be interpreted as holding that while the Code precludes the development of novel causes of action to enforce the duties it created, existing common law causes of action which are integral to common law rights and duties are still available.

The fourth argument put forward by the Court in \textit{Bhadauria} is that “it is one thing to apply the law of negligence in the recognition of so-called statutory torts. It is quite a different thing to create by judicial fiat an obligation—one in no sense analogous to a duty of care in the law of negligence—to confer an economic benefit upon certain persons, \textit{with whom the alleged obligor has no connection} …[emphasis added]”. This reason, found at page 189 in a succinct manner, focuses not so much on the origin of the right—common law or statutory—but rather on the analytical underpinning of the obligation. While all torts require proximity, or “connection” as the Court put it, between the rights holder and the alleged obligor, a general tort of discrimination is different in kind, given the absence of such a requirement. In other words, the Court seems to have been bothered by the lack of a specific relationship between the defendant and plaintiff in a general tort of discrimination, a relationship without which a common law duty, corrective in nature,\textsuperscript{21} is difficult to establish. Hence, the Court saw the creation of a general duty not to discriminate.

\textsuperscript{19} Chief Justice Laskin stated: “The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime…” \textit{Bhadauria, supra} note 5 at 194-95.
\textsuperscript{20} \textit{Bhadauria, supra} note 5 at 189, 190.
placed on anybody towards anyone with respect to any decision or action, as the equivalent of transferring an economic benefit from one person to another, namely as a distributive act.

Between the lines there could be a fifth consideration guiding Laskin C.J. The establishment of a general tort of discrimination in one swift judicial move by the Ontario Court of Appeal seems to have been too great a leap for the incremental pace at which the common law progresses. The Supreme Court in *Bhadauria* appeared reluctant to develop the law by assembling so many novel arguments together before the firmness of each withstood the test of rigorous adjudication. Given the absence of clear doctrinal guidelines in the Court of Appeal’s decision, the opinion of the Supreme Court indicates a desire to avoid a slippery slope into micro-managing commercial decisions in the market as well as interfering with the private sphere where individuals decide whom to invite for dinner.

Each of these reasons could have stood on its own, and it seems that some degree of tension exists between them. For example, the first reason assumes that the Code extinguished all pre-existing common law writs now covered by the Code, whereas the third reason allows those pre-existing causes of action to stand. The reasons operate in different theoretical spheres as well. Whereas reason number two focuses on the proper role of the court within a certain institutional design—the need not to undermine the mechanism of enforcement created by the legislature—the fourth reason is a substantive reason, stemming from the principles of the common law of torts.

Admittedly, these reasons deserve a more serious analysis than will be presented below. Perhaps, as scholars have argued, *Bhadauria* should be overruled under a strong reading of *Ashby* v. *White*. Hence a common law cause of action, at least in some cases, ought to be provided.

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22. For an analysis of the different approaches to *Bhadauria* see N. Gupta, “Reconsidering *Bhadauria*: A Re-examination of the Roles of the Ontario Human Rights Commission and the Courts in the Fight Against Discrimination” (L.L.M. Thesis, University of Toronto Law School, 1993). Some commentators have called upon the court to overrule *Bhadauria*, and reinstate the Court of Appeal’s position. See I.B. McKenna “A Common Law Action for Discrimination in Job Applications” (1982) 60 Can. Bar Rev. 122; H. Kopyto, “The *Bhadauria* Case: The Denial of the Right to Sue for Discrimination” (1981) 7 Queen’s L.J. 144; I.A. Hunter, “The Stillborn Tort of Discrimination: *Bhadauria* v. Board of Governors of Seneca College of Applied Arts and Technology, 37 N.R. 455, 124 D.L.R. (3d) 193 (S.C.C. 1981)” (1982) 14 Ottawa L. Rev. 219 at 226, wondering, in Lord Denning’s words, whether the Court’s stifling of the common law was the product of timorous souls, fearful of allowing a new cause of action, or bold spirits, who were ready to allow it if justice so required. An alternative approach could modify *Bhadauria* so as to include a ‘practicability’ component: as long as an administrative remedy is reasonably accessible, one would have to exhaust the administrative procedure before turning to courts of general jurisdiction and the common law. Given the overwhelming burden under which most human rights commissions currently operate, receiving relief has arguably become impracticable.


24. In “Civil Actions for Discrimination” (1977) 55 Can. Bar Rev. 106, Hunter argues that litigation should not be the first option, in light of the conciliatory and educational purposes of human rights legislation. However, Hunter recognizes that on some occasions recourse to the courts is necessary in order to ensure that “any lingering private grievances … be resolved by private proceedings” (ibid. at 118) in the event that the plaintiff rejects what the tribunal sees as a reasonable settlement, or when the plaintiff disagrees with a decision that the complaint does not warrant convening a tribunal. It could be added that there could be cases where the public interest warrants attention and debate unavailable in the administrative channels. Therefore, from a public perspective, there could be cases that should be adjudicated in the general jurisdiction, given its greater exposure and accessibility.
arguably holds little force where the statutory regime covers some, but not all, grounds of discrimination (as was the case in Vriend). First and foremost, where the legislature has chosen to remain silent with respect to a potentially protected ground (sexual orientation), its enforcement scheme would not be tampered with if the common law gates were opened to plaintiffs alleging discrimination on grounds not covered by the code. The Vriend scenario is an instance where the legislature has chosen not to provide access to the Human Rights Commission in matters regarding discrimination on the basis of sexual orientation.\footnote{The matter was debated before the Alberta legislature, which chose not to adopt an amending bill which would have extended the design to cover sexual orientation. See discussion in Reichman, supra note 14 at ch. 3. It should be noted that even absent a clear indication of a legislative choice on point, the statutory design itself, and the lack of civil remedies, could stand for the exclusive proposition adopted by the Court in Bhadauria, thereby suggesting that the legislative enforcement design might not be implicated if the matter was dealt with by the common law courts.}

As a result, unlike the alternative faced by Mrs. Bhadauria, an administrative course of action was unavailable to Mr. Vriend. Therefore, it is clear that the legislative enforcement scheme envisioned by the Human Rights Code would not be frustrated, or, for that matter, implicated at all, given that providing access to the common law courts would not conflict with any statutory option—conciliatory, educational or adjudicative.\footnote{Cf. Hunter, supra note 24, discussing the educative and conciliatory function of human rights legislation.}

Second, had Mr. Vriend, or a person in his shoes, turned to the common law, his claim would not have sought to establish a general tort of discrimination, as contemplated by the Ontario Court of Appeal. Rather, he would have proposed a specific prohibition, limited to social occurrences when proximity\footnote{The terminology of proximity is not foreign to tort law, and in particular to the law of negligence, where it serves a double purpose: first, to establish privity (neighbourhood), or the circle of those to whom the defendant owes a duty of care; second, to establish cause in fact, and more specifically, the ‘distance’ or ‘length’ of the chain of events that form the causal connection between the actions/inactions of the defendant and the damage caused to the plaintiff. Both uses of proximity are part of an attempt to link the plaintiff, the defendant and the harm, or more accurately, to determine the responsibility of the particular defendant, who behaved in a particular manner, to the plaintiff, who suffered a certain kind of harm. For the centrality of the concept of responsibility, see A. Ripstein, Equality, Responsibility and the Law (Cambridge and New York: Cambridge University Press, 1999). The term ‘proximity’ will be used in this paper primarily in its first meaning, namely of establishing privity, neighbourhood or some other type of relationship between the person who discriminated and the person who suffered such discrimination.} can be established.\footnote{The claim that an employer and an employee are in a ‘proximate’ relationship is strengthened by the presence of an employment contract, but is not necessarily limited to the contractual phase. Arguably, an employer and employee share a connection, and owe each other reciprocal duties, by virtue of their relative status. See Reichman, supra note 14 at ch. 1.} Thus, the fifth argument presented above, i.e., the Supreme Court’s arguable aversion from broad-brushed, sweeping reforms that provide little guidance for concrete future cases, could have been mitigated.

The Supreme Court’s first proposition, that the Code displaced the common law altogether, seems equally inconclusive when matters not addressed by the Code are at issue. Since the Human Rights Code did not include the ground of sexual orientation, it is not clear that common law development in this area has been foreclosed.\footnote{But cf. D. Mullan, supra note 8 at 8, arguing that a legislative decision not to include a protected}
the Supreme Court was decided (and, of course, before the Charter was adopted), the common law regime rests on the principle of legislative supremacy, not legislative exclusivity.\textsuperscript{30} This suggests that a clear, if not explicit,\textsuperscript{31} legislative indication be present before the common law is displaced or frozen.\textsuperscript{32} Common law courts, it should be recalled, have, as a general matter, adopted the position that a statute should not be interpreted as derogating from the common law, unless such derogation is demanded by the statutory purpose.\textsuperscript{33} It would follow that legislative silence should require support from sources other than the silence itself before it can be taken as barring the development of the common law.\textsuperscript{34} If this is the case, it is


\textsuperscript{31} The normative source of Gibson’s analysis is not clear. On the one hand, he seems to support the common law ‘action on the case’ doctrine, which suggests that the common law, through considerations of consistency and coherence, may approach like cases in a like manner. On the other hand, Gibson expects the court to rely on public policy considerations as determined by the legislature, suggesting that in the absence of an indication of such a clear policy, as is the case of discrimination on the basis of physical appearance, “the courts would be very reluctant to impose liability, there being little evidence of public policy contrary to the conduct in question, and little or no opportunity for the defendant to learn in advance that the conduct is legally questionable” (ibid at 149). In contrast, this paper suggests that public policy is a common law doctrine, which is designed to ensure that common law rights are consistent with the premise of a civil society, of which they are a part. Put differently, ‘public policy’ is there to ensure that the common law retains the concept of a ‘public’, which allows rights to be meaningful. (See Reichman, supra note 14 at ch. 1). Therefore, even if there is evidence that the legislature has specifically decided not to include a certain ground, the common law must remain true to its principles and examine the issue. Should the legislature reject the common law conclusion, it is free to intervene, thereby shifting the future dialogue between the judiciary and the legislature to the constitutional domain of judicial review and the exercise of a possible override.


\textsuperscript{33} In Metropolitan Asylum District Managers, supra note 6, Lord Blackburn stated at 543: “It is clear that the burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals to show that by express words or by necessary implication such an intent appears.” Old common law maxim is equally clear: Quæ communi legi derogant stricté interpretantur (Things derogating from the common law are to be strictly interpreted. Jenk. Cent. 221); and Statutum Affirmativum non derogat communi legi (An affirmative statute does not take from the common law. Jenk. Cent. 24).

\textsuperscript{34} “[I]f it were intended that the Code exhaust the field of human rights in Ontario, it would have been clearly stated”: L.N. Klar, “Developments in Tort Law: The 1980-81 Term” (1982) 3 Supreme Court L. R. 385 at 397. Later, Klar specifically raises the issue of sexual preference, leaving the question open. It should be noted that the legislative silence here is not used to deduce civil liability from the Code by way of analogy, as was contemplated and rejected by G. Williams, “The Effect of Penal Legislation in the Law of Tort” (1960) 23 Mod. L. Rev. 233. The silence is merely taken as not precluding an independent development of the common law, with respect to a type of discrimination not included in the statutory scheme.
unclear why only a pre-existing common law cause of action may address discrimination which is not covered by the Code. Hence, the force of reason number three is put into question. In any event, it should be remembered that on the facts of Vriend, there actually was an established cause of action under the common law, namely, wrongful dismissal.35

As for reading Bhadauria as substantively rejecting a common law tort of discrimination due to lack of proximity between the obligor and the recipient, in some instances such proximity is in fact present, as will be shown below. While the Court in Bhadauria may have been correct to reject a general duty of care between citizens qua citizens to refrain from discriminating against one another because of insufficient proximity, finding such proximity in the structure of some relationships, such as between the provider of a service and a prospective customer, a landlord and an applicant for tenancy, or an employer and an applicant for an advertised position is not so far-reaching. It does, however, require further analytical work, not provided in full by the Ontario Court of Appeal. The remainder of this paper will be dedicated to the conceptual structure upon which a duty to provide equal service in some circumstances may be founded.36

In short, it is argued that where a human rights code is silent with respect to a ground of alleged discrimination, and when a specific relationship which could be identified as proximate is at issue, a consistent reading of Bhadauria37 would lead to the conclusion that neither access to the common law nor the civil law38

35. See discussion supra note 14.
36. By way of a preview, it will be argued that an incremental approach, identifying certain types of relationships where discrimination is irreconcilable with the underlying premise of such relationships, should receive a more favourable response from a common law court than the sweeping move advanced by the Court of Appeal for Ontario in Bhadauria. More specifically, it is submitted that such proximity, from which a duty not to discriminate may arise, is clearly present in the scenario of Vriend, where a corrective, rather than a distributive, argument could be made in support of establishing a duty not to dismiss a person because of irrelevant group-based characteristics. At minimum, such a question should be squarely presented to a contemporary court acting under the general jurisdiction conferred on it by the common law.
37. Support for the position advanced here could be found in Canada Trust Co. v. Ontario Human Rights Commission (1991), 74 O.R. (2d) 481 (C.A.), where both the trial division and the Court of Appeal found that courts of general jurisdiction may hear an application for advice and direction regarding the validity of a restrictive charitable trust, despite the initiation of an investigation of the same issues under the Human Rights Code. Such a holding may be viewed as reaffirming the genuine need for the common law to develop organically, especially when the legislature has remained silent, as was the case with respect to the law of charitable trusts. Similarly, it could be argued that as Canadian legislatures have not displaced the common law of contracts, property and torts, the common law may, indeed must, examine to what extent consideration of the other party’s sexual orientation may play a role in a decision [not] to contract or to dispose of one’s property in a certain way.
38. As pointed by Vizkeley, supra note 7, we should be mindful of the experience of Quebec, which has been quite different from that of other Canadian jurisdictions. The protection scheme adopted by Quebec specifically allows for recourse to the courts, and the Superior Court in Yvon Blanchette v. La Compagnie d’Assurance du Canada sur la Vie, [1984] C.S. 1240 (Qué.), interpreted the Code de Procédure Civil and the Code Civil du Bas Canada as permitting access to courts without first obtaining a decision from the Human Rights Commission finding discrimination. It should be noted that Mr. Blanchette did not go directly to court, as Mrs. Bhadauria did. He filed a complaint with the Human Rights Commission, alleging discrimination because
is a priori foreclosed. In such circumstances, courts of general jurisdiction are authorized to determine whether an exercise of one’s legal powers in such a discriminatory manner is consistent with legal doctrines and principles governing the use of such legal power.

Thus, Bhadauria should not be read as a hurdle. Rather, the analysis should focus on the specific relations within which discrimination takes place. Such analysis should determine whether the relationship is proximate enough to give rise to a cluster of correlative duties and obligations, among which is the duty to provide equal service. Such an approach, as will be shown below, attempts to present a corrective, rather than a distributive, understanding of a duty not to discriminate, either as arising directly between two individuals, or as arising once the relationship is situated within a community of moral agents. In order to present a focused analysis, this paper will concentrate on the relationship between the provider of goods and services customarily available to the general public and those indicating desire to purchase the goods and services. It should, however, be noted that similar analysis is available with respect to the relationship between a landlord and an applicant for advertised lodging, or an employer and an applicant for an advertised position.39

With this in mind we may turn to outline the contours of the principle of freedom of contract in an attempt to glean from the possible rationales behind the jurisprudence an understanding of a non-discrimination norm.

C. The Provision of Goods and Services Customarily Available to the General Public—The Contractual Analysis

1. Premise and Exceptions

Having established that the interaction between the statutory regime and the common law should not necessarily bar access to the common law, we may return to the original question: As an owner of a restaurant, a theatre, a retail store or, generally, as a provider of goods and services customarily available to the public,40 can I, under the common law, refuse to serve or accommodate gays or lesbians? Blacks? Jews? Women? Or, for that matter, red-heads, left-handed people or people

39. See Reichman, supra note 14 at ch. 1.
40. This phrase is found in the IRPA, supra note 4, and designed to capture those goods and services the provision of which is not dependent upon a certain unique associational membership. Cf. Gould v. Yukon Order of Pioneers, [1996] 1 S.C.R. 571 interpreting a similar phrase in s. 8(a) of the Yukon Human Rights Act, R.S.Y. 1986 (Supp.), c. 11.
with tiny ears? Can I factor into the use of my legal powers group-based characteristics as such?  

As stated in the first paragraph of this paper, the positive legal answer of yesteryear to this question in Canada—human rights codes notwithstanding—is yes.  

At first blush, the common law appears to be an ocean of freedom of contract. “Every Subject has the freedom to put his cloth to be dressed by whom he will” wrote Lord Coke, by way of an example, stating the Magna Carta principle of freedom of commerce. “Any merchant is free to deal as he may choose with any individual member of the public,” wrote the Supreme Court of Canada in a civil law case, which is taken to represent common law principles as well. Theoretically, the common law appears to incorporate rights flowing from the autonomy of the subject, the individual, who is under no legal obligation to consider the desires of others.

However, a more careful examination reveals the nuanced legal reality. Amidst the ocean, some distinct islands appear; pockets of law in which the traditional concepts of freedom of contract are modified. Put more precisely, the law contains a layer of decisions which reflect even more traditional concepts of profession and community, concepts which are distinct from the relatively newer ideas of freedom of contract. Such concepts of profession and its relation to the community could be seen as placing limits on the freedom of contract, in the sense that duties to perform certain activities, such as providing services in a certain manner (a non-exclusive, non-prohibitive price), are not based solely on contractual interaction between two individuals, but also on the law of the realm. In other words, the common law includes a body of law—the law of the realm—which places certain duties on members of certain professions towards customers and prospective customers. In that respect, the ‘law of the realm’ recognizes that members of

41. The reader will no doubt notice that unlike the constitutional or the human rights contexts, groups mentioned here need not necessarily suffer from historical disadvantage or prejudice; nor is a showing of widespread, or systemic, discrimination required, as this analysis takes place on a purely conceptual level. This distinction is relevant, since it alerts us to the presence of two possible models. One is distributive, seeking to provide certain social goods to groups which heretofore were deprived of these goods. The other is corrective, seeking to correct breaches of duties which occur when a party behaves in contradiction with his or her undertaking towards another party or towards the community.

42. Christie, supra note 2; Franklin, supra note 1; Loew’s Montreal Theatres Ltd. v. Reynolds (1921), 30 Que. K.B 459 [hereinafter Loew’s].

43. It should be noted that the analysis of one’s legal powers to discriminate is not confined to the contractual sphere. Rather, it is intertwined with property law, tort law and the doctrine of public policy as well. Due to breadth concerns, this paper will focus on the principle of freedom of contract and its exceptions. For property law analysis and for a discussion of the doctrine of public policy as it pertains to the question of discrimination, see Reichman, supra note 10.

44. Coke, 2. Inst. (London 1671) 47.

45. Christie, supra note 2 at 142, per Rinfret C.J.

46. See Sparrow, supra note 8 and Loew’s, supra note 42, discussed infra notes 207, 217 and accompanying text. See also W. Tarnopolsky & W.F. Pentney, supra note 3.

47. According to legal jargon, the action for a failure to carry out these professional duties is an action ‘on the case’ (i.e., an action for offending the custom of the realm, the community itself) as distinguished from an action for a breach of contract, which is an ‘assumpsit’ (an action stemming from the breach of a specific, voluntary undertaking, or a promise one has made). See generally P.S. Atiyah, The Rise and Fall of Freedom of Contract (Oxford: Clarendon Press; New York: Oxford University Press, 1979).
professions of a certain kind can be seen as proximate to customers, and, more importantly, to prospective customers, so as to give rise to certain obligations, as will be articulated below.

These islands in the sea of freedom of contract, which in fact are remnants of a lost continent, have been classified by scholars into three groups: the law of common callings, businesses affected with a public interest and the prime necessity doctrine. 48

The archipelagos termed ‘common callings’, which, during the evolution of the common law, 49 included a robust body of professions, 50 if not the very concept of a business, dwindled in modern times into rules governing three professions 51: Innkeepers, 52 Ferrymen 53 and Common Carriers. 54 Those practising these vocations are subject to a unique cluster of duties stemming from the profession itself, rather than the specific contract entered into. 55 Among these duties are the duty to provide service, 56

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49. See Haar & Fessler, supra note 9, describing the origin of common callings in the 12th century; see also C.K. Burdick, “The Origin of the Peculiar Duties of Public Service Companies” (1911) 11 Colum. L. Rev. 514; M.G. Arterburn, “The Origin and First Test of Public Calling” (1926-7) 74 U. Pa. L. Rev. 411.

50. For an impressive list, see E.A. Adler, “Business Jurisprudence” (1914) 28 Harv. L. Rev. 135 at 146.


52. See generally Halsbury’s Laws of England, vol. 24, 4th ed. (London: Butterworths, 1980) “Innkeepers”. An innkeeper is a proprietor of an establishment held out as offering food, drink, and if so required, sleeping accommodation, without special contract, to any traveller presenting himself who appears to be able and willing to pay a reasonable sum for the services and facilities provided and who is in a fit condition to be received.

53. See generally Halsbury’s Laws of England, vol. 21, 4th ed. (London: Butterworths, 1980) “Ferries” (in Highways, Streets and Bridges) at paras. 877, 886. A ferryman is the holder of a franchise to operate a ferry. Such a franchise is granted by the Crown or parliament, or acquired by prescription (continuing use) which assumes a lost grant. A ferry line is considered as a “highway of a special description”: Huzey v. Field (1835), 2 C.M.&R. 432, 150 E.R. 186. A highway in turn, is defined as a “way over which there exists a public right of passage, that is to say a right of all Her Majesty’s subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance”: ibid. at para. 1. The right to charge tolls is usually part of the franchise: ibid. at para. 877.


56. A common carrier, absent lawful grounds for refusal, is bound to accept goods which are offered to him for carriage according to his profession: Johnson v. The Midland Railway Co. (1849), 4 Ex. 367 [hereinafter Johnson]. Similarly, a common carrier of passengers, is bound to carry according to his profession: Clarke v. West Ham Corp., [1909] 2 K.B. 858 at 877, 882 (C.A.). A ferry owner must give attendance at all reasonable hours: Gravesham Borough Council v. British Railways Board, [1978] Ch. 379, [1978] 3 All E.R. 853 [hereinafter Gravesham]. While such hours might not mean all hours of day and night, nonetheless the ferryman cannot simply decide he does not wish to conduct business, as the grant of a ferry is for the benefit of the public, so that the public may be certain of finding the means of transit across the river: Dibden v. Skirrow;
Consequently, the reasons the provider may legitimately put forward for refusing service are limited. For example, the race, nationality and ancestry of the patron

[1907] 1 Ch. 437 at 444. Moreover, the owner cannot relieve himself of his duties by building a bridge: Paine v. Partrich (1691), Carth 191, 90 E.R. 715 [hereinafter Paine]. An innkeeper, naturally, doesn’t get the night off; the provider must provide even if he or she is not interested in doing business at all (regardless of the customer). For example, an innkeeper must open the door to a guest even though he has arrived in the middle of the night, the keeper was sleeping, and was not interested in doing business until the morning (the only question being whether the innkeeper in fact heard the knock on the door and could have concluded that a guest has arrived): Hawthorne v. Hammond (1844), 1 Car.& Kir. 404, 174 E.R. 866 [hereinafter Hawthorne]. See also R. v. Ivens (1835), 7 C.& P. 213, 173 E.R. 94 [hereinafter Ivens].

57. “An Innkeeper cannot be a bankrupt, for he is not like a trader; he must receive all comers and feed them and lodge them taking reasonable rate”: Eyre J. in Newton v. Trigg (1691), 1 Salk. 109, 91 E.R. 100 [hereinafter Newton]; R v. Collins (1623), Palm. 373, 81 E.R. 1130; Crisp v. Pratt (1639), Cro.Car. 549, 79 E.R.1072 [hereinafter Crisp]. Similarly, if a common carrier demands an unreasonable charge or seeks to impose unreasonable conditions, this amounts to a wrongful refusal to carry: Garton v. The Bristol and Exeter Railway Co. (1861), 1 B.&S. 112, 121 E.R. 656 [hereinafter Garton]; Allday v. The Great Western Railway Co. (1864), 5 B.&S. 903, 122 E.R. 1066 for which the common carrier is liable should the goods suffer any damage in consequence: Jackson v. Rogers (1683), 2 Show. K.B. 327 89 E.R. 968 [hereinafter Jackson]; Crouch v. The London and North-Western Railway Co. (1854), 14 C.B. 255, 139 E.R. 105. Likewise, a ferry toll must be reasonable: A-G v. Simpson, [1901] 2 Ch. 671 (C.A.), on appeal [1904] A.C. 476 (H.L.); Stamford Corp. v. Pawlett (1830), 1 Cr.& J. 57, 148 E.R. 1334; aff’d (1831), 1 Cr. & J. 400, 148 E.R. 1478 (Exch.), and, where such is the custom, the ferryman may even be obliged to carry the inhabitants of a town for free: Paine, supra note 56.

58. “The true view of the common law rule was that if an inn was not full the landlord was bound to admit travellers.... He could not pick and choose”: Lord Alverstone C.J. in Browne v. Brandt, [1902] 1 K.B. 696 [hereinafter Browne]. A ferryman must carry all peaceable wayfarers who are willing to pay his toll: Hammerton v. Earl of Dysart, [1916] 1 A.C. 57 at 103 (H.L.). A common carrier is bound to carry any person not in an unfit condition, for whom he has accommodation upon tender of his proper fare, without the imposition of any unreasonable condition: Garton v. Bristol and Exeter Rly Co. (1861), 1 B&S 112 at 162.

59. For example, in Constantine v. Imperial Hotels Ltd., [1944] 1 K.B. 693 [hereinafter Constantine], a famous black West Indian Cricketer was transferred from one hotel to another, apparently because of his colour. The Court found that transfer amounted to a refusal of service, for which the hotel was liable in tort (even though specific damage was not proved).


61. Only ‘reasonable grounds’ are recognized as valid grounds for refusal to serve. For example, in the context of innkeepers, if the inn is full: Lane v. Cotton (1702), 2 Mod.Rep. 472 at 484, 88 E.R. 1450 at 1464 [hereinafter Lane] or perhaps if insufficient food is available: Pidgeon v. Legge (1857), 21 J.P. 743 [hereinafter Pidgeon]; if the guest refuses payment in advance: Anon (1460), Y.B 39, Hen 6 fo. 18, Pl. 24; Mulliner v. Florence (1878), 3 Q.B.D. 484 at 488 (C.A.); if the guest arrives drunk: Lamond v. Richard & The Gordon Hotels Ltd., [1897] 1 Q.B. 541 (C.A.); filthy: Pidgeon, supra; or indulges in “indecent or improper behaviour”: Ivens, supra note 56; Hawthorne, supra note 56 at 407, 868, refusal is ‘reasonable’. It should be noted, nevertheless, that when the provision of refreshment (part of the duty to lodge) was at stake, and in a time of social disturbance (World War I) the Court accepted reasons of ‘bad character’ (such as mongrelizing activities amongst the military and newspaper reports of conviction in fraud: Rothfield v. North British Railway Co. (1920), 57 S.L.R. 661, [1920] S.C. 805 (Scot.)). However, if the guest arrives late, or upon Sunday, or refuses to disclose his name [Ivens, supra] or is ill and has to wear his overcoat, or wishes to sit up all night: Fell v. Knight (1841), 8 M.& W. 269 at 273, 151 E.R. 1039 at 1041, a refusal to serve was deemed unreasonable. See Molot, supra note 9 at 620.

In the context of common carriers, Halsbury’s Laws of England, supra note 54 at para. 441 informs us that “it is a lawful excuse for refusing to carry that the common carrier does not hold himself out to carry the particular kind of goods offered, or that his operations do not extend to the proposed destination: Macklin v. Waterhouse (1828), 5 Bing. 212, 130 E.R. 1042; Johnson,
were specifically rejected as justifications for refusal to serve. 

Furthermore, the provider is liable at law for goods lost, stolen or damaged while under the hospices of the provider absent negligence.

The second island identified by scholars was labeled the ‘prime necessity’ doctrine, after a passage from Minister of Justice for the Dominion of Canada v. The City of Levis. Under that doctrine, ‘public utilities’, such as water and

supra note 56 Johnson v. Midland Railway Co. [1849] ExCh. 367. He may refuse to accept foods for carriage unless and until he is paid the full and proper price for carriage: Wyld v. Pickford (1841), 8 M.& W. 443, 151 E.R. 1113. He may also refuse on the ground that he has no room in his vehicle, or no convenience for carrying goods in safety: Jackson, supra note 57; Batson v. Donovan (1820), 4 B.& Ald. 21 at 32, 106 E.R. 846 at 850; Riley v. Horne (1828), 5 Bing. 217 at 220-21, 130 E.R. 1044 at 1045; Spillers and Bakers Ltd. v. Great Western Railway Co., [1911] 1 K.B. 386 at 392. He may also refuse to accept the goods if they are brought to him a long time before he is ready to start on his journey, for the goods must be tendered at a reasonable time [and the carrier might find himself responsible during storage]: Lane v. Cotton (1701), 1 Ld. Raym. 646 at 652, 91 E.R. 1332 at 1335. If the country through which the carrier’s vehicle has to pass is in so disturbed a state that the goods cannot be carried safely, he may lawfully refuse to accept them: Edwards v. Sherratt (1801), 1 East 604, 102 E.R. 233. He may also refuse to accept goods tendered to him for carriage without such protection of packing as is necessary to enable him to carry them with a reasonable prospect of protection from loss or damage in transit: Munster v. South Eastern Railway Co. (1858), 4 C.B.(N.S.) 676 at 701, 140 E.R. 1257 at 1267; Sutcliffe v. Great Western Railway Co., [1910] 1 K.B. 478 at 495 (C.A.). It should be recalled that the general rule is that absent lawful grounds, the common carrier is bound, as exercising a public employment, to accept goods which are offered to him for carriage according to his profession. Ibid. at para. 441.

62. Rothfield, supra note 61, dealt with the rejection of a Jew, allegedly of German origin, whose occupation was a moneylender. This case was relied upon by the Court of Appeal in Bhaduria, supra note 5, as an example of an exception that proves the rule, but distinguished by Laskin C.J.C. of the Supreme Court as insufficient to establish a general tort of discrimination, since it arises in the context of a specific common law duty attached to innkeepers. The Supreme Court did not attempt to explain the rationale behind that unique duty, nor did it try to provide a principle which should limit the scope of this duty.

63. “Subject to certain statutory limitations, a common carrier is absolutely responsible for the safety of goods entrusted to him for carriage save where loss or damage result from: (1) an act of God, (2) an act of the Queen’s enemies, (3) the fault of the consignor, or (4) inherent vice in the goods themselves”: Halsbury’s Laws of England, supra note 54 at para. 446 “Common Carriers”, vol. 5(1), para. 446, citations omitted. “He is liable even when overwhelmed and robbed of the goods by irresistible force”: ibid., citing Coggis v. Bernard (1703), 2 Ld.Raym. 909, 92 E.R. 107 [hereinafter Coggis]; Forward v. Pitard (1785), 1 Term Rep. 27 at 34, 99 E.R. 953 at 957 [hereinafter Forward]. “A common carrier is liable for loss or injury caused wholly by the fault of persons over whom he has no control”; ibid. at para. 447, and see citations there. It should be noted, again, that such liability is part of the law, not the contract: see e.g. Forward, supra at 33; Bretherton v. Wood (1821), 3 Brod.& Bing. 54 at 62-62, 129 E.R. 1203 at 1206-07. Similarly, “the liability of a ferry owner in respect of goods carried by him is similar to that of a common carrier”: Halsbury’s Laws of England, supra note 53 at para. 889, citing Southcote’s Case (1601), 4 Co.Rep. 83b, 76 E.R. 1061. Likewise subject to very limited exceptions (such as live animals) the innkeeper “is chargeable to guests for restoring property which is lost or stolen within the hospitium of the inn and he is under the like liability to make good to his guest any damage to the guest’s property brought to the inn as he would be if the goods were lost. The liability of an innkeeper is strict, that is to say, without proof of negligence on his part, but subject to certain conditions, the liability can be limited in amount”: Halsbury’s Laws of England, vol. 21, 3rd ed. (London: Butterworths, 1960) “Innkeepers” at 451-52, para. 950. And see Shacklock v. Etherpe, Ltd., [1939] 3 All E.R. 372 (H.L.). As an example, see Orchard v. Bush & Co., [1898] 2 Q.B.D.C.B. 284 [hereinafter Orchard], where a guest left his coat in a coat closet in a restaurant which was part of an inn, the coat was lost and the inn held liable.

64. [1919] A.C. 505 (P.C.) [hereinafter City of Levis]. At the core of the dispute was whether the city of Levis could disconnect a federal building from the water supply, given that the federal government did not pay municipal taxes. The Court stated at 513 that:
electricity, were deemed prime necessities; hence the provider, a private corporation, was held under a duty to supply to all, without discrimination, provided a reasonable price was paid. As M. Taggart has shown, this case was used (and is still used) in New Zealand jurisprudence to establish public utilities law.

In the case of the Crown, no implication of an obligation upon the respondents to give a water supply can be based on liability to water taxation, since the Crown is admittedly not liable to such taxation. The respondents, moreover, have not the monopoly of water supply, so that the implication of an obligation cannot be supported on the ground that the Government of Canada has been deprived of the right to supply water to the government building. It must be recognized, however, that water is a matter of prime necessity, and that, where waterworks have been established to give a supply of water within a given area for domestic and sanitary purposes, it would be highly inconvenient to exclude from the advantages of such supply government buildings, on the ground that these buildings are not liable to water taxation. The respondents are dealers in water on whom there has been conferred, by statute, a position of great and special advantage, and they may well be held in consequence to come under an obligation towards parties, who are none the less members of the public and counted among their contemplated customers, though they do not fall within that class, who are liable to taxation, and who being in the immense majority are expressly legislated for and made subject to taxation. Their Lordships are, therefore, of opinion that there is an implied obligation on the respondents to give a water supply to the government building provided that, and so long as, the Government of Canada is willing, in consideration of such supply, to make a fair and reasonable payment.

[Emphasis added].  


66. The causal link between a service or a good being a prime necessity and the ‘prime necessity duty’, is not obvious. As the New Zealand jurisprudence demonstrates, see infra note 69, City of Levis, supra note 64, has been viewed as holding that a ‘practical monopoly’ is necessary, in addition to the nature of the service as a necessity, to trigger such a duty (although City of Levis itself refrains from using monopolistic terminology). In Canada, Levis was read to establish, absent a statutory obligation, a duty stemming from the essence of the service being essential and from the “relative positions of the parties”. (Levis at 513. This element is stressed in Tsawwassen Indian Band v. Delta (Corp.) (1997), 149 D.L.R. (4th) 672 at 685 (B.C.C.A.) [hereinafter Tsawwassen]). Analyzing the relative positions, or ‘relationship’, the court found the corporate municipality, like the city of Levis, under a duty: “The advantages which Lord Parmoor attributed to the City were simply the system of waterworks it owned and the authority to levy taxes for water. These factors gave the City an advantage over other entities in providing services, an advantage which gave rise to an obligation to supply services to taxpaying and non-taxpaying members of the public alike.”  

67. In Chastain, supra note 65, it was held that a security deposit requirement violated the common law obligation to provide power in a non-discriminatory manner (promoting, in many cases, legislative intervention).


70. Mayor of Auckland v. The King, [1924] G.L.R. 415 (applying the principle in reverse by demanding that the Crown pay a reasonable price for rubbish collection, which was deemed a matter of necessity); State Advances Superintendent v. Auckland City Corp. and the One Tree Hill Borough, [1932] N.Z.L.R. 1709 (C.A.) [hereinafter State Advances] (finding a duty to supply water to tenants put in by mortgagee despite outstanding debts by defaulting and dispossessed mortgagors); Marlborough v. County Council and Blenheim Borough Council v. MacFarlane (unreported, 19 Dec. 1985 (C.A.) decision appealed: [1984] 4 N.Z.L.R. 198 (refusing to strike down an application to review failure to supply water to property just outside water supply area; the County Council eventually extended supply); Wairoa Electric-Power Board v. Wairoa Borough, [1937] N.Z.L.R. 211 (S.C.) (finding electricity a prime necessity, calling for reasonable
premised on such a duty. While Australian jurisprudence seems to have rejected this principle, Canadian common law has long since incorporated a contextualized common law duty placed on public utilities corporations to provide service pricing; South Taranaki Electric-Power Board v. Patea Borough, [1955] N.Z.L.R. 954 (S.C.) (finding that the Electric Power Board enjoyed practical monopoly, and the principle of City of Levis, supra note 64 applies). But see Stubbs v. Taumarunui Borough, [1975] 1 N.Z.L.R. 125 (S.C.) (refusing to extend doctrine to (as yet not existing) drainage pipes).

71. The structure of the duty was laid out in State Advances, supra note 70 at 1715, per Myers C.J.: (i) that the supply of water is a matter of prime necessity; (ii) that where a water-supply authority has a practical monopoly there lies upon it an obligation (implied where not expressed) to supply water to all those requiring it and who are prepared to pay a fair and reasonable charge; and (iii) that apt, if not coercive, language is required to confer upon the water-supply authority the right to refuse water, or stop the supply to any particular premises by reason of non-payment of a rate or charge in respect of water previously supplied, except to the person primarily liable for, and actual in default in respect of, the arrears. In the nature of things, that person is generally the person to whom the water in respect of which the arrears are owing was actually supplied.


73. “Certainly the obligation of a public utility having a practical monopoly, to supply the services is clear and is as old as the notion of a public utility: Chastain [supra note 65]; Munn v. Illinois, 94 U.S. 113 (1876) [hereinafter Munn]; Canada (Attorney General) v. Toronto (City) (1893), 23 S.C.R. 514; St. Lawrence Rendering Company Ltd. v. Cornwall (City), [1951] O.R. 669 (Sup. Ct.).” Per Saunders J. in Adams Lake Indian Band v. District of Salmon Arm (1997), 27 B.C.L.R. (3d) 334, 137 D.L.R. (4th) 89 (S.C.) (sub nom. 238709 B.C. Ltd. v. Salmon Arm (District)) [hereinafter Adams]. The duty was confirmed on appeal—see infra note 74.

74. The common law duty was analyzed in depth on appeal, see Tsawwassen, supra note 66 [a.k.a. Adams Lake Indian Band v. District of Salmon Arm]. At issue was whether a corporation (be it a ‘private’ entity providing prime necessities, a municipality or an arm of the Crown) has a duty to provide, indefinitely and for a reasonable price, water, sewers, fire protection and gas, to non-native residents of a commercial project under an Indian band, possessing powers of self-taxation. Saunders J. found that although such a duty existed, it was not indefinite and the municipal corporations could withdraw, giving reasonable notice. She distinguished City of Levis, supra note 64, in two ways. First, at bar was the provision of services to several acres of land, not to one building in a city, and hence the ‘inconvenience’ argument did not help the band (and perhaps might even have helped the corporation). Second, the bands in question could establish such services on their own. It should be noted that the reason for refusal was not solely economic. In one case, refusal to provide service (fire protection) to the emerging project was linked to a failure to agree on the density of the project.

The Court of Appeal, analyzed the question as follows: The ability of the Bands to provide their own services or to secure an alternate supply does not determine the issue of whether the municipalities have a duty to continue to supply services in exchange for a reasonable price. … [T]he issues matters are, in fact, only two of many factors which must be considered in deciding the issue. In other words, the common law, as taken from the Levis decision, can be viewed as a continuum where the extent of the obligation owed depends upon the nature of the relationship between the parties. For example, if in a given situation an individual property owner asked a municipality to continue to provide services even though the owner was not or would not be obligated to continue to pay taxes, it is arguable that the common law would impose upon the municipality a duty to supply this single property owner with services indefinitely, subject only to reasonable compensation being paid for the services. On the other hand, if the relationship involved two independent taxing authorities of roughly equal size, both with the ability to put in place the necessary infrastructure, it is arguable that the common law would allow one of the parties to terminate the provision of services to the other with a relatively short period of reasonable notice.

[A]s indicated by the foregoing examples, there are several criteria which are helpful in assessing the relationship between given parties and determining the exact nature and
without discrimination and for a reasonable price, the principle of freedom of contract notwithstanding.

The third island of law by which freedom of commerce is limited was given the title “businesses affected with public interest,”75 after a passage from the decision of Chief Justice Hale’s *De Portibus Maris* (The Ports of the Sea),76 written in the mid-seventeenth century,77 and cited in two English cases around the turn of the 19th century.78 In the first case, the Court found that private owners of property

extent of the common law obligation which may or may not be owed. Without attempting to set out an exhaustive list, some of the more important factors include: the relative size of the parties; the resources available to each of the parties including the ability to raise revenue; the ability to implement or maintain a new and existing infrastructure; the experience each party may already have in providing the services in question; and the length of time over which the service has already been provided by one of the parties [at 685-86].

After analyzing the factors, the Court found a duty, but, given the relative positions, found that duty to be terminable upon reasonable notice, and remanded the case so further evidence as to that which may constitute ‘reasonable notice’ and/or ‘reasonable price’ could be adjudged. The Court further asserted that the duty to provide service is reciprocal, stating, in effect, that the band must respect municipal by-laws regarding density.

It is important to note that the Court rejected an argument that the statutory scheme, under which the bands may request the Lieutenant Governor to order the municipalities to provide services for a year, sealed the common law duty to provide service for a reasonable price.

75. B.P. McAllister, “Lord Hale and Business Affected With a Public Interest” (1930) 43 Harv. L. Rev. 759.

76. As quoted in M. Taggart, “Public Utilities and Public Law”, supra note 9 at 216:

A man for his own private advantage may in a port town set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own … If the king or subject have a publick wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen … Or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king’s license or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be *jurisdiction privati* only; as if a man set out a street in a new building on his own land, it is now no longer bare private interest, but is affect with a publick interest.

77. For further discussion on the history of the treaties by Hale see D.E.C. Yale, ed., *Sir Matthew Hale’s The Prerogatives of the King* (London: Selden Society, 1976).

78. *Bolt v. Stennett* (1800), 8 Term Rep. 606, 101 E.R. 1572, involved a defence for Stennet, the city of London deputy for loading and unloading, who used Bolt’s crane without his consent. The crane, privately owned but placed on a public quay, was necessary for discharging the city’s ancient privilege, namely unlading goods. Consequently, Bolt received reasonable compensation for the use of his crane, but could not sue in trespass.

*Allnutt v. Inglis* (1810), 12 East 527, 104 E.R. 206 [hereinafter *Allnutt*], involved the refusal of the London Dock Company to accept wine imported by Allnutt after he refused to pay the price demanded. The Company, a private corporation certified by the Board of Treasury under the Warehousing Acts, to store, upon landing, goods free of import duties, enjoyed a monopoly of such duty-free facilities. As a result of the refusal, the wine was landed and stored elsewhere thus attracting an import duty, for which the plaintiff sued. The court held that where private property is, by the consent of the owner, invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit. Therefore the company was bound by law to receive the goods into its warehouses for a reasonable price. The issue of whether the company could repudiate the certificate at its pleasure was left open.
‘invested with a public interest’, such as a crane in a public wharf, cannot (unreasonably) refuse to permit the use of their property for purposes which are integral to the mentioned ‘public interest’, such as unloading a ship docking at the public wharf. The second case established that owners of businesses affected with a public interest, such as a warehouse certified to serve as a duty-free landing facility, are not entitled to demand an unreasonable storage price.79 Thus, the sea of freedom of commerce was parted, creating the following island:

There is no doubt that the general principle is favoured both in law and justice, that every man may fix what price he pleases upon his own property for the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms.80

Haar and Fessler, in their “revolutionary rediscovery of the common law tradition of fairness in the struggle against inequality,”81 illustrate how this island has provided rich soil for the growth of the “common law doctrine of equal service”82 in the area of public utility law in the U.S. and beyond. Contiguous with the U.S. development of the law of common carriers—as applied to the railroad corporation,83 or the telephone84—Hale’s doctrine, incorporated in Munn v. Illinois,85 was pivotal in clothing utilities with a public interest, thus subjecting their provision to the doctrine of equal service. Warehouses, grain elevators and railroads, diverted away from jus privatii in Munn, were followed by the establishment of a duty to provide, at a reasonable

79. “For this purpose therefore the question may be taken to be, whether they [the company] may claim an unreasonable rent? But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that where private property is affected with a public interest, it ceases to be juris privati only; and in case of its dedication of such a purpose as this, the owners cannot take arbitrary and excessive duties, but the duties must be reasonable”. Allnut, supra note 78 at 212, per Le Blanc J.
80. Ibid. at 210-11, per Lord Ellenborough C.J.
81. This is the full title of Haar & Fessler’s book, supra note 9.
82. “The hallmarks of the earliest common law doctrine of equal service, though cast and recast in various formulations, were the complementary concepts of equality of access, adequacy of rendition and reasonableness in the pricing of public or communal services and facilities”. Ibid. at 56.
83. Fitchburg Railroad Company v. Addison Gage, 78 Mass. 393 (1859), putting in place a thin notion of a duty to charge only a reasonable price, but allowing discrimination (differential fees for ice and bricks). This rule has lead to great abuse, and was replaced by rediscovering the principles behind the law of the common carrier—a duty to render service, and a duty not to discriminate: McDuffee v. Portland & Rochester Railroad, 52 N.H. 430 (1873) [hereinafter McDuffee]; New England Express Co. v. Maine Central Railroad Co., 57 Me. 188 (1869); and Messenger v. Pennsylvania Railroad Co., 37 N.J.L. 531 at 536-37 (1874) [hereinafter Messenger], which held that there is an implied condition, that it is held as a quasi public trust for the benefit of all the public, and that the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. For fuller exposition, see Haar & Fessler, supra note 9 at ch. 4.
84. See, e.g., State ex rel Webster v. Nebraska Telephone Co., 17 Neb. 126 (1885).
85. Munn, supra note 73, holding that the Illinois legislature could set maximum prices for warehouses, grain elevators and railroads, as the use of one’s property for such purposes was “clothed with a public interest” and therefore did not violate the constitutional taking clause, which protected only private property.
price, gas, water, banking, and even wholesale marketing of ice and fire insurance.90

It should, however, be noted that given the U.S. constitutional structure, Munn is located in a slightly different context; the inquiry in Munn dealt with the powers of the states to regulate prices via statutory means.92 As such, the holding in Munn was abandoned in Nebbia93 which found all businesses—not only those affected with a public interest—to be subject to state regulation, including price regulation. It should further be noted that Munn should not be read as replacing the idea of freedom of contract with a general duty to provide all services, or with a general grant to the state (or its judiciary) to replace individual choice.94 Having said that, the decline of Hale’s doctrine during the twenties (the Lochner Era) and thirties

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86. Portland Natural Gas & Oil Co. v. State ex rel. Keen, 135 Ind. 54 (1893). Compare to earlier decision, Paterson Gas Light Co. v. Brady, 27 N.J.L. 245 (1858) [hereinafter Paterson] where the Court feared all businesses would become public, and the Court would force companies to provide services outside their reach.


90. German Alliance Insurance Co. v. Lewis, 233 U.S. 389 (1914).

91. Constitutionally, the debate focused on the scope of legislative taking power (eminent domain) and the subsequent legislative authority to delegate this domain to private utility companies. The U.S. Constitution limits the powers of the state to confiscate, or ‘take’ land (or other property), even if compensation is offered. The state has to show that the taking is for public purpose or use: Missouri Pacific Railway Co. v. Nebraska, 164 U.S. 403 (1896). Such powers over ‘eminent domain’ were deemed delegable to private utility companies. See H.N. Scheiber, “The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts” in D. Fleming & B. Bailyn, eds., Law in American History (Boston: Little, Brown and Company, 1971) at 327.

92. The controversy in Munn, supra note 73 (and its progeny) centred around the constitutional powers of the state to regulate private business by statute. For the interconnectedness of the liberty of contract, the concept of business affected with a public interest and the notion of what constituted a direct effect on interstate commerce (all constitutional doctrines), see B. Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (New York: Oxford University Press, 1998), esp. part III. The Court found that as regulation is legal in common law when businesses are affected with a public interest, so could these businesses be subjected to price regulation by the legislature. As the Court put it, “Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created”: Munn, ibid. at 125-26. Scholars of the time such as McAllister (supra note 75), C. Fairman, (“The So-Called Granger Cases. Lord [sic] Hale, and Justice Bradley” (1952-53) 5 Stan. L. Rev. 587) and W.H. Hamilton (“Affectation with Public Interest” (1930) 39 Yale L.J. 1089), following the dissent in Munn, challenged the broad language of the regulatory powers of the common law, the wisdom of bestowing upon judges such a task, and the constitutionality of subjecting (in effect) all businesses to legislative regulation. As an alternative, scholars suggested limiting the boundaries of state intervention to situations where either a franchise was needed in the common law, or special privileges were given to a business, such as use of public property or governmental funding (including tax exemptions). See Taggart, supra note 9 at 223 quoting T. Cooley, “Limits of State Control of Private Business” (1878) 233 Princeton Rev., new series 1, as cited in Scheiber, supra note 91 at 327.


94. See Slaughterhouse cases (Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923)) where the Supreme Court struck down state legislation declaring food processing, the manufacturing of clothing, the production of fuel, public utilities and common carriers as businesses affected with public interest, and thus subject to wage regulation. Chief Justice Taft, recognizing the difference between regulating wages and rates, nonetheless stated that the judicial power to declare a service ‘affected with public interest’ stemmed from the “indispensable nature
(the New Deal Era, in favour of regulatory commissions), should not necessarily teach us that the underlying principles which support the duty to provide equal service in the context of businesses affected with public interest were rejected.\textsuperscript{95} In fact, it has been argued that these principles are still very much alive in U.S. jurisprudence today.\textsuperscript{96}

2. Beyond the Islands—Possible Rationales for the Exceptions

Outlining these islands is important because under a common law regime, we are required to reason with previous cases in an attempt to elucidate a consistent and coherent understanding of the governing legal concepts.\textsuperscript{97} We must search for a rationale with which to explain the distinction between innkeepers on the one hand, and restaurants on the other. Should none be discovered, we must question the distinction, and search for an alternative rationale which would better fit with the principles underlying past precedent.\textsuperscript{98} This approach stands in stark contrast to the one applied by Lennox J. in Franklin v. Evans, a case allowing an owner of a restaurant to establish a ‘no-blacks’ rule in his restaurant. The main legal\textsuperscript{99}
problem Lennox J. had with the proposition that a restaurant keeper is not at liberty to refuse accommodation on the ground of colour was that no authority directly in support of this contention could be found. The absence of precedent on point satisfied Lennox J. that restaurant owners were sufficiently different from innkeepers. In order to reinforce this conclusion, the Court chose to focus on a strict reading of the monopoly rationale, stressing that restaurant owners did not receive a grant of monopoly or quasi-monopoly, and therefore were not obligated to assume any corresponding duties.\(^{100}\)

The case law, however, was less clear cut than the judge found it to be. An innkeeper’s duty was established when the interaction between a patron and an establishment that provided sleeping facilities and an eatery involved only the purchase of a meal.\(^{101}\) Lennox J. was thus forced to rely on the fact that the restaurant in the case before him was not part of an inn, and added (apparently seeking to distance the Court from such a technical approach) that even innkeepers may be excused on various grounds.\(^{102}\) Unfortunately, the judge stopped short of sharing with his readers what these other grounds were in the case he cited.\(^{103}\) In short, the

100. Lennox J. did not see the fact that a license is required for operating a restaurant as suggesting reciprocity, since “no limit is placed upon the number of licenses issued”. He proceeded to state that licenses are issued to department stores as well, “but it could hardly be that the proprietor of a departmental store, for instance, cannot legally justify his arbitrary refusal to sell to a particular applicant, although ostensibly ready to sell to all who may apply”. And he continued: “That the immediate acceptance of an offer to pay the quoted price may constitute an irrevocable contact in itself does not impugn the soundness of the proposition I have been endeavouring to state. There was no ‘bargain struck’ in this instance”, despite the possibility of seeing such a bargain, as will be argued below. Lennox J. conceded that the law of innkeepers imposes a duty of equal service but noted that “there are many modifications and distinctions, such as ‘private hotels’, ‘residential hotels’, etc., where the general rule has no application or a limited application only”: Franklin, supra note 1 at 350-1.

101. “[E]ven an hotel-keeper may be excused on various grounds. Regina v. Rymer (1877), 2 Q.B.D. 136 [hereinafter Rymer] is only one of many instances”.

102. The facts of Rymer, ibid., a case of a private indictment, were as follows: “The prosecutor, Mr. Cramer, who was a householder living within twelve hundred yards of the hotel, had been in the habit of coming to the premises of the defendant accompanied by two dogs. He had formerly three. One of the two was a savage dog, and generally wore a muzzle; the other of the two was a quiet animal … [although had upon one occasion vomited on the door-mat of a tradesman’s shop in the town]…. They were very large, of the St. Bernard mastiff breed. … After a recent visit from the prosecutor, the hotel keeper wrote to him as follows:-

Dear Sir,- I regret to have to request you will be so good as not to bring your dog or dogs into the Carlton. The slop and mess this evening has been much complained of, and the dogs are as objectionable in the Carlton as in the hotel…. The prosecutor replied that he had a right to bring the dogs [unless dirty or wet], since hoteliers are “under special laws, some of which tend to protect the public against the petty, tyrannical, whimsical, mad freaks or act of individual landlords”. The prosecutor was subsequently denied service upon arrival with a dog to the refreshment bar. The court found that in these circumstances the prosecutor was not a traveller and the refreshment bar not part of the hotel, but continued: … even if both the foregoing questions had been answered otherwise, I think it clear that the defendant had reasonable cause for refusing to receive the prosecutor. I do not lay down positively that under no circumstances could a guest have a right to bring a dog into an inn. There may possibly be circumstances in which, if a person came to an inn with a dog, and the innkeeper refused to put up the dog in any stable or outhouse, and there were nothing that could make the dog a cause of alarm or annoyance to others, the guest might be justified in bringing the dog into the inn. But it is not necessary to decide
treatment of precedent by the Court in Franklin suggests that Lennox J. was less interested in principle than in finding ways to restrict the reach of the case law as it was then, in order to support his conclusion.

Contrary to Lennox J.’s approach, it is submitted that the jurist’s task does not end when the case before her does not land on one of the above islands. Given that these three islands all deal with the limits of the ‘freedom (not) to contract’ or, put positively, with the duty to provide equal service upon request, and given that the reasoning the courts have used in developing these bodies of law overlaps, some consideration has to be given to the underlying principles mutual to these islands, and, ultimately, to the common law.

Of course, some may dismiss these islands as examples of common law fossils, an archaic body of law which exists only because the common law method of updating doctrine is imperfect, and frozen remnants from ancient times sometimes remain even though their justifications may no longer be valid. However, before such a conclusion is reached we must, under common law methodology, ensure that no justification can indeed be found to support such norms. Rather than isolating and dismissing this part of the law as anachronistic, this paper will search for deeper principles that may be reconcilable with our understanding of modern doctrine, in order to assess whether the older part of the common law mentioned above withstands the passage of time and changing circumstances. In other words, the methodology guiding this paper places at the centre of the investigation an ideal model of the common law as an ongoing adjudicative paradigm which demands an effort to make sense of, and provide a rationale for, the existing body of law (including the law governing common carriers, prime necessities and businesses affected with a public interest). Only if this effort fails, finding repugnancy rather than coherence, may parts of the law be to dismissed or overruled.

Judicial justifications for the law governing common carriers, prime necessities and businesses affected with a public interest vary, but could nonetheless be analytically classified into three categories: the de facto or de jure monopolistic (or

any such question. In this case, looking at the previous facts, the number of the dogs previously brought, and their kind and behaviour, the nature of the right claimed by the prosecutor in his letter, and the size and class of the dog, I think the defendant would have had ample ground for his refusal even if the place had been an inn and the prosecutor a traveller.” Ibid. at 140.

It is submitted that the judicial reliance on Rymer, a case involving sloppy dogs, in the context of a refusal to serve on the basis of race is problematic, and perhaps demonstrative of the Court’s refusal to appreciate the significance of counsel’s plea for equal citizenship.

104. This can be seen with respect to businesses affected with a public interest, where a railroad or a phone line could be both businesses affected with a public interest and common carriers. See Haar & Fessler, supra note 9.

105. It should be noted that once repugnancy between two parts within the common law is found, the common law methodology demands that the jurist decide which of the two inconsistent parts to overrule. It would seem that the decision would have to take into account which part would best fit with the principles embodied in the other areas of the common law not immediately affected by the clash.

106. See, for example, F.P. Hall, The Concept of a Business Affected with a Public Interest (Bloomington, IN: Principia Press, 1940), canvassing the justifications provided in the various cases.
quasi-monopolistic)\textsuperscript{107} conditions under which the service is provided,\textsuperscript{108} the necessity of the service to the individual and/or the community,\textsuperscript{109} and finally, the reciprocal duties emanating from practising a vocation which ‘holds itself out’ to the general public (or which is ‘public’ in some other way).\textsuperscript{110}

With this in mind, I turn to examine the three rationales found in the case law and the literature, namely monopoly, necessity and the concept of a ‘public profession’.

\textit{a) Monopoly}

Both U.S. and British case law supports imposing duties on businesses operating under monopolistic conditions.\textsuperscript{111} As Professor Michael Trebilcock points out, monopolies may limit the freedom of contract.\textsuperscript{112} This rationale was used by Lennox, J. in \textit{Franklin} to reject an analogy between an inn and a hotel,\textsuperscript{113} suggesting that the finding of a monopoly is a necessary element in establishing innkeepers’ duties. However, \textit{requiring} the finding of a monopoly is difficult to support\textsuperscript{114}

\textsuperscript{107} The literature identifies different types of monopolistic conditions, such as legal monopoly: \textit{Simpson v. A-G.}, [1904] A.C. 476 at 490 (H.L.); \textit{A-G Australia v. Adelaide Steamship Co. Ltd.}, [1913] A.C. 781 (P.C.); a ‘natural’ monopoly which occurs by way of business; and ‘virtual’ monopoly or oligopoly: \textit{Allnutt, supra} note 78, and \textit{Munn, supra} note 73. For a critical analysis see “Note: Judicial Intervention in Admission Decisions of Private Professional Associations” (1982) 49 U. Chi. L. Rev. 840 at 848. See also M.J. Trebilcock, \textit{The Limits of Freedom of Contract} (Cambridge, MA: Harvard University Press, 1993), analyzing the relationship between monopoly, legal or natural, and the freedom of contract.

\textsuperscript{108} B. Wyman, “The Law of the Public Callings as a Solution of the Trust Problem” (1904) 17 Harv. L. Rev. 156 at 156-60. In general, U.S. jurisprudence, following \textit{Munn, supra} note 73, relies on the monopoly reasoning, and in some cases explicitly states that the finding of monopolistic conditions is a \textit{causa sine qua non}. See \textit{Barrows v. Northwestern Memorial Hosp.}, 123 Ill.2d 49, 525 N.E.2d 50 (1988); \textit{Hottentot v. Mid-Maine Medical Center}, 549 A.2d 365 at 368 (Me. 1988) [hereinafter \textit{Hottentot}]. See “Note”, \textit{supra} note 9.

\textsuperscript{109} A clear example of reliance on necessity can be found in the innkeepers cases, as at stake was the provision of shelter and food \textit{for a traveller}, stemming from the necessity of such a service in a sometimes hostile environment. See, generally, J.H. Beale, Jr., \textit{The Law of Innkeepers and Hotels} (1906) at 1-9. This is also reflected in J.H. Beale, Jr., & B. Wyman, \textit{Cases on Public Service Companies: Public Carriers, Public Works, and other Public Utilities} (Cambridge, MA: The Harvard Law Review Publishing Association, 1902). In \textit{Sparrow v. Johnson}, [1899] 8 Q.B. Que. 379 [hereinafter \textit{Sparrow}], Bossé J., rejects the analogy between a theatre, as an amusement place, and an inn, for the purposes of establishing a duty for equal service, stating: “L’hôtelier ou aubergiste est, par nos lois, soumis à des obligation spéciales nécessaires pour la sécurité et la santé des voyageurs. [para.] Un théâtre est placé dans des condition essentiellement différents. Il n’y a plus là nécessité, mais simple question d’amusement…” (383).

\textsuperscript{110} This rationale will be dealt with in detail \textit{infra}, subsection c). For sub-categories see \textit{infra}, notes 141, 142, 143 and accompanying text.

\textsuperscript{111} Coke, \textit{supra} note 44; \textit{Ipswich Tailors’ Case} (1614), 11 Co.Rep. Coke 53a, 77 E.R. 1218; \textit{Munn, supra} note 73.

\textsuperscript{112} Trebilcock, \textit{supra} note 107.

\textsuperscript{113} “A restaurant keeper is not at all in the same position as persons who, in consideration of the grant of a monopoly or quasi monopoly, take upon themselves definite obligations, such as supply accommodations of a certain character, within certain limits, and subject to recognized qualifications, to all who apply”: \textit{Franklin, supra} note 1 at 350. It should be noted that as a matter of common law, an inn (unlike a ferry) does not require a grant or franchise to operate: see Anon. (1623), 2 Roll.Rep. 345 referred to in 3 Burr. at 1501. And see \textit{Halsbury’s Laws of England, supra} note 63 at 445, n. (h).

\textsuperscript{114} Adler, \textit{supra} note 50.
because it captures both too much and too little. Too much—because there is little evidence supporting a finding that a monopoly ever existed in the inn industry, or in any other historic common callings.\textsuperscript{115} Too little—because it offers little support for not classifying many more businesses as monopolies. Why inns and not other apartment rentals? Too much—because it does not explain whether inns should be considered a monopoly in the first place. While some public utilities might be deemed ‘natural monopolies’—it makes very little sense to lay competing grids of water, power or telephone to offer meaningful consumer choice—it is unclear such rationale applies for inns. Opening an inn involves a much smaller investment in infrastructure and, in that respect, the expenses are not so dissimilar from other houses. Pressing the monopoly rationale further reveals a difficulty in distinguishing common inns, held under the aforementioned host of duties, from ‘private’ inns, held to be outside the scope of the duty.\textsuperscript{116} The same applies to the distinction between a private carrier as recognized in law\textsuperscript{117} and a common carrier, which is difficult to reconcile with the monopoly rationale. Should not the monopolistic conditions apply to both? And as an analytical matter, does not the very existence of a private carrier negate the existence of a monopoly?

It is therefore not surprising, \textit{Franklin} notwithstanding, that when discussing the underpinnings of ‘businesses affected with a public interest’ courts have not confined the analysis to those businesses which operate in monopolistic conditions, as earlier U.S. jurisprudence\textsuperscript{118} and leading Privy Council cases reveal.\textsuperscript{119}

Establishing monopoly should therefore not be perceived as essential to the establishment of a duty to serve, but rather as an instance, dramatic as it may be, of a structure which rests on a kind of proximity between a service or goods provider and its customers (including prospective ones). In other words, for the logic of the contractual justification for monopoly-related duties to make sense, one must recognize the underlying proximity between the provider and the prospective customer. Without such proximity, it is unclear why the monopolistic provider would owe anything to the prospective customer in the pre-contractual stage. Placing duties on the provision of monopolistic goods and services owed to each and every interested member of the community must, therefore, rest on a broader understanding of the contractual and pre-contractual relationship between the monopolistic provider—as a provider of goods and services to the general public—and its customers, present and future. This broader understanding, it is suggested, is located in a public aspect underlying the professional relationship, as will be discussed under subheading (c) below.

\textsuperscript{115} It is difficult to understand why a ‘private’ veterinary surgeon should be held not liable in malpractice, while a ‘common’ surgeon would, if the rationale were monopoly, 19 Y.B. 19, Hen. VI. 49, pl. 5. As a matter of history, it is unclear whether some professions operated under monopolistic conditions while others not. See Adler, \textit{supra} note 50 at 149-50.

\textsuperscript{116} For a distinction between private inns and common inns see Halsbury’s \textit{Laws of England}, supra note 52.

\textsuperscript{117} See Halsbury’s \textit{Laws of England}, \textit{supra} note 54.

\textsuperscript{118} See Hall, \textit{supra} note 106 at 149; Haar & Fessler, \textit{supra} note 9. It is clear that courts have not used one single justification.

\textsuperscript{119} In \textit{City of Levis}, \textit{supra} note 64, for example, the Privy Council referred to the “[i]nconvenience” of providing end-users with choice, instead of attempting to rely on strict monopoly.
At this point it should be noted that, given the accentuated imbalance embedded in the specific example of the provision of goods and services under monopolistic conditions, it is not surprising that the duties attached to such relationships are expansive. This approach is congruent with modern contract law analysis, which is sensitive to the notion of meaningful consent, since by definition, the relationship between the monopolistic provider and those who desire the good/service is such that the latter have little choice. In light of the possible abuse of such an imbalance of power, the monopolistic provider was not only denied the liberty to pick and choose his or her customers, but also the liberty to pick and choose the days the service will be provided. Once a monopoly has been established, the provider can either serve at all reasonable times, or relinquish the monopoly. In that respect, monopolistic conditions may be seen as subjected to a more rigid regime; but such an extra burden should not obfuscate the common underpinning of proximity that arises from the professional relationship.

b) Necessity

The second rationale presented to justify the three islands focuses on the nature or subject matter of the service as necessary to the survival of an individual placed under the care of the provider, or necessary to the development or existence of the community at large. As with monopoly, it will be shown that this rationale, while valid, is only a segment of a deeper, broader structure of relationship common to professions which provide goods and services to the general public.

As is apparent from the above definition, the rationale of necessity recognizes proximity in the pre-contractual stage. It relates one person (the provider) to another (the customer, including the prospective customer) via the nature of the good or service being crucial to the survival of the individual or the community. Situating the duty to provide equal service as part of a relationship of proximity (hence good faith, or care) is exemplified in the innkeeper-traveller case. As the law bears out, the innkeeper owes the traveller (and only the traveller) a duty, akin to a duty of care, to provide shelter and food, lest serious harm befall “passengers and wayfarers.” The structure of the duty, then, is situational: the traveller is in a position of necessity, and the innkeeper has assumed responsibilities which are integral to the raison d’être of an inn, namely the provision of food and shelter to those who

121. A traveller is distinguished from a neighbour (Calye’s Case, supra note 55) or a resident (Burgess v. Clements (1815), 4 M.& S. 306, 105 E.R. 848; Parkhurst v. Foster 1 Salk. 387, 91 E.R. 337), to whom no such duty is owed. See also Grimston v. Innkeeper (1627), Het. 49, 124 E.R. 334; Newton, supra note 57 at 269; R. v. Luellin (1701), 12 Mod. Rep. 445, 88 E.R. 1441; Rymer, supra note 102.
122. “This premise”, writes Molot, supra note 9 at 634, “was developed out of historical necessity of medieval England, a land in which bad roads, the ubiquity of thieves along them and poor communications made travel a dangerous pastime indeed. Inns were intended as a haven for the traveller, his horse and belongings against robbery and murder, hunger thirst and exhaustion.”
123. This term was coined in Calye’s Case, supra note 55.
present themselves in a position of need. In exchange for fulfilling her duties the innkeeper receives compensation, and in order to secure payment the innkeeper has a lien on the guests’ goods.124 Such a structure (mutatis mutandis) could be presented with respect to the common carrier and the ferryman. It should be noted that this rationale, unlike monopoly, is not directly related to the scarcity of the service or to the lack of alternatives.

However, upon closer examination, this situational formation seems inadequate in explaining some historical aspects of the law, and is even more difficult to reconcile with the reality of modern travel. Historically, it is not difficult to see why travellers needed some legal recourse against innkeepers who took advantage of the dire conditions and hazards one would have to endure while travelling, either by overcharging or by working in collusion with criminals to steal the travellers’ belongings.125 Yet while the cases insisted on establishing the status of a traveller, less emphasis was placed on his actual need or necessity in each case. It is clear that a true traveller might need accommodation and a meal after confronting the peril of travel in medieval England—but should a person, on his way home from work, stopping for a meal at an inn’s restaurant, be considered a guest and recover the cost of a lost coat?126 Other authorities confirm that while the courts insisted on travellers being ‘transients’, factors such as distance, unfamiliarity, or danger of hostile environment, played little role in 19th century cases,127 let alone in cases decided more recently.128 Similarly, going back in time, before the duties of common carriers were solidified in the three named professions (innkeepers, common carriers and ferrymen), courts of early common law did not insist on a finding of necessity for the establishment of a common calling (and pursuant duties).129

The necessity rationale seems to capture both too much and too little, much like the monopoly justification. As courts have noted in rejecting the necessity rationale as causa sine qua non, the conditions which might have placed travellers in a situational necessity vis-à-vis the innkeeper in medieval England are far from prevalent

125. D.S. Bogen, “The Innkeeper’s Tale: The Legal Development of a Public Calling” (1996) Utah L. Rev. 51. Professor Bogen traces the development of the innkeeper’s duties, and suggests that at least in part the expansion of the duty to serve all was premised on a previous liability of the innkeeper for goods stolen from a guest at the inn.
126. Orchard, supra note 63.
127. See American and English Encyclopedia of Law, vol. 16, 2nd ed. (Northport, Long Island, NY: Edward Thompson Company, 1904), Innkeeper, stating that it is doubtful whether is was ever intended to lay any stress on the term ‘guest’ (citing Walling v. Potter, 35 Conn. 183 (Sup. Ct. 1868), where the plaintiff resided half a mile from the defendant’s inn in the town of Kent yet was not denied the status of a guest).
...Blackstone stated that a cause of action would lie against “an inn-keeper, or other victualler” who refused to admit a traveller without cause (3 Blackstone’s Comm., Sharswood ed., p. 166), and Judge Cardozo found that a “plaintiff, if wrongfully ejected from [a] café, was entitled to recover damages for injury to his feelings as a result of the humiliation” (Morningstar v. Lafayette Hotel Co., 211 N.Y. 465 at 467 (1914) [hereinafter Morningstar]). Although in Morningstar the plaintiff was a guest in the hotel wherein the café from which he was ejected was situated, there is nothing in the opinion to indicate that this was a crucial factor in the court’s decision.
129. See Adler, supra note 50.
in modern Britain or the settled parts of North America today.\textsuperscript{130} Likewise, it is unclear on what basis we could justify today the law of the common carrier or the ferryman, if necessity is our guiding star.\textsuperscript{131} Although a morning coffee,\textsuperscript{132} or alcoholic refreshments\textsuperscript{133} might be a matter of life and death to some, it is unclear in what way the duty to provide such services relates to the necessity in which a traveller, as opposed to any community member, finds himself. And if indeed food is such a necessity, it is unclear whether Lennox J.’s distinction between a restaurant and an inn is viable. Furthermore, it is unclear what would distinguish a traveller’s necessity from that of a sick person seeking a ‘common surgeon’ or a traveller seeking a ‘common blacksmith’ to shoe her horse, or, for that matter, a person seeking a ‘common tailor’, all historically recognized professions,\textsuperscript{134} but currently found outside the scope of common callings. In other words, the need to assure minimum accessibility is difficult to confine to necessities such as inns, carriers and ferries, to the exclusion of others.

Moreover, the situational formation is open to an analytical critique: while some paradigmatic cases of necessity exist, it is unclear whether the necessity rationale is able to provide a principled litmus test with which to determine what is ‘necessary’ for a person or for the community, and what is only ‘needed’ but not essential. What should be our criterion to assess Bossé J.’s assertion in Sparrow that shows (i.e., theatres) are not matters of necessity, but simply of amusement (and hence the duties of innkeepers do not apply)?\textsuperscript{135} Isn’t culture an important (necessary) aspect of a community, or of a life worth living? Conversely, isn’t TV, now considered a public utility, just a matter of amusement? Don’t we use the telephone,

\begin{itemize}
  \item \textsuperscript{130}Harder, supra note 128 at 99:
  \begin{quote}
  … At common law, a person engaged in a public calling, such as an innkeeper or common carrier, was held to be under a duty to the general public and was obligated to serve, without discrimination, all who sought service. On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased (Madden v. Queens County Jockey Club Inc., 296 N.Y. 249 at 253; Woolcott v. Shubert, 217 N.Y. 212 at 216 (1916)). The reason for the rule that innkeepers could not refuse service to members of the public was to make travel throughout the King’s domain possible. For whatever benefit and purpose the rule once served in ancient times, it has no relevance in the 20th century, and should not be recognized for the purpose of distinguishing inns from other places of public accommodation. In our view, a restaurant proprietor should be under the same duty as an innkeeper to receive all patrons who present themselves “in a fit condition”, unless reasonable cause exists for a refusal to do so.
  \end{quote}

  \item \textsuperscript{131}See Molot, supra note 9 at 634-35.
  \item \textsuperscript{132}Harder, supra note 128.
  \item \textsuperscript{133}Even in cases where a status of guest was refused, the court did not question the association between food, lodging and an alcoholic refreshment. See for example Rymer, supra note 102.
  \item \textsuperscript{134}See Adler, supra note 50 at 155, especially n. 76.
  \item \textsuperscript{135}See Sparrow, supra note 109.
\end{itemize}
deemed a common carrier, for more than ‘necessary’ communications? It is not clear why the non-provision of food and shelter to travellers is more harmful to the community or to individuals in need than the non-provision of adequate education to all, for example. Likewise, it is not clear why the promotion of travel is superior to the promotion of other aspects of communal solidarity, such as welfare for those who are unable to work. Why should food and shelter be deemed necessary to the traveller and not to the disabled local?

Rather than approaching necessity as an exhaustive explanation for the limits on freedom of contract, necessity could (and should) be conceived of as another acute example of a certain structure which calls for establishing a duty to provide equal service. We could conceive of the connection between the provider of necessary goods and services and the prospective customer as a particular connection, or proximity, stemming not merely from the situation of a necessity but from the fact that the provider ‘holds himself out’ as a provider of a certain kind of goods and services, and thereby assumes a certain kind of undertaking towards a person in a situation of need. This conceptualization views such ‘holding out’ as part of a general framework of professional undertaking. In other words, this rationale distinguishes the relationship between the provider and a person expressing a desire to receive/purchase the good/service, and situates the proximity only between them. This explanation is not restricted to the nature of the good/service as being vital, or necessary, but flows from the nature of the relationship between a member of a profession and a member of the public expressing interest in purchasing the good/service around which the profession is organized. It might be the case, as with monopoly, that when the necessity of the service is established, specific concerns call for an exceptional restriction on the provider’s discretion, for fear of abuse or severe harm. But it seems erroneous to deny a duty to provide an equal service absent a finding of necessity, because such a conclusion would ignore the relational structure which enables us to relate the provider of essential services to the would-be customer in the first place.

Unfortunately, the development of the law in Canada has avoided a search for a rationale which would take into account more than monopoly or necessity (narrowly construed), and has instead adopted a ‘pigeon hole’ technique. Such an approach, as mentioned above, shuns a quest for reason in favour of treating the three doctrinal islands as separate entities, divorced from the rest of the body of law.

c) ‘Public profession’

In the search to justify the limits of the freedom to ‘pick and choose’ your customers, the limits on the freedom to charge prices at whim (or more precisely, to charge whatever the market will bear) and the limits on the freedom to choose

136. Can we justify, under the necessity rational, the duty not to refer a guest from one inn to another? Constantine, supra note 59.
137. See Christie, supra note 2.
138. Molot, supra note 9 at 615.
whether to provide a service at all on a given day, scholars and courts have turned to the ‘nature’ of the profession in question. Such an examination suggests that some professions are ‘public’. Scholars and courts have defined ‘public’ in this context\(^{139}\) according to one of three, somewhat overlapping, models:

i) The public nature of the profession is determined by the ‘governmental’\(^{140}\) nature of the services it provides, in the sense of services analogous to those provided by the state (i.e., are a part of meaningful citizenship; are expected to be provided by, or are otherwise related to, the sovereign; yield substantial control over the community and its members; are governed by a comprehensive regulatory regime; or operate on a very large scale compared to the size of the relevant community). The legal framework under which private bodies providing these services operate, including their powers and duties, should resemble that of governmental agencies.

ii) Public professions are those requiring a \textit{quid pro quo} reciprocity with public authorities;\(^ {141}\) (i.e., obtaining a grant, franchise or license, or receiving public funding, taxation benefits, the right of use of public property, the use of public fora for advertisement, etc., in exchange for accepting public standards, including equal access).

iii) A public or a common profession is one in which the \textit{raison d’être}\(^ {142}\) of the profession is organized around non-associational interactions. The profession is organized around an interaction with an abstract customer, any member of the public, and hence is organized around serving the public. Consequently, equal access to the services provided by the business as such\(^ {143}\) is intrinsic to the profession.

Each model will be examined in turn.

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\(^{139}\) It is submitted that the private-public divide is contextual. In Britain, the debate has centred around the application of judicial review under Order 53 and the source of \textit{ultra vires} judicial review jurisdiction. (See P. Craig, “Ultra Vires and the Foundations of Judicial Review” (1998) 57 Cambridge L.J. 63; C. Forsyth, “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review” (1996) 55 Cambridge L.J. 122; D. Oliver, “Is the Ultra Vires Rule the Basis of Judicial Review?” [1997] Pub. L. 624 [hereinafter Eldridge]; P.W. Hogg, “The Dolphin Delivery Case: The Application of the Charter to Private Action” Case Comment (1986) 51 Sask. L. Rev. 273). As a point of context, then, this inquiry searches for a ‘public’ aspect of private entities engaged in their use of the common law. The ‘public’ aspect, therefore, is integral to the common law of private bodies, and is not a province of administrative law (cf. \textit{The Province of Administrative Law}, \textit{supra} note 48. The nature of the restraint on private entities explored here rejects the application of s. 53 to these bodies, and rejects a full analogy between judicial review and the common law duty of equal service (cf. D. Oliver, \textit{Common Values and the Public-Private Divide}, \textit{supra} note 9). This matter will be further discussed below.

\(^{140}\) Haar & Fessler, \textit{supra} note 9 at 200, note this trend in American jurisprudence.

\(^{141}\) Haar & Fessler, \textit{supra} note 9 at 219.

\(^{142}\) Molot, \textit{supra} note 9 at 641.

\(^{143}\) Adler, \textit{supra} note 50.
i) Nature of service associated with the business of government

Perhaps the most familiar justification for imposing equality-based duties on private entities is that the subject matter of the service provided is seen as ‘governmental’ in nature. Justice Thomas Cooley of the Michigan Supreme Court, who searched for a limited version of ‘business affected with a public utility’, wrote that some facilities, whether provided by private entities or public agencies, are “proper and usual for the government to provide,” \(^{144}\) and hence governmental in nature.

Modern scholars have tried to identify the governmental nature of such services not only by looking at the origin of power (i.e., whether originally belonging to the state or not) but also by the degree of control the provision of such services yields over the individual. \(^{145}\) In a similar vein, courts lent a favourable ear to the duty to provide equal service in power-imbalance situations, \(^{146}\) suggesting that it is the asymmetry of power, emblematic of the citizen-government relationship that likewise characterizes the public nature of the provision of such goods and services. Some authority can also be found for the proposition that those services, goods and facilities which could be categorized as important for meaningful citizenship and participation are, in a sense, public. In other words, some services are integral to the business of the state, either because they pertain to goods expected to be delivered by the state, such as prisons, or because they are intimately linked to the actual participation in the community, such as telecommunications and postal services. Cooley might have classified these services under “welfare”. Indeed, one line of cases identifies those professing a common calling as employed by the public or as “public servants,” \(^{149}\) suggesting that their contribution is to the welfare of the public at large.

144. T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (Boston: Little, Brown and Company, 1868), as cited in Haar & Fessler, supra note 9 at 202. And see W.F. Foster, “The Doctrine of the United States Supreme Court of Property Affected by a Public Interest, and its Tendencies” (1895) 5 Yale L.J. 49. Cooley mentioned “necessity, convenience and welfare” as features which distinguish a purely commercial activity from that which is sufficiently governmental so as to allow the government to engage in such an activity, or regulate it, under the U.S. Constitution. By implication, if such an activity is carried out by a private company, the common law may place it under a duty of equal service. Perhaps under the rubric of ‘convenience’, one could point to considerations of scale, which might tint a commercial business in a quasi-governmental light, or to the need to co-ordinate with other aspects of government, such as public land development. Another aspect of ‘governmentness’ could be traced to the origin of the specific power granted to private entities. For example, the power to expropriate land for public use was a delegated sovereign state power of eminent domain. Such delegation of state power sufficiently infused corporations with governmental properties to subject them to duties similar to those the government would face. As Haar and Fessler put it, “the power determined the identity” (Haar & Fessler, supra note 9 at 217).

145. See e.g. “Note”, supra note 9.

146. A similar analysis could be read between the lines in Adams, supra note 73.

147. Such as education, and the provision of health: see Eldridge, supra note 139.

148. See e.g. J. Habermas, Legitimation Crisis (Boston: Beacon Press, 1975); J. Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Cambridge, MA: MIT Press, 1996).


150. Ivens, supra note 56.
Others have suggested inferring a governmental nature (or sufficient entanglement with governmental agencies) from the degree of governmental regulation of the activity.\footnote{Molot, supra note 9. A similar rationale was used to substantiate governmental nature for the purposes of constitutional judicial review. See Eldridge, supra note 139.} If the activity is closely regulated or if the profession operates under exact governmental scrutiny, not only is this an indication of public interest, but such proximity may draw the profession toward being (perceived as) an extension of a governmental agency. In other words, detailed regulation and specific licensing may sufficiently blur the line between the profession and the governmental agency that ‘commandeers’ many aspects of the professional conduct. Under such circumstances, some argue that the courts may find adequate foundation for a common law duty of equal service, based on the fact that the discretion of the private entities has been sufficiently displaced by regulation. Under such circumstances, a failure to establish a duty to provide equal service might be perceived as a governmental license to discriminate. It is therefore quite intuitive to approach some public utilities as ‘governmental’.

However, the notion of finding governmental power everywhere is problematic. Practically, a slight shift from the paradigmatic cases reveals the difficulties of using power as a litmus test. Are inns governmental? Perhaps in the past a secure shelter for travellers was perceived as analogous to what we now understand to be governmental. But can we make sense of this body of law today, other than by shrugging it off as an anachronism? And if an inn is governmental, why not a restaurant? Any exercise of legal, political or economic power?\footnote{M. J. Horwitz, “The History of the Public/Private Distinction” (1982) 130 U. Pa. L. Rev. 1423; A.C. Hutchinson & A. Petter, “Private Rights/Public Wrongs: The Liberal Lie of the Charter” (1988) 38 U.T.L.J. 278.} Just as with necessities, the degree of indeterminacy and malleability might render this justification, from a legal point of view, less helpful. Yet the shortcomings of the ‘governmental’ rationale are not merely practical. Classifying the aforementioned islands (or, for that matter, services customarily provided to the general public, or all commercial activity) as governmental entails some thorny discrepancies, which might be too obvious to ignore.

Moreover, as a matter of definition and as concluded by the courts, in pursuing a vocation that is governmental in nature, profit must be only an incidental factor.\footnote{“That an industry was owned privately, even that the profit motive underlay its formation and provided the incentive for its investment, was not determinative in the courts’ eyes. When the function performed was judicially defined as public in nature … its financing and pursuit of profit became ‘incidental only’.” Haar & Fessler, supra note 9 at 206. And see Sandford v. Catawissa Railroad Co., 24 Pa. 378 at 380-81 (1855) [hereinafter Sandford]. The profit motive was not persuasive in Morningstar, supra note 128 either, dealing with excessive charges for food in a hotel. A similar picture appears in English jurisprudence, where the duty to provide service at a reasonable price is tied to a concept of vocation which is not for individual profit only, or even primarily. See Crisp, supra note 57 and Kirkman v. Shawcross (1794), 6 Term Rep. 14 at 17, 101 E.R. 410 at 411.} Such a discrepancy between what appears to be the economic reality (i.e., the drive for profit) and its legal description (i.e., profit is only incidental) is not the only dissonance associated with casting common callings, business affected with a public interest and the provision of prime necessities as ‘governmental’.

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151. Molot, supra note 9. A similar rationale was used to substantiate governmental nature for the purposes of constitutional judicial review. See Eldridge, supra note 139.


153. “That an industry was owned privately, even that the profit motive underlay its formation and provided the incentive for its investment, was not determinative in the courts’ eyes. When the function performed was judicially defined as public in nature … its financing and pursuit of profit became ‘incidental only’.” Haar & Fessler, supra note 9 at 206. And see Sandford v. Catawissa Railroad Co., 24 Pa. 378 at 380-81 (1855) [hereinafter Sandford]. The profit motive was not persuasive in Morningstar, supra note 128 either, dealing with excessive charges for food in a hotel. A similar picture appears in English jurisprudence, where the duty to provide service at a reasonable price is tied to a concept of vocation which is not for individual profit only, or even primarily. See Crisp, supra note 57 and Kirkman v. Shawcross (1794), 6 Term Rep. 14 at 17, 101 E.R. 410 at 411.
It has long been recognized that replacing the institutional contours of government with others, such as the ‘subject matter of the decision’, is no easy task. Power, as distinguished from institutional lines, is inherently fuzzy as a demarcation tool for what is government and what is private. It is unclear that such demarcation is at all obtainable a priori, without first having in mind the specific duty one seeks to impose: can we know whether X’s power is ‘governmental’ without first asking ourselves what might be the consequence of X being deemed government? Can we decide whether an entity is ‘powerful enough’ to be deemed governmental, without first being armed with the desired outcome we wish to reach? In other words, adopting power as a theoretical paradigm for determining that which is governmental might require us to shoot the arrows first, and then draw the target; our bull’s-eye claim might sound somewhat hollow.

Moreover, are we allowed, under a principled legal system, to deem an entity governmental with respect to some aspects of its activity, and non-governmental with respect to others? The Canadian Supreme Court has recently broken new ground by stating that we can. Others, convincingly, doubt such a double-standard approach. Moreover, once deemed governmental when engaged in a given activity, is an entity subjected to the full host of governmental duties or only to some? It would be quite artificial to classify an establishment as ‘governmental’ for the purposes of common law duties, and ‘non-governmental’ for grounding constitutional or administrative judicial review. If that is indeed the case, we may encounter a paradox. Finding a ‘governmental aspect’ of a private entity for the purposes of subjecting it to common law duties risks removing the entity from the common law altogether, shifting the analytical framework to constitutional or administrative law. Common law duties based on the governmental nature of the service become an oxymoron, because the proper source of governmental duties resides in statutory or constitutional law. Transplanting such a foreign apparatus, designed to deal with the branches of government, to the common law sphere inhabited by inns and


155. Eldridge, supra note 139.

156. Hogg, supra note 139; D. Beatty, in “Canadian Constitutional Law in A Nutshell” (1998) 36 Alta. L. Rev. 605 finds the move made in Eldridge redundant.

157. But cf. Molot, supra note 9. However, it should be noted that Molot suggests that we can “pick and choose” which of the common law duties are applicable. While this move might make sense in terms of the common law, it is unclear whether we can substantiate a differentiation between ‘governmentness’ for common law purposes, and non-government for Charter purposes. Molot did not have to confront that issue, writing in 1968.

158. Even if we assume that absent a clear statute the common law would ascribe private law duties to governmental entities, i.e., subject the government to the law of torts, or contract law, a principled approach would situate the source of the duty in the initial vires of the governmental agency, rather than in the moral agency of the interacting parties. Similarly, the content of the common law duties imposed upon governmental agencies might in fact be more lax than those placed upon individuals, since the government is arguably not acting for its own benefit, but rather for the benefit of the public at large. Thus, the government may be allowed to invoke public interest as a justification for reduced reliance damages in pre-contractual negotiations that broke down.

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restaurants would not only violate precedent (both in Canada and the U.S.), but would also introduce peculiar anomalies. Would a hotel have to guarantee its guests (or the public) freedom of expression? Would a restaurant be under an administrative duty to provide reasons for changing its menu? Could a section 15 claim be launched against a restaurant’s decision to serve, or not to serve, kosher food?

As mentioned by Oliver, attempting to reclassify the provision of services customarily available to the public as ‘governmental’ risks expanding ‘government’ beyond the breaking point of meaningful communication. Such use of language further dilutes the meaning of government, thus threatening to undermine the legitimacy of constitutional judicial review. But more importantly in the context here, it might obscure rather than clarify the underlying principles at the core of the islands under investigation, even if it might serve a progressive cause.

ii) Reciprocal relation with the public—accepting a grant, franchise, public funding or other use of public fora

The second explanation of the ‘public’ nature of the three islands suggests that the ‘public element’ is a product of a constructive bargain struck between the public (or the relevant organ of the State) and the provider. The provider receives a grant to use something that belongs to the public and in exchange, the provider is bound

159. *Dolphin Delivery*, supra note 16.
162. The possibility of subsuming all legal interactions under the constitutional norm by providing a jurisdictional person with a constitutional cause of action against another jurisdictional person is dealt with in Reichman, *supra* note 14 at ch. 2. See also J.D. Whyte, “Is the Private Sector Affected by the Charter?” in L. Smith et al., eds., *Righting The Balance: Canada’s New Equality Rights* (Saskatoon, SK: Canadian Human Rights Reporter, 1986).
163. See “Note”, *supra* note 9. But see Oliver, *supra* note 161, calling such a classification artificial and unnecessary, if not harmful, to the progressive agenda.
164. The goods received from the state could be the right to use public docks: *Allnut, supra* note 78, or more generally, a franchise, (as is the case with a ferry—see *supra*) including a monopolistic one. It should be noted that theoretically this justification views a monopoly as a public good which can be traded in exchange for a public-oriented duty. This is distinguished from the ‘monopoly’ justification, which focuses on the alleviation of dangers associated with monopoly. Another ‘state good’ could be a privilege to engage in a profession over which the state has assumed full control via regulation: Davis J. dissenting in *Christie, supra* note 2 at 152. A right to use state power to expropriate property is another good which associates a corporation with the government. The grant of such power was needed in the public utility cases—see *supra* notes 82-96 and accompanying text. However, the bargaining construct sidesteps the ‘eminent domain’ conundrum. It assumes that the state has powers to expropriate land for public use, and instead of scrutinizing whether the actual use was indeed for a public purpose (i.e., whether the state, or the delegated corporation, has acted constitutionally and/or whether the ‘subject matter’ is sufficiently public to establish common law duties), the very act of receiving some state-related good implies a correlative consideration. Public funding is a classic example of ‘state good’. Cf. T. Cooley’s *Treatise*, supra note 144, which suggests public funding and easement of taxation discounts, as possible sources of justifications for deeming a business as affected with a public interest. The act of accepting public funding, in and of itself, does not necessarily substantiate a duty to use the money in a manner respecting the duty of equal service. If an individual receives welfare, that does not automatically mean that he should not exclude Jews from a dinner he is cooking with that money. The acceptance of public grants, here, is used to suggest that a bargain
to provide equal service. Because the provider is entrusted with a use of a concrete, identifiable ‘public element’, and because this ‘public element’ belongs to every member of the public, the provider is not entitled to pick and choose clients, unless specifically empowered to do so by the grant. Similarly, the provider cannot wake up one morning and decide he wishes to cease providing the service for the day (or the week), without returning the grant and relinquishing the role of a provider altogether. Likewise, the provider cannot charge unreasonable or discriminatory prices, as that would in effect deny access to some and thus undermine the implied conditions of the bargain. Such a *quid pro quo* perception seeks to preserve some notion of choice on the part of the provider. The provider chooses to interact with the public, as part of her choice to pursue a certain profession. Nevertheless, this choice is limited in its scope, since the set of implied obligations in return for the grant is practically beyond negotiation. Interestingly, under this reordering of the bargaining power, it is the provider who might find herself faced with a ‘standard contract’ without an opportunity to contribute meaningfully to the shaping of the conditions. Such reordering may offset the imbalance between the individual confronted by a refusal to serve, unreasonable pricing or discrimination.

While this contractual logic may offer some inner consistency, it nonetheless fails to remove all difficulties. The ‘public element’ [*quid*] which gives rise to the ‘equivalent’ duty [*quo*] has to be identified carefully. Especially problematic might be the argument that state recognition and enforcement of *any* legal transaction might be perceived as a benefit, and therefore the use of *any* legal power could be grounds for establishing a reciprocal duty to the public. The argument would read that since the state is granting its citizens use of its courts, each citizen owes the state a reciprocal duty [in this case, to provide equal service]. The distance between such an assertion and a comprehensively paternalistic regime might be too close for comfort. Is the right to contract in any manner a ‘privilege’ from the state? A right to establish a corporation? A right to express one’s views? One could argue that it is the law (or the state) that permits us to live and interact, for which we should all be grateful. In other words, applying the *quid pro quo* justification demands that a prior conception of what actually ‘belongs’ to the public (or the state) and what, even if by prescription, belongs to the other party, the would-be business-person. The analytic difficulties with which such a project is riddled might seem overwhelming.

165. A case on point is *Allnut*, supra note 78 where Lord Ellenborough could be read as stipulating a *quid pro quo*: “... but if he [the provider] have a monopoly..., if he will take Benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms....”

166. Bracton was very clear on this point, stating that in fact all grants and franchises (i.e., the right to engage in any vocation) belonged to the King. Citizens could nonetheless engage in all non-franchised activities, unless or until the King reassumed his powers. H. Bracton, *On The Laws and Customs of England* (c. 1250), trans. S.E. Thorne (Cambridge, MA: Harvard University Press, 1968) at 166.
It should be noted that as a conceptual matter, this model regards non-discrimination as a social good, to be traded for access to a certain kind of public property. In this respect, the model avails itself to a distributive justice theory more than to a corrective justice theory; it suggests that access to some goods or services, or opportunities, as a certain social good, should be distributed equally. Since the common law is organized around corrective justice as a core theory of justice, introducing the reciprocal model may be rejected; it would appear better suited for the statutory or constitutional regimes.167

Doctrinally, as with the previous models, it is not clear that the ‘public grant’ and reciprocal assumption of duty can adequately explain the normative reality. The duty to provide equal service might be explained via the underlying logic of the grant. That is, the community and its members grant a provider a right to use a public element, so each member of the public can meaningfully enjoy the service provided. But can we explain the liability faced by those pursuing common callings for lost goods? Could we explain the lien innkeepers enjoyed? Should such a lien be enjoyed by restaurants? Furthermore, this model does not explain why the duty to provide equal service is limited to the three islands. Once a right to use an element that ‘belongs’ to the community can be identified, a reciprocal duty should be established. Hence, it is not clear if we can support the distinction, thus far entrenched in Canadian case law, between inns and restaurants (or other places of amusement, for that matter). In fact, this model may not be able to support any kind of distinction, as mentioned above, leading to infinite expandability. All kinds of *qua pro quibus* could be inferred with respect to all kinds of activities, with little guidance as to a principled approach. Such a characteristic of a legal test might be a serious, if not fatal, flaw.

iii) Nature of service as non-individual, or non-associational

In light of the intricate and complex contemporary legal reality which eludes simplistic categorization, perhaps a re-examination of the legal past is called for, in order to better understand the present as well as to identify trends of development. Early cases support the idea that the core of the duties placed upon common callings, businesses affected with a public interest, or prime necessities lies in the nature of these professions as dealing with the ‘general public’ on a ‘non-individual’ basis. The underlying logic of these vocations is not centred around unique

167. At least one court suggested that finding a legislative intent to confer the power to discriminate raises “a question of the constitutional authority of the legislature to convey a prerogative so hostile to the character of our institutions and the spirit of the organic law”: *McDuffee*, supra note 83.
168. See discussion in Molot, *supra* note 9 at 636.
169. Non-individual does not deny the human aspect of providing service, as clearly human beings are cast in the roles of provider and customer. ‘Non-individual’ as a feature which characterizes the interaction of the provision of the service stands for the non-associational aspect of such provision. The logic of the business in question does not require the provider and the customer to form an association, nor to engage in meaningful, moral, aesthetical or value-forming communicative exchange or creation. The business is oriented toward an exchange of tangible goods or services, the identity of the provider or customer being a mere circumstance.
individual contracts between the provider and the customer as creating the basis for a specific performance tailored to the whims and desires of the two contracting parties. Rather, the logical engine at the crux of such services is the provision of a ‘standard service’ (perhaps with minor modifications to fit each case) which emanates from the profession itself. A blacksmith, an innkeeper, a common carrier, or a ferryman follow, in carrying out their business, a uniform, professional code with respect to all abstract ‘customers’. Part of this standard, not to say ‘indifferent’ or ‘impersonal’, professional interaction is a fixed price to all, according to the service required. Since the logic of the transaction, including the performance of the service, does not depend on the group-based characteristics of the customer or provider other than in their roles as such, considering the group-based characteristics of the customers must be foreign and irrelevant.\footnote{170}

In other words, some professions, by their nature, hold themselves out to be non-individual; they are constituted around transactions with ‘abstract customers’, and thus cannot accept discriminatory practices based on the group-based characteristics of a customer (or a prospective customer). Analytically, classifying some professions as non-associational entails the reverse category, namely those professions which are organized around greater sensitivity to the creative element of individual interactions and to the special aesthetic or moral conviction of the interacting parties.\footnote{171} The latter might allow, under this rationale, consideration of individual characteristics in the decision whether to provide service, unless conditions of monopoly\footnote{172} or necessity\footnote{173} allow imposition of a duty to provide equal service. As

\footnote{170}{As Adler, \textit{supra} note 50, when analyzing the cases dealing with common callings, states: What then did “common” mean? Simply, “business,”—business carrier, business tailor, business barber. A common surgeon was one who made business of surgery, who practiced it commonly; a common tailor was one who was in the business of tailoring. In 1367 an order was made for porters and creelmen “who then exercised that craft commonly”—a perfect illustration to the true meaning of the word “common”…(at 152).
We may reasonably conclude, therefore, that so far as the carrier’s \textit{business} is concerned, it is no different from any other business. The carrier, like every other business man, purports to serve and to deal with the public. Business is impersonal; in ordinary course it is merely a question of merchandise or other exchangeable values on the one hand and money on the other. A man is engaged in business when he solicits the favour and undertakes to deal with persons \textit{indifferently} for profit. This is the common characteristic of all business and at once its identification and definition (at 156). [emphasis in original]}

\footnote{171}{Those who follow the writings on the law of common callings are familiar with the ‘test’ writers have to pass in order to qualify as presenting a viable rationale for the law of common callings: the distinction between a carpenter and a smith, found in \textit{Keilway} 50, Pl. 4, \textit{infra} note 209. Some have claimed that the distinction originates in a monopoly (see Wyman, \textit{supra} note 108). Others try to distinguish the case dealing with a carpenter by suggesting that since the blacksmith sits at the intersection, he is already at work, holding himself out as available, while the carpenter assumes his obligation as a private person. Thus, the carpenter transacts via a full contract, rather than as a professional who follows a standard code of business (see Adler, \textit{supra} note 50 at n. 76). The reading suggested here identifies a carpenter as a different type of a professional, one in which personal creativity and art play an important role, and consequently the interaction between the customer and the provider is meaningful, in an authentic way, to the performance of the service and to the individual engaged in the transaction. As pointed out to me by Professor Ernie Weinrib, the division between associational and non-associational vocations is consistent with a Hegelian approach (see \textit{Hegel’s Philosophy of Right}, trans. T.M. Knox (Oxford: Oxford University Press, 1967) at para. 35).}

\footnote{172}{\textit{Falcone v. Middlesex County Medical Society}, 34 N.J. 582, 170 A.2d 791 (1961) [hereinafter \textit{Falcone}]; \textit{Hottentot}, \textit{supra} note 108.}

\footnote{173}{\textit{Pinsker v. Pacific Coast Soc. of Orthodontists}, 1 Cal.3d 160 at 166, 460 P.2d 495 at 499 (1969).}
a side comment, it could be argued that the nature of the profession, or our understanding of its nature, may shift over time.174 Recognizing the role of a profession allows us to substantiate a kind of proximity between the would-be customer and the professional provider of goods and services. The provider and the would-be customer are situated within the social fabric in a relative position that is infused with certain expectations which flow directly from the raison d’être of the profession: to conduct a certain kind of business.175 Moreover, recognizing the professional robe a provider dons when conducting business, even in the precontractual phase, permits us to realize that her actions, including the initial choice to pursue the profession, are informed by the nature and logic of the profession as organized around transactions which are indifferent to some characteristics of the other contracting party. In this sense, most professions are constructed around non-individual interactions. Only very specific aspects of the individual customer (or would-be customer) are relevant to the transaction which lies at the core of the profession. Rather, the professional role calls for focusing on the standard of service, quality of product, and craftsmanship.

These two elements—the inherent constraints intrinsic to the profession as a non-individual profession and the initial choice to engage in such a profession—could be viewed as the dual structure at the core of the duty of equal service.176 The professional role can be seen as establishing the initial proximity required to support that duty.

Although the origin of the model flows from times when status, rather than contract, was the governing paradigm for analyzing duties, at least one scholar has argued that this origin should not be seen as incompatible with a contractual analysis, but rather as enriching it. According to this argument, the public act of ‘holding oneself out as a member of the profession’, as is the case when one hangs out an

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174. Shifting perceptions is a recognized legal phenomenon. Films were originally not seen as a medium for expression (Mutual Film Corp. v. Industrial Com. of Ohio, 236 U.S. 230 (1915)), gas not as a public utility (Paterson, supra note 86) and racetracks not as fully private (Garifine v. Monmouth Park Jockey Club, 29 N.J. 47 148 A.2d 1 (1959) [hereinafter Garifine]). All three holdings were later reversed. Similarly, it could be argued that theatres were considered in the days of the Norman conquest to be non-individual (communal), i.e., beyond private ownership. Perhaps their sociological role in society has shifted, through the rule of aristocracy and the rise of individualism, to include a unique associational, or identity-forming aspect, and hence the pre-World War II courts were more attuned to the right of the owner to decide who may enter. Arguably, our contemporary understanding of culture and community is such that we recognize theatres as a ‘general’ or ‘public’ socializing forum. Thus, unless the theatre is part of a club organized around membership, we view the relationship between the theatre owner and the public as non-individual, or as centred around the role of providing culture and consuming it, rather than as creating and forming joint aesthetic associations. Perhaps a similar account could apply to restaurants.

175. “Why are Inns established?” asked the Court in Ivens, supra note 56 at 97, and then replied: “for the reception of travellers who are often very far distant from their own house.” Thus, the contours of the duty owed by the innkeeper towards the traveller includes receiving guests in late hours. As we see, the Court engages in an analysis of the nature of the profession or vocation at hand, and inquires as to the set of responsibilities assumed by those who choose to hold themselves out as members of that profession.

176. See Molot, supra note 9, analyzing cases; see Haar & Fessler, supra note 9; Burdick, supra note 49.
inn sign, could be seen legally as making an (irrevocable?) offer to the general public to provide equal service.\textsuperscript{177}

However, the contractual edifice, if approached without the underlying notion of a profession, lacks a powerful and convincing justification for the duty to provide equal service upon request. Under ordinary contract doctrine, each person may explicitly limit his offer to some designated members of the public, using whatever criteria he may wish, including, for example, race. This might not be true once the foundational notion of acting in a professional capacity is recognized. As an analytical matter, the non-individual profession, from which a professional draws the competence to use the contractual tools, does not include the power to discriminate. Put differently, upon assuming the role of a member of a non-individual profession, a person relinquishes the liberty to pursue his profession in such a way that involves serving only people from race X (or gender Y or religion N), if such a qualification is not supported by reasons integral to the profession itself. For example, a surgeon might profess to operate solely on women for reasons of expertise, if indeed biological differences warrant such specialization. But beyond any such expertise-related instances, a doctor must provide medical services indiscriminately. Similarly, a blacksmith may not claim to shoe only those riding white horses or only those belonging to the Anglican Church, as these reasons are immaterial to the profession. Hence, their introduction is repugnant to the very business the person is claiming to practice.\textsuperscript{178}

In the same fashion, a railroad company under the common law could not grant special privileges to one man or set of men, and deny them to others.\textsuperscript{179} “Because the Institution, so to speak, is public”, wrote the Pennsylvania Supreme Court about the “institution” or profession of common carriers, “the public, every member of the community stands on an equality as to the right to its benefit, and therefore, the carrier cannot discriminate between individuals for whom he will render the service. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all.”\textsuperscript{180} This justification could be read as supporting an idea that the ‘nature’ of the profession requires it to deal indiscriminately with the public. And in a sentence earlier the court states: “The business of the common carrier is for the public, and it is his duty to serve the public indifferently.” In other words, the nature of the business is non-individual. Since pursuing the business demands commitment to the integrity of its nature, indifference to irrelevant characteristics (such as the identity of the customer or the type of merchandise she wishes to ship) is required.

\textsuperscript{177.} See Burdick, \textit{supra} note 49 at 516: “It was because a person held himself out to serve the public generally, making that his business, and in doing so assumed to serve all members of the public who should apply, and to serve them with care, that he was liable in an action on the case for refusal to serve or for lack of care in the performance of the service, by which refusal or lack of care he had committed a breach of his [general] assumpsit.”

\textsuperscript{178.} This idea of a profession resembles concepts of the \textit{ultra vires} doctrine. Yet the competence to contract was not allocated by statute—it is inherent to the role and therefore cannot tolerate repugnancy to the inner logic, or \textit{raison d’être}, of the role. Compare to cases dealing with sale of offices, where the contract was between public parties, but the subject matter ‘belonged’ to the government, or the public.

\textsuperscript{179.} Sandford, \textit{supra} note 153, cited in Haar & Fessler, \textit{supra} note 9 at 203 in a different context.

\textsuperscript{180.} Messenger, \textit{supra} note 83, as cited in Haar & Fessler \textit{supra} note 9 at 205-06.
In that respect, the duty imposed upon a person acting in his or her capacity as a member of a profession to exercise his or her legal power in accordance with the raison d’être of the profession is indeed status-like, in the sense that the person cannot pick and choose those elements of the profession he or she embraces (such as presenting oneself as a ‘common surgeon’) and those he or she rejects (such as providing service in a non-discriminatory fashion). In other words, a person may not put up a sign of an inn, and in the same breath put up a sign declaring that no blacks are allowed. Once a person has assumed the profession of an innkeeper, she has assumed it in its entirety, as if she assumed a certain status. However, unlike the vices of feudal status which by definition barred mobility by confining a person to a born-into social space, viewing a profession as status-like in the sense that it includes some obligations that arise from the profession itself does not impair social mobility since people are free to choose their professions and to switch from one profession to another if they so desire. Perhaps more importantly, the content of the duty imposed on members of a profession could be seen as ‘anti-status’. The duty is to treat a prospective customer in the abstract, free from any status-like characteristics one may attribute to a customer because of the customer’s lineage, skin colour, religion, sexual orientation and/or other such factors.181

In other words, even though the duty may be placed on a member of a profession as such, thereby raising concerns of a status-like regime, the content of the duty can be seen as promoting choice and agency. A person can choose whether to hold herself out as a member of a profession, and, more importantly, members of the community who interact with a member of the profession are taken as equal moral agents, rather than classified into casts with which one does not engage. In that respect, the content of the duty is compatible with contract law paradigms, and with the notion of moral agency.

The only instance in which such group-based classifications could be considered by a member of a profession is if the nature of the business is associational, as in a club, where the identity of the members matters, and membership is therefore not open to the general public.182 However, for a business to be a true associational club, it has to show that it is organized around membership. In many cases, such an associational aspect would constrain the size of the membership body in order to sustain a claim that individual identity of the members matters.

Naturally, there will be instances when the lines between the associational and the non-associational will have to be defined. For example, in order to determine whether a landlord is under an obligation to provide equal service upon request, i.e., whether she is at liberty to take into consideration the particular group-membership of a rent applicant, we must ensure that the landlord is in the business of providing housing, i.e., is a commercial landlord, rather than an accidental landlord renting

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181. I owe this point to Professor Ernest Weinrib.
182. For discussion of associational rights see J. Rossi, “The Common Law “Duty to Serve” and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring” (1998) 51 Vand. L. Rev. 1233. However, if such association is monopolistic, exclusion ought to be rejected. See Falcone, supra note 172.
out her apartment for a limited period of time. The distinction involves ‘line-drawing’ difficulties. Suppose one rents her cottage? Suppose one rents her parents’ apartment where she grew up? It should be noted, however, that these difficulties are not unique to this context. They arise whenever non-commercial considerations invade, as a conceptual matter, the definition of the business at hand. For example, in the context of freedom of religion, a family business receives different treatment than a non-individual, commercial enterprise. Similar lines are drawn for tax purposes, where the authorities have to determine whether one is in the business of a commercial landlord. If the legislature is silent, a court of law might be required, eventually, to establish bright lines, at the price of accuracy.

This model parts from the classic private law model by establishing a duty which is not owed directly by one person to another. The duty to provide equal service does not flow directly from the abstract moral agency of the two parties, but is rather mediated through the concept of a profession as a status. Analytically, the idea of a status provides the civil society with the social organization with which to allow abstract rights holders to mitigate the tension between each agent’s autonomy to pursue whatever goals she wishes, that is, showing no consideration to the desires of other agents, with the need for recognition from other agents (that is, the premise that each moral agent should be recognized by other moral agents as a member in the community of moral agents). In other words, it appears that a community of abstract moral agents suffers from a tension of sorts: on the one hand, each member is conceptualized as purely autonomous, and on the other hand each member’s

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183. If we accept that in the associational cases imposing a duty to provide service to all, that is, to ignore the associational aspect, is in conflict with the human dignity (autonomy) of the service/good provider (see further discussion under property, below) we can, by analogy, accept the claim that one’s own domicile, the house or apartment in which one generally lives, deserves, when put temporarily on the rental market, a different kind of treatment, because of its centrality to one’s sense of self (see D.I.A. Cohen, “On Property as Self” (1998) 26 J. of Psychiatry & Law 3). In other words, perhaps, under the common law regime, one may be entitled to express prejudice when one’s own apartment is rented for a limited period of time. The thought of a man sleeping in Joan’s bedroom might be offensive to her, prompting her to decline renting her apartment to men; Joseph, a member of the Jewish faith, might be offended by a Catholic dining in his dining room, given dietary concerns; François, a sovereignist, might find the idea of a federalist using his study intolerable; Paul, a Catholic, might feel that renting his own apartment to a gay couple might somehow taint his bedroom and doom him to hell. All, undoubtedly, are prejudicial attitudes. Yet it could be argued that imposing a legal duty in these cases to ignore prejudice might constitute a harm in itself, given the centrality of one’s home to one’s identity. One could, perhaps, equate the renting of one’s own home to providing personal services, which are arguably exempted from the duty to provide equal services.


185. At a certain point a sale of a house amounts to a sale of stock, if the seller is in the business of selling houses.

186. However, if such a line were drawn such that all property other than the domicile itself of the landlord (and perhaps the domicile of one’s parents or children), were considered commercial, the dissonance created might be minimal. The special case of the person renting out her own apartment might be seen as a transaction flavoured with familial (or associational) essence, rather than a purely commercial enterprise. As such, the liberty to associate (or not to associate) might trump equality demands. It should be noted that it is not clear whether such an approach is identical to the one adopted by the human rights code. For example, the Alberta human rights code does not differentiate between the commercial and accidental rent provider. However, s. 11.1 of the IRPA states that “[a] contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened shows that the alleged contravention was reasonable and justifiable in the circumstances.”
autonomy is affected by the recognition of other members. Conversely, each member is both fully autonomous and under an obligation to respect the autonomy of others, which by definition means that each member is less than fully autonomous.

A community of abstract agents, organized solely around autonomy-based abstract rights, is therefore not necessarily the best conceptualization of the entire sphere of social interaction between individuals. The move from an abstract rights-based community to a concept of civil society in which moral agents are permitted to assume status-based obligations towards other members of the community allows for mitigating some of the aforementioned tension, without replacing the theoretical foundation of rights and without eradicating abstract rights-based private law. At their core, status, and status based obligations provide a social structure through which moral agents assume obligations towards (specific or non-specific) members of the community. These obligations entail recognition of the desires of other members of the community as an aspect of their moral agency.

The professional status is a complex social unit through which agency can be situated in a community. It contains a code of behaviour which flows from the service around which the profession is organized. In the case of professions organized around the provision of goods and services irrespective of the contextualized characteristics of the customers (or those seeking to become customers), the code of behaviour includes an obligation to ignore such characteristics, that is, an obligation to strip a customer from part of his or her contextualized characteristics, and treat him or her solely as a customer. A member of a non-individual profession, acting in her capacity as such, is expected to treat her customers in the same manner she expects her customers, and other members of the community, to treat her: stripped of any characteristics irrelevant to the provision of goods and services around which the profession is organized. The status-based obligations restrain the freedom, or autonomy, of the provider of certain goods and services to pick and choose her customers because such restraint allows for a social sphere of interaction where the tension between the autonomy of the provider and the recognition of all members of a community as deserving equal respect is mitigated. The professional status, including the obligations which flow from this status, provides the civil society with a more coherent structure of interaction because it recognizes that the exercise of autonomy takes places within an embodied community. Thus, it places upon the autonomy-based rights of the professional an obligation to exercise these rights in a manner consistent with the idea of a community, where other members seek to exercise their autonomy-based rights. Philosophically speaking, given the demand to respect other people’s membership in the community, this structure can be seen as approaching the exercise of autonomy-based rights in a community as an aspect of human dignity, common to all.

187. For an Hegelian critique of the Kantian paradigm see Brudner, supra note 97. The notion of status builds upon Brudner’s exposition.
188. Marriage is an example of assuming an obligation to specific members of a community. Marriage provides a couple with the tool through which to express their recognition for each other not merely as agents free to pursue their own goals. The unit provides a structure under which each married person is expected to take into consideration the wellbeing of his or her spouse. As a result, familial obligations may trump individual property or testimonial rights.
It should be noted that the professional status, as any status, should be seen as replacing autonomy, or abstract rights. For the status to be a coherent part of a rights-based civil society, the individual must retain choice whether to enter a status and whether to depart. Furthermore, coding respect for the dignity of others into professional behavior does not mean that individuals are conceptualized as means to an end (the end being preserving the dignity of others). That is so because we do not interact solely in our capacity as members of non-associational professions. As mentioned above, some vocations are associational. Moreover, we also interact outside our capacity as members of a profession. The professional status, as with other status, does not cover civil society in its entirety, and does not consume or replace autonomy. It does, however, provide a structure consistent with autonomy-based rights as part of a community of moral agents.

In that context it should be stressed that the duty outlined here addresses taking into consideration the characteristics of a customer (or a prospective customer), that is, his or her identity or group membership. It does not address taking into consideration other aspects of the interaction, such as the essence of the service requested in particular circumstances. Thus, a nurse may not take into consideration the race or gender of a person requesting medical services, but as a moral agent she may refuse to assist or participate in an elective abortion which she may perceive as an unjustified termination of human life. An individual providing printing services may not take into consideration the sexual orientation of his customers, but, provided he is not operating under monopolistic conditions, the duty advanced here does not bar him from opting not to print certain materials, the content of which contradicts his faith.189 In other words, the legal obligations which flow from one’s professional status do not fully replace agency and do not fully relieve professionals from the moral consequences of their actions.190 Such obligations, however, legally restrict the considerations professionals may consider as professionals.

It should further be noted that approaching the duties owed by the provider of a public service to a prospective customer as status based is compatible with the corrective nature of the common law. Access to the service is not viewed as a type of social good to be distributed equally. Rather, this model expands the form of corrective justice to include the ‘public’ elements of the civil society. More specifically, this model suggests that the shift from the state of nature to civil society

189. Cf. Brillinger and the Canadian Lesbian and Gay Archives v. Brockie, (29 September 1999; 24 February 2000) BI-0179-98 (O.H.R.B.), where the Ontario Human Rights Board decided to the contrary, without distinguishing between taking the identity of a customer into account and refusing service so as not to take part in, or be associated with, a commission of what one’s religion sees as a sin. Placing the printer under a duty to provide printing services in these circumstances may be problematic because such a duty coerces the printer to commit a certain act or associate with a certain cause against his will as an autonomous agent. In order for such a coercion to be justified in law, we have to locate the source of such a duty. This paper suggests that professional status may be a source of a duty to provide equal service upon request, because the profession is organized as non-associational, or non-individual, and therefore as a professional, the printer may not take the group-based identity of his customers into account. Further analytical work is required in order to establish a duty to provide a service irrespective of the nature, associational or other, of one’s actions.

includes not only the establishment of an adjudicative system, which allows the actual existence of rights, but also the establishment of legal status. We may recognize the status of citizenship, the status of family (i.e., the institution of marriage) and the status of a profession, each including an element of initial choice, but each restricting choice with respect to the bundle of behaviours and the legal consequences entailed by the status.

Civil society, then, enriches human life by allowing one to act in one’s capacity as a member of a profession, and at the same time places a certain host of obligations, or standards of behaviour, upon members of certain professions. The concept of a profession is ‘public’, in the sense that it exists, or is meaningful, only in a civil society. It is also ‘public’ in the sense that members of the general public may rely on adherence to standards of professional behaviour by members of the profession who hold themselves out in their professional capacity. Some professions are further ‘public’ in the sense that they are organized around a non-associational transaction, namely a transaction which does not involve the ‘private’, or individual, characteristics of the two interacting parties, but rather sees the member of the non-associational profession and her customer as abstract moral agents, and thus fellow members in the civil society.

It is both towards the profession and towards each and every member of the community of moral agents, or the civil society (the rem), that the member of the profession owes his duty to adhere, when acting in her capacity as member of a profession, to the standards that define the profession. By interacting in his capacity as a member of a profession, by holding himself out as a professional, the member of the profession assumes the responsibilities that are integral to the profession. These responsibilities are directed both toward other members of the profession (and the profession in general) which are affected by the behaviour of each member, and toward members of the community who rely on adherence to that which defines the profession. Consequently, a member of the public who expresses desire to contract, according to the standards of the profession, with a person holding herself out as a member of a non-associational profession, acquires standing to demand that the member of the profession be faithful to the raison d’être of the profession. A member of a non-associational profession who refuses to be faithful to the raison d’être of the profession by taking into consideration the irrelevant group affiliation of the prospective customer and refusing service breaches his duty to act according to his or her undertakings. The person who has relied on the public undertaking of the professional, i.e., on the professional holding him or herself out as a member of a non-associational profession, and was refused service, has a right to turn to a court of law in order to correct the breach of duty toward her.

It is perhaps worthwhile to unpack the self-contradiction that occurs when a member of a non-associational profession breaches his duty to adhere to the standards of behavior that define the profession and refuses service on account of a prospective customer’s race, religion, sexual orientation or other such group-based characteristic. By refusing to transact for these reasons, a member of the non-associational profession may be denying his own capacity to interact as a member of a non-associational profession, thereby denying his membership in the community.
of moral agents (who, as a general matter, have the capacity to interact as individuals and in their capacity as citizens, professionals, married people or representatives of the state). Yet one may not deny oneself such membership and still claim to be a moral agent, as entailed by the claim that one is entitled to choose one’s customers freely. Alternatively, by refusing service based upon irrelevant characteristics, the professional may be denying the membership of the person whom he refuses to serve in the community of moral agents. Yet by denying his fellow human being’s membership, the professional in effect also denies his own, since membership flows from moral agency, shared by all. A third option is that the refusing professional may be denying the raison d’être of the profession. But one may not deny the raison d’être of one’s profession and still hold oneself out as acting as a member of such a profession. That is, one may dispute, as a factual matter, whether a certain profession includes certain constitutive elements, but once a court of law has determined what a profession is organized around, one may not claim to act as a member of a profession and at the same time dispute that the profession indeed exists. Lastly, the refusing professional may be denying the existence of civil society at large, suggesting that we are still in the state of nature. But challenging the existence of civil society involves challenging the authority of the courts and the very existence of the concepts of rights and duties. Since the member of the profession is seeking to contract, he puts himself in a contradictory position if he challenges the institution of contract which is meaningful only in a civil society, where there is a court of law to crystallize (i.e., pour content into) and enforce rights and obligations, including the right to contract.

It should be noted that the harm caused by the breach is not confined to the value of the service refused. Each facet of the challenges articulated above includes a certain type of harm, which could be conceptualized as dignitary harm, since it threatens the embodiment of human dignity that ought to be enjoyed by all members of the community as moral agents. Each facet suggests that some members of the community are in fact lesser members. Severing one’s standing in the community, as hurting one’s good name or reputation, requires a remedy, since it injures an aspect of personhood similar to hurting one’s psyche, body or property. It is through our membership in the community of moral agents that we define ourselves and express the embodiment of our human dignity. Thus an action that cannot but entail the dilution of our belonging to the community of moral agents, done in a breach of the standards of behaviour one undertakes to uphold towards the members of the community, is injurious, and ought to be remedied in law.

However attractive the qualified return to the ancient concept of status-like professions might be, its limits, in the context of this inquiry, must be recognized. While this rationale may cover the duty not to discriminate (and perhaps, as a derivation, the duty to charge only a reasonable price, so as not to exclude the poor), it fails, much like previous justifications presented, to fully capture the legal reality.\footnote{191} The
logic of this rationale rejects the distinction between the three distinct islands and the rest of sea, or at least reverses the exception and the rule by conceptualizing freedom to associate as a distinct exception within the sea of professional duties. Those who have had the privilege to partake in arguing a case in court realize that while it may be commendable to suggest a rationale that calls for reconceiving settled conceptions in an academic paper, it might be more problematic to argue such a rationale before the court, especially given that the outcome of such an argument amounts to a major, and perhaps controversial, change in the way we approach the scope of such fundamental principles as freedom of contract.

Yet if this model is in fact more consistent with the basic principles of the common law (if not with the very idea of a common law community), then the length of the journey should not inhibit the first steps. Indeed, the trend in U.S. and British jurisprudence is to move away from the three islands to a broader understanding, resting on the nature of the profession as non-individual and on the reciprocity between members of the profession and the public.

D. Freedom of Contract—Conclusion and Suggested Reconception

The purpose of this paper was to demonstrate, through detailed common law analysis, that the presence of a human rights code should not bar access to the common law and that, early 20th-century decisions notwithstanding, the common law, once engaged, does not allow certain kinds of discrimination. A mapping of the common law of contract reveals a body of law which limits the power of certain professions not to contract. More specifically, it limits the legitimate reasons for not providing service. Group-based characteristics—regardless of whether these groups have been historically disadvantaged or are currently exposed to bias and prejudice—are not among such legitimate reasons. As a result, taking race, ethnicity, gender, religion and sexual orientation into account in the provision of at least some goods and services—those which are organized around interaction with the general public on a non-individual basis—can be viewed as unsupported in law. Furthermore, this body of law demands charging only a reasonable price, which means at a minimum that the price should not be so outrageous as to deny access to the service. It goes without saying that the provider is not at liberty to charge a reasonable price to some, and an unreasonable one to others.

We have seen, as did Holmes more than a century ago, that no single rationale

192. Similar claims were made with respect to the idea of contract in general. See Atiyah, supra note 47.
195. Oliver, Common Values in Public and Private Law; Oliver, Common Values and the Public-Private Divide, supra note 9.
196. O.W. Holmes, The Common Law (Cambridge, MA: Belknap Press of Harvard University, 1967 (1st ed. by Little Brown, 1881)). Holmes, unable to reconcile the cases based on the principle of the bailee’s responsibility, which he seems to have advocated, resigned to answer the quest
can fully capture this body of law as we know it. Therefore, either further rationales have to be elucidated, or the law, as it stands today, reflects a misunderstanding of the underlying principles, or at least has remained frozen around inapplicable rationales. A third possibility is that searching for only one rationale to capture all three islands is ill-conceived, since, as with life, law is hardly reducible to a single governing principle. For example, Professor Bogen, in his detailed account of the development of the law of the innkeeper, demonstrates the wide spectrum of factors that could have influenced the emergence of the host of duties imposed on the innkeeper, ranging from the social conditions that followed the black plague and the structure of jurisdiction of the different English courts in the 14th and 15th centuries.\textsuperscript{197} It would thus seem that some of the peculiarities of the existing law are a result of factual situations which demanded application of more than one rationale. Similarly, some of the judicial conclusions were likely influenced by the background of other aspects of the law as it stood at that time.\textsuperscript{198}

Nevertheless, according to the concept of the common law to which this paper subscribes, the interpretative method around which the common law is organized demands that we try to make sense of past case law and try to present a coherent structure in which the legal principles are consistent. Therefore, while conceding that the common law, as it now stands, contains more than one clear doctrinal blueprint, this paper suggests that an ideal type of the common law would include recognition of the ‘public aspect’, or impersonal dimension, of the profession. It seems that from the foregoing survey of the law and the analysis of the justifications behind the law, there emerges a possible coherent rationale. Interacting in one’s capacity as a member of a certain profession—one which is constructed around non-individual transactions with members of the public—entails the assumption of responsibilities integral to that profession, including a non-discrimination norm. In that respect, entering a profession is akin to assuming a certain status, that is, accepting a set of duties and obligations. It is submitted that this rationale goes a long way to capture the normative reality, or at least the path of development. It explains early common law cases as well as the trend of modern law. It enriches the pre-contractual analysis of the respective powers of the provider of goods and services customarily available to the general public and a prospective customer by being informed by the proximity which exists between these parties as members of the same community (the common law community).

Conceptually, this approach contextualizes freedom of contract when exercised by members of a profession, acting in their capacity as such. This contextualization

\textsuperscript{197} Bogen, \textit{supra} note 125.

\textsuperscript{198} When rejecting an analogy between an inn and a theatre, Bossé J. must have had in mind not only the perceived difference regarding the ‘necessity’ of these services, but also the effect of analogy: placing a theatre under a duty to serve (an inn doesn’t close at night: \textit{Ivens, supra} note 56, a ferry must be available at all reasonable hours: \textit{Gravesham, supra} note 56); making a theatre liable for goods lost, etc.
allows us to better understand the legitimate expectations a member of such a profession faces in carrying out her non-individual business and therefore might illuminate the limits of his or her freedom to pick and choose his or her customers. More specifically, the concept of acting in one’s capacity as a professional might limit the relevant considerations one is entitled to consider when practicing one’s vocation vis-à-vis the community at large. In analytic terms, the idea of ‘acting in one’s professional capacity’ is an expression of abstract moral agency in the sense that a particular professional is expected to carry out a set of duties any rational agent would ascribe to a certain profession. Furthermore, this rationale is compatible with the corrective structure of the common law. It does not view access to service, or equal opportunity, as a social good. Rather, it views it as integral to the relationship between the provider of certain goods and services, and her customers, including those expressing the desire to become customers.

While restricting choice—a member of a non-individual profession cannot pick and choose which part of the professional responsibility he seeks to follow and which to disregard—this paradigm does not replace individual liberties with communal interests. While taking account of the community, or the ‘common’, presupposed by the common law, the paradigm does not unduly subsume the individual moral agent into the whole. It allows freedom in choosing one’s vocation, and it limits one’s freedoms in pursuing that vocation only as much as these limits are integral to the vocation itself. Furthermore, it recognizes that some professions are in fact organized around identity-related interactions, and thus it tolerates some instances of discrimination. In short, it is submitted that the concept of a profession as a certain kind of status, and its relations to moral agency and the community, proves a promising start for our understanding of the basic principles of the common law, freedom of contract and its limits.

This approach rejects discrimination as a matter of corrective justice, or more accurately, an expanded notion of corrective justice. This is in distinction from human rights codes, which are distributive in nature. The codes typically approach equal opportunity, or equal access, as a certain social good, to be allocated in a certain manner. Therefore, groups which were denied access in the past have to be

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199. Analytically, such legitimate expectations may be conceived of as part of a ‘larger contract’ between the profession and the community, with respect to the use of public elements by the profession, be these public elements concrete goods or the legal power to address non-specific members of the community. Viewed differently, such expectations can be seen as derived from the essence of the profession, quite like the expectations of due diligence and other professional standards.

200. As mentioned above, such a classification takes seriously the notion of a profession as possessing inherent requirements on the manner in which the profession is being pursued. These requirements are not arbitrary, as they could be shown to derive from the raison d’être of a profession being ‘common’, directed at the ‘public’, or non-individual. A person holding herself out as professing such a vocation is seen as publicly declaring the assumption of some responsibility to the profession itself. Hence, the professional owes a duty to members of the community to provide equal service as part of meeting a certain standard of practicing a profession. Such a standard, in professions defined around non-individual service, does not tolerate discrimination, or refusal to serve based on irrelevant characteristics. Such a return to the idea of a profession (and virtues/responsibilities thereof) is consistent with a long tradition within the common law. This is the essence of Haar and Fessler’s book, supra note 9.
identified, and spheres of interaction where opportunity was denied have to be enu-
merated, so as to allow a more just distribution of opportunities. In contrast, this paper suggests that discrimination can be conceptualized as a breach of one’s duties, assumed upon entrance to certain professions, and relied upon by members of the public who seek to purchase the goods and services around the provision of which the professions are organized. This approach is not strictly private, in the Weinribian sense, because it is dependent on the ‘public’ nature of a profession, that is, the profession as a status in civil society, rather than on the actual contractual transaction between two private individuals. The approach advanced here ascribes in rem characteristics to acting in one’s capacity as a member of a profession: one assumes certain duties and obligations towards any and all members of the community by holding oneself out as a member of a non-associational profession.

Cases of monopoly, or services which are deemed necessary, serve as acute cases in which the proximity between members of the profession and members of the public is imbued with such an imbalance of power, the abuse of which may lead to such a harm, that the common law has placed stringent duties on the providers. Prominent among these is the duty to serve, i.e., the lack of liberty to decide not to provide service on any given day for no reason. However, the absence of monopolistic conditions or necessary services should not cause us to ignore either the proximity between members of non-individual professions and members of the public, or the inconsistency inherent in allowing members of such professions to discriminate. This kind of inconsistency undermines the very profession in the name of which its members act.

The emerging categorization, under such an understanding of common law jurisprudence dealing with duties imposed on providers of goods and services, would yield three types of goods and services: those deemed necessities, or those provided under monopolistic conditions; those common to all, or public, i.e., lacking an individual nature; and those which are individual, or associational, resting

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201. In this respect, this paper suggests that Hohfeld’s attack on in rem rights was too expansive. While Hohfeld is correct in suggesting that in rem rights always materialize in adjudication between two particular individuals, and therefore play out in adjudication as in personam rights would, the analytical foundation is different, once we appreciate the necessary proximity that is required for the application of in personam rights, which does not require a ‘public’ element, and the structure of in rem rights, which requires some public element as a broker between the holder of the in rem right and the person subjected to correlative duty which flows from the right. See W.N. Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26 Yale L.J. 710.

202. The monopoly may not necessarily extend to goods and services which otherwise would be essential, but nonetheless, the monopoly [de jure or de facto] carries with it a duty to serve all. Cf. City of Levis, supra note 64. For the development of the law of public callings see Wyman, supra note 108. For the use of the concept of monopoly in U.S. common law jurisdiction see Falcone, supra note 172; and in the context of discrimination against minorities see “Note”, supra note 9.

203. This category may cover most of modern commerce, as its source is the nature of the entity as one which “held [itself] out to serve the public generally, making that [its] business”: Burdick, supra note 49; Adler, supra note 50; Molot, supra note 9. For U.S. cases broadening the common law duty to serve (without necessarily extending the stringent liabilities for reasonable prices, stolen goods and the like) see examples in “Note”, supra note 9 at 1998, such as restaurants, gasoline stations, home builders and even places of amusement, such as casinos.
on the unique identity and characteristics of the clientele, and/or its relationship with the provider.204

If such a classification is accepted, it is submitted that the legal regime which should apply to each category is as follows:

i) With respect to businesses providing ‘true’ necessities or operating under monopolistic conditions,206 the provider must render, upon request, adequate service to all and must charge only a reasonable price, or relinquish its position.206

ii) The law with respect to the second group—‘those businesses which are deemed common to all’—should be that the provider may refuse a request for service if a relevant cause is found.207 One such cause may be that the provider has decided not to engage in business on a given day (unlike the monopoly or prime necessity provider, where such a decision is unacceptable). Another such reason may be commercial—that the specific customer has a bad credit history (whereas with monopolies or the provision of prime necessities, such commercial considerations might be unacceptable).

204. This category includes those businesses and services which do not hold themselves open to the general public, but which are centred around association, such as private clubs, or familial associations. In addition, the category includes goods and services in which the provider invests part of his or her personality, as is the case of contracts for personal services, such as singing, or performing art and the like, which constitute part of the very identity of the performer, above and beyond the commercial interest involved. In a sense, one could claim that these belong to a private sphere, and are thus governed by *jus privat* (see Hale, quoted in *supra* note 76), based upon the liberty to pursue one’s happiness (See Coke, *supra* note 44 Coke, inst. 2.47).

205. Such true necessities, in modern days, should include basic public utilities (water, electricity, gas) and health services, without which actual life might be in peril.

206. *Browne, supra* note 58. As for the prices, not only must they be reasonable, but the provider is liable for damage to the customers’ goods once under her hospices (and if she falsely refused to accommodate, even if lost or stolen outside her hospices: *White’s Case, supra* note 55). In other words, the common law regulates these necessities to a great extent, seeing them as part of a profession which ‘belongs’ to the community (*Parker v. Flint* (1699), 12 Mod. Rep. 254, 88 E.R. 1303). Very few reasons are considered ‘reasonable grounds’ for refusal to serve. Among them are a full house (“For he is bound to receive all manner of people into his house till it be full” said Holt C.J. in *Lane, supra* note 61) and indecency, drunkenness and improper behaviour of the guest (*Ivens, supra* note 56, but see *Scrivenor v. Reed* (1858), 6 W.R. 603, stating that pursuant to misconduct an owner may remove a guest from a particular room, but not from the house altogether).

207. The businesses under this category may consider broader factors in their decision as to whether to engage in a transaction with a specific individual. For example, a licensee of a pub (which is not an inn) may assess the likelihood of a future disorder and if he finds a fight likely, or if he finds the individual customer to be troublesome, he may eject the customer, even if disorderly conduct has not yet begun. (*See Sealey v. Tandy*, [1902] 1 K.B. 296). Had this been an inn, the owner would have had to wait until disorder actually started. U.S. jurisprudence suggests that the racial identity of the customer may not be such a relevant consideration (“the colored man, under the common law of this State, is entitled to the same rights and privileges in public places as white man”: *Ferguson v. Gies*, 82 Mich. 358 at 365, 46 N.W 718 at 720 (1890)). In Canada, Bossé J. left the question open in *Sparrow, supra* note 109 at 383, and Martin J. in *Lowe’s, supra* note 42 at 466 commented that it might be unlawful to exclude persons of colour from the equal enjoyment of all rights and privileges in all places of public amusement. (It should be noted that Martin J. distinguished between total exclusion and using group-based characteristics to assign seating). As distinguished from the law regarding common callings and monopolies, the business may decide to ‘close up shop’, and it is not clear whether it should be subjected to the ‘reasonable price’ requirement (provided price is not a proxy for group-based discrimination, i.e., charging higher prices to minorities) or to the liability to guard customers’ goods.
However, group characteristics as such are not a reasonable ground for refusing service, since there could be no support in the ‘inner logic’ around which the profession is constituted to support such a refusal. On the contrary, recognizing the reciprocal relationship between the profession and the community might substantiate a duty, owed by the profession, to accept the community in its entirety—minorities included.

iii) The law with respect to the third group of goods and services, organized around associational or a specific, creative relationship, is the classic ‘freedom of commerce’ scenario. The provider and its clientele are at liberty to consider every factor, relevant or not, prejudicial or not, and to decide whether to provide service. In these cases, the provision of the service is integral to the freedom of association or to self-identification which the common law cannot alienate.

While this reclassification of the law is consistent with common law jurisprudence, as well as with scholarly writings, it is difficult to assert with a reasonable

208. It should be noted that a justification for exclusion based on loss of clientele (“I have nothing against blacks, but if I serve blacks I will lose business, because people will go elsewhere”) misses the point. Either the profession is considered non-associational, in which case there will be nowhere else to go which does not serve blacks, and therefore no credible loss of business could be shown, or the profession is considered associational (i.e., sensitive to the group-identity of the customers) in which case the duty wouldn’t apply, and the organizational structure of the profession would be club-like. The idea that a profession could be associational to some but non-associational to others again misapplies the term ‘profession’: either a restaurant is about serving food to the general public for profit, or it is about providing an environment for people to associate with their friends as they eat, in which case it should be organized as a club, with membership requirements, size limits and the like.

209. This rubric of the law captures what may be termed as ‘personal services’ (for which special performance is rejected—see Halsbury’s Laws of England, vol.9(1), 4th ed. (London: Butterworths, 1980) “Contract”), or transactions to which the identity of the provider and the customer is important, as may be the case in the paradigmatic case of a contract. See Atiyah, supra note 47. See Keilway (1503), 50 Pl. 4, 72 E.R. 208, where the Court stated that “where a carpenter makes a contract to build a house and does nothing, the action against him lies not on the case but it sounds in contract”; implying that there is no duty on the carpenter to provide his services without an explicit contract, which he may or may not enter into. For associational rights in general see Rossi, supra note 182.

210. The reasons for that are twofold. First, the common law draws, at least to some extent, its legitimacy from acceptance, hence from moral reasoning, formed via moral interaction within associations. Full control over such associations obliterates the necessary freedom to form values. Second, the common law could be seen as drawing its legitimacy from the concept of human dignity. Integral to the concept of human dignity is the sphere in which one may form moral values, associate and interact with people of one’s choosing or liking. Subordinating the human dignity of A, who wishes not to include B in the association, to the claim of B who wishes to force association, amounts, unless the association is in some way ‘open to the public as such’, to the subordination of the dignity of one to the dignity of another, which is repugnant to the very idea of human dignity. This does not entail granting full control to A regarding his property rights, as will be discussed below, but it does suggest that the state might require further justification before it disallows A from forming a club with people of his choosing.

211. Haar & Fessler, supra note 9.

212. Singer, supra note 9; Molot, supra note 9; Oliver, supra note 9; Burdick, supra note 49; Taggart, supra note 9; Haar & Fessler, supra note 9. It should be noted that each of the writers presents a different model for analysis, and therefore would reach a slightly different articulation of the governing categories. Yet it would appear that all the aforementioned writers challenge the assumption that retail store owners, or restaurateurs, may discriminate against their customers or prospective customers along group-based characteristics such as race.
degree of confidence that this principle accurately reflects the current state of the law. Given the legislative intervention in the form of human rights codes, it could be argued that the development of the common law has been delayed, if not frozen. It is perhaps time that courts of general jurisdiction revisit the common law, in order to further elucidate governing principles.

Should the reconception of professional duties under the common law suggested above be adopted, how can we explain Christie,213  Franklin214 and Loew’s?215

One reply would simply state that no explanation is needed—these cases were wrongly decided. The court misapplied the common law method of arguing from principles and chose to ignore the search for the principles underlying the duty of non-individual professions to provide equal service. Alternatively, the court misapplied contract doctrine, as it failed to find a binding contract that was in fact established in each of these cases.216

A second response would suggest that the court failed to correctly categorize the cases of restaurants and theatres as non-individual, or non-associational, businesses. Instead, perhaps the court incorrectly assumed that these were associational establishments, and therefore applied a principle of freedom of association (although terming it freedom of commerce). Our sociological understanding today would lead us to conclude that while people indeed associate in restaurants and amusement establishments, the raison d’être of these establishments is to provide service to all (i.e., to make profit). There is nothing in the logic of the business itself that calls for attending to one group identity feature or another: restaurants are about food, service and decor. While a restaurant may institute a dress code, issuing a regulation that only Whites, or only Jews, or only Canadians are ‘allowed’ requires the establishment to transform itself into a club, organized, if identity really matters, around specific membership. Clearly, such was not the case of the tavern in the Forum in Montreal, nor was it the case with Evans’ restaurant. Loew’s is a slightly different case,217 as it involves segregation, not total exclusion. However, the criticism still stands. Either the theatre is organized around association or around provision of a non-individual service to the general public.218

In conclusion, it should be repeated that the common law of contract and

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213. Supra note 2.
214. Supra note 1.
215. Supra note 42.
216. Arguably, Mr. Christie had ‘struck a bargain’ by asking for 3 glasses of beer and presenting adequate money in a tavern open for business. Likewise, Mr. Franklin had done the same by asking for a luncheon in a restaurant (presumably relying on the menu). Mr. Reynolds could be held as entering into a contract for general admission to a show, as specifically stated by his ticket. The theatre could not have relied on a condition on the back of the ticket that “all privileges might be revoked by the management”, as this condition could not be construed to include unreasonable cancellation (see dissent by Carroll J. at 461-62). Hence the house segregation rule did not apply to Mr. Reynolds, even though he knew about it, since it was not part of the offer and acceptance.
217. Another aspect of Loew’s, supra note 42, was its staging as a test case. At least one judge found that such a stage does not warrant the sympathy of the Court.
218. An interesting question might be whether a theatre can put in place a ‘black/ white/ male/ female/ Jewish/ Catholic/ heterosexual /homosexual night’, in which only members of these identity groups are allowed. Perhaps one could answer in the positive, provided that ‘general’ nights were offered too, and that the price and quality of the shows were the same for all.
Professional Status and the Freedom to Contract

pre-contract provides at least a starting point (if not more), from which to address the issue of discrimination in the provision of goods and services customarily available to the public. It is no coincidence that the legislature chose that phrase—‘customarily available to the public’—for the human rights codes. It represents an idea that some services are indeed ‘general’ or ‘common’. It alludes to the idea of ‘custom’ as an important ground. As we may recall, the old cases about professional responsibility rested on the custom of the realm (action on the case),\(^{219}\) since the contractual paradigm was not available (at first) or was found inapplicable as the law of common callings developed. Furthermore, it is no coincidence that several U.S. state courts have “rejected the arbitrary distinction”\(^ {220}\) between the three common callings mentioned above and other ‘public accommodations’ such as restaurants,\(^ {221}\) gasoline stations,\(^ {222}\) hospitals\(^ {223}\) and home builders.\(^ {224}\) Places of amusement, such as a casino, were captured as well,\(^ {225}\) and scholars suggested that the U.S. courts should also recognize a duty not to exclude applied to retail stores.\(^ {226}\)

The analysis above suggests that group-based prejudice can be restricted at common law with regard to both heads of discrimination (the provision of goods and services customarily available to the general public, and employment). However, when prejudice is exhibited in the exercise of one’s agency in the associational sphere, such as in the forming of a club, a family business, or renting out one’s own domicile, it has been suggested here that the law, and therefore the court, is not at liberty to demand respect for the community by enforcing coercive sanctions.\(^ {227}\) Such enforcement, even had the legal process been immaculately precise, infringes, in the name of one person’s human dignity, upon the dignity of another, given the crucial role association plays in the very forming of actual (as opposed to abstract) agency.

It should be noted that the approach suggested here departs from the one adopted by Wilson J.A. (as she then was) in Bhadauria. The analysis here does not attempt to create a comprehensive tort of discrimination in a single, sweeping stroke. Rather,

\(^{219}\) See Gibson, \textit{supra} note 30, celebrating the ‘action on the case’ as developed by the Ontario Court of Appeal in \textit{Bhadauria}.

\(^{220}\) \textit{“Note”}, \textit{supra} note 9.

\(^{221}\) \textit{Harder}, \textit{supra} note 128.


\(^{223}\) \textit{Leach v. Drummond Medical Group, Inc.}, 144 Cal.App.3d 362 at 373, 192 Cal.Rptr. 650 at 657 (1983) basing a duty to provide equal service on virtual monopoly.

\(^{224}\) \textit{Beech}, \textit{supra} note 164 at 435-36, 157 N.W.2d 213 at 227-28.

\(^{225}\) \textit{Uston v. Resorts International Hotel Inc.}, 89 N.J. 163, 445 A.2d 370 (1982), in effect overruling \textit{Garifine}, \textit{supra} note 174, which held that since a racetrack was a private enterprise it could exclude any would-be patrons.

\(^{226}\) \textit{Singer}, \textit{supra} note 9.

\(^{227}\) Cf. S.C. Coval & J.C. Smith, “Compensation for Discrimination” (1982) 16 U.B.C. L. Rev. 71, esp. at 98-100. The authors attempt to identify clashes between ‘fundamental rights’ and less fundamental interests, suggesting that the interest of a restaurant owner as to the identity of his patrons is less fundamental than the interest of a landlord as to the group identity of her tenants. I failed to fully grasp the reasoning provided in support of such a distinction, as well as those presented to support a distinction between the proper enforcement mechanisms in these two situations. As mentioned, the approach suggested here does not accept categorical differences between the types of interactions. However, as a matter of theory, both the approach suggested here and that adopted by Coval and Smith recognize the centrality of human agency.
the approach taken here attempts to situate discrimination in relatively defined areas. As such, this approach is an incremental one, addressing one case at a time. Moreover, this paper acknowledges that not all prejudicial behaviour automatically gives rise to a tort, as exemplified by recognizing the associational sphere as generally outside the scope of such duties at law.

Beyond the substantive analysis, the thrust of this paper is that, in dealing with matters not covered by a human rights code, common law courts could contribute to the conceptualization of what constitutes discrimination, thereby joining the fight against discriminatory practices. The analysis of Bhadauria advanced above suggests that access to common law courts is not necessarily closed, given the relative position of the common law as a default legal regime, which draws its legitimacy from the idea of reason. Moreover, the analysis of the common law in its entirety suggests a certain kind of proximity between a prospective customer and a member of a non-individual profession, so as to give rise to certain kinds of duties in the provision of goods and services customarily available to the general public. It is therefore argued that when confronted with grounds not covered by the human rights code, the common law legal regime is, and should be, engaged.

This paper may be seen, then, as a small step in the common law march, started some thousand years ago—a march which is not restricted to a single jurisdiction—to revisit the concepts upon which the common law is founded, as part of our professional duty to better understand the law and the tools it provides to ameliorate injustices.

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228. See discussion in Klar, supra note 34 at 393.

229. As mentioned above, further work needs to be done in order to fully outline the exact contours of a cause of action in tort which allows a plaintiff a remedy against instances of discrimination when proximity is established in non-associational, profession-based interactions.

230. Professor Richard Epstein, in the introduction to his book (supra note 193 at 7) writes that he has asked many people to refer him to any book or article that states in systemic terms the modern case for anti-discrimination law against the common law alternatives, and none has been offered. If my argument is correct, Epstein’s quest was misguided because the anti-discrimination principle is integral to a systemic understanding of the common law.