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Criminal Law Edition (Robson Crim)

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Robson Crim: A Vision for Multivalent Interrogations of Criminal Law

RICHARD JOCHELSON,^{*} AMAR KHODAY,^{**} AND DAVID IRELAND^{***}

It is an exciting time for Canadian criminal law scholarship. There are any number of critical matters to examine, from issues of legislative reform, serious concerns relating to the scope of police powers in conducting investigations and their impact on constitutional rights and values, to the scope of criminal offences and defences. To explore these and many other significant topics, there is a variety of excellent venues to publish within Canada for scholars and practitioners in our communities, including practitioner journals, short submission reviews, criminology journals, and traditional law journals. When we met with the editorial team at the *Manitoba Law Journal (MLJ)* we did notice that there was a lacuna in Canada's scholarly criminal law realms. We wanted to develop a venue where scholars of criminal law, criminal justice, and criminology could openly discuss legal issues of significant import - a space where scholars could debate criminal law practice, theory, philosophy, and, also, provide an intellectual home that would welcome cognate disciplines to engage in these debates. In short, we wanted to establish a leading location to host national and international conversations on criminal law and justice, while at the same time allowing for the progression of the *MLJ's* goal to provide interesting insights to the local and national bar.

This is neither the first, nor the last time that the *MLJ* has interrogated issues of criminal law. From jury work, plea bargaining, matters of

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substantive criminal law and the definition of crimes, to considering quasi criminal matters, the *MLJ* has a history of fostering criminal law scholarship in its generalist issues.¹ However, this is the first time that the *MLJ* has published a special edition on criminal law under the guidance of Robson Hall's criminal law research cluster, www.Robsoncrim.com. On the website, we endeavour to situate the role of www.Robsoncrim.com going forward:

Robson Hall, one of Canada's oldest law schools, has undergone a recent period of growth in its criminal law offerings. Robson Hall now offers a variety of opportunities for law students who want to study criminal law in Canada. The courses vary from standard criminal law & procedure courses and evidence courses through to courses on criminal law & the *Charter*, sexual regulation & the criminal law, and clinical courses on criminal law. As part of our commitment to education at Robson Hall and to legal education outside of the ivory tower, this space will provide reflections on current issues in criminal law. As part of our commitment to open access principles, these pages will be open and accessible to all. We will also consider submissions from readers and students at Robson Hall and beyond. Welcome to Robson Crim and stay tuned for regular updates, stories and blawg posts.²

Robson Crim started off as a venue to house law blog (blawg) posts penned by Robson Hall faculty members and students. The topics have run the gamut from revenge porn, to homelessness to prosecutorial misconduct.³ It quickly ballooned to well over 60 blawg submissions from various contributors across Canada and the world in under one year

¹ See for example Michelle Gallant, "An Empirical Glance of Manitoba Civil Forfeiture Regulation" (2014) 38 Man LJ 219; 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.

² See <https://www.robsoncrim.com/about>.

³ See for example Amar Khoday, "Lies, Damn Lies, and Prosecutorial Abuse" (7 June 2017), *Robsoncrim (blog)*, online <<https://www.robsoncrim.com/single-post/2017/06/07/Lies-Damn-Lies-and-Prosecutorial-Abuse>>; Richard Jochelson "Intimate Images and the Tyranny of Modern Love/Abuse" (9 January 2017), *Robsoncrim (blog)*, online <<https://www.robsoncrim.com/single-post/2017/01/09/Intimate-Images-and-the-Tyranny-of-Modern-LoveAbuse>>; David Ireland, "Joey" (30 August 2016), *Robsoncrim (blog)*, online <https://www.robsoncrim.com/single-post/2016/08/30/Joey>.

including academic collaborators,⁴ law students,⁵ practitioners,⁶ and many others. Over the course of several months, we assembled a team of 19 collaborators across various disciplines, who have agreed to contribute to Robsoncrim.com through blawg contributions and by serving as a peer review advisory and editorial committee for our inaugural criminal law special edition and collaboration with the *MLJ*.⁷ Our social media presence is also extremely encouraging. According to our Twitter and Facebook analytics we have received more than 50,000 digital hits.⁸ It became obvious that there was the demand, need and collaborative team available to issue a call for papers to assemble this special issue on criminal law. The *MLJ* has a top flight editorial staff ready to provide oversight and professional support. Working with the *MLJ* guarantees that this criminal edition is available on Heinonline, Westlaw-Next, and Lexis Advance Quicklaw. We are extremely grateful for this support and for the support of the Dean of University of Manitoba's Faculty of Law, Dr. Jonathan Black-Branch.⁹

⁴ 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>.

⁵ See for example Kasia Kieloch, "Judge Training on Sexual Assault: JUST may not be just" (12 May 2017), *Robsoncrim* (blog), online <https://www.robsoncrim.com/single-post/2017/05/12/Judge-Training-on-Sexual-Assault-JUST-may-not-be-Just>.

⁶ See for example John Burchill, "TALE OF THE TAPE: Policing Surreptitious Recordings in the Workplace" (29 May 2017), *Robsoncrim* (blog), online <https://www.robsoncrim.com/single-post/2017/05/29/TALE-OF-THE-TAPE-Policing-Surreptitious-Recordings-in-the-Workplace>.

⁷ We thank our collaborators Steven Bittle, John Burchill, Erin Dej, Robert Diab, Ruby Dhand, James Gacek, Mandi Gray, Rebecca Bromwich, Lara Karaian, Ummni Kahn, Jennifer Kilty, Kyle Kirkup, Leon Laidlaw, Garret Lecoq, Laurin Menzie, Melanie Murchison, Michael Nesbitt, Debra Parkes, and Erin Sheley. See <https://www.robsoncrim.com/collaborators>.

⁸ See <https://twitter.com/robsoncrim> and <https://www.facebook.com/robsoncrim>.

⁹ We acknowledge the support, both material and collegial, of Dr. Bryan Schwartz, Professor Darcy MacPherson, and our student editors Kasia Kieloch and Stefanie Reece.

Following the release of our call for papers, we were overwhelmed with submissions. When we saw the quality of the work, we knew it would be appropriate to consider having an annual criminal law special edition of the *MLJ*. After a double blind peer review process, we accepted 13 scholarly papers for publication in this volume. After acceptance, we grouped the papers thematically. This special issue is broken down into five sections.

The first section is titled State Abuses and the Criminal Process. In the first paper, “Reforming and Resisting Criminal Law: Criminal Justice and the Tragically Hip”, Professor Kent Roach merges resistance and media analyses to explore how the songs *38 Years Old* and *Wheat Kings* can be interpreted as a call to reform and resist issues of legal process injustice such as mandatory minimum sentencing and wrongful convictions. He makes a powerful case for the role of art in the resistance against injustice as a precursor to legal change. Professors Rod Lindsay, Michelle Bertrand and Andrew Smith continue the discussion of injustice in the criminal process by bringing a psychological analysis to bear in “The Importance of Knowing How a Person Became the Suspect in a Lineup: Multiple Eyewitness Identification Procedures Increase the Risk of Wrongful Conviction”. In this piece, the authors raise concerns about eyewitness identification and the potential impact on wrongful convictions. The paper uses psychological methods to raise concerns about testimony that is routine in the criminal trial, and answers the call of the editors to examine legal phenomenon through cognate lenses. Professor Marie Manikis and Peter Grbac, in the next paper, “Bargaining for Justice: The Road Towards Prosecutorial Accountability in the Plea Bargaining Process”, discuss the ways prosecutorial discretion remains relatively unconstrained. They argue that the balance must shift to favour procedural fairness over expedience, preferring the German model of managing prosecutorial discretion. In “Beyond Finality: *R v Hart* and the Ghosts of Convictions Past”, Professor Amar Khoday and Jonathan Avey continue the discussion of criminal process and injustice by examining Mr. Big sting operations. In *R v Hart* decided in 2014, the Supreme Court of Canada considered the admissibility of incriminating statements elicited through these tactics and has placed certain limitations on their use. Prior to *Hart*, most courts readily admitted incriminating statements into evidence. In light of the inherent dangers arising from such in producing wrongful convictions, Khoday and Avey

We also acknowledge support from the University of Manitoba Research Office, the Legal Research Institute, and the Manitoba Law Foundation.

argue that pre-*Hart* decisions should be revisited while applying the framework set out in *Hart*. In the next paper, Jeffery Couse returns to discussions of abuse of process which come up in the previous papers, to examine the doctrine in “Jackpot: The Hang-Up Holding Back the Residual Category of Abuse of Process”. In analyzing abuse of process jurisprudence and the remedy of the judicial stay, the author proposes an approach that considers the societal considerations inherent in the remedy, and minimizes unwarranted windfalls for criminal defendants.

The second section of this issue, Perspectives on Injustice: Corrections and Correcting Courts interrogates problems in the corrections system and when courts are actively involved in corrections work. Professor Rebecca Bromwich, in “Theorizing the Official Record of Inmate Ashley Smith: Necropolitics, Exclusions, and Multiple Agencies”, uses critical discourse analysis to unpack the Ashley Smith tragedy. She argues in favour of the need for fundamental changes in the criminal justice and correctional systems as a result. Joshua Watts and Professor Michael Weinrath, in “Manitoba’s Mental Health Court: A Consumer Perspective”, undertake a study of the diversion mechanism of mental health courts by interviewing the participants. Their multipronged results seem to indicate a preference and tendency towards procedural fairness in the program, but the coerciveness of the program was also referenced by participants, indicating that issues of punitivity may be still be alive in these diversionary approaches.

In the next section, Issues in Policing and the Criminal Process, the papers explore legal issues concerning investigation and data collection. John Burchill, in “Tale of the Tape: Policing Surreptitious Recordings in the Workplace”, explores secret recording of workplace activities and considers their use, in the policing workplace, in subsequent judicial proceedings and the implications for workplace dismissal. In “Supreme Court of Canada in *World Bank Group v Wallace: On Production of Records, Immunities of International Organizations and the Global Fight Against Corruption*”, Dmytro Galagan explores the protections that international organizations can use in preventing document production, and the role of international treaties in governing production in the context of international corruption cases. Both articles explore the evolving role of surveillance in spaces that we often do not examine in the day-to-day practice of criminal law.

The issue continues with a section dedicated to Criminal Sexualities and Sexual Expression. Professor Richard Jochelson and James Gacek, in “Animal Justice and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada”, examine recent Supreme Court of Canada jurisprudence and outline different approaches that the Court undertakes in giving meaning to older laws. In the context of bestiality law, the Court has given a conservative interpretation to the criminal law that falls well behind developments in other common law jurisdictions, such as New Zealand. Law student, Julie Yan, in a featured student paper, “Art in the Dichotomy of Freedom of Expression & Obscenity: An Anti-Censorship Perspective” makes a radical argument in favour of relatively unmitigated free speech in the context of the intersection of child pornography and art. She calls for an elimination of obscenity and indecency law (noting that other prevailing laws can address the harms) and grounds the policy recommendation in anti-censorship feminism.

The last section, The Constitution and Judicial Activism, contains two articles. The first, by Professor Michelle Lawrence, “Voluntary Intoxication and the *Charter*: Revisiting the Constitutionality of Section 33.1 of the *Criminal Code*”, explores the legal bar against using the self-induced intoxication defence in the context of personal violence, and argues that due to its unconstitutionality, the impugned Code provisions should be struck; alternatively, Lawrence argues for an interpretation of the provision that builds into its application a minimal fault standard. Last, Professor Melanie Murchison, in “Making Numbers Count: An Empirical Analysis of Judicial Activism in Canada”, undertakes the establishment of a rigorous model for assessing activism using the Supreme Court’s own words. She uses the model to unpack judicial decisions in cases that interpret various constitutional protections against police powers in Canada and she concludes by making suggestions for future judicial activism research.

We thank each of the authors for their meaningful contributions to this volume and to their commitment to cutting edge research in the criminal law. At Robson Crim we believe passionately that criminal law in Canada must be studied from perspectives of multivalence. Black letter law analyses indeed have their place, as do complex theoretical interrogations of criminal law. Speaking across disciplines between law, criminology, sociology, psychology, and other disciplines is an ever-present challenge. We must never forget that good criminal law practice is informed well by the social sciences and humanities. Likely the cognate disciplines would also do well

to take doctrinal analysis seriously and to include rigorous legal analyses in their own interrogations. We hope that this special edition, and future special editions provide a national, perhaps international, space where these multiple perspectives and disciplines can intersect and thrive. Thank you for reading this issue. We look forward to publishing many more as we continue our mission of fostering innovative and engaging criminal law scholarship.

CALL FOR PAPERS: Deadline February 1, 2018
Manitoba Law Journal- Robson Crim's Second Special Issue on Criminal
Law



The *Manitoba Law Journal* in conjunction with Robsoncrim.com are pleased to announce our second annual call for papers in Criminal Law. We invite scholarly papers, reflection pieces, research notes, book reviews, or other forms of written or pictorial expression. 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 general submissions dealing with topics in criminal law, criminology, criminal justice, urban studies, legal studies and social justice that relate to criminal regulation.

We will be reviewing all submissions on a rolling basis with final submissions due by **February 1, 2018**. 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 15,000 words (inclusive of footnotes) and if at all possible conform with the Canadian Guide to Uniform Legal Citation, 8th ed (Toronto: Thomson Carswell, 2014) - 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, 2018** and should be sent to info@robsoncrim.com. For queries please contact Professors [Richard Jochelson](#), [Amar Khoday](#) or [David Ireland](#), at this email address.

THE JOURNAL

The *Manitoba Law Journal (MLJ)* is a publication of the Faculty of Law, University of Manitoba located at Robson Hall. We aim at producing critical coverage of events in our own community, but welcome pertinent commentary concerning developments at the national or international level or in other provinces. 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.

Reforming and Resisting Criminal Law: Criminal Justice and the Tragically Hip

KENT ROACH*

ABSTRACT

This paper examines two Tragically Hip songs, *38 Years Old* and *Wheat Kings*, with a view to understanding how they can be interpreted as a call both to reform and resist criminal law. In a reformist spirit, *38 Years Old* can be interpreted as an imaginary hypothetical that suggests that judges should be able to devise exemptions from all mandatory sentences, including life imprisonment for murder. The song can also be interpreted as a demonstration that imprisonment must be resisted and endured by offenders and their families because it will always be violent and destructive. *Wheat Kings* similarly can be interpreted as a call to reform remedies for the wrongly convicted and to make legal determinations of innocence. At the same time, *Wheat Kings* exonerated David Milgaard in 1992 long before the Canadian legal system did. In doing so, it illustrates how art, like media and science, can resist the coercive conclusions of the criminal law and can make normative conclusions that can be seen as a form of law.

Keywords: *Mandatory Sentences, Wrongful Convictions, Innocence Hearings, Prosecutorial Stays, David Milgaard, Law Reform, Critical Legal Pluralism.*

* Kent Roach, C.M., F.R.S.C. is the Prichard-Wilson Chair of Law and Public Policy and Professor of Law at the University of Toronto Faculty of Law. Professor Roach has been editor-in-chief of the *Criminal Law Quarterly* since 1998. He is also the author of *Criminal Law* published by Irwin Law and now in its sixth edition and co-author of *Cases and Materials on Criminal Law and Procedure* published by Emond Montgomery and now in its eleventh edition.

I. INTRODUCTION

Popular culture can reveal truths about the criminal law that are rarely seen in learned legal judgments or treatises. Such outsider or external perspectives can be dismissed as uninformed populist threats to the criminal law. At the same time, popular art can provide insights and criticisms that criminal justice professionals might otherwise miss and ignore at the peril of criminal justice losing public support and legitimacy.

Depictions of law in popular culture can also be seen as a form of legal pluralism that resists state law in a manner that itself constitutes a form of law. For example, Paul Butler has argued that hip-hop reveals much about American criminal justice because it “takes punishment personally” and because it refuses to view “all criminals with the disgust that the law seeks to attach to them.”¹ He has argued that hip-hop has its own theory of justice.²

As a teacher and criminal law writer of a certain age, it is not a coincidence that my two favourite bands are Bruce Springsteen and the E Street Band and The Tragically Hip. Both groups are “proletarian...with an intellectual sensibility”.³ The summer of 2016 was for many Canadians tinged with bittersweet feelings as the Tragically Hip did a tour of Canada after announcing that their lead singer and songwriter Gord Downie had terminal brain cancer. The tour ended with a nationally televised concert in the Hip’s hometown of Kingston, Ontario. It had a reported viewership of 4 million with as many as 12 million, a third of Canada’s population, tuning in at some point.⁴ The influence of popular artists such as the Hip or

* Professor of Law and Prichard-Wilson Chair in Law and Public Policy, University of Toronto. I thank David Asper, Benjamin Berger, Stephen Bindman, Amanda Carling, Emma Cunliffe, Lisa Kerr, Carey Roach, Jonathan Rudin and three anonymous reviewers who all made suggestions that improved the paper without in any way being responsible for its shortcomings.

¹ Paul Butler, “Toward a Hip-Hop Theory of Punishment” (2004) 56:5 *Stan L Rev* 983 at 984-85.

² Paul Butler, *Let’s Get Free: A Hip-Hop Theory of Justice* (New York: New Press, 2009).

³ Stephen Marche, “Watching Canada’s Biggest Rock Band Say a Dramatic Good-bye”, *The New Yorker* (20 August 2016), online: <www.newyorker.com/culture/culture-desk/watching-canadas-biggest-rock-band-say-a-dramatic-goodbye>.

⁴ “Millions watch Tragically Hip Live on CBC” *CBC News* (21 August 2016), online: <<http://www.cbc.ca/news/canada/tragically-hip-cbc-broadcast-ratings-1.3730276>>.

Springsteen on the way that people think about criminal justice should not be under-estimated.

The Tragically Hip is a rock band influenced by blues, folk, and country. It was formed in Kingston, Ontario in 1983. Kingston is best known for its penitentiaries. Until recently, it was the home to six federal prisons. The oldest was Kingston Penitentiary that opened in 1835 and closed in 2013. Kingston's infamous Prison for Women across the road from Kingston Penitentiary opened in 1934 and closed in 2000. The father of one the Hip's members, Rob Baker, is a provincial court judge. Given this context, it is not surprising that some of the Hip's songs dealt with criminal justice.

This article will examine two of the Hip's songs.⁵ *38 Years Old* recounts a 1972 prison escape from Millhaven Penitentiary just outside Kingston. It tells a story about Mike who at twenty years of age is imprisoned for killing the man who raped his sister. Mike as a thirty eight year old escapes only to be re-captured at his parents' home and returned to his other "home", Millhaven, a prison that was infamous for its violence towards prisoners.

Wheat Kings explores the long process, including the apparent intervention of Prime Minister Brian Mulroney, to correct David Milgaard's 1970 wrongful conviction for the murder of Saskatoon nurse Gail Miller. The song was released in 1992, the same year as the Supreme Court held that new evidence implicating another man in the murder meant that Milgaard's conviction was a miscarriage of justice. At the same time, the Court also concluded that Milgaard had not established his innocence either beyond a reasonable doubt or on a balance of probabilities.⁶ Milgaard was only compensated in 1997 after DNA testing revealed that the other man, Larry Fisher, was the real killer of Gail Miller.

⁵ My review of the Hip's work relies on the helpful online repository of its work found at www.hipmuseum.com/hiplyrics.html. There are a few other Hip songs that deal with criminal justice. The unreleased song *Montreal* deals with the massacre at École Polytechnique and *Locked in the Trunk of a Car* also examines crime and its aftermath and is interpreted by some as making reference to the murder of Pierre Laporte in October 1970. At the same time, Bruce Springsteen's work deals much more extensively with the criminal justice system perhaps reflecting the much greater use of imprisonment in the United States than Canada. For example, the 1984 album *Born in the USA* features a majority of its characters either being imprisoned or going to jail.

⁶ *Re Milgaard*, [1992] 1 SCR 866, [1992] 90 DLR (4th) 1 [*Re Milgaard*].

There is a growing literature on law and popular culture. Much of this work has focused on film and television⁷ and almost all of it is American. Some of it has focused on the two primary topics examined in this article: prisons and wrongful convictions. For example, there is a large literature on how prisons have been portrayed in films and television.⁸ There is a smaller literature on popular culture and wrongful convictions.⁹ For example, Brandon Garrett has examined the role that images have played in wrongful convictions.¹⁰ More recently, the law and popular culture literature has engaged with the literature on critical legal pluralism.¹¹ This literature examines the narratives of popular culture as a form of law that can resist the dominant understandings promoted by state law.

The article engages with the law and popular culture and critical legal pluralism literature in a number of ways. First, it focuses on the prose of the lyrics as opposed to the analysis of images that dominates the literature. This article, like the Hip, also makes no apology for being Canadian. In doing so, it contributes to an examination of Canadian law in the light of Canadian popular culture.

This article also interprets the two Hip songs in light of the rich historical record¹² about the Millhaven prison break and David Milgaard's

⁷ Austin Sarat, ed., *Imagining Legality: Where Law Meets Popular Culture* (Tuscaloosa: University of Alabama Press, 2011); Richard Sherwin, "Nomos and Cinema" (2001) 48:6 *UCLA L Rev* 1519; Austin Sarat, Lawrence Douglas & Martha Umphrey, eds., *Law on the Screen* (Stanford: Stanford University Press, 2005); Amar Khoday, "Visualizing Interrogative Injustice: Challenging Law Enforcement Narratives of Mr. Big Operations Through Documentary Film" (2016) *Annual Rev of Interdisciplinary Justice Research* 152 at 156.

⁸ Dawn Cecil, *Prison life in Popular Culture: From the Big House to Orange is the New Black* (Boulder: Lynne Rienner Publishers, 2015); Paul Mason, ed, *Captured by the Media: Prison Discourse in Popular Culture* (Cullompton: Willan, 2006).

⁹ Stephen Mexal, "The Roots of 'Wilding': Black Literary Naturalism, the Language of Wilderness and Hip Hop in the Central Park Jogger Rape Case" (2013) 46:1 *African American Rev* 101.

¹⁰ Brandon Garrett, "Images of Injustice" in Charles Ogletree Jr. & Austin Sara, eds, *Punishment in Popular Culture* (New York: New York University Press, 2015).

¹¹ Wendy Adams, *Popular Culture and Legal Pluralism* (New York: Routledge, 2017). Professor Adams builds on the critical legal pluralism work of the late Robert Cover and the late Rod Macdonald. See, for example, Robert Cover, "Nomos and Narrative" (1983) 97 *Harv L Rev* 4 [Cover]; and Rod Macdonald, "Custom-Made-For a Non-Chirographic Critical Legal Pluralism" (2011) 26:2 *CJLS* 301.

¹² See, for example, Willard Oliver & Nancy Marion, *Crime, History and Hollywood: Learning Criminal Justice History Through Motion Pictures* (Durham: Carolina Academic Press, 2013).

wrongful conviction. The use of history and popular culture promotes critical distance from state law. This distance can be used to advocate for significant reform of the criminal law to respond to the injustices revealed in the two songs as amplified by the historical record.

Consistent with the critical legal pluralism literature, the two songs can also be seen as a form of law that declared Mike's punishment in Millhaven to be unjust and that declared David Milgaard to be innocent when the Canadian criminal justice system was not willing to do so. Critical legal pluralism, especially when joined with popular culture and history, can provide a vehicle both to advocate for reforming state law by revealing injustices but also for resisting the injustices imposed by state law.

This article contains two main sections: the first is devoted to *38 Years Old* and the insights it provides into punishment and prisons. The second is devoted to *Wheat Kings* and the perspectives it provides on wrongful convictions.

There are three parts to the two main sections. The first part examines the song in historical context, drawing from David Garland's "history of the present" approach. Garland uses Michel Foucault's genealogical mode of inquiry: namely the use of historical material to engage critically with the present. Genealogical analysis traces how "contemporary practices and institutions" emerge out of "specific struggles, conflicts, alliances and exercises of power, many of which are nowadays forgotten."¹³

The songs reveal the Hip as a band that knows and uses Canadian history as a resource to understand and critique Canada.

In the second part of each section, I examine how various legal reforms might respond to the injustices that the songs reveal. The songs, of course, do not call for specific reforms, but Gord Downie's inspiring work on Indigenous and other issues suggest that he has an interest in making Canada better. In particular, I examine the case for allowing exemptions from all mandatory sentences including for murder and for improving the processes to exonerate the wrongfully convicted.

¹³ David Garland, "What is a History of the Present? On Foucault's Genealogies and Their Critical Preconditions" (2014) 16:4 *Punishment & Society* 365 at 372. See also David Garland, *The Culture of Control* (Chicago: University of Chicago Press, 2001) at ch 1. I am indebted to Lisa Kerr for discussions on this point.

Each section concludes by examining the song as a form of resistance to state law and the creation of an alternative belief system¹⁴ or as a form of “critical legal pluralism.”¹⁵ These final sections demonstrate the normative potential of narrative to resist criminal law, even a reformed criminal law. *Wheat Kings* in particular is “juris-generative”¹⁶ because it reveals how the Hip, along with the Milgaard family and other supporters, pronounced David Milgaard to be innocent when the Canadian legal system refused to do so. Viewed through the lens of critical legal pluralism, the two songs are not simply calls to reform and correct injustices in Canadian criminal law: they are themselves forms of law that deserve our attention and respect.

The internal reformist part of this article reflects and builds on some of my own modest efforts to reform Canadian law including with respect to mandatory sentences and the correction of wrongful convictions.¹⁷ At the same time, the more external and legally pluralist parts of this article that resist aspects of state law reflect my growing appreciation that Canadian law, perhaps even reformed law, remains an alien and coercive force in the lives of some of the most disadvantaged.

¹⁴ Here I am influenced by Cover, *supra* note 11 (collective cultural production of meaning without relying on the state). A complementary but somewhat different approach that draws on autopoietic systems theory is used by David Schiff and Richard Nobles to illustrate how both science and the media discourse provide alternative understandings of reality that can be used to challenge wrongful convictions. See Richard Nobles & David Schiff, *Understanding Miscarriages of Justice* (Oxford: Oxford University Press, 2000) [Nobles & Schiff]; examining how science and media discourse challenge and resist the finality of criminal convictions.

¹⁵ Martha-Marie Kleinhans & Roderick A Macdonald, “What is Critical Legal Pluralism?” (1997) 12:2 CJLS 25 at 40 & 46 [Kleinhans & Macdonald]; proposing a “critical legal pluralism” that rejects “authoritative interpretation” by experts or state law and celebrates and legitimates the normative conclusions drawn by other systems of meaning. I am indebted to an anonymous referee for bringing this article to my attention.

¹⁶ Cover, *supra* note 11 at 25 (reference to cultural, creative and social process of meaning not limited to state law).

¹⁷ I acted as counsel for the Canadian Civil Liberties Association that unsuccessfully argued in *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3; that mandatory life imprisonment violated s.12 of the *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. I prepared a report for the Driskell Inquiry on reforming prosecutorial uses of stays of proceedings in wrongful conviction cases. See Manitoba, Department of Justice, *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, (Winnipeg: Queens Printer, 2007) at Appendix F.

II. 38 YEARS OLD AND PUNISHMENT

A. Historical Perspective: The 1972 Millhaven Prison Break

38 Years Old is a song about an escape of 14 inmates from Millhaven Penitentiary in July 1972. The song was released in 1989 as part of the Tragically Hip's second album *Up to Here*. Gord Downie, the lead singer and chief lyricist of the Hip, was 7 years old at the time of the escape. This and poetic license may explain why he described the escape as occurring in 1973 and involving 12 men. The Hip may have gotten the dates and the numbers wrong, but the song accurately notes that the pictures of the escapees were "lined up across the front page"¹⁸ of the newspapers.

The 1972 escape came at a time of growing prisoner unrest and escapes from Canadian prisons. A commission of inquiry into the 1971 Kingston Penitentiary riot concluded that the prisoners who first entered Millhaven when it was prematurely opened during the riot were "required to run 'the gauntlet' formed by 10 to 12 prison guards armed with night sticks."¹⁹ As Professor Michael Jackson notes "with such an induction ceremony, it was hardly surprising" that Millhaven "then the newest jewel in the correctional crown" had 19 major incidents in its first 6 years.²⁰

In August 1972, the *Wall Street Journal* reported that prison escapes in Canada had increased 60% over the last year and involved 530 prisoners escaping from federal penitentiaries. It quoted a Conservative Member of Parliament that "law and order in Canada is a mess". It also noted that one escapee, Lucien Rivard, had "become something of a folk hero in Quebec" after escaping from Bordeaux prison by using a garden hose that he was allowed to use to water the prison's outdoor hockey rink.²¹

Sport also played a key role in the 1972 Millhaven escape. It was widely reported that one of the 14 escapees, Richard Smith, was the star pitcher for the prison softball team. Smith was reported to have "suffered his worst defeat of the season" that night. A player who hit a home run off of Smith

¹⁸ *38 Years Old* lyrics found online: www.hipmuseum.com/uthlb.html [38 Years Old].

¹⁹ Solicitor General of Canada, *Report of the Commission of Inquiry into Certain Disturbances at Kingston Penitentiary During April 1971* (Ottawa: Information Canada, 1973) at 34.

²⁰ Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 50-51.

²¹ Nick Thomas, "Stone walls do not a prison a make- or not in Canada at any rate", *The Wall Street Journal* (16 August 1972) A1 [Thomas].

told the press that Smith “wasn’t himself. He didn’t move the ball around at all but was rather just throwing straight strikes.” He also recalled that Smith “just grinned” when the other player said he would see him later in the week when another softball game was scheduled at the prison.²² Smith was removed from the game in the third inning. Prison officials believed this was “just what he wanted” because the team bench was close to the hole in the fence that the escapees used.²³ Sports can be a vehicle to humanize “the other” and make one appreciate their abilities and humanity. In this vein, the report of the Truth and Reconciliation Commission focused quite a bit on how young Indigenous children often turned to sports in the residential schools.²⁴

38 Years Old also features a police chief telling the public that “they had nothing to fear” because the “last thing they want to do is hang around here”.²⁵ Most of the escapees were in fact apprehended within miles of the prison. Some, however, made it to Ottawa, Montreal, and Niagara on the Lake before being re-captured.

There were many media reports at the time of fearful and resentful residents in the Kingston area. A Bath resident argued that the escapees should be rounded up “with a machine gun. I think it’s near time they got tougher on those fellows. There’s no point treating them with kid gloves”. Other residents expressed concerns about repeated escapes and speculated that the guards “must have been sleeping when the ball game was on”. Another complained that the inmates had access to a colour television that he himself could “not afford”.²⁶ When artists such as the Hip and Springsteen write from the perspective of the offender, they place themselves in the shoes of those who are unpopular and feared. They provide an important reminder of the humanity of offenders.²⁷

²² “Sabres Lose Pitcher”, *Globe and Mail* (12 July 1972) 8.

²³ Thomas, *supra* note 21.

²⁴ Truth and Reconciliation Commission, *Canada’s Residential Schools: The History 1939-2000*, vol 1 (Montreal: McGill Queen’s University Press, 2015) at ch 43.

²⁵ *38 Years Old*, *supra* note 18.

²⁶ Ron Lowman, “Paul 14 guards his sister as 9 convicts on loose nearby”, *Toronto Star* (12 July 1972) 1 and 15.

²⁷ On Springsteen’s approach to offenders, see Abbe Smith, “The Dignity and Humanity of Bruce Springsteen’s Criminals” (2005) 14:3 *Widener L J* 787.

The hunt for the escapees involved over 400 police officers and soldiers seconded from a nearby army base.²⁸ This detail explains the phrase in *38 Years Old* that after the escape “the Mounties had a summer time war to wage”.²⁹ The war metaphor also hints at the implicit threat of violence from the state while also underlining that the escapees were greatly outnumbered and bound to lose the “war”.

38 Years Old tells a story about an important piece of Canadian correctional history. The Millhaven prison break should be understood in the context of the violence among and against prisoners that led to the 1971 Kingston Penitentiary riot and the premature opening of Millhaven. The song alludes to this violence in its reference to “war”. When the fictional Mike is recaptured, his mother says that “the horrors have ceased”. Mike replies for “the time being at least”³⁰ likely in reference to Millhaven’s reputation for violence. Much of the emotional power of the song is contained in its contrast between Mike’s unsuccessful attempt to escape to his real home and his recapture and return to his violent “home” in Millhaven.

B. Mike’s Guilt and Mandatory Sentences

The back story of *38 Years Old*, and its implications for the criminal law and sentencing, is found in its explanation of the murder for which Mike has already served 18 years before his escape. It suggests that Mike’s story is not as simple as the “hometown shame” that the media reports in an earlier verse. Rather the song explains that Mike’s “sister got raped so a man got killed. Local boy went to prison, man's buried on the hill. Folks went back to normal when they closed the case. They still stare at their shoes when they pass our place”.³¹ This verse conveys much in four short lines. It demonstrates the inability of the criminal law to distinguish different forms of moral blameworthiness and the injustice of “one size fits all” mandatory sentences for even the most serious crime of murder.

²⁸ “Escapers elude cordon, steal guns”, *Globe and Mail* (15 July 1972) 1.

²⁹ *38 Years Old*, *supra* note 18.

³⁰ *Ibid.*

³¹ *Ibid.*

Mike's Guilt and Murder

A person like Mike who killed another to avenge a crime against a family member would most likely have subjective knowledge that the death of the victim was likely to occur. It would not matter either to Mike's guilt or his punishment that he may have been an impulsive and inexperienced 20 year old at the time of the killing who had "never kissed a girl". Depending on the circumstances, Mike might also have the additional fault requirement of planning and deliberation necessary to establish first degree murder under s.231(2) of the *Criminal Code*.

The inability of *mens rea* to distinguish good from bad motives for crimes is a longstanding feature of the criminal law. It has long inspired artistic critiques such as Jean Valjean in Victor Hugo's *Les Miserables* who is convicted of stealing a loaf of bread to feed a child. The limits of *mens rea* to gage moral blameworthiness are also revealed in debates about assisted suicide where until the recent *Carter*³² decision, the criminal law did not provide relief for those who assisted in the death of another in order to relieve enduring and intolerable suffering.

It thus seems relatively clear that Mike would have the necessary *mens rea* to be convicted of second and perhaps first degree murder even after *Charter*-based reforms³³ ensured that no one could be convicted of murder in the absence of proof beyond a reasonable doubt of subjective foresight of death. This raises the question of whether Mike would have a valid defence.

Self-defence, including defence of others, would not cover revenge killings such as that committed by Mike. The new provision in s.34 of the *Criminal Code* arguably expands self-defence by placing less emphasis on proportionality. Nevertheless s.34 still requires that a person respond to a force of threat in the future and to have acted reasonably in the circumstances. The defences of necessity or duress would also not apply because the peril faced by Mike's sister had passed. These criminal law defences support the state's monopoly on punishment.

Provocation?

Provocation is a unique defence in Canadian criminal law because it is a partial excuse that reduces murder to manslaughter. It is Mike's most likely

³² *Carter v Canada* (Attorney General), 2015 SCC 5, [2015] 1 SCR 331 [*Carter*].

³³ *R v Vaillancourt*, [1987] 2 SCR 636, 47 DLR (4th) 399; *R v Martineau*, [1990] 2 SCR 633, 6 WWR 97.

defence but even that is doubtful. Mike may have been subjectively provoked by his sister's rape. That, however, is not enough because the accused must also respond to provocation "on the sudden and before there was time for their passion to cool".³⁴ Mike would likely not qualify if he learned about his sister's rape days or perhaps even hours before the killing.

In addition to the requirements of sudden and subjective provocation, there would also have to be an objective basis for provocation in the sense that the conduct of the victim must be of such a nature "as to be sufficient to deprive an ordinary person of the power of self-control".³⁵ The Supreme Court has long stressed that this objective standard is designed to encourage "reasonable and non-violent behavior"³⁶ in upholding a conviction of a 16 year boy who killed a man who he claimed made sexual advances. More recently, the Court has upheld the denial of the defence in a case where a man killed a person he found in bed with his estranged wife. The Court stressed that the ordinary person should not be individualized or diluted to the point of defeating its purpose in encouraging proper behaviour.³⁷ Although sexual assault prosecutions notoriously often fail victims, it is unlikely that courts would even partially excuse Mike's vigilante but understandable violence. Without a basis in law, the jury that convicted Mike might never have been told about the provocation defence, thus preventing them from being an independent source of judgment and law on this matter and one that could potentially resist the law with its narrow focus on fault.³⁸

Interestingly, one recent and controversial statutory restriction on the provocation defence might not apply in Mike's case. As part of its oft-criticized *Zero Tolerance for Barbaric Cultural Practices Act*,³⁹ the Harper government amended s.232(2)⁴⁰ to replace the long standing requirement that provocation must be based on the victim's "acts or insults" towards the accused and replaced it with a requirement that the victim's actions must "constitute an indictable offence under this Act that is punishable by five

³⁴ *Criminal Code*, RSC 1985, c C-46, s 232(2) [*Criminal Code*].

³⁵ *Ibid.*

³⁶ *R v Hill*, [1986] 1 SCR 313 at 324, 27 DLR (4th) 187.

³⁷ *R v Tran*, 2010 SCC 58, [2010] 3 SCR 350.

³⁸ Benjamin L Berger, "The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination" (2011) 61:4 UTLJ 579 [Berger].

³⁹ SC 2015, c 29.

⁴⁰ *Criminal Code*, *supra* note 34, s 232(2).

or more years imprisonment”. Rape or today sexual assault would qualify as such an offence. Mike’s fictional case reveals how the amendment might expand the provocation defence by no longer requiring that the victim engage in an act or insult. For example, the defence might now apply even if a victim who was committing an indictable offence said or did nothing to the killer that could constitute an act or insult.

Mike’s case reveals some of the curious logic of the 2015 amendment. On the one hand, the amendment was designed to restrict the defence, especially in the case of so-called honour killings.⁴¹ On the other hand, by singling out those who had committed serious offences as less deserving of the full protection of the murder offence, it could possibly partially excuse vigilante violence against “criminals” deemed less worthy of the law’s protections.

The Limited Ability of the Criminal Law to Judge Blameworthiness

The above analysis reveals the limits of substantive criminal law in the form of *mens rea* requirements and defences in distinguishing between the moral blameworthiness of someone like Mike who kills in response to a grievous wrong to a family member and someone who kills for financial gain or sadistic satisfaction.

The failure of the criminal law to excuse or partially excuse Mike’s crime may well be appropriate. *38 Years Old* does not attempt to glorify what Mike has done or to suggest that he should not have been punished for killing his sister’s rapist. Indeed it affirms that as a result of Mike’s action “a man is buried on the hill”. At the same time it suggests that even though “they closed the case”, there is something troubling about it because people “still stare at their shoes when they pass” Mike’s family home.⁴² This may suggest that the 18 years punishment that Mike has already endured and the punishment he will continue to endure when returned to his Millhaven “home” is disproportionate.

Capital Punishment and Commutation

Given the time frame in the song, Mike would have been convicted of murder in the 1950’s when all murder in Canada was treated as capital

⁴¹ For my argument that the restrictions that the amendment placed on the provocation defence are arbitrary and violate the *Charter* see Kent Roach, “Vandalizing the Criminal Code with Irrational and Arbitrary Restrictions on Provocation” (2015) 62:4 *Crim LQ* 403.

⁴² *38 Years Old*, *supra* note 18.

murder subject to hanging. At the same time, this harsh and inflexible mandatory penalty was offset by an unfettered power of the Governor in Council to commute death sentences. The fact that Mike is still alive suggests that his death sentence was commuted. There has already been a departure from a mandatory sentence.

The 1956 Royal Commission on the Insanity Defence explained how the power of executive clemency was exercised after examining “all available sources of information” including “much evidence available for consideration that could not be presented in court under the rules of evidence governing courts in Canada.” It quoted with approval a statement by a British minister in 1907 that “numerous considerations” including “the motive”, “the amount of provocation”, and the “character and antecedents”⁴³ of the offender would influence the exercise of discretion.

Mike’s youth as a young adult who “had never kissed a girl” and who had killed his sister’s rapist would have likely resulted in the commutation of his death sentence. The executive’s power of commutation, like the power of prosecutorial discretion or jury nullification, can provide a vehicle for mercy and empathy. These qualities provide a source of judgment independent from the more rational and transparent rules that govern criminal liability.⁴⁴ To be sure, the executive’s unfettered discretion in making commutation decisions could also be a source of arbitrariness and even discrimination, but it was also a vehicle for considering human frailties that are not relevant to the rationalist confines of substantive criminal law.

Today, the Court will not assume that harsh applications of mandatory sentences will be avoided by the wise use of prosecutorial discretion or executive clemency, but will instead invalidate grossly disproportionate sentences as cruel and unusual punishment contrary to s.12 of the *Charter*. This is largely a good thing, but it should make us pause that it was easier to make exceptions and depart from mandatory sentences for murder in the days of capital punishment than it is today.

⁴³ Canada, Privy Council Office, *Report of the Royal Commission on the Defence of Insanity as a Defence in Criminal Cases* (Ottawa: Queens Printer, 1956) at 2.

⁴⁴ Berger, *supra* note 38.

The Charter and the Mandatory Penalty of Life Imprisonment for Murder

Under the *Charter*, the Supreme Court has emphatically rejected the idea of one off exceptions for sympathetic offenders such as Mike. It has reasoned that such exercises of judicial discretion will harm the rule of law values of “certainty, accessibility, intelligibility, clarity and predictability” and create an uncertain and unpredictable “divergence between the law on the books and the law as applied”.⁴⁵ The long history of commutation of death sentences, however, reveals that it was not that long ago that discretionary relief from mandatory punishment was much more readily accepted and used as a vehicle for making the criminal law more merciful and humane.

Mandatory sentences can be challenged not only as applied to the particular offender, but on the basis of reasonably hypothetical offenders. For example, the Court in 1987 struck down a seven year mandatory sentence for importing narcotics on the basis that it was cruel and unusual because it could be applied to a teenager who imported a joint of marijuana.⁴⁶ More recently, the Court struck down a one year mandatory minimum sentence for a second offence of possession of narcotics for the purpose of trafficking on the basis that it could be applied to the reasonably hypothetical offender of an addict who twice shared drugs with friends or who sold drugs to support his addiction and had made successful rehabilitation efforts by the time of sentencing.⁴⁷ The fictional case of Mike in *38 Years Old* seems no more fictional or unlikely as the reasonable hypotheticals used in the above real cases. Of course, Mike’s crime of murder is more serious than the crimes of importing or trafficking in narcotics.

The Supreme Court has already upheld mandatory life imprisonment for murder under the *Charter*. In *Luxton*,⁴⁸ the Court held that the mandatory sentence of life imprisonment with ineligibility for parole for 25 years for first degree murder was not cruel and unusual punishment even though the 25 year period was high and selected in order to win support for the abolition of the death penalty. The Court stressed the fault requirements for any murder conviction and the rationality of the serious

⁴⁵ *R v Ferguson*, 2008 SCC 6 at para 69, [2008] 1 SCR 96 [*Ferguson*].

⁴⁶ *R v Smith*, [1987] 1 SCR 1045, [1987] 40 DLR (4th) 435.

⁴⁷ *R v Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 [*Lloyd*].

⁴⁸ *R v Luxton*, [1990] 2 SCR 711, [1990] 6 WWR 137.

crimes including planned and deliberate killings and the killing of police officers and prison guards that Parliament selected as grounds for first degree murder.

The Court noted that offenders with special circumstances might be eligible “for the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purposes and for early parole”.⁴⁹ Escorted absences from custody would allow offenders like Mike to see their families in some circumstances. Like commutation decisions, they would be granted by the executive on a discretionary basis. The reference to early parole referred to so-called faint hope hearings that allowed an offender to apply to a jury that could rule that the offender would be entitled to parole earlier than 25 years. Faint hope hearings were, however, subsequently abolished thus depriving juries of the ability to make discretionary decisions influenced by the same human factors that motivated the Hip to display a degree of empathy to Mike, the murderer, who had “never kissed a girl”. In addition, under the *Protecting Canadians by Ending Sentence Discounts for Multiple Murder Act*,⁵⁰ it would now be possible for Mike to be ineligible for parole for 50 or even 75 years if he killed more than one person. Such legislation with its punitive focus on ending discounts for second murders ignores the effect of punishment on the offender including issues that relate to motive and personal characteristics.

In *R v Latimer*,⁵¹ the Supreme Court upheld that mandatory sentence of life imprisonment with a minimum of ten years ineligibility of parole for second degree murder. The Court recognized that Robert Latimer’s “good character and standing in the community, his tortured anxiety about Tracy’s well-being, and his laudable perseverance as a caring and involved parent”⁵² mitigated punishment, but held that these did not outweigh the need to punish and denounce his intentional decision to take his daughter’s life. It viewed Latimer’s motive to prevent his daughter from suffering another painful surgery through the limited and rationalist lens of *mens rea* doctrine⁵³ when it commented:

⁴⁹ *Ibid.*

⁵⁰ SC 2011, c 5.

⁵¹ *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3 [*Latimer*].

⁵² *Ibid* at para 85.

⁵³ In the earlier decision of *R v Morrisey*, 2000 SCC 39, [2000] 2 SCR 90; upholding a mandatory four year sentence for manslaughter with a firearm the Court similarly did

In considering the character of Mr. Latimer's actions, we are directed to an assessment of the criminal fault requirement or *mens rea* element of the offence rather than the offender's motive or general state of mind. We attach a greater degree of criminal responsibility or moral blameworthiness to conduct where the accused knowingly broke the law. In this case, the *mens rea* requirement for second degree murder is subjective foresight of death: the most serious level of moral blameworthiness.⁵⁴

This is a thin approach to moral blameworthiness which focuses simply on the *mens rea* requirement of knowledge that the victim would likely die and disregarded why Latimer killed his daughter.⁵⁵ In contrast, motive is central to *38 Years Old* and most other artistic understandings of why people kill.

The Court in *Latimer* attempted to distance itself from the decision that Mr. Latimer would be subject to life imprisonment by noting that he could be granted parole earlier and the executive retained jurisdiction to grant him mercy. The Court also released its decision in January 2001 allowing Latimer to spend Christmas with his family.

Robert Latimer was eventually freed, but perhaps not as soon as the Court expected. The executive did not commute his sentence or grant him a pardon. He was initially denied parole in 2007 in part because he told the parole board that he believed he acted correctly in killing his daughter. On judicial review, he was granted day parole, but placed under strict conditions that he reside in a halfway house five days a week. These conditions were overturned in 2010 on judicial review.⁵⁶ The parole board denied a subsequent request that he be allowed to travel outside of Canada, but this was overturned on another successful judicial review.⁵⁷

not give weight to the fact that one accused had no motive for drunkenly killing his friend and was extremely remorseful. Similarly, in *Ferguson*, *supra* note 45; the fact that an accused killed the victim while attempting to exercise his duties as a police officer did not prevent the Court from upholding and applying a similar mandatory four year penalty.

⁵⁴ *Latimer*, *supra* note 51 at para 82.

⁵⁵ For criticisms of this aspect of the case, see Allan Manson, "Motivation, the Supreme Court and Mandatory Sentencing for Murder" (2001) 39 CR (5th) 65; Kent Roach "Crime and Punishment in the Latimer Case" (2001) 64:2 Sask L Rev 469.

⁵⁶ *Latimer*, *supra* note 51.

⁵⁷ The reviewing judge determined: "It is quite clear on the facts of this case, as it was at all levels of Court before me, that in considering Mr. Latimer's unique case, the principles of rehabilitation, specific deterrence and societal protection against risk from him do not apply. I cannot discern any basis for the Appeal Board to find that Mr. Latimer poses any risk to any persons inside or outside of Canada, or that an

Robert Latimer's saga underlines how it is dangerous to rely on parole or executive commutation to mitigate punishment. It also suggests that when it comes to murder, courts will give much weight to the fact that accused, like Mike, intentionally killed. They will be less influenced than the executive would have traditionally been in the motive of the killing and the chance of re-occurrence and the character of the offender. Unless the Court was prepared to reconsider *Latimer*, it is likely that Mike would be unsuccessful in challenging what today would be his mandatory sentence of life imprisonment. Punishment for murder in the *Charter* era may be more predictable and rational, but also often more harsh, than in the days of mandatory capital punishment.

Reforming Mandatory Sentences: The Need for Exemptions from all Mandatory Sentences

After a period of rejecting *Charter* challenges to mandatory sentences, the Supreme Court has become more active in the last few years and struck a number of them down. In the recent *Lloyd* case, Chief Justice McLachlin for the majority of the Court warned:

If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences. Another solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment.⁵⁸

The Supreme Court's call in *Lloyd* for Parliament to reform mandatory minimum sentences by creating statutory exemptions is a bit ironic given that such statutory reform is only necessary because the Court itself had refused to use its own remedial powers to create constitutional exemptions from them. In the 2008 decision of *R. v. Ferguson*, the Court expressed concerns about the uncertainty that case-by-case exemptions could cause. When extending the suspended declaration of invalidity in the *Carter* assisted dying case, a majority of the Court softened its position by allowing exemptions from the unconstitutional assisted suicide offence that it

elimination of reporting requirements for international travel would present any real risk to public safety or adversely affect the protection of society under subsection 101(a) of the CCRA." *Latimer v Canada (Attorney General)*, 2014 FC 886.

⁵⁸ *Lloyd*, *supra* note 47 at paras 35-36.

allowed to operate for 4 more months. Even then four judges vigorously dissented on the same concerns about creating uncertainty that had motivated the Court to reject the use of exemptions both in *Ferguson* and in the original *Carter* decision.⁵⁹

The Court's reluctance to use constitutional exemptions may eventually force Parliament to reform most mandatory sentences⁶⁰ even though one might have expected independent judges to be more sensitive to exceptional cases, such as that presented in *38 Years Old*, than Parliamentarians. In any event, fictional cases like Mike or the reasonable hypotheticals that feature in s.12 jurisprudence make the case for discretion to depart from mandatory sentences whether exercised by the executive in its commutation decisions, by judges or by Parliament.

Parliament when it enacts mandatory minimum sentences including life imprisonment for murder is institutionally incapable of seeing the most sympathetic offender possible. Parliamentarians cannot be expected to anticipate the Mikes or the Latimers that will be caught by a sentence designed to deter and denounce a specific crime but one stripped of the specificity provided by actual offenders. Cases like Latimer's and Mike's suggest that any statutory exemption should be extended to murder including first degree murder. This is because a person can kill and even can plan and deliberate about killing under extenuating and unforeseen circumstances that will not be recognized under criminal law defences. Such a statutory exemption scheme does not mean that anyone should be excused for intentional killings. Moreover, it would not result in automatic or indiscriminate leniency. Any exemption would have to be justified by the trial judge and could be challenged by appeal.

Cases like Mike's and Latimer's also suggest that it would be a mistake for Parliament to take up the Court's other suggestion in *Lloyd* for reform: namely an attempt to tailor offences more narrowly to ensure a better fit between the crime and the mandatory sentence. Such a tailoring would likely focus on elements of the prohibited act and the fault element that have been tightened under Canada's reformed murder offences, but it would not address the questions of motive or personal characteristics that help explain why Mike's punishment would strike many as grossly disproportionate and shocking to the conscience.

⁵⁹ *Carter*, *supra* note 32.

⁶⁰ As suggested in Benjamin L Berger, "A More Lasting Comfort? The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*" (2009) 47 SCLR (2d) 101.

The TRC and Exemptions from Mandatory Sentences

If Parliament amended the *Criminal Code* to allow trial judges to depart from every mandatory sentence it would follow the Truth and Reconciliation Commission's (TRC's) 32nd call for action. The TRC made this recommendation after documenting how Indigenous overrepresentation has increased in Canada's prisons even in the face of efforts taken by Parliament in s.718.2(e)⁶¹ and the courts to remedy it. It argued that mandatory sentences and offence-based restrictions on conditional sentences were barriers to reducing Indigenous overrepresentation in Canadian prisons.

The TRC's call for action was not worded in a manner that only allows exemptions for Indigenous people and is based on the importance of sentencing discretion. It also contemplates that trial judges would have to justify departures from any mandatory sentence or restriction on a conditional sentence and that there should be both stable funding and evaluation of community sanctions. The TRC was not naïve about crime including the enhanced levels of victimization of Indigenous community, but nevertheless concluded that carefully justified departures from mandatory sentences could increase community safety by facilitating rehabilitation of offenders who in most cases will eventually be released.⁶² A song that the Hip released in 1989 about the injustice of a mandatory sentence is consistent with the TRC's 2015 recommendations designed to respond to the legacy of residential schools. Art can inspire law reform proposals, but it remains to be seen if and how the TRC's law reform proposal will be applied to mandatory sentences for murder.

Summary

In one line- "my sister got raped, a man got killed" - *38 Years Old* establishes a hypothetical that seems as reasonable and as likely to occur as the *Lloyd* hypothetical of a person convicted twice for trafficking for sharing drugs with friends. At the same time, the Hip's hypothetical is far more

⁶¹ *Criminal Code*, *supra* note 34, s 718.2(e)

⁶² Truth and Reconciliation Commission of Canada, *Canada's Residential Schools Final Report-The Legacy*, vol 5 (Montreal: McGill-Queen's University Press, 2015) at 242. This recommendation was also consistent with that made by a jury led by retired Supreme Court Justice Ian Binnie who made the same recommendation with respect to offenders with fetal alcohol spectrum disorders. *Ibid* at 223. I disclose that I acted as the project lead on this volume of the TRC's report and as a member of the Binnie jury.

challenging to the law because it revolves around Mike's motive for committing murder. Like Robert Latimer, Mike might have lost a *Charter* challenge to the mandatory sentence of life imprisonment. As the song suggests, Mike would be returned to his Millhaven "home" despite the fact that the murder was understandable and he had "never kissed a girl". Ironically and contrary to fears that the *Charter* has made us lax towards criminals, Mike was more likely to be treated leniently in the pre-*Charter* era, first by having his mandatory death sentence for murder commuted by the executive and second by being much more likely to be granted parole in the early 1970's than a contemporary offender given the increased reluctance of parole boards to grant parole and our declining faith in rehabilitation.⁶³

Unless Parliament allows statutory exemptions from all mandatory sentences, the Mikes of Canada will continue to face "freezing slow time away from the world".⁶⁴ Alas the federal government may be reluctant to extend statutory exemptions from mandatory sentences to murder. It might argue that there is no need to allow exemptions because this mandatory sentence has survived *Charter* challenge first in *Luxton* in 1990 and then in *Latimer* in 2001. The above analysis has suggested that *Luxton* may no longer be good law because of the abolition of faint hope hearings and the stacking of 25 years of parole ineligibility. In addition, the outcome of *Latimer* may not have been what the Court expected and is a reminder that it is dangerous to rely on the executive to provide relief against mandatory sentences. At the same time, there is a danger that these precedents will loom large in policy-making about the scope of any exemption from mandatory sentences. If so and assuming (contrary to the above argument) that *Luxton* and *Latimer* remain good law, this would be another example of the minimal standards of the *Charter* becoming de facto maximum standards of the fairness that can be expected from the state towards offenders.⁶⁵ This would be regrettable given that the hypothetical of Mike

⁶³ Anthony Doob, Cheryl Webster & Allan Manson, "Zombie Parole: The Withering of Conditional Release in Canada" (2014) 61 Crim LQ 301 at 309. See generally Garland, *supra* note 13.

