manitobaLawJournal

2018 Volume 41(4), Special Issue

Criminal Law Edition (Robson Crim)

PUBLICATION INFORMATION

ISSN 0076-3861
Cite as (2018) 41:4 Man LJ
Printed in Canada on recycled and acid-free paper.
Published annually on behalf of the Faculty of Law, University of Manitoba.
Annual Subscription Rate: Canada: $35.00 CDN; Foreign: $35.00 U.S.
Back issues available from: Manitoba Law Journal
4th Floor Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2
E-mail: lawjournal@umanitoba.ca

ACKNOWLEDGEMENTS

This issue has been supported by a major grant from the Social Sciences and Humanities Research Council program for Aid of Scholarly Journals.

The Manitoba Law Journal gratefully acknowledges the family of Shelley Weiss for the endowment of the Shelley Weiss Publications Office, which houses its ongoing operations at Robson Hall Law School at the University of Manitoba, and for the annual Shelley Weiss scholarship that is awarded to one or more student editors in their second year of our program.

We acknowledge the assistance and peer review administration of the editors and collaborators of www.robsoncrim.com/. For a list of our collaborators please visit: https://www.robsoncrim.com/collaborators.

We would also like to thank the *Manitoba Law Journal* Executive Editors for providing their endless support, constant encouragement, and expert editorial advice.

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INFORMATION FOR CONTRIBUTORS

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Manuscripts and communications should be directed to:
Criminal Law Special Edition (Robson Crim)

Richard Jochelson
Manitoba Law Journal
466 Robson Hall, Faculty of Law
University of Manitoba
Winnipeg, Manitoba R3T 2N2

Phone: 204.474.6158
Fax: 204.480.1084
E-mail: info@Robsoncrim.com

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Editors-in-Chief
Manitoba Law Journal
466 Robson Hall, Faculty of Law
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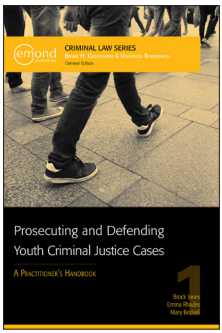

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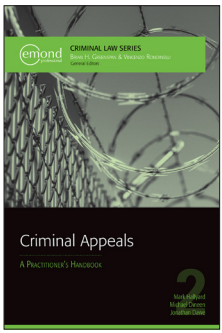

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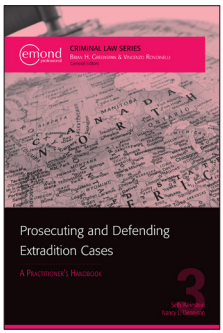

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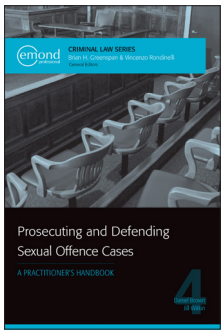

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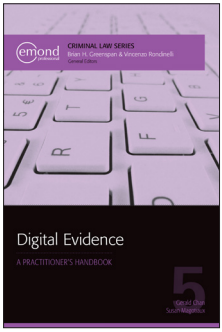

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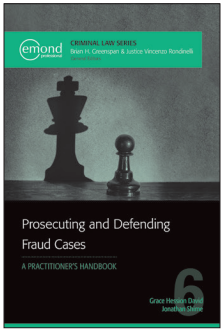

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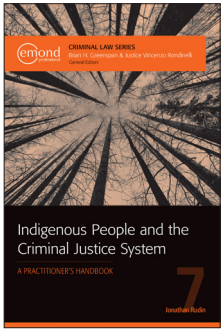

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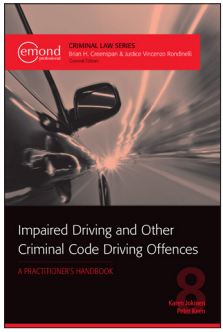

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2018 Volume 41(4), Special Issue

Criminal Law Edition (Robson Crim)

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Vulnerable Populations: Delay, Sentencing and Removal

The Judiciary: Disclosure, Exclusion, and Instruction.

Manitoba Law Journal and Robson Crim Call for Papers: Due February 1, 2019

The Manitoba Law Journal in conjunction with Robsoncrim.com are pleased to announce our annual call for papers in Criminal Law. This is our fourth specialized criminal law volume, though Manitoba Law Journal is one of Canada's oldest law journals. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. We are in press for volumes 41(3) and 41(4) of the Manitoba Law Journal and have published papers from leading academics in criminal law, criminology, law and psychology and criminal justice. We welcome academic and practitioner engagement across criminal law and related disciplines.

We invite papers that relate to issues of criminal law and cognate disciplines as well as papers that reflect on the following sub-themes:

- Intersections of the criminal law and the *Charter*
- Interpersonal violence and crimes of sexual assault
- Indigenous persons and the justice system(s)
- Gender and the criminal law
- Mental health and the criminal law
- Legal issues in youth court, bail, remand, corrections and court settings
- Regulation of policing and state surveillance
- The regulation of vice including gambling, sexual expression, sex work and use of illicit substances
- Analyses of recent Supreme and Appellate court criminal law cases in Canada
- Comparative criminal law analyses
- Criminal law, popular culture and media
- Empirical, theoretical, law and society, doctrinal and/or philosophical analyses of criminal law and regulation

We also are hoping to dedicate a section of this edition to: **Criminal Justice and Evidentiary Thresholds in Canada: the last ten years**. We invite papers relating to evidentiary issues in Canada's criminal courts including:

- Reflections on Indigenous traditions in evidence law (including possibilities);
- New developments in digital evidence and crimes;
- Evidentiary changes in the criminal law;
- Evidence in matters of national security;
- Thresholds of evidence for police or state conduct;
- Evolutions of evidence in the law of sexual assault or crimes against vulnerable populations;
- Evidence in the context of mental health or substance abuse in or related to the justice system;
- Use of evidence in prison law and administrative bodies of the prison systems;
- Understandings of harms or evidence in corporate criminality;
- Historical excavations and juxtapositions related to evidence or knowing in criminal law;
- Cultural understandings of evidence and harm; and
- Discursive examinations of evidence and harm and shifts in understandings of harms by the justice system.

Last but not least, we invite general submissions dealing with topics in criminal law, criminology, criminal justice, urban studies, legal studies and social justice that relate to criminal regulation.

SUBMISSIONS

We will be reviewing all submissions on a rolling basis with final submissions due by February 1, 2019. This means, the sooner you submit, the sooner we will begin the peer review process. We will still consider all submissions until the deadline.

Submissions should generally be under 20,000 words (inclusive of footnotes) and if at all possible conform with the Canadian Guide to Uniform Legal Citation, 9th ed (Toronto: Thomson Carswell, 2018) - the "McGill Guide". Submissions must be in word or word compatible formats and contain a 250 word or less abstract and a list of 10-15 keywords.

Submissions are due February 1, 2019 and should be sent to info@robsoncrim.com. For queries please contact Professors Richard Jochelson or David Ireland, at this email address.

THE JOURNAL

Aims and Scope

The Manitoba Law Journal (MLJ) is a publication of the Faculty of Law, University of Manitoba located at Robson Hall. The MLJ is carried on LexisNexis Quicklaw Advance, Westlaw Next and Heinonline and included in the annual rankings of law journals by the leading service, the Washington and Lee University annual survey. The MLJ operates with the support of the SSHRC aid to scholarly journal grants program.

Peer Review

We generally use a double-blind peer review process to ensure that the quality of our publications meets the requisite academic standards. Articles are anonymized and then, after editorial review, reviewed by anonymous experts. Occasionally the identity of the author is intrinsic to evaluating the article (e.g., an invited distinguished lecture or interview) and the reviewers will be aware of it. Articles are accepted with revisions, encouraged to revise and resubmit, or rejected.

This is an *open access journal*, which means that all content is freely available without charge to the user.

Towards a Crim Community – Here We Go Again

ANNA TOURTCHANINOVA AND BRENDAN ROZIERE

Robson Crim, Robson Hall's criminal law research cluster and Canada's criminal law blog (Robsoncrim.com), is now in its third year of operation. With the publication of our latest peer-reviewed volumes we have published over 30 refereed articles in the areas of criminal law, criminal justice and criminology. Further, having now partnered with almost 40 academic peer collaborators at Canada's top universities and law schools we have ensured a robust network of peer reviewers and have fostered a nationwide Crim community. This is a community that is evidenced by our publication of more than 250 blawgs,[1] with bloggers from across Canada, the USA and Europe.

Robson Crim has developed as a hub for national Crim research and now accepts many more submissions than we can accommodate. Further, we have recently tapped into the CanLII Connects system and are excited by the drive towards open access in legal scholarship and authorship. We have made connections with Emond Publishing who have graciously provided editorial assistance to us in these two latest volumes. Our commitment to open access publication, as well as our presence on the usual legal databases and Academia.edu contributes to making our resources easy

[1] See for example Leon Laidlaw, "A Meagre Outlook for Bill C-16: The Case of Transgender University Students" (19 June 2017), Robsoncrim (blog), online <https://www.robsoncrim.com/single-post/2017/06/19/A-Meagre-Outlook-for-Bill-C-16-The- Case-of-Transgender-University-Students>; James Gacek, "Judicial Dissensus is not a Disservice to Justice: The Importance of Dissent in the 'Court of Last Resort'" (5 June 2017), Robsoncrim (blog), online <https://www.robsoncrim.com/single-post/2017/06/05/Judicial-Dissensus-is-not- a-Disservice-to-Justice-The-Importance-of-Dissent-in-the-%E2%80%98Court-of-Last- Resort%E2%80%99 >; Rebecca Jaremko Bromwich, "Sex, Women's Mental Illness, and Videotape" (26 September 2016), Robsoncrim (blog), online https://www.robsoncrim.com/single-post/2016/09/26/Sex-Women%E2%80%99s- Mental-Illness-and-Videotape.

to access. As part of our commitment to advancing legal research and disseminating knowledge in the fields of criminal law, criminal justice and criminology, we present you, this year, with two additional volumes of the Criminal Law Edition of the Manitoba Law Journal.

Thanks to extremely insightful and valuable contributions, last year's special edition Criminal Law volume of the Manitoba Law Journal achieved a ranking in the top 0.1 percent on Academia.edu, amassing over 2500 downloads there alone. Similarly, Robsoncrim.com received over 3000 paper reads on the journal pages and the journal received thousands more downloads on the paid legal databases. From articles as diverse as Mr. Big operations,[2] bestiality law,[3] and the Tragically Hip in the context of wrongful convictions,[4] we achieved more readership than we could have expected. As part of our commitment to open access fundamentals, these and future pages will remain open and accessible on Robsoncrim.com, themanitobalawjournal.com, CanLII, Heinonline, Westlaw-Next, and Lexis Advance Quicklaw. Additionally, submissions from academics, readers, practitioners and students will continue to be considered, as these offer unique and important insights into the field of criminal law and cognate disciplines.

Indeed, the Manitoba Law Journal has a rich history of hosting criminal law analyses.[5] Yet, following the release of our last call for papers, we were overwhelmed with the volume of submissions for a special edition on criminal law. When we saw the quality of the work, we knew it would be appropriate to consider publishing two volumes. This year, after a significant increase in the number of submissions and an arduous double-

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2 Amar Khoday and Jonathan Avey, "Beyond Finality: R v Hart and the Ghosts of Convictions Past" (2017) 40(3) Man LJ 111.

3 James Gacek and Richard Jochelson, "'Animal Justice' and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada" (2017) 40(3) Man LJ 335.

4 Kent Roach, "Reforming and Resisting Criminal Law: Criminal Justice and the Tragically Hip" (2017) 40(3) Man LJ 1.

5 See for example David Ireland, "Bargaining for Expedience? The Overuse of Joint Recommendations on Sentence" (2014) 38 Man LJ 273; Richard Jochelson et al, "Revisiting Representativeness in the Manitoban Criminal Jury" (2014) 37-2 Man LJ 365; Amar Khoday, "R v Creighton Twenty Years Later: Harm versus Death Revisited" (2013) 37 Man LJ 162.

blind peer review process, we accepted and put together twenty papers into two special volumes, each containing three to four thematically organized sections.

The first section in this volume confronts issues of *Terrorism, National Security, and Transnational Crime*.

This section begins with Rebecca Bromwich's article, "(Where is) the Tipping Point for Governmental Regulation of Canadian Lawyers? Perhaps it is in Paradise: Critically Assessing Regulation of Lawyer Involvement with Money Laundering After *Canada (Attorney General) v Federation of Law Societies of Canada*". She discusses the Supreme Court of Canada's decision in *Canada (AG) v Federation of Law Societies of Canada*, and whether law societies truly have the capacity to combat money laundering in the legal profession.

Next, Jonathan Avey explores potential threats to Military Police independence in "Police Independence vs Military Discipline: Democratic Policing in the Canadian Forces". He argues that despite steps taken towards preserving police independence, the *National Defence Act* still contains provisions that make interference with Military Police investigations possible. To prevent such interference, he contends that several changes to the legislation are required.

Concluding the first section, in "The Problem of "Relevance": Intelligence to Evidence Lessons from UK Terrorism Prosecutions", Leah West discusses barriers to using intelligence information as evidence in criminal proceedings against known terrorists. Comparing Canada's rules of evidence to those of the UK, she highlights changes that Canada should adopt in order to address the "intelligence to evidence" problem and ensure that terrorists who return to Canada are brought to trial.

The second section, *Delay and Sentencing Vulnerable Populations*, tackles sentencing issues including due process and proportionality.

Keara Lundrigan opens the section in "*R v Jordan*: A Ticking Time Bomb". Commenting on the Supreme Court of Canada's recent decision in *R v Jordan* and the issue of trial delay, she argues that the ceilings set in *Jordan* are insufficient to meaningfully address trial delays. Further, she criticizes the Canadian Senate's recommendation to implement a system of costs, concluding that only larger reforms will successfully reduce delays.

Then Haley Hrymak provides her analysis of the courts' response to the fentanyl crisis in "A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers". Her

findings suggest that the courts have taken a punitive approach to sentencing fentanyl traffickers that focuses on deterrence, despite evidence that most involved are motivated by addiction.

Wrapping up the second section is Sasha Baglay's article, "In the Aftermath of *R v Pham*: A Comment on Certainty of Removal and Mitigation of Sentences". In *R v Pham* the Supreme Court of Canada held that immigration consequences may be considered by judges when deciding an appropriate sentence. Reviewing 63 sentencing decisions following *Pham*, Baglay argues that the courts have been inconsistent in their approach to doing so and makes several recommendations for a more structured framework.

The third and final section, *Judicial Fairness: Disclosure, Exclusion, and Instruction*, features four articles covering a broad range of issues for the courts.

Myles Anevich begins by examining three approaches to reforming American guilty plea disclosure obligations in "Disclosure in the 21st Century: A Comparative Analysis of Three Approaches to the Information Economy in the Guilty Plea Process". Noting the high number of guilty pleas and near non-existent disclosure obligations at this stage in the United States, he suggests that adopting a model similar to that used in Canada would be the most practical way to reform the system to protect the constitutional rights of accused individuals.

Then in "An Analysis of Third Party Record Applications Under the *Mills* Regime, 2012-2017: The Right to Full Answer and Defence versus Rights to Privacy and Equality", Heather Donkers analyzes Ontario Superior Court decisions on third party records applications in sexual assault trials. She finds that whether the record production order will be made depends largely on the deciding judge's focus on either the relevant provisions of the *Criminal Code* or the Supreme Court of Canada's guidelines for interpreting these provisions in *R v Mills*.

Patrick McGuinty provides an analysis of one-hundred cases involving the exclusion of evidence in "Section 24(2) of the *Charter*: Exploring the Role of Police Conduct in the *Grant* Analysis". Based on his findings, he argues that the police conduct inquiry plays the most important role for judges conducting the *Grant* analysis. Further, he contends that since "good faith policing" lacks a clear definition, this factor may be broadly applied; reducing the likelihood that a *Charter* breach will result in evidence being excluded.

The final article of this issue is Lisa A. Silver's "The *WD* Revolution", in which she explores the legacy of the Supreme Court of Canada's decision in *R v W(D)*. Reaffirming the decision's critical importance to Canadian jurisprudence, she covers the impact of the case that, in her words, "is synonymous with applying the reasonable doubt standard to the credibility assessment in a criminal trial."

Putting together a double volume was no small feat. We would like to thank our authors, who submitted highly relevant and thoughtful pieces of legal analysis, touching on fields of criminology, criminal justice and criminal law, amongst others. We would also like to thank our Robson Crim collaborators, and our peer reviewers,[6] all of whom helped put this project together for another round. The entire editorial team would like to extend an extra thank you to Rebecca Bromwich, Melanie Murchison, and James Gacek for their help and support, as well as to the Dean of the Faculty of Law, at the University of Manitoba, Dr. Jonathan Black-Branch.

Thank you for reading this special double volume of the Manitoba Law Journal's Criminal Law edition. We look forward to many more. We encourage you to peruse our latest call for papers in the pages that follow and at https://www.robsoncrim.com/call-for-papers-mlj.

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[6] Visit our collaborators at https://www.robsoncrim.com/collaborators. We thank our collaborators (new and old) including Sasha Baglay, Benjamin Berger, Michelle Bertrand, Steven Bittle, John Burchill, Erin Dej, Robert Diab, Ruby Dhand, James Gacek, Daphne Gilbert, Mandi Gray, Thomas S. Harrison, Chris Hunt, Adelina Iftene, Brock Jones, Rebecca Bromwich, Lara Karaian, Lisa Kelly, Lisa Kerr, Ummni Khan, Jennifer Kilty, Kyle Kirkup, Leon Laidlaw, Michelle Lawrence, Rick Linden, Garrett Lecoq, Lauren Menzie, Melanie Murchison, Michael Nesbitt, Debra Parkes, Nicole O'Byrne, Micah Rankin, Amar Khoday, David Ireland, David Milward, Richard Jochelson, Kristen Thomasen, and Erin Sheley. We also thank the many peer reviewers who assisted us through our digital peer review platform from across the world.

(Where is) the Tipping Point for Governmental Regulation of Canadian Lawyers? Perhaps it is in Paradise: Critically Assessing Regulation of Lawyer Involvement with Money Laundering After *Canada (Attorney General) v Federation of Law Societies of Canada*

REBECCA BROMWICH [*]

ABSTRACT

The Supreme Court of Canada in *Canada (Attorney General) v Federation of Law Societies of Canada*[1] confirmed that Canada's Provincial and Territorial Law Societies have the sole jurisdiction to regulate the conduct of lawyers sufficiently to prevent and curtail lawyers' involvement in money laundering, ousting the jurisdiction of Federal authorities which otherwise regulate and control money laundering in other sectors. Consequently, this decision places a high burden on law societies as regulators, and assumes

[*] Rebecca Jaremko Bromwich, PhD, LLM, LLB, is a faculty member in the Department of Law and Legal Studies at Carleton University, where she serves as Director of the Graduate Diploma in Conflict Resolution program. She is also a co-editor of RobsonCrim, the blog of Robson Hall law school, and serves as a *per diem* Crown Attorney. Note that the author did not rely on nor divulge any confidential information in the research or analysis relating to this paper. All sources relied upon are part of the public record. The author is a former employee of the Federation of Law Societies of Canada.

[1] *Canada (AG) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401 [*FLSC*].

their capacity to meet it. This article critically examines the extent to which law societies are positioned to effectively meet that burden, and, relatedly, what implications this may have for the future of lawyer self-regulation in Canada. The article critiques the extent to which law societies have the capacity to combat the use of law practices as shields for money laundering as well as what capacity legal regulators as currently constituted reasonably have to do so in the future. With reference to the 2016 Report of the Intergovernmental body developing and promoting policies to combat money laundering and terrorist financing (FATF), this article raises concerns that the Supreme Court of Canada's judgment in the *Federation of Law Societies* case rests on a shaky foundation whereby money laundering was unexplored as an issue because it was conceded to be a global problem. It suggests that the current magnitude of money laundering in a globalized economy, as revealed by the Panama Papers and Paradise Papers, among other sources, coupled with the low capacity of law societies to address it renders the global threat of money laundering sufficiently calamitous to the international monetary system for governmental regulation of lawyers, as opposed to continued self-regulation, to be an appropriate course of action justifiable under s. 1 of the *Charter*.

I. INTRODUCTION

"The tipping point is that one magic moment ...where everything can change all at once." — Malcolm Gladwell[2]

In *Canada (Attorney General) v Federation of Law Societies of Canada*,[3] the Supreme Court of Canada ruled that lawyers are exempted from the regime governing the conduct of other financial intermediaries, such as accountants, through means of the Federal agency entitled Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). This agency is permitted to search for and seize data identifying illegal transactions and those involved in them. In the case, the Federation of Law Societies of Canada (FLSC), an umbrella association composed of provincial and territorial legal self-regulating bodies, successfully challenged the constitutional applicability of this anti-money-laundering legislation to

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2 Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (New York: Back Bay Books, 2002) at 4.

3 *FLSC*, *supra* note 1.

the legal profession. The Supreme Court held that the constitutional entitlement of clients to solicitor-client confidentiality rendered unconstitutional the applicability of the FINTRAC regime to lawyers.[4] Essentially, this decision leaves prevention of complicity in money laundering by lawyers in the purview of provincial and territorial law societies to regulate, curb, and control.

The *FLSC* case confirmed that it falls within the responsibility of Canada's Law Societies to regulate the conduct of lawyers sufficiently to prevent and curtail lawyers' involvement in money laundering. Regulating lawyers with respect to their participation in money laundering falls outside of the ambit of FINTRAC. This article critically analyses the efficacy of measures being taken by provincial, federal, and territorial law societies across Canada to prevent complicity by Canadian lawyers in money laundering. From this analysis, it identifies gaps in existing regulation and makes suggestions for change to improve existing regulatory regimes.

The Financial Action Task Force (FATF),[5] an intergovernmental body headquartered in Paris that sets standards for resisting money laundering worldwide, raised serious concerns about Canada's approach to money laundering in its September 2016 Report, indicating that "legal counsels, legal firms and Quebec notaries… constitute a significant loophole"[6] in Canada's anti-money-laundering and counter terrorist financing regimes. The FATF Report stated that Canada failed to make ample progress on several fronts.[7] After the *FLSC* case, it is confirmed that lawyers and legal

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4 *Ibid* at para 110.

5 The Financial Action Task Force (FATF) is an inter-governmental body that was established in 1989 by the ministers of its member nations. The stated objectives of the FATF are to set standards and promote effective implementation of legal, regulatory, and operational measures for combating money laundering, terrorist financing, and other "related threats to the integrity of the international financial system." The FATF is therefore a "policy-making body," which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. See online: <http://www.fatf-gafi.org/about/>.

6 FATF, *Anti-Money Laundering and Counter Terrorist-Financing Measures*, *Canada* (Paris: Fourth Round Mutual Evaluation Report, FATF, 2016), online: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>. The report indicates that Canada has made progress in regulating the not-for-profit sector, as well as the financial sector, but that significant gaps exist in the regulation of "non-financial" industries, and specifically the legal profession after the *FLSC* case.

7 *Ibid.*

entities are not required to adhere to anti-money laundering obligations that are put in place to govern banks and other financial institutions. In consequence, the FATF is not satisfied with the mechanisms available under Canada's existing regulatory regimes for lawyers and notaries, characterizing the regulatory regimes applicable to lawyers, and notaries as leaving "gaping holes" in Canada's reporting system.[8] The FATF Report further contends that "the legal profession in Canada is especially vulnerable to misuse for money laundering and terrorist financing risks," linked to a great extent with the profession's involvement in transactions such as real estate deals and the oversight of client trust accounts.[9]

This article discusses the current capacities of law societies to curb money laundering in the context of the magnitude of it as a problem, and what the ability and positionality of legal self-regulators to do so implies for the efficacy of continued lawyer self-regulation in Canada. First, the article looks at the general regime for addressing money laundering in Canada. Then, it considers the decision in the *FLSC* case, in particular troubling the inattention in that decision to questions of the capacity of lawyer self-regulators in Canada to address threats to the public interest involved in money laundering. It moves on to discuss the regime for self-regulation currently in place in relation to the legal profession in Canada, and, subsequently, to critically assess the capacity of those regulators to deal with the large-scale issue of money laundering. It then looks at alternative models in place in other jurisdictions where government is involved in lawyer regulation and lawyers are publicly regulated. From this analysis, the article contends that, without a considerable increase in resources allocated to the problems of money laundering and terrorist financing, existing Canadian professional self-regulatory regimes for lawyers and notaries are positioned with neither the practical ability nor expertise to surmount the daunting task of countering money laundering and that therefore, professional self-governing regulatory regimes are inadequate to ensure lawyers are not involved in money laundering. The article concludes with the contention that, in the context of globalized economics and correspondingly massive amounts of money laundering, lawyer self-regulation needs to either be bolstered by significant fiscal support from public agencies, or to be eradicated in favour of the installation of a public legal services regulator.

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8 *Ibid.*

9 *Ibid* at 15.

II. MONEY LAUNDERING

The FATF Report in 2016, the Panama Papers that same year, and the Paradise Papers in 2017, all overwhelmingly show that Canadian businesses and law firms are involved in the massive flow of monies across jurisdictions. It is less clear, but certainly suggested, by the FATF Report, that lawyers and law firms are implicated in illicit dimensions of this flow, including through money laundering. The scope of the movement of money across jurisdictions, as well as of money laundering as a field of criminal activity both in Canada and worldwide, are immense. Money laundering is connected with a variety of criminal enterprises, including terrorist financing.[10] In 2011, the RCMP estimated the annual cost of money laundering to the Canadian economy alone as between $5 and $15 billion.[11] In a globalized economy, the illicit movement of money across international borders is a very significant issue. The United Nations Office on Drugs and Crime[12] estimates that as of 2016 the amount of money laundered around the world each year is 2 - 5% of the global GDP, totalling $800 billion - $2 trillion in current US dollars.[13]

Money laundering is criminalized in the *Criminal Code of Canada* and the general structure for preventing it is managed through regulatory prohibitions in Canada. Money laundering is described in s. 462.31 of the *Criminal Code of Canada* as "laundering the proceeds of crime."[14] It is a term that refers to various methods by which "dirty money" acquired through criminal or terrorist activities is transitioned through legitimate businesses. This process converts the "dirty" money into "clean" money, not easily traceable to criminal activity. Once laundered, the money cannot be easily linked to the person, organization, or transaction from which it originated; once laundered, money can be spent.

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10 For discussion, see e.g. Rachel Ehrenfeld, *Funding Evil: How Terrorism Is Financed and How to Stop It* (Chicago: Bonus Books, 2005).

11 Shannon Brennan & Roxanne Vaillancourt, *Money Laundering in Canada, 2009* (Ottawa: Statistics Canada, 2015), online: <http://www.statcan.gc.ca/pub/85-005-x/2011001/article/11454-eng.htm>.

12 United Nations Office on Drugs and Crime (UNODC), *Money Laundering and GDP* (Vienna: UNODC, 2017), online: <https://www.unodc.org/unodc/en/money-laundering/globalization.html>.

13 *Ibid.*

14 *Criminal Code*, RSC 1985, c C-46, s 462.31.

As enacted in 2000 and amended in 2008, Canada's *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*[15] establishes a regulatory regime with the ambit of curtailing money laundering and illicit terrorist financing activities. Working with the definition of money laundering set out in s. 462.31(1) of the *Criminal Code*,[16] the regulatory statute sets forth measures that require professionals to collect and maintain information as well as enjoin them to prepare prescribed documents about their clients to be retained and submitted as required to the regulator. The *Act* establishes FINTRAC to administrate its regime. The legislation and the regulations enacted under it permits FINTRAC to execute warrantless searches of the offices and computers belonging to people or entities that are subject to the Regime, and sets out penal sanctions for non-compliance with its provisions. As originally enacted, the *Act* applied to lawyers and other professionals equally. On its website, FINTRAC defines money laundering as: "the process used to disguise the source of money or assets derived from criminal activity. Profit-motivated crimes span a variety of illegal activities from drug trafficking and smuggling to fraud, extortion and corruption."[17]

Without question, especially since the Panama Papers were the files of one law firm, lawyers are implicated across jurisdictions in questionable financial transactions involving the movement of monies across borders in clandestine ways. Much of this flow of money is not money laundering *per se*, and much of it is not illegal but, certainly, some of it may be. The ease and magnitude of lawyers' involvement with questionable financial dealings moving money across borders, and, in some cases, laundering it, was highlighted in 2016 with the watershed release of the "Panama Papers," in which, by means of a leak of electronic data held by a law firm, 11.5 million publicly released records reveal a global professional context where law firms and banks sell financial secrecy to politicians, billionaires, celebrities, professional athletes, drug traffickers and fraudsters alike.[18] The Panama

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15 *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 [the Act], online: <http://laws-lois.justice.gc.ca/eng/acts/P-24.501/>.

16 *Criminal Code*, *supra* note 14, s 462.31(1).

17 Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), *What Is Money Laundering?* (Ottawa: Financial Transactions and Reports Analysis Centre of Canada, 2015), online: <http://www.fintrac-canafe.gc.ca/fintrac-canafe/definitions/money-argent-eng.asp>.

18 The International Consortium of Investigative Journalists (ICIJ), *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption* (Washington: ICIJ,

Papers, a data leak from a single law firm – Mossack Fonseca - alone identify 143 politicians, including 12 world leaders, their families, and associates from around the world as having been actively using offshore tax havens, as well as scores of criminal transaction. An estimated 625 Canadians are named in the documents comprising the Panama Papers.[19] Complicity of lawyers in large scale money laundering and tax evasion transactions was again suggested with the release, in November 2017, of the "Paradise Papers." These were another set of several million records that, when publicly released by means of a data leak, revealed no overtly illegal activity, but did underscore the secret movement, facilitated by lawyers and banks, of billions of dollars across jurisdictions, certainly avoiding, if not provably evading, taxation.[20]

In response to the magnitude and complexity of the problem of money laundering, jurisdictions across the developed world have enacted a variety of laws to counter it.[21] On the international level, organizations such as the International Monetary Fund[22] and the United Nations have also developed strategies to counter money laundering, understanding it as an urgent global problem.[23]

Money laundering can either involve individual white-collar criminality, broader corporate criminality on the part of an entity, or both. Money laundering is a type of white-collar crime that sits in a somewhat vague and morally grey area. This is because the primary illegal behavior producing the funds is not necessarily perpetrated by the money launderers, who are

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2016), online: <https://panamapapers.icij.org/20160403-panama-papers-global-overview.html>.

19 Daniel Tencer, "Canadian Names in Panama Papers Leak Unveiled in Searchable Database," *Huffington Post* (9 May 2016), online: <https://www.huffingtonpost.ca/2016/05/09/panama-papers-canadian-names_n_9869810.html>.

20 See e.g. "Paradise Papers: Everything You Need to Know About the Leak," *BBC* (10 November 2017), online: <http://www.bbc.com/news/world-41880153>.

21 For discussion, particularly of European provisions, see e.g. Toby Graham, Evan Bell & Nicholas Elliott, *Butterworths International Guide to Money Laundering Law and Practice* (London, UK: Clays Ltd, 2003).

22 See William E Holder, "The International Monetary Fund's Involvement in Combating Money Laundering and the Financing of Terrorism" (2003) 6:2 J of Money Laundering Control at 383–387.

23 The webpage "United Nations Actions Against Terrorism" provides a comprehensive list of links to UN counter-terrorism efforts, including access to documentation and sites maintained by UN specialized agencies, online: http://www.un.org/en/counterterrorism/>.

financial intermediaries who derive their power to be intermediaries from their legitimate business dealings in many instances, and may not otherwise be engaged in criminal behaviour. In Canada, money laundering is prohibited by the *Criminal Code*,[24] ss. 462.31 , 83.02, 83.03, and by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*[25] at s. 3.

Section 462.31(1)[26] of the *Criminal Code* defines "laundering of proceeds of crime" as anyone who:

> uses, transfers the possession of, sends, or delivers to any person or place, in any manner and by any means, any property or any proceeds of any property with the intent to conceal or convert that property or those proceeds, knowing or believing that all or part of that property or of those proceeds was obtained or derived directly or indirectly as a result of
> (a) the commission in Canada of a designated offence; or
> (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

Interpretive guidance for Courts dealing with the *Criminal Code* money laundering provisions was recently provided in *R v Tan Tien Nguyen*.[27] There, the Ontario Superior Court clarified that the offence of money laundering has three essential elements, as follows:

> a. dealing with property or proceeds of crime in almost any manner or any means imaginable, including sending, delivering, transferring, altering, disposing, using, etc...;
> b. having an intent to conceal or convert the property or proceeds; and
> c. knowing or believing that all or part of the property or proceeds was obtained directly or indirectly, as a result of the commission of a designated offence.[28]

In *R v Tejani*,[29] the *mens rea* of money laundering offences was previously held to involve belief or knowledge that the proceeds were derived from the commission of a crime.

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24 *Criminal Code*, *supra* note 14, ss 462.31, 83.02, 83.03.

25 The Act, *supra* note 8, s 3.

26 *Criminal Code*, *supra* note 14, s 462.31(1).

27 *R v Tan Tien Nguyen*, 2013 ONSC 605.

28 *Ibid* at para 315.

29 *R v Tejani* (1999), 138 CCC (3d) 366, 1999 CanLII 3765 (Ont CA).

III. MONEY LAUNDERING AND SOLICITOR-CLIENT PRIVILEGE: THE SUPREME COURT OF CANADA'S DECISION IN *FEDERATION OF LAW SOCIETIES OF CANADA*

In *Canada (Attorney General) v Federation of Law Societies of Canada*,[30] the Supreme Court of Canada struck down provisions of Canada's federal anti-money laundering legislation as they pertained to the duties of lawyers to report money laundering, and as such concerned searches of law offices. The disputed regulations would have required lawyers to collect information about their clients as well as information about financial transactions by those clients. Further, it would have required lawyers to turn the client information collected over to Federal government authorities on demand.[31] The Supreme Court found that the impugned regulatory requirements violated *Charter* protections against unreasonable search and seizure (s. 8), and rights to security of the person (s. 7). The impugned provisions were found to be unconstitutional because they lead to a violation of solicitor-client privilege, a privilege that protects communications between lawyers and their clients from being disclosed without the client's permission. Justice Cromwell, writing for a majority of the Supreme Court of Canada, held that this violation of the client's ss. 7 and 8 rights under the *Charter* was not justifiable under s. 1.[32]

The *FLSC* case officially began in 2011, when the *FLSC* filed a petition in British Columbia.[33] However, while the specific case resolved by the Supreme Court of Canada in *FLSC* began in 2011, the legal debate between the Federation of Law Societies of Canada and the Federal Government as to whether the federal anti-money laundering and terrorist financing regime should apply to lawyers and Quebec notaries had been ongoing since at least 2001. Their petition challenged the constitutionality of a number of sections of the *Act* and its regulations. At this first instance, the BC Chambers Judge held that the impugned provisions violated the rights of clients and lawyers in particular because it impinged upon solicitor-client

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30 *FLSC*, *supra* note 1.

31 Regulations made under the Act particularize how the legislative scheme applies to legal counsel: the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184.

32 *FLSC*, *supra* note 1 at para 9.

33 *Federation of Law Societies of Canada v Canada (Attorney General)*, 2011 BCSC 1270.

privilege. This interference with solicitor-client privilege was unconstitutional as a violation of the clients' rights under s. 7 of the *Charter*.

The British Columbia Court of Appeal upheld the decision at first instance on appeal in 2013.[34] Upon further appeal, the Supreme Court of Canada upheld the original decision.[35] More in-depth discussion of this series of decisions has been offered in scholarly commentary elsewhere.[36] There were significant points of difference between the analyses of different levels of Court with respect to ss. 7 and 8 of the *Charter*. It is beyond the scope of this article to consider the Court's *Charter* analysis of solicitor-client privilege in detail. Rather, the purpose of this article is to consider the reliance on lawyer self-regulation that is the consequence and the upshot of the *FLSC* decision. As a result of that decision, lawyers are exempt from reporting to government information about "suspicious transactions" involving their clients.

The Supreme Court of Canada in the *FLSC* case held that sections 62, 63, 63.1, and 64 of the *Act* were unconstitutional to the extent that they applied to documents in law offices or otherwise in the possession of legal counsel and legal firms. The Court held that the impugned provisions, insofar as they relate to lawyers and law offices, infringe s. 8 of the *Charter*. The Court took a particularly dim view of the *de facto* authorization by these provisions of the sweeping searches of law offices and was concerned about the prospects of such cases to risk breaching solicitor-client privilege. The principles governing searches of law offices set out in *Lavallee, Rackel & Heintz v Canada (Attorney General)*,[37] were applied. More specifically, the

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34 *Federation of Law Societies of Canada v Canada (Attorney General)*, 2013 BCCA 147.

35 *FLSC*, *supra* note 1.

36 See e.g. Amy Salyzyn, "A False Start in Constitutionalizing Lawyer Loyalty in Canada (Attorney General) v Federation of Law Societies of Canada" (July 2016) Supreme Court Law Review, Ottawa Faculty of Law Working Paper No 2016-28, online: <https://ssrn.com/abstract=2812652> [forthcoming].

37 *Lavallee, Rackel & Heintz v Canada* (AG), 2002 SCC 61, [2002] 3 SCR 209. These principles were set out at para 49 of that decision, as follows:

> 1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.
>
> 2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
>
> 3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.

Court in *FLSC* affirmed that solicitor-client privilege must remain as close as possible to absolute in order to be relevant, and that Court must enforce rigorous norms to ensure its protection.

The *FLSC* case is part of a broader trend within Canadian courts of constitutionalizing solicitor-client privilege, as has been pointed out by others.[38] For instance, the Supreme Court of Canada held in the administrative law context that determining where a statute permits review of documents over which solicitor-client privilege is asserted is Question of Law of Central Importance and outside the relative expertise of the decision-maker.[39]

However, in its focus on solicitor-client privilege, and not on money laundering, in *FLSC*, this decision both fails to appreciate the pressing and substantial need to deal with money laundering and terrorist financing and

> 4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.
>
> 5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.
>
> 6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.
>
> 7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.
>
> 8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.
>
> 9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.
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> 10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

[38] Mahmud Jamal & Brian Morgan, "The Constitutionalization of Solicitor-Client Privilege" (2003) SCLR 20 at 213.

[39] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53.

rests upon problematic dominant beliefs about the necessity and efficacy of lawyer self-regulation as an inherent good.[40] The balance struck by the Court would be more appropriate to a historical socioeconomic context that predated the massive flow of monies across national jurisdictions that is evidenced in the FATF Report, the Panama Papers, and the Paradise Papers. Further, it is highly problematic at a time where self-regulation for lawyers is being eroded in virtually all jurisdictions with the exception of Canada, and where movements towards public regulation of lawyers are not resulting in issues for the independence of the bar.

The *FLSC* case is one installment in a long series of Supreme Court of Canada cases that have bolstered the doctrines of solicitor-client and litigation privilege in Canada, and which have had the ancillary consequence of shoring up lawyer self-regulation against scrutiny and protecting the power of lawyers as an interest group. These cases include, notably, *Canada (Privacy Commissioner) v Blood Tribe Department of Health*,[41] and followed most recently by *Lizotte v Aviva Insurance Company of Canada*.[42] The *FLSC* case is unique amongst these cases in that it applies specifically to money laundering.

From beginning to end, the decision of the majority of the Supreme Court of Canada, authored by Justice Cromwell, focused on the interests of the public in solicitor-client privilege. Little was said about money laundering as a global problem, and the notion that the public interest is engaged in the issue of money laundering was not seriously discussed. Notably, Justice Cromwell, writing for a majority of the Supreme Court of Canada, did recognize and acknowledge that the regulation of money laundering is a pressing and substantial objective. [43] However, the majority nonetheless found that the impugned legislation failed under the test set out in *R v Oakes*[44] because "there are less drastic means of achieving the

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40 See especially *FLSC*, *supra* note 1 at paras 77–80, where Cromwell J declines to rule on the question of whether, as submitted by the Federation, the notion of independence of the Bar "essentially places lawyers above the law" as contended by the Attorney General at para 78. In declining to rule on this question, the judgment accepts foundational assumptions about the independence of the bar as being linked inextricably to self-regulation that this article argues are untenable.

41 *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44.

42 *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52.

43 *FLSC*, *supra* note 1 at para 59.

44 *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes*].

same objectives."[45] The fact that the majority decision of the Court conceded, without discussing the dimensions of, money laundering as a pressing and substantial issue, resulted in the inclusion within the judgment of almost no analysis of the scope, breadth, and nature of money laundering as a problem. By conceding that money laundering is a "pressing and substantial" concern without discussing it, the Court in *FLSC* focused in on the public benefit of access to counsel at the expense of appreciating the public harm associated with large scale financial crime. It also offered no analytical space for comparison of the capacity, systemic tendency, and inclination of the self-regulating machinery of Canada's legal profession to adequately address money laundering. In my view, the inattention to the scope of the problem results in a flawed and problematic ruling on what means might ameliorate it.

While the perspective taken in this article concurs with that articulated by Justice Cromwell concerning the violation of the s. 8 rights of clients and the s. 7 rights of lawyers under the *Charter*, it takes issue with the conclusion[46] that these limitations are not reasonably justifiable in a free and democratic society, and thereby not justifiable under the test set out in *Oakes*,[47] to assess whether infringements on *Charter* rights are constitutionally permissible. It is true that the Court has held that, to save a violation of s. 7 under s. 1, the Court needs to find there to be a very compelling reason akin to war, or other serious calamity.[48] This article contends that the scope and scale of money laundering is sufficiently calamitous to the global economy to be compelling enough to save a violation under s. 7. At bottom, what this article is suggesting is in keeping with the 2016 FATF Report: that the scope, breadth, and impacts of money laundering on a global scale are so immense as to in fact be sufficiently calamitous as virulent threats to the integrity of the international monetary system to merit consideration under this section. Consequently, the inattention of the Court in the *FLSC* case to the gravity of the context renders it a flawed decision.

Because the decision contains no specific consideration of the enormity of the scope of money laundering, it also contains no express consideration

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45 *FLSC*, *supra* note 1 at para 61.

46 *Ibid* at para 9.

47 *Oakes*, *supra* note 44 at para 70.

48 See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 518, 24 DLR (4th) 536.

of the adequacy, spottiness or unevenness of Law Societies' ability to regulate money laundering across Canada and effectively enforce those regulations is given a paucity of consideration. The concession that money laundering is a problem without exploration of the extent of that problem results in a lack of critical assessment of the practical ability of Law Societies to regulate money laundering. Even though the Court concedes that the eradication of money laundering is a pressing and substantial objective, the inattention in the judgment to the magnitude of the problem distorts what might be an appropriate remedy.

Justice Cromwell's decision does state that he does not intend to interfere with the legislature's ability to regulate in pursuit of its valid goal to prevent money laundering and terrorist financing. In relation to the search provision, he states: "I do not foreclose the possibility that Parliament could devise a constitutionally compliant inspection regime without a judicial pre-authorization requirement."[49] Further, he sets forth: "Parliament is entitled, within proper limits which I have outlined, to impose obligations beyond those which the legal profession considers essential to effective and ethical representation."[50] A concurring decision was rendered by Chief Justice MacLachlin and Justice Moldaver.

The *FLSC* decision leaves Canadians in the position of relying exclusively upon the law societies as regulators to address money laundering. In the following section, this article sets forth a critical perspective on the extent to which this reliance is reasonable.

IV. REGULATORY REGIMES FOR LAWYERS ACROSS CANADA

If legal regulators, as currently constituted in Canada, lack the capacity, and are neither positioned nor inclined, to effectively regulate lawyers' involvements with money laundering, this concern calls into question their efficacy as regulators for the profession on other respects as well. In Canada, lawyers are part of a self-regulated profession falling constitutionally within provincial and territorial jurisdiction. This self-regulation of lawyers is widely assumed to be a tradition of long duration, has been described as a "sacred cow" in Canada by Devlin and Hefferman,[51] and persists despite

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49 *FLSC*, *supra* note 1 at para 56.

50 *Ibid* at para 113.

51 Richard F Devlin & Porter Heffernan, "The End(s) of Self Regulation?" (2008) 45:5

changes elsewhere in the world. Notwithstanding the claim that self-regulation of lawyers' conduct is a longstanding tradition under the common law, however, when looked at in historical context, lawyer self-regulation of the sort that the Court protects in the *FLSC* case is a relatively recent phenomenon. As Amy Salyzyn has pointed out, the notion, now widely embraced, and underpinning the *FLSC* decision, that lawyer self-regulation is conducted in the public interest, is a relatively recent suggestion.[52]

What lawyer self-regulation means was clarified and confirmed by the Supreme Court of Canada in *Pearlman v Manitoba Law Society Judicial Committee.*[53] In the *Pearlman* case, the Supreme Court of Canada explained that it viewed governance of the legal profession as being composed of three aspects of control, those being control over: 1) who is permitted to practice law, 2) what conditions or requirements will be placed upon those who seek to practice law, and 3) what means are to properly be employed to enforce those conditions/requirements.[54]

While there are broad similarities between the manner in which the legal profession is self-regulated across the country, there are important differences between the jurisdictions as well. There are thirteen law societies convened across Canada, and each runs its own regulatory regime. A co-ordination and facilitation function as between the law societies is performed by the Federation of Law Societies of Canada.[55] In each Law Society, a volunteer board of elected leaders (often called "benchers") takes time out of their professional practices to be involved in self-government of the profession.[56] Additionally, each law society, as well as the *FLSC*, employs professional staff to deal with regulatory and policy issues. Some law

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Alta L Rev 169 at 171.

52 Amy Salyzyn, "From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence" (24 October 2016) in *Canadian Bar Review*, Ottawa Faculty of Law Working Paper No 2016-43, online: <https://ssrn.com/abstract=2858332> [forthcoming].

53 *Pearlman v Manitoba Law Society Judicial Committee,* [1991] 2 SCR 869, 84 DLR (4th) 105.

54 *Ibid* at 886.

55 For discussion, see e.g. Alice Woolley et al, *Lawyers' Ethics and Professional Regulation*, 2nd ed (Toronto: LexisNexis Canada, 2012).

56 For discussion, see e.g. Alice Woolley, *Understanding Lawyers Ethics in Canada* (Toronto: LexisNexis Canada, 2011).

societies have large staff complements (such as the Law Society of Ontario), while others operate on a much smaller scale, like those of the Territories.

Each law society across Canada has a mechanism for dealing with money laundering. The *FLSC* acts as a coordinating and facilitating body striving to synchronize the workings of each individual law society. It is not in itself a regulator, however, but an association of agencies. The *FLSC* is not an authority with binding power over any of its constituent parts. The law societies are really its clients or members. The *FLSC* has provided "Model Rules to Fight Money Laundering and Terrorist Financing."[57] These rules include a model rule prohibiting lawyers from collecting more than $7,500 in cash from a client,[58] as well as rules requiring lawyers to verify the identities of clients.[59]

While the *FLSC* model rules themselves are not enforceable, they, or similar rules, have now been adopted in jurisdictions across Canada. Quebec is a notable exception to the general pattern of self-regulation of lawyers across Canada since its Barreau et Chambre des notaires "co-regulate" with government.[60]

As a result of the decision of the Supreme Court of Canada in *FLSC*, law societies that regulate lawyers across Canada have implemented their own anti-money laundering rules by barring lawyers from receiving more than $7,500 in cash on a particular file, in most cases, and by requiring them to obtain and verify their clients' identities and keep certain records on hand.

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57 Federation of Law Societies of Canada (FLSC), *Model Rule on Client Identification and Verification Requirements* (Ottawa: FLSC, 2008), online: <http://flsc.ca/wp-content/uploads/2014/10/terror2.pdf>.

58 The full text of the FLSC Model Rule on Cash Transactions can be viewed at Federation of Law Societies of Canada (FLSC), *Model Rule on Cash Transactions* (Ottawa: FLSC, 2014), online: <https://flsc.ca/wp-content/uploads/2014/10/terror1.pdf>.

59 The FLSC Model Rule on Client Identification and Verification Requirements can be viewed at Federation of Law Societies of Canada (FLSC), *Model Rule on Client Identification and Verification Requirements* (Ottawa: FLSC, 2014), online: <https://flsc.ca/wp-content/uploads/2014/10/terror2.pdf>.

60 See e.g. Laurel S Terry, Steve Mark & Tahlia Gordon, "Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology" (2012) 80:6 Fordham L Rev 2661.

V. EFFICACY AND GAPS

The intention of this article is to link the watershed revelations of the Panama Papers and the Paradise Papers with the decision of the Supreme Court of Canada in *FLSC* in contending that these events render the time ripe for Canadian jurisdictions to re-think lawyer self-regulation in general. The context in which lawyer self-regulation does exist in a broader environment of neoliberal promotion of self-regulation for professions, and is in large part a product of lobbying by powerful law societies in support of lawyer self-regulation also merits further consideration, but that is beyond the scope of this article.[61] Money laundering is specifically considered because it demonstrates how the present moment carries a particular urgency rendering lawyer self-regulation, which was always already problematic, untenable. In addition to Salyzyn's critical questioning of whether lawyers self-regulate in the public interest or in their own,[62] many concerns have been raised in recent years about whether the self-regulation of the legal profession in Canada is effective, fair, transparent, and consistent.[63] Lawyer self-regulation in Canada has been likened to a "dead parrot" by Harry Arthurs, who contended in 1995 that "no regulatory effort [is] invested in enforcement" of the *Rules* of professional conduct of Canada's Federal and Provincial law societies.[64] The effectiveness, fairness, equities, transparency, and amenability to corruption within regimes for

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61 For discussion, see e.g. Joan Brockman, "Money for Nothing, Advice for Free: The Law Society of British Columbia's Enforcement Actions Against the Unauthorized Practice of Law" (2010) 29 Windsor Rev Legal & Soc Issues 1–43.

62 Salyzyn, *supra* note 52.

63 Richard Devlin, "Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002) 25:2 Dalhousie L J 335.

64 Harry W Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33:4 Alta L Rev 800 at 803. Arthurs also argued that the level of regulatory effort expended didn't matter very much, rather that the "ethical economy" of the profession was determined by factors other than regulatory intervention, including the circumstances of the practice of law. While Arthurs did not advocate governmental regulation of lawyers, his argument is consistent with the contention made in this paper that the economic significance of money laundering and the relative impunity with which lawyers can engage in it, are important predictors of high levels of unethical conduct on the part of lawyers. While governmental regulation might not deter lawyers from participating in money laundering, it could ensure investment in efforts to ensure accountability for those who do.

lawyer self-regulation have been called into question in recent years in a myriad of ways in Canada.

The early months of 2017 witnessed a boom in investigative journalism exposing problems with lawyer conduct and lawyer self-regulation. A *Toronto Star* exposé revealed multiple instances in which Law Societies across Canada, and particularly the Law Society of Upper Canada, failed to report criminal behavior on the part of lawyers to police.[65] The *Star* study documented the cases of over 230 lawyers sanctioned by the Law Society of Upper Canada in the preceding ten years, all of whom who had stolen, defrauded or diverted some $61 million held in trust funds for clients, and very few of whom were reported to police. Also in 2017, a CBC Fifth Estate documentary entitled "Betrayal of Trust"[66] highlighted cases in which client money had been misappropriated and mishandled by lawyers across Canada, as well as client allegations that lawyer services were performed in a "shoddy" manner. This docu-drama and the *Toronto Star* investigation revived public ire about lawyer self-regulation, which had also been raised in relation to lawyer misconduct, including allegations of sexual misconduct, by leading figures in the self-regulation network itself. This last concern was brought into particular prominence with *Law Society of Upper Canada v Hunter*,[67] in which a former Treasurer, which is the title of the highest officer of the Law Society of Upper Canada, faced allegations of sexual misconduct. Self-government of the legal profession may produce concerns that the legal profession is not providing the public with meaningful opportunities to access justice.[68]

Public concerns with lawyer self-regulation are longstanding. They have been, for instance, raised about how well law societies set forth and enforce the obligations of a lawyer in relation to physical evidence of a crime, public infamy in the case of Ontario lawyer Ken Murray.[69] It was Murray who for months hid videotapes in his law office that were crucial pieces evidence against serial killer Paul Bernardo (Cooper). Alarms have also been raised

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65 Kenyon Wallace, Rachel Mendleson & Dale Brazao, "Broken Trust," *The Toronto Star* Projects (5 May 2014), online: <http://projects.thestar.com/broken-trust/>.

66 CBC, "Betrayal of Trust," *The Fifth Estate* (17 February 2017), online: <http://www.cbc.ca/fifth/episodes/2016-2017/betrayal-of-trust>.

67 *Law Society of Upper Canada v Hunter*, 2007 ONLSHP 0027, [2007] LSDD No 8.

68 Devlin & Heffernan, *supra* note 51.

69 *R v Murray*, 2000 48 OR (3d) 544, [2000] OJ No 2182 (Sup Ct J).

about the efficacy of legal self-regulators in assuring lawyer competence in the face of negligence allegations in relation to lawyers, as well as the remedial action taken by law societies to rectify this.[70] Other concerns have been raised about discriminatory or biased practices detrimentally affecting "racialized licencees,"[71] and the extent to which self-regulation may perpetuate, rather than alleviate, the marginalization of lawyers who are members of historically marginalized groups. Further concerns were raised in 2007 by the Competition Bureau, in which a report relating to all self-regulated professions across Canada had questioned whether continued self-regulation was the best choice for lawyers.[72]

While all of these concerns received short bursts of media attention and public debate, none of them resulted in a sustained public critique of lawyer self-regulation across Canada, and "curiously,"[73] the approach taken in Canada has been to shore up the current self-regulatory regime for lawyers. Somewhat oddly, concern about the legal profession and its ability to self-regulate, and whether its self-regulation is in the public interest, have never yet reached a "tipping point" in Canadian public debate. We have not experienced widespread public calls for an end to lawyer self-regulation.

It becomes surprising that changes to lawyer regulation have not been seriously considered by policy makers in Canada particularly in light of arguments made by prominent legal scholar Alice Woolley as well as scholar, lawyer, and former Dean of Western University's Law School, Philip Slayton. Woolley advocates for change to the regulatory regime for lawyers in Canada. She takes a relatively moderate view that lawyer self-regulation in Canada is seriously flawed, but does not call for an end to it, rather

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70 Paul Paton, "The Independence of the Bar and the Public Interest Imperative: Lawyers as Gatekeepers, Whistleblowers or Instruments of State Enforcement?" in Law Society of Upper Canada Task Force on the Rule of Law and Independence of the Bar, *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law and the Independence of the Bar* (Toronto: Irwin Law, 2007).

71 Law Society of Upper Canada (LSUC), *Challenges Facing Racialized Licensees: Final Report* (Toronto: LSUC, 2014), online: <http://www.lsuc.on.ca/uploadedFiles/Equity_and_Diversity/Members/Challenges_for_Racialized_Licensees/stratcom-challenges-facing-racialized-licensees-final-report.pdf>.

72 Canada, Competition Bureau, *Self-Regulated Professions: Balancing Competition and Regulation* (Gatineau, Que: Competition Bureau of Canada, 2007), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions-study-final-E.pdf/$FILE/Professions-study-final-E.pdf> at 61–78.

73 Devlin & Heffernan, *supra* note 51.

seeking changes to the ways in which lawyer self-regulation is administered.[74] More specifically, Woolley calls for government and lawyer co-regulation through the establishment of legal regulatory review offices in each province and territory. She proposes that lawyers should be governed by lawyers, government, and non-lawyers together.

Slayton takes a more radical view. In his book, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession*,[75] Slayton details a series of egregious instances of misconduct by Canadian lawyers and argues, that taken together with the "ineffective and confused treatment"[76] of those lawyers by regulators support the assertion that radical change is needed to the manner in which lawyers are regulated in Canada. Slayton argues that lawyer self-regulation has "the tendency to create, encourage, or permit transgression."[77] More specifically, Slayton contends:

> There are no good arguments for the view that only lawyers can regulate lawyers, and many good arguments for the contrary position. Disciplinary action should be in the hands of an independent body; for a law society to investigate, prosecute, and judge, violates elementary principles of justice.[78]

Woolley similarly contends that it is fallacious to suggest that independence of the bar necessitates lawyer self-regulation.[79] Slayton made these arguments about matters unrelated to money laundering, and called for public regulation of lawyers even before the current controversy around lawyers' involvement in money laundering came into public view. Woolley, too, published her critiques of lawyer self-regulation in 2011, before the FATF Report, Panama, and Paradise papers shed light on the magnitude of money laundering as a financial crisis.

If Slayton is correct and lawyer self-regulation is "ineffective and confused"[80] when dealing with small-scale forms of misconduct at the local

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74 See e.g. Alice Woolley, "Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation" (1 June 2011), SPP Research Paper No 11-9, online: <https://ssrn.com/abstract=1920921>.

75 Phillip Slayton, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession* (Toronto: Penguin Canada, 2008).

76 *Ibid* at 316.

77 *Ibid* at 318.

78 *Ibid.*

79 Woolley, *supra* note 74.

80 Slayton, *supra* note 75.

level, or if Woolley is correct that lawyer self-regulation "could be improved and made better able to ensure that lawyers act as zealous advocates within the bounds of legality"[81] through co-regulation with government and the establishment of a separate tribunal for discipline, or both, then policy-makers should take seriously the suggestion they both make: that lawyer self-regulation as it currently exists is not tenable.

The capacity of lawyer self-regulation to adequately police lawyers' conduct, problematic in principle and practice in general becomes still more worrisome at the level of high-stakes global finance and illicit electronic monetary transactions across jurisdictions. Further, if Salyzyn is correct that lawyer self-regulation is not necessarily or obviously in the public interest, it becomes clear that legal regulators are not well positioned to address money laundering if the complicity in it is profitable for the profession as a whole. The FATF Report provides compelling evidence that Canada's provincial and territorial self-regulating bodies for lawyers and notaries are neither constituted, equipped, nor resourced appropriately to independently handle the tasks of barring money laundering and countering terrorist financing. While the FATF is relatively satisfied that Canada's public regulatory mechanisms for dealing with money laundering other than in the context of law firms are satisfactory, to the contrary, it finds the measures taken by the legal profession inadequate. Indeed, "in light of the risks," of leaving the task of preventing money laundering through firms to the law societies, the September 2016 FATF Report said, the Supreme Court ruling in *FLSC* "raises serious concerns."[82] The FATF's report contends that subjecting all financial institutions and non-financial businesses to anti-money laundering obligations must be a priority for Canada.

VI. Alternative Regulatory Options: Other Jurisdictions and Public Bodies

Self-regulation was historically the dominant model for governance of the legal profession in Common Law jurisdictions, certainly across the Commonwealth until this century.[83] However, this is no longer the case.

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81 Woolley, *supra* note 74 at 46.

82 FATF, *supra* note 6.

83 Julia Black, "Critical Reflections on Regulation" (2002) 27 Austl J Leg Philosophy 1 at

Several key jurisdictions, including England, the birthplace of the common law tradition itself, now no longer govern their legal professions by means of forms of self-regulation. Further, the model by which lawyers are regulated in the United States is complex and state-based, involving accountability generally to the Supreme Courts of each state jurisdiction.[84]

For example, the legal profession in Scotland, in Australia, as well as that of England and Wales are now publicly regulated by government rather than by lawyers.[85] Illustratively, under *The Legal Services Act*[86] [*LSA*], which received Royal Assent on 30 October 2007, regulation of lawyers is carried out by a public, governmental body in England and Wales. The Solicitors Regulation Authority is the public regulatory body in those jurisdictions.[87] This new legislative regime effected a significant change in the approach to regulation of lawyers' professional enterprises and their conduct. The *LSA* enacted a new regulatory regime that departs radically from the traditional approach in which regulators prosecute individual complaints of alleged rule violations. Rather than being driven by complaints and run by lawyers, the *LSA* functions on the basis of outcomes-focused regulation (OFR), and places clients, and the public, not lawyers, at the centre of the analysis. Involved in OFR is a high level focus on principles and big picture outcomes affecting the provision of legal services. Certainly, Slayton[88] has argued strongly for similar changes in Canada.

Legislation in Australia and Scotland also now provides for governmental participation in the regulation of lawyers. For instance, in New South Wales, the *Legal Profession Act*[89] provides for this. In Scotland,

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84 Thomas D Morgan & Ronald D Rotunda, *Problems and Materials on Professional Responsibility* (Westbury, NY: Foundation Press, 1995) at 35.

85 For discussion, see e.g. Terry, Mark & Gordon, *supra* note 60.

86 *The Legal Services Act*, 2007 c 29, online: <http://www.legislation.gov.uk/ukpga/2007/29/contents>.

87 Susan Fortney, "Legal Services Board, Market Impacts of the Legal Services Act of 2007 – Baseline Report (Final) 2012" (15 February 2013), online: <http://research.legalservicesboard.org.uk/wp-content/media/Impacts-of-the-LSA-2012-Final-baseline-report.pdf>

88 Slayton, *supra* note 75 at 317.

89 *Legal Profession Act, 2004, No 112*, online: <http://www.legislation.nsw.gov.au/#/view/act/2004/112>.

co-regulation came into effect through the *Legal Services (Scotland) Act.*[90] The public regulation, or co-regulation, of lawyers in jurisdictions outside of Canada has not eradicated the existence of solicitor-client privilege (sometimes called lawyer professional privilege, as in Scotland), although in jurisdictions apart from Canada, the privilege is understood to be "subsumed in the common law"[91] and has not taken on the constitutional status it has in Canada.

It is not the intention of this article to suggest that public regulation of lawyers would be a panacea. All of the systems described, where co-regulation or public regulation have come into effect, are not without flaws. Indeed, the apparent low level of interest on the part of the Canadian government in prosecuting the wealthy elite for white collar crime[92] generally calls into question how effective a public regulator might be at enforcing anti-money laundering provisions against lawyers. The ambit of this article is simply to suggest that the particular, and pressing, problem of money laundering presents a context rendering it appropriate to trouble the assumption that lawyer self-regulation is necessarily required in order for the legal profession to flourish, and to highlight how Canada's regime for lawyer self-regulation is increasingly out of step with global trends.

VII. Conclusion: Reaching the Tipping Point

As many have noted, with the globalization of the world economy, there is a high level of interdependence between nations in the international monetary system. At the same time, the legal profession is in flux. Globalization presents the growing challenge of interjurisdictional connectedness, and with it, an unprecedented and colossal flow of money between borders. This flow of monies between jurisdictions carries the potential of calamitous consequences to the tax bases and social infrastructures of domestic jurisdictions. At the same time, western

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90 *Legal Services (Scotland) Act, 2010*, asp 16, online: <http://www.legislation.gov.uk/asp/2010/16/pdfs/asp_20100016_en.pdf>.

91 See *Narden Services Ltd v Inverness Retail and Business Park Ltd & Ors*, 2008 SC 335.

92 Some have contended inattention to crimes committed by the wealthy and powerful is illustrated by the failure of Canada to establish a national Securities regulator. For a background discussion, see e.g. Canada, Department of Finance, "Government of Canada Moves to Protect Canadian Investors" (26 May 2010), online: <https://www.fin.gc.ca/n10/10-051-eng.asp>.

countries are witnessing a period of unfolding radical change to the way law is practiced in multinational mega-firms, and with consultants doing off-shored legal work. Alongside the changes to the profession, there has been change to regulation of lawyers in many jurisdictions. Many factors are contributing to this, and so too to changes to the ways in which lawyers are regulated.[93] Similarly, many concerns have been raised about the capacity of lawyers to self-regulate in Canada.[94] In response, jurisdictions around the globe are moving away from lawyer self-regulation to alternative regulatory models, and in some jurisdictions, the notion of solicitor-client privilege has been eroded.[95] However, except for the province of Quebec, Canada has not moved away from lawyer self-regulation. To the contrary, lawyer self-regulation is becoming increasingly constitutionally entrenched.

This article has argued that the decision of the majority of the Supreme Court of Canada in *FLSC* is deeply problematic because the balancing undertaken within it under s. 1 does not expressly consider either the global scope of the public harms effected by money laundering or the existential threat money laundering poses to the international monetary system. By failing to engage with the urgency and calamitous nature of this context in a s. 1 analysis, the majority decision in *FLSC* does not adequately consider the balance the mischief sought to be remedied by the impugned regulatory scheme and the oversight of lawyers it entailed as against the capacity of self-regulating bodies overseeing the legal profession to do so appropriately. While the Supreme Court applied the correct legal test, it did so without considering the full range of policy issues at stake. Now, with the FATF Report available, government should not hesitate to move forward to regulate money laundering by providing regulatory oversight of, and support for, the work of law societies in ensuring money laundering facilitated by lawyers does not take place.

The deference to lawyers' rights in *FLSC* to a point of declining to definitively refute a contention that lawyers are "above the law"[96] is part of a larger context of exceptionalism and acceptance of dominant

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93 Black, *supra* note 83.

94 Slayton, *supra* note 75.

95 In the EU, for example, corporate counsel do not enjoy solicitor-client privilege: *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*, [2010] EUECJ C-550/07.

96 *FLSC*, *supra* note 1 at para 78.

understandings that self-regulation by lawyers is a public good. In a global context where most jurisdictions have stepped away from lawyer self-regulation, Canada's increasingly entrenched self-regulation model for lawyers and notaries is out of step with common law trends. This dissonance is rendered particularly knotty in light of the watershed data breaches in the Panama Papers and Paradise Papers. Evident concerns about lawyer complicity in money laundering, and the global magnitude of the threat money laundering poses to the stability of the international monetary system, signal the opportune moment at which a tipping point has been reached. Either lawyer self-regulation in Canada needs to be resourced and supported in a different way through public funds, or Canada's regime for lawyer self-regulation should give way to a new model that involves government oversight more in accordance with those now prevalent across common law jurisdictions. Members of the public should be concerned, and government should be concerned on their behalf as self-regulating law societies have neither the capacity, nor resources, nor constitution necessary to adequately ensure that lawyers are not participating in money laundering.

It is further problematic to assume that the Benchers (other terms) of law societies, as duly elected members of the Bar in the relevant jurisdiction, selected by their peers out of a wide range of practice areas, really have the required expertise to deal with money laundering. As Woolley has suggested, reform to the lawyer self-regulatory system could be effected by involving government and the public.[97] An alternative possibility might be to infuse law societies with public funds to supplement their resources, allocating large sums of public monies to be administered privately would no doubt be less publicly palatable than government taking control of lawyer regulation. Given the scope and scale of this problem, it seems that now should be the time to start contemplating how a public regulatory regime for lawyers might be implemented in Canada. As discussed, the Common Law jurisdictions of England and Wales, Scotland, and Australia have already changed their regulatory model for lawyers, and as such provide useful examples of how this might be successfully accomplished. It is worrisome to consider, that, if the legal profession, and government, together fails to regulate money laundering, the profession and even the public become complicit in money laundering and corporate crime.

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[97] Woolley, *supra* note 74.

This article has examined current issues relating to concerns about participation by lawyers in money laundering and what the FATF Report identifies as troubling gaps in the regulatory regime intended to fill it. It has contended that law societies across Canada, while they may have subjectively benevolent intentions and legal expertise, lack the necessary resources and logistical capacity to curtail money laundering, and are in any case constituted in a way that is inherently problematic as protectionist of lawyers. Governmental oversight is necessary for regulatory work towards curtailing money laundering. Concern about lawyers' roles in the multi-billion dollar global business of money laundering should constitute the point that tips Canada away from uncritical acceptance of unsupportable assumptions about the necessity of lawyer self-regulation into an alternative, publicly-led, regulatory regime for lawyers.

Police Independence vs Military Discipline: Democratic Policing in the Canadian Forces

JONATHAN AVEY *

ABSTRACT

Over the last 25 years, there has been a gradual acceptance within the Canadian Forces that Military Police need to be able to function independently when exercising their duties as police officers. This acceptance has led to organizational and administrative changes to provide such independence to MP members; however, despite these changes, there remains the risk that MP independence may be eroded in the course of criminal or disciplinary investigations. This article presents two recent matters to illustrate that the independence currently afforded to MP investigators is still very much in doubt. The first is the recent decision of the Court Martial Court of Appeal in *R v Wellwood*, which brought the dichotomy of MP independence and the need to maintain discipline and a rigid obedience to orders from a superior squarely before the court. The second is the recent controversy surrounding the MP investigation into allegations against Lieutenant Colonel Mason Stalker, which ultimately resulted in a stay of proceedings being directed on all charges and Stalker launching a lawsuit against the Department of National Defence and the Canadian Forces.

* Jonathan Avey, CD, JD, is a Crown Attorney with the Manitoba Prosecution Service and an LLM candidate at the Osgoode Hall Faculty of Law at York University, and previously served for 14 years in the Canadian Armed Forces. His academic research focuses primarily on constitutional issues in criminal law and criminal procedure. The views expressed in this paper are entirely those of the author and are not representative of the Governments of Canada or Manitoba, or any of their departments. The author wishes to thank the anonymous peer reviewers for their valuable feedback, and to the editorial staff of the Manitoba Law Journal for their patience and assistance in bringing this work to completion.

This article argues the steps already taken by the CF to ensure MP independence are positive, but not sufficient. Specific sections of the *National Defence Act* inappropriately permit senior members of the CF to interfere in MP investigations. In the absence of a finding that police independence is a principle of fundamental justice under s. 7 of the *Charter*, it falls to Parliament to ensure that Military Police personnel are free to carry out police functions in an independent manner. The offending portions of the *NDA* should be immediately repealed and further amendments should be enacted that prohibit any interference in MP investigations.

Keywords: police independence; principle of fundamental justice; military police; *National Defence Act*; Deschamps Report; democratic policing; military law; military discipline; Canadian Forces

I. INTRODUCTION

The principle of police independence is deeply entrenched in Canadian law. The reason is simple: we do not live in a totalitarian state where the police act as enforcers of those in political power. Police officers are imbued with an enormous amount of authority – both legal and moral. With that authority, however, comes both legal responsibility and the expectation of a high moral standard. In order to maintain public confidence in the police, officers cannot act – or be perceived as acting – to protect or defend a political or private interest. Rather, the police must independently and fairly enforce the law without the interference of political leaders or those they have put in authority. Officers must also be free to perform their duties without fear of reprisals against them for doing so.

It is well established in Canadian law that the nature and unique concerns of the military necessitate a separate and parallel system of military justice.[1] This is not manifested by a system identical to that of civilian law save that it wears a uniform, but one that addresses the unique requirements of service life. One of the requirements of this separate system is that the Canadian Forces (CF) have a professional police force trained to conduct

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1 See *R v Généreux*, [1992] 1 SCR 259 at para 60, 70 CCC (3d) 1 [*Généreux*]; see also *MacKay v The Queen*, [1980] 2 SCR 370 at 400, 403–04, 114 DLR (3d) 393; *MacKay v Rippon*, [1978] 1 FC 233 at paras 6–8, 36 CCC (2d) 522.

criminal and disciplinary investigations in the unique environments encountered in the course of military employment. The result is the Military Police (MP), whose duties encompass both the more traditional police duties performed by civilian police officers as well as those required in order to fulfill their role as soldiers in support of military operations.

Like all members of the Canadian Forces, Military Police members (MPs) take on legal obligations under military law in addition to those imposed on all members of Canadian society.[2] They fall under the authority of the *National Defence Act* (*NDA*),[3] and must comply with the *Queen's Regulations and Orders* (*QR&O*), which are enacted pursuant to the *NDA* in order to provide an authoritative manual of military law.[4] Finally, in addition to these statutes, MPs are also governed by the *Military Police Professional Code of Conduct*.[5]

One of the most basic functions of military law is to ensure a rigid adherence to discipline. One only needs to look so far as s. 83 of the *NDA* to see how seriously disobedience to orders may be treated: "Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment."[6] This article will examine the tension between the need to maintain military discipline – including a rigid adherence to obedience of lawful orders – and the democratic requirement that Military Police members be independent from external or political influences in the execution of their duties. I will also examine other ways in which the principle of democratic policing is at risk of being eroded as a result of the current organizational and administrative structure of the Canadian Forces. In doing so, I will examine the recent decision of the Court Martial Appeal Court (CMAC) in *R v Wellwood*, a matter that brought this dichotomy squarely before the courts.[7] I will also be examining portions of the *NDA* that affect MP independence,

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2 Canada, Department of National Defence, *Military Justice at the Summary Trial Level*, vol 2.2 (Ottawa: DND, 2011) at 1-1–1-6.

3 *National Defence Act*, RSC 1985, c N-5 [NDA].

4 Canada, Department of National Defence, *Queen's Regulations and Orders for the Canadian Forces*, online: <http://www.forces.gc.ca/en/about-policies-standards-queens-regulations-orders/index.page> [*QR&O*].

5 *Military Police Professional Code of Conduct*, SOR/2000-14.

6 NDA, *supra* note 3, s 83.

7 *R v Wellwood*, 2017 CMAC 4, 140 WCB (2d) 660 [*Wellwood*].

as well as the question of whether police independence should receive constitutional protection.

This is by no means the first consideration of MP independence in recent years. Both Andrew Halpenny and Kent Roach have confronted the issue.[8] Halpenny advocated for a restructuring of the MP chain of command that would result in the CF Provost Marshal (CFPM), the CF's senior MP officer, consolidating all MPs under his or her command, with the Provost Marshal answering to a Military Police Services Board, which in turn would report to the Chief of the Defence Staff.[9] The CF subsequently adopted this position in April 2011.[10] Roach would go further, positing that MP independence should be recognized as a constitutional principle associated with the rule of law and under s. 7 of the *Charter* as a principle of fundamental justice.[11] While I agree wholeheartedly with Roach's position, this article will focus on what I refer to as *institutional independence*, that is, independence of the Military Police as a branch within the confines of the Forces as an institution, including its governing legislation.

In this article, I will do the following: first, I will outline the organizational structure of the Canadian Forces, generally, with emphasis on how MPs fit within that structure. I will also provide some background to show how the notion of MP independence has evolved over time. Second, I will review the facts of the *Wellwood* case to illustrate how MPs can be placed in the position of being forced to choose between competing authorities. As part of this section, I will review the conduct requirements that apply to CF members under the *NDA* and the penalties a member may be liable to for violating those standards. Third, I will consider the question of what impacts a perception of command influence may have on the military justice system and why such perceptions must be fought. Finally, I will argue that further steps need to be taken to ensure an independent and

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8 Andrew Halpenny, "The Governance of Military Police in Canada" (2010) 48:1 Osgoode Hall LJ 1; Kent Roach, "Police Independence and the Military Police" (2011) 49:1 Osgoode Hall LJ 117.

9 Halpenny, *supra* note 8 at 52–53.

10 See Canada, Department of National Defence, "The Canadian Forces Military Police Group," Backgrounders CFPM BG 11-01, online: <http://www.forces.gc.ca/en/news/article.page?doc=the-canadian-forces-military-police-group/hnps1vb3>.

11 Roach, *supra* note 8 at 127–31; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*].

impartial Military Police. Specifically, I will argue that the *NDA* should be amended to remove sections that specifically permit command interference with MP investigations. I will also argue that Parliament should enact specific provisions that explicitly prohibit such interference by senior commanders. This will have the dual effects of protecting against interference and promoting the perception of an impartial Military Police branch, thus preserving the public confidence in the administration of military justice.

II. The Structure of the Canadian Forces

In this section, I will summarize the general organizational structure of the CF, and will show how this structure directly impacts each individual member. This is not intended as a thorough or in-depth guide to the intricacies of military administration, but rather to provide a foundation of context to understand the myriad of ways that MP independence may be infringed upon. I will also discuss how the structure of the CF has changed regarding the MP, and discuss specific provisions of the *NDA* that impact on the independence of MP.

A. The Overall Structure

The term "Canadian Forces" refers to the unified armed services of Canada, encompassing the Canadian Army, the Royal Canadian Navy and the Royal Canadian Air Force. Unlike some nations' armed forces, whose branches are independent of one another,[12] the CF all falls into one organizational structure, commanded by the Chief of the Defence Staff (CDS), who is the senior commissioned officer of the Canadian Forces.[13] While each service (land, sea, or air) generally has its own established chain of command and areas or responsibility, there is overlap. For example, a Military Police officer or a Cook may be enrolled in the Air Force, because the nature of the position is not specific to the air service, they may be assigned to duties on an Army base. This would be different than a member

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12 For example, the United States has divided its armed services into separate departments, with each answering to its own chain of command, and ultimately to a civilian appointed by the President.

13 NDA, *supra* note 3, s 14.

who is a pilot, for example, who would likely be most out of place at a naval facility.

The CF can be simply described as a hierarchical structure similar to a pyramid; in many ways similar to the organization of a civilian police department. Each individual soldier is assigned a position within the structure, and answers to a direct chain of command. In terms of units and not individuals, the structure is similar: each unit falls within a larger organization within the structure, which is ultimately commanded by the CDS. While at first glance this structure appears to be straightforward, it can very quickly become complex. As will be discussed in greater detail when considering the issues in *Wellwood*, there can be a disconnect between rank and authority, even though the former is always, to some extent, imbued with the latter.

For the individual member, their position in the chain of command determines how their career progresses: personnel evaluations are typically performed by a member's immediate supervisor and opportunities for advanced training are often intended for specific units or positions. In turn, how a member is evaluated and the training they have received will strongly influence their future career assignments, opportunities for promotions, and postings. Prior to 2011, this structure presented a much higher risk of interference with MPs. As Halpenny noted, MPs are typically posted in detachments of 10-20 members, commanded by a junior officer holding the rank of captain. These detachments, though, answered to base or wing commanders, who are frequently colonels – a difference of three rank levels (and a vast difference in terms of tenure: a colonel is typically an officer with 15-20 years of experience, where as a captain may have as little as 3 or 4). Halpenny described the result thusly:

> This can cause the local Detachment Commander, who depends upon being perceived by his commander as cooperative and productive and who has otherwise no policing priority guidelines, to be agreeable to those priorities that the commander sees as important. MP are then liable to be employed in a manner that does not optimally use their policing training and skills, and may result in poor policing.[14]

As mentioned previously, in April 2011 the CF implemented one of Halpenny's recommendations by consolidating all MPs under the authority of the Provost Marshal when they are exercising military police functions. This removed MPs from the command authority of their environmental or

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[14] Halpenny, *supra* note 8 at 46–47.

operational chains of command during the time when independence is most necessary.[15] The result is that MPs are ostensibly insulated from local pressures or considerations in exercising their police-specific functions.

B. The Evolution of MP Independence Within the CF

Military Police members are in a unique position within the CF, in that they are both CF soldiers and police officers, and thereby fall under two distinct classes of actors. It follows that they have two distinct types of duties: "field and garrison duties" which are "essentially of a military nature" and their "investigative responsibilities, 'which are almost wholly of a policing nature.'"[16] Regarding their investigative responsibilities, over the last 25 years the principle of police independence has incrementally been recognized within the CF.[17]

In his article, "Police Independence and the Military Police" Kent Roach provides a valuable overview of the way independence has developed in the military police.[18] Roach traces its beginning with the role of the military police generally, and following the increase of police independence from the Somalia Inquiry through the Dickson Reports, the 1998 Accountability Framework, subsequent amendments to the *NDA*, and the 2011 increased command authority of the CF Provost Marshal.[19] I do not propose to duplicate this overview. For this article, it suffices to say that the Somalia Inquiry brought to light the real-life consequences of a military police lacking independence, including serious criminal allegations that went uninvestigated and the ways that investigations could be, and indeed were, tainted by conflicts of interest. Former Chief Justice Dickson shed further light when tasked with examining the military police and military justice. He approved of a 1998 Accountability Framework, which was "meant to ensure that the reporting relationship of the [Provost Marshal] to the [Vice Chief of the Defence Staff] does not in any way compromise the independence of the CFPM in relation to the investigatory role of the

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15 Roach, *supra* note 8 at 139.

16 Roach, *supra* note 8 at 136, citing Canada, Department of National Defence, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: DND, 14 March 1997) at ii.

17 Roach, *supra* note 8 at 132; see also Halpenny, *supra* note 8.

18 Roach, *supra* note 8.

19 *Ibid* at 132–40.

military police."[20] Finally, in 2011, changes in the organizational and command structure regarding military police resulted in the consolidation of all MPs under the authority of the Provost Marshal while they are carrying out investigatory duties.

The above summary clearly demonstrates that there has been, as Roach describes, a "growing acceptance" of the necessity for military police independence.[21] In addition to their newfound structural independence, MPs now possess the statutory ability to file a complaint of improper interference with an investigation with the Military Police Complaints Commission (MPCC).[22] As Roach notes, this 2009 addition to the *NDA* will allow the MPCC to develop the jurisprudence on the scope of police independence. It is not impregnable, however, as its authority to examine such complaints can be limited through legislation that authorizes command direction and interference.[23] Thus, in the absence of constitutional protection for police independence, it provides only the security given by any enacted statute and is subject to legislative change.

Illustrating this state of affairs is the manner by which the *Strengthening Military Justice in the Defence of Canada Act* amended the *NDA* in 2013.[24] The Act altered the oversight relationship between the Vice Chief of the Defence Staff (VCDS) and the Provost Marshal. As Roach stated:

> [T]he [1998] Accountability Framework contemplated that while the VCDS would establish "general priorities and objectives for military police services" and be responsible for "general administrative and financial control," the VCDS would "*have no direct involvement in individual ongoing investigations but will receive information from the CFPM to allow necessary management decision making.*"[25]

However, when the *NDA* was amended, s. 18.5 was enacted. It reads:

> 18.5(1) The Provost Marshal acts under the general supervision of the Vice Chief of the Defence Staff in respect of the responsibilities described in paragraphs 18.4(a) to (d).
> (2) The Vice Chief of the Defence Staff may issue general instructions or guidelines

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20 *Ibid* at 137, citing Canada, Department of National Defence, *Report of the Military Police Services Review Group* (Ottawa: DND, 1998) at 14 [*Dickson Committee Report*].

21 Roach, *supra* note 8 at 139.

22 NDA, *supra* note 3, s 250.19.

23 Roach, *supra* note 8 at 138–39.

24 *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24.

25 Roach, *supra* note 8 at 137–138, citing *Dickson Committee Report*, *supra* note 20 at 15 [emphasis in original].

> in writing in respect of the responsibilities described in paragraphs 18.4(a) to (d). The Provost Marshal shall ensure that they are available to the public.
> (3) The Vice Chief of the Defence Staff may issue instructions or guidelines in writing in respect of a particular investigation.
> (4) The Provost Marshal shall ensure that instructions and guidelines issued under subsection (3) are available to the public.
> (5) Subsection (4) does not apply in respect of an instruction or guideline, or of a part of one, if the Provost Marshal considers that it would not be in the best interests of the administration of justice for the instruction or guideline, or that part of it, to be available to the public.[26]

In plain language, this amendment permits the VCDS to exercise command authority to interfere with an ongoing MP investigation pursuant to s. 18.5(3). Furthermore, s. 18.5(5) provides that any instructions issued by the VCDS to the Provost Marshal may not be released to the public. This legislation expressly negates MP independence. As I will discuss in detail below, the inclusion of subsections (3)-(5) in the *NDA* represents a regression in the law governing MP; in my view, there is no justification for these provisions to remain in force and they ought to be immediately repealed.

III. *WELLWOOD*: AN ILLUSTRATION OF COMPETING AUTHORITIES

Having provided an overview of the organizational structure of the CF, I will now turn to the circumstances that resulted in the court martial of Major Wellwood. Major Wellwood was charged with of obstructing a peace officer in the execution of his duties under s. 129 of the *Criminal Code*, and two counts of conduct to the prejudice of good order and discipline under s. 129 of the *NDA*.[27] The charges arose from an acrimonious encounter between Major Wellwood and Corporal Plourde, a military police officer.

On February 5, 2012, the spouse of a CF member involved in a training exercise in the Beauce region of Quebec contacted police to advise that the member had contacted her and confided he had suicidal thoughts involving the use of a firearm. This was brought to the attention of the military police, and Corporal Plourde, as the MP assigned to the exercise as the police

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26 NDA, *supra* note 3, s 18.5.

27 See NDA, *supra* note 3, s 130 (providing that an act or omission constituting an offence under any Act of Parliament is an offence under the Code of Service Discipline and falls within the jurisdiction of military law).

officer responsible for law enforcement, was tasked to investigate and ensure the member was not in danger. Attempting to confirm the location of the member, Corporal Plourde proceeded to Command Post 8 (CP-8), commanded by Major Wellwood.[28]

When approaching CP-8, Corporal Plourde and his driver, Private Simard-Bolduc, had to pass through a gatehouse that controlled access to the area. Instead of stopping, Private Simard-Bolduc activated the emergency lights and was permitted access. This was reported to the Command Post. Major Wellwood determined to intercept the MPs and demand an explanation for why they did not stop at the gatehouse.[29]

When confronted, Corporal Plourde indicated to Major Wellwood that he was there looking for a suicidal member, and invoked his authority to act under a provincial statute.[30] Major Wellwood told him that the military chain of command was already aware of the situation and handling it, and further that the matter was not under military police jurisdiction. Corporal Plourde replied that it was a police matter, not that of the chain of command, and that she "should not confuse her rank with his police authority."[31]

It was at this time that the confrontation progressed past a mere exchange of words about who should act. Major Wellwood ordered Corporal Plourde – in colourful language, reflecting the antagonistic nature of the conversation – to leave the premises, forbade him from speaking with anyone else and blocked him from entering the CP.[32] Corporal Plourde, who fully intended to enter the CP to talk with others, was required to use force to remove Major Wellwood from his path.[33]

While Corporal Plourde's investigation, and that of the military chain of command, continued past this interaction, it was the incident recounted above that resulted in the charges against Major Wellwood. In summary, it was an incident where both actors felt they had the legal authority and responsibility to act, which the other was infringing upon. What should be

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28 *Wellwood*, *supra* note 7 at paras 28–31, 227.

29 *Ibid* at para 229.

30 Specifically, *An Act Respecting the Protection of Persons Whose Mental State Presents a Danger to Themselves or to Others*, CQLR c P-38.001; see *Wellwood*, *supra* note 7 at para 42.

31 *Wellwood*, *supra* note 7 at paras 41–45.

32 *Ibid* at paras 230–32.

33 *Ibid* at paras 47–48, 50.

recognized is that the former is correct, as both Major Wellwood and Corporal Plourde were justified in taking action – and indeed, required to – but it does not follow that the latter is equally accurate. There was nothing to be gained for either party in impeding the efforts of the other; conversely, there was a realistic possibility of danger if time was wasted and a potentially suicidal member was not located.

One factor that may have contributed to the parties' actions during this incident is the suicide of Corporal Stuart Langridge. The suicide itself occurred in 2008; there was an immediate "sudden death" investigation, and subsequently two further investigations in 2009 and 2010. While the details of the investigations were not publicly available at the time, the fact of their existence and the allegations leveled by Corporal Langridge's parents against members of the CF were well-publicized. On April 29, 2011, Glenn Stannard, the Chair of the Military Police Complaints Commission, gave notice of his intention to convene a public interest hearing into complaints about the investigations.[34]

The MPCC hearing was extensive, hearing from approximately 90 witnesses and entering some 22,000 documents into evidence.[35] The Final Report (the "Langridge Report") criticized the initial investigation,[36] the handling of Corporal Langridge's suicide note to his family,[37] the 2009 investigation surrounding who was Corporal Langridge's Next of Kin,[38] and the decision to close the 2010 investigation file without performing any

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34 Canada, Military Police Complaints Commission, "The Notice of Decision to Conduct a Public Interest Investigation into the Military Police Investigations Relating to the Death of Corporal Stuart Langridge," by Glenn Stannard (Ottawa: MPCC, 29 April 2011), online: <http://www.mpcc-cppm.gc.ca/info/pubs/329-eng.aspx>.

35 Canada, Military Police Complaints Commission, *Final Report Following a Public Interest Hearing Pursuant to Subsection 250.38(1) of the* National Defence Act *with Respect to a Complaint Concerning the Conduct of Sergeant David Mitchell; Petty Officer 2nd Class Eric McLaughlin; Sergeant Matthew Ritco; Sergeant Scott Shannon; Warrant Officer Jon Bigelow; Warrant Officer (Retired) Sean Bonneteau; Warrant Officer Blair Hart; Master Warrant Officer Ross Tourout; Chief Warrant Officer (Retired) Barry Watson; Major Daniel Dandurand; Lieutenant-Colonel Brian Frei; Lieutenant-Colonel (Retired) Bud Garrick; and Lieutenant-Colonel Gilles Sansterre*, by Glenn Stannard, Chairperson (Ottawa: MPCC, 10 March 2015) at 4.

36 *Ibid* at 10–11, 166–432.

37 *Ibid* at 12–15, 433–511.

38 *Ibid* at 16–18, 545–634.

actual investigation.[39] The final report is in excess of 1000 pages. There is no question that the public interest hearing was appropriate under the circumstances – at a minimum, the transparency provided by the public hearing and report serves to promote accountability within the CF.

For those in the CF who were not involved in the Langridge investigations, however, it would be easy to view the hearing (and later, the Langridge Report) as a warning that any actions surrounding a suicidal or potentially suicidal member could be extensively analyzed later on. At the time of the events in *Wellwood*, the MPCC's hearing was still ongoing – it takes little imagination to conceive that Corporal Plourde was determined not to be the subject of any future hearing by walking away from the situation. Similarly, Major Wellwood can easily be envisioned as being determined not to be perceived as behaving negligently towards the well-being of a soldier (which was one of the allegations leveled by Corporal Langridge's parents against his chain of command).

Given such a backdrop, one can sympathize with both parties' desire to remain involved. Notwithstanding that, decisions under such circumstances must be based on training and adherence to law. Unfortunately, the spectre of suicide and other mental health incidents are not unheard of in the modern CF. It is entirely foreseeable that similar interactions may occur in future. At a minimum, this should serve as a warning to the CF that all members should be informed about their duties and obligations, not only regarding their own chain of command, but also how it may affect dealing with Military Police members.

A. High Stakes: Disciplinary Charges under the *National Defence Act*

For Major Wellwood, the potential jeopardy in impeding Corporal Plourde is readily apparent, as doing so may constitute a criminal offence. Similarly, even if criminal charges are not pursued, such an incident could easily form the basis of internal disciplinary or even administrative actions. What may not be so clear is the potential jeopardy for Corporal Plourde.

For civilians who have never served in a professional armed force, it may be difficult to grasp the seriousness with which orders are viewed. This is understandable, as the only reference that most people have is that of directions from a civilian boss; however, the situations are not analogous.

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39 *Ibid* at 18–23, 635–682.

Civilian perception of the armed forces is strongly influenced by popular culture, and as Amar Khoday notes, "[p]roducers and mediums of popular culture play a significant role in transmitting ideas and information about law and justice."[40] Khoday aptly demonstrates how popular culture routinely focuses on a hero who flouts military discipline, often for moral reasons.[41] What is typically lost in these cinematic portrayals, though, is just how seriously such breakdowns in discipline are taken by the military.

Discipline is the cornerstone upon which a military force is built. Field Marshal de Saxe stated its importance as follows:

> Next to the forming of troops, military discipline is the first object that presents itself to our notice; it is the soul of all armies; and unless it be established amongst them with great prudence, and supported with unshaken resolution, they are no better than contemptible heaps of rabble, which are more dangerous to the very state that maintains them than even its declared enemies.[42]

The necessity to maintain military discipline has been written on more recently. The Supreme Court of Canada termed the requirement that military members obey orders as an "absolute necessity"[43] and ultimately, as Major C. E. Thomas notes, this necessity is the basis for the offence of disobeying a lawful command under s. 83 of the *NDA*.[44]

A conviction under s. 83 carries significant jeopardy. As previously mentioned, the offender is liable to imprisonment for life. However, even if a member receives a non-custodial sentence, the mere fact of a conviction represents a significant impediment for the member in terms of career progression, in addition to whatever sentence is ultimately imposed.[45]

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40 Amar Khoday, "Valorizing Disobedience Within the Ranks: Law and Resistance in American Military Films" (2018) 36:2 Cardozo Arts & Ent LJ [forthcoming in 2018].

41 *Khoday, supra* note 40.

42 Field-Marshal Count Saxe, *The Art of War: Reveries and Memoirs* (London, UK: J Davis, 1811) at 48.

43 *R v Finta*, [1994] 1 SCR 701 at para 123, 28 CR (4th) 265.

44 Major CE Thomas, "*R v Liwyj*: Can a Soldier Be Punished for Disobeying an Unlawful Command?" (2012), 88 CR (6th) 352.

45 See NDA, *supra* note 3, s 139 (available sentences include imprisonment, dismissal from the CF, reduction in rank, a severe reprimand or reprimand, a fine, and what is termed "minor punishments" such as stoppage of leave or confinement to barracks. A combination of the aforementioned punishments may also be imposed—i.e., imprisonment and reduction in rank, or a reprimand and a fine).

B. To Obey or Not to Obey

Turning to the facts in *Wellwood*, Corporal Plourde was given a direct order by Major Wellwood: to leave the camp and not speak to anyone else present. This was after Major Wellwood indicated that the matter fell outside military police jurisdiction. Thus, Corporal Plourde was presented with a significant question: how certain was he that the matter he was dealing with fell within his jurisdiction as a peace officer? It was on this point that the potential jeopardy, if any, that the corporal could face turned: if his initial assessment that it was a military police matter was correct, the order given by Major Wellwood was unlawful. As Major C. E. Thomas indicates, in the context of a charge under *NDA* s. 83, "legality of the order… remains an essential element of the charge."[46] This is consistent with *QR&O* article 19.015, which provides that "[e]very officer and non-commissioned member shall obey lawful commands and orders of a superior officer."[47] An unlawful order is thus no order at all, and there is no obligation to follow it – or conversely, no punishment for disobeying it.

As mentioned previously, Corporal Plourde was confronted with a different perspective, as Major Wellwood asserted that the chain of command was dealing with the situation – and that the military police had no authority to act. The major's assertion that it was a chain of command responsibility is not without merit: every officer in the CF has a duty to promote the welfare of her subordinates.[48] If the major was correct in asserting the matter fell under her exclusive authority, she would have every right to give orders in furtherance of that objective.

In sum, Corporal Plourde had to determine whether he was confident enough that he was acting within his jurisdiction and authority as a peace officer that he was prepared to disregard what would otherwise be a lawful command from an officer ten ranks his superior, and risk the punishment for doing so.

While the Court Martial Appeal Court was not unanimous in its ultimate disposition of the appeal, on the question of whether Corporal Plourde should have obeyed Major Wellwood's order (one of the grounds

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46 Thomas, *supra* note 44.

47 *QR&O*, *supra* note 4, art 19.015 [emphasis added].

48 *Ibid*, art 4.02(1)(c); see also *Wellwood*, *supra* note 7 at paras 119, 239.

of appeal from conviction) the panel agreed: "[Major Wellwood's] position does not hold water."[49]

Cournoyer JA., writing for the majority, reviewed the principle of police independence as it has been interpreted by previous courts, citing Binnie J. in *R v Campbell* for the proposition that, "[a] police officer investigating a crime is not acting as a government functionary or as an agent of anybody... the police are independent of the control of the executive government."[50] He also adopts expressly Roach's assertion that the principle of police independence applies to the military police vis-à-vis the chain of command when they are performing activities related to law enforcement.[51]

Cournoyer JA. concludes his analysis by indicating:

> The independence of the military police with respect to the chain of command in the course of law enforcement activities is indisputable. Moreover, contrary to another of the appellant's arguments, law enforcement activities also include the duty and powers of police officers under the common law and not restricted to investigations regarding service offences.[52]

Thus, the CMAC validated Corporal Plourde's actions insofar as his refusal to obey Major Wellwood's order in a resounding fashion. However, as I will address later on, I respectfully disagree with Cournoyer JA.'s conclusion that military police independence with respect to the chain of command is indisputable. While Corporal Plourde was justified in not following the order he was given, the reality is that no military police officer should ever be in the position where they are faced with such an evaluation. In this case, Corporal Plourde acted properly; however, as Cournoyer JA. recognized, it is impossible to predict the multitude of situations where the aims and authority of MPs may come into conflict with those of the chain of command, or how those situations may be handled.[53]

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49 *Wellwood*, *supra* note 7 at paras 91, 238.

50 *R v Campbell*, [1999] 1 SCR 565 at paras 27–29, 171 DLR (4th) 193 [*Campbell*], cited by *Wellwood*, *supra* note 7 at para 94.

51 See Roach, *supra* note 8 at 132, 139–40, cited by *Wellwood*, *supra* note 7 at para 95.

52 *Wellwood*, *supra* note 7 at para 100. Regarding the instant case, Cournoyer JA observed that a police officer responding to a 911 call is acting within their authority, per *Dedman v The Queen*, [1985] 2 SCR 2 at 28, 20 DLR (4th) 321; *R v Godoy*, [1999] 1 SCR 311 at paras 15–16, 168 DLR (4th) 257; *R v Clayton*, 2007 SCC 32 at paras 21–25, 2 SCR 725.

53 See *Wellwood*, *supra* note 7 at para 104, where Cournoyer JA declined to expand on his conclusion that police independence applied to the MP and how it might apply in other circumstances, indicating it would be "unwise and inappropriate" to do so.

As I will address below, there are legislative steps to ensure MP are granted institutional independence, and in addition, further protection would be granted if police independence is recognized as a principle of fundamental justice. Outside the formal legal system, however, there are still actions that may be taken within the Canadian Forces, itself. Such actions could include specific training for officers on their obligations with respect to MP investigations, and how the authority vested in them by virtue of their rank and/or position may overlap those of a military police investigator, who is a subordinate by rank but who is nonetheless cloaked in the authority of a police officer.

IV. THE DANGERS OF COMMAND INTERFERENCE

Command interference in the exercise of police duties can take many different forms, and have various impacts. Interference may be specific to a particular investigation, and so are limited in the sense that its impacts may not have a direct effect on any other investigation; however, interference can also take forms that are more systemic in nature. Regardless of the particular nature of the interference, though, command interference can have serious effects on society's – including CF members' – confidence in the administration of military justice.

To see a real-life example of the dangerous effects command interference may have, we need only look back to the turning point that has ultimately brought about the level of MP independence currently enjoyed: the Somalia Inquiry. The numerous instances of command interference that either hampered or outright prevented MP investigations were recognized, as were numerous systemic issues that resulted.[54] In terms of life, liberty, and security of the person, these interests, of any number of individuals, were threatened. The torture and murder of Shidane Arone is the most well-known consequence, but the misconduct was by no means limited to that infamous event, but rather was rampant leading up to it. Had MPs enjoyed the independence they should, and been permitted to carry out their duties properly, it is possible what was later dubbed "Canada's National Shame" would never have occurred.[55]

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54 Roach, *supra* note 8 at 132–40.

55 Donna Winslow, *The Parliamentary Inquiry into the Canadian Peace Mission in Somalia* (Brussels: Geneva Centre for the Democratic Control of Armed Forces, 2002) at 7.

The Somalia affair provides an illustration of what may occur from Military Police being restricted from pursuing investigations. It led to blatant misconduct, criminal charges, loss of life under atrocious circumstances, the disbanding of the entire Canadian Airborne Regiment, and a serious blow to the reputation of the Canadian Forces as a whole. Since that time, the CF has strived to gain back a reputation for professionalism. This was aptly expressed by Colonel (Ret'd) Michel Drapeau, who stated:

> Over the past decade I have watched our army transform itself into a world-class organization whose performance in Afghanistan has gained the unrestricted admiration and respect of both our allies and Canadians. This is due, in my estimation, to two interconnected factors: a second-to-none field leadership and the unremitting performance by the rank and file who serve above and beyond the call of duty.[56]

The CF's foreign involvement since Somalia was not limited to the mission in Afghanistan, although that was certainly its most visible, spanning from 2001-2014. Other operations included involvement with the United Nations in Bosnia from 1992-2007, the UN observer mission in Ethiopia and Eritrea from 2000-2003, UN airlift support in the Democratic Republic of the Congo in 2003, assisting at the Cambodia Mine Action Centre from 1993-2000, and many others.[57]

Throughout this time, the Military Police has carried out its functions, both domestically and abroad, without interference from the chain of command. They are part of the team described by Colonel Drapeau that has displayed exemplary leadership and unremitting performance by front-line soldiers. In short, the Military Police has demonstrated that it is fully capable of carrying out its mandate without the assistance of senior CF leadership, or the direction or involvement of those falling outside the MP branch.

A. Avoiding the Perception of Command Interference

The justice system is no stranger to evaluating not only an actual problem, but also the perception of a problem. Lord Chief Justice Hewart

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56 *Standing Committee on National Defence*, 41st Parl, 1st Sess, No 065 (11 February 2013) at 1530 (Michel Drapeau).

57 Canada, Centre for Operational Research and Analysis, "Canadian Armed Forces Operations from 1990–2015," prepared by Michael A Stevens (Ottawa: Valcom Consulting Group Inc, November 2015).

expressed the oft-quoted maxim nearly a century ago: "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."[58] Our more modern courts have recognized as legitimate questions surrounding whether a judge's decision was influenced by bias, or the reasonable apprehension of bias,[59] whether an accused was deprived of a fair trial or the appearance of one,[60] and what requirements must be met for an independent judiciary.[61] On a more general level, though, the justice system must have the confidence of society if it is to function properly. As actors in the system, this applies equally to police, and is no less applicable in the military context.

The perception of fairness was commented on by Senator (and retired Lieutenant-General) Roméo Dallaire, who referred to the effects of command interference found in the aftermath of the Somalia Inquiry and commented that such interference "put the entire military justice system at risk by undermining the confidence of the troops, who began to question whether the system would be able to respond to their needs."[62]

A Canadian who joins the CF has not simply accepted a job, but rather adopted an entirely different lifestyle – one that requires them to place themselves under the authority of a separate legal system with which few are familiar. They are subject to strict rules and regulations – actions such as showing up late for work, which may or may not even merit comment in a civilian workplace, can result in disciplinary charges, and punishments. The system that administers these rules and regulations must be fair – and it must be perceived as fair. That system does not begin when a person is charged and brought before a court, but when conduct is investigated. Confidence in the justice system – military or civilian – requires that police have the support of the public. In the case of the Military Police, they require the support of the CF membership. Even the appearance of unfairness will erode that support, and MPs will find it increasingly more difficult to effectively discharge their duties.

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58 *R v Sussex Justices; Ex parte McCarthy*, [1924] 1 KB 256 at 259.

59 *R v RDS*, [1997] 3 SCR 484, 10 CR (5th) 1.

60 *R v Schmidt*, [1945] SCR 438, 2 DLR 598; *R v Schmaltz*, 2015 ABCA 4 at paras 13–14, 320 CCC (3d) 159.

61 *R v Valente*, [1985] 2 SCR 673, [1986] 19 CRR 354; *Généreux*, *supra* note 1.

62 *Debates of the Senate*, 41st Parl, 1st Sess, Vol 150, Issue 163 (21 May 2013) at 1950 (Hon Roméo Dallaire).

All Canadians have the right to expect independent and impartial policing. It must also appear fair and impartial. Public confidence in the police depends on it. A system that appears to be acting on the direction of either a political authority, or one wholly removed from the police, risks being perceived as akin to a police state. For CF soldiers, who experience an extreme power imbalance when faced with someone even a single rank higher than themselves, it is imperative that those who are tasked with police duties be perceived as being free to carry them out independently.

It bears emphasizing that Canadians who join the CF do not give up their rights as Canadian citizens simply by volunteering to take on responsibility for the safety of the nation. As Justice Létourneau stated, "We as a society have forgotten, with harsh consequences for the members of the armed forces, that a soldier is before all a Canadian citizen, a Canadian citizen in uniform."[63]

B. The Investigation and Charges against Lieutenant Colonel Stalker

An illustration of the need for a strong perception of MP institutional independence is the recent investigation surrounding Lieutenant-Colonel Mason Stalker, who was charged with several offences, including sexual assault and sexual exploitation. To understand the concern about the potential appearance of command interference in the investigation, and how it could negatively impact the military justice system, some background is required.

On March 27, 2015, former Supreme Court Justice Marie Deschamps released her report on the external review conducted into sexual misconduct and sexual harassment in the Canadian Armed Forces.[64] This review was conducted in response to numerous media articles on the topic of sexual assault in the military, as well as several internal surveys within the CF.

Justice Deschamps's report was devastatingly blunt. In it she reports candid accounts from serving members, including comments stating that sexual harassment at military colleges is a "passage oblige" and "[members]

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63 *Standing Committee on National Defence*, 41st Parl, 1st Sess, No 065 (11 February 2013) at 1655 (Gilles Létourneau).

64 Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces* (Ottawa: Government of Canada, 27 March 2015) [*Deschamps Report*].

do not report sexual harassment because it happens all the time."[65] In the CF, generally, a "sexualized culture creates a climate conducive to more serious incidents of sexual misconduct… The use of the word 'cunt', for example, is commonplace, and rape jokes are tolerated"[66] While the misconduct described was primarily reported by female members, it was acknowledged that LGBTQ members reported a similarly degrading environment.[67] In short, she determined that the CAF possessed a culture that was sexualized and misogynistic, allowing harassment and abuse to be overlooked, under-reported, and poorly understood.[68] The Deschamps Report made ten specific recommendations, with the intention of addressing the serious problem of sexual misconduct within the CF.[69]

While the CF did not implement all of Justice Deschamps's recommendations, in one regard the Report was spectacularly successful: it brought to the forefront a very real issue facing the Forces that sparked immediate action. Shortly after release of the Report, General Jonathan Vance was appointed as Chief of the Defence Staff. He made no secret of his intention to address the problem, stating upon assuming his new role, "As my first order to the Canadian Armed Forces, everybody must continue to work together to eliminate this harmful behaviour. It must stop now."[70]

He wasted no time in issuing his first operational order setting in motion Operation HONOUR (Op HONOUR). In doing so, he formally recognized that the behaviour described and the existence of the sexualized culture in the CF "runs contrary to the values of the profession of arms and

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65 *Ibid* at 14.

66 *Ibid* at 15.

67 *Ibid* at 16.

68 James Cudmore, "Military's Response to Sexual Misconduct Report Curtailed by General's Orders," *CBC News* (13 May 2015), online: <http://www.cbc.ca/news/politics/military-s-response-to-sexual-misconduct-report-curtailed-by-general-s-orders-1.3071386>.

69 *Deschamps Report*, *supra* note 64 at ix–x.

70 Postmedia News, "Operation Honour Dubbed 'Hop on Her' by Soldiers Mocking Military's Plan to Crack Down on Sexual Misconduct," *National Post* (26 October 2015), online: <http://nationalpost.com/news/canada/operation-honour-dubbed-hop-on-her-by-soldiers-mocking-militarys-plan-to-crack-down-on-sexual-misconduct>; see also, "Gen. Jonathan Vance Says Sexual Harassment 'Stops Now,'" *CBC News* (23 July 2015), online: <http://www.cbc.ca/news/politics/gen-jonathan-vance-says-sexual-harassment-stops-now-1.3165065>.

ethical principles of the DND/CAF." He went on to state that, "[h]armful and inappropriate sexual behaviour is a real and serious problem for the CAF which requires the direct, deliberate and sustained engagement by the leadership of the CAF and the entire chain of command to address."[71]

General Vance has continued to make Op HONOUR a priority, instituting a policy that sexual misconduct convictions will result in administrative review with a view to release the member from the CF.[72] An administrative release (akin to firing an employee) is not limited to circumstances where the individual has been convicted of wrongdoing, however. As Rear Admiral Jennifer Bennett, director general of the military's strategic response team on sexual misconduct, notes, even where the evidence is insufficient for a criminal conviction the military can take action. This is also possible where no trial was conducted, but the conduct is still deemed to be inappropriate.[73]

Against this background one can consider the matter surrounding Lieutenant Colonel Stalker. In July 2015, Lieutenant Colonel Stalker was charged with three counts of sexual assault, four counts of sexual exploitation, one count of sexual interference, one count of invitation to sexual touching, and one count of breach of trust by a public officer. The charges were laid after an investigation performed by the CF National Investigation Service, a division of the Military Police. As an immediate result of the charges, he was removed from his position as Commanding Officer of the 1st Battalion, Princess Patricia's Canadian Light Infantry.[74]

Sixteen months later, all charges against the highly-decorated officer were withdrawn.[75] In May 2017, Lieutenant Colonel Stalker launched a suit

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71 Canada, Department of National Defence, *CDS OP Order – OP Honour* (14 August 2015) at paras 1, 3, online: <http://www.forces.gc.ca/assets/FORCES_Internet/docs/en/caf-community-support-services-harassment/cds-op-order-op-honour.pdf>.

72 Bruce Campion-Smith, "Top General Issues Orders to Drum Out Sexual Offenders," *The Star* (13 January 2017), online: <https://www.thestar.com/news/canada/2017/01/13/top-general-issues-orders-to-drum-out-sexual-offenders.html>.

73 *Ibid.*

74 Trisha Estabrooks, "Lt.-Col. Mason Stalker, Based in Edmonton, Faces Sex Charges," *CBC News* (28 July 2015), online: <http://www.cbc.ca/news/canada/edmonton/lt-col-mason-stalker-based-in-edmonton-faces-sex-charges-1.3171086>.

75 Clare Clancy, "'I Have Always Maintained My Innocence': Sexual Assault Charges Dropped Against Military Commander," *Edmonton Journal* (4 November 2016), online: <http://edmontonjournal.com/news/crime/sexual-assault-and-exploitation-charges-dropped-against-decorated-military-commander>.

against the Department of National Defence and the CF, alleging that the MP investigation was negligent, electing to lay charges after interviewing a small number of witnesses who failed to corroborate the complainant's allegations. He alleges that the allegations against him were incongruent with the established timeline of his CF service, and that a "proper, professional and competent investigation prior to (Stalker's) arrest would have clearly indicated that the allegations made against the Plaintiff could not have possibly been true." [76] Interestingly, he also alleges that even though the charges against him have been withdrawn, the MP investigation into his conduct continues.[77] Most relevant to this article, though, is the following excerpt from Lieutenant Colonel Stalker's statement of claim:

> The very few witnesses interviewed pre-arrest saw nothing unusual and provided no corroboration to the Complainant's false and malicious allegations,...This demonstrates a campaign by the Defendant to showcase the Plaintiff's arrest to the public – which we allege likely occurred in order to diminish negative headlines that followed the 'Deschamps Report.'[78]

Lieutenant Colonel Stalker's assertions have not yet been proven. They may be entirely without merit. However, they do raise the question, if the allegations against him could have been disproven by such simple investigatory measures as an examination of his service record, why did the matter proceed? The statement of claim provides one argument: the charges provided the CF the opportunity to show just how seriously sexual misconduct allegations were being handled. But this raises another concern: if one accepts the possibility that the CF used the allegations against Lieutenant Colonel Stalker as a tool to influence public perception, is there a possibility that the investigation itself was the subject of command influence? Put more specifically, could the VCDS, in full awareness of the public perception regarding the CF in the wake of the Deschamps Report, have influenced an investigation that resulted in criminal charges against a

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76 See "Military Officer Taking Legal Action Against DND Over Sex Assault Investigation," *CTV News* (5 May 2017), online: <https://www.ctvnews.ca/canada/military-officer-taking-legal-action-against-dnd-over-sex-assault-investigation-1.3400629>.

77 *Ibid.*

78 Julia Wong, "Federal Government Claims No Wrongdoing After Edmonton Military Officer Files $8M Lawsuit," *Global News* (13 December 2017), online: <https://globalnews.ca/news/3915584/federal-government-claims-no-wrongdoing-after-edmonton-military-officer-files-8m-lawsuit/>.

CF member to bolster public perception in the wake of damning allegations against the CF as an institution?

Whether or not Lieutenant Colonel Stalker's assertions are ultimately proven, the fact remains that the VCDS has the statutory authority to issue instructions or guidelines in respect of a MP investigation. The circumstances surrounding the investigation into Lieutenant Colonel Stalker provide a concrete example of a circumstance where it could reasonably be questioned whether such interference occurred. What effect does that have on CF members' confidence in the Military Police, and the administration of military justice? Even if no such instructions or guidelines were issued in this case, when one considers that a military police investigation featuring interference by the second-highest ranking member of the CF may result in criminal or disciplinary charges, it is difficult to argue that the Military Police currently operate with the independence required to maintain the perception of impartiality.

V. Ensuring Military Police Independence

While I agree that the organizational changes Halpenny advocated for were required to move MPs away from a traditional military chain of command and towards a model comparable to that of a civilian police department, in my view the changes made were nothing more than necessary first steps in protecting MP independence. In my view, they are insufficient to ensure the required level of independence that the military justice system requires. This is especially true given certain amendments made to the *NDA* by the *Strengthening Military Justice in the Defence of Canada Act* that impact on MP independence.[79]

The position of Military Police members as soldiers with military duties necessitates that they answer to a military chain of command; however, their unique role when tasked as police officers requires that they are independent from the standard CF structure in order to carry out police duties. Just as important, however, is that, along with actual independence, MP investigators be perceived as being independent. In this section, I will propose changes to the *NDA* that in my view are necessary for the MP branch to have true institutional independence, including both repealing and enacting legislation.

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[79] *Strengthening Military Justice in the Defence of Canada Act*, *supra* note 24.

A. Amending the National Defence Act

As stated above, I agree with Roach in his assessment that police independence warrants constitutional protection, not merely that provided for in a statute that Parliament may revoke at its pleasure. At this time, however, police independence is not recognized as a constitutional principle, despite it being clearly and inextricably linked to the rule of law, which the Supreme Court has twice described as "one of the 'fundamental and organizing principles of the Constitution.'"[80] Even with that constitutional proximity, however, it is unlikely that current legislation would be invalidated based solely on this connection. Put simply, the published decision invalidating democratically enacted legislation on the basis of an unwritten constitutional principle has yet to be penned.[81] Thus, until such time as such a principle is recognized, the focus squarely falls on ensuring that the legislative provisions governing the Canadian Forces not only provide for MP independence, but ensure it is protected.

In its current form, the *National Defence Act* does not do so. Section 18.5, governing the supervisory relationship between the Vice Chief of the Defence Staff and the Provost Marshal, explicitly permits interference in investigations. It is worth restating the section:

> 18.5(1) The Provost Marshal acts under the general supervision of the Vice Chief of the Defence Staff in respect of the responsibilities described in paragraphs 18.4(a) to (d).
> (2) The Vice Chief of the Defence Staff may issue general instructions or guidelines in writing in respect of the responsibilities described in paragraphs 18.4(a) to (d). The Provost Marshal shall ensure that they are available to the public.
> (3) The Vice Chief of the Defence Staff may issue instructions or guidelines in writing in respect of a particular investigation.
> (4) The Provost Marshal shall ensure that instructions and guidelines issued under subsection (3) are available to the public.
> (5) Subsection (4) does not apply in respect of an instruction or guideline, or of a part of one, if the Provost Marshal considers that it would not be in the best interests of the administration of justice for the instruction or guideline, or that part of it, to be available to the public.[82]

The section can be bifurcated cleanly: subsections (1)-(2) pertain to the Provost Marshal's general responsibilities; whereas subsections (3)-(5)

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80 *Campbell*, *supra* note 50 at para 18, citing *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at 240, 161 DLR (4th) 385.

81 Roach, *supra* note 8 at 131.

82 NDA, *supra* note 3, s 18.5.

pertain to specific investigations.[83] It is noteworthy that, while the VCDS may issue instructions or guidelines pertaining to both the Provost Marshal's general responsibilities and regarding a particular investigation, instructions pertaining to the former are required to be available to the public. Instructions or guidelines relating to the latter, however, may be withheld. In a report prepared on police independence and the Military Police, Roach acknowledged that subsections (1)-(2) are "consistent with the balance that must be struck between military police independence and accountability, policy guidance and the management responsibilities of the general command."[84] I agree – the Provost Marshal, like all CF members, has to be accountable for their general duties; with that comes the necessity that some direction be permitted in carrying out his or her duties. It is the latter provisions that directly infringe on the independence of the Military Police, and ought to be immediately repealed.

When Parliament was considering the *Strengthening Military Justice in the Defence of Canada Act*, the issue of police independence was raised on several occasions, both in the House of Commons during debates and while the bill was in committee. In fact, in one of the bill's first committee meetings Peter Tinsley, a former Military Police officer and lawyer, and former Chair of the Military Police Complaints Commission, expressed strong concern about the new s. 18.5. He pointed out that the Somalia commission was quite critical of the position of the Military Police within the structure of the Forces, "which vitiated any notion of independence and gave rise to the potential for the perception of improper influence being exercised."[85]

Tinsley proceeded to review the recommendations made by the special advisory group (SAG) chaired by Brian Dickson, as well as the mandated review of the *NDA* headed by Antonio Lamer in 2003. He concluded:

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[83] *Ibid*, s 18.4 ("The Provost Marshal's responsibilities include (a) investigations conducted by any unit or other element under his or her command; (b) the establishment of selection and training standards applicable to candidates for the military police and the ensuring of compliance with those standards; (c) the establishment of training and professional standards applicable to the military police and the ensuring of compliance with those standards; and (d) investigations in respect of conduct that is inconsistent with the professional standards applicable to the military police or the *Military Police Professional Code of Conduct*").

[84] *House of Commons Debates*, 41st Parl, 1st Sess, No 102 (29 March 2012) at 1550–1555 (Hon Wayne Easter).

[85] *Standing Committee on National Defence*, 41st Parl, 1st Sess, No 066 (13 February 2013) at 1535–1540 (Peter Tinsley).

> [N]otwithstanding the consistent recommendations of the Somalia commission, the Dickson report, and Lamer in respect of the necessary independence of the military police from the chain of command in respect of police operational decisions and investigations—as well, it is in stark contrast to the accountability framework—[Bill C-15] includes a provision that specifically authorizes the VCDS to "issue instructions or guidelines in writing in respect of a particular investigation."[86]

Tinsley was not the only person to refer to the Somalia Inquiry. Senator Roméo Dallaire expressed concern over this section, describing it as "counter to everything that was recommended in the aftermath of Somalia."[87] Similar concerns were expressed in the House of Commons by several opposition members who questioned the need for such a power.[88] In response, Chris Alexander provided the following justification for the provision:

> The intent of proposed subsection 18.5(3) is to recognize the unique circumstances of the military police, who often operate in zones of armed conflict. [...]
>
> Military police may be going to investigate a situation, here or there on the battlefield, but they do not have knowledge of the operational next steps of the mission. They do not know if there is going to be direct fire called in at that location. They do not know if there is going to be a live fire training exercise at that location. They do not know if there is going to be an air strike at that location. That is what this provision in the bill, as unamended, seeks to allow the VCDS to inform the Provost Marshal of, and absolutely the Provost Marshal could make public the rationale. [...]
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> However, in those rare cases when, for reasons of operational secrecy, the protection of Canadian lives or, if there is personal information involved in the investigation, privacy, the Provost Marshal may not make the instructions fully public or may not make them public at all.

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86 *Ibid* at 1540.

87 *Debates of the Senate*, 41st Parl, 1st Sess, Vol 150, Issue 163 (21 May 2013) at 1950 (Hon Roméo Dallaire).

88 *House of Commons Debates*, 41st Parl, 1st Sess, No 44 (4 November 2011) at 1325 (John McKay); *House of Commons Debates*, 41st Parl, 1st Sess, No 102 (29 March 2012) at 1550–1555 (Hon Wayne Easter); *House of Commons Debates*, 41st Parl, 1st Sess, No 226 (21 March 2013) at 1020 (Elizabeth May); *House of Commons Debates*, 41st Parl, 1st Sess, No 226 (21 March 2013) at 1050 (John McKay); *House of Commons Debates*, 41st Parl, 1st Sess, No 242 (29 April 2013) at 1815 (Marc Garneau).

> In other words, the intent of proposed section 18.5 is to strengthen the independence of the military police, as the default position is that the instructions must be made public.[89]

With the greatest of respect to Mr. Alexander, it is difficult to see how a statutory provision that allows a senior officer to issue instructions regarding a particular investigation could strengthen the independence of the MP simply because the instructions may be publicly released. It should be remembered that the VCDS is subject to military law, has a vested interest in the perception of the CF as a whole, is not a police officer – and so may not fully appreciate the impact of any instructions given on an investigation – and is not subject to the processes of the Military Police Complaints Commission.

However, turning to the circumstantial examples provided, they are best described as specious. There will, no doubt, be times when the MP are required to conduct investigations in combat zones. Stating that they may not be aware of what may be occurring in those areas, though, ignores that MPs are not only police officers – they are also professional soldiers, with all the training, knowledge, and resources that come with that status. MPs – like all CF members – do not operate in a vacuum. They know the organizational structure of the CF and operational commands. They know who the key contact people are while deployed. They know who to inquire of to ensure they will not be walking into a hot combat zone. They know who to contact to inquire about live-fire exercises or air-strikes. Even in the worst-case scenario, which is that MPs find themselves in a situation when conducting an investigation is not feasible for operational reasons, they are specifically trained in how to react and deal with the situation. In short, it is entirely unnecessary to truncate police independence for the reasons given.

When pressed on the reason why the authority of the VCDS is not limited in the nature of the instructions that he or she may give, the government response was that the limitations are in the accountability and transparency provisions themselves. Peter MacKay, then Minister of National Defence, testifying before the Senate Standing Committee on Legal and Constitutional Affairs, stated, "I would respectfully suggest that the limitations are in the transparency and the accountability. That is to say,

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89 *House of Commons Debates*, 41st Parl, 1st Sess, No 226 (21 March 2013) at 1040 (Chris Alexander).

the behaviour of the Vice Chief of the Defence Staff in injecting himself into an investigation must be completely transparent."[90]

It is unfortunate that the government seemed to miss the point: interference with police independence is not a problem solely when the interference is surreptitious. Section 18.5 imposes no limits whatsoever on the VCDS's discretion to issue instructions – whether publicly available or otherwise, such direction directly impacts police independence and may adversely affect public confidence in the administration of military justice. The fact remains that when the VCDS issues orders in respect of a particular investigation, the Provost Marshal is obliged to follow those orders. He or she has no recourse. Thus, the section presents a simple cost-benefit weighing for the VCDS: is he or she prepared for the response that may result, in the event their order is publicly released?

While this is not a constitutional question, to borrow from the language often used in constitutional assessments, the legislation is disproportional: it permits absolute interference with police investigations, but for a completely unnecessary stated purpose.

In addition to repealing s. 18.5(3)-(5), I am of the view that sections should be enacted specifically prohibiting any interference with a police investigation. This could be done through several different means. Attempting to do so could be listed as a service offence under the Code of Service Discipline.[91] Alternatively, a clarifying subsection could be added to s. 83 indicating that, without restricting s. 83, any order purporting to interfere or that would result in interference with a Military Police investigation is not a lawful command. Such provisions would clearly send the message that MPs are to carry out their police duties independently without any interference from senior service members.

Police independence is not yet recognized as a principle of fundamental justice; nonetheless it is strongly linked to the unwritten constitutional principle of the rule of law. It is worthy of, and indeed requires strong protection. The CF has already taken steps to remove command influence from MPs as they carry out police duties by placing them under the command of the CF Provost Marshal when they are so employed. This is not sufficient, however, to ensure they enjoy true independence. Contrary

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90 *Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl, 1st Sess, Issue 37 (23 May 2013) at 1030 (Hon Peter MacKay).

91 Being Part III of the NDA, *supra* note 3.

to Cournoyer JA.'s pronouncement in *Wellwood* that the independence of military police from the chain of command is indisputable, the fact remains that interference can be – and currently is – permitted by democratically enacted legislation.[92] In order to achieve true Military Police independence, s. 18.5(3)-(5) must be repealed.

VI. Conclusion

Military law occupies a unique position within the Canadian legal system. It is neither criminal nor administrative, nonetheless it reflects principles of both. Regardless of how much it interacts with principles of civilian law, however, it will continue to function in a unique manner to meet the distinct requirements of the Canadian Forces. This includes those tasked with carrying out police investigative duties while still acting within their responsibilities as soldiers.

The need for military police independence has been gradually accepted. Changes have been made in furtherance of this, including the administrative reassignment of military police officers to fall under the command authority of the CF Provost Marshal when carrying out police functions. This step, while certainly necessary and welcome, represents merely one step on the path to military police independence. As the recent case of *R v Wellwood* illustrates, there are still uncertainties within the CF surrounding the intersection of military police duties as police officers and their responsibilities as Canadian Forces soldiers. These uncertainties can, and should, be addressed by ensuring that there is clear legislation providing for the independence of the Military Police when carrying out police functions.

At this time, the *National Defence Act* expressly permits interference in military police investigations by the Vice Chief of the Defence Staff, the second-highest ranking member of the CF and who has a vested interest in how the CF is perceived by the public, and who therefore may be perceived to act in a way that will prevent incidents that may embarrass the CF from being brought into the public eye. Further, that interference itself may not be made public. The existence of this legislation has the potential to strongly impact the perception of fairness surrounding military police investigations,

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92 *Wellwood*, *supra* note 7 at para 100.

as is aptly demonstrated by the recent controversy surrounding Lieutenant Colonel Mason Stalker and his subsequent lawsuit.

This current state of the law should not stand. The rule of law demands that police act independently – and public confidence in the administration of military justice just as strongly demands that they be perceived as acting independently. It is hoped that the judiciary will recognize the principle of police independence as a principle of fundamental justice under s. 7 of the *Charter* at its first opportunity; however, until the courts make such a determination, the immediate obligation remains that s. 18.5(3)-(5) should be removed from the *NDA*. Permitting it to remain in force is to allow the law governing military justice to regress back to a time that resulted in disastrous consequences for the CF, and to invite interference from biased actors and risk the public perception – including the perception within the Canadian Forces membership – that the military is free to place its own interests above those of justice.

The Problem of "Relevance": Intelligence to Evidence Lessons from UK Terrorism Prosecutions

LEAH WEST *

ABSTRACT

As of November 2017, 60 known foreign terrorist fighters have been permitted to return and live in Canada without criminal consequence. The reason for this, according to the Minister of Public Safety, is the problem of using information collected for intelligence purposes as evidence in criminal proceedings. Often referred to as the "intelligence to evidence" (I2E) dilemma, this challenge has plagued Canada's terrorism prosecutions since the Air India bombing in 1985. Yet, not all countries struggle to bring terrorists to justice. Canada's prosecution statistics pale in comparison to the United Kingdom.

In a democracy committed to upholding the rule of law and respecting human rights, prosecuting terrorists is the strongest and most transparent deterrent to this threat. This article argues that as the threat of terrorism grows both domestically and abroad, Canada must learn from the UK's experience and reform the rules of evidence to ensure that criminal charges are pursued. This article will outline and compare the relevant Canadian and UK rules of evidence and assess their practical implications for national security prosecutions in light of primary research conducted in London in the fall of 2017. It concludes with a series of legislative and organizational reforms to improve the efficiency of Canadian terrorism trials.

* Leah West, MA, JD, is the Anti-Terrorism Research Fellow at the University of Ottawa where she is completing her LLM. She is also counsel with the National Security Litigation and Advisory Group of the Department of Justice. Leah's views are her own and do not reflect the opinion of the Department of Justice.

Keywords: Terrorist; intelligence; evidence; relevance; disclosure; terrorism trial; counter-terrorism; foreign fighter; criminal prosecution; national security

I. INTRODUCTION

As of November 2017, approximately 60 known foreign terrorist fighters have been permitted to return and live in Canada without criminal consequences.[1] Unsurprisingly, political opposition has called on Prime Minister Trudeau's Liberal Government to account for this number, suggesting that the interests of national security require foreign fighters to be targeted and killed before they return home and put Canadians at risk.[2]

In response, the Minister of Public Safety, Ralph Goodale explained that Canada prefers to lay charges rather than target citizens on enemy soil.[3] "When evidence is available charges are laid,"[4] said the Minister in the House of Commons, and "[w]hen prosecutions are possible"[5] he continued, "they are prosecuted to the fullest extent of the law."[6] Yet, between 2001 and 2015 Canada conducted a mere 21 terrorism prosecutions, with only 17 more scheduled to move through the courts in 2016-2017.[7] The

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1 *House of Commons Debates*, 42nd Parl, 1st Sess, No 234 (20 November 2017) at 15314 (Hon Ralph Goodale) [*Hansard*] ("the director of CSIS indicated before a parliamentary committee some months ago, the number of returnees known to the Government of Canada is in the order of 60, and they are under very careful investigation"); Evan Dyer, "'Canada Does Not Engage in Death Squads,' While Allies Actively Hunt Down Their Own Foreign Fighters," *CBC News* (17 November 2017), online: <http://www.cbc.ca/news/politics/isis-fighters-returning-target-jihadis-1.4404021>.

2 Tonda MacCharles, "Conservatives Slam Trudeau as Soft on Terror as Push for Security Changes Begins," *Toronto Star,* (20 November 2017), online: <https://www.thestar.com/news/canada/2017/11/20/conservatives-slam-trudeau-as-soft-on-terror-as-push-for-security-changes-begins.html>.

3 Evan Dyer, "Does the Law Prevent Canada from Killing Its 'Terrorist Travellers'?" *CBC News* (4 December 2017), online: <http://www.cbc.ca/news/politics/killing-canadian-jihadis-death-squads-1.4429137>.

4 *Hansard*, *supra* note 1 at 15314 (Hon Ralph Goodale).

5 *Ibid.*

6 *Ibid.*

7 Public Prosecution Service of Canada (PPSC), "Report on Plans and Priorities 2016–17," online: <http://www.ppsc-sppc.gc.ca/eng/pub/rpp/2016_2017/index.html#sec

problem, explained Minister Goodale, is one "bedeviling countries around the world in terms of how you actually move from intelligence to evidence and make a case stick."[8]

The intelligence to evidence (I2E) problem has plagued Canada's terrorism prosecutions since the Air India bombing in 1985.[9] However, not all countries struggle to bring terrorists to justice. Canada's prosecution statistics pale in comparison to the United Kingdom, who between 2015 and 2016 prosecuted 79 people for terrorism related offences,[10] and in 2017 arrested 400 more.[11] While there is no doubt that the daily threat of terrorism is greater in the UK,[12] Craig Forcese and Kent Roach argue that

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tion_2_2>; Public Prosecution Service of Canada, "Transition Book" (February 2017), online: <http://www.ppsc-sppc.gc.ca/eng/tra/tr/08.html>; Craig Forcese & Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015) at 317–322 [*False Security*].

8 Rachel Gilmore, "Canada Struggling to Prosecute Returned ISIS Fighters," *ipolitics* (26 November 2017), online: <https://ipolitics.ca/2017/11/26/canada-struggling-prosecute-returned-daesh-fighters/>.

9 Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence*, *Vol 4* (Ottawa: Public Works and Government Services Canada, 2010) at 12 [*Air India Vol 4*]; Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism*, (Toronto: Cambridge University Press, 2011) at 373.

10 "The Counter-Terrorism Division of the Crown Prosecution Service (CPS) – Cases Concluded in 2015" (19 July 2016), online: <https://www.cps.gov.uk/publications/prosecution/ctd_2015.html:prosecutions that concluded in 2015>; refers to prosecutions concluded in 2015; "The Counter-Terrorism Division of the Crown Prosecution Service (CPS) – Cases Concluded in 2016" (10 February 2017), online: <https://www.cps.gov.uk/publications/prosecution/ctd_2016.html>.

11 UK, Home Office, "Operation of Police Powers Under the Terrorism Act 2000, Quarterly Update to September 2017" (London, UK: Home Office, 2017) at 4 (400 persons were arrested in the year ending 30 September 2017).

12 Vikram Dodd, *The Guardian*, "UK Facing Most Severe Terror Threat Ever, Warns MI5 Chief" (17 October 2017); MI5, "Threat Levels" (December 2017), online: <https://www.mi5.gov.uk/threat-levels> (threat level assessed as severe, meaning an attack is highly likely as of 6 December 2012); Craig Forcese, "Streamlined Anti-terror Investigations: Quick Notes on the UK Experience" (17 November 2017), *National Security Law Blog* (blog), online: <http://craigforcese.squarespace.com/national-security-law-blog/2016/11/17/streamlined-anti-terror-investigations-quick-notes-on-the-uk.html>.

per capita Canada falls behind all of its closest allies when it comes to putting terrorists on trial.[13]

Terrorism is the most significant threat to Canadian national security today.[14] Even if the targeted killing of Canadian foreign fighters directly participating in an armed conflict is legal, as a nation committed to upholding the rule of law and respecting human rights prosecuting terrorists is the strongest and most transparent deterrent Canada has to counter this threat.[15] As the threat of terrorism grows both domestically and abroad, Canada must learn from the UK's experience and reform the rules of evidence to ensure that criminal charges are pursued.

This article will outline and compare the relevant Canadian and UK rules of evidence and assess their practical implications for national security prosecutions in light of primary research conducted in London in the fall of 2017. This comparison will proceed in five parts. First, Part II will review the literature on this topic and describe the research methodology employed by the author. Part III follows with a brief outline of the history of the intelligence to evidence problem in Canada. Part IV will then examine the rules of disclosure in the UK as compared to Canada's common law standard established in *R v Stinchcombe*.[16] This section will also demonstrate how the UK' *Criminal Procedure and Investigations Act 1996* (*CPIA*) empowers

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13 *False Security, supra* note 7 at 278, 290 (between 2001 and 2014 Canada charged 45 people for terrorism offences; the UK charged 721).

14 Canada, Public Safety Canada, *2014 Public Report on the Terrorist Threat to Canada*, (Ottawa: Public Safety Canada, 2014) at 2. Terrorism is not defined in Canadian law; however, terrorist activity is defined in s 83.01 of the *Criminal Code*, RSC 1985 c C-46. Activities include an open list of acts, most physically violent, that are committed in whole or in part "for a political, religious or ideological purpose" and "with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act" in or out of Canada. Such acts must intentionally (a) cause death or serious bodily harm to a person by the use of violence; (b) endanger a person's life; (c) cause a serious risk to the health or safety of the public; (d) cause substantial property damage; or (e) cause serious interference or serious disruption of an essential service, facility, or system. It also includes being an accessory, conspiracy, counselling and inciting, or the attempt or threat to commit any such act or omission.

15 Craig Forcese & Leah Sherriff, "Killing Citizens: Core Legal Dilemmas in the Targeted Killing of Canadian Foreign Terrorist Fighters" (2016) 57 Cdn YB Intl Law 134; *False Security, supra* note 7 at 274.

16 *R v Stinchcombe*, [1991] 3 SCR 326, 1991 CanLII 45 [*Stinchcombe*];

Crown Prosecutors to act strategically when laying charges and conducting prosecutions to limit the need to rely on and disclose national security material.[17] Part V will establish that the *CPIA* creates little need to rely on the UK's Public Interest Immunity (PII) scheme to prevent the disclosure of national security material; however, when it is necessary, the PII process is more efficient and ensures greater procedural fairness than proceedings conducted under s. 38 of the *Canada Evidence Act* (*CEA*).[18]

Leveraging the lessons learned from the UK, Part VI concludes with an analysis of the *CPIA* in light of the *Canadian Charter of Rights and Freedoms* (*Charter*).[19] Although the principles of fundamental justice protected by s. 7 of the *Charter* would prohibit the wholesale adoption of the UK regime, four legislative and organizational reforms inspired by the *CPIA* are recommended to improve the efficiency of Canadian terrorism trials. These recommendations attempt to respect both the preoccupations of the Canadian Security Intelligence Service (CSIS), and the necessary balance between an accused's right to disclosure and the public interest in prosecuting terrorism.

II. Literature and Methodology

A. Literature

Since 2001, much has been written in Canada and the UK regarding the assertion of national security privilege and the use of secret evidence in criminal and immigration proceedings, and the corresponding impact on the protection of human rights.[20] Canada's struggle to bring charges and

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17 *Criminal Procedure and Investigations Act 1996*, (1996) UK c 25 [CPIA].

18 *Canada Evidence Act*, RSC 1985, c C-5 [CEA].

19 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

20 Peter Rosenthal, "Disclosure to the Defence After September 11: Sections 37 and 38 of the Canada Evidence Act" (2004) 48 Crim LQ 186; Kathy Grant, "The Unjust Impact of Canada's Anti-Terrorism Act on an Accused's Right to Full Answer and Defence" (2003) 16 Windsor Rev Legal Soc Issues 137; Stephen Townley, "The Use and Misuse of Secret Evidence in Immigration Cases: A Comparative Study of the United States, Canada, and the United Kingdom" (2007) 32 Yale J Intl L 219; Matthew R Hall, "Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings" (2002) 35 Cornell Intl LJ 515; Jasmina Kalajdzic, "Litigating State Secrets: A Comparative Study of National Security Privilege in Canadian, US and English Civil Cases" (2010) 41:2 Ottawa L Rev 289; Craig Forcese

secure convictions against those suspected of terrorism has also been well documented in the report of the Air India Commission, and in the subsequent publications of Kent Roach and Craig Forcese.[21] Both scholars have repeatedly called for the implementation of the Commission's recommendations, many of which involve reform to Canada's disclosure regime.[22]

Some of the reforms suggested by the Air India Commission however, focus on improving cooperation between Canada's national security agencies, which would more closely reflect the relationship between the UK's MI5 and British law enforcement.[23] The increased capacity for information sharing and joint investigations between these agencies since the attacks on 7/7 has been thoroughly documented by Dr. Frank Foley at King's College London and others.[24] Most recently, David Anderson, the

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& Lorne Waldman, "Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings" (2007), online: <https://ssrn.com/abstract=1623509>; Sudha Setty, "Comparative Perspective on Specialized Trials for Terrorism" (2010) 63:1 Me L Rev 131; Daphne Barak-Erez & Matthew C Waxman, "Secret Evidence and the Due Process of Terrorist Detentions" (2009) 48:1 Colum J Transnat'l L 3; Cian C Murphy, "Counter-Terrorism and the Culture of Legality: The Case of Special Advocates" (2013) 24:1 King's LJ 19; Didier Bigo et al, "National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges" in CEPS Paper in Liberty and Security in Europe No 78 (2015); Jeffrey Davis, "Uncloaking Secrecy: International Human Rights Law in Terrorism Cases" (2016) 38:1 Hum Rts Q 58.

21 *Air India Vol 4*, *supra* note 9; Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Final Report, Vol 1* (2010); Kent Roach, "Be Careful What You Wish For? Terrorism Prosecutions in Post-9/11 Canada" (2014) 40 Queen's LJ 99; Kent Roach, "'Constitutional Chicken': National Security Confidentiality and Terrorism Prosecutions after R v Ahmed" (2011) 54:2 SCLR 357; *False Security*, *supra* note 7, ch 9.

22 *Air India Vol 4*, *supra* note 9 at 305–322 (Roach outlines what he refers to as "Back-End Strategies to Reconcile the Demands of Disclosure and Secrecy").

23 *Ibid* at 297–304 (Roach outlines what he refers to as "Front-End Strategies to Make Intelligence Useable in Terrorism Prosecutions").

24 For criticism of Canadian inter-agency cooperation from a UK perspective, see Philip Wright, "Symbiosis or Vassalage? National Security Investigations and the Impediments to Success" in Craig Forcese & François Crépeau, eds, *Terrorism, Law and Democracy: 10 Years after 9/11* (Montreal: Canadian Institute for the Administration of Justice, 2012); Frank Foley, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past* (Cambridge: Cambridge University Press, 2013); Frank Foley, "Why Inter-Agency Operations Break Down: US Counterterrorism in Comparative Perspective"

former Independent Reviewer of UK Terrorism Legislation released his assessment of the MI5 and police internal reviews into the 2017 attacks in London and Manchester, providing additional insight into the operational capacities, priorities, and challenges of these organizations.[25]

Since 2016, Forcese has published several pieces comparing the organizational cultural and operational approach to terrorism investigations in the UK and Canada.[26] In the article, "Staying Left of Bang," Forcese draws on lessons learned from the UK and asks skeptically whether Canadian rules of evidence are really to "blame" for the arm's length relationship between the RCMP and CSIS.[27] In his analysis, Forcese identifies that MI5 and law enforcement conduct joint terrorism investigations and, when doing so, MI5 carries out its collection to evidential standards (meaning information is collected in a way that it can be used in court.) As describe bellow, this is not the current practice in Canada as the Canadian disclosure regime strongly disincentives joint investigations.

Forcese's article also sounds the alarm first rung by Joe Fogarty, the former security intelligence liaison between Canada and the UK. Testifying before the Senate, Fogarty warned that Canada has "been remarkably lucky, as a country, that you have not faced fast-moving, sophisticated opponents since 2001 because you could have been living in tragedy here."[28]

(2016) 1:2 European J Intl Security 150; Frank Foley, "The Expansion of Intelligence Agency Mandates: British Counter-Terrorism in Comparative Perspective" (2009) 35:4 Rev Intl Studies 983; Frank Foley, "Reforming Counterterrorism: Institutions and Organizational Routines in Britain and France" (2009) 18:3 Security Studies 435. For more on UK reforms, see Peter Clarke, "Learning From Experience" (The Colin Cramphorn Memorial Lecture 2007 delivered at the Policy Exchange 24 April 2007) (London, UK: Policy Exchange, 2007); Antony Field "Tracking Terrorist Networks: Problems of Intelligence Sharing Within the UK Intelligence Community" (2009) 35 Rev Intl Studies 997; Peter Taylor, "How Britain Has Been Kept Safe for a Decade," *BBC News* (17 July 2016), online: <http://www.bbc.com/news/magazine-36803542>.

25 David Anderson, *Attack in London and Manchester March–June 2017* (December 2017), online: <https://www.gov.uk/government/publications/attacks-in-london-and-manchester-between-march-and-june-2017>.

26 Craig Forcese, "Staying Left of Bang: Reforming Canada's Approach to Anti-Terrorism Investigations" (2017) University of Ottawa Working Paper 2017-23 at 2.

27 *Ibid* at 16–17.

28 Evidence, Standing Senate Committee on National Security and Defence, 41st Parl, 2nd Sess (2 April 2015) (Joe Fogarty) [Evidence of Joe Fogarty].

Mr. Fogarty testified that when serving in Ottawa he advised that the key difference between the operations of the UK and Canada was that CSIS and the RCMP lacked the institutional framework to "share information extensively and also protect themselves from the disclosure" in criminal proceedings.[29] It was his opinion that without the introduction of legislation like the *CPIA*, Canada "could not be as effective in criminal justice terms as it should be."[30]

To date, little has been published in the public domain that validates the claims made by Mr. Fogarty.[31] Thus, this author sought to confirm the importance of the *CPIA* to the working relationship between police and intelligence officers investigating terrorism, and how this facilitates the use of intelligence as evidence by prosecutors in the UK.

B. Methodology

This article undertakes a comparative analyses of the rules of evidence in the UK and Canada, specifically the regimes governing the disclosure of evidence in criminal proceedings, and the applicable privileges available to protect information where the law requires its disclosure but the interests of national security necessitate its protection.

This article does not engage in an assessment of how or why the rules of evidence have evolved with the growth of international terrorism. Rather, the comparison focuses narrowly on the mechanical effect these regimes have had on the conduct of criminal prosecutions for terrorist related activity since 1985 in Canada and 1996 in the UK. The aim of this comparison is to identify differences in the UK regime that increase the efficiency and effectiveness of terrorism prosecutions in that country.

The UK provides an appropriate comparison because, like Canada, it is a common law jurisdiction. As such, the laws of evidence in both jurisdictions are based on the judge and jury model of adjudication, whereby the judge decides questions of law and the jury is responsible for

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29 *Ibid.*

30 *Ibid.*

31 One exception is a brief article by Susan Hemming of CPS that explains the role of the prosecutor in applying the CPIA, but the article focuses predominantly on the implications of counter-terrorism legislation introduced post 2000. Little is made of the importance of the disclosure test: "The Practical Application of Counter-Terrorism Legislation in England and Wales: A Prosecutor's Perspective" (2010) 86:4 Intl Affairs 955.

questions of fact.[32] The comparison is also relevant because both states have a Westminster-based parliamentary system of government. While the courts in both jurisdictions show deference to the executive branch of government in the realm of national security, this deference is limited by the application of human rights law; in particular, the right to due process and fair trial under article 6 of the *European Convention on Human Rights*,[33] and s. 7 of the *Canadian Charter of Rights and Freedoms*.[34]

The author's research question could not be answered by solely reviewing secondary literature or the relevant legislation, regulations and case law of these jurisdictions. To understand the practical applications of the CPIA in terrorism investigations and prosecutions, and its impact on inter-agency cooperation in the UK, interviews with those who apply and challenge the law was necessary. Interviews with Crown Prosecutors were also required to fully ascertain their role in bringing charges and successfully

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[32] Howard L Krongold, "A Comparative Perspective on the Exclusion of Relevant Evidence: Common Law and Civil Law Jurisdictions" (2003) 12 Dal LJ 97 at 101. The judge is also responsible for giving jury instructions on how to apply the law, and the judge is responsible for determining what evidence may be admitted and warn the jury about the weight to be given certain evidence. Where the admissibility of evidence is challenged, the judge will consider it in the absence of the jury.

[33] *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950), 213 UNTS 221, ETS 5 (entered into force 3 September 1950) [*European Convention on Human Rights*].

[34] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009) at 163; Helen Fenwick, Gavin Phillipson & Roger Masterman, "The Human Rights Act in Contemporary Context" in H Fenwick, G Phillipson & R Masterman, eds, *Judicial Reasoning Under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007) at 2 argues that, while similar, the UK's human rights legislation is not as strong as Canada's); Kent Roach, "Section 7 of the Charter in National Security Cases" (2012) 42 Ottawa L Rev 337. For foundational case law on the interpretation of section 7, see *Re: BC Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81; *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4, [2004] 1 SCR 76; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350; see also European Court of Human Rights (ECHR), "Guide on Article 6 of the European Convention on Human Rights" (30 April 2017), online: <http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> (rights under Article 6(1) include (1) access to a court, which is real and effective; (2) a hearing before an independent and impartial tribunal established by law; (3) that this hearing be public in nature and within a reasonable time; (4) that it present a real opportunity for the case to be made; and (5) that there be a reasoned decision).

prosecuting terrorists where national security information is at risk of disclosure. This information was not otherwise available. As such, primary research was critical for understanding how those who investigate and practice law in the shadows work with those who prosecute terrorists in open court.

The author sought and received approval to conduct in person interviews from the University of Ottawa's Social Sciences and Humanities Research and Ethics Board.[35] Research subsequently began in Canada with conversations with Department of Justice counsel, Bill Boutzouvis and Debra Robinson. They were asked about their work with UK prosecutors during the Operation Crevice trial of five members of a terrorist cell with Canadian connections, and to discuss any advantages they perceived to the UK evidentiary system.[36] Experienced Special Advocates, John Norris, and the Honourable Justice Francois Dadour, were also engaged for their perspective on the UK's application of public interest immunity in comparison to the regime under the *Canada Evidence Act*; both men previously travelled overseas to share lessons learned and best practices with their British counterparts.

Next, the author travelled to London in November 2017. Three lawyers from the Counter-Terrorism Division of the Crown Prosecution Service, Jess Hart, Karen Stock and the division head Mari Reid, were interviewed and agreed to have their comments recorded and transcribed for attribution in this article. Interviews were also conducted and recorded for attribution with the First Senior Treasury Counsel at the Criminal Court Mark Heywood, QC and Senior Treasury Counsel Louis Mably, QC.[37] As Senior Treasury Counsel, these barristers argue the most serious criminal offences at London's Central Criminal Court, and both have extensive experience prosecuting terrorism offences. Martin Chamberlain, QC, a Special Advocate and human rights barrister, was also interviewed about his opinions and experience in closed material proceedings.[38] Finally, David

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35 University of Ottawa, Social Science and Humanities REB, Ethics Approval Notice, No 03-17-01 (approved 8 May 2017).

36 "Five Get Life over UK Bomb Plot," *BBC News* (30 April 2007), online: <http://news.bbc.co.uk/2/hi/6195914.stm>.

37 Attorney General's Office, "New First Senior Treasury Counsel announced" (5 November 2015), online: <https://www.gov.uk/government/news/new-first-senior-treasury-counsel-announced>.

38 For comments by Martin Chamberlain on Closed Proceedings, see "Special Advocates

Anderson, QC, the former Independent Reviewer of Terrorism Legislation met with the author to share his perspective of MI5 and police cooperation, and the potential impact of the new *Investigatory Powers Act*[39] on national security investigations.[40] Unfortunately, while some members of the Metropolitan Police's counterterrorism unit were willing to meet with the author, their heavy workload did not permit in-person interviews; limited information was exchanged via email.

All persons interviewed consented to being identified by name and title. Universally, those in London stand by and were proud of the work they are doing to counter and prosecute terrorism, and were hopeful that the lessons learned by the UK could assist Canada in overcoming the ongoing intelligence to evidence dilemma.

III. The History of the Problem

A. The Difference Between Intelligence and Evidence

The I2E problem is typically explained as one rooted in the divergent mandates of Canada's primary national security agencies: the Royal Canadian Mounted Police (RCMP) and Canadian Security Intelligence Service (CSIS or "the Service").

Prior to the creation of CSIS in 1984, the RCMP's Security Service was responsible for both domestic security intelligence and national security policing. Following a series of scandals and failures by the Security Service in the 1970s and 80s, the 1981 *Report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police*[41] recommended that the responsibility for collecting intelligence be stripped from the RCMP and entrusted to a civilian intelligence agency with a clearly defined legislative mandate.[42]

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and Fairness in Closed Proceedings" (2009) 28:3 CJQ 314.

39 *Investigatory Powers Act 2016* (UK), c 25.

40 For David Anderson's report on the legislation, see *A Question of Trust: Report of the Investigatory Powers Review* (June 2015), online: <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf>.

41 Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law*, Second Report, vol 2 (Ottawa: PCO, 1981) [*Macdonald Commission*].

42 *Ibid* at 428, 753; Canadian Security Intelligence Service, "History of CSIS" (May 2014), online: <https://www.csis-scrs.gc.ca/hstrrtfcts/hstr/index-en.php>; Phillip Rosen,

The Government of the day heeded the advice of the MacDonald Commission and introduced legislation establishing a new civilian national security agency. Separating the Security Service from the RCMP was meant to prevent a single agency from having "too much, or inadequately controlled power"[43] thereby becoming a threat to individual rights.[44]

In 1983, the report of the Special Senate Committee established to review Bill C-157, the *Canadian Security Intelligence Service Act* (*CSIS Act*)[45] highlighted the differences between security intelligence and law enforcement:

> The differences are considerable. Law enforcement is essentially reactive. While there is an element of information-gathering and prevention in law enforcement, on the whole it takes place after the commission of a distinct criminal offence. The protection of security relies less on reaction to events; it seeks advance warning of security threats, and is not necessarily concerned with breaches of the law. Considerable publicity accompanies and is an essential part of the enforcement of the law. Security intelligence work requires secrecy. Law enforcement is "result-oriented", emphasizing apprehension and adjudication, and the players in the system- the police, prosecutors, defence counsel, and the judiciary- operate with a high degree of autonomy. Security intelligence is, in contrast "information-oriented"... Finally, law enforcement is a virtually "closed system with finite limits-commission, direction, apprehension, adjudication. Security intelligence operations are much more open-ended. The emphasis is on investigation, analysis and formulation of intelligence.[46]

Since its establishment, the primary mandate of CSIS is the collection of security intelligence to investigate defined threats and advise the Government on matters related to the security of Canada.[47] The Service's

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Library of Parliament, "The Canadian Security Intelligence Service" (24 January 2000) [84-27E].

43 *Debates of the Senate*, 32nd Parl, 1st Sess (3 November 1983) at 6131 (Michael Pitfield).

44 *Ibid*. See also Senate, Special Committee on the Canadian Security Intelligence Service, *Report of the Special Committee of the Senate on the Canadian Security Intelligence Service, Delicate balance: A Security Intelligence Service in a Democratic Society* (November 1983) [*Pitfield Report*].

45 *Canadian Security Intelligence Services Act*, RSC 1985, c. C-23 s 12 [CSIS Act].

46 *Pitfield Report*, *supra* note 44 at 6 (for early discussions on the CSIS mandates, see the five-year review of the CSIS Act: House of Commons, Special Committee on the Review of the CSIS Act and the Security Offences Act, *In flux but not in crisis: a report of the House of Commons Special Committee on the Review of the Canadian Security Intelligence Service Act and the Security Offences Act* (September 1990).

47 CSIS Act, *supra* note 45. "Threats to the security of Canada" is defined in section 2 of

role is intentionally proactive rather than reactive, and to fulfil its mandate CSIS may collect and analyze information gathered from open and closed sources. Importantly, CSIS does not collect information with the aim of using it to support a criminal conviction, but the Service may share information related to criminal activities with law enforcement.[48]

As a security intelligence service, every action taken by CSIS regardless of the threat under investigation is governed by three key considerations, or perhaps more accurately, three preoccupations. First, unlike typical policing, security intelligence has national and international dimensions. The threat actors, influences, consequences and theatres of operation demand liaison and information sharing with foreign and domestic partners of all types, often under the demand for secrecy.[49] As a "net importer of intelligence"[50] maintaining strong relationships of trust with these partners is vital to the Service's success.[51] Second, the constant fear of penetration by a foreign agency or threat actor demands unrelenting vigilance and creates

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the Act as (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage; (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person; (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious, or ideological objective within Canada or a foreign state; and (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada; but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).

48 *Ibid* ss 14(b), 19(2)(a); *Pitfield Report*, *supra* note 44 at 6.

49 *Macdonald Commission*, *supra* note 41 at 693. For a description of the "Originator Control" principle and some of Canada's intelligence sharing agreements, see Craig Forcese, "The Collateral Casualties of Collaboration" in Hans Born, Ian Leigh & Aidan Wills, eds, *International Intelligence Cooperation and Accountability* (New York: Routledge, 2011).

50 *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 at para 68.

51 *Ibid*; Evidence to Senate Standing Committee on National Security and Defence, 39th Parl, 1st Sess (26 March 2007) (Margaret Bloodworth, National Security Advisor); Kent Roach, *Comparative Counter-Terrorism Law* (Toronto: Cambridge, 2015) at 771; Kent Roach, "Permanent Accountability Gaps and Partial Remedies" in Michael Geist, ed, *Law, Privacy and Surveillance in Canada in the Post-Snowden Era* (Ottawa: University of Ottawa, 2015) at 174.

an obsessive need to safeguard employees, sources and investigative techniques.[52] Third, the ultimate aim of a security intelligence organization is not the public recognition of success or to provide a sense of security to citizens. The aim is the collection of information about people and organizations who seek to obscure their true intent, necessitating the careful use of deceit, manipulation and intrusive technology without violating the rights and freedoms the agency has been established to protect.[53]

While the responsibility for national security intelligence was transferred to CSIS in 1984, the RCMP retained jurisdiction over national security law enforcement.[54] Following the attacks on 9/11, the RCMP established Integrated National Security Enforcement Teams (INSET) across the Country to "collect, share and analyze information and intelligence that concern threats to national security and criminal extremism/terrorism."[55] The aim of these teams is "to reduce the threat of terrorist criminal activity in Canada and abroad by preventing, detecting, investigating, and gathering evidence to support the prosecution of those involved in national security-related criminal acts."[56] Unlike the security intelligence collected by CSIS, evidence is information collected by the RCMP to advance a police investigation, support the laying of criminal charges, and secure a conviction.[57]

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52 *Macdonald Commission, supra* note 41 at 693; Senate, Special Committee on Terrorism and Public Safety, *Report* (1987) at 41 (Chair Hon William Kelly); *Henrie v Canada (Security Intelligence Review Committee),* [1989] 2 FC 229, 53 DLR (4th) 568 at 577–578, aff'd (1992), 88 DLR (4th) 575, 140 NR 315 (FCA).

53 *Macdonald Commission, supra* note 41 at 693–694; Solicitor General Canada, *People and Process in Transition Report to the Solicitor General by the Independent Advisory Team on CSIS* (October 1987) at 5.

54 *Security Offences Act*, RSC 1985, c S-7, s 6 (federalizes the prosecution and police role for crimes implicating national security and gives RCMP jurisdiction over the "apprehension of the commission" of these offences).

55 "Security Criminal Investigations Programs" (21 October 2017), online: <http://www.rcmp-grc.gc.ca/nsci-ecsn/index-eng.htm> [*Security Criminal Investigations Programs*]. For more on the growth of the RCMP counter-terrorism intelligence capabilities, see Martin Rudner, "Challenge and Response: Canada's Intelligence Community and the War on Terrorism" (2004) 11:2 Cdn Foreign Policy J 17.

56 *Security Criminal Investigations Programs, supra* note 55.

57 The RCMP's duties are codified in *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, s 18.

To be used at trial, the collection of evidence must comply with constitutional and legislated standards, and law enforcement's adherence to these standards is often the subject of litigation. Consequently, the police and Crown Prosecutors expect that the reliability and significance of the material they have collected will be challenged in open court.[58]

When the collection mandates of the RCMP and CSIS are layered over conventional security threats such as foreign espionage or organized crime, the lines between these organizations' areas of responsibility scarcely intersect. The same cannot be said for terrorism. Unlike most criminal investigations that arise after an offence is committed, investigations into terrorism are designed to stop the bomb from going off. Consequently, various forms of preparatory conduct is criminalized under the *Criminal Code* which, along with the Service's new authority to engage in "threat disruption" activity, has blurred the lines between security intelligence and law enforcement.[59] As a result, CSIS and the information it collects are increasingly drawn into criminal proceedings.

We can anticipate that the growing threat of domestic terrorism and the corresponding shift in both RCMP and CSIS resources towards anti-terrorism will continue to augment the need to use security intelligence as evidence in criminal proceedings.[60] This reality, however, clashes with the

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58 *Air India Vol 4*, *supra* note 9 at 12, 38; Security Intelligence Review Committee, *Annual Report 1991–1992* (1992) at 9–10.

59 CSIS's threat reduction mandate was introduced in 2015 through Bill C-51 and codified in the CSIS Act, *supra* note 47, s 12.1: "If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat"; see also *Air India Vol 4*, *supra* note 9 at 47; *False Security*, *supra* note 7 at 13. For examples of peremptory or inchoate offences, see *Criminal Code*, *supra* note 14, s 83.02 (Providing or collecting property for certain activities), s 83.03 (Providing, making available, etc., property or services for terrorist purposes), s 83.04 (Using or possessing property for terrorist purposes), s 83.181 (Leaving Canada to participate in activity of terrorist group).

60 Colin Freeze, "RCMP Shelved Hundreds of Organized-Crime Cases After Terror Attacks," *The Globe and Mail* (18 September 2017), online: <https://www.theglobeandmail.com/news/national/mounties-put-hundreds-of-files-on-hold-in-shift-toward-anti-terrorism/article36285597/>. ("INSETS were allotted budgets of $10-million each year shortly after they were created in the early 2000s and soon started overrunning these budgets by hundreds of thousands of dollars. By a decade later, the overruns had increased consistently by $15-million to $20-million, and in 2014 and 2015, after the terrorist attacks that killed the soldiers, the INSETs were overspending by $50-million each year. Last year, the overrun was reduced to $40-million").

Service's preoccupying need to protect its officers, methods, partners, and sources from public scrutiny.

B. I2E: A Recognized Problem Since Air India

To this day the Air India bombing remains the deadliest terrorist attack in Canadian history, and yet, it took almost two decades to bring the perpetrators to trial. When hearings finally commenced in 2003, only three people stood charged. The attack's mastermind, Talsinder Singh Parmar, ultimately plead guilty to manslaughter before the conclusion of the 217 day judge-alone trial; the two others, Ripudaman Singh Malik and Ajaib Singh Bagri were acquitted.[61]

The acquittal of Malik and Bagri resulted from the trial judge's finding that key prosecution witnesses lacked credibility.[62] These witnesses had been CSIS human sources and promised confidentiality. Instead of the anonymity they were assured, they were dragged onto the stand and faced public cross-examination. One of the sources was forced into witness protection after an RCMP error revealed her name.[63] Another potential witness, Tara Singh Hayes, was murdered.[64] Unsurprisingly the testimony of the remaining human sources was reluctant and easily shaken.[65]

Following the trial, the Government struck a commission of inquiry to review the intelligence investigation of the Air India plot, the criminal investigation of the bombing, and the failed prosecutions of the conspirators. One of the Commission's assigned tasks was to examine how Canada could establish "a reliable and workable relationship between security intelligence and evidence that can be used in a criminal trial."[66] Another task was to assess "whether the unique challenges presented by the prosecution of terrorism cases…are adequately addressed by existing

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61 *Air India Vol 1*, *supra* note 21 at 116; *False Security*, *supra* note 7 at 48–50.

62 *R v Malik and Bagri*, 2005 BCSC 350, 64 WCB (2d) 420; Kent Roach, "The Air India Trial" (2005) 50:3 Crim LQ 213.

63 Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy-Post Bombing, Vol 2* (Ottawa: Public Works, 2010) at 221–223 [*Air India Vol 2*].

64 *False Security*, *supra* note 7 at 50.

65 *Air India Vol 2*, *supra* note 63 at 222–224.

66 *Air India Vol 4*, *supra* note 9 at 11.

practices or legislation and, if not, the changes in practice or legislation that are required to address these challenges."[67]

In 2010, the Commission concluded that CSIS had failed to share important information collected after the bombing with the RCMP, and when it did, refused to make collected intelligence available for use in criminal prosecutions. This, the report found, diminished both the quality evidence available at trial and the accused's rights to procedural fairness.[68] Predictably, a key reason cited by the Commission for the break down in the relationship was that information shared by CSIS with the RCMP was inadequately protected, thereby compromising the Service's sources, methods and assessments. Another reason identified was the Service's fear of the Crown Prosecutor's far-reaching disclosure obligations in criminal proceedings.[69]

The Commission's report offered 35 recommendations to improve the relationship between intelligence and evidence, and enhance the efficiency and effectiveness of terrorism prosecutions. However, more than thirty years after the bombing, few if any of the Commission's suggestions have been adopted, and Canada continues to struggle under the weight of inordinately long and complex "mega-trials."[70]

The I2E problem, however, has not been lost on the subsequent Governments. In 2013, a Public Safety report outlining the Harper Government's counter terrorism strategy noted that "[p]rosecuting terrorist activities may engage the relationship between intelligence and evidence, which can represent significant disclosure challenges. Individual rights, such as the right to due process, need to be balanced with the need to protect national security sources and methods."[71] The Report also described the undertaking of an "extensive review of the disclosure process and the role of security intelligence agencies in this process."[72] No public findings and no apparent changes were made as a result of that review.

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67 *Ibid.*

68 *Air India Vol 1*, *supra* note 21 at 148

69 *Ibid.*

70 Canada, Public Safety, "Building Resilience Against Terrorism: Canada's Counter-Terrorism Strategy" (Ottawa: Public Safety, 2013) at 24 ["Building Resilience"]; see also *False Security*, *supra* note 7 at 290.

71 "Building Resilience," *supra* note 70 at 25.

72 *Ibid.*

Next, in the second half of 2016, the Trudeau Government engaged in wide-ranging consultations with Canadian citizens, stakeholders and subject-matter experts on issues related to national security.[73] The green paper published to facilitate these discussions set out the I2E problem and noted:

> [s]ometimes, this means that a criminal court may be unable to hear the national security information – and may need to rely on an unclassified summary instead… This raises the question of whether justice can truly be served in these examples.[74]

In June 2017, the Liberal Government's consultations culminated in the introduction of Bill C-59: *An Act respecting national security matters* which, if passed, will result in the most significant overhaul of the Canadian national security regime since the creation of CSIS. Accompanying the Bill was a *Charter* statement submitted to Parliament by the Attorney General explaining that widespread changes are necessary to ensure that "Canada's national security framework keeps pace with developments in the current threat environment."[75] Noticeably absent from the proposed legislation was any means of resolving the intelligence to evidence problem. Instead, in the summer of 2017, the Government recommitted to further "targeted consultations" on the I2E problem.[76] A consultation paper was circulated, however the results of the process are still outstanding.

Through all of this, Canada has continued to struggle to bring terrorists to trial. Between 2001 and 2015 Canada conducted 21 terrorism prosecutions.[77] The Public Prosecution Service of Canada (PPSC) is

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73 Canada, Public Safety, *National Security Consultations: What We Learned Report* (Ottawa: Public Safety, 2017) at 1.

74 Canada, Public Safety, *Our Security, Our Rights: National Security Green Paper, 2016* (Ottawa: Public Safety, 2016) at 20.

75 House of Commons, Charter Statement, *Bill C-59: An Act respecting national security matters* (20 June 2017).

76 Government of Canada, "Questions and Answers: Strengthening Security and Protecting Rights," online: <https://www.canada.ca/en/services/defence/nationalsecurity/our-security-our-rights/questions-answers-strengthening-security-protecting-rights.html?wbdisable=true> ("Discussions are now underway with provinces and territories, judges and experts regarding proposals to amend the Canada Evidence Act and other statutes in an effort to "create a national security system of justice in criminal and civil proceedings that protects Canadians while safeguarding their rights").

77 Public Prosecutions Services Canada, "Transition Book" (February 2017), online: <http://www.ppsc-sppc.gc.ca/eng/tra/tr/08.html>; *False Security, supra* note 7 at 317–322.

responsible for national security prosecutions across the country. The PPSC *2016-2017 Report on Plans and Priorities* reinforced the importance of bringing terrorists to trial given "the gravity of the impact of these offences on Canada's national security, international relations and national defence."[78] At the time of the annual report's publication, PPSC was in the midst of prosecuting an additional 17 individuals for terrorism offences and had charges pending against 9 persons located outside of Canada.[79] While this may appear to be a major jump given the number of successful terrorist attacks and publicized attempts in Canada in recent years, it is only a fraction of those persons known to have left this country to engage in terrorist activity abroad. As of February 2016, the Federal government was aware of more than 180 individuals with Canadian connections who were abroad and suspected of engaging in terrorism-related activities or joining terrorist organizations, and 60 who had returned.[80] In November 2017, the Minister of Public Safety confirmed that the number of persons designated as "extremist travellers"[81] who had returned to Canada remained approximately 60 however, since first reported, only 2 of the 60 had been charged with a criminal offence.[82]

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78 Public Prosecution Service Canada, "Report on Plans and Priorities 2016–17" (accessed 17 October 2017), online: <http://www.ppsc-sppc.gc.ca/eng/pub/rpp/2016_2017/index.html#section_2_2>.

79 *Ibid.*

80 *Criminal Code*, *supra* note 14, s 83.191 (Leaving Canada to facilitate terrorist activity); s 83.201 (Leaving Canada to commit offence for terrorist group); s 83.202 (Leaving Canada to commit offence that is terrorist activity).

81 Public Safety Canada, *2016 Public Report on the Terrorist Threat to Canada* (Ottawa: Public Safety, 2016) at 7.

82 *Ibid*; Robert Fife, "Spy Agencies See Sharp Rise in Number of Canadians Involved in Terrorist Activities Abroad" (23 February 2016), online: <https://beta.theglobeandmail.com/news/politics/sharp-rise-in-number-of-canadians-involved-in-terrorist-activities-abroad/article28864101/?ref=http://www.theglobeandmail.com&>; Daniel Leblanc & Colin Freeze, "RCMP Investigating Dozens of Suspected Extremists Who Returned to Canada," *Globe and Mail* (8 October 2014), online: <http://www.theglobeandmail.com/news/politics/rcmp-investigating-dozensof-suspected-extremists-who-returned-to-canada/article20991206/> (in October 2014, the RCMP was reportedly tracking 90 individuals who intended to travel or had returned from overseas); John Geddes, *MacLeans*, "What Should Canada Do About Returning Jihadists?" (24 November 2017).

IV. DISCLOSURE

A. Canada's Disclosure Regime

In Canada, Crown disclosure in criminal proceedings is a constitutionally protected right governed by common law. The common law rule requires the Crown to disclose all relevant information in its possession and control.[83] The two assumptions underpinning the Crown's disclosure obligation are (1) that the material is relevant to the accused's case otherwise, it would not be in the possession of the Crown; and (2) that the material will comprise the case against the accused.[84]

Crown disclosure includes "any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence."[85] It is not limited to material that will be introduced as evidence, and there is no distinction between inculpatory and exculpatory information. The fruits of a criminal investigation are not the property of the Crown but rather the property of the public to be used to ensure justice is done.[86] The defence, on the other hand, is entitled to maintain a "purely adversarial role"[87] and has no duty to assist the prosecution through disclosure.[88]

The constitutional premise for the *Stinchcombe* rule is that failure to disclose information in the Crown's possession impedes an accused's ability to make full answer and defence which is a fundamental principle of justice protected by s. 7 of the *Charter*.[89] Therefore, "[u]nless the information is clearly irrelevant, privileged, or its disclosure is otherwise governed by law, the Crown must disclose to the accused all material in its possession."[90]

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83 *Stinchcombe, supra* note 16 at 338.

84 *Ibid* at 339. There is, however, a duty to disclose alibi evidence. See *R v Cleghorn*, [1995] 3 SCR 175, 1995 CanLII 63 at para 32.

85 *R v McNeil,* 2009 SCC 3, [2009] 1 SCR 66 at para 17 [*McNeil*].

86 *Stinchcombe, supra* note 16 at 333 (as address in Part IV, the law does, however, provide for limited or delayed disclosure in order to protect privileges and other interests); see CEA, *supra* note 18 at ss 37–39.

87 *Ibid.*

88 *Ibid.*

89 *R v O'Connor*, [1995] 4 SCR 411, 1995 CanLII 51 at para 18 [*O'Connor*]; *Stinchcombe, supra* note 16 at 340.

90 *McNeil, supra* note 85 at para 18.

Even then, claims of privilege are subject to review by the trial judge who, in certain circumstances, may "conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege."[91]

Stinchcombe disclosure is problematic for national security investigations where intelligence is or could be shared with law enforcement. Any intelligence shared with police in the course of investigating terrorist activity will be subject to disclosure unless the Attorney General can justify withholding it on the basis of privilege, most commonly s. 38 of the *Canada Evidence Act*.[92]

Section 38 of the *CEA* sets out a regime for preventing the disclosure of information or documents that contain "sensitive"[93] or "potentially injurious"[94] information. Potentially injurious information is defined in the *CEA* as information that "if it were disclosed to the public, could injure international relations or national defence or national security."[95] Sensitive information refers to "information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard."[96]

This regime will be discussed in more detail in Part III however, it is important to highlight that invoking s. 38 does not guarantee that sensitive or injurious information will be protected from disclosure. The Federal Court judge tasked with hearing the s. 38 application must engage in a three-part test and balancing exercise.[97] First, the designated judge determines that the information subject to disclosure is relevant. Second, would the release of the information be injurious to national security, national defence or international relations? If yes, this is not enough to bar its release. Under the third part of the test, the Judge must find that the public interest in

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91 *Stinchcombe*, *supra* note 16 at 340.

92 CEA, *supra* note 18, s 38.

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

97 *Canada (AG) v Ribic*, 2003 FCA 246 at paras 17-21, [2005] 1 FCR 33 at 17–21 [*Ribic*].

disclosing the information is outweighed by the public interest in protecting it.[98] This final balancing exercise makes it impossible for CSIS to know with any level of certainty whether the information they share with law enforcement will one day become public in a criminal proceeding.

To limit the possibility that their intelligence will be subject to *Stinchcombe* disclosure, CSIS and the RCMP engage in parallel investigations rather than joint operations. This relationship is guided by the "*One Vision 2.0*" framework established by the agencies to reinforce "the importance of collaboration and information sharing, while respecting legislative mandates, in order to facilitate separate and distinct investigations in parallel."[99] This framework specifies that CSIS information shall be shared with RCMP by way of either an advisory letter or a disclosure letter.

Disclosure letters are a means for the Service to share a tip or provide a lead to the police that they may then use to discover or develop evidence of an offence.[100] The Service's authority to share this information is governed by s. 19(2) of the *CSIS Act*. While it is understood that these letters will be subject to disclosure if criminal charges are laid, the information contained therein is not to be used to support an application before the Court for a warrant or arrest.[101] These letters are centrally controlled, and their contents are not to be disseminated beyond the headquarters level of the RCMP.[102]

An advisory letter results from a formal request by the RCMP to use CSIS information in a specified manner.[103] Once provided to the RCMP, the letters can be disseminated at the force's discretion.[104] These letters will often include caveats respecting the use of the information in various proceedings, including the requirement to obtain a sealing order to protect the release of the information when seeking a judicial authorization for a search warrant, wiretap or production order. CSIS also has the opportunity

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98 *Canada (AG) v Khawaja*, 2007 FCA 388, [2008] 4 FCR 3 at para 8 [*Khawaja*].

99 ATIP Release to Colin Freeze: *CSIS- RCMP Framework For Cooperation, One Vision 2.0*, online: <https://www.theglobeandmail.com/news/national/article31788061.ece/BINARY/na-security-web-document.pdf>.

100 *Ibid.*

101 *Ibid.*

102 *Ibid.*

103 *Ibid.*

104 *Ibid.*

to review any application brought by the RCMP that leverages the information provided in an advisory letter before it is filed with the Court.[105]

Maintaining separate and distinct investigations also serves to prevent CSIS from becoming a party to the Crown's criminal investigation for the purpose of disclosure. The duty to disclose under *Stinchcombe* only extends to material in the possession and control of the Crown, including all material gathered by an investigating police force. Information falling outside the police and prosecutor's investigation is classified as third party material.

1. Third Party Disclosure

PPSC guidelines make clear that information in the possession of other government departments is not to be considered in the possession of the Crown or the investigative agency for disclosure purposes.[106] Only if the Crown "is put on notice or informed of the existence of potentially relevant information in the hands of a third party, including information pertaining to the credibility or reliability of the witnesses in a case"[107] does the Crown have an obligation to make reasonable inquiries with the third party.[108] Other government agencies are not obligated to provide the Crown with the requested information, but the Crown must notify the defence so that they can determine whether to bring an application for the third party records.[109]

The Supreme Court set out the test to obtain third party disclosure in *O'Connor*. First, the onus is on the defence to establish that the records sought are likely relevant, meaning there is a "reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify."[110] If the relevance threshold is met, the records must be produced to the Court who then weighs "the positive and negative

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105 *Ibid.*

106 Public Prosecution Service of Canada, "Deskbook: Part II: Principles Governing Crown Counsel's Conduct, Principles of Disclosure," s 4.1, online: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch05.html#section_4_1>.

107 *Ibid.*

108 *Ibid.*

109 *Ibid.*

110 *O'Connor, supra* note 89 at para 22.

consequences of production with a view to determining whether, and to what extent, production should be ordered."[111] In carrying out this balancing exercise, the court must consider a variety of factors including the accused's right to make full answer and defence, and the reasonable expectation of privacy vested in the records.[112]

So long as the Service's role in a national security criminal investigation is such that CSIS can maintain its status as a third party, information in the possession and control of the Service will be protected from disclosure unless the accused can meet *O'Connor's* higher relevance threshold. However, should CSIS's activities be too closely intertwined with the work of the investigating police force they could be considered a first party, necessitating full *Stinchcombe* disclosure.

A finding that CSIS acted as a first party in a criminal terrorism investigation would create massive risks for the Service. As noted above, the mandate of the Service is much broader than the RCMP's because "an intelligence dossier will naturally contain a range of information, including much that is unsifted or unfiltered, as well as innuendo, hearsay and speculation."[113] CSIS investigates threats rather than specific crimes, and CSIS may collect information where there are "reasonable grounds to suspect" that the information may assist with an investigation into a threat to the security of Canada. By consequence, the Services' investigative holdings regarding a threat connected to the accused would likely extend far beyond the scope of a criminal investigation. However, in order to comply with *Stinchcombe,* it is possible that much of the CSIS file, while unrelated to the criminal charge in and of itself, would not be clearly irrelevant to the initial investigative threshold, the credibility or reliability of witnesses or informants, or the basis for securing an early search warrant or wiretap authorization, thereby necessitating its disclosure.

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111 *Ibid* at para 137.

112 *Ibid* at para 31.

113 Stanley Cohen, *Privacy, Crime and Terror Legal Rights and Security in a Time of Peril* (Toronto: LexisNexis Canada, 2005) at 404.

B. The UK Disclosure Regime

1. Crown Disclosure Duty

The UK disclosure regime is codified in Part II of the *CPIA*[114] and fully detailed in an associated *Code of Practice*.[115] Applying the *Code of Practice* is only mandatory for police investigations "with a view to it being ascertained whether a person should be charged with an offence or is guilty of an offence so charged."[116]

Similar to the test for relevance in Canada, relevant material is defined in the *Code of Practice* as anything that appears "to have some bearing on any offence under investigation or any person being investigated or on the surrounding circumstances unless it is incapable of having any impact on the case."[117] However, unlike the Canadian regime, what must be disclosed to an accused is not synonymous with what is "relevant." Aside from the materials the Crown will be relying on to make their case against the accused, prosecutors are only obligated to disclose information "which might reasonably be considered capable of undermining the case against the accused, or of assisting the case for the accused"[118] regardless of whether that material would be admissible at trial.[119] This is known as the "disclosure test" and applies to material the prosecution either has in their possession or has inspected. The prosecution has an ongoing responsibility to apply this test to unused material throughout the proceedings.[120]

Material that is deemed to be relevant but will not form part of the prosecution's case is classified as "unused material."[121] This material is listed in a detailed schedule by a police officer assigned to serve as the case's

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114 CPIA, *supra* note 17.

115 Canada, Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (Section 23(1)) Code of Practice* at para 2.1 [*Code of Practice*].

116 CPIA, *supra* note 17, s 22(1).

117 *Code of Practice*, *supra* note 115, s 2.1.

118 CPIA, *supra* note 17, s 3.

119 *Ibid*, ss 3, 7(a).

120 David Corker & Stephan Parkinson, *Disclosure in Criminal Proceedings* (Oxford: Oxford University Press, 2009) at 86 (originally there were two tests for disclosure, one at the initial stage and one following defence disclosure; the tests were unified under the *Criminal Justice Act 2003*).

121 *Code of Practice*, *supra* note 115 at para 7.

"disclosure officer."[122] Prosecutor's work with the disclosure officer early and often to ensure they are aware of the issues involved in the case as it progresses to trial.[123] The prosecutor is allowed to rely on this schedule without inspecting the material except where the disclosure officer believes the unused material may satisfy the test for disclosure.[124] The schedule of unused material is provided to the defence for their review.[125]

The House of Lords had the opportunity to opine on the Crown's disclosure obligation in *R v H and C*.[126] The House found that "if material does not weaken the prosecution case or strengthen that of the defendant there is no requirement to disclose it."[127] The House was categorical that "[n]eutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court."[128] Prosecutors are instructed against being lax in their approach to disclosure; the UK justice system, recognizes the Crown Court, is not well served if it is overburdened by erroneous or wholesale disclosure.[129]

In the context of national security investigations leading to a criminal charge, the result of the House's interpretation and the Court's guidelines is that security intelligence in the possession of the police or Crown need not be disclosed unless the Crown intends to rely on it or the material would weaken the prosecution's case.

In practice, Crown disclosure for terrorism offences is overseen by a dedicated unit of lawyers who comprise the Crown Prosecution Service's

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122 *Ibid* at para 2.1.

123 Interview of Mari Reid, Unit Head Counter Terrorism, Special Crime and Counter Terrorism Division, Crown Prosecution Service (9 November 2017).

124 *Code of Practice, supra* note 115 at paras 7.1–7.3 (information provided by an accused person which indicates an explanation for the offence with which he has been charged; any material casting doubt on the reliability of a confession; any material casting doubt on the reliability of a prosecution witness; any other material which the investigator believes may satisfy the test for prosecution disclosure in the Act).

125 *Ibid* at para 10.1.

126 *R v H; R v C*, [2004] UKHL 3, [2004] 2 AC 134 [*H and C*].

127 *Ibid* at para 35.

128 *Ibid*.

129 Court and Tribunals Judiciary, "Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court" (April 2010) at para 3, online: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Protocols/crown_courts_disclosure.pdf> [*Crown Court Disclosure Protocol*].

Special Crimes and Counter Terrorism Division. The Counter Terrorism Division was established in 2011 in acknowledgement of both the size and complexity of terrorism prosecutions, and the special considerations needed when managing cases that involve sensitive material and security intelligence.

Seasoned CPS Counter Terrorism lawyers repeatedly stressed that prosecuting these cases demands early consultation with the disclosure officer to identify all of the sources of disclosure, especially where there may be material held by local police forces, foreign law enforcement, and various security agencies.[130] Wherever possible, CPS counsel prefer to brief investigating police agencies before charges are laid if there is any risk that the security agencies have had contact with the suspect.[131]

Additionally, in terrorism cases, CPS will always contact MI5 (the UK's security intelligence agency), MI6 (the foreign intelligence agency) and GCHQ (the signals intelligence agency). As a matter of course CPS will provide the agencies with a written case summary, a list of proposed charges, and request to review any material the agencies hold in relation to the accused. Any identified material is reviewed with a view to (a) possibly using the collected intelligence as evidence, and (b) determining if it meets the disclosure test. While the material remains at all times in the control of the security services, once reviewed by CPS that material is considered "prosecution material" for the purpose of scheduling, and the disclosure test applies.[132]

CPS prosecutors stress the need for constant review, guidance and dialogue between themselves, the disclosure officer, the investigating officer and partner agencies. The issues in terrorism trials can be very complicated, and by consequence the application of the relevance standard and disclosure test can evolve dramatically from investigation to trial, resulting in the need to release additional materials.[133]

Another significant consideration when handing disclosure under the UK regime is the statutory time limits imposed on the Crown to bring cases

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130 Interview of Jess Hart, Counsel, Special Crime and Counter Terrorism Division, Crown Prosecution Service (9 November 2017).

131 Interview of Mari Reid, *supra* note 123.

132 Interview of Jess Hart, *supra* note 130.

133 Interview of Karen Stock, Senior Counsel, Special Crime and Counter Terrorism Division, Crown Prosecution Service (9 November 2017).

to trial. Under the *Prosecutions of Offences Act*,[134] the Crown must bring an accused charged with an indictable offence to trial 182 days following the day after the court appearance when the defendant was first remanded.[135] While applications may be made in order to extend this timeline, the Crown must demonstrate "good and sufficient cause"[136] and that they have executed their responsibilities with "all due diligence and expedition."[137]

2. Sensitive Material

The *CPIA* sets out a separate process for handling unused "sensitive material."[138] If a disclosure officer believes the disclosure of information "would give rise to a real risk of serious prejudice to an important public interest"[139] it is listed on a second schedule that is not provided to the defence. The material, however, must be disclosed to the prosecutor who, having an understanding of the full investigation and legal issues, is ultimately responsible for confirming that it is listed on the proper schedule.[140]

Factors that must be considered when making this assessment are listed in the *Crown Disclosure Manual* and include, the ability of the security and intelligence agencies to protect the safety of the UK; the willingness of foreign sources to continue to cooperate with UK security and intelligence agencies; the impact on human sources and confidential informants; and the protection of secret and covert methods of investigation.[141]

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134 *Prosecution of Offences Act 1985*, 1985 (UK), c 23.

135 *Ibid*, s 22; Crown Prosecution Service, "Legal Guidance: Custody Time Limits," online: <http://www.cps.gov.uk/legal/a_to_c/custody_time_limits/>.

136 *Prosecution of Offences Act 1985*, *supra* note 134, s 22.3.

137 *Ibid.*

138 *Code of Practice*, *supra* note 115 at para 2.1.

139 *Ibid.*

140 Corker & Parkinson, *supra* note 120 at 53; Interview of Jess Hart, *supra* note 130.

141 Crown Prosecution Service, "Legal Guidance: Disclosure Manual" at para 8.4, online: <http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/> [*CPS Disclosure Manual*]. See also para 8.8, which states, "The police and the CPS must always take care to protect intelligence information and information given to the police in confidence. That will be so whether or not it is thought likely that the court will order its disclosure. If the investigator is unsure whether information was given in confidence, the position should be clarified with the person who provided the information."

Should sensitive material satisfy the disclosure test the prosecutor must consider whether, through its release, the "public interest may be prejudiced either directly or indirectly through incremental or cumulative harm."[142] If so, consultation with the police and security services is necessary to determine if it is possible to disclose the material in a way that would be fair to the defence and not compromise the identified public interest. If no compromise is available through the provision of summaries, extracts, redactions, or the admission of facts, the prosecutor must withhold the disclosure on public interest grounds and seek a ruling from the court on the applicability of public interest immunity.[143] Alternatively, they may abandon the case.

The *CPS Disclosure Manual* reaffirms that sensitive neutral material or material damaging to the accused need not be disclosed.[144] Crown Prosecutors alone determine what does and what does not meet the test for disclosure, and thus what sensitive material is at risk of being released. This discretion is the key to the entire intelligence to evidence process.

Prosecutors interviewed for this report were committed to their duty and to applying the disclosure test fairly. This, I heard frequently, may nevertheless involve clever consideration of the facts and issues to identify ways of limiting the need for disclosure. This is done pre-charge by deciding not to lay certain charges, charging a lesser offence, or narrowing the dates to which charges apply to obviate the disclosure of sensitive material from earlier phases of an investigation that may have been more intelligence driven.

As an example, a Senior CPS prosecutor described a complex terrorism investigation where there was sufficient evidence to support the charge of "preparation of a terrorist attack" under the *Terrorism Act 2006*.[145] Bringing

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142 *CPS Disclosure Manual, supra* note 141 at para 8.14.

143 *Ibid* at para 8.22; *Code of Practice, supra* note 115 at para 10.5: "If a court concludes that an item of sensitive material satisfies the prosecution disclosure test and that the interests of the defence outweigh the public interest in withholding disclosure, it will be necessary to disclose the material if the case is to proceed. This does not mean that sensitive documents must always be disclosed in their original form: for example, the court may agree that sensitive details still requiring protection should be blocked out, or that documents may be summarized, or that the prosecutor may make an admission about the substance of the material under section 10 of the Criminal Justice Act 1967."

144 *Ibid* at para 8.23.

145 *Terrorism Act 2006* (UK), c 11.

those charges, however, might require widespread disclosure of sensitive material which could reveal a human source.[146] To avoid these risks CPS would charge the target with a lesser offence such as "encouragement of terrorism" that could be proven without jeopardizing the source or future investigations.[147]

In other circumstances where the Prosecutor believes that security intelligence has a high evidentiary value and may be crucial to meeting the Crown's burden of proof, CPS will provide the security service with a legal opinion as to why the information is important to the prosecution. That opinion will then be assessed by the Services in terms of national security.[148]

This can also arise in circumstances where the police are aware that security intelligence exists and they want to use that intelligence in interviews or as evidence to substantiate a charge where an accused is being held in investigatory detention.[149] In such instances, CPS will be engaged to assess what implications the use of that intelligence may have on disclosure requirements, potential charges, the length of sentence that may be sought, etc. Pre-charge, the message stressed by CPS with MI5 is that this information, once permitted to be converted into and used as evidence, is unlikely to be leveraged just once: "once it's released it's there and it's out there, and if you've got more material of this sort of nature we'll be coming back for it."[150]

The more serious the case, CPS counsel confirmed, the more likely the Security Service will consent to the use of their intelligence as evidence,[151] and to become "overtly involved in a prosecution."[152] Once that commitment is made, noted First Senior Treasury Counsel, Mark Heywood, "a careful decision-making process leads to identifying what that evidential material is, and also considering the mechanisms by which it can be created as evidence and then deployed."[153]

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146 Interview of Karen Stock, *supra* note 133; the offence is codified in *Terrorism Act* 2006, *supra* note 145, Part 1, s 5.

147 *Terrorism Act* 2006, *supra* note 145, Part 1, s 1.

148 Interview of Karen Stock, *supra* note 133.

149 *Ibid.*

150 *Ibid.*

151 *Ibid.*

152 Interview of Mark Heywood, QC, First Senior Treasury Counsel (8 November 2017).

153 *Ibid.*

Under the UK regime, disclosure does not necessarily demand disclosure of the underlying material, it is the information and not the original documents, notes or recordings that must be disclosed.[154] "There is no proscribed form for making disclosure" noted Louis Mably, a senior barrister who has prosecuted several high profile terrorism cases, "it just has to be effective disclosure."[155] This means that post-charge CPS can tailor the need for disclosure by admitting facts or conceding legal issues. Material may also be edited or summarized in a disclosure notice to ensure the information that meets the disclosure test is communicated without jeopardizing the sensitive techniques, sources or partners who were the source of that information.

A source report was used by Senior CPS Prosecutor Karen Stock to exemplify this technique. Ms. Stock noted that should the content of a source report potentially undermine a fact asserted by the Crown, the name and identifying information of the Source could be edited out of the report to allow for its disclosure.[156] She described the conversations between CPS and the agencies on such a matter as a "negotiation" or "consultation," but one that must be agreed upon by all parties. "If everyone is in agreement,"[157] confirmed another CPS Counsel, "that's usually the best way forward. If you can't agree to that then the two options are either a PII application to protect and withhold the information, or drop the case…It's a stark contrast if you can't find some kind of compromise."[158]

As noted above, the Crown has a continuing obligation to release information that becomes disclosable. In practice, fulfilling this obligation falls to the prosecuting barrister; CPS simply does not have the resources for counsel to be present at all stages of a trial.[159] Consequently, barristers will be assigned to terrorism cases early and will review important and potentially problematic sensitive material so that they can work with CPS to develop a trial strategy to avoid raising intelligence to evidence issues.[160] Conventionally two barristers will be assigned to complex cases, and the

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154 *Ibid.*

155 Interview of Louis Mably, QC, Senior Treasury Counsel (8 November 2017).

156 Interview of Karen Stock, *supra* note 133.

157 Interview of Jess Hart, *supra* note 130.

158 *Ibid.*

159 Interview of Mark Heywood, *supra* note 152; interview of Karen Stock, *supra* note 133.

160 Interview of Mari Reid, *supra* note 123.

junior instructed counsel is responsible for staying abreast of any need for additional disclosure or further investigation throughout the duration of the trial.[161]

Of utmost importance to the entire process is that the barristers are made aware of all of the relevant material and present the criminal case consistently with the intelligence case. Without this awareness, a barrister may inadvertently create disclosure problems by asserting facts too forcefully or in a manner unsupported by the broader national security investigation.[162] The barrister must not only be informed and capable of identifying when the Crown's duty to disclose has been engaged, but must also avoid making allegations or questioning assertions that result in additional material becoming disclosable to the accused.[163] To avoid "a disclosure car-crash,"[164] explained Mark Heywood, the case must be "set on a course which is not going to inadvertently engage material held by the agencies."[165]

3. Defence Disclosure Obligation

In the UK, both the prosecution and the defence must respect the overriding objective that the criminal case be dealt with justly. The *Criminal Procedure Rules* codify that dealing with a criminal case justly entails:

A) acquitting the innocent and convicting the guilty;
B) dealing with the prosecution and the defence fairly;
C) recognising the rights of a defendant, particularly those under Article 6 of the European Convention on Human Rights;
D) respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case;
E) dealing with the case efficiently and expeditiously;
F) ensuring that appropriate information is available to the court when bail and sentence are considered; and
G) dealing with the case in ways that take into account—
    a. the gravity of the offence alleged,
    b. the complexity of what is in issue,
    c. the severity of the consequences for the defendant and others affected, and

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161 Interview of Mark Heywood, *supra* note 152.

162 Interview of Jess Hart, *supra* note 130.

163 Interview of Karen Stock, *supra* note 133.

164 Interview of Mark Heywood, *supra* note 152.

165 *Ibid.*

d. the needs of other cases.[166]

Importantly, all parties are obligated to assist the court in the early identification of real issues.[167]

Both defence and prosecution are also obliged to present evidence, whether disputed or not, in the shortest and clearest way; to limit delay and avoid unnecessary hearings; and to co-operate in the progression of the case.[168] Where the parties have not complied with the *Criminal Procedure Rules* the Court may order costs against the offending party, refuse to allow a party to introduce evidence or draw adverse inferences from the late introduction of an issue or evidence.[169]

In order to ensure the defence meets this duty and the overriding objective is met, they must file a defence statement with the prosecutor and the court. The purpose of this statement is to prevent ambush defences, encourage guilty pleas or discontinuances by the prosecution, facilitate better trial preparation, and generally improve the efficiency of the court system.[170] "The trial process" notes the *CPS Disclosure Manual*, "is not well served if the defence make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good."[171] What's more, in the UK, it is widely accepted that "concealment of evidence until a late stage by either side necessarily leads to the jury being unable to assess the weight or probative quality of such evidence."[172]

The *CPIA* stipulates that a defence statement must set out in writing the nature of the accused's defence, including any particular defences on which he intends to rely; the facts at issue with the prosecution and why; any point of law he wishes to advance and any authority he intends to rely on in support of that point.[173] Furthermore, any defence statement that raises an alibi must provide the particulars of any witness who is able to give

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166 Canada, Ministry of Justice, *Criminal Procedure Rules 2015*, SI 2015/1490, r 2.

167 *Ibid*, r 3.3.

168 *Ibid*.

169 *Ibid*, r 3.5.

170 Ian Dennis, *The Law of Evidence*, 5th ed (London, UK: Sweet & Maxwell, 2013) at 364.

171 *CPS Disclosure Manual*, *supra* note 141 at para 15.

172 Steve Unglow, *Evidence Text and Materials* (London, UK: Sweet & Maxwell, 1997) at 319.

173 CPIA, *supra* note 17, s 6(a)(1).

evidence in support of the alibi, or may be of assistance in identifying any such witness.[174] The statement must be updated as required.[175]

Importantly, a defence statement is deemed a statement of the accused, and can be leverage by the prosecution at trial if it contains admissions or inconsistencies with the accused's testimony.[176] Finally, the defence has a duty to provide the court and the prosecution detailed particulars of any witness they intend to call at trial.[177]

Only after the defence statement is served may defence counsel make an application for additional prosecution disclosure. The application must set out the reasonable grounds to believe that the prosecution has the requested material and that is meets the test for disclosure under the *CPIA*.[178]

The *CPS Disclosure Manual* notes that the defence statement enhances the prosecution's ability to (1) make an informed decision about whether the remaining unused material meets the disclosure test; or (2) whether it is necessary to make further investigative enquiries.[179] It is also crucial to the Crown's ability to bring the case to trial in an expedient manner by narrowing down and focusing on the issues in dispute. This is especially true in complex cases or where the investigation entails the search of an accused's personal electronic devices which have the potential to yield hundreds of thousands of pages of information subject to the same principles of disclosure. [180]

A CPS lawyer illustrated this point by describing a case where a man charged with attempting to leave the UK to join the Islamic State. A search of his computer based on curated search terms revealed "mindset" material. The list of search terms and the material found was then disclosed to the defence.[181] The statement of defence subsequently asserted that the accused had an academic interest in gathering material regarding specific research

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174 *Ibid*, s 6(a)(2).

175 CPIA, *supra* note 17, s 6(b).

176 Dennis, *supra* note 170 at 62.

177 CPIA, *supra* note 17, s 6(c).

178 *Rules of Criminal Procedure 2015*, r 15.5.

179 *CPS Disclosure Manual*, *supra* note 141 at para 15.5.

180 *Ibid* (see c 30, "Digital Guidance," and Appendix H, "The Use of Keyword Searches and Digital Evidence Recovery Officers").

181 Interview of Jess Hart, *supra* note 130.

questions. As a result, the Crown developed a second set of search terms with defence counsel to capture material related to the accused's research interest. This material was also disclosed.

All CPS counsel interviewed agreed that in the past five years there has been a noticeable improvement in the level of defence engagement in national security cases, specifically as it relates to complying with defence disclosure obligations and narrowing issues for trial. They described the shift as a "culture change," which one lawyer credited to the presence of a High Court judge designated to hear terrorism cases at the initial case management conference and throughout all pre-trial proceedings.[182]

4. Third Party Disclosure

The prosecutor's duty to disclose is limited to material that is obtained, generated or examined in the course of an investigation. The *CPIA* makes clear that material held by third parties, including other government and public bodies, is not subject to disclosure in criminal proceedings.[183] The *CPS Disclosure Manual* also states categorically that UK security and intelligence agencies "are third parties under the *CPIA 1996*. They are not deemed to be 'investigators'."[184]

However, under the *CPIA*, an investigator has a duty to pursue all reasonable lines of enquiry.[185] Senior Treasury Counsel referred to this as "the duty to gather."[186] Consequently, if law enforcement or the Crown has reason to believe that a Government department has material that may be relevant to an issue in the case, reasonable steps should be taken to identify and consider such material.[187] What is reasonable will vary from case to case,[188] nevertheless, the *CPS Disclosure Manual* states:

> Where the Agencies believe that they have information (including documents), which may be relevant to the investigation or prosecution of a criminal offence or to the defence, they have a general professional duty to draw this fact to the

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182 Interview of Karen Stock, *supra* note 133.

183 Corker & Parkinson, *supra note* 120 at 91.

184 *CPS Disclosure Manual, supra* note 141 at para 33.2 (examples of other investigating agencies include immigration authorities and foreign police officers).

185 CPIA, *supra* note 17, s 23(1).

186 Interview of Mark Heywood, *supra* note 152.

187 *CPS Disclosure Manual, supra* note 141 at para 4.

188 *Ibid.*

> attention of the investigator or prosecutor. Furthermore, the Agencies have a duty to support the administration of justice by ensuring that investigators and prosecutors are given full and proper assistance in their search for relevant material.[189]

Should the Crown be denied access, they must consider "what if any further steps might be taken to obtain the material or inform the defence."[190]

Therefore, if the prosecutor fulfills their obligation "to gather" the defence should never have to make a third party disclosure application from another government agency. Theoretically, an application could be made of another government department, but in practice the prosecutors wants to "own" and control the disclosure process limit unnecessary litigation, and prevent the defence from having a legitimate argument that third party disclosure should be compelled.[191]

C. Practical Implications

Testifying before the Canadian Senate, Joe Fogarty remarked that the UK's enactment of the *CPIA* enabled the sharing of information by national security teams and law enforcement and protected that information from "unnecessary disclosure, the effect of which has improved the operational relationships between the services because it has established a sense of certainty when carrying out their respective mandates."[192]

In Canada, terrorism prosecutions are likely to involve a variety of satellite hearings on issues tied to intelligence to evidence i.e.: the adequacy of disclosure, third party disclosure, or the unsealing of a confidential appendix to a warrant. Every instance creates uncertainty and risk for CSIS. The result: parallel investigations.

Conversely, in the UK, the only time disclosure is litigated in the courtroom is where the defence and the Crown are unable to agree on whether a scheduled piece of unused material meets the disclosure test. As noted above, in such an instance the defence is required to make an application under s. 8 of the *CPIA*. Often, remarked one CPS lawyer, the making of the application resolves the issue before being heard by the trial

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189 *Ibid* at para 33.8.

190 *CPS Disclosure Manual*, *supra* note 141, Forward at para 50.

191 Interview of Louis Mably, *supra* note 155; interview of Mark Heywood, *supra* note 152.

192 Evidence of Joe Fogarty, *supra* note 28.

judge. This is because in having to enunciate in writing why certain material would assist the defence or undermine the prosecution, the issues is clarified for the prosecution who then agrees to the additional disclosure or resolves the matter through the admission of facts, etc.[193]

The practical effect of the Crown's control over disclosure is that police and intelligence officers can readily share information. To illustrate this point, consider a scenario where MI5 has human source intelligence that gives them reason to believe that a target of investigation is planning to detonate a bomb at a tube station one particular morning in London. This intelligence is passed from MI5 to the Metropolitan police who attend at the tube station. The police identify the subject, find explosives in his possession and arrest him. How the police knew to look for the accused in the station on that date is not subject to disclosure unless the prosecution concludes that something about the human source or the information they provided would undermine the Crown's case. The prosecution has a duty to review the sensitive intelligence material in order to make this assessment, but the defence is prohibited from making a third party application for the disclosure of MI5's investigative holdings. If the defence makes a s.8 application to have the judge determine whether the relevant intelligence is disclosable, the prosecution can present the intelligence investigation to the Judge *ex parte* in order to demonstrate that, in the context of the entire case, the material does not assist the accused.[194] If the judge denies the defence's application, at trial the prosecution simply presents to the jury that on the day in question the police had reason to believe the accused was planning an attack on the tube station, and when located in the area he was found in possession of explosives. "We wouldn't necessarily produce any evidence of why the police happened to be there,"[195] said CPS Counsel, "Why does it matter? What does that matter to the offence? … Why does the jury need to know what specifically told them to go to that tube station unless there is something undermining about that?"[196]

This narrow approach to disclosure is not without flaws, and can and has led to miscarriages of justice. In July 2017, the Crown Prosecution Service Inspectorate and the Inspectorate of Constabulary published a joint

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193 Interview of Jess Hart, *supra* note 130.

194 *Ibid*; interview of Karen Stock, *supra* note 133.

195 Interview of Jess Hart, *supra* note 130.

196 *Ibid*.

report entitled: *Making it Fair: The Disclosure of Unused Material in Volume Crown Court Cases*.[197] The report found that 22% of police schedules reviewed were wholly inadequate. It also concluded that prosecutors failed to comply with the Attorney General's guidelines and challenge police when schedules were sub-standard, that there was poor application of the *CPIA* disclosure test, and "[j]udges expressed a lack of confidence in the prosecution's ability to manage the disclosure process."[198]

Similarly, in their 2016-2017 Annual Report, the Criminal Cases Review Commission, an independent investigatory body in the UK, determined the following:

> [a] major cause of miscarriages of justice continues to be non-disclosure, at or before trial, of material which could have been of assistance to the defence.
>
> Sometimes non-disclosure is deliberate. But all too often it is caused by a combination of the sheer volume of material to be considered, which in recent years has grown significantly, and the increasing pressure on the resource available to those whose duty it is to check it, almost invariably the police.[199]

Mark Heywood, the UK's most senior trial Crown, conceded this point. He remarked that pressure on resources had led to the appointment of disclosure officers who are unfamiliar with the investigation they are assigned to review, and resulted in a pressure to reduce, either consciously or unconsciously, the volume of what is "relevant"; a problem, he noted, for both the defence and the prosecution.[200]

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197 Her Majesty's Crown Prosecution Service Inspectorate, *Making It Fair: The Disclosure of Unused Material in Volume Crown Court Cases* (UK: HMCPSI, July 2017), online: <http://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2017/07/CJJI_DSC_thm_July17_rpt.pdf>.

198 *Ibid* at 19.

199 Criminal Cases Review Commission, "Annual Report and Accounts 2016–2017," online:<https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1l/uploads/2015/01/1096_WLT_Criminal-Cases-Review-AR_WebAccessibleM-1.pdf> (the CCRC is a post appeal organisation created to review cases where a person has been convicted of an offence, and has exhausted their normal rights of appeal, but maintains that they have been wrongly convicted or incorrectly sentenced).

200 Interview of Mark Heywood, *supra* note 152.

V. National Security Privilege

A. Section 38 of the Canada Evidence Act

In Canada, the Crown may seek a judicial order to authorize the non-disclosure of material that must be produced to the defence under *Stinchcombe* for reasons of national security, national defence, international relations or other specified public interests.

Section 38 of the *CEA* is a complex scheme designed to apply flexibly to any judicial proceeding, be it civil, criminal, or administrative. It may be initiated by any justice participant who learns that they may be required to disclose or seek to call sensitive or potentially injurious information through written notice to the Attorney General of Canada (AGC).[201] Notice is intended to give the AGC the opportunity to review the material and, where feasible, enter into a disclosure agreement to prevent the need for "proceedings to come to a halt while the matter [i]s transferred to the Federal Court for a determination."[202]

If no agreement can be reached between the AGC and the parties, an application is made to the Federal Court and a specially designed judge will be assigned to the proceedings. In almost all circumstances a security cleared *amicus curiae* will be assigned to assist the court and, where so ordered, represent the interests of the respondent in closed proceedings.[203]

The AGC will then file the redacted material with the court. Depending on the volume of the material, the redaction and filing of documents may be done in waves over the course of months, if not years. What typically arises next is a labour and time intensive exchange of private and *ex parte* submissions and affidavits, followed by private and *ex parte* hearings including the cross examination of affiants.

Legal submissions will address the elements of the tripartite test developed in *Ribic*.[204] First, the Court must determine whether the information sought to be protected by the AGC is relevant to the underlying proceeding. The relevance threshold is low, and where the s. 38 application

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201 CEA, *supra* note 18, s 38.01.

202 *Air India Vol 4*, *supra* note 9 at 182.

203 *Huang v Canada (AG)*, 2017 FC 662 at para 48 [*Huang*].

204 *Ribic*, *supra* note 97 at paras 17–21.

arises from a criminal prosecution it will mirror the test in *Stinchcombe*.[205] Second, the judge must assess whether disclosure of the relevant material would be injurious to international relations, national defence or national security, as outlined in s. 38.06 of the *CEA*. Third, if the disclosure of the information at issue would cause injury to a national interest, the judge must determine whether the public interest in disclosure is outweighed by the public interest in non-disclosure.

It is the party seeking disclosure that bears the burden of proving that the public interest requires disclosure.[206] In criminal cases, "to make a meaningful review of the information sought to be disclosed, the judge must be either informed of the intended defence or given worthwhile information in this respect."[207] These submissions may be made to the Court "without disclosing to any other party the substance or detail of the defence in the criminal proceeding."[208]

The s. 38 regime is extremely flexible: "the factors to be considered in determining whether the public interest is best served by disclosure or non-disclosure will vary from case to case. The judge must assess those factors which he or she deems necessary to find the balance between the competing public interests."[209] Further still, s. 38.06(2) provides that the Court may order the disclosure of the information subject to conditions or in any form the judge considers appropriate.

While the flexibility of the s. 38 regime and the *Ribic* test may be welcome in certain judicial proceedings, it creates uncomfortable uncertainty for CSIS. This uncertainty is further exacerbated in criminal proceedings where the right to a fair trial is constitutionally protected and may not be easily overcome by claims of national security.

That said, the AGC does hold a trump card. Following an order of the Federal Court for disclosure, s. 38.13(1) permits the AGC to personally issue a certificate barring its disclosure. The consequence of course, is that the trial judge may conclude that the issuance of a certificate renders a trial unfair by effectively reversing the Federal Court's finding that the

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205 *Ibid* at para 44.

206 *Ibid* at para 21.

207 *Khawaja, supra* note 98 at para 35.

208 *Toronto Star v Canada*, 2007 FC 128 at paras 36–37, [2007] 4 FCR 434.

209 *Huang, supra* note 203 at para 50; *Khadr v Canada*, 2008 FC 549 at paras 36–39, 329 FTR 80.

information must be released to the accused. Section 38.14 authorizes a trial judge to "make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial."[210] How exactly the trial judge can appropriately calibrate any such order is questionable without having access to the protected information or the Federal Court's classified reasons. This, noted the Air India Commission, "creates risks that the trial judge could err on the side of caution in protecting the accused's right to a fair trial and stay proceedings, when such a drastic remedy is not necessary to protect the accused's rights, given the nature of the non-disclosed evidence."[211]

B. Section 18.1 of the *CSIS Act*

A second statutory privilege applicable to security intelligence is found in s. 18.1 of the *CSIS Act*. This provision was introduced after the Supreme Court found in *Canada v Harkat*[212] that CSIS human sources did not benefit from the common law police informer privilege.[213]

Section 18.1 prohibits the disclosure of the identity of a CSIS human source or any information from which the identity of a human source could be inferred in a proceeding before a court, person or body with jurisdiction to compel the production of information. Unlike the s. 38 regime, the application of the privilege can only be challenged on two grounds: (1) that the individual is not a human source, meaning they did not provide CSIS with information in exchange for a promise of confidentiality; or (2) that the identity or the information protected by the privilege is essential to establish an accused's innocence in a criminal trial.[214] Any hearing respecting the privilege is to be held *in camera* and *ex parte*.[215] To date, there has been no recorded decision overturning the application of this privilege.

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210 CEA, *supra* note 86, s 38.14 (it was this provision that was found to safeguard an accused's fair trial rights in *R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110, where the Supreme Court upheld the constitutionality of the section 38 regime).

211 *Air India Vol 4*, *supra* note 9 at 198.

212 *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37, [2014] 2 SCR 33.

213 *Ibid* at para 87.

214 CSIS Act, *supra* note 47, s 18.1(4) (human source is defined in section 2).

215 *Ibid*, s 18.1(7).

C. UK Public Interest Immunity

As in Canada, litigating national security privilege in the UK is a balancing act. Unlike Canada, in criminal proceedings drawing the line between the rights of the accused and the risk to the public interest rest solely with the trial judge.

Traditionally, claims of "Crown Privilege" were not questioned by British Courts, and the executive took full advantage of the deference shown them by the Courts. This changed in 1968 when the House of Lords reversed their position in the landmark case *Conway v Rimmer,*[216] finding that the Court was the final arbiter when deciding whether the public interest necessitated the non-disclosure of relevant evidence.[217]

The right to disclosure in criminal proceedings is protected by article 6(1) of the *European Convention of Human Rights*.[218] The UK does not have its own bill of rights and has instead incorporated the *ECHR* into domestic legislation through the adoption of the *Human Rights Act 1998*.[219] Section 2 of the *Human Rights Act* states that all domestic courts must, in all cases, take into account the Convention rights. UK legislation must be interpreted in light of the Convention, and where legislation is found to be incompatible with the Convention, the Court may make a declaration of incompatibility.[220] It is also unlawful for a public authority to act in a manner incompatible with the Convention, however they are not liable if in accordance with domestic legislation the authority "could not have acted differently."[221]

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216 *Conway v Rimmer*, [1968] UKHL 2, [1968] 2 ALL ER 304.

217 *Ibid.*

218 *European Convention on Human Rights*, *supra* note 33, art 6(1). Article 6(1) stipulates: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

219 *Human Rights Act 1998* (UK), c 42.

220 *Ibid*, s 4.

221 *Ibid*, s 6.

At first there was uncertainty as to whether common law claims for public interest immunity could be made in criminal prosecutions, but this was resolved through the passage of *CPIA* which gave the prosecutor the authority to make an application to withhold material on the basis of the public interest.[222]

In 2000, UK's procedure for adjudicating PII was at issue in three cases heard by the European Court of Human Rights (ECHR).[223] The Court found that disclosure of evidence is not an absolute right, and competing interests may be weighed against the rights of the accused so long as the measures taken are strictly necessary. The ECHR further stipulated that the aim of the state's nondisclosure must be legitimate, the trial judge must be capable of weighing the public's interest against those of the defendants, and the undisclosed material may not form part of the prosecution's case.[224]

Four years later, in the case of *R v H and C*, the House of Lords established the modern approach to PII in light of the European Court's jurisprudence interpreting the *CPIA*. The House confirmed that there may be instances where the test for disclosure set out in the *CPIA* is met but disclosure of the information would pose a serious risk to an important public interest.[225] In such circumstances, disclosure must be made to the furthest extent possible, and if limited disclosure may render the trial process unfair or the protected information may prove the accused's innocence, fuller disclosure must be ordered even if this might lead to a discontinuance to avoid making it.[226] At the same time, the House warned that "the trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good."[227]

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222 CPIA, *supra* note 17, s 3(6).

223 *Rowe and Davis v United Kingdom*, [2000] ECHR 91; *Jasper v United Kingdom*, [2000] 30 EHRR 441; *Fitt v United Kingdom*, [2000] 30 EHRR 480.

224 Corker & Parkinson, *supra* note 120 at 136.

225 *H and C*, *supra* note 126 at para 18.

226 *Ibid* at para 36 (see also *R v Keane*, [1994] 1 WLR 746, where Lord Taylor remarked at para 751: "If the disputed material may prove the defendants innocent of avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it.")

227 *Ibid*.

Before derogating from the "golden rule" of full disclosure the Court must ask a series of questions now codified in *Crown Court Disclosure Protocol*. These rules pronounce that "[i]t is clearly appropriate for PII applications to be considered by the trial judge"[228] as the facts and grounds to be established

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[228] *Crown Court Disclosure Protocol*, *supra* note 129 at 13–14 (citing *H and C*, *supra* note 126 at para 36:

> When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:
>
> (1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.
>
> (2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered.
>
> (3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.
>
> (4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence? This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymized form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).
>
> (5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.
>
> (6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this

or resisted by both parties must be carefully analyzed.[229] Furthermore, any decision with respect to disclosure must be continually reviewed as the proceedings develop in case the balance shifts.[230]

To assist the court in adjudicating PII claims, the House in *H and C,* endorsed the appointment of Special Advocates but found that "such an appointment will always be exceptional, never automatic; a course of last and never first resort."[231] Instead, the decision emphasized the need to "involve the defence to the maximum extent possible without disclosing that which the general interest requires to be protected but taking full account of the specific defence which is relied on."[232] In practice the Courts have heeded this warning. Reliance on Special Advocates is rare, noted Mark Heywood, who was unaware of any ever being appointed in a criminal case.[233]

Under the PII regime, the rules and the test for protecting sensitive information is not dependent on the source of that information.

Recognized grounds of public interest immunity include: the protection of informants and human sources, sensitive investigation and surveillance techniques, observation posts, the preservation of diplomatic relations, and national security.

In every case the court considers the same series of questions set out in *H and C.* What may vary is the procedure relied on to adjudicate the PII application, but in every instance they are heard by the trial judge.

> leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.
>
> (7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced? It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review.

229 *H and C, supra* note 126, at para 35.

230 *R v Davis*, [1993] 2 ALL ER 643, [1993] 1 WLR 613 [*Davis*].

231 *Ibid* at para 22; for a full discussion on the use of Special Advocates in the UK as compared to Canada, see Daniel Alati, *Domestic Counter-Terrorism in a Global World: Post-9/11 Institutional Structures and Cultures in Canada and the United Kingdom* (London, UK: Routledge, 2017).

232 *Davis*, *supra* note 230 at para 37.

233 Interview of Mark Heywood, *supra* note 152.

The *Criminal Rules of Procedure 2015*, sets out three forms of PII applications. The first and most common PII application is made with notice to the defence about the nature of the sensitive material, and both sides are entitled to make representations.[234] In rarer instances, the defence is not notified of the nature of the material in the application and substantive arguments are made *ex parte* (although the defence may make representations regarding procedure).[235] The final form of application is reserved for "highly exceptional" circumstances where the public interest necessitates that it be made without notice to the defence.[236]

While all forms of PII applications have been upheld by the ECHR, the Court relied heavily on the role of the trial judge and their duty to ensure trial fairness to find the second form compatible with art. 6 of the Convention.[237] As for the third type of application, the European Court strongly implied that the appointment of a Special Advocate was the only way to protect the art. 6 rights of the accused in such circumstances.[238]

1. National Security Claims for Immunity

The *CPS Disclosure Manual* specifies that the issuance of a Ministerial Certificate is the preferred means of protecting national security information. These certificates are sought when material belonging to MI5, MI6 and GCHQ "is relevant to the case, satisfies the disclosure test, if disclosed, would cause a real risk of serious prejudice to an important public interest and, the relevant agency's Minister believes properly ought to be withheld."[239]

Commonly, it will be the prosecutor, being familiar with the issues and having already seen the relevant investigative holdings, who will advise the agency that certain materials satisfy the disclosure test.[240] The agency's legal adviser will then seek instructions from their client as to whether disclosure of the identified material would cause a real risk of serious prejudice to an

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234 *Criminal Procedure Rules*, *supra* note 167, r 15.3.

235 *Ibid.*

236 *Ibid.*

237 Dennis, *supra* note 170 at 387.

238 *Ibid* at 388 (citing *Edwards and Lewis v United Kingdoms* (2005), 40 EHRR 24, [2003] Crim LR 891).

239 *CPS Disclosure Manual*, *supra* note 141 at para 34.4.

240 *Ibid* at para 34.7.

important public interest.[241] The agency will be anxious to avoid putting unnecessary claims before the Minister,[242] who must personally review the material or a representative sample of the material before issuing a certificate.[243] Once a certificate is signed by a Minister, the Attorney General should be consulted.[244]

Unlike the Canadian s.38 regime, it is the prosecutor, not the legal advisor for the agency or the AGC who argues the PII application; it is accepted that they are in the best position to assist the court in determining where the balance between the interests lies.[245]

Although a Minister's Certificate carries considerable weight, recent case law shows that its issuance is not conclusive, and there must be evidence to support the risk asserted by the Minister.[246] Once it is established that there would be a significantly grave threat to national security, the inquiry will typically end there, however if the evidence is not dispositive the court may engage in the balancing of interests.[247] Ultimately, if the court determines that "the defendant cannot have a fair trial, there is no balance to be had."[248]

In practice, PII applications are rare. One prosecutor interview stated that she had only been involved in two in her five years with CPS, and none in the two years since she joined the Counter Terrorism Division. The Division head, Mari Read, who has been prosecuting terrorism cases since 2006 could not recall more than two cases where a PII application was necessary.

This, it was explained, is because the Crown has control of the case and the charge at a very early stage. Avoiding the need to assert privilege is the goal from the beginning, stated one CPS lawyer:

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241 *Ibid* at para 34.11.

242 *Ibid*.

243 *Ibid* at para 34.16.

244 *Ibid* at para 34.19.

245 *Ibid* at para 34.21.

246 *Secretary of State for Foreign and Commonwealth Affairs v Assistant Deputy Coroner for Inner North London*, [2013] EWHC 3724 at paras 53–58; see also *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs*, [2010] EWCA Civ 65.

247 *Ibid*.

248 Interview of Louis Mably, *supra* note 155.

> particularly if you are aware of issues, you don't charge where you have to disclose something. You find a way to charge something else…you find another solution. You avoid the problem in the first place. That's always the best way forward. You don't want to get yourself to a point where the decision is out of your hands. The problem with PII is the decision is out of your hands. It's up to the judge and if the judge rules against you, you've then got to drop the case. You've got to avoid getting to that place in the first place. If you do a lot of PII you're going [about it] wrong because you have not figured out what the problems and issues are early enough.[249]

Another lawyer with CPS explained that successful terrorism prosecutions are "all about strategy and working [disclosure] out beforehand… to the extent that we can front load it."

Thus it is the *CPIA* disclosure regime, and not the method for adjudicating privilege that is fundamental to the protection of national security information in the UK. "If relevance was the test of disclosure in any way" remarked Mark Heywood, "we'd have a nightmare. Relevance is elastic… it would be unending litigation."[250]

VI. FINDINGS AND RECOMMENDATIONS

A. Findings

The application of the Canadian disclosure regime to terrorism prosecutions results in unending litigation about the provision and protection of information. This litigation is not only inefficient, it creates uncertainty for CSIS who is unable to predict whether their information will be subject to *Stinchcombe* disclosure, sought in an *O'Connor* application for third party information, or released by the Federal Court following a s. 38 application. For an organization whose mandate cannot be met without collecting secrets, working covertly, and protecting the anonymity of its sources and employees this uncertainty is a nightmare.

The UK system facilitates bringing terrorists to trial. Through interviews it became clear that the aim of the Crown Prosecution Service is not to prosecute every terrorist to the fullest extent of the law but to disrupt terrorist activity and get members and facilitators of terrorist organizations off the streets. The *CPIA* empowers the prosecution to do this by charging lesser offences and consequently disclosing less sensitive material. Secure in

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249 Interview of Jess Hart, *supra* note 130.

250 Interview of Mark Heywood, *supra* note 152.

the knowledge that the Crown Prosecutors will set the proceedings on a course to eliminate, to the greatest extent possible, the need to disclose sensitive material, the security services and police are not hesitant to share information and work jointly on national security investigations.[251]

In Canada, however, there is no incentive to charging lesser offences when the disclosure regime necessitates the release of all relevant investigative materials, both inculpatory and exculpatory. Instead, an increasing number of alternate measures to prosecution have been introduced to disrupt terrorists, prevent them from travelling, and limit their access to resources and networks.[252]

Additionally, the *CPIA* and its corresponding regulations and guidelines promote trial efficiency by making it the duty of both the prosecution and defence to identify and narrow issues for trial and ensure that the necessary information is disclosed even where the source of that information must be protected. The effect is that all parties are responsible for working together to find the right balance between the interests of justice and the protection of national security.

Nevertheless, wholesale importation of the *CPIA* is not the answer to Canada's I2E problem. First, as discussed briefly above, recent review in the UK has identified that the police and crown routinely fail to comply with the *CPIA*, creating opportunities for the miscarriage of justice.

Second, in Canada, the right to make full answer and defence is enshrined in s. 7 of the *Charter*. In *Stinchcombe*, the Supreme Court rejected the argument that the accused's constitutional right to the disclosure is limited to exculpatory evidence. While the Court held that the right to Crown disclosure is not absolute, it "admits...few exceptions."[253] Thus, as the Air India commission identified, introducing legislation exempting injurious national security information from Crown disclosure would violate s. 7 and would have to be justified as a reasonable limit under s. 1 of the *Charter*.[254]

Third, in Canada, s. 7 protects the right against self-incrimination and the associated right to remain silent. The Supreme Court in *Stinchcombe* found that there was no corresponding duty on the defence to disclose

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251 Evidence of Joe Fogarty, *supra* note 28.

252 *False Security*, *supra* note 7 at 282.

253 *McNeil*, *supra* note 85 at para 18.

254 *Air India Vol 4*, *supra* note 9 at 155.

material to the Crown because "the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution."[255] This is altogether different than the UK, where the *CPIA* requires active and ongoing defence participation. Prosecutors rely on defence disclosure to identify issues, defences, and potential witnesses when applying the disclosure test to unused material. There are consequences if an accused fails to cooperate with the Crown, and negative inferences may be drawn if issues or defences are not raised as soon as practicable in the proceedings. Imposing requirements of defence disclosure to this extent within the Canadian criminal justice system would certainly be vulnerable to constitutional challenge.

B. Recommendations

1. Recommendation: Codify the Definition of Relevance

While adopting the CPIA is not a viable option, nothing prevents Parliament from codifying a standard of relevance under the CEA that is commensurate with the standard set out in Stinchcombe. The common law interpretation of relevance as that which is "not clearly irrelevant" is unhelpful and provides little guidance to law enforcement, CSIS, and the Crown. It is recommended that Canada adapt and codify the UK's definition of relevance as follows:

> Material is relevant and must be disclosed to the accused if:
>
> a) it is in the possession or has been inspected by the Crown, and
> b) has some bearing on any offence charged, or on the surrounding circumstances of the Crown's investigation;
> c) unless the material satisfying a) and b) is incapable of having any impact on the case against the accused, or of assisting the case for the accused.

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255 *Stinchcombe*, *supra* note 16 at 333.

2. Recommendation: Codify Third Party Disclosure for Terrorism Prosecutions

Parliament is also free to legislate new procedures for the production of CSIS records for terrorism proceedings. The goal of such legislation would be to limit litigation around the production of CSIS records under *O'Connor* and minimize the need to make applications for non-disclosure under the *CEA*. As noted by the Air India Commission, it would also "respond to concerns that the breadth of *Stinchcombe* and *O'Connor* may have adversely affected relations between the RCMP and CSIS and the passage of secret intelligence to the police."[256]

In *R v Mills*,[257] the Supreme Court held that it was open for Parliament to enact a statutory limit on the common law right to third party disclosure.[258] Subsequently, in *McNeil*, the Court relied on its decision in *Mills* to find that statutory exceptions to both the *Stinchcombe* and *O'Connor* disclosure regime may be "nonetheless constitutional."[259]

As discussed in Part IV, *Stinchcombe* disclosure is premised on two assumptions, that material in the possession of the Crown is relevant to the accused's case (otherwise it would not be in the possession of the Crown) and that this material will comprise that case against the accused. Terrorism proceedings result in three additional assumptions: (1) CSIS will have records pertaining to the accused's terrorist activities, and (2) these records will not comprise the criminal case against the accused; and (3) these records will likely consist of highly sensitive material that is not relevant to issues at trial.[260]

In recognition of this first assumption, a third party regime for terrorism proceedings should impose a duty on the Crown to make inquiries with CSIS when prosecuting terrorism offences. Identified records should be reviewed and assessed by the Crown Prosecutor for their "likely relevance." If there is a "reasonable possibility that the information is logically probative

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256 *Air India Vol 4*, *supra* note 9 at 158 (the Commission suggested that the modification of the third party disclosure similar to the regime limiting access to records of sexual assault victims under the *Criminal Code* may provide a more nuanced solution to reform to Crown Disclosure under *Stinchcombe*, at 156).

257 *R v Mills*, [1999] 3 SCR 668, 1999 CanLII 637 [*Mills*].

258 *Ibid*.

259 *McNeil*, *supra* note 85 at para 21.

260 Cohen, *supra* note 113 and accompanying text.

to an issue at trial or the competence of a witness to testify" the information is disclosable to the defence.[261]

Such a duty would be compatible with the Crown's role as a Minister of Justice and their undivided loyalty to the proper administration of justice.[262] In *McNeil*, the Supreme Court affirmed that "Crown Counsel have a duty to make reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in the possession of evidence."[263] The Court recognized that as both an advocate and an officer of the Court, "Crown counsel can effectively bridge much of the gap between first party disclosure and third party production."[264]

The second assumption necessitates limited participation by the defence to identify potential issues for trial that the Crown must consider when reviewing CSIS documents. The Crown and the defence must then make a good faith effort to identify pertinent records. Imposing a significant but not onerous burden on the defence is consistent with their obligation under *O'Connor* to satisfy the court through a particularized request that third party documents exist and how they could assist the defence.[265] It is also consistent with the recognized need to prevent the defence from engaging in "fishing expeditions"[266] for irrelevant evidence at the expense of the effective administration of justice.[267]

While it may be argued that obligating even limited defence disclosure is a violation of an accused's s. 7 rights, the Supreme Court in *R v MPB*,[268] remarked that the protection against disclosure is not an absolute right.[269]

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261 *McNeil*, *supra* note 85 at para 33 [emphasis added].

262 *Ibid* at para 49.

263 *Ibid* at para 49 (citing *R v Arsenault* (1994), 153 NBR (2d) 81 at para 15 (CA)).

264 *McNeil*, *supra* note 85 at para 51.

265 The role of the defence was fully canvassed in the Lesage-Code Report who provided a series of recommendations for third-party disclosure requests in complex trials. See Patrick Lesage & Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (Toronto: Ontario Ministry of the Attorney General, 2008) at 45-55 [*LeSage-Code Report*].

266 *Ibid* at 48.

267 *Ibid* at 47–48.

268 *R v P (MB)*, [1994] 1 SCR 555, 1994 CanLII 125.

269 *Ibid*; *R v Chaplin*, [1995] 1 SCR 727, 96 CCC (3d) 225 at 227–228, 237 (Justice Sopinka upheld the policy purpose for placing the onus on the defence "to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time consuming disclosure requests

It is also questionable whether identifying possible defences and deficiencies in the Crown's case is truly assisting the prosecution.

Respecting the third assumption, once the Crown identifies disclosable information in the Service's possession, they must engage with the Service to determine the most appropriate way to provide that information to the accused in light of any applicable privileges. As in the UK, the common law does not require the disclosure of original third-party records; the test in *O'Connor* speaks only to the production of likely relevant information.[270] This disclosure obligation could be met in various ways: redacting documents, providing summaries, admitting facts, drafting witness statements, etc. Depending on the mechanism selected, it may result in the "Crown holding documents that the accused does not possess";[271] however this, the Supreme Court found in *Mills*, "does not of itself deprive the accused of the right to make full answer and defence."[272]

As Justices LeSage and Code noted in their 2008 report of their review of complex mega-trials:

> If both counsel remember their duties as "officers of the court" and as "ministers of justice", then it should only be in an exceptional case that disclosure requests need to be the subject of a motion in court. Most disclosure disputes are amenable to reasonable compromise and counsel on both sides have a duty to seek such compromises.[273]

In circumstances where likely relevant Service information cannot be produced because its disclosure in any form could injure international relations, national defence or national security, or violate human source privilege under s.18.1 of the *CSIS Act*, notice would then be given to the AGC. If the AGC does not permit the disclosure of the likely relevant material, an application to withhold the information should be made to the trial judge and argued *in camera* and *ex parte* by the Crown and Counsel for the AGC. *Amici curiae* could be appointed to assist the trial judge, and where so ordered represent the interests of the accused in the *ex parte* proceedings.

... Fishing expeditions and conjecture must be separated from legitimate requests for disclosure").

270 *O'Connor, supra* note 89 at para 19.

271 *Mills*, *supra* note 253 at para 116.

272 *Ibid.*

273 *LeSage-Code Report*, *supra* note 265 at 49.

It is not recommended that the adjudication of national security claims before the trial judge replicate the s. 38 *CEA* process. The application of the *Ribic* test requires the balancing of the national security interest in protecting the information against the public interest in its disclosure. The test does not only require the production of information where the accused's innocence is at stake or where trial fairness is at risk: any arguable interest may be sufficient to merit the release of documents if a judge deems that it outweighs the national security risk. Further still, a judge need not accept the Attorney General's assessment of the risk or injury that would arise if material were disclosed, and may call for its release even where the accused's interests are not at stake so long as the material is relevant under *Stinchcombe*. Thus, the *Ribic* test, while flexible, is unpredictable and its litigation is long and complex.

For this reason, this author suggests that when determining whether to order the disclosure of sensitive CSIS records that the Crown has identified as likely relevant in a terrorism proceeding, the court should be limited to two discrete questions. First, would the release of the information at issue cause injury to national security? If the answer is no then the information must be disclosed. Second, if the injury is made out, is disclosing the information essential to trial fairness? If trial fairness necessitates the information's disclosure, the Crown and the AG would have two options: disclose the material or stay the proceedings.

Having seen the Service's holdings, the Crown Prosecutor could re-visit disclosure decisions throughout the proceedings if an issue arises that changes the likely relevance of CSIS material. The Court would also be in a position to reassess their findings regarding trial fairness as evidence is presented. However, no appeal of a disclosure decision should be permitted until the conclusion of a trial resulting in a conviction.

3. Recommendation: Specialized Crowns and Judges

To make this regime work, Canada should look to the UK as a model and establish a division of specialized terrorism prosecutors within the Public Prosecution Service. Not only would terrorism counsel need to have the necessary security clearance to review Service documents, but it would also be essential for them to gain experience and an understanding of CSIS operations and reporting, and build trust with CSIS officials. Having dedicated counsel assigned to terrorism prosecutions would also facilitate earlier consultation regarding the impact of intelligence sharing between

CSIS and the RCMP, and the implications for charging and disclosure. It would also be advantageous to have dedicated Superior Court Judges in each jurisdiction assigned to case manage and preside over terrorism prosecutions as soon as initial pre-trial custody hearings are complete.

4. Recommendation: Codify Witness Anonymity and Protection

Finally, it is recommended that s. 486 of the *Criminal Code* be amended to enhance the protection of witnesses in terrorism prosecutions. In the UK, MI5 has become less reluctant to have their employees testifying in criminal proceedings because there is certainty and an understanding of how their identity will be protected.[274] The *Criminal Code* should be amended to provide for the testimony of witnesses in terrorism trials under a pseudonym, and also permit their voice and image to be obscured where the Crown can establish that such measures are necessary in the interest of justice.[275] The entrance and exit of such a witnesses into the courtroom should also be made via a closed route, and applications for the adoption of such measures should be heard *in camera*, and where necessary *ex parte*.

VII. CONCLUSION

There is no disputing that Canada has an intelligence to evidence problem. Since the establishment of CSIS, the Crown's obligation to disclose all material in its possession that is not clearly irrelevant has made the Service apprehensive about sharing its intelligence with the RCMP. This apprehension is exacerbated further by the uncertainty built into the s. 38 *Ribic* test and the Federal Court's balancing of interests. Add to this, the possibility that CSIS records, never revealed to law enforcement, may be ordered disclosed on the basis that they are "likely relevant" creates an untenable level of risk for an organization preoccupied with protecting the secrecy of its partners, sources, techniques and employees. Thus, to avoid the hazards tied to criminal disclosure obligations, CSIS and the RCMP engage in parallel investigations, and Crown Prosecutors are unable to

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274 Interview of Mari Reid, *supra* note 123.

275 See Security Service "Evidence and Disclosure," online: <https://www.mi5.gov.uk/evidence-and-disclosure>; UK AG's Legal Guidance on "Witness Protection and anonymity," online: <http://www.cps.gov.uk/legal/v_to_z/witness_protection_and_anonymity/#a06>.

leverage the information in the possession of Canada's national security agencies to bring terrorists to justice.

The UK does not struggle with the same dilemma. Interviews undertaken for this article reinforced the importance of clear guidelines for the disclosure of Crown material and third party production. Legislating similar guidelines for CSIS records that respect the fundamental principles of justice protected by s. 7 of the *Charter* will provide greater certainty to the Service when making choices about what and how much information to share with the RCMP.

The reforms suggested in this article are also likely to incentivize the Service, the Crown and the defence to work together to find a means of disclosing the necessary information while protecting the source of that information. Certainty would also be enhanced by limiting the discretion of the Court. Should disclosable information be too sensitive to release in any form, the question of whether it should be disclosed should not be left to a judge to balance against the interests of the accused. The test for disclosure in such circumstances must be discreet: if the information would be injurious to national security it cannot be released. Once the injury is made out, the level of risk to Canada's national security should not be left to a judge to adjudicate. Instead, the trial judge should assess whether withholding the information would render the trial unfair or place the innocence of the accused at stake. If the judge finds that a trial cannot proceed fairly without the disclosure of the sensitive information, the state is left with a policy choice: release the information or withdraw the prosecution. Either option creates a risk to national security, one that only the Government of Canada is competent to make.

R v Jordan: A Ticking Time Bomb

KEARA LUNDRIGAN *

ABSTRACT

This article explores the progression of s. 11(b) *Charter* jurisprudence, the impact of trial delays, and the possibility of replacing the remedy of a stay of proceedings under s. 24(1) of the *Charter* with a system of costs. It further critiques the Senate of Canada's recommendations to reduce trial delays. The article argues that the Supreme Court of Canada's decision in *R v Jordan* fails to facilitate meaningful long-term change yet implementing a system of costs would further perpetuate trial delays. Ultimately, changes to the current structure and operation of the criminal justice system are required to immediately reduce trial delays beyond the current *Jordan* ceilings. All participants of the criminal justice system should strive towards the further reduction the ceilings for trial delay in Canada. Without these changes, the culture of complacency towards trial delay will continue to erode the s. 11(b) *Charter* rights of accused persons.

Keywords: *Jordan*; section 11(b); section 24(1); *Charter of Rights and Freedoms*; trial delay; reasonable time; ceilings; complacency; system of costs; damages; remedies; Senate of Canada; recommendations

I. OVERVIEW

The Supreme Court of Canada ("the Court") has nurtured a culture of complacency in the criminal justice system. Individual accused continue to wait considerable time for trial despite *Charter* protection. Section 11(b) of the *Charter of Rights and Freedoms*[1] ("the *Charter*")

* Keara Lundrigan received her Juris Doctorate from the University of New Brunswick, Faculty of Law, in 2017. She is currently completing her articles at a criminal defence firm in Ottawa, Ontario, with an anticipated call date of June 2018. She intends to practice in criminal law.

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being

guarantees a right to trial within a reasonable time. The time it currently takes to complete a trial is vehemently unreasonable.

In the 27 years since the Supreme Court of Canada's decision in *R v Askov*[2] and its reiteration of the *Askov* principles in *R v Morin*,[3] the time it takes to complete a trial has increased dramatically, notwithstanding the decrease in the number of criminal charges laid annually. The median number of court appearances for a trial in 2013-14 was five and the elapsed time between charge and disposition was 123 days.[4] Forty per cent of cases in 2013-14 required 241 days or more to complete.[5]

The Court's most recent s. 11(b) decision, *R v Jordan*,[6] was introduced as a catalyst to combat the complacency the Court has facilitated. Moldaver, Karakatsanis and Brown JJ, writing for the majority in *Jordan*, developed a framework that included a presumptive ceiling to determine whether an accused's s. 11(b) rights are violated. This shift in jurisprudence, in many respects, falls short. While the new framework accounts for a transitional period before its application, it is outside the Court's jurisdiction to deal with systematic and budgetary issues surrounding the criminal justice system. Instead, a revamp is required. As a consequence of the *Jordan* framework, hundreds of charges are being stayed under s. 24(1) of the *Charter*, the minimal remedy considered appropriate by the Court for a breach of an individual's s. 11(b) rights.[7]

In reaction to *Jordan*, the Senate of Canada's Committee on Legal and Constitutional Affairs ("the Senate Committee") launched a study to investigate lengthy court delays in Canada. Deputy Chair of the Committee, Senator George Baker, indicated that in the second stage of the process the Committee will investigate introducing a system of costs into the criminal

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Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(b) [*Charter*].

2 *R v Askov*, [1990] 2 SCR 1199, 74 DLR (4th) 355 [*Askov*].

3 *R v Morin*, [1992] 3 SCR 286, 76 CCC (3d) 193 [*Morin* cited to SCR].

4 Statistics Canada, "Completed Case Processing Times in Adult Criminal Courts," Presentation to the Senate Committee on Legal and Constitutional Affairs, by Yvan Clermont (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 4 February 2016) [Statistics Canada, "Completed Case Processing Times"].

5 *Ibid.*

6 *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 [*Jordan*].

7 *Mills v the Queen*, [1986] 1 SCR 863 at 928, [1986] SCJ No 39 (QL) [*Mills* cited to SCR]; *Rahey v R*, [1987] 1 SCR 588 at 605, [1987] SCJ No 23 (QL) [*Rahey* cited to SCR].

justice system as a remedy to s. 11(b) *Charter* infringements.[8] Senator Baker suggested that this system of costs would replace an order of stay of proceedings under s. 24(1). A factually innocent accused would receive compensation once acquitted, while an accused who is convicted would receive a reduction in sentence below the statutory or mandatory minimum for the offence.

Although *Jordan* has woken the criminal justice system up from a deep slumber, it fails to facilitate meaningful change. A system of costs would further perpetuate existing delays: a stay of proceedings continues to be the only appropriate and just remedy to a breach of an accused's s. 11(b) rights. The federal government must take a proactive, preventative approach to reducing court delays as opposed to the reactionary approach of adding a system of costs to the criminal justice system.

This article will examine the evolution of s. 11(b) *Charter* jurisprudence to decipher the complacency in the criminal justice system that *Jordan* was designed to correct. It will then discuss the remedy of a stay of proceedings under s. 24(1) of the *Charter* and contrast it with the proposed remedy of costs in the criminal justice context. In doing so, it will incorporate and evaluate recommendations from the Senate Committee's recommendations from its August 2016 interim report[9] ("the Report") as well as recommendations from the witnesses who testified before the Committee. To conclude, this article will provide recommendations regarding the path forward in a post-*Jordan* criminal justice system.

II. SECTION 11(b) JURISPRUDENCE

The Supreme Court of Canada's s. 11(b) jurisprudence from 1982 to 1990 echoes the reasoning of the Court in *Jordan*. However, the shift in jurisprudence in *Askov* in 1990 until *Jordan* in 2016 facilitated the justification of delay by the Crown and the courts to the detriment of the accused. The right to a trial within a reasonable time was characterized by the Court in *Morin* as a societal – as opposed to individual – interest: an

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8 Senator George Baker, Address (Delivered at the University of New Brunswick Faculty of Law Speaker's Hour, 17 January 2017) [unpublished].

9 Senate, Standing Committee on Legal and Constitutional Affairs, *Delaying Justice Is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (August 2016) (Co-Chairs: Hon Bob Runciman, Hon George Baker) [*Delaying Justice*].

accused would rather a violation of his or her s. 11(b) rights and a remedy under s. 24(1) than to have a speedy disposition.[10] This rhetoric sent the message that the right to a trial within a reasonable time is irrelevant.

Accused have waited for years for trial to proceed with little to no recourse. Under the *Morin* framework, the accused had the burden of proving prejudice beyond the fact that the trial had taken longer than the recommended guidelines. Crown and institutional delay were protected: prejudice had to be proven to be granted a remedy. It allowed the criminal justice system to institutionalize lengthy trials as the norm, fostering complacency among all stakeholders. It was not until *Jordan*, when prejudice was removed as a prerequisite to a s. 11(b) violation, that the Court put pressure on stakeholders to decrease criminal trial delays. Section 11(b) has become once again a right with a remedy. But this new framework is not without its problems.

A. Developing Section 11(b) Principles: Early Decisions

Mills v the Queen[11] was the first instance that the Supreme Court of Canada addressed a s. 11(b) *Charter* issue. Lamer J (as he then was) was the only Justice to address the merits of s. 11(b) in his dissent. He defined liberty and security of the person as s. 11(b) interests. He concluded that the purpose of s. 11(b) was to minimize pre-trial detention and other prejudices such as the "stigmatization of the accused, loss of privacy, stress and anxiety relating from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction."[12] In doing so, he categorized pre-charge delay as immaterial to s. 11(b) but relevant to ss. 7 and 11(d) interests.[13] This definition of the purpose of s. 11(b) of the *Charter* has been adopted in all subsequent s. 11(b) jurisprudence.[14] It is Lamer J's dissent in *Mills* that diverges from the American approach to trial within a reasonable time as set out in *Barker v Wingo*.[15] It was here that Lamer J first advocated to remove prejudice from

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10 *Morin*, *supra* note 3 at 298; Steve Coughlan, "*R v Jordan*: A Dramatically New Approach to Trial Within a Reasonable Time" (2016) Criminal Reports (Westlaw).

11 *Mills*, *supra* note 7.

12 *Ibid* at 928.

13 *Ibid* at 948.

14 *Rahey*, *supra* note 7.

15 *Barker v Wingo*, 407 US 514, 92 S Ct 2182 (1972).

the reasonableness analysis: an approach that would eventually be adopted by the Supreme Court of Canada 30 years later in *Jordan*.

Rahey v R[16] expanded on the concept of security of the person in a s. 11(b) context to include not only physical integrity but also "overlong subjection to the vexations and vicissitudes of a pending criminal accusation."[17] Examples of these vexations included stigmatization of the accused, loss of privacy, stress and anxiety from a variety of factors in addition to those listed by Lamer J in *Mills*. The Court held that actual impairment or prejudice need not be proven by the accused for a violation of his or her s. 11(b) rights to be remedied.[18] Although the Court recognized that prejudice animated the right, actual prejudice was not relevant in establishing a s. 11(b) violation.[19]

The Court in *R v Conway*[20] added relevant factors to consider in determining whether an accused's s. 11(b) *Charter* rights have been breached. These factors include: whether the accused waived or caused the delay; the time requirements given the nature of the case and any limitations on institutional resources; and the reasonableness of the overall lapse in time.[21] The Court held that once a person charged has satisfied the court that the total time is "*prima facie* unreasonable," the onus shifts to the Crown to justify the delay[22] – a principle adopted by the Court in *Jordan*.

It is evident that the Court's reasoning in *Mills*, *Rahey*, and *Conway* aligns with its reasoning in *Jordan*. The early s. 11(b) jurisprudence was in favour of prescribing a remedy: it was alive to the fact that a right without a remedy is an "empty promise"[23] and that proving actual prejudice was an insurmountable hurdle for many accused. The Court recognized the value of an accused's s. 11(b) rights and were in favour of trial within a reasonable time. This jurisprudence led to relatively timely trials and did not breed a culture of complacency in the criminal justice system.

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16 *Rahey*, *supra* note 7 at 605.

17 *Ibid* at 599.

18 *Ibid* at 603.

19 *Ibid*.

20 *R v Conway*, [1989] 1 SCR 1659, 49 CCC (3d) 289 [*Conway*].

21 *Ibid* at 1670–1671.

22 *Ibid* at 1672.

23 Lawrence David, "Resource Allocation and Judicial Deference on Charter Review: The Price of Rights Protection According to the McLachlin Court" (2015) 73:1 UT Fac L Rev 35.

B. Fostering Complacency: *R v Askov* and *R v Morin*

R v Smith[24] was the first indication of a jurisprudential shift – one which would enable the Crown and the courts to rationalize delays. *Smith* discussed the weighing of factors to be considered to determine whether an accused's s. 11(b) rights have been breached. In addition to the factors outlined in *Conway*, the Court added that prejudice to the accused must be considered. However, the Court failed to acknowledge that prejudice is inherent in a s. 11(b) violation. It also put the onus on the accused to prove prejudice existing beyond the mere fact that the trial had gone on for an unreasonable amount of time.

This shift was cemented in *R v Askov*[25] when the Court developed the first test to determine whether there was an infringement of the accused's s. 11(b) *Charter* rights.[26] *Askov* was the first time that a societal interest in trial within a reasonable time was considered within an accused's s. 11(b) rights. It weighs heavily in favour of the Crown, who would simply justify delay by demonstrating that the accused deliberately caused the delay or that the accused suffered no prejudice due to the delay. While the Court acknowledged that over time the presumption that the accused suffered prejudice becomes irrebuttable, it was careful to prevent an accused's s. 11(b) *Charter* right from becoming one which could be "transformed from a protective shield to an offensive weapon in the hands of the accused."[27] Yet, with the guidelines offered for a trial within a reasonable time, it gave the accused a hard number to argue for any s. 11(b) *Charter* application, facilitating s. 11(b) applications.

The lower courts' interpretation of *Askov* led to the message by the Court in *R v Morin*[28] that s. 11(b) rights are worthless. *Askov* was a public relations disaster for the Court: between October 22, 1990, and September 6, 1991, over 47,000 charges were stayed or withdrawn in Ontario alone due to violations of the accused's s. 11(b) *Charter* rights.[29] Reacting to the fallout from *Askov*, the Court in *Morin* built in a period of eight to 10

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24 *R v Smith*, [1989] 2 SCR 1120, 52 CCC (3d) 97.

25 *Askov*, *supra* note 2.

26 *Ibid* at 1238–1239.

27 *Ibid* at 1227.

28 *Morin*, *supra* note 3.

29 *Ibid* at 773.

months for provincial court cases to the guidelines of six to eight months from committal to trial provided in *Askov*.[30] The Court warned that these guidelines required adjustments for different areas in the country based on local conditions.[31] This warning gave ammo to the Crown and the courts to justify the delays in their respective jurisdictions.

This hardline approach in *Morin* that gave greater weight to prejudice to the accused and allowed for flexibility in the time guidelines resulted in a higher threshold for the accused to establish a breach of his or her s. 11(b) *Charter* rights. The Court transformed s. 11(b) into a *Charter* right without a viable remedy. The result was a criminal justice system which no longer valued expediency; stakeholders were in cruise control throughout trial with no acceleration of the process. This laissez-faire attitude continued from 1992 until July 2016 with the redesigned s. 11(b) framework in *Jordan*.

III. The *Jordan* Framework: Catalyst for Speedy Trials?

The accused in *Jordan* was charged with nine co-accused on a fourteen-count information that included various drug trafficking offences. The accused was released on strict house arrest and bail conditions from December 2008 to the end of trial in February 2013. The majority in *Jordan* held that the delay of 49.5 months minus the 5.5 months of defence delay for a total of 44 months' delay attributable to the Crown or institutional delay was a violation of the accused s. 11(b) *Charter* rights and issued an order for a stay of proceedings under s. 24(1) of the *Charter*. *Jordan* developed the following test to determine whether an accused's s. 11(b) rights have been violated:[32]

> There is a ceiling beyond which delay becomes presumptively unreasonable…[It] is 18 months for cases tried in provincial court and 30 months for cases in superior court or cases tried provincially after a preliminary inquiry. Defence delay does not count towards the presumptive ceiling…Total delay must be calculated and then defence delay deducted.[33]

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30 *Ibid* at 799.

31 *Ibid* at 797.

32 *Jordan*, *supra* note 6 at paras 46–48, 66, 69–81, 82–91.

33 *Ibid* at paras 66, 105.

Once the presumptive ceiling is exceeded, the burden shifts to the Crown to rebut the presumption of unreasonableness based on exceptional circumstances. Exceptional circumstances lie outside control of the Crown in that (a) they are reasonably unforeseen or reasonably unavoidable; and (b) they cannot be reasonably remedied. If the exceptional circumstance relates to a discrete event, the delay reasonably attributable to that event is subtracted. If the exceptional circumstance arises from the cases complexity, the delay is reasonable.

For cases below the presumptive ceiling, the defence may show that the delay is unreasonable. To do so, it must establish two things: (a) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and (b) the case took markedly longer than it reasonably should have.

For cases currently in the system, the framework must be applied flexibly and contextually, with due sensitivity to the parties' reliance on the previous state of the law.

For delays that exceed the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. The exception will take effect when the Crown satisfies the court that the time the case had taken is justified based on parties' reasonable reliance on the law as it previously existed – a contextual assessment. The judge should consider the time parties have had following release of this decision to correct their behaviour.

For cases below the ceiling, the two criteria in (iii) must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. The defence need not demonstrate that it took initiative to expedite matters for the period of delay preceding this decision. A stay of proceedings will be even more difficult to obtain for cases currently in the system.

This framework restored the s. 11(b) jurisprudence to the position it was in 25 years ago, before the secondary interest of societal concerns took precedence. It eliminated the reliance on prejudice to the accused as a factor in the analysis and replaced flexible time guidelines that could be explained away with a presumptive ceiling that is triggered regardless of where in the country the accused was tried. It promotes simplicity and predictability in s. 11(b) applications.

The *Jordan* framework was applied to the facts in the companion case to *Jordan*, *R v Williamson*.[34] The accused was charged in 2009 with historical sexual offences against a minor. He was released on strict bail conditions from the time of his arrest in January 2009 to the time of his trial in December 2011. The Court accepted the trial judge's assessment of the delay of 35 months: eight months of inherent delay, one month delay attributable to the Crown, and 26 months of institutional delay. The total delay minus defence delay was 34 months; thus the accused's s. 11(b) rights were infringed and the Court of Appeal for Ontario's order for a stay of proceedings was upheld.

While the *Jordan* framework appeared to be more flexible in its application in *Williamson*, the framework is not without its faults. For example, it is less forgiving than the *Askov/Morin* framework.[35] Applying the *Jordan* framework to the facts of *Askov*, the delay would not have been presumptively unreasonable. In *Askov,* the Court found that while there was 30 months' delay, six months' delay was attributable to the defence: the total delay would only amount to 24 months. This would be below the 30-month ceiling imposed in *Jordan* and absent defence counsel's ability to demonstrate it took meaningful steps to expedite proceedings or that the case took markedly longer than it should have, no violation of the accused's s. 11(b) *Charter* rights would have been found. This delay occurred 27 years ago. The amount of delay required to trigger a breach of s. 11(b) *Charter* rights should have decreased in that time, not increased. Heightened trial complexity is no excuse for the increase in delays: new case management programs and technologies that could facilitate these complex trials have not been adopted or implemented in the criminal justice system.

Furthermore, the *Jordan* framework perpetuates a cynical approach to s. 11(b) claims: that accused want to have their trials delayed and benefit from the violation of their *Charter* rights. As stated by Michael A. Code, to suggest that a stay is a windfall for the accused is to "engage in an '*ex post facto* analysis of rights violations' and confuses a constitutional remedy for the harm done by the state with a 'benefit.'"[36] It presumes the guilt of the

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34 *R v Williamson*, 2016 SCC 28, [2016] SCR 741.

35 Erin Dann, "*R v Jordan*: The Good the Bad and the Ugly in the New 11(b) Framework," *For the Defence – The Criminal Lawyers' Association Newsletter* 37:3 (9 Dec 2016) 6.

36 Michael A Code, "Trial Within a Reasonable Time: A Short History of Recent Controversies Surrounding Speedy Trial Rights in Canada and the United States"

accused and neglects to consider the financial burden of a drawn-out charges that do not simply disappear with an order for a stay of proceedings.

By setting a ceiling in *Jordan* that is descriptive rather than prescriptive, the Court has facilitated the maintenance of the status quo. Had a prescriptive ceiling been set – one that tells the state how long a case should take – would, as Erin Dann argued, "foster constructive incentives" for reducing delay beyond the ceilings.[37] Instead, the Court opted for a descriptive ceiling that reflects how long it currently takes to complete a trial. It is open for the Court to alter its current ceilings to reflect an emerging reality in a post-*Jordan* world should another s. 11(b) case come before the Court. However, without an incentive to decrease delays below the ceilings set at the current reality, the ceilings may never be realistically reduced lower than their current levels.

Moreover, the 18-month and 30-month numbers arrived at for the presumptive ceilings were 'invented' by the Court.[38] No proposals or submissions were made by counsel in *Jordan* on a number for a presumptive ceiling at any level of court. The majority stated that they arrived at the ceilings by starting at the *Morin* guidelines followed by a qualitative review on appellate level decisions on delay. They reasoned that the ceilings accounted for other factors that can reasonably contribute to the time it takes to prosecute a case, such as the inherent time requirements and the increased complexity of criminal cases since *Morin*.[39] The ceilings also reflect prejudice, despite its absence from the framework: the majority picked a higher number than under *Askov/Morin* so that prejudice can automatically be inferred. Consequently, the *Jordan* presumptive ceilings are "best guess ballpark figures"[40] as opposed to the guidelines in *Askov/Morin* which were based on evidence.

This higher ceiling may allow for greater tolerance of inefficiencies. The current ceilings allow for a year and a half for delays in provincial court cases

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(Scarborough, Ont: Carswell, 1992) at iii.

37 Dann, *supra* note 35.

38 Jacques Gallant, "How an 'Invented' Supreme Court Ruling Has Rocked the Canadian Justice System," *Toronto Star* (19 March 2017), online: <https://www.thestar.com/news/gta/2017/03/19/how-an-invented-supreme-court-ruling-has-rocked-the-canadian-justice-system.html>.

39 *Jordan*, *supra* note 6 at paras 52–55.

40 Coughlan, *supra* note 10.

– an amount of time that greatly exceeds the time it currently takes for most cases to proceed through the provincial court system. It can foster complacency in jurisdictions that currently have relatively efficient proceedings: the opposite of the Court's intention in *Jordan*. A court can find a violation of an accused's s. 11(b) *Charter* rights under the presumptive ceiling, but the Court has made it difficult as a positive obligation is placed on the accused and the defence counsel.

The new framework requires the accused to take initiative to expedite matters. Cromwell J, dissenting in *Jordan*, characterizes this requirement as a judicially-created diminishment of a constitutional right.[41] It requires the accused to actively attempt to prevent his or her *Charter* rights from being violated; blame is not solely placed on the lack of institutional or Crown resources. Toronto criminal defence lawyer Sean Robichaud voiced concerns over these duties: "[p]rotections that accused persons would otherwise enjoy are being sacrificed, or waived under coercive circumstances, to avoid a problem they often did not contribute towards."[42] The accused should not have to actively fight against a violation of his rights to have a s. 11(b) violation found and remedy ordered.

Regardless of the limitations of the *Jordan* framework, one thing is clear: attitudes have shifted and all stakeholders are scrambling to reduce trial times. Since the release of the decision in July 2016 to March 2017, criminal defence lawyers have applied for 800 stays in criminal cases; this includes over three dozen murder, attempted murder and manslaughter cases. In Ontario, 6,500 cases in Provincial Court are currently past the 18-month mark.[43] The framework seems to have reached a balance between the 47,000 stays in the first year of the *Askov* framework and making s. 11(b) a right without a remedy, as under *Morin*.

The *Jordan* framework serves as a much-needed reboot of the s. 11(b) jurisprudence. The effect it has moving forward depends in part on the willingness of the stakeholders, including the federal government, to enact change in the system and aim for delays that fall far below the current presumptive ceilings. The Court also has an important role to play in the

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41 *Jordan*, *supra* note 6 at para 263.

42 Gallant, *supra* note 38.

43 Sean Fine, "Courts Shaken by Search for Solutions to Delay," *The Globe and Mail* (12 March 2017), online: <www.theglobeandmail.com/news/national/courts-shaken-by-search-for-solutions-todelays/article34275019/>.

reduction of delay: it cannot shy away from re-evaluating the presumptive ceilings and further challenge the stakeholders to lessen the delay, as well as re-evaluating the framework to minimize the imperfections that currently exist. There is more work to be done.

IV. CURRENT REMEDIES FOR A SECTION 11(b) BREACH: SECTION 24(1)

Despite the failings of the s. 11(b) *Jordan* framework, lower courts must work within it and assign appropriate remedies. Remedies for a s. 11(b) *Charter* breach currently fall under s. 24(1) of the *Charter,* which allows for any remedy that is "appropriate and just in the circumstances" to be awarded by a court of competent jurisdiction.[44] This remedial section of the *Charter* grants the judiciary wide discretion in developing remedies for *Charter* breaches. Yet, the Supreme Court jurisprudence indicates that the "minimum remedy" to a s. 11(b) violation is an order for a stay of proceedings under s. 24(1), and this order cannot be granted by a preliminary inquiry judge: only a trial judge or a superior court judge can grant a remedy under s. 24(1).

A. Courts of Competent Jurisdiction

A remedy under s. 24(1) of the *Charter* can only be granted by a court of competent jurisdiction. *Mills* outlined the procedure for granting a s. 11(b) remedy under s. 24(1) of the *Charter*. The Court defined a "court of competent jurisdiction" as a court that has jurisdiction over the person and the subject matter, as well as jurisdiction to grant the remedy. [45]

As a general rule, the court of competent jurisdiction to grant a s. 24(1) remedy is the trial court. The superior criminal courts have constant complete and concurrent jurisdiction but should only exercise this jurisdiction in limited circumstances. A preliminary inquiry judge, on the other hand, is not a court of competent jurisdiction for the purposes of a s. 24(1) remedy. Once an accused is committed to trial, he or she must have access to a trial judge for the purposes of a s. 11(b) application. Superior courts should exercise their jurisdiction when no trial court is available to

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44 *Charter*, *supra* note 1 at s 24(1).

45 *Mills*, *supra* note 7.

the accused for a s. 11(b) application.[46] This ensures that there is always a court accessible to hear a s. 11(b) application and order the appropriate and just remedy. It also means that an accused cannot claim that his or her trial has exceeded a reasonable amount of time until the end of the preliminary inquiry, which can take months to complete.

B. Appropriate & Just Remedies for a Section 11(b) Breach

Section 24(1) of the *Charter* is a broad remedial provision. It allows judges to be creative in proposing remedies for *Charter* breaches by providing an ambiguous ambit of any "appropriate and just" remedy. Such remedies must be appropriate and just to both the claimant and the state.[47] The most common s. 24(1) remedies are declaratory relief and an injunction but remedies such as damages, stays of proceeding, reduced sentences and costs are available.[48] Not all of these remedies are considered equal remedies for a s. 11(b) violation.

Lamer J noted in his dissent in *Mills* that after the passage of an unreasonable time, "no trial, not even the fairest possible trial," is permissible and the minimum remedy to a breach of an accused's s. 11(b) *Charter* right is a stay of proceedings.[49] While additional remedies, such as damages, may be appropriate in the circumstances, such remedies can only be added to a stay of proceedings when it is proven that there was malice or bad faith on behalf of the Crown that resulted in prejudice to the accused.[50] The majority in *Rahey v R* adopted Lamer J's reasoning in *Mills* that a stay of proceedings is a minimum remedy to a s. 11(b).[51] Thus, the large ambit of remedies available under s. 24(1) becomes closed when remedying a s. 11(b) violation.

The appropriate remedy for a breach of a s. 11(b) right has not been challenged in the 30 years of Supreme Court of Canada s. 11(b) jurisprudence since *Rahey*: a stay of proceedings remains the remedy for a s.

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46 *Ibid* at paras 82, 86, 87, 93, 100.

47 David, *supra* note 23 at 15.

48 Vinay Shandal, "Combining Remedies Under Section 24 of the *Charter* and Section 52 of the *Constitution Act, 1982*: A Discretionary Approach" (2003) 61:2 UT Fac L Rev 175.

49 *Mills*, *supra* note 7 at 928.

50 *Ibid*.

51 *Rahey*, *supra* note 7 at 605.

11(b) violation. Consequently, the breadth of judicial discretion in s. 24(1) remedies for s. 11(b) violations remains stunted: additional remedies can only be added to a stay of proceedings in limited circumstances. This erodes the creativity of judges and the possibilities of alternative remedies to stays given the current state of the criminal justice system and the overwhelming amount of s. 11(b) applications since *Jordan*.

An example of the restrictions *Mills* and *Rahey* have placed on s. 24(1) remedies in cases of s. 11(b) violation is provided by *R v Court*.[52] Glithero J attempted to provide unconventional remedies in *Court*, a trial he stayed on the basis of delay: he included an order excluding police testimony about a taped statement of the accused because the tape was lost; an order requiring the Crown to pay the cost of an investigation into material not disclosed in a timely fashion; and put restrictions and obligations on the Crown in the conduct of the ensuing re-trial.[53] Yet, none of these additional remedies could be provided without first granting a stay of proceedings and thus were nothing more than symbolic as the trial did not proceed for evidence to be excluded or restrictions on Crown conduct on re-trial.

Court demonstrates the potential for creativity for s. 24(1) remedies. Perhaps in a post-*Jordan* world changes must also manifest in relation to the remedies available to justices under s. 24(1). Yet, the presumptive ceilings in *Jordan* show that any delay above 18 or 30 months is presumptively unreasonable and thus Lamer J's reasoning from *Mills* remains influential: any trial that has gone on for an unreasonably long time cannot continue. However, there is room for an expansion in s. 24(1) remedy where the delay is either below or above the presumptive ceiling but exceptional circumstances exist. It also is restrictive in terms of awarding costs or a reduction in sentence in lieu of a stay of proceedings, as in *Vancouver (City v Ward)*.[54]

C. *Ward* Damages

The Court in *Ward* recognized *Charter* damages as a distinct public law remedy that can be ordered against the federal or provincial government as opposed to individual government officials for the purpose of

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52 *R v Court* (1997), 36 OR (3d) 263, [1997] OJ No 3450 (QL) (Gen Div).

53 Morris Manning, "Charter Remedies in Criminal Cases: A Cure for the Common Remedy" (2005) 16:1 NJCL 261.

54 *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 [*Ward*].

compensation, vindication, and/or deterrence.55 Damages may be awarded under s. 24(1) of the *Charter* where appropriate and just but they must be sought in a civil court. Section 24(1) damages are a one-time award and not compensation of an indeterminate amount for an indeterminate time.[56] The majority in *Ward* developed a test to determine whether damages should be granted as a remedy under s. 24(1):[57]

Establish that a *Charter* right has been breached. The onus is on the plaintiff; Functional justification of damages: the plaintiff must show why damages are a just and appropriate remedy, having regard for whether they fulfill at least one of the functions of compensation, vindication, and/or deterrence;

Countervailing factors: the state can demonstrate countervailing factors that defeat the functional consideration that support a damage award and render damages inappropriate or unjust. For example, the Crown can show that alternative remedies adequately address the need for compensation, vindication and deterrence; or on the grounds of effective governance.

There is no rigid requirement for the plaintiff to establish a level of fault beyond the *Charter* breach but they must prove a functional need for damages.[58] For s. 11(b) this may mean the accused must prove negligence or bad faith on the part of the Crown in bringing his or her case to trial in order to obtain damages on top of an order for a stay of proceedings. There have been no civil cases claiming s. 24(1) *Charter* damages for a breach of an individual's s. 11(b) *Charter* right. Consequently, the success of a s. 24(1) damage claim for a s. 11(b) *Charter* breach remains unknown, nor is there any indication of what quantum of damages is appropriate for a violation of an accused's s. 11(b) *Charter* rights.

A claim for s. 24(1) damages in civil court comes at extra expense to the accused. As damages are only considered an additional remedy to a stay of proceedings, the risk in seeking damages will likely outweigh any potential damage award. In most situations, civil courts are not accessible to those accused criminally and damages remain elusive due to prohibitive costs. The Court in *Ward* awarded $5,000 in damages for a breach of the plaintiff's s.

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55 Kent Roach, "A Promising Late Spring for Charter Damages: *Ward v Vancouver*" (2011) 29:2 NJCL 135.

56 David, *supra* note 23 at 15.

57 *Ward*, *supra* note 54 at paras 4, 23, 27, 34, 42.

58 *Ibid* at para 27; Roach, *supra* note 55 at 153.

8 *Charter* right against unreasonable search and seizure. In doing so, the Court quantified the damage award as 'moderate' implying that higher and lower awards are in the range of what is appropriate and just.[59] Whether this amount is considered moderate for all *Charter* right violations or merely breaches of s. 8 is uncertain. The Court in *Ward* did allude to compensation for pecuniary or intangible interests such as loss of earnings caused by prolonged detention,[60] which also may apply to loss of earnings due to prolonged time to trial for s. 11(b) remedies.

The inaccessibility of civil courts to criminal accused coupled with the lack of precedent on s. 24(1) damages awarded for a violation of an accused's s. 11(b) *Charter* rights will prevent or deter individuals from pursuing *Charter* damages under the *Ward* framework for s. 11(b) breaches. Despite civil law's shortcomings surrounding *Charter* damages, the test from *Ward* could be informative in introducing a more accessible system of costs to the criminal law process.

V. ADDING COSTS TO THE CRIMINAL JUSTICE SYSTEM: THE HOW

To limit the number of stays of proceedings post-*Jordan*, the Senate Committee is investigating introducing a system of costs to the criminal justice system to replace the remedy of stays of proceedings as the minimum remedy for a s. 11(b) violation. This system of costs would provide *Charter* damages for a s. 11(b) violation to factually innocent accused at the end of trial and would provide a reduction in sentence to accused convicted at trial. Criminal courts do not have the jurisdiction to award damages under s. 24(1) nor do they have power to reduce sentences below the statutory minimum without an amendment to the Criminal Code.

As demonstrated by *Ward*, the only recourse an accused has in terms of costs is to commence a civil action against the government. Thus, the only remedy available for a breach of an accused within the criminal justice system s. 11(b) rights is a stay of proceedings. The government would have to legislate costs as a minimum remedy to a s. 11(b) violation to override the Supreme Court of Canada's precedent from *Mills* and *Rahey* that states a stay of proceedings is the minimum remedy. Given the Court's strong stance

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59 Roach, *supra* note 55 at 154.

60 *Ibid.*

on the remedy, any legislation removing a stay as a minimum remedy may not withstand the Court's scrutiny and be found to be unconstitutional. Thus, the constitutionality of a system of costs as the prominent remedy to a s. 11(b) violation remains unknown. For the purposes of this section, the constitutionality of the system of costs will be assumed.

Options for forums to award s. 24(1) damages under the current constitutional framework include: superior criminal courts, provincial criminal courts sitting as trial courts, administrative tribunals, and small claims courts. Provincial criminal courts sitting as preliminary inquiry tribunals are precluded from awarding s. 24(1) damages.

A. Potential Forums Under the Current Constitutional Framework

Under the current constitutional framework, the *Ward* test for determining whether *Charter* damages are merited can be applied by the three forums with jurisdiction to grant *Charter* costs. The test for sentence reduction or damages could rely on the presence of one of the three purposes identified in *Ward*: compensation, vindication, and deterrence. Providing a venue for accused to seek damages under s. 24(1) will protect innocent accused from *Charter* violations and will ensure a remedy is always available, even if it is a third party's rights that were violated.[61] Yet, these three forums still present the same accessibility issues as the current civil court venue, namely the extra cost to litigants relative to the small quantum potentially awarded.[62] Additionally, except with superior criminal courts and provincial criminal courts, there is no guarantee that the justice seized with the issue has training or experience in criminal law or *Charter* violations.

1. Superior Criminal Courts and Provincial Criminal Courts

Mills, *Rahey*, and *Ward* stand for the proposition that criminal courts have inherent jurisdiction to provide any s. 24(1) remedy (including damages) for a breach of an accused's s. 11(b) *Charter* rights. In rare

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61 An example of when a third party's *Charter* rights were violated is *R v Edwards*, [1996] 1 SCR 128, 132 DLR (4th) 31, where the accused's girlfriend's apartment was searched without a warrant.

62 Akash Toprani, "A Tale of Two Section Twenty-Fours: Towards a Comprehensive Approach for Charter Remedies" (2012) 70:2 UT Fac L Rev 14.

instances, criminal courts have exercised their jurisdiction to award costs in the past, but never for a violation of the accused's s. 11(b) rights.

Criminal courts are unlikely to exercise this jurisdiction on a regular basis as a remedy to s. 11(b) breaches. As argued by Kent Roach, criminal courts will not want to take on the additional task of considering a damage award at a criminal trial.[63] Although it may be beneficial to the accused to have a "one-stop shop"[64] for their trial and *Charter* damages, it burdens the court with additional work. This will also lead to increased trial length as courts must hear submissions on damages or a reduction in sentence either at the time of the s. 11(b) *Charter* application or at the time of sentence.

Additionally, the Court in *R v Nasogaluak*[65] held that s. 24(1) could not be used to lower a sentence below the statutory minimum. A violation of an accused's *Charter* rights can be reflected in the sentencing process and therefore there is no need to resort to the *Charter* to craft a remedy. The Court left the possibility of sentence reduction outside of statutory limits, but only where it is "the sole effective remedy for some particularly egregious form of misconduct by state agents."[66] The *Criminal Code* would require amendments to expand on the remedial powers of criminal courts to include sentence reductions below the statutory minimum.

Criminal courts awarding s. 24(1) costs would create a "one-stop shop" or accused to be awarded a remedy for a breach of his or her s. 11(b) *Charter* rights. It would reduce the problem of accessibility currently present by adding time to the trial at the time of the s. 11(b) application or at the time of sentencing rather than have accused make a claim in an entirely new venue, making them wait longer for a remedy. It would create an equitable system whereby all accused would have access to remedies for breaches of their *Charter* rights: self-represented litigants would be accommodated within the system. The s. 24(1) damages would be awarded at the same moment in time that a stay of proceedings would currently be ordered. The judiciary would be well-versed in *Charter* issues and remedies to make an appropriate and just remedy in the circumstances: expertise would not be a problem.

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63 Roach, *supra* note 55 at 142.

64 Toprani, *supra* note 62 at 14.

65 *R v Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206.

66 *Ibid* at para 64.

While criminal courts remain the ideal solution, they are not the perfect solution. All accused, even self-represented litigants, would have access to s. 24(1) remedies, but they must be alive to the fact that a *Charter* breach occurred. By implementing a system of costs without providing legal representation to all litigants, the system of costs risks becoming two-tiered and accessible only to those who can afford counsel. This, of course, is a risk with any of the currently available solutions.

Additionally, if a remedy is to be granted at the time the application is heard, it may not be known whether the accused will be acquitted or convicted. Thus, while a remedy of costs is appropriate and just in the circumstances, exactly how long the trial will run or how the costs will be awarded will be unknown until the end of the trial. A judge could propose the quantum for damages should the accused be acquitted or the reduction in sentence prior to knowing the outcome or could defer his or her decision on the type of costs awarded until the end of trial. Either way, justice for the violation of the accused's s. 11(b) *Charter* rights is further delayed and—if a violation of an accused's *Charter* rights is found—the remedy does little to encourage an expeditious completion of the trial.

2. Administrative Tribunals

R v Conway[67] declared that an administrative tribunal can grant *Charter* remedies if it has jurisdiction, explicit or implicit, to decide questions of law. To determine this, we must look to the enabling statute: the *Charter* cannot enhance the powers of an administrative tribunal. The Court in *Conway* shifted from the *Mills* jurisprudence that required a court of competent jurisdictions to grant s. 24(1) remedies towards a contextual approach.[68] This approach accepted that administrative tribunals should play a primary role in *Charter* remedies.

The prospect of administrative tribunals awarding *Charter* damages for breaches of an accused's s. 11(b) rights has many benefits. It eliminates the added court resources needed under the superior and provincial criminal court model. It may also be less expensive to plaintiffs to make *Charter* claims as they will not face the prospect of an adverse cost award, as in civil

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67 *Conway*, *supra* note 20.

68 Christopher D Bredt & Ewa Kraiewska, "*R v Conway*: Simplifying the Test for Administrative Tribunal's Jurisdiction to Consider Charter Issues" (2011) 29:2 NJCL 189 at 196–197.

courts.[69] Administrative tribunals may also have the jurisdiction to order a broad range of alternative remedies to damages or reductions in sentencing. These remedies have the potential to be granted without submissions from the applicant.[70] Administrative tribunals present an efficient and equitable alternative to superior criminal courts.

Though efficient and equitable, administrative tribunals too have their flaws. Dealing with *Charter* damages through administrative tribunals eliminates the "one-stop shop" for accused under the superior and provincial court system. Administrative tribunals are not completely free: while no costs can be awarded for a failed claim, plaintiffs will likely have to hire counsel. The cost of counsel for an administrative hearing will likely be higher than for an additional submission during the criminal trial. It shifts the cost to the individual whose rights have been violated instead of placing the cost of remedying the violation on the state. Additionally, the remedies available through an administrative tribunal will ensure *Charter* compliance but they will not necessarily be designed to compensate individuals for past *Charter* violations: an expansion of the range of remedies that can be granted by administrative tribunals is required.

No administrative tribunal currently exists that has jurisdiction to decide questions of law and grant the remedy required for a s. 11(b) breach. Provincial human rights tribunals could take on the burden of granting s. 24(1) remedies.[71] This requires a change in the enabling statutes to ensure jurisdiction over the question of law and that the *Charter* is not excluded from its jurisdiction. Additionally, it would require that the remedies available to provincial human rights tribunal be expanded to include s. 24(1) damages. Knowledge possessed by human rights tribunals would be adequate for the purposes of awarding s. 24(1) *Charter* damages: human rights law is closely connected to constitutional law.

The limitation of human rights tribunals being reformatted to grant s. 24(1) remedies is the wait time for a hearing: it takes approximately one year to get a hearing depending on the province in which the accused is located.[72] Thus, an accused whose rights to trial within a reasonable time has been violated must wait an additional year after the conclusion of their criminal

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69 Roach, *supra* note 55 at 141.

70 Bredt & Kraiewska, *supra* note 68.

71 Toprani, *supra* note 62 at 15.

72 *Ibid.*

trial for damages. This may not be devastating for the factually innocent accused receiving financial compensation, but it may be a great hindrance for a convicted accused who is seeking a reduction in sentence: his or her sentence could be served by the time the application is heard. Financial damages could be awarded in lieu of a reduction in sentence, but will $5,000 replace three months of freedom?[73] However, the administrative tribunal scheme allows claims to be settled prior to hearing and thus this additional delay may be relatively short.

Administrative tribunals, while attractive, perpetuate the delays for the accused. The accused must expend their own resources to claim a remedy for a violation of his or her s. 11(b) *Charter* rights and wait an additional period after the completion of trial for a remedy. No administrative tribunal is currently equipped with jurisdiction to grant a *Charter* damages remedy: changes to enabling statutes must occur. Most importantly, the legislature has power over the jurisdiction of administrative tribunals. If the legislature believes that administrative tribunal remedies for *Charter* breaches are too excessive or too plentiful, it can amend the enabling statute to prevent the tribunal from granting s. 24(1) remedies. It has the potential to once again make s. 11(b) a *Charter* right without an obtainable remedy.

3. Small Claims Courts

The resolution of s. 11(b) violations through s. 24(1) remedies in small claims court provides a venue for litigants to represent themselves. It also excludes the possibility of unsuccessful litigants being ordered to pay adverse costs.[74] Small claims court is thus more accessible to more litigants making *Charter* remedies available to more individuals. Like administrative tribunals, small claims court s. 24(1) remedies would allow third party non-accused to obtain a remedy for a breach of his or her *Charter* rights: it could open the possibility for the expansion of s. 11(b) rights to complainants.

Small claims courts' limit on quantum claimed has increased well above the $5,000 awarded as *Charter* damages in *Ward*. For example, in 2016, the quantum limit for Ontario small claims court increased from $10,000 to $25,000.[75] This would provide the flexibility necessary to grant the

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[73] In *Ward*, $5,000 was the amount of damages awarded for a breach of the accused's section 8 *Charter* rights.

[74] Roach, *supra* note 55 at 142.

[75] Ontario, Ministry of the Attorney General, "Small Claims Court – Increase in Monetary Limit from $10,000 to $25,000" (14 April 2016), online: <https://www.attorney

appropriate and just s. 24(1) remedy given the circumstances surrounding the s. 11(b) breach. However, as the Court in *Ward* stated that loss of earnings for a period of prolonged detention could be claimed under s. 24(1) damages, the $25,000 cap may be insufficient to remedy a s. 11(b) breach. For example, if the accused in *Williamson* had been suspended from his job as a teacher *without pay* and the delay attributable to the Crown remained at 34 months, at the end of trial had Mr. Williamson been acquitted, part of his claim for damages would be for 34 months' lost earnings. This would greatly exceed the $25,000 cap. Remedying s. 11(b) violations in small claims courts may prohibit claimants' from receiving an appropriate and just remedy.

Unlike superior and provincial criminal court judges or administrative tribunals, small claim courts judges have little experience in criminal or constitutional matters. Small claims courts are predominantly limited to a niche class of disputes.[76] In Ontario, for example, small claims court judges are 'deputy judges' – lawyers who sit on a *per diem* basis.[77] These deputy judges may not have the experience in deciding complex *Charter* issues, which could lead to divergent results. This, coupled with the fact that most small claim courts litigants are self-represented, may make the s. 24(1) process slow and unpredictable.

Granting s. 24(1) remedies in small claims courts eliminates the accessibility issue of criminal courts and administrative tribunals. It also protects the claimant from paying adverse costs if he or she is unsuccessful. Small claims courts are nonetheless limiting. Claimants cannot receive greater than a $25,000 damage claim and it does not guarantee access to the expertise necessary for *Charter* issues. Small claims court, like superior criminal courts and administrative tribunals, remain an inappropriate forum to award appropriate and just remedies under s. 24(1) of the *Charter*.

VI. CRIMINAL COSTS: A MOVE IN THE RIGHT DIRECTION?

There is a system in place that could award s. 24(1) damages for a s. 11(b) breach. These damages could be awarded by superior and provincial criminal courts, administrative tribunals or small claims courts. These

general.jus.gov.on.ca/english/courts/scc/scc_increase_limit.php>.

76 Toprani, *supra* note 62 at 14.

77 *Ibid.*

forums could apply the *Ward* test to determine whether *Charter* damages are warranted. However, just because something can be done does not mean it should be done.

An examination of the Court's s. 11(b) jurisprudence indicates that s. 24(1) damages in the form of costs or a reduction in sentence will be insufficient for a breach of an accused's s. 11(b) rights. Lamer J's reasoning in Mills holds true: after the passage of an unreasonable time, "no trial, not even the fairest possible trial," is permissible and the minimum remedy to a breach of an accused's s. 11(b) *Charter* right is a stay of proceedings.[78] Once the presumptive ceiling is reached any further time it takes to adjudicate the case on its merits will continue to be an unreasonable amount of time regardless of how fast the rest of the trial may take. Arguments that sentence reduction provides the judiciary with a remedy to *Charter* infringements of the factually guilty "without throwing the baby out with the bathwater"[79] by granting the accused an "undeserved"[80] remedy fall short. No amount of money or reduction in sentence will make an unreasonable delay reasonable. Moreover, replacing the minimum remedy of a stay of proceedings for a s. 11(b) breach with a minimum remedy of damages may not withstand constitutional scrutiny.

A remedy for a s. 11(b) breach under s. 24(1) must be appropriate and just to both the accused and the government. With 800 stays of proceedings already applied for since July 2016 and 6,500 cases in Ontario provincial courts alone currently over the 18-month presumptive ceiling,[81] the amount of *Charter* damages awarded could be significant, especially if costs for lost earnings are included.[82] In trying to keep remedies appropriate and just to both parties, the accused may never recover the full amount for suffering. On top of this, the accused will continue to be tried, absorbing more legal costs.

No reduction in sentence or costs will compensation for a degradation of evidence due to delay. Witnesses' memories fade or they become unavailable over time. The cost to an accused of degradation of evidence cannot be measured. It is not tangible like the damages in *Ward* where a

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78 *Mills*, *supra* note 7 at 928.

79 Toprani, *supra* note 62 at 16.

80 *Ibid*.

81 These numbers reflect a period from July 2016 to March 2017.

82 Fine, *supra* note 43.

strip search occurred on arrest, nor is it quantifiable in the way that unreasonable search and seizure can be, where what is at issue is a matter of whether a search, a partial strip search, a complete strip search, or no search at all occurred. There is no measure of how strong the memory of the witness would have been had the trial taken place within a reasonable time. You cannot tell how much an accused was stripped of his or her right to a fair trial, s. 11(d) of the *Charter*, by a breach of s. 11(b). Of course, jurisprudence would develop that would guide courts on the appropriate and just amount of damage, but there is no evidence to ground the jurisprudence in its development. A stay of proceedings requires less weighing of factors after a s. 11(b) breach has been found.

A system of costs puts the failure of the government back onto society: on the accused in terms of additional legal costs and society generally through taxpayers' money to pay damages. A counter-argument is that two-thirds of the accused tried in 2013-14 were convicted and thus no financial costs would be awarded but rather it would save taxpayers money by reducing the period of incarceration. This does not consider the extra money spent on the trial itself or the amount of costs paid to the one third accused acquitted.83 A system of costs, while quasi-satisfying the societal purpose of s. 11(b) that an accused be brought to trial, ignores the primary purpose of s. 11(b): that an accused be brought to trial within a reasonable time. Instead, it perpetuates the delay.

Introducing a system of costs would increase the burden on the accused. The court could issue a declaration or an injunction under s. 24(1) to prevent the accused's s. 11(b) rights from continuing to be violated, but the only meaningful way to prevent s. 11(b) rights from being violated is a stay of proceedings. Permitting a trial to continue permits the delay to continue. There would be little use in making a s. 11(b) application until the end of trial or at the time of sentencing when the total amount of delay can be determined. As the Court did in *Morin*, a system of costs would make s. 11(b) a right without a viable remedy. There would be less urgency on the Crown to complete trial in a timely manner as there is no penalty to them directly: it would be the government who pays the cost and not the individual actor, per Ward. While pressure from superiors in Public Prosecutions, delay could continue to be explained away by individual

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83 Statistics Canada, "Completed Case Processing Times," *supra* note 4.

Crown Prosecutors with no perceivable repercussions. Introducing a system of costs would be a step back from the progress made in *Jordan*.

Many Senate Committee witnesses referred to the impact trial delays have on the complainant involved. It also puts his or her life on hold for an indeterminate period. Complainants have no s. 11(b) *Charter* rights, but it is nonetheless an important consideration given the Senate's emphasis on the secondary societal purpose of s. 11(b). A system of costs would offer little reprieve to the stress and anxiety of the complainant caused by trial delay. Not only would they have to wait extra months to testify and for a verdict, but they would also see a convicted accused receive financial compensation or serve a lesser sentence for a crime against them due to Crown delay. Unlike the factually-innocent accused, the complainants receive no financial compensation for their lives being put on hold. A stay of proceedings would not be ideal for complainants but an efficient judicial system that prevents delay before it occurs would benefit them greatly.

VII. Recommendations

Introducing a system of costs is a reactive solution to *Jordan*. The government needs to instead create proactive preventative solutions to reduce delays. The Senate Legal and Constitutional Affairs Committee has heard from 22 witnesses as of March 9, 2017: legal associations, police services, provincial legal and prosecutions services, and private individuals. Witnesses advocated for different interests in the criminal justice system – for the police, for the accused, for the complainant, and for society generally. Yet, based on witnesses' testimony, an incontrovertible theme of demanding investments in upgrades to the front lines of the criminal justice system is apparent. More importantly, not a single witness proposed introducing a system of costs to the criminal justice system. More practical recommendations were put forward that would reduce delays rather than perpetuating the complacency that currently exists.

A. Senate Committee's Preliminary Findings

In its Interim Report published in August 2016, the Senate Committee studied the impact of delays on victims and witnesses, accused persons, and on the justice system. It also studied the issue of bail reform, case management, court resources, and alternative methods to traditional criminal justice. In doing so, the Committee arrived at the following four

recommendations that the Government of Canada should undertake immediately:[84]

1. Work with the provinces, territories and judiciary to examine and implement best practices in cases and case flow management to reduce the number of unnecessary appearances and adjournments and to ensure criminal proceedings are dealt with more expeditiously;
2. Take steps to ensure that the system is in place to make the necessary judicial appointments to provincial superior courts as expeditiously as possible;
3. Show leadership in working with provinces and territories to help share best practices concerning mega-trials, restorative justice programs, therapeutic courts, "shadow courts" and integrated service models for courthouses, and to help them implement these in appropriate circumstances; and
4. Take the lead and invest in greater resources in developing and deploying appropriate technological solutions to modernize criminal procedures.

The Committee found that delay impacts all areas of the criminal justice system. It fosters feelings of revictimization in complainants by inducing worry and anxiety with every additional adjournment.[85] The accused may be left uncompensated for lengthy periods of pre-trial detention and face ostracizing and stigmatization by their community if they are acquitted.[86] Delays erode the confidence of the public in the justice system, calling the efficiency and fairness of the system into question.[87] Delays are a benefit to no one. To combat delay, the Committee suggested providing case management training to all judges and additional resources, including electronic resources, to the judicial system and legal aid.[88] This would be an ideal starting point in reducing delays.

The recommendations made indicate that the Senate Committee is alive to the issues causing delay in the criminal justice system. The evidence is before them. To abandon this course of action in favour of a system of

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84 *Delaying Justice*, *supra* note 9 at 4.

85 *Ibid* at 5.

86 *Ibid.*

87 *Ibid* at 6.

88 *Ibid* at 6, 8, 11–13.

costs would be wrong. It would take resources away from innovations and programs required by the criminal justice system to reduce trial delays. It would stymie and significantly hamper any progress made towards reducing delays.

B. Going Forward: Methods of Eliminating Delay

Senate Committee witnesses provided various practical solutions to delay, all of which are proactive and would have immediate impact. No one solution will work alone: several solutions must be implemented to work in tandem to reduce delays. Federal government funding is required for each solution and thus the Senate should look to implement these solutions as opposed to sinking money into a system of costs. The recommendations can be divided into the following categories: case management techniques; judicial resources; police powers; bail reform; federal legislation revision; technological advancements; and the availability of programs. None of these solutions will be achieved without changing the legal culture.[89] A change in the idea that 18 months or 30 months is a reasonable amount of time to complete a trial must occur.

1. Case Management Techniques

A triage system like that of the healthcare system is necessary to prioritize cases. This would make the criminal system more efficient.[90] It would allocate priority based on case complexity and diversion and early resolution options available for each case.[91] This would help reduce the number of cases that would proceed to trial in addition to making more programs available to individual accused based on their needs.

A scheduling practice that facilitates the expeditious disposition of routine cases would also be beneficial in reducing delays. A system that

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89 This paper studies Witness Statements to the Senate Standing Committee on Legal and Constitutional Affairs on delay up to March 9, 2017.

90 Nova Scotia, Attorney General, "Written Submission to Senate Standing Committee on Legal and Constitutional Affairs" on the issue of "a study on the issue of delays in criminal proceedings" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 23 February 2016) at 5.

91 Canada, Department of Justice, *The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System* (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 2016) at 4 [DOJ, *Early Case Consideration*].

would quickly identify cases likely to require more counsel and judicial attention so that effective use can be made of courtroom time and counsel preparation time would be necessary. One method is the introduction of case timetables that would be set by the judge in consultation with counsel to determine the length of time the case should take at the outset.[92] However, this would also take up judicial resources that could be better used elsewhere. An effective solution could be to appoint judges specifically for case timetables that would not be subsequently seized with the case. With the help of court administrative staff, all scheduling could be done in a manner similar to a pre-trial conference. The accused would have an expectation of the length of trial from the outset and could appropriately organize their lives around the trial.

Implementing case management teams in Crown offices is another solution. These teams would be in large local jurisdictions and where dedicated teams are not feasible, vertical file management procedures could be developed to promote Crown ownership and accountability over files.[93] The early assignment of cases to specific Crown prosecutors would ensure consistency and accountability. The current method of passing files over based on who is available on the day of the hearing does not put anyone in control of a file: there is no one person to take the blame for delay. The case management team would be responsible for bail hearings, pre-charge screenings including elections and appropriateness of diversion programs, first appearances, pre-trial conferences, further disclosure requests, set date court, and communications with the investigating police officer. This would make more Crown prosecutors available for trial, reducing delay due to unavailability or counsel preparation time. It would also reduce over-charging,[94] as all files would be subject to pre-charge screening prior to first appearance.

A third case management solution, closely related to the first two solutions, is maximizing first appearances. The Department of Justice Canada recommends that all non-bail first appearances take place within four weeks of arrest with shorter periods for specialized cases such as

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92 *Ibid.*

93 *Ibid* at 23.

94 Legal Aid Ontario, "LAO Submission to the Standing Senate Committee on Legal and Constitutional Affairs to Inform the Senate Study on Delays in Canada's Criminal Justice System" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 2016) at 5.

domestic violence cases, cases involving young persons, or child abuse.[95] At the first appearance full disclosure should be made available to the accused even if no application for disclosure has been made. The Crown's position on early resolution should be communicated to the accused and the accused should be provided the opportunity to speak to duty counsel regarding the Crown's position on early resolution prior to the first appearance to attempt to resolve the matter without setting dates for trial. For example, Legal Aid Nova Scotia recommends that more information be provided to self-represented litigants at first appearance to help guide them through the court process.[96] This could be facilitated during the accused's meeting with duty counsel regarding plea bargains.

Essential to a successful system of case management is technological advancements. Implementing a program of electronic disclosure would dramatically decrease the number of adjournments required prior to election/plea and trial.[97] An electronic disclosure designed to categorize the documents contained in the disclosure would not only help get the disclosure to the accused or their counsel, but it would also help in reducing the time required for preparation for trial. One click would replace rifling through papers to find the document required. Technology would also be valuable in creating an efficient scheduling practice that prioritizes more complex cases. The system could fill dead time in court that was created by a resolution to cases prior to trial. Technological advancements could also include video-trials and pre-conferences where the available justice, the Crown, and the accused would not have to be in the same courtroom, or any courtroom at all.[98] It could be done from offices and conference rooms. Available judges could be seized of matters from neighbouring jurisdictions to help alleviate backlog.

These case management innovations would reduce unnecessarily scheduled trial dates that result in adjournment after adjournment for issues such as disclosure that could be resolved at first appearance. The 90 per cent of criminal cases that do not end with a trial will not be set down for trial

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95 Canada, Department of Justice, *supra* note 91 at 28.

96 Nova Scotia, Attorney General, *supra* note 90 at 4.

97 Legal Aid Ontario, *supra* note 94 at 4.

98 Saskatchewan, Ministry of Justice, "Saskatchewan Ministry of Justice Presentation – Standing Senate Committee on Legal and Constitutional Affairs" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 24 February 2016) at 3.

unnecessarily.[99] The innovations would create a system that prioritizes cases based on complexity and ensures that the appropriate amount of court time is scheduled for each trial without overscheduling, leaving much needed courtrooms empty while accused wait for trial. It is the first step required to fix the delays that currently occur in the criminal justice system.

2. Judicial Resources

Appointing experienced criminal lawyers from both sides of the aisle would facilitate speedy dispositions at trial. Along with filling all judicial vacancies, the federal and provincial governments must proportionally increase Crown prosecutor positions to ensure Crown availability for trial.[100] This also means an increase in legal aid funding to ensure defence counsel's availability. To increase judicial resources, the appointment process must be improved. Partisan patronage appointments must be eliminated. Superior Courts should be split into criminal and civil divisions so the appointments process can appoint judges with the appropriate experience to the appropriate division.[101] A streamlined process to appoint judges with the experience necessary to dispose of criminal matters efficiently is necessary to reduce delays in the future.

3. Bail Reform/Police Powers

The Criminal Lawyers' Association argued that denial of bail fundamentally hampers the justice systems ability to deliver justice: federal bail reform has failed, unjustly incarcerated marginalized groups such as the poor, the dispossessed, the disadvantaged, the mentally ill, and those new to our country and culture.[102] The wholesale denial of bail undermines efficiency in dealing with criminal matters as it is difficult to meet with clients to review disclosure and it lacks the rehabilitative programs that would benefit the accused.

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99 Canadian Bar Association, "Study on Matters Pertaining to Delays in Canada's Criminal Justice System" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 17 February 2016) at 2.

100 *Ibid* at 3.

101 Ian Greene, "Delays in Criminal Proceedings" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 9 March 2016) at 6.

102 Criminal Lawyers' Association, "Presentation on Delays in the Criminal Justice System" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 18 February 2016).

As of 2000-01, 60 per cent of all admissions to provincial correctional facilities are accused remanded until trial.[103] Failure to comply with a court order is the fourth most frequently occurring offence in Canada, representing nineteen percent of all cases in 2003-04.[104] The use of bail supervision and verification programmes to provide monitoring, referrals, and supervision beyond reporting conditions would reduce the amount of bail court appearances and re-appearances. It would provide community-based services to assist accused who are at risk of being denied bail on primary grounds: the risk of non-appearance. These programs could also provide counselling and treatment options while awaiting trial. Ontario has had success with these programs since 1979: in 2003-04 81 per cent of bail supervision programme clients attended all their court appearances.[105] These programs cost $3 a day per client, compared to $315 per day per inmate in custody.[106] Not only would these programs reduce delays but also would save the funds that could be put back into the program and other proactive delay-reduction mechanisms.

Disclosure should be provided by the Crown at the bail hearing.[107] The Crown should endeavour to provide as much information at the time of the bail hearing so the defence counsel can appropriately advise his or her client. Before the bail hearing, the police should provide the Crown with, at minimum, a synopsis and record of arrest, the criminal record of the accused, and a synopsis of any videotaped statements where a transcript has not yet been prepared.[108] This would give both Crown and defence counsel a better idea of the issues and whether release or remand will be consented to before proceeding with the bail hearing.

Technology could be useful to resolving bail reform issues. The use of an audio and video remand system would facilitate meetings between the accused and their counsel to discuss disclosure: it would be secure and convenient access to clients.[109] It would also reduce having accused transported to court when scheduling is at issue. If the court has time for a

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103 DOJ, *Early Case Consideration*, *supra* note 91 at 2.

104 *Ibid* at 3.

105 *Ibid* at 16.

106 *Ibid*.

107 *Ibid* at 21.

108 *Ibid*.

109 *Ibid* at 19.

bail hearing when the accused is not present in the courtroom, it could proceed without the accused's physical attendance by video. This would fill gaps of dead time that currently exist when matters are adjourned for disclosure and thus reduce delays without requiring the extensive use of weekend and statutory holiday courts.

Police in Canada currently have the power under s. 498(1)(c) of the *Criminal Code* to release an accused with sureties or under s. 499 by signing an undertaking (Form 11.1).[110] More education on how and in what circumstances to release an accused would eliminate the number of bailing hearings required. An amendment to the *Criminal Code* to allow police to release without sureties would further relieve the justice system as an appearance to release on consent by Crown counsel would not be required.[111]

A more efficient bail system can be easily structured if the proper supervision programs and technology are available. Police powers can further reduce congestion in bail courts by exercising their power to release accused with sureties or on an undertaking. These small changes would have a sizable impact on reducing delays.

4. Federal Legislation Revision

Providing court administrative staff with the power to schedule through legislative reform would be a step in reducing delay. It would eliminate the need to go before a justice to request or change a date. It could also grant the power for administrative staff to remove cases from the docket with consent of both the Crown and defence counsel and subsequently reschedule a different matter in the same timeslot. It would a greatly reduce dead time that courts currently experience when a 1.5-day trial is adjourned or withdrawn.

Revising sentencing provisions may also reduce trial delay. Frequently recommended revisions include revisions to mandatory minimum sentences, Part XXIV of the *Criminal Code* in relation to dangerous and long-term offender designations, provisions dealing with the *Sexual Offender Information Registration Act* (*SOIRA*), and the provisions dealing with judicial interim release.[112] Changes to these provisions would grant the Crown

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110 *Ibid* at 11.

111 Greene, *supra* note 101 at 6.

112 Nova Scotia, Attorney General, *supra* note 90 at 6.

greater flexibility in negotiating a plea bargain prior to trial. The current rigid mandatory minimums sentences, for example, do not allow a Crown attorney to give an offer below the minimum to an accused, putting the accused in an all-or-nothing situation where they have nothing to lose by going to trial. There is no incentive to plead guilty early in the process.

5. Availability of Programs

Rehabilitation should be a prominent goal in restructuring the criminal justice system to reduce delays. Various rehabilitative programs exist but no province offers all programs necessary to reduce delays. Sharing information between provinces on programs offered would help build a system that works for everyone. A critical requirement is increased access to legal aid funding to provide access to legal services to more accused, reducing the number of self-represented litigants in the process.[113] This will also make more accused aware of the range of programs available and give them the advice necessary to make use of the programs.

A range of adult diversion programs with clear operating principles and eligibility of community use must be made available.[114] Crown counsel should be encouraged to consider and promote the use of these diversion programs in all appropriate circumstances. These diversion programs can include mediation, sentencing circles, Aboriginal court worker programs, mental health services, drug therapy courts, and addictions counselling.[115] For example, Legal Aid Ontario has implemented an Aboriginal Justice Strategy that increases client access to *Gladue* report-writing services among other services for Aboriginal clients in addition to a Mental Health Strategy to better help clients with mental health issues.[116] The Saskatchewan Ministry of Justice has implemented an Aboriginal Courtworker Program that ensures Aboriginal accused receive fair treatment.[117] Incorporating

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113 Canadian Bar Association, *supra* note 99 at 3.

114 DOJ, *Early Case Consideration*, *supra* note 91 at 31.

115 *Ibid*; Greene, *supra* note 101; Nova Scotia, Attorney General, *supra* note 90; Legal Aid Ontario, *supra* note 94; Saskatchewan, Ministry of Justice, *supra* note 98; Ottawa Police Services, "Presentation to Senate Standing Committee on Legal and Constitutional Affairs" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 14 April 2016); John Bradford, "Delays in Criminal Trials" (Ottawa: Senate Standing Committee on Legal and Constitutional Affairs, 20 April 2016).

116 Legal Aid Ontario, *supra* note 94 at 6.

117 Saskatchewan, Ministry of Justice, *supra* note 98 at 4.

diversion programs such as these in each province would provide viable options to accused to avoid trial.

Restorative justice is necessary in the criminal justice system. Without it, accused will proceed through the trial process with no resources to rehabilitate them. It offers no alternative to a criminal trial and sentence. These diversion programs will see accused treated fairly and allow them to get the help they need while simultaneously reduce trial delays. It considers the uniqueness in circumstance of every accused and the differing needs for rehabilitation. The federal government and the provinces must work together to build a range of programs to service all accused.

VIII. CONCLUSION

Jordan once again made s. 11(b) of the *Charter* a right with a remedy. It has woken the criminal justice system up from its 25-year slumber to address trial delay. Yet, the presumptive ceilings do nothing to encourage reducing delays below their current levels. *Jordan* simply brings the s. 11(b) jurisprudence back to pre-*Askov/Morin* state: it does not address the current realities of the criminal justice system. In doing so, it creates a new form of complacency.

The minimum remedy to a breach of an accused's s. 11(b) rights is currently a stay of proceedings under s. 24(1) of the *Charter*: this should not be altered. While a system of costs can be introduced into the criminal justice system through amendments to the *Criminal Code*, this does not mean that a system of costs should be introduced. A system of costs, as proposed by the Senate Committee, is a reactive remedy to *Jordan* and will do nothing to reduce trial delays. Instead, it will perpetuate delay by allowing a trial to continue beyond a reasonable time.

Proactive remedies are required to combat trial delays. These remedies include, but are not limited to, case management techniques, greater judicial resources, bail reform, federal legislation revision, and increased availability of diversion programs. Not one solution will be successful in reducing delays: various solutions must be introduced simultaneously to work to reduce delays. A change in attitudes about the reasonable amount of time for trial is imperative for any remedy to be effective. Collaboration between the federal government, provincial and territorial governments, the judiciary and both Crown and defence counsel is necessary to reduce

criminal trial delays. It should not be on accused alone to fight the systematic abuse of their *Charter* rights.

A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers

HALEY HRYMAK *

ABSTRACT

An analysis of the British Columbia fentanyl sentencing decisions reveals that courts are emphasizing the need for enhanced deterrence as a response to the opioid crisis. Increasing prison sentences is not an evidenced-based response to this public health crisis. In the street-level trafficking cases examined, 12 of the 14 people were motivated to traffic to support their own addiction. The courts' response of lengthening custodial sentences for people who are trafficking fentanyl will not deter street-level trafficking. Instead, the court's punitive approach will increase the number of people in custody, and disproportionately impact Indigenous people and those with substance abuse issues. Lengthier prison sentences should not be the prescribed response by the courts to deal with this public health crisis. The courts' response to the opioid crisis exacerbates the present risks to people who use drugs and puts a vulnerable population at an increased risk of harm.

* This article comprises chapter two of my LL.M thesis at the University of British Columbia entitled "The Opioid Crisis as Health Crisis, Not Criminal Crisis: Implications for the Criminal Justice System". While I am thankful to many people for their assistance and support, I would like to specifically acknowledge the insightful feedback of the anonymous reviewers, the editors at the *Manitoba Law Journal*, Kyle McCleery, Catherine Highman, Casey St. Germain, and Professor Debra Parkes. The author is a Crown Attorney with the Public Prosecution Service of Canada. The views expressed in this article are the author's alone and do not represent the views or positions of the Public Prosecution Service of Canada or the Government of Canada.

Keywords: fentanyl; opioid crisis; deterrence; sentencing; public health; criminal law; street-level trafficking; exceptional circumstances; addiction; substance use; Indigenous people; stigma; British Columbia

I. INTRODUCTION

Across Canada an alarming number of fentanyl related deaths has resulted in a public health crisis.[1] The current opioid crisis in British Columbia has the courts calling for enhanced deterrence and lengthier prison terms.[2] Over forty years of empirical evidence shows no relationship between increasing sentences and preventing crime.[3] The courts' response may result in an increase in the number of people in prison, particularly Indigenous people and those with substance abuse issues. This article analyzes British Columbia's judicial response to the fentanyl crisis and argues that relying on deterrence and increasing the prison sentences for street-level traffickers may be a harmful response.[4] The imposition of lengthier prison sentences will not promote public safety and ignores the fact that most street-level traffickers are substance users themselves.

Part two of this article looks at the current crisis in British Columbia and the courts' response. The fentanyl crisis and the major findings from the jurisprudence of fentanyl sentencing decisions during the past few years in British Columbia are examined. The sentencing range set by the Court of Appeal is a key focus of this article. This section also discusses the courts' findings with respect to the moral culpability of people trafficking in fentanyl, particularly when they do not know that fentanyl is contained within the drugs they are selling. The three "exceptional cases" from the

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1 BC Gov News, "Provincial health officer declares public health emergency" (April 14, 2016) online: <https://news.gov.bc.ca/10694>; Health Canada, "Government of Canada Actions on Opioids: 2016 and 2017" online: www.canada.ca (2017). *R v Butler*, 2017 BCPC 315 at para 22, 142 WCB (2d) 575 [*Butler*].

2 *R v Creuzot,* 2017 BCSC 1075 at para 39, 140 WCB (2d) 692 [*Creuzot*].

3 Cheryl Webster & Anthony Doob, "Searching for Sasquatch: Deterrence of Crime Through Sentence Severity" in Joan Petersilia & Kevin R Reitz, eds, *The Oxford Handbook of Sentencing and Corrections,* (New York,: Oxford University Press, 2012) at 2 [Webster & Doob].

4 The terms "opioid crisis" and "fentanyl crisis" are used interchangeably throughout this article.

jurisprudence are examined. Lastly, the "enhanced emphasis" on deterrence to street-level fentanyl traffickers is discussed.

Part three of this article provides a full review of deterrence. The intention for deterrence as a sentencing principle, as well as the research showing the inefficacy of deterrence is explained. This article argues that the courts' emphasis on deterrence for increasing the range for fentanyl traffickers will not have the effect of deterring other offenders, particularly those with addiction who are dealing at the street level. Theories for why the courts emphasize deterrence in light of the overwhelming research are proposed. The first theory is that the current Canadian legal climate is particularly punitive towards drug offences. The second is the influence of strong stigmas for people who use drugs and commit drug offences. The final theory is that the courts have limited available responses and are reluctant to accept that deterrence is ineffective, particularly during this difficult period of the opioid crisis. The effects of the courts' decision are expanded on and lead into a discussion of prison in part four.

Part four begins by discussing some of the problems with prison sentences in Canada, to ensure this article "bear(s) witness to the violence of incarceration."[5] This article predicts that the increased prison sentences may have a particularly detrimental impact on the Indigenous population and people with substance abuse issues. Some of the critiques that surrounded the imposition of mandatory minimum penalties through the *Safe Streets and Communities Act* are discussed, because of the parallel concerns that such punitive measures would disproportionately impact Indigenous offenders and substance users. This article clearly outlines why the shift towards longer prison sentences for fentanyl traffickers put a vulnerable population at an increased risk of harm.

II. The Fentanyl Crisis

In 2017, 1,449 people lost their lives in British Columbia to illicit drug deaths, with fentanyl detected in 83% of those deaths.[6] This number is a

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5 Debra Parkes, "Women in Prison: Liberty, Equality, and Thinking Outside the Bars" (2016) 12 JL & Equal 127.

6 British Columbia, Ministry of Public Safety & Solicitor General (Office of the Chief Coroner), British Columbia Coroners Service, "Illicit Drug Overdose Deaths in BC January 1, 2008- May 31, 2018" (2018) at 3-4 [BC Coroner]; Estefania Duran & Richard Zussman, "B.C. Marks 2017 as Deadliest O.D. Death Year in Provincial History", *Global*

drastic increase from the 2016 statistics of 995,[7] which was also a drastic increase from 525 in 2015.[8] In the months from January to May of 2018, 620 people have lost their lives to fentanyl.[9] As a result of the number of people who have died from fentanyl overdoses, in April 2016, the BC Provincial Health Officer, Dr. Perry Kendall, declared there to be a public health emergency.[10] The courts' response to this devastating crisis requires analysis. Between January 1, 2016 and July 31, 2017, 333 people in BC died from illicit drug overdoses while under community corrections supervision or within 30 days of release from a correctional facility.[11]

The BC Coroner's office has directed that efforts to reduce the risks of deaths and injury be evidence-based, innovative, and compassionate.[12] The potency and hidden nature of this drug has led to a national crisis. This article articulates the precedent being set by the court in British Columbia- where the opioid crisis has hit the hardest.[13]

The potency of the substance is at the center of this crisis; a grain of salt is a lethal dose.[14] Fentanyl is a synthetic opioid that is designed to exhibit effects similar to morphine and heroin for treating pain.[15] It is markedly different from other opioids because it is estimated to have a 20 to 50 times

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News (31 January 2018) online: <https://globalnews.ca/news/3979853/b-c-saw-1422-overdose-deaths-in-2017> [Duran & Zussman].

7 BC Coroner, *supra* note 6 at 3-4.

8 BC Centre for Disease Control, *The BC Public Health Opioid Overdose Emergency: March 2017 Update* (British Columbia: Observation Population and Public Health, 2017) at 1.

9 Webster & Doob, *supra* note 3.

10 BC Gov News, "Provincial health officer declares public health emergency" (April 14, 2016) online: <https://news.gov.bc.ca/10694>; Health Canada, "Government of Canada Actions on Opioids: 2016 and 2017" online: <www.canada.ca>; *Butler*, *supra* note 1 at para 22.

11 British Columbia, Report to the Chief Coroner, *BC Coroners Service Death Review Panel: A Review of Illicit Drug Overdoses* (5 April 2018) at 18.

12 Duran & Zussman, *supra* note 6.

13 *R v Toth*, 2017 BCSC 501 at para 35, 138 WCB (2d) 287 [*Toth*]. See also News 1130 Staff, "National Opioid Overdose Numbers Show Crisis Is Hitting the West Hardest" *News 1130* (6 June 2017), online: <www.news1130.com/2017/06/06/national-numbers-opioid-epidemic-show-hitting-west-hardest/>.

14 *R v Smith*, 2016 BCSC 2148 at para 24, 134 WCB (2d) 510 [*Smith* BCSC].

15 *R v Smith*, 2017 BCCA 112, 138 WCB (2d) 605 [*Smith* BCCA].

higher potency than heroin.[16] The drug is designed to be used in a medical setting for pain relief. It has a fast "onset action" because it is highly soluble.[17] Fentanyl is legally available in patches, sublingual tablets, and intravenous and lozenge form.[18] These forms assist in dealing with chronic pain by administering low levels of fentanyl into the body over a period of several days.[19] Prescription fentanyl can be abused by chewing or smoking the gel from the patches. A great deal of the fentanyl that is seen in the drug trade is manufactured illegally in China and smuggled all over the world.[20]

Drug traffickers are able to drastically increase their profit margin by cutting their substances with fentanyl.[21] Traffickers can mix a small amount of fentanyl with substances including heroin, cocaine, oxycodone, or cutting agents, and create a cheaper product with the same effect.[22] Due to its potency and the method of mixing fentanyl with other substances, traffickers can import a small amount of fentanyl and still stand to make revenue when it is inconspicuously sold to users.[23] It is difficult for law enforcement agencies to detect the smuggling of fentanyl because it is frequently imported in small quantities - another factor that makes this drug so pernicious.[24] When traffickers mix the fentanyl, it is difficult to break down evenly, which means that some batches will contain more of the powerful substance than others.[25] People who overdose from fentanyl die

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16 *Ibid* at para 16.

17 James Shorthouse, *A Dictionary of Anesthesia*, 2nd ed (Oxford: Oxford University Press, 2017).

18 Julie Worley, "A Primer on Heroin and Fentanyl" (2017) 55:6 J Psychosocial Nursing & Mental Health Services 16 at 17.

19 *R v McCormick*, 2017 BCPC 22 at paras 32-37, 136 WCB (2d) 712.

20 Worley, *supra* note 18 at 17.

21 Tamsyn Burgmann, "Fentanyl Brought to BC by Organized Crime, Experts Say," *CBC News* (6 August 2015), online: <www.cbc.ca/news/canada/british-columbia/fentanyl-brought-to-b-c-by-organized-crime-experts-say-1.3182229>.

22 Claude Solnik, "The Fentanyl Factor", *Long Island Business News* (9 November 2017), online: <https://libn.com/2017/11/09/the-fentanyl-factor/>.

23 Donald Ashley, "The Price of Crossing the Border for Medications: Letter" (2017) 377:14 New England J Medicine 1699.

24 Worley, *supra* note 18.

25 Justine Hunter, "British Columbia Police Prepare for Growing Fentanyl Crisis," *The Globe and Mail* (14 June 2016), online: <https://www.theglobeandmail.com/news/british-columbia/british-columbia-police-

from respiratory depression resulting in lethally low-circulating oxygen levels.

A. Caselaw on Fentanyl Sentencing

This article looked at the reported sentencing decisions for street-level traffickers in British Columbia between January 1, 2016 to November 1, 2017. The time period of 2016-2017 was selected to coincide near the time the fentanyl crisis was declared. The initial search for fentanyl sentencing decisions yielded 50 cases, which were narrowed down to only the sentencing decisions involving street-level fentanyl trafficking. The judgements were determined to be for street-level traffickers either when there was explicit reference from the judge that it was a low-level or street-level trafficker, or if the applicable street-level range was imposed by the sentencing judge.[26] From these reported decisions, 16 cases were found to involve street-level trafficking of fentanyl and there was a total of 14 different accused people.[27] British Columbia was selected because it is the epicenter of the fentanyl crisis in Canada.

Street-level traffickers, or "pushers," are the people who sell directly to the purchaser for their personal use.[28] A street-level trafficker typically sells the product to the end user by walking or riding bikes in a particular area; being a participant in dial-a-dope trafficking schemes (where people use a cell phone to take orders and deliver drugs); or using a residence such as a crack shack.[29] Drug trafficking works in a hierarchical fashion and street-level drug traffickers usually work under a mid-level drug trafficker who loads the individual with the drugs for distribution. Street-level dealers typically do not mix, cut, or package the drugs. The street-level trafficker

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prepare-for-growing-fentanyl-crisis/article30461855/>.

26 While Crown, defence, and the Court were usually not in agreement about the sentence to be imposed, the street-level range was not in question for the cases reviewed in this article. The facts of the cases further supported that they were street-level given the quantity of fentanyl, the method of distribution, and the way the person came to be arrested.

27 These 16 decisions include both the provincial and appeal decisions for *R v Rutter* and *R v Smith*. It is therefore 14 different individuals, and 16 cases.

28 Frederick Desroches, "Research on Upper Level Drug Trafficking: A Review" (2007) 37:4 J Drug Issues 827 at 828; see also *R v Mann and Mann*, 2017 BCPC 401 at para 42 [*Mann*].

29 *Mann*, *supra* note 28 at para 43.

does not carry a large volume of drugs at one time given the potential impact on the drug trafficking operation if the drugs were seized by law enforcement or through theft.[30] These traffickers are considered the lowest rung in the drug hierarchy and are more likely to be detected by law enforcement.[31] Individuals at a higher level of the trafficking operation, either as couriers, mid-level dealers, or high-level dealers, insulate themselves from detection and are more difficult for police to detect.[32] An important topic from the sentencing jurisprudence was the establishment of the sentencing range for street-level trafficking of fentanyl.

B. The Range for Fentanyl Sentencing for Street-Level Traffickers

The range of sentence available to courts for fentanyl trafficking was defined by the British Columbia Court of Appeal in *R v Smith*. *Smith* set the range for street-level trafficking of fentanyl to a prison sentence of "18-36 months and possibly higher."[33] This range is a step up from the six to eighteen-month range for trafficking in other schedule I substances in British Columbia.[34] In appealing the sentence of 6 months, the Crown in the *Smith* appeal filed evidence of the tragic effects of the fentanyl crisis across Canada and particularly within BC. The Court of Appeal dismissed the sentence appeal but accepted that the Court should establish a longer range for street-level trafficking of fentanyl to appropriately respond to the magnitude of the crisis. The law has made an obvious pronouncement that trafficking in this harsh drug will lead to a harsh sentence, but many of the cases of fentanyl trafficking involve people who do not know they are

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30 *Ibid* at para 42.

31 *R v Henry*, 2017 BCSC 1627 at para 44, 141 WCB (2d) 513; Thomas Kerr et al, "Characteristics of Injection Drug Users Who Participate in Drug Dealing: Implications for Drug Policy" (2008) 40:2 J Psychoactive Drugs 147 at 150.

32 *R v Derycke*, 2016 BCPC 291 at para 28, 133 WCB (2d) 282 [*Derycke*].

33 *Smith* BCCA, *supra* note 15 at para 45. The maximum sentence for trafficking in a schedule I substance is life imprisonment.

34 *R v Voong*, 2015 BCCA 285 at para 44, [2015] BCJ No 1335 (QL) [*Voong*]. The *Controlled Drugs and Substances Act*, SC 1996, c 19, is Canada's federal drug control statute. Substances are classified in schedules I through IV, with schedule I being considered the most serious. Examples of schedule I substances include methamphetamine, heroin, and cocaine. Statutorily, the scope of sentence for trafficking in schedule I substance (including fentanyl) ranges from a suspended sentence to life imprisonment.

trafficking fentanyl. The Crown within the *Smith* appeal filed evidence of the tragic effects of the fentanyl crisis across Canada and particularly within British Columbia.[35]

C. Moral Culpability in Fentanyl Trafficking

The law has made an obvious pronouncement that trafficking in this harsh drug will lead to a harsh sentence, but the terms are less clearly defined for individuals who are unaware that they are selling fentanyl. As described, it is difficult for users to detect whether the substance contains fentanyl, and many street-level traffickers are unaware they are selling products that contain fentanyl. The Court of Appeal decided that public awareness of the dangers of fentanyl distribution were still emerging up until January of 2015, and after that date the public was more likely to be aware of the harms of fentanyl. As a result of the media, and the public health reports and initiatives creating a public awareness, the courts presume that people are aware of fentanyl and its harms following January 2015.[36] The new lengthier range can be applied to individuals if they are trafficking past January 2015.[37]

An important factor in the *Smith* decision is <u>when</u> the new range is to be applied. There is a presumption that before January of 2015, traffickers were not expected to know the harms of fentanyl and its potential presence in the drugs. After January 2015, traffickers are expected to have known the harms of fentanyl, and the potential for fentanyl to be present in their products. The Court of Appeal recognized that it would be within the discretion of the sentencing judge to determine if the time the offence was committed was a time when the fentanyl crisis was within the knowledge of the public, or if there was evidence that the trafficker knew their substance contained fentanyl.[38]

It is an established rule of law that lack of knowledge of the substance is not a mitigating factor.[39] However, this reasoning does not fully comprehend the inconspicuous nature of fentanyl, and the vulnerable

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35 *Smith* BCCA, *supra* note 15 at para 2.

36 *Smith* BCSC, *supra* note 14 at para 32.

37 *R v Rutter*, 2017 BCCA 193 at para 5, 139 WCB (2d) 114 [*Rutter* BCCA], citing *Smith* BCCA, *supra* note 15 at paras 60-61.

38 *Ibid.*

39 *Derycke*, *supra* note 32 at para 65; *Henry*, *supra* note 31 at para 90.

position that street-level traffickers are often in. As described, people who sell drugs at the street level are typically supplied by mid-level traffickers.[40] A key consideration that appears absent from the caselaw is that street-level traffickers typically receive their drug supply from someone else. Given the nature of their work, street-level dealers are not given large supplies of drugs and are typically not involved in the packaging or cutting of the drugs. The case of Mr. Aden Rutter gives context to the difficulty of imposing inherent moral culpability for fentanyl street-level traffickers. In this case, "Mr. Rutter said that he believed the fentanyl to be heroin, that it was described to him by his supplier as heroin, and that he described the fentanyl to his customers as heroin."[41] Part three of this article revisits this issue and suggests that it may be ineffective to try to deter people from trafficking fentanyl without acknowledging that street-level traffickers often do not know they are trafficking fentanyl. This range set out in *Smith* is intended to be imposed absent exceptional circumstances or exceptional cases.

D. Exceptional Circumstances

An accused individual must establish "exceptional circumstances" in order to be sentenced outside of the custodial range for a particular offence.[42] The "exceptional cases," or people who establish they have "exceptional circumstances," are typically sentenced to suspended sentences and avoid custodial dispositions. Suspended sentences are a non-custodial sentence whereby the sentenced person follows a probation order with conditions defined by the sentencing judge. The maximum length of the suspended sentence is three years. Suspended sentences are non-custodial sentences but are still recognized as having the ability to specifically deter the individual being sentenced.[43] However, these sentences are not able to send a message of general deterrence, and partly for that reason, the courts can only give these non-custodial sentences in exceptional cases.[44]

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40 *Toth*, *supra* note 13 at paras 16, 72; *R v Rocha*, 2009 MBCA 26 at paras 61-63, [2009] 6 WWR 37; *R v Nazarek*, 2017 BCSC 1909 at paras 67-69, 142 WCB (2d) 649.

41 *R v Rutter*, 2016 BCPC 321 at para 3, 134 WCB (2d) 76 [*Rutter* BCPC].

42 *Voong*, *supra* note 34 at para 59.

43 *Voong*, *supra* note 34 at para 39.

44 *R v Porter*, 2017 BCPC 330 at para 69, 142 WCB (2d) 834 [*Porter*]; *R v Joon*, 2017 BCPC 301; *R v Naccarato*, 2017 BCSC 645 at para 93, 138 WCB (2d) 604.

As set out by the Court of Appeal in *Voong*, there are numerous factors that the court can consider in deciding whether a case is exceptional.[45] *Voong* provides a list of factors, but the main consideration is whether the person has made strides towards rehabilitation that have led them to truly turning their life around:

> Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence.[46]

The British Columbia Court of Appeal in *Smith* clearly demonstrates that trafficking fentanyl will result in a period of time in jail unless there are numerous mitigating factors that lead the case to be defined as exceptional by the sentencing judge.[47]

Of the 14 different accused persons addressed in this article, three cases were upheld to have exceptional circumstances that took them outside the sentencing range: Mr. Joon, Mr. Porter and Ms. Naccarato.[48] The set of cases examined in this article shows that addiction motivated nearly all of the people who were engaging in street-level trafficking, and only the three people who came to their sentencing hearing either with no pre-existing addiction, or completely rehabilitated, were given non-custodial sentences.[49] The rehabilitative steps of Mr. Porter and Ms. Naccarato are not to be diminished. However, it is problematic that the court relies on people to "truly turn their life around" between their offence and sentencing date when the individual is affected by an addiction. An underlying expectation that individuals overcome their addiction between their date of arrest and

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45 *Voong, supra* note 34 at para 59.

46 *Ibid.*

47 *R v Hambly,* 2016 BCPC 215 at para 12, 132 WCB (2d) 82.

48 The British Columbia Court of Appeal reversed Mr. Rutter's suspended sentence, and the trial judge did not explicitly say that the sentence was being imposed because Mr. Rutter's circumstances were exceptional. There was a second case, *R v Ramstead* (9 January 2017) Fort St. John 29639-1, that was addressed in the *R v Rutter* appeal that this article does not discuss because the trial decision was not reported.

49 Only two of the fourteen accused were not motivated to traffic by their addiction.

sentencing shows a fundamental misunderstanding of addiction.[50] Below is a summary of the three exceptional cases and the factors the court considered in finding exceptional circumstances.[51]

Case	**What the Courts said made the case Exceptional**[52]
Mr. Joon[53]	● **Not a drug user**; in good health; had a positive upbringing. Trafficking in fentanyl was "out of character" for him ● No need to specifically deter him or to protect the public ● Very young (19) at the time of trafficking
Mr. Porter[54]	● Exceptional because "in his early attempt at age 18 to take control of his own life and his own addiction; that he was able to remain sober throughout his 20s…"[55] ● A supporter from the treatment facility Mr. Porter attended described that his rehabilitation was so effective that he was "not the same guy" as he was no longer affected by his addiction.[56]
Ms. Naccarato[57]	● Turned her life around; positive supports ● "A prison sentence would likely expose her to persons in the drug trade and would do more harm than good."[58]

The decisions in *Porter* and *Naccarato* both discuss that a custodial sentence would interfere with rehabilitation. By extension this implies the

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50 Addiction is a relapsing and remitting disease that affects people in different ways with different rates of recovery.

51 Emphasis throughout the chart is my own.

52 There are circumstances for Mr. Porter and Ms. Naccarato that may have contributed to the courts finding that their case was exceptional, but the portions selected for this chart were the most salient.

53 *R v Joon*, 2017 BCPC 301.

54 *Porter*, *supra* note 44 at para 72

55 *Ibid.*

56 *Ibid* at para 34.

57 *R v Naccarato*, 2017 BCSC 645 at para 9, 138 WCB (2d) 604.

58 *Ibid.*

court understands that prisons are not the place to foster rehabilitation, and that they can "do more harm than good."[59] Yet, the remaining people who were motivated by their addiction to engage in street-level drug trafficking were sentenced to custodial sentences.[60] The application of the exceptional circumstances solely to three people shows that the court is reluctant to acknowledge the harms of incarcerating people presently struggling with addiction, and arguably in the most need of support.

E. The "Enhanced" Need for Deterrence in Fentanyl Trafficking Cases

Drug trafficking cases in Canada emphasize deterrence and denunciation as paramount considerations; drug trafficking is seen as a "scourge on society."[61] British Columbia caselaw shows that the courts are increasing the sentences and finding there is an "enhanced" need for deterrence when the substance being trafficked is fentanyl.[62] This article argues that a widespread response to enhancing deterrence for fentanyl traffickers is an ineffective response to the fentanyl crisis that stands to cause more harm during this public health crisis. To understand the potential harms of the courts' enhanced reliance on deterrence and denunciation, it is first necessary to revisit the intention of these sentencing principles.[63]

III. LOOKING DEEPER INTO DETERRENCE

Part two established that the courts in British Columbia are responding to the fentanyl crisis by implementing longer prison sentences for fentanyl traffickers as a result of deciding there is an enhanced need to emphasize deterrence. Part three begins by identifying the assumptions underlying the sentencing principles of deterrence and shifts to summarizing the extensive research on deterrence. Research shows that, to the extent individuals are deterred, it is largely through the existence of the sanction and not the

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59 *Naccarato*, *supra* note 57 at para 9.

60 Of the 11 remaining people who were not considered to have "exceptional circumstances" and therefore receive a custodial disposition, 10 were motivated to traffic because of their addiction.

61 *Derycke*, *supra* note 32 at para 68.

62 *R v Butler*, *supra* note 1; *Creuzot*, *supra* note 2.

63 *Smith* BCCA, *supra* note 15 at para 26.

severity of the sanction.[64] Further, a significant consideration in this article is that deterrence and addiction are mutually incompatible. Individuals' motivations may not be affected by the increase in the range of custodial sentence for dealing in fentanyl if they are dealing to support their habit. Many people engage in street-level trafficking to obtain the substance they are dependent on and there are often existing vulnerabilities within that population. This section of the work further looks at the reasons courts emphasize deterrence in the face of the research, including the conservative trend in criminal justice in Canada; the stigma of people who use drugs; and the challenges for the courts to shift.

A. What is Deterrence?

The purpose of deterrence is to discourage individuals from offending.[65] There are two forms of deterrence: specific and general.[66] Specific deterrence is aimed at the individual being sentenced, and it works to try and specifically deter that person from engaging in the offending behaviour in the future. General deterrence is intended to ensure that people do not become offenders in the first place. General deterrence is intended to send a preventative message to the public when individuals are sentenced. The result is that the offender is often punished more severely to send a message to people that may be inclined to participate in related criminal activity.[67] Imposing general deterrence will often result in a harshening of the sentence.[68] As a result, when courts focus on deterrence it tends to result in the imposition of prison sentences or an increase of the length of jail

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64 Webster & Doob, *supra* note 3 at 175.

65 *R v BWP,* 2006 SCC 27 at para 2, [2006] 1 SCR 94 [*BWP*]; *R v BVN,* 2004 BCCA 266, 196 BCAC 100. Denunciation is not specifically addressed in this article but it is also emphasized in the research. Denunciation is the court's way of communicating that society condemns the offender's conduct. It is a symbolic message that the conduct will result in a punishment for conflicting with society's values as set out in Canada's *Criminal Code*.

66 *Criminal Code,* RSC 1985, c C-46, s 718(b).

67 Russel Durrant, Stephanie Fisher, & Maria Thun, "Understanding Punishment Responses to Drug Offenders: The Role of Social Threat, Individual Harm, Moral Wrongfulness, and Emotional Warmth" (2011) 38 Contemporary Drug Problems 147 at 169.

68 *BWP, supra* note 65 at para 36.

sentences.[69] These principles are broadly applied to all people convicted of trafficking fentanyl, regardless of their personal circumstances or present addictions. However, research suggests that increasing the prison sentences for street-level traffickers is not an effective response to the fentanyl crisis.

B. Emphasizing Deterrence Will Not Deter

Research suggests that increasing the sentence in order to deter future offenders is not effective at actually deterring future offenders.[70] Deterrence through severity, or "DTS," is the theory that crime may be decreased if the severity of punishment is increased.[71] Research indicates harsher sentences do not achieve even a marginal effect on the deterrence of crime.[72] While some judges are aware that harsher sentences may not deter the specific offender before them, there is a general misconception that harsher sentences may deter other offenders.[73]

The principle of deterrence, detached from research and an understanding of criminal behaviour, is rational: if people know they are going to receive a harsh sentence for a crime, they will think twice before committing it.[74] This encapsulates the same view economists have that "higher prices lower the demand, and that human beings are rational decision-makers."[75] Highway traffic offences, including speeding tickets may coincide with this, but this rational decision making does not align with the reality of most crimes.[76] Crimes are frequently committed under the influence of intoxicants, "powerful emotions, or situational pressures."[77] Further, the more serious crimes are considered morally wrong and most

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69 *Ibid.*

70 Webster & Doob, *supra* note 3 at 2.

71 *Ibid.*

72 Michael Weinrath & John Gartrell, "Specific Deterrence and Sentence Length" (2001) 17:2 J Contemporary Criminal Justice 105.

73 Webster & Doob, *supra* note 3 at 7.

74 *Ibid* at 8.

75 *Ibid.*

76 Jeffrey Howard, "Punishment as Moral Fortification" (2017) 36:1 L & Philosophy 45 at 48.

77 Webster & Doob, *supra* note 3 at 9.

people would not commit them regardless of the penalty.[78] Incidents of homicide and the death penalty provide an example of the incorrect assumptions of deterrence. The implementation of the death penalty for people convicted of homicide in the United States did not have the expected deterrent effect; lower rates of homicide do not exist in the states with the death penalty for homicide compared with those that do not.[79]

The evidence that deterrence through severity is ineffective was referred to in the Supreme Court of Canada decision of *R v Nur*.[80] As discussed by Debra Parkes, the Supreme Court's decision in *Nur* includes a "candid discussion of the principle of deterrence as it relates to sentencing severity" and an acknowledgment that "doubts concerning the effectiveness of incarceration as a deterrent have been longstanding."[81] The Supreme Court acknowledged the literature to ultimately say, "mandatory minimum sentences do not, in fact, deter crimes."[82]

Increasing sentence severity does not show a reduction in crime. A complex sequence of factors must be present in order for variation in sentence severity to have a potential deterrent effect on levels of crime.[83] Below is a table outlining the pre-conditions that must be present for a DTS theory to be successful. The table is divided into two rows. The bottom row titled "reality" outlines that the four requirements for DTS are not supported by empirical research; DTS is "empirically implausible."[84]

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78 *Ibid*.

79 Daniel S Nagin, Francis T. Cullen & Cheryl Lero Jonson, "Imprisonment and Reoffending" (2009) 38 Crime & Justice 115.

80 *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773 [*Nur*].

81 *Ibid* at para 113 as cited in Debra Parkes, "Punishment and Its Limits" Forthcoming in (2018) Supreme Court Law Review.

82 *Nur*, *supra* note 80 at para 114.

83 Webster & Doob, *supra* note 3 at 9.

84 *Ibid*.

The Four Main Requirements of Deterrence and the Corresponding Reality[85]				
Requirement	Individuals will be aware that the punishment for trafficking fentanyl is harsher.	The potential offender will evaluate their actions and weigh the consequences prior to engaging in criminal activity.[86]	Individual offenders will view the increased penalty as costly or punitive.[87]	Individuals will believe they are likely to get arrested for the offence and receive the punishment.
Reality	Public opinion polls show that most individuals are unaware of the maximum sanctions for offences, and what crimes have mandatory minimums.[88] Further research shows that people are generally unaware of the punishment levels in their communities.[89]	Many offences are committed in the "heat of the moment" or are guided by impulse or sway of emotion.[90] Individuals are often motivated by their circumstances including poverty and substance abuse.	Individuals who are most at risk of criminal behaviour are often entrenched within a lifestyle where criminal behaviour is required or rewarded, and they have a reduced perception of risk within committing crime.[91]	Individuals perceive the probability of being arrested as low, and the statistics of reported crimes reflect this.

85 *Ibid.*

86 *Ibid* at 10.

87 *Ibid.*

88 *Ibid* at 9.

89 *Ibid* at 10 citing Anothony Doob and Julian Roberts, "Crime and the Official Response to Crime: View of the Canadian Public" (1982) Ottawa: Department of Justice, Canada.

90 *Ibid.*

91 *Ibid* citing Stephen Baron et al., "Deterrence and Homeless Male Street Youths" (1998) 40:1 Can J Crim 27. See also Dr. Evan Wood Expert Opinion Letter to BC Courts

C. Deterrence and Addiction

Deterrence and addiction are incompatible with each other. Addiction involves engaging in drug use on an ongoing basis despite risk of harms or negative consequences associated with these behaviors.[92] The current model of sentencing views punishment and "sending a message" to the offender (and other offenders) as a solution while addiction as a mere factor to balance on sentence. Understanding addiction and its specific impact to the crime at hand may assist in crafting sentences suited to reduce recidivism. The threat of an increased jail term does not dissolve an addiction.

Enhanced sentences, including mandatory minimum sentences, for drinking and driving offences have often been cited for their potential deterrent capabilities.[93] Research shows that the indicator of future offences related to drinking and driving for people with substance abuse issues was the presence of an alcohol addiction, not the perceived deterrence.[94] Research indicates that people with severe addictions will not be deterred by the imposition of stricter sanctions, and suggests that treatment should be provided. This was acknowledged by the British Columbia Appeal Court in *R v Preston* in 1990, a case involving conversations around rehabilitation, deterrence, and addiction. In *Preston* the court said: "to speak of deterrence, specific or general, in respect to persons physically and uncontrollably addicted to an illegal substance may not be entirely an exercise in logic."[95] Harsher sentencing principles are not likely to obtain a deterrent impact when there is an addiction present.

D. Street-Level Trafficking and Addiction

People engaged in street-level trafficking are often motivated by their addiction to sell drugs in order to access drugs for their own use; it is a "survival technique."[96] In a study conducted in the Downtown Eastside,

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dated September 2017.

92 American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders*, 5 Ed (DSM-5), (Arlington, VA: APA, 2013).

93 Jiang Yu, Peggy Chin Evans & Lucia Perfetti Clark, "Alcohol Addiction and Perceived Sanction Risks: Deterring Drinking Drivers" (2006) 34:2 J Criminal Justice 165.

94 *Ibid* at 172.

95 *R v Preston*, 1990 BCCA 576 at 15, 47 BCLR (2d) 273.

96 Pivot Legal Society, "Prosecuting Fentanyl Trafficking Offences" (2017), online: <www.pivotlegal.org/fentanyl_sentencing>.

there were 412 Intravenous Drug Users who participated and 68, or 17%, of them disclosed they had dealt drugs during the previous six months.[97] The primary reasons the participants gave for trafficking was obtaining the drugs (49%) and getting money (36%). Unstable housing and recent incarceration were the factors positively associated with people involved in drug dealing. Further research shows that individuals who are targeted by enforcement are most commonly the individuals who "carry several markers of higher intensity addiction."[98] It is the people at the lowest level who are the most visible and in the most dangerous role of the drug-dealing hierarchy. Of the 14 different accused discussed in this article who were convicted of street-level trafficking of fentanyl, 12 were said to have addictions that motivated their offence.

E. Why Emphasize Deterrence in Fentanyl Sentences if it is Not a Research-Based Response?

1. Canadian Law on Drugs

The courts of British Columbia have responded to the fentanyl crisis within the current punitive framework set in Canada since 2006.[99] In 2006, the Conservative government took power in Canada and vastly changed the look of criminal justice. From 2006 to 2015, Parliament substantially changed criminal law, including sentencing provisions.[100] Scholars have noted that this approach did "little to address the root causes of crime."[101] Research reviewing the proposed and passed legislation, government documents, and parliamentary speaker notes from January 2007 to January 2014 found a blending of illicit drug use and danger to society throughout the policy discourse.[102] Illicit drug use was emphasized as a criminal problem and not a public health issue.[103] Numerous "tough on crime" bills were

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97 Thomas Kerr et al, *supra* note 31 at 149.

98 *Ibid* at 149-150.

99 Parkes, *supra* note 5 at 132.

100 *Ibid.*

101 Susan Boyd, Connie Carter & Donald MacPherson, *More Harm Than Good: Drug Policy in Canada* (Halifax: Fernwood Publishing, 2016) at 36.

102 Shelley Marshall, "Canadian Drug Policy and the Reproduction of Indigenous Inequities" (2015) 6:1 Intl Indigenous Policy J 1 at 2.

103 *Ibid* at 6, citing Hon. Rob Nicholson (Minister of Justice and Attorney General of

passed, including ones that promised to keep the streets safe while removing rehabilitative options for specific offences. Critics of the *Safe Streets and Communities Act* had argued that Canadian drug laws were already severe[104] and further that there was a disconnect between the message of the conservative government and the crime statistics; in 2012 Canada had its lowest crime rate in 40 years.[105]

During this time, harm reduction was removed from the National Anti-drug Strategy, and there was a pronounced shift away from supporting harm reduction initiatives in Canada. In line with shifting away from harm reduction, the federal government shifted to allot 70% of its overall budget, or $273.6 million, to the Enforcement Action Plan.[106] Some legal scholars have described these legislative changes as "the Punishment Agenda," in large part because of the addition of numerous mandatory minimum sentences for imprisonment, and stark limits on the availability of conditional sentences.[107]

The *Safe Streets and Communities Act* was implemented in 2012 and introduced numerous mandatory minimum sentences including those for drug crimes. Conditional Sentence Orders were introduced into the *Criminal Code* in 1996 by the Liberals as a way of reducing the use of imprisonment, and two separate bills were passed in 2007 and 2012 during the Punishment Agenda to severely restrict courts' use of conditional sentence orders.[108] During the Punishment Agenda prisons were purported by the Conservative legislators to be an effective method for reducing criminal behaviour and alternatives to custodial sentences were reduced.[109]

Canada in support of Bill C-10).

104 Susan C Boyd & Connie Carter, "Killer Weed: Marijuana Grow Ops, Media, and Justice" (Toronto: University of Toronto Press, 2014) at 5.

105 Statistics Canada, "Police-Reported Crime Statistics in Canada," by Samuel Perreault, in *Component of Statistics Canada*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2012), online: <www.statcan.gc.ca/pub/85-002-x/2013001/article/11854-eng.pdf>, as cited in Marshall, *supra* note 102 at 2.

106 *Ibid.*

107 Parkes, *supra* note 5 at 131.

108 Conditional sentence orders are jail sentences served in the community. They are often called house arrest because the typical conditions require that people remain in their home unless they are attending their education, employment, or appointments with their probation officer.

109 Alana Klein, "Criminal Law and the Counter-Hegemonic Potential of Harm

During this time, the option for sentencing judges to implement a conditional sentence for individuals convicted for trafficking of a schedule one substance was removed.[110] Today the legacy of a Conservative and punitive sentencing regime exists within the criminal justice system despite Canada's new Liberal leadership. The shifts during the Punishment Agenda have affected the rate of incarceration within Canada and enforced a "tough on crime" mentality. This mentality has affected individuals of drug crimes, regardless of their potential substance abuse issues or mental health.

The emphasis in sentencing decisions on deterrence for fentanyl traffickers is in line with the shift towards increased use of imprisonment in Canada in recent years. The "tough on crime" measures are socially and economically costly and are found to have a disproportionately negative effect for "people living with drug dependence, Aboriginal people, and youth in or leaving the foster care system."[111] The impact of the "tough on crime" agenda to vulnerable populations will be further discussed later in this article.

2. Stigma in Sentences

The severe punishment that drug offenders receive is tied to the stigma of drug offenders and people who use drugs as "deviant others."[112] The stigma is dependent on the drug type, with low levels of stigma for marihuana, and higher levels for methamphetamine and heroin use. There is a propensity towards the punishment of people who use drugs because of the perception of the moral wrongfulness of drug use, and the perception of harm to both the individual and to others in society as a whole.[113] Further, addiction is often stigmatized by society as a problem related to self-control or a moral failing.[114] This "tough on crime" approach is not

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Reduction" (2015) 38:2 Dalhousie LJ 448.

110 *The Safe Streets and Communities Act* amended s.742.1, the section that allows for imposing of conditional sentences, to exclude sentences that are indictable and prosecuted by indictment and carry a maximum term of imprisonment of 14 years or life.

111 Pivot Legal Society, *Throwing Away the Key: The Human and Social Cost of Mandatory Minimum Sentences* (Vancouver: Pivot Legal Society, 2013) at 1.

112 Durrant, Fisher & Thun, *supra* note 67 at 150. Robert J MacCoun, "Moral Outrage and Opposition to Harm Reduction" (2013) 7:1 Crim L & Philosophy 83 at 86, 91.

113 Durrant, Fisher & Thun, *supra* note 67 at 167.

114 Charles Dackis & Charles O'Brien, "Neurobiology of Addiction: Treatment and Public

grounded in evidence. The opioid crisis is a notably difficult time for courts to shift to accepting the "null hypothesis [that] variation in the severity of sanctions is unrelated to levels of crime."[115] Nevertheless, the public may be more receptive to a shift towards non-custodial sentences if presented with the full context. When the public is provided with information about the effects, costs, and the eventual release of prisoners they are more likely to favour alternatives to prison.[116] Members of the public who are provided context, as well as a choice, do not necessarily favour a punitive sentence.[117] This article submits that the stigmas that surround drug offenders are a factor that leads the court to continue relying on deterrence as a sentencing method despite the fact it is not supported by research.

3. The Crisis of Stigmas

The message to reduce stigma experienced by people who use drugs is an important response to the opioid crisis.[118] The stigmas associated with drug use affect their ability to access resources, get housing, have employment opportunities, and ultimately to be safe in society. The stigma of being a "drug user" leads people to using drugs alone, and it is the people using alone and in private who represent the majority of people who are dying from fentanyl overdoses.[119] There have been no recorded deaths at

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Policy Ramifications" (2005) 8:11 Nature Neuroscience 1431 at 1431. See also, Heather Henderson, *I Am More Than My Addiction: Perceptions of Stigma and Access to Care in Acute Opioid Crisis* (MA Thesis, University of South Florida College of Arts and Sciences, 2018).

115 Webster & Doob, *supra* note 3.

116 Kimberly Varma & Voula Marinos, "Three Decades of Public Attitudes Research on Crime and Punishment in Canada" (2013) 55:4 Can J Corr 549.

117 *Ibid* at 551.

118 See Boston University School of Public Health, Dean's Seminar Series on Contemporary Issues in Public Health, "The Opioid Epidemic: Why Cops are Sending People with Addiction to Treatment instead of Jail" (16 March 2016), online: <www.bu.edu/sph/news-events/signature-programs/deans-seminars/deans-seminar-series-on-contemporary-issues-in-public-health/deans-seminar-series-on-contemporary-issues-in-public-health-2015-2016/the-opioid-epidemic-why-cops-are-sending-people-with-addiction-to-treatment-in-stead-of-jail/>.

119 BC Coroner, *supra* note 6 at 12.

the overdose prevention sites or supervised consumption sites in BC.[120] The majority of overdose deaths are of men, and individuals between the ages of 30-49.[121]

On January 31, 2018 the BC Coroner Lisa Lapointe, in discussing the number of deaths from fentanyl urged that "if we truly want to save lives, we're all going to have to be willing to let go of old stereotypes, and old and sadly ineffective solutions."[122] Problematic substance use is a complex medical condition with available evidence-based treatments. The courts should be mindful of these stigmas and their devastating potential in sentencing individuals trafficking fentanyl at the street-level who have addiction; they are among the most vulnerable to overdose death in this crisis.

F. The Challenges for Courts to Shift the Law

The criminal justice system has a significant amount of contact with people who use substances, and many come to be incarcerated within Canadian prisons.[123] While research has advanced dramatically to allow for a comprehensive understanding of addiction, the criminal justice system lags behind.[124] Individuals with addiction issues face custodial sentences at a high rate. Statistics show that 90% of people in Canadian federal

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[120] Vancouver Coastal Health, "Insite user statistics" (February, 2018) online: http://www.vch.ca/public-health/harm-reduction/supervised-injection-sites/insite-user-statistics>.

[121] *Ibid* at 1.

[122] Duran & Zussman, *supra* note 6.

[123] Gerald Thomas, *Harm Reduction Policies and Programs for Persons Involved in the Criminal Justice System* (Ottawa: Canadian Centre on Substance Abuse, 2005) at 2; Richard Lippke, "Punishment Drift: The Spread of Penal Harm and What We Should Do About It" (2017) 11:4 Criminal L & Philosophy 645.

[124] Adela Beckerman & Leonard Fontana "Issues of Race and Gender in Court-Ordered Substance Abuse Treatment" (2008) 33:4 J Offender Rehabilitation 45; Kathy Bettinardi-Angres & Daniel Angres, "Understanding the Disease of Addiction" (2010) 1:2 J Nursing Regulation 31. This article does not address rehabilitative sentencing options because they are beyond the scope of the reported caselaw on street-level fentanyl trafficking decisions in BC. For information on alternative sentencing options see: James Lessenger & Glade Roper, *Drug Courts: A New Approach to Treatment and Rehabilitation* (New York: Springer, 2007); Canada, Department of Justice, *Drug Treatment Court Funding Program Evaluation: Final Report,* by the Corporate Services Branch's Evaluation Division (Ottawa: Department of Justice Canada, 2015).

penitentiaries are assessed as having substance abuse issues.[125] In 2002, Canada reached an all-time high for charges recorded under the *Controlled Drugs and Substances Act:* 93,000.[126] The evidence shows that people who use drugs are overrepresented within the justice system.[127]

In the *PHS Community Services Society* case, the operation of the safe injection site, Insite, was ultimately upheld by the Supreme Court.[128] In *PHS*, the court referred to evidence that many of the people accessing Insite to use intravenous drugs have histories of physical and sexual abuse, family histories of drug abuse, exposure to serious drug use, and mental illness.[129] As the Supreme Court commented in *PHS*:

> Many injection drug users in the DTES [Downtown East Side] have been addicted to heroin for decades, and have been in and out of treatment programs for years. Many use multiple substances, and suffer from alcoholism. Some engage in street-level survival sex work in order to support their addictions. It should be clear … that these people are not engaged in recreational drug use: they are addicted. Injection drug use is both an effect and a cause of a life that is a struggle on a day to day basis.[130]

Abstinence is what is expected and required under the current laws. The two cases from the British Columbia Court of Appeal exemplify the court's resistance to change. *Smith* sets the longer range, and *Rutter* is a decision where the BCCA overturned the judge's imposition of a suspended sentence for being demonstrably unfit and replaced it with a period of six months' incarceration followed by 24 months' probation.[131]

Mr. Rutter was motivated by his drug addiction to participate in trafficking, and at the time of his sentencing he had been abstinent for a

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125 Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2015-2016,* by Howard Sapers (Ottawa: Office of the Correctional Investigator, 2017) [OCI Report 2015-2016].

126 Thomas, *supra* note 123.

127 Weber et al., "Treatment and Punishment of Drug-Addicted Offenders: Insights from a Quantitative Empirical Survey" in Richard Soyer & Stefan Schumann, eds, *Treatment Versus Punishment for Drug Addiction: Lessons from Austria, Poland, and Spain* (Austria: Springer, 2015) at 39.

128 *PHS Community Services Society v Canada (Attorney General)*, 2011 SCC 44 at para 7, [2011] 3 SCR 134 [*PHS*].

129 *Ibid.*

130 *Ibid.*

131 *Rutter* BCCA, *supra* note 37 at para 37. The sentencing judge in provincial court made no express finding that "exceptional circumstances" existed in this case.

year and employed for six months. The provincial court sentencing judge found that prison would put Mr. Rutter's rehabilitation at risk and stated "it is likely that, if sentenced to jail, Mr. Rutter will use drugs while in jail and will resume trafficking in them upon his release."[132] The Court of Appeal in *Rutter* discussed the trial judge's decision which did not impose jail for Mr. Rutter and decided "the sentencing judge lost sight of the presumptive effectiveness of jail as a general deterrent."[133] The Court of Appeal further added:

> The principle of deterrence as a goal of sentencing is embedded in our law. The Supreme Court of Canada has said so in C.A.M., the amendments to the *Criminal Code* specifically refer to it as a sentencing objective. We must assume that deterrent sentences have some effect. It is futile to ask whether a particular sentence will deter others. That question can never be answered.[134]

The courts continued reliance on deterrence as an effective principle in sentencing is creating a particularly pernicious climate for people who use drugs in the wake of the opioid crisis.

G. Consequences of Misunderstanding and Continuing Deterrence Through Sentencing Policies

The emphasis on deterrence and the corresponding increase of the sentencing range for drug trafficking will have several impacts on the criminal justice system. The emphasis on deterrence puts judges in a difficult position of applying the law with consistency because of the essentially automatic 18-month custodial sentence which may follow even for a first-time offender and regardless of whether the person is from a vulnerable group.[135] Ultimately the sentences imposed will not have an impact on reducing recidivism and protecting society. The only tangible effect that will result from the courts' current response to the fentanyl crisis will be the increase in the prison population over time. The final section of this article argues the increase in the imposition of prison sentences will

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132 *Rutter* BCPC, *supra* note 41 at para 28.

133 *Rutter* BCCA, *supra* note 37 at para 23.

134 *Ibid* citing *R v Johnson*, (1996), 112 CCC (3d) 225 at para 29, [1996] BCJ No 2508 (QL). [emphasis added].

135 *Ibid.*

particularly impact individuals in vulnerable groups, including Indigenous people and individuals who use substances.[136]

IV. Prison and Looking Beyond

The first portions of this article addressed how courts are responding to fentanyl traffickers, and the imposition of longer prison sentences. Writing more than 15 years ago, Professor Michael Jackson lamented the absence of prisons from conversations about the criminal justice system, and asked the question "...is it not strange that lawyers and judges, as gatekeepers of the only process that can result in a sentence of imprisonment, know or care so little about what happens inside prisons?"[137] The imposition of a prison sentence has a severe impact on people because of the denial of their rights and liberties and because of the state of prisons in Canada.[138]

Critiques of prison date back to the first penitentiary developed in Kingston in 1835 where imprisonment was condemned for being unduly harsh, and ineffective at rehabilitation.[139] As stated by Michael Jackson:

> Society has spent millions of dollars over the years to create and maintain the proven failure of prisons. Incarceration has failed in its two essential purposes – correcting the offender and providing permanent protection to society.[140]

Current issues that exist in Canadian prisons include: limited treatment for individuals with addictions and mental health problems; high volumes of use of force incidents; a lack of skills training and vocational programs within corrections; and a decline in the quality of managing individuals and their cases.[141] Imprisonment does not reduce recidivism; instead, individuals who have spent time in custody are more likely to have a deeper involvement with criminal behaviour than those who have not.[142] In

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136 Webster & Doob, *supra* note 3 at 17-18.

137 Michael Jackson, "Change and Continuity in the Canadian Prison - Lessons From Scholarship" in Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 1.

138 *Ibid*; Parkes, *supra* note 5 at 142; OCI Report 2015-2016, *supra* note 125.

139 *R v Gladue*, [1999] 1 SCR 688 at para 53, [1999] SCJ No 19 (QL) [Gladue].

140 *House of Commons*, Sub-Committee on the Penitentiary System in Canada [Ottawa: Minister of Supply and Services, 1977) (Chair: Mark MacGuigan).

141 OCI Report 2015-2016, *supra* note 125 at 4.

142 Howard, *supra* note 76 at 59-60.

particular, people who are incarcerated for drug offences have higher recidivism rates than other offenders.[143] A longer period of incarceration is the answer the courts have to the fentanyl crisis, yet prison sentences are intended to be used when no other available sanction can achieve the fundamental purpose of sentencing.

People who use substances and have mental illness are disproportionately represented in Canadian prison populations. Often, an individual's substance use is a contributing factor to their interaction with the law, and custodial sentences disrupt their lives and often exacerbate their substance abuse. Research in Toronto revealed that time in jail increased people's risk of homelessness by 40%.[144] Prison sentences remove people from their community and whatever stability and supports they have established. Custodial sentences terminate employment and housing arrangements that are often difficult to find. They also disrupt delicate connections with family, friends or community resource workers such as doctors, health clinicians, support workers, and probation officers. These connections and supports for people living on the margins of society are important considerations to recidivism.

The impact that increased prison sentences stands to have on people who use substances – particularly Indigenous peoples – is a warranted discussion, one of which I turn to next.

A. Responding to the Over-Incarceration of Indigenous People

Canada's mass incarceration of Indigenous people in intrinsically connected to the conversation of increasing prison sentences for street-level fentanyl traffickers. Colonial laws began with the *Indian Act* of 1876. As a result of this Act, Indigenous people were effectively stripped of their land, confined to reserves, and deprived of their rights to self-determination. Colonial structures sought to intentionally remove Indigenous culture from the Canadian society by banning traditional ceremonies and languages. In

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143 Don Andrews & Craig Dowden, "Managing Correctional Treatment for Reduced Recidivism: A Meta-Analytic Review of Programme Integrity" (2005) 10:2 Legal & Criminological Psychology 173 at 177.

144 B.C. Civil Liberties Association, *Justice Denied: The Causes of B.C.'s Criminal Justice System Crisis* (Vancouver: BCCLA, 2012) at 29, citing The John Howard Society of Toronto, *Homeless and Jailed: Jailed and Homeless* (Toronto: The John Howard Society of Toronto, 2010).

1886, the first drug prohibition in Canada was directed at Indigenous people when the *Indian Act* was amended to add a prohibition against Indigenous people buying or possessing alcohol. Today, Indigenous people are more likely to be sentenced to prison than non-Indigenous people.[145]

There has been a significant increase in the overrepresentation of Indigenous people in Canada's prison system and this overrepresentation continues to grow.[146] While Indigenous people made up 3% of the adult population of Canada between 1995-1996, Indigenous people accounted for 16% of people sentenced to custody during that time.[147] In the most recent report from statistics Canada, analyzing the years 2016-2017, Indigenous adults "accounted for 28% of admissions to provincial/territorial correctional services and 27% for federal correctional services, while representing 4.1% of the Canadian adult population."[148] Canada's Correctional Investigator attributes the growth in the prison population in the past decade to the incarceration of Canada's marginalized populations, including Indigenous people and people struggling with addictions.[149]

Problematic substance use among Indigenous people is tied to the "cultural oppression and erosion, economic exclusion, and the intergenerational impacts of trauma borne from colonial practices such as

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145 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Winnipeg: TRCC, 2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> at 170 [TRC]. See also Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act,* (Ottawa: Office of the Correctional Investigator, 2017) at 11.

146 *R v Williams*, [1998] 1 SCR 1128 at para 58, [1998] SCJ No 49 (QL), as cited in *Gladue, supra* note 139 at para 61.

147 In 2011-12 that number had grown to 28% of all admissions to sentenced custody. Micheline Reed & Julian V Roberts, "Adult Correctional Services in Canada 1996-1997" (1998) 18:3 *Juristat* 1 at 7; TRC, *supra* note 145 at 170.

148 Jamil Malakieh, Canadian Centre for Justice Statistics, "Adult and Youth Correctional Statistics in Canada, 2016/2017" Statistics Canada, June 19, 2018. See also: Statistics Canada, Canadian Centre for Justice Statistics, *Adult Correctional Statistics in Canada: 2015/2016*, Julie Reitano, Catalogue No 85-002-X, (Ottawa: Statistics Canada 2017).

149 Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2014-2015*, by Howard Sapers (Ottawa: Office of the Correctional Investigator, 2015), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx>.

the residential school system."[150] Recent research reveals that Indigenous people in BC are five times more likely than non-Indigenous people to experience an overdose event, and three times more likely to pass away from overdose.[151]

This colonial history and the continued systemic discrimination results in Indigenous people being under greater surveillance of illicit substance use. Indigenous peoples are more likely to experience a higher rate of residential instability and homelessness, and people who use drugs and are homeless are more likely to use drugs in a public space and be vulnerable to police detection.[152] Elizabeth Comack's research on "racialized policing" reveals that Indigenous people are frequently subject to police surveillance and are more likely to be "stopped, questioned, searched, and detained because they 'fit the description.'"[153]

This article argues that there is a risk for an adverse impact to Indigenous people resulting from the increase in fentanyl sentencing. The predicted disproportionate impact parallels the impact recognized to Indigenous people through the imposition of mandatory minimum sentences for numerous offences including drug trafficking. The *Safe Streets and Communities Act* resulted in numerous mandatory minimum penalties (MMPs) for drug trafficking offences and the Act was highly criticized for its potential to disproportionately affect Indigenous people and other marginalized groups including people who use drugs.[154] A Special Report by the British Columbia Provincial Health Officer noted the specific harm to

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150 Marshall, *supra* note 102 at 5-6.

151 First Nations Health Authority, "Overdose Data and First Nations in BC: Preliminary Findings" (2017) at 7 online: <http://www.fnha.ca/newsContent/Documents/FNHA_OverdoseDataAndFirstNationsInBC_PreliminaryFindings_FinalWeb.pdf>.

152 Marshall, *supra* note 102 at 5. See also Pan et al., "The Cedar Project: Impacts of Policing Among Young Aboriginal People Who Use Injection and Non-injection Drugs in British Columbia, Canada" (2013) 24:5 Intl J of Drug Policy at 449.

153 Elizabeth Comack, *Racialized Policing: Aboriginal People's Encounters with the Police* (Winnipeg: Fernwood Publishing, 2012).

154 British Columbia, Office of the Provincial Health Officer, *Health, Crime and Doing Time: Potential Impacts of the Safe Streets and Communities Act on the Health and Well-being of Aboriginal People in BC,* (Victoria: Office of the Provincial Health Officer, 2013) at xiv. Further, the Assembly of First Nations debated that the SSCA bill in Parliament would cause a particular harm to Aboriginal peoples in BC, and numerous organizations wrote reports regarding the harms of the MMPs including The Canadian Bar Association: BCCL, PIVOT Legal Services, and BC Ministry of Health.

the health of Aboriginal people that could result from the enactment of the *Safe Streets and Communities Act*:

> Instead of recognizing the history and context of Aboriginal people, amendments introduced in the Act create circumstances that will likely result in more Aboriginal youth and adults in correctional centres, and lower health status for Aboriginal populations.

The mandatory minimums ultimately did contribute to the over-incarceration of Indigenous people in prison, and have been struck down by the courts for being unconstitutional.[155]

The Supreme Court of Canada offered a response to the mass incarceration of Indigenous people through the decision of *R v Gladue*.[156] *Gladue* provided further guidance to the scope of s. 718.2(e) of the Criminal Code, which states that when sentencing an offender, a court must consider "all available sanctions, other than imprisonment" and pay "particular attention to the circumstances of Aboriginal offenders."[157] The Supreme Court of Canada's decision in *Gladue* called for judges to pay attention to the unique circumstances of Indigenous offenders in order to reduce the use of prison as a sanction and expand the use of restorative justice principles in sentencing.[158] All areas of the criminal justice system need to apply the principles set out within *Gladue* to develop culturally appropriate sanctions and prison should be a last resort.[159] While there are problems with the implementation of *Gladue*, the decision to apply longer sentences for fentanyl traffickers does not account for the mass incarceration of Indigenous people in Canada.[160]

One of the "Calls to Action" made by the Truth and Reconciliation Commission was to "commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so."[161] In setting

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155 TRC, *supra* note 145 at 170; *R v Lloyd,* 2016 SCC 13, [2016] 1 SCR 130.

156 *Gladue*, *supra* note 143.

157 *Criminal Code*, *supra* note 66 at s. 718 (2)(e).

158 *Gladue*, *supra* note 139. More recently, in *R v Ipeelee*, 2012 SCC 13 at para 87, [2012] 1 SCR 433, the Supreme Court called upon judges to pay attention to the unique circumstances of Indigenous people.

159 *Gladue, supra* note 139 at para 48.

160 Beckerman & Fontana, *supra* note 124.

161 TRC, *supra* note 145 at 324.

longer custodial ranges and a harsher sentencing regime for fentanyl street-level traffickers, courts may focus on deterrence and sentence Indigenous people without an understanding of the existence of systemic discrimination and mass incarceration against Indigenous people in Canada. When courts sentence Indigenous people and emphasize the principle of deterrence, they are shifting away from recognizing the continued harm of colonization to the Indigenous community and the desperate need for alternatives to incarceration.

B. Prescribing Prison for Addiction

Addiction is an illness and it is "characterized by a loss of control over the need to consume the substance to which the addiction relates."[162] The courts need to address the role that addiction plays in the crime and the need for rehabilitation when it comes to sentencing individuals who are committing crime to support their addiction.[163] The same way individuals are not sentenced to prison to get medical treatment, individuals with substance abuse issues should not be given lengthy prison sentences and be expected to rehabilitate.[164] There is significant research pertaining to how addiction may be caused, including biogenetic predispositions; early life traumatic experiences; and personality.[165] Further, there are evidence-based treatments for addiction and effective strategies to reduce harm to people who use drugs. Prescribing longer custodial sentences during the opioid crisis ignores the complexities of addiction and the vast medical research.

Addiction should be at the heart of the conversation about individuals' criminal involvement.[166] People who use drugs are often motivated by financial gain to pay for the cost of the drug, and as a result substance use is a strong predictor of recidivism. People who are sentenced to a period of incarceration will serve time within a Canadian prison where drugs are often readily available.[167] Research shows that individuals who are able to

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162 *R v Hansen*, 2012 BCCA 142, 543 WAC 40, citing *PHS, supra* note 128.

163 Public Services Foundation of Canada, *Crisis in Correctional Services: Overcrowding and Inmates with Mental Health Problems in Provincial Correctional Facilities,* (2015) at 43.

164 Paul Smith, "The human cost of the prison system's failure to deal with drug addiction and mental illness" (2007) 27:37 Insite Out Prison Health.

165 Bettinardi-Angres & Angres, *supra* note 124.

166 Dackis & O'Brien, *supra* note 114; Weber et al., *supra* note 127 at 39.

167 Emily Van Der Meulen, "'It Goes on Everywhere': Injection Drug Use in Canadian Federal Prisons" (2017) 52:7 Substance Use & Misuse 884.

address their drug problems through substance abuse treatments are less likely to be repeat offenders. The needs of people with substance abuse issues must be central to the criminal justice system.[168] Individuals who are incarcerated are at an increased risk of overdoses and therefore, meaningful prevention interventions need to be employed.[169] The courts should reconsider their approach to the opioid crisis in light of the potential to perpetuate harm.

V. Conclusion

BC courts are responding to the opioid crisis with the imposition of increased prison terms. This increase is a result of the British Columbia Court of Appeal's decision that trafficking in fentanyl requires the enhanced emphasis on deterrence in order to send a strong message to future offenders. BC courts' emphasis on deterrence for fentanyl trafficking during the opioid crisis is misplaced. Increasing sentence severity does not result in a decrease in the commission of crime through deterrence. Canada is currently taking a very punitive approach to drug crimes and the sentences are influenced in part by the stigmas associated with people who use drugs, and the courts' reluctance to accept the inefficacy of deterrence. A significant impact of the courts' actions for fentanyl traffickers will be an increase in the number of individuals incarcerated in Canada, and this will have a particularly harsh impact on people with addictions and Indigenous people. The current focus on punishment ignores that most street-level traffickers are substance users themselves. Attempts to solve criminal justice problems that do not account for the complexities of addiction are ineffective and harmful. This is a public health crisis, not a criminal crisis, and the courts' current response may exacerbate the harms of the crisis.

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168 Jonathan K. Burns, "Mental Health and Inequity: A Human Rights Approach to Inequality, Discrimination and Mental Disability" (2009) 11:2 Health and Human Rights at 19.

169 Stuart A Kinner et al, "Incidence and Risk Factors for Non-Fatal Overdose Among a Cohort of Recently Incarcerated Illicit Drug Users" (2012) 37:6 Addictive Behaviors 691.

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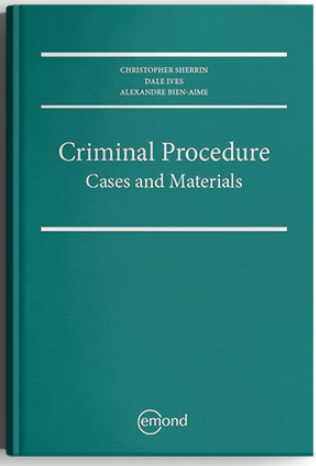

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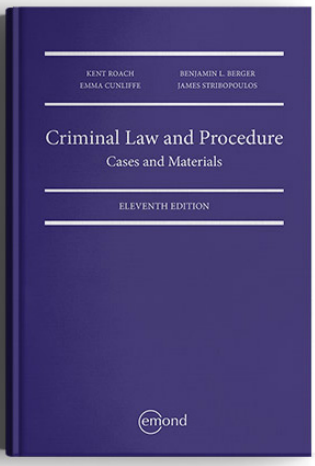

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In the Aftermath of *R v Pham*: A Comment on Certainty of Removal and Mitigation of Sentences

SASHA BAGLAY *

ABSTRACT

This comment discusses the findings of the review of 63 sentencing decisions made in the 4-year period immediately following the *R v Pham* decision. The main objective of the study is to explore how courts have been applying *Pham* – specifically how their construction of the inadmissibility process impacted the weight given to collateral immigration consequences and whether it led to slight mitigation of sentences. The study reveals some inconsistencies in judicial approach to the certainty of removal and its use as a factor in sentence mitigation. It is hoped that these findings will prompt both courts and defence counsel to become more cognizant of the nuances of the inadmissibility regime and strive to develop a more principled framework for consideration of these consequences in sentencing.

Keywords: sentencing; immigration; *R v Pham*; collateral consequences; inadmissibility; permanent residents; deportation; right to IAD appeal; proportionality

I. INTRODUCTION

Permanent residents convicted of certain offences face dual state-imposed consequences: first, they are subject to criminal sanctions and, second, they may become inadmissible and be removed from Canada - in some cases without the right to appeal a removal order. Inadmissibility may result in a person's return to an unsafe and/or

* Sasha Baglay is an Associate Professor, Faculty of Social Science and Humanities, University of Ontario Institute of Technology.

unknown country (e.g, for long-term residents who immigrated to Canada as children) and lengthy separation from family in Canada. These collateral consequences can make a criminal sentence disproportionately harsh. However, until recently, questions remained about the parameters of appellate intervention to vary a sentence due to immigration consequences, the guiding principles for sentence determinations where collateral consequences are involved, and the weight to be given to such consequences.[1]

In *R v Pham*,[2] the Supreme Court was asked to clarify whether an otherwise fit sentence can be varied on appeal to take into account collateral immigration consequences. Hoang Anh Pham, a permanent resident, was convicted of producing and possessing marihuana for the purpose of trafficking and was sentenced to two years of imprisonment. At the time, a 2-year sentence barred Mr. Pham from appealing the removal order. He sought to have the sentence reduced by one day in order to preserve the right to immigration appeal. The Supreme Court held that collateral (immigration) consequences[3] may be taken into account. They are not aggravating or mitigating factors, but are a part of the personal circumstances of the accused. The Court emphasized that while having discretion to take into account collateral consequences, judges must ensure that they do not compromise the proportionality of a sentence. The closer the sentence is to the sentencing range, the more likely it is to remain proportionate. Conversely, the greater the departure, the more questionable the fitness of a sentence.[4] As subsequently interpreted by lower courts, immigration consequences may help situate the case within the range of appropriate sentences, but they cannot be used to re-calibrate that range.[5]

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1 For an overview of approaches prior to *Pham*, see *R v Pham*, 2013 SCC 15, [2013] 1 SCR 739 at 23–28 (Factum of the Appellant), online: <https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=34897> [*Pham*, appellant's factum].

2 *R v Pham*, 2013 SCC 15, [2013] 1 SCR 739 [*Pham*].

3 Collateral consequences can be defined as any negative effects of a sentence beyond its immediate impact, such as the loss of liberty in case of a prison sentence or the loss of money as a result of an imposed fine. Examples of collateral consequences include social stigma, travel and employment restrictions, far-reaching impact of prohibitions, and immigration consequences. Eric Monkman, "A New Approach to the Consideration of Collateral Consequences in Criminal Sentencing" (2014) 72:2 UT Fac L Rev 38 at 43.

4 *Pham*, *supra* note 2 at para 18.

5 *R v Tweneboah-Koduah*, 2017 ONSC 640 at para 62, 136 WCB (2d) 722 [*Tweneboah-*

Further, the weight given to collateral consequences would vary from case to case; in some, it may be appropriate to mitigate a sentence, while in others it may not.

R v Pham has undoubtedly increased the awareness of courts and other participants of the criminal justice process of collateral immigration consequences. However, the Supreme Court did not elaborate on how judges should go about determining the weight to be given to them in individual cases. The article's working hypothesis is that the certainty of the offender's removal would be one of the key factors in such decision-making.[6] The more certain the removal and/or the harsher its consequences, the more likely it is to make collateral consequences more compelling. This comment examines how sentencing courts construe provisions of the *Immigration and Refugee Protection Act*[7](*IRPA*) to determine the certainty of removal and whether/how this factor leads to slight mitigation of sentences. The analysis is based on review of sentencing decisions from across Canada in the 4-year period immediately following *Pham* (March 13, 2013 to March 13, 2017). Given that the topic of collateral immigration consequences received virtually no scholarly attention to date,[8] it is hoped that this comment will provide useful information to both researchers and practitioners.

The comment is in five parts. Part Two explains the interrelationships between immigration and criminal law, setting out the context for understanding collateral immigration consequences. Part Three presents the findings of the case review. The analysis reveals that sentencing courts are not uniform in their interpretation of the *IRPA*: some presume that removal is almost certain in the absence of immigration appeal, others do not make a clear pronouncement on the issue, and a small minority overemphasizes immigration officers' discretion not to proceed with inadmissibility. In light of these different interpretations, Part Four turns to

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Koduah]; *R v RC*, 2016 ONCJ 605 at para 28, 2016 CarswellOnt 16137 [*RC*].

6 It should be noted that certainty of removal is not the only factor that may influence the courts' evaluation of immigration consequences. For discussion of other relevant considerations, see Sasha Baglay, "Sentencing, Inadmissibility, and Hope 'Management' Post-Bill C-43 and Post-*Pham*" (2018) [unpublished, on file with author].

7 *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

8 The only recent article on collateral consequences in sentencing is Monkman, *supra* note 3. However, it does not focus specifically on immigration consequences.

the Federal Court jurisprudence[9] and immigration processing manuals to verify if sentencing courts' characterization of the inadmissibility process, particularly as relates to discretion of immigration officials, is accurate. The comment concludes with suggestions that could facilitate the development of more consistent and accurate decision-making on immigration consequences.

II. CONTEXT: CRIMMIGRATION CONNECTIONS

The topic of this comment broadly fits into extensive and evolving literature on interrelationships between immigration law and crime/criminal law/criminalization – or crimmigration. The crimmigration connections exhibit themselves in a myriad of ways, including media and political discourses equating migrants with criminals and security threats; increased screening and surveillance of migrant populations; prolonged immigration detention that borderlines on punitive; expanded criminality- and security-based grounds for denial or revocation of citizenship; and many others.[10] For the purpose of our discussion, three points of intersection between immigration and criminal law need to be highlighted:

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9 The Federal Court has jurisdiction to review all decisions made under the IRPA and can be considered to have specialized expertise with respect to the immigration statute.

10 For discussion of crimmigration in a Canadian context, see e.g. the special issue of Queen's Law Journal: (2014) 40:1 Queen's LJ; Karine Côté-Boucher, "Bordering Citizenship in 'an Open and Generous Society': The Criminalization of Migration in Canada" in Sharon Pickering & Julie Ham, eds, *The Routledge Handbook on Crime and International Migration* (London, UK: Routledge, 2015) at 75; Mary Bosworth & Sarah Turnbull, "Immigration Detention, Punishment, and the Criminalization of Migration" in Sharon Pickering & Julie Ham, eds, *The Routledge Handbook on Crime and International Migration* (London, UK: Routledge, 2015) at 91. For discussion in other jurisdictions, see e.g. the special issue of European Journal of Criminology: (2017) 14:1 European J Criminology; Thomas Ugelvik, "The Limits of the Welfare State? Foreign National Prisoners in the Norwegian Crimmigration Prison" in Peter Scharff Smith & Thomas Ugelvik, eds, *Scandinavian Penal History, Culture and Prison Practice: Embraced by the Welfare State* (London, UK: Palgrave, 2017) 405; Izabella Majcher & Clément de Senarclens, "Discipline and Punish? Analysis of the Purposes of Immigration Detention in Europe" (2014) 11:2 AmeriQuests; César Cuauhtémoc García Hernández, "The Life of Crimmigration Law" (2015) 92:4 Denver UL Rev 697; Daniel Martinez & Jeremy Slack, "What Part of 'Illegal' Don't You Understand? The Social Consequences of Criminalizing Unauthorized Mexican Migrants in the United States" (2013) 22:4 Soc & Leg Stud 535; Rebecca Sharpless, "Immigrants Are Not Criminals: Respectability, Immigration Reform, and Hyperincarceration" (2016) 53 Hous L Rev 691; Mark L

(i) Criminal convictions/sentences as a trigger of inadmissibility;
(ii) Interpretation of the "term of imprisonment" for the purpose of inadmissibility and access to immigration appeal;
(iii) Role of collateral immigration consequences in the determination of fit sentences.

Although crimmigration connections have always existed in our system, their intensity can change over time moving between more and less punitive ends of the spectrum. The following sections will detail applicable rules and procedures helping us situate current crimmigration connections on that spectrum.

In addition, it is important to keep in mind that grounds, procedures and consequences of inadmissibility may vary, depending on the immigration status of the person concerned, namely whether they are a permanent resident, a foreign national, a protected person or a refugee claimant. Although permanent residents are the primary focus of this article's discussion, for the purpose of clarity, it is necessary to briefly define each of the mentioned groups. Permanent residents are persons who have been admitted to Canada through an immigration process. They are entitled to remain in Canada as long as they comply with the residency obligation[11] and maintain 'good behavior.'[12] Foreign nationals are persons

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Noferi, "Mandatory Immigration Detention for US Crimes: The Noncitizen Presumption of Dangerousness" in Maria João Guia, Robert Koulish & Valsamis Mitsilegas, eds, *Immigration Detention, Risk and Human Rights: Studies on Immigration and Crime* (London, UK: Springer, 2016) 215; Ingrid V Eafly, "Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement" (2013) 88 NYUL Rev 1126; Yolanda Vázquez, "Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System" (2011) 54:3 How LJ 639; Juliet P Stumpf, "States of Confusion: The Rise of State and Local Power over Immigration" (2008) 86:6 NCL Rev 1557.

[11] A permanent resident must be physically present in Canada for at least 730 days in every five-year period in order to maintain his or her residency status. IRPA, *supra* note 7, s 28.

[12] For example, the Supreme Court noted in *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at paras 1–2 [*Tran* SCC] that "… successful integration of permanent residents involves mutual obligations for those new immigrants and for Canadian society …. This obligation [the obligation to avoid "serious criminality"] is breached when a permanent resident is convicted of a federal offence punishable by a maximum term of imprisonment of at least 10 years, or of a federal offence for which a term of imprisonment of more than 6 months has been imposed." Permanent residents may also lose their status on other grounds of inadmissibility, such as security, violation of human or international rights, and

who are not Canadian citizens or permanent residents; they are usually admitted for strictly defined periods of time and for a specific purpose: as students, foreign workers or visitors. Protected persons and refugee claimants constitute a special group of foreign nationals who were forced to leave their home countries due to fear of persecution, torture or of risk to life; they enjoy greater protections and supports reflective of the humanitarian nature of their admission. Refugee claimants are persons who have lodged claims for protection and are awaiting decisions on them; those whose claims are eventually accepted, receive status of protected persons.

In the hierarchy of immigration statuses, foreign nationals have more limited entitlements in Canada compared to the other groups. This is reflected, *inter alia*, in the inadmissibility regime which allows for their removal, in some cases, without a hearing[13] and always without access to immigration appeal (unless the foreign national holds a permanent resident visa or is a protected person). In contrast, permanent residents can be removed only following a tribunal hearing and, in most cases, can appeal the removal order. Finally, protected persons and refugee claimants cannot be returned to the countries of persecution/danger unless they are considered a threat to Canada or Canadians.[14] These differences in the inadmissibility and removal procedures are due not only to different conceptualizations of each group's entitlement to be in Canada, but also to the different implications of removal. A permanent resident with strong and long-term connections in Canada will likely experience greater hardship than a foreign national who has been in Canada for a limited time and has not developed roots in the country. Further, protected persons and refugee claimants by definition would face not merely hardship, but risks to their lives. The understanding of these nuances is important in order to accurately assess the certainty of person's removal and ensuing consequences for the purpose of sentence determinations.

misrepresentation. IRPA, *supra* note 7, ss 34–37, 40.

13 For example, immigration officers can issue a removal order, without referral for the Immigration Division hearing, where a foreign national is inadmissible on the grounds of serious criminality or non-compliance with the IRPA. *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 228 [IRPR].

14 IRPA, *supra* note 7, s 115.

A. Criminal Convictions/Sentences as a Trigger of Inadmissibility

Immigration legislation traditionally conceives of non-citizen admissions as a balancing act between, on the one hand, the nation's need to facilitate mobility and entry of 'desirable' newcomers and, on the other, the imperatives of protecting the safety of the host society from the 'undesirables'. To this end, inadmissibility provisions seek to guard the host nation from non-citizens who are deemed dangerous or burdensome. For permanent residents, the ability to remain in Canada is conditional, among other things, on their "good behavior." According to s. 36(1) of the *Immigration and Refugee Protection Act* (*IRPA*), a permanent resident may become inadmissible on the grounds of serious criminality upon:

> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
> (b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
> (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.[15]

Importantly, an offence is treated as indictable even if it was prosecuted summarily.[16] By effectively converting a less serious offence into a more serious one, this rule expands the reach of inadmissibility provisions.[17] A permanent resident falling within one of the above grounds would suffer consequences stemming from criminal as well as immigration legislation. First, they will serve the imposed sentence and then an inadmissibility process will be commenced. For the purposes of our discussion, we will consider only inadmissibility arising from convictions in Canada as outlined in s. 36(1)(a).

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15 *Ibid*, s 36(1).

16 *Ibid*, s 36(3)(a).

17 For example, use of a forged document is a hybrid offence. If prosecuted by indictment, it is punishable by a maximum of no more than ten years. *Criminal Code*, RSC 1985, c C-46, s 368.

The inadmissibility process consists of the following stages:

(i) preparation of a report on inadmissibility and its referral to a superior immigration officer;

(ii) referral of the report to the Immigration Division of the Immigration and Refugee Board (IRB);

(iii) an admissibility hearing before the Immigration Division (where a removal order may be issued);

(iv) if a permanent resident has a right to appeal, appeal of the removal order to the Immigration Appeal Division (IAD) of the IRB.

The initial inadmissibility report is prepared by an immigration officer and outlines the circumstances of the case and relevant ground(s) of inadmissibility.[18] The report is referred to a superior officer (the Minister's delegate) for review. If the Minister's delegate finds the report well-founded, the case is sent to the Immigration Division of the IRB for an admissibility hearing.[19] The relevant *IRPA* provisions contain the word 'may' suggesting the existence of discretion not to prepare a report or not to refer the report to the Immigration Division. The interpretation of these provisions by sentencing courts and the Federal Court as well as relevant administrative practices will be discussed in subsequent sections of the article. Such interpretation can be an important factor in assessment of the certainty of removal. If discretion is considered to be very limited, the removal may appear more certain; if discretion is broad, courts may be more likely to conclude that removal is not inevitable.

For convictions in Canada, the admissibility hearing is almost a rubber stamp process: the Division has to be satisfied that the person indeed has been convicted of the specified offence and, as per s. 36(1)(a) of the *IRPA*, either a sentence of more than 6 months was imposed or the offence carries a maximum penalty of at least 10 years of imprisonment. Extenuating circumstances that may be considered at a sentencing hearing are not considered at an admissibility hearing. Neither does the Immigration Division have the power to take into account humanitarian and compassionate factors.[20] As noted by the Federal Court, "[t]he Immigration

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18 IRPA, *supra* note 7, s 44(1).

19 *Ibid*, s 44(2).

20 *Canada (Minister of Citizenship and Immigration) v Fox*, 2009 FC 987 at para 42, [2010] 4 FCR 3.

Division's admissibility hearing is not the place to embark upon a humanitarian review or to consider the fairness or proportionality of the consequences that flow from a resulting deportation order. Those are consequences that flow inevitably by operation of law and they impart no mitigatory discretion upon the Immigration Division."[21] If the Immigration Division finds the person inadmissible, it is required to issue a removal order.[22] The statistics in Table 1 confirm that the absolute majority of hearings result in findings of inadmissibility and a removal order; outcomes favourable to the person concerned are extremely rare.

Table 1. Breakdown of admissibility hearings by outcome, access to information request A-2017-01601/RA

Year	Favourable to person concerned	Removal order issued	Failed to appear	Withdrawal /other	Total
2002	0	151	8	21	180
2003	4	548	111	49	712
2004	2	625	160	23	810
2005	2	727	184	34	947
2006	0	719	190	45	954
2007	1	798	191	48	1,038
2008	3	910	230	57	1,200
2009	4	1,052	225	41	1,322
2010	1	749	164	25	939
2011	2	712	184	30	928
2012	0	694	140	25	859
2013	5	430	101	17	553
2014	1	324	80	20	425
2015	3	515	131	39	688
2016	2	509	149	35	695
2017 (Jan to Aug)	0	344	64	16	424
Grand total	**30**	**9,807**	**2,312**	**525**	**12,674**

21 *Wajaras v Canada (Minister of Citizenship and Immigration)*, 2009 FC 200 at para 11, 175 ACWS (3d) 1129.

22 IRPA, *supra* note 7, s 45(d).

A removal order can be appealed to the Immigration Appeal Division (IAD) of the IRB. However, permanent residents inadmissible on the grounds of serious criminality – defined in the *IRPA* as an offence "that was punished in Canada by a term of imprisonment of at least six months" - do not have a right to appeal.[23] Thus, a term of imprisonment of over six months would make a permanent resident not only inadmissible but will also deprive them of the right to appeal. Those who do not have such a right, will be streamlined for removal,[24] unless they face risks in the destination country.[25]

The IAD may grant special relief – such as a stay of removal or quashing a removal order - where humanitarian and compassionate (H&C) considerations so warrant.[26] In contrast to the admissibility hearing, which narrowly focuses on the fact of a conviction, the IAD undertakes a more individualized assessment of a case, weighing both the safety of the public and the interests of the person concerned. This approach is reflected in the *Ribic* factors, which guide IAD decision-makers:[27]

(i) the seriousness of the offence leading to the deportation order;
(ii) the possibility of rehabilitation and the risk of re-offending;
(iii) the length of time spent in Canada and the degree to which the appellant is established here;
(iv) the family in Canada and the dislocation to the family that removal would cause;
(v) the family and community support available to the appellant;

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23 *Ibid*, ss 64(1), (2).

24 Under section 49(1)(a) of the IRPA, a removal order comes into force on the date that it is made if there is no right to appeal. Once a removal order comes into force, a person concerned loses his or her permanent resident status, and the order must be enforced as soon as possible. IRPA, *supra* note 7, ss 46(1)(c), 48.

25 Persons alleging risks of persecution, torture, or risk to life in destination countries can file a Pre-Removal Risk Assessment (PRRA) application. The gist of this process is discussed in part three of the comment.

26 IRPA, *supra* note 7, ss 67, 68.

27 *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4. These factors have subsequently been approved by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84; *Al Sagban v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 4, [2002] 1 SCR 133.

(vi) the degree of hardship that would be caused to the appellant by his return to his country of nationality;

(vii) the best interests of any child directly affected by the decision.

The above factors are non-exhaustive and the weight given to them will vary from case to case.[28] For instance, a violent offence and/or repeated criminal conduct will weigh heavily against the appellant, while the converse will be true if the offence is a single occurrence and is minor in nature. Similarly, strong and long-term establishment in Canada favours the appellant, while short-term residence with little connection to Canada will be of little assistance.[29] Connections to family, friends and community will also be important in determining the possibility of rehabilitation as the existence of strong supports is usually viewed as a factor favouring the appellant. In addition, the IAD can consider hardship – both resulting from uprooting from Canada and from removal to a country with which the appellant and their family have little or no connection.[30]

After a hearing, the IAD can confirm the removal order, quash it or order a stay of removal. The latter option gives permanent residents a 'second chance': they are allowed to remain in Canada if they abide by imposed conditions for a specified period of time (usually anywhere between 6 months and 5 years).[31] The legislation provides for a series of mandatory and optional conditions, which focus on monitoring the individual and supporting their rehabilitation.[32] After a passage of specified

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28 *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339. For detailed discussion of these factors, see Immigration and Refugee Board (IRB), "Removal Order Appeals," ch 9, online: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RoaAmr.aspx> [IRB, "Removal Order Appeals"].

29 The factors relevant to determining the strength of an appellant's connection are length of residence in Canada; the age of arrival to Canada; length of residence elsewhere; frequency of trips abroad and the quality of contacts with people there; place of education; location of appellant's immediate family, friends, and professional and/or employment contacts. See *Archibald v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 747 (QL) at para 10, 95 FTR 308.

30 IRB, "Removal Order Appeals", *supra* note 28 at 21–23.

31 Lorne Waldman, *Canadian Immigration and Refugee Law Practice* (Toronto: LexisNexis Canada, 2010) at 421.

32 The full list of mandatory conditions can be found in section 251 of the IRPR, *supra* note 13. The conditions include not committing any federal offences, reporting changes of address, attending counselling, making reasonable efforts to obtain and/or keep employment, and others.

time, the IAD reconsiders the case and determines whether to ultimately allow or dismiss the appeal. However, if a person is convicted of another serious criminality offence, the stay is cancelled and the person is subject to removal.[33]

As Table 2 demonstrates, between one third and a half of appeal cases result in stays of removal. Thus, access to appeal is an essential and only opportunity to contextually determine if removal is indeed warranted in a given case. It injects humanity into the administration of inadmissibility provisions and helps guard from their overreach. It is, thus, not surprising that preservation of the right to appeal becomes an important consideration at sentencing.

Table 2. Breakdown of IAD appeals by outcome, access to information request A-2017-01601/RA

Year	Allowed	Dismissed	Abandoned	Withdrawn /other	Stay ordered	Total
2002	1	0	0	2	1	4
2003	1	50	30	11	84	178
2004	12	101	65	17	170	365
2005	28	135	68	19	266	516
2006	58	174	53	25	347	657
2007	91	161	76	38	526	892
2008	149	180	108	114	509	1,060
2009	218	238	109	51	758	1,374
2010	262	199	93	48	653	1,255
2011	260	176	76	28	608	1,148
2012	352	193	88	20	525	1,178
2013	334	175	86	21	498	1,114
2014	374	170	74	29	372	1,019
2015	335	129	83	26	325	898
2016	265	151	77	32	331	856
2017 (Jan to Aug)	149	87	44	26	157	463
Total	**2,889**	**2,319**	**1,130**	**507**	**6,130**	**12,975**

[33] IRPA, *supra* note 7, s 68(4).

B. Interpretation of the "Term of Imprisonment" for the Purpose of Inadmissibility and Access to Immigration Appeal

The "term of imprisonment" of a particular length is often used as a measure of person's inadmissibility or access to IAD appeal. For example, under s. 36(1)(a), a permanent resident is inadmissible where "a term of imprisonment of more than six months has been imposed."[34] Section 64 deprives of the right to IAD appeal persons convicted of offences "punished… by a term of imprisonment of at least six months."[35] However, the "term of imprisonment" is not defined in the *IRPA*. For example, it does not make it clear if pre-trial custody should be counted towards a term of imprisonment or whether conditional sentences constitute a term of imprisonment. Depending on interpretation the phrase, the inadmissibility regime will acquire either a wider reach or will be somewhat more constrained.

Until 2017, the predominant view at the IRB and the Federal Court was that conditional sentences constituted a "term of imprisonment."[36] However, in the 2017 *Tran* decision, the Supreme Court held that, for the purpose of s. 36(1)(a), the "term of imprisonment" does not include conditional sentences.[37] This interpretation acknowledges that conditional sentences are used for less serious and non-dangerous offenders and that the length of a conditional sentence alone is not a reliable indicator of "serious criminality."[38]

With respect to pre-trial custody, the Federal Court has long held that, for the purposes of the *IRPA*, it forms part of the "term of imprisonment."[39]

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34 *Ibid*, s 36(1)(a).

35 The word "punished" in section 64(2) of the IRPA refers to the sentence imposed, not the actual duration of incarceration. See *Martin v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 347, 341 NR 341.

36 See e.g. *Adu-Poko v Canada (Minister of Citizenship and Immigration)*, [2005] IADD No 1538; *Kwan v Canada (Minister of Public Safety and Emergency Preparedness)*, [2006] IADD No 52. However, some decision-makers arrived at the opposite conclusion: see *Sadowski v Canada (Minister of Public Safety and Emergency Preparedness)*, [2007] IADD No 637; *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1040, 246 ACWS (3d) 649, rev'd *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 237, [2016] 2 FCR 459.

37 *Tran* SCC, *supra* note 12.

38 *Ibid* at paras 28, 32.

39 *Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FC 7, 245 FTR 170

Most of the existing caselaw concerns interpretation of the "term of imprisonment" for the purpose of eligibility for an IAD appeal,[40] but the same position has also been adopted in some cases concerning s. 36(1)(a).[41] Thus, an individual who, for example, receives a 5-month sentence and a 2-month credit for pre-trial custody will be regarded as having a 7-month sentence and, hence precluded from making an IAD appeal.[42] As a result of

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[*Atwal*]; *Cheddesingh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 124, 286 FTR 310; *Jamil v Canada (Minister of Citizenship and Immigration)*, 2005 FC 758, 277 FTR 163; *Magtouf v Canada (Minister of Citizenship and Immigration)*, 2007 FC 483, 162 ACWS (3d) 650 [*Magtouf*]; *Canada (Minister of Citizenship and Immigration) v Gomes*, 2005 FC 299, 265 FTR 179. It is worth noting, however, that some IRB decisions interpreted section 64 as not including pre-trial custody. See e.g. IAD decision referred to in *Atwal* at paras 12–15.

40 *Atwal*, *supra* note 39 at para 12; *Sherzad v Canada (Minister of Citizenship and Immigration)*, 2005 FC 757 at paras 57–61, 276 FTR 72 [*Sherzad*]; *Ariri v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 834 at para 18, 180 ACWS (3d) 113 [*Ariri*]; *Brown v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 660 at paras 18–23, 2009 CarswellNat 1917 [*Brown* FC]; *Magtouf*, *supra* note 39 at paras 21–24.

41 See e.g. *Canada (Minister of Public Safety and Emergency Preparedness) v Ramos Pacheco*, [2009] IDD No 22; *Tieu v Canada (Minister of Citizenship and Immigration)*, [2005] IADD No 1735. However, such interpretation should be taken with caution. Speaking in *obiter*, the Federal Court noted in *Cartwright v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 792, 236 FTR 98 at 111–113 [*Cartwright*] that the interpretations of sections 64 and 36(1)(a) might be different as the former refers to "punishment" and the latter to "sentence."

42 The conclusion hinges on the wording of section 64, which refers to the offences "punished" by six months or more rather than a "sentence" of over six months. See *Cartwright*, *supra* note 41; *Sherzad*, *supra* note 40. According to the Supreme Court caselaw, there is an important distinction between "sentence" and "punishment." As explained in *R v Wust*, 2000 SCC 18, [2000] 1 SCR 455 [*Wust*], a "sentence" is a judicial determination of a legal sanction. It commences on the day that it is imposed and refers to the term imposed at the time of sentencing (hence, a five-month sentence will be a five-month sentence regardless of credit for pre-trial custody) (see *R v Mathieu*, *below*). In contrast, "punishment" is the infliction of the legal sanction. Although pre-trial custody is not intended as punishment when it is imposed, it can be deemed part of the punishment upon the offender's conviction. Drawing on this distinction, the Supreme Court concluded in *Wust* that pre-trial custody can be considered part of a sentence and be credited towards it even if this has the effect of reducing the sentence below the mandatory minimum. *R v Mathieu*, 2008 SCC 21, [2008] 1 SCR 723 [*Mathieu*] – dealing with the interpretation of *Criminal Code* section 731(1)(b) on the availability of probation orders – added further nuance to the understanding of the "sentence of imprisonment." The Supreme Court held that, in the context of access to probation,

this interpretation of the "term of imprisonment," the inadmissibility's reach is broader than the plain reading of ss. 36 and 64 may suggest (namely, that they refer to the term imposed at the time of sentencing).

C. Role of Collateral Immigration Consequences in Determination of Fit Sentences

In the past, collateral immigration consequences were rarely considered in sentencing, but more recently, they started being recognized as a relevant factor.[43] This change is likely due not only to greater judicial awareness of collateral consequences generally, but also to an increasingly restrictive access to the IAD appeal, which made immigration consequences of a conviction/sentence much more immediate and severe.[44] Under the 1976 *Immigration Act*, all permanent residents (except for those under security certificates) had access to an IAD appeal. In 1995, the right to appeal was restricted to exclude persons whom the Immigration Minister declared to be a danger to the public. In 2002, when the *Immigration and Refugee Protection Act* came into effect, a further limitation on IAD appeals was imposed: those sentenced to 2 years or more will not have access to it. In

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the phrase "sentence of imprisonment" meant the term imposed by the judge at the time of sentencing, after the deduction of credit for pre-trial custody. Hence, the Court concluded at para 17: "a sentence of less than two years does not ... become a sentence of more than two years simply because the trial judge, in imposing the sentence of less than two years, took into account the time already spent in custody as a result of the offence." At the same time, the Court acknowledged that, it is possible, on an exceptional basis, to count pre-sentence custody as part of the term of imprisonment imposed at the time of sentence. For example, such exceptions exist with respect to minimum sentences (see *Wust*, *supra* note 42) and conditional sentences (*R v Fice*, 2005 SCC 32, [2005] 1 SCR 742), and they are not overruled by *Mathieu*. Building on availability of the above exceptions and the difference between immigration and criminal contexts, the Federal Court continues to maintain its position that pre-sentence custody is a part of the "term of imprisonment." See *Brown* FC, *supra* note 40; *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2010 FC 30, 184 ACWS (3d) 773; *Ariri*, *supra* note 40.

43 *Pham*, appellant's factum, *supra* note 1 at 20. See also *R v Hamilton* (2004), 72 OR (3d) 1, 186 CCC (3d) 129 (CA) [*Hamilton*]; *R v Kanthasamy*, 2005 BCCA 135, 195 CCC (3d) 182; *R v Wisniewski*, 2002 MBCA 93, 166 Man R (2d) 73; *R v Almajidi*, 2008 SKCA 56, 310 Sask R 142.

44 For an overview of the changing access to IAD appeal, see John A Dent, "No Right of Appeal: Bill C-11, Criminality, and the Human Rights of Permanent Residents Facing Deportation" (2002) 27 Queen's LJ 749.

2013, this threshold was lowered to sentences of 6 months or more. Despite the above developments, until *Pham*, it was not standard practice for either parties or courts to turn their minds to immigration consequences of a sentence. Thus, since 2013, all participants of sentencing hearings faced a steep learning curve related to the nuances of relevant immigration rules and procedures.

As the preceding sections demonstrate, the state perceives an offence committed by a non-citizen though two lenses: criminal law and immigration law. Their intersection in the context of inadmissibility provisions, at times, produces exaggerated images of criminality. Section 36(3)(a) of the *IRPA* – which treats hybrid offences as indictable for inadmissibility purposes even if those offences were prosecuted summarily - acts as a magnifying glass, amplifying the seriousness of those offences. In addition, offences punished by 6 months or more are perceived as "serious criminality" for the purpose of IAD appeal (although they would not necessarily be considered such at criminal law).[45] Finally, the long-standing interpretation of the "term of imprisonment" to include pre-sentence custody effectively curtails the right to appeal even further. Taken together, these rules and interpretations reflect an exaggerated concern over "foreign criminality" and provide for a quite expansive notion of inadmissibility. The only recent developments that slightly temper the regime's scope are the Supreme Court's decisions in *Pham* and *Tran*.

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45 For example, common assault, fraud under $5,000, theft under $5,000, possession of a stolen property under $5,000, trespassing at night, public mischief, and flight from a peace officer may now be considered serious enough to deprive one of access to IAD. Although sentences for these offences vary significantly, depending on the circumstances and absence/presence of prior criminal record, in some cases custodial sentences of over six months would be appropriate. See generally, Clayton Ruby et al, *Sentencing*, 8th ed (Toronto: LexisNexis Canada, 2012) at 864–873; Clayton Ruby et al, *Sentencing*, 6th ed (Toronto: LexisNexis Canada, 2004) at 805, 815–820. These examples were provided in the Opposition's response speech (Mr. Kevin Lamoureux (Liberal)) at the second reading of Bill C-43 "Faster Removal of Foreign Criminals Act," which reduced the threshold for access to IAD appeal from two years to six months. See *House of Commons Debates*, 41st Parl, 1st Sess, No 151 (24 September 2012), online: <http://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-151/hansard#7684027>.

III. Evaluating Certainty of Removal: Caselaw Analysis

A number of factors are relevant to the assessment of certainty of removal: the type of offence in question; the length of imposed sentence; the immigration officers' discretion in the inadmissibility process; the immigration status of the person concerned; and the availability of avenues (other than the IAD appeal) to avoid removal. Thus, sentencing courts have to muster not only the basics of the inadmissibility process outlined in ss. 36 and 64 of the *IRPA*, but also be familiar with other aspects of the immigration system.

Section 36(1)(a) sets out two bases for serious criminality – each with different implications for sentencing:

(i) Offences punishable by a maximum of 10 or more years of imprisonment. In relation to these offences, inadmissibility is triggered regardless of the actually imposed sentence. That sentence matters only for access to IAD appeal. A sentence of over 6 months exposes a permanent resident to certain removal, unless the CBSA exercises discretion not to proceed. If a sentence is under 6 months, then the risk of removal is somewhat harder to estimate as it would depend, first, on immigration officers' exercise of discretion, and presuming, they do proceed with inadmissibility, on the outcome of the IAD appeal.

(ii) Offences punishable by a maximum under 10 years of imprisonment. For these offences, the actually imposed sentence will determine if inadmissibility is triggered. If the sentence is under 6 months, then no concerns over inadmissibility arise and the offender will not be at risk of immigration consequences. If a sentence is over 6 months, then it both triggers inadmissibility and deprives of the right to appeal. Then, a permanent resident faces certain removal, unless immigration authorities exercise discretion not to proceed.

Although the IAD appeal is usually the most effective way to obtain special relief on the basis of humanitarian and compassionate (H&C) considerations, there are also other avenues that may allow a person concerned to remain in Canada. In the absence of the right to appeal, he/she may explore a Pre-Removal Risk Assessment (PRRA) application or an application to remain in Canada on H&C grounds. If a sentencing court

considers that PRRA and/or H&C application are available, it may be inclined to conclude that the loss of access to IAD appeal is not detrimental to the person concerned and may give less weight to this collateral consequence.

An H&C application is a procedure entirely different from consideration of H&C factors by the IAD. It is made to the immigration minister, is paper-based and does not involve a hearing. Under s. 25 of the *IRPA*, the Minister has a broad power to "grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."[46] The determination of H&C applications usually involves assessing whether an applicant will suffer either "unusual and undeserved" or "disproportionate" hardship as a result of having to comply with existing immigration rules.[47] However, this power can be exercised in relation to foreign nationals and not permanent residents. Thus, an H&C application can be made only after the removal order comes into force; until that time, the person remains a permanent resident. As this application becomes available only at the final stage of the inadmissibility process and does not stay removal, it is unlikely to be an effective alternative for the person concerned.

A PRRA is also available only to those who are ready for removal, but it narrowly focuses on the risks of torture, of persecution, of cruel and unusual treatment or punishment or risk to life in the destination country.[48] Thus, it may be relevant to a relatively small number of persons facing removal. In most cases, a successful PRRA will lead to conferral of refugee protection, barring applicant's removal from Canada. However, persons considered inadmissible on grounds of serious criminality face a number of

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46 IRPA, *supra* note 7, s 25(1).

47 Immigration Refugees and Citizenship Canada (IRCC), *Inland Processing Manual*, "IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds," s 5.10 cited in *Kanthasamy v Canada (Citizenship and Immigration)*, [2015] SCJ No 61 (QL) at para 26.

48 Keeping in mind its objective to ensure compliance with Canada's non-refoulement obligations, an individual will not be removed until his or her PRRA is assessed, unless it is a repeat application or a PRRA that was filed after the prescribed application deadline. See IRPR, *supra* note 13, ss 162, 163, 232.

restrictions.[49] First, their PRRA can consider only the risk of torture, risk to life or risk of cruel or unusual treatment or punishment, but not the risk of persecution.[50] Second, officers must consider not only the risks to the applicants, but also dangers that they may pose to the Canadian public.[51] As a result of this balancing, a person may be removed despite the existence of risks in a destination country. Finally, even if PRRA is successful, it will only lead to a stay of removal, but not to refugee protection.[52] This stay is not permanent and may be cancelled by the Minister.[53]

The above information makes it clear that H&C and PRRA are not true alternatives to an IAD appeal and are unlikely to effectively prevent the person's removal. Without the understanding of the nature and workings of these procedures, sentencing courts may be left with a mistaken presumption that a person has viable means to remain in Canada.

Pham pushed sentencing courts to venture further into complex and less unfamiliar area of immigration law. How are they navigating these complexities? What are their resulting conclusions on the certainty of removal and how do these conclusions impact sentence determinations? The foregoing analysis is based on the review of sentencing decisions made between March 13, 2013 (the date of *R v Pham* decision) and March 13, 2017.[54] The Quicklaw noteup of the *Pham* decision turned up more than 300 lower court decisions. However, these results included discussion of various types of collateral consequences, not only immigration ones. Hence, a more focused search was conducted by using keywords 'sentencing',

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49 Importantly, serious criminality is defined differently than for the purpose of the IAD appeal. Section 112(3)(b) of the IRPA defines it as "a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years."

50 *Ibid*, s 113(d).

51 Where these extraordinary grounds of refusal are to be considered, the person concerned must be provided with a written assessment related to the grounds in question and allowed 15 days to submit a response. See IRPR, *supra* note 13, ss 172(1), (2).

52 IRPA, *supra* note 7, ss 112(3)(b), 114(1)(b).

53 *Ibid*, s 114(2).

54 The search captured decisions of all levels of courts in all provinces (but not territories). Due to the author's lack of proficiency in French, only Quebec decisions available in English were reviewed.

'immigration', 'consequences', and 'collateral'. A total of 89 trial and appellate decisions discussing collateral immigration consequences was identified.[55] Out of these, 63 decisions dealt with permanent residents and touched upon questions of certainty of removal; the rest involved foreign nationals or discussed the validity of guilty pleas in light of immigration consequences. Geographically, the decisions were represented as follows: 18 from British Columbia; 2 from Alberta; 1 from Saskatchewan; 4 from Manitoba; 34 from Ontario; 4 from Quebec.

For the purpose of analysis, the cases were broken down into two groups: those with fit sentences well over 6 months (40 cases) and those with fit sentences in the range of 6 months (23 cases). This division reflects the approach developed in jurisprudence, namely that certain removal can factor into decisions on sentence mitigation in two circumstances: (1) where deportation is inevitable, but for pragmatic reasons some reduction in the term of imprisonment may be warranted, and (2) where deportation can be avoided by a modest adjustment to the sentence.[56]

A. Sentences Over 6 Months

Following *Pham*, courts have become more alert to the 6-month cutoff for the purposes of the IAD appeal. However, they are ultimately guided by the principle of proportionality and recognize that in some cases, a fit sentence will always be over 6 months. Where the right of appeal cannot be preserved, the question turns on whether a sentence should nevertheless be slightly mitigated to take into account the collateral consequence of removal. The existing caselaw does not reflect a uniform position on this issue. One line of cases follows *R v Critton*, where the Superior Court of Ontario concluded that certain deportation may, in some circumstances,

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55 The initial search turned up close to 200 decisions, but upon review, only 89 of them were identified as relevant for the purpose of this study. A large number of decisions in the initial search either contained only one-to-two sentences with peripheral mention of immigration consequences and did not involve any substantial discussion of that factor or mentioned immigration consequence in description of cases cited by the defence or the Crown.

56 *Hamilton*, *supra* note 43 at para 156.

serve to mitigate the severity of a sentence.[57] The other line of cases does not consider certain removal a relevant consideration.[58]

In *Critton*, the court justified mitigation on purely pragmatic grounds, namely:

> (1) the risk of incomplete rehabilitation on release from custody is not a risk imposed upon the Canadian people
> (2) frequently, the offender subject to deportation serves "harder time" in Canada because he or she is incarcerated a significant distance from family who are resident in a foreign country
> (3) Canadians are spared the expense of continued incarceration of the accused where the offender is deported.[59]

Although *Critton* involved a foreign national, it has also been invoked in sentencing of permanent residents.[60] However, in the latter case, ground (2) will not apply as permanent residents are likely to have family in Canada. At the same time, parity-related reasons can be added to the list. Persons under removal orders are not eligible for parole until they become eligible for full parole.[61] Hence, they are likely to end up spending longer in detention and a slight reduction of the overall sentence may help mitigate the effect of this rule.

Not all of the examined decisions followed or even mentioned *Critton*. In fact, four different approaches regarding certainty of removal have been discovered in the sample:

(i) Certainty of removal is explicitly mentioned and sentences are slightly mitigated. Out of the total of 40 cases with sentences over 6 months, the certainty of deportation was taken into account to slightly reduce a sentence in 6 cases.[62] In 3 more cases, *Critton* was not mentioned specifically,

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57 *R v Critton*, [2002] OJ No 2594 (QL) at para 86, 54 WCB (2d) 543 [*Critton*]; *R v Edwards*, 2015 ONCA 537 at para 7.

58 In fact, *Critton* itself acknowledged the existence of conflicting caselaw on the issue – see paras 77–86. See also discussion in *R v Grant*, 2015 ONCJ 751 at paras 41–51.

59 *Critton*, *supra* note 57 at para 86.

60 As previously mentioned, there are significant differences in the inadmissibility process and its consequences for permanent residents versus foreign nationals.

61 *Corrections and Conditional Release Act*, SC 1992, c 20, s 128(4).

62 *R v Boyce*, 2016 ONSC 1118 (two years less a day for conspiracy to import controlled substance); *R v Ali*, 2016 ONSC 2600 [*Ali* ONSC] (5.5 years for importing cocaine); *R v Jha*, 2015 ONSC 4656 (ten years for second degree murder); *R v Virk*, 2014 BCPC 289, 117 WCB (2) 634 (global sentence of four years on several counts of assault and possession of prohibited firearms); *R v Kim*, 2014 BCPC 1, 111 WCB (2d) 525; *R v*

but judges took into account all personal circumstances of the offender, including the possibility of removal.[63]

(ii) Certainty of removal is not mentioned explicitly and its role in sentence determination is unclear. In 19 cases, the certainty of deportation was not discussed and *Critton* was not mentioned. [64] In some of them, the reference to immigration consequences was so brief that it was difficult to determine if they played any role at all. In others, courts focused on *Pham* and emphasized that reducing a sentence to under 6 months would lead to an unfit sentence.

(iii) Certainty of removal or other immigration consequences need not be considered. 6 decisions reflected the position that immigration consequences do not need to be taken into account if they cannot make any difference for access to IAD appeal. For example, in *R v Adam*,[65] a court stated that 'there is no basis to consider the risk of Mr. Adam being

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GW, 2017 ONSC 3149.

63 *R v Azizi*, 2017 MBQB 22 (six years for robbery); *Tweneboah-Koduah*, *supra* note 5 (26 months for sexual assault); *R v Dehal*, 2016 BCSC 479 (three years for possession of ketamine for the purpose of trafficking).

64 *R v Gonzales*, 2016 BCCA 436, 134 WCB (2d) 446 (eight months for identity theft); *R v SB*, 2014 SKQB 202, 449 Sask R 263 (three years for sexual assault); *R v DRC*, 2016 ONSC 5169 (4.5 years for five counts of assault); *R v Dusanjh*, 2016 ONSC 4317 (three years, three months for robbery); *R v Stein*, 2015 ONCA 720 (12 months for possession of cocaine for the purpose of trafficking); *R v Thomas*, 2017 BCSC 982 (five years and six months for two counts of sexual assault of persons under 16; two counts of uttering threats; one count of having a firearm or imitation for a dangerous purpose); *R v Clase*, 2017 ONSC 2484 (one count of sexual assault; one count of assisting himself to commit an indictable offence by means of choking); *R v Diaz*, 2017 ONSC 1883 (20 months for sexual assault); *R v Uribe*, 2013 ONSC 6830, 111 WCB (2d) 108 (18 months for robbery); *R v Sanghera*, 2016 BCCA 251, 131 WCB (2d) 326 (three years for aggravated assault); *R v Bizimana*, 2016 MBB 172, 133 WCB (2d) 369 (37 months for aggravated assault); *R v Dhillon*, 2013 BCPC 259, 109 WCB (2d) 311 (one year for dangerous driving causing death); *R v Aleksev*, 2016 ONSC 6080, 133 WCB (2d) 172 (two years less a day for criminal negligence causing death); *R v Kabanga-Muanza*, 2014 ONSC 7521, 119 WCB (2d) 630 (15 months for drug trafficking); *R v Rich*, 2014 BCCA 24, 111 WCB (2d) 629 (2.5 years for sexual exploitation); *R v Young*, 2014 BCSC 1195 (18 months concurrently for breaking and entering, robbery, assault with a weapon, and unlawful confinement); *R v Jahanrakhshan*, 2013 BCCA 322, 108 WCB (2d) 577 (four years for multiple counts of possession and use of forged credit cards); *R v Crespo*, [2016] ONCA 454, 132 OR (3d) 287 (15 months for sexual assault); *R v Todorov*, 2015 QCCQ 8505 (two years less a day for breaking and entering and sexual assault).

65 *R v Adam*, 2017 ONSC 2526.

deported' since Mr Adam's sentence was considerably over 6 months.[66] In *R v Gill*,[67] the court said that "potential collateral consequences regarding deportation do not arise"[68] since a fit sentence would be significantly over 6 months.[69] In *R v Zhai*,[70] the court wrote that it was not necessary to factor immigration consequences into the quantum of sentence. In *R v Stankovic*,[71] the court decided not to consider immigration consequences because they would not make any difference for the access to an IAD appeal. In *R v Jihad*,[72] the same position was agreed upon by both the Crown and defence. In *R v Lauture*,[73] it was noted that nothing could be done to address immigration consequences as a sentencing court was not an appropriate forum to consider them.

(iv) Removal is not considered inevitable or sentencing courts cannot conclusively determine the nature of immigration consequences and, hence, this factor is not given much or any weight. In 2 cases, courts emphasized the existence of discretion not to commence inadmissibility proceedings. For example, in *R v Carrera-Vega*,[74] a judge noted that serious criminality created a possibility of removal, but did not mean that it would necessarily occur. He decided it would be contrary to *Pham* to alter a sentence on the basis of 'sheer speculation'[75] of what might happen as a result of a sentence of incarceration. Similarly, in *R v Brown*,[76] a court noted that inadmissibility creates only potential for deportation, but does not mean that the offender will be deported. In 4 other cases – 2 of them involving refugees – the court could not ascertain what the immigration consequences would be. In *R v*

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66 *Ibid* at para 23 (five years on each count of robbery).

67 *R v Gill*, 2015 BCSC 1907.

68 *Ibid* at para 62.

69 *Ibid* (three years for sexual assault).

70 *R v Zhai*, 2016 BCSC 2495 at para 56 (two counts of trafficking in a controlled substance; one count of unauthorized transfer of a firearm, which carries a mandatory three-year minimum).

71 *R v Stankovic*, 2015 ONSC 6246 (three years for sexual assault).

72 *R v Jihad*, [2015] OJ No 7240 (QL) (66 months for attempted murder).

73 *R v Lauture*, 2015 QCCQ 3470 (four years for robbery, conspiracy, and aggravated assault).

74 *R v Carrera-Vega*, 2015 ONSC 4958.

75 *Ibid* at para 64 (6.5 years for drug importation).

76 *R v Brown*, 2015 ONSC 6430 (18 months for robbery).

Ali,[77] (a refugee from Iraq convicted of aggravated assault), a letter from the Canada Border Services Agency (CBSA) indicated that his status as a refugee was under review, which may or may not result in deportation. Parties agreed that due to the unknown outcome of the review, collateral consequences will not be taken into account for the purpose of sentencing.[78] In *R v Henareh,*[79] for similar reasons, the court concluded that exact immigration consequences could not be ascertained. In *R v Gamarra Moran*[80] and *R v Onwualu*,[81] the judges noted that the question of whether the risk of removal will be realized lies outside the jurisdiction of the sentencing court.

B. Sentences Under 6 Months

Where a fit sentence is in the range of 6 months, *Pham* prompts courts to consider if a sentence at the bottom range or even slightly below it should be imposed in order to avoid immigration consequences. The type of those consequences depends on whether a given offence is punishable by a maximum under 10 years of imprisonment or by a maximum of 10 or more years. Out of a total of 23 decisions, 17 involved offences with a possible maximum of 10 or more years of imprisonment;[82] hence, the immediate immigration consequence at stake was availability of IAD appeal. In the 6 remaining cases, the offences carried a maximum under 10 years and

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77 *R v Ali,* 2015 BCSC 2539.

78 However, even if consequences could be ascertained, it is not likely that they would have made a difference due to the seriousness of the offence. Mr. Ali was sentenced to 8.5 years.

79 *R v Henareh*, 2015 BCSC 2455 (possession of opium for the purpose of trafficking).

80 *R v Gamarra Moran*, 2015 QCCQ 12400 (12 months for breaking and entering).

81 *R v Onwualu*, 2015 QCCA 1515, JE 2015-1560 [*Onwualu*].

82 *R v Pinas*, 2015 ONCA 136, 120 WCB (2d) 11 [*Pinas*]; *R v Nassri*, 2015 ONCA 316, 125 OR (3d) 578 [*Nassri*]; *R v Zheng*, 2013 ONSC 4582, 107 WCB (2d) 813 [*Zheng*]; *R v Abude*, 2016 BCSC 543 [*Abude*]; *R v Ameeri,* 2016 BCSC 1187 [*Ameeri*]; *R v Zhou*, 2016 ONSC 3233 [*Zhou*]; *R v Gomez*, 2017 BCPC 7, 136 WCB (2d) 313 [*Gomez*]; *R v Gugaruban*, 2013 ONSC 3243 [*Gugaruban*]; *R v Vu*, 2015 ONCJ 432 [*Vu*]; *R v Layugan*, 2016 ONSC 2077, 129 WCB (2d) 622 [*Layugan*]; *R v Atta*, 2016 ONCJ 34 [*Atta*]; *R v Jin*, 2016 ONSC 1194 [*Jin*]; *R v Orders*, 2014 BCSC 771, 113 WCB (2d) 153 [*Orders*]; *R v Habeta*, 2014 ABPC 110, 113 WCB (2d) 802 [*Habeta*]; *R v Dhindsa*, 2014 MBPC 55, 119 WCB (2d) 319 [*Dhindsa*]; *R v RL*, 2013 ONCJ 617, 110 WCB (2d) 369 [*RL*]; *R v Al-Mashwali*, 2015 ABPC 240 [*Al-Mashwali*].

immigration consequence revolved around a question of whether inadmissibility will be triggered at all.[83] Some decisions made a clear distinction between these two types of cases, but others merely used general reference to 'immigration consequences' without naming what specifically they might entail.

Like in cases with sentences well above 6 months, there is no uniformity in courts' perceptions of the certainty of removal. 15 out of 23 decisions adopted a working presumption that deportation will follow.[84] Although often not specifically stating that the individual faces certain removal, they do speak of harsh consequences of a sentence over 6 months, which seems to suggest that removal is considered almost certain. In 6 other decisions, the reasons do not allow ascertaining if the risk of removal played any particular role in imposition of a sentence under 6 months or of a discharge.[85] In 2 cases, the court acknowledged that removal would happen only after consideration of the circumstances by immigration officials and, hence, could not be considered automatic.[86]

C. Counsel Submissions on Immigration Consequences

As seen from above, judicial positions on the certainty of removal vary quite significantly. While some of these differences can be attributed to the peculiar circumstances of each case, the nature of defence's submissions regarding immigration consequences may also be a contributing factor. Out of 40 cases with fit sentences over 6 months, only 1 decision – *R v Ali*[87] – mentioned an affidavit of an immigration lawyer explaining immigration

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83 *R v Wheatley*, 2017 ONCJ 175, 138 WCB (2d) 163 [*Wheatley*]; RC, *supra* note 5; *R v Frater*, 2016 ONCA 386 [*Frater*]; *R v Carlisle*, 2016 ONCA 950 [*Carlisle*]; *R v Morris*, 2015 ONCJ 591 [*Morris*]; *R v Zhang*, 2017 BCCA 185, 138 WCB (2d) 317 [*Zhang*].

84 *Pinas*, *supra* note 82; *Nassri*, *supra* note 82; *Zheng*, *supra* note 82; *Abude*, *supra* note 82; *Jin*, *supra* note 82; *Dhindsa*, *supra* note 82; *Zhou*, *supra* note 82; *Gomez*, *supra* note 82; *Gugaruban*, *supra* note 82; *Vu*, *supra* note 82; *R v Carlisle*, *supra* note 83; *Zhang*, *supra* note 83; RC, *supra* note 5; *Frater*, *supra* note 83; *Wheatley*, *supra* note 83. Five of these (the last five) involved offences with a maximum under ten years.

85 *Layugan*, *supra* note 82; *R v RL*, *supra* note 82; *Morris*, *supra* note 83; *Atta*, *supra* note 82; *Orders*, *supra* note 82; *Ameeri*, *supra* note 82. Discharge was granted in the following cases: *R v Mata-Escobar*, [2015] OJ No 7142 (QL); *R v MA*, 2014 ONCJ 667, 118 WCB (2d) 183.

86 *Al-Mashwali*, *supra* note 82; *Habeta*, *supra* note 82.

87 *Ali* ONSC, *supra* note 62.

consequences. In contrast, a higher proportion of cases with sentences in the range of 6 months (6 out of 23) included an opinion letter of an immigration lawyer. The rest of the decisions did not mention such evidence and only referred to the *IRPA* provisions on inadmissibility and/or *Pham*. It should be noted, however, that court transcripts were not analyzed and it is possible that submission on the issue were made, but were not mentioned in the decisions. Arguably, the lack of complete and detailed information on immigration procedures and their consequences may skew judicial assessment not only of the certainty of removal, but also of its relevance as a factor in sentence determination.[88] The contrasting pairs of cases described below demonstrate how the nature of the defence's argument and the level of detail on relevant immigration processes can make a difference in the final outcome.

The first pair – *Nassri* and *Onwualu* - deals with appeals seeking a reduction of 9-month sentences in order to preserve the right to appeal. In *Nassri*, the appellant was sentenced to 9 months of imprisonment for robbery and possession of a weapon. On appeal, he argued that potential removal to Syria made the sentence disproportionate. The Ontario Court of Appeal acknowledged that Syria was one of the most dangerous places in the world and found that a sentence under 6 months was within range, ultimately imposing 6 months less 15 days. The court accepted defence's evidence (based on the opinion of an immigration lawyer) that it was 'almost certain' that a case would be referred for an admissibility hearing and a removal order will be issued. In contrast, in *Onwualu*, the Quebec Court of Appeal refused to reduce a 9-month sentence for simple possession of 8 grams of crack cocaine. The court concluded that it did not need to consider the risks that Mr. Onwualu may face in his country of origin (Nigeria). The court emphasized that this task fell on immigration officials and not the sentencing court:

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88 However, it is important to acknowledge that detailed information does not always make the court's determination of the certainty of removal easy and clear cut. For example, in *R v Henareh*, *supra* note 79, an immigration officer was called as a witness to provide a step-by-step explanation of the inadmissibility process as it is applied to a refugee (Mr. Henareh was a refugee). The court ultimately concluded that immigration consequences were unclear, as much depended on the immigration officials' evaluation of Mr. Henareh's circumstances, the conditions in the destination country, and other factors.

> [51] Sections 112 to 115 of the IRPA provide for a pre-removal risk assessment in most cases where an individual is subject to a removal order....
> [52] It is therefore not for the courts to substitute themselves for the mechanisms set out in the IRPA so as to proceed to a review of pre-removal risks as part of the sentencing decision following a criminal offence. On the contrary, the courts must rather assume that the assessment and review mechanisms set out in the IRPA will be effective in preventing the offender from being sent back to a country where he is at risk of persecution...[89]

The different outcomes in *Onwualu* and *Nassri* can be explained in part by the differences in courts' characterizations of the immigration process and its consequences. In *Nassri*, the court was made aware that the appellant could file a PRRA application in order to highlight to the immigration authorities the risks he might face upon removal to Syria. However, at the time of the appeal, the assessment was not completed and its outcome was unknown. The affidavit of an immigration lawyer explained why PRRA would be futile, making an IAD appeal the only viable option to avoid removal. This information was an important factor in Ontario Court of Appeal's conclusion that Mr. Nassri's removal would be 'virtually certain' in the absence of access to the IAD and, correspondingly, in the ultimate decision to vary the sentence.

In contrast, in *Onwualu*, no affidavit from an immigration lawyer was submitted (at least there is no mention of it in the decision). The Quebec Court of Appeal construed availability of a PRRA as the basis to presume that Mr. Onwualu's removal was not certain and automatic. The scarcity of evidence about the appellant's social situation, family circumstances, prospects for rehabilitation, or the risk of re-offending could have also contributed to the overall conclusion not to vary the sentence. Had more detailed information been provided, especially keeping in mind limitations of PRRAs, it might have led the Court to evaluate the case quite differently.

The second pair of cases – *Habeta* and *Al-Mashwali* – involved applications for discharge in order to avoid triggering inadmissibility provisions.[90] In *R v Habeta*,[91] a refugee from Ethiopia was convicted of

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89 *Onwualu*, *supra* note 81 at paras 51–52.

90 A discharge does not lead to a conviction and, thus, does not trigger section 36(1). Assault causing bodily harm is punishable by a maximum of ten years and the use of a forged document also carries a maximum of ten years if prosecuted by indictment. See *Criminal Code*, *supra* note 17, ss 267, 368. Hence, discharge was the only way to avoid triggering inadmissibility in both cases.

91 *Habeta*, *supra* note 82.

assault causing bodily harm. In *R v Al-Mashwali*[92] a refugee claimant from Yemen was convicted of producing a forged repair invoice for a car that he sold. In both cases, courts accepted that removal was not automatic and that if it were to happen, it would be only after immigration officials reviewed the cases. In *Habeta*, the defence argued that the extreme fear and anxiety that the very prospect of removal will cause Mr. Habeta would make a conviction a disproportionate penalty. The court accepted the argument. It is likely that other factors such as the absence of prior criminal record, remorse, and a positive pre-sentence report contributed to the decision to allow for a discharge.[93] In contrast, in *Al-Mashwali*, the application for discharge was rejected. Taking the approach similar to *Onwualu*, the court concluded:

> [I]t would be wrong for me to grant a discharge to Mr. Al-Mashwali on the assumption that if I do not grant a discharge, and a conviction is entered against him, that those who are granted discretion under the IRPA will improperly exercise that discretion against Mr. Al-Mashwali's interests. To make that assumption is to presume, without a factual foundation, that those entrusted with powers under the IRPA will abuse them.[94]

The defence produced a letter from an immigration lawyer explaining consequences of a criminal record, but the court concluded that opinion evidence on matters of domestic law was not receivable. The exact content of the letter is not known, but, surprisingly, there are some inaccuracies in the court's characterization of the inadmissibility process, which factor into the overall assessment of the certainty of removal and the gravity of immigration consequences of a conviction. For example, it noted that the Immigration Division can make one of four possible decisions, only one of those being issuance of a removal order. However, the court did not acknowledge that the Division has no discretion not to issue a removal order if it finds the person inadmissible.[95] The court also overemphasized immigration officers' discretion not to proceed with the inadmissibility process; as will be shown below, no such discretion exists where a foreign national is involved. Finally, the court mentioned that the Minister may

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92 *Al-Mashwali*, *supra* note 82.

93 A discharge was considered to be within range, although injuries were non-trivial.

94 *Al-Mashwali*, *supra* note 82 at para 42.

95 The removal process would be very different had Mr. Al-Mashwali received status of a protected person. However, his refugee claim was pending at the time of sentencing.

choose to stay a removal order, but such stays are not permanent and persons inadmissible on criminality grounds usually cannot benefit from them.[96]

IV. Federal Court on Discretion in Inadmissibility Process

Several cases in the sample gave much weight to the existence of immigration officers' discretion not to proceed with inadmissibility determination, concluding as a result that removal was far from given. While the number of such cases is relatively small, it is important to ascertain the scope of officers' discretion. For this purpose, we turn to Federal Court jurisprudence and immigration processing manuals.

As outlined in section II, the discretion not to proceed is located at the first two stages of the process, namely, the preparation of a report on inadmissibility and referral of the report to the Immigration Division. Section 44 of the IRPA, which governs those stages, reads:

> 44(1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.
> (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing...[97]

The above provisions give rise to several questions:

(i) Under s. 44(1), does an officer who is of the opinion that a permanent resident is inadmissible for serious criminality have discretion not to prepare and transmit a report to the Minister?

(ii) What is the meaning of "relevant facts" under s. 44(1), namely, are only facts related to the conviction relevant or are personal circumstances of the permanent resident, including humanitarian and compassionate (H&C) considerations, relevant, too?

(iii) Under s. 44(2), what factors is the Minister to take into account in forming an opinion whether the report is well-founded?

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96 The Minister may order stays or temporary administrative deferrals of removal in situations of humanitarian crisis. Administrative deferrals of removal are currently in place for certain regions in Somalia, the Gaza Strip, Syria, Mali, the Central African Republic, South Sudan, Libya, Yemen, and Burundi. See CBSA, "Removal from Canada," online: <https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>.

97 IRPA, *supra* note 7, s 44 [emphasis added].

(iv) Under s. 44(2), does the Minister have discretion not to refer a report to the Immigration Division?[98]

The above issues have been discussed in both processing manuals of the immigration department and Federal Court jurisprudence. The Manuals support the interpretation that discretion exists under both s. 44(1) and 44(2). For example, with respect to the preparation of a report, they say:

> [T]his discretion gives officers flexibility in managing cases where no removal order will be sought, or where the circumstances are such that the objectives of the Act may or will be achieved without the need to write a formal inadmissibility report under the provisions of A44(1).[99]

The Manuals makes it clear that such discretion is to be exercised sparingly and a record of the decision is to be kept for future reference.[100] The Manuals outline factors to be considered when deciding whether to write a report under s. 44(1), namely:

- In minor criminality cases, is a decision on rehabilitation imminent and likely to be favourable?
- Has the permanent resident been convicted of any prior criminal offence? Based on reliable information, is the permanent resident involved in criminal or organized criminal activities?
- What is the maximum sentence that could have been imposed?
- What was the sentence imposed?
- What are the circumstances of the particular incident under consideration?
- Did the conviction involve violence or drugs?[101]

If a report is prepared, a permanent resident is to be informed of the criteria used to assess their case and provided with an opportunity to make submissions.[102] At this stage, the officer will consider factors such as the individual's age at the time of acquiring permanent residence, the length of their residence in Canada, the degree of establishment, location of family

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98 AMM *v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 809, [2010] 3 FCR 291 at para 12 [AAM].

99 Immigration Refugees and Citizenship Canada (IRCC), *Processing Manual*, "ENF 5 – Writing 44(1) Reports," online: <https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf05-eng.pdf> at 8.

100 *Ibid* at 10.

101 *Ibid* at 9.

102 *Ibid* at 12.

and family support responsibilities, criminal activity in which he/she was involved and any other factors the officer deems appropriate.[103]

Similarly with respect to s. 44(2), the Manuals suggest existence of discretion not to refer a report to the Immigration Division.[104] It instructs that exercise of discretion should be guided by the same factors that are considered in writing s. 44(1) reports.[105] In addition, Minister's delegates need to consider the seriousness of the offence, criminal history, length of sentence, and prospect of rehabilitation.[106] For instance, cases like *R v Carrera-Vega* and *R v Brown* (discussed in section III(A)), which involved serious offences of drug trafficking and robbery respectively, would be extremely unlikely to trigger positive exercise of discretion. At the same time, sentencing courts in those cases referred to the discretion not to proceed and concluded that removal was not a given.

The author filed an access to information request seeking to find out the annual breakdown of cases in which discretion under ss. 44(1) and (2) was exercised. The CBSA responded that information on the exercise of discretion under s. 44(1) was not collected electronically and hence could not be reported. With respect to decisions not to refer a report under s. 44(2), the system could provide information only from November 2015 onwards (see table 3).[107] Although this data is not sufficient to draw any generalized conclusions, it is in line with previously mentioned instructions to the officers that the discretion is to be exercised only very rarely. Hence, sentencing courts should not be overly reliant on the existence of discretion

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103 *Ibid*.

104 IRCC, *Processing Manual*, "ENF 6 – Review of Reports Under Subsection A44(1)," online: <https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf06-eng.pdf> at 34–38 [IRCC, ENF 6]. For example, in *R v Ali*, 2015 MBCA 64, 319 Man R (2d) 298 [*Ali* MBCA], the CBSA exercised its discretion not to refer a case to the Immigration Division. The case involved a permanent resident from Somalia sentenced to nine months of imprisonment for dangerous operation of a motor vehicle causing bodily harm. Discretion not to pursue deportation was also exercised in *R v Vazquez-Cabello*, 2015 ABCA 214, 602 AR 129 (convictions of attempted sexual exploitation and breach of recognizance).

105 IRCC, ENF 6, *supra* note 104 at 33. For a list of factors, see page 34.

106 *Ibid* at 35–36.

107 The Field Operational Support System (FOSS), which was used prior to November 2015, was not collecting such data in a reliable manner.

and can safely presume that in the absence of IAD appeal removal is virtually certain.

Table 3. Minister's delegates' exercise of discretion not to refer an inadmissibility report to the Immigration Division of the IRB, A-2017-12736/MEL (CBSA)

Year	Number of cases
2015	1
2016	1
2017 (Jan to Aug)	0

Despite the instructions found in the Manuals, a number of cases sought further clarification on the interpretation of s. 44 from the Federal Court. To date, the jurisprudence remains somewhat mixed,[108] but generally accepts that some discretion exists, at least with respect to permanent residents. Some judges opine that the discretion under ss. 44(1) and (2) is broad enough to consider factors outlined in the Manuals, including those that touch upon humanitarian and compassionate considerations. This is, for example, the position taken by Madam Justice Snyder in *Hernandez*.[109] However, the predominant view (both prior and post-*Hernandez*) is that such discretion is more limited. For example, in *Correia*[110] Justice Phelan concluded that only conviction-related issues, but not H&C, rehabilitation or other factors could be taken into account. He characterized the process as "a very limited inquiry being essentially a confirmation that the conviction was in fact handed down."[111] This position was subsequently adopted by Justice von Finckenstein in *Leong*.[112]

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108 This has been acknowledged by judges: *Spencer v Canada (Minister of Citizenship and Immigration),* 2006 FC 990 at para 15, 298 FTR 267 [*Spencer*]; AMM, *supra* note 98 at para 32.

109 *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2006] 1 FCR 3. See also a similar approach in *Spencer, supra* note 108.

110 *Correia v Canada (Minister of Citizenship and Immigration)*, 2004 FC 782, 253 FTR 153.

111 *Ibid* at paras 22–23. The same point was made in *v Canada (Solicitor General)*, 2004 FC 1126 at para 19, 256 FTR 298 [*Leong*]: "Issues relating to humanitarian and compassionate considerations or the safety of the Applicant are obviously vital to the Applicant. They have no place in these routine administrative proceedings. Rather the *Act* sets out specific procedures for dealing with them in ss. 25, and 112 respectively."

112 *Leong*, *supra* note 111.

In *Cha*,[113] the Federal Court of Appeal suggested that there is little discretion under both s. 44(1) and (2) and that nothing beyond conviction could be considered. However, given that the case concerned a foreign national and the Minister's delegate was empowered to make a removal order without referral to the Immigration Division, the Court specified that it did not wish to be taken as approving or disapproving of earlier determinations in *Hernandez*, *Leong* and *Correia*, which concerned permanent residents.[114] The Court of Appeal concluded that the scope of discretion may vary, depending on the grounds on inadmissibility, whether the person concerned is a permanent resident or a foreign national, and whether the report has to be referred to the Immigration Division.[115] The Court held that officers have no discretion not to proceed in relation to foreign nationals:

> [T]he wording of sections 36 and 44 of the Act and of the applicable sections of the Regulations does not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in Canada, any room to manoeuvre apart from that expressly carved out in the Act and the Regulations. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it.[116]

Given that *Cha* left the conclusions in *Hernandez* and *Correia* untouched, officers are considered to have some discretion under ss. 44(1) and (2) in relation to permanent residents.[117] However, there is no consensus on what the scope of that discretion is.[118] Generally, the majority

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113 *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 FCR 409 [*Cha*].

114 *Ibid* at para 13.

115 *Ibid* at para 22.

116 *Ibid* at para 35.

117 For example, *AMM*, *supra* note 98, reviewed prior caselaw and suggested that there is discretion in case of permanent residents, but not foreign nationals.

118 *Richter v Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, [2009] 1 FCR 675, noted at para 14 that in *Cha*, *supra* note 113, "the question was left open whether some minimal amount of discretion was available." In *Spencer*, *supra* note 108, the Court held that officers may take into account factors outlined in the Manual.

of post-*Hernandez* jurisprudence holds that it is rather narrow.[119] For instance, in *Awed*, Justice Mosley interpreted the word 'may' in s. 44(1) not as connoting discretion, but as merely authorizing an officer to perform an administrative function.[120] Relying on *Awed*, he reemphasized in *Richer* that the *IRPA* does not empower officers to consider personal factors in making s. 44(1) reports.[121] *Melendez* provides the best summary of the existing Federal Court jurisprudence on ss. 44(1) and (2):

> 1. There is conflicting case law as to whether an immigration officer has any discretion under subsection 44(1) of the IRPA beyond that of simply ascertaining and reporting the basic facts which underlie an opinion that a permanent resident in Canada is inadmissible.
>
> 2. Nevertheless, the jurisprudence and the Manual do suggest that a Minister's delegate has a limited discretion, when deciding whether to refer a report of inadmissibility to the Immigration Division pursuant to subsection 44(2) or to issue a warning letter, to consider H&C factors, including the best interests of a child, at least in cases where a permanent resident, as opposed to a foreign national, is concerned.
>
> 3. Although the Minister's delegate has discretion to consider such factors, there is no obligation or duty to do so.
>
> 4. However, where H&C factors are presented to a delegate of the Minister, the delegate's consideration of the H&C factors should be reasonable in the circumstances of the case, and in cases where a delegate rejects such factors, the reasons for rejection should be stated, even if only briefly.[122]

V. CONCLUDING REFLECTIONS

The nature of immigration consequences that a given individual is likely to face depends on a variety of factors, including the person's immigration status (permanent resident/foreign national/refugee claimant/protected person), the type of offence committed (with reference to the maximum

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119 The Federal Court of Appeal noted this trend in *obiter* in *Bermudez:* "... a number of decisions post *Hernandez* ... have tended to significantly narrow the discretion contemplated at section 44 of the *IRPA* in *Hernandez*." See *Bermudez v Canada (Citizenship and Immigration)*, 2016 FCA 131, [2017] 1 FCR 128 at para 44. Note that the case dealt with cessation of refugee protection and an officer's discretion to consider H&C factors under section 108(2) of the IRPA.

120 *Awed v Canada (Minister of Citizenship and Immigration)*, 2006 FC 469 at para 18, 148 ACWS (3d) 282.

121 *Ibid* at para 13.

122 *Melendez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 1363, [2017] 3 FCR 354 at para 34.

sentence that it carries), the conditions in the destination country, and the exercise of immigration officers' discretion. The participants of sentencing hearings are still developing their understanding of the nuances of immigration law, of the relevant factors and their implications for evaluation of immigration consequences. The suggestions below can contribute to the development of a more consistent and accurate decision-making on immigration consequences:

1. Clearly acknowledging the certainty of removal as a factor relevant to determining the weight to be given to immigration consequences.

Arguably, the certainty of removal should be the starting point in the analysis of immigration consequences. How else would courts be able to determine the seriousness of those consequences? If removal is nearly certain, the immigration consequences should be given more weight; and vice versa. The hypothesis that the certainty of removal is likely to be an important factor in sentence determination was confirmed in many, but not all reviewed cases. Only about a third of all examined decisions clearly stated their position on the certainty of removal. Another third was ambiguous on the issue and the remainder either considered removal speculative due to the existence of discretion in the inadmissibility process, or could not determine what the exact consequences would be, or did not consider such consequences relevant.

2. Defence should be better versed in immigration law.

Although we have to be careful not to transform a sentencing hearing into an immigration inquiry, it seems that accurate evaluation of immigration consequences is impossible without detailed information on relevant factors and procedures. There is an increased responsibility on defence counsel to inform their clients of immigration consequences[123] and to provide submissions to courts on the issue. In fact, Lawyers' Professional Indemnity Company (LawPRO), which provides professional liability insurance to lawyers, advises that "a lawyer who fails to address the potential

[123] For example, caselaw on validity of guilty pleas suggests that an offender's lack of understanding of a significant collateral consequence (such as an immigration one) may render the guilty plea uninformed. See *R v Quick*, 2016 ONCA 95; see also *R v Shiwprashad*, 2015 ONCA 577. Nevertheless, unlike in the United States (see *Padilla v Kentucky*, 130 S Ct 1473), Canadian courts stopped short of imposing a duty on defence counsel to advise clients if a guilty plea would trigger deportation.

immigration consequences of a client's conviction could be exposed to a claim."[124] In particular, it would be good practice for defence to:

(i) know the differences in inadmissibility and removal procedures for permanent residents, foreign nationals and refugees/protected persons and to specify the exact status of their clients in submissions to courts. In fact, some courts suggested that it should be standard practice for counsel to provide information on an offender's immigration status as is "done with respect to an offender's age and criminal record."[125]

(ii) seek an opinion of an immigration lawyer, explaining implications of a sentence/conviction, viability of alternatives to IAD appeal, and other relevant factors;

(iii) provide sentencing courts with an overview of the Federal Court jurisprudence on the interpretation of discretion under s. 44. This will help alleviate concerns noted in some of the examined cases where sentencing courts interpreted this section as conferring significant discretion on immigration officers. Statistical data on s. 44 decisions could add a useful reality-based perspective demonstrating how rare the positive exercise of such discretion is.

(iv) where an individual is a refugee, it may be worthwhile adopting a line of argument developed in *Habeta*, which focuses on the extreme stress that the very prospect of removal would cause the applicant. This would shift the attention away from trying to second-guess how immigration authorities would evaluate the case to focusing on the actual experiences of individuals faced with a prospect of removal to danger.

(v) be aware that pre-sentence custody is included in calculation of the term of imprisonment for immigration purposes and ensure credit given for such custody does not make the client ineligible for IAD appeal.

3. Considering the certainty of removal as a relevant factor in all cases, regardless of the length of a fit sentence.

There currently exist different regimes with respect to consideration of immigration consequences based on the length of a fit sentence. In cases with a range around 6 months, *Pham* directs courts to consider immigration

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124 Katie James & Nora Rock, "Can a Criminal Conviction Make Your Client Inadmissible for Residency/Citizenship?" online: <https://*www.practicepro.ca/information/doc/conviction_inadmissible.pdf*>.

125 *Ali* MBCA, *supra* note 104 at para 12.

consequences and failure to do so constitutes an error in law.[126] In contrast, no similar requirement has been firmly recognized with respect to cases with a range well over 6 months. Although prior jurisprudence noted that the certainty of removal may be taken into account to slightly mitigate a sentence, no uniform approach has emerged. Currently, the approach depends on a court and, as a result, in some cases, such consequences may remain unaddressed. Defence seems to perpetrate the disparity between the two groups of cases as it tends not to submit immigration lawyers' opinions as evidence in cases where a sentence is well over 6 months. In the examined sample, such an opinion was submitted in only one out of 40 cases. In contrast, such opinions were more frequently submitted where a range of sentence was around 6 months: 6 out of 23 in the examined sample. This tends to reinforce the idea that where removal is inevitable, immigration consequences need not be considered at all. As mentioned earlier, failure to at least slightly mitigate a sentence may give rise to parity concerns as, due to the current legislative framework, persons subject to removal orders are likely to spend longer in prison without access to parole than those who are not.

Ultimately, however, all parties to the process – the defence, the Crown and courts – have a role to play in developing a more principled and nuanced approach to the evaluation of collateral immigration consequences. While courts should be motivated to reflect more deeply on how they determine the nature and weight of such consequences, Crown and defence should ensure that courts have all necessary information to make such determinations.

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126 *R v De Aquino*, 2017 BCCA 266.

Disclosure in the 21st Century: A Comparative Analysis of Three Approaches to the Information Economy in the Guilty Plea Process

MYLES ANEVICH *

ABSTRACT

The Criminal Justice System in Canada and the United States is no longer a system based upon trials, it is now a system of plea bargaining. Though the system of adjudication has changed, in the American Federal System disclosure obligations on the prosecution have not evolved. At the guilty plea stage disclosure obligations are not minimal, they are practically non-existent. This article sets the stage for the current state of the law in the American Federal System and then proposes three possible avenues for reform ranging from moderate to extreme. These proposed reforms are 1) a reimagining of *Brady* obligations in light of the Seventh and Tenth Circuits' interpretation of *Ruiz*; 2) a wholesale adoption of the American Bar Association's 1996 proposed reforms; or, 3) adopting the Canadian approach to disclosure obligations at the plea-bargaining stage. The article concludes by advocating for the adoption of the Canadian model, suggesting that the American Bar Association Reform would be impractical and the reimagining of *Brady* would not go far enough to adapt to the 21st century method of criminal adjudication.

* Myles Anevich, BA (McGill University), JD (University of Windsor), LLM (Columbia Law School), is a criminal defence attorney practicing in Toronto Ontario. He was called to the Bar of Ontario in 2017.

I. INTRODUCTION

In the vast majority of cases in both Canada and the United States, the popular conception of the criminal trial process that we see on television and learn in high-school civics classes does not exist. The common expectation is a process where an individual is accused of a carefully defined crime, and prosecutors attempt to convince a judge and jury of their guilt beyond a reasonable doubt in an adversarial trial against a "vigorous and effective defence lawyer."[1] Instead, over the past few decades the Criminal Justice systems of Canada and the United States have slowly transitioned from this adversarial process of adjudication by a neutral trier of fact, to a quasi-inquisitorial system where guilt is determined through negotiations with a member of the state bureaucracy.

In both Canada and the United States, a higher proportion of guilty verdicts are as a result of pleas, as opposed to trials.[2] Guilty pleas must be voluntary and informed, and courts will inquire into these two aspects, but otherwise they are subjected to little scrutiny and great deference. However, the current state of the law in the United States is jurisprudentially under-equipped to fairly and appropriately handle this transition. The law is stuck in a world of trials, not guilty pleas, and constitutional protections have not caught up to the new system of adjudication.

This article attempts to address this issue, first by establishing the current state of the law and its inherent failures, and then by transitioning to three potential avenues of reform: one grounded purely in pre-existing jurisprudence, one grounded in a fundamental shift in the administration of the criminal justice system itself, and finally one that is based upon the Canadian approach to this very same issue.

II. DISCOVERY OBLIGATIONS IN THE CRIMINAL PROCESS

The discovery process is a crucial procedural safeguard for the accused, helping to protect against wrongful convictions and compensate for the

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1 Gerrard E Lynch, "Our Administrative System of Criminal Justice" (1997–1998) 66 Fordham L Rev 2117 at 2118–2119.

2 See e.g. Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 Windsor Rev Legal Soc Issues 1 at 2; see also US, Bureau of Justice Statistics, Federal Justice Statistics Program 2014 – Statistical Tables (March 2017), Table 4.2, online: <https://www.bjs.gov/content/pub/pdf/fjs14st.pdf> [BJS 2014].

investigatory power imbalance inherent in the system by allowing each side to adequately prepare their case.[3] Expansive and meaningful discovery laws help protect against wrongful convictions by allowing the defence to adequately and vigorously challenge evidence, exposing potential eyewitness misidentifications and false confessions.[4] In addition to ensuring a more fair and accurate criminal justice system, practitioners in jurisdictions with more expansive discovery regimes report a more efficient process, with fewer reversals and retrials, and more cases resolving earlier in the process.[5] In the alternative, inadequate discovery laws undermine the due process rights of accused persons and threaten the reliability of outcomes.[6]

A. The Current American Approach

From a plain and textual reading of the Fifth and Sixth Amendments to the United States Constitution, it would appear that a defendant in the federal system would have access to a broad and liberal system of disclosure and discovery regarding the prosecution's case.[7] The due process, nature and causes, and confrontation clauses would seemingly on their face necessitate some form of discovery and disclosure of inculpatory evidence.[8] However, contrary to this reading of the constitution, there is no constitutional right to discovery of inculpatory evidence.[9]

A federal prosecutor's discovery obligations for inculpatory evidence are roughly encapsulated by Rule 16(a) of the *Federal Rules of Criminal Procedure*,

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3 The Justice Project, *Expanded Discovery in Criminal Cases: A Policy Review* (Washington, DC: The Justice Project, 2007) at 1.

4 *Ibid*. Wrongful convictions in this sense can be grounded in multiple factors, but most commonly arise out of either factual or legal misunderstandings that appropriate disclosure would help address. For more examples and further explanation, see Sherrin, *supra* note 2 at 7–13.

5 The Justice Project, *supra* note 3.

6 *Ibid*.

7 US Const amend V, VI. Specific references are to the clause "nor be deprived of life, liberty, or property, without due process of law," in the 5th Amendment, and "...and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him," in the 6th amendment.

8 After all, what use is a right to cross-examine adverse witnesses if that right does not include an ability to do a good job cross-examining by having materials available to you before trial.

9 As Judge Learned Hand stated in 1923, "While the prosecution is held rigidly to the

which sets out an extremely limited obligation. Regarding exculpatory evidence, the Supreme Court held in *Brady v Maryland* that "...the suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[10] This right was later expanded in *United States v Bagley* to include evidence that can be used for impeachment purposes.[11] According to the Supreme Court, the duty to disclose this type of evidence is applicable even when there has not been a *Brady* request from the defendant.[12]

Unfortunately, *Brady* is largely inapplicable to the plea-bargaining process. Not only does the disclosure obligation not trigger immediately, but even if it did, to find a violation of *Brady* a defendant would have to show "a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different."[13] Essentially *Brady* mandates prosecutors, convinced of the strength of their case (and potentially suffering from confirmation bias), to engage in a prospective analysis of potential exculpatory elements. This prospective analysis is then retroactively analyzed by judges, after having seen how all of the evidence plays out in order to determine if any piece, or pieces of information, would have changed the result. As the Supreme Court demonstrated in *United States v Turner*,[14] this analysis is quite challenging.

The key flaw in this regime is threefold. First, the prosecution at this early assessment stage does not know the defence's strategy, therefore it is hard to see how they can truly know if a piece of evidence could be utilized at trial. Second, it is easy to imagine a scenario in which exculpatory and inculpatory evidence intersect, with both sides seeing a piece of evidence as beneficial to their case and the prosecutor choosing not to disclose. Third, at the judicial assessment stage it is near impossible to retroactively assess

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charge, he need not disclose the barest outline of his defence." *United States v Garsson*, 291 F 646 at 649 (SD NY 1923).

10 *Brady v Maryland*, 373 US 83 at 87 (USSC 1963) [*Brady*].

11 *United States v Bagley*, 473 US 667 (USSC 1985) [*Bagley*].

12 See *United States v Agurs*, 427 US 97 at 107

13 *Bagley*, *supra* note 11 at 682.

14 *United States v Turner*, 582 US __ (USSC 2017) [*Turner*].

how the disclosure of that piece of evidence could have altered how the trial unfolded.[15]

Due to these failures inherent in the system, it is highly unlikely that almost any failure to disclose potentially exculpatory or impeachment evidence at the plea-bargaining stage would meet the standard set by the Supreme Court. The conclusion we draw from this is even if upon appeal a defendant can show that the piece of evidence would fit into the *Brady/Giglio* framework, the applicability of harmless error analysis and the limits of hindsight make this protection effectively meaningless in the vast majority of cases.

III. Plea Bargaining as the Hegemon of the American Criminal Justice System

Plea bargaining has become so pervasive within the criminal justice systems of the United States that it can be said "to affect almost every aspect of [the] system, from the legislative drafting of substantive offences"[16] to the rehabilitation process in correctional institutions.[17] With this reality, some scholars argue that there are two options in practice; either society fully embraces a "system of negotiated case resolution that is open, honest, and subject to effective regulation [or] one that has been driven underground."[18]

In 2012, of the 96,260 criminal defendants in the Federal System whose cases came to a resolution, 89% pled guilty, 8% had the charges dismissed, and only 3% went to trial.[19] In 2014, among the 85,781 criminal defendants whose cases came to a resolution, a similar 89% of defendants pled guilty, with 2.5% of defendants going to trial.[20]

As the Supreme Court of the United States observed in *Lafler v Cooper*, "the reality [is] that [the] criminal justice [system] today is for the most part

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15 For example, compare the way the majority and dissent attempt to apply the test in *Turner*, *supra* note 14.

16 Albert W Alschuler, "Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System" (1983) 50 U Chicago L Rev 931 at 932.

17 *Ibid*.

18 *Ibid* at 935.

19 US, Bureau of Justice Statistics, Federal Justice Statistics, 2012 – Statistical Tables (January 2015), Table 4.2, online: <www.bjs.gov/index.cfm?ty=pbse%side=62>.

20 BJS 2014, *supra* note 2, Table 4.2.

a system of pleas, not a system of trials."[21] In *Lafler's* companion case *Missouri v Frye*, Kennedy J., put a finer point on this observation, stating: "[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system."[22]

The conception of plea bargaining is somewhat at odds with the actual functioning of the justice system. From a bird's eye perspective, the culture of the Canadian and American justice systems treats the parties to a criminal matter in similar fashion to those in a civil suit. Courts do not function as a truth-seeking organ of the state, instead they sit as neutral bodies to resolve disputes between formally equal parties.[23] Referring to the Federal Justice System of the United States Gerrard Lynch once observed:

> While some special rules apply to criminal cases, in its essential structure a criminal case is nothing more than an ordinary lawsuit: the state, like a private party in a tort or contract action, is just one entity that may come before the court to present a claim for relief, and the defendant is nothing more or less than the party from whom that relief is sought. Just as in a civil case, if the plaintiff party elects to withdraw its complaint, or if the defendant acknowledges his liability and agrees to the relief, there is no longer a dispute for the court to resolve. And as in a civil case, the parties may settle their disagreement by jointly agreeing to some compromise, and if they do, the court will not (much) inquire into whether that is the "right" result under the law, for their compromise once again has the effect of leaving no dispute for the court to arbitrate.[24]

The fundamental issue that arises from this reality though is that the parties are not equal. Defendants in the vast majority of cases lack the investigative resources of the state, and the funds to sustain a prolonged case. From this perspective to have a meaningful process of plea bargaining in line with the ethos of our adversarial systems the information gap must be narrowed. While defendants cannot commandeer the state to investigate all aspects of interest in their case, whatever the fruits of the state's investigation are must be shared with the defence to have meaningful resolution discussions as anything close to resembling even parties.

In the face of this reality it is both strange and unsettling that the law has not adapted in the United States to the new order of the criminal

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21 *Lafler v Cooper*, 132 S Ct 1376 at 1388 (USSC 2012) [*Lafler*].

22 *Missouri v Frye*, 132 S Ct 1399 at 1407 (USSC 2012), quoting Robert E Scott & William J Stuntz, "Plea Bargaining as Contract" (1992) 101 Yale LJ 1909 at 1912 [emphasis in original].

23 Lynch, *supra* note 1 at 2120.

24 *Ibid* at 2120–2121.

process. Effectively the current state of the law is that 97% of accused, by virtue of deciding to plead guilty, are not afforded the already minimal disclosure obligations guaranteed by the Fifth Amendment. Not only is this current interpretation of the law remarkably under-inclusive and contrary to the underlying principles of due process as set out in the *Bill of Rights*, but it is also dangerous and risks wrongful convictions.

IV. Proposed Reforms

In the face of this challenge in the criminal justice system, I propose three possible paths for reform. These three paths range from a moderate expansion of existing jurisprudential approaches, to a fundamental reimagining of the methods and mechanisms of discovery in the criminal process. The first proposed reform would fall into the first category, and is a moderate expansion of the rights of accused persons that relies on existing jurisprudence. Under this approach prosecutors would be required to disclose *Brady* material before a guilty plea, with a failure to do so vitiating the voluntariness of the plea. The second proposed reform is significantly more extreme and would require a fundamental reimagining of the criminal disclosure process. This would be in the form of the wholesale adoption of the 1996 proposed American Bar Association Reforms. The third potential avenue of reform is to adopt a disclosure regime similar to the one in Canada. This would represent somewhat of a middle-ground between the two paths and would vindicate the rights of accused individuals while not drastically altering the criminal justice system.

A. Brady Violations as a Method to Invalidate Guilty Pleas

1. Roadmap for a Right

Regardless of whether any single piece of information would change the result of a case if it went to trial, proponents of a liberal federal discovery regime have observed that access to information is not only influential at the trial stage, but also during the plea bargaining process.[25] Rule 11 of the *Federal Rules of Criminal Procedure* requires that a defendant who is pleading

[25] Ronald J Allen et al, *Criminal Procedure: Adjudication and Right to Counsel*, 2nd ed (New York: Wolters Kluwer, 2016) at 1185.

guilty does so knowingly and voluntarily.[26] I would suggest that knowing the information the prosecution intends to rely upon ought to be a necessary step to satisfy these criteria. However, under the current state of the law it is unclear if jurisprudence is evolving in this direction.

Looking directly at the applicability of *Brady* to plea bargaining, in *Ruiz* the Supreme Court expressly held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."[27] The Court reached this conclusion by looking at the purpose for the *Brady* rule, and finding that "the need for this information is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea."[28] The Supreme Court went even further in rejecting a *Brady* requirement for impeachment evidence at the plea bargaining stage by holding that there is no obligation to disclose information related to potential affirmative defenses, such as self-defence, stating: "We do not believe the Constitution here requires provision of this information to the defendant prior to plea bargaining."[29] This rejection of a *Brady* standard at this early stage of the criminal process was, in the view of the majority of the Court, partly because it would "significantly interf[ere] with the administration of the plea-bargaining process."[30]

Since *Ruiz* there has been a split amongst the federal circuits on exactly what the case stands for. The disagreement centers on whether *Ruiz* suggests that a failure to disclose material exculpatory evidence violates due process, or whether it instead is an absolute bar to *Brady* challenges as a means to invalidate guilty pleas.[31] This disagreement arises because although the Court in *Ruiz* found that there is no *Brady* violation for a failure to disclose impeachment evidence, the Court went against the trend of their jurisprudence and drew a distinction between impeachment evidence and

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26 *Federal Rules of Criminal Procedure*, Fed R Crim P 11, online: <https://www.justia.com/criminal/docs/frcrimp/>.

27 *United States v Ruiz*, 536 US 622 at 633 (USSC 2002).

28 *Ibid* [emphasis in original].

29 *Ibid.*

30 *Ibid.*

31 Michael Nasser Petegorsky, "Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining" (2013) 81 Fordham L Rev 3599 at 3625.

exculpatory evidence.[32]

The Seventh and Tenth Circuits have interpreted *Ruiz* to require the prosecution to disclose exculpatory evidence prior to the entry of a guilty plea.[33] In *McCann v Mangialardi*, the Seventh Circuit held that *Ruiz* strongly suggested that the government is required to disclose material exculpatory evidence prior to a guilty plea.[34] The Seventh Circuit reached this decision by finding that the Supreme Courts' basis for not requiring the disclosure of impeachment information prior to the acceptance of a plea rested on two reasons. First, impeachment information was unlikely to be "*critical information of which the defendant must always be aware prior to pleading guilty*";[35] and second, impeachment information is "special in relation to the *fairness of the trial*, not in respect to whether a plea is *voluntary*."[36] Based on this language, the Circuit found that a distinction was drawn between impeachment and exculpatory evidence, and therefore the Supreme Court would likely find a due process violation if the government withheld material exculpatory evidence prior to a guilty plea.[37]

The Tenth Circuit reached a similar conclusion to the Seventh Circuit in *United States v Ohiri*.[38] In *Ohiri*, the Circuit court similarly interpreted *Ruiz* as drawing a distinction between impeachment and exculpatory evidence, finding impeachment evidence relevant to trial fairness only, whereas exculpatory evidence was characterized as "critical information of which the defendant must always be aware prior to pleading guilty."[39] The Court in coming to this conclusion also based their decision on the Supreme Court's "statement that Ruiz's constitutional *Brady* rights were protected by the plea agreement's stipulation that she would receive all

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32 *Ibid*. Prior to *Ruiz*, the Supreme Court had treated impeachment and exculpatory evidence as "constitutionally indistinguishable."

33 *Ibid* at 3625–3628.

34 *McCann v Mangialardi*, 337 F (3d) 782 at 787 (7th Cir 2003).

35 *Ibid* [emphasis in original].

36 *Ibid* [emphasis in original].

37 *Ibid* at 788.

38 *United States v Ohiri*, 133 F App'x 555 (10th Cir 2005) [*Ohiri*].

39 *Ibid* at 562, citing *Ruiz*, *supra* note 27 at 630.

material exculpatory evidence."[40]

On the other hand, *Ruiz* has been interpreted by the Second, Fourth and Fifth Circuits as an absolute ban on applying *Brady* to guilty pleas.[41] The Fifth Circuit in *United States v Conroy* held that a guilty plea precludes a *Brady* challenge.[42] In reaching this decision the circuit held that *Brady*, at its core, protected a right to a fair trial and was therefore of no application when a defendant waived their right to trial.[43] Furthermore, the Circuit interpreted *Ruiz* as drawing no distinction between impeachment and exculpatory evidence, and therefore precluding all post-guilty plea claims.[44]

The Fourth circuit similarly interpreted *Ruiz* to preclude post-plea *Brady* claims in *United States v Moussaoui*.[45] In *Moussaoui* the Circuit Court held that *Brady* was purely a trial right, designed to protect the right to a fair trial and a fairly achieved verdict. Therefore, an admission of guilt would negate the purpose of the right, and therefore the procedural protections that accompany it.[46]

The application of *Brady* to the guilty plea process was also rejected by the Second Circuit Court of Appeals in *Friedman v Rehal*,[47] and the District Court for the Eastern District of New York in *Carrasquillo v Heath*.[48] In *Friedman* the Court rejected applying *Brady* to guilty pleas in part based on *Ruiz*, but also based on a 2000 Fifth Circuit opinion in which the Court *en banc* ruled that applying *Brady* to the guilty plea process would constitute a "new rule-one that seeks to protect a defendant's own decision making regarding the costs and benefits of pleading and of going to trial."[49] In *Carrasquillo* the District Court summarized the applicable law and rejected the appellant's *Brady* claim, stating "…there is no clearly established federal

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40 Petegorsky, *supra* note 31 at 3627, citing *Ohiri*, *supra* note 38 at 562.

41 Petegorsky, *supra* note 31 at 3628–3631.

42 *United States v Conroy*, 567 F (3d) 174 (5th Cir 2009) [*Conroy*].

43 *Ibid* at 178.

44 Petegorsky, *supra* note 31 at 3628, citing *Conroy*, *supra* note 42 at 179.

45 *United States v Moussaoui*, 591 F (3d) 263 (4th Cir 2010) [*Moussaoui*].

46 Petegorsky, *supra* note 31 at 3629, citing *Moussaoui*, *ibid* at 285.

47 *Friedman v Rehal*, 618 F (3d) 142 (2d Cir 2010) [*Friedman*].

48 *Carrasquillo v Heath*, 2017 WL 4326491 (ED NY) [*Carrasquillo*].

49 *Friedman*, *supra* note 47 at 154–155, citing *Matthew v Johnson*, 201 F (3d) 353 at 362 (5th Cir 2000) (en banc).

law requiring the production of potentially exculpatory or impeachment evidence prior to a defendant's guilty plea, the Court cannot find that the State court unreasonably applied federal law in rejecting Petitioner's *Brady* claim."[50]

Based on these two different interpretations of *Ruiz*, it appears that there is a disagreement within the circuits that makes the intervention of the Supreme Court a national interest. While some would suggest that the Supreme Court's recent ineffective assistance of counsel jurisprudence might serve as a guide for reform,[51] I would suggest that a broad interpretation of *Turner* as applied to existing guilty plea jurisprudence would be sufficient, with one exception. In *Turner*, though the central doctrinal question was somewhat avoided, the Supreme Court revisited the legal framework for *Brady* applications. In this case the government made two significant concessions regarding the state of *Brady* jurisprudence, acknowledging that the Supreme Court has held that the *Brady* rule's "overriding concern [is] with the justice of the finding of guilt,"[52] and that the Government's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[53]

2. Remedy for Breach

From this starting point, the central question to be decided in *Turner* was the materiality of the withheld exculpatory evidence.[54] Evidence is material within the meaning of *Brady* "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[55] The question before the Supreme Court was the

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50 *Carrasquillo*, *supra* note 48.

51 For example, Petegorsky, *supra* note 31 at 3641 proposes that a broad interpretation of *Ruiz*, *Lafler*, and *Missouri* could lead to the inference that *Brady* applies to the voluntariness of guilty pleas.

52 *Turner*, *supra* note 14 at 10, citing *Bagley*, *supra* note 11 at 678.

53 *Turner*, *supra* note 14 at 10, citing *Kyles v Whitley*, 514 US 419 at 439 (USSC 1995) [*Kyles*].

54 *Turner*, *supra* note 14 at 11.

55 *Cone v Bell*, 556 US 449 at 469–470 (USSC 2009). In *Turner*, the Supreme Court then expanded on this concept by applying its decision in *Kyles*, holding that a reasonable probability of a different result is one in which the suppression of evidence "undermines confidence in the outcome of the trial" (*Kyles*, *supra* note 53 at 434).

"legally simple but factually complex"[56] determination of whether in light of the entire factual record, if the withheld evidence had been disclosed if the result would have been different.[57]

Based on *Turner*, the most recent Supreme Court decision to interpret *Brady*, if the Seventh and Tenth Circuits are correct and *Ruiz* allows *Brady* claims to apply to guilty pleas, then in order to succeed a petitioner must simply show they would not have pled guilty if they had seen the evidence.[58]

As noted earlier, there is one exception to relying on *Brady* jurisprudence alone, which would be the importation of the Supreme Court's approach to the requirements for a showing of prejudice in *Lee v United States*.[59] *Lee* was a case involving ineffective assistance of counsel at a guilty plea based on deficient advice regarding the immigration consequences of a guilty plea.[60] A central conflict within this case was whether the test for showing prejudice was on the denial of a right, or the denial of a result, with the latter requiring a showing of a prospect of success at trial.[61] The Court held that a prospect of success at trial was not required for a reversal, but instead, an individual determination of the specific factors and preferences that would have caused the accused to reject the plea.[62] I would import this standard into the analysis, requiring a showing that based on some aspect of the withheld information the accused would not have pled guilty.

The SCOTUS in *Lafler* and *Frye* previously recognized how the method of resolution has shifted from trials to guilty pleas.[63] This reform simply builds on this recognition and adapts existing jurisprudence to the modern method of case resolution. Since the method of resolution has so fundamentally changed, so too must the conception and implementation of rights. The parties in a criminal proceeding are not equals in many ways, especially in a system dominated by the discretion of an adversarial party.

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56 *Turner*, *supra* note 14 at 11.

57 *Ibid.*

58 This would also be true if the Supreme Court would settle the disagreement between the circuits and definitively rule on this issue.

59 *Lee v United States*, 137 S Ct 1958 (USSC 2017) [*Lee*].

60 *Ibid* at 1963.

61 Compare reasoning *ibid* at 1971, Thomas J (dissenting).

62 *Ibid* at 1966.

63 See *Lafler*, *supra* note 21; see also *Frye*, *supra* note 22.

However, by giving existing jurisprudence a broad reading the SCOTUS can significantly remedy this power imbalance, help avoid uninformed pleas, and bring disclosure obligations into the 21st century.

If courts are reticent or fail to reform disclosure obligations, statutory mechanisms can be used to accomplish this task. The most sweeping of these proposals was the 1994 American Bar Association proposed reform to the discovery obligations in the federal criminal justice system.

B. American Bar Association Proposed Reform

In 1994 the American Bar Association's House of Delegates approved a new set of standards for discovery obligations in the criminal justice system.[64] The organization released this updated set of standards to reflect the development of the law since its last edition, and the "growing recognition on the state and federal levels that expanded pretrial discovery in criminal cases is beneficial to both parties and promotes the fair administration of the criminal justice system."[65] These proposed standards essentially call for full disclosure of all information in possession of the prosecution, with limited exceptions to protect safety of witnesses and privilege, which would be counterbalanced by significant defence discovery obligations.[66] The drafters noted that in crafting these new standards they were meant to be interpreted in their totality, therefore any alterations to obligations would have to be counterbalanced by changing the obligations on the other side.[67]

Though these suggestions are somewhat revolutionary and would fundamentally alter the discovery process, they were grounded in an effort to create a fairer and more efficient system of discovery. The Standards were to be interpreted in light of the objectives of pre-trial procedures, which, according to the ABA, centred on efficiency and fairness.[68]

Standards 11.2-1 and 11.2-2 set out a complete reciprocal relationship that was "carefully crafted to comply with applicable constitutional rules and

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64 American Bar Association, *ABA Standards for Criminal Justice: Discovery and Trial by Jury*, 3rd ed (Chicago: ABA, 1996).

65 *Ibid* at xv.

66 *Ibid* at xvi.

67 *Ibid* at xvii.

68 *Ibid* at 1, standard 11-1.1, objectives of pretrial procedures.

to provide a fair balance of obligations upon the prosecution and defense."[69] The Standards required the prosecution to not just disclose the typical *Brady/Giglio* material, but also all documents or objects in the possession of the prosecution related to the impugned conduct or character of the accused; and the names, addresses, and statements of "all persons known to the prosecution to have information concerning the offense charged"[70] and which of these people the prosecution intends to call as witnesses.[71] The Standards went even further in requiring disclosure of if the defendant was subject to electronic surveillance, or search and seizure.[72]

Interestingly, the Standards are ambiguous on a key aspect of the prosecution's obligations, specifically at what point the prosecution was obligated to fulfil their discovery obligations. Though the standard itself was silent, the accompanying commentary made clear that the prosecution's disclosure obligations would trigger automatically, which is to say, absent a defence request, "at a reasonable time prior to trial, to be specified in advance, so that the defense will have a meaningful opportunity to review and analyze the materials."[73] The exact definition of what constituted a reasonable time was not explicitly set out, but instead was suggested that the disclosure process "should be conducted as early as possible, to enable both parties to make meaningful use of the information."[74] This requirement of meaningful use of the information would by implication mean that disclosure would need to take place before the plea bargaining stage of the criminal process.

These Standards would have been revolutionary, fundamentally altering obligations and the balance of power within the federal system. However, it

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69 *Ibid* at 13, standard 11-2.1, commentary.

70 *Ibid* at 11, standard 11-2.1(a)(ii).

71 *Ibid* at 11–12, standard 11-2.1(a)(i)–(viii), 11-2.1(b).

72 *Ibid* at 12, standard 11-2.1(c)–(d).

73 *Ibid* at 13. The exact wording of the commentary is as follows:

> The Third Edition Standards do not require that a specific request be made by the defense to trigger pretrial discovery obligations for the government. Such a requirement serves little purpose, and can be a trap for unwitting defense counsel. This neither enhances the fairness of the criminal justice system nor promotes equality among similarly situated defendants. Thus, under the revised rules, the prosecution has disclosure obligations in every criminal case, whether or not a defense request for discovery has been made.

74 *Ibid* at 14.

is notable that these obligations potentially would have presented challenges during national security prosecutions, specifically under CIPA procedures, as the requirements of the two systems somewhat conflict.

While the concrete disclosure suggestions might be a step-too far for some and represent a fairly extreme position that seemingly brings the civil discovery system into the criminal sphere, the suggested remedies are notable and appear like they would be a strong step towards reform if adopted.[75] Under the proposed ABA model, non-compliance with a disclosure rule would give the court a range of options in order to mitigate the harms caused by non-disclosure. These remedies include: ordering the non-compliant party to disclose the previously undisclosed material, granting a continuance, prohibiting the non-compliant party from relying upon the undisclosed evidence, or allowing a judge to enter an order it deems appropriate in the circumstances.[76] The potential remedies also extended to sanctions directly against counsel.[77]

The central idea behind this range of sanctions was that the sanction should be proportionate to the offending conduct and the purpose of the sanction should be to mitigate any unfairness caused by a failure to disclose.[78] The key difference between this proposed model, and the current federal procedure is that it is prospective, as opposed to retrospective. Since there is a free flow of information between the prosecution and the defence, disclosure errors are easier to spot and the court can fashion precise remedies to combat the specific scope of unfairness caused. Though under this system the decision of the District Court would likely be weighed against the same standard on appeal, with the same deference given to the

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75 By "Civil Discovery System," I mean a system akin to the federal civil discovery rules that mandate a mutual open-file discovery system and exchange of all relevant information going toward the disposition of the matter, including "list of witnesses, including their phone numbers and address; the designation of witnesses whose testimony is expected to be given by deposition; and the identification and summary of other evidence that the party expects to offer." See, for example, The Justice Project, *supra* note 3 at 7.

76 ABA Standards, *supra* note 64 at 109, standard 11-7.1(a)

77 *Ibid*, standard 11-7.1(b)

78 *Ibid* at 109–111, standard 11-7.1, commentary.

decisions of the court of first instance, a failure to disclose would likely be met with harsher appellate sanctions.

This approach however, would be incredibly difficult to implement. Not only does it require the consent of political actors in a fractured political environment, but it is a fairly radical shift. Unlike an expansion, or modification, of existing jurisprudence, which evolves slowly, this reform would fundamentally reshape the landscape of the justice system. Though the proposals are laudable in effect it is perhaps too radical and would transform too many aspects of the adversarial system to a civilian, or inquisitorial, one.

C. The Canadian Approach

The third possible reform, which represents somewhat of a middle-ground between the two previous options is a wholesale adoption of the Canadian model of disclosure in criminal cases. As Professor David Ireland recognized in his 2015 article, *Bargaining for Expedience: The Overuse of Joint Recommendations on Sentence*, Canada in the not so distant past had to grapple with the same issues that currently face the United States.[79] In Canada plea-bargaining transformed from being seen as "... a somewhat vulgar addition to the criminal justice system,"[80] to a legitimate and widely practiced method of disposing of cases.[81] While plea-bargaining has been happening for much longer, a series of Supreme Court decisions in the 1990's helped legitimize and, somewhat, regulate the process by mandating broad discovery obligations on prosecutors. Under this model, the prosecution must disclose all documents in its possession or control which are relevant to the accused's case.[82]

Though Canada's system of criminal adjudication, much like that of the United States, was not centered upon negotiated outcomes in the *Charter*[83] era, it has evolved to wholly embrace plea bargaining.[84] Some legal

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79 David Ireland, "Bargaining for Expedience: The Overuse of Joint Recommendations on Sentence" (2015) 38 Man LJ 273 at 280–284.

80 *Ibid* at 283.

81 *Ibid* at 280–284.

82 *R v McNeil*, 2009 SCC 3 at para 22, [2009] 1 SCR 66 [*McNeil*].

83 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*].

84 Ireland, *supra* note 79 at 280–284.

scholars see the *R v Stinchcombe*[85] decision as the first significant step in the legitimization of plea bargaining.[86] These newly required maximal disclosure obligations on the prosecution meant, according to Professor Kent Roach, that prosecutors and defence counsel would be able to reach negotiated outcomes much easier, and therefore dispose of cases pre-trial more frequently.[87]

1. R v Stinchcombe: The Origins of Open-File Disclosure in Canada

Prior to 1991, Canada had a minimal disclosure requirement, similar to the federal system. However, the Supreme Court of Canada in *Stinchcombe* interpreted s. 7 of the *Charter of Rights and Freedoms* to impose a legal duty on the Crown to disclose all relevant information to the defence.[88]

In adopting this maximal approach to disclosure, Sopinka J writing for a unanimous court, dismissed various arguments for a restrictive disclosure regime (many of which have been similarly advanced with much more success in the United States), holding that after weighing the pros and cons "…there is no valid practical reason to support the position of the opponents of a broad duty of disclosure."[89]

However, the duty imposed upon the prosecution is not absolute and the Supreme Court left the determination of what and when to disclose subject to the discretion of Crown Counsel, but reviewable upon motion to a judge.[90] The standard upon with the judge reviews the Crown's discretion is "the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege."[91] To withhold disclosure the prosecution

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85 *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1 [*Stinchcombe*].

86 *Ibid* at 285.

87 Kent Roach, *Due Process and Victims Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 98.

88 *Stinchcombe*, *supra* note 85; *Charter*, *supra* note 83, s 7. Section 7 of the *Charter* reads as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

89 *Stinchcombe*, *supra* note 85 at para 17.

90 *Stinchcombe*, *supra* note 85.

91 *Ibid* at para 22.

must show that the documents are "clearly irrelevant, privileged, or [that their] disclosure is otherwise governed by law."[92]

Since *Stichcombe*, disclosure requirements for relevant materials in the possession of the prosecution have moved from a matter of prosecutorial discretion to a constitutional obligation.[93] If the relevance of a piece of evidence is established and there is no compelling reason not to disclose, for example withholding the identity of a confidential informant, a failure to do so will likely violate s. 7 of the *Charter*.

The Supreme Court in *R v Dixon* expanded upon the scope and application of *Stinchcombe,* holding that a right to disclosure is just one of the components of the right to make full answer and defence.[94] Infringements of the right to disclosure will not always amount to a *Charter* violation, and the Supreme Court has noted that there will be some situations in which a failure to disclose will meet the threshold test from *Stinchcombe*, but the information will only have marginal value to the issues at trial.[95] In *Dixon*, the Supreme Court set the threshold requirement for compelled disclosure fairly low, holding that "The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence"[96] Under *Dixon* an accused's right to make full answer and defence is breached:

> where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his *Charter* right to disclosure.[97]

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92 *McNeil*, *supra* note 82 at 18, citing *Stinchcombe*, *supra* note 85 at 336.

93 *Kreiger v Law Society of Alberta*, 2002 SCC 65 at para 54, [2002] 3 SCR 372.

94 *R v Dixon*, [1998] 1 SCR 244 at para 23, 166 NSR (2d) 241 [*Dixon*].

95 *Ibid* at paras 23–30.

96 *Ibid* at para 21.

97 *Ibid* at para 22 [emphasis in original].

A breach of the right to make full answer and defence will also be found if the failure to disclose affected the outcome at trial or the overall fairness of the trial process.[98]

Dixon established a two-part test for determining infringements on the right to make full answer and defence, the first part looking at the reliability of the verdict, and the second looking at the fairness of the trial.[99] To assess the reliability of the result at trial "the undisclosed information must be examined to determine the impact it might have had on the decision to convict."[100] At this stage the onus is on the accused to demonstrate that there is a reasonable possibility that the verdict might have been different but for the prosecution's failure to disclose.[101] This assessment of evidence would look at the totality of the evidence in the case, not the item-by-item, in order to determine the probative value of the withheld evidence and whether it would have altered the verdict.[102]

A negative finding under the first branch of the test is not fatal to a *Charter* challenge. Even if an appellate court does not find that the withheld evidence would have a reasonable possibility of altering the verdict, a defendant can still succeed on appeal if they can show that "there is a reasonable possibility that the failure to disclose affected the overall fairness of the trial process."[103] This stage of the analysis looks beyond the impact that the new evidence would have had on the trier of fact, and turns to how the new evidence would have impacted the conduct of the defence.[104] The reasonable possibility of affecting the fairness of the trial "must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure"[105] This test will, for example, be made out if the defence can show that the failure to disclose robbed them of investigative

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98 *Ibid* at para 34.

99 *Ibid* at para 36.

100 *Ibid*.

101 *Ibid* at 34.

102 *R v Taillefer*, 2003 SCC 70 at para 82, [2003] 3 SCR 307 [*Taillefer*].

103 *Ibid* at 83.

104 *Ibid*.

105 *Dixon*, *supra* note 94 at para 34 [emphasis in original].

resources.[106] The Court in *Taillefer* gave two examples of this, reasoning that the statement of a witness that could have been used for impeachment, and disclosure "to the defence that there is a witness who could have led to the timely discovery of other witnesses who were useful to the defence,"[107] would both satisfy this branch.[108]

It is interesting at this stage of the comparison to reflect upon the subtle differences between the Canadian approach for finding a violation under *Dixon* and the US approach for violations of *Brady*. The key distinction between the two tests is probability (*Brady*) as compared to possibility (*Dixon*). Canada expressly rejected the approach preferred in the United States. In *Dixon*, the Court found that this standard was preferable to one requiring the accused to demonstrate probability or certainty that the fresh evidence would have affected the verdict.[109] In so finding the Court held:

> [i]mposing a test based on a reasonable possibility strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice. It recognizes the difficulty of reconstructing accurately the trial process, and avoids the undesirable effect of undermining the Crown's disclosure obligations.[110]

Both approaches examine how the new evidence would affect confidence in the outcome of the trial, and both require a holistic analysis of the new evidence in light of the totality of the evidence.[111] However, the Canadian approach seems to be more akin to that taken by Kagan J in her dissent in *Turner*. Justice Kagan, would have found a *Brady* violation on the grounds that the withheld evidence would have recast the trial, so much so to have undermined the confidence in the verdict.[112] Essentially, though it was impossible to prove retrospectively, Kagan J reasoned that if the defence had access to this previously withheld information alterative decisions could have been made that would dramatically affect the conduct of the

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106 *Taillefer*, *supra* note 102 at para 84.

107 *Ibid.*

108 *Ibid.*

109 *Dixon*, *supra* note 94 at para 34.

110 *Ibid.*

111 See *Turner*, *supra* note 14.

112 *Ibid*, Kagan J dissenting at 3.

defence.[113] This approach was unconvincing to the majority in *Turner*, but would have been well grounded under the *Dixon* test.

2. Stinchcombe and Guilty Pleas

The next logical step in this analysis is therefore to question whether a failure to disclose relevant information has the power under the Canadian approach to render a guilty plea invalid. It appears from the post-*Stinchcombe* Supreme Court of Canada jurisprudence that a failure to disclose would indeed provide a post-conviction route to the invalidation of a plea.

In *Adgey v The Queen* the Supreme Court held that an accused may be permitted to change his plea, in other words withdraw a guilty plea, if they can show "that there are valid grounds for his being permitted to do so."[114] However, in *Adgey* the Court chose not to set out an enumerated list of grounds for withdrawal of a plea.[115] A starting point for this analysis was set out by the Court of Appeal for Ontario in *R v T(R)*, in which the Court held:

> To constitute a valid guilty plea, the plea must be voluntary and unequivocal. The plea must also be informed, that is the accused must be aware of the nature of the allegations made against him, the effect of his plea, and the consequence of his plea.[116]

The Court of Appeal for Ontario then went on to hold that even if the requirements of validity were met, a plea could nonetheless be withdrawn if an accused's constitutional rights were infringed.[117]

The government's disclosure obligations under *Stinchcombe* arise "before the accused is called upon to elect the mode of trial or to plead."[118] The Supreme Court has held that the decision to elect mode of trial or enter into a plea affect the rights of an accused in a profound way, and in coming to this decision it would be of great assistance to an accused to know the

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113 *Ibid* at 4.

114 *Adgey v The Queen*, [1975] 2 SCR 426 at 431, 39 DLR (3d) 553, citing *R v Bamsey*, [1960] SCR 294 at 298, 125 CCC 329.

115 *Taillefer*, *supra* note 102 at para 85.

116 *R v R(T)* (1992), 10 OR (3d) 514 at 519, 17 CR (4th) 247, cited with approval by the Supreme Court in *Taillefer*, *supra* note 102.

117 *Ibid*.

118 *Stinchcombe*, *supra* note 85 at para 28.

strengths and weaknesses of the Crown's case.[119] The purpose of the duty to disclose under *Stinchcombe* is integrally tied to ensuring that the decision at this stage "is made with full knowledge of the relevant facts."[120] Therefore, a failure to disclose relevant information has the potential to infringe upon an accused's right to make full answer and defence, in addition to the knowledge element of a valid guilty plea.[121]

In *Taillefer* the Supreme Court created a modified approach to the *Dixon* test when applied to guilty pleas.[122] Under this modified approach the two steps of *Dixon* merge into one, since the entire analysis of the breach now centres on the accused's decision to plead guilty that they now wish to withdraw.[123] With this consideration in mind, LeBel J in *Taillefer* adopted the following threshold test:

> The accused must demonstrate that there is a reasonable possibility that the fresh evidence would have influenced his or her decision to plead guilty, if it had been available before the guilty plea was entered. However, the test is still objective in nature. The question is not whether the accused would actually have declined to plead guilty, but rather whether a reasonable and properly informed person, put in the same situation, would have run the risk of standing trial if he or she had had timely knowledge of the undisclosed evidence, when it is assessed together with all of the evidence already known. Thus the impact of the unknown evidence on the accused's decision to admit guilt must be assessed. If that analysis can lead to the conclusion that there was a realistic possibility that the accused would have run the risk of a trial, if he or she had been in possession of that information or those new avenues of investigation, leave must be given to withdraw the plea.[124]

Though the Supreme Court made it clear that the test was objective, in subsequent cases the Court of Appeal for Ontario has modified the approach to be subjective.[125] This modification to the test was in part done because the validity of a guilty plea is inherently subjective, and inquiries

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119 *Ibid.*

120 *Taillefer*, *supra* note 102 at para 86.

121 *Ibid.*

122 *Ibid* at 90.

123 *Ibid.*

124 *Ibid.*

125 See e.g. *R v Quick*, 2016 ONCA 95, 129 OR (3d) 334 [*Quick*]; *R v Henry*, 2011 ONCA 289, 277 CCC (3d) 293.

into whether a plea is "informed" look at the specific accused, not the reasonable person.[126]

From this analysis it is clear that Canada has adopted a significantly broader disclosure obligation for prosecutors, applied it to guilty pleas, and has a significantly lower burden of proof for infringements of one's disclosure obligations. The question that remains though is how this model could apply to the United States, a country that's constitutional court is famously resistant to relying on foreign jurisprudence, especially when it comes to interpreting the *Constitution*.[127]

3. Application to the United States

In a 2005 debate between himself and the late Justice Antonin Scalia, Breyer J., referring to an earlier conversation with a critical congressman stated: "If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something."[128] Justice Scalia, responding to Breyer, raised a good point: when interpreting the US constitution, other than old English law, the court ought to focus exclusively on the text of the document, the intent of the framers, and how the people understood the constitution; If that is the case then foreign law is irrelevant.[129]

I would argue that while that might be true for Swiss, German, or even modern English law, Canada is *sui generis* amongst the "foreign law" regimes.[130] The *Charter of Rights and Freedoms* shares strong thematic and interpretive similarities with the American Bill of Rights, and the earliest

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126 *Quick*, *supra* note 125 at 35–36.

127 See e.g. Norman Dorsen, "The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer" (2005) 4:3 Intl J Constitutional L 519.

128 *Ibid* at 523.

129 *Ibid* at 525.

130 *Ibid*. Scalia J used these countries as examples because the framers of the constitution, as we can see in the Federalist Papers, used them as reference points while drafting the United States Constitution.

interpretations of the *Charter* placed heavy emphasis on American jurisprudence.[131]

Furthermore, the issue here is grounded in due process and fair trial rights, both of which flow from British law and have evolved in similar ways in North America. Beyond simply precedential roadblocks, the Canadian approach aligns with structural, historical, ethical and prudential underpinnings of the Fifth Amendment.[132] When the first congress drafted the Fifth Amendment they sought to preserve the common-law rights deemed essential to the accusatory criminal procedure, and act as a safeguard against the importation of an inquisitorial procedure.[133] The Fifth Amendment, like the other parts of the Bill of Rights was a codification of the minimum level of trial rights, and was subject to expansion pursuant to the Ninth Amendment.[134] Enacting broad disclosure obligations at the guilty plea stage fulfils this framer's intent purpose of safeguarding against the slow creep of an inquisitorial system, fulfils the ethos of protecting the citizens from central government tyranny, and is grounded in the language of the Fifth and Sixth Amendments.

Applying this Canadian approach to the United States is in theory relatively straightforward, and is effectively taking the first reform that this article proposed one step further. Building upon the existing SCOTUS jurisprudence, to implement the Canadian approach would require five open minded justices to draw inspiration and guidance, but not necessarily

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131 *Charter*, *supra* note 83, s 11(c); see e.g. *R v Askov*, [1990] 2 SCR 1199, 74 DLR (4th) 355 (in which the Supreme Court of Canada places considerable emphasis on *Barker v Wingo*, 407 US 514 (USSC 1972), in determining the meaning of the speedy trial right of section 11(b) of the *Charter*).

132 These four phrases come from Phillip Bobbitt's modalities of constitutional argument. For further explanation of the modalities, see Ian C Bartrum, "Metaphors and Modalities: Meditations on Bobbit's Theory of the Constitution" (2008) 17 Wm & Mary Bill Rts J 157 at 158.

133 Thomas Davies, "Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in *Chavez v Martinez*" (2003) 70 Tenn L Rev 987 at 1007.

134 See Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2012) for discussion of how the constitution can evolve through common practice to include rights of "the people" that were not expressly delegated nor denied by the constitution – for example the right to testify at one's own trial as a fundamental aspect of the Fifth Amendment that was statute barred at founding but gained constitutional entrenchment and recognition over time.

feel bound by foreign law. In short, the distinction is a recognition that it is almost impossible, or at least unduly burdensome, to show a probability of a different outcome retrospectively, and an adoption into US law of the Canadian requirement of a possibility of a different outcome.

V. The Path Forward

Adopting more expansive disclosure rights in the United States would be a step-forward, but no more than any other doctrinal revision that seeks to bring procedural protections in line with the actual functioning of the criminal justice system. In a world dominated by guilty pleas, as opposed to trials, rights that were first envisioned as protecting an individual from rogue state agents at trial need to be reimagined and reinterpreted to apply to 97% of cases, not just 3%. After all, what use is a constitutional protection if the vast majority of defendants have no ability to take advantage of it.

This article has presented three pathways for reform to a pernicious problem in American criminal procedure. These suggestions were presented in somewhat of a goldilocks pattern, with the first being too little, the second being too aggressive, and the third being "just right." While adoption of the ABA guidelines would likely be the most effective avenue of reform, it is a significant departure from current federal practice and its implementation might be impractical. Turning to the more practical solutions proposed, dissent in *Turner* seems to indicate at least a portion of the court would be receptive to expanded disclosure obligations and expanded review procedures for when the prosecution falls short. The Canadian approach, based in large part on its holistic review mechanism, lower burden of proof on the rights claimant, and recognition of how truly integrated plea bargaining is in the justice system would be the best path of reform. However, as mentioned *supra*, beyond the roadblock of simply recognizing a problem, the SCOTUS is extremely resistant to foreign jurisprudence when interpreting their own constitution.

While I am cautiously optimistic that the door has been opened to use *ex juris* case law as an aid for normatively assessing the possibilities of reform, I am at the same time cognizant that any reform will likely have to be strongly grounded in existing precedent. As such, regardless of what might be the best route forward, the arc of case law will likely have to take a more winding path towards reform. Nonetheless, whether the SCOTUS

broadens disclosure obligations through an expansion of *Ruiz* or innovates along the lines of the *Stinchcombe/Dixon* framework, it will be a considerable and necessary step forwards.

An Analysis of Third Party Record Applications Under the *Mills* Scheme, 2012-2017: The Right to Full Answer and Defence versus Rights to Privacy and Equality

HEATHER DONKERS*

ABSTRACT

Over the last several decades, third-party record applications have begun to eclipse the use of prior sexual history as the main tool for challenging the credibility of sexual assault complainants in criminal trials. This article outlines the early common law and statutory developments governing the use of third-party record applications, identified as the "*Mills* scheme," and analyzes these cases through the lens of how they balance the privacy and equality rights of complainants with the right to full answer and defence of accused persons. The author then examines the decisions of 22 cases at the Ontario Superior Court during the period of 2012-2017 that applied the "*Mills* scheme," finding that in nearly 50% of those cases, disclosure of records in which the complainant had a high privacy interest was ordered by the court.

The author argues that the s. 278 provisions of the *Criminal Code* direct judges to weigh defendant's legal rights against both the privacy and security of the person rights of complainants, in light of the equality context, while

* Heather is a JD Candidate (2019) at Osgoode Hall Law School in Toronto, Ontario. A former United Nations intern, Heather was the co-winner of the Aird & Berlis and Women's Law Association of Ontario 2018 Equality Award, for her efforts in combatting gender-based violence and championing diversity in the legal profession. She is the current President of the Law Students' Society of Ontario and the President of the Osgoode chapter of Canadian Lawyers for International Human Rights. Heather intends to pursue a career working in criminal, constitutional, and international law. You can follow her on Twitter at @HeatherDonkers.

considering factors such as discriminatory myths and society's interest in having complainants report their experiences to the police. In *Mills*, however, the Court's guidelines for the application of s. 278 rendered the provisions more malleable than they were intended to be. These guidelines include: stress placed on the importance of judicial discretion; the court's description of subsection 278.5(2)'s factors as a "checklist" that "may come into play during a judge's deliberation"; and, most importantly, its holding that fair trial rights must prevail over privacy rights in "uncertain" situations. The author finds that these *Mills* guidelines continue to be relied upon most heavily in cases where production is ultimately ordered. Conversely, in cases where production is not ordered, the analysis more closely follows the provisions themselves. Finally, in some cases, there is no apparent analysis of competing rights at all.

> ...I think they really, truly need to understand there needs to be better education on the side of law enforcement, or on the judicial side, as to why it is so under-reported; why people feel such a sense of shame; why victims will blame themselves or feel responsible [...] why people tend to get away with this and why people are reluctant to come forward...[1]

> I think at all times the victim should be given the utmost of respect. If it's proven, it's proven...and it isn't, it isn't, but by disrespecting the person who was victimized doesn't prove anything. It should be based on proof. The victim shouldn't have to be humiliated once more.[2]

> The rape trial gives sexual violence a public form, while at the same time inscribing it within a discourse in which women are forced to present an inadequate, hysterical subjectivity. The mechanism of records disclosure is a central contemporary enactment of this process of hysterization...[3]

> Like sexual history evidence, information gathered from records is used to create a distinction between the complainant and the 'ideal victim.' If once the ideal

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1 Canada, Research and Statistics Division, *A Survey of Survivors of Sexual Violence in Three Canadian Cities,* by Melissa Lindsay (Ottawa: Department of Justice Canada, 2014) at 25.

2 *Ibid* at 24.

3 Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall LJ 251 at 258–259 [Gotell, "Ideal Victim"].

> victim was characterized by her chastity and sexual morality, the new ideal victim is consistent, rational, self-disciplined, and blameless.[4]

Keywords: third party record; sexual assault; *R v O'Connor*; *R v Mills*; section 278; equality rights; privacy rights; right to full answer and defence.

I. INTRODUCTION

Since 1991, Canadian common law surrounding third-party record applications has been developing in response to new information about the realities of sexual assault for complainants. The epigraphs illustrate the importance of discerning the role of third-party record applications in sexual assault trials today; they represent a relatively new site of controversy in Canadian law that has eclipsed the use of prior sexual history as the main tool for challenging credibility.[5] As the law continues to invade the extra-legal settings through which women have been able to express their experiences of sexual violence, such as therapy, complainants must be prepared to endure an "unprecedented level of scrutiny"[6] during trial.[7] This article will outline the common law and statutory developments regarding third-party record applications in sexual assault trials, and examine the decisions of 22 cases over the last five years at the Ontario Superior Court that have applied s. 278 of the *Criminal Code* and *R v Mills*. It will expand upon the earlier works of Canadian legal scholar Lise Gotell, who suggested that prioritization of competing rights in the *Mills* decision has led to inconsistent judicial application of the s. 278 provisions. This article will argue that this trend has continued in the more recent cases, resulting in a near 50% disclosure rate of records in which complainants have a high privacy interest; an interest that is too often ignored or under-analyzed by the judiciary in these cases.

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4 *Ibid.*

5 *Ibid* at 260.

6 *Ibid.*

7 *Ibid*; David M Tanovich, "Whack No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013) 45 Ottawa L Rev 495 at 505 [Tanovich, "Ethics of Defence"].

II. COMMON LAW AND STATUTORY DEVELOPMENT REGARDING THIRD-PARTY RECORD APPLICATIONS

A. *R v O'Connor* [1995]

R v O'Connor is a leading Supreme Court of Canada decision on disclosure of medical and therapeutic records in criminal cases.[8] A five-person majority held that these records can be disclosed to the defence by order of the judge if they meet several requirements.[9] First, a court must decide whether the document should be disclosed to the judge for further inspection. Here, the accused must establish that the records are "likely relevant" to an issue at trial. At this stage, as the majority in *O'Connor* described it, relevance is expressed in terms of "whether the information may be useful to the defence,"[10] and is meant only to protect against "'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests' for production."[11]

If the defence is successful in showing likely relevance at the first stage, the judge will then review the content of the records to determine whether they should be disclosed to the defence; in whole, in part, or not at all. "Likely relevance," at the production stage, should be a higher threshold than at the disclosure stage. In the words of the Court, "the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or to the competence of the witness to testify."[12] At this stage, the judge is to balance the "salutary and deleterious effects" of production.[13] Factors to consider include:

> (1) the extent to which the record is necessary to make full answer and defence;
> (2) the probative value of the record;
> (3) the nature and extent of the reasonable expectation of privacy vested in that record;
> (4) whether production would be premised upon any discriminatory belief or bias, and;

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8 *R v O'Connor*, [1995] 4 SCR 411 at 427, 130 DLR (4th) 235 [*O'Connor*].

9 *Ibid* at 434–435.

10 *Ibid* at 436.

11 *Ibid* at 438.

12 *Ibid* at 436.

13 *Ibid* at 441.

> (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record.[14]

The majority on this issue concluded by saying that the effect of production, or non-production, on the integrity of the trial, is more appropriately dealt with at the admissibility stage of the evidence, and not in deciding whether the information should be produced. Moreover, in considering society's interest in the reporting of sexual crimes, the Court held that there are other avenues available to the judge to ensure that production does not frustrate that societal interest.[15]

The dissent on this issue stated that in deciding whether to order production of private records, the court must exercise its discretion in a way that is consistent with *Charter* values.[16] The values involved in this instance are the right to full answer and defence, the right to privacy, the right to security of the person, and the right to equality without discrimination.[17] Moreover, they held that because third-party records "do not form part of the Crown's 'case to meet,'" it cannot be assumed that such records are likely to be relevant.[18] In the dissent's view, "the burden on an accused to demonstrate likely relevance is a significant one."[19]

The dissenting judges decided that the trial judge must first balance the "salutary and deleterious effects of ordering that the records be produced to determine whether, and to what extent, production should be ordered"[20] having regard to the constitutional issues at play on both sides, before ordering production for judicial inspection.[21] After determining that the records should be produced to the court, the dissent then suggested seven factors to be considered when deciding whether the records should be disclosed to the defence. The first five factors are the same as what the majority decision had outlined, with two additions:

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14 *Ibid* at 442.

15 *Ibid.*

16 *Ibid* at 480.

17 *Ibid.*

18 *Ibid.*

19 *Ibid* at 497.

20 *Ibid* at 493.

21 *Ibid.*

> (6) the extent to which production would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims; and
> (7) the effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome.[22]

Finally, the dissent suggested that "where a court concludes that production is warranted, it should only be made in the manner and to the extent necessary to achieve that objective."[23]

B. Section 278 Provisions [1997]

After the majority decision in *O'Connor* was released, there was significant backlash from women and feminist groups.[24] Extensive consultations were undertaken by the Canadian government at this time, which eventually led to the passing of Bill C-46, later becoming ss. 278.1 to 278.9 of the *Criminal Code* in 1997.[25] These provisions retain the two-step test from *O'Connor*, but expand the range of factors to be considered in production applications to include all the factors that were set out by the dissent, as described above.[26]

C. *R v Mills* [1999]

Two years after the changes to the *Criminal Code*, an eight-person majority of the Supreme Court upheld the s. 278 provisions as constitutional in *R v Mills*.[27] Deference was given to the decision of the federal government in enacting the provisions, despite that they departed from the majority holding in *O'Connor,* because of their lengthy consultations on the subject.[28] To this end, the Court held that "Parliament

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22 *Ibid* at 504.

23 *Ibid* at 506.

24 Ontario Women's Justice Network, "Evolution of the Law about Third-Party Records" (2016), online: <http://owjn.org/2016/05/evolution-of-the-law-about-third-party-records/>.

25 Jennifer Koshan, "Multiple Sexual Offence Proceedings and the Disclosure of 'Records' Under the Criminal Code" (10 November 2010), *ABlawg* (blog), online: <https://ablawg.ca/2010/11/10/multiple-sexual-offence-proceedings-and-the-disclosure-of-"records"-under-the-criminal-code/>.

26 *Criminal Code,* RSC 1985, c C-46, ss 278.1–278.9.

27 *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1 [*Mills*].

28 *Ibid* at 744.

may build on the Court's decision, and develop a difference scheme as long as it meets the required constitutional standards."[29]

In arriving at the decision of constitutionality, the Court considered whether the procedure established in Bill C-46 violated the principles of fundamental justice, two of which seemed to conflict: the right to full answer and defence and the right to privacy. The Court held that "[n]either right may be defined in such a way as to negate the other and both sets of rights are informed by the equality rights at play in this context."[30] In balancing the principles of fundamental justice under s. 7 of the *Charter*, the Court took to defining each of them.

For one, the right of an accused to make full answer and defence was described as "crucial to ensuring that the innocent are not convicted."[31] As explained by the Court, this right does not include the right to evidence that would distort the search for truth.

The right to privacy was framed by the Court as falling within s. 8 of the *Charter*, because an order for the production of records made pursuant under ss. 278.1 to 278.9 of the *Criminal Code* would constitute a seizure under s. 8. The Court delineated the following approach on the right to privacy, which is worth reproducing here:

> An order for the production of records made pursuant to ss. 278.1 to 278.91 of the *Criminal Code* is a seizure within the meaning of s. 8 of the *Charter*. The reasonable expectation of privacy or right to be left alone by the state protected by s. 8 includes the ability to control the dissemination of confidential information. Privacy is also necessarily related to many fundamental human relations. The therapeutic relationship is one that is characterized by trust, an element of which is confidentiality. The protection of the complainant's reasonable expectation of privacy in her therapeutic records protects the therapeutic relationship and the mental integrity of complainants and witnesses. Security of the person is violated by state action interfering with an individual's mental integrity. Therefore, in cases where a therapeutic relationship is threatened by the disclosure of private records, security of the person and not just privacy is implicated.[32]

The Court also took to framing the rights of full answer and defence, and privacy, within the context of equality concerns. Namely, "[a]n

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29 *Ibid.*

30 *Ibid* at 688.

31 *Ibid* at 720.

32 *Ibid*; see court-written summary of the case on CanLII.

appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence."[33]

Ultimately, the Court held that the new *Criminal Code* provisions did not violate s. 7 of the *Charter*. The provisions, by themselves, did not deny access to documents to which the defence is constitutionally entitled. Instead, the Court held that it was open to Parliament to determine a procedure in which it could be delineated by a court whether the records were likely relevant and necessary in the interests of justice, based on a balancing of both the right to full answer and defence, and the right to privacy, as well as security of the person and equality concerns.[34]

To this end, because the privacy rights of complainants in third party record applications were affirmed by the Supreme Court, the *Mills* decision could be viewed as a feminist legal victory. However, despite deferring to the expertise of Parliament, the holding in *Mills* arguably 'watered down' the s. 278 provisions. For example, the Court reverted to the reasoning of the majority in *O'Connor* on the following point: "If a record is established to be "likely relevant" and, after considering the various factors, the judge is left uncertain about whether its production is necessary to make full answer and defence, then the judge should rule in favour of inspecting the document."[35] In *O'Connor*, Justice L'Heureux-Dubé had stated that "[i]n borderline cases, the judge should err on the side of production."[36] Arguably, this logic does not "balance" the competing rights, as Parliament intended, but instead allows for an 'edging out' of the privacy rights of the complainant, in favour of the right to full answer and defence.

Similarly, in addressing the argument that the judge cannot consider factors listed in s. 278.5(2) without looking at the records, the Court in *Mills* suggested that the provision "does not require that the judge engage in a conclusive and in-depth evaluation of each of the factors."[37] Instead, the Court held that it requires the judge only to take the factors "into account."[38] The factors are described as a "check-list" of the various considerations that "may come into play in making the decision regarding

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33 *Ibid* at 727.

34 *Ibid* at 755.

35 *Ibid* at 748.

36 *O'Connor*, *supra* note 8 at 502.

37 *Mills*, *supra* note 27 at 749.

38 *Ibid* at 751.

production to the judge."[39] To this end, the Court in *Mills* does not prescribe that judges adhere strictly to what Parliament outlined in s. 278.5(2).

At the beginning of the *Mills* decision, in deciding to give deference to Parliament (or at least some deference), the unanimous Court in *Mills* emphasized that Parliament can be a significant ally for vulnerable groups:

> In adopting Bill C-46, Parliament sought to recognize the prevalence of sexual violence against women and children and its disadvantageous impact on their rights, to encourage the reporting of incidents of sexual violence, to recognize the impact of the production of personal information on the efficacy of treatment, and to reconcile fairness to complainants with the rights of the accused.[40]

However, the Court's decision ultimately allows for the scales of justice to tip in the direction of the accused, if the judge is so much as "uncertain" about whether the production of private records is necessary to make full answer and defence. This language, albeit subtle, allows room for the lower courts to order the production of records, even when that decision may go against the aforementioned intentions of Parliament in enacting the s. 278 provisions.

D. *R v Batte* [2000]

The most recent higher-court development on this issue occurred in 2000 with the Ontario Court of Appeal decision in *R v Batte*. The case clarified the "likely relevance" threshold set out in the s. 278 provisions. The Court held that therapeutic records pass the "likely relevance" test from s. 278.3 only if there is some basis for concluding that the statements can (a) provide the accused with some added information not already available to the defence, or (b) have some potential impeachment value.[41] The effect of this decision was to slightly raise the threshold for producing records to the court.[42]

While *Batte* represents a favourable development, the "*Mills* scheme" maintains its direction from the Supreme Court that allows for an interpretation of s. 278 which privileges defendants' fair trial rights over

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39 *Ibid* at 749.

40 *Ibid* at 670.

41 *R v Batte*, [2000] 49 OR (3d) 321 at paras 71–72, 145 CCC (3d) 449.

42 Gotell, "Ideal Victim," *supra* note 3.

complainants' rights to privacy and equality. This article examines the interpretations of lower courts, where the *Mills* scheme has been given meaning, to determine whether this prioritization has remained an issue in the most recent cases.

III. THE EARLY CASES

Canadian legal scholar Lise Gotell has examined the early decisions of lower courts in relation to the *Mills* scheme. She found that case law between 1999 and 2002 suggested a reduced likelihood of the disclosure of records, stemming from the insistence in *Mills* and *Batte* on a strong evidentiary basis for the "likely relevant" test.[43] However, even in decisions where the court refused to grant access to the records, the courts' analyses were "highly individualistic"[44] in considering the potential consequences of disclosure. Gotell argued that this framing denied the systemic nature of sexual violence, "containing women's words about their experiences within a rigidly demarcated and depoliticized personal space."[45] Moreover, this sort of judicial analysis ignores Parliament's direction, and the affirmation in *Mills*, that it is important for courts to consider both the equality concerns and the societal issues at play. Decisions to intrude upon this personal space seemed to hinge upon "assertions about the disordered and hysterical character of complainants."[46] These decisions, Gotell argued, have been legitimized by the conception of a fair trial, giving wide scope for rigorous credibility testing of complainants.[47]

Four years after the publication of her first piece, Gotell analyzed another series of third-party record applications from 2002 until 2006. She found that in about half of the cases she analyzed, production of at least some of the personal records was ordered.[48] More specifically, of the fourteen cases analyzed, seven applications were dismissed, seven resulted

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43 *Ibid* at 256.

44 *Ibid.*

45 *Ibid.*

46 *Ibid.*

47 *Ibid* at 266–267.

48 Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1–278.9 of the *Criminal Code*" (2008) 20:1 CJWL 111 at 127 [Gotell, "Tracking"].

in the production of at least some records to the court, and five resulted in the disclosure of records or edited portions of records to the defence.[49] To Gotell, this suggested that access to complainants' records under s. 278 had been "rendered permeable through judicial interpretation"[50] over time.[51] Gotell indicated several factors that she found to have contributed to this trend.

First, Gotell found that the higher threshold requirement from *Batte* was almost universally cited in the 2002-2006 decisions.[52] However, while this may have been expected to reduce the likelihood of records passing the first stage of production, increased reliance on the decision was "offset by cases in which the threshold for production is simply sidestepped, sometimes by agreement of the complainants and/or record holders and sometimes by the disturbing tendency of judges to ignore the threshold standard or bypass this stage entirely."[53] Moreover, even in cases where the standard in *Batte* was used to dismiss applications for record production, Gotell found that judges frequently detailed the ways in which applications might meet the "likely relevance" threshold. This tactic, in Gotell's opinion, highlighted the continued possibilities for hystericizing complainants, which would go against the principles iterated by Parliament in enacting the s. 278 provisions.

Second, Gotell emphasized the role of the *Mills* decision in allowing so many production orders to be granted. While the s. 278 provisions direct judges to weigh defendants' fair trial rights against the privacy and equality rights of complainants, and to consider factors such as society's interest in the reporting of sexual violence, the stress in *Mills* on judicial discretion, and its argument that fair trial rights should prevail when judges are "uncertain," has the effect of allowing production more often than not. The iterations of these *Mills* instructions, as Gotell describes them, are evident in the too-brief analyses of judges in these cases, as well as their excision of equality concerns from the balancing equation, and the privileging of the

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49 *Ibid.*

50 Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43:3 Alta L Rev 743 at 757.

51 *Ibid.*

52 Gotell, "Tracking," *supra* note 48 at 128.

53 *Ibid.*

legal rights of the accused.[54] These trends, as analyzed and described by Gotell prior to 2006, remain prevalent in many of today's cases as well.

IV. ANALYSIS OF POST-*MILLS* DECISIONS, 2012-2017

A. Methodology

This article examines twenty-two cases at the Ontario Superior Court between 2012 and 2017, each dealing with a third-party records application in the context of a charge of sexual assault or other crimes involving criminal sexual behaviour. The time frame of 2012-2017 was chosen because it allows for in-depth analysis of the most recent third-party record applications, in order to establish whether there are any trends in judicial decision-making that can inform policy-making or jurisprudence in this area going forward. Ontario Superior Court cases were chosen because this is the forum in which most third-party record applications are processed in Ontario. All of the cases analyzed were publicly available on CanLII at the time of writing.

B. Basic Findings

As seen in Appendix A, the most common applications by defence counsel were for counselling records,[55] followed by Children's Aid Society

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54 *Ibid.*

55 *R v MC,* 2012 ONSC 1676 at para 3, 100 WCB (2d) 157; *R v D(C),* 2012 ONSC 7105 at para 3; *R v Beckford and Stone,* 2012 ONSC 7365 at para 4, 276 CRR (2d) 26 [*Beckford*]; *R v Ali,* 2013 ONSC 7124 at para 1, 110 WCB (2d) 635 [*Ali*]; *R v Hughes,* 2013 ONSC 6548 at para 1, 109 WCB (2d) 565 [*Hughes*]; *R v Barbaro,* 2013 ONSC 7970 at para 2, 110 WCB (2d) 857 [*Barbaro*]; *R v RWAP,* 2014 ONSC 3021 at para 1, 113 WCB (2d) 329 [*RWAP*]; *R v MacArthur,* 2014 ONSC 5583 at para 2, 117 WCB (2d) 36 [*MacArthur*]; *R v JAB,* 2014 ONSC 6992 at para 11, 118 WCB (2d) 442; *R v PB,* 2015 ONSC 7220 at para 6, 127 WCB (2d) 87; *R v Hidalgo,* 2016 ONSC 7216 at para 1, 135 WCB (2d) 40 [*Hidalgo*]; *R v A(A),* 2017 ONSC 2678 at para 1, 138 WCB (2d) 570; *R v RN,* 2017 ONSC 2446 at para 1, 139 WCB (2d) 367.

(CAS) records,[56] medical records,[57] and police occurrence reports.[58] The 2014 Supreme Court case of *R v Quesnelle* dealt particularly with police reports, clarifying the correct classification for this type of document.[59] The Supreme Court affirmed that an application must be brought pursuant to s. 278.2, rather than under the lower threshold for disclosure from *R v Stinchcombe,* because police occurrence reports fell under the definition of "records" – that is, documents in which there was a reasonable expectation of privacy and that were not pertaining to the offence in question.[60] The other most popular record requests have not yet been the subject of in-depth analysis by the Supreme Court.

In each of the cases analyzed for this article, defence counsel argued a series of issues at trial to which the records were likely relevant and should thereby be admitted. The chart in Appendix B shows that the most commonly cited issues were the complainant's credibility and reliability, as well as the accused's right to make full answer and defence.[61] Even in the cases where more specific issues were argued – like to prove that no crime was ever committed, or that the complainant made inconsistent statements

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56 *R v Lonergan,* 2012 ONSC 1401 at para 4, 101 WCB (2d) 342 [*Lonergan*]; *R v Blake,* 2013 ONSC 481 at para 10, 108 WCB (2d) 827 [*Blake*]; *RWAP, supra* note 55 at para 1; *R v YCB*, 2014 ONSC 922 at para 2, 111 WCB (2d) 837; *R v BT*, 2016 ONSC 4407 at paras 2–5, 132 WCB (2d) 128; *R v DAB,* 2016 ONSC 4289 at para 1, 131 WCB (2d) 599; *R v RN*, *supra* note 55 at para 1.

57 *R v D(C)*, *supra* note 55 at para 3; *Beckford, supra* note 55 at para 4; *Ali, supra* note 55 at para 1; *R v DW,* 2013 ONSC 649 at para 3; *R v Armstrong,* 2016 ONSC 1657 at para 7, 129 WCB (2d) 143 [*Armstrong*]; *MacArthur, supra* note 55 at para 2.

58 *R v Musse*, 2012 ONSC 6097 at para 1, 104 WCB (2d) 268 [*Musse*]; *Beckford*, *supra* note 55 at para 4; *Blake, supra* note 56 at para 10; *Armstrong, supra* note 57 at para 7.

59 *R v Quesnelle,* 2014 SCC 46, [2014] 2 SCR 390.

60 *Ibid* at paras 67–68.

61 *Musse*, *supra* note 58 at para 1; *R v MC*, *supra* note 55 at para 12; *R v D(C)*, *supra* note 55 at para 9; *Lonergan*, *supra* note 56 at para 12; *Beckford*, *supra* note 55 at para 4; *Blake*, *supra* note 56 at para 11; *Ali*, *supra* note 55 at para 28; *R v DW*, *supra* note 57 at para 10; *R v Hughes*, *supra* note 55 at para 4; *Barbaro*, *supra* note 55 at para 10; *RWAP*, *supra* note 55 at para 3; *R v YCB*, *supra* note 56; *MacArthur*, *supra* note 55 at para 3; *R v JAB*, *supra* note 55 at para 12; *R v PB*, *supra* note 55 at para 25; *Armstrong*, *supra* note 57 at para 2; *Hidalgo*, *supra* note 55 at para 19; *R v BT*, *supra* note 56 at para 30; *R v DAB*, *supra* note 56 at para 15; *R v A(A)*, *supra* note 55 at para 6; *R v JW*, 2017 ONSC 4343 at para 4, 141 WCB (2d) 626; *R v RN*, *supra* note 55 at para 3.

to law enforcement and treatment providers – the underlying idea was that the records would illuminate the complainant's lack of credibility.

C. Records with a High Privacy Interest

Therapeutic records, medical records, and CAS records compel a heightened privacy interest for the complainant. Most of the cases analyzed were requests for these highly sensitive records, with defence counsel citing credibility testing as the main reason for the application. Interestingly, however, judicial discussion about the weighing of competing rights occurred in only about a third of these cases.[62] Further, this kind of analysis happened most often in cases where the application was dismissed, and less often in cases where production was ordered.

In *R v DAB,* for example, the judge's decision stated that the requested documents, mainly CAS records, were likely relevant because "the records in question are not therapeutic counseling records of these two complainants, but their factual disclosure in the first instance for each complainant of the allegations of alleged abuse."[63] The judge did not evaluate, under the threshold test, whether production would be necessary in the interests of justice. As such, the judge ordered production of the records for the court. Following a review of the documents, the judge held that they were satisfied under s. 278.7 "that certain parts of the records produced"[64] were likely relevant and "necessary in the interests of justice."[65] There was no discussion as to how the judge arrived at that result. Disclosure of the records to the defence was thereby ordered despite the lack of judicial analysis that is required by the production provisions. The kind of bare analysis found in this case is consistent with Gotell's findings from the earlier cases that judicial analysis of whether production is necessary "is, for the most part, succinct and economical to the extreme."[66]

Similarly, in *R v M.C.,* the complainant consented to having her therapeutic and medical records produced to the court for review.[67]

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62 See *Blake*, *supra* note 56; *R v MC*, *supra* note 55; *Beckford*, *supra* note 55; *R v D(C)*, *supra* note 55; *Barbaro*, *supra* note 55; *Armstrong*, *supra* note 57; *Hidalgo*, *supra* note 55.

63 *R v DAB, supra* note 56 at para 15.

64 *Ibid* at para 17.

65 *Ibid.*

66 Gotell, "Tracking," *supra* note 48 at 141.

67 *R v MC*, *supra* note 55 at para 13.

However, after reviewing the documents and redacting some limited irrelevant information, the judge ordered production of the records to the defence without any analysis on why the records were likely relevant to matters at issue, or why production would be necessary in the interests of justice.[68] The extent of the judge's analysis of competing rights was to say that she did consider them.[69] Again, this sort of statement is insufficient under a purposive reading of the provisions, and to the extent that *Mills* emphasized the importance of meaningful analysis of competing *Charter* rights.[70] Fortunately, this particular verdict was overruled, the conviction quashed, and a new trial ordered by the Court of Appeal in *R v M.C.* 2014 ONCA 611, primarily for admitting and using records that the judge should not have received under the s. 278 provisions. However, it is important to recognize that, because the records were produced at trial, some level of the complainant's privacy interest had already been lost.

In cases where there has been some discussion of competing rights, the result of whether production is ordered depends on judicial prioritization of those rights. In *R v MacArthur*, the presiding judge reviewed counselling records in possession of Native Child and Family Services (NCFS). The judge considered the "very high expectation of privacy in the therapeutic records sought,"[71] and the "particular vulnerability of women and children from the First Nations communities who are being serviced by the NCFS,"[72] but production was nevertheless ordered (subject to some redaction).[73] This was largely because the complainant was told by the NCFS at the outset of her counselling that, pursuant to a protocol, notes made by the therapist may need to be produced in court.[74] The judge concluded on this note that "[the complainant] must, therefore, have appreciated that at least what she said about the Incident might have to be produced to the court and yet she has sought counselling."[75] This kind of conclusion is concerning, if for no

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68 *Ibid* at para 16.

69 *Ibid* at para 17.

70 *Mills*, *supra* note 27.

71 *MacArthur*, *supra* note 55 at para 32.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 *Ibid* [emphasis added].

other reason than because it suggests that if complainants do not want notes from their counselling sessions to be produced in criminal proceedings, they should not seek counselling at all. Moreover, the analysis does not meaningfully weigh the complainants' rights against the fair trial rights of the accused; it privileges the latter with little explanation as to why.

In many of the cases in which production of therapeutic, medical, or CAS records were ultimately not ordered, there was a more fulsome *Charter* analysis that meaningfully considered the heightened privacy interests in such records. In one particularly strong analysis, from *R v Blake*, the presiding judge balanced not only the right to full answer and defence with the right to privacy, but also considered "the equality of individuals whose lives are heavily documented."[76] Drawing on the analysis in *R v Medwid*, the judge in *Blake* considered how applications involving CAS records tend to place an already marginalized group at a further disadvantage, by "making them the subject of additional scrutiny based solely on the fact that their lives have been documented by reason of their involvement with social agencies."[77] Moreover, he considered how therapeutic records developed from contact with social agencies hold a particular privacy interest, because there is often an inherent assumption of trust and confidentiality.[78] Thus, the judge was engaged not only with the privacy and equality interests involved in third party records, but also with some of the underlying principles inherent to those interests.

The judge's analysis in *Blake* is a marked difference from the analysis provided by many of the judges presiding over the early cases, as described by Gotell, and many of the recent cases that were analyzed for this article. It must be recalled that the production provisions direct judges to weigh the legal rights of defendants against the privacy and equality rights of complainants.[79] However, as has been demonstrated in the jurisprudence since 1999, this context-sensitive balancing exercise either has not happened

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76 *Blake*, *supra* note 56 at para 26.

77 *Ibid* at para 27. The effect of heavy documentation on the likelihood and consequences of record production has also been described in the context of women with mental disabilities who report sexual assault: see Lauren Katz, "When Equality Calls for Privilege: Sexual Assault and the Disclosure of Mental Health Records in Police Possession in Canada" (2016) 1 Cambridge L Rev 77.

78 *Ibid.*

79 Gotell, "Tracking," *supra* note 48 at 140.

at all, or has been narrowed through judicial interpretation because of the inconsistencies between the provisions and the *Mills* decision.

V. Section 278 Provisions Versus *Mills* – A Question of Judicial Interpretation

The s. 278 provisions were enacted to limit judicial discretion by directing judges to engage in a multi-stage balancing exercise before ordering the production and disclosure of third-party records in sexual assault cases. Subsection 278.5(1) requires judges to evaluate both the likely relevance of the records to an issue at trial, and whether the production and disclosure of the records is necessary in the interests of justice.[80] The provisions also direct judges to weigh defendant's legal rights against both the privacy and security of the person rights of complainants, in light of the equality context, while considering factors such as discriminatory myths and society's interest in having complainants report their experiences to the police.[81] In *Mills,* however, the Court's guidelines for application of s. 278 have allowed judges to render the provisions more malleable than they were intended to be. These guidelines include: stress placed on the importance of judicial discretion;[82] the court's description of subsection 278.5(2)'s factors as a "checklist" that "may come into play during a judge's deliberation";[83] and, most importantly, its holding that fair trial rights must prevail over privacy rights in "uncertain" situations.[84] These *Mills* guidelines continue to be relied upon most heavily in cases where production is ultimately ordered, such as in *R v D.C., R v Beckford and Stone, R v MacArthur,* and others. Conversely, in cases where production is not ordered, the analysis more closely follows the provisions themselves, such as in *Blake.*[85] Finally, in some

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80 *Criminal Code, supra* note 26, s 278.5(1).

81 *Ibid*, s 278.5(1)(a)–(h).

82 *Mills*, *supra* note 27 at 742.

83 *Ibid* at 749.

84 *Ibid* at 748. Interestingly, none of the cases, not even those that did balance the competing rights, touched on how disclosing the contents of the records might actually *detract* from the fairness of the trial process *and* simultaneously impinge on equality rights by introducing harmful myths about complainants.

85 See *Blake*, *supra* note 56 at para 38.

cases, such as *R v DAB*, there is no apparent analysis of competing rights at all.

VI. CONCLUSIONS

Out of the twenty-two cases analyzed, a total of thirteen applications for record production were dismissed, while nine were allowed. This statistic leans slightly more towards dismissal than Gotell's 50% statistic from 2006, but it remains that judicial interpretation of *Mills*, in concert with the production provisions, has led to inconsistent findings. The stage at which each record application was dismissed or produced is found in Appendix C.[86]

Mills was the first case in which the Court invoked the equality guarantees of the *Charter* in deciding a sexual assault case.[87] However, the majority's gestures to equality rights were tempered by its narrow framing of privacy rights. The ruling emphasized that the disclosure of confidential information in the context of sexual assault trials infringes on privacy rights of the complainant.[88] In the context of relationships between therapist and patient, privacy is essential for trust and, where confidentiality is threatened, "so too is the complainant's mental integrity and security of the person."[89] However, as Gotell has argued, a highly individualistic understanding of complainants' concerns underpins this discussion.[90] This kind of analysis ignores the power relations that influence victims' abilities to engage in the productive importance of speaking about sexual assault inside and outside

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86 *Musse*, *supra* note 58 at para 21; *R v MC*, *supra* note 55 at para 17; *R v D(C)*, *supra* note 55 at para 47; *Lonergan*, *supra* note 56 at paras 23, 28; *Beckford*, *supra* note 55 at para 45; *Blake*, *supra* note 56 at paras 44, 61; *Ali*, *supra* note 55 at para 41; *R v DW*, *supra* note 57 at para 11; *R v Hughes*, *supra* note 55 at para 11; *R v Barbaro*, *supra* note 55 at para 22; *R v RWAP*, *supra* note 56 at para 22; *R v YCB*, *supra* note 56 at para 56; *MacArthur*, *supra* note 55 at para 43; *R v JAB*, *supra* note 55 at para 36; *R v PB*, *supra* note 55 at para 32; *Armstrong*, *supra* note 57; *Hidalgo*, *supra* note 55 at para 23; *R v BT*, *supra* note 56 at para 55; *R v DAB*, *supra* note 56 at para 17; *R v A(A)*, *supra* note 55 at para 8; *R v JW*, *supra* note 61 at para 24; *R v RN*, *supra* note 55 at para 22.

87 Gotell, "Ideal Victim," *supra* note 3 at 269.

88 *Mills*, *supra* note 27 at 722.

89 Gotell, "Ideal Victim," *supra* note 3 at 269.

90 *Ibid.*

the courtroom.[91] These are precisely the kinds of relations that the s. 278 provisions had called upon judges to consider, but that many judges in the most recent cases have either minimized, or ignored.

The *Charter* protects the right of accused persons to make full answer and defence vis-à-vis ensuring the opportunity to delineate the credibility of witnesses. Section 278 of the Code and the common law ensure that this right is subject only to reasonable limits, such as what is necessary to ensure that complainants' rights to privacy and equality remain relatively uncompromised. A corresponding purpose of all relevant legislation and jurisprudence is to ensure that confidence is not lost in the Canadian justice system. Thus, where Parliament has directed judges to balance the right to full answer and defence against rights of privacy and equality of complainants, it is important – and necessary – that judges do so; to ensure a fair trial, to combat the systemic disadvantages facing sexual assault complainants in the justice system, and to bolster public confidence in the consistency of the justice system.

Similarly, lawyers must execute their role as "zealous advocates" responsibly, including in third-party record applications involving sexual assault or violence. In her article, "The Ethical Identity of Sexual Assault Lawyers," Elaine Craig detailed some of the ways in which defence counsel have described their own role in sexual assault trials. Notably, one lawyer offered the following explanation for why sexual assault complainants, like the women in the epigraph to this article, continue to report their experience of the criminal justice system as traumatic:

> It's the way we as defence council have to approach the problem. You know, you gotta attack the alleged victim. If the issue of credibility is going to be decided by the judge, then of course, you gotta attack the victim. And they feel that they are on trial. And you know, it's amazing as to what you, the type of questions you can do based on the information you have.[92]

Lawyers must take care not to cross into the realm of "whacking the complainant,"[93] including by requesting more confidential records than are

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91 *Ibid.*

92 Elaine Craig, "The Ethical Identity of Sexual Assault Lawyers" (2016) 47 Ottawa L Rev 73 at 95 [emphasis added].

93 *See generally* Tanovich, "Ethics of Defence," *supra* note 7; and David M Tanovich, "An Equality-Oriented Approach to the Admissibility of Similar Fact Evidence in Sexual Assault Prosecutions" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Practice &*

necessary or by misusing the records that are permitted to enter into evidence. In *Mills*, the Supreme Court warned that:

> Equality concerns must…inform the contextual circumstances…[A]n appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence… The accused is not permitted to 'whack the complainant' through the use of stereotypes regarding victims of sexual assault.[94]

The use of this language in *Mills* is indicative of legal and ethical norms grounded in equality values, that can serve as guidance for defence lawyering in sexual assault cases, including in third-party record applications. Despite the reservations about *Mills* that have been detailed throughout this article, the case retains its value in its direction towards a nuanced conversation about the competing rights involved in these cases, and the importance of delineating an ethical approach to sexual assault lawyering that takes into consideration evolving societal norms about sexual violence. Thus, as has been argued by David Tanovich, ethical lawyering in the context of sexual assault cases is possible.[95] I would add that it is absolutely necessary.

Women's Activism (Ottawa: University of Ottawa Press, 2012) at 554.

94 *Mills, supra* note 27 at 727 [emphasis added].

95 Tanovich, "Ethics of Defence," *supra* note 7 at 508.

Appendix A

Type of record sought for production	**Number of cases in which the defence was seeking this record**	**Names of cases in which the defence was seeking this record**	**Number of cases in which the record was ultimately produced to the defence**	**Cases in which the record was ultimately produced to the defence**
Therapy/Counselling/Psychology/Psychiatry Records	13	*R v* MC *R v DC* *R v Beckford and Stone* *R v Ali* *R v Hughes* *R v Barbaro* *R v RWAP* *R v MacArthur* *R v JAB* *R v PB* *R v Hidalgo* *R v A(A)* *R v RN*	4	*R v* MC *R v DC* *R v Beckford and Stone* *R v MacArthur*
Children's Aid Society Records	7	*R v Lonergan* *R v Blake* *R v RWAP* *R v YCB* *R v BT* *R v DAB* *R v RN*	4	*R v YCB* *R v BT* *R v DAB* *R v RN*
General Medical Records (hospital, clinic, or doctor)	6	*R v DC* *R v Beckford and Stone* *R v Ali* *R v DW* *R v MacArthur* *R v Armstrong*	4	*R v DC* *R v Beckford and Stone* *R v DW* *R v MacArthur*

Copies of police occurrence reports or trial records from other charges "involving" the complainant	4	*R v Musse* *R v Beckford and Stone* *R v Blake* *R v Armstrong*	1	*R v Beckford and Stone*[96]
General information regarding the current case from the police (i.e. dates of statements made, dates of preliminary inquiries, etc.)	2	*R v BT* *R v Hidalgo*	1	*R v BT*
Copies of police statements made by a third party (not the complainant herself)	1	*R v JW* (this was a novel claim in Ontario)	0	N/A
Records from Youth/Family Services Programs	2	*R v DC* *R v Blake*	1	*R v DC*
School Records	2	*R v BT* *R v DAB*	2	*R v BT* *R v DAB*
OHIP Billing Records	1	*R v Armstrong*	0	N/A
ODSP Records	1	*R v DC*	1	*R v DC*
Canada Pension Plan Records	1	*R v DC*	1	*R v DC*
Foster Care Services Records	1	*R v Lonergan*	0	N/A

[96] This is the only case in which the defense took the position that their application did not fall under the *Mills* scheme definition of a "record," but that the documents should nevertheless be produced.

Appendix B

Issue for which defence counsel explicitly argued that production is both likely relevant and necessary in the interests of justice	**Number of cases in which defence counsel argued under this issue**	**Names of cases in which defence counsel argued this issue**
Complainant's credibility and reliability	17	*R v Musse* *R v MC* *R v DC* *R v Beckford and Stone* *R v Blake* *R v Ali* *R v DW* *R v Hughes* *R v Barbaro* *R v MacArthur* *R v JAB* *R v Hidalgo* *R v DAB* *R v AA* *R v JW* *R v PB* *R v BT*
For the right to full answer and defence / the right to a fair trial	11	*R v Musse* *R v DC* *R v Lonergan* *R v Beckford and Stone* *R v Blake* *R v Ali* *R v RWAP* *R v MacArthur* *R v JAB* *R v DAB* *R v JW*
To prove that no crime was ever committed / that the allegations were fabricated	4	*R v Blake* *R v MacArthur* *R v JAB* *R v Hidalgo*

To obtain possible evidence of inconsistent statements made by the complainant to their treatment providers and/or the police and the court about the alleged incidents	3	*R v Ali* *R v MacArthur* *R v BT*
To point at whether the complainant "confused their alleged sexual assaults" by the accused with later or earlier sexual assaults committed against them by others (A.A. para 31); or otherwise to prove that the complainant's trauma "emanates from incidents unrelated to the charges in this case" (M.C. para *12*)	3	*R v Ali* *R v RN* *R v MC*
To inform the court about an unfolding of events, given memory problems of the complainant; or otherwise illuminate the ways in which claimed mental health issues affect the complainant's ability to recall the events in question	2	*R v DC* *R v Hughes*
To determine whether counselling sessions played a role in "reviving, refreshing, or shaping the memory of the complainant" (*Barbaro*, para 12)	2	*R v Barbaro* *R v PB*
To obtain evidence regarding why a complainant made delayed disclosure	2	*R v Ali* *R v Hughes*
Whether the applicant was the cause of the complainant's mental health issues / panic attacks	1	*R v DC*
To test an assertion made during trial by the complainant	1	*R v Armstrong* (in this case, the complainant claimed she had never had an STD; the accused wanted to refute this claim with the extra evidence)
To explore the facts behind a previous trial involving the complainant	1	*R v Armstrong*
To prove that the complainant had not made any earlier complaints against the accused	1	*R v Lonergan*

To point to the possibility that the records contain information about animus towards the accused that might have motivated the allegations against him rather than actual abuse	1	*R v Ali*
"That the records may contain evidence of prior sexual abuse by others and might also reveal that those allegations of sexual abuse did not result in any charges or criminal convictions" (*Blake*, para 17)	1	*R v Blake* (defence argued that if this was true, they could suggest that the complainant fabricated allegations of sexual abuse against Mr. Blake and that those allegations also had no merit)

Appendix C

Cases in which the application was dismissed because it was found not to meet the "likely relevance" threshold	**Cases in which the records were found to be "likely relevant," but the application was nevertheless dismissed because production was not "necessary in the interest of justice"**	**Cases in which the applications that were accepted on the grounds of likely relevance and necessity that were ultimately not produced to the accused after the judge's review of the records**	**Cases in which the records were ultimately produced to the defence**
R v Musse *R v Blake* (the CAS records and police records) (judge goes further to say that production was not necessary in the interest of justice, despite also saying they were not relevant – para 44) *R v Ali* (2013) *R v RWAP* (the counselling records) (the CAS records mentioned in the case were not dealt with by the judge in this instance) *R v JAB* *R v Armstrong* (except for the time and place of a previous trial involving the comp, which were to be produced by the Crown) *R v Hidalgo* *R v Hughes*	*R v Barbaro* (Crown, defence, and complainant counsel all agreed that the records were likely relevant, judge reviewed them, and decided it should not be produced to accused) *R v JW*	*R v Lonergan*	*R v MC* *R v DC* *R v Beckford and Stone* (the police reports and the medical and therapeutic records) *R v DW* (all ten documents) *R v YCB* (respondent consented to likely relevance of documents relating to **named** complainants and witnesses for the same investigation, but not those which relate to unnamed persons, because they are not relevant) *R v MacArthur* *R v BT* *R v DAB* *R v RN* (the CAS records)

R v A(A) *R v RN* (the counselling records)			
TOTAL: 10	**TOTAL: 2**	**TOTAL: 1**	**TOTAL: 9**

Section 24(2) of the *Charter*; Exploring the Role of Police Conduct in the *Grant* Analysis

PATRICK MCGUINTY*

ABSTRACT

This article explores the role of the police conduct inquiry in the application of s. 24(2) of the *Canadian Charter of Rights and Freedoms* under the *Grant* analysis from *R v Grant*. It argues, based on the author's research, that the first line in the *Grant* analysis, namely the police conduct inquiry, has become the determinative factor in the *Grant* analysis. The article further argues that the concept of good faith policing is being unevenly and inconsistently applied. Good faith policing has never been clearly defined, yet it plays a significant role in the police conduct inquiry. This is dangerous as it gives rise to scenarios where the concept of good faith policing captures a broad scope of conduct. As a result, evidence is sometimes being admitted, when it otherwise would have been excluded.

***Keywords*:** Exclusion of evidence; *Canadian Charter of Rights and Freedoms*; Evidence; Policing; Good Faith Policing; Section 24(2); Criminal Law; Constitutional Law; *R v Grant*; *Grant* analysis; Administration of Justice

> "I fail to see how the good faith of the investigating officer can cure an unfair trial…" Sopinka J. in R v Hebert [1990] 2 SCR 151
>
> "The good faith of the police will not strengthen the case for admission to cure an unfair trial. The fact that the police thought they were acting reasonably is cold comfort to an accused if their actions result in a violation of his or her rights to fair criminal process…" Iacobucci J. in R v Elshaw [1991] 3 SCR 24

I. INTRODUCTION AND BACKGROUND

Section 24(2) of the *Canadian Charter of Rights and Freedoms*[1] is an important, yet contentious provision in our *Charter*. It is contentious because it can deprive the court of crucial evidence. It is important because it is a significant remedy available to an accused whose rights have been infringed. Bearing this in mind, it is imperative that s. 24(2) be accompanied by clear guidelines in order to ensure that evidence is excluded in appropriate circumstances. The Supreme Court has been tasked with determining how s. 24(2) should be interpreted and applied. The Supreme Court's most recent major comment on this provision was in 2009 when the Court rendered its decision in *R v Grant*.[2]

The decision in *Grant* afforded courts with a framework that requires judges to consider three separate independent factors when determining whether to exclude illegally obtained evidence.[3] This framework is known as the *Grant* analysis. In *Grant*, and in subsequent decisions, the Supreme Court has been unequivocally clear that all three factors of the analysis must be balanced against one another.[4] The Court further held that one factor should never be determinative over the others.[5] In other words, one factor should never trump the others. This article argues that the most important factor in the *Grant* analysis is the first factor, namely the police conduct inquiry. This part of the analysis invites judges to assess the police conduct associated with the *Charter* breach. The significance of the police conduct inquiry is an important concept which this article attempts to address.

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* Patrick McGuinty is a third-year JD student at the University of New Brunswick's Faculty of Law. The author owes a special thank you to Dylan McGuinty, Sr. (LLB 1983) and to Dr. Nicole O'Byrne (University of New Brunswick, Faculty of Law) for their helpful comments on earlier drafts. The author additionally thanks the editors for the Manitoba Law Journal.

1 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 [*Grant*].

3 The three factors judges are required to consider are (1) the seriousness of the *Charter*-infringing state conduct, (2) the impact of the breach on the rights of the accused, and (3) society's interest in the adjudication of the case on its merits. See *ibid* at para 71. These factors will be discussed later in this paper.

4 *Ibid* at para 86.

5 *R c Côté,* 2011 SCC 46 at para 48, [2011] 3 SCR 215.

This article argues that the *Grant* framework is being unevenly applied. It argues that the police conduct inquiry in the *Grant* analysis appears to have become the determinative factor in the *Grant* analysis. This goes against the instructions set out by the Supreme Court in *Grant* which require that all three factors be balanced together. The police conduct inquiry under the *Grant* analysis tends to determine whether evidence will be excluded. In other words, the test for determining whether evidence should be excluded currently revolves primarily around the police conduct inquiry.

The concept of good faith policing plays a vital role in the police conduct inquiry. This article will argue that the lack of a clear definition for the concept of good faith policing is problematic. The concept of good faith policing and its application to the *Grant* framework is the main focus of this article. The Supreme Court has given minimal guidance on the application of the concept of good faith policing; there is no clear definition of what types of conduct fall within the scope of good faith policing. The result is that good faith policing is receiving inconsistent application.[6] This has led some courts to mistakenly label negligent or reckless police conduct as good faith policing[7]. As a result, evidence is being admitted when it perhaps ought to be excluded.

This article argues that it is perilous for the police conduct inquiry to be the determinative factor in the *Grant* analysis when the concept of good faith policing, a concept which plays a substantial role in the police conduct inquiry, has not been properly defined. It creates the risk that police conduct will falsely be captured by the concept of good faith policing and will lead to the admission of evidence which may have otherwise been excluded. This is a core issue this article seeks to address.

The arguments made will be supported by the author's research. The research consists of an analysis of one hundred decisions from the year 2016 in which s. 24(2) of the *Charter* as well as the *Grant* analysis were considered and applied. The methodology used will be explained later in this article.

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6 Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2016) (release number 28) at 10-58.1; see also Steve Coughlan, "Common Law Police Powers and Exclusion of Evidence: The Renaissance of Good Faith" (2006), 36 CR (6th) 353.

7 Examples of such cases will be discussed throughout this paper.

This article begins by giving the reader a brief overview of the exclusion of evidence in Canada, as well as the police conduct inquiry. It reveals the current and historical importance of the police conduct inquiry. Part III then briefly summarizes the current approach to the concept of good faith policing. Part IV discusses the author's research, which is used to support the main arguments this article attempts to make. This article concludes with some remarks and recommendations.

II. THE EXCLUSION OF EVIDENCE IN CANADA

The law surrounding the exclusion of evidence in Canada has changed drastically over time. Prior to the enactment of the *Charter*, Canadian judges were reluctant to exclude evidence obtained illegally or in violation of a person's rights under the Canadian Bill of Rights 1960.[8] Unlike the *Charter*, the Bill of Rights did not include an exclusionary remedy. In 1971, the Supreme Court held that a judge did not have the discretion to exclude evidence obtained in breach of a person's rights.[9] Therefore, as long as the evidence was relevant, illegally obtained evidence was admissible.

The manner in which the evidence was obtained was irrelevant to the determination of its admissibility. A somewhat vivid and startling example of this pre-*Charter* law was displayed in *R v Devison*,[10] where the Nova Scotia Court of Appeal stated, "Even if he (the accused) had been knocked down and beaten and the blood sample extracted from him, it would still be admissible."[11] This bright line rule was subject only to the narrow and seldom used exception that gave judges the discretion to exclude evidence that would be "gravely prejudicial" to the accused.[12] This rigid and inflexible

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8 See, for example, *R v Wray,* [1971] SCR 272, [1970] SCJ No 80 (QL) [*Wray*], where the Supreme Court of Canada followed *Kuruma v the Queen*, [1955] AC 197, [1955] 2 WLR 223.

9 *Wray, supra* note 8; *Hogan v The Queen*, [1975] 2 SCR 574, 18 CCC (2d) 65 [*Hogan*]; see also Peter W Hogg, *Constitutional Law of Canada*, 2016 student ed (Toronto: Thomson Reuters, 2016) at 41.2 [*Hogg*].

10 *R v Devision* (1974), 21 CCC (2d) 225, 10 NSR (2d) 482.

11 *Ibid* at 230.

12 *Wray, supra* note 8; *R v Rothman*, [1981] 1 SCR 640, [1981] SCJ No 55 (QL); *Hogan, supra* note 9; see also David Stratas, "The Law of Evidence and the *Charter*" in The Law Society of Upper Canada, ed, *Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2003) at 277–278.

rule heavily disregarded individual rights – the police were essentially free to collect evidence by whatever means necessary. Naturally, this led to much discontent amongst the community.[13] The court's search for the truth trumped any interest in procedural fairness or in protecting the rights of an accused; it was truth over fairness.[14] This evidently explains the Supreme Court's reluctance to allow judges to exclude illegally obtained evidence.

During the rights revolution, while the government of Canada was drafting the *Charter*, there was much debate surrounding the exclusion of evidence. Some lobbied for the American exclusionary rule.[15] Others felt that it was more appropriate to discipline the police officers separately and to allow the admission of the evidence in order to convict the guilty and stay true to the Court's search for the truth.[16] The final outcome was a compromise between the two schools of thought.[17] The framers of the *Charter* provided Canadians with s. 24(2) of the *Canadian Charter of Rights and Freedoms*.[18] Section 24(2) requires a judge to exclude evidence obtained

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13 John Sopinka et al, *The Law of Evidence in Canada*, 4th student ed (Markham: LexisNexis Canada, 2014) at 572.

14 Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999). This article was located in Kent Roach's book, *Criminal Law and Procedure: Cases and Materials*, 11th ed (Toronto: Emond Montgomery, 2015) at 130–134.

15 Generally, illegally obtained evidence is automatically excluded. See *Weeks v US*, 34 S Ct 341 (1914); *Mapp v Ohio,* 367 US 643 (1961); *Elkins v United States*, 364 US 206 at 217 (1960), EG Ewaschuk, QC, "Search and Seizure: Charter Implications" (1982), 28 CR (3d) 153; however, the absolute exclusionary rule in the United States may be changing, see *US v Herring,* 129 S Ct 695 (2009).

16 *Hogg, supra* note 9 at 41–42.

17 See the judgment of Dickson CJ in *R v Simmons* (1989), 45 CCC (3d) 296, [1988] 2 SCR 495 at 323, where he states, "The *Charter* enshrines a position with respect to evidence obtained in violation of *Charter* rights that falls between two extremes. Section 24(2) rejects the American rule that automatically excludes evidence obtained in violation of the Bill of Rights. It also shuns the position at common law that all relevant evidence is admissible no matter how it was obtained." See also Gerard E Mitchell, "The Supreme Court on Excluding Evidence Under the Charter" (1992), 70 CR (3d) 118.

18 Section 24(2) of the *Charter* states, "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

in a manner[19] that breached a person's *Charter* rights, if the admission of the evidence *could*[20] bring the administration of justice into disrepute. The enactment of s. 24(2) fundamentally changed the law of evidence.[21]

Over time, the Supreme Court has consistently contributed to the development of s. 24(2). The Court's most recent major comment on the s. 24(2) framework was set out in its 2009 decision in *Grant*.[22] McLachlin C.J. and Charron J., writing for the Court in *Grant*, set out the current framework for the exclusion of evidence:

> When faced with an application for exclusion under s.24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admissions may send the message that the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interest of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. [23]

The Court's primary concern was to ensure that evidence would only be excluded if its admission would bring the administration of justice into disrepute.[24] The Court further emphasized that courts must be concerned

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19 In *R v Strachan*, [1988] 2 SCR 980, 56 DLR (4th) 673, and *R v Debot*, [1989] 2 SCR 1140, 52 CCC (3d) 193, the Supreme Court took a generous approach to the words "obtained in a manner" and required that there must be a "temporal" and not "causal" connection between the obtainment of the evidence and the *Charter* breach. Dickson CJ stated that the trial judge must look at the "entire chain of events" and that a temporal link between the *Charter* breach and the obtainment of evidence will suffice. This concept was most recently affirmed by the Ontario Court of Appeal in *R v Pino*, 2016 ONCA 389 at para 56, 2016 CarswellOnt 8004, where Laskin JA affirmed that the approach must be generous, temporal, and contextual.

20 The actual wording of section 24(2) is "would" and not "could"; however, in *R v Collins*, [1987] 1 SCR 265, at 287–288, [1987] SCJ No 15 (QL) [*Collins*], Lamer J looked at the French reading of section 24(2) and determined that the provision should thus be read as "the evidence shall be excluded if it is established that having regard to all the circumstances, admission of it in the proceedings *could* bring the administration of justice into disrepute" [emphasis in original].

21 See generally *Stratas*, *supra* note 12.

22 *Grant*, *supra* note 2.

23 *Ibid* at para 71.

24 *Ibid* at paras 67–70.

about the long-term repute of the administration of justice and not its short-term repute.[25]

Many Canadian academics commended and welcomed the new framework.[26] Following the decision in *Grant*, many scholars predicted that the new framework would lead to much lower rates of exclusion.[27] The general consensus was that there would be higher rates of admission due to the fact that judges now had to adopt a more contextual and principled approach. Despite these predictions, the truth is, no one knew what the outcome would be. This is because the *Grant* framework is somewhat unclear and unpredictable. The framework demands a complete contextual analysis. It requires judges to balance all of the three factors in order to come to a conclusion on whether to exclude the evidence.[28] However, the

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25 *Ibid* at para 68. The court emphasized that their main concern was the long-term repute of the administration of justice. At paragraph 68, the court stated, "The phrase 'bring the administration of justice into disrepute' must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute."

26 See RJ Delisle et al, *Evidence: Principles and Problems*, 10th ed (Toronto: Carswell, 2012) at 205; Don Stuart, *Charter Justice in Canadian Criminal Law*, 10th ed (Toronto: Carswell, 2010) at 595–597; Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Toronto: LexisNexis Canada, 2011) at 557–573.

27 For example, see David M Paciocco & Lee Stuesser, *The Law of Evidence* 5th ed (Toronto: Irwin Law, 2008) (revised 2009) at 38; Mike Madden, "Marshalling the Data: An Empirical Analysis of Canada's Section 24(2) Case Law in the Wake of *R v Grant*" (2011) 15:2 CCLR 229 [*Madden*]; see also Don Stuart, "Welcome Flexibility and Better Criteria from the Supreme Court of Canada for Exclusion of Evidence Obtained in Violation of the Canadian Charter of Rights and Freedoms" (2010) 16 SW J Int'l L 313 at 326; Tim Quigley, "Was It Worth the Wait? The Supreme Court's New Approaches to Detention and Exclusion of Evidence" (2009), 66 CR (6th) 88 at 94. These academics all made very similar predictions regarding an increase in the admission of evidence after *Grant*.

28 *Grant*, *supra* note 2 at para 71.

predictions of lower rates of exclusions were proven wrong; since *Grant*, Canada continues to have high rates of exclusion.[29]

Some academics were not as receptive to the new *Grant* framework. Paciocco (now Justice Paciocco) showed understandable concern about the complete discretion awarded to trial judges under the new framework.[30] In *Grant*, McLachlin C.J. and Charron J. attempted to address some of these concerns by stating that "patterns" would emerge through the common law which would help restore certainty in the s. 24(2) analysis.[31] The Court may have been aware that the prior jurisprudence provided a degree of certainty in relation to the application of s. 24(2).[32] It seems the Court was hoping that the new framework would slowly adopt a degree of certainty over time through the common law.

For the purposes of this article, it is important to consider the first factor in the *Grant* analysis. The first factor in the *Grant* analysis requires a judge to assess the *Charter* infringing state conduct. This commonly invites judges to look into the police conduct surrounding the *Charter* breach. The police conduct inquiry is not new to the s. 24(2) analysis. Many of the very early s. 24(2) decisions took into account the conduct of the police when determining whether to admit or exclude evidence.[33] Following the enactment of the *Charter*, when considering whether to exclude evidence under s. 24(2), judges consistently applied the "shock the community" test.[34] Put simply, courts would consider whether the admission of the impugned

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29 This will be further discussed in part IV of this paper, where the author reviews some of the past empirical statistics relating to the rates of exclusion under the *Grant* framework.

30 David M Paciocco, "Section 24(2): Lottery or Law – The Appreciable Limits of Purposive Reasoning" (2011) 58 Crim LQ 15.

31 *Grant*, *supra* note 2 at para 86.

32 For example, under the previous *Collins/Stillman* framework developed in *R v Stillman*, [1997] 1 SCR 607, 144 DLR (4th) 193, following the Supreme Court's decision in *Collins*, the Supreme Court created the conscriptive evidence rule. This rule required judges to automatically exclude all illegally obtained conscriptive evidence. As a result, this ensured a high degree of certainty within the section 24(2) analysis when it came to conscriptive evidence.

33 For an excellent general overview of the early case law and the several early decisions released around the country, as well as the general history of section 24(2), see James A Fontana & David Keeshan, *The Law of Search and Seizure in Canada*, 9th ed (Toronto: LexisNexis Canada, 2015) at 1086–1096.

34 *Ibid* at 1093.

evidence would shock the ordinary man.[35] Naturally, this assessment required courts to consider the conduct of the police officers.[36] The police conduct inquiry has thus always played a vital role in the application of s. 24(2).

III. SERIOUSNESS OF THE *CHARTER* INFRINGING STATE CONDUCT

The police conduct inquiry, under the first factor of the *Grant* analysis, plays a very important part in the overall analysis. This factor appears to be the most determinative factor in the *Grant* analysis. As noted, it requires judges to consider the seriousness of the *Charter* infringing state conduct. In other words, the first branch of the *Grant* analysis inescapably requires judges to assess the conduct of the police at the time the *Charter* breach crystallized.[37] As noted, the conduct of the police officers in obtaining the evidence has always been a crucial part of a judge's analysis when deciding whether to exclude evidence.

The reason judges must consider the conduct of the police is due to the fact that the Canadian justice system must disassociate itself from unlawful police conduct.[38] By excluding evidence, Canadian courts send a clear message that they do not condone state conduct in which police officers do not comply with the *Charter* rights of Canadians.[39] Therefore, serious breaches favour the exclusion of evidence under this branch of the analysis. Minor breaches tend to favour admission because they lessen the need for courts to disassociate themselves from the unlawful police conduct. Judges must be cognizant of the fact that the inquiry into police conduct is only one part of the analysis; judges must still balance all three factors of the *Grant* analysis against one another and one factor must never trump the others.[40]

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35 *Ibid* at 1086–1096.

36 *Ibid*.

37 *Roach*, *supra* note 6 at 10-45 (para 10.1050).

38 *Grant*, *supra* note 2at para 72.

39 *Ibid*.

40 *Grant*, *supra* note 2 at para 86; *Côté*, *supra* note 5 at para 48.

The Supreme Court in *Grant* stated that the first factor in the *Grant* analysis was not concerned with deterrence or with punishing the police for not complying with the *Charter*.[41] The Court explained that this branch of the analysis was concerned with ensuring that courts were disassociating themselves with *Charter* infringing state conduct in order to maintain the repute of the administration of justice and upholding public confidence.[42] As Lamer J. stated in *Collins*, "it is not open to the courts in Canada to exclude evidence to discipline the police, but only to avoid having the administration of justice brought into disrepute."[43] The Court in *Grant* did acknowledge that it was perhaps a "happy consequence" that *Charter* infringing police conduct would be deterred due to the risk of exclusion.[44]

The Supreme Court held that judges must evaluate the conduct of the police and place it on a spectrum. In essence, the Court held that judges must determine whether the conduct of the police was "committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, willful or flagrant."[45] McLachlin CJ and Charron J. stated the following:

> State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the *Charter* may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a willful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.[46]

In *R v Harrison*,[47] a decision released by the Supreme Court with *Grant*, the Supreme Court stated, "police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights. What is important is the proper

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41 *Grant*, *supra* note 2 at para 73.

42 *Ibid.*

43 *Collins*, *supra* note 20 at 518–519.

44 *Grant*, *supra* note 2 at para 73.

45 *Collins*, *supra* note 20 at 527.

46 *Grant*, *supra* note 2 at para 74.

47 *R v Harrison*, 2009 SCC 34, [2009] 2 SCR 494.

placement of the police conduct along that fault line, not the legal label attached to the conduct."[48]

In *Grant*, the Supreme Court provided judges with further guidance in relation to the police conduct spectrum. The Court stated that breaches committed in good faith would lessen the need for Canadian courts to disassociate themselves with unlawful police conduct.[49] The result is that *Charter* breaches committed in good faith tend to favour admission. However, the Court offered an important caveat. McLachlin CJ and Charron J. restricted the application of the good faith policing by stating that "ignorance of *Charter* standards must not be rewarded or encouraged and negligence or willful blindness cannot be equated with good faith."[50]

The concept of good faith policing is one of the focal points of this article. Put simply, police conduct equating to good faith is found primarily where an officer holds an honest and reasonable belief that their actions are lawful.[51] It is important that negligent or reckless police conduct not be mischaracterized as good faith policing.[52]

Good faith policing is often found when the police rely on legal authority to justify their actions.[53] A recurring theme of good faith policing in relation to s. 8 breaches is found when the police honestly and reasonably believed that the illegal search performed was authorized by a valid search warrant.[54] For example, where a warrant includes minor inadvertent errors, it may be invalid; if the police performed the search due to an honest and reasonable belief that it was valid, then their conduct may be labeled as good faith policing. Another common example of good faith policing is where there is confusion in the law relating to police powers incident to arrest. The latter example has been the subject of many Supreme Court decisions in the last five years.[55] Put simply, if the confusion in the law is such that an

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48 *Ibid* at para 23.

49 *Grant*, *supra* note 2 at para 75.

50 *Ibid*; see also *R v Genest*, [1989] 1 SCR 59 at 87, [1989] SCJ No 5 (QL) [*Genest*]; *R v Kokesch*, [1990] 3 SCR 3, [1990] SCJ No 117 (QL) [*Kokesch*].

51 *R v Caron*, 2011 BCCA 56 at para 38, [2011] BCWLD 2263.

52 *Grant*, *supra* note 2 at para 75.

53 *Roach*, *supra* note 6 at 10-48–10-58.1.

54 *Ibid*.

55 See e.g. *R v Cole*, 2012 SCC 53, 3 SCR 34 [*Cole*]; *R v Aucoin*, 2012 SCC 66, [2012] 3 SCR 408 [*Aucoin*]; *R v Vu*, 2013 SCC 60, [2013] 3 SCR 657 [*Vu*]; *R v Spencer*, 2014 SCC

officer may have honestly and reasonably believed their actions were lawful, they may be found to have been acting in good faith.[56]

It is helpful to consider a statement by Ryan J.A. in *R v Washington*[57] where he summarizes the law of good faith policing, but also identifies the incomplete definition of good faith policing. He states that "Although good faith is not fully defined in the jurisprudence, the underlying notion is that good faith is present when the police have conducted themselves in manner that is consistent with what they subjectively, reasonably and non-negligently believe to be the law."[58] It is important to also acknowledge Ryan J.A.'s admission that good faith policing is not fully defined. As will be argued in this article, this can be problematic.

By way of example, in *R v Saeed*,[59] Karakatsanis J., in a concurring judgment, found the seriousness of the officer's conduct to be lessened when, incident to arrest the officer obtained a genital swab from the accused without the consent of the accused or a warrant. Karakatsanis J. opined that, although this was an unreasonable search under s. 8 of the *Charter*, the officer's conduct did not favour exclusion because there was significant confusion in the law relating to the power of police to obtain genital swabs incident to arrest.[60]

In *R v Fearon*[61] the Supreme Court admitted illegally obtained evidence from the accused's cell phone. The police unlawfully searched the cell phone of the accused incident to arrest. The Court found that the breach was committed in good faith due to the uncertainty in the law relating to the police powers to search a cell phone incident to arrest. In *Fearon*, the Court acknowledged that there were two conflicting appellate authorities in Canada relating to the police powers to search cell phones incident to

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43, [2014] 2 SCR 212 [*Spencer*]; *R v Fearon,* 2014 SCC 77, [2014] 3 SCR 621 [*Fearon*]; *R v Saeed,* 2016 SCC 24, [2016] 1 SCR 518 [*Saeed*].

56 *Vu*, *supra* note 55 at paras 69 and 71.

57 *R v Washington*, 2007 BCCA 540, 248 BCAC 65.

58 *Ibid* at para 78.

59 *Saeed*, *supra* note 55.

60 *Ibid* at 126.

61 *Fearon*, *supra* note 55.

arrest.[62] The Court accepted that the police honestly and reasonably believed that their actions were *Charter* compliant.[63]

Both *Saeed* and *Fearon* reveal that, where the law relating to police powers incident to arrest is unclear, an officer's conduct may be labelled good faith policing. It is important to note however that the concept of good faith policing is limited. For the purpose of clarity, it must be emphasized that negligent or reckless disregard for the *Charter* rights of an accused should never equate to good faith policing. Additionally, it is imperative that judges be cognizant of the fact that good faith policing is not determinative. The Supreme Court in *R v Mann*[64] held that a finding of good faith policing is not determinative in the overall analysis; judges must still look at all of the other relevant factors.[65]

IV. The Uneven Application of Good Faith Policing in the *Grant* Analysis

The research I have conducted consists of an empirical study of one hundred s. 24(2) cases from the year 2016. The methodology used will be summarized below. My research reveals two trends that are worth discussing. Firstly, negligent and reckless police conduct is sometimes being characterized as good faith policing. This is possibly due to the fact that good faith policing has never been clearly defined. Secondly, there is a strong link between the police conduct inquiry and the ultimate decision of whether to exclude or admit impugned evidence under the *Grant* framework. Put simply, the police conduct inquiry appears to be the determinative factor in the analysis. This does accord with the Supreme Court's clear instructions that all three factors of the *Grant* analysis must be balanced against one another without allowing for one factor to trump the others.[66]

The uneven and inconsistent application of good faith policing can affect a court's *Grant* analysis. This is especially dangerous when considering

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62 *Ibid* at para 93–95.

63 *Ibid*.

64 *R v Mann*, 2004 SCC 52, [2004] 3 SCR 59 [*Mann*].

65 *Ibid* at para 55.

66 *Grant*, *supra* note 2 at para 86; *Côté*, *supra* note 5 at para 48.

that the first factor in the *Grant* analysis is potentially the determinative factor. This may lead to the admission of evidence that otherwise ought to have been excluded.

A. My Research, Findings and Methodology

The objective of my research was to analyze how judges have been applying the first factor of the *Grant* analysis. My prior studies of s. 24(2) had made it clear that the first factor was an important one; I set out to research just how determinative it was in the overall analysis. Additionally, I wanted to assess how forgiving a finding of good faith policing was. In other words, I wanted to explore what the effect of a finding of good faith policing was on a judge's overall decision of whether to admit or exclude evidence.

I conducted a study of the 2016 case law where s. 24(2) was applied. I collected a sample of one hundred judicial decisions from the year 2016. These one hundred cases all included defence applications for the exclusion of evidence pursuant to s. 24(2) of the *Charter*. These cases were studied in an attempt to find trends in the law in relation to the first factor of the *Grant* analysis and the concept of good faith policing.

The method used for creating this sample was the following: on WestLaw Next Canada, I searched for cases using the search words "Section 24(2) of the *Canadian Charter of Rights and Freedoms*". I then narrowed the search by requiring that only decisions rendered after January 1st 2016 be listed. I then compiled my list based on the first one hundred cases found. The result was a list of one hundred judicial decisions from the year 2016 which have considered s. 24(2) and the *Charter* and the *Grant* analysis. The methodology used was not specialized and was used to simply compile a list of one hundred cases that could be studied from 2016. Cases range from trial level all the way to the Supreme Court. The reason for choosing a wide breadth of cases was simply to get a general view and feel for the application of s. 24(2) and its relationship with the police conduct inquiry. It is worth noting that in some of the decisions studied, the judge found that there was no *Charter* breach but completed the *Grant* analysis in case an appellate

court found that there had in fact been a *Charter* breach.[67] It is not uncommon for judges to do so.[68]

The cases were studied to firstly determine what *Charter* breach occurred. I then directed my attention to the judge's *Grant* analysis to determine whether the court excluded the evidence and how the police conduct was assessed in each case. This allowed me to study the relationship between s. 24(2) of the *Charter* and the police conduct inquiry under the *Grant* analysis. The cases studied, and the accompanying results are listed in a table attached as "Appendix A".

It is openly conceded that the research I have undertaken represents only a very small sub-set of the thousands of cases in which courts have applied s. 24(2) and the *Grant* analysis. The research I have conducted is far less comprehensive than the prior research undertaken by academics such

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67 See e.g. in my research list: *R v Beairsto,* 2016 ABQB 216, [2016] AWLD 3272; *R v Beauregard,* 2016 ABCA 37, [2016] AWLD 881; *R v Flett,* 2016 MBPC 66, 134 WCB (2d) 456; *R v Gibson,* 2016 ONCJ 732, 135 WCB (2d) 622; *R v Habib,* 2016 ABCA 190, 131 WCB (2d) 482; *R v Kading,* 2016 ONCJ 212, [2016] OJ No 1974 (QL); *R v Kosterewa,* 2016 ONSC 7231, 135 WCB (2d) 17; *R v Neill,* 2016 ONSC 4963, 134 WCB (2d) 457; *R v Prince,* 2016 ABPC 297, [2017] AWLD 520. These are some of the cases studied in which the judge found no breach but completed the *Grant* analysis.

68 The Ontario Court of Appeal has commended this practice and has stated that judges who do not find a *Charter* breach should in fact proceed to the *Grant* analysis. It serves to provide potential appellate court cases with the findings of the trial judge in relation to the *Grant* analysis. In *R v Macnab,* 2016 SKQB 61, [2016] SJ No 111 (QL), the court at paragraph 43 stated the following in relation to this practice: "The late Justice Marc Rosenberg, an eminent jurist formerly of the Ontario Court of Appeal has expressly said that trial judges who don't find a *Charter* breach should go on to performed the section 24(2) analysis. He offered the following reasons: the analysis itself may not be adopted by the appellate court, because the failure to find a breach may have distorted the analysis. But the facts are the key: if the trial judge makes the factual findings necessary to conduct a 24(2) analysis (for example, as to whether the officer was acting in good faith), then the appellate court can adopt those facts and do its own analysis. This will prevent the necessity for a new trial."

as Asselin,[69] Madden[70] and Jochelson, Huang and Murchison[71] whose greatly appreciated works have all impressively and significantly contributed to the understanding of the application of s. 24(2). My research does not purport to offer the same type of evidence. My research is smaller scale and not as comprehensive as previous empirical studies of s. 24(2), such as the ones conducted by the authors noted above. Rather, my research, on a much smaller scale, attempts to look at the interaction between s. 24(2) of the *Charter* and the police conduct inquiry.

As a point of interest, according to the 100 cases I studied, I found that in 2016 there was an overall exclusion rate of 67%.[72] This is comparable to a 70% exclusion rate found by Mike Madden in 2010,[73] a 73% exclusion rate found by Arianne Asselin in 2013,[74] and a 68% exclusion rate found by Jochelson, Huang and Murchison in 2014.[75] Speaking generally, the exclusion rate that I found is in the same range that it has been in since the release of the Supreme Court's decision in *Grant*. It is interesting to note that these rates of exclusion are relatively high when considering the fact that the drafters of s. 24(2) intended for evidence only to be excluded in limited circumstances.[76]

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69 Arianne Asselin, *The Exclusionary Rule in Canada: Trends and Future Directions* (LLM Thesis, Queen's University Faculty of Law, 2013) [unpublished], online: <https://qspace.library.queensu.ca/bitstream/handle/1974/8244/Asselin_Ariane_J_201308_LLM.pdf;jsessionid=FD51C66F9887411C66816F83710DA511?sequence=1>.

70 Mike Madden, "Empirical Data on S. 24(2) Exclusion Under *R v Grant*" (2011), 78(2) CR (6th) 278 [Madden, "Empirical Data"]; *Madden, supra* note 27.

71 Richard Jochelson, Debao Huang & Melanie J Murchison, "Empiricizing Exclusionary Remedies: A Cross Canada Study of Exclusion of Evidence Under Section 24(2) of the *Charter*, Five Years After *Grant*" (2016) 63 Crim LQ 206.

72 It is important to note that the cases in which no *Charter* breaches were found were not considered in my overall determination of the exclusion rate. These cases were not considered in the exclusion rate analysis because it was a guarantee that the evidence would not be excluded since no *Charter* breach was found. In other words, it would have been redundant to include those cases in the exclusion rate analysis because there was no possibility of exclusion – there was no breach found and thus there was no possibility for exclusion.

73 Madden, "Empirical Data," *supra* note 70.

74 Asselin, *supra* note 69 at para 99.

75 Jochelson, Huang & Murchison, *supra* note 71.

76 Stratas, *supra* note 12 at 279 where he cites the Special Joint Committee on the

B. An Overemphasis on Police Conduct

After surveying 100 cases from the year 2016, I began to look at the relationship between the rates of exclusion and the characterization of the police conduct. I wanted to see if judges tended to exclude evidence once the police conduct was placed on the more serious end of the spectrum, and on the other hand, if judges would admit evidence when the police conduct was placed on the lower end of the spectrum. My research showed that when judges characterized the conduct of the police as negligent, reckless, willful, blatant or flagrant, there was a 97% exclusion rate. Where courts characterized the police breach as a minor breach or a breach committed in good faith, there was an 86% rate of admission.

There appears to be a strong link between the police conduct inquiry and the decision of whether to exclude or admit evidence. If a judge labels the conduct of a police officer as being on the more serious end of the spectrum, there is a very high likelihood that the evidence will be excluded. If the conduct of the officer is labeled as being on the lower end of the spectrum, where the breach was minor, inadvertent or committed in good faith, then there is a strong chance that the evidence will be admitted. Naturally, this suggests that there is a strong link between the labeling of the police conduct and the decision of whether to admit or exclude evidence.

Another point worth noting is that, in my research, judges often did not place the conduct of the officers on a spectrum as required by *Grant*.[77] Instead of placing the conduct on a spectrum, judges seemed to have a tendency to place the conduct of the officers into two separate boxes. Each box sits at separate ends of the spectrum. There seldom appears to be a middle point. If the conduct of the officer was characterized as minor, inadvertent or committed in good faith, it is placed in the box that favours admission. If the conduct is negligent, reckless, willful or blatant, it is placed in the box that favours exclusion. Once the conduct was placed into one of the boxes, there was often, as noted above, a direct relationship between the conduct of the police officer and the overall outcome of whether to exclude the evidence.

Constitution of Canada, *Proceedings*, 32nd Parl, 1st Sess, No 7 (1980–1981) at 99–100 (E Ewaschuk).

77 *Grant*, *supra* note 2 at para 74.

The Supreme Court in *Grant* has required that the conduct of the officer be placed on a spectrum, not into a box.[78] Failing to properly place the police conduct on a spectrum takes away from the judge's overall balancing of the three *Grant* factors. When the conduct is placed in a box as being either serious or minor, this incidentally precludes the judge from properly balancing all three factors. This is akin to what took place under the *Collins/Stillman* framework. McLachlin C.J. and Charron J. acknowledged that the *Collins/Stillman* framework put the "all the circumstances approach" into a "straightjacket."[79] The Court was critical of the fact that the trial fairness inquiry took away from a judge's ability to properly consider all of the factors under the framework. The police conduct inquiry seems to have had the same effect. The police conduct inquiry seems to have put the "all the circumstances approach" into a "straightjacket" due to the fact that it has become the determinative factor.

It is worth noting that throughout my research I found it common for judges, in their written judgments, to spend a majority of their s. 24(2) analysis writing on the first factor of the *Grant* analysis. For example, in *R v Khandal*,[80] the presiding judge of the Ontario Court of Justice spent 15 paragraphs writing on the first factor of the *Grant* analysis. He then offered 3 paragraphs on the second factor, and 1 paragraph on the third factor.[81] In *R v Leung*[82] the judge of the British Columbia Provincial Court spent 11 paragraphs of his judgment addressing the first factor of the *Grant* analysis. He then wrote one paragraph on the second factor and wrote one paragraph on the third factor.[83] This was a recurring theme throughout my research. To be clear, this did not happen in every case, but it happened often enough that it is worth mentioning.

Admittedly, the conclusion I have arrived at through my research is perhaps expected. It is logical that serious police breaches often result in

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78 *Ibid.*

79 *Ibid* at 101. The Court warned that the conscriptive evidence rule from *Stillman* restricted judges from being able to properly consider all of the subsequent factors in the *Collins/Stillman* framework. The 24(2) analysis was being restricted when the impugned evidence was conscriptive.

80 *R v Khandal*, 2016 ONCJ 446, 131 WCB (2d) 466.

81 *Ibid.*

82 *R v Leung*, 2016 BCPC 198, 131 WCB (2d) 582.

83 *Ibid* at paras 53–66.

exclusion and that minor police breaches result in admission. However, the strong link between the first factor in the *Grant* analysis and the overall decision of whether to exclude or admit evidence appears to create a one-step test. Put simply, s. 24(2) seems to revolve primarily around the police conduct inquiry. However, courts have been instructed by the Supreme Court to consider all three factors together – not simply just the police conduct inquiry.[84] Therefore, the police conduct inquiry seems to have put the entire *Grant* analysis into a straightjacket. Relying too heavily on the first factor may lead some courts to fail to recognize that even minor or good faith policing breaches can still amount to a serious breach on the rights of an accused. These serious breaches may warrant exclusion even though the officer committed a minor or good faith breach.

It is helpful to contrast the differing opinions Karakatsanis J. and Abella J. in *Saeed*. In *Saeed*, Karakatsanis J. appeared to rely on the first factor of the *Grant* analysis. The officer in this case conducted a genital swab on the accused incident to arrest. Karakatsanis J., in her concurring opinion, found that the police had breached s. 8 of the *Charter*. Karakatsanis J. found that the seriousness of the police conduct was lessened due to the fact that there was confusion in the law.[85] Karakatsanis J. would have admitted the evidence.[86]

In *Saeed*, Abella J. issued a strong dissent.[87] Abella J. firstly disagreed with the finding of good faith.[88] She found it unacceptable that the officers performed a genital swab without the consent of the accused or a warrant. She further argued that this was a profound infringement of the most serious nature on the bodily integrity of the accused.[89] Abella J. thoughtfully considered the impact of the search on the *Charter* rights of the accused. Abella J. would have excluded the evidence.[90] I would emphasize that Abella J. appears to have fully considered the impact of the breach on the rights of

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84 *Grant, supra* note 2 at para 86; *Côté, supra* note 5 at para 48.

85 *Saeed, supra* note 55 at para 126.

86 *Ibid* at para 129.

87 *Ibid* at para 131–168.

88 *Ibid* at para 149.

89 *Ibid* at para 150–153.

90 *Ibid* at para 168.

the accused. The contrasting opinions in *Saeed* are illustrative of the issue this article attempts to identify.

In *R v Harflett*,[91] the police officer involved took possession of the accused's vehicle after he had found that the accused was driving with a suspended license. The officer searched the vehicle without reasonable grounds to do so. He found a large amount of marijuana. At trial, the trial judge admitted the evidence. The trial judge held that there was no *Charter* violation, yet conducted a s. 24(2) analysis as a means of demonstrating that, had he found a breach, the evidence would not have been excluded. It was accepted by the trial judge that the police officer was acting in good faith and that he had honestly believed he had authority to search the vehicle.

The Ontario Court of Appeal intervened, determined there was a breach and that the evidence ought to be excluded. The Court of Appeal allowed the appeal, excluded the evidence and acquitted the accused.[92] The Ontario Court of Appeal accepted the trial judge's finding that the officer was acting in good faith.[93] However, they emphasized that the officer's conduct nonetheless constituted a serious breach on the *Charter* rights of the accused and that the officer had shown a pattern of abuse in the past.[94] The Court found that, although the search of the appellant's vehicle was minimally intrusive, it was nonetheless a serious breach due to the fact that there were no grounds to search the vehicle. They held that the trial judge incorrectly found that the impact of the breach on the rights of the accused was minimal.[95] Respectfully, the Ontario Court of Appeal seems to be correct in deciding to exclude the evidence and not condoning a warrantless search. The example in *Harlfett* shows the difference it can make when all three factors from the *Grant* analysis are considered holistically.

The examples above simply serve to illustrate that in certain cases, the police conduct inquiry can be determinative without full consideration of the impact of the breach on the rights of the accused. This is at odds with the directives given by the Supreme Court which require that all factors be balanced against one another without allowing for one factor to be

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91 *R v Harflett*, 2016 ONCA 248, 336 CCC (3d) 102 [*Harflett*].

92 *Ibid* at para 58.

93 *Ibid* at para 44–45.

94 *Ibid* at para 40–45.

95 *Ibid* at para 56.

determinative over the other.[96] As seen in *Harflett*,[97] when judges properly consider all three factors of the analysis, the outcome of the decision can be much different. The words of Lambert J.A. of the British Columbia Court of Appeal are appropriate to depict the point I am making:

> With respect, I do not think that good faith, in itself, important though it is, outweighs all other factors to the point where none of them need be considered. And I do not think the view that good faith does outweigh all the other factors can be considered to have survived the decisions of the Supreme Court.[98]

It is also appropriate to consider a statement from the Supreme Court in *R v Mann*[99] where Iacobucci J. stated, "good faith is but one factor in the analysis and must be considered alongside other factors."[100] In essence, this article is making the same point as the two preceding passages. Although the concept of good faith policing is valuable, it should never be determinative; good faith policing should never outweigh the other *Grant* factors.

C. The Inconsistent and Uneven Application of Good Faith Policing

By way of review, I have explained that good faith policing arises when the police honestly and reasonably believed that their actions were lawful. As noted, negligence and reckless police conduct should not be characterized as good faith policing. [101] Unfortunately, apart from this, the Supreme Court has never clearly defined the concept of good faith policing. As noted, much of the recent Supreme Court jurisprudence seems to emphasize that good faith policing arises when there is confusion in the law that has led the police to honestly and reasonably believe that their actions were lawful.[102] However, the undefined scope of good faith policing is unfavourable and has led to inconsistent applications of good faith

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96 *Grant*, *supra* note 2 at para 86; *Côté*, *supra* note 5 at para 48.

97 *Harflett*, *supra* note 91.

98 *R v Gladstone* (1985), 22 CCC (3d) 151 at 156, [1985] 6 WWR 504.

99 *Mann*, *supra* note 64.

100 *Ibid* at para 55.

101 *Grant*, *supra* note 2 at 75.

102 See e.g. *Cole*, *supra* note 55; *Aucoin*, *supra* note 55; *Vu*, *supra* note 55; *Spencer*, *supra* note 55; *Fearon*, *supra* note 55; *Saeed*, *supra* note 55.

policing.[103] Some of the decisions studied suggest that courts tend to inconsistently and unevenly characterize police conduct as good faith policing.

In *R v Wegner*[104] a police officer noticed a suspicious looking man in a shopping mall. The officer found the man to be suspicious given that he was "pacing back and forth in front of some stores."[105] The man entered a bathroom stall in the mall's washroom. The officer, based on a simple hunch, followed the man into the washroom. The officer announced himself and opened the stall door. He found the accused ingesting cocaine.[106] The accused brought an application to have the evidence excluded. The judge agreed that this amounted to a breach of the accused's right against unreasonable search and seizure. Nonetheless, the judge found that the officer was acting in good faith and admitted the evidence.[107]

In *Wegner*, the judge, for the Ontario Court of Justice, found that the officer was acting in good faith by pursuing a "low level" investigation after he became suspicious of the accused "pacing back and forth in front of stores."[108] There are doubts about whether the officer's conduct in this scenario should be captured by the concept of good faith policing. The officer was acting on a simple hunch and committed a *Charter* breach. The officer was aware, or ought to have been aware, that he did not have the legal authority to open the door to the bathroom stall based on a simple suspicious hunch, yet he did. The officer did not have legal grounds to enter the bathroom stall and his failure to recognize that may be characterized as negligent. Although this breach is understandably a minor breach, there are concerns about whether it should be characterized as a good faith breach.

The point being made is that certain conduct is being forgiven as good faith policing when it should perhaps fall towards the more serious end of the police conduct spectrum. Consequently, conduct such as the conduct identified in the cases above is being captured under the concept of good faith policing and favours admission. This can be problematic if the conduct

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103 Roach, *supra* note 6 at 10-58.1.

104 *R v Wegner*, 2016 ONCJ 228, 130 WCB (2d) 42.

105 *Ibid* at para 2.

106 *Ibid* at paras 2–5.

107 *Ibid* at paras 22–25.

108 *Ibid* at para 22.

of the officer should actually be characterized as a more serious breach, and not as a good faith breach.

To be clear, my research has not shown that courts are always misapplying good faith policing. My research has simply shown that some police conduct, which appears negligent or reckless, is being characterized as good faith policing. There appears to be an uneven application of the concept of good faith policing which leads to inconsistent results. It is possible that this is due to the lack of clarity surrounding the definition of good faith policing and the types of conduct it should be capturing.

D. The Undermining of *Charter* Values

As Iacobucci J. stated in *R v Hall*,[109] judges across this country must "staunchly uphold constitutional standards."[110] The police conduct inquiry has arguably become the determinative factor in the overall decision of whether to exclude evidence. This can be problematic when the concept of good faith policing, which plays a significant role in the police conduct inquiry, has no clear definition and is receiving uneven and inconsistent application. There are concerns that this will undermine s. 24(2) of the *Charter* and the remedy it offers to all persons whose rights have been infringed.

Section 24(2) is a remedial provision that provides a remedy to an accused when their *Charter* rights have been breached.[111] It is therefore "cold comfort" to an accused if his/her *Charter* rights are severely breached but he/she receives no remedy simply because the officer was found to be acting in good faith. As noted by Sopinka J. in *R v Hebert*, it is difficult to understand how good faith policing can cure a serious breach.[112] Additionally, as noted by Iacobucci J., "the fact that the police thought they were acting reasonably is cold comfort to an accused if their actions result in a violation of his or her rights."[113] An accused is not comforted by the fact that the officer honestly and reasonably believed they were acting lawfully. The accused's rights have still been infringed, sometimes severely,

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109 *R v Hall*, 2002 SCC 64, [2002] 3 SCR 309.

110 *Ibid* at para 128; see also *Genest*, *supra* note 50 at para 87; *Kokesch*, *supra* note 50.

111 *Collins*, *supra* note 20 at para 19.

112 *R v Hebert*, [1990] 2 SCR 151, [1990] SCJ No 64 (QL).

113 *R v Elshaw*, [1991] 3 SCR 24 at 18, 59 BCLR (2d) 143.

and the impact of that infringement must be fully taken into account. The trend in the law currently favours the admission of evidence when the police were acting in good faith. This trend does not appear to be consistent with s. 24(2). It is also especially dangerous if the concept of good faith policing is being applied inconsistently and has the potential to capture a very broad scope of conduct.

To be clear, there are many scenarios in which good faith policing is found and the admission of the impugned evidence is entirely warranted. However, when deciding to admit the evidence, careful attention must be paid to the impact of the breach on the rights of the accused. Good faith on the part of the police must not overwhelm the analysis. This trend presents the risk that *Charter* values may be undermined.

It is also important to note that the inconsistent and uneven application of the concept of good faith policing has increased the chances that negligent or reckless police conduct will be characterized as good faith policing. Coupling this with the fact that the concept of good faith policing is arguably the determinative factor, there is an increased chance that evidence that should otherwise be excluded will be admitted. The point being made is that the confusion in relation to the concept of good faith policing and the overreliance on the first factor of the *Grant* analysis has led to the admission of evidence that perhaps should have been excluded. The result is that, in some cases, *Charter* rights are being undermined and not properly protected.

V. RECOMMENDATIONS AND CONCLUSION

The concept of good faith policing lacks a clear definition. In fact, in *Grant*, the limited guidance given by the Court is that "negligence or good faith cannot be equated with good faith."[114] It is still alarming that the Supreme Court has never truly defined the concept of good faith policing. This is alarming when considering it plays such a vital role in the *Grant* analysis. The lack of clarity has led to inconsistent and uneven applications of good faith policing which has the potential to capture negligent and reckless breaches. In other words, good faith policing is being applied in a wide variety of circumstances due to the lack of clarity given to its definition. Coughlan articulates the versatility in the application of good faith policing:

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[114] *Grant*, *supra* note 2 at para 75.

> Good faith has always been a flexible concept within s. 24(2), and courts have applied it in a number of ways. Some cases have treated good faith as the mere absence of bad faith, and have therefore held either that a lack of malice is a factor favouring admission, or have held that a failure to act in good faith is not automatically bad faith, and therefore, is not necessarily a factor favouring exclusion. Similarly, there has been confusion over whether bad faith requires a conscious decision by police to ignore the limits on their powers, or whether simply ignorance of the limits of those powers is sufficient.[115]

This passage from Coughlan suggests that courts have not applied good faith policing consistently. Rather, it has been applied in a "number of ways." This lack of clarity is problematic. It is important for the Supreme Court to give Canadian judges and lawyers a definitive statement on the concept of good faith policing. The scope and limits of good faith policing must be defined. This is imperative given that it plays a vital role in the police conduct inquiry. This will help judges, lawyers and police understand what types of conduct should, and should not be captured by good faith policing. Judges and lawyers would have a clear understanding of arguably the most important aspect of the police conduct inquiry under the *Grant* analysis.

A finding of good faith policing appears to have a direct bearing on the admission or exclusion of evidence. Without a clear definition of good faith policing, this may lead to the admission of evidence that otherwise ought to have been excluded. Therefore, when courts admit evidence based on good faith policing, Canadians must have confidence that they are doing so based on a proper characterization of the police conduct. Anything less would greatly undermine public confidence in the administration of justice. In order to maintain this confidence, good faith policing must be given a clear definition to ensure that negligent and reckless breaches are not being rewarded by a good faith characterization.

Section 24(2) serves to protect the rights of all Canadians and provides a significant remedy if those rights have been breached. Parliament chose to entrench this provision in the *Charter*. A clear definition of the concept of good faith policing may help ensure that s. 24(2) is properly applied, given that good faith policing plays such a vital role in the *Grant* analysis. As Chief Justice John Marshall of the Supreme Court of the United States explained in 1803, there is no such thing as a right without a remedy.[116] In Canada, s.

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115 Coughlan, *supra* note 6.

116 *Marbury v Madison*, 5 US 137 (1803).

24(2) provides a remedy for those whose rights have been infringed. It is therefore imperative that s. 24(2) be applied properly so that it remains a meaningful remedy.

APPENDIX A

No.	CASE NAME / CITATION	*CHARTER* BREACH	EXCLUSION OR ADMISSION
1	R v Ahmad 2016 ONCJ 704	s.10(b)	Admission
2	R v Armstrong 2016 MBQB 134	s. 8 / s.9	Exclusion
3	R v Artis 2016 ONSC 2050	s.8	Admission
4	R v Azarnush 2016 ONCJ 355	s. 8 / s.9 / s.10(b)	Exclusion
5	R v Beairsto 2016 ABQB 216	No breach found	Admission
6	R v Beauregard 2016 ABCA 37	No breach found	Admission
7	R v Biellie 2016 ONSC 6866	s.10(a) / s.10(b)	Admission
8	R v Bullen 2016 ONSC 7875	s.8	Admission
9	R v Burke 2017 ONSC 737	s.8	Exclusion
10	R v Cameron 2016 SKPC 2016	s. 8	Exclusion
11	R v Carreau 2016 ONCJ 700	s.8	Admission
12	R v Chanmany 2016 ONSC 3092	s.10(b)	Exclusion
13	R v Clarke 2016 BCSC 1323	s.8	Exclusion
14	R v Coderre 2016 ONCA 276	s.8	Admission

15	R v Coutu 2016 MBQB 7	s.10(b)	Exclusion
16	R v Craig 2016 BCCA 154	s.8	Admission
17	R v D'Souza 2016 ONSC 5855	s.8 /s.10(a) / s.10(b)	Exclusion
18	R v Dadmand 2016 BCSC 877	s.8	Admission
19	R v Densmore 2016 YKTC 65	s.10(b)	Exclusion
20	R v Doonanco 2016 ABQB 612	s.8	Exclusion
21	R v Ducherer 2016 SKQB 110	s.8	Admission
22	R v Eastwood 2016 ONCJ 583	s.8	Exclusion
23	R v Elzain 2016 ONCJ 50	s.10(b)	Admission
24	R v Ferreira 2016 ONSC 2039	s.8	Exclusion
25	R v Flett 2016 MBPC 66	No breach found	Admission
26	R v Gayle 2016 ONSC 3464	s. 8 / s.9	Admission
27	R v Giampaolo 2016 CarswellOnt 19041	s.7 / s.8 / s.9 / s.10(b)	Exclusion
28	R v Gibson 2016 ONCJ 732	No breach found	Admission
29	R v Gunnarson 2016 NLTD(G) 191	s.9	Exclusion
30	R v Habib 2016 ABCA 190	No breach found	Admission
31	R v Hall 2016 ONCJ 696	s.9 / s.10(b)	Exclusion

32	R v Harflett 2016 ONCA 248	s.8	Exclusion
33	R v Harper 2016 BCPC 254	s.9	Exclusion
34	R v Hiebert 2016 MBQB 170	s.8	Admission
35	R v Hussein 2016 ABQB 703	s.10(b)	Admission
36	R v James 2016 ONSC 4086	s.8	Exclusion
37	R v Kading 2016 ONCJ 212	No breach found	Admission
38	R v Khandal 2016 ONCJ 446	s.10(b)	Exclusion
39	R v King 2016 ABCA 364	s.8	Admission
40	R v King 2016 NLTD(G) 45	s.8	Exclusion
41	R v Kosterewa 2016 ONSC 7231	No breach found	Admission
42	R v Lacroix 2016 ONSC 3052	s.9	Admission
43	R v Leaf 2016 ONSC 1974	s.8 / s.9 / s.10(a)	Exclusion
44	R v Lecuyer 2016 NLTD(G) 123	s.8 / s.9	Exclusion
45	R v Leung 2016 BCPC 198	s.8	Exclusion
46	R v Lorenzo 2016 ONCJ 634	s.9	Exclusion
47	R v MacDonald 2016 ABQB 98	s.8 / s.9	Exclusion
48	R v Marek 2016 ABQB 18	s.8	Exclusion

49	R v Marks 2016 ABPC 290	s.10(b)	Admission
50	R v Martineau 2016 ABPC 195	s.8	Exclusion
51	R v Masse 2016 SKPC 148	s.8 / s.10(b)	Exclusion
52	R v Mawad 2016 ONSC 7589	s.8	Admission
53	R v Mazza 2016 ONSC 5581	s.8 /s.9 / s.10(b)	Exclusion
54	R v McCann 2016 ONSC 6057	s.10(b)	Admission
55	R v McCormack 2017 CarswellNfld 6	s.8 / s.9	Exclusion
56	R v McMahon 2016 SKPC 172	s.8	Exclusion
57	R v Miller-Williams 2016 ONCJ 524	s.8 / s.9 / s.10	Exclusion
58	R v Moore 2016 ONCA 964	s.10(b)	Exclusion
59	R v Nascimento-Pires 2016 ONCJ 143	s.8	Exclusion
60	R v Neill 2016 ONSC 4963	No breach found	Admission
61	R v Nguyen 2016 ONSC 8048	s.8 / s.9	Exclusion
62	R v Nithiyananthaselvan 2016 ONCJ 426	s.8 / s.9 / s.10(a) / s.10(b)	Exclusion
63	R v Noftball 2016 NLCA 48	s.8	Admission
64	R v Ohenhen 2016 ONSC 5782	s.8 / s.9 / s.10(b)	Exclusion

65	R v Olive 2016 ONCJ 558	s. 8 / s.9 / s.10(b)	Exclusion
66	R v Pattinson 2016 ONSC 1193	s.10(b)	Admission
67	R v Paxton 2016 ONSC 2906	s.8	Admission
68	R v Persaud 2016 ONSC 8110	s.8	Exclusion
69	R v Poirier 2016 ONCA 582	s.7 / s.8	Exclusion
70	R v Primeau 2016 SKPC 134	s.8 / s.9	Exclusion
71	R v Prince 2016 ABPC 297	No breach found	Admission
72	R v Rahman 2016 ONCJ 718	s.8 / s.9	Exclusion
73	R v Randawa 2016 BCPC 263	s.8	Exclusion
74	R v Ranglin 2016 ONSC 3972	s.8	Admission
75	R v Reddemann 2016 BCSC 442	s.10(b)	Exclusion
76	R v Richards 2016 ABQB 176	s.8	Admission
77	R v Richards 2016 ONSC 3556	s.10(b)	Exclusion
78	R v Saeed 2016 SCC 24	s.8	Admission
79	R v Seguin 2016 ONCJ 441	s.9 / s.10(a) / s.10(b)	Exclusion
80	R v Singh 2016 ONCJ 386	s.2(a)	Exclusion
81	R v Singh 2016 ONSC 1144	s.8	Admission

82	R v Squires 2016 NLCA 54	s.8 / s.9	Exclusion
83	R v Stockton 2016 ONSC 1408	No breach found	Admission
84	R v Street 2016 SKPC 7	s.9 / s.10(a)	Exclusion
85	R v Suteau 2016 SKPC 79	s.9 / s.10(a)	Exclusion
86	R v Tetrault 2016 ABQB 373	s.8 / s.9	Admission
87	R v Thompson 2016 CarswellOnt 6360	s.7 / s.8 / s.9 / s.10(a)	Exclusion
88	R v Tieu 2016 ABQB 344	s.10(b)	Exclusion
89	R v Topper 2016 ONCJ 716	s.8 / s.9	Exclusion
90	R v Walsh 2016 CarswellNfld 69	s.10(a) / s.10(b)	Exclusion
91	R v Wasilewski 2016 SKCA 112	s.8	Admission
92	R v Wawrykiewicz 2016 ONSC 569	s.8	Admission
93	R v Wegner 2016 ONCJ 228	s.8	Admission
94	R v Whipple 2016 ABCA 232	No breach found	Admission
95	R v Whitton 2016 BCSC 2518	s.8	Exclusion
96	R v Wieczorek 2016 ONCJ 414	No breach found	Admission
97	R v Williams 2016 SKPC 39	s.9 / s.10(b)	Exclusion
98	R v Williams 2016 SKPC 69	s.10(b)	Exclusion

99	R v Wilson 2016 MBPC 26	s.10(b)	Exclusion
100	R v Wiseman 2016 NLTD(G) 180	s.8 / s.9	Exclusion

The *WD* Revolution

LISA A. SILVER*

ABSTRACT

The *W(D)* decision matters. As a paradigm of the core principles of fundamental justice, *W(D)* has empowered the credibility assessment and given it meaning. From its release in 1991, the essence of the decision, invoked by the case initials, reverberated through the appellate and trial courts and changed the legal landscape. From its modest beginnings as an admonishment to beware of the impermissible "credibility contest," *W(D)* radically transformed the everyday to the infra-ordinary by imbedding the presumption of innocence and the inextricably connected reasonable doubt standard into the decision-making analysis. But the revolutionary path has not been easy as the courts struggle with the tension between the "ideal" and the "real." Yet, *W(D)* has survived this ordeal to become an essential trial concept. How *W(D)* has made this not-so "magical" transition is discussed in this article as we trace the impact of the decision through statistics, case law, the judicial lens and the personal perspective. At the end of this examination, we will see *W(D)* anew; not as a worn-out overplayed "mantra" but as an invigorating principle representing the plurality of what is at stake in a criminal trial. To apply *W(D)* is to know it. This article attempts that very task.

***Keywords*:** credibility assessment; *W(D)*; principles of fundamental justice; presumption of innocence; reasonable doubt; standard of proof; burden of proof; Supreme Court of Canada; criminal appeals; grounds of appeal; appellate review; empirical analysis of the law; trial judge; jury instructions

* Lisa A Silver, BA, LLB, LLM, is an assistant professor at the University of Calgary, Faculty of Law.

I. EXPLAINING THE REVOLUTION: WHY *W(D)* STILL MATTERS

In the 1991 Supreme Court decision of *R v W(D)*, Justice Cory proposed a simple three-step instruction to the jury on the "question of credibility" as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.[1]

Thus, launched the *W(D)* Revolution as an avalanche of cases based on this so-called *W(D)* instruction ensued.[2] Since then, the decision has been considered an astounding 9,137 times.[3] To this day, the principles enshrined in the decision are readily identifiable by mere mention of the case initials.[4] But, does this iconic status ensure the staying power of the *W(D)* principle, which is synonymous with applying the reasonable doubt standard to the credibility assessment in a criminal trial?

The answer to this question depends on our perception and understanding of the impact of the decision. On one view, the iconic reputation and representation of the case detracts from its potential importance as a legal principle. Iconography begets simplification. With simplification, the case becomes a mere representation of an ideal, resulting in the dilution of the core meaning of the *W(D)* instruction. This flattening out of *W(D)*, instead of being a vehicle for widely disseminating the underlying message, has the potential to weaken those very same principles of fundamental justice it attempts to protect. The other view, advanced in this article, is that *W(D)* is revolutionary. This provocative view recognizes the extraordinary and lasting impact *W(D)* is continuing to have on the criminal justice system. *W(D)* has created a revolutionary paradigm shift

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1 *R v W(D)*, [1991] 1 SCR 742 at 758, 3 CR (4th) 302 [*W(D)* cited to SCR].

2 See e.g. *R v JHS*, 2008 SCC 30, [2008] 2 SCR 152 [*JHS*], Binnie J ("has proven to be a fertile source of appellate" at para 8).

3 Westlaw search as of September 11, 2017.

4 See e.g. *R v Wruck*, 2017 ABCA 155 [*Wruck*], Watson JA ("the central argument in support of interim judicial release in this case is one which takes on its character from the watershed decision of the Supreme Court over 25 years ago, now compactly called *W(D)*" at para 5).

away from its early conception as a warning to the trier of fact to refrain from making a "choice between two alternatives"[5] in assessing opposite narratives. This shift has transformed *W(D)* into a robust and sophisticated analytical decision-making tool embedded in our principles of fundamental justice. It is the contention of this article that the *W(D)* principle is key to the integrity of our criminal justice system. *W(D)* must be embraced and celebrated, not derided and discarded.

I set this challenge to discover the true essence of *W(D)* as a multi-dimensional five-part journey in which we interact with the impact of *W(D)* through a variety of interpretive modes from the historic to the juridical. We start with some pre-*W(D)* history in Part II of the article with a nostalgic look back to the roots of *W(D)* to provide both contextual relevance and support for the sustainability and resiliency of the decision. In Part III we construct the *W(D)* Revolution through a structural survey of the decision in an attempt to understand what the case is and what the case is not. Part IV offers what *W(D)* is as seen through the judicial lens. Part V extends this analysis further by offering a numeric glance at the influence of *W(D)* as it is cited and recited through the subsequent case law. Part VI concludes the journey with a look forward and a recognition of the extraordinary impact *W(D)* continues to have on the decision-making process.

II. The "Winner" Takes All: Assessing Credibility Pre-*W(D)*

As a criminal defence appellate lawyer practicing in the late eighties to early nineties, the *W(D)* decision was a vindication of what we appellate lawyers already knew; that credibility assessment could potentially strain the metaphorical golden thread of the presumption of innocence. Even before the watershed moment offered by Justice Cory in *W(D)*, we argued appeals based on the forbidden temptation by the trier of fact to enter into a "credibility contest" in assessing credibility. This erroneous approach denied the "legitimate possibility" [6] that the trier of fact could not choose the 'winner' and was thus left in a state of reasonable doubt. By choosing

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5 *R v Nimchuk* (1976), 33 CCC (2d) 209, [1976] OJ No 1258 (QL) at para 7 (CA) [*Nimchuk* cited to QL].

6 See *R v Challice* (1979), 45 CCC (2d) 546, [1979] OJ No 1301 (QL) at para 38 (CA) [*Challice* cited to QL].

sides, the trier effectively reversed the burden of proof, necessitating the accused present the stronger or more persuasive case.

In the days before Justice Cory's sage advice on how to deal with such an issue, we relied on two Ontario Court of Appeal decisions, *R v Challice*[7] and *R v Nimchuk*,[8] to make our case. Particularly useful was Justice Martin's decision in *Nimchuk*, which connected general credibility assessment principles to the specific testimonial concern arising from the presentation of two conflicting versions of the events. Justice Martin articulates the issue, reminiscent of *W(D)*, by suggesting three possible assessment alternatives in paragraph 7 involving:

> In our view, the trial judge in concluding that in order to acquit the appellant he would have to find that Mrs. Vanka was "framing him", in effect, placed the burden of proof upon the appellant. The trial judge appeared to think that he was confronted with a choice between two alternatives, either accepting the evidence of the accused, and finding that Mrs. Vanka framed him, or accepting the evidence of Mrs. Vanka, which required a conviction. There was, of course, a third alternative, namely, if a reasonable doubt existed, in view of the conflicting testimony, as to exactly where the truth of the matter lay, it would, of course, require an acquittal.[9]

While the error in *Nimchuk* resulted in a new trial, the Court in *Challice*, after carefully reviewing the charge as a whole, found the jury would fully understand "their duty with respect to the burden and standard of proof"[10] despite the trial judge's direction to "decide whose version you are going to accept."[11] This consideration of the entire charge in determining the efficacy of this error becomes part of a greater willingness to look at errors contextually. Later, this holistic approach is used as a prophylactic against other grounds of appeal, such as those errors relating to the

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7 *Ibid.* The Alberta Court of Appeal approved of *Challice* with a brief reference in *R v Larson*, 1983 ABCA 22, and then later a more detailed discussion in *R v Nehring*, 1984 ABCA 60. Similarly, in Quebec, the decision was first approved of in *R c St-Amour*, 1988 CanLII 296 (QC CA).

8 *Nimchuk*, *supra* note 5 at para 7. In 2017, there were 114 mentions of the *Nimchuk* decision.

9 *Ibid.*

10 *Challice*, *supra* note 6 at para 44.

11 *Ibid* at para 36.

misapprehension of the evidence, unreasonable verdict, and the more general burden of proof or *Lifchus*[12] errors.

Due to the influence of *Challice*[13] and *Nimchuk*, cases from the pre-*W(D)* era tended to view the issue as either a "credibility contest"[14] or a "choice between two alternatives."[15] Better yet, was the use of the phrase "stark choice"[16] or "stark alternatives,"[17] to describe the magnitude and polarity of the error as characterized by Justice Morden in *Challice*.[18] It is therefore disconcerting to read the 1992 British Columbia Court of Appeal decision in *R v CP*[19] suggesting that "in fairness to the learned trial judge, it must be recognized that he delivered this charge before the judgments in *R v (W)D* and *R v H(C)*, and we have no doubt juries will henceforth be instructed that reasonable doubt applies to credibility when it is in issue."[20] This, when the concept of making a "stark choice"[21] was not new. In fact, this concern can be traced back to 1946 in *R v Nykiforuk*,[22] a decision of the Saskatchewan Court of Appeal. Notably, the Court in *Nykiforuk* cites the golden thread decision of *Woolmington v DPP*[23] in discussing the issue.

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12 *R v Lifchus*, [1997] 3 SCR 320, 150 DLR (4th) 733 [*Lifchus* cited to SCR].

13 *Challice* has been cited 198 times, with 170 of those cases occurring after the release of *W(D)* in 1991 (Westlaw search as of September 17, 2017).

14 Westlaw database search, as of September 17, 2017, for the term "credibility contest" found 1313 cases: 1296 of those cases were rendered after the release of *W(D)* on March 28, 1991. Of those post-*W(D)* decisions, 103 reference *Challice*, 22 reference *Nimchuk*, and 15 cite both cases.

15 Westlaw database search found 36 decisions as of September 17, 2017.

16 See e.g. *R v CWH* (1991), 3 BCAC 205, 68 CCC (3d) 146; *R v EP*, [2005] NJ No 111 (QL), 2005 CanLII 7874 (NL PC); *R v Turner*, 2017 ONSC 99, 135 WCB (2d) 630; *R v Colson* (2007), 74 WCB (2d) 184, 2007 CanLII 28726 (NL PC).

17 See e.g. *R v Nehring*, 1984 ABCA 60, [1984] 3 WWR 632; *R v Smith*, 1989 ABCA 187, 7 WCB (2d) 374; *R v VK* (1991), 14 WCB (2d) 251, CanLII 5761 (BCCA).

18 *Challice*, *supra* note 6 at para 38.

19 *R v CP* (1992), 74 CCC (3d) 481, 18 BCAC 209.

20 *Ibid* at para 46.

21 *Ibid* at para 44.

22 *R v Nykiforuk*, [1946] 3 DLR 609, 86 CCC 151 (SKCA). See also *Kearney v The Queen* (1957), 119 CCC 99 (NB CA); *R v Woods*, [1969] 2 OR 132, 3 CCC 222 (CA).

23 *Woolmington v DPP* (1935), 25 Cr App R 72.

By the early 1980s, the Supreme Court began to weave the *Challice* narrative into their jurisprudence starting with a brief reference in the 1982 decision of *Brisson v The Queen.*[24] The *Challice* caution received even wider treatment in *Nadeau v The Queen*,[25] where the Appellant was charged with first-degree murder but convicted by a jury of second-degree murder. According to Justice Lamer, the trial judge erred in his instruction on the standard of proof as he imperatively directed the jury, as excerpted on page 573, to:

> [C]hoose the more persuasive, the clearer version the one which provides a better explanation of the facts, which is more consistent with the other facts established in the evidence.
> You must keep in mind that, as the accused has the benefit of the doubt on all the evidence, if you come to the conclusion that the two (2) versions are equally consistent with the evidence, are equally valid, you must give - you must accept the version more favourable to the accused. These are the principles on which you must make your choice between the two (2) versions.[26]

This instruction was squarely within the identifiable error in *W(D)*. Moreover, the accused, according to Justice Lamer, has the "benefits from any reasonable doubt at the outset,"[27] while the onus to prove that case continually rests on the prosecutor until the final decision on guilt or innocence. This concept was so basic that *Nadeau* cites no case law in support of allowing the appeal and ordering a new trial. *Nadeau* was cited in *W(D)* and still has traction as a directive case for a trial judge in assessing credibility.[28]

Nadeau was also cited in two high profile murder appeals later in that decade; *R v Thatcher*[29] *and R v Morin.*[30] Chief Justice Dickson, in writing for the majority upholding the conviction for first-degree murder in *Thatcher*,

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24 *Brisson v The Queen*, [1982] 2 SCR 227, 139 DLR (3d) 685, Laskin CJC ("[t]his is not a case where the jury may have been misled by being directed to determine guilt or innocence on the basis of the credibility of the witnesses on each side: see, for example, *R v* Challice ..." at 232).

25 *Nadeau v The Queen*, [1984] 2 SCR 570, 14 DLR (4th) 1 [*Nadeau*].

26 *Ibid* at 573.

27 *Ibid* at 572–573.

28 See e.g. *R v Desrosiers*, 2017 ONCJ 80 at para 210, 137 WCB (2d) 434; *R c St-Pierre*, 2016 QCCQ 4479 at para 63.

29 *R v Thatcher,* [1987] 1 SCR 652, 39 DLR (4th) 275 [*Thatcher* cited to SCR].

30 *R v Morin, [*1988] 2 SCR 345, 44 CCC (3d) 193 [*Morin* cited to SCR].

considered the *Nadeau* error. In the *Thatcher* case, the error was characterized as an improper instruction to the jury to choose between the Crown and defence evidence "thereby reducing the burden of proof."[31] The court also considered whether such an error could be "cured" by s. 613(1(b)(iii) of the Criminal Code[32] (now s. 686(1)(b)(iii)) permitting an appellate court to dismiss an appeal where there is no substantial wrong or miscarriage of justice. In *Nadeau*, the court declined to apply the section as the verdict would not necessarily be the same.[33] However, in *Thatcher*, the proviso was applied resulting in the dismissal of the appeal. As in *Challice,* the error in *Thatcher*, when viewed within the context of the charge, essentially disappears.[34]

The *Morin* decision, as a ground of appeal advanced by the Crown, affords us a different perspective of the issue. Here, the Crown argued the standard of reasonable doubt must be applied to the whole of the evidence, not as a "piecemeal" application to individual pieces of evidence. Although Justice Sopinka generally agreed evidence should be considered as a whole in determining the ultimate guilt or innocence of the accused, exceptions could be found in the duty of the trial judge to give appropriate direction in vital areas, such as credibility assessments. This position is exemplified in the later Supreme Court decision in *R v MacKenzie*[35] where the credibility assessment involved a contradiction between the accused's out of court statement and his evidence at trial.[36]

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31 *Thatcher*, *supra* note 29 at 700.

32 *Criminal Code*, RSC 1985, c C-46.

33 This "test" derives from the common law as articulated in *Makin v Att. Gen. for New South Wales*, [1894] AC 57 at 70 and approved of in Canada as early as *Allen v The King*, 44 SCR 331, 18 CCC 1, Fitzpatrick CJC (considered whether the error was "an irregularity so trivial" to not amount to a substantial wrong or miscarriage of justice at 334). Another early version of the "test" can be found in *Brooks v The King*, [1927] SCR 633 at 636, 1 DLR 268 ("onus was upon the Crown to satisfy the Court that the jury, charged as it should have been, could not, as reasonable men, have done otherwise than find the appellant guilty"). Subsequent cases such as *R v Bevan*, [1993] 2 SCR 599 at 616–617, 1993 CanLII 101 have refined this "curative provision" to whether "the verdict would necessarily have been the same if such error had not occurred."

34 *Thatcher*, *supra* note 29 at 701.

35 *R v MacKenzie*, [1993] 1 SCR 212, 18 CR (4th) 133 [*Mackenzie*].

36 *Morin*, *supra* note 30; *Nadeau*, *supra* note 25; *Thatcher*, *supra* note 29; *Challice*, *supra* note 6 are all cited in *MacKenzie*, *ibid*.

The Morin position is consistent with the depiction of the trial judge assisting the jury through the "judicial lens" of experience in complex and crucial areas of the evidence. Even at this early stage, what became known as the *W(D)* instruction is viewed as an important part of the discourse between the trial judge, learned in the law, and the jury of peers as finders of the facts. In this way, *W(D)* can be viewed as the bridge between fact and law and as epitomizing the relationship the judge has with the jury during a trial. This relationship, through the charge or instructions to the jury, does not end in the bounded space of the courtroom but remains throughout the jury deliberations.

As an additional wrinkle to our pre-*W(D)* survey is the connection between credibility assessment and other legal principles circumscribed at that time. A good example of this is found in *R v Corbett*[37] which considered the admissibility of bad character evidence in the form of a criminal record. This decision created the *Corbett* application in which a *voir dire* is required to determine the admissibility of an accused's criminal record in circumstances where the accused will testify. It is in the dissent of Justice LaForest where the wider implications of the *Challice* ground can be observed. Justice LaForest outlines several factors in exercising the discretion to exclude, which still inform the *Corbett* application. As part of this discussion, Justice LaForest mentions the problematic situation of when the case "boils down to a credibility contest"[38] and the "fair trial" desire to put before the jury the record of all parties in making the credibility assessment.[39]

Justice LaForest references two lines of authority emanating from American case law. One view, as found in *Gordon v United States*,[40] suggests the criminal record is highly probative "for exploring all avenues which would shed light on which of the two witnesses was to be believed."[41] In the other view, exemplified by *United States v Brown*,[42] the court found the *Gordon* argument fallacious. Where credibility was the core issue, then "admissions of earlier

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37 *R v Corbett*, [1988] 1 SCR 670, 41 CCC (3d) 385 [*Corbett* cited to SCR].

38 *Ibid* at para 159.

39 *Ibid* at paras 160–161.

40 Gordon *v United States*, 383 F 2d 936 (1967).

41 *Ibid* at 941.

42 *United States v Brown*, 409 F Supp 890 (WDNY 1976).

convictions would be highly prejudicial"[43] by distracting the jury from the evidence and inviting them to enter into the impermissible inference that as the accused acted wrongly in the past he must be guilty now.[44] Justice LaForest took a truly Canadian view by favouring a case-by-case contextual approach where credibility instances could not "override the concern for a fair trial."[45]

There are two items to consider from this dissent. First, there appears to be a disjunct between the caution against entering into a 'credibility contest' and the manner in which trial evidence is actually presented. There is a telling gap between the enunciated principle and the trial realities where narratives unfold like every day events. Certainly, in the American decision of *Gordon v United States*, the Court considered credibility as a question of whom to believe. We will explore this dichotomy further in this article but even before *W(D)* swept onto the precedential stage, the courts were struggling with the application of reasonable doubt and the differences between 'accepting or rejecting' evidence and 'choosing' one type of evidence over another. Second, *Corbett* underlines the important concept of trial fairness, which is engaged by credibility assessments. Trial fairness, as a principle of fundamental justice, permeates *W(D)* and yet is not given due deference in the *W(D)* trope. Both concepts of trial reality and trial fairness will inform the *W(D)* Revolution.

III. Constructing the *W(D)* Revolution

A. Creating *W(D)*: Introduction

Typically, a methodology that employs deconstruction attempts to break down hidden assumptions found in a concept by reducing it to its constituent parts as a method of reinterpretation. But the utilization of this methodology in understanding *W(D)* seems counterintuitive considering the appellate courts shun this approach when the *W(D)* error is raised on appeal. The concept of "cherry-picking"[46] or parsing a charge or reasons of a trial judge is a stock derisive criticism on appeal. In the courts' view,

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43 *Ibid* at 892.

44 *Ibid*.

45 *Corbett*, *supra* note 37 at para 161.

46 See e.g. *R v Davis*, [1999] 3 SCR 759 at para 103, 139 CCC (3d) 193; *R v NCB*, 2012 ABCA 238 at para 12, [2012] AWLD 4087 [*NCB*]; *R v Lopez*, 2015 BCCA 294 at para 48, [2015] BCWLD 4885 [*Lopez*]; *R v Hilton*, 2016 ABCA 397 at para 77, 343 CCC (3d) 304 [*Hilton*], Paperny JA, dissenting.

breaking down a trial judge's work product results in *reductio ad absurdum*, where the few lines of error are given greater weight than should be apportioned considering the context of the entire case. In law, context is everything.

Yet, up to this point, we have deconstructed *W(D)* without knowing it. We have traced the *W(D)* concept through its pre-history and found the core meaning of the *W(D)* instruction is about choices or rather, about keeping the reasonable doubt mind open to making none. We have also found a golden thread woven in between these choices and that makes all the difference. Credibility assessment, indeed assessing the whole evidential landscape, is imbued with our principles of fundamental justice grounded in the proper application of the presumption of innocence as articulated by the burden on the prosecutor to prove guilt beyond a reasonable doubt. It also engages the gatekeeper function of the trial judge to ensure trial fairness. The pre-*W(D)* case law situates this concept in the testimonial arena where credibility is key. These cases offer a scenario easiest to visualize, the complainant and the accused giving diametrically opposed versions of the events. We can easily see in that vivid picture the ease of committing the *Nimchuk* error; to believe the accused is to find that the complainant "framed" the accused.

However, *Nadeau*, *Thatcher*, and *Morin* decisions tell us a more expansive story which is not limited by sides; those cases are speaking to the very heart of the criminal law through the burden on the Crown to prove the case beyond a reasonable doubt. How *W(D)* weighs into this fray is not a question of deconstruction but of construction as *W(D)* builds on this past case law to create an elegant yet simple framework for the trial judge to use to ensure the evidence is assessed properly and consistently within the core principles of criminal law. But contrary to fiction where we imagine "if we build it, they will come,"[47] constructing legal principles is fraught with difficulty. We in law do not simply build from pre-vetted plans, we question and probe while we build and often challenge the plan. With this construction material before us, we now turn to what the *W(D)* framework is made of: a mantra, or a reminder; or perhaps here too we are not confined to a choice between two alternatives. It would hardly be an article on *W(D)*

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47 A reference to *Field of Dreams*, 1989, DVD (Beverley Hills, Cal: Universal Studios Home Entertainment, 2012).

if we did not expose the seminal decision to our scrutiny in answering the question: of what stuff is *W(D)* made?

B. The Building Materials: The Case

To give perspective to this quest, we will first review the backdrop of the case in the broader context of the facts and of the legal landscape of that time. *W(D)* was charged and convicted of sexual offences involving his teenaged niece. It was, as in the previous cases of *Challice* and *Nimchuk*, a trial in which credibility and divergent narratives were at the core of the trial. It was like *Challice,* a jury trial but, as identified by Justice Cory, it was a situation where the trial judge in his original charge correctly directed on the standard of proof relating to credibility assessment but then erred in the recharge to the jury.[48] The issue was one of quantum and reversible error. In the lower appellate court, the Ontario Court of Appeal was divided and, in the Supreme Court, that divisiveness on the impact or effect of the error would remain. This impact question would become the main thrust of future appeals on the thereafter named *W(D)* error.

But first some socio-legal context. *W(D)* was heard on February 1, 1991 and released weeks later, on March 28, 1991. The panel of five consisted of Justices Sopinka, Gonthier, Cory, McLachlin, and Iacobucci. Justice Sopinka, who dissented in the decision, was the longest sitting justice having been appointed May 24, 1988. Justice Iacobucci was the newcomer having been appointed less than a month previously on January 7, 1991. Historically, the late 1980s to mid-1990s were turbulent times in the Supreme Court: these were heady days of criminal law where the highest court struggled with core elements of criminal offences such as in the subjective/objective *mens rea* debate raging through a series of cases on the fault element of murder, manslaughter, criminal negligence, dangerous driving, and sexual assault.[49] Connected to this debate was the related issue of offences which purportedly reversed the burden of proof onto the accused.[50] New amendments to sexual assault laws were also probed and

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48 *W(D)*, *supra* note 1 at 751.

49 See e.g. *R v Vaillancourt*, [1987] 2 SCR 636, 39 CCC (3d) 118; *R v Tutton*, [1989] 1 SCR 1392, 48 CCC (3d) 129; *R v Martineau*, [1990] 2 SCR 633, 58 CCC (3d) 353; *R v Hundal*, [1993] 1 SCR 867, 19 CR (4th) 169; *R v Creighton*, [1993] 3 SCR 3, 105 DLR (4th) 632 [*Creighton*]. Note, the Court did not unanimously agree on the essence of criminal negligence until the decision of *R v Roy*, 2012 SCC 26, [2012] 2 SCR 60.

50 See e.g. *R v Whyte*, [1988] 2 SCR 3, 5 DLR (4th) 481; *R v Penno*, [1990] 2 SCR 865, 59

discussed in a number of cases and with these amendments were evidential questions of proof, reliability, and credibility, most notably of children.[51] Intoxication and the *pro forma* categories of general and specific intent were dissected and debated.[52] Although on divergent issues, these cases engaged themes resonating through *W(D)*, such as the presumption of innocence, burden of proof, trial fairness, and the desire to protect the integrity of the criminal justice system from miscarriages of justice. Against the background of these momentous decisions is a divergent court with many split decisions, dissents, and multiple majorities; in short, a fractious court. Notably, Justice Cory was a strong voice in many of these ground-breaking criminal law cases. Justice Sopinka too was instrumental, both as speaking for the Court or as part of the dissenting opinion.[53]

Justice Cory, for the majority in *W(D)*, begins the analysis by generously excerpting[54] the charge to the jury; both the error free main charge and the erroneous recharge. By setting out the charge in this fashion, the reader of the decision experiences the charge first-hand and can gauge the effect of it. The trial judge, in the re-charge error, advises the jury that "at the end of the day the core issue to be determined by yourselves is whether you believe the complainant or whether you believe the accused."[55] Justice Cory first identifies this error in the language of precedent, lending continuity to his admonishment by referencing the *Challice* and *Morin* decisions.[56] Then comes the solution, as Justice Cory, in the oft-quoted passage excerpted at the beginning of this article, speaks to the model trial judge by offering a recommended instruction. But before the three-step solution there is a prologue sentence, not as oft-quoted,[57] and a brief paragraph following in

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CCC (3d) 344; *R v Downey*, [1992] 2 SCR 10, 90 DLR (4th) 449.

51 See e.g. *R v Hess*; *R v Nguyen*, [1990] 2 SCR 906, 79 CR (3d) 332; *R v* M(W*H)*, [1992] 1 SCR 984, 98 Nfld & PEIR 359; *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, 66 CCC (3d) 321 [*Seaboyer*]; *R v L(DO)*, [1993] 4 SCR 419, 25 CR (4th) 285 [*L(DO)* cited to SCR].

52 See e.g. *R v Bernard*, [1988] 2 SCR 833, 45 CCC(3d) 1; *R v Daviault*, [1994] 3 SCR 63, 93 CCC (3d) 21.

53 See e.g. *R v DeSousa*, [1992] 2 SCR 944, 76 CCC (3d) 124; *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1; *Creighton*, *supra* note 49, Sopinka J, dissenting.

54 The excerpt is over three-and-a-half pages.

55 *W(D)*, *supra* note 1 at 757.

56 *Ibid.*

57 Quoted in 360 decisions referencing *W(D)*. The prologue is found at page 757 and

which Justice Cory qualifies the proposed instruction as a suggestive "ideal." This "appropriate instruction"[58] is in the form of a recommendation consisting of a simple generic formula not contextually connected to the facts.

Later in the judgment, Justice Cory gives a list of factors supportive of the majority's position that no substantial wrong or miscarriage of justice resulted from the re-charge error. Many of those factors are connected to the charge when "read as a whole,"[59] which would not have left the "jury (...) in doubt as to the burden resting on the Crown."[60] He referenced the short time lapse between the main charge and recharge and the urging of the trial judge to apply the correct standard of proof. Justice Cory also emphasized, by quoting the colourful passage of Justice Addy in *R v Lane and Ross*,[61] that jurors are not "morons, completely devoid of intelligence"[62] but are "conscientious" and "anxious to perform their duties" and would not "be forgetful of instructions."[63] True, but with that intelligence they would also realize that the instructions were contradictory and possibly confusing.

Justice Sopinka's dissent adds a different perspective. His dissent also opens by providing continuity with the past by labelling the issue through the *Challice* metaphor of an unacceptable tug of war "presented as a contest between the credibility of the complainant and that of the accused."[64] Justice Sopinka carefully summarizes the facts; presenting them vividly but in a manner which feeds into unacceptable myths and stereotypes. [65] He depicts the complainant as a 16-year-old "dropout" living from place to place, who did not "complain of these incidents immediately after despite numerous

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states, "[i]deally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines."

58 *W(D)*, *supra* note 1 at 757.

59 *W(D)*, *supra* note 1 at 761.

60 *Ibid* at 758.

61 *R v Lane and Ross*, [1970] 1 OR 681, 1 CCC 196 (Sup Ct J), Addy J (dismissing the severance application of two co-accused at 8).

62 *W(D)*, *supra* note 1 at 761.

63 *Ibid*.

64 *Ibid* at 745.

65 *Ibid* at 746.

opportunities to do so."[66] Furthermore, she remained in the company of the accused after the event. The accused is described as a "poor witness, uneducated and illiterate."[67] This recitation of the facts is a stark reminder that this was a watershed moment for the Supreme Court in their approach to child witnesses and sexual offences. This is the time when the language of "myths and stereotypes"[68] became part of the court's lexicon and reasoning. Only a few months before *W(D)*, the Court was recognizing the influence of the genderized trope in *R v Lavallee*.[69]

Justice Sopinka takes issue with the standard charge on credibility in which the accused "is in exactly the same position as any other witness as to credibility."[70] Such a "bald statement,"[71] in the opinion of Justice Sopinka may lead a jury, without further "elaboration" to fail to appreciate that the assessment of the accused's evidence must be done through the consideration of the whole of the evidence while applying the burden of proof beyond a reasonable doubt.[72] In Justice Sopinka's view, credibility was "fundamental" to the final determination of the case and the concept of the burden of proof "the most fundamental rule of the game."[73] A misdirection in the instructions could not be salvaged by a proper charge elsewhere in the instructions. The jury required proper instructions not contradictory ones. To find the jury would understand the task required was "pure speculation"[74] requiring a new trial.

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66 *Ibid.*

67 *Ibid.*

68 Although, "myths and stereotypes" as a phrase was first used by the Supreme Court by L'Heureux-Dubé J, dissenting in Seaboyer, *supra* note 51, the phrase was referenced a year earlier in the majority decision of Wilson J in *R v Lavallee*, [1990] 1 SCR 852, 55 CCC (3d) 97 [*Lavallee*] (quoting from *State v Kelly*, 478 A 2d 364 (1984)). See also *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114, 40 DLR (4th) 193, Dickson CJC (quoting from the report entitled "Canadian National Action Programs – Women" under the heading "Traditional beliefs by managers and women in the many negative myths and stereotypes of working women" at 1119).

69 *Lavallee*, *supra* note 68.

70 *W(D)*, *supra* note 1 at 747.

71 *Ibid* at 747.

72 *Ibid* at 748.

73 *Ibid* at 750.

74 *Ibid.*

It is worthwhile to step back from these two opinions to consider the language used and the emphasis given to certain concepts. For Justice Sopinka, as he posited in the majority decision of *Morin*, the burden of proof was "one of the most fundamental rules of the game" [75] and credibility in *W(D)* was the "fundamental issue."[76] Even the trial judge, in the passage of the instructions where the error was made, recognized that determining credibility "is very fundamental to this trial and that is the very heart in effect is who you are going to believe."[77] On the other hand, Justice Cory found credibility was merely "important"[78] and he gave no special descriptor to the burden of proof. His emphasis was on the "correct and fair"[79] or "fair and error free"[80] main charge and the charge "read as a whole."[81]

For Justice Cory, fairness is a reasoned balance between perfection and reversible error. Reasonableness becomes the touchstone, but such a long view may not sit well with the admonishment to only find the accused guilty beyond a reasonable doubt. The criminal standard is not about balance but about tipping the scales of justice. In *FH v McDougall*,[82] the Supreme Court understood this when they found *W(D)* was unique to the criminal justice system where credibility was "fundamental"[83] as opposed to the civil system where the standard of proof was merely an offset. Trial fairness encompasses many concepts, some of which do require a balanced view and approach, such as in charging the jury on the positions of the defence and prosecution. However, there is one fundamental concept which defies balance and compromise; that is in the fundamental precepts of presumption of innocence and with it the burden on the prosecution to prove guilt beyond a reasonable doubt. This special dimension, attributable only to criminal law, encapsulates complex concepts requiring the deft hand of the trial judge to unravel and reveal in an accessible 'human' manner devoid of legalistic language and incomprehensible terminology. As the Alberta Court

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75 *Morin*, *supra* note 30 at 375.

76 *W(D)*, *supra* note 1 at 750.

77 *Ibid* at 749.

78 *W(D)*, *supra* note 1 at 757.

79 *Ibid* at 751, 760, 761. Cory J used this phrase three times to describe the charge.

80 *W(D)*, *supra* note 1 at 753.

81 *Ibid* at 753, 758, 761. Cory J used this phrase three times in his reasons.

82 *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41 [*McDougall*].

83 *Ibid* at 41–42.

of Appeal suggests in *R v Barton*,[84] instructions to the jury must be user friendly and understandable, taking meaning and solidity from the trial narrative. Of note, in *Barton* a *W(D)* argument was raised.

Reading this "as a whole"[85] it is a wonder that the *W(D)* decision reached the 'cult status' it did. I suggest it is partially language which caused the initial error but also what brings this case into one of the most used and easily identified decision. A decision readily recognized by its two initials. Justice Cory, as already mentioned, called his three-step model instruction an "ideal"[86] but also a "formula"[87] which if used would avoid the "oft-repeated"[88] error on appeal. The lure of a formulaic solution to an 'oft-repeated' error, part self-serving and part altruistic, is simple to understand but as we will discuss in the next section, even when the Supreme Court disapproved of the formulaic stance *W(D)* encouraged, the case continued to be the 'star attraction' and the *cause celebre* of case law.

C. The Nuts and Bolts: There is No Magic in That!

In fact, the courts do not like formulaic instructions that suggest insulation from error. There is no such reality where a stock repetition of an approved instruction results in an error free charge. There is no such magic here. Soon after its release, *W(D)* becomes imperative, reaching the "must do" pinnacle. The Supreme Court quickly resiles from this heightened state to the 'nice to do' position. It was in 1994 when Justice Cory in *R v S(WD)*[89] made the 'obvious' even more so when he stated "[o]bviously, it is not necessary to recite this formula word for word as some magic incantation. However, it is important that the essence of these instructions be given."[90] Instead of formula, instead of ideal, we have "essence."[91] If an instruction, in the essentials, instructs the jury on the proper approach to credibility assessment, then no error is committed.

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84 *R v Barton*, 2017 ABCA 216 at paras 155–163 [*Barton*].

85 *W(D)*, *supra* note 1 at 753.

86 *Ibid* at 757.

87 *Ibid* at 758.

88 *Ibid.*

89 *R v S(WD)*, [1994] 3 SCR 521, 119 DLR (4th) 464.

90 *Ibid* at 533.

91 *Ibid.*

Even after *W(D)*, Justice Cory continued to offer 'suggested' direction to the jury in areas such as the preferred exhortation to the deadlocked jury in *R v G(RM)*[92] or on the proper charge tied to *W(D)* on reasonable doubt as in *Lifchus*.[93] In *G(RM)*, Justice Cory cautions trial judges that his "helpful" "suggestion" not be "slavishly" adhered to "as a magic incantation."[94] In *Lifchus*, the suggested charge on reasonable doubt again cautions that the instruction "is not a magic incantation to be repeated word for word"[95] but a "suggested form that would not be faulted if it were used."[96] Even if the form itself is not used, Justice Cory continues to explain that "any form of instruction that complied with the applicable principles and avoided the pitfalls referred to would be satisfactory."[97] Although not a formula, it is a recipe to be followed allowing, of course, for personal taste. Notably, at paragraph 40 of *Lifchus*, Justice Cory clarifies the difference between error and error free as the "reasonable likelihood"[98] a jury would misunderstand. As an illustration, he references *W(D)* as the example of where "the charge, when read as a whole, makes it clear that the jury could not have been under any misapprehension as to the correct burden and standard of proof to apply."[99]

D. The Framework: What *W(D)* is

And yet, *W(D)* continued to be called a "test" albeit not an "academic" one.[100] In fact, *W(D)* is described in many ways by the Supreme Court:

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92 *R v G(RM)*, [1996] 3 SCR 362, 110 CCC (3d) 26 [*G(RM)* cited to SCR]. Even before the release of *W(D)*, *supra* note 1, Cory J in *R v Askov*, [1990] 2 SCR 1199 at 1228–1229, 75 OR (2d) 673, warned against "magical incantations."

93 *Lifchus*, *supra* note 12.

94 *G(RM)*, *supra* note 92 at 386.

95 *Lifchus*, *supra* note 12 at para 40.

96 *Ibid.*

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*

100 See e.g. *L(DO)*, *supra* note 51 at 469–470, L'Heureux-Dubé J.

"directions"[101]; "principle(s)"[102]; "instruction"[103]; "questions"[104]; "message"[105];"charge"[106]; "procedure"[107]; "step(s)"[108]; "approach"[109]; "formula"[110]; "caution"[111]; "analysis"[112]; "analytical framework"[113]; "factors",[114] and finally in *R v Wilcox*,[115] an "analytical process."[116] But what can we glean from this other than uncertainty as to what exactly the purpose and placement of *W(D)* should be? It tells us that *W(D)* has become much more than the sum of its parts and that this ideal formula, this list of questions to be asked by the trier, is a message, which embodies the legal principles encapsulated in the presumption of innocence as guaranteed under the *Charter* and as reflected in our fundamental values. It is a signature of our justice system that we do not approach the evidence as an everyday experience but, as emphasized in *R v Starr*,[117] a special occasion requiring, nay challenging us, to look at people, stories, and events in a different way: in a way that protects the individual and the integrity of the administration of justice. It is the last *W(D)* descriptor, "analytical process,"[118] suggests this change of function of *W(D)*. Finally, the material and the ideal meet where the act of decision making, and all that it entails, coincides with legal principles and societal expectations.

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101 See e.g. *R v Haroun*, [1997] 1 SCR 593 at 597, 115 CCC (3d) 261, Sopinka J, dissenting.

102 See e.g. *R v Sheppard*, 2002 SCC 26 at para 65, [2002] 1 SCR 869.

103 See e.g. *R v Van*, 2009 SCC 22 at para 23, [2009] 1 SCR 716, LeBel J [*Van*].

104 *JHS*, *supra* note 2 at para 10.

105 *Ibid* at para 13.

106 *McDougall*, *supra* note 82 at para 83, Rothstein J.

107 See e.g. *R v Avetysan*, 2000 SCC 56 at para 28, [2000] 2 SCR 745 [*Avetysan*].

108 See e.g. *McDougall*, *supra* note 82 at para 83.

109 *R v Boucher*, 2005 SCC 72 at para 29, [2005] 3 SCR 499 [*Boucher*].

110 See e.g. *R v Dinardo*, 2008 SCC 24 at paras 18, 23, [2008] 1 SCR 788 [*Dinardo*].

111 *R v Daley*, 2007 SCC 53 at para 106, [2007] 3 SCR 523.

112 *R v Laboucan*, 2010 SCC 12 at para 7, [2010] 1 SCR 397.

113 *R v CLY*, 2008 SCC 2 at paras 24, 31, [2008] 1 SCR 5 [*CLY* SCC].

114 *R v JAA*, 2011 SCC 17 at para 67, [2011] 1 SCR 628 [*JAA*].

115 *R v Wilcox*, 2014 SCC 75, [2014] 3 SCR 616 [*Wilcox*], Karakatsanis J.

116 *Ibid* at para 1.

117 *R v Starr*, 2000 SCC 40, [2000] 2 SCR 144.

118 *Wilcox*, *supra* note 115 at para 1.

E. The Framework: What *W(D)* isn't

Still, the Supreme Court after *W(D)* made it perfectly clear what *W(D)* is not. It is not a "magic incantation,"[119] although nothing in law is for that matter. As early as 1993, in *R v Evans*,[120] Justice Cory, the progenitor of *W(D)*, is speaking to the legal community at page 640 when he reminds us that:

> At the outset, it's worth repeating that a jury charge should not be microscopically examined and parsed. There is no such thing as a perfect jury charge. Rather, the directions to the jury must be looked at as a whole to determine if there has been any error. See, for example, *R. v. W. (D.)*.[121]

In the next paragraph, Justice Cory reiterates his view that the charge, when read as a whole, is "eminently fair."[122] Later, in the *Avetysan* decision, Justice Major reminds trial judges they "need not mimic" the *W(D)* ideal as "the language used to obtain the result" is within their "wide discretion."[123] He further agrees with Justice Cory's assessment in *Evans* that perfection is not what a trial judge strives for but "adequacy."[124] Indeed, an adequately informed jury and a form of instruction that is "in substantial compliance with the existing law is the sum total of what the appellate court expects from the trial judge."[125] Even so, the court in *Avetysan* allowed the appeal as there were multiple errors in the charge on reasonable doubt resulting in a departure from "established principles."[126] Justice Deschamps in *R v Boucher* is even more candid on the non-status of *W(D)* as a miracle prescription, reminding us "the approach set out in *W.(D.)* is not a sacrosanct formula that serves as a straitjacket for trial courts."[127]

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119 This phrase is from the American decision *Time Inc v Hill*, 87 S Ct 534 (1967), Fortras J ("[b]ut a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters" at 557–58).

120 *R v Evans*, [1993] 2 SCR 629, 82 CCC (3d) 338.

121 *Ibid* at 640.

122 *Ibid*.

123 *Avetysan*, *supra* note 107 at paras 1, 3.

124 *Ibid* at paras 1, 8, 9, 12. Indeed, Major J characterizes the charge as "adequate" on five occasions in the decision.

125 *Ibid* at para 2.

126 *Ibid* at para 3.

127 *Boucher*, *supra* note 109 at para 29.

The use of 'sacrosanct' and 'straitjacket' signify a growing frustration with the *W(D)* decision and the growing appeals grounded in the error. A frustration that culminates in a series of five cases released in 2008 from the Supreme Court,[128] attempting to explain and temper the impact of the *W(D)* instruction. Justice Binnie in *JHS* best exemplifies the effort by the Court to resolve *W(D)* as the "normal" and not the sensation it seemed to become when he clarified at paragraph 9 that the "so-called" instruction "simply unpacks for the benefit of the lay jury what reasonable doubt means in the context of evaluating conflicting testimonial accounts."[129] Despite the critical treatment it received in 2008, the *W(D)* ground of appeal did not abate. In 2009, Justice LeBel in the *Van* decision urged the "wording from *W. (D.)* must not be followed to the letter."[130]

Similar treatment of the oft-quoted *W(D)* paragraphs can be mined from lower court decisions.[131]

For instance, the appellant in the British Columbia Court of Appeal decision of *R v Terry*[132] urged the Court to find the *W(D)* instruction as a directive. The Court readily rejected this position as such "special"[133] instruction was not needed. This case is a reminder that much of the court's response to *W(D)* was indeed framed by the appellate counsel who attempted to crystallize *W(D)* as an imperative. However, as reminded by the 'magical incantation' caution, perhaps counsel was not suggesting presence but absence: not that the *W(D)* words were to be intoned 'just so,' but that without these 'words to the effect' the spirit of the ideal would render the trial unfair.

I cannot leave the *Terry* decision without underlining the faulty characterization of *W(D)* as a "special" instruction. Although I earlier criticized the Supreme Court for normalizing the status of *W(D)*, I also find fault with the idea that *W(D)* is singular and applies only in specific

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128 See *CLY* SCC, *supra* note 113; *Dinardo*, *supra* note 110; *JHS*, *supra* note 2; *R v REM*, 2008 SCC 53, [2008] 3 SCR 3 [*REM*]; *McDougall*, *supra* note 82.

129 *JHS*, *supra* note 2 at para 9.

130 *Van*, *supra* note 103 at para 20.

131 See e.g. *R v Yeung*, 2017 ONCA 190, 137 WCB (2d) 111 (the court describes *W(D)* as a "mantra" at para 7); *R v Murray*, 2017 ONCA 393, [2015] OJ No 2529 (QL) [*Murray*], Watt JA (describes *W(D)* as a "command" at para 77).

132 *R v Terry* (1994), 91 CCC (3d) 209, [1994] BCWLD 1665 at paras 42, 43 (BCCA).

133 *Ibid* at paras 43–45.

circumstances. True, *W(D)* is about the intersection of credibility and reasonable doubt but I would suggest that virtually every case before the courts would have that general aspect. We live in the adversarial system in which narrative is everything. Perhaps that is the trouble with *W(D)* and why it continues to pervade case law, albeit in a more seamlessly organic manner. The reality is that in a trial, *W(D)* is everywhere.

The Alberta Court of Appeal also weighed in on *W(D)* while dispensing advice to appellate counsel and other appellate courts. For instance, the court in *R v Tran* remarked that "it is not appropriate to read a trial judge's reasons preciously in a spirit of *post-facto* fault finding"[134] and "equally, an appeal court is not to 'cherry pick' through reasons in a process of isolating words and phrases from their contexts."[135] This reference to "cherry-picking"[136] lends an immediate connection to Justice Cory's approach in *W(D)* where context is everything and errors can be tolerated depending on the overall fairness of the instruction when 'read as a whole.'

Finally, *W(D)* is not sacrosanct. In *R v NCB*,[137] the court roundly dismisses the appellant's argument on the burden of proof issue by commenting on the "difficulty" of such ground as contrary to the "mass of authority" that "does not characterize incompleteness of reasons, or a departure from the catechism in *R v W (D)*...as being demonstrative of error by themselves."[138] The metaphoric rise of *W(D)* is found by the Courts to be misguided.

F. The "Finishing Touches": What *W(D)* may be

We have seen thus far that *W(D)* did not create a novel instruction but clarified an already recognized interplay between assessing the credibility of testimonial evidence and the fundamental principles of the burden of proof. Rather, it provided an "ideal formula" that when utilized by the trial judge, could avoid, what became known as, the *W(D)* error. But it was an ideal with a difference; it was not a "magic incantation," which if not intoned or "mimicked" by the trial judge in a charge resulted in a reversible

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134 *R v Tran*, 2008 ABCA 209 at para 36, 58 CR (6th) 246.

135 *Ibid.*

136 See e.g. *Lopez and Hilton*, *supra* note 46.

137 *NCB*, *supra* note 46 at para 12.

138 *Ibid.*

error. Nor was it a "straitjacket" that incentivized parsing and cherry-picking specific words and phrases of a jury charge to conjure up a persuasive ground of appeal. On the contrary, it is the spirit of *W(D)* which matters.

This admonishment to take note of content over form is perfectly modelled by Moldaver JA, as he then was, in his majority decision of *R v Pintar*.[139] In this decision, he muses on the "functional approach"[140] to jury instructions in the context of self-defence, again raising the specter of "magical incantations" in his discussion on what instructions are and are not.[141] As suggested by Justice Moldaver,[142] the "functional approach" necessitates the form of the instruction be accountable to the content. This requires a contextual reading of the charge as a unique expression of the specific issue raised in any given case.[143] No two charges, in other words, should be the same and yet the underlying fundamentals remain the same. Justice Moldaver cautions that the functional approach was neither "novel" nor "radical" but a labelling or calling out of what trial judges did on a regular basis through the giving of instructions to the jury.

The trial judge, as portrayed by Justice Doherty in *R v Haughton*,[144] is like a tailor creating a bespoke suit from material ready at hand. There should be neither too little nor too much material and the embellishment should be as needed not extemporaneous or shoddy workmanship. Eloquent and elegant are the words that come to mind. In this way, its

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139 *R v Pintar* (1996), 110 CCC (3d) 402 (Ont CA) [*Pintar*].

140 *Ibid* at paras 34–41.

141 *Ibid* at para 38.

142 Moldaver J, as a member of the Supreme Court, often offers advice to trial judges and counsel on the appropriate approach to jury instructions and trial strategy. See e.g. *R v Hart*, 2014 SCC 52, [2014] 2 SCR 544; *R v Rodgerson*, 2015 SCC 38 at paras 44–54, [2015] 2 SCR 760.

143 See also *Avetysan*, *supra* note 107, Major J ("[t]rial judges' charges to juries vary. No particular magical incantation is required" and that charging a jury is a matter of "wide discretion" at para 1).

144 *R v Haughton* (1992), 11 OR (3d) 621 (CA), aff'd [1994] 3 SCR 516, Doherty JA ("[a] trial judge's instructions to the jury must be custom-made for the particular case. Those directions must equip the jury with the law necessary to render its verdict. The scope of the trial judge's legal instructions will depend in large measure on the nature of the evidence adduced and the issues legitimately raised by that evidence. A trial judge should not engage in a far-ranging esoteric discourse on potential applications of legal principles which bear no realistic relationship to the issues raised by the evidence" at 625).

purpose, according to Justice Moldaver in *Pintar*, is "to relieve against some of the confusion and complexity,"[145] and, if done properly, such instructions enable:

> trial judges to be somewhat more selective and proactive in the formulation of their instruction. It is designed to encourage trial judges to pinpoint the real basis upon which the claim to self-defence rests and communicate that defence to the jury in as clear and comprehensible a fashion as possible. [146]

This is in harmony with the recent *Barton*[147] decision, a plea for clarity in jury instructions requiring an integration of the specific facts of each case with the relevant law. This advice, I suggest, is equally applicable to the *W(D)* scenario.

It is the plasticity of *W(D)*, therefore, not its immutability, that has defined the oft-quoted passage. *W(D)* symbolizes a fundamental value yet also provides a platform for further development of the law. It is this organic quality of a legal principle, which defines its staying power and development into iconic status. In the next part, we will follow the blossoming of the *W(D)* instruction from a simple three-step formula to a complex and robust 'analytical process' connecting and enhancing vital trial concepts. This can be traced through the burgeoning grounds of appeal which rely upon or brush against the *W(D)* mantra and lends decided richness to appellate decisions. Simultaneously, this transformative ability of *W(D)* redefines the historical meaning of the decision as case law renames the principles inherent in the case. The old school 'credibility contest' or 'choice between two alternatives' becomes more sophisticated. The emphasis shifts from the interplay between two opposing sides to the heart of the fundamentalism of the instruction – the burden of proof.

IV. The Making of the *W(D)* Revolution

To construct this conceptual transition, *W(D)* effectively made the past part of the present by leaning into the "stark alternative" error and providing a framework onto which the principle could rest. This framework imagined the *W(D)* principle as a chameleon, which took on the shape of the case before it in the context of the principles of fundamental justice.

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145 *Pintar*, *supra* note 139 at 40.

146 *Ibid.*

147 *Barton*, *supra* note 84.

This continuity permitted an enlargement of *W(D)*, not a diminishment. This is accomplished by two treatments. First, the *W(D)* principle is imagined through a sophisticated judicial lens that emphasizes the heart of the principle, the burden of proof. Second, *W(D)* became a discussion piece woven through more than one ground of appeal, touching upon differing areas of law with the common bond or golden thread of the burden of proof. As a result, this prodigious principle has become a richer and more robust part of our criminal justice nomenclature. In this way, I suggest *W(D)* is alive and well and reminding trial judges and counsel alike across Canada to take heed of our fundamental values.

A. The *W(D)* Revolution as Imagined Through the Judicial Lens

The first strand in this shift is the sophistication of the principle as seen through the judicial lens. The best example comes to us from the Ontario courts where the *W(D)* notion has gone through an inspirational makeover. Instead of describing the principle as a 'credibility contest' or 'stark choice between two alternatives,' the issue is one of "uneven scrutiny"[148] of the evidence or "different standards of scrutiny"[149] or "unbalanced scrutiny"[150] or "misallocation"[151] of the burden of proof. In this modern approach to *W(D)*, "balance" and "scrutiny" are the key tropes. Thus, the evidence is no longer signified by which side the evidence emanates, the accused or the prosecutor. Rather, the whole of the evidence requires a calm, reasoned, judge-like examination. Although this examination is connected to the "standard" or "burden" of proof in the criminal sense, the use of the balancing metaphors suggests a balanced standard more akin to the civil balance of probabilities. By employing this language, the courts shift the

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148 See e.g. *R v Stromberg*, 2015 ONCA 121 at paras 2, 4, [2015] OJ No 831 (QL) (this approach is taken in many decisions, notably in Ontario); *R v LRS*, 2016 ABCA 307 at para 29, 134 WCB (2d) 529 [*LRS*]; *Gauthier c R*, 2017 QCCA 4 at para 71 [*Gauthier*].

149 See e.g. *R v CAM*, 2017 MBCA 70 at paras 4, 32–39, 354 CCC (3d) 100 [CAM] (this approach is taken in many decisions, notably in Manitoba); *R v B(D)*, 2002 CanLII 41611 at para 2 (Ont CA); *Lopez*, *supra* note 46 at para 47; *R v Smith*, 2008 SKCA 61 at paras 39, 54, 80 WCB (2d) 602; *R v MTL*, 2016 YKCA 11 at para 2, 132 WCB (2d) 99.

150 See e.g. *R v Adams*, 2016 ONCA 413 at para 30, 130 WCB (2d) 525 (this phrase is used mostly in Ontario); *Lopez*, *supra* note 46.

151 *R v Davis*, 2013 ABCA 15 at paras 85–86, 275 CRR (2d) 266; *R v MJB*, 2015 ABCA 146 at para 34, 395 DLR (4th) 197.

W(D) concern from the singular assessment of credibility required in a criminal case, which protects the accused through the presumption of innocence, to an equal, not necessarily equitable review. However, this shift is in many ways consistent with Justice Cory's caveat in *W(D)* that the magnitude of the error must be seen in the light of the whole of the evidence.

Other cases describe the *W(D)* error in a quantitative manner. Thus, the trial judge errs by employing a "higher standard" of scrutiny in the credibility assessment of the accused, resulting in the reversal of the burden of proof.[152] This characterization better reflects the concern with the application of the proper standard and burden of proof. Yet, it is a characterization which moves away from the *W(D)* instruction as it views the credibility assessment in silos, partitioning the complainant's evidence from the accused's evidence as separate entities. It may also have the unwelcome effect of blurring the lines between how we make everyday assessments of data. In the everyday, we regularly make innate choices between what we accept and do not accept. In the unique space of a criminal case, the decision-maker must consciously turn their mind to employing a special or different standard than the everyday. This specialness surrounding the criminal burden of proof is best viewed as the "infra-ordinary,"[153] a standard that embodies what is at risk in a criminal trial.

Even with this change of approach and language, the courts still view the *W(D)* ground as a challenging one.[154] Justice Doherty at paragraph 59 of *R v Howe*,[155] recognizes the profusion of such grounds and the difficulty in successfully advancing it. In Justice Doherty's view:

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[152] *R v Howe*, [2005] OJ No 39 (QL) at para 58, 192 CCC (3d) 480 (CA) [*Howe* cited to QL]. See also *R v Aksidan*, 2004 BCSC 1318 at paras 23–29.

[153] See Georges Perec, *Species of Spaces and Other Pieces* (London, UK: Penguin, 1997) at 208–211 [edited and translated by John Sturrock]. The word "infra-ordinary" was coined by the French writer, Georges Perec. It describes an "everyday" that is not "ordinary or extraordinary, neither banal nor exotic" but requires us to appreciate what we continually miss in the margins between significant and insignificant. The "infra-ordinary" leads to a different perspective that requires us to view seemingly ordinary matters in a heightened way.

[154] See *R v Andrade*, 2015 ONCA 499 at para 39, 326 CCC (3d) 507 (quoting Doherty JA in Howe, *supra* note 152); *R v Aird*, 2013 ONCA 447 at para 39, 107 WCB (2d) 735.

[155] *Howe*, *supra* note 152 at para 59.

> It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant.[156]

Here, Justice Doherty is attempting to confront the curative proviso by explaining it is not the presence of the error but the magnitude of such error that matters on appeal. In reading this, one is reminded of the outcome of *W(D)* in which the trial judge clearly erred in his instructions in the recharge yet the court found no substantial error. Justice Doherty in *Howe* also highlights the presence of deference, which is a key component of maintaining the integrity of the justice system. The application of deference by the appellate courts to issues of fact-finding and to credibility assessment, establishes the parameters of appellate intervention, which work in conjunction with the curative proviso. This deference is also connected to the visual side of the judicial lens, the observations made by the trial judge at the time of trial, as opposed to the written and oral advocacy that typically drives the appellate courts.[157] In this context, the concept of the common place maxim of "seeing is believing" is nurtured and rewarded over the written expression of the law.

This mixed messaging confirms the *W(D)* ground is "difficult." What is apparent is that the "difficulty" of this ground of appeal lies in the inextricable mingling of the character or principled purpose of the *W(D)* instruction and the narrative landscape of a trial. The interplay of fact and law is so near seamless that the difficulty lies in picking them apart, not "cherry-picking" as the derisive side of this argument can be viewed, but as revealing the parts which make up the whole. The inability to do this adequately, I suggest, may be a direct result of the synergy of what we now label as the *W(D)* principle. The concepts underlying *W(D)* are deep within our criminal justice system and are "difficult" concepts to articulate and appreciate and yet are necessary to articulate and appreciate. Credibility

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156 *Ibid.*

157 See *Savard c R*, 2016 QCCA 380, aff'd 2017 SCC 21, Dutil JA ("[i]t is often difficult to describe why one believes or does not believe a witness. This conclusion is based on many elements that a trial judge can see in the front line" at para 40 [translated by author]).

assessments in light of the formidable duty to apply the rule of law in the context of those fundamental principles is difficult. But difficult does not mean we turn away from that duty. It means we must be ever cognizant of that duty as we go about applying reason and common sense.

To better understand this shift and how it is viewed through the judicial lens, we will look at two recent exemplar cases from two different provincial appellate jurisdictions: the Alberta Court of Appeal decision in *R v Cunningham*[158] and the Manitoba Court of Appeal decision in *R v CAM*.[159] To best appreciate the impact of these decisions, we will examine these cases through the optics of case law. The *CAM* case will present us with a thoroughly modern approach, which is illuminated by the line of Ontario cases scrutinizing *W(D)* in light of the burden and standard of proof. But first we will view the *Cunningham* decision through the Supreme Court's quest to decant the essence of *W(D)* and free the principle from the formula.

The Alberta Court of Appeal's candid treatment of *W(D)* in *Cunningham* reduces the *W(D)* concept to the original conundrum of "who to believe" but with a distinctly "intellectualized" twist. In doing so, the Alberta Court of Appeal relies on *R v Vuradin*,[160] authored by Justice Karakatsanis, who filters the *W(D)* question through the judicial lens of the burden of proof. In this way, the Court deconstructs the *W(D)* "three-step" analysis by detaching the purpose of *W(D)* from the "formula." According to Karakatsanis J, the essence of *W(D)*, as emulated in the burden of proof, transcends the ritual vocalization of *W(D)*. Therefore, the trier of fact's approach to the credibility analysis pursuant to *W(D)*, in terms of which evidence the trier turns to first in that assessment, does not matter.[161] In other words, it is the principle that counts not the stratified hierarchy as suggested by Justice Cory's modest, yet attractive, *W(D)* instruction.[162]

Although this attitude suggests a fresh perspective, in fact it was a position taken a decade earlier in two Manitoba Court of Appeal

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158 *R v Cunningham*, 2014 ABCA 329, [2014] AWLD 4331 [*Cunningham*].

159 *CAM*, *supra* note 149.

160 *R v Vuradin*, 2013 SCC 38, [2013] 2 SCR 639 [*Vuradin*].

161 *Ibid* at para 21.

162 See e.g. see *R c Moynan*, 2013 QCCQ 9808 at para 13; *R v JW*, 2014 ONCA 322 at para 24, 316 OAC 395; *JNC v R*, 2013 NBCA 59 at para 9, 109 WCB (2d) 665; *R v Majedi*, 2013 BCCA 351 at para 18, 341 BCAC 146; *R v Menow*, 2013 MBCA 72 at para 25, 300 CCC (3d) 415 (this position has been approved and applied throughout Canada).

decisions[163] and reflects, in some sense, the minority view of the Supreme Court in the series of cases on *W(D)* rendered in 2008. In *CLY*,[164] the Supreme Court reversed the lower court's majority decision, quashing the conviction and ordering a new trial. Even though the result was unanimous, the reasons show a split in the court regarding the effect of the *W(D)* error. Justice Fish, who wrote the powerfully indignant minority decision,[165] resumed the lower court's discussion on substance over form. His opinion, pointedly at odds with the majority opinion judgment, finds a clear *W(D)* error. *CLY* is an excellent example of how the courts then viewed the *W(D)* error in virtually diametrically opposed perspectives.

The majority decision of Justice Abella,[166] agrees there is an error in the "highly problematic"[167] approach the trial judge took in assessing credibility but no error in the burden of proof. Here, Justice Abella distills Justice Fish's arguments to rigid approval of the *W(D)* "catechism" as she reiterates Justice Cory's *W(D)* comments as a "helpful map, not the only route."[168] Although Justice Fish does view the lack of adherence to the *W(D)* process as a fatal error, it is not because the trial judge deviated from the approved route but because the "pathway" chosen revealed an untenable error in assessing the evidence, resulting in the reversal of the burden of proof.

For Justice Fish, this could have been avoided by keeping the *W(D)* instructions in mind, not as a one-dimensional representation of credibility assessment possibilities, but as the multi-dimensional "analytical framework"[169] supporting the fundamental principles paramount in the task of assessing and weighing the evidence. In closing, Justice Fish gives us words to ponder as he candidly and wisely explains, in paragraph 33, that "[i]n short, judges may know the law, yet err in its application; they may know the facts, yet make findings of credibility unsupported by the record. What matters in either instance is the substance and not the form

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163 *R v CJL*, 2004 MBCA 126 at paras 62–64, 197 CCC (3d) 407; *R v CLY*, 2006 MBCA 124 at paras 8–9, 213 CCC (3d) 503.

164 *CLY* SCC, *supra* note 113.

165 Concurring with Fish J's dissent are Binnie and Deschamps JJ. The decision was rendered by a seven-member panel and was split 4 to 3.

166 Abella J's majority decision is concurred in by three further Justices.

167 *CLY* SCC, *supra* note 113 at para 5.

168 *Ibid* at paras 8, 11.

169 *Ibid* at para 31.

of the decision."[170] Despite the minority status of Justice Fish's comments, courts have subsequently approved of his comments.[171]

After *CLY* was released at the end of January 2008, *R v Dinardo*,[172] which was argued only days before the release of *CLY*, followed on May 9, 2008. The unanimous decision, authored by Justice Charron described *W(D)* in a formulistic manner despite the caution at paragraph 23 that "what matters is that the substance of the *W. (D.)* instruction be respected."[173] The court does, in the same paragraph, reiterate the purpose of *W(D)* as requiring the trial judge to "direct" his or her "mind" to the ultimate standard of proof. However, in the selfsame paragraph, Justice Charron dismisses the ground, preferring to characterize the "substantive concerns" as a sufficiency of reasons issue. To characterize a burden of proof argument as such does require a preference for form over content.

The *JHS*[174] and *REM*[175] decisions considered *W(D)* more substantively. *JHS* was argued at the same time as *Dinardo* but released three weeks later under the authorship of Justice Binnie on behalf of the seven-member panel. The exasperated tone of the decision is palpable when Justice Binnie, in paragraph 8, references the 3,743 reported decisions citing *W(D)* while commenting on the case as a "fertile source of appellate review."[176] Keep in mind that the numeric count at that time covered cases over a period of 17 years. Since that decision, there have been almost 6000 more citations in nearly half the time. Fertile source, indeed.

In Justice Binnie's view, *W(D)* is a teachable moment for the jury and a mere "unpacking" of the concept of credibility assessment in the context of the reasonable doubt principle. For Justice Binnie, the difficulty in applying the exact *W(D)* instruction was in its oversimplification when more complex evidence is before the trier such as exculpatory and inculpatory evidence from the accused. This concern is captured by Binnie J when he suggests *W(D)* has attained a status of immutability "never claimed for" by the

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170 *W(D)*, *supra* note 1 at para 33.

171 See e.g. *R v VY*, 2010 ONCA 544 at paras 9–15, 334 DLR (4th) 33.

172 *Dinardo*, *supra* note 110.

173 *CLY* SCC, *supra* note 90 at para 23.

174 *JHS*, *supra* note 2.

175 *REM*, *supra* note 128.

176 *JHS*, *supra* note 2 at para 8.

author. According to Justice Binnie, it is the "message" not the package that matters. In *JHS*, the trial judge "got across the point"[177] of *W(D)* and thereby delivered the message.[178] But delivering a message and expounding the meaning of the message are two different things. Delivering *W(D)* does not unpack the concepts in a meaningful way for proper application.

A different panel of seven members heard *REM* in May of 2008 with the unanimous decision rendered by Chief Justice McLachlin. The issue was one of sufficiency of reasons. *W(D)* in this context is peripheral yet connected. The Court is again emphasizing substance over the rote recitation of the *W(D)* "rule." In the same way, reasons are sufficient if the content "seize[s] the substance" of the "critical issue" of "a reasonable doubt in the context of credibility assessment."[179] In the final *W(D)* decision in 2008, Justice Rothstein, again for a seven-member court in *McDougall*,[180] considered the inapplicability of the decision in a civil action. In saying this, Justice Rothstein found *W(D)* to be a "guidepost to the meaning of reasonable doubt"[181] and "developed as an aid"[182] in arriving at the ultimate decision where there were conflicting testimonial accounts.

Months later, in the 2009 *Van* decision, Justice LeBel approached *W(D)* purposively as an instruction "to ensure that the jury know how to apply the burden of proof to the issue of credibility."[183] However, Justice LeBel reverted to Justice Cory's reasoning by suggesting an error in the charge was not fatal if the trial judge "clearly conveyed"[184] the proper burden and standard. The deficiency could thus be "compensated" for at another point in the charge.[185] Similarly, in the 2010 *Laboucan* decision, Justice Charron, on behalf of the full court at paragraph 19, found the reasons demonstrated the trial judge "faithfully" followed the applicable *W(D)* principles.[186] This

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177 *Ibid* at para 16.

178 *Ibid* at paras 9, 10, 13, 16.

179 *REM*, *supra* note 128 at para 46.

180 *McDougall*, *supra* note 82.

181 *Ibid* at para 84.

182 *Ibid* at para 85.

183 *Van*, *supra* note 103 at para 23.

184 *Ibid.*

185 *Ibid.*

186 *W(D)*, *supra* note 112 at para 19.

case was followed shortly by *R v Szczerbaniwicz*,[187] in which Justice Abella for the majority reiterated the now familiar *W(D)* mantra emphasizing that the substance of *W(D)* "must be respected, not its literal tripartite incantation."

As a result of the Supreme Court's emphasis on substance over the form, the Court became increasingly focused on *W(D)* as a container for burden of proof and reasonable doubt instructions. The 2013 *Vuradin* decision exemplifies this nuanced approach.[188] Justice Karakatsanis, writing for the Court, clearly characterizes the *W(D)* concern as a misapplication of the burden of proof. Reminiscent of Justice Sopinka in the dissent of *W(D)*, she cites those principles as "paramount" and "central" in a criminal trial. In paragraph 26, Justice Karakatsanis also embraces Justice Fish's disquiet with content over form when she notes that "although a trial judge is not required to outline the *W.(D.)* steps, the trial judge here referred to *W.(D.)* and the dangers that it addresses"[189] (emphasis added). In this brief passage, the *W(D)* Revolution is complete as the formulaic is jettisoned in favour of a purposive approach to credibility assessment. Thus, the true meaning of *W(D)* is revealed as an integral and continuing aspect of the criminal trial; from the overarching gate keeper duty of trial fairness to the minutiae of the final analysis of the evidence. *W(D)* is finally accepted as the analytical place-keeper to ensure the special burden of proof and our principles of fundamental justice stay firmly in mind throughout the criminal trial.[190]

In this long but necessary segue through the Supreme Court's judicial lens of *W(D)* as a catalyst of change, we return to a discussion on how this view of *W(D)* as articulated by the Supreme Court has impacted recent provincial appellate decisions. As will be argued in the numeric portion of this article, the Alberta Court of Appeal stands as a unique voice in *W(D)* history. Alberta regularly reviews grounds of appeal based on *W(D)* and

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187 *R v Szczerbaniwicz*, 2010 SCC 15 at para 14, [2010] 1 SCR 455.

188 *Vuradin*, *supra* note 160 at para 21. This approach, as discussed in this paper, occurred over time but can also be seen in *R v Lee*, 2010 SCC 52 at para 7, [2010] 3 SCR 99, where the court dismisses the *W(D)* ground as the trial judge did not err in applying the "reasonable doubt standard."

189 *Ibid* at para 26.

190 This is reminiscent of Rothstein J, dissenting, in *JAA*, *supra* note 114 at para 66, where, in dismissing the ground based on *W(D)*, he does so on the basis that the trial judge "kept his eye firmly on the proper standard and burden of proof."

produces dissents on the issue. Unsurprisingly then, the Alberta court in *Cunningham* turned to *Vuradin* to illuminate the *W(D)* concern.

Cunningham was rendered "by the court," which consisted of Justices Picard, Watson and the then Justice Brown, who was later elevated to the Supreme Court. Again, the angst of the court in reviewing, yet again, a *W(D)* issue is evident. In paragraph 14, the court comments on how submissions "essentially rehearse" general arguments on credibility assessment and reasonable doubt. Then, the Court, in paragraph 16, reveals a singular truth concerning *W(D)* when it states:

> Ultimately a trial judge or jury *does* have to make intellectually valid choices amongst competing evidence. The concern of the law is whether in its reasoning process the trial judge or jury loses sight of the presumption of innocence and the Crown's burden of proof: *Vuradin*; *R v Prokofiew*, ... *R v S(JH)*... *W(D)* is not a straightjacket for trial courts, or, for that matter, for appeal courts, as noted by Duval-Hesler CJQ in *R(J)* where she trenchantly observed 'courts of appeal throughout Canada, and certainly this Court of Appeal, are beset by appeals on the basis of *W.(D.)*'.[191]

The Court references Justice Duval-Hesler's decision in *RJ* to distinguish between *W(D)* concerns invoking "lay juries" and reasons as given by a trial judge. In the Court's view, trial judges are presumed to know the law and deserve deference in their factual findings. This presumption limits appellate intervention to consider whether the lower court's decision was "reasonable."[192]

Two issues arising from this position require our attention. First, is the underlying warning that *W(D)* not become a "straightjacket" for appellate courts. This view fits nicely with the courts' protective stance relating to the traditional role of the trial judge as the ultimate arbiter of the facts whose decision-making abilities, as seen through the judicial lens, are to be upheld if reasonably held. The further concept of the "presumption" the judge knows the law, must be tempered by the comments we discussed earlier made by Justice Fish in *CLY* that "judges may know the law" [193] [emphasis added].

Second, is the comment on the realities of decision-making, which implies a trier of fact "*does* have to make intellectually valid choices amongst

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191 *Cunningham*, *supra* note 158 at para 16.

192 *Ibid* at paras 17–18.

193 *Ibid* at para 33.

competing evidence."[194] That phrase 'intellectually valid choices' must be viewed in the context of the pre-*W(D)* decisions where the error was described as a 'stark choice between two alternatives.' Here the court is not admonishing the trier for making choices if they are 'intellectually' validated by the application of the reasonable doubt principle. This sentiment has been taken up by other provincial courts[195] and within Alberta's trial courts as well. In three Alberta Queens Bench decisions[196] Justice Renke leans on this approach. For instance, in *R v JAB* at paragraph 107, he acquits the accused as he has "no intellectually valid reason for rejecting the Accused's evidence."[197] He refers to similar wording at para 173 of the *Page* decision.[198]

In the Manitoba CAM decision,[199] written by Mainella JA, the issue is based on the modern "Ontario" approach to the *W(D)* error involving an "uneven scrutiny of the evidence."[200] The court approaches the issue in two different ways. The first, is reminiscent of *Cunningham* as Justice Mainella acknowledges the trial judge may properly believe "the evidence of a Crown witness over that of a witness for the defence" without committing an error in applying the burden of proof. The second, invokes the familiar contextual approach. The court explicitly finds that the trial judge "reviewed the evidence in accordance with the approach discussed in *R v W(D)*."[201]

It must be noted that the CAM case, like so many of the cases referencing *W(D)*, involve sexual offences and/or domestic assaults for the obvious reason that so often such offences involve diametrically opposing versions of events with little to no independent evidence, outside of the complainant and accused. Again, like many *W(D)* appeals, the appellant is

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194 *Ibid* at para 16.

195 See *R v Clouter*, 2015 CanLII 1809 at para 36 (NL PC); *R c Arvisais-Moisan*, 2016 QCCQ 9656 at para 53 [*Arvisais-Moisan*]; *LSJPA – 1716*, 2017 QCCQ 8467 at para 134 [*LSJPA – 1716*].

196 *R v JAB*, 2016 ABQB 362 at para 107, 133 WCB (2d) 188 (acquittal entered) [*JAB*]; *R v Johnson*, 2016 ABQB 633 at para 171, [2016] AJ No 1183 (QL) (acquittal entered); *R v Page*, 2017 ABQB 33 at para 173, [2017] AWLD 1112 (acquittal entered on some counts) [*Page*].

197 *JAB*, *supra* note 196 at para 107.

198 *Page*, *supra* note 196.

199 CAM, *supra* note 149 at paras 22, 32–38.

200 See *Sromberg, LRS, and Gauthier*, *supra* note 148.

201 CAM, *supra* note 149 at para 22.

the accused and the grounds of appeal focus on the cluster of errors arising from factual determinations such as misapprehension of the evidence and the weight of the evidence, unreasonable verdict and the reversal of the burden of proof. *W(D)*, in this instance, is raised by the court as confirmation the trial judge approached the assessment in the appropriate manner. The court, in dealing with the burden of proof issue, does not rely on *W(D)* specifically but on the case law which works in tandem with the principle. Related to this approach is the previously discussed appellate standard of reasonableness as an aspect of deference to the trial judge's finding of fact with the admonishment the appellate court must not substitute their opinion for the original fact finder.

The position in CAM does not seem novel, yet the court adds a twist by citing the 1947 Supreme Court decision in *White v The King*[202] to support the contention that "issues of credibility are not determined by a 'set of rules' that 'have the force of law'."[203] This expression is singular considering *W(D)*'s pedigree as a legal principle requiring the trier of fact to apply the standard of proof to the credibility determination. These comments must be viewed in the proper context: the court was confronted with appellate arguments, both written and oral, interlaced with myths and stereotypes. In CAM, the court needed to be exhaustive in their response.[204]

CAM is a case demonstrating a court's desire to diffuse an impermissible basis for an appeal that was obscured by *W(D)*. In other words, the court found the appellant's argument to be a thinly veiled attempt to rely upon erroneous beliefs of how a woman should act and react by wrapping it in a *W(D)*-like package. *W(D)* is indeed a powerful and fundamentally important concept but must be approached in a manner consistent with the prime objectives of the principle, which is to ensure a just and fair trial consistent with our principles of fundamental justice. The passages in CAM on the issue are written for everyone in the justice system and should be read by all, notably the caution in paragraphs 51 and 52 of the judgment where the court states that:

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202 *White v The King*, [1947] SCR 268, 89 CCC 148.

203 *Ibid* at 272. Of interest, counsel for the appellant in this case was G Arthur Martin, the author of the *Nimchuk* decision and a member of the *Challice* panel. See *Nimchuk*, *supra* note 5; *Challice*, *supra* note 6.

204 CAM, *supra* note 149 at paras 45–53.

> Trial judges have a heavy responsibility to ensure that counsel do not introduce the spectre of such forbidden reasoning into a trial. If that occurs in a jury trial, it should be answered by a timely and appropriate instruction to the jury (see *R v Barton*, 2017 ABCA 216 (CanLII) at paras 1, 159-61). In judge-alone trials, judges must not succumb to drinking from such a poisoned chalice in their assessment of credibility. The accused's submission that the complainant's credibility as to her version of events was undermined because it did not conform to some "idealized standard of conduct" (*R v CMG*, 2016 ABQB 368 (CanLII) at para 60) is unsound. I reject it unequivocally. Credibility determinations must be based on the totality of the evidence, not untested assumptions of a victim's likely behaviour based on myths and stereotypes.[205]

This frank statement calibrates the *W(D)* decision to focus on an assessment of the evidence free of bias and misconceptions but tied to the paramount consideration of the standard of reasonable doubt. This is best articulated by Judge Sylvain Meunier in *Arvisais-Moisan* that, "[t]hus, *DW (D)* is a model of analysis which is certainly not sacrosanct but which guarantees the safeguarding of the principle of reasonable doubt and reaffirms the need to prove beyond a reasonable doubt of guilt of an accused" [translated by author].[206]

B. Complexity and Enhancement

The second strand to consider in the *W(D)* revolutionary shift is the way the principle has become bound up with other grounds of appeal resulting in a richer and more complex principle than originally imagined. *W(D)* is now a discussion piece woven through more than one ground of appeal, touching upon differing areas of law with the common bond or golden thread of the burden of proof. Reference to some of these connected grounds have already been made earlier in this article, such as the grounds relating to reasonable doubt in unreasonable verdict cases. Other areas offer a more specific connection to *W(D)* as potential errors in assessing the credibility of evidence, which clash with other evidentiary principles such as, the rule in *Browne v Dunn*,[207] the admission and use of "Mr. Big"

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205 CAM, *supra* note 149 at paras 51, 52.

206 *Arvisais-Moisan*, *supra* note 195 at para 53; *LSJPA – 1716*, *supra* note 195 at para 134.

207 *R v Martin*, 2017 ONCA 322 at paras 14, 22, 348 CCC (3d) 384 (appeal allowed due to the error).

statements,[208] collateral fact rule,[209] *Vetrovec* warning[210] and intent in a first-degree murder trial.[211] This connectivity is most significantly seen in the line of cases where the *W(D)* instruction is required, whether the accused testifies or not.[212] Thus, the "principles underlying" *W(D)*, as envisioned by Blair JA in *BD*, have "a broader sweep."[213]

The darker side of this broader dissemination of *W(D)* is the use of the decision as a shield in response to related errors of unreasonable verdict or misapprehension of the evidence. Often, the appellate court, in dismissing such an appeal, will emphasize the *W(D)* instruction as proof of the trial judge's appropriate principled approach to the case. Such a broad application of *W(D)* reduces the content over form approach to an absurdity as *W(D)* becomes what the court fears: a magical charm.[214]

V. FINALLY, THE *W(D)* REVOLUTION BY THE NUMBERS

In order to truly observe the impact of the *W(D)* revolution, we will turn finally to *W(D)* by the numbers. An empirical analysis provides a platform for contemplation of the enormity of the issue and presents a unique narrative of why the issue deserves such contemplation. But first a caution; the numeric story is open to interpretation and subject to a deeper statistical analysis, which positions the numbers in a broader context. As referenced at the beginning of this article, there are over 9000 mentions of *R v W(D)* in case law.[215] Undoubtedly, the obvious reason for this explosion of

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208 *R v Kelly*, 2017 ONCA 621, 387 CRR (2d) 93.

209 *R v SB*, 2017 SCC 16, [2017] 1 SCR 248.

210 *Murray*, *supra* note 131, Watt JA (a *Vetrovec* caution given in relation to the accused's testimony "or witnesses who testify on his behalf…impermissibly transfers a burden of proof to an accused and is contrary to the commands of *R. v. W. (D.)*" at paras 123, 125).

211 *R v Zvolensky*, 2017 ONCA 273 at paras 102, 113, 352 CCC (3d) 217.

212 See e.g. *R v BD*, 2011 ONCA 51 at paras 105, 144, 266 CCC (3d) 197 [*BD*]; *R v Kirlew*, 2017 ONCA 171 at para 32, [2017] OJ No 1184 (QL); *R v JMM*, 2012 NSCA 70, [2012] NSJ No 364 (QL).

213 *BD*, *supra* note 212.

214 See e.g. *R v RA*, 2017 ONCA 714, 355 CCC (3d) 400, Huscroft JA, contra Trotter JA, dissenting.

215 As of September 12, 2017, using the Westlaw database, I found 9,173 case considerations of *W(D)* over 26 years. In contrast, *Vetrovec v The Queen*, [1982] 1 SCR

citations is the self-fulfilling popularity of Justice Cory's *W(D)* "model" instruction. Instantly, the three-step charge to the jury became an indispensable trial judge created "note to self" which if utilized promised, in the words of Justice Cory at page 758, that "the oft repeated error ... would be avoided."[216] Conceived in that light, it would be more surprising not to see *W(D)* repeated and cited in so many decisions.

But there is another side to the numbers, which is the appellate dimension. The Supreme Court alone has referenced the decision 36 times[217] with 5[218] of those cases, as earlier discussed, released in 2008. There are 1718 decisions referencing *W(D)* from appellate courts across Canada.[219] The Court of Appeal for Ontario has rendered the most decisions with 497 case citations, which is 28.9% of the total appellate cases. Thus far, in 2017, there are 71 provincial appellate level cases.[220] Except for five Crown appeals, these appeals are defence initiated.[221] Of the 71, only one appeal, from the New Brunswick Court of Appeal in *DAM v R,* was allowed based on the *W(D)* error.[222] The Quebec Court of Appeal in *GU c R*, allowed the appeal for reasons other than the *W(D)* issue but commented on the flawed credibility assessment.[223] There are 2 dissenting judgments on the issue; one decision from Ontario, *R v Black*,[224] for which a notice of appeal to the

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811, 136 DLR (3d) 89 [*Vetrovec*], which created the "*Vetrovec* warning," has been considered 972 times since 1981, and *Kienapple v R*, [1975] 1 SCR 729, 44 DLR (3d) 351 [*Kienapple*], which launched the "*Kienapple* principle," has 2,851 case mentions since 1975. Finally, there are 2,015 case considerations for the 1986 *Charter* decision in *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

216 *W(D)*, *supra* note 1 at 758.

217 CanLII search as of September 15, 2017.

218 *CLY* SCC, *supra* note 113; *Dinardo*, *supra* note 110; *JHS*, *supra* note 2; *McDougall*, *supra* note 82; *REM*, *supra* note 128.

219 Westlaw search as of September 12, 2017.

220 Derived from combined searches done on both Westlaw and CanLII databases.

221 See *R v ARD*, 2017 ABCA 237, 353 CCC (3d) 1 [*ARD*]; *R v Spencer*, 2017 SKCA 54, 354 CCC (3d) 525; *R c Sénécal*, 2017 QCCA 954; *R v Thompson*, 2017 SKCA 33, [2017] SJ No 182 (QL); *R c Alie*, 2017 QCCA 18. All decisions are from Crown appeals.

222 *DAM v R*, 2017 NBCA 9, 352 CCC (3d) 471.

223 *GU c R*, 2017 QCCA 1207 at paras 39–41, 46.

224 *R v Black*, 2017 ONCA 599, 140 WCB (2d) 637, Pardu JA, dissenting directly on the issue.

Supreme Court has been filed[225] and one decision from Alberta, *R v ARD*, a dissent in a Crown appeal against acquittal.[226]

Although very few dissents are rendered on the *W(D)* issue, this does not mean appellate justices are *ad idem* on the approach to and the significance of *W(D)*. Case in point, is the Alberta Court of Appeal's treatment of the issue. In the last five years,[227] the Alberta Court of Appeal has the second largest number of appellate decisions referencing *W(D)* with 101 cases in contrast to Quebec with 71 decisions and British Columbia with 77 cases. The only other province with more decisions is Ontario, rendering 146 decisions. Clearly, the Alberta Court of Appeal has been engaged with the *W(D)* ground on a regular basis.

The Alberta Court of Appeal rendered one of the two dissents on the issue in 2017. However, there are two further cases from 2017 with related dissents by Justice Berger.[228] A review of 2016, reinforces the Alberta appellate divide on the issue. In 2016, there were 14 decisions raising *W(D)*, including two bail pending appeal matters. Of those 14 decisions, two of the cases have dissenting opinions on the *(W)D* issue: *Hilton*,[229] where the majority allowed an appeal based on a *W(D)* error and *R v Threefingers*,[230] where the majority dismissed the appeal.

These numbers tell us that *W(D)* is often raised but rarely successful. This is consistent with similar judicial conclusions, such as Justice Binnie's comment in *JHS*[231] that *W(D)* is a "fertile source of appellate review."[232] Further support for the numbers are found in Justice Doherty's remarks in

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225 See 2017 CarswellOnt 14024 (filed on July 21, 2017). Black's case was successfully argued. See 2018 SCC 10.

226 *ARD*, *supra* note 221, Slatter JA, dissenting.

227 Westlaw search from January 1, 2012 to September 16, 2017.

228 In *R v AGW*, 2017 ABCA 247, [2017] AJ No 808 (QL), Berger JA, dissenting on issues involving misapprehension of the evidence and failure to appropriately apply the standard of proof. Similarly, in *R v Gulliver*, 2017 ABCA 223, [2017] AWLD 5193, Berger JA, dissenting on the sufficiency of the reasons to articulate the credibility assessment process.

229 *Hilton*, *supra* note 46.

230 *R v Threefingers*, 2016 ABCA 225, 340 CCC (3d) 301.

231 *JHS*, *supra* note 2.

232 *Ibid* at para 8.

Howe[233] on the difficulties of appellate success on burden of proof issues. It is hardly surprising that the numbers also confirm the almost exclusive use of the case by the defence on appeal. *W(D)* involves the fundamental trial task, credibility assessment, which is inextricably linked to the most fundamental trial concept, the burden of proof.

Despite these predictable results, the numbers should still give us pause. Does this mean *W(D)* is an overused and underperforming ground of appeal that makes something out of nothing? Or is it such a complicated legal construct that trial judges regularly engage the ground and provide a foundation for potential appellate correction?

In fact, the reality may have shades of both positions: *W(D)* is overused because it is such an easy error for a trial judge to make. As discussed earlier in this article, in our everyday lives we encounter narratives like those found on the daily court docket. We are constantly required to assess information from loved ones, friends, and even from those unknown to us. We may base our assessments on several complex factors but in the end, we make a choice as to which narrative we will accept, the kind of choice which can lead to a *W(D)* error. There is a difference: in the everyday when we accept one version of events over another, we are not in the arena of justice where special protections and considerations are advanced through the principles of fundamental justice. True, trial judges are legal specialists and are required to view the legal world through the "judicial lens," however such a lens is not engaged automatically and must be intentionally looked through as part of the "infra-ordinary." *W(D)* is such a prolific ground of appeal for that reason as it requires judges to think contrary to the everyday and to assess the evidence through the reasonable doubt lens. This heightened situation requires delicacy of thought, involving the intricate confluence of both fact and law. *W(D)* is an easy ground of appeal to raise but it is a concept difficult to master in both thought and effect.

W(D) is, in many ways, a personal ground of appeal. It suggests the trial judge not only erred in legal principle but also failed in the judicial sense. Such an error implies a lack of awareness of the most basic concept of criminal law; that of reasonable doubt. A *W(D)* ground extends beyond the case itself and strikes at the very heart of the criminal justice system by calling into question the integrity of the judicially imposed result. It is a ground premised on a system which has been compromised. Such an error

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[233] *Howe*, *supra* note 152.

has the potential to result in a miscarriage of justice through the missteps of the trial judge alone. Conversely, such an error cannot be lightly indulged. The ground engages the full arsenal of appellate court jurisdictional authority such as deference to the trier of fact, the presumption a trial judge knows the law, the reasonableness of the ultimate outcome, the due consideration of the full context of the case, and the recognition that justice need be fairly dispensed but not perfectly so. It is no wonder then that *W(D),* as a ground of appeal, is often used yet is rarely successful.

This brief segue into a mere slice of the numeric backdrop does reveal the complexities surrounding the issue, which support the revolutionary and almost incendiary aspect of *W(D)*. On one issue, these provincial appellate numbers do make clear, that *W(D)* as a ground of appeal laden with the burden of usage and judicial effrontery, will continue to engage appellate courts struggling to comprehend its meaning and place in our justice system. In the end, no matter how the numbers are viewed, the numeric significance of *W(D)* is remarkable for a decision rendered by a five-panel court.[234]

VI. CONCLUSION

The survey of the *W(D)* Revolution is now complete. The oft-quoted three-step test created by Justice Cory as a guide for trial judge's in assessing credibility has evolved into an immutable reminder of the fundamental principles of criminal law. This evolution is a marker of modernity as credibility assessment has morphed into a sophisticated, complex, and challenging part of the function of the trial judge in a criminal case. This change in tone and complexion of *W(D)* did not arise easily nor has it been fully embraced. Rather, it has occurred out of the changing role of the trial judge as a gatekeeper and guardian of the core principles underlying our justice system.

The *W(D)* incantation, although not a "magical" one, serves as a mighty reminder of what is at stake in a criminal trial; the presumption of innocence, the burden of proof on the Crown, the standard of proof beyond

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[234] Five-member panels have meaning in the appellate arena. In the case of a provincial appellate decision, where three-member panels are the norm, a five-member panel is precedential, as such a panel is needed to re-consider precedent setting decisions from their court or to tackle particularly precedent-setting issues. Conversely, a five-member panel at the Supreme Court may suggest the issue is not of precedential concern.

a reasonable doubt, trial fairness and the scrupulous avoidance of miscarriages of justice. *W(D)* and the oft-quoted "test" is now bound up in these fundamental principles of justice creating a synergy of fact and principle. Its influence cannot and should not be underestimated. In an era where there are calls for re-consideration of the *W(D)* decision,[235] it behooves us to recognize what *W(D)* is and is not.

An exemplary tale will serve as a caution of the dangers of indifference – the re-characterization of the presumption of subjective *mens rea* for crimes. The presumption was firmly in the forefront of pre-*Charter* decisions such as *Beaver v The Queen*[236] and *R v Sault Ste Marie*.[237] After the advent of the *Charter*, the presumption became marginalized by the s. 7 fault element analysis. This secondary position was further advanced in *R v ADH*[238] as the presumption became a mere tool of statutory construction.[239] This marginalization will not happen to the *W(D)* principle. *W(D)* has not disappeared or become redundant but is subsumed in the fundamental tenets of our justice system. In this integration, *W(D)* signals to the trier of fact that we are in the presence of the principles of fundamental justice, which must be applied with rigour. Our challenge is to ensure that the substance or essence of *W(D)*, which reminds each of us in the justice system to keep an open and larger view of the evidence, does not evolve further beyond recognition.

Yet, the case continues to exist uneasily within the rule of law. On one hand, it articulates a core concept vital to the fair and just administration of justice. On the other, it is considered an over-used behemoth that provokes strong reaction from the appellate courts. It is at once protected and rejected by the courts. It is an ideal but not a perfect one. As reiterated by Justice Cory in *Evans*, released two years after *W(D)*, "a jury charge should not be microscopically examined and parsed. There is no such thing as a

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235 See *Wruck*, *supra* note 4, Watson JA (the Crown's position is the "application of the *W(D)* formula should perhaps be reconsidered in light of subsequent case law that deals with how appellate courts analyze reasons for judgment given by trial judges. See e.g. *R v Vuradin*" at para 8).

236 *Beaver v The Queen*, [1957] SCR 531, 118 CCC 129.

237 *R v Sault Ste Marie*, [1978] 2 SCR 1299, 40 CCC (2d) 353.

238 *R v ADH*, 2013 SCC 28 at para 25, [2013] 2 SCR 269, Cromwell J.

239 See Sarah-Jane Nussbaum, "Diminishing Protection of Subjective Fault: A Case Comment on *R. v. ADH*" (2014) 77 Sask L Rev at 279.

perfect jury charge."[240] Yet, the desire to "parse" and "examine" is tempting on an issue which lies so close to the heart of the criminal justice system. Miscarriages of justice are real and sadly frequent enough in our justice system that to refrain from "microscopic examination" seems contrary to our responsibilities to our clients and to the law. It is difficult to reconcile the end goal of a fair and just decision with an admonishment by the courts to not take *W(D)* to the nth degree. *W(D)* is not merely a mental construct or a state of mind of the decision-maker whose boundaries are defined by legal principles. Rather, *W(D)* transcends the ordinary as a symbol or a gesture encapsulating all that is our criminal justice system.

What of the premise of this article that *W(D)* has somehow transcended the banal and revolutionized in three steps the way triers of fact approach and assess evidence? I would suggest the revolution is there in every one of those 9000 cases citing *W(D)* and in every trial lawyer who stands up to remind the trier of fact that *W(D)*, as the embodiment of the presumption of innocence and the principle of reasonable doubt, is a key component of our criminal justice system. In the end, it is not the presence of *W(D)* for which we must be ever vigilant, but the absence of justice should we not take *W(D)* seriously.

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240 *Evans*, *supra* note 120.

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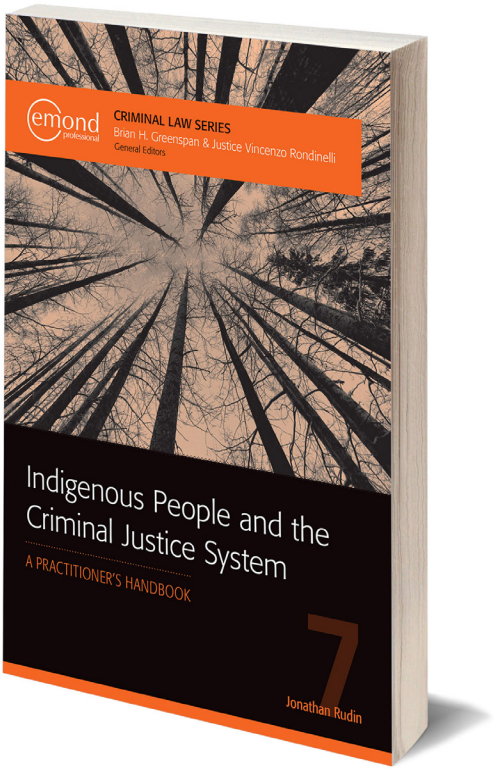

By Jonathan Rudin
General Editors Brian H. Greenspan &
Justice Vincenzo Rondinelli

Book 7 in Emond's award-winning Criminal Law Series

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