⁶⁴ *38 Years Old*, *supra* note 18.

⁶⁵ On the dangers of the minimum standards of the *Charter* becoming maximum standards when crafting criminal laws see Kent Roach, "The Dangers of a Charter-proof and Crime-based Response to Terrorism" in Ronald Daniels, Patrick Macklem & Kent Roach eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001); Kent Roach, "Reforming Criminal Justice and

in *38 Years Old* and the historical record suggests that “mercy for murderers” was routine in pre-Charter Canada.⁶⁶

C. Resisting and Enduring Punishment

The above interpretation of *38 Years Old* as a reasonable and compelling hypothetical that supports the ability of judges to craft exemptions from all mandatory sentences undoubtedly reflects my own policy preferences and pre-occupations. Moreover, it could reasonably be criticized as an over reading or even overt politicalization of a good song. *38 Years Old* does not advocate exemptions from all mandatory sentences. That is not the job of the artist.

Mike’s Resistance to the Violence of the Criminal Law

By using the familiar cultural motif of a prison break, the song can be seen as a celebration of human agency in resisting punishment. This fits into a long tradition of rock being associated with rebels and outlaws. Such a reading of *38 Years Old* sits uneasily with Canadian myths which have traditionally stressed the importance of order. To be sure, Canada’s national symbol, the Mounties, makes an appearance in the song. The Mounties appear not as a benevolent force bringing law and order, but as an army who is at “war” with Mike and his small band of escapees. In appealing to Mike as an outlaw underdog and by making him human, Gord Downie is working in a similar tradition as Bruce Springsteen,⁶⁷ an artist who makes more than one favourable appearance in Downie’s work. The focus on the prison break suggests that criminal law should simply be resisted rather than reformed.

Despite its rock and roll or rebel account of a prison escape, there is a somber tone in the music and words of *38 Years Old*. From the start, it seems clear that Mike is going to lose his “war”. The Mounties will get their man, Mike will have a pathetically short time to be re-united with his family before

National Security in an Age of Populism” (2017) 64 Crim LQ 286 at 309-314.

⁶⁶ Carolyn Strange, “Mercy for Murderers: An Historical Perspective on the Royal Prerogative of Mercy” (2001) 64:2 Sask L Rev 559.

⁶⁷ Bruce Springsteen’s recent autobiography joyfully recounts an incident early in his career when a member of his band, the late Danny Federici, was wanted by the police, but avoided capture when Springsteen invited the crowd onto the stage in order to allow Federici to make his escape. See Bruce Springsteen, *Born to Run* (New York: Simon and Schuster, 2016) at 144.

being forcibly returned to his prison “home”. This could be seen as a triumph of a Canadian preference for order over liberty, but in a way that surely critiques Canadian practices. This also accords with the Downie’s uneasy acceptance that the Hip has become an icon of Canadian identity. He used the last Hip’s concert in Kingston and his subsequent album about residential schools as a plea for Canadians to not simply recognize their history, but to improve on it.

The Resistance by Mike and his Family

The idea that *38 Years Old* is about resisting the law raises the question of who is imposing state law and who is resisting it. As discussed above, the “Mounties” and in reality a combination of policing, military and prison officials were the ones who tracked down and re-captured the Millhaven escapees.

But who is Mike? He is possibly a composite of two of the escapees. One, Robert Clark, was indeed 38 years old at the time of the escape. He was captured the morning after the escape when he was flushed by tracker dogs. He was serving a sentence of life imprisonment for escaping prison,⁶⁸ suggesting that he was a recidivist resister or escapee. Another of the escapees, 25 year old Rudolph Nuss, was like Mike, re-captured at his parent’s home. Press reports suggest that Nuss, who was serving a sentence for robbery and was arrested at his parents’ Niagara home was planning to cross the border to the United States. *38 Years Old*, however, reveals another possibility. Nuss may have wanted to see his family and receive help from them. The emotional heart of *38 Years Old* is a twice repeated verse that describes the family home as “same pattern on the table, same clock on the wall. Been one seat empty eighteen years in all”.⁶⁹

Artists can humanize offenders in a way that not only invokes our compassion but provides an alternative and more complex verdict than that produced by state law. A family’s love and acceptance of an offender underlines that he or she is not the sum of the worst or most stupid thing they have ever done in their lives. Theories of restorative and Indigenous justice also suggest that families and others close to offenders have the potential to assist offenders in changing their behavior in a way that prison

⁶⁸ “The Millhaven break out: 10 down, 4 to go”, *Toronto Star* (22 July 1972).

⁶⁹ *38 Years Old*, *supra* note 18.

officials cannot.⁷⁰ *38 Years Old* affirms the importance of keeping a place at the family table even when offenders cannot be present. The importance of family is an important connection between *38 Years Old* and *Wheat Kings*. Both songs are uplifting to the extent that they show families supporting sons who are being punished for murder and providing alternative verdicts about both the offence and the offender.

38 Years Old depicts Mike's family reacting to the escape in various ways. The father tells the police that he "will tell him if he saw anything", but it is unclear that he did. Mike is captured so perhaps his father told the police, but such an action would be a shocking betrayal given that Mike's family has kept a place at their table for him for 18 years. In this way, the song juxtaposes the punishment and separation of Mike from the community under state law with his family's continued acceptance of Mike as symbolized by keeping a place for him at the table. This focus on Mike's inclusion in his family rather than his separation from society when viewed through the lens of critical legal pluralism resemble more communitarian responses to crime including that promoted by Indigenous law or restorative justice.

Perhaps fearing for her son's safety from the armed police, Mike's mother appears to express relief at his capture when she cries "The horror has finally ceased". This represents the ability of mothers to place the safety of their children above all else. It also suggests that Mike's mother is naïve about what awaits Mike after his capture. Mike, who unlike his mother, knows what it is like to be in Millhaven replies that "Yeah, for the time being at least".⁷¹ Mike was returning to a violent prison "home"⁷² that was the antithesis of his family's home.

Mike's younger brother clearly assists in the escape by holding "back the curtains" after hearing "the tap on my window in the middle of the night". This a powerful depiction of brotherly support and love. It also evokes the possibility of happier and more successful adventures. This is likely not the first time that Mike's brother assisted him in sneaking into the family home, albeit after an adventure that apparently did not include kissing a girl.

⁷⁰ See generally John Braithwaite, *Crime, Shame and Re-Integration* (Cambridge: Cambridge University Press, 1989); Kent Roach, *Due Process and Victims Rights* (Toronto: University of Toronto Press, 1999) at chs 8 & 9 (exploring differences and similarities between restorative and Aboriginal forms of justice).

⁷¹ *38 Years Old*, *supra* note 18.

⁷² *Ibid.*

Empathy and its Limits

The protagonist of *38 Years Old* is named Mike which is also the name of Gord Downie's older brother. This form of personalization of the story resulted in many people erroneously thinking that the song was autobiographical. This confusion eventually led the Hip not to play the song at their concerts. Although the song may have created some problems for Downie and his family, these problems are a testament to the power of its narrative and the ability of good art to allow people to stand in another's shoes. Feminist commentators such as Martha Minow⁷³ have suggested that this method can be extended to judging. Minow urges that judges should attempt to understand the unique perspectives of the litigants that appear before them. *38 Years Old* provides some of the raw and emotional material that could allow the listener and perhaps even a judge to attempt to stand in the shoes of offenders.

At the same time, there is a real limit to the ability of judges fully to stand in an offender's shoes. As the late Robert Cover reminded us, punishment will always be experienced by offenders as a form of violence.⁷⁴ Even a judge who empathized with Mike would likely send him away for a time. This, combined with my pessimistic analysis about Mike's legal chances of being acquitted or escaping a mandatory sentence of life imprisonment suggests that Mike will have to endure continued punishment when returned to his Millhaven "home". The empathy that even the most sympathetic and sensitive judge can display will have real and hard limits. Mike will have to draw on his internal resources and the empathy of his family to endure the punishment including the increased punishment for the escape that he will face. Mike must hope that his family continues to support him by keeping an empty seat at the dinner table and that one day the horrors will truly have ceased and he can return to his real home.

The above interpretation of *38 Years Old* reminds us that sometimes the criminal law simply must be resisted and when, as in the song, resistance is defeated by capture and conviction, punishment must be endured. The criminal law has a limited ability to understand offenders (and victims) or

⁷³ Martha Minow, *Making All the Difference* (Ithaca: Cornell University Press, 1990).

⁷⁴ Robert Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601. For a recognition of the difficulty of a man imagining the experiences of a woman, however, see Justice Wilson's statement in *R v Morgentaler*, [1988] 1 SCR 30 at 171-172, [1988] 44 DLR (4th) 385.

to see how many offenders may also be victims. Judges may attempt to place themselves in the shoes of those affected by the criminal law, but ultimately the coercive and hierarchical reality of the criminal law creates and maintains barriers.

38 Years Old as a Declaration that Mike's Sentence is Unjust

Consistent with the critical legal pluralism literature,⁷⁵ it is also possible to interpret *38 Years Old* as a form of law itself that pronounces Mike's punishment to be unjust and disproportionate, regardless of whatever conclusion might be drawn by state law. The Hip and their listeners might simply conclude that it is unjust or that it shocks the conscience to imprison a young man who had "never kissed a girl"⁷⁶ because he killed his sister's rapist. This presents an alternative sense of justice to state law where fault is not measured exclusively by the rules of criminal liability or even discretion in enforcement of the law.

To the extent that the test for cruel and unusual punishment seeks to rely on community standards, the legal system should not ignore that many ordinary people would have found Mike's or Latimer's punishment to be excessive. To be sure, such conclusions can be dismissed as populist or uninformed, but the criminal law will lose legitimacy if there are too many cases where there is a wide divergence from the public's verdict and those produced by state law. In addition, there is the real possibility that the criminal justice system has already lost legitimacy among those who are the objects of state law and those, like the Hip, who identify with them.

Summary

38 Years Old operates on many levels. The 1972 Millhaven prison escape was, as the song suggests, front page news that did not end well for the escapees. Mike's ultimately futile escape to his real home and his return to his Millhaven "home" is poignant. Interpreted in historical context, *38 Years Old* recalls a time of particular violence and unrest in Canada's prisons.

The backstory to *38 Years Old* reveals how the criminal law would impose a severe mandatory sentence (death, at the time referred to in the song and life imprisonment today) on a 20 year old who killed someone who had raped his sister. This speaks to the limited ability of the criminal

⁷⁵ See for example Kleinhans & Macdonald, *supra* note 15.

⁷⁶ *38 Years Old*, *supra* note 18.

law to differentiate different forms of moral blameworthiness and the limited scope of criminal defences that largely seek to maintain the state's monopoly on legitimate violence. It also reveals mandatory sentences as blunt and harmful instruments that will inevitably punish those offenders who commit a crime under the most extenuating and sympathetic conditions. The reasonable hypothetical of Mike suggests that Parliament should respond to the Supreme Court's call in *Lloyd* and the Truth and Reconciliation Commission's 32nd call for action by empowering trial judges to justify departures from all mandatory sentences, including murder even though the Supreme Court has upheld such sentences from *Charter* challenges.

Finally, *38 Years Old* reminds us of the limits of even a reformed criminal law. Mike may not receive a merciful exemption even if one was now available. Even if he does, he will still serve time in prison. The song reminds us that those most directly affected by the criminal law will need the assistance and love of their families and the keeping of place at the dinner table to endure both the harms that the criminal law responds to and the harms that it imposes. It provides an alternative legal verdict that does not reduce Mike to the abstract category of being a murderer but sees him as a son and a brother: in other words, as a person.

III. WHEAT KINGS AND WRONGFUL CONVICTIONS

A. Historical Perspective: David Milgaard's Long Struggle To Be Exonerated

Wheat Kings is one of the Hip's most popular songs. Like Springsteen's *Born in the USA*, however, it can be misinterpreted by casual listeners. It is vitally important to understand that *Wheat Kings* was released in 1992. It exonerated David Milgaard as innocent in the same year that the Supreme Court refused to do so. It also recognized that wrongful convictions were "nothing new" at a time when the Canadian criminal justice system was still very reluctant to admit it made mistakes.

Wheat Kings can be interpreted as a call to reform criminal law to better remedy wrongful convictions and to allow for determinations of innocence, but its historical context suggests that it could be dangerous to rely on the legal system as the sole remedy for wrongful convictions. This leads to an external perspective that stresses the ability of art, like science, and the

media,⁷⁷ to resist the conclusions of state law. In declaring David Milgaard to be innocent, *Wheat Kings* also suggests that art can produce its own form of law.

“Our Parent’s Prime Ministers”⁷⁸ and Ministerial Review of Miscarriages of Justice

The Milgaard case was consistently in the news in the late 1980’s and early 1990’s as Milgaard’s mother, Joyce, led a very public campaign to persuade Minister of Justice Kim Campbell to exercise the powers of the royal prerogative of mercy under what was then s.690 of the *Criminal Code*⁷⁹ to re-open Milgaard’s 1969 conviction for murdering Saskatoon nurse Gail Miller. This was the only way to re-open the case because Milgaard’s appeal in the courts had been exhausted. As one of Milgaard’s lawyers, David Asper has written: “In Canada, lawyers must try cases in the courts and not in the media. The problem in the Milgaard case was that we couldn’t get to court”.⁸⁰ Like Mike in *38 Years Old* who must have had his mandatory death penalty for murder commuted by the Cabinet, Milgaard’s fate depended on the actions of elected politicians and not judges.

Joyce Milgaard was rebuffed when she tried directly to speak to Campbell who as Minister of Justice was the ultimate decision-maker.⁸¹ After Campbell eventually denied the first application in 1988, supporters started an “an overt political campaign” against her and the “Department of Justice”. As Asper explained, “we had nothing to lose, and we held nothing back”.⁸²

⁷⁷ Nobles & Schiff, *supra* note 14.

⁷⁸ *Wheat Kings* lyrics found online: <www.hipmuseum.com/fullylb.html>.

⁷⁹ *Criminal Code*, *supra* note 34, s 690 as it appeared in 1988.

⁸⁰ David Asper, “No One’s Interested in Something You Didn’t Do’: Freeing David Milgaard the Ugly Way” in Adam Dodek & Alice Wooley, eds, *In Search of the Ethical Lawyer* (Vancouver: University of British Columbia Press, 2016) at 71.

⁸¹ Joyce Milgaard wrote her own song in response to this rebuff. It started with the following verse: “Please, Madame Minister, listen to me. Please, Madame Minister, set David free. He is not guilty, you have the proof. How can you stand there so cold and aloof?” See Joyce Milgaard with Peter Edwards, *A Mother’s Story* (Toronto: Doubleday Canada, 1999) at 154. Like *Wheat Kings*, this song declares David Milgaard to be innocent.

⁸² *Ibid* at 73.

The campaign included an unscheduled but famous discussion between Prime Minister Mulroney and Joyce Milgaard in September 1991 in front of a Winnipeg hotel. With his characteristic flair, Mulroney later recalled that there was “just something so forlorn but very loving about a woman standing alone on a very cold night in Manitoba on behalf of her son”. He added that “it was a question of our system being able to respond to the need for justice... and as Prime Minister, well to make suggestions, let me put it that way”.⁸³ The second petition was granted a few months later, much more quickly than the first application had been denied.

The different treatment of the two applications remains a matter of controversy to this day. Mulroney in his memoirs claims he intervened on Milgaard’s behalf while Campbell in her memoirs claims that no such intervention took place.⁸⁴ Thus two of our “parent’s Prime Ministers” do not agree on what happened. A Commission of Inquiry into Milgaard’s wrongful conviction could not get to the bottom of what happened because the federal government successfully restrained the provincial inquiry from examining the matter.⁸⁵ This perhaps explains why the Ministerial review process for many who work for the wrongfully convicted remains “dark, yellow and sinister hung with the pictures of our parents’ prime ministers”. The hard work in finding the new evidence that is necessary to re-open wrongful convictions also forces the wrongly convicted to work in “a museum” while those they attempt to exonerate are “locked up in it after dark”.⁸⁶

The Supreme Court Reference

A few months after Joyce Milgaard spoke with Prime Minister Mulroney, Minister of Justice Campbell referred the second application directly to the Supreme Court of Canada. This was an unusual procedure likely taken because Milgaard’s former defence lawyer was a member of the Saskatchewan Court of Appeal which would have normally heard the fresh

⁸³ “Mulroney describes role in freeing Milgaard”, *Globe and Mail* (30 July 1997) A3.

⁸⁴ Saskatchewan, Edward P MacCallum, Commission of the Inquiry Into the Wrongful Conviction of David Milgaard, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard* vol 1 (Saskatoon: Ministry of Justice, 2008) at 376 [Milgaard Inquiry].

⁸⁵ *Canada (Attorney General) v Saskatchewan (Milgaard Inquiry Commission)*, 2006 SKQB 385, [2006] 50 Admin LR (4th) 165.

⁸⁶ *Wheat Kings*, *supra* note 78.

appeal. It also responded to the intense public pressure and campaigning for Milgaard.

The Supreme Court heard the case at a time when it was preoccupied with issues of trial delays. Chief Justice Lamer and four other Justices devoted 16 days to hearing witnesses including David Milgaard and Larry Fisher from a witness box specially constructed in the Ottawa court-room for the Reference.⁸⁷ Both Milgaard and Fisher testified that they did not kill Gail Miller, creating an uncertainty that is also reflected in *Wheat Kings'* lyrics which refer both to "the killer" and "someone standing in the killer's place".⁸⁸

The Milgaard Guidelines to Prove Innocence

The Supreme Court issued guidelines during the reference that indicated that it was prepared to determine and declare whether Milgaard was innocent. This is exceptional for a criminal justice system that traditionally has limited itself to verdicts of guilty or not guilty, the latter including everything from innocence to failure to establish guilt beyond a reasonable doubt. The Court's guidelines responded to Milgaard's claims of innocence, but also perhaps a growing sense, as indicated in *Wheat Kings*, that wrongful convictions of the innocent were "nothing new".⁸⁹

The Court's guidelines, however, assigned considerable weight to the finality of Milgaard's 1970 murder conviction. They placed the onus on Milgaard to prove his innocence either on a civil standard of the preponderance of the evidence or beyond a reasonable doubt. The latter standard was extraordinary given that it is normally only the state with its powers and resources that is expected to prove anything beyond a reasonable doubt.

The Court's Ambiguous Judgment

In the end, the Supreme Court issued a short and ambiguous judgment that found that Milgaard had not proven his innocence on either standard, but that given the new evidence implicating Larry Fisher that Milgaard's continued conviction would constitute a miscarriage of justice. This finding

⁸⁷ Stephen Bindman, "Antonio Lamer and Wrongful Convictions: A Journey from Confidence to Contrition" in Adam Dodek & Daniel Jutras, eds, *The Sacred Fire: The Legacy of Antonio Lamer* (Toronto: LexisNexis, 2009) [Bindman].

⁸⁸ *Wheat Kings*, *supra* note 78.

⁸⁹ *Ibid.*

reflects that the long recognized ground of allowing appeals on the basis of a miscarriage of justice. A miscarriage of justice under the *Criminal Code* is a broader concept than the concept of wrongful conviction of the factually innocent that is often used by Innocence Projects and the media and is sometimes used by the legal system as a basis for deciding whether to compensate the wrongfully convicted. It includes a broad range of procedural or substantive errors that places either the fairness of the trial or the reliability of the conviction in serious doubt.⁹⁰

The Court's judgment resulted in Milgaard's release a few days later, but it fell far short of the exoneration that Milgaard wanted. The short judgment was published in full in many newspapers at the time. The judgment went out of its way to conclude that Milgaard had been convicted after a fair trial, thus seemingly absolving the justice system of any responsibility for the miscarriage of justice. The Court also concluded that Milgaard had failed to establish his innocence either beyond a reasonable doubt or on a balance of probabilities. This was a huge defeat for Milgaard who had consistently and correctly claimed that he was innocent.

At the same time, the Court advised the government that in light of new evidence regarding Larry Fisher's similar acts of violence towards women in downtown Saskatoon that Milgaard's continued conviction would be a miscarriage of justice. In addition, the Court indicated that even if Milgaard was convicted at a new trial, he should be pardoned by the executive. The Court seemed to recognize that Milgaard who had already served 23 years in prison and was in a fragile mental state, had had enough.

The concluding paragraphs of the 1992 Reference are a study in ambiguity that should be quoted in full in order to appreciate the significance of *Wheat Kings*:

While there is some evidence which implicates Milgaard in the murder of Gail Miller, the fresh evidence presented to us, particularly as to the locations and the pattern of the sexual assaults committed by Fisher, could well affect a jury's assessment of the guilt or innocence of Milgaard. The continued conviction of Milgaard would amount to a miscarriage of justice if an opportunity was not provided for a jury to consider the fresh evidence.

⁹⁰ For a discussion and defence of the breadth of the concept of a miscarriage of justice see Bibi Sangha, Kent Roach & Robert Moles, *Forensic Investigations and Miscarriages of Justice* (Toronto: Irwin Law, 2010) at 2-3, 105-106.

It is therefore appropriate to recommend to the Minister of Justice that she set aside the conviction and direct that a new trial be held.

It would be open to the Attorney General for Saskatchewan under the *Criminal Code*⁹¹ to enter a stay if that course were deemed appropriate in light of all the circumstances.

However, if a stay is not entered, a new trial proceeds and a verdict of guilty is returned, then we would recommend that the Minister of Justice consider granting a conditional pardon to David Milgaard with respect to any sentence imposed.⁹²

Media Reactions to the Court's Judgment

The media, like popular culture, can provide valuable insights into the law that legal professionals should not ignore. Although generally sympathetic to Milgaard's release, the media was quite critical of the Supreme Court's judgment and the difficult position it left Milgaard in. For example, the *Toronto Star* argued that "the court's reasoning is, at best, tortuous....the court said Milgaard deserves a new trial. But it urged the Saskatchewan government not to proceed. But should the province go ahead, and a jury find him guilty, the court recommended that Justice Minister Kim Campbell pardon him." It summed up the Court's decision as giving Milgaard "the freedom he needs but not the exoneration he sought."⁹³

Geoffrey Stevens was even more critical. He argued "now, 23 years later, the system grudgingly releases Milgaard, a huge cloud over his head, penniless and unemployable". He added if Joyce Milgaard "had not buttonholed Mulroney, there would have been no Supreme Court review, Milgaard would be staying in prison and Campbell would be insisting, of course, that her precious system works".⁹⁴ The Court's failure to be persuaded of Milgaard's innocence could be related to the high burden of proof it placed on Milgaard and the lack of a DNA exclusion at the time, but it is also a reminder that the legal system may be less generous in deciding whether to exonerate people than social, media, and artistic processes.

⁹¹ *Criminal Code*, *supra* note 34, s 579.

⁹² *Re Milgaard*, *supra* note 6 at 873-874.

⁹³ "A Second Trial for David Milgaard", *Toronto Star* (15 April 1992) A22.

⁹⁴ Geoffrey Stevens, "Credit PM, not the system, for Milgaard Outcome", *Toronto Star* (19 April 1992) B3.

Saskatchewan's Stay of Proceedings

The Saskatchewan government was even less sympathetic to Milgaard than the Supreme Court. Serge Kujawa, an NDP backbencher, who had represented the Attorney General of Saskatchewan in Milgaard's unsuccessful appeal to the Saskatchewan Court of Appeal, criticized "the media circus" surrounding the case. He argued that the Supreme Court had made its decision "on a mercy basis that Milgaard has put enough time in the penitentiary. That's not its purpose, and that's why I object to all this going on this way".⁹⁵ His approach suggested that mercy had no place in the law and indicated a desire to keep the law autonomous and superior to the "media circus". Similar defences of the autonomy and supremacy of the legal system would re-surface many years later in the Milgaard Inquiry report.

Saskatchewan Attorney General Robert Mitchell told a news conference: "We will not be offering any compensation to David Milgaard...The bottom line is that there was nothing that was brought before the Supreme Court which convinced even one justice that Mr. Milgaard is either innocent or a victim of a miscarriage of justice."⁹⁶ Mitchell elaborated, "The Supreme Court couldn't find him innocent, so it's difficult for me where I am to make a pronouncement on that subject. All I can do is decide whether or not to proceed with a trial. There's nothing I can do to dispel (the cloud over Milgaard)".⁹⁷ This statement assumed that only the Supreme Court could declare Milgaard to be innocent.

Attorney General Mitchell had the last word in denying Milgaard a new trial, but his decision to enter a stay was widely criticized in the media. The *Globe and Mail* argued that Milgaard should face a new trial because the Court's decision left him in a "kind of legal limbo" in which he will be a "free citizen" but one with "no apology, no compensation, no acquittal". Milgaard's 23 years in prison constituted "exceptional circumstances" that merited a new trial as a way of removing some of "the tarnish on his reputation" and ensuring that he was "innocent without question marks".⁹⁸ Milgaard never received a new trial and, as will be seen, he failed in other attempts to have the legal system recognize his innocence.

⁹⁵ "Supreme Court ruling on Milgaard has Saskatchewan abuzz", *Ottawa Citizen* (16 April 1992) A11.

⁹⁶ "Free at last, prisoner mulls plans", *Vancouver Sun* (18 April 1992) A10.

⁹⁷ Stephen Bindman, "Out but not really free", *Ottawa Citizen* (18 April 1992) A3.

⁹⁸ "A new trial for David Milgaard", *Globe and Mail* (22 April 1992) A14.

Public Reactions to Milgaard's Legal Limbo

A dark legal cloud still hung over Milgaard in 1992 when *Wheat Kings* was released. The song, however, can be seen as part of a social process of exonerating Milgaard by referring to him serving “for something that he didn’t do”. The song’s reference to “a nation whispers we always knew he would go free” also refers to wide-spread but far from unanimous public support for Milgaard in 1992.

A public opinion poll in May 1992 found that 75% of respondents believed that a public inquiry should have been held into Milgaard’s conviction and 60% believed that Milgaard should receive compensation, something which seems consistent with a belief in his innocence. At the same time, support for compensating Milgaard was lower in Manitoba and Saskatchewan where less than a majority of respondents (46%) believed that Milgaard should be compensated.⁹⁹ This divergence of opinion puts a bit of an edge on an Ontario-based band calling Saskatoon “the Paris of the Prairies”.¹⁰⁰

It was five years after both Milgaard and *Wheat Kings* were released that DNA found at the scene of the murder was identified as Larry Fisher’s with the benefits of new testing procedures. Fisher was a serial rapist who had attacked other women in Saskatoon. He was subsequently convicted of Miller’s murder. It was only after this new definitive evidence that the legal system recognized Milgaard as an innocent person. The Saskatchewan government apologized to him and agreed to \$10 million in compensation.¹⁰¹ This remains the largest settlement for a Canadian

⁹⁹ Stephen Bindman, “Most Canadians support Milgaard’s call for an inquiry”, *Canwest News* (4 May 1992).

¹⁰⁰ There has been competition over the famous “Paris of the Prairies” remark with Winnipeg and Chicago both claiming the mantle. There is also dispute over whether it relates to the river running through Saskatoon or its vibrant artistic community. In 2009, Montmartre, Saskatchewan (population 500) even constructed a 1/38 scale model of the Eiffel Tower in an attempt to establish its claim to the label. See Patrick White, “We will always have Paris, even in Saskatchewan”, *Globe and Mail* (3 July 2009), online: <<https://www.theglobeandmail.com/news/national/well-always-have-paris-even-in-saskatchewan/article4278307/>>.

¹⁰¹ “Milgaard will get \$10 million compensation”, *CBC News* (17 May 1999) online: <<http://www.cbc.ca/news/canada/milgaard-will-get-10-million-compensation-1.174896>>.

wrongful conviction, but one that averages to slightly over \$40,000 for each year David Milgaard spent in prison.

Wrongful Convictions as “Nothing New”

The Hip’s recognition in *Wheat Kings* that wrongful convictions were “nothing new” in 1992 was ahead of the times. Interestingly in light of Gord Downie’s subsequent role in championing Indigenous issues, two of Canada’s wrongful convictions at the time involved Indigenous accused.¹⁰²

In 1989, the Royal Commission on Donald Marshall’s Jr.’s prosecution exonerated the Mi’kmaq man who, like Milgaard, had been convicted as a teenager by a jury for a murder he did not commit. Like Milgaard, the legal system had not exonerated Marshall even while it reversed his conviction.¹⁰³ Both Milgaard and Marshall had long hair at the time of their trials and looked very different from the juries that convicted them. The reference in *Wheat Kings* to “Our parent’s prime ministers” underlines that the Hip identified with and had more in common with the teenagers charged in both cases than with those older adults who charged and convicted them.

In 1992, the Alberta Court of Appeal on another reference from the Minister of Justice overturned the murder conviction of Wilson Neepose, a Samson Cree man.¹⁰⁴ Marshall, Milgaard, and Neepose were the three contemporary wrongful convictions that in 1992 justified the Hip’s conclusion that wrongful convictions were “nothing new”.¹⁰⁵

¹⁰² See generally, Kent Roach, “The Wrongful Conviction of Indigenous Persons in Australia and Canada” (2015) 17:2 Flinders LJ 203.

¹⁰³ Nova Scotia, *Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queens Printer, 1989) at 7 (concluding that the Nova Scotia Court of Appeal had in reversing Marshall’s murder conviction in 1983 erroneously suggested he was guilty of robbery and perjury and had mounted “a defence of the criminal justice system at the expense of Donald Marshall Jr. in spite of overwhelming evidence that the system itself had failed.”).

¹⁰⁴ *R v Neepose*, [1992] ABCA 77, [1992] 12 CR (4th) 296.

¹⁰⁵ Historically astute Canadians (which Downie and the Hip have proven to be) would also have recognized both the Wilbert Coffin and Stephen Truscott cases as possible wrongful convictions even though the Supreme Court allowed Coffin to hang and upheld Truscott’s conviction. In *R v Coffin*, [1956] SCR 191, 114 CCC 1; the Supreme Court initially declined to even hear Coffin’s appeal, but on a reference to the Court held that the jury was entitled to presume Coffin’s guilt of murder because he was found in possession of goods stolen from the victims and that he had a fair trial even if some of the jurors could not speak his language and the jurors attended a movie during the trial with some of the police officers who testified for the Crown. Two of the seven

The Canadian legal system was more reluctant in 1992 than the Hip to accept the reality of wrongful convictions. The Supreme Court still allowed fugitives to be extradited to face the death penalty. It was only in 2001 that the Court prohibited the practice in light of the growing recognition of the reality of wrongful convictions.¹⁰⁶ Stephen Bindman has documented how Chief Justice Lamer's approach to wrongful convictions evolved considerably from 1992 when as the lead on the Milgaard panel he practically invited Saskatchewan to enter a discretionary stay to when in 2006 as the author of a public inquiry on three wrongful convictions in Newfoundland, Lamer criticized such prosecutorial stays for leaving the wrongfully convicted in legal limbo. In 2006, Lamer was also prepared to apologize to the wrongfully convicted, something that neither the Court nor the Saskatchewan government did in 1992 for David Milgaard.¹⁰⁷

B. Correcting Wrongful Convictions and Determining Innocence

Wheat Kings raises a number of legal issues that over a quarter of a century later remain controversial. The first is the process used to correct wrongful convictions once appeals have been exhausted. Should elected politicians or "Our parents Prime Ministers" make such decisions about re-opening convictions? Should the law be more interested "In something you didn't do" by making determinations and declarations of innocence?

Reforming the Correction Process for Wrongful Convictions

David Milgaard's two applications to Minister of Justice Kim Campbell to re-open his conviction were made under what was then s.690 of the *Criminal Code*. The Inquiry into Milgaard's wrongful conviction concluded that this remedy: "Presented a number of challenges for the Milgaards. The

judges who heard the case dissented and would have ordered a new trial. In Reference *Re Truscott*, [1967] SCR 309, [1967] 2 CCC 285; the Supreme Court over one dissent affirmed Stephen Truscott's murder conviction after hearing new evidence. It was only in 2007 after the introduction of additional new scientific evidence that the Ontario Court of Appeal indicated that Truscott was not guilty, though even then the Court did not declare him innocent. See Reference *Re Truscott*, 2007 ONCA 575, [2007] 225 CCC (3d) 321 [*Re Truscott*].

¹⁰⁶ *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283.

¹⁰⁷ Bindman, *supra* note 87.

remedy was in the absolute discretion of the Minister and a definitive test was not stated nor did one exist”.¹⁰⁸ The Minister of Justice was advised by former Supreme Court Justice William McIntyre, but the Milgaards’ did not have access to his opinion in the course of their appeal for the mercy of the Crown. At the same time it was this type of procedural flexibility that perhaps allowed Prime Minister Mulroney to influence the process that eventually culminated in Milgaard’s release from prison.

In 2002, the s.690 process was replaced with the current process contained in ss.696.1-6 of the *Code*. It now provides a more defined and procedurally regular process, but one in which the Minister of Justice still has the exclusive power to re-open a case by ordering a new trial or a new appeal.¹⁰⁹ Section 696.3(3) (a) of the *Code* provides that the Minister may provide a remedy if he or she “is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred”¹¹⁰ and s.696.4 affirms that the provision is not intended to serve as an additional appeal. It only provides “an extraordinary remedy” often on the basis of “new matters of significance”.¹¹¹

Just as the historical context of *38 Years Old* reveals that exemptions for mandatory sentences used to be routine, a historical perspective on wrongful conviction review suggests that the 2002 reforms may not be as favourable to the accused as older law. The present s. 696.3 sets a higher standard for Ministerial intervention than applied from 1892 to 1955 when a predecessor provision had provided that as part of the commutation process the Minister of Justice could direct a new trial or refer the case in whole or part to the Court of Appeal “If he entertains a doubt whether such person ought to have been convicted...”.¹¹² This is an important reminder that procedural transparency and regularity may not necessarily be a guarantee of justice and that it can be a mistake to think that the *Charter* era has ushered in a new era of progress and fairness. Concerns about delays and bias in the Ministerial review process persist under the 2002 reforms

¹⁰⁸ Milgaard Inquiry, *supra* note 84 at 101.

¹⁰⁹ *Criminal Code*, *supra* note 34, s 696.1-6.

¹¹⁰ *Ibid*, s 696.6(3) (a).

¹¹¹ *Ibid*, s 696.4.

¹¹² *Criminal Code*, RSC 1927, c 36, s 1022(2). It is also a higher standard than used by the Criminal Cases Review Commission in England and Wales which refers cases back to the Court of Appeal if there is “a real possibility” that a conviction will not be sustained. See *Criminal Appeal Act*, 1995 c 35, s 13; see also *R v CCRC ex parte Pearson*, [1999] 3 All ER 498, [1999] Crim L Rev 732.

and a number of people who have been wrongfully convicted have found creative ways to avoid the process.

The Milgaard Inquiry: Its Reform Proposal and Criticism of the Milgaard Campaign

The inquiry into Milgaard's wrongful conviction recommended that Ministerial involvement be replaced by the creation of an independent agency such as the Criminal Cases Review Commission that has made similar decisions in England and Wales since 1997. The Commission's recommendation in this regard was in large part driven by the Commissioner's decidedly negative views about the publicity campaign that accompanied Milgaard's two applications for Ministerial review. For example Commissioner MacCallum wrote:

The involvement of a federal politician in the review of individual cases of alleged wrongful conviction invites public advocacy in a media campaign, a war in which the truth is likely to be the first casualty. Although it can be said that the Milgaard case was unprecedented in the intensity of its media campaign, other wrongful conviction advocates have also relied upon public support to put pressure on the federal Minister.¹¹³

He contemplated that a commission would be a neutral agency "independent of the government of the day" that would be immune from accusations of "political favoritism, or of having succumbed to political pressure".¹¹⁴

The Milgaard inquiry's recommendation for an independent agency echoes those made by other commissions of inquiry. I have argued in support of such a reform in the past as have many others.¹¹⁵ At the same time, however, the Milgaard inquiry was controversial and lost the support of many in Canada's small innocence community in no small part because Commissioner McCallum was so determined to criticize the lobbying that took place for David Milgaard during the two s.690 applications and to

¹¹³ Milgaard Inquiry, *supra* note 84 at 377.

¹¹⁴ *Ibid.*

¹¹⁵ See Bibi Sangha, Kent Roach & Robert Moles, *Forensic Investigations and Miscarriages of Justice* (Toronto: Irwin Law, 2010) at ch 12. For a recent article that demonstrates how the Canadian Ministerial review process since 2002 has produced far fewer corrections of miscarriages of justice on a per capita basis than the CCRC or its Scottish equivalent and concludes that a CCRC should be formulated in Canada see Emma Cunliffe & Gary Edmond, "Reviewing Wrongful Convictions in Canada" (2017) 64 Crim LQ 475.

eliminate any repeat performance. For example, the Commissioner concluded:

A repetition of the sort of media campaign launched in the Milgaard case would not be a desirable thing. Members of the Milgaard group themselves admitted that it was unfortunate, but necessary. Without agreeing with that, I can say that without limiting freedom of expression, some way should be found to at least lessen recourse to sensational publicity as a means of getting a remedy under s. 690 of the *Criminal Code*. One solution which holds promise is the replacement of the federal Minister in such applications with an independent review commission, of which more will be said later. [One witness]...said that the media campaign gave a black eye to the whole administration of justice. I accept that.¹¹⁶

The Milgaard Commission's criticism of those who successfully campaigned for Milgaard's innocence (implicitly including the Hip) is very harsh. They engaged in a "media campaign" that revolved around "sensational publicity" and even "a war in which the truth is likely to be the first casualty." It almost seems as if the real mischief being addressed is the danger of negative publicity that gives a "black eye to the whole administration of justice" as opposed to the actual miscarriage of justice.

The Milgaard's commission's criticism of the publicity campaign sits uneasily with its candid and important finding that the ultimate decision on the second application "was based on the need to air the issues, given the public outcry, and not on a reasonable basis for finding that justice had miscarried".¹¹⁷ Taken to the logical conclusion, this suggests that the second application should not have been allowed with Milgaard remaining in jail at least for five more years before more definitive DNA evidence was available.

The Milgaard Inquiry seems to be proposing a type of exchange: an independent body should be created so that wrongful conviction cases no longer have to be argued in the media. Acceptance of such a bargain seems to me to be unwise because any independent commission could make errors. In addition, the legal system does not normally make determinations of innocence and when it did in the Milgaard reference, it got it wrong. Unless one believes that the legal system does not make mistakes or is above criticism, the option of arguing your case in the court of public opinion should never be foreclosed.

As a matter of constitutional principle and institutional design, it is difficult to dispute the idea that an independent commission would be

¹¹⁶ Milgaard Inquiry, *supra* note 84 at 720.

¹¹⁷ *Ibid* at 749.

better suited to review cases than the federal Minister of Justice even assisted by independent advisors and investigators such as retired judges. At the same time, it should be acknowledged that some who have had applications rejected by the independent CCRC have expressed dissatisfaction with the commission and argued that it is not concerned enough with whether applicants are innocent.¹¹⁸

The Milgaard inquiry argued that an independent commission would act in an inquisitorial manner, but over 95% of applicants to the CCRC in England and Wales have their applications rejected, often on a preliminary basis. There is some evidence that applicants to the CCRC who are legally represented are more likely to receive a new appeal from the Commission.¹¹⁹ In addition, the CCRC has shown little interest in studying the systemic causes of wrongful convictions, much less advocating for reforms to address them.¹²⁰

The Milgaard Inquiry may have painted too rosy a picture of the CCRC in its attempt to prevent the type of lobbying that led to Milgaard's 1992 reference. In doing so, it may have placed too much faith in legal reforms and ignored the continued importance of campaigning on behalf of the wrongfully convicted: campaigning that was essential to obtaining Milgaard's release and exonerated him when the Supreme Court was not prepared to do so. Campaigning challenges state law's assertion of a monopoly on questions of guilt and innocence. As such, campaigning constitutes a form of legal pluralism as well as a form of democratic engagement.

An alternative to a CCRC, one now used in some Australian states, is to allow a person like Milgaard to apply for a second appeal without any executive intervention if appellate courts determine that there is "fresh and

¹¹⁸ For a collection of essays critical of CCRC and in particular with its focus on appellate doctrine on reversing convictions as opposed to concerns about factual innocence, see Michael MacNaughton, ed, *The Criminal Case Review Commission: Hope for the Innocent?* (London: Palgrave, 2010). See also the various articles in (2012) 58:2 Crim LQ 135-302 for a special issue examining the merits of the present Canadian system and the comparative experience with commissions.

¹¹⁹ Jacqueline Hodgson & Juliet Horne, *The extent and impact of legal representation on applications to the Criminal Cases Review Commission* (Coventry: CCRC, 2009), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1483721>.

¹²⁰ Kent Roach, "The Role of Innocence Commissions: Error Correction, Systemic Reform or Both?" (2010) 85:1 Chicago-Kent L Rev 89.

compelling evidence”.¹²¹ As a matter of constitutional principle it may be better to place responsibility for correcting wrongful convictions on the judiciary than even an independent executive agency. That said, a weakness of the new Australian approach is that it depends on the wrongfully convicted to gather new evidence often while they are still imprisoned in their “museum”.¹²²

An independent commission that can re-open convictions may still be the optimal reform, but one must still carefully consider the possibility that even an independent commission could make errors, not have resources fully to investigate most cases it considers, and that it will likely reject the vast majority of applications it considers. Even when a commission refers a case back to the courts, it is unlikely because of its quasi-judicial role to champion an applicant’s innocence or systemic reforms that may better protect the innocent from wrongful convictions. As will be seen, the legal system will not generally make determinations of innocence. The sort of campaigning for exoneration seen in *Wheat Kings* will always have an important role to play. It may be discomfiting to legal professionals concerned with the repute of the justice system, but campaigning does not deserve the harsh criticism it received from the Milgaard Inquiry. Moreover, campaigning should not be abandoned even if the process of correcting miscarriages of justice is reformed.

Reforming Prosecutorial Uses of Stays of Proceedings

As discussed above, the decision of the Saskatchewan Attorney General to stay proceedings after the reference played a key role in depriving David Milgaard of a hearing that could have resulted in him receiving a not guilty (but not an innocent) verdict. The Milgaard Inquiry found no misconduct in the prosecutorial decision given the Supreme Court’s “broad hint”¹²³ in the 1992 reference that a stay should be used. Nevertheless, it agreed with both the Lamer Inquiry in 2006 and the Driskell Inquiry in 2008 that prosecutorial stays should be used more sparingly in wrongful conviction cases because they promoted and prolonged the stigma and suspicions engendered by the original conviction. If there was no genuine and

¹²¹ See generally, Bibi Sangha & Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (Sydney: Butterworths, 2015). See also generally (2015) 17:2 Flinders LJ 155-537 for a symposium on the recent Australian experience with some comparisons to Canada.

¹²² *Wheat Kings*, *supra* note 78.

¹²³ Milgaard Inquiry, *supra* note 84 at 337.

foreseeable prospect of a new trial, all three inquiries recommended that prosecutors use alternatives to stays of proceedings such as withdrawing charges or calling no evidence so that people like Milgaard had an opportunity at least to receive a not guilty verdict.

Such legal reforms may not, however, be enough. The late Romeo Phillion had his conviction quashed in 2009 as a result of a Ministerial reference. Ontario prosecutors withdrew charges instead of staying proceedings. Phillion, like Milgaard, wanted an exoneration. A court rejected Phillion's challenge of the prosecutorial decision.¹²⁴ This is not surprising given that courts defer to the exercise of prosecutorial discretion in the absence of a clear abuse of process.¹²⁵ This underlines the continued and pervasive role of discretion in our justice system. This means that the wrongfully convicted, those who have been most harmed by prosecutorial decisions, often remain dependent on prosecutorial discretion. Even if such discretion is exercised to provide the wrongfully convicted with an acquittal, this may not result in exoneration. The presumption of innocence that applies in law once a conviction has been reversed may be more fictional than real for those who have been wrongfully convicted of murder.

Milgaard's Continued and Failed Search for a Legal Exoneration

Once the prosecutorial stay was entered in his case, David Milgaard was denied access to a criminal trial to make the case that he was innocent. Like others who have been wrongfully convicted, including Romeo Phillion,¹²⁶ Milgaard turned to the civil courts in an attempt to establish his innocence. In a little noticed episode, Milgaard once again did not find what he was looking for from the legal system.

Milgaard sued police and prosecutors involved in the case, alleging a wide ranging conspiracy. His conspiracy claim was not struck out,¹²⁷ but the trial judge went out of his way to suggest that Milgaard could not bring a malicious prosecution lawsuit because he had not been declared innocent.¹²⁸ This underlines the "Catch 22" that the wrongfully convicted

¹²⁴ *R v Phillion*, 2010 ONSC 1604, [2010] 214 CRR (2d) 284.

¹²⁵ *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167.

¹²⁶ After his challenge to the Crown withdrawal of charges was unsuccessful, Mr. Phillion commenced civil litigation. His claim was struck out as an abuse of process, but this was reversed in *Phillion v Ontario (Attorney General)*, 2014 ONCA 567, 121 OR (3d) 289.

¹²⁷ *Milgaard v Saskatchewan*, [1994] 118 DLR (4th) 653, [1994] 9 WWR 305 (SK CA).

¹²⁸ *Milgaard v Kujawa*, [1994] 1 WWR 338 at paras 17-19, 112 Sask R 241 (SK QB).

can find themselves in: the criminal justice system generally does not make determination of innocence but proof of innocence is often a prerequisite for compensation and exoneration.

Milgaard next brought a \$1.3 million defamation claim against the Saskatchewan Attorney General. The Attorney General defended this lawsuit claiming that it was an abuse of process. Preliminary litigation did not go well for Milgaard with a judge refusing to strike out the Attorney General's claim of qualified privilege for making the remarks or his claim that Milgaard was an abuse of process. Justice Barclay stated:

It can be argued that as Milgaard was convicted of the murder of Gail Miller, the conviction, which was upheld by the Saskatchewan Court of Appeal, is at a minimum, prima facie proof that the person committed the offence.... It must be emphasized that Milgaard had his opportunity to establish his innocence on a balance of probabilities before the Supreme Court of Canada. The court exhaustively reviewed all of the evidence that could be called on the question of Milgaard's guilt or innocence which included the testimony of Milgaard that he had nothing to do with the murder of Gail Miller.¹²⁹

Given these discouraging results, as well as his limited resources, it is not surprising that Milgaard's two civil lawsuits designed to establish his innocence never proceeded to trial. Milgaard failed to persuade either the Supreme Court or the civil courts to recognize his innocence. This suggests that the wrongfully convicted must often look outside of state law for determinations and declarations of innocence.

“Nobody’s Interested in Something You Didn’t Do”:¹³⁰ Legal Determinations of Innocence

The declaration of David Milgaard's innocence in *Wheat Kings* raises the question of whether the legal system should make determinations of innocence that could contribute to exonerations.

The criminal justice system does not provide for determinations and declarations of innocence, something noted by the Ontario Court of Appeal when it decided that it could not make a declaration that William Mullins Johnson was innocent after his conviction for murdering and sexually assaulting his niece was overturned after the Indigenous man had served 12 years in prison. Mullins-Johnson was one of the many persons who were wrongly convicted as a result of Charles Smith's flawed pathology evidence.

¹²⁹ *Milgaard v Mitchell* (1996), [1997] 3 WWR 82, 151 Sask R 100 (SK QB).

¹³⁰ *Wheat Kings*, *supra* note 78.

The Court of Appeal raised policy concerns that determinations of innocence would create two classes of not guilty verdicts and that they may be difficult to make without definitive evidence such as DNA.¹³¹

Christopher Sherrin has argued that the legal system should be reformed to include innocence hearings and determinations. He stresses that innocence is often treated by governments as a prerequisite to compensation and that the question of innocence often matters greatly for society and the wrongfully convicted person.¹³² I agree with Professor Sherrin that if used, innocence hearings should only be conducted at the request of the previously convicted and they should not be based on the high standard of proof beyond a reasonable doubt employed by the Supreme Court in the Milgaard Reference.¹³³

At the same time, the Supreme Court's failure to find that Milgaard had established his innocence on a balance of probabilities should sound a cautionary tale about legal determinations of innocence. The UK system has in recent years moved towards requiring the wrongfully convicted to establish innocence as part of the compensation process. Concerns, however, have been raised that the legal standards are too demanding in cases where there is no definitive evidence of innocence.¹³⁴ Even if the legal system was reformed to include innocence hearings, *Wheat Kings* reminds us that the legal system should not have a monopoly on declarations of innocence, a matter to be examined in greater depth in the next section.

Summary

Wheat Kings can be interpreted as a criticism of a justice system that relies on the decision of elected officials to correct wrongful convictions;

¹³¹ *R v Mullins-Johnson*, 2007 ONCA 720, [2007] 228 CCC (3d) 505. See also *Re Truscott* (2007), *supra* note 105 at para 264, noting that Mr. Truscott "has not demonstrated his factual innocence. To do so would be a most daunting task absent definitive forensic evidence such as DNA. Despite the appellant's best efforts, that kind of evidence is not available."

¹³² Christopher Sherrin, "Declarations of Innocence" (2010) 35:2 Queen's LJ 437.

¹³³ Kent Roach, "Exonerating the Wrongfully Convicted: Do We Need Innocence Hearings" in Margaret Beare, ed, *Honouring Social Justice: Honouring Dianne Martin* (Toronto: University of Toronto Press, 2008) [Roach, "Exonerating the Wrongfully Convicted"].

¹³⁴ Hannah Quirk & Marny Requa, "The Supreme Court on Compensation for Miscarriages of Justice" (2012) 75:3 Mod L Rev 387.

that is very slow in correcting or admitting its errors and that does not make determinations about innocence.

The 2002 changes to the Ministerial review process add some procedural regularity, but still allow the Minister of Justice as an elected official and one who bears some responsibility for the criminal justice system to make decisions whether convictions should be re-opened. The Milgaard Inquiry, like many other inquiries, recommended that the decision be transferred to an independent commission, but successive governments have been unwilling to embrace such a major reform or even more minor reforms such as giving the accused a second right of appeal on the basis of fresh and compelling new evidence.

Wheat Kings identifies the legal system's lack of interest in innocence as a problem. Prosecutors who follow the advice of three inquiries into wrongful convictions should be less willing to use prosecutorial stays that place a previously convicted person in the same kind of legal limbo that David Milgaard found himself in 1992 and that prolonged the stigma arising from his original and erroneous murder conviction. Nevertheless, the alternatives of withdrawing charges or calling no evidence remain matters of prosecutorial discretion. Moreover, the best they can provide is a not guilty verdict that may not truly exonerate the wrongfully convicted. Such persons may seek compensation only to find that it can be denied because they have not established their innocence. The legal system continues its Catch 22 of refusing to determine innocence, but making proof of innocence a prerequisite for the wrongly convicted to be compensated or exonerated. Twenty five years after *Wheat Kings*, the legal system for the wrongfully convicted remains "dark...yellow, grey and sinister".¹³⁵

C. "Let's See What Tomorrow Brings": Alternative Interpretations of Resistance and Innocence

Just as *38 Years Old* does not call for legal reforms such as exemptions from mandatory sentences, *Wheat Kings* does not call for the creation of an independent agency such as the CCRC or for the creation of innocence hearings. Again, it is not the job of artists to make concrete reform proposals. Perhaps even more than *38 Years Old*, *Wheat Kings* can be interpreted as a cautionary tale about relying on legal reforms and a

¹³⁵ *Wheat Kings supra* note 78.

recognition of the ability of culture and art to both resist legal conclusions and provide alternative verdicts that are themselves a form of law.

Critical Legal Pluralism

As discussed above, the Milgaard Commission's call for the creation of an independent agency to replace the Minister of Justice's role seems in part motivated by a desire to remove media and civil society campaigning from wrongful convictions. Innocence groups even seem prepared to accept such a bargain suggesting that the creation of a Canadian version of the CCRC could put them out of business.¹³⁶ Such an approach, however, would come with many risks. It would nourish a legal orthodoxy that accepts the state law, including reformed state law, as the exclusive source of authority about wrongful convictions.

Critical legal pluralism accepts that non-state systems of ordering can make legal conclusions that are independent and sometimes in contradiction to those reached by state laws. Martha-Marie Kleinhans and the late Rod Macdonald have defended critical legal pluralism¹³⁷ in part on the basis of the normative significance of narrative. Robert Cover stressed the ability of small communities to create their own normative and legal systems and the ability of the state law to de-legitimate or even kill the sometimes redemptive understandings promoted by those small communities.¹³⁸ Cover was referring to the understandings created by small religious communities, but his critical legal pluralism approach could also be applied to the work of Innocence Projects when their claim that some of their clients are innocent. More recently, Wendy Adams has applied a critical legal pluralist approach inspired by the work of both Cover and Macdonald to popular culture with particular attention to the ability of literature to produce its own *nomos* or moral ordering that includes narrative of resistance on issues such as the rights of animals.¹³⁹ In a critical

¹³⁶ Wendy Gillis, "Innocence Canada becoming a shadow of its former self", *Toronto Star* (21 October 2016), online: <www.thestar.com/news/gta/2016/10/21/innocence-canada-becoming-shadow-of-its-former-self.html>. An official of Innocence Canada (formerly the Association in Defence of the Wrongly Convicted), suggests that a CCRC would replace its work.

¹³⁷ *Supra* note 15 at 40 & 46.

¹³⁸ Cover, *supra* note 11.

¹³⁹ Wendy A Adams, *Popular Culture and Legal Pluralism* (New York: Routledge, 2017) [Adams].

legal pluralist framework, there would be greater acceptance of alternative sources of meaning that when necessary could contradict and challenge the conclusions reached by even a reformed legal system including by a Canadian CCRC or a court hearing new evidence at new innocence hearings.

Exoneration is a normative and a redemptive process that goes beyond the legal reversal of a guilty verdict or even the legal construction of an innocence finding. State law can play a role in exoneration, but so too can civil society, the media, science, and art. Those who accept critical legal pluralism or even those who have a sense of humility about state law should be sensitive to the complexity and plurality of our moral and legal worlds. Declarations of innocence in popular culture such as *Wheat Kings* make legal and normative claims that can resist conclusions of guilt or non-innocence reached by state law. They can provide a critical role in the process of exoneration. They can also provide comfort and support to those who suffer and must endure wrongful convictions.

The Role of the Media

The often central role of the media in exonerations is recognized in the reference in *Wheat Kings* to the “late breaking story on the CBC” about Milgaard’s case. There are some concerns that since the CCRC has been created in England and Wales that the media has taken less of an interest in alleged wrongful convictions because of an assumption that the CCRC can be relied upon to discover and correct wrongful convictions.¹⁴⁰ If innocence hearings were held under state law, constructions of innocence in the media or civil society may play less of a role.

The media, like art, provides a means to challenge or resist the perhaps erroneous conclusions that the legal system makes. It accords with what David Nobles and Richard Schiff have defended as the ability of alternative scientific and media discourses to disturb the finality that the legal system attempts to accord to its fallible verdicts. Professors Nobles and Schiff use autopoietic theory to explain how law, science, and the media each constitute autonomous and self-referential systems of meaning and they

¹⁴⁰ Paul Mason, “Press and Release” in Michael Naughton, ed, *The Criminal Cases Review Commission: Hope for the Innocent?* (New York: Palgrave Macmillan, 2010).

explain controversies over miscarriage of justice as a result of collision between these different systems of meaning.¹⁴¹

The Limits of State Law and the Continued Role for Campaigning

The Supreme Court's 1992 decision that Milgaard had not established his innocence was what Cover called "jurispathic"¹⁴² to the attempts by the Milgaards and their supporters to declare David to be innocent. At the same time, the media and campaigning pushback to the decision, as well as the Hip's declaration in *Wheat Kings* that Milgaard was innocent, demonstrates that these alternative forms of ordering had resilience even in the face of a considered rejection of innocence by the Supreme Court. In this regard, Robert Cover may have overestimated the success of state law in killing or discrediting alternative normative systems.

Campaigning and social and media declarations of innocence can be powerfully "jurisgenerative" even in the face of conclusions by state law to the contrary. The construction of David Milgaard as innocent by his family, supporters and the Hip ultimately prevailed over the Supreme Court's more formal determination that Milgaard had failed to establish his innocence. In Milgaard's case, first the media and art such as *Wheat Kings* provided the push-back and then science in the form of the 1997 DNA exclusion ensured exoneration. Although societal exonerations do not have the same official status and legal import as a judicial determination of innocence, they do have meaning especially for ordinary people who pay attention.

Critical Legal Pluralism and the Construction of Innocence

Wheat Kings goes beyond the autopoietic approach used by Nobles and Schiff which focuses on the alternative and self-contained discourses of the media and science. It does not suggest that the CBC or science determined that David Milgaard was innocent. Rather *Wheat Kings* declares David Milgaard to be innocent. In this respect, *Wheat Kings* engages in critical legal pluralism and can itself be seen as a form of law.

¹⁴¹ Richard Nobles & David Schiff, *Understanding Wrongful Convictions* (Oxford: Oxford University Press, 2000) at 259-60. They write: "Different communities have different conceptions of miscarriage of justice....miscarriage of justice carries widespread abhorrence. However, that abhorrence cannot be simply translated into legal activity or legal reform".

¹⁴² Cover, *supra* note 11 at 40.

The Milgaard case was extraordinary because the Court declared its willingness to make a determination of innocence, something that courts have subsequently retreated from. The Court made a negative decision that adversely affected Milgaard. As seen above, Milgaard's subsequent attempts to establish his innocence through civil suits also failed. But even when courts refuse to make determinations of innocence, it is a mistake to think that the space left by the legal system is a normative void, devoid of meaning. Rather it is a space that has filled by alternative forms of normative ordering. These forms of ordering have the potential to resist the conclusions drawn by state laws. In short, *Wheat Kings* is its own form of legal verdict, one that turned out to be more correct than that reached by the Supreme Court. A critical legal pluralism approach would suggest that state law does not and should not have a monopoly on determinations of innocence.

By proclaiming Milgaard's innocence when the law did not, *Wheat Kings* can be seen as an exercise of what Robert Cover called "redemptive constitutionalism" that challenged the law.¹⁴³ It also reveals what Rod Macdonald recognized as the ability of narratives to generate legal and normative conclusions that can challenge and resist the claims of state law to be the only legitimate law.¹⁴⁴ *Wheat Kings* directly contradicted the Supreme Court's declaration that Milgaard had not proven his innocence. In doing so, the Hip resisted what Benjamin Berger has characterized as the "epistemologically colonial"¹⁴⁵ aspirations of state law or what Robert Cover called its "jurispathic"¹⁴⁶ tendencies.

Milgaard's supporters including the Hip created an alternative and it turns out a correct interpretation of Milgaard as innocent. In contrast, the Milgaard Inquiry took a legal monist approach that viewed the campaigners' attempts to construct Milgaard as innocent and illegitimate. The Commission's report can be seen as an aggressive attempt to reaffirm the monopoly of a reformed state law with respect to questions of guilt or

¹⁴³ Cover, *supra* note 11.

¹⁴⁴ Klainhaus & Macdonald, *supra* note 14; see also Adams, *supra* note 139 at 57. Other forms of critical legal pluralism could also include Indigenous law, which may also rely on the power of narrative to reach normative conclusions that may be at odds with the legal verdicts of state law and that can be used to resist state law. See John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

¹⁴⁵ Benjamin Berger, *Law's Religion* (Toronto: University of Toronto Press, 2015) at 103.

¹⁴⁶ Cover, *supra* note 11 at 40.

innocence or what Macdonald identifies as the orthodoxy of state law.¹⁴⁷ In contrast, a critical legal pluralist approach would be neither surprised nor offended by alternative legal conclusions of the sort that *Wheat Kings* draws.

As Robert Cover argued jurisdictional redundancy can minimize some of the coercive and jurispactic force of legal determinations.¹⁴⁸ Cover was referring to a jurisdictional redundancy between different courts. Milgaard tried to exploit this redundancy through civil litigation but this ultimately failed to result in his exoneration. Benjamin Berger has similarly stressed the importance of discretion in the system as exercised by prosecutors, juries and the executive as an important counterbalance to the criminal law that may be necessary to bridge the gap between criminal law and criminal justice.¹⁴⁹ Milgaard benefitted from the prosecutorial stay in the sense that he did not face a second prosecution, but it left him in a legal limbo of continued suspicion and stigma that might not have changed had the prosecutor under current reforms gave him the benefit of the not guilty verdict available in state law.

Wheat Kings speaks to the need for a more fundamental jurisdictional redundancy that embraces critical legal pluralism. Such critical legal pluralism can be informed and nurtured by alternative sources of meaning found in art, science, and the media, but its claims to make legal conclusions on issues such as guilt, innocence, and exoneration should not be ignored. Cultural actors such as the Hip have considerable influence when they declare someone to be innocent.

The ability of popular culture to engage on questions of innocence can fill gaps in the state legal system left by the legal system's reluctance to make formal declarations of innocence.¹⁵⁰ Even when state law attempts, as it did in the Milgaard reference, to occupy the space by making determinations of innocence, *Wheat Kings* provided an alternative and ultimately more persuasive verdict to that rendered by state law.

¹⁴⁷ Kleinhaus & Macdonald, *supra* note 15 at 309; Adams, *supra* note 139 at 48.

¹⁴⁸ Robert Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation" (1981) 22 Wm & Mary L Rev 639.

¹⁴⁹ Berger, *supra* note 38.

¹⁵⁰ Roach, "Exonerating the Wrongfully Convicted", *supra* note 133 at 78 ("Even without innocence hearings, exonerations do happen. Apologies get made...civil society and the media have their own processes of exoneration").

Conclusion

38 Years Old and *Wheat Kings* are two pieces of exceptional song writing that memorialize important incidents in Canadian criminal justice history. Those who escaped from Millhaven in 1972 and David Milgaard who was imprisoned for 23 years for a murder he did not commit and struggled even longer for exoneration all suffered greatly at the hands of the Canadian legal system. The Hip's songs will ensure that they are not forgotten.

The songs should be interpreted in their historical context to appreciate their full critical significance. *38 Years Old* takes on a different significance once the listener understands that prisoners such as Mike were beaten when Millhaven was opened and were forced to live in a violent prison "home". Similarly the Hip's 1992 declaration of David Milgaard's innocence in *Wheat Kings* can only be fully understood when compared to the Supreme Court of Canada's failure in the same year to find that Milgaard was innocent.

The Hip make no apology for being Canadian and they have been embraced as Canadian icons. At the same time, they reject any sense of Canadian supremacy or complacency. Rather they hold a mirror to us because they want Canada to do and be better. They remind us about what the Mikes and Milgaards, as well as Indigenous peoples, have resisted and endured. It is perhaps not surprising that a band from Kingston has reminded us of the humanity of those we imprison.

By effectively using the historical record and tight forceful prose, the two songs can be read as making a case for reform of Canadian criminal law. The case of Mike can serve as a hypothetical example that suggests that that Parliament should provide escape clauses from all mandatory sentences, including the mandatory sentence of life imprisonment for murder. *Wheat Kings* similarly can be interpreted as a basis for reforming Canadian criminal law to make it more attentive to questions of innocence and to allow wrongful convictions to be corrected without the need for intervention by "Our parent's Prime Ministers".¹⁵¹ There are strong arguments that these reforms are necessary and long overdue.

At the same time, the two brilliant songs can be interpreted as a reminder that state law, even reformed law, will not always have all the solutions and that popular culture provides an important alternative source of meaning that can temper and resist the conclusions of state law. Indeed, the songs themselves can be interpreted in a critical legal pluralist

¹⁵¹ *Wheat Kings*, *supra* note 78.

framework as a form of law. *38 Years Old* tells us that Mike's punishment is unjust, disproportionate, and harsh regardless of the conclusions of state law that he was guilty of murder. Similarly *Wheat Kings* tells us that David Milgaard was innocent of murder even when the Supreme Court said he was not.

The two songs should make us want to reform the Canadian criminal justice system by reforming mandatory sentences and the process of correcting wrongful convictions. On another level, however, the two songs remind us of the importance of looking outside of state law to resist the inevitable errors and harms that any legal system, even a reformed one, will impose. These are no small accomplishments, especially for two rock songs that last four minutes each. For this and many other reasons, we are in the debt of Gord Downie and the Tragically Hip.

The Importance of Knowing How a Person Became the Suspect in a Lineup: Multiple Eyewitness Identification Procedures Increase the Risk of Wrongful Conviction

R. C. L. LINDSAY,^{*} MICHELLE I. BERTRAND,^{**} AND ANDREW M. SMITH^{***}

ABSTRACT

The proportion of times that suspects in lineups are factually guilty can be referred to as the “base rate” of guilt. How a person came to be a suspect in a criminal investigation strongly impacts the base rate of culprit presence in identification procedures, yet this issue has received little consideration from either researchers or the criminal justice system. We argue that consideration of base rates is crucial. In cases where the culprit is not previously known to the witness, the base rate of culprit presence in any identification procedure may be low, and thus, the probability that an identified suspect is guilty should be questioned more than when the suspect was known to the witness prior to the crime. Using the existing body

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of literature, we (briefly) discuss (1) the role of eyewitness error in wrongful convictions, (2) the issue of base rates, (3) the dangers of using identification procedures such as showups or mug searches prior to a lineup procedure, (4) the likelihood that showups and mug searches will lead to high rates of police apprehending the actual criminal, and (5) how errors made at this stage are more likely when witnesses view multiple suspects prior to lineups. We conclude that identifications obtained in such situations should be treated with caution and require substantial independent evidence of guilt to justify conviction. Lastly, we provide practical considerations for those working within the criminal justice system.

Keywords: eyewitnesses, lineups, showups, mugshots, base rates, police, Crown, judges, wrongful convictions, probative value.

I. INTRODUCTION

The thesis we shall develop is that certain common, inevitable, and necessary police practices of generating suspects will lead to surprisingly low base rates of suspect guilt (i.e., the proportion of times that a suspect in a lineup is factually guilty) in eyewitness identification procedures¹ raising concern over the rate with which innocent suspects might be identified.² Critically, these suspect-generating practices that are likely associated with low base rates cannot be avoided and are likely necessary for many investigations. However, variations in how persons become suspects are associated with differences in the likely guilt of those persons, and thus knowing how a person became a suspect is

¹ In fact, in a recent field experiment involving eyewitnesses to real crimes under investigation by officers in the Robbery Division of the Houston Police Department, the statistically-predicted base rate of suspect guilt was 35%. In other words, only 35% of lineups included a guilty suspect and 65% included an innocent suspect. See John T Wixted et al, "Estimating the reliability of eyewitness identifications from police lineups" (2016) 113:2 Proceedings of the National Academy of Sciences of the United States of America 304.

² To be clear, the authors are psychologists, not lawyers. Prior experience indicates that lawyers often insist that guilt only exists after a court finding. We will use the terms guilt and guilty in the sense of "factual guilt"; i.e., whether or not the person in question actually committed the crime independent of whether or not a court ever rules regarding guilt or innocence.

important.³ We argue that, when assessing the likely guilt of an identified suspect, the Courts need to carefully consider how that person became a suspect in the first place and revise their guilt belief in light of this information. Finally, we also discuss how this low base rate problem is exacerbated by putting suspects identified from low reliability identification methods (e.g., showups and mugbook searches) in more ‘pristine’ identification procedures (e.g., lineups) and treating an identification from the more pristine procedure as independent and untainted evidence that the suspect is guilty.

Before addressing our primary thesis we very briefly outline the role of eyewitness error in the wrongful conviction of innocent persons. We then briefly outline the general status of eyewitness identification accuracy as reflected by psychological research. Extensive reviews of eyewitness identification issues in the literature can be found in the *Handbook of Eyewitness Psychology*⁴ and the more recent reflections of Chief Justice Rabner of the New Jersey Supreme Court.⁵ Despite the high volume of research in the area, we will limit our discussion to the specific studies relevant to our thesis.

³ A piece of evidence is probative to the extent that it makes a fact more or less probable than that fact would be without the piece of evidence (See *R v Watson*, 30 OR (3d) 161 at para 33, [1996] OJ No 2695). But, even if the evidence is probative, the probability that the suspect is the culprit may still be low. This results from the fact that the base rate of suspect guilt greatly constrains the probability that the suspect is guilty. For example, if an eyewitness identifies a suspect from an identification procedure, that identification is probative because it increases the probability that the suspect is the culprit. But, if the probability that the suspect was the culprit before the identification procedure was only 10%, that identification might only increase the probability that the suspect is guilty to 20% (there would still be an 80% chance that the suspect is innocent).

⁴ Michael P Toglia et al, eds, *The Handbook of Eyewitness Psychology: Volume I: Memory of Events* (Psychology Press, 2006); see also Roderick C L Lindsay et al, eds, *The Handbook of Eyewitness Psychology: Vol II Memory for People* (Mahwah, NJ: Erlbaum, 2007).

⁵ The Honorable Stuart Rabner, “Evaluating Eyewitness Identification Evidence in the 21st Century” (2012) 87:5 NYUL Rev 1249.

II. THE ROLE OF EYEWITNESS ERROR IN WRONGFUL CONVICTIONS

Exonerations occur when evidence not presented during the original trial or appellate process establishes the innocence of a previously convicted person. Although several types of evidence might be used to establish the innocence of a convicted person, two common antecedents to exoneration include the discovery of exonerating DNA-based evidence and the recantation of witness testimony.⁶

Eyewitness identification has never been presumed infallible – it has long been known that eyewitnesses can and do make mistakes.⁷ In the last 25 years, cases of exoneration have drawn attention to the fallibility of eyewitnesses. Of the first 1600 exonerations in the U.S. (DNA and non-DNA based), 34% involved a mistaken eyewitness identification.⁸ In Canada, eyewitness error was involved in 36.4% of the first 45 cases of exoneration⁹ (e.g., Thomas Sophonow, who was wrongfully convicted of the 1984 murder of Barbara Stoppel in Winnipeg, Manitoba¹⁰).

The problem with eyewitness identifications—at least from a wrongful conviction standpoint—is that such identifications are highly convincing evidence; i.e., they are believed by the triers of fact. Differentiating between correct and incorrect identifications based on witness testimony can be quite difficult.¹¹ Yet, eyewitness testimony is compelling. To illustrate the

⁶ The National Registry of Exonerations, *The First 1600 Exonerations* (2015), online: <https://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf> [The National Registry].

⁷ See e.g. Edwin M Borchard, *Convicting the Innocent: Errors of Criminal Justice* (New Haven: Yale University Press, 1932).

⁸ The National Registry, *supra* note 6.

⁹ Andrew M Smith & Brian L Cutler, “Introduction: Identification Procedures and Conviction of the Innocent” in Brian L Cutler, ed, *Reform of Eyewitness Identification Procedures* (Washington, DC: APA, 2013) 3.

¹⁰ See e.g. “Thomas Sophonow was wrongfully convicted in the death of 16-year-old Barbara Stoppel”, *CBC News* (12, October 2016), online: <<http://www.cbc.ca/news/canada/manitoba/thomas-sophonow-was-wrongfully-convicted-in-the-death-of-16-year-old-barbara-stoppel-1.3802001>>.

¹¹ Melissa Boyce, Jennifer L Beaudry, & Roderick C L Lindsay, “Belief of Eyewitness Identification Evidence” in Roderick C L Lindsay et al, eds, *The Handbook of Eyewitness Psychology: Vol II Memory for People* (Mahwah, NJ: Erlbaum, 2007) 179 [Boyce, Beaudry & Lindsay]; compare Kristy A. Martire & Richard I Kemp, “The Impact of Eyewitness

influence of eyewitness evidence, consider the findings of the Devlin Committee who examined 2116 lineups administered in England and Wales in 1973. In 169 cases, the only evidence against the accused was the testimony of a single eyewitness. In another 178 cases, multiple eyewitnesses identified the accused, but there was no additional evidence of guilt. It is crucial to note that in these combined 347 cases, 74.35% of accused persons were found guilty based solely on the identification evidence.¹²

We conclude that a problem of identification error leading to wrongful conviction is clearly established. We have deliberately kept this part of the discussion brief because few, if any, readers were likely to have doubted the accuracy of this conclusion.

III. BASE RATES AND WRONGFUL CONVICTIONS

While many factors that lead to eyewitness identification errors have been identified and studied (e.g., poor memory of the culprit, poor police procedure) we contend that the base rate of culprit presence in identification procedures is a crucial, yet often overlooked, factor.¹³ If the base rate is high (i.e., the identification procedure almost always contains the culprit), then selections of suspects most often will lead to convictions of guilty people. Conversely, if the base rate is low (i.e., the identification procedure rarely contains the culprit), selections of suspects will all too often lead to convictions of innocent people.

While there certainly exists an overall base rate for all identification procedures conducted—and this is a typical way to discuss the concept; as if

Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony” (2009) 33:3 Law & Hum Behav 225.

¹² See Table 1 of UK, *Report to The Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases*, Rt. Hon. Lord Devlin (London, England: Her Majesty’s Stationery Office, 1976) [Devlin]. Note that the author only provided the combined rate of convictions and did not separate out convictions based on single or multiple witnesses. Also, there is no way of knowing how many of the convictions were appropriate; however, the Devlin Commission was examining issues leading to wrongful conviction after several exonerations at the time.

¹³ See Gary L Wells, Yueran Yang, & Laura Smalarz, “Eyewitness Identification: Bayesian Information Gain, Base-Rate Effect Equivalency Curves, and Reasonable Suspicion” (2015) 39:2 Law & Hum Behav 99 [Wells, Yang & Smalarz], for one example of discussion regarding the importance of base rates.

there is one base rate—we argue that ‘base rate’ should be conceptualized not in the singular, but as ‘base rates,’ plural.¹⁴ Different identification procedures will have different base rates, and base rates for procedures will differ depending on how suspects are found.¹⁵ We discuss how base rates are likely to vary among identification procedures and consider how this variation in base rates is likely to impact the reliability of eyewitness testimony.

IV. BACKGROUND ON EYEWITNESS IDENTIFICATION PROCEDURES

Witnesses provide crucial information that helps police to find culprits of crimes. Verbal descriptions of the crime (e.g., location, sequence of events) and culprit (e.g., what they looked like, what was said, what they were wearing) are important sources of information, and suspects are found, at least in part, based on descriptions. However, verbal descriptions provide limited information, and descriptions of a culprit’s appearance are rarely detailed or distinctive enough to conclusively distinguish among individuals.¹⁶ Further, witnesses often describe features that can easily be altered, such as clothing and accessories.¹⁷

Because it is limiting to rely solely on verbal descriptions, police will frequently employ a variety of visual recognition-based identification techniques to aid in identifying culprits. When administering an identification technique, police will present witnesses with one or more

¹⁴ *Ibid.* In Wells, Yang & Smalarz, one of their main points is that base rates vary dramatically from jurisdiction to jurisdiction, division to division, and even officer to officer. In this paper we address systematic variance as it relates to the different base rates associated with different identification/investigative procedures.

¹⁵ Certainly, different crimes will have different base rates as well but this will not be of concern for the current discussion.

¹⁶ See e.g. Lowell Kuehn, “Looking Down a Gun Barrel: Person Perception and Violent Crime” (1974) 39:3 *Perceptual & Motor Skills* 1158; Christian Meissner, Sigfried Sporer & Jonathan Schooler, “Person Descriptions as Eyewitness Evidence” in Roderick C L Lindsay et al, eds, *The Handbook of Eyewitness Psychology: Vol II Memory for People* (Mahwah, NJ: Erlbaum, 2007) 3.

¹⁷ See e.g. Joanna D Pozzulo et al, “The Relationship Between Recalling a Person and Recognizing That Person” (2009) 27 *American J of Forensic Psychology* 19.

individuals, either in person or via photo or video, and ask the witness to indicate whether (one of) the individual(s) presented is the culprit.¹⁸

There are three common identification procedures that we will review in the present paper: lineups, showups, and mug-book searches. Police use lineups and showups to test their hypothesis that a given suspect perpetrated some crime. With over 600 published papers on the topic in the psychological literature, the most widely studied identification procedure is the lineup, a procedure in which a suspect is embedded amongst some number of known-innocent persons, called fillers. Unlike a lineup, a showup does not include fillers. Rather, showups involve presenting a lone suspect to the eyewitness for an identification attempt. In both procedures, the correct decision when a suspect is guilty is to identify that person. Rejecting an identification procedure when the suspect is guilty is an error. When the suspect is not guilty, the correct decision is to reject the identification procedure (indicate that the culprit is “not there”). Identifying the suspect from an identification procedure when that person is innocent is an error. In a lineup an eyewitness can also err by identifying a known-innocent filler.¹⁹ It is well documented that lineups produce better applied outcomes than showups. Indeed, lineups decrease innocent suspect identifications with little or no loss in culprit identifications.²⁰ Lineups

¹⁸ Our discussion is not dependent on whether identification procedures are conducted with photos, videos, or live persons, so we do not further distinguish among these media.

¹⁹ Known-innocent filler identifications are not as dangerous as innocent suspect identifications because these known-innocent persons are not at risk of arrest and conviction (police knew they were innocent before the lineup procedure). Yet, filler identifications are still extremely costly in that they impeach eyewitnesses who might have been useful later in the case if police found the actual culprit. See Gary Wells, Nancy Steblay & Jennifer Dysart, “Eyewitness Identification Reforms: Are Suggestiveness-Induced Hits and Guesses True Hits?” (2012) 7 *Perspectives on Psychological Science* 264.

²⁰ Lineups decrease innocent suspect identifications without (or with only a minimal) decreasing culprit identifications. See Nancy Steblay et al, “Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison” (2003) 27:5 *Law & Hum Behav* 523 [Steblay]; see also Steven Clark, “Costs and Benefits of Eyewitness Identification Reform: Psychological Science and Public Policy” (2012) 7:3 *Perspectives on Psychological Science* 238. Gary L Wells, Laura Smalarz & Andrew Smith, “ROC analysis of lineups does not measure underlying discriminability and has limited value” (2015) 4:4 *J of Applied Research in Memory & Cognition* 313.

produce better applied outcomes than showups, because fillers draw (or “siphon”) many false-positive responses away from the innocent suspect, but fewer true-positive responses away from the guilty suspect.²¹

Despite the fact that showups are less reliable than lineups, it is not the case that showups can simply be disavowed. Showups are generally used in situations in which lineups are not feasible, such as when police locate an individual near the scene of the crime in both time and space but lack probable cause for arrest. So, while policy recommendations in both Canada and the United States suggest restricting the use of showup procedures,²² both countries allow for the use of showups in exigent circumstances. Indeed, in a recent survey of U.S. police departments, 37.1% had recommendations that their officers not conduct showups after a certain amount of time (the mean amount of time recommended was 2.3 hours²³), and the Canadian best-practice recommendation is that “[s]howups should only be used in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event”.²⁴ How often do police officers encounter the exigent circumstances that justify the use of showups? Some research suggests that showups represent 30%²⁵ to almost 80%²⁶ of all identification procedures.

A mug-book search presents large numbers of photos of previously arrested people to the witness hoping that the culprit is in the set of photos and will be recognized by the witness. Mug-book searches tend to be used under different circumstances than lineups or showups. Police tend to use

²² US Department of Justice, Office of Justice Programs, & National Institute of Justice. *Eyewitness Evidence: A Guide for Law Enforcement* (Washington, DC: 1999), online <<http://www.nij.gov/pubs-sum/178240.htm>>; Canada, FPT Heads of Prosecutions Committee, *The Path to Justice: Preventing Wrongful Convictions* (2011) at 57: online <<http://www.ppsc-sppc.gc.ca/eng/pub/ptj-spj/ptj-spj-eng.pdf>>[Prosecutions Committee].

²³ US, Police Executive Research Forum, *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies* (Washington, DC: 2013) at 58.

²⁴ Prosecutions Committee, *supra* note 22.

²⁵ Dawn McQuiston & Roy Malpass, *Eyewitness identifications in criminal cases: An archival study* (2001) [unpublished, paper presented at the fourth biennial meeting of the Society for Applied Research in Memory and Cognition, Kingston, Ontario, Canada] [McQuiston & Malpass].

²⁶ Robert Gonzalez, Phoebe Ellsworth & Maceo Pembroke, “Response Biases in Lineups and Showups” (1993) 64:4 *J of Personality & Social Psychology* 525.

mug-book searches when they have not yet narrowed in on a given suspect. Given the large number of photos available, the presence of innocent individuals who resemble the true culprit is likely in many—perhaps most—cases. The literature concerning mug-book searches is smaller than that for lineups or showups but clearly reflects a high risk of false identification with most witnesses unable to resist identifying someone as the number of photos examined increases. For example, Lindsay and colleagues found that approximately 95% of witnesses to a mock crime incorrectly identified at least one innocent person from a set of several hundred photos.²⁷ Many selected more than one person with the overall ratio being approximately 8 innocent selections for each selection of the actual “criminal”.²⁸

No matter the identification procedure, it is clear that identifying the culprit is only possible if the culprit is present in the identification procedure shown to the witness(es). If the culprit is not present, then a suspect identification is a false identification and an innocent person is at risk of arrest and wrongful conviction. The probability that a particular suspect is the culprit prior to an identification procedure is referred to as the *prior probability*²⁹ and the overall proportion of the time that suspects in lineups are the culprits can be referred to as the *base rate* of suspect guilt. If an eyewitness identifies a suspect, police and courts generally believe that this suggests that the suspect was guilty. There is no doubt that when an eyewitness identifies a suspect, this increases the *posterior probability* that the suspect is the culprit (i.e., the probability that a suspect is guilty after an identification procedure). But, whether police officers and the courts should infer from an identification that the suspect is guilty depends, in part, on how that individual became a suspect in the first place.

²⁷ See Roderick C L Lindsay et al, “Using Mug Shots to Find Suspects” (1994) 79:1 J of Applied Psychology 121.

²⁸ *Ibid.*

²⁹ Mathematically, prior probability can range from 0 (*a priori* certainty that the suspect is innocent) to 1 (*a priori* certainty that the suspect is guilty). Prior probabilities near zero are unlikely because the person is unlikely to be a suspect. Prior probabilities near one could occur due to evidence such as DNA. See e.g, Gary L Wells & Roderick C. L. Lindsay, “On Estimating the Diagnosticity of Eyewitness Nonidentifications” (1980) 88:3 Psychological Bulletin 776; see also Andrew M Smith, Roderick C L Lindsay & Gary L Wells, “A Bayesian Analysis on the (Dis)Utility of Iterative-Showup Procedures: The Moderating Impact of Prior Probabilities” (2016) 40:5 Law & Hum Behav 503.

V. THERE IS VALUE IN KNOWING HOW SOMEONE BECAME A SUSPECT

The literature on lineups has generally focused on which factors influence witness accuracy at the time an identification is made.³⁰ The focus of this paper, however, is regarding critical points missing from most discussions of eyewitness identification accuracy: How does a suspect come to be in the lineup in the first place? How does the way in which a suspect came to be in the lineup impact base rates? And, how do base rates impact the posterior probability that an identified suspect is guilty? We will argue that a failure to consider the impact of each of these factors contribute to miscarriages of justice that are due to mistaken eyewitness identification.

The base rate of culprit presence in identification procedures is obviously important. If for every 100 lineups, 90 contained the culprit, most suspects identified would be the true culprits. Conversely, if for every 100 lineups, only 10 contained the culprit, suspect selections often may not be the true culprits. Knowledge of factors that influence the base rate of suspect guilt are critical to the evaluation of identification evidence by police and the courts.³¹ Consideration of such factors will permit police and the courts to evaluate the strength of identification evidence more accurately and potentially influence subsequent decisions. Police or the Crown may decide that additional evidence is required before charging a suspect. Defense attorneys may seek to have identification evidence excluded due to a high risk of false identification. Judges may accept such defense arguments if the identification evidence is deemed unreasonably dubious.

³⁰ For an exception to this general statement, see Gary L Wells, Yueran Yang & Laura Smalarz, "Eyewitness Identification: Bayesian Information Gain, Base-Rate Effect-Equivalency Curves, and Reasonable Suspicion (2015) 39:2 Law & Hum Behav 99.

³¹ Even in the case that suspect identifications are extremely diagnostic, the posterior probability that an identified suspect is guilty is greatly constrained by the prior probability that the suspect is the culprit. For example, assume that under some set of conditions, the suspect is identified 90% of the time when guilty and only 10% of the time when innocent. In this instance, suspect identifications are extremely diagnostic of guilt (far more diagnostic than what is typically observed in the lab). And yet, if only 10 out of 100 lineups leading to suspect identification contain the guilty suspect, there will be 9 correct identifications (90% of 10) and 9 false identifications (10% of 90) leading to only a 50% chance that a suspect who is identified is guilty. When the base rate is low, identification evidence will always be dangerous!

VI. WHY IS KNOWING HOW AN INDIVIDUAL BECAME A SUSPECT IMPORTANT?

Consider two hypothetical situations, N and U. In situation N (named suspect), an eyewitness tells law enforcement that she has known the man who committed a crime for about 10 years, but she only knows him as “Chaz.” Police are familiar with a man named Chester Brown who is called Chaz and frequents the eyewitness’ neighbourhood. They decide to conduct an identification procedure to confirm that they have the right “Chaz.” They place a photo of Chester Brown within an array of photos of similar-looking men and ask the eyewitness to indicate whether or not any of the men is the culprit. In this instance there is a reasonably high probability that this photo array contains the actual culprit because the eyewitness was able to name the culprit and steer police in a clear direction.³²

Compare this to situation U (unnamed suspect), where an eyewitness tells police that her assailant—who is not known to her—shoved her over and stole her purse. The eyewitness describes her assailant as a white male with brown hair and of average height and weight. Shortly after the crime occurs, police find an individual fitting this description near the scene and decide to present the suspect to the eyewitness immediately for an identification attempt (showup). In this instance, law enforcement personnel have come to suspect an individual based on his fit to the very general description provided by the eyewitness and his presence near the scene of the crime, both factors that could easily be attributable to chance rather than to the fact that the suspect is the culprit. The (prior) probability that the suspect is the culprit is much higher in situation N than in situation U; i.e., before the identification procedure, the suspect in situation N is more likely to be guilty than is the suspect in situation U. Thus, how an individual came to be a suspect provides insight into the likely guilt of that person and therefore has probative value.

³² Additional and frequently occurring factors that can lead to named suspects include forensic evidence such as fingerprints and DNA, informants, unusual characteristics of crimes associated with previous occurrences (the cliché M.O.), etc. In some cases prior knowledge of the criminal may be so clear as to preclude the need for identification procedures (e.g., spousal abuse). “N” cases are expected to be more likely than “U” cases to lead to confessions, plea bargains, etc. and less likely to lead to identification procedures.

Situations N and U – and hence the base rate of culprit presence – are directly related to the visual identification techniques used by police officers: lineups, showups, and mug shots. Lineups involve presenting a suspect and some number of known-innocent fillers to the eyewitness. Hence, to conduct a lineup, one must first have a suspect. This makes lineups the likely identification procedure for cases in which police officers already have a suspect (such as in situation N or other circumstances for which the evidence prior to the identification procedure is highly suggestive of guilt). As mentioned earlier, showups tend to be used when law enforcement personnel locate a suspect near the scene of the crime, shortly after it occurred.³³ Match-to-a-general description and mere proximity to a crime scene are not probable cause for arrest, but are cause for a brief investigatory detention.³⁴ The brevity of an investigatory detention influences how an identification procedure must be conducted as there will likely be insufficient time to construct and administer a proper lineup procedure.³⁵ Because showups can be conducted much more rapidly than lineups, they appear to fill a gap in criminal investigations in that they can be used in contexts in which lineups are not feasible. Given this context in which showups are used (viz. when police lack the probable cause required to make an arrest and carry out a lineup or when a suspect was not named by an eyewitness), we think it is quite logical to infer that showups would also tend to be associated with lower rates of suspect guilt than are lineup procedures. Moreover, given that mug-book searches tend to be used when police have few (if any) leads and have not narrowed in on a particular suspect, we find it quite likely that a given individual in a mug-book would be even less likely to be guilty than a suspect in a showup procedure. Hence, both how an individual came to be a suspect and the first identification procedure used by police are informative of the likely guilt of the suspect.

³³ Showups also may be used long after a crime when police have few leads and insufficient evidence to justify conducting a lineup. Suspects may be “run by” the witness just to see if further investigation of the individual is justified. See Steblay, *supra* note 20.

³⁴ *R v Mann*, 2004 SCC 52, [2004] 3 SCR 59 [Mann].

³⁵ Miko Wilford & Gary Wells, “Eyewitness System Variables” in Brian L Cutler, ed, *Reform of Eyewitness Identification Procedures* (Washington, DC: American Psychological Association, 2013) 23.

VII. BASE RATES IN LINEUPS

An obvious question at this point is: how can the base rate be established? This is important information, but because the ground truth of a suspect's guilt or innocence cannot be determined with absolute certainty, establishing an exact base rate is not possible. Theoretically, the base rate could be 100% with all lineups containing the actual culprit, though in practice, this is clearly not the case. Yet there are a few approaches that may provide a rough idea as to whether the base rate would be high, low, or somewhere in between.

One of these approaches is to determine the maximum base rate possible for lineups. The maximum base rate can be established simply by looking at the number of lineups—each containing a different suspect—that are administered in a case. We discuss the issues assuming each case involves only a single culprit, though the logic extends to cases involving multiple culprits as well.

Many people think that investigations follow a fairly linear pattern: police follow leads, find a suspect, conduct a lineup, get an identification, and the case goes to court. Certainly this happens. However, it may also happen that police find a suspect and conduct an identification procedure, but the evidence leads them to conclude that they have the wrong person; e.g., an identification is not made, the suspect has an alibi, there is a lack of physical evidence, etc. Of course, the police do not stop investigating just because their first (or second, or third, etc.) suspect turned out to be innocent. They seek another suspect—as they should—and the process may repeat itself, with the new suspect being placed in an identification procedure and shown to the same witness.

However, in such cases, every time police present a new lineup with a new suspect to a witness for identification, the maximum possible base-rate of culprit presence in the lineups for that case decreases. In situation U that we described earlier, where a woman's purse was stolen by a single culprit, if she was shown two different lineups that each contain a different suspect, the maximum culprit-present base rate possible for that case is 50%. That is, if only one culprit committed the crime but the witness views two lineups that each contain a different suspect, one of these suspects must be innocent (though it is also possible that both are). Therefore, for a single-culprit crime, the maximum base rate is $1/n$, where n represents the number of lineups (or other ID procedures) conducted in the case, each with a different

suspect. As such, knowing how many lineups, each with a different suspect, officers showed to witnesses in a particular case allows for calculation of the maximum possible base rate for that case. Combining this information across many officers and many cases allows for calculation of the maximum culprit-present base rate for a particular sample. Of course, it would be useful to know how often police use multiple identification procedures when searching for a single culprit.

A survey of 117 Canadian police officers who conducted lineups between 2009 and 2012 was used to estimate the maximum culprit-present base rate in the sample.³⁶ Officers were asked 1) how many lineups they had administered in the 12 months preceding the survey, and 2) to indicate the largest number of separate lineups, each with a different suspect, they had shown to a single witness for a single-culprit crime. Regarding the first question, the officers in the sample conducted a total of 803 lineups. Regarding the second question, forty-nine of the 117 officers in the survey (41.9%) had, on at least one occasion in the previous 12 months, shown a witness more than one lineup, each with a different suspect. Breaking this down by the maximum number of suspects officers presented to the same eyewitness, 58.1% of officers had only ever shown 1 lineup to a witness, 20.5% of officers reported a maximum of 2, 12.0% reported 3, 3.4% reported 4, 2.6% reported 5, 1.0% reported 6, and 3.4% reported 10. The data showed that officers do not generally go beyond two or three lineups, but that would put the maximum base rate for such cases at 50% and 33.3% (respectively). Moreover, 10.4% of officers reported using 4 or more lineups with the same eyewitness; in other words, these eyewitnesses were given at least three opportunities to identify an innocent suspect and some were given as many as nine or even 10 opportunities to identify an innocent suspect.

This type of information can provide important context in an individual case. For example, suppose a defence lawyer queries how many different suspects and lineups were shown to a witness before their client was identified, and they find out that the witness was shown 10 lineups, each with a different suspect, and their client was identified from the tenth. This would lead to the point that the maximum base rate for that case was 10% and they could ask many relevant questions, e.g., How did police come

³⁶ Michelle I Bertrand, *A Survey of Police Eyewitness Identification Procedures* (Doctoral Dissertation, Queen's University, 2014) [unpublished] [Bertrand]. Data from American officers also was collected and produced similar patterns and conclusions.

to suspect their client after the first nine non-identifications? Was there other evidence pointing to the guilt of any of the other nine? What evidence other than the identification points to their client's guilt?

Employing the logic described above, where maximum base rate is equal to $1/n$, and where n represents the number of lineups, Bertrand³⁷ calculated that 108 out of the 803 lineups conducted by the officers in the sample necessarily had to be absent the culprit. Therefore, at most, 695 of the 803 lineups could have contained the culprit, resulting in a maximum culprit-present base rate of 86.6%.³⁸ However, we want to make it clear in no uncertain terms that this number does not, and cannot, equal the actual base rate. Aside from a multitude of other factors that can decrease the base rate (e.g., the number of these cases in which witnesses viewed showups with different suspects before the lineups, that used mugbook searches, where there were multiple suspects but police leaned more towards a given suspect who was identified from the first procedure), the calculation relies on the faulty assumption that the guilty party had to have been in one of the lineups. The assumption of perfect police accuracy cannot be true (evidenced by wrongful convictions based on identification errors), so the actual base rate has to be somewhat lower. The base rate in this sample drops quite quickly as soon as the assumptions are adjusted downward in some manner. For example, let the assumption be that there is an 80% chance that one of the suspects in a police investigation is the culprit. This still weighs in favour of police accuracy, yet would drop the maximum culprit-present base rate to 69.3%. In a recent field experiment comparing different lineup procedures in the field, John Wixted and colleagues estimated that only 35% of lineups included the culprit.³⁹ If there were only a 35% chance that one of the suspects in a police investigation is the culprit, this figure would drop the maximum culprit-present base rate to 30.3% in Bertrand's sample!⁴⁰

³⁷ *Ibid.*

³⁸ *Ibid.* Officers were asked both how many lineups they had administered in the preceding 12 months, and what was the maximum number of lineups they had administered, each with a different suspect, in a case with a single culprit (within the same time frame).

³⁹ *Supra* note 1.

⁴⁰ Clearly this entire section requires numerous assumptions that need not be correct or precise. The point is simply that many factors will lead to low base rates of suspect guilt and one is the presence of more suspects than culprits in the identification procedures

VIII. HOW ARE SUSPECTS FOR LINEUPS FOUND?

The discussion of base rates in lineups leads to a critical question that has received little attention to date: how did the suspect end up in the lineup in the first place, and what is the *a priori* likelihood that the suspect in a lineup is guilty? That is, are the ways in which police find suspects likely to lead them to find guilty suspects or innocent ones?

Police find suspects in a multitude of ways. Sometimes information from witnesses, informants, and/or forensics points to a specific person. Or, a culprit whose image is captured on Closed-Circuit Television (CCTV) may be recognized by police, parole officers, prison case-workers, or the general public.⁴¹ From a police point of view, regardless of how the name comes up, it is relatively easy to go from the name to the lineup. These methods result in determining named suspects and appear to be associated with a desirable situation in that there is a reasonable suspicion that the suspect is the culprit.⁴²

But what happens if there is no information pointing to a specific person? How do police find suspects for lineups in the absence of any information specific to individuals (other than descriptions)? One manner in which law enforcement might come to suspect an individual is if the individual matches the description of the culprit and is near the scene of the crime shortly after its occurrence. Under such conditions, they might use a showup. We now turn our discussion to showups and their impact on base rates.

employed in a case. This particular factor is of interest because it can be established within a given case by questioning witnesses and police regarding the repeated presentation of identification procedures to witnesses.

⁴¹ In situations like these where a suspect is named, there is less danger of an innocent suspect identification from the lineup. Rather, the danger of an innocent suspect identification occurs at the time of perception. For example, if the witness thinks the culprit they are viewing is their neighbour but because of a combination of bad lighting, distance from the culprit, expectancies, etc., the culprit is not actually their neighbor, this could lead to a mistaken identification despite prior knowledge of the suspect. Similarly, if a police officer looks at CCTV footage and mistakenly names an individual with whom they have had previous contact, this also could lead to mistaken identification and wrongful conviction. Thus, situation N is not immune from identification error, just less likely to lead to such errors.

⁴² Wells, Yang & Smalarz, *supra* note 13.

IX. SHOWUPS

When law enforcement personnel locate an individual fitting the general description of the culprit near the scene of the crime in both time and space, this is not probable cause for arrest⁴³ – but it might be cause for including the suspect in a showup procedure (presenting only the suspect to the eyewitness for an identification attempt). An identification from a showup would likely give probable cause for an arrest. Showups fill a void in the criminal justice system because they can be used very efficiently in the field in instances in which law enforcement personnel would not be able to construct a proper lineup.⁴⁴ Without being able to use a showup procedure, police would be forced to release potentially guilty suspects back into the community. Showups are an important investigative tool but they are more likely to lead to innocent suspect identifications and produce less reliable evidence than lineups.⁴⁵

X. HOW DO POLICE RESPOND TO SHOWUP DECISION-MAKING?

If the eyewitness identifies the person shown, police will follow some continuation that could include further investigation, appearance in lineups, arrest, charges, etc. This is a completely reasonable and expected course of action.

But how do police respond if the witness does not identify the suspect? One possibility is that they search for another suspect. Similar to why police may show a witness more than one lineup, they cannot abandon the investigation just because the evidence suggests that the first suspect was innocent. For example, consider the sexual assault case of *Neil v Biggers* that went all the way to the United States Supreme Court. In this case, Neil identified Biggers as her assailant from a showup approximately 7 months after being victimized.⁴⁶ Over that 7-month period, Neil was presented with numerous lineups and showups, and 30 to 40 photographs of suspects (maximum base rate of 3.33% [30 suspects] to 2.5% [40 suspects]). It seems

⁴³ *Mann*, *supra* note 34; *Washington v Lambert*, 98 F (3d) 1181 (9th Cir, 1996).

⁴⁴ *Supra* note 19.

⁴⁵ Nancy Steblay et al, “Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison” (2003) 27:5 *Law & Hum Behav* 523.

⁴⁶ *Neil v Biggers*, 409 US 188, 93 S Ct 375 (1972) [*Neil*].

reasonable to assume that on some occasions police will use multiple identification procedures if eyewitnesses reject suspects. Indeed, as previously mentioned, over half of the officers in one survey sample had shown a witness two or more lineups, each with a different suspect, for a single-culprit crime on at least one occasion in the 12 months preceding the survey.⁴⁷

Repeated showup (or other) procedures can be seen as an iterative loop: police find a suspect, present the suspect in a showup (or lineup), and if an identification is obtained, stop presenting showups. If an identification is not obtained, police loop back to the first step—find a suspect, conduct a showup (or lineup)—and continue the process of finding suspects and running identification procedures until they get an identification (at which point they investigate the identified suspect further). Of course, they may stop because they run out of suspects but as in the *Neil v Biggers* case⁴⁸ there is no reason to believe that additional suspects will not be presented later. Smith et al⁴⁹ provided data on showup usage (from the aforementioned police survey by Bertrand⁵⁰) which established that Canadian officers use multiple showups,⁵¹ with most reporting using a maximum of two showups in an individual case. Note that the fact that a given officer presented no more than two showups to a given witness in a case does not preclude the possibility that other officers presented other showups with different suspects to the same witness.

⁴⁷ Bertrand, *supra* note 36.

⁴⁸ *Neil*, *supra* note 46.

⁴⁹ Andrew M Smith et al, “The Impact of Multiple Show-Ups on Eyewitness Decision-Making and Innocence Risk” (2014) 20:3 J of Experimental Psychology: Applied 247 [Smith et al].

⁵⁰ Bertrand, *supra* note 36.

⁵¹ Note that because of the small number of Canadian officers we do not make definitive claims regarding Canadian procedure. However, data was also collected from American officers and demonstrated they used multiple showups as well. Most reported using a maximum of 2 (54%) or 3 (24%) showups in an individual case, 12% reported a maximum of 4 – 6 showups, and 7% reported a maximum of more than 7 showups, with the highest being 100 showups in a single-culprit case. It is unclear whether American officers simply use showups more than Canadian officers or if the small sample missed Canadian officers who repeatedly use showups at a rate similar to American officers.

XI. WHAT IS THE IMPACT OF REPEATED SHOWUPS ON ACCURACY AND BASE RATES?

The aforementioned paper by Smith et al examined questions regarding the potential impact of repeated showups.⁵² After establishing via the survey data that officers did use multiple showups in practice, Smith et al experimentally examined the impact of repeated showups on correct and false identification rates. The data showed that if the culprit was in the first showup, most participants correctly identified the culprit, but when the culprit was absent, large proportions of participants identified the innocent suspect. Exacerbating the already high innocent-suspect identification rate, innocent suspect identifications cumulated with each additional showup, while culprit identifications steadily decreased.

All individuals presented in showups are suspects, so any identification that is not of the culprit is going to be an innocent-suspect identification (i.e., unlike a lineup, it cannot be a filler identification). False identifications of innocent suspects occurred frequently for the first showup in Smith et al's study.⁵³ The problem with iterative-showup procedures is that the probability of an innocent-suspect identification cumulates with each additional showup. For example, if there is a 30% chance of an innocent suspect identification on the first showup and a 15% chance of an innocent-suspect identification on the second showup, then the total risk of an innocent-suspect identification is 45% across two showups when neither included the culprit. Making matters worse, culprit identifications do not cumulate with the use of additional showups, because there is only one culprit. Even a sequence of two showups resulted in more false than correct identifications in these studies.⁵⁴ In Smith et al, if the sequence reached as many as 6 showups false identifications were approximately nine times as likely as correct identifications.⁵⁵ Yet it was rare for participants to see that many showups as most would make a selection prior to that point. Indeed, the reason officers may rarely exceed two or three showups is that witnesses

⁵² Smith et al, *supra* note 49.

⁵³ *Ibid.*

⁵⁴ *Ibid.* Alternative analyses included in the Smith paper lead to the conclusion that two showups can produce equal rates of correct and false identifications. But all analyses indicate that accuracy, as indicated by the proportion of identifications that are correct, declines with the number of showups a witness is exposed to.

⁵⁵ *Ibid.*

often will have made an identification, correctly or incorrectly, by the time they have seen three showups.

XII. MUGSHOTS

If the evidence in a case does not point to a specific person, and if showups cannot be used because no one fitting the culprit's description is found near the scene of the crime (or all showups are rejected), police may turn to another visual identification technique to find a suspect: mugshots. Mugshots are photos the police have on file of people who were previously arrested. Police may ask a witness to look through a mugbook (collection of mugshots either as pictures in albums or more commonly now on computers) to see if they recognize anyone in the mugbook as the culprit. If the culprit has been arrested before, their picture may be on file, and perhaps the witness will recognize the culprit from the mugshot. An English field study reported that in 11.2% of offences, there was at least one mugbook viewing for witnesses and that the accused robbers were more than three times as likely to have been selected from a mugbook first rather than directly from a lineup.⁵⁶

If the witness identifies someone from a mugbook, the identified individual is a viable suspect and the witness who selected the suspect (and/or other witnesses) may later be asked to view a lineup containing the suspect. But, the same question we posed earlier regarding showups applies here: what is the likelihood that someone selected from a mugbook is going to be the culprit?

Research has demonstrated that if a culprit is in a mugbook (a presumption that may not be true), and if the culprit is in a relatively early position (such that the witness does not have to wade through too many pictures of others before encountering the culprit's picture), then witnesses are often able to identify the culprit.⁵⁷ On the other hand, few people are able to resist choosing from mug books, probably because such large collections of photos will normally include many persons who resemble the

⁵⁶ Josh P Davis et al, "Identification on the Street: A Field Comparison of Police Street Identifications and Video Line-ups in England" (2015) 21:1 *Psychology, Crime & Law* 9 [Davis et al].

⁵⁷ Roderick C L Lindsay et al, "Using Mug Shots to Find Suspects" (1994) 79:1 *J of Applied Psychology* 121 [Lindsay, "Mug Shots"].

culprit. For example, Stewart and McAllister found that about 35% of people correctly identified a culprit from a staged crime out of 216 mugshots, but on average, participants selected approximately two innocent people as well.⁵⁸ Lindsay et al found that less than 5% of their sample were able to examine a set of 727 photos without making at least one false identification and most made multiple false selections.⁵⁹ Given that laboratory photo collections (maximum about 1200) contain dramatically fewer photos than real world mugshot collections (many thousands in large cities and over 1.5 million in at least one set that the authors are aware of), it is likely that the research both overestimates correct identification rates and underestimates false identification rates from mugshots.⁶⁰ Also keep in mind that, as with showups, all people selected from mugshots are suspects. Unlike lineups, there are no fillers in mugbooks.

XIII. REPEATED IDENTIFICATIONS OF THE SAME SUSPECT BY THE SAME EYEWITNESS

An important point to keep in mind is that identification procedures are not used in exclusion of each other—oftentimes they are used in conjunction with each other. Below, we outline the effect on the accuracy of eyewitness decisions of using multiple identification procedures with the same witnesses.

Showups, mugbooks, and lineups can be used in a single case, sometimes multiple times, and too often with the same witnesses. For example, if a suspect is identified from a showup, police may later show a lineup that contains the suspect to one or more witnesses including the

⁵⁸ Heather A Stewart & Hunter A McAllister, “One-at-a-Time Versus Grouped Presentation of Mug Book Pictures: Some Surprising Results” (2001) 86:6 J of Applied Psychology 1300.

⁵⁹ Lindsay, “Mug Shots”, *supra* note 57.

⁶⁰ Research indicates that sorting mugshots can increase the chances that a culprit’s photo will appear much earlier than would occur using random searching. However, none of the systems tested to date will consistently reduce the number of photos to be examined sufficiently to eliminate high rates of false positive choices from extremely large sets of photos. Also, sorting creates a homogenous pool all resembling the culprit. This will generate numerous false identifications even if smaller numbers of photos are examined (*supra* note 57). Furthermore, sorting techniques can eliminate the culprit if, for example, there is a serious error in the description provided by the witness.

witness(es) who identified the suspect from the showup. Data from the previously mentioned English field study supports this assertion and paints an even more unsettling picture regarding the probative value of visual identification techniques.⁶¹ The authors examined 696 robbery cases, which are perhaps the epitome of stranger identification crimes. The data indicated that lineups rarely were the first identification procedure used. Initial identifications were made 6.67 times more often from showups than lineups and 3.29 times more often from mugshots than lineups, though a lineup was frequently conducted after a showup or mugshot identification. When this was done, 84% of witnesses repeated their identification, i.e., they identified the same person from both the showup or mugshot and lineup. What we do not know from the Davis et al research is whether the showups reported were the first showups the witness saw; all we know is that more than 60% of the suspects arrested were first identified from showups (and many others from mugbooks).⁶² However, taken in conjunction with the survey data reported in Smith et al, it is almost certain that some proportion of these showups were not the first ones witnesses saw.⁶³

Obviously, it is reasonable to assume some proportion of these identifications were correct, but if a false identification is made from a showup or mugshot, will the same witness later shown the same suspect in a lineup be likely to identify that same person regardless of whether or not the suspect is guilty?⁶⁴ Experimental studies support the pattern that once witnesses have identified a person from one procedure, they often repeat the identification from subsequent procedures even when the initial identification was mistaken. For example, across two studies Dysart et al exposed participants to a staged crime followed by a mugbook search and then by a lineup.⁶⁵ The culprit was not included in the mugbook. Correct

⁶¹ Davis et al, *supra* note 56.

⁶² *Ibid.*

⁶³ Smith et al, *supra* note 49.

⁶⁴ See e.g. Tim Valentine et al, "Live Showups and Their Influence on a Subsequent Video Line-up" (2012) 26:1 Applied Cognitive Psychology 1.

⁶⁵ Jennifer E Dysart et al, "Mug Shot Exposure Prior to Lineup Identification: Interference, Transference, and Commitment Effects" (2001) 86:6 J of Applied Psychology 1280; see e.g. John C Brigham & Donna L Cairns, "The Effect of Mugshot Inspections on Eyewitness Identification Accuracy" (1988) 18:16 J of Applied Social Psychology 1394.

identifications (selections of the culprit when present in the lineup) were made by 64% of participants. When the culprit was absent and not previously seen person was in the lineup, 20% of participants falsely identified a lineup member. However, when an innocent person was selected from the mugbook and was included in the subsequent lineup, 61% of participants identified the innocent suspect from the lineup.

In some instances, witnesses are shown multiple lineups—with the same suspect—during the course of an investigation. Sometimes the lineups are presented via different media, such as via a photo lineup and later followed by a live lineup. This is common procedure in New York,⁶⁶ and occurred in the well-known North Carolina wrongful conviction of Ronald Cotton in which Jennifer Thompson was a witness.⁶⁷ However, research shows that, as happened in the Cotton case where Thompson identified him from both a photo and live lineup (and then later in court), if a witness incorrectly identifies an individual from a first lineup, they are likely to make the same mistaken identification from a second lineup rather than ‘correct’ the error at the second lineup.⁶⁸ Hinz and Pezdek also demonstrated that exposure to an innocent suspect face in a first lineup increased the chances the innocent person would be identified from the second lineup, even if they had not been identified in the first.⁶⁹

⁶⁶ Al Baker & Joseph Goldstein, “New Jersey Ruling on Witnesses May Prod New York to Change”, *The New York Times* (26 August 2011) online: <<http://www.nytimes.com/2011/08/27/nyregion/new-jersey-ruling-on-witnesses-may-prod-new-york-to-change.html>>.

⁶⁷ Frontline, “What Jennifer Saw” (25 February 1997), online <<http://www.pbs.org/wgbh/pages/frontline/shows/dna/etc/script.html>>.

⁶⁸ See e.g. Tiffany Hinz & Kathy Pezdek, “The Effect of Exposure to Multiple Lineups on Face Identification Accuracy” (2001) 25:2 *Law & Hum Behav* 185 [Hinz & Pezdek]; Kathy Pezdek & Iris Blandon-Gitlin, “When is an Intervening Line-up Most Likely to Affect Eyewitness Identification Accuracy?” (2005) 10:2 *Legal and Criminological Psychology* 247; and Nancy K Steblay, Robert W Tix & Samantha L Benson, “Double Exposure: The Effects of Repeated Identification Lineups on Eyewitness Accuracy” (2013) 27: 5 *Applied Cognitive Psychology* 644.

⁶⁹ Hinz & Pezdek, *supra* note 68.

XIV. GENERAL IMPACT OF MULTIPLE IDENTIFICATION PROCEDURES

The research from all of these areas demonstrates that using repeated identification procedures can increase the dangers of mistaken identification and subsequent wrongful conviction. What may look like strong evidence to the courts—a witness making multiple identifications of the same person—can be problematic as an incorrect decision made in an earlier identification procedure is likely to be made again in later identification procedures. That is, errors are likely to be repeated, not corrected. The probative value of a second identification of the same suspect is exceedingly low and likely does not outweigh its prejudicial effect. Devlin concluded that the only informative identification decision with regard to a particular suspect and witness was the first identification decision.⁷⁰

Similarly, repeated rejections of suspects prior to an eventual identification of the accused may be misinterpreted in court as an indication that the witness is not willing to identify just anyone and thus that the eventual identification is likely to be accurate. However, this pattern will frequently occur simply because witnesses will often choose someone if presented with repeated opportunities to do so, regardless of whether the culprit is ever one of the suspects on offer. There is reason to be concerned about how frequently eyewitness identification errors are made, particularly with repeated identification procedures.

Conversations and consultation with both Police and Crown by the first author indicate that showups and mugshots are viewed as inferior sources of identification evidence by the courts. Perhaps for this reason, often the only identification evidence presented in court is the last identification, a lineup identification. This approach shields the courts from critical information needed to properly assess the weight that a lineup identification ought to be accorded. Similarly, prior identification attempts involving suspects considered prior to the accused are rarely presented in court. Again, this prevents the court from considering the impact such repeated identification procedures have on identification accuracy. Knowledge of how the accused became a suspect, such as via multiple showups, would provide useful context and should lead to caution regarding the lineup identification in relevant circumstances.

⁷⁰ Devlin, *supra* note 12.

XV. CONCLUSIONS

We have discussed relevant literature on three common identification techniques (lineups, showups, and mugshots) to demonstrate that it is crucial to determine how an individual came to be a suspect in the first place as this informs on the probability that the suspect was the culprit before the identification procedure, and thus the likelihood that police have arrested the true culprit. We now outline more specific conclusions and points of consideration.⁷¹

1. Identifications From Showups Do Not Provide Strong Evidence of Guilt

Identification from a showup is far from conclusive evidence of guilt because people often are prone to choosing the first person they are presented with in a showup regardless of whether or not the person is the culprit.⁷² Though the same can be said of lineups, mistaken identification rates are lower with lineups because fillers “siphon off” mistaken suspect identifications and showups tend to be associated with lower base rates than lineups, which should make us even more skeptical that a suspect identified from a showup is guilty.

2. Repeated Showups Increase the Risk of Mistaken Identification

Identification from any showup other than the first is less useful as evidence of guilt because innocence risk (the probability that an identified person is factually innocent) always increases with repeated identification procedures and thus the identified person is more and more likely to be innocent.⁷³

⁷¹ While we do provide some examples and recommendations specific to a Canadian context, we contend that the issues we have identified are a concern for all criminal justice systems, and the considerations and recommendations are applicable to most systems.

⁷² Smith et al, *supra* note 49.

⁷³ It is worth noting that the increased risk of mistaken identification from repeated identification procedures, and showups in particular, is not due to a change in the accuracy of individual decisions by witnesses. Thus, a witness presented with a fourth showup generally is as likely to identify the culprit if presented as would have been the case from the second or third showup. The problem is that false identifications are cumulative such that all witnesses who identify someone from the first three showups

3. *Finding Suspects Via Showups May Lead to Low Base Rates in Lineups*

Using showups to find suspects for lineups can lead to low base-rates of culprit-present lineups. The first showups shown to witnesses will lead to many incorrect identifications resulting in low base-rates of suspect guilt for subsequent lineups.⁷⁴

4. *Using Repeated Showups is Highly Problematic*

Using repeated showups to find suspects for lineups virtually guarantees a low base-rate of suspect guilt in lineups and a high rate of wrongful conviction (unless supported by strong and independent corroborating evidence). As the number of showups increases, the base-rate of target presence in subsequent lineups logically must decrease. Empirically, data suggest catastrophically low target presence in lineups when suspects are obtained after a series of showups shown to witnesses.⁷⁵ This just adds to the obvious danger of relying on such procedures for identification evidence or as a source of suspects for lineups, unless the witnesses attempting identifications from the lineups are not the same witnesses who selected the suspects from showups.

To be clear on this last point, if police had multiple witnesses in a case and used one for showup procedures until that witness selected a suspect, that suspect could reasonably be shown to other witnesses provided that the other witnesses had never been exposed to the suspect (or other suspects) as part of the investigation; i.e., the witnesses had not seen any suspect in a previous showup, mugshot search, lineup, or other identification procedure.

will have been incorrect no matter which person they identified. Furthermore, as more witnesses identify someone from earlier showups, fewer are left to identify the culprit if he is eventually presented. Across cases, this guarantees that innocence risk increases with repeated identification procedures.

⁷⁴ For example, in the Smith et al (*supra* note 49) studies participants made a false identification 41% and 47% of the time from the first presented target-absent showup respectively.

⁷⁵ In the Smith et al (*supra* note 49) studies, participants made a false identification cumulatively 68% of the time from four target-absent showups in the first study and in the second study, false identifications were made 47%, 60%, 73%, and 80% of the time after presentation with 1, 2, 3, and 4 target-absent showups respectively.

5. Using Multiple Identification Procedures Likely Carries Forward Any Errors

Research demonstrates that witnesses will often make the same decision in subsequent lineup procedures as they did in prior procedures. This means that if they misidentified an individual from a showup, mugbook, or earlier lineup they are likely to make the same mistaken identification from a later lineup. Thus, the witness will not self-correct the error. Witnesses testifying in court are often believed, and triers of fact cannot easily differentiate between accurate and inaccurate witnesses.⁷⁶

6. Triers of Fact Need to Know if Multiple Identification Procedures Were Used and Understand the Risks

The courts currently view prior identification attempts as irrelevant so long as they did not involve the accused and/or the witness had not identified someone other than the accused. This is a problem that represents a serious risk of mistaken identification leading to wrongful conviction. If police find lineup suspects via showups or mugshots, and particularly multiple showups—which, based on the evidence seems likely—the base-rate of culprit presence in lineups may be extremely low for those cases. If the witness identified an innocent suspect from a showup, even the best lineup procedures will not protect that innocent suspect from misidentification in a subsequent lineup.

Within Canada, police and the Crown are supposed to provide, via disclosure, “[a]ll inculpatory and exculpatory evidence”.⁷⁷ This quote is drawn directly from the recommendations made within the FPT Heads of Prosecutions Committee report regarding the best practices Canadian police and prosecutors should be using in order to reduce the chances of wrongful convictions. This statement was also made specifically regarding identification procedures. Clearly, use of weak and particularly repeated identification procedures could be exculpatory (by rendering identification evidence too dangerous to rely on). While showups and mugshot searches certainly are investigative tools, they are clearly also identification procedures and as such, information regarding their usage should be disclosed to provide important context regarding the probative value of any suspect identification. This assertion is supported by another

⁷⁶ Boyce, Beaudry & Lindsay, *supra* note 11.

⁷⁷ Prosecutions Committee, *supra* note 22 at 57.

recommendation within the FPT report that “[i]t is vitally important that the trier of fact not only be told of the identification but also all the circumstances involved in obtaining it, e.g. the composition of the photo-pack.”⁷⁸ While the report provides only that single example within the context of a photo-pack (i.e., lineup), we contend that knowledge of how the person came to be a suspect (e.g., via showups or mugshot search) is also an important circumstance in obtaining the identification of which the trier of fact should be aware.

The aforementioned FPT report includes best-practice recommendations for identification procedures, but these are not mandated procedures. Administration of identification procedures varies widely across Canada⁷⁹ and there is currently no legislation within Canada regarding how officers should administer identification procedures. However, legislating specific procedures may create other difficulties as this would preclude the possibility of better procedures replacing them in the future (at least without the passing of further legislation).⁸⁰

Given that procedures are not mandated nor uniform across Canada, it is all the more important that triers of fact have full information regarding all identification procedures used in obtaining identifications from witnesses.

XVI. PRACTICAL CONSIDERATIONS FOR ACTORS IN THE CRIMINAL JUSTICE SYSTEM

We assume good faith on the part of the actors in the criminal justice system in that we presume they do want good evidence and they do want to hold the correct person accountable for a crime. As such, there are practical recommendations all levels of the criminal justice system can follow that will demonstrate responsible use of showups, mugshots, lineups, and other identification techniques (e.g., CCTV).

⁷⁸ *Ibid* at 76.

⁷⁹ McQuiston & Malpass, *supra* note 25; Bertrand, *supra* note 36.

⁸⁰ Implementing a system like the Home Office in England and Wales would provide appropriate flexibility. The Home Office, in consultation with police and experts, issues *Memoranda of Best Practice* that mandate how officers should administer identification procedures. One advantage is that this leads to uniformity in procedures across the country. A second advantage is that this system has a built-in mechanism for revising procedures as better techniques are developed, without having to change legislation.

Police. Police need to consider the source of their suspects in individual cases. Did the witness name the suspect? Did they find a suspect based on a witness-provided description that was relatively unique? Or was the description generic enough to describe many individuals and the suspect was only identified after presenting multiple showups to a witness? Within individual cases, what is their maximum base rate of culprit presence based on the number of different suspects shown to a witness? If their suspect fits a generic description and/or was identified after repeated showups, police should be cautious, especially if they cannot find other evidence connecting the suspect to the crime.

Another practical step is if the witness previously viewed or selected the person from any investigative or identification procedure (e.g., lineup, showup, or mugshot), a subsequent lineup should never be conducted with that witness and suspect. If there were other witnesses to the crime, police should use them for subsequent visual investigative or identification procedures.

Police Departments. Chiefs of police would be wise to consider the cumulative effect of their identification procedures on department-wide base rates of culprit presence in identification procedures. That is, if most suspects are typically initially identified through one or more showups, or through a mugshot search, and then placed in a lineup, they would likely have a fairly low base rate of culprit presence in their lineups. Chiefs could develop departmental guidelines that if suspects are first found through a less reliable identification procedure prior to being placed in a lineup, officers must have evidence aside from an eyewitness identification prior to laying a charge.

Crown. The Crown should ask if repeated identification attempts were made with witnesses—i.e., for information on all identification procedures, regardless of whether or not they involved the same suspect and officers—and what procedures were used. This includes showups and mugshots as they are indeed identification procedures.

Further, the Crown should seriously consider declining prosecution if there is no convincing evidence other than identification from a showup, or if there were multiple identification procedures used with the same witness—especially if they followed one or more showups.

Defence. Defence lawyers should be asking how their client came to be a suspect and whether multiple identification procedures were conducted. They should ask police about usage of showups and/or mugbook searches.

The defence should also ask witnesses if they were ever asked to decide if someone else was the criminal during the investigation of the crime (i.e., shown other suspects). Further, if the witness responds affirmatively, they should ask how many times and whether they were asked more than once if the accused was the culprit (i.e., shown the accused in both a showup or mugshot search followed by a lineup).

Judges. Judges should be open to defense arguments that the use of repeated identification attempts renders the identification evidence of a witness inadmissible because of the high risk of mistaken identification. Higher courts need to support the decisions of lower court judges who reasonably exclude such evidence.⁸¹

Should Usage of Showups be Banned? In short: no. It may seem tempting to just forbid the use of showups altogether, but this is unrealistic. In cases where culprits are not known to witnesses, police have limited avenues to find criminals and showups will, in at least some cases, be their best chance of doing so. What we argue is that when suspects are found via such methods and no other convincing evidence points towards the suspect as the actual culprit, police and the Crown should be conservative in their arrest and prosecution of such individuals.

Focus on the Witness as Well as the Accused. Combining all of the concerns we have raised suggests the necessity of a broadened focus when considering criminal cases. Generally, early aspects of investigations focus on witnesses (and forensics) in efforts to determine what happened and who was involved. However, once a suspect is identified, the focus shifts to the accused such that the actions and decisions from witnesses are seen in relation to the accused. Does the culprit fit the witness' description? Did the witness identify him? Does he have a criminal record? What can be lost is information about the witness' actions not related to the accused. Did the witness attempt identifications of other suspects? How many such attempts were made? Answers to these questions are not irrelevant. They are directly predictive of the likelihood that the accused is the culprit (base rate) such that the more prior identification attempts the witness made, the less reliable the evidence is that the witness identified the true culprit.

⁸¹ We are not suggesting that repeated identification procedures should always lead to exclusion but that the court should be open to the possibility that too many showups preceded the lineup, etc.

To the extent that triers of fact lack this information and guidance interpreting it, identification evidence may be accorded more weight than it deserves and wrongful convictions will result.⁸² Guilty pleas also may be inappropriately obtained based on the accused's fear that being identified by an eyewitness will lead to their conviction, even if they are factually innocent.⁸³

A Final Point. Showups, mugshots, and lineups are important visual identification procedures and investigative tools which help police identify both potential suspects and likely culprits. Yet, as we have demonstrated, these techniques can be problematic without proper considerations. The answer is not to ban such techniques but rather to use them responsibly, realize their limitations, and act accordingly.

A sergeant with the Ontario Provincial Police explained that he trained his officers and detectives to think of an eyewitness identification as the beginning of the investigation, not the end. The identification made it clear who to focus on. If the suspect was actually the culprit, it should be possible to find additional, convincing evidence that the suspect committed the crime *independent* of the eyewitness identification. If such evidence cannot be found, everyone should question the accuracy of the identification.

⁸² Of all cases decided in Canada for 2013/2014, convictions were 15.8 times more likely than acquittals. Note that guilt is the most likely outcome in Canadian criminal courts. Given this fact, it is all the more important that the justice system is appropriately weighting the evidence used in determining guilt. See Statistics Canada, *Adult criminal court statistics in Canada, 2013/2014*, by Ashley Maxwell (Ottawa: 28 September 2015).

⁸³ US, The National Registry of Exonerations, *Exonerations in 2016* (Irvine, California: University of California Irvine, 2017) at 7. Of the 166 exonerations recorded by the National Registry of Exonerations in 2016, 74 (i.e., 44.6%) had plead guilty.

Bargaining for Justice: The Road Towards Prosecutorial Accountability in the Plea Bargaining Process

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I. INTRODUCTION

If the Supreme Court of Canada's recent decisions on prosecutorial discretion¹ are any indication, judicial constraint of prosecutorial discretion will continue to be exercised in an exceptionally limited manner. Consider, for example, the Supreme Court's decision in *Babos*.² One of the central issues of this case was the egregious conduct of a prosecutor who, during the plea bargaining process,³ threatened to lay

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¹ See *R v Babos*, 2014 SCC 16, [2014] 1 SCR 309 [*Babos*]; *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 [*Anderson*]; *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773 [*Nur*]; *R v Nixon*, 2011 SCC 34, [2011] 2 SCR 566 [*Nixon*]; *R v Anthony-Cook*, 2016 SCC 43, [2016] 2 SCR 204 [*Anthony-Cook*].

² *Babos*, *supra* note 1.

³ In this article, "plea bargaining" refers to a broad range of behaviours—from simple discussions to concrete agreements—that take place between different actors in the criminal court system—notably Crown and defence counsel—and that is perceived to be binding on the involved parties (Simon N Verdun-Jones, "Plea Bargaining" in Michelle G Grossman & Julian V Roberts, eds, *Criminal Justice in Canada: A Reader* (Toronto: Nelson Education, 2015) 168 at 169 [Verdun-Jones]. For the purpose of this article, it is assumed that the plea bargaining process is, as per the *Martin Report*, an essential part of the criminal justice system that, when "properly conducted, benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally"

additional charges against two accused if they refused to enter guilty pleas.⁴ Despite the lower courts' acknowledgment that the prosecutor's conduct was unacceptable and despite the call from the trial judge to grant a stay of proceedings, the majority of the Supreme Court refused to justify that stay or provide any other remedies for this misconduct.⁵ Even though the prosecutor's "bullying tactic" was "reprehensible and unworthy of the dignity of her office,"⁶ Justice Moldaver, writing for the Majority, ultimately denied the accused's appeal. Considering the manner in which the lower courts characterized the prosecutor's conduct (as an abuse of process) and mindful of the strongly worded dissent from Justice Abella, the Majority's opinion arguably stands for the acceptance, albeit reluctantly, of behaviour that should not have been condoned as well as a resultant dilution of standards that should have been applied in order to guard against injustice.⁷

Situations of prosecutorial misconduct, like the one presented in *Babos*, raise serious questions about the role of prosecutorial discretion in the criminal justice system generally and the plea bargaining process more specifically. For all of the alleged benefits that come with prosecutorial discretion—such as flexibility, scarce resource maximization, and individualized justice⁸—there remains the "very real potential for pernicious use and abuse of this discretion."⁹ This article focuses on the place of prosecutorial discretion in the specific context of plea bargaining in Canada and asks whether and to what extent prosecutorial discretion ought to be guided and constrained to promote the principles of procedural fairness, accountability, flexibility, and transparency. Considering that between 2008 and 2009, fifty-nine percent of accused persons appearing before Canadian adult courts pleaded guilty and it is widely believed that many of these guilty

(Ontario, Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Ministry of the Attorney General, 1993) at 281 [Martin Report].

⁴ *Babos*, *supra* note 1. See review of the facts at paras 7-18.

⁵ For a review of the judicial history, see *ibid* at paras 19-28.

⁶ *Ibid* at para 61.

⁷ H Archibald Kaiser, "Babos: Further Narrowing Access to a Stay of Proceedings Where the Integrity of the Judicial Process Is Implicated" in Don Stuart, ed, *Criminal Reports* (Toronto: Carswell, 2014) 59 at 83 [Kaiser].

⁸ Brandon K Crase, "When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion" (2007) 20:3 *Geo J Leg Ethics* 475 at 481 [Crase].

⁹ *Ibid* at 482.

pleas resulted from a plea bargain reached between prosecutors and defence counsel,¹⁰ a critical reflection surrounding prosecutorial discretion in the plea bargaining process is both important and timely.

This article draws on doctrinal as well as comparative legal methods to argue that the current devices designed to constrain and guide prosecutorial discretion in Canada—case law, provincial Rules of Professional Conduct (“Rules”), and Crown Policy Manuals (“Manuals”)—risk prioritizing expedience over procedural fairness and ought to be reformed. We look to the German model as an alternative avenue for reform of prosecutorial discretion while also raising limitations associated with this model. This article proceeds in three parts. Part I contextualizes prosecutorial discretion by outlining the nature of this discretion and its place in the criminal justice system broadly and the plea bargaining process more specifically. Part II sets out the inadequacies of the current devices and notes their inability to constrain and guide prosecutorial discretion during the plea bargaining process. Part III explores alternative avenues for reform of prosecutorial discretion in the plea bargaining process by engaging in a comparative analysis inspired by the German model of prosecutorial oversight and assessing the strengths and limitations of this model. This model embraces a number of policies and procedures aimed at regulating the plea bargaining process, including note-taking during plea discussions and motivating plea recommendations. The German model is most notably lauded for its transparency, which can, in turn, enable greater prosecutorial and procedural accountability. While it might be argued that additional regulations imposed on the Canadian process risk grinding the gears of criminal justice to a halt, we argue that our proposed avenues for reform do not impose time-consuming burdens on prosecutors, particularly when these changes are combined with policies and practices that favour decriminalization. As will be seen, prosecutors in Canada have more discretionary powers to charge individuals with offences, and in this respect, implementing the proposed new measures and combining them with additional diversion and decriminalization strategies can realistically lead to a more efficient and equitable process.

¹⁰ Verdun-Jones, *supra* note 3 at 169.

II. PROSECUTORIAL DISCRETION AND ITS SPECIFIC CHALLENGES
IN THE CONTEXT OF PLEA NEGOTIATIONS

Prosecutorial discretion refers to the freedom of choice and of action exercised by the Attorney General—and his/her delegated agent (“prosecutor”)—in matters relating to the prosecution of criminal offences that fall within his/her authority.¹¹ This discretion encompasses a wide range of activities including but not limited to the choice of charge, the decision to proceed summarily or by indictment when the offence is hybrid, and the staying of proceedings or the withdrawal of charges.¹² Prosecutorial discretion is inherent to the office of the Attorney General and flows from the sovereign’s constitutional right to prosecute crime.¹³ When exercising this discretion in prosecutorial matters, the prosecutor occupies a distinct position because he/she must not only consider the situation of the individual in question but also the demands of the public interest.¹⁴ As Justice Rand notes in *Boucher v The Queen*, the Canadian prosecutor’s function as a “minister of justice” is a “matter of public duty than which in civil life there can be none charged with greater personal responsibility.”¹⁵ As will be discussed in greater detail below, the discretion to prosecute is much wider in the Canadian context than in the German one. Whereas the Canadian prosecutor’s wide discretion demands an evaluation of the public interest, prosecutors in Germany generally have to observe mandatory prosecutions when the evidence is sufficient, regardless of any evaluation for the public interest dimension.¹⁶

¹¹ David Vanek, “Prosecutorial Discretion” (1987-1988) 30 Crim LQ 219 at 219.

¹² Donna C Morgan, “Controlling Prosecutorial Powers—Judicial Review, Abuse of Process, and Section 7 of the Charter” (1986-1987) 29 Crim LQ 15 at 20 [Morgan].

¹³ *Ibid* at 19. See also Marc Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009) 34 Queens LJ at 818-32 [Rosenberg].

¹⁴ *Ibid*. See also Mark Phillips, “The Public Interest Criterion in Prosecutorial Discretion: A Lingering Source of Flexibility in the Canadian Criminal Process?” (2015) 36 Windsor Rev Legal Soc Issues 43.

¹⁵ *Boucher v The Queen*, [1955] SCR 16 at 24, 110 CCC 263.

¹⁶ See Joachim Herrmann, “The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany” (1974) 41 U Chicago L Rev 469. This principle dates back to the Code of Criminal Procedure of 1877 and is used to enforce the equal application of the law and to protect against prosecutorial bias.

Balancing these potentially competing interests in Canada requires an important level of independence.¹⁷ Neither the government, nor Parliament, nor the police may attempt to influence the Attorney General, and by extension the Crown, as prosecutors exercise their discretion over “the nature and extent of the prosecution.”¹⁸ Moreover, the Attorney General may not attempt to influence individual prosecutors as they make routine decisions.¹⁹

Prosecutorial independence from the government advances the rule of law.²⁰ Independence from government and Parliament insulates prosecutors from political influence, thereby assuring that prosecutions do not proceed because the accused is an opponent of the government or is engaged in politically (not legally) objectionable activities. As Donna Morgan notes, the prosecutor is to “stand alone, acting independently of political or other external influences. He is to be neither instructed [n]or restrained, save by his final accountability to Parliament.”²¹

The Supreme Court has characterized discretion as an essential feature of the criminal justice system and has recognized that prosecutorial discretion does not offend the principles of fundamental justice.²² According to Justice La Forest, the complete elimination of discretion would result in an “unworkably complex and rigid” criminal justice system.²³ When exercised fairly and firmly, prosecutorial discretion helps further the goals of flexibility, scarce resource maximization, and individualized justice. We briefly outline each of these goals in turn. First, given that criminal statutes cannot be drafted specifically or quickly enough to respond to changes in public attitudes and conduct, discretion allows prosecutors to adapt the criminal law to novel circumstances. Second, in a system characterized by scarce resources—notably time and money—discretion empowers prosecutors to assess and determine those cases worthy of being pursued. Third, discretion allows for a system of individualized

¹⁷ Brian A Grosman, “The Role of the Prosecutor in Canada” (1970) 18 Am J Comp L 498 at 499–500 [Grosman].

¹⁸ *Krieger v Law Society of Alberta*, 2002 SCC 65 at para 47, [2002] 3 SCR 372 [Krieger].

¹⁹ Rosenberg, *supra* note 13 at 832–36.

²⁰ *Ibid* at 835.

²¹ Morgan, *supra* note 12 at 19.

²² *R v Beare*, [1988] 2 SCR 387 at para 51, 55 DLR (4th) 481 [Beare].

²³ *Ibid*.

justice in which prosecutors only bring provable cases that are in the interest of society.²⁴

The same goals that justify the use of discretion in the criminal justice system are also used to justify the place of prosecutorial discretion in the plea bargaining process. For some commentators, including Mary Lou Dickie, Crown Counsel, and member of the Crown Case Management Team (Ontario), the plea bargaining process is “merely an extension of the screening process in an effort to find the correct result for a matter before the court.”²⁵ If properly conducted, she asserts, the plea bargaining process allows the prosecutor to develop “innovative approaches to trial proceedings, dispositions, and sentences that can satisfy the needs of the accused, victims, and society.”²⁶ This assertion echoes the spirit of Recommendation 46 of the *Martin Report*, which not only affirms the necessity of these negotiations but also acknowledges the benefits that flow from them.²⁷

Nevertheless, the optics of the plea bargaining process—insulated from the public and unconstrained by the procedural safeguards of the trial—challenge the assumption that prosecutorial discretion should be exercised in plea bargain negotiations as it does in a trial, namely in a relatively unfettered manner. This assumption ought to be rejected for two principal reasons. First, contrary to Dickie’s assertion, the prosecutor’s power in the plea bargaining process extends far beyond merely screening cases. In an effort to persuade the defendant to plead guilty, the prosecutor wields the incredible power of offering promises that relate to the nature of the charge(s) to be laid (charge bargaining), the ultimate sentence that may be decided by the court (sentence bargaining), and even the facts that may be raised with the trial judge (fact bargaining).²⁸ These promises are indeed powerful incentives for guilty pleas, particularly in specific contexts, such as

²⁴ Crase, *supra* note 8 at 481.

²⁵ Mary Lou Dickie, “Through the Looking Glass – Ethical Responsibilities of the Crown in Resolution Discussion in Ontario” (2005) 50 Crim LQ 128 at 147 [Dickie].

²⁶ *Ibid.*

²⁷ *Martin Report*, *supra* note 3 at 281.

²⁸ Verdun-Jones, *supra* note 3 at 170. See generally Simon N Verdun-Jones & Alison Hatch, *Plea Bargaining and Sentencing Guidelines* (Ottawa: Department of Justice Canada, 1988) at 2 where the authors list examples of the possible promises and agreements available for each “type” of bargaining.

cases where an accused can become a state collaborator/informant,²⁹ offences that carry mandatory minimum sentences,³⁰ and plea negotiations conducted with a member of a vulnerable population.³¹

Second, the private form of interaction that characterizes the plea bargaining process renders ineffective the traditional procedural safeguards that are designed to keep prosecutorial discretion in check and justify judicial deference to prosecutorial discretion in the first place. In *R v Power*,³² the Supreme Court approvingly cites JA Ramsay who writes that prosecutorial discretion is constrained, in large part, because proceedings take place in a public forum where members of the public are entitled to

²⁹ See the case of Karla Homolka discussed notably in Simon N Verdun-Jones & Adamira A Tijerino, “Victim Participation in the Plea Negotiation Process in Canada: A Review of the Literature and Four Models for Law Reform” (2002) Department of Justice Canada.

³⁰ See Palma Paciocco, “Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing” (2014) 18 Can Crim L Rev 241 and Marie Manikis, “The Recognition of Prosecutorial Obligations in an Era of Mandatory Minimum Sentences of Imprisonment and Over-representation of Aboriginal People in Prisons” (2015) 71 SCLR 277 that discuss the rise of the prosecutor’s negotiating power in the mandatory minimum sentence context [Manikis].

³¹ Research has evidenced that certain populations are more susceptible to plead guilty following state incentives and persuasive discourse. For example, the developmentally disabled or cognitively impaired, juveniles, and the mentally ill are often eager to please and are easily influenced and led to comply in situations of conflict. They lack coping mechanisms and are easily overwhelmed by stress and anxiety. See e.g. James W Ellis & Ruth A Luckasson, “Mentally Retarded Criminal Defendants” (1984-1985) 53 Geo Wash L Rev 414; Ronald W Conley, Ruth A Luckasson & George N Bouthilet, *The Criminal Justice System and Mental Retardation: Defendants and Victims* (Baltimore: Brookes Publishing Company, 1992). Further, Indigenous people who are denied bail have a strong tendency to plead guilty. This happens disproportionately in the Canadian criminal justice system. See e.g. Brent Knazan, “The Toronto Gladue (Aboriginal Persons) Court: An Update” (Paper delivered at the National Judicial Institute Aboriginal Law Seminar, St. John’s Newfoundland and Labrador, April 2005) [unpublished] at 18. See also Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Toronto: Penguin Canada, 2006) at ch 3. Rupert Ross, a prosecutor who has spent most of his career working with First Nations in remote northwestern Ontario, describes how Indigenous accused show clear discomfort when they enter pleas of “not guilty” upon advice of their lawyers, especially where the court is taking place in their home community. He highlights: “I suspect that for many Native accused, putting such an onus on the community by requiring witnesses to come forward and testify would be seen as an immoral thing to do. The rule is not to burden others that way.”

³² *R v Power*, [1994] 1 SCR 601 at para 45, 23 WCB (2d) 194. [*Power*].

raise prosecutorial misconduct with the Attorney General.³³ The result is that the prosecutor “must be prepared to account for their actions on every single case they prosecute.”³⁴ The closed-door nature of the plea bargaining process, however, does away with this procedural safeguard in its entirety. While the abuse of process doctrine certainly remains a possibility for the complainant (a point discussed in greater detail below), the fact that plea bargaining negotiations are unrecorded, that the prosecutor’s actions are unsupervised, and that the prosecutor’s decisions need not be justified, make it difficult for the courts—let alone the defence, the public, or the victim³⁵—to require the prosecutor to account for his/her actions. This situation is rendered all the more difficult, as in *Babos*, when the Prosecutor denies having engaged in the alleged misconduct at all.³⁶ This is particularly problematic for unrepresented accused that might suffer from significant power imbalance in this process. As highlighted by Brenton Klause, in the context of an unrepresented accused, some prosecutors do adopt a practice whereby conversations that occur during plea discussions with an unrepresented accused are placed on the record in front of the judge.³⁷ These prosecutors then ask the accused, in court, to either agree or disagree with the contents of the recording before he/she is called upon to enter a plea. The German model offers a useful way forward in the context of an unrepresented accused by requiring discussions be recorded and then analyzed by the judge that hears the plea.

In accepting the necessity of plea bargaining, the Martin Committee was aware and appreciative of the challenges raised above. In fact, the Committee’s acceptance of plea bargaining was largely premised on the

³³ JA Ramsay, “Prosecutorial Discretion: A Reply to David Vanek” (1987-1988) 30 Crim LQ 378 at 378-79.

³⁴ *Ibid.*

³⁵ Marie Manikis, “Recognizing Victims’ Role and Rights During Plea Bargaining: A Fair Deal for Victims of Crime” (2012) 58 Crim LQ 411. Manitoba’s *Victims’ Bill of Rights*, CCSM c V55, s 12(i) makes it mandatory for prosecutors to inform victims where they seek information about the possibility of discussions between the Crown attorney and the defence. It is worth noting that most provincial Bills of Rights do not include such obligations, and even when they do, as in the case in Manitoba, victims are not entitled to know the details of discussions or specifics about how the process unfolded, but rather just general information about the possibility of discussions between the parties.

³⁶ *Babos*, *supra* note 1 at footnote 8.

³⁷ Brenton Klause, “The Self-Represented” (Seminar delivered at the Saskatchewan Legal Education Seminar, 2006).

belief that plea bargaining would be properly conducted lest improper conduct undermines the public's confidence in the administration of criminal justice. As per Recommendation 50 of the *Martin Report*, the Crown's position on the sentence must not be formulated for reasons of expediency nor can the position bring the administration of justice into disrepute.³⁸ The problem here is that faith without action does little to guide or constrain prosecutorial power as well as ensure procedural fairness. Over two decades have passed since the Martin Committee published its seminal report with some but not all of its recommendations put into practice. Despite calls for further reform from the Criminal Justice Review Committee (1999),³⁹ the current devices designed to guide and constrain prosecutorial discretion in the plea bargaining process remain, as will be discussed in the next part, procedurally ineffective and inadequate.

III. THE LIMITS OF CURRENT DEVICES TO CONSTRAIN AND GUIDE PROSECUTORIAL DISCRETION

A body of rules—drawn from three sources—govern the conduct of prosecutors in Canada as they exercise their discretion during the plea bargaining process. These sources referred to as devices for the purpose of this piece include case law, the Rules, and Manuals.⁴⁰ In this part, the limitations of each device are discussed by addressing their inability to adequately guide and constrain prosecutorial discretion during the plea bargaining process. Although some variations exist between the devices available in the different provinces, they regulate plea bargaining in a similar limited way.

³⁸ *Martin Report*, *supra* note 3 at 300. In addition, this report recommended that the Attorney General set clearer guidelines for the exercise of prosecutorial discretion, including plea discussion.

³⁹ John D Evans, Hugh Locke & Murray Segal, *Report of the Criminal Justice Review Committee* (Toronto: The Committee, 1999) at ch 6. While the Report generally advocates for increased efficiency in the plea bargaining process, notable recommendations include requiring the sentencing judge to conduct a plea comprehension inquiry in all cases, regardless of whether the accused is represented by counsel (6.3) and having the Ministry of the Attorney General and the Department of Justice (Canada) circulate to Crown counsel a list of early resolution “best practices” (6.8).

⁴⁰ Dickie, *supra* note 25 at 138.

A. Caselaw analysis: The inaccessibility of the abuse of process doctrine and the inapplicability of a lower standard of review for tactics/conduct in the plea bargaining process

While judges continue to strongly justify the prosecutor's independence and scope of authority, the tone from the bench has evolved over the past three decades such that prosecutorial discretion is no longer immune from the gaze of the courts. As highlighted by Justice Rosenberg, this shift in tone, which recognized the possibility of judicial review, can be attributed to a series of events that left many Canadians critical and wary of the Attorney General's role in the criminal justice system. These events include the Supreme Court's 1985 decision in *Operation Dismantle Inc v R* (which held that cabinet decisions are indeed reviewable in the courts), the 1989 release of the Report of the Royal Commission on the Donald Marshall, Jr., Prosecution (which recognized the Crown's role in Marshall's wrongful conviction), and a general desire for greater transparency in the operation of public affairs, notably in the criminal justice system.⁴¹

This shift is reflected in the fact that the traditional position held by the courts—that prosecutorial discretion is not subject to judicial review even if the decision could be considered an abuse of power—is no longer valid law.⁴² In his comparison of the language used in the cases of *R v Power* and *R v Krieger*, Justice Rosenberg notes that the highly deferential approach to the review of prosecutorial decisions in *Power* has “given way to a more interventionist tone in *Krieger*.”⁴³ He supports his argument by contrasting statements made by Justice L'Heureux-Dubé in *Power*—“the Crown cannot function as a prosecutor before the court while also serving under its general supervision”⁴⁴—with statements made by Justices Iacobucci and Major in *Krieger*—“Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown's prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial

⁴¹ Rosenberg, *supra* note 13 at 817.

⁴² *Ibid* at 839. Even critics who have argued that facilitating judicial review of prosecutorial discretion will generate an avalanche of litigation until the proverbial wheels of justice grind to a halt view this development positively. See e.g. Michael Code, “Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg” (2009) 34 *Queen's LJ* 863 at 854–56.

⁴³ *Ibid* at 842.

⁴⁴ *Power*, *supra* note 32 at para 45.

discretion.”⁴⁵ This approach was recently clarified in *Anderson* in which the Supreme Court reaffirms that “[a]ll Crown decision making is reviewable for abuse of process.”⁴⁶ A distinction is therefore made between exercises of prosecutorial discretion that can only be reviewed for abuse of process and tactics/conduct before the court that are subject to a wider range of review by the court (even when they fall short of an abuse of process).

While the tone from the courts suggests a shift in how courts have traditionally characterized and discussed prosecutorial discretion and its scope, this shift in tone has not translated into a shift in action. As exemplified by the analysis below, the Supreme Court has adopted a notoriously high evidentiary threshold and has remained reluctant to interfere with prosecutorial discretion, particularly when asked to remedy an abuse of process with a stay of proceedings.

First, the standard of “considerable deference”⁴⁷ retained to identify abuse of process is very difficult to meet and indeed very rarely achieved. In *Anderson*, the Supreme Court ruled that conduct should only be considered an abuse of process if it seriously compromises trial fairness and/or the integrity of the justice system.⁴⁸ The claimant must demonstrate that prosecutorial conduct matches these criteria on a balance of probabilities.⁴⁹ In *Nur*, the Supreme Court recognized that the abuse of process doctrine is of limited utility because it sets “a notoriously high bar,”⁵⁰ which seems to suggest that, in practice, this standard creates a situation where “the prosecutor’s discretion is effectively immune from meaningful review.”⁵¹ In addition to this notoriously high bar, the Supreme Court has defined prosecutorial discretion in an increasingly broad manner, such that little prosecutorial conduct is reviewable on a more relaxed standard.⁵² The Supreme Court was careful in *Anderson* to differentiate between acts falling

⁴⁵ *Krieger*, *supra* note 18 at para 47.

⁴⁶ *Anderson*, *supra* note 1 at para 36.

⁴⁷ *Nur*, *supra* note 1 at para 48.

⁴⁸ *Anderson*, *supra* note 1 at para 50. For further discussion on this standard see Manikis, *supra* note 30.

⁴⁹ *Ibid* at para 52.

⁵⁰ *Nur*, *supra* note 1 at para 94.

⁵¹ *Ibid*.

⁵² *Anderson*, *supra* note 1 at para 44. Compare with *Krieger*, *supra* note 18 at para 43 (“Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General’s office and which are protected from the influence of improper political and other vitiating factors by the principle of independence”).

under prosecutorial discretion and decision and acts amounting to conduct or tactics. Matters falling under the latter category are subject to a wider-ranging judicial review with a less stringent standard but are limited to the trial process. This distinction necessarily subjects prosecutorial conduct/tactics in the context of plea bargaining to the higher standard of abuse of process, which is problematic since it presumes that conduct/tactics that are prohibited at trial will be accepted during the plea bargaining process.

Second, as exemplified by the Majority's reasoning in *Babos*, courts remain reluctant to interfere with prosecutorial discretion, notably when they are tasked with determining the appropriateness of a stay of proceedings under the abuse of process doctrine. As the Majority in *Babos* makes clear, the accused will only be permitted to articulate his/her claim for a stay of proceedings if the threshold of "clearest of cases" has been met. The Majority also acknowledges that meeting this burden is onerous since the stay will only be granted in "exceptional" and "very rare" circumstances.⁵³ Moreover, the Majority's formulation of the test with its rigorous balancing exercise at each level of the analysis creates further obstacles for the complainant to make out a successful claim.⁵⁴ Even if a trial judge were to conclude that the prosecutorial conduct in question could not be condoned, the balancing exercise forces him/her to undermine his/her conclusion and possibly determine that the egregious behaviour is, nonetheless, pardonable (as was the case in *Babos*).⁵⁵

Considering the significant asymmetry of information and resources between the complainant and the prosecutor, the evidentiary threshold required to be met under the abuse of process doctrine, and the closed-door nature of the plea bargaining process, the complainant, makes his/her case in a clearly disadvantageous position. While the Majority in *Babos* is correct in asserting that society is entitled to have proceedings that determine the merits of a case, its reasoning does not pay adequate attention to the equally important assertion that society is also entitled to have, as Justice Abella notes, "confidence in the integrity of the justice system."⁵⁶ Accordingly, writing for the Minority, she highlights that although the public has an

⁵³ *Babos*, *supra* note 1 at para 44.

⁵⁴ *Kaiser*, *supra* note 7 at 62.

⁵⁵ *Babos*, *supra* note 1 at para 84.

⁵⁶ *Ibid* at para 75.

interest in trials on the merits, it has “an even greater interest in knowing that when the state is involved in proceedings, particularly those that can result in an individual’s loss of liberty, it will put fairness above expedience. Justice is not only about results, it is about how those results are obtained.”⁵⁷ The ultimate result of *Babos*, *Anderson*, and *Nur* is the formulation of an abuse of process doctrine that is notoriously difficult to prove and when applied, does more to obstruct relief from integrity prejudice than render it more accessible, all the while doing very little to keep prosecutorial discretion in check.⁵⁸

B. The inadequacies of the current ethical duties for prosecutors

The LSUC Rules fail to provide meaningful constraints and guidance to prosecutors as they engage in the plea bargaining process. As Section 5.1-3 (Duty as Prosecutor) of the Rules outlines, prosecutors are to “act for the public and the administration of justice resolutely and honourably within the limits of the law.”⁵⁹ According to the accompanying commentary, translating this duty into practice involves the prosecutor seeing justice “done through a fair trial on the merits” rather than merely seeking a conviction.⁶⁰ LSUC’s framing of prosecutorial duty is problematic in that it is void of any reference to plea bargaining; instead, prosecutorial discretion is conceptualized vis-à-vis the trial. One could argue that this section and its accompanying commentary are less about LSUC’s treatment of plea bargaining in the Rules and more about the challenge(s) with articulating rules that cover all of the diverse functions exercised by prosecutors.

However, just a few sections down from the discussion on prosecutorial duty, Section 5.1-8 (Agreement on Guilty Pleas) sets out, in far greater detail, the manner in which a lawyer for an accused or potential accused ought to act in the context of plea bargaining. This section sets out two positive duties for counsel and two positive duties for the client. It also explicitly recognizes that a specific relationship (lawyer-client) is operating in a specific context

⁵⁷ *Ibid.*

⁵⁸ Kaiser, *supra* note 7 at 81.

⁵⁹ The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: Law Society of Upper Canada, 2000, LSUC at 5.1-3.

⁶⁰ *Ibid* at 5.1-3 Commentary.

(discussions preceding the agreement on the guilty plea). The accompanying commentary suggests that in the process of agreeing to the guilty plea, placing duties on counsel for the accused may help guard against expediency.⁶¹ The burden of “guard[ing] against expediency,” however, should not be borne solely by counsel and the client. In light of the particular position that the prosecutor occupies, and the power he/she exercises when bargaining with the charge, sentence, or facts, more robust instructions are needed in the Rules to address the ethical duties for prosecutors in the plea bargaining process.

C. Crown Policy Manuals and the need for greater direction

Crown Policy Manuals are the primary mechanisms by which the Attorney General offers advice and guidance to prosecutors regarding the exercise of prosecutorial discretion. This advice is intended to inform the prosecutor’s judgment, support flexibility, and establish key considerations for prosecutorial decision-making.⁶² We draw on the Manual in Ontario to illustrate its limited use in the plea bargaining process. The Manual sets out four binding directives pertaining to plea bargaining. First, prosecutors cannot accept a guilty plea to a charge knowing that the accused is innocent. Second, a guilty plea to the charge cannot be accepted when a material element of the charge can never be proven unless that fact is fully disclosed to the defence. Third, prosecutors cannot claim to bind the Attorney General’s right to appeal the sentence. Fourth, prosecutors must honour all agreements reached during the plea bargaining (provided there are no exceptional circumstances).⁶³

The Manual is public despite the fact that the Supreme Court in *Power* explicitly discourages the Crown from publishing the “precise details about the process by which [prosecutors] decide to charge, to prosecute, and to take other actions.”⁶⁴ According to Justice L’Heureux-Dubé, publishing these manuals “promotes inflexible and static policies which are not necessarily desirable.”⁶⁵ The then-Attorney General Michael Bryant

⁶¹ *Ibid* at 5.1-8 Commentary.

⁶² Ministry of the Attorney General, *Role of the Crown: Preamble to the Crown Policy Manual*, 2005 at 4 [*Crown Policy Manual Preamble*].

⁶³ Ministry of the Attorney General, *Resolution Discussions*, 2005 [*Crown Policy Manual Resolution Discussions*].

⁶⁴ *Power*, *supra* note 32 at para 44.

⁶⁵ *Ibid*.

celebrated the public dimension of the Manual,⁶⁶ noting that the directives assist in making the boundaries of prosecutorial discretion more transparent. In contrast to the Rules, the Manual does outline specific directives that are to be followed by prosecutors as they engage in plea bargaining. The trade-off with this transparency is a set of directives that are far too basic and far too tightly circumscribed to hold prosecutors accountable for their actions and render the process of plea bargaining more transparent. By focusing primarily on specific conditions that would vitiate the bargain, the directives prioritize the (eventual) outcome of the bargaining over the *process* by which the outcome is reached. While the Attorney General is tasked with balancing the competing demands of accountability, flexibility, and transparency, the appropriate balance has not been reached with regards to the directives for plea bargaining set out in the Manual.

IV. TOWARDS GREATER TRANSPARENCY AND ACCOUNTABILITY: THE GERMAN MODEL AS INSPIRATION FOR REFORM

Having argued that the optics of the plea bargaining process should be cause for concern and having noted some of the inadequacies of the current devices in their inability to constrain and guide prosecutorial discretion during the plea bargaining process, we now make a case for reform. Our approach assumes that plea bargaining remains an accepted option,⁶⁷ that maintaining the *status quo* is no longer tenable, and that any reform must focus on the process—and not just the outcome—of plea bargaining. Considering the reluctance of courts to make the abuse of process doctrine more accessible to complainants and mindful that the Rules may be better

⁶⁶ Crown Policy Manual Preamble, *supra* note 63 at 1.

⁶⁷ This proposition is, of course, debatable with scholars articulating persuasive arguments for the abolition of plea bargaining. See especially the scholarship of Jeff Palmer, “Abolishing Plea Bargaining: An End to the Same Old Song and Dance” (1999) 26 Am J Crim L 505; and Stephen Schulhofer, “Plea Bargaining as Disaster” (1991-1992) 101 Yale LJ 1979 as well as comments by the late Marc Rosenberg of the Ontario Court of Appeal that expressed skepticism of the most common rationale for plea bargaining—namely preventing the collapse of the criminal justice system (Kirk Makin, “Top Jurist Urges Review of ‘Coercive’ Plea Bargaining System”, *The Globe and Mail* (7 March 2011)) [Makin].

suited for general pronouncements of proper conduct that apply generally to prosecutorial discretion, our proposals focus on potential changes to Crown Manuals in the hope that they translate into structural changes on the ground.⁶⁸ These changes seek to promote transparency during the plea bargaining process, which, in turn, would facilitate process-based accountability that would enable the accused to effectively use a lower standard of review currently only available for challenges to prosecutorial conduct/tactics at trial.

Inspired by recent efforts by the German Federal Parliament to formalize plea bargaining, we outline three avenues for reform and then assess each avenue according to a matrix structured by the principles of accountability, transparency, and flexibility through discretion. Accountability guarantees equality in the operation and enforcement of the law; transparency ensures that arrangements agreed upon are voluntary,⁶⁹ and flexibility respects the prosecutor's constitutionally protected discretionary function in the criminal justice system.⁷⁰

A. Contextualizing the German Model

As in any comparative analysis, there is the risk that by “borrowing” an approach from a foreign jurisdiction to address a particular domestic challenge, one might overlook key differences in social structures between the jurisdictions while paying insufficient attention to how the “borrowed” approach functions in relation to the foreign jurisdiction's coherent set of principles and rules.⁷¹ To address both of these concerns and assess the

⁶⁸ For instance, legal realists have expressed distrust towards legal rules and noted the gap between the law in the books and the law in action. See e.g. Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962). The limits of laws in the policing context are discussed in Rob Baldwin & Richard Kinsey, “Rules, Realism and the Police Act” (1985) 4:3 *Critical Social Policy* 89.

⁶⁹ Stanley A Cohen & Anthony Doob, “Public Attitudes to Plea Bargaining” (1989) 32 *Crim LQ* 85 at 88. As highlighted by Cohen and Doob, accountability and transparency were identified as the “necessary conditions of effective reform” under the Law Reform Commission's 1989 Working Paper (that eventually led to the 1993 *Martin Report*).

⁷⁰ Rosenberg, *supra* note 13.

⁷¹ Hugh Collins, “Methods and Aims of Comparative Contract Law” (1991) 11:3 *Oxford J Leg Stud* 396. See also Trevor Jones & Tim Newburn, *Policy Transfer and Criminal Justice: Exploring US Influence over British Crime Control Policy* (New York: Open University Press, 2007); Michele Graziadei, “Transplants and Receptions” in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford

appropriateness of the German model, it is helpful to consider some relevant differences and similarities between the two jurisdictions. The principal difference between Canada and Germany is that Germany, as a Civil law country, treats the trial as an event designed to find the material truth rather than, as in Common law countries, determine guilt by way of an adversarial process where the state must prove its case beyond a reasonable doubt.⁷² In practice, this means that in Germany, admissions of guilt are viewed merely as confessions, are not sufficient to convict the defendant, and cannot be used to end or avoid a trial.⁷³ While Germany has historically mandated compulsory prosecution, modifications to the *German Code of Criminal Procedure* have allowed for a greater exercise of prosecutorial discretion while the increasing use of informal plea bargains has also played a significant part in eroding the principle of mandatory prosecution.⁷⁴

The use of plea bargaining in Germany is much more restricted than in Canada. While sentence bargaining has become common in Germany, charge and fact bargaining are still formally prohibited.⁷⁵ This prohibition applies to all serious cases. For less serious cases, prosecutors have tools to summarily dispose of various cases prior to trial. Charge bargaining is therefore very limited and only occurs in instances where the defendant's guilt is "minor" or would not have an impact on the sentence.⁷⁶ As for fact bargaining, it appears to be rarer. Interviews conducted with German prosecutors and defence attorneys reveal general disapproval of the practice and acknowledgment that fact bargaining does not occur.⁷⁷

University Press, 2008) 470; Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4:2 MJECL 111.

⁷² Regina E Rauxloh, "Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?" (2011) 34:2 Fordham Intl LJ 2011 296 at 296 [Rauxloh].

⁷³ *Ibid* at 297.

⁷⁴ Yue Ma, "Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective" (2002) 12 Intl Crim Just Rev 22 at 35 [Ma].

⁷⁵ See *Beschlussempfehlung und Bericht des Rechtausschusses* [Decision and Recommendation Report of the Legal Committee], 20 May 2009 and *Bundesgerichtshof* [Federal Court of Justice], 3 March 2005, BGH GSSt 1/04.

⁷⁶ See Jenia Iontcheva Turner, "Prosecutors and Bargaining in Weak Cases: A Comparative View" in Erik Luna & Marianne Wade, eds, *The Prosecutor in Transnational Perspective* (Oxford: Oxford University Press, 2012) 102 [Turner].

⁷⁷ Jenia Iontcheva Turner, "Judicial Participation in Plea Negotiations: A Comparative

Even though Canada and Germany rely on different approaches to adjudicate criminal claims—reflecting the Civil/Common law divide—and despite the fact that plea negotiations play slightly different roles in each system—in Germany, the sentence concession may be gained from a *confession* of guilt whereas that concession in Canada may be gained from an *admission* of guilt—plea negotiations are used, accepted, and deemed legal (and constitutional) in both jurisdictions.⁷⁸ Moreover, both jurisdictions share a common history with plea bargaining—as a practice that was first hidden but widely acknowledged to a practice that has become legalized and upheld by the courts—and invoke similar justifications to defend its use—notably the efficient allocation and management of scarce resources.⁷⁹

The German model was legislatively enshrined in the 2009 *Bill for the Regulation of Agreements in the Criminal Procedure*. Flagging situations of abuse, some prosecutors and defence counsel have noted that the model is not perfect.⁸⁰ Moreover, considering that the Federal Constitutional Court only ruled on the legality and scope of this significant legislative change in 2013,⁸¹ it remains to be seen whether the reforms will actually change the culture surrounding plea negotiations. Nevertheless, the appeal of the German model as inspiration for reform in Canada is its general scepticism of prosecutorial discretion. This scepticism in the German model is largely a function of the principle of substantive truth since each judge must scrutinize the truthfulness of the confession not as an admission but as a piece of evidence.⁸²

Since plea negotiations in Canada go beyond discussions that relate to sentencing, it can be argued that greater risks of wrongful convictions exist and thus greater attention needs to be paid to this process by adopting

View” (2006) 54:1 Am J Comp L 199 at 231.

⁷⁸ Rauxloh, *supra* note 72 at 297.

⁷⁹ Julia Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Oxford: Clarendon Press, 1995) at 168.

⁸⁰ Rauxloh, *supra* note 72 at 310 highlights that there are many examples of abuses on both sides with reported cases of defendants being put under great pressure to confess to crimes that they denied having committed. Anecdotal evidence is also provided that suggests that defence counsel forced prosecution into a settlement declaring that he knew that there was a serious basis for appeal.

⁸¹ BVerfG [Federal Constitutional Court], 19 March 2013, Case No 2 BvR 2628/10.

⁸² Rauxloh, *supra* note 72 at 311.

measures that enable greater transparency and accountability as well as the discovery of abuses and pressures that can lead to wrongful convictions.

B. Proposed reform 1: Keep notes/records of the plea bargaining process

The first proposed reform would be to mandate that details of the plea bargaining process be noted/recorded and then presented to the judge as he/she accepts, rejects, or reformulates the guilty plea or the sentence. Under the German model, the plea agreement must be extensively recorded.⁸³ In its 2013 interpretation of the 2009 legislation, the Bundesverfassungsgericht (BVerfG) [Federal Constitutional Court], held that for the plea agreement to be considered by the court, the following pieces of information must be noted/recorded: Which party suggested that the negotiation(s) take place, the contributions by each party to the negotiation(s), which fact(s) and circumstance(s) formed the basis of the eventual decision, and which suggested outcome(s) were settled upon.⁸⁴ While this holding has been criticized as overburdensome and impractical,⁸⁵ these means, according to the BVerfG, justify the ends. Considering the impact that plea bargaining has on the accused, the BVerfG concluded that “comprehensive transparency” is necessary.⁸⁶ According to the BVerfG, “the legislature considers plea bargaining to be admissible only if the transparency and documentation obligations are observed.”⁸⁷

Mindful of the Canadian prosecutor’s workload, this first reform could be pursued using different strategies. A transcript detailing every word spoken might not be practical since it would entail additional resources to transcribe proceedings, however, alternative strategies are feasible. One strategy includes mandating a checklist featuring some/all of the criteria mentioned by the BVerfG that would be signed by the prosecutor and accused/counsel. A second strategy involves recording the negotiation(s)

⁸³ Andreas Mosbacher, “The Decision of the Federal Constitutional Court of 19 March 2013 on Plea Agreements” (2014) 15 German LJ 5 at 11.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Alexander Schemmel, Christian Corell & Natalie Richter, “Plea Bargaining in Criminal Proceedings: Changes to Criminal Defence Practice as a Result of the German Constitutional Court Verdict of 19 March 2013?” (2014) 15 German LJ 43 at 50.

⁸⁷ *Ibid.* at 51.

using audio or video devices and having those recordings made available to the sentencing judge (automatically or upon request).

These two alternative strategies are not without limitations. First, some crucial interactions may be left out of the documented interactions and not all of the relevant dynamics behind the discussions will be captured. Beyond potential privacy and technical glitch issues, there is also the risk that this process could become a mere inconvenience that needs to be carried out quickly without much reflection. With regards to the first limitation, audio recordings have the advantage of capturing the tone of the exchange while video recordings can capture non-verbal language.⁸⁸ These recordings would, therefore, provide a more effective way to capture situations of pressure and abuse of process while also helping prosecutors in developing the strongest evidence possible to help convict the guilty. Moreover, not only are most courthouses already equipped with audio and video technology for use in other proceedings, starting/stopping a video or audio recording would not take additional time in a busy prosecutorial schedule.⁸⁹ With regards to the second limitation, the checklist option might prompt

⁸⁸ A parallel can be made between this proposal and the electronic recording of custodial interrogations. Electronic recording in the custodial interrogation context has emerged as a powerful innovation that has helped guard against false confessions. Much of the literature on this topic has emerged from the United States. See e.g. Thomas P Sullivan, "Electronic Recording of Custodial Interrogations: Everybody Wins" (2005) 95:3 J Crim L & Criminology 1127; The Justice Project, "Electronic Recording of Custodial Interrogations: A Policy Review", online: <[http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project\(07\).pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project(07).pdf)>; Matthew D Thurlow, "Lights, Camera, Action: Video Cameras as Tools of Justice" (2005) 23:4 Marshall J Computer & Info L 771; Lars Nelson, "Preserving the Public Trust: Prosecutors' Professional Responsibility to Advocate for the Electronic Recording of Custodial Interrogations" (2007-2008) 44:1 Willamette L Rev 1; Lisa C Oliver, "Mandatory Recording of Custodial Interrogations Nationwide: Recommending a New Model Code" (2005-2006) 39:1 Suffolk UL Rev 263.

⁸⁹ See e.g. Jane Bailey & Jacquelyn Burkell, "Implementing Technology in the Justice Sector: A Canadian Perspective" (2013) 11:2 CJLT 253 in which the authors of the study interviewed individuals involved in implementing technological change in the Canadian court setting. Successes and challenges related to the implementation changes are discussed. See also Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (August 2016) (Chair: Bob Runciman, Deputy Chair: George Baker).

prosecutors and defence lawyers to reflect on whether their motives and conduct risk giving rise to wrongful convictions.⁹⁰

Such a reform has the potential to benefit all parties involved. For the prosecutor, this reform disincentivizes overly aggressive, baseless, and malicious prosecution while also protecting the prosecutor from a false accusation of abusive conduct. For the accused/counsel for the accused, the reform would render the abuse of process doctrine more accessible by allowing him/her to overcome the high evidentiary burden of proving abuse (if necessary). Indeed, if the audio or video options were adopted, the accused would be able to rely on non-verbal as well as tonal interactions, which would go a long way to help detect and prove situations of abuse. In the context of groups or unrepresented accused who are more inclined to plead guilty (as discussed above), this reform can expose potentially problematic conversations and tactics. Further, this reform would reduce the risk of an accused being pressured by his/her counsel to plead guilty to a crime, even though he/she may be factually or legally not guilty.⁹¹

For the judge, this reform would allow him/her to evaluate the (procedural) fairness of the plea bargaining process and, if unfair, assess the questionable conduct in a context that is not abstract (as was done by the Majority in *Babos*) but that is instead based on recordings from the actual event. This reform would also assist the judge in conducting, as per Section 606 of the *Criminal Code*,⁹² plea comprehension inquiries and assessing the voluntariness of the guilty plea.⁹³ Finally, in light of the Supreme Court's recent decision in *Anthony-Cook*,⁹⁴ this reform would provide judges with a

⁹⁰ See discussion about reflexivity and ethical checklists in Jarrett Blaustein, "Ethical Criminologists Fly Economy: Process-oriented Criminological Engagement 'Abroad'" in Sarah Armstrong, Jarrett Blaustein & Alistair Henry, eds, *Reflexivity and Criminal Justice* (London: Springer, 2017) 357.

⁹¹ Milica Potrebic Piccinato indicates that despite defence counsel's duty to protect their clients, they sometimes compel a client to act in a manner that is inconsistent with the intentions of the client. This can be explained in various ways, including the economic demands on defence counsel to be financially efficient in order to survive professionally (Milica Potrebic Piccinato, "Plea Bargaining" (2004) Department of Justice Canada). Similarly, Grosman exposes the professional pressures of defence counsels to get into plea agreements with prosecutors in order to maintain good relationships with them (Grosman, *supra* note 17).

⁹² *Criminal Code*, RSC 1985, c C-46, s 606 [*Criminal Code*].

⁹³ Joseph Di Luca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" (2005) 50:1-2 *Crim LQ* 14 at 42.

⁹⁴ *Anthony-Cook*, *supra* note 1.

clearer and more reliable portrait of any circumstances that led to a joint submission at sentencing when judges are inclined to depart from this joint submission.

One could argue that this reform would result in a chilling effect on prosecutorial discretion because the boundaries between firm and aggressive prosecutorial conduct may, at times, seem blurred. The challenge with this argument is that it presupposes that prosecutorial conduct in the negotiation room is evaluated using a different standard than the standard used to assess prosecutorial conduct in a public courtroom. As raised in the second part of this article, if the prosecutor's tactics are inappropriate in the trial context, they should also be deemed inappropriate in the plea bargaining context. At the moment, the lack of transparency, unfortunately, leads to situations where problematic conduct remains undetected and difficult to prove. This first reform would not limit prosecutorial discretion, but rather facilitate the monitoring of exchanges that can be problematic and beyond the accepted range of conduct.

C. Proposed reform 2: Mandate (oral or written) reasons

The second proposed reform would be to mandate that reasons for the agreed-upon plea bargain be recorded—orally or in writing—and then presented to the judge as he/she accepts, rejects, or reformulates the guilty plea or the sentence. Under the German model, prosecutors are required to provide written reasons for their disposition of cases.⁹⁵ Like the first proposed reform of keeping notes or recording the plea bargaining process, this second proposed reform helps realize many of the same goals of transparency and accountability without adding a significant burden on the system. That said, this second proposed reform shifts the focus away from the process of plea bargaining and directs it towards the outcome of the bargain. For prosecutors, having to justify their reasoning would encourage them to deliberate carefully and ensure that their decision rests on defensible grounds.⁹⁶ For judges, this reform would allow him/her to inquire into the original offense and assess whether or not the plea bargain

⁹⁵ Ma, *supra* note 74 at 48.

⁹⁶ *Ibid* at 39.

is appropriate and reflective of the offense⁹⁷ or other accepted considerations.⁹⁸

One could critique this reform by suggesting that mandating prosecutors to justify their decisions would be impractical and burdensome. It is important to note that these reasons would not necessarily have to be justified at great length nor would they need to be written down; presenting the reasons orally, for example, could suffice to realize the goals set out above. One could also critique this reform by suggesting that mandating prosecutors to justify their decisions is an unwelcome intrusion into the prosecutorial function and that judges will be empowered to meddle in the prosecutor's reasoning. It is worth noting some of the limits of this argument on a number of fronts, including the role of prosecutors as representatives of the public interest. Indeed, it would make sense for an actor who represents the public interest to make his/her motives more transparent.⁹⁹ This awareness would not be considered an intrusive meddling by judges since the judiciary would generally not intervene in decisions reached by prosecutors and defence, unless there is an issue with the motives brought forward. It is worth noting that the *Criminal Code* (notably section 606(1.1)(b)(iii))¹⁰⁰ and case law (notably the Supreme Court's decision in *Anthony-Cook*)¹⁰¹ empower judges, in some situations, to

⁹⁷ H Michael Caldwell, "Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System" (2011) 61:1 Cath U L Rev 63 at 88.

⁹⁸ In the context of plea bargaining of sentences that give rise to joint submissions, the Supreme Court in *Anthony-Cook* made clear that it is legitimate for prosecutors to take into account elements unrelated to the offense (*Anthony-Cook*, *supra* note 1).

⁹⁹ Victims' rights in most common law jurisdictions have opened the door for greater transparency in this regard. For example, in England and Wales, the former Director of Public Prosecutions made clear that prosecutorial discretion needs to be transparent (Kim Evans, "Keir Starmer on 'Prosecutorial Discretion'" (6 December 2013) *The Justice Gap* (Magazine), online: <<http://thejusticegap.com/2013/12/keir-starmer-prosecutorial-discretion/>>. In this respect, Starmer put in place the *Victims' Right to Review Scheme* in which victims have more opportunities to be made aware of the motives behind prosecutorial decisions. For details regarding the scheme, see The Crown Prosecution Service, "Victims' Right to Review Scheme" (July 2016), online: <https://www.cps.gov.uk/victims_witnesses/victims_right_to_review/index.html>.

¹⁰⁰ *Criminal Code*, *supra* note 92, s 606(1.1)(b)(iii). In *Anthony-Cook*, the Supreme Court developed a high standard of review of joint submissions at the sentence (*Anthony-Cook*, *supra* note 1).

¹⁰¹ *Anthony-Cook*, *supra* note 1.

reject agreements made by the accused and the prosecutor. This reform would actually guarantee greater protection than that offered by the Supreme Court in *Anthony-Cook*,¹⁰² since judges would routinely be aware of the reasons behind plea agreements (and not just when a judge seeks to depart from a joint submission related to sentencing).

D. Proposed reform 3: Improving efficacy with decriminalization

While we maintain that the aforementioned reforms would not burden the criminal justice system, we acknowledge that to enable greater efficiency in the process and reduce the risks of wrongful convictions, the reforms mentioned above must be combined with revised prosecutorial guidelines that encourage diversion and alternatives to criminalization.

In Germany, under the Strafprozessordnung (StPO) [Code of Criminal Procedure], prosecutors can use their discretionary powers to charge bargain as a way to divert cases outside the criminal process in contexts where the defendant's guilt is "minor." In these cases, prosecutors can refrain from pressing charges if the defendant agrees to fulfill a condition, such as compensating the victim or paying money to the treasury or a charity.¹⁰³ This practice has proven to be efficient with regards to resource management as well as enabling a quick resolution of cases.¹⁰⁴

Further, German prosecutors are discouraged from striking bargains in weak cases. If the prosecutor believes that the suspect is guilty of a serious crime but has doubts about the strength of the evidence, a trial would be considered the more appropriate avenue than attempting to bargain the case. This conduct is also reinforced internally among peers, which is an important dimension of its success. Indeed, a prosecutor who would attempt to bargain a weak case would be negatively perceived as cutting corners to obtain convictions among her peers.¹⁰⁵

A similar reform in Canada would translate into prosecutorial guidelines that encourage diversion and alternatives to criminalization for

¹⁰² *Ibid.*

¹⁰³ Strafprozessordnung (StPO), §§ 153(1), 153a(1) [Code of Criminal Procedure].

¹⁰⁴ See Sean Boyne, "Is the Journey from the In-Box to the Out-Box a Straight Line? The Drive for Efficiency and Prosecution of Low-Level Criminality in Germany" in Erik Luna & Marianne Wade, eds, *The Prosecutor in Transnational Perspective* (Oxford: Oxford University Press, 2012) 37.

¹⁰⁵ Turner, *supra* note 76.

defendants who represent a low level of moral blameworthiness (i.e. non-serious offences). This guideline reform would also posit that prosecutors should drop criminal charges and proceed with diversion whenever they are unlikely to meet the burden of proof at trial or take the case to trial in the event of a serious case for which they have doubts about the strength of the evidence. This practice would enable prosecutors to dispose of cases quicker through a more selective process, which would, in turn, save time and resources by not charging non-serious cases.¹⁰⁶ At the same time, this approach would signal to prosecutors that they should spend more criminal justice resources on the most serious cases by way of a trial. Combined with the requirement to provide reasons for agreements, this additional guideline would also posit that weak prosecutorial evidence cannot be used as a reason justifying a guilty plea agreement with the accused.

In addition to enabling greater efficiency by diverting less serious cases to alternative programmes and processes outside criminal proceedings,¹⁰⁷ this reform would advance procedural justice and reduce the chances of wrongful conviction by discouraging plea bargaining in cases with weak evidence. This proposal would also be advantageous for victims and members of the public that have an interest in ensuring that the state does not use processes that can indeed lead to wrongful convictions.¹⁰⁸

¹⁰⁶ *Ibid.* See the experience implemented by the New Orleans District Attorney Harry Connick, which increased efficiency .

¹⁰⁷ An example of such diversion programs can be found at the municipal level in Montreal. The Municipal Court has implemented the Programme d'accompagnement justice-santé mentale (PAJ-SM) and the Programme accompagnement justice itinérance à la cour (PAJIC), which respectively offer diversion for people with mental health problems and those experiencing homelessness. The PAJ-SM provides an alternative to incarceration by diverting accused persons with mental health issues away from the criminal justice system. Similarly, PAJIC is left to prosecutorial discretion and strives to end the cycle of poverty and decrease the impact of judicialization on the indigent by enabling the modification of sentences and the dropping of charges of people who have experienced homelessness and have been convicted or been found to owe a debt to the Municipal Court.

¹⁰⁸ United States, US Department of Justice, *Study of Victim Experiences of Wrongful Conviction*, by Seri Irazola et al (2013). In this study, many victims described the impact of the wrongful conviction as being comparable to, or worse than, their original victimization. Victims also made clear that one of the primary ways they could be assisted in a case of wrongful conviction was to reduce the potential for a wrongful conviction to occur in the first place.

V. CONCLUSION

In a speech describing the dramatic entrenchment of plea bargaining in Ontario, Justice Marc Rosenberg lamented a system that has become “coercive and abusive” to the point that the pressure to plead guilty is now “too extreme.”¹⁰⁹ As argued in this paper, the current devices designed to constrain and guide prosecutorial discretion in Canada—case law, Law Society Rules, and Crown Manuals—have failed to ensure that procedural fairness is prioritized over expedience. The burden for a defendant to make out an abuse of process claim is too high, the rules governing prosecutorial conduct are too vague, and the directives set out by the Attorney General do not go far enough.

In an article Justice Rosenberg published three years before he gave that speech, he cautions that no one system can be “fully insulated from the impact of outright corruption” since “nothing can guarantee that the powers of the Attorney General will always be exercised in the public interest.”¹¹⁰ By juxtaposing his spoken and written words, we argue throughout this article that accepting the practice of plea bargaining does not imply accepting a system that is void of procedural safeguards, as well as checks and balances. The German model, while not perfect, offers a strong and realistic way forward in thinking concretely and creatively about rendering the plea bargaining process more accountable and more transparent without inhibiting prosecutors from carrying out their roles. Lest justice be cheapened, the plea bargaining process in Canada demands reform. After all, justice is “not only about results, it is about how those results are obtained.”¹¹¹

¹⁰⁹ Makin, *supra* note 67.

¹¹⁰ Rosenberg, *supra* note 13 at 817.

¹¹¹ Babos, *supra* note 1 at para 85.

Beyond Finality: *R v Hart* and the Ghosts of Convictions Past

A M A R K H O D A Y * A N D J O N A T H A N
A V E Y * *

ABSTRACT

In July 2014, the Supreme Court of Canada released its decision in *R v Hart*, in which it confronted the controversial police investigatory tactic known as a “Mr. Big Operation” (MBO). MBOs are undercover operations wherein police officers assume the role of organized crime figures seeking to recruit the accused into their organization. Using inducements, threats, and/or an atmosphere of oppression, the officers elicit incriminating statements from the accused, which prior to *Hart* were admissible in subsequent criminal prosecutions. In *Hart*, however, the Supreme Court recognized the risk of false confessions as a result of the investigatory tactics used, and consequently, the risk of a wrongful conviction. The Court formulated a new common law rule: that an MBO-generated confession will be presumptively inadmissible unless the Crown can demonstrate that the probative value of the statement outweighs its prejudicial effect.

The new rule is a fundamental reversal from the way MBO-generated evidence has previously been considered. In this article, we argue that while

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this rule will be considered in cases going forward, it should also be considered in past cases where the decision is no longer subject to appeal. In doing so, we confront the principle of finality, and examine when cases that are no longer before the courts should be re-examined for a retrospective application of a new law. In our view, the notion of finality must give way where strong indicia suggests that a wrongful conviction due to problematic methods of evidence procurement may have occurred. To that end, we argue that past cases where individuals were convicted on the basis of MBO-generated evidence should be reviewed in order to determine whether the evidence would be admissible under the framework from *Hart*, and by extension, whether there is a risk that a wrongful conviction occurred. Finally, we examine different options of how closed cases could be re-examined, and posit that the most appropriate course of action is an inquiry headed by a Canadian judge.

“One of the overriding concerns of the criminal justice system is that the innocent must not be convicted.”¹

- Justice Frank Iacobucci

“Unreliable confessions present a unique danger. They provide compelling evidence of guilt and present a clear and straightforward path to conviction. Certainly in the case of conventional confessions, triers of fact have difficulty accepting that an innocent person would confess to a crime he did not commit. And yet our experience with wrongful convictions shows that innocent people can, and do, falsely confess. Unreliable confessions have been responsible for wrongful convictions – a fact we cannot ignore.”²

- Justice Michael Moldaver

I. INTRODUCTION

In many ways, time plays a central role in the life of the law. Laws are not only culturally contingent but also temporally dependent. When new norms are created, whether via legislation, the development of a new constitutional or common law rule or interpretation, the intended effects are often (though not exclusively) prospective. To the extent that a new rule is applied retrospectively, it is usually in connection with a case that is still subject to appeal. However, when a legal case is final and no longer subject

¹ *R v Oickle*, 2000 SCC 38 at para 36, [2000] 2 SCR 3 [Oickle].

² *R v Hart*, 2014 SCC 52 at para 6, [2014] 2 SCR 544 [Hart].

to appeal prior to the new norm coming into effect, parties are typically unable to avail themselves of the new norm. Courts will generally not permit retroactive applications of the new rule(s) to the already concluded case. Finality wins. The “tyranny” of time prevails.

And yet, there is a value to having finality and closure to cases, including within the criminal justice system. Disputes with respect to criminal liability and related punishment need resolution. This is important for the accused, the victim(s) of a crime and/or their families as well as the state. For those who are party to criminal litigation, there may be little desire to let cases fester along with the uncertainty and anxiety that normally attend many criminal cases. Defendants often seek to resolve matters through plea agreements, endure any punishments and move on. As it is, there is a seemingly never-ending supply of criminal cases before the courts. The conveyor belt must press forward. When a trial takes place, a person is convicted of a crime and the appellate process has run its course, there may be little left to be done except to accept the outcome and the finality of the judgment.

Notwithstanding the benefits of finality, we may ask ourselves whether any exceptions should be made to avoid a seemingly harsh result. One such exception to this might be where an individual has been wrongfully convicted, or there has been a substantial likelihood of this. The possibilities of a wrongful conviction or miscarriage of justice are not academic. As United States Federal Appellate Court Judge Alex Kozinski writes, there are numerous circumstances that may render a conviction suspect or wrongful.³ One set of circumstances that is particularly relevant to this article is the procurement and admission of false confessions.⁴ Whatever virtue lies in the finality of convictions, this is considerably diminished, if not superseded, when they are secured on the basis of unreliable confessions. If the retroactive application of a new norm plays a key role in addressing a miscarriage of justice, this should be viewed as a benefit.

In this article, we turn our attention to what are oftentimes viewed as a controversial police investigative technique, Mr. Big operations (MBOs). MBOs are undercover operations whereby law enforcement officials masquerade as organized crime figures endeavouring to recruit an accused into their organization. Employing the use of inducements, threats and/or

³ Alex Kozinski, “Criminal Law 2.0” (2015) 44 *Geo LJ Ann Rev Crim Proc* iii at iii-xiii.

⁴ *Ibid* at vii.

the creation of an atmosphere of oppression, undercover agents actively elicit incriminating statements. As a result of these techniques, we contend, as others have, that MBOs produce serious risks of generating false confessions and, consequently, wrongful convictions.⁵ Although Canadian courts traditionally admitted incriminating statements elicited during MBOs into evidence, in 2014 the Supreme Court of Canada in *R v Hart* held that such statements were presumptively inadmissible unless the Crown could prove on a balance of probabilities that the probative value of the impugned statements outweighed their prejudicial impact.⁶ The Court also determined that where undercover state actors employed the use of force, the incriminating statements as a result of such tactics could be excluded as an abuse of process, regardless of any reliability surrounding them.⁷ Within several months of *Hart*, the Supreme Court in *R v Mack* also provided that in the event that confessions arising from such operations bore sufficient indicia of reliability, jurors should be advised or cautioned concerning issues of reliability surrounding such confessions.⁸

The *Hart* Court established a significant new common law rule⁹ to govern a practice that had otherwise been left largely unhindered.¹⁰ Despite the significance of the *Hart* rule, in only a few cases decided since *Hart* was released have statements procured through MBOs been excluded¹¹ or have

⁵ See e.g. David Milward, “Opposing Mr. Big in Principle” (2013) 46:1 UBC L Rev 81.

⁶ *Hart*, *supra* note 2.

⁷ *Ibid* at paras 11, 78, 86, 89, and 111-118.

⁸ *R v Mack*, 2014 SCC 58 at paras 52-54, [2014] 3 SCR 3 [*Mack*].

⁹ See David M Tanovich, “*R v. Hart: A Welcome New Emphasis on Reliability and Admissibility*” (2014) 12 CR (7th) 298; Lisa Dufraimont, “*Hart and Mack: New Restraints on Mr. Big and a New Approach to Unreliable Prosecution Evidence*” (2015) 71 SCLR (2d) 475.

¹⁰ One of the reasons that the *Hart* case drew significant attention was because the Newfoundland and Labrador Court of Appeal excluded the MBO confessions procured by the undercover officers on the basis that the tactics infringed *Hart*’s s.7 right to silence. This was despite the Supreme Court’s earlier rulings which clearly limited the scope of the right to silence to detention. *R v Hart*, 2012 NLCA 61, 327 Nfld & PEIR 178. Subsequent to the Court of Appeal’s decision in *Hart*, but prior to the Supreme Court’s decision in July 2014, one trial court released its decision which excluded evidence in MBOs cases. See *R v Smith*, 2014 ONSC 3939, OJ No 3054.

¹¹ See e.g. *R v Sharples*, 2015 ONSC 4410, [2015] 124 WCB (2d) 252. See also *R v SM*, 2015 ONCJ 537, OJ No 5173. In *SM*, police officers used the father of the accused (the accused was a minor) as a state agent to elicit incriminating statements. Decided within the framework of the *Youth Criminal Justice Act*, the court used the factors set out in

charges been altogether dropped by the Crown.¹² The *Hart* Court's comments regarding the creation of an oppressive atmosphere and the applicability of the abuse of process doctrine has also resulted in the exclusion of statements in at least two cases.¹³ By contrast, it is worth noting that in most other cases, MBO-generated statements have been admitted under the *Hart* framework.¹⁴ As actors in the legal system and academics rightly turn necessary attention to the development of the jurisprudence concerning MBOs going forward, the ghosts of earlier MBO cases tug and gnaw at the present. What should the legal system do with those cases decided prior to *Hart* which did not benefit from its holding – cases where police conduct may very well have breached the standards that *Hart* set out? Does *and should* the tyranny of time and the principle of finality, as well as the non-retroactive application of new norms, prescribe that those whose cases were final and no longer subject to appeal prior to the release of *Hart* have no right to benefit from the protections the Court set out? Drawing from both the facts and the new common law rule articulated in *Hart*, we contend that a serious examination of pre-*Hart* MBO cases should be undertaken in light of the *Hart* Court's new established standards and conclusions. If such earlier decisions were decided after the advent of *Hart*, would the confessions still be admitted? Given that many convictions may have relied almost exclusively on the confessions, alternative outcomes may have been the consequence. While the *Hart* Court acknowledged the potential for MBOs to solve cold cases, it observed that, “[s]uspects confess to Mr. Big during pointed interrogations in the face of powerful inducements and sometimes veiled threats – and this raises the spectre of unreliable confessions.”¹⁵ It added that “[w]rongful convictions are a blight on our justice system and we must take reasonable steps to prevent them before they occur.”¹⁶ If our Supreme Court views wrongful convictions in

Hart to exclude incriminating statements made by the accused.

¹² “Murder charge against N.S. man dropped after Mr. Big ruling”, *CTV News* (24 September 2014), online: CTV News <<http://atlantic.ctvnews.ca/murder-charge-against-n-s-man-dropped-after-mr-big-ruling-1.2022286>>.

¹³ *R v Derbyshire*, 2016 NSCA 67, 31 CR (7th) 263; *R c Laflamme*, 2015 QCCA 1517, 23 CR (7th) 137.

¹⁴ See e.g. *R v Randle*, 2016 BCCA 125, 129 WCB (2d) 204; *R v Wruck*, 2016 ABQB 370, 132 WCB (2d) 132; *R v Subramaniam*, 2015 QCCS 6366, 130 WCB (2d) 297.

¹⁵ *Hart*, *supra* note 2 at para 5.

¹⁶ *Ibid* at para 8.

such light – as it should – and takes seriously the need to take reasonable steps to prevent them before they occur, we should equally be concerned about any that may have already taken place before the Court imposed the basic standards set out in *Hart* and the scrutiny it demands. This means taking steps to revisit older cases based on the new standards established in *Hart*.¹⁷

In this article, we do the following. First, we examine the *Hart* decision to detail the new rule articulated by the Court and how the facts of the case illustrate the rather broad and protective approach its holding portends. Second, drawing from *Hart*, we revisit several earlier pre-*Hart* decisions to suggest that under the new rule adopted by the Court and with the facts of *Hart* as backdrop, the incriminating evidence might not have been admitted leading, at least in some cases, to an acquittal. In arguing for the revisiting of pre-*Hart* MBO cases, we address the problematic notion of applying newer protections retroactively, and in doing so, undermine the concept of finality. In our view, the sometimes suffocating grip of finality must be loosened where strong indicia suggests a wrongful conviction due to problematic methods of evidence procurement. Lastly, assuming a revisiting of earlier cases is justified, we examine different options of how governments may undertake this endeavour. Drawing from current models, chief in our minds is the use of an inquiry headed by a Canadian judge.

¹⁷ It is worth noting perhaps that while many acknowledge that *Hart* was a step in the right direction, there are still reasonable criticisms. For instance, Adelina Iftene argues that *Hart* did not go far enough toward limiting the power of the police. She contends that the *Charter* right to silence should have been deployed to protect an accused's right to choose to speak to the authorities, as well as protect the overall fairness of the trial. Chris Hunt and Micah Rankin posit that rather than create a new common law evidentiary rule that is specific to one particular type of investigative technique, the common law confessions rule should be deployed to address the admissibility of MBO confessions. Amongst other reasons, they argue that under the confessions rule, the Crown must prove the voluntariness of the impugned statements beyond a reasonable doubt (rather than on a balance of probabilities under the current rule). Each provides compelling arguments for their proposals. However, given the length of time the Court took to come up with its rule in *Hart* (two and a half decades) since the time the technique was really deployed in the early 1990s, and its reluctance to adopt these approaches when it had the opportunity to do so, we will proceed on the basis that the standards set in *Hart* are going to be the operating norms for years to come. Adelina Iftene, "The *Hart* of the (Mr.) Big Problem" (2016) 63 Crim LQ 178; Chris Hunt & Micah Rankin, "R v *Hart*: A New Common Law Confession Rule for Undercover Operations" (2014) 14:2 OUCLJ 321.

II. HART AND THE GHOSTS OF CONVICTIONS PAST

The Supreme Court's decision in *Hart* was noteworthy for several reasons. The first is readily apparent: the Court crafted a new common law rule to determine the admissibility of evidence obtained by way of an effective and widely-used investigatory tactic.¹⁸ For this reason alone, *Hart* will shape Canadian jurisprudence for years to come, as there is no indication that police have any intention of ceasing MBOs.¹⁹

Hart stands for more than the formation of a new common law rule, though. It also represents a significant attitudinal shift away from the way MBOs have previously been viewed by the Supreme Court of Canada. Indeed, previously it was content to allow police to exploit the gap in procedural protection between the *Charter* and the common law confessions rule, at one point going so far as to label MBOs "skillful police work."²⁰ In *Hart*, however, the Court recognized that the law did not provide sufficient protection to accused persons who confess under MBOs.²¹ This is far from the incremental development in the common law that the Court is known for.²²

Finally, it must be recognized that the *Hart* Court displayed significant apprehension with respect to the tactics used by the police investigators. In what was characterized as "an extremely intensive Mr. Big operation,"²³ both the majority decision written by Justice Moldaver and the decision by Justice Karakatsanis, concurring in the result, comment with great concern on

¹⁸ *Hart*, *supra* note 2 at para 56.

¹⁹ See e.g. "Top cop says undercover police operation Mr. Big is here to stay", *Ottawa Citizen* (25 August 2014), online: <<http://ottawacitizen.com/storyline/top-cop-says-undercover-police-operation-mr-big-is-here-to-stay>>.

²⁰ *Hart*, *supra* note 2 at para 114; *R v Fliss*, 2002 SCC 16 at para 21, [2002] 1 SCR 535 Binnie J.

²¹ *Hart*, *supra* note 2 at para 67.

²² See e.g. The Rt Hon Beverley McLachlin CJC, "Preface" in Mary Arden, *Common Law and Modern Society: Keeping Pace with Change* (Oxford: Oxford University Press, 2016) ("It is the role of judges to develop the common law - their home turf - incrementally, in conformity to changing values and needs, and to interpret legislation in a manner that reflects current realities." at 7); see also John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) ("The culture of common law is of incremental development on a case-by-case basis" at 113).

²³ *Hart*, *supra* note 2 at para 148.

specific aspects of the MBO waged against Mr. Hart and the impact those aspects had on the circumstances and reliability of Hart's confessions, the potential for abuse of process, and the Court's concern for the administration of justice. In this section, we will examine the *Hart* decision in detail, demonstrating the extent of the protection put in place by the new common law rule.

A. The *Hart* Decision

The Supreme Court in *Hart* issued three concurring decisions. The majority decision authored by Justice Moldaver, which dealt with the additional issue of whether Mr. Hart should have been permitted to testify in camera, primarily concerned itself with the formation and application of the new common law rule for MBO-generated confessions. Although Justice Moldaver explained the factors²⁴ that might give rise to an MBO confession being deemed inadmissible, he did not address whether the police conduct in *Hart* amounted to an abuse of process, since it was not necessary for the appeal's disposition under the majority's reasons.²⁵ Justice Cromwell, concurring with the majority, only differed in that he would have referred the matter back to a trial court so that the presiding judge could evaluate the admissibility of the evidence in the first instance.²⁶

Justice Karakatsanis differed substantially in terms of how MBO-generated evidence should be evaluated. Her concurring opinion argues that the majority's new rule "fails to consistently take into account broader concerns that arise when state agents generate a confession at a cost to human dignity, personal autonomy and the administration of justice."²⁷ In her view, protection of an accused's interests in these circumstances is properly provided for by way of the principle against self-incrimination in section 7 of the *Charter*.²⁸

While the *Hart* Court was not in complete agreement as to how confessions resulting from MBOs should be evaluated, all members of the

²⁴ *Ibid* at paras 111-118.

²⁵ *Ibid* ("Given my conclusion that [Hart's] confessions must be excluded under the common law, it is not necessary to consider whether the police conduct in this case amounted to an abuse of process" at para 148).

²⁶ *Hart*, *supra* note 2 at para 152.

²⁷ *Ibid* at para 167.

²⁸ *Ibid* at para 168; *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*].

Court raised serious concerns with the nature of the operation. It is clear throughout the decision that the Court is alive to the potential for a wrongful conviction to arise from an unreliable confession, and appropriately so. This recognition concerning the dangers of wrongful convictions has been recognized by the courts as well as by the executive branch of the federal government. As noted in the Department of Justice's 2004 *Report on the Prevention of Miscarriages of Justice*, "[a] wrongful conviction is a failure of justice in the most fundamental sense."²⁹

A confession, as courts have acknowledged, is evidence unique in the justice system as it is accepted that an accused may be convicted based solely on a confession with no confirmatory evidence.³⁰ Not only may a confession provide a sufficient evidentiary basis to support a determination of guilt beyond a reasonable doubt, numerous studies utilizing mock juries have shown that people are hesitant to believe that a person might confess wrongfully.³¹ The Supreme Court in *R v Oickle* acknowledged this where Justice Iacobucci described the phenomenon of a false confession as "counterintuitive", but nonetheless recognized that there have been hundreds of cases where a confession was later proven false.³² This counterintuitive phenomenon, however, still has the power to result in a wrongful conviction. As Bruce MacFarlane, a specialist in the area of wrongful convictions explains:

False confessions easily lead to miscarriages of justice because of the significant impact they have on the decision-making process of justice officials and lay juries. Except in the rare situation where a perpetrator is actually caught in the act of committing the crime, a confession is regarded as the most powerful, persuasive, and damning evidence of guilt that the state can adduce. It follows, therefore, that

²⁹ Canada, Department of Justice, *Report on the Prevention of Miscarriages of Justice* (Ottawa: 2004) at 2.

³⁰ *R v Pearce*, 2014 MBCA 70 at para 50, 310 Man R (2d) 14; see also *Kelsey v The Queen*, [1953] 1 SCR 220 at 227-28, 105 CCC 97; *R v Singh*, 2007 SCC 48 at para 29, [2007] 3 SCR 405 [Singh].

³¹ See Saul M Kassin & Lawrence S Wrightsman, "Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts" (1981) 11:6 J Applied Soc Psych 489; Saul M Kassin & Katherine Neumann, "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis" (1997) 21:5 Law & Hum Behav 469; see also Richard A Leo & Richard J Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998) 88:2 J Crim L & Criminology 429.

³² *Oickle*, *supra* note 1 at paras 34-35.

a *false* confession is the most prejudicial evidence that can arise at trial. Judges and juries tend to disbelieve claims of innocence in the face of a confession, and are usually unwilling to accept that someone who has confessed did not actually commit the crime.³³

Because of the powerful sway that a confession holds, it is vital that a confession only be admissible where it is clear that it is both reliable and offered voluntarily. As previously stated, it is clear from *Hart* that the Court is aware of the potential dangers of false confessions, as preventing the admission of a false confession is a paramount theme throughout the decision.

In considering reliability, courts are directed to first consider the circumstances in which the statement was made, then to consider surrounding circumstances for indications of reliability, such as confirmatory evidence. The factors to be considered are the length of the operation, the number and nature of interactions between the police and the accused, the nature and extent of the inducements, the presence of threats, the conduct of the interrogation, and the personality of the accused, including age, sophistication, and mental health. Indicators of reliability may include the level of detail in the confession, whether it leads to the discovery of corroborating evidence, or if it includes information that either has not been made public or that the accused would not have known if he had not been involved in the crime.³⁴

A major consideration in evaluating the reliability of a confession is the presence and nature of any inducements or threats. It is well accepted in jurisprudence that the presence of these factors may lead to an unreliable confession; for this reason, the presence of either may be fatal under the common law confessions rule.³⁵ Unlike a conventional police investigation, however, the confessions rule provides no protection in an MBO.³⁶ Also

³³ Bruce A MacFarlane, “Convicting The Innocent: A Triple Failure of the Justice System” (2006) 31 Man LJ 403 at 474. In a more recent article MacFarlane examines the role that decision-making processes among prosecutors may lead to wrongful convictions. Bruce A MacFarlane, “Wrongful Convictions: Drilling Down to Understand Distorted Decision-Making by Prosecutors” (2016) 63 Crim LQ 439.

³⁴ See *Hart*, *supra* note 2 at paras 102-105.

³⁵ See *Oickle*, *supra* note 1 at paras 48-57

³⁶ The common law confessions rule only provides protection when a person makes incriminating statements to an individual whom they subjectively believe is a person in authority. Such belief must also be reasonable. A person in authority is generally accepted as meaning a person formally engaged in “the arrest, detention, examination

unlike conventional investigations, blatant inducements and veiled threats are often an integral part of MBOs; they are employed not only to create the environment to draw in the target of the investigation, but ultimately to draw out the confession itself.

Even by MBO standards, though the inducements in *Hart* were substantial: the Court described them as “powerful”, “overwhelming” and “life changing”.³⁷ Far from a simple offer of money or a mere convincing talk from a potential business partner, when the surrounding context of Hart’s life was considered they were designed to be so life-altering as to be irresistible. Over \$15,000 was given to Hart during the investigation, an amount that lifted him out of poverty, in addition to the expensive new clothes and dinners at upscale restaurants purchased by the undercover officers. The operation transformed Hart’s life from a position where he was unable to pay for a bed to sleep on to one of luxury, and promised him even greater rewards and a prosperous lifestyle if he was accepted into the organization in the future.³⁸

Even more compelling, though, was the social acceptance and camaraderie offered by the officers. Knowing that he was socially isolated, and by extension vulnerable, the officers sought to become his best friends, even separating him from his wife, a tactic that permitted them to deeply imbed themselves in his life. In this, the police were spectacularly successful. Hart repeatedly told the officers that he loved them, that he considered them family and that he was willing to do anything – even leave his wife and move away from Newfoundland, if that was what was necessary to join the organization. As Justice Moldaver noted, the “depth of the respondent’s commitment to the organization and the undercover officers can hardly be exaggerated.”³⁹

or prosecution of the accused.” *R v Wells*, [1998] 2 SCR 517 at para 14, 163 DLR (4th) 628. Since the target of an MBO has no knowledge of the undercover officers’ status as state actors or persons in authority, the confessions rule does not apply. See *R v Grandinetti*, 2005 SCC 5 at para 44, [2005] 1 SCR 27 [*Grandinetti*]. See also *Erven v The Queen*, [1979] 1 SCR 926 at 931, 44 CCC (2d) 76 [*Erven*]; *R v Hodgson*, [1998] 2 SCR 449 at paras 32-34, 127 CCC (3d) 449 [*Hodgson*].

³⁷ *Hart*, *supra* note 2 at paras 5, 13, 134, 147, 206 and 224.

³⁸ *Ibid* at paras 134-35.

³⁹ *Ibid* at paras 136-38.

The result of these inducements was that when Hart eventually met “Mr. Big”, he knew “that his ticket out of poverty and social isolation was at stake.”⁴⁰ When confronted about the death of his daughters, and his explanation of having a seizure being dismissed as a lie, the “circumstances left [Hart] with a stark choice: confess to Mr. Big or be deemed a liar by the man in charge of the organization he so desperately wanted to join.”⁴¹ As Justice Moldaver stated, “these circumstances, considered as a whole, presented the respondent with an overwhelming incentive to confess – either truthfully or falsely.”⁴²

While strong inducements pervaded the *Hart* investigation, there was a noticeable lack of direct threats. It is common in MBOs for the undercover officers to “cultivate an aura of violence by showing that those who betray the criminal organization are met with violence.”⁴³ This was accomplished by one of the officers telling Hart “that if prostitutes were dishonest, the organization had to deal with them” and going on to claim that he had assaulted a prostitute personally. The officer also slapped another undercover investigator in Hart’s presence, ostensibly for having revealed their business dealings to outsiders.⁴⁴

Despite the facts of the above police conduct, it must be noted that the trial judge, in response to a defence argument that the officers’ threatening conduct was oppressive, found as a fact that Hart had not felt threatened. Indeed, the trial judge found that Hart had bonded with the undercover officers and made no effort to leave the operation.⁴⁵ However, while these findings were accorded deference, the Court was still cognizant of the effect that threats may have, noting that “[n]o matter how reliable the confession, the courts cannot condone state conduct - such as physical violence - that coerces the target of a Mr. Big operation into confessing.”⁴⁶

In addition to considering the circumstances surrounding a confession, *Hart* also reinforces the need to examine whether the statement itself contains “indicators of reliability.”⁴⁷ Such an examination looks at whether

⁴⁰ *Ibid* at para 139.

⁴¹ *Ibid* at para 140.

⁴² *Ibid*.

⁴³ *Ibid* at para 9.

⁴⁴ *Ibid* at paras 29-30.

⁴⁵ *Ibid* at para 41; see also *R v Hart*, 2007 NLTD 74, 265 Nfld & PEIR 266 (*voir dire* ruling of Dymond J).

⁴⁶ *Hart*, *supra* note 2 at para 11.

⁴⁷ *Ibid* at para 141.

the incriminating statement fits with other established facts, whether it gives rise to further evidence, or whether it can itself be confirmed by other evidence discovered. In his evaluation, Justice Moldaver bluntly stated that the statements at issue in *Hart* did not contain any of these indicators. He noted that Hart's description of how the crime was committed was inconsistent, proceeding from an outright denial to a verbal description that would have been illogical in the circumstances, ending with a physical demonstration that was different from any previous account. In addition to the inconsistencies, there was also a "complete lack of confirmatory evidence." Accordingly, he pronounced that the reliability of the confessions was "in serious doubt."⁴⁸

In applying the Court's new rule to the factual findings, Justice Moldaver determined that the minimal reliability of the confessions meant that they had a low probative value. Recognizing that the prejudicial effect of the statements would be significant, he held that the confessions must be excluded.

In formulating the rule as it did, and providing a clear illustration of how it is to be applied, the Court has truly shifted the balance with respect to MBO-generated statements from favouring the Crown to providing greater protections to the accused than what has previously existed. This is done in two ways: the first is the presumption of inadmissibility; the second is the crafting of the rule itself and the direction given in the evaluation of the underlying factors. Weighing probative value and prejudicial effect is a familiar exercise for trial judges, as it is the fundamental rule to apply when faced with the prospect of excluding relevant evidence.⁴⁹ Of course, it has always been within the prerogative of trial judges to exclude MBO-generated confessions as being more prejudicial than probative, but that was only done on one occasion.⁵⁰ By implementing a rebuttable presumption, the Court not only provides a starting point in the analysis, but also sends a clear signal to trial judges that the protection must lean in favour of the accused and toward exclusion of the confession.

⁴⁸ *Ibid* at paras 141-44.

⁴⁹ See *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, 83 DLR (4th) 193.

⁵⁰ See *Hart*, *supra* note 2 at para 65; *R v Creek*, 1998 CanLII 3209 (BCSC), BCJ No 3189.

The Court's decision also provides guidance with respect to the evaluation itself. The majority clearly states that the prejudice attached to MBO-generated confessions exceeds that of standard confessions because of the attached facts that go against the accused's character. Both the principles of moral prejudice and reasoning prejudice are stated as being substantial concerns, especially when combined with the possibility of unreliable confessions.⁵¹ The effect of this analysis is to send a second message to trial judges: that the prejudice faced by an accused is substantial, and must not be underestimated. The combination of the presumption of inadmissibility with the emphasis of the significant prejudice results in substantial protection for an accused.

Hart makes it clear that MBOs are to be treated very differently going forward. In doing so, the Court expressed great concern about the nature of the evidence presented, as guilty verdicts based on similar circumstances would carry a substantial risk of a wrongful conviction. These concerns included inducements and threats, inconsistent statements and those for which there is lack of confirmatory evidence, and the particular vulnerabilities of an accused that may contribute to a false confession. We will now consider how these factors have been viewed in several previously decided MBO cases and discuss how the evidence in each would have been evaluated under the *Hart* framework. Before doing so, however, we will briefly examine the Supreme Court's decision in *R v Mack* in order to illustrate how an MBO may be conducted in a manner that results in admissible evidence.⁵²

B. The *Mack* Case

While *Mack* was heard in conjunction with *Hart*, the *Mack* Court issued its judgement just under two months following the *Hart* decision. *Mack* is valuable in that it clearly illustrates a situation where the probative value of the MBO-generated statements does outweigh the prejudicial effect. Indeed, Justice Moldaver, writing for a unanimous court in *Mack*, recognized that while the lower courts did not have the benefit of *Hart*, it is of no issue because "[the] confessions would clearly be admissible under that framework."⁵³

⁵¹ *Hart*, *supra* note 2 at paras 76-77.

⁵² *Mack*, *supra* note 8.

⁵³ *Ibid* at para 32.

Dax Mack was accused of murdering his roommate, Robert Levoir. Police commenced an investigation after receiving a tip from one of Mack's friends that he had confessed to shooting Levoir and burning the body. The MBO lasted four months, during which time Mack carried out a number of jobs for the organization, and eventually told the officers that he had shot Levoir five times before burning the body on his father's property. Following his confession, Mack took one of the undercover officers to the precise location where the body had been burned.⁵⁴

In evaluating the reliability of Mack's statements the Court noted both a lack of strong inducements or threats and a plethora of confirmatory evidence. While Mack was paid, the amount was relatively small: \$5000 over the four-month investigation. At the time, Mack was working, and this legitimate work continued to be available to him. There were no threats made against him; in fact, he was told that he could make no admissions and remain in the organization. In contrast to Hart's various accounts, which changed with each telling, Mack's confessions were consistently conveyed to three separate parties, including the investigating officers. He provided the same motivation for the killing to both his friends and the police, and indicated to all that he had burned the body. Subsequent to Mack's arrest, police located Levoir's remains in the fire pit he had shown to the officer, as well as shell casings fired from a gun located in Mack's apartment.⁵⁵

Conversely, there was limited prejudice. The accused's involvement with the organization involved no violent actions and revealed nothing prejudicial about his background. Given the surrounding circumstances of the confessions, the Court noted any prejudicial effect was "easily outweighed by their probative value."⁵⁶

While *Hart* seems to represent the quintessential example of how police should not execute an MBO, *Mack* illustrates how undercover police officers may engage in MBOs and remain within the parameters set out in *Hart*. *Mack* provides a definitive declaration that MBOs will produce admissible evidence so long as it complies with the *Hart* framework, and an illustration of what such evidence may look like. Put simply, statements gained by neither strong inducements nor threats, that are internally

⁵⁴ *Ibid* at paras 4-16.

⁵⁵ *Ibid* at paras 33-34 and 36.

⁵⁶ *Ibid* at para 35.

consistent and are consistent with surrounding circumstances and other available evidence will likely be viewed as reliable. Taken together, *Hart* and *Mack* provide a helpful standard of comparison for the previously decided cases that follow.

Though the Court determined that the circumstances and the conduct of the police in *Mack* satisfied the *Hart* test, it also indicated that in MBO cases heard by juries, courts should also provide sufficient warnings and proper instructions to jurors concerning the nature of the evidence, how it was acquired and whether there are sufficient indicators of reliability and the existence of confirmatory evidence.⁵⁷ In other words, even where circumstances surrounding MBO confessions provide sufficient indicia of reliability for the purpose of admissibility, juries should still be given guidance related to the evidence nonetheless. The failure of a court to provide such guidance may result in the ordering of a retrial.⁵⁸

C. Inducements and Threats

It is difficult to imagine a successful MBO that does not incorporate inducements or threats in any way. Indeed, the presence of either, or both, factors is often an integral part of the operation, since officers will very likely portray themselves as a financially lucrative criminal organization that does not tolerate disloyalty in order to appear authentic. However, as *Hart* and *Mack* made clear, it is not merely the presence of inducements or threats that will be a factor in judicial decision-making, but also the circumstances that surround them.

Inducements are typically thought of in terms of material gain: money, vacations, or cars. Sometimes these are inducements by themselves while to others these are symbols of an enhanced lifestyle that they desire. In *Hart*, the Court acknowledged an alternative form: the social inducement. It was not, however, the first time social inducements had been recognized, as they played a significant role in the case of *R v Unger*. In 1990, Kyle Unger was charged with the brutal murder of Brigitte Grenier, a 16-year-old high school student. Prior to the conclusion of his preliminary hearing, however, the Crown entered a stay of proceedings with respect to the charges. It was only after an MBO that resulted in Unger confessing to the murder that the

⁵⁷ *Ibid* at paras 51-54.

⁵⁸ See *R c Perreault*, 2015 QCCA 694, [2015] JQ No 3389.

Crown proceeded - this time by direct indictment.⁵⁹ Unger was convicted, but later brought an application for release pending a ministerial review by the Federal Minister of Justice of his conviction. Both his application for release and later his application for ministerial review, were accepted.

During the period subsequent to the initial stay of proceedings, when the RCMP initiated the MBO, Unger became socially isolated. Despite the charges being stayed, his arrest was well-known in the community, and he experienced difficulty seeking employment. In this isolated state, he was “wined, dined and shown large sums of money.”⁶⁰ He testified that he lied to police when he confessed to the murder because he wanted to impress the officers, join their organization and make lots of money.⁶¹

The substance of Unger’s statements will be discussed below. However, while the trial judge rejected Unger’s assertion that he lied in order to be accepted by a criminal organization, it is clear that the statements were made with the motivation of benefitting from the inducements held out to him. Ultimately, the result of those statements was a conviction, followed by fifteen years incarceration before it was acknowledged that a miscarriage of justice “may” have occurred.⁶²

Hart and *Unger* are hardly the only cases to feature strong inducements. In *R v Skiffington*, defence counsel characterized the options faced by the accused as follows:

I mean he’s got two choices (...) [h]e can say, “I killed her,” or he can say, “I didn’t kill her.” (...) Now, if he says, “I did it,” what’s going to happen? (...) when you say, “I did it,” we’ve got some wonderful gifts here. You can get a new home, you can get a new car, you can get \$50,000 in cash. You’ll have enough money to retire to your villa in France, and as an extra special bonus, behind curtain number one, you’ll never be, ever be convicted of this offence. And as an extra extra special bonus behind curtain number one, W. won’t blow your brains out. (...). Or you can persist in saying you didn’t do it, and then you get curtain number two. Well, what’s behind curtain number two? Not very much, there’s no home, no car, no \$50,000, a life of poverty, and there’s W. standing there with the gun, ready to blow your brains out. Because that’s what you get behind curtain number two because behind curtain number two is where the liars go.⁶³

⁵⁹ *R v Unger*, [1993] 85 Man R (2d) 284 at paras 1 and 16-25, 83 CCC (3d) 228 [*Unger* MBCA].

⁶⁰ *R v Unger*, 2005 MBQB 238 at para 17, 196 Man R (2d) 280 [*Unger* MBQB].

⁶¹ *Ibid.*

⁶² *Ibid* at para 51.

⁶³ *R v Skiffington*, 2004 BCCA 291 at para 36, 186 CCC (3d) 314.

Skiffington, faced with the options articulated by his lawyer, chose to say he killed his wife. He was convicted, and despite the trial judge not instructing the jury on the several exculpatory statements he made throughout the police investigation as well as the lack of an instruction regarding the unreliability of induced statements, his conviction was upheld on appeal.

The flip side of inducements is the use of threats. These may be direct, in that the subject may be threatened by words or actions specifically directed at them, or indirect, such as when the investigating officers create a threatening or oppressive environment.⁶⁴ The case of *R v Terrico* illustrates not only the lengths that some police officers will go to in order to coerce a confession, but also the extent to which the courts were prepared to overlook such behaviour.⁶⁵ When the courts willingly accept such tactics, police will continue to push the boundaries in order to determine where the limits are. The investigatory tactics in *Terrico* clearly demonstrate this, as the statements at issue were compelled by the creation of an oppressive environment and threats of violence, and in our view could not be admitted under the criteria from *Hart*.

William Terrico was charged with first-degree murder for hiring B.B., at the time a juvenile, to kill his father in December 1989. B.B. pled guilty as a young offender to committing the murder in 2002, and was sentenced to three years. The evidence against him consisted of testimony from B.B., and from a number of undercover police officers involved in the MBO.⁶⁶ B.B.'s credibility was vigorously challenged on cross-examination, and he admitted his account of the murder had changed on a number of occasions over the years, that he routinely lied to police and that he had been involved in illegal gun-running.⁶⁷ It is important to note that, aside from the MBO-generated statements by Terrico, B.B.'s testimony was the only evidence against him.

The MBO began in a manner similar to others, with Terrico being approached by an undercover officer who offered him money in exchange for casual work. In this case, it was enlisting Terrico's assistance in order to

⁶⁴ See e.g. *Oickle*, *supra* note 1 at para 51.

⁶⁵ *R v Terrico*, 2005 BCCA 361, (2005) 199 CCC (3d) 126, leave to appeal ref'd [2005] SCCA No 413 (QL) [*Terrico*].

⁶⁶ *Ibid* at para 2.

⁶⁷ *Ibid* at para 7.

locate the officer's ex-girlfriend. Unlike in *Hart* or *Unger*, however, the operation focused not on inducements, but on threats of violence. Specifically, the operation was designed to present the appearance that the officers were involved in organized crime and that they were ruthless men who turned to violence whenever necessary.⁶⁸

The turning point of the operation was when the undercover team staged the beating of an officer in a hotel room. The room was set up to appear as though a fight had occurred, and fake blood was applied to the officer to simulate injuries. While the "beating" occurred, Terrico was in an adjoining room with a female undercover officer playing the officer's girlfriend; she submitted evidence that at this time Terrico appeared "very scared" as the two waited.⁶⁹ The purpose of the exercise was to drive home that the "biker gang" had no tolerance for falsehood, and to scare him into believing he would be beaten if he did not tell them about his criminal history. In this, they succeeded. Terrico subsequently admitted his involvement to "Mr. Big."⁷⁰

Terrico testified during his trial that over the course of the investigation, he became progressively more scared and intimidated. He stated that he lied to the officer who first contacted him first to impress, and second to continue making money. Over time his motivation shifted to lies of self-preservation. Referring to the operation, he said it was "all very real. You don't walk away from that."⁷¹

Based on *Hart*, the probative value of statements will directly correlate to their reliability. Conversely, the substantial prejudice attached to an MBO-coerced statement is present. In *Terrico*, the trial judge was not required to consider a challenge to the admissibility in the context of a challenge to the MBO itself; rather, the judge conducted a threshold reliability analysis as the Crown and defence agreed that the confession was hearsay and a principled approach to the exception of hearsay evidence was applicable.⁷² In his view, the threatening environment created by the police

⁶⁸ *Ibid* at para 8.

⁶⁹ *Ibid* at para 10.

⁷⁰ *Ibid* at para 13; see also Amar Khoday, "Scrutinizing Mr. Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations" (2013) 60:2 Crim LQ 277 at 295-96 [Khoday].

⁷¹ *Terrico*, *supra* note 65 at para 18.

⁷² *Ibid* at para 14.

officers worked in the opposite way to what Terrico testified. Rather, that as a result of the officers repeatedly admonishing Terrico of the importance of honesty, any fear present would have resulted in a truthful, reliable statement.⁷³ Accordingly, the trial judge found that threshold reliability had been met.

We hardly need to state that we take issue with the trial judge's decision. It flies in the face of decades of jurisprudence, all of which says the presence of threats undermines the reliability of any statements made.⁷⁴ However, it has been held that where the confessions rule does not apply, the presence of violence does not act to exclude a confession as it likely would under the confessions rule.⁷⁵ Despite this, the decision in *Terrico* sets a dangerous precedent. Taking the trial judge's reasoning to its logical extension, police should be free to threaten suspects at will: so long as they induce sufficient fear, any confessions should be reliable. This reasoning, however, has long been rejected; even before the adoption of the *Charter* the dangers of threats on the reliability of the statement were acknowledged.⁷⁶ Further, this reasoning ignores a fundamental part of MBOs: that any denials from the subject of the investigation are dismissed, with an urging that the suspect tell "the truth" - that is, what the organization wants to hear. Finally, it also directly contradicts the Supreme Court's comment in *Hart* that, "[n]o matter how reliable the confession, the courts cannot condone state conduct - such as physical violence - that coerces the target of a Mr. Big operation into confessing."⁷⁷ Nor does the fact that the threat was not made explicitly to Terrico negate its effect; as Amar Khoday has noted, "it was made abundantly clear to him what happens to individuals who were not honest and loyal."⁷⁸ Since it was clear that "honest" meant admitting to the murder, Terrico's testimony that he was "stuck between a rock and a hard place" seems apropos.⁷⁹

⁷³ *Ibid* at paras 16 and 26.

⁷⁴ See e.g., *Oickle*, *supra* note 1 at para 53; see also *Hodgson*, *supra* note 36 ("...there can be no doubt that there may well be great unfairness suffered by the accused when an involuntary confession obtained as a result of violence or credible threats of imminent violence by a private individual is admitted into evidence" at para 26).

⁷⁵ *R v Wells*, [1998] 2 SCR 517, 163 DLR (4th) 628.

⁷⁶ See *Erven*, *supra* note 36 at 930-31.

⁷⁷ *Hart*, *supra* note 2 at para 11.

⁷⁸ *Khoday*, *supra* note 70 at 296.

⁷⁹ *Terrico*, *supra* note 65 at para 18.

It is worth noting that even though the tactics used in *Terrico* were effective in drawing out incriminatory statements, they were not direct threats of violence, but rather implied through the construction of a threatening atmosphere. It is tempting to believe that is the proverbial line in the sand; unfortunately, such beliefs are dashed by cases such as *R v Hathway*.⁸⁰

Wilfred Hathway was investigated for the murder of his landlord. After conventional investigation techniques were ineffective, the Saskatoon City Police Service requested the assistance of the RCMP, who initiated an MBO. Contact was made between Hathway and the undercover officers that resulted in Hathway being offered various jobs that escalated in frequency and remuneration over time.⁸¹

Hathway had eventually become suspicious that his new associates were involved in illegal activities. It was subsequently revealed to him that his associates were involved in a nationwide criminal organization. One of the major operatives in the organization told him that, if he did anything they did not approve of, he would disappear.⁸² The undercover agents later staged a beating of a female in Hathway's presence. In addition to the assault, officers threatened the life of the woman, her spouse and their two-year-old child. This caused Hathway to fear not only for his life, but also for that of his daughter.⁸³

The rest of the MBO played out predictably: Hathway met Mr. Big after being told he had to admit that he was involved in the murder. At first he denied it, but ultimately admitted he was involved. Interestingly, the details provided by Hathway in his confession were said to be inconsistent with the details of the actual crime scene.⁸⁴ Despite the direct threat, the implied threat and the inconsistencies, his confession was admitted and he was convicted of first-degree murder. Under the *Hart* rule, though, the court would have had to consider the prejudice to Hathway resulting from his admission, and the effects on the reliability of his admission from the inconsistencies between his inculpatory and exculpatory statements, the threats to both Hathway and his daughter, and a lack of confirmatory

⁸⁰ *R v Hathway*, 2007 SKQB 48, 292 Sask R 7.

⁸¹ *Ibid* at paras 7-12.

⁸² *Ibid* at paras 14-15.

⁸³ *Ibid* at para 19.

⁸⁴ *Ibid* at paras 21 and 23.

evidence. Ultimately, we contend that Hathway's confession would not be admitted under the standards set out in *Hart*.

It is clear that both inducements and threats may have a substantial impact on an individual who is the target of an MBO. Indeed, in all but the rarest of cases, it can be argued that the only reason a person provides a confession is as a result of either, or both, of these two factors. It is also clear that the mere presence of them will not result in automatic exclusion of the statements, but that a detailed analysis must be performed in order to carefully determine whether the reliability of the confession is undermined.

D. Inconsistent Statements

There are two ways that statements can present inconsistencies. First, in the case of multiple statements made by an individual, the information in one may be inconsistent, or even directly contradict the information in another. The second way is that, regardless of how many statements are made, the information given may be inconsistent with, or contradict, independent physical evidence or other established factual circumstances. In some cases, both forms of inconsistency may be present.

The presence of either or both forms of inconsistency should be an immediate area of concern when evaluating the reliability of an incriminating statement. This should be readily evident: by definition, when two statements contradict each other in material ways, one statement is unreliable. Similarly, when a statement purports to report facts that are contradicted by physical evidence or factual circumstances indicating the information in the statement is physically impossible, the statement simply must be considered unreliable.

The confessions in *Hart* are a clear illustration of unreliable information due to inconsistencies between multiple statements. Hart's description of how the crime was committed proceeded from an outright denial to a verbal description that would have been illogical in the circumstances, eventually ending with a physical demonstration that was different from any previous account. The danger in proceeding while relying on such statements is that on some level the Crown has to base its case on one statement being factual, effectively conceding any remaining statements are not, but still asking the jury to accept the chosen one as true. In effect, the Crown is forced to choose which set of facts it wants to prove occurred, argue that the accused should be believed in that instance, but that the same accused should not be believed with respect to any other instances. This is

particularly dangerous when the confession is uncorroborated by any independent evidence.

Just as *Hart* provides a clear illustration of inconsistencies between multiple statements, *Unger* illustrates how a statement can be inconsistent with physical evidence or surrounding circumstances. Unger's confession included several details, namely, that Unger had committed the murder alone, that he had thrown sticks used in the murder into a nearby creek and that the murder was committed near a bridge, which he later took one of the officers to.⁸⁵ As Justice Beard, then of the Manitoba Court of Queen's Bench, noted, none of these details were true. The Crown rejected the notion that Unger acted alone, and charged Timothy Houlahan as a co-accused in the matter. The sticks Unger claimed to have disposed of were left protruding from Grenier's body, and the bridge Unger identified had not even been built until months after the murder was committed.⁸⁶ Far from Unger's confession being in accordance with the evidence, it was, on its face, patently contradictory and unreliable.

The MBO-generated statements in *Unger* are comparable to those in *Hart*, both in that they came after inducements made even stronger by social isolation, and by the inherent unreliability of the statements themselves. *Hart*'s confessions, which the majority deemed unreliable in part because they were inconsistent with each other, at least had the benefit of not being directly contradicted by physical evidence - even if they suffered from other shortcomings. As Justice Beard so aptly pointed out, however, Unger's confession contained marked contradictions to the factual circumstances: his account simply could not be true with respect to at least two major determinative points. These considerable inconsistencies call into question the reliability of Unger's statement as a whole; regardless, this induced, physically impossible confession grounded a conviction for murder.

E. Particular Vulnerabilities of the Accused

The Supreme Court in *Hart* recognized that the social acceptance and camaraderie offered by the undercover officers had great effect on Nelson Hart, due in no small part to his social isolation. In fact, recognizing that this made him vulnerable, they sought to isolate him even further.

⁸⁵ *Unger* MBQB, *supra* note 60 at para 18.

⁸⁶ *Ibid* at para 19.

Like Nelson Hart, Kyle Unger was isolated and vulnerable to social inducements: he was nineteen years old, naïve, and uneducated, living in a small town in which many residents believed him a murderer. He was unable to find employment. It was when he was in this state that he met police investigators who offered him the answers to all his problems: they provided him employment, the prospect of money, and friendship. All they wanted in return was a confession. For a broke young man acknowledged by his mother and acquaintances, respectively, as a “story teller” and more candidly, a “bullshitter”, falsely confessing to a crime must have seemed too good to be true.⁸⁷ In retrospect, it certainly was.

While social isolation may be one factor contributing to a person’s incentive to confess, it is by no means the only vulnerability that may be exploited. Gisli Gudjonsson, an internationally renowned authority on suggestibility and false confessions, first proposed the idea of interrogative suggestibility in the 1980s, defining it as “the extent to which, within a closed social interaction, people come to accept messages communicated during formal questioning, as the result of which their subsequent behavioural response is affected.”⁸⁸ Recognizing that people vary in how suggestible they are, he developed the Gudjonsson Suggestibility Scale to measure how suggestive an individual is to coercive interrogation.⁸⁹

We would not suggest that every person, who is under police scrutiny should be evaluated to determine how suggestible they might be under interrogation (or in a coercive environment such as that created by an MBO). Certainly, such a requirement would be entirely impractical and place an impossible burden on police investigators. However, as Christopher Sherrin states, there has been extensive research conducted to comprehend the individual factors that may cause an individual to falsely confess, and the law can benefit from understanding the findings that have been made.⁹⁰ At a minimum, courts should understand that several specific

⁸⁷ *Ibid* at paras 21-22.

⁸⁸ Gisli H Gudjonsson & Noel K Clark, “Suggestibility in Police Interrogation: A Social Psychological Model” (1986) 1:2 *Social Behaviour* 83 at 84.

⁸⁹ Gisli H Gudjonsson, “A New Scale of Interrogative Suggestibility” (1984) 5:3 *Personality & Individual Differences* 303.

⁹⁰ Christopher Sherrin, “False Confessions and Admissions in Canadian Law” (2005) 30:2 *Queen’s LJ* 601 at 630 [Sherrin].

factors have been shown to have a substantial impact on an individual's suggestibility.⁹¹

Research also suggests an existing link between interrogative suggestibility and false confessions.⁹² Among the subjects of this research, perhaps the most instructive involves the most well known group of test subject: the infamous Birmingham Six. Sherrin summarizes the findings aptly:

Here is a group of undoubtedly innocent people, who were questioned in the same time period about the same offence by the same police task force, yet who responded differently to the interrogations. Significantly, the four false confessors all scored higher on suggestibility and compliance than the two non-confessors. The two non-confessors scored quite low in terms of suggestibility while two of the confessors scored quite high; the other two confessors scored in the average range.⁹³

It is not our intention to argue that an individual's interrogative suggestibility is conclusive proof that they would falsely confess, given the opportunity. Indeed, such a conclusion would vastly overreach the data itself. Not only can it be said that not every suggestible person would falsely confess, it is equally certain that not all false confessions will come from a person who is highly suggestible.⁹⁴ As Sherrin states, it is "probably impossible to devise a psychological test that can conclusively differentiate between innocent and guilty people."⁹⁵ Despite this, interrogative suggestibility "appears to be connected to some of the other characteristics commonly found in false confessors (...). As a result, it is only appropriate

⁹¹ *Ibid* at 633. Factors include youth, intelligence, memory, anxiety, impulsivity, sleep deprivation, the employment of coping strategies, self-esteem, mood, and withdrawal from intoxicants. For more information on the research leading to these conclusions, see Gisli H Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Chichester, UK: Wiley, 2003) at 380-90, 395-98, 400-402, 423-25, 428-30; Gisli H Gudjonsson et al, "The Relationship of Alcohol Withdrawal Symptoms to Suggestibility and Compliance" (2004) 10:2 *Psychol Crime & L* 169; R Pollard et al, "Interrogative Suggestibility in a US Context: Some Preliminary Data on Normal Subjects" (2004) 37:5 *Personality & Individual Differences* 1101; Gisli H Gudjonsson et al, "Confessions and Denials and the Relationship with Personality" (2004) 9 *Leg & Criminological Psychol* 121.

⁹² Sherrin, *supra* 90 at 634-35.

⁹³ *Ibid* at 636-37 (citations omitted).

⁹⁴ *Ibid* at 638.

⁹⁵ *Ibid* at 634.

that the law take interrogative suggestibility into consideration when regulating police questioning and assessing confessions and admissions.”⁹⁶

We would argue that courts should consider degrees of suggestibility, both in connection with conventional interrogation techniques and in MBOs. Hart was recognized as being highly suggestive, resulting from social isolation, and Unger provides another example of someone who was likely influenced by the same factor, but courts would do well to acknowledge the other factors listed above that may indicate interrogative suggestibility, and by extension may call any confessions’ reliability into question.

In this section, we have discussed several particular cases that illustrate how police techniques may very well have run afoul of the new standards in *Hart*. The review was not intended to be exhaustive but to provide a sampling of notable cases. We would also add that not every MBO confession would lead to a trial. Based on the pre-*Hart* jurisprudence, it is not inconceivable that many individuals would have felt compelled to plead guilty rather than pursue a defence at trial. Certainly, they may have been advised by learned counsel to do so given the established unavailability of the confessions rule and the *Charter* right to silence with respect to considering the admission of incriminating statements arising from MBOs.⁹⁷ Those subjected to more aggressive MBOs will not necessarily have challenged the confessions in court, preferring to just settle the matter through a plea agreement with the Crown. This does not alleviate concerns that such those who pleaded guilty were also wrongly convicted.

Assuming that the confessions elicited in such pre-*Hart* decisions might have been excluded under the rule articulated in *Hart*, the next question one might need to address is how to confront the concept of finality once guilt has been adjudged and all opportunities for appeal have been exhausted. In the following section, we examine how the notion of finality should be bypassed in favour of revisiting finalized cases and overturning a wrongful conviction.

III. FINALITY AND THE LIMITS OF RETROACTIVITY

The premise of this article is that the common law rule first articulated in *Hart* concerning the presumptive inadmissibility of incriminating

⁹⁶ *Ibid* at 638-39.

⁹⁷ See *Grandinetti*, *supra* note 36; *R v McIntyre*, [1994] 2 SCR 480, 153 NBR (2d) 161 [*McIntyre*]; *Hart*, *supra* note 2 at para 173, Karakatsanis J concurring.

statements procured through MBOs should be applied retroactively to cases decided prior to *Hart*. This would extend to cases where the decisions are final and no longer subject to further appellate review. Though we shall discuss in the next section the appropriate fora through which to engage in a re-examination of such earlier decisions in light of the *Hart* rule, we shall first tackle here how our proposition confronts the concept of finality and the presumption against retroactive application of new rules.⁹⁸ In the first part of this section, we discuss how the traditional position does not favour retroactive applications of the law to cases that are final and no longer subject to appeal. We then discuss instances where the norm against retroactivity has been countered and some of these bases underlying such exceptions.

A. Upholding Finality

In a variety of judgments, both civil and criminal in nature, courts have expressed the importance of finality with respect to judicial decision-making. The principle of finality seeks to uphold the idea that there is a societal and state interest in having litigation come to an end at some point. The importance of finality appears to be particularly underscored in civil litigation. For parties that have been successful at trial, such litigants should be entitled to rely on the principle of finality, and furthermore such reliance becomes increasingly stronger as the years pass.⁹⁹ The British Columbia Court of Appeal has asserted that the principle of finality is important because, “[i]t is in the interests of society and of the litigants themselves that all points should be raised before judgment so that when judgment is delivered there is an end in the courts of this Province to the matters in issue. *Interest reipublicae ut sit finis litium*.”¹⁰⁰ The importance connects to

⁹⁸ In some of the fora suggested in the next section, surpassing finality, and retroactive application of new norms is not a technical requirement. Nevertheless, even where finality and non-retroactive application of law are not strictly applicable, these are enduring principles at the conceptual level. As such, we feel it behooves us to provide a rationale for why finality should be set aside and the *Hart* rule should be applied retroactively.

⁹⁹ *Marché D’Alimentation Denis Thériault Ltée v Giant Tiger Stores Limited*, 2007 ONCA 695 at para 38, 87 OR (3d) 660.

¹⁰⁰ *Johnson v Laing*, 2004 BCCA 642 at para 11, 248 DLR (4th) 239.

economic and psychological interests of the parties and the community at large. As the Ontario Court of Appeal states:

Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. Under our system for the adjudication of personal injury claims, that end point occurs when a final judgment has been entered and has either not been appealed, or all appeals have been exhausted.¹⁰¹

The principle of finality also plays an important role in criminal cases. The Supreme Court of Canada has asserted that, “[f]inality in criminal proceedings is of the utmost importance but the need for finality is adequately served by the normal operation of *res judicata*: a matter once finally judicially decided cannot be relitigated.”¹⁰² The ability of an individual convicted of a crime to challenge that conviction on the basis of a new rule or interpretation coming into existence after the conviction typically arises where the individual is “still in the judicial system.”¹⁰³ Specifically, the conviction is not truly final if it is still subject to further appeal.¹⁰⁴ In *Wigman*, the accused was convicted of attempted murder in late 1981. Following an unsuccessful appeal before the British Columbia Court of Appeal, he appealed to the Supreme Court of Canada. After leave to appeal was granted, but before the scheduled hearing date, the Supreme Court released its decision in *R v Ancio*.¹⁰⁵ In *Ancio*, the Court departed from earlier decisions and concluded that the requisite fault standard for convicting someone of attempted murder is nothing less than the specific intent to commit murder. Prior to *Ancio* and following the Court’s decision in *R v Lajoie* in 1974, the requisite fault standard for attempted murder was the intention to kill or the intention to cause bodily harm knowing that death may result and was reckless as to whether death ensued or not.¹⁰⁶ During *Wigman*’s trial, the jury was appropriately instructed in accordance with the older *mens rea* standard from *Lajoie*, which was the prevailing standard in effect at the time. As a consequence of a more restrictive *mens*

¹⁰¹ *Tsaoussis v Baetz*, (1998), 41 OR (3d) 257 at para 16, 165 DLR (4th) 268 (CA).

¹⁰² *R v Wigman*, [1987] 1 SCR 246 at 257, 33 CCC (3d) 97 [*Wigman*].

¹⁰³ *Ibid.*

¹⁰⁴ See *R v Sarson*, [1996] 2 SCR 223 at 237, 107 CCC (3d) 21 [*Sarson*].

¹⁰⁵ *R v Ancio*, [1984] 1 SCR 225, 6 DLR (4th) 577.

¹⁰⁶ *R v Lajoie*, [1974] SCR 399, 10 CCC (2d) 313; *Wigman*, *supra* note 102 at 252.

rea standard set out in *Ancio*, Wigman sought its application on appeal. Against the arguments of the Crown, the Court determined as long as an accused was “still in the system”, he or she was “entitled to have his or her culpability determined on the basis of what is held to be the proper and accurate interpretation of the *Code*.”¹⁰⁷

The ability to rely upon a new constitutional, statutory, or common law rule or interpretation appears to expire once an individual is no longer “in the system”. Once a case is considered final, which is to say, it is no longer subject to further appeal to the Supreme Court of Canada, the resort to new rules or interpretations that come into existence after a case has become final is no longer possible. This applies even in cases where an individual has been convicted of a crime that is later determined to be unconstitutional.¹⁰⁸

There are several rationales in support of the general presumption against retroactivity. In *Retroactivity and the Common Law*, Ben Juratowich articulates some of these rationales.¹⁰⁹ First, the presumption against retroactivity affirms the idea of certainty concerning legal norms and/or their interpretation. Juratowich argues that “when the meaning of a law is settled at the time of an event to which that law applies, that law should not later be altered in a way that vitiates the existing certainty about the law’s application to that past event.”¹¹⁰ Connected to this notion of certainty is the idea that persons can have the ability to rely on the law that existed at the time the events occurred.¹¹¹ Certainty is also important in facilitating

¹⁰⁷ *Wigman*, *supra* note 102 at 261.

¹⁰⁸ See *Sarson*, *supra* note 104, where a *Charter Habeus* claim could be applied to “ongoing” issue rather than a retrospective one. As noted below, the availability of post-conviction relief may be available in the United States where, for example, a norm which was valid at the time of conviction is later deemed unconstitutional even after the case is otherwise no longer subject to further appeal. This applies as well in cases where an individual has served their sentence and has been released and seeks to have their record expunged. See e.g. Tony Gonzales, “How Nashville Man Cleared Of 'Homosexual Acts' Conviction Paves The Way”, *National Public Radio* (16 November 2016), online: NPR <<http://www.npr.org/2016/11/16/502208745/how-nashville-man-cleared-of-homosexual-acts-conviction-paves-the-way>>.

¹⁰⁹ Ben Juratowich, *Retroactivity and the Common Law* (Oxford: Hart Publishing, 2008) [Juratowich].

¹¹⁰ *Ibid* at 44.

¹¹¹ *Ibid* at 44. This is regardless of whether there was actual reliance. As Juratowich raises, one of the problems with using actual reliance is that it would benefit those who had

human autonomy.¹¹² With respect to certainty and human autonomy within the criminal law context, there is a “desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction.”¹¹³ Consequently, the application of retroactive norms to conduct and events that transpired prior to the promulgation of the new rule leads to uncertainty and disrupts an individual’s choice to conduct their affairs.

A second rationale against retroactive application of new norms, which Juratowich identifies, is their impact on liberty (and is indeed tightly connected to certainty). He argues that the application of retroactive laws impacts on liberty in two ways. First, it results in a deprivation of security in connection with past events which were previously legal. Indeed, he posits that “[t]here is a sense of finality and security that comes with knowing how the law applied to past events—the impact of state regulation on that aspect of life is known and in the past.”¹¹⁴ Because the state has a monopoly on changing the legal consequences of past events, non-state actors and entities “should generally be entitled to feel, think and act as though the state will not alter the legal consequences of past events with that change being deemed to have been operative in the past. There should generally be no need to devote thought or resources to such past events.”¹¹⁵

Second, Juratowich asserts that retroactive laws impact liberty by removing an actual freedom. He argues that it is not simply that one is being deprived of a choice as to whether to follow the law or a lawful path. The freedom to act that previously existed or was unimpeded has now been altered. This may have an impact that results in a pecuniary disadvantage where the penalty involved includes fines.¹¹⁶

The relationship between negative liberty and retroactivity has particular salience to criminal law. As Juratowich articulates, the distaste for retroactive law is identifiable with two maxims embedded in both

actual knowledge of the law as against those who did not. *Ibid* at 44-48.

¹¹² *Ibid* at 48.

¹¹³ See *Polyukhovich v Commonwealth of Australia*, (1991), 172 CLR 501 at 688, cited in Juratowich, *supra* note 109 at 48.

¹¹⁴ Juratowich, *supra* note 109 at 50.

¹¹⁵ *Ibid* at 50. For an example of the state exercising its power to retroactively change legal consequences to insulate its liability for its own misfeasance; see *Authorson v Canada*, 2003 SCC 39, [2003] 2 SCR 40.

¹¹⁶ Juratowich, *supra* note 109 at 51.

international and domestic law: (1) *nullum crimen sine lege antea exstanti*; and (2) *nulla poena sine lege antea exstanti*.¹¹⁷ These principles are textually enshrined, at least in part, in section 11 of the *Charter* as well as article 15 of the *International Covenant on Civil and Political Rights*.¹¹⁸ The first maxim, *nullum crimen sine lege antea exstanti*, is that a person should not be found guilty of committing acts that were not considered crimes at the time the acts were committed. The second principle, *nulla poena sine lege antea exstanti*, is that a person shall not be subjected to a heavier penalty than one which was applicable at the time of the commission of the crime. This of course does not prevent all retroactive applications of law but is focused on protecting a criminal defendant from particular applications in the context set out. Noticeably, the concern here is that defendants are not to be disadvantaged by the application of retroactive laws that impose criminal liability or more serious punishments than would have been applicable at the time certain acts were committed. However, where a law imposes a lighter penalty than that which existed at the time a crime was committed, the accused shall benefit. These norms are protective of the liberty of individuals affected or potentially affected by retroactive law or punishments. As we shall discuss in greater detail below, where the new norm does not impose criminal liability or a more serious punishment, but in fact provides greater legal protections rooted in a constitution or at common law, retroactive applications of such new norms or interpretations should be considered in cases even where finality has been reached. They

¹¹⁷ *Ibid* at 52.

¹¹⁸ *Charter*, *supra* note 28, s 11(g) (“Any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations”); *Charter*, *supra* note 28, s 11(i) (“Any person charged with an offence has the right if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment”); see also *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art 15 (entered into force 23 March 1976, accession by Canada 19 May 1976) (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby”).

do not inhibit or impinge upon individual liberty or autonomy, but rather the new rule places restrictions on questionable state action in evidence gathering. We next look into the reasons why finality and the presumption against retroactivity may be overcome.

B. Breaking the Hold of Finality

While there are many reasons for the presumption against retroactivity continuing to resonate within legal systems, there are exceptions – or instances where there should be exceptions. Juratowich articulates certain instances where the presumption is defeasible to countervailing reasons of sufficient strength.¹¹⁹ One countervailing reason is that if the presumption against retroactivity exists to preserve certainty with respect to the law, then such presumption is defeated where certainty did not previously exist in the first place. *Ergo*, if certainty did not exist, there is none to preserve by applying a new norm retroactively. Juratowich explains that, “where the law at the time of acting is uncertain, that uncertainty means that a person cannot know how her liberty is constrained.”¹²⁰ In the case of admitting confessions elicited through MBOs, prior to the Newfoundland and Labrador Court of Appeal’s decision concerning *Hart*, and subsequently the Supreme Court’s ground breaking decision, there had not been any uncertainty that the typical rules governing the admission of incriminating statements permitted their inclusion. As discussed earlier, Supreme Court precedent demonstrated that neither the common law confessions rule nor the *Charter* right to silence applied to the admission of MBO confessions.¹²¹

While the presumption against retroactivity affirms the principle of finality, some courts in the United States, unlike their Canadian counterparts, have carved out exceptions, particularly where constitutional rules are in play. This includes cases that are no longer subject to direct appeal. While such cases are of course not binding on Canadian courts, they may provide some guidance about when it is appropriate to circumvent the presumption against retroactivity. In *Teague v Lane*, the United States Supreme Court has held, with respect to *habeus corpus* applications brought before federal courts regarding state court convictions, that new constitutional rules will not apply in such collateral proceedings barring two

¹¹⁹ Juratowich, *supra* note 109 at 60.

¹²⁰ *Ibid* at 62.

¹²¹ Grandinetti, *supra* note 36; McIntyre, *supra* note 97.

exceptional circumstances.¹²² The first exception looks at any new rules that render types of primary conduct “beyond the power of the criminal law-making authority to proscribe.”¹²³ In other words, the court will ask whether the state lacked the jurisdiction to proscribe the activity in question in the first place.¹²⁴

The second exception focuses on “watershed” rules that “implicate the fundamental fairness and accuracy of the criminal proceeding.”¹²⁵ The United States Supreme Court has indicated that it was extremely rare for a rule to qualify under this category.¹²⁶ There were two essential elements. First, the new “rule must be necessary to prevent an ‘impermissibly large risk’ of an inaccurate conviction.”¹²⁷ In one of the only examples of this, the Supreme Court in *Whorton v Bockting* identified the right to have counsel appointed for indigent defendants charged with a felony as held in *Gideon v Wainwright*. The *Whorton* Court stated, “[w]hen a defendant who wishes to be represented by counsel is denied representation, *Gideon* held, the risk of an unreliable verdict is intolerably high.”¹²⁸ Second, the *Whorton* Court stated that the new rule must “alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.”¹²⁹ Though the Court has not spelled this element out in detail, it has offered some clarification. Such bedrock procedural elements must be based on constitutional rights. The *Whorton* Court further opined that in order to meet this requirement, “a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding.”¹³⁰ In providing an example of this, the Court once again turned to its earlier decision in *Gideon*.

¹²² *Teague v Lane*, 489 US 288 at 311, 109 S Ct 1060 (1989).

¹²³ *Ibid.*

¹²⁴ See Paul E McGreal, “A Tale of Two Courts: The Alaska Supreme Court, the United States Supreme Court, and Retroactivity” (1992) 9:2 Alaska L Rev 305 at 313 [McGreal].

¹²⁵ *Whorton v Bockting*, 549 US 406 at 416, 127 S Ct 1173 (2007) [*Whorton*]; *Danforth v Minnesota*, 552 US 264 at 303, 128 S Ct 1029 (2008) [*Danforth*].

¹²⁶ *Whorton*, *supra* note 125 at 419.

¹²⁷ *Ibid* at 418.

¹²⁸ *Ibid* at 419.

¹²⁹ *Ibid* at 418-419.

¹³⁰ *Ibid* at 421.

While the *Teague* ruling was originally intended to apply only to collateral attacks brought forth in federal court, state courts are, by contrast, permitted to give greater effect to retroactivity rules in such cases. Indeed, in *Danforth v Minnesota*, the United States Supreme Court held that state courts were not limited to the two exceptions set out in *Teague* when applying new federal constitutional rules retroactively in *habeas corpus* applications brought before state courts.¹³¹ In some instances, it may be deemed mandatory for state courts to apply new norms retroactively. Last year, in *Montgomery v Louisiana*, the Supreme Court went so far as to conclude that state courts were in fact required to apply new substantive rules of constitutional retroactivity in collateral proceedings.¹³² In an earlier decision, *Miller v Alabama*, the Supreme Court determined that mandatory life sentences for juvenile offenders offended the Eighth Amendment's prohibition on cruel and unusual punishment. In subsequent collateral proceedings before Louisiana courts, the Louisiana state Supreme Court refused to apply *Miller* to an individual convicted to a mandatory life sentence as a juvenile offender. The *Montgomery* Court clarified that such a required application did not extend to procedural rules of a watershed nature leaving it to state courts to determine whether the new rules should be applied retroactively.

It is worth noting that within the United States' federalist system, individual states have their own constitutions with rights enshrined therein. In addition to the fact that such rights may provide broader protections than those set out under the federal constitution, state courts are free to develop more flexible rules concerning retroactive application of state constitutional norms. As the Oregon Supreme Court expressed in *State v Fair*, "[i]n the present case since we are dealing with a new principle of law which rests entirely on our own Constitution the determination of retroactivity or prospectivity is for us alone."¹³³

In an example of state courts applying new rules retroactively, Maryland offers one possibility. Article 23 of Maryland's state constitution provides that "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the

¹³¹ *Danforth*, *supra* note 125.

¹³² *Montgomery v Louisiana*, 136 S Ct 718, 193 L Ed 2d 599 (2016).

¹³³ *State v Fair*, 263 Or 383 at 388, 502 P 2d 1150 (OR 1972). See also McGreal, *supra* note 124 at 305.

evidence to sustain a conviction.”¹³⁴ Pursuant to this provision, the state issued a rule that in connection with jury instructions, jurors were advised that they are “the judges of the law and that the court’s instructions are advisory only.”¹³⁵ This included instructions concerning the standard of proof required to find guilt in criminal cases. A number of convictions were secured on the basis of such pronouncements. In 1980, the Maryland Court of Appeals, the state’s highest appellate court, in *Stevenson v State*, interpreted the Article 23 to limit a jury’s power to deciding the law to non-constitutional “disputes as to the substantive ‘law of the crime,’ as well as the ‘legal effect of the evidence.’”¹³⁶ The court stressed that all other legal issues are for the judge alone to decide.¹³⁷ The *Stevenson* court pointed out however this interpretation was not a “new” one. This conclusion that the interpretation was not a “new” rule effectively stymied attempts by legal counsel on appeal. It did so for the following reason: after *Stevenson*, Maryland courts concluded that because the interpretation in *Stevenson* was not new, the failure of trial counsel to object to a court’s jury instruction (that its instructions were wholly advisory) constituted a waiver – even where the trials took place prior to *Stevenson*. However, in *Unger v State*, a subsequent 2012 decision by the Maryland Court of Appeals, the court held that previous decisions, including *Stevenson*, indeed created a new rule and as such the failure of counsel in trials prior to *Stevenson* to object to the jury instruction did not constitute a waiver.¹³⁸ The Court of Appeals in *Unger* asserted that these holdings were to be retroactive.¹³⁹ In *State v Waine*, the Court of Appeals posited that, “[t]he *Unger* decision effectively opened the door to postconviction relief for persons tried during the era of the advisory only jury instruction—an opportunity that had been foreclosed by *Stevenson* [and subsequent decisions].”¹⁴⁰ In *Waine*, the defendant’s trial (which took place prior to *Stevenson*) was impacted by the previously valid jury instruction. *Waine* was granted post-conviction relief further to *Unger* by way of an order for a new trial.

¹³⁴ MD Const art XXIII.

¹³⁵ *State v Waine*, 444 Md 692 at 695, 122 A 3d 294 (MD Ct App, 2015) [*Waine*].

¹³⁶ *Stevenson v State*, 289 Md 167 at 180, 423 A 2d 558 (MD Ct App, 1980).

¹³⁷ *Ibid* at 179.

¹³⁸ *Unger v State*, 427 Md 383 at 416-417, 48 A 3d 242 (MD Ct App, 2012) [*Unger*].

¹³⁹ *Waine*, *supra* note 135 at 696; *Unger*, *supra* note 138 at 416.

¹⁴⁰ *Waine*, *supra* note 135 at 696.

It is worth noting that the *Unger* and *Waine* appeals to the Maryland Court of Appeals were done pursuant to the state's *Post Conviction Procedure Act*.¹⁴¹ Under the statute, there is a general time limitation, whereby a petition for post-conviction relief may not be filed more than 10 years after the sentence was imposed.¹⁴² However, the statute allows for a court to "reopen a postconviction proceeding that was previously concluded if the court determines that the action is in the interests of justice."¹⁴³ In addition the legislation also provides for relief for the application of new constitutional standards:

Notwithstanding any other provision of this title, an allegation of error may not be considered to have been finally litigated or waived under this title if a court whose decisions are binding on the lower courts of the State holds that:

- (i) the Constitution of the United States or the Maryland Constitution imposes on State criminal proceedings a procedural or substantive standard not previously recognized; and
- (ii) the standard is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence.¹⁴⁴

What the foregoing suggests is that while retroactive applications of the law are not generally desired, there are notable exceptions and particularly where constitutional rights are implicated. Below, we turn our attention to whether older cases where the evidence relied exclusively or heavily upon on MBO confessions should be re-evaluated in light of the new common law rule discussed in *Hart*.

C. The *Hart* Rule and Finality

Though we discuss in the next part the different possibilities through which to revisit pre-*Hart* MBO cases that are final and no longer subject to appeal, in this section, we shall examine reasons why the *Hart* rule should be used when revisiting such cases. There are reasonable rationales for applying the rule in *Hart* retroactively. We deal with each in turn.

Drawing inspiration from the United States jurisprudence discussed earlier, we argue that the *Hart* rule constitutes (or is closely analogous to) a watershed rule that implicates the fundamental fairness and accuracy of the trial, as articulated in *Teague*. Though the United States Supreme Court

¹⁴¹ *Maryland Uniform Post Conviction Procedure Act* (2014).

¹⁴² *Ibid*, s 7-103(b).

¹⁴³ *Ibid*, s 7-104.

¹⁴⁴ *Ibid*, s 7-106(c)(2) [emphasis added]. More recently, the Florida Supreme Court applied new rules retroactively. See *Walls v State*, 2016 Fla LEXIS 2328, 41 Fla L Weekly S 466.

construed the notion of watershed rules more narrowly, *Hart* could be viewed as one such rule. Prior to the decision, law enforcement officials were given largely free reign by the courts to engage in MBOs without much hindrance. The promulgation of the *Hart* rule placed a significant hurdle limiting the state's ability to advance a case based on conscriptive and self-incriminating evidence procured through these operations. Indeed, as observed above, confessions arising from MBOs are now deemed presumptively inadmissible unless the Crown can prove on a balance of probabilities that the probative value of the incriminating statement(s) outweighs its prejudicial impact. The focus of the test looks to fundamental issues of reliability given the use of inducements and veiled threats of violence. The *Hart* Court was also concerned with both the moral and reasoning prejudice that arises from these confessions. The Court stresses that moral danger arises from the potential of a jury being swayed by the implied bad character evidence of the accused. Reasoning prejudice emerges when the jury is distracted away from the offence charged and directed toward the accused's misconduct in seeking entry into the criminal organization. The Court asserts that, "[d]espite the well-established presumption that bad character evidence is inadmissible, it is routinely admitted in Mr. Big cases because it provides the relevant context needed to understand how the accused's pivotal confession came about."¹⁴⁵

Furthermore, the combination of an unreliable confession paired with bad character evidence produces a toxic mix endangering the liberty of an accused. Justice Moldaver states:

Putting evidence before a jury that is both unreliable and prejudicial invites a miscarriage of justice. The law must respond to these dangers. The fact that there are no proven wrongful convictions in cases involving Mr. Big confessions provides little comfort. The criminal justice system cannot afford to wait for miscarriages of justice before taking reasonable steps to prevent them.¹⁴⁶

One has to recognize the *Hart* ruling for what it is – a one hundred and eighty degree shift concerning the admissibility of MBO confessions. It might be argued that having freely admitted such incriminating statements in past cases without subjecting them to adequate judicial scrutiny posed a serious, substantial, and intolerably high risk of an unreliable verdict. Accordingly, it is more than reasonable to argue that the new rule

¹⁴⁵ *Hart*, *supra* note 2 at para 76.

¹⁴⁶ *Ibid* at para 77.

established in *Hart* constitutes a new watershed rule and previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding.

One question that may emerge is whether a common law rule as in *Hart*, as opposed to one rooted in constitutional law (such as in the American cases discussed earlier), can supply sufficiently a legal or conceptual basis for countering the principle of finality and non-retroactivity of new rules in connection with cases for which direct appeal is no longer available. One way to bypass this would be to subscribe to a Blackstonian view – that the common law has no temporal origin but is rooted in natural law. According to this perspective, judges do not ‘create’ common law rules that have existed since time immemorial, but they merely ‘discover’ them through common sense and reasoning. From this point of view, the rule articulated in *Hart* is not a new rule, but merely one that the Supreme Court of Canada suddenly and just recently “discovered” and revealed in 2014. Under this theory, applying the *Hart* rule is not a retroactive application of a ‘new’ rule. While such a theory works rather conveniently for our purposes, it nevertheless strains credulity that a common law rule conceived in specific reference to a very particular police investigative technique found in Canada has existed since time immemorial only to be discovered very recently. However, one does not need to turn to Blackstonian theory to articulate that a new common law rule developed by the Supreme Court of Canada should be applied retroactively.

While one may intuitively seek to turn to the *Charter* for protection, this does not in actuality render other sources of legal protection obsolete. Indeed, the common law serves as an independent source of protection outside of the *Charter*. The confessions rule is a particular example of such legal protections rooted in the common law. As the Supreme Court of Canada asserted in *Oickle*, the *Charter* does not subsume the common law – rather, the *Oickle* Court observed that the scope of the common law, particularly the confessions rule, is at times broader in that it does not apply solely to instances of arrest or detention, as in the case of the right to counsel under section 10 of the *Charter*.¹⁴⁷ The same could be said about the common law right to silence as elucidated under *R v Turcotte*, where the Supreme Court asserted that the common law right to silence “applies any time [an accused] interacts with a person in authority, whether detained or

¹⁴⁷ *Oickle*, *supra* note 1 at paras 29-30.

not.”¹⁴⁸ This is in contradistinction to the right to silence founded in section 7 of the *Charter*, which is limited to the context of detention.¹⁴⁹ Second, the burden and standard of proof with respect to the common law confessions rule is for the Crown to demonstrate the voluntariness of a confession beyond a reasonable doubt.¹⁵⁰ With respect to the *Charter*, the burden is on the accused to demonstrate on a balance of probabilities that her rights have been breached.¹⁵¹ Lastly, a breach of the common law confessions rule always results in exclusion, whereas the decision to admit evidence despite a *Charter* breach is conditional upon an assessment of whether admitting the impugned evidence would bring the administration of justice into disrepute.¹⁵² While there are differences between the *Hart* rule and the confessions rule, there are some commonalities. First, the *Hart* rule applies regardless of whether an accused is in detention, as is the case with the confessions rule. Second, the Crown has the burden to justify the inclusion of the incriminating statements. In the case of the confessions rule, the Crown must demonstrate beyond a reasonable doubt that the incriminating statements were made voluntarily. MBO confessions are presumptively inadmissible, however the Crown bears the burden of rebutting this presumption on a balance of probabilities by showing that the probative value of the incriminating statements outweighs their prejudicial impact.

In addition to being an independent source of law that is not subsumed by the *Charter*, common law norms can also have a considerable interplay with constitutional norms. In *R v Singh*, the Supreme Court of Canada concluded that the common law confessions rule and the *Charter* right to silence essentially overlap in instances where an accused made incriminating statements to an individual who he subjectively knew was a person in authority.¹⁵³ In *Singh*, the accused asserted his wish not to speak with the police roughly 18 times during the course of a police interrogation. Eventually he relented and made incriminating statements. Though conceding the voluntariness of his statements for the purposes of the confessions rule, *Singh* argued that the statements were elicited in violation of his right to silence. The Supreme Court concluded that where statements

¹⁴⁸ *R v Turcotte*, 2005 SCC 50 at para 51, [2005] 2 SCR 519.

¹⁴⁹ *Singh*, *supra* note 30 at para 46.

¹⁵⁰ *Ibid* at para 25; *Oickle*, *supra* note 1 at para 30.

¹⁵¹ *Oickle*, *supra* note 1 at para 30.

¹⁵² *Ibid*.

¹⁵³ *Singh*, *supra* note 30 at paras 24-25.

were made voluntarily to a person in authority beyond a reasonable doubt for the purposes of the confessions rule, this was the functional equivalent of a determination that the *Charter* right to silence had not been breached. Indeed in *Singh*, the Court observed, “the confessions rule effectively subsumes the constitutional right to silence in circumstances where an obvious person in authority is interrogating a person who is in detention because, in such circumstances the two tests are functionally equivalent.”¹⁵⁴

Thus far, it is clear that the Supreme Court affirms that the *Charter* does not subsume the common law, but in some instances the common law may, however, subsume the *Charter* – or at least specific portions of it. In other circumstances, short of the common law subsuming the *Charter*, the former can influence and inform an interpretation of the latter. When the Supreme Court announced the existence of a right to silence rooted within the principles of fundamental justice within section 7, the Court drew on common law principles grounded on the confessions rule and the privilege against self-incrimination.¹⁵⁵ Within the context of administrative law, the Supreme Court has stated that the common law duty of fairness forms part of the basic tenets of the legal system and inform constitutional principles grounded within the principles of fundamental justice under section 7.¹⁵⁶ In a similar fashion, the values underlying the *Charter* can also influence the interpretation and scope of the common law in instances where the *Charter* does not directly apply. Over the past two decades, the Supreme Court has held that common rules may be adapted to be consistent with *Charter* values, stating:

The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.¹⁵⁷

What all this strongly suggests is that while the *Charter*, being constitutional law, is formally that body of law against which all others must typically conform, the reality is that the common law plays a significant role in the legal system. In some cases, it subsumes or informs the interpretation of the *Charter*. In others, the interpretation and/or scope of the common law is adapted to comply with the values underlying the *Charter*. While not

¹⁵⁴ *Ibid* at para 39.

¹⁵⁵ *R v Hebert*, [1990] 2 SCR 151 at 164-175, [1990] 5 WWR 1.

¹⁵⁶ See *Suresh v Canada*, 2002 SCC 1, [2002] 1 SCR 3.

¹⁵⁷ *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 92, 126 DLR (4th) 129.

constitutionalized in the formal sense, common law rules may be refitted, or created in light of the *Charter*.

In concluding this section, we recognize that there is a value to finality and that there are compelling reasons for its existence and application. Yet, there are countervailing considerations when the new legal rules constitute foundational norms that strike at the heart of trial fairness. The non-retroactivity of new rules traditionally applied in the criminal law context to protect accused from facing crimes that did not exist when their acts were committed. When the new rules in question are intended to be protective, the same concerns do not apply as in the case of newly created offences that are applied retroactively to conduct which took place prior to the new rules coming into effect. By applying the rules in *Hart* to earlier MBO cases, we next consider what would be the best fora to consider pre-*Hart* decisions in light of *Hart's* standards.

IV. SOME WAYS FORWARD

If, as we have argued, pre-*Hart* MBO cases resulting in conviction should be revisited using the standards set by the *Hart* Court, how should such reviews take place? What mechanisms should be employed? What cases should be revisited and what should be the basis for selecting such cases for review? For example, should convictions based solely on a trial be examined or should a reviewing body also consider those whereby an individual pleaded guilty on the basis that the incriminating statements would be more than likely admitted under pre-*Hart* standards? What body or institution should undertake such reviews? Should such reviews take place under the auspices of the judiciary, the executive branch (particularly the Minister of Justice), or an independent administrative review body? Should such pre-*Hart* convictions be assessed purely in isolation of one another or should they be assessed as part of broader patterns of police investigative conduct?

In this section of the article, we will canvass several possible options for undertaking reviews of pre-*Hart* convictions. They will run the spectrum from isolated individual reviews to *en bloc* review, to examining the possible merits of reviews by the judiciary, the Minister of Justice to independent reviews by specially created administrative bodies.

A. Individualized Review Processes

One approach to reviewing MBO convictions would be a more traditional and highly individualized approach to examining pre-*Hart* MBOs. Reviews would be done on a case-by-case basis. Under the two processes indicated below, individual applicants who had been convicted on the basis of an MBO confession would apply directly to an applicable body. In one instance, the body is a court, while the other is the executive branch.

1. *Habeus Corpus* Reviews – *The Judicial Approach*

Though much more hypothetical at this stage, one conceivable approach to reviewing MBO decisions that are final and no longer subject to appeal is via an application to a court for *habeus corpus*. In order for courts to be able to undertake such a review using a new standard that did not exist before the earlier decision became final, one of two possible changes would have to occur. As noted earlier, the Supreme Court of Canada has limited the application of new standards only to cases that are still subject to further appellate review (rather than being final and no longer subject to appeal). To alter this, the Court would have to change its approach, or, in the alternative, Parliament could make necessary legislative changes to permit courts to apply new standards retroactively to cases that have been finalized and are no longer subject to appeal. In order to prevent opening the floodgates and jeopardizing the principle of finality more broadly, Canadian courts could be permitted, similar to American courts, to apply certain types of new “watershed” rules retroactively. This would limit the eligibility of applications made, while still ensuring that new rules affecting the fundamental fairness of trials will apply to earlier cases. As the Supreme Court of Canada observed in *Oickle*, “[o]ne of the overriding concerns of the criminal justice system is that the innocent must not be convicted.”¹⁵⁸

In the case of *habeus corpus* applications, an accused may already have been convicted, but this hardly means that the conviction should stand if at the time of the original trial, there was an absence of fundamental rules governing the admission of incriminating statements procured through rather problematic means. Courts play a vital gatekeeping role against miscarriages of justice, even though it is abundantly clear that they have not

¹⁵⁸ *Oickle*, *supra* note 1 at para 36.

always done so.¹⁵⁹ It is also an independent branch of the government and is not charged with any duties or responsibilities with respect to prosecuting crimes. This being said, even if courts were authorized to revisit these older cases, there is legitimate concern about how this might swell already packed dockets and exacerbate delays in the court system. Other fora, as suggested below might be better equipped for the task.

2. Ministerial Reviews Regarding Miscarriages of Justice

Ministerial reviews performed by the federal Minister of Justice provide an executive and administrative process to review convictions that may constitute a miscarriage of justice. The *Criminal Code* and relevant regulations set out the procedures and considerations. In reviewing whether a miscarriage of justice has transpired, the Minister must take into account, among other considerations “whether the application is supported by new matters of significance that were not considered by the courts”, “the relevance and reliability of information that is presented in connection with the application”, and “the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.”¹⁶⁰ In pre-*Hart* MBO cases that are no longer subject to appellate review and for which courts did not subject the reliability of the evidence to the factors set out in *Hart*, such criteria and the presumptive inadmissibility of the incriminating statements are arguably “new” matters of significance not previously considered by the courts when originally adjudicating those cases. The factors set out in *Hart* help to assess the relevance and more particularly the reliability of the incriminating information used to convict. An application in pre-*Hart* cases should not be seen as serving as a further appeal since the *Hart* test was unavailable at the time any earlier appeals to appellate courts were possible.

¹⁵⁹ Sometimes courts commit lapses when examining miscarriages of justice. See e.g. Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution, Digest of Findings and Recommendations* (Halifax: Nova Scotia, 1989) (“While the Court did quash Marshall's conviction and enter a verdict of acquittal, it also inexplicably chose to blame Marshall for his wrongful conviction. We have concluded that the Court's conclusion in this regard represented a serious and fundamental error” at 7).

¹⁶⁰ *Criminal Code*, RSC 1985, c C-46, s 696.4 [*Criminal Code* or *Code*].

Under the *Criminal Code*, the Minister of Justice is granted certain powers of investigation.¹⁶¹ The Minister may take it upon herself to undertake the relevant investigation. However, she may delegate such powers to “any member in good standing of the bar of a province, retired judge or any other individual who, in the opinion of the Minister, has similar background or experience the powers of the Minister to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence and otherwise conduct an investigation.”¹⁶² Lastly, the Minister may also refer to a court of appeal any question in relation to such applications on which the Minister seeks assistance of that court for the court to furnish its opinion.

There have been criticisms regarding the Ministerial review process – specifically, that as a part of the government, the Minister has final authority to decide whether to grant an application. Because governments hold the power to prosecute, there may be strong reluctance to re-open cases and second-guess past work by provincial counterparts. In order to separate the review process from the government, some have called for the creation of a permanent and independent Criminal Cases Review Commission¹⁶³ (CCRC), modeled from an administrative agency in the United Kingdom which carries the same name. The UK CCRC is an independent body which began its work in 1997. Its main objectives include reviewing convictions and/or sentences with a fresh eye and referring cases back to a court of appeal. Despite calls to create a CCRC in Canada, this move was ultimately rejected in favour of creating certain processes that provided some distance and perceived independence. However, as some critics have argued and as noted above, the ultimate authority within the context of Ministerial review still lies with the federal Minister of Justice.¹⁶⁴ It is worth

¹⁶¹ *Ibid*, s 696.2(2).

¹⁶² *Ibid*, s 696.2(3).

¹⁶³ See e.g. Kent Roach, “An Independent Commission to Review Claims of Wrongful Convictions: Lessons from North Carolina?” (2012) 58 *Crim LQ* 283 (“Commissions of inquiry have been recommending since 1989 that Canada create an independent commission to assume the powers of the federal Minister of Justice to refer cases of suspected miscarriages of justice for judicial re-consideration” at 283).

¹⁶⁴ It is worth noting that there have been criticisms concerning the UK’s CCRC. See Michael Naughton, “The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System” (2012) 58 *Crim LQ* 207. For a more positive appraisal of the UK’s CCRC relative to the Ministerial review process in Canada, see Narissa Somji, “A Comparative Study of the Post-Conviction Review Process in Canada and the United Kingdom” (2012) 58 *Crim LQ* 137.

noting, though, that it was through the Ministerial review process, which led to Kyle Unger's conviction being quashed and a new retrial re-ordered. However, given the sheer number of possible pre-*Hart* MBOs that could be challenged, other review processes that involve *en bloc* review may be more advisable.

B. An En Bloc Administrative Review

Separate from having a government department or court revisit prior Mr. Big cases and the admission of incriminating statements, another avenue would be to create an *ad hoc* administrative review process. The federal government as well as the governments of the provinces and territories are each empowered via legislation to establish commissions of inquiry.¹⁶⁵ As Ruel identifies, through various sources, there are several recognized rationales for the creation of commissions.¹⁶⁶ A few of these are particularly relevant to the discussion here. First, because commissions of inquiry operate independently, they may act in a non-partisan way and free from institutional impediments.¹⁶⁷ Second, they allow for the review of events or issues of public importance.¹⁶⁸ Third, commissions of inquiry can devote sufficient time, resources and expertise to the study of a particular problem, and can take a long-term view.¹⁶⁹ Lastly, and ultimately, as Ruel posits, their role is to make recommendations and provide advice to the relevant executive with respect to a particular problem, situation or issue under review.¹⁷⁰

These factors are relevant to consider when contemplating the establishment of a commission concerning pre-*Hart* MBO cases. First, the Minister of Justice and her coordinate role as Attorney General of Canada are essentially duties relating to law enforcement. There may be a certain level of unspoken resistance when reviewing claims of miscarriage of justice to those convicted of serious crimes. Second, the issue of whether past MBO cases led to convictions based on potentially unreliable evidence is a matter of significant public importance as it concerns the proper administration of justice. Third, given the potential for many possible applicants seeking relief

¹⁶⁵ Simon Ruel, *The Law of Public Inquiries in Canada* (Toronto: Carswell, 2010) at 2.

¹⁶⁶ *Ibid* at 2-3.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid*.

¹⁷⁰ *Ibid*.

based on *Hart*, a commission could devote sufficient time and resources to the subject matter. Furthermore, depending on who is appointed to take charge of the inquiry, they may have significant expertise or possibly develop it through a review of many cases. Finally, the commission could provide the necessary advice and recommendations to Minister or cabinet about what steps should be taken with respect to particular cases.

Jurisdictional matters may arise with respect to the construction of a commission of inquiry where the focus is on a matter outside of the jurisdiction's competence. Ruel articulates that where the subject matter touches upon the powers of more than one jurisdiction,¹⁷¹ in such cases, it may be possible for two or more jurisdictions to jointly establish a commission of inquiry.¹⁷² Given the national scope and use of MBOs across the country, and that it concerns the criminal law power of the federal government and procedures used by police officers in enforcing the *Criminal Code*, it seems appropriate that a Commission of Inquiry assume a national role. Under the *Inquiries Act*, the federal cabinet may "cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof."¹⁷³ The inquiry would focus on issues concerning possible wrongful convictions arising from the admission of incriminating statements derived from MBOs. However, unlike previous inquiries such as the commissions examining specific wrongful conviction cases such as those of Thomas Sophonow or Guy Paul Morin, this would be an *en bloc* examination looking at numerous cases.

The creation of an inquiry to study a broader phenomenon is not unheard of. Commissions of inquiry have been created to study a variety of events and actions tied to a single theme. For instance, the Truth and Reconciliation was created to examine numerous acts and institutions of violence perpetrated against indigenous peoples in Canada over numerous decades. The Krever Commission studied the "blood system in Canada" with a focus on the safety of blood products from 1981 to 1994 with respect to HIV and AIDS as well as Hepatitis from 1965 to 1995. Within the context of criminal law, the government of Manitoba in 2003, initiated a

¹⁷¹ *Ibid* at 13.

¹⁷² *Ibid.*

¹⁷³ *Inquiries Act*, RSC 1985, c I-11, s 2.

Forensic Evidence Review Committee (FERC).¹⁷⁴ The goal of the FERC was to review homicide cases from the previous 15 years in which hair comparison evidence was relied upon to secure a conviction.¹⁷⁵ Also, in the criminal law context, an *en bloc* review was created in the mid-1990s to study concerns with respect to women who killed or attempted to kill a male partner/spouse and the availability of the defence of self-defence in their cases. In 1995, the federal government commissioned the “Self Defence Review” (SDR) and appointed Judge Lynn Ratushny to undertake the inquiry.¹⁷⁶ Because the SDR provides an interesting model for a Commission to follow, we shall discuss it briefly below.

The federal government created the SDR to examine whether women were able to receive the benefit of the defence of self-defence in homicide-connected trials.¹⁷⁷ This was prompted in significant part by the Supreme Court of Canada’s decision in *R v Lavallee* in 1990.¹⁷⁸ The thrust of the *Lavallee* Court’s holding was that in connection with their claims to self-defence, female defendants should be able to present expert testimony concerning their reasonable apprehension of death or grievous bodily harm within the context of abusive relationships. The Court also clarified that an imminent perception of death was not required. There were concerns that women prior to *Lavallee* but also after were unable to properly access the main benefits of the decision. Through the SDR, Judge Ratushny reviewed 98 applications from women seeking review of their cases.¹⁷⁹ Of those, approximately 35 were cases that were decided and completed prior to the release of the *Lavallee* decision, and did not benefit from the Court’s conclusions.

¹⁷⁴ Government of Manitoba, *Forensic Evidence Review Committee: Final Report* (Winnipeg: 2004).

¹⁷⁵ Through its vetting process, the FERC ultimately reviewed two cases, one of which was Kyle Wayne Unger’s. While Unger’s incriminating statements from the MBO were admitted, so was a hair sample alleged to be his that was found at the crime scene. Through the FERC process, it was determined through further DNA testing that it was indeed not his hair which was found. This removed any physical evidence tying Unger to the murder. See *Unger* MBQB, *supra* note 60.

¹⁷⁶ Canada, *Self-Defence Review: Final Report*, by Judge Lynn Ratushny, (1997) [SDR].

¹⁷⁷ *Ibid* at 11.

¹⁷⁸ *R v Lavallee*, [1990] 1 SCR 852, [1990] 4 WWR 1.

¹⁷⁹ SDR, *supra* note 176 at 34.

Following her appointment to carry out this inquiry, Judge Ratushny conducted a roundtable discussion with various experts on self-defence and abuse.¹⁸⁰ She also solicited legal analyses from learned legal scholars.¹⁸¹ The SDR would identify potential applicants and application packages were to be sent out.¹⁸² Judge Ratushny mailed out 236 application packages and she received 98 application forms.¹⁸³ Her Honour then requested that representatives of the Elizabeth Fry Society make personal contact with the individuals who were sent the 236 application packages and explain the process to them.¹⁸⁴ Once the 98 applications were received, Judge Ratushny obtained reports from the Correctional Service of Canada.¹⁸⁵ She then sorted the 98 applications into three groups: (1) applications where there appeared to be some evidence of self-defence in the facts surrounding the woman's offence; (2) applications where self-defence seemed unlikely under the facts; or (3) applications where there appeared to be no facts supporting a claim of self-defence.¹⁸⁶ Judge Ratushny proceeded to only consider those applications that fit under categories #1 and #2.¹⁸⁷ She invited these applicants to send her their stories in writing, explaining what happened in their own words.¹⁸⁸ While she received many long letters, others who did not feel comfortable doing so in writing were given the chance to call Judge Ratushny collect at any time while others expressed themselves through audio or audio-visual recording.¹⁸⁹ Her Honour also appointed four regionally based legal counsel for the applicants.¹⁹⁰ Each applicant who had not been screened out at the earlier stage (group three) was provided their appointed counsel's address and phone number.¹⁹¹ The function of counsel was to assist applicants with respect to their applications but not act in an adversarial capacity.¹⁹² The counsel's first responsibility was to make contact

¹⁸⁰ *Ibid* at 32-33.

¹⁸¹ *Ibid* at 33.

¹⁸² *Ibid* at 33-34.

¹⁸³ *Ibid* at 34.

¹⁸⁴ *Ibid* at 35-36.

¹⁸⁵ *Ibid* at 36.

¹⁸⁶ *Ibid*.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid* at 37.

¹⁸⁹ *Ibid*.

¹⁹⁰ *Ibid* at 38-39.

¹⁹¹ *Ibid*.

¹⁹² *Ibid* at 39.

with their assigned applicants, listen to their stories and provide a preliminary assessment as to the individual's eligibility for SDR.¹⁹³ Counsel were also expected to assist in addressing concerns of the applicants in addition to responding to any requests made by Judge Ratushny.¹⁹⁴

Two further stages included file building and analysis. Judge Ratushny sought and received documentation from various sources with respect to cases under review. This documentation included information from defence counsel, prosecutors, court officials, police, doctors, forensic experts, and shelter workers.¹⁹⁵ Many lawyers sent their original files with the undertaking that they would be returned.¹⁹⁶ After the files were reviewed, case summaries were produced with the assistance of her assistant legal counsel.¹⁹⁷ Judge Ratushny then analyzed each remaining case on the basis of the relevant standard of review she set out and in light of the elements of self-defence that existed at the time.¹⁹⁸ Her Honour then dispatched any further questions to applicants that need responses before the review could be completed.¹⁹⁹ In her letters to the applicants, Judge Ratushny indicated problem areas in their claims regarding self-defence.²⁰⁰ Applicants were also provided the case summaries that were prepared along with a list of sources relevant to their case.²⁰¹ In an additional stage, Judge Ratushny met and conducted interviews with 14 women.²⁰² She indicated that she could not provide a positive recommendation without having met with the particular women in question.²⁰³ The overall process culminated in Judge Ratushny submitting several recommendations and her final report.

C. Selecting the Most Suitable Review Process

Of the possible options canvassed, we would argue that the most suitable option would be an inquiry that resembled, to a certain degree, the

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid* at 40.

¹⁹⁸ *Ibid* at 42.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid* at 43.

²⁰³ *Ibid.*

inquiry process established for the SDR and conducted by Judge Ratushny. Two of the suggestions noted above, *habeus corpus* reviews by courts and the Criminal Cases Review Commission are not available at the moment. *Habeus corpus* reviews do not cover the application of new rules to older cases that have been finalized and are no longer subject to review. As noted above, a change would need to be made to permit such appeals. Despite several calls to create a CCRC in Canada, this still has not transpired and does not appear likely to in the near future.

Applications for review by the Federal Minister of Justice may be possible options. However, unlike the Ratushny-led SDR inquiry process, applicants might not be signalled to the possibility of this. In the SDR process, Judge Ratushny made potential applicants aware of the inquiry she was undertaking and the possibility to submit applications.

The SDR process provides a potential model subject to necessary modifications for undertaking an assessment of pre-*Hart* decisions. As with applicants in the SDR process, appropriate individuals, those whose convictions were based on the admission of a MBO confession may be alerted to the review process. The review can and should be limited to those whose cases were finalized and no longer subject to appellate review before *Hart* was released. This would be different from the SDR where both pre and post *Lavallee* decisions were considered. Like the SDR, legal counsel should be assigned to assist in the application process and assist in its smoother running.

A Mr. Big review (MBR) inquiry could assess whether the techniques employed in pre-*Hart* decisions would satisfy the norms that the *Hart* Court set out. Specifically, an MBR could assess whether the probative value of admitting an MBO confession outweighs its prejudicial impact thus rebutting a presumption of inadmissibility. This determination would rely on the factors set out in *Hart*. In addition, an MBR would also assess whether the techniques involved amounted to an abuse of process. Lastly, and following *Mack*, where the case in question involved a jury making the decision at trial, an MBR could examine the record to assess whether jurors received any form of warning relating to the reliability of the incriminating statements.

Within the framework of Judge Ratushny's vetting system noted above, she established three categories for screening purposes. They included instances where there appeared to be some evidence of self-defence, cases where self-defence was unlikely, and instances where there were no facts to

support a self-defence claim. A MBR process could establish a similar type of screening system for applications in connection with each of the three categories: (1) the probative value outweighing the prejudicial impact analysis; (2) the abuse of process analysis; (3) where applicable, jury warnings concerning the reliability of the evidence. A preliminary vetting system could establish the degrees of likelihood as to whether facts found in a given case would satisfy any of these criteria. While MBOs conducted since *Hart* might account for the standards and factors set out in the Court's decision, it may also be the case that undercover police officers in pre-*Hart* decisions did not engage in conduct which would render the confessions unreliable (from the perspective that the probative value outweighed its prejudicial impact) or that the conduct did not amount to an abuse of process. Or put another way, in connection with assessing reliability, it may be that the presumption of inadmissibility concerning an MBO confession may be easily rebutted. The review process could also account for any other evidence available to support a conviction other than the confessions themselves.

An MBR inquiry process should focus not only on convictions secured through trials and verdicts rendered, but also on instances where accused have pleaded guilty. Allowing for this broader scope properly recognizes the inherent dangers of MBOs is not only in connection with trials but also in pushing or persuading an accused to plead guilty. In the pre-*Hart* period, because there was no effective means to exclude the evidence, many would have certainly been advised to negotiate a plea deal. This may have been despite the egregious nature of some MBO techniques employed.

The inquiry process established by the federal government for the SDR provides a reasonable and possible basis from which to construct a mechanism to revisit pre-*Hart* MBO cases. Depending on the powers the federal government would provide, at the very least, an MBR process could make recommendations to the Minister of Justice with respect to which cases and convictions should be quashed and deserve a retrial.

V. CONCLUSION

Confessions secured through aggressive investigative techniques that pose serious concerns regarding the reliability of the evidence may lead to wrongful convictions. Prior to *Hart*, there was relatively little scrutiny concerning MBO confessions and their reliability. *Hart*, however,

represents a fundamental shift in the consideration of MBO confessions, reversing the Court's previous characterization of the investigations as skillful police work and declaring that the procured statements are presumptively inadmissible. The *Hart* decision demonstrates the Court's understanding of the inherent dangers of investigatory tactics that involve inducements and threats, as well as the dangers of relying on statements that are inconsistent with surrounding evidence or for which there is no confirmatory evidence. The spectre of wrongful convictions loomed over the Court's decision, as it will over future MBO cases.

While attention must be paid to the ways that courts are applying the test and factors in cases going forward (and whether the *Hart* test is a sufficiently effective way to handle the admissibility of MBO confessions), it is equally important for our legal system to return to pre-*Hart* cases with a view to considering whether miscarriages of justice ensued from the failure to exclude unreliable evidence. In this article, we have considered a number of cases that, when evaluated under the *Hart* criteria, we argue would have resulted in the confessions being ruled inadmissible. While the application of new norms to cases that have been finalized and are no longer subject to appeal is in tension with the notion of finality and principle of non-retroactivity, as this article has discussed, there are exceptions - and circumstances that should be exceptions. The rule in *Hart* qualifies as an exceptional watershed rule which should have retroactive application. While the law in its current state would need to be altered in order to proceed in that manner, it is within the authority of the federal Minister of Justice to establish a formal inquiry, headed by a Canadian judge and modeled from the Self Defence Review conducted by Judge Ratushny. This would be an *en bloc* review of numerous individual cases with a view toward assessing the admissibility of their confessions under the standards set out in *Hart*. Where the reviewing judge or judges find that the impugned admissions would not be admissible under the *Hart* criteria and there is a possibility that a miscarriage of justice occurred, the reviewing authority would forward recommendations to the Minister as to whether a retrial should be ordered. It is our view that this procedure would best identify those cases where a wrongful conviction may have occurred and provide a remedy, while still upholding the principle of finality and maintaining public confidence in the administration of justice.

“Jackpot:” the Hang-Up Holding back the Residual Category of Abuse of Process^{*}

J E F F E R Y C O U S E ^{* *}

ABSTRACT

The abuse of process doctrine allows courts to stay criminal proceedings where state misconduct compromises trial fairness or causes ongoing prejudice to the integrity of the justice system (the “residual category”). The Supreme Court revisited the residual category in the 2014 case *R v Babos*. In *Babos*, the Supreme Court provided a three-stage test for determining whether an abuse of process in the residual category warrants a stay of proceedings.

This article critically examines *Babos* and its progeny. Notwithstanding the Supreme Court’s insistence that the focus of the residual category is societal, all three stages of the test remain disconcertingly preoccupied with the circumstances of the individual accused. Courts’ reluctance to give undeserving accused the “jackpot” remedy of a stay has prevented the court from dissociating itself from state misconduct. Instead, courts have imposed remedies which inappropriately redress wrongs done to the accused. This paper suggests four ways for courts to better advance the societal aim of the residual category. First, a cumulative approach should be taken to multiple instances of state misconduct rather than an individualistic one. Second, courts ought to canvass creative remedies in considering whether an alternative remedy can adequately dissociate the justice system from the

^{*} This paper was written in a personal capacity and does not in any way reflect the views of the Ontario Superior Court of Justice or the Ministry of the Attorney General.

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misconduct. Third, courts should avoid using terms like “unwarranted windfall” and “jackpot” to describe the remedy of a stay of proceedings. Finally, courts need not be so hesitant to stay proceedings. Properly applied, the abuse of process analysis carries minimal risk of “unwarranted windfalls.”

Keywords: *Abuse of process – residual category – prejudice – integrity of the justice system – ss. 7, 24(1), Canadian Charter of Rights and Freedoms – remedies – stay of proceedings – exclusion of evidence – sentence reduction – restorative justice – proactive remedies.*

I. INTRODUCTION

The abuse of process doctrine allows courts to stay criminal proceedings in two circumstances: (1) where state misconduct compromises trial fairness (the “main category”) or (2) where state misconduct does not affect trial fairness but “impinges on the integrity of the justice system” (the “residual category”).¹ The Supreme Court revisited the residual category in the 2014 case *R v Babos*. Writing for the majority, Moldaver J reaffirmed that the remedial goal in such cases is “not to provide redress to an accused for a wrong that has been done to him or her in the past.”² Rather, “the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.”³ Moldaver J clarified that the test used for determining whether state misconduct warrants a stay of proceedings is the same for both categories. It consists of three requirements:

1. There must be prejudice to the integrity of the justice system which will be perpetuated by the conduct of a trial or its outcome;
2. There must be no alternative remedy capable of redressing the prejudice;
3. Where uncertainty remains after the first two stages, the court balances the need to denounce misconduct and preserve the integrity of the justice system against society’s interest in adjudicating the case on its merits.⁴

¹ *R v Babos*, 2014 SCC 16 at para 1, [2014] 1 SCR 309 [*Babos*].

² *Ibid* at para 39.

³ *Ibid*.

⁴ *Ibid*.

This article critically examines each stage of the abuse of process analysis as articulated and applied in *Babos* and its progeny. While *Babos* did not alter the first two stages of the abuse of process analysis *per se*, the majority applied those stages of the abuse of process test in ways which have important ramifications for future abuse of process cases. With respect to prejudice caused to the integrity of the justice system, the first stage, the majority assessed each instance of state misconduct individually rather than cumulatively. Moreover, the majority considered the passage of time since the misconduct and defence counsel’s delay in bringing an abuse of process application as mitigating factors. The majority did not consider alternative remedies short of a stay, skipping the second stage of the abuse of process test.

Babos’ key innovation was to make the third stage of the test in the residual category mandatory. Prior to *Babos*, courts only balanced the need to dissociate the court from state misconduct against society’s interest in adjudicating the case on its merits when uncertainty persisted after the court determined the only remedy capable of redressing prejudice was a stay of proceedings. Under the new framework, however, balance “must always be considered.”⁵

The central argument of this article is that, notwithstanding the Supreme Court’s insistence on the residual category’s societal focus in *Babos*, all three stages of the test used to determine whether a stay of proceedings is warranted remain disconcertingly preoccupied with the circumstances of the individual accused. The unspoken concern animating courts’ application of the residual category is that a stay of proceedings may give the accused more than they deserve. Quite apart from whether society’s interest in adjudicating the trial on its merits outweighs the need to dissociate the justice system from state misconduct, courts distort the analysis in order not to give undeserving accused the “jackpot” remedy of a stay of proceedings.⁶

Courts’ reluctance to give the accused more than they deserve has held back the residual category of abuse of process in at least two ways. First, it has narrowed access to the remedy of a stay of proceedings. The Supreme Court has long maintained that stays are reserved for the “clearest of cases.”⁷

⁵ *Babos*, *supra* note 1 at para 41.

⁶ *R v Muthuthamby*, 2010 ONCJ 435 at para 33, 79 CR (6th) 64 [*Muthuthamby*]. O’Donnell J uses the word “jackpot” to describe a stay of proceedings.

⁷ *R v O’Connor*, [1995] 4 SCR 411 at para 82, 103 CCC (3d) 1.

However, where the need to dissociate the court from misconduct outweighs society's interest in adjudication of the case on its merits and the court nevertheless permits the trial to continue because of extraneous factors like whether the accused deserves a stay, the court unjustifiably implicates itself in state misconduct. Second, the reluctance to award an accused the "jackpot" of a stay of proceedings has influenced courts to grant remedies which inappropriately redress wrongs done to the accused, rather than dissociate the justice system from the misconduct.

If courts are serious about dissociating the justice system from conduct which offends society's sense of fair play and decency, then they must legitimately engage with the purpose of the residual category. This article suggests four ways in which courts may do so. First, a cumulative approach should be taken to multiple instances of misconduct rather than an individualistic one. Second, courts ought to canvass creative remedies in considering whether an alternative remedy can adequately dissociate the justice system from the misconduct. Third, although it would be preferable to abandon the third stage entirely, to the extent that courts are bound to apply it, courts should avoid considering the particular circumstances of the accused, except insofar as they are relevant to the need to denounce misconduct. The language of "unwarranted windfalls" and "jackpots" is particularly unhelpful and its use ought to be avoided.⁸ Finally, courts need not be so hesitant to stay proceedings. Having concluded that state misconduct impinges on the integrity of the justice system and that the only remedy capable of adequately dissociating the justice system from that misconduct is a stay of proceedings, a court may safely conclude that a stay of proceedings is warranted.

⁸ For "jackpot" see *Muthuthamby*, *supra* note 6 at para 33. For "windfall" see *Babos*, *supra* note 1 at para 43; *R v Zarinchang*, 2010 ONCA 286 at para 60, 99 OR (3d) 721; *R v Regan*, 2002 SCC 12 at para 211, [2002] 1 SCR 297 [Regan]; *R v B(A)*, 2015 ONSC 5541 at para 74, 24 CR (7th) 191; *R v Spagnoli*, 2011 ONSC 4843 at para 60, 284 CCC (3d) 24; *R v Smith*, 2014 ONCJ 756 at paras 67 and 68, [2014] OJ No 5240 [Smith]; *R v Russo*, 2016 ONCJ 762 at para 96, 136 WCB (2d) 132 [Russo]; *R v Haevischer*, 2014 BCSC 2172 at para 152, 118 WCB (2d) 253; *R v Gonsalves*, 2016 ONCJ 768 at para 42, 136 WCB (2d) 375 [Gonsalves]; *R v Noel*, 2015 ONSC 2140 at para 53, 120 WCB (2d) 443. See also Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Canada Law Book, 2013) at 9.350 [Roach, *Constitutional Remedies*].

II. R V BABOS: ABUSE OF PROCESS REVISITED

A. Facts

The abuse of process claim in *Babos* arose from long and complicated proceedings. On February 17, 2006, police officers, believing Mr. Babos was transporting guns in his vehicle, pulled Mr. Babos over. The officers searched the trunk of Mr. Babos’ car, found a semi-automatic firearm and arrested Mr. Babos.⁹ Mr. Piccirilli was arrested on June 21, 2006.¹⁰ Mr. Babos and his co-accused Mr. Piccirilli were charged with firearms related offences and drug trafficking offences.¹¹

The first instances of misconduct occurred before the trial began. The appellants accused the provincial Crown initially assigned to the case of threatening Mr. Piccirilli on three separate occasions, between June 2006 and February 2007, with additional charges if he did not plead guilty.¹² Specifically, the appellants alleged the Crown uttered the following threats:

1. The Crown told Mr. Piccirilli’s former lawyer, in the presence of Mr. Piccirilli that “if your client doesn't settle, he's gonna be hit by a train.”
2. Mr. Piccirilli stated that the Crown said to him, “if you proceed, we’ll bring other charges against you” and that she would “use section 577 [of the *Criminal Code*]” to go “straight to trial.”
3. Another of Mr. Piccirilli’s counsel stated that the Crown told her that if Mr. Piccirilli did not plead guilty, she would charge Mr. Piccirilli with money laundering and organized crime offences.¹³

Although there was no evidence that the Crown had threatened Mr. Babos directly, the Supreme Court inferred that the threats conveyed to Mr. Piccirilli would have “come to [Mr. Babos’] attention.”¹⁴ Although these threats occurred well before the trial began in April 2008, the threats only came to light in October 2008 when Mr. Babos’ former counsel testified at Mr. Babos’ s. 11(b) application.

Before the appellants’ trial began, the provincial Crown was removed from the file for health reasons and replaced by a federal Crown. The federal Crown joined the charges against the appellants in a single indictment and,

⁹ *Supra* note 1 at para 7.

¹⁰ *Ibid* at para 8.

¹¹ *Ibid.*

¹² *Ibid* at para 10.

¹³ *Ibid.*

¹⁴ *Ibid.*

based on evidence led at the preliminary hearings, charged them with “four additional offences related to organized crime, firearms, and drug trafficking.”¹⁵

The second instance of misconduct occurred at the outset of the trial, which began in April 2008. Counsel for Mr. Babos brought a motion to exclude the firearm seized from the trunk of Mr. Babos’ car.¹⁶ A key issue at the hearing was whether the officer had opened the trunk or Mr. Babos had opened the trunk and thereby consented to the search.¹⁷ One of the officers testified that Mr. Babos opened the trunk, despite having testified at the preliminary inquiry that he had opened the trunk himself.¹⁸ When confronted with the inconsistency, the officer testified that the other officer had “convinced” him that the new version of events was the truth.¹⁹ The trial judge found that the officers had “colluded for the purpose of misleading the court,” concluded that the trunk had been illegally searched and excluded the evidence under s. 24(2).²⁰

In June 2008, the federal Crown sought to adduce the same firearm against Mr. Piccirilli, taking the position that Mr. Piccirilli lacked standing to claim a s. 8 violation because the car belonged to Mr. Babos.²¹ The trial judge provisionally ruled in favour of the Crown.²² In October, Mr. Babos brought a motion to stay the charges for unreasonable delay.²³ Shortly thereafter, Mr. Piccirilli had a heart attack and the trial was adjourned.²⁴ Mr. Piccirilli applied for bail on the basis that the detention centre where he was being held lacked capacity to care for his health.²⁵ Mr. Piccirilli undertook to provide the court with his medical report and list of medications.

The third instance of misconduct occurred before Mr. Piccirilli’s bail application was heard. The federal Crown contacted the detention centre directly and spoke to Mr. Piccirilli’s doctor, who, without Mr. Piccirilli’s

¹⁵ *Ibid.*

¹⁶ *Ibid* at para 12.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid* at para 13.

²¹ *Ibid* at para 14.

²² *Ibid.*

²³ *Ibid* at para 15.

²⁴ *Ibid.*

²⁵ *Ibid.*

consent, provided the federal Crown with Mr. Piccirilli’s medical documents.²⁶ The federal Crown provided those documents to Mr. Piccirilli’s counsel.²⁷ Although the federal Crown initially refused to disclose the source of those documents, she subsequently did so by affidavit.²⁸

Mr. Babos’ s. 11(b) application resumed in late October.²⁹ During these proceedings, the provincial Crown’s threatening conduct “came to light for the first time.”³⁰ The federal Crown declined to call the provincial Crown to give evidence because the provincial Crown’s health precluded her from testifying.³¹ The federal Crown did not admit the threats.³²

Mr. Babos and Mr. Piccirilli subsequently brought an application to stay the proceedings for abuse of process.³³ The trial judge granted the appellants’ request on November 14, 2008.³⁴ The trial judge stayed the proceedings on the basis of the provincial Crown’s threats, the police officers’ collusion to mislead the court and the federal Crown’s “improper conduct in securing Mr. Piccirilli’s medical records.”³⁵

B. Moldaver J’s Majority Judgment

1. *The Test for Abuse of Process*

Writing for the majority, Moldaver J revisited the test for abuse of process established in *R v Regan*.³⁶ As indicated above, abuse of process claims in the criminal context fall into two categories of cases: (1) where state misconduct “compromises the fairness of an accused’s trial; and (2) where state misconduct “risks undermining the integrity of the judicial process” but does not affect trial fairness.³⁷ In either category, a stay of proceedings will only be warranted in the “clearest of cases.”³⁸

²⁶ *Ibid* at para 16.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ *Ibid* at para 17.

³⁰ *Ibid*.

³¹ *Ibid*.

³² *Ibid*.

³³ *Ibid* at para 18.

³⁴ *Ibid*.

³⁵ *Ibid* at para 19.

³⁶ *Ibid* at para 32; *Regan*, *supra* note 8 at paras 54-57.

³⁷ *Babos*, *supra* note 1 at para 31.

³⁸ *Ibid*.

Whether a stay of proceedings is warranted is determined by the applying same test for both categories.³⁹ The test has three requirements:

- (1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome";
- (2) There must be no alternative remedy capable of redressing the prejudice; and
- (3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits".⁴⁰

Moldaver J stressed that state misconduct is not a necessary condition to establish an abuse of process.⁴¹ "Circumstances may arise", he emphasized, "where the integrity of the justice system is implicated in the absence of misconduct."⁴²

In the residual category, the question at the first stage of the test is whether the state "has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system."⁴³ Moldaver J downplayed the distinction between ongoing and past misconduct, maintaining that the question to be answered at the first stage remained "whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system."⁴⁴

At the second stage, the question is "whether any other remedy short of a stay is capable of redressing the prejudice."⁴⁵ Different remedies apply to the trial fairness category as compared to the residual category. Because in the former category "the focus is on restoring an accused's right to a fair trial," procedural remedies such as ordering a new trial are more appropriate.⁴⁶ In the residual category, the concern is prejudice to the integrity of the justice system.⁴⁷ Importantly, Moldaver J stressed that remedies in the residual category are designed not to compensate the

³⁹ *Ibid* at para 32.

⁴⁰ *Ibid*. Citations omitted.

⁴¹ *Ibid* at para 37.

⁴² *Ibid*.

⁴³ *Ibid* at para 35.

⁴⁴ *Ibid* at para 38.

⁴⁵ *Ibid* at para 39.

⁴⁶ *Ibid*.

⁴⁷ *Ibid*.

accused for wrongs; rather, “the focus is on whether an alternate remedy short of a stay of proceeding will adequately dissociate the justice system from the impugned state conduct going forward.”⁴⁸

As indicated above, *Babos*’ key change to the abuse of process test in the residual category pertains to the third stage. At the third stage, Moldaver J emphasized that the balancing of interests “takes on added significance when the residual category is invoked.”⁴⁹ The court must consider whether the integrity of the justice system is better protected by staying the proceedings or having a trial despite the misconduct.⁵⁰ The seriousness of the misconduct, whether the conduct is systemic or isolated, the circumstances of the accused, “the charges he or she faces,” and the interests of society in adjudicating the case on its merits are all relevant considerations to this balancing exercise.⁵¹ Breaking with past jurisprudence which required balancing only in uncertain cases, Moldaver J concluded that balance must always be considered in the residual category.⁵²

2. Application to the Facts

According to Moldaver J, the facts of *Babos* lent the abuse of process analysis to an individualistic approach because each instance of misconduct was committed at different times by different players.⁵³ However, Moldaver J acknowledged that a cumulative approach may be warranted in other cases.⁵⁴

Accessing Medical Records without Consent

Moldaver J found the federal Crown’s conduct in accessing Mr. Piccirilli’s medical records “occasioned no prejudice to the integrity of the justice system.”⁵⁵ First, the federal Crown had asked only for an affidavit; the medical records were forwarded on the doctor’s own initiative.⁵⁶ Second, the federal Crown disclosed the source of the information within

⁴⁸ *Ibid.*

⁴⁹ *Ibid* at para 40.

⁵⁰ *Ibid* at para 41.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid* at para 73.

⁵⁴ *Ibid.*

⁵⁵ *Ibid* at para 52.

⁵⁶ *Ibid* at para 51

days of receiving it.⁵⁷ Third, Mr. Piccirilli had put his health in issue and had undertaken to provide the court with his medical records.⁵⁸ Proceeding in light of this misconduct – if there was any – did not prejudice the integrity of the justice system.

Police Collusion to Mislead the Courts

Moldaver J found the appellants failed at the second stage with respect to the police collusion.⁵⁹ The appropriate remedy, according to Moldaver J, was to exclude the evidence of the firearm against Mr. Piccirilli, even though he lacked standing to challenge its admissibility.⁶⁰ Exclusion of the evidence would “serve to dissociate the court from the officers’ collusion and the Crown’s misguided attempt...to introduce the firearm against Mr. Piccirilli,” both of which were intended to achieve the admission of the firearm into evidence.⁶¹

Threatening Conduct

Moldaver J found the Crown’s threatening comments to Mr. Piccirilli and his counsel caused prejudice to the integrity of the justice system.⁶² Moldaver J notably did not consider whether a remedy short of a stay of proceedings was adequate because, in his view, the third stage was dispositive.⁶³ Moldaver J found that a stay of proceedings would not respect society’s interest in adjudicating the case on its merits.⁶⁴ Of particular significance was the fact that the threats were made more than a year before the trial began.⁶⁵ According to Moldaver J, counsels’ eighteen month silence indicated they did not take the threats seriously.⁶⁶ At this stage, Moldaver J found that the serious nature of the charges weighed against “threats uttered more than a year before trial by a Crown no longer on the case” favoured a trial notwithstanding the misconduct.⁶⁷

⁵⁷ *Ibid* at para 52.

⁵⁸ *Ibid* at para 51

⁵⁹ *Ibid* at para 56.

⁶⁰ *Ibid* at para 57.

⁶¹ *Ibid*.

⁶² *Ibid* at para 66.

⁶³ *Ibid* at para 67.

⁶⁴ *Ibid* at para 69.

⁶⁵ *Ibid* at para 65.

⁶⁶ *Ibid* at para 63.

⁶⁷ *Ibid* at para 69.

III. ANALYSIS

A. Unwarranted Windfalls and Jackpots

In *R v Mack*, Lamer J (as he then was) recognized that the “issuance of the stay obviously benefits the accused but the court is primarily concerned with the larger issue: the maintenance of the public confidence in the legal and judicial process.”⁶⁸ Regrettably, the recurrence of the language of “unwarranted windfalls” and “jackpots” in judgments demonstrates that the concern that an undeserving accused will benefit from a stay continues to influence courts.⁶⁹ In *R v Muthuthamby*, for example, O’Donnell J opined, “[t]he stay is the cudgel of judicial intervention. It is the blunt force trauma of constitutional remedies. It lacks subtlety. It risks being devoid of balance. It reflects no middle ground. It is the jackpot of judicial remedies.”⁷⁰ In *R v Smith*, Loignon J refused to stay the proceedings, concluding that a “stay would be an unjustified windfall to the accused.”⁷¹ Yet, under the residual category, it is not the fact that an accused benefits from a stay that is relevant to abuse of process. Rather, it is whether the charges are so serious that the integrity of the justice system is better protected by proceeding with a trial in spite of the misconduct.⁷² As I will argue in the subsequent sections, this “hang-up” with “jackpots” and “unwarranted windfalls” has caused courts to distort each stage of the abuse of process test. It has held back the residual category because it has prevented the courts from redressing prejudice to the integrity of the justice system.

B. The First Stage: Prejudice to the Integrity of the Justice System

At the first stage, the court is supposed to ask whether the impugned state conduct causes prejudice to the integrity of the justice system. In the face of multiple instances of misconduct, however, the Supreme Court has sanctioned the assessment of each form of misconduct individually, a practice that I will argue is inconsistent with the societal focus of the residual category. Moreover, the passage of time since the abuse of process and the tactics of defence counsel are not appropriate considerations in assessing

⁶⁸ *R v Mack*, [1988] 2 SCR 903 at para 81, 44 CCC (3d) 513.

⁶⁹ For examples see *supra* note 8.

⁷⁰ *Supra* note 6 at para 33.

⁷¹ *Supra* note 8 at para 68.

⁷² *Babos*, *supra* note 1 at para 41.

the prejudice to the integrity of the justice system. I argue that it is more consistent with the purpose of the residual category for courts to stay tainted counts but allow untainted counts to proceed to trial.

1. Cumulative vs Individual Misconduct

H. Archibald Kaiser has argued that the “atomized study” of the three instances of misconduct in *Babos* “seems out of place when the final obligation is to render a qualitative judgment on what the effects are on ‘the integrity of the justice system’ whether the ‘abuse will continue to plague the judicial process’ or cause a ‘taint of the justice system.’”⁷³ The individualistic approach is also out of step with recent Supreme Court jurisprudence on s. 24(2) applications, which have similar underlying policy considerations. The Supreme Court has preferred a cumulative approach to the question of whether admission of evidence would bring the administration of justice into disrepute.⁷⁴

The facts of *Babos* itself illustrate why an individualistic approach to misconduct is inappropriate. Although Moldaver J is correct to say that the three forms of misconduct were perpetrated at different times and by different actors, he overlooks the fact that misconduct permeated virtually every stage of the justice process. The appellants’ introduction to the justice system began with an illegal car search. The provincial Crown threatened Mr. Piccirilli on three separate occasions before the trial began. Police collusion marred the s 24(2) hearing. During the trial, the Crown inappropriately accessed Mr. Piccirilli’s medical records without his consent. Looking at the case as a whole, it is difficult to identify a stage in the proceedings untainted by misconduct. Moreover, it makes little sense to distinguish between the federal and provincial Crowns as different state actors when both are “quasi-judicial officers” who ultimately represent her Majesty.⁷⁵

⁷³ H Archibald Kaiser, “*Babos*: Further Narrowing Access to a Stay of Proceedings Where the Integrity of the Judicial Process is Implicated” (2014) 8 CR (7th) 59 (WL) [Kaiser].

⁷⁴ *Ibid.* See also Kent Roach, “The Evolving Test for Stays of Proceedings” (1997-1998) 40 Crim LQ 400 at 404 and 407 for some of the differences between s 24(1) jurisprudence and s 24(2) jurisprudence. Roach goes a step further and argues that the “main category” and the “residual category” should not be considered watertight compartments. Cumulative prejudice to both the accused’s right to a fair trial and the integrity of the justice system may justify a stay, in his view.

⁷⁵ *Babos*, *supra* note 1 at para 61.

To be clear, narrative clarity may require separate discussion of separate instances of misconduct. In addition, there may be circumstances where different instances of misconduct suggest distinct alternative remedies, requiring a discrete analysis of each particular instance of misconduct. The argument here is not that courts must forego separate analyses of misconduct. Rather, when courts assess prejudice at the first stage of the abuse of process analysis, they must consider the overall prejudice to the integrity of the justice system. To compartmentalize and attack each instance of misconduct on the basis that different actors acted improperly at different times is to ignore the accretive effect of multiple instances of misconduct.⁷⁶ When misconduct has permeated multiple stages of the justice process, the integrity of the justice system suffers more prejudice than the mere sum of the individual instances of misconduct.

2. Passage of Time and the Tactics of Defence Counsel

In dissent, Abella J rightly criticized the majority’s reliance on the passage of time between the threats and the abuse of process motion to “attenuate what was unpardonable conduct.”⁷⁷ Abella J forcefully argued that “time is not a legal remedy for a fundamental breach of the Crown’s role, and cannot retroactively cure intolerable state conduct.”⁷⁸ When the concern is the integrity of the justice system, what matters is not how much time has elapsed since the misconduct but rather that the misconduct happened at all. Moreover, it should not matter how seriously the defence perceived the threats. As Nathan Gorham has argued, the absence of prejudice to the individual is simply not relevant to the residual category.⁷⁹ What matters is whether the threats offend the community’s sense of fair play and decency. Focusing on the passage of time and the tactics of defence counsel at the first stage inappropriately shifts the analysis onto the accused and away from the prejudice to the integrity of the justice system.

An alternative explanation for the majority’s focus on timing and tactics is that the majority is worried about the tactics of opportunistic defence counsel. Defence counsel may resort to an abuse of process application as a

⁷⁶ Kaiser, *supra* note 73.

⁷⁷ Babos, *supra* note 1 at para 82.

⁷⁸ *Ibid.*

⁷⁹ Nathan Gorham, “Regan: The Residual Category of Abuse of Process” (2002) 49 CR (5th) 87 (WL).

last resort after all other attempts to avoid trial have been exhausted, complicating the proceedings and wasting resources. “Had [the threats] been taken seriously,” Moldaver J wrote, “one might have expected counsel to respond immediately.”⁸⁰ Yet, if the abuse is to come before the court, then it makes little difference from society’s perspective when the motion is brought, provided it is brought before trial.⁸¹

The majority may also be worried that defence counsel will wait until abuses have accumulated in order to bring a stronger abuse of process claim, rather than bringing the abuses to the court’s attention immediately. This concern is likely unfounded, however. If the justice system is functioning properly, abuses will be rare, and multiple abuses by different state actors which have no impact on the fairness of the trial will be even rarer.⁸²

Moreover, restricting access to the remedy of abuse of process is surely not the solution to this tactic. When an accused experiences multiple instances of state misconduct in the judicial process, it suggests there is a systemic problem. This is precisely the kind of situation in which a stay of proceedings is required to send the message that the justice system does not condone misconduct by state actors.⁸³

3. *Charges Untainted by Misconduct*

All of this is not to suggest that courts are required to stay all counts when confronted with multiple instances of state misconduct. On the contrary, it is appropriate for courts to stay only those counts tainted by the misconduct, while leaving untainted counts intact.⁸⁴ Because the prejudice to the integrity of the justice system arises not from the misconduct itself

⁸⁰ *Babos*, *supra* note 1 at para 63.

⁸¹ This generally describes the approach taken in the United Kingdom. See Andrew L-T Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* 2nd ed (Oxford: Oxford University Press, 2008) at 168. With respect to timing, the Supreme Court of Canada has said only that stay applications in the trial fairness category should be brought at the end of trial. See *R v La*, [1997] 2 SCR 680 at paras 27-28, 148 DLR (4th) 608. It does make sense, however, for residual category abuses of process applications to be brought before trial. See Roach, *Constitutional Remedies*, *supra* note 7 at 9.470.

⁸² *Canada (Minister of Citizenship & Immigration) v Tobiass*, [1997] 3 SCR 391 at para 91, 10 CR (5th) 163.

⁸³ *Babos*, *supra* note 1 at para 41.

⁸⁴ In *Regan*, *supra* note 8 at para 108, the trial judge stayed 9 out of 18 charges. Although the stay was reversed, the Court did not comment unfavourably on the severance of tainted from untainted counts. See also *R v Munro*, [1992] 97 Cr App R 183.

but rather from the court’s association with the misconduct, staying the tainted counts necessarily precludes the court’s association with the misconduct. Staying the tainted counts thus adequately dissociates the justice system from the misconduct.

Staying untainted counts, on the other hand, does nothing to further to dissociate the justice system from the misconduct because there is no prejudice left to remove. Furthermore, there is a strong societal interest in adjudicating the untainted counts on their merits. In *Babos*, for instance, some of the counts were added by the federal Crown following the preliminary inquiry.⁸⁵ As Moldaver J found that the federal Crown’s accessing of the medical records did not prejudice the integrity of the justice system, it was arguably open to Moldaver J to find that the new counts were untainted by the provincial Crown’s threatening conduct.

As a practical matter, the distinction between tainted and untainted counts may not always be easy to make. For example, where an improper investigation into one set of charges occurs simultaneously with a proper investigation into a different set of charges, it will likely not be clear whether all of the counts are tainted.⁸⁶ Where untainted counts can be surgically severed from tainted counts, however, there is a strong societal interest in adjudicating the untainted counts on their merits.

C. The Second Stage: Alternate Remedies for Abuse of Process

At the second stage, the court determines whether a remedy short of a stay of proceedings would adequately dissociate the court from the impugned state conduct. *Babos* itself offers limited guidance as to what remedies short of a stay of proceedings would redress prejudice to the integrity to the justice system. In fact, with regards to the threatening conduct the majority never even considers alternative remedies. I argue in this section that the failure to properly apply the second stage is indefensible because it deprives the court of the opportunity to dissociate the justice system from misconduct while respecting society’s interest in adjudicating the case on its merits.

The failure to consider alternative remedies is particularly unfortunate because, as I demonstrate in this section, a wide range of alternative

⁸⁵ *Supra* note 1 at para 11.

⁸⁶ For more examples where drawing the line between tainted and untainted charges is difficult: see Peter M Brauti & Candice Welsch, “Illegal Police Conduct in the Course of a Bona Fide Investigation” (1999-2000) 43 *Crim LQ* 64 at 74-75.

remedies exist, including but not limited to exclusion of evidence, sentence reduction, denunciation, costs, and orders for restorative justice. The remedy for each case will depend on the particular circumstances of the case but trial judges enjoy considerable discretion in determining an appropriate remedy. As the Ontario Court of Appeal recently held in *R v Gowdy*, a trial judge's remedial choice for an abuse of process "unless encumbered by legal error, a reviewable error of fact or a decision that is so clearly wrong as to amount to an injustice, is entitled to deference."⁸⁷ The remedy should, however, avoid redressing a wrong done to the accused and instead focus on dissociating the court from the misconduct. This limits the applicability of certain remedies like exclusion of evidence and sentence reduction. As a practical matter, Crowns may also unilaterally withdraw charges as a proactive remedy for abuses, or enter into joint agreements with defence counsel to remedy abuses of process.

1. The Second Stage must be Applied

In *Babos*, Moldaver J essentially "leaped over" the second stage by deciding the matter at the third stage:⁸⁸

Turning to the second stage of the test, as no argument was made that there was an alternate remedy capable of redressing the particular harm caused to the integrity of the justice system by the threats, I need not finally decide whether such a remedy was available. Instead, I turn to the third stage of the test, namely, whether Ms. Tremblay's conduct was sufficiently egregious to warrant a stay of proceedings.⁸⁹

Prior to *Babos*, skipping the second stage would have been conceptually indefensible because the third stage was reserved for uncertain cases. How can it be said that it is uncertain whether a stay is required if no alternative remedies have been considered? Moldaver J circumvents this requirement by making the third stage mandatory. Since "balance must always be considered," Moldaver J simply decides the matter at the third stage.⁹⁰

This cannot be the correct approach. First, skipping over the second stage deprives the court of the opportunity to redress the prejudice to the integrity of the justice system without staying the proceedings. This means that there will either be no remedy, in which case the integrity of the justice

⁸⁷ *R v Gowdy*, 2016 ONCA 989 at para 72, 135 WCB (2d) 573 [*Gowdy*].

⁸⁸ Tim Quigley, "Babos: Balancing Test Unnecessarily Restricts Residual Category for Stay as Abuse of Process" (2014) 8 CR (7th) 55 (WL) [*Quigley*].

⁸⁹ *Babos*, *supra* note 1 at para 67.

⁹⁰ *Ibid* at para 41.

system is prejudiced, or there will be a stay, which frustrates society’s interest in adjudication of the case on its merits. Yet, if an alternative remedy is available, then both of those interests can be satisfied. In *Gonsalves* and *Russo*, for instance, the accused were charged with driving while intoxicated and subsequently arbitrarily detained for seven hours and four and a half hours, respectively.⁹¹ In both cases, the courts proceeded straight to the balancing stage without considering alternative remedies, predictably concluding that the serious charges favoured adjudication of the case on its merits. However, the remedy of denunciation, considered below, arguably would have allowed these cases to proceed while also dissociating the court from misconduct. Skipping the second stage deprives the court of an important opportunity to address the very interests considered at the third stage.

Second, it is intellectually misleading to weigh the seriousness of the misconduct against the societal interest in having a trial without acknowledging that a stay is the only remedy capable of redressing the prejudicing integrity to the justice system. Tim Quigley argues that in leaping over the second stage, Moldaver J essentially conceded that no remedy short of a stay of proceedings could adequately redress the prejudice to the integrity of the justice system.⁹² If the only remedy capable of dissociating the justice system from the misconduct is a stay of proceedings, then that should provide the context for the balancing stage which follows. Stays are warranted in cases of misconduct not simply because the misconduct is egregious. They are warranted because a stay is the only remedy capable of redressing the prejudice to the integrity of the justice system. Balancing the prejudice to the integrity of the justice system against society’s interest in adjudication of the case on its merits without acknowledging the singular ability of a stay to remedy the prejudice removes from consideration one of the strongest arguments in favour of staying the proceedings. By skipping the second stage, the court sets the applicant up for failure at the third stage.

2. *Alternative Remedies*

Exclusion of Evidence

⁹¹ *Gonsalves*, *supra* note 7; *Russo*, *supra* note 7.

⁹² *Supra* note 86.

Exclusion of evidence may be an appropriate remedy where there is some link between the misconduct and the evidence short of the “obtained in a manner” threshold for s. 24(2) applications. In *Babos*, for example, Moldaver J faulted the trial judge for failing to consider the alternative remedy of exclusion of the firearm evidence against Mr. Piccirilli notwithstanding Mr. Piccirilli’s lack of standing to challenge admission of the evidence under s. 24(2).⁹³ The trial judge had already excluded the evidence against Mr. Babos under s. 24(2).⁹⁴ It was during the s. 24(2) application that the police collusion came to light. This linked the officers’ misconduct to the firearm evidence. Evidence was also excluded as a remedy under s. 24(1) in *R v Smith*. In that case, police used excessive force in removing the accused from his car and then administered an intoxilyzer test two hours later.⁹⁵ Although the intoxilyzer reading was not obtained in a manner that breached the accused’s *Charter* rights, there was a temporal link between the excessive force and the reading that justified the exclusion of evidence as an alternative remedy under s. 24(1).⁹⁶

Unfortunately, in many cases falling under the residual category, there will be no link between the evidence and the misconduct. For example, in many drinking and driving cases, the *Charter* breach occurs after all the evidence is obtained. As the Ontario Court of Appeal concluded in *R v Iseler*, there is no causal or temporal nexus between the breach and the obtaining of the evidence in such cases.⁹⁷ It is difficult to imagine how evidence could be excluded in a principled manner where there is no causal or temporal connection with the state misconduct. This was the conclusion Hackett J reached in *R v Young*:

...the police misconduct in this case began after the discovery of the marijuana and continued into this trial. In my view, the exclusion of the marijuana would not

⁹³ *Supra* note 1 at paras 56-57.

⁹⁴ *Ibid* at para 13.

⁹⁵ *Supra* note 8 at para 65.

⁹⁶ *Ibid*.

⁹⁷ *R v Iseler* (2004), 190 CCC (3d) 11 at para 31, 191 OAC 80 (Ont CA), citing *R v Sapusak*, [1998] OJ No 4148 at para 1 (CA), 40 WCB (2d) 191. Similarly, in *R v Dawson*, 2016 ONSC 3461 at para 58, 356 CRR (2d) 193 [*Dawson*], Mew J commented that exclusion of evidence was not appropriate because the misconduct was not related to any evidentiary issues that might arise at trial.

reflect the nature and the extent of this misconduct in a manner that would redress the injury to the integrity of justice in this case.⁹⁸

The arbitrary selection of a piece of evidence to exclude is more likely to redress the wrong done to the accused than dissociate the justice system from the state misconduct.

The utility of exclusion of evidence as a remedy is also undermined by the fact that in many cases, an exclusion of evidence would have the same effect as a stay of proceedings.⁹⁹ As a practical matter, courts appear more willing to entertain the remedy of exclusion of evidence where it would not result in the dismissal of all charges against the accused.¹⁰⁰

Sentence Reduction

Drinking and driving cases have engaged the residual category of abuse of process perhaps more than in any other context.¹⁰¹ In these cases, police officers typically administer an intoxilyzer test properly and obtain a reading of “over 80.” The police then transport the accused to a police station and place them in a holding cell, ostensibly to allow them time to sober up. The problems start in the holding cell. In some cases, accused have been held for over ten hours, well in excess of the time the human body requires to eliminate alcohol from the bloodstream.¹⁰² Because there is no reason to detain the accused this long, the police violate the accused’s s. 9 right to freedom from arbitrary detention. Since there is no link between the evidence and the *Charter* breach, exclusion of evidence is not available under s. 24(2) and, as discussed above, inappropriate under s. 24(1).

Trial judges have preferred the remedy of a sentence reduction in these cases. Yet, there are two problems with the remedy of a sentence reduction. The first problem is that it sends the wrong message to the public. As noted by Moldaver J, the point of a remedy for an abuse of process is *not* to redress

⁹⁸ *R v Young*, 2014 ONCJ 171 at para 20, 113 WCB (2d) 418.

⁹⁹ For example see *R v Basi*, 2009 BCSC 1685 at para 41, 85 WCB (2d) 717; *R v Tweedly*, 2013 BCSC 910 at para 151, 107 WCB (2d) 555.

¹⁰⁰ For example see *Smith*, *supra* note 8.

¹⁰¹ For sentence reductions in other contexts see *R v Carter*, 2016 ONSC 2832 at para 40, 130 WCB (2d) 150; *R v Adams*, 2016 ABQB 648, [2017] 4 WWR 741; *Gowdy*, *supra* note 87.

¹⁰² *R v Sathymoorthy*, 2014 ONCJ 318 at para 18, 315 CRR (2d) 76. In this case the accused was not provided with replacement clothing after soiling himself.

wrongs to the accused.¹⁰³ The point is to send the message that courts do not condone state misconduct.¹⁰⁴ A sentence reduction essentially treats state misconduct as a mitigating factor in sentencing. The message it communicates to the public is that an accused who suffers misconduct will have their sentence adjusted accordingly. This is perhaps why Lebel J in *R v Nasogaluak* cautioned courts that “it is neither necessary nor useful to invoke s. 24(1) of the *Charter* to effect an appropriate reduction of sentence to account for any harm flowing from unconstitutional acts of state agents consequent to the offence charged.”¹⁰⁵

Mandatory minimum sentences present a second problem to the remedy of a sentence reduction. Without ruling on whether sentence reductions outside the statutory minimums were valid, Lebel J in *Nasogaluak* commented that they should be “exceptional” and reserved for “particularly egregious... misconduct by state agents.”¹⁰⁶ Although in *R v Nur*, Moldaver J would have used sentence reduction below the mandatory minimum as a remedy for abuses of process which lead to grossly disproportionate sentences, he was in dissent on this point.¹⁰⁷ While some lower courts have refused to grant a sentence reduction below mandatory minimums,¹⁰⁸ others routinely use exceptional remedy to avoid staying the proceedings.¹⁰⁹ In fact, recourse to the remedy has become so routine, that a judge recently declared “[t]here is ample authority for applying s. 24(1) of the *Charter* to suspend the constitutional minimum of a \$1000 fine.”¹¹⁰ Not only does this dilute the remedy of a sentence reduction outside the statutory limits, it also subverts Parliament’s clear intention to circumscribe judicial discretion in sentencing.

¹⁰³ *Babos*, *supra* note 1 at para 39.

¹⁰⁴ *Ibid.*

¹⁰⁵ *R v Nasogaluak*, 2010 SCC 6 at para 5, [2010] 1 SCR 206.

¹⁰⁶ *Ibid* at para 64. Lebel J preferred to use the broad discretion under s 718 and 718.2 to craft a fit sentence.

¹⁰⁷ *R v Nur*, 2015 SCC 15 at paras 162-172, [2015] 1 SCR 773.

¹⁰⁸ *R v Silvester*, 2016 ABPC 62 at para 42, [2016] AWLD 1753; *R v Ralph*, [2016] AJ No 727 at para 22, 2016 CarswellAlta 1290 [*Ralph*].

¹⁰⁹ See for example, *R v Evong*, 2014 ONCJ 745 at para 93, [2014] OJ No 6435; *R v Kristoffersen*, 2014 ONCJ 137 at para 45, [2014] OJ No 1411; *Muthuthamby*, *supra* note 6 at para 38; *Smith*, *supra* note 8 at para 68; *R v Sytsma*, 2015 ONCJ 462 at para 34, [2015] OJ No 4435 [*Sytsma*].

¹¹⁰ *Sytsma*, *supra* note 109.

Denunciation

Denunciation is a controversial remedy. In *R v Corbasson*, for example, Schwarzl J rejected the Crown’s submission that denunciation was a sufficient remedy, declaring that it amounted to “no immediate or directly meaningful remedy at all.”¹¹¹ While likely insufficient for cases involving serious misconduct, denunciation may be an effective remedy in cases involving relatively minor misconduct. Denunciation is an attractive remedy because it is aimed squarely at dissociating the court from misconduct, consistent with the purpose of the residual category. In *R v Dawson*, for instance, the police failed to bring the accused before a Justice of the Peace without unreasonable delay in violation of s. 503(1) of the *Criminal Code*. Mew J held that denunciation, along with a sentence reduction, was an appropriate remedy, and admonished the officers responsible for the misconduct.¹¹² In *R v Gowdy*, the police issued a media release unnecessarily disclosing that the accused was HIV-positive, causing the accused psychological stress. The trial judge rebuked the police for the practice and granted the accused a sentence reduction. The Ontario Court of Appeal upheld the trial judge’s selection of remedy.¹¹³

While the remedy may be effective for relatively minor misconduct, overreliance on this remedy may lead to the perception that the remedy is hollow, particularly where the misconduct recurs after it has already been the subject of a judicial rebuke. As indicated above, courts have already rebuked police for the problem of overholding. The remedy of denunciation in this context will increasingly offer diminishing returns in terms of dissociating the courts from this misconduct, such that costs or a stay may be warranted when the court is presented with evidence that state actors responsible for the misconduct are not addressing the problem.

Restitution, Damages, and Costs

In terms of creative remedies, a restitution order or an order to pay damages are both plainly inconsistent with the purpose of remedies under the residual category of abuse of process, since both remedies are designed

¹¹¹ *R v Corbasson*, 2015 ONCJ 563, at para 32, [2015] OJ No 5298.

¹¹² *Dawson*, *supra* note 97 at para 66.

¹¹³ *Supra* note 87. While upholding the remedy of a sentence reduction as appropriate, the Court of Appeal found the trial judge erred in reducing the sentence below the mandatory minimum.

to compensate an individual for wrongs done to them.¹¹⁴ Costs, on the other hand, may be an appropriate remedy in cases where it is the Crown whose conduct is impugned and the Crown's conduct demonstrated "a marked and unacceptable departure from the reasonable standards expected of the prosecution."¹¹⁵ Where, for example, the Crown threatens the accused, costs send the message that courts do not condone threatening conduct by imposing a financial penalty on the Attorney General.¹¹⁶ If costs are awarded only for the abuse of process motion itself, then the order does not compensate the accused for the wrong done to them, since the accused is in no better position than they were in before the motion. Rather, costs compensate the accused for bringing serious state misconduct to light, even if that misconduct was not quite serious enough to warrant a stay of proceedings.

Order for Restorative Justice

Nick Kaschuk suggests that an order for "some sort of restorative justice process" may be appropriate in some circumstances.¹¹⁷ The restorative justice order Kaschuk has in mind is a meeting between the accused and the officer whose conduct the accused has impugned. Such a meeting would provide the officer with an opportunity to understand the harm caused not just to the accused but also to the justice system as a whole; conversely, the accused may better understand the pressures that led the officer to such misconduct.¹¹⁸ Moreover, such a process counters the "cynical conclusion that the administration of justice is either unwilling, unable, or indifferent to policing their police."¹¹⁹ While it is unclear whether judges have jurisdiction to compel police officers or other state actors to participate in such a process, judges ought nevertheless to consider an order for restorative justice as a creative alternative remedy for redressing prejudice to the justice system.

¹¹⁴ Nick Kaschuk, "Additional Creative 24(1) Remedies in Drinking and Driving and Other Charter Cases" (2015) 19:2 Can Crim L Rev 275 at 278 [Kaschuk]. See also *Ralph*, *supra* note 108 at para 22.

¹¹⁵ Kaschuk, *supra* note 114 at 280-281; *R v Singh*, 2016 ONCA 108 at para 38, 129 OR (3d) 24 [Singh] 1; *R v R (DC)*, 2017 BCPC 80 at para 153, [2017] BCWLD 2704.

¹¹⁶ Kaschuk, *supra* note 114. EG. *Singh*, *supra* note 115.

¹¹⁷ Kaschuk, *supra* note 114 at 286.

¹¹⁸ *Ibid* at 288.

¹¹⁹ *Ibid* at 286.

Proactive Remedies

In *R v Vader*, the Crown stayed proceedings after becoming aware of disclosure problems, and subsequently recommenced proceedings.¹²⁰ Thomas J commented there was “nothing wrong in considering the use of a stay as one of the tools in the toolkit.”¹²¹ Thus it is open to Crowns who recognize that an abuse of process has occurred to “self-medicate” by withdrawing charges unilaterally, or by jointly agreeing with defence counsel on an appropriate remedy. The Crown attempted to employ the former tactic in *R v Rutigliano* in order to avoid court-ordered disclosure of privileged information.¹²² The Ontario Court of Appeal reversed the judge’s privilege order, but the Crown argued that it had remedied the abuse of process because it had withdrawn all of the counts tainted by the abuse of process.¹²³ Only untainted counts remained. This remedy ought to be available to Crowns. Society’s interest in adjudication of untainted charges surely outweighs the need to dissociate the justice system from misconduct when that misconduct has no relation to the charges in question.

In applying this remedy, Crowns risk the possibility that defence counsel will nevertheless argue that the abuse of process taints the remaining charges. For example, where an improper investigation occurs simultaneously with a proper investigation, it may be impossible to separate the two investigations. Where an improper investigation into one set of charges caused a proper investigation into another set of charges, or where an improper investigation preceded a proper investigation, courts may simply conclude that the abuse of process tainted all the charges. Therefore, it is a remedy that should be applied with caution. The clearest case in which such a remedy may be considered is where a proper and completed investigation precedes an improper investigation into separate crimes.

A joint agreement between the Crown and defence counsel on a remedy is another proactive way to deal with abuse of process. Crowns and defence counsel could agree, for example, to withdraw certain charges, or to engage in a restorative justice process. The benefit of joint agreements is that they remedy the prejudice to the integrity of the justice system before the misconduct can taint the court. It would obviously be preferable for such

¹²⁰ *R v Vader*, 2016 ABQB 55, [2016] AJ No 69. Thomas J ultimately found no abuse of process, as there was no evidence of a bad faith basis for staying the proceedings.

¹²¹ *Ibid* at para 38.

¹²² *R v Rutigliano*, 2013 ONSC 6589 at para 74, 302 CCC (3d) 228.

¹²³ *R v Rutigliano*, 2015 ONCA 452, 126 OR (3d) 161.

agreements to be subject to court approval, or at least to be made public, in order to bring the state misconduct to light but the option is presently available without these requirements.

D. The Third Stage: The Balancing Inquiry

At the third stage of the test for abuse of process, the court asks whether, notwithstanding prejudice to the justice system for which no remedy short of a stay of proceedings can provide redress, the case should nevertheless proceed to trial in order to protect society's interest in adjudication of the trial on its merits.¹²⁴ In this section, I argue that the test is analytically redundant. By making the balancing stage mandatory in the residual category, the Supreme Court has arguably opened the door to allowing courts to deny a stay on the basis that the accused does not deserve one.

1. The Balancing Stage is Analytically Redundant

Abella J questioned the third stage of the abuse of process test in her dissent. "When a trial judge has found that the conduct cannot be condoned because it is such an exceptional assault on the public's sense of justice," she pointed out, "it seems to me to be conceptually inconsistent to nonetheless ask the court to undermine its own conclusion by re-weighing the half of the scale that contains the public's interest in trials on the merits."¹²⁵ Several commentators have picked up on Abella J's criticism of the balancing stage of abuse of process. Quigley has pronounced the balancing stage "unnecessary" and "illogical," while Kaiser has described its application a "strained" result of "faulty reasoning."¹²⁶ The criticism is that once a judge has concluded the prejudice to the justice system is so serious that only the exceptional remedy of a stay of proceedings can adequately dissociate the justice system from the misconduct, it makes no sense to then reweigh that conclusion against society's interest in adjudication of the case on its merits.¹²⁷ Society's interest in adjudication of the case on its merits, it is argued, has necessarily been considered in determining that a stay is necessary to redress the prejudice to the justice system.¹²⁸ In light of the

¹²⁴ Babos, *supra* note 1 at para 32.

¹²⁵ *Ibid* at para 84.

¹²⁶ Quigley, *supra* note 88; Kaiser, *supra* note 73.

¹²⁷ Quigley, *supra* note 88.

¹²⁸ *Ibid*.

conclusion that the misconduct cannot be condoned, it is not necessary to reweigh society’s interest in adjudication of the case.

Indeed, several post-*Babos* cases cast doubt on whether the third stage is truly necessary. In *R v Hunt*, for instance, the trial judge, who granted a stay of proceedings, referred to decisions pre-dating *Babos* and, as a result, failed to apply the third stage of the abuse of process analysis.¹²⁹ The Newfoundland Court of Appeal dismissed the Crown’s appeal, observing:

In this case, the applications judge undertook the necessary balancing of interests, though he did not characterize it in those words. **In determining that a stay was the only appropriate remedy for the breach of the Respondents' section 7 rights he considered whether a trial should proceed despite the effect on the integrity of the justice system.** [Emphasis added]¹³⁰

Plainly, the Newfoundland Court of Appeal was satisfied that the balancing of interests was implicit in the trial judge’s finding that no remedy short of a stay was sufficient to dissociate the justice system from the misconduct.

A decision of the Ontario Court of Appeal also casts doubt on whether application of the third stage is required. In *R v Kift*, the trial judge determined that the remedies of exclusion of evidence and sentence reduction adequately dissociated the justice system such that a stay was not warranted.¹³¹ The accused appealed, arguing that the trial judge was obligated to proceed to the third stage of the abuse of process analysis and balance the need for a stay against society’s interest in adjudication of the case on its merits.¹³² The Ontario Court of Appeal disagreed, holding that the third step is not necessary where the trial judge has concluded a remedy short of a stay is sufficient.¹³³ By the same token, where the court is certain that the only remedy capable of redressing the prejudice to the justice system is a stay, then there seems little point in carrying on to the third stage of the abuse of process analysis.

Prior to *Babos*, the balancing stage was only applied where there was still uncertainty after the second stage.¹³⁴ In uncertain cases, courts do not reweigh the interests so much as they make the balancing exercise explicit. To

¹²⁹ *R v Hunt*, 2016 NLCA 61 at para 48, 33 CR (7th) 321, leave to appeal filed 2016 CarswellNfld 494.

¹³⁰ *Ibid* at para 52.

¹³¹ *R v Kift*, 2016 ONCA 374 at para 5, [2016] OJ No 2626.

¹³² *Ibid* at para 2.

¹³³ *Ibid* at paras 7-8.

¹³⁴ *Regan*, *supra* note 8 at para 57.

require balancing in cases where a stay is clearly warranted, however, is analytically redundant because the interests have already been weighed.

2. The Balancing Stage May Allow the Court to do Indirectly what it cannot do Directly

Turning to the balancing stage when there is no uncertainty may also allow the courts to do indirectly what they cannot do directly: deny undeserving accused the “jackpot” remedy of a stay of proceedings. In *Babos*, Moldaver J’s judgment strayed dangerously close to this territory. For example, at the third stage, Moldaver J wrote that society’s interest in a full trial was “profound,” given the “very serious nature of the charges.”¹³⁵ Moldaver J weighed this interest against misconduct he characterized as “threats uttered more than a year before trial by a Crown no longer on the case.”¹³⁶ Yet, Moldaver J had already acknowledged that the “bullying tactics” of the Crown were “reprehensible and unworthy of the dignity of her office,” even if they were not “an abuse of the worst kind,” as concluded by the trial judge.¹³⁷ In effect, at the balancing stage, Moldaver J weighed the seriousness of the offences against the mitigating factors of the state misconduct. The implicit message in *Babos* is that the accused do not deserve a stay because they did not take the threats seriously and waited too long to bring their abuse of process application.

R v Grenier illustrates mandatory balancing’s disturbing potential.¹³⁸ In that case, the trial judge refused to grant a stay of proceedings to an accused who had been arbitrarily detained for 81 days following the completion of his sentence for breaching bail conditions, misconduct the trial judge concluded society would “not tolerate.”¹³⁹ The trial judge noted that the applicant had been charged with sexual assault, a serious charge which militates against a stay of proceedings.¹⁴⁰ Yet in the balancing stage, the trial judge primarily focused on the accused’s personal circumstances, a factor the majority in *Babos* referenced obliquely and without any explanation.¹⁴¹

¹³⁵ *Supra* note 1 at para 69.

¹³⁶ *Ibid.*

¹³⁷ *Ibid* at paras 61 and 66.

¹³⁸ *R v Grenier*, 2014 NBQB 68, 418 NBR (2d) 167 [*Grenier*].

¹³⁹ *Ibid* at para 73.

¹⁴⁰ *Ibid* at para 71.

¹⁴¹ See also *R v Waisanen*, 2015 ONSC 5823 at para 37, [2015] OJ No 4835. In that case, Campbell J considered the seriousness of the drinking and driving charges. Yet under

For example, the trial judge noted that before the trial, “[t]he applicant was not working, was living a difficult lifestyle tainted by drug use, and by his own admission, “not doing much” at the time this charge was laid. The applicant had been involved with the criminal justice system since he was approximately 15 years old.”¹⁴² The trial judge also faulted the applicant for contributing to the “confusion” that led to his over-incarceration.¹⁴³ It is difficult to understand how society’s interest in adjudication of the case on its merits is bolstered by the fact that the applicant was a drug user, or that the misconduct was in any way mitigated by the applicant’s contribution to the confusion that led to his over-incarceration, when the applicant had no legal training. Yet, that is precisely what *Babos*’ mandatory balancing exercise permits.

The trial judge placed significant emphasis on the fact that in other cases involving serious misconduct, including *Babos*, a stay was not held to be the appropriate remedy. The trial judge thus concluded that the applicant “would benefit from a ‘windfall’ in the present situation were the stay of proceedings to be granted.”¹⁴⁴ By requiring judges to reweigh seriousness of the misconduct against society’s interest in proceeding with a trial, *Babos* appears to have opened the door for Courts to decline a stay of proceeding simply because an accused does not deserve one.

IV. CONCLUSION

The concern that undeserving accused may realize an unwarranted windfall from the “jackpot” remedy of a stay of proceedings has held back the residual category of abuse of process. It has narrowed access to the remedy at the first stage by sanctioning an individualistic approach to multiple instances of misconduct and by allowing irrelevant considerations like the passage of time and the tactics of defence counsel to mitigate state misconduct. Judges have come to rely on the inappropriate remedy of sentence reduction, even outside the statutory limits, in order to avoid the drastic remedy of a stay. Worse yet, in making the balancing stage

the heading of “circumstances of the accused,” Campbell J commented that the accused was “clearly driving his motor vehicle impaired by alcohol,” essentially double-counting the seriousness of the charges in favour of adjudication of the case on its merits.

¹⁴² *Grenier*, *supra* note 138 at para 70.

¹⁴³ *Ibid* at para 69.

¹⁴⁴ *Ibid* at para 75 (Emphasis in original). Somewhat incongruously, the trial judge believed that a stay of proceedings would be “correcting ‘the past wrong.’”

mandatory, the Supreme Court in *Babos* has made it possible for a judge to refuse a stay when it is clear that a stay is the only remedy capable of redressing prejudice to the justice system. Indeed, the Supreme Court has opened the door for judges to skip the alternative remedy step and use the balancing stage to deny undeserving accused the remedy of a stay.

Narrowing access to the remedy of a stay of proceedings risks associating the justice system with egregious misconduct. Yet, if the test is properly applied, the risk of “unwarranted windfalls” is low. First, the seriousness of offences for which the accused has been charged mitigates the prejudice to the integrity to the prejudice of the justice system that would be caused by having a trial on its merits. Second, trial judges must consider a wide range of creative s. 24(1) remedies to redress the prejudice to the integrity of the justice system, including exclusion of evidence in appropriate cases, costs, or even an order for restorative justice. Finally, courts need not be so hesitant to stay proceedings when it is justified. As Kent Roach has argued, stays “remain the best and most decisive means by which a court can dissociate itself from abusive prosecutions and send a loud and clear message that it will not condone or be tainted by such unacceptable behaviour.”¹⁴⁵ Having concluded that the exceptional remedy of a stay is the only remedy capable of redressing the prejudice to the integrity of the justice system, judges may rest assured that any “windfall” inuring to the accused is worth the price of dissociating the justice system from the misconduct.

¹⁴⁵ Roach, *Constitutional Remedies*, *supra* note 7 at 9.360.

Theorizing the Official Record of Inmate Ashley Smith: *Necropolitics, Exclusions, and Multiple Agencies*

R E B E C C A B R O M W I C H *

ABSTRACT

This article presents findings from a critical discourse analysis (CDA) of public texts, revealing how sense was made of Ashley Smith in the official record, where she was configured as a carceral subject: an inmate. Smith's is a case fundamentally like those of many inmates. This can be better understood if a new language is deployed for theorizing these recurring deaths. Smith's death can be read not as an isolated system failure, but as a necropolitical success. CDA of this official story reveals that the Smith case is an extreme result of everyday brutality. It is not anomalous, but rather a predictable and recurring result, of a society and bureaucracies' gradual necropolitical exclusions. Drawing on theorizations about logics of exclusion from Giorgio Agamben and Achille Mbembe, the article argues that forms of governance in power and knowledge that allow some people, and in particular certain women and girls, to be categorized as *homo sacer*, neither alive nor dead, were actively involved in Ashley Smith's death both before and after her transfer to CSC custody. These forms of governance remain in operation with widely felt consequences in prisons, not just in Canada, but across neoliberal societies, and not just in prisons, but also in those societies in general. I argue that, on this analysis, the death of Inmate Smith speaks to a need for broad-based and fundamental change to operating logic deployed in the operation of the criminal justice and

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correctional systems, and in consequence, it is quite correct for reference to the Smith case to be situated in the Ministerial Mandate letter to Justice.

Keywords: *Law, Feminist Legal Studies, Cultural Study of Law, Girls Studies.*

I. INTRODUCTION

“[T]hey don’t know what goes on in my head.”
- September 2006 journal entry of Ashley Smith¹

Ashley Smith died in Grand Valley Institution, a Federal Penitentiary located in Ontario, at age nineteen. Her 2007 death, by self-induced strangulation, drew public attention, partly because guards who did not intervene videotaped her last moments. Her death was also shocking because of her youth, her female gender, and the fact that she had never committed a serious criminal offence, yet died in prison. A 2013 inquest² into the cause of her death culminated in an unprecedented verdict of homicide. Never before had a Canadian inquest into the death of a prison inmate resulted in a homicide verdict when another inmate did not cause the death.

However, the bulk of the recommendations made in that inquest were categorically ignored or rejected in the Correctional Service of Canada (CSC)’s, 2014 response.³ From a formal legal perspective, the Smith case is closed. Nonetheless, as matters warranting public scrutiny, questions about her case are unresolved and call out for attention, analysis, and action. The continued relevance of the Smith case was acknowledged in the 2015 mandate letter sent by Prime Minister Justin Trudeau to newly appointed

¹ New Brunswick, Office of the Ombudsman & Child and Youth Advocate, *The Ashely Smith Report* (New Brunswick, June 2008) at 23 [NB Ombudsman] online: <<http://www.cyanb.ca/images/AshleySmith-e.pdf>>.

² Office of the Chief Coroner, “Inquest Touching the Death of Ashely Smith: Jury Verdict and Recommendations”(Ontario: December 2013), online: <<http://www.chch.com/wp-content/uploads/2013/12/2013-1219-AshleySmithVerdict.pdf>>.

³ Correctional Service Canada, *Response to the Coroner’s Inquest Touching the Death of Ashley Smith*, (Ottawa: Correctional Services Canada, 7 October 2014) online: <<http://www.csc-scc.gc.ca/publications/005007-9011-eng.shtml>>.

Justice Minister Jody Wilson-Raybould.⁴ This Mandate Letter assigned to the Department of Justice the mandate of addressing issues brought to light by the Smith case. Advocates for abolition of segregation in prisons have suggested that this mandate should properly be with Public Safety. Indeed, when the *Federal Government* tabled Bill C-56 an Act to amend the *Corrections and Conditional Release Act* and the *Abolition of Early Parole Act* on June 19, 2017, the Ashley Smith case was referenced in the legislative proposal from the Minister of Public Safety to limit the time inmates can spend in solitary confinement to 21 days, and eventually to 15. However, the implication of the arguments in this article is that the Prime Minister has it, at least partially, right. Curbing overuse of solitary confinement is a step in the right direction towards reducing abuses, and even torture, of prisoners in corrections custody. However, Ashley Smith's death in prison does not only reflect problems with the use of solitary confinement. It reflects far-reaching problems with the operating logics of the justice and correctional systems and calls for fundamental change to how we do justice.

The battleground for establishment of authoritative legal truths about Ashley Smith was not contained within a courtroom. The jury verdict in the Inquest does not include reasons for decision: it provides only recommendations. There is no single authoritative legal narrative of the Smith case, yet it takes place in an interaction of an abundance of law. It involves a set of complex interactions between statutes, regulations, directions, judicial, and administrative decisions. Contestation and construction of the meanings of the Smith case continue to take place in a multitude of legal spaces like courts, youth facilities, prisons, and Parliament, as well as in the public domain. Ashley Smith's case, for the purposes of this study, was delimited to consist of the set of public texts that purport to define truths about her incarceration and death and delimit the timeframe of the production of those truths, to the time during which she was publicly presented as a case to be resolved by the formal legal system. This period starts when she first appears in youth court in 2002 and ends

⁴ Office of the Prime Minister, "Minister of Justice and Attorney General of Canada Mandate Letter", by Rt. Hon. Justin Trudeau (Ottawa: Office of the Prime Minister, 2015) online: <<http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>>.

with the response of the Correctional Service of Canada to the Inquest verdict on December 11, 2014.⁵

In this article, I argue that the death of Inmate Smith is a case fundamentally like those of many inmates before, and after, hers, and not just female inmates. Building on my Ph.D. thesis and book,⁶ I suggest a new language for theorizing these recurring deaths as part of the same phenomenon, and contend that this phenomenon speaks to a need for fundamental change to the operating logics of our correctional and criminal justice systems. The usual operation of the criminal justice and correctional systems is as monstrous bureaucracies through necropolitical logics of exclusion. The arguments put forward in this article are derived from analysis of critical discourse analysis (CDA) of certain figures of Ashley Smith that emerge in the Smith case. Those representations are looked at as technologies of governance. Dominant configurations of Ashley Smith - as a child, a mental patient and an inmate - make possible certain understandings of her case while they foreclose others.

This paper describes how the death of Inmate Smith can be read not as an isolated system failure, but a necropolitical success. It reports on a CDA that reveals that the Smith case is an extreme result of routine, everyday brutality. It is not anomalous, but rather a predictable result, of a society and bureaucracies' gradual necropolitical exclusions. Raced and gendered governmental systems of power and knowledge that allow people to be categorized as neither alive nor dead were actively involved in Ashley Smith's death both before and after her transfer to CSC custody. What is horrifying is not that any person in particular, or any group, planned to kill her. They almost certainly did not. Rather, systems of power in place brought about her death, have eluded accountability for it, and remain in place, making similar deaths in custody predictably likely to recur. I then contend, based on this analysis, that preventing prison homicides like that inflicted on Smith can be most effectively achieved not by addressing a small subset of offenders, however defined, but by broad-based justice and correctional system reform.

⁵ *Supra* note 3.

⁶ Rebecca Bromwich, *Looking for Ashley: Re-Reading What the Smith Case Reveals About the Governance of Girls, Mothers and Families in Canada* (Bradford: Demeter Press, 2015) [Bromwich].

II. THE STUDY

A. The Case

This study took Ashley Smith's case as a particular "event" where conflicts, confluences, and tensions between existing ways of thinking and deployments of governmental power become visible.⁷ It asked what combination of rules, power relationships, institutional accretions of power, and circumstances in seemingly unrelated fields gives rise to a particular outcome.⁸ It probed of what general type various figures of Ashley Smith are constructed as a case. For the purposes of this research, the Ashley Smith "case" was defined much as Michel Foucault defined the "case" of Pierre Rivière,⁹ I adopt the definition of "caseness" advanced by Lauren Berlant¹⁰ a state in which the singular is both individual and marked as an exemplar.¹¹ The complex interplay of a large number of formal legal texts with the interpretive judgment of numerous system actors makes the Smith case an intersection of modes of governance and cultural practices within a variety of discourses: mental health, constitutional, correctional, legal, medico-legal, and youth criminal justice. Intersectional methodology, as described by Rebecca Johnson, as a method for unpacking the "intersection" of discourses and narratives that intersect to produce a legal case, was employed.¹²

In my study of the case, I inquired into questions about of what social problem or phenomenon Ashley Smith is a "case," and what governmental work is done by prevalent constructions of her as an exemplar. Elsewhere, I have written about figures of Smith as a child and a patient. This article analyzes how sense was made of Ashley Smith in the official record, where

⁷ Alan Hunt & Gary Wickham, *Foucault and the Law: Towards a Sociology of Law as Governance* (Boulder, Colo: Pluto Press, 1994).

⁸ *Ibid.*

⁹ Michel Foucault, *I, Pierre Rivere, Having Slaughtered My Mother, My Sister and My Brother: A Case of Parricide in the 19th Century*, translated by Frank Jellinek (Lincoln: University of Nebraska Press, 1975).

¹⁰ Lauren Berlant, "On the Case" (2007) 33:4 *Critical Inquiry* 663 at 665 [Berlant].

¹¹ *Ibid.*, at 666.

¹² Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law* (Vancouver: UBC Press, 2002) at 174.

she is configured as a carceral subject: an inmate.¹³ The term “inmate” is deliberately used in this analysis in the face of the more commonly accepted term “offender” to trouble neat distinctions between subjects held involuntarily in mental health and corrections custody.

This study deploys the tool of CDA to make visible the implicit ideological content of articulations of Ashley Smith. Other important methodological tools on which I rely are the concepts of representation, figuration, and articulation. I work with the concept of figuration.¹⁴ As explained by Claudia Castaneda, figuration is the process by which a representation is given a particular form: “a figure is the simultaneously material and semiotic product of certain [discursive] processes”.¹⁵

B. Necropower and Exclusion

Concepts of necropower found in the work of Giorgio Agamben and Achille Mbembe, which are related notions to Foucault’s idea of biopower, are foundational to this research. In referring to the concept of “necropolitics,”¹⁶ I am talking about a notion developed by Mbembe taken together with Giorgio Agamben, as a relationship between sovereign power and control over life and death. Mbembe adds to Foucault’s understandings of biopower and sovereignty the concept of necropower, which goes beyond merely “inscribing bodies within disciplinary apparatuses.”¹⁷ Rather, in the era of necropower, weapons are deployed “in the interest of maximum destruction of persons and the creating of death-worlds, new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of living dead.”¹⁸ These populations are not disciplined in the sense Foucault talks about with reference to biopower. A disciplined individual is sought to be transformed. An individual who is politically or socially dead is never meant to be re-

¹³ Bromwich, *supra* note 6.

¹⁴ Teresa de Lauretis, *Figures of Resistance: Essays in Feminist Theory* (Chicago: University of Illinois Press, 2007) at 259.

¹⁵ Claudia Castaneda, *Figurations: Child, Bodies, Worlds* (Durham: Duke University Press, 2002) at 3-4.

¹⁶ See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Stanford: Stanford University Press, 1998) [Agamben].

¹⁷ Achille Mbembe, “Necropolitics” (2003) 15:1 *Public Culture* 11 at 34 [Mbembe].

¹⁸ *Ibid* at 40.

incorporated into the social and political community. They are excluded in order that the population can be managed.

Necropolitics as a theorization of this formulation of power is especially useful because it allows for understanding of certain subjects as occupying statuses that are neither fully living nor dead, and it offers an accounting for the power of the state to impose death and death-like status on subjects. Necropolitics encompasses the power of the state to impose a variety of forms of “death.” Necropower is the formation of power dominant in what Mbembe calls late modern colonial occupation: governmentality in “management of the multitudes.” While Mbembe does not speak directly about solitary confinement in correctional institutions, I would suggest that solitary confinement in all its forms and named by all of its euphemisms (e.g. “therapeutic quiet”, “administrative segregation”, and “suicide watch”) is such a death world. Relatedly, I also find useful the concept of “*homo sacer*” as developed by Agamben.¹⁹ In his work, Agamben looks at the concept of “*homo sacer*”, a liminal being that exists *between* living and dying, people whose lives are easily forfeited, whose deaths are not *murder*. I find helpful Agamben’s discussion of the wolf and the ban. He looks at werewolves as those who are “banned” as ancient forms of excluded persons: “the man who has been banned from the city.”²⁰ Agamben identifies carceral inmates as, in some instances, members of the *homo sacer* category, or people who have been banned. Agamben sees the *homo sacer* as an exemplary figure that illumines the logic of exception. In my analysis of the several forms of death to which Ashley Smith is subject through her experiences of social exclusion, including incarceration, I build on Agamben’s concept of *homo sacer*, which I argue Smith becomes when she becomes a “terminal” inmate. I also argue that Smith exemplifies the extreme reduction of the logics to which members of western societies are subject.

Thus, necropolitics and the notion of the *homo sacer* provide an analytical framework to aid in understanding how the death of Ashley Smith happened in a series of stages. On this analysis, the day of her actual biological death is perhaps the least contingent, most pre-determined, and in many ways one of the less significant events, that contributed to her exclusion from political community. It was this exclusion that started in

¹⁹ Agamben, *supra* note 16.

²⁰ *Ibid* at 63.

motion the series of linked events that led to her incarceration and social, political, juridical, and biological deaths.

Further, it is also in part by building on this reasoning that I posit that, to understand the Smith case as a site of contending discourses, we must look beyond the final moments, or even months or years of her incarceration to the conditions of possibility that produced her as someone to become *homo sacer* before she was ever imprisoned. Also useful as a foundational assumption to this book is the theorization by Agamben that, in the logic of exclusion underlying the construct of the *homo sacer*, the political body and the physical body are inextricably linked: politics are at issue in the subjects' biological bodies.²¹ This connection is of great importance in explaining what is at stake in the Smith case: the confinement and death of her biological body is inextricably linked to the silencing of her political voice and the voices of other adolescent girls.

C. Research Design

This research involved critical discourse analysis (CDA) of all publicly available formal legal documents produced in reference to Ashley Smith's case. CDA is employed as a critical and interpretive methodology to reveal operations of power in places where familiar social, administrative, and political discourses mask or normalize it.²² This is a study of figurations of Ashley Smith as girl as technologies of power that emerge in three discursive sites: formal legal documents, docu-dramas, and print media texts. I looked at how a set of systems and rationalities came together in manifold small ways to produce Ashley Smith's case. The study explores troubles and complicates what these figurations do as technologies of power.

Documents studied include reports from the New Brunswick Ombudsman,²³ by the Corrections Investigator for Canada²⁴ and the University of Toronto Faculty of Law's International Human Rights

²¹ *Ibid* at 105.

²² Michael Shapiro, *Reading the Postmodern Polity: Political Theory as Textual Practice* (Minneapolis: University of Minnesota Press, 1992).

²³ NB Ombudsman, *supra* note 1.

²⁴ Canada, The Correctional Investigator, "Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women", Office of the Correctional Investigator (Ottawa: 30 September 2013) ["Risky Business"].

Program.²⁵ Also included are documents produced in relation to the inquests, judgments on motions in the inquests, as well as the full judgment in the 2013 inquest. Studied as well are a number of documents produced in the inquests and civil trial. All docudramas concerning Ashley Smith were also studied, with a focus on those that brought Ashley Smith's case into notoriety. These included CBC's *Out of Control* and *Behind the Wall* as well as a documentary on CBC's *The Current* in 2012 called "Ashley Smith and Mental Health in Canadian Prisons." Many print media articles about Ashley Smith's case from a range of print media outlets were studied. Sites included national articles of record, local media sources, and also more tabloid forms of journalism from across the political spectrum.

After my initial review of all (over 5000) media articles revealed that there were certain chronological turning points in the coverage, I focused where the number of articles spiked, which at times marked turning points in the case. I determined that three time periods are representative of shifts in the discourses around her case. These are the immediate media response to her death (October 2007-June 2008), media coverage of her first inquest (2010-2011) and of the second inquest as it wrapped up and was met with an institutional response (2013-2014). The discursive analysis involved the production of a running list of descriptors of Ashley Smith signaling the variety of figures of her circulating throughout the case. I coded for the following focal points in descriptions and definitions of Ashley Smith: mental illness, child, girl, woman, and inmate. I employed coding, using a colour scheme identifying how a text primarily configured or identified Smith. At bottom, this was a qualitative analysis, even though the coding produced quantitative metrics of how many documents characterized her as each. I discerned chronological trajectories in the growth, flourishing, and falling away of certain configurations of Ashley Smith as case or instance of a particular "type" of subject. The analysis that follows discusses patterns and trends in representations and figures of Ashley Smith that coalesced.

²⁵ Elizabeth Bingham & Rebecca Sutton, *Cruel, Inhuman and Degrading? Canada's treatment of federally-sentenced women with mental health issues* (Toronto: International Human Rights Program, 2012).

D. Findings

Ashley Smith's mother, Coralee Smith, is quoted in many sources, as saying, after the verdict was rendered in the second inquest: "now the whole story has been told."²⁶ This study does not reveal a new, truer story about Ashley Smith. I have conducted my research from an epistemological position that telling the "whole story" about Ashley Smith is not possible: all narratives are selective, incomplete, and necessarily partial.²⁷ I deconstruct different ways Ashley Smith's case has been told to unpack the ways in which meanings have been made, and governmental technologies have been crafted, articulated and deployed, out of Ashley Smith's life and death.

My study revealed three "types" of which Ashley Smith has usually been represented as a "case" or exemplar.²⁸ She has primarily been configured as an inmate, a child, and a patient. These figures are outcomes of microprocesses of governance in relation to micro-and macro power. They function as technologies of governmental power. It also revealed a significant silence. In the public talk about Ashley Smith, there is a conspicuous absence of discussion about Ashley Smith's agencies. CDA of the Smith case makes evident that the idea of Ashley Smith as an agent becomes increasingly impossible with each figuration of her that becomes widely accepted in the Smith case, with the final, most sympathetic rendering of her relying completely on her passivity.

In the discussion that follows, I present findings of my CDA of the "official story" of Ashley Smith, in which is foregrounded the configuration of Ashley Smith as a carceral subject.²⁹ My findings about the mental health and child figures of Ashley Smith are published elsewhere. I theorize the implications of what analysis of the official story about Inmate Smith reveals. I argue that, long before she physically died on October 19, 2007, as constructed in the discursive figure of Inmate Smith, Ashley Smith was

²⁶ Angela Mulholland, "After Death Deemed Homicide, Ashley Smith Family Calls for New Criminal Investigation", *CTV News* (19 December 2013), online: <<http://www.ctvnews.ca/canada/after-death-deemed-homicide-ashley-smith-family-calls-for-new-criminal-investigation-1.1600083>>.

²⁷ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

²⁸ Berlant, *supra* note 10 at 663-672.

²⁹ My other findings (about the other figures of Ashley Smith as girl that emerge in her case) are published in my book. See Bromwich, *supra* note 6.

configured as a *homo sacer*. Inmate Smith was constructed as a contingent being, dissolved into a banned person, a fetish object of the correctional system, socially and juridically dead, living in a state of “pure life” that rendered her biological death, if not inevitable, highly predictable and probable, and that the construction of inmates as *homo sacer* effected in no small part through solitary confinement, is a routine practice in Canada's correctional and criminal justice systems.

III. INMATE SMITH

A. YP Smith – Incarcerated “Young Person”

Representations of Inmate Smith as a carceral subject emerge in 2003. On October 21, 2003, Ashley Smith is remanded to custody and begins her prolonged “experience within” the youth custodial apparatus.³⁰ Her incarceration is for violating her probationary conditions by throwing crab apples at a postal worker.³¹ Smith's remand into custody formally reconfigures her as a carceral subject, a “Young Person” (YP) from April 2003 until October 2006. Despite having initially been sentenced to a short time in custody, she acquires further charges while serving the sentence, and then while serving that sentence, over and over again, remains “either a part-time or full-time” inmate at the NB youth prison for three years.³²

Because the labeling system in the YCJA refers to all young people incarcerated through its machinations as “young persons”, YP Smith remains throughout this period officially genderless: official texts do not refer to her as a woman or girl. Nonetheless, her female embodiment presents complexities and expense not associated with male YPs.

YP Smith faces more than 800 incident reports during her time in youth custody at NBYC, and 50 more criminal charges.³³ In these incidents, YP Smith is frequently restrained and segregated. For example, not because this represents an exceptional day (it does not), on June 1, 2004, while segregated, YP Smith “smear[ed] feces throughout her cell, covering the cell

³⁰ NB Ombudsman, *supra* note 1.

³¹ *Ibid* at 18.

³² *Ibid* at 17.

³³ “Risky Business”, *supra* note 24; NB Ombudsman, *supra* note 1.

window which obstructed supervision checks.”³⁴ When staff are cleaning the cell, YP Smith “became non-compliant with staff and attempted to exit the cell, which lead to her being physically restrained by staff.”³⁵ Smith then proceeds to cover her window and the cell camera with torn cloth; she is then placed “in a body belt restraint” and subjected to a “pat search.”³⁶ Another example of restraint and segregation used occurs on June 26, 2004. While she is segregated, YP Smith refuses staff demands that she remove items she has placed over her cell window and camera.³⁷ In consequence, “staff were authorized to place Ashley in a restraint belt called the ‘WRAP’” and YP Smith remains immobilized in this state for “approximately 50 minutes.”³⁸

Another example of the use of segregation and restraint against YP Smith is documented on March 1, 2005. The NBYC Superintendent authorizes staff to pepper spray Smith after she refuses their request “to leave the shower area and return to her cell.” YP Smith is then found “in possession of a piece of metal, possibly a razor blade”.³⁹ Once subdued, YP Smith is transferred to segregation “where the decontamination process (applying copious amounts of water to the eye area) was commenced.”⁴⁰ Yet another example is an incident reported on January 27, 2006 when YP Smith, not segregated at that moment “became extremely vocal towards staff; yelling names, and throwing items around in her cell.”⁴¹ She then refuses to hand over utensils to correctional staff, stating she would only do so if she was transferred back into segregation. She also threatens to self-injure “or trash ... her cell if her requests were not met”.⁴² YP Smith then self-injures and “began walking around in her cell naked.”⁴³ Management transfers YP Smith back to segregation.⁴⁴

³⁴ NB Ombudsman, *supra* note 1 at 21.

³⁵ *Ibid* at 21.

³⁶ *Ibid*.

³⁷ *Ibid* at 22.

³⁸ *Ibid*.

³⁹ *Ibid* at 23.

⁴⁰ *Ibid*.

⁴¹ *Ibid* at 22.

⁴² *Ibid* at 21.

⁴³ *Ibid* at 22.

⁴⁴ *Ibid*.

Walking around naked, refusing to return utensils, shouting loudly, covering a window with cloth, and refusing to get out of the shower are not behaviours that would lead adolescents in family homes to be arrested. Even smearing one's feces around one's room, while not socially acceptable and definitely unusual, is only *criminal* behaviour because Inmate Smith is already a carceral subject. Considered in the context of Smith's many complaints about not being provided with adequate sanitary supplies such as tampons and toilet paper, the feces incidents could be re-read as acts of frustration, resistance or protest.⁴⁵ Looked at in the context of Primo Levi's analysis of how Auschwitz inmates endured petty cruelties that, taken together, stripped their humanity from them,⁴⁶ these actions can be re-read as reflections of a dehumanizing context rather than simply pathologized as evidence of Inmate Ashley's unmanageability.

The foregoing examples are unexceptional amongst the 800 plus incidents that take place at NBYC. The fact that YP Smith is already in custody is foundational to her disobedient and unruly conduct being defined as criminal in *all subsequent* incidents.

B. Adult Inmate

Inmate Smith becomes a member of a large subset of inmates upon her transfer to adult custody when she turns 18. Once she becomes an adult carceral subject and transferred to CSC custody, Ashley Smith is officially labeled an "offender" or "Inmate Smith." The *Corrections and Conditional Release Act* (CCRA) is the statutory framework within which the CSC defines "inmate". Gradually, she becomes officially understood as a member of a much smaller subset of terminal inmates. The necropolitical process by which this reconstitution takes place begins quickly upon her labeling with a maximum security designation and assignment to solitary confinement. Finally, she becomes a member of an even smaller subset when bureaucratic dissolution of her bodily integrity and autonomy to a point where she exists as *homo sacer*, a contingent body in a death-world. In this trajectory, Inmate Smith's biological death is the final point on a long necropolitical journey

⁴⁵ Bromwich, *supra* note 6.

⁴⁶ Primo Levi, *Survival In Auschwitz: The Nazi Assault on Humanity* (New York: Simon and Schuster, 1996). Levi's analysis is relevant to considering the banality and burdensome weight of accumulating sanctions to which Ashley Smith was subject but it is important not to over-state parallels between imprisonment in Canada and Nazi concentration camps.

of dehumanization that begins long before she is transferred to CSC custody.

For CSC's local and national bureaucracies, Inmate Smith's gender and embodiment make her an administrative headache from the beginning of her incarceration as an adult. She bears differentiating criteria that make her unusual for the type "inmate". Statistically, the usual or archetypal inmate in North America is a working class man. Ashley Smith's embodiment does not fit readily into this stereotype. Inmate Smith is a woman whereas most inmates are men, and she is younger than most inmates.

Because the YCJA is formally gender blind, YP Smith officially acquires a gender in discourse when she enters adult corrections and becomes a woman inmate. Gender is explicitly and overtly relevant to the conditions in which Inmate Smith is held; the everyday conditions in which she lives in CSC custody are fundamentally gendered. Different rules are applied to her than to male inmates as part of CSC's "women-centered-approach." For example, surveillance and searches of her must be carried out in the presence of woman guards, which add an administrative burden not imposed by men. Criminologists have criticized the CSC's "woman centred" approach as based in a risk-based model that focuses on responsabilization and control.⁴⁷ Women inmates are tasked in this logic with "taking responsibility" for their "choices": in de-contextualized responses to their actions while inmates' conditions of incarceration are determined not with reference to their rehabilitative needs, but rather what will be least disruptive to the functioning of the institution.

This management model produces a disjuncture between colloquial understanding of maximum-security designation as a reflection of dangerousness and the basis for the institutional coding of maximum security. While it stands in for dangerousness in popular understanding, the official designation of "maximum security" may or may not mean violent, dangerous or at risk of escaping. It may just as likely mean an inmate is understood to self-harm or is designated by relevant corrections officials as mentally ill. Consequently, the gendered space of incarceration for women by CSC overlaps significantly with the death-space of solitary confinement.

⁴⁷ See Kelly Hannah-Moffat, "Gridlock or Mutability: Reconsidering 'Gender' and Risk Assessment" (2009) 8:1 *Criminology & Public Policy* 209 at 221-229.

Woman inmates are confined to the death-world of solitary confinement for a wider range of reasons, and per capita at least as often, as are men.⁴⁸

Shortly after becoming an adult Inmate in October 2006, Ashley Smith comes to be understood as an unusually unmanageable inmate. In the context of governance by a rationalized bureaucracy, unmanageability on the part of a subject is a major crisis for the system. While the Inmate Smith figure remains ubiquitous in official texts, it is clear from communications between CSC staff and management, as well as from the volume of texts produced about her that the system is struggling to maintain the representation of Inmate Smith as ordinary. A tension between the exceptional and ordinary, always endemic to bureaucracies, which works to transform the particular into a case of a general type, is clearly evident in the Smith case. The cumulative weight of Inmate Smith's record begins to guide discretionary decisions to pre-emptively limit her potential to cause problems for the institution. As noted above, Inmate Smith is labeled "high needs", is assigned a maximum-security designation and, largely pre-emptively, consigned to segregation status. During the Inmate Smith period, while official documents label and code her like many others, it is obvious from the volume of documents generated that containment of Inmate Smith is proving resource intensive. Incidents involving her are triggering requirements for production of thousands of reports by front line staff, which are then circulated to management. From May to October 2007, according to Sapers, Inmate Smith is mentioned in "hundreds" of daily CSC reports called "SITREPS," 22 of which mention repeated ligature-tying and selfharming incidents.⁴⁹

C. "Terminal" Inmate

By late 2006 or early 2007, in the theoretical framework of necropolitics, Inmate Smith can be understood as a "terminal" inmate; alternatively, on Agamben's formulation, she can be understood as banned or *homo sacer*. She has been dehumanized into someone who is, in many respects, socially and juridically already dead. Micro definitions that

⁴⁸ See e.g. Joan Martel, "Telling the Story: A Study in the Segregation of Women Prisoners" (2001) 28:1 Social Justice 196. See also Kelly Hannah-Moffat, "Gendering Risk at What Cost: Negotiations of Gender and Risk in Canadian Women's Prisons" (2004) 14:2 Feminism & Psychology at 243.

⁴⁹ "Risky Business", *supra* note 24 at 20.

constitute her banal physicality and survival behaviours as well as her resistances as “incidents” and responses by guards as “uses of force” produce Inmate Smith’s status as a terminal inmate. There is a great deal of continuity between the youth and adult systems in respect of how the systems coded, made sense of, and responded to, Smith’s conduct. Just as YP Smith had accumulated hundreds of incident reports and criminal charges in youth custody, so did Inmate Smith attract hundreds of incident reports and scores of new charges. As before, records of these incidents rarely (if ever) reference her harming others but rather involve defiance, self-harm or general unruliness that would not be considered criminal if undertaken by an actor not already framed as a carceral subject. Over the 11.5 months Smith was held in the adult system, “[she] was involved in approximately 150 security incidents, many which revolved around her self-harming behaviours”, which consisted of “superficially cutting herself, head-banging or, most frequently, fashioning a ligature out of material and then tying it around her neck.”⁵⁰ The construction of her basic survival behaviours as new disciplinary incidents is a denial of Inmate Smith’s autonomous existence, and a relentless erosion of her bodily integrity.

A difference between the Inmate Smith and YP Smith periods is that the youth system, perhaps because it had the benefit of recourse to the “safety valve” of the ability to transfer Smith to adult custody, did not seem to struggle as much with how to contend with her. In contrast, the adult correctional system quite rapidly spun out: it is evident that the cumulative weight of disciplinary infractions incurred by Inmate Smith in adult CSC custody began to exhaust guards and the system itself. Mandatory compliance with general systemic rules by guards was producing a totalizing regime of surveillance and of containment. While reconfiguration of Inmate Smith as an adult took place at a discrete moment in October 2006, there was continuity in the totalizing paradigm of surveillance in which she was enmeshed through her time in youth corrections to her time as an adult inmate.

Official documents from the Inmate period of the Smith case show the day-to-day conditions in correctional institutions to contain messy enactments of struggles between local and systemic power hierarchies. During this period, it is evident in official texts that Ashley Smith is successfully frustrating attempts by front line staff and management to

⁵⁰ Correctional Investigator of Canada, *A Preventable Death*, by Howard Sapers (20 June 2008) at 5 [*Preventable Death*].

manage her. There is also an institutional struggle between front line CSC guards, the management of particular institutions, and central CSC management about how to deal with Inmate Smith.

Clearly, Inmate Smith was exhausting system resources. In 11.5 months in Federal CSC Custody, Inmate Smith was moved 17 times amongst three federal penitentiaries, two treatment facilities, two external hospitals, and one provincial correctional facility. According to Sapers, “nine of the ...17 moves of Ms. Smith were institutional transfers that occurred across four of the five CSC regions. The majority of these institutional transfers occurred in order to address administrative issues such as cell availability, incompatible inmates and staff fatigue, and had little or nothing to do with Ms. Smith’s needs.”⁵¹ The series of transfers between CSC and mental health institutions reveals a sequence of security-based attempts to exclude Inmate Smith from the jurisdictions and concerns of institutions. Further, it reveals messy interaction between, and overlap of, disjointed bureaucracies within CSC. It sheds light on the bureaucratic workings of local institutions in various regions of Canada as well as CSC’s centralized national management. Different units within CSC were evidently trying to divest themselves of the problems, costs, and exhaustion caused by this troublesome inmate.

The sheer geographic range of these transfers is in part produced because Inmate Smith is female and there are few facilities available for woman inmates. Her gender therefore is engaged in the processes that compound the effect of necropolitical actions that bring about her social death. Far from her home and family in Moncton, Inmate Smith becomes unrooted and banned, losing her social identity. At a practical level, these transfers result in the impracticality of Inmate Smith having any visitors, visitors who in turn could have acted as non-expert advocates on her behalf or witnesses to her struggles. More abstractly, they produce Inmate Smith as politically locationless, eroding her membership in any form of community. Indeed, they produce Ashley Smith for the bureaucratic CSC systems in which she is enmeshed, as a fetish object, unmoored from her index offence, origins, or identity outside of prison. These transfers can also be analytically understood as seventeen *unsuccessful* attempts by various entities within the correctional system to divest themselves and the system of the management woes Inmate Smith’s presence is causing.

⁵¹ “Risky Business”, *supra* note 24.

Under CSC's "woman-centred approach", as one of few woman inmates, Inmate Smith is inherently problematic and a drain on resources for CSC from the beginning of her incarceration. Women are vastly more expensive to hold in prison than men, and mundane aspects of their incarceration are made more bureaucratically complex by rules crafted to protect women from abuse. Inmate Smith's most banal physicality: her menstrual cycles, her need for female undergarments, her large physical size (itself discordant with the stereotypically diminutive stature expected of women) are challenging for CSC to address. Inmate Smith fits neither stereotypical expectations of inmates, nor of women, and is in consequence difficult for the prison system to manage as an "offender", and for a variety of actors to imagine as a "victim" or person to protect.

Definition, classification and coding of Inmate Smith involved many interpretive moments. Inmate Smith is assigned a Maximum Security designation. She is sub-categorized as a "high risk female inmate", or a "high risk female offender." The deployment of this categorization profoundly affects the manner in which she is governed. Descriptions of Inmate Smith sometimes refer generally to her lengthy record but more often to her riskiness; they rarely if ever mention the crimes for which she was originally incarcerated. Also left unstated, and unclear, is to whom or what she poses a risk. Codes and charges assigned to various "incidents" obscure the banal triviality of the acts involved. As was the case while she was in youth custody; examples of the trivial incidents giving rise to charges are legion. The accumulation of her charges in youth custody and incident reports in adult custody involved daily, moment-to-moment microprocesses of governance in the interpretations and discretionary behaviours by guards. Equally, the weight of these texts, once amassed in large numbers as a record, in turn shapes the discretion of guards, who seek to act pre-emptively to prevent Inmate Smith from breaching the security of the institutional population.

As in the YP Smith period, it is in application and invocation of a complex web of legislative, regulatory, and administrative details through official texts that the official story of Inmate Smith takes shape. The CCRA formally governs how CSC officials deal with "incidents" arising and "offences" committed, in prison. In principle, this Act is focused on managing risks posed by inmates to one another and to the broader community. What measures are necessary and proportionate depends on whether an inmate is considered by prison officials to be a safety threat to themselves or others, making risk management the Act's primary objective.

The risk rationality in which the CCRA was steeped at the time of the Smith case has been further entrenched in statutory drafting in the years since her death. In addition, section 87 of the CCRA requires that all decisions (including transfer decisions) taken by the Correctional Service consider the health status of an inmate.

Subordinate official texts, such as regulations, guidelines, directives, and “management models” guide how bureaucrats are to interpret and implement the legislative regimes set out in the statutory laws. These regulatory texts are meant to be interpreted and applied in a manner consistent with the statutes. Relevant regulatory texts include the Corrections and Conditional Release Regulations, as well as several CSC Commissioner’s Directives concerning “uses of force”, and SITREPS – Situation Reports, which are circulated to all managers throughout the organization. These SITREPS are of great importance to the case because, according to Sapers, Inmate Smith figured prominently almost daily.⁵² Another key instance of official representation of Inmate Smith is that of “offender Ashley Smith” in the CSC Response to the Office of the Correctional Investigator’s Deaths in Custody Study.

Management of Inmate Smith, and other woman inmates, is done under CSC’s Situation Management Model (SMM). There is a textual gap between the categories available to assign to Ashley Smith and actual assignment of her to categories. Semantic indeterminacy is evident despite the felt boundness of guards by the formal legal tests in place. Even where guards feel they have no choice but to take particular actions in relation to Inmate Smith, it is they who “sign off” on the orders. Their discretion is involved. CSC officials in various levels of management positions as well as police and judges in a myriad of moments in incidents and charges in the Smith case exercise judgment. For example, the decision to transfer YP Smith to adult custody was a discretionary judicial determination. Charges for assaulting a peace officer were laid against Inmate Smith after altercations with guards when she refused to disrobe or leave a room were defined as “incidents” by interpretive judgment exercised by staff. Framing of her resistance to being brought to court to face charges on several occasions, as assaults on police officers and security incidents were also judgment calls. Finally, every time a judge found her guilty of new criminal

⁵² *Preventable Death*, *supra* note 50.

charges, the guilty finding and the sentence were both contingent on the judge's discretion within legal limits.

Solitary confinement cells in Canadian custodial facilities are given a variety of names, none of which refer to discipline or punishment of the inmate. The same geography of limited space (a small room with no windows and few items of furniture or amenities) is used to contain inmates in solitary confinement or segregation in Grand Valley Institution, in the Saskatoon Regional Psychiatric Centre, the Young Offenders Centre in New Brunswick, as well as all of the other institutions in which Ashley Smith was held in her time in custody. These small, locked rooms are referred to euphemistically as "administrative segregation," "observation cells", and "therapeutic quiet." All of these terms actually mean the same thing; to ensure security and management of risks, the same logic is applied and the same rooms, the same death spaces, are used to hold solitarily inmates who have been disruptive as are used for those on suicide watch.

While maximum security is understood colloquially to refer to a person's dangerousness, the determination by bureaucrats as to whether a subject should be labeled maximum-security is, according to the tests set out in applicable regulations, made in reference to the risks they pose. This determination is made pre-emptively. It need not refer to a past event. The decision whether to code an inmate "Maximum Security" involves a discretionary process. The stated aim of this classification is "to provide the safest and least restrictive environment possible." Federally sentenced female offenders are to be classified and housed in environments that are commensurate with their assigned security designation. Longstanding concerns have been repeatedly raised about the overuse of the maximum security designation and solitary confinement against woman inmates, and are identified in the 1996 *Arbour Report* as systemic "shortcomings... of the most serious nature."⁵³

CDA reveals that both Inmate Smith's maximum security classification and her relegation to solitary confinement are official designations that are not what they seem. While they sound like references to dangerousness on her part, they actually reframe her "high needs" as institutional risks. CSC has acknowledged, but rejects, the critique that the 'maximum-security' designation is applied inequitably to women, over-estimating the risks they

⁵³ Solicitor General Canada, *Commission of Inquiry into certain events at the Prison for Women in Kingston*, (Ottawa: Public Works and Government Services Canada, 1996) [*Commission of Inquiry*].

pose and imposing unnecessary restrictions. In response to this critique, a CSC study examined the question of gender differences in security classification by comparing maximum-security female to maximum-security male offenders.⁵⁴ This study did not find significant gender differences in the use of maximum security designations, but it did find that the assignment of risk could be assessed based on “suicide potential”, that woman inmates were more likely to have “high needs” and that “high needs” inmates were more likely to be understood as “high risk”, especially if they showed “suicide potential.”⁵⁵

The logics of security and risk that lead to Inmate Smith’s designation as dangerous are self-confirming. System actors mobilize certain logics when exercising their discretionary judgment. CSC culture and policies produce certain discursive conventions. These texts are written in a particular language, referring to pre-existing policies and procedures, with specific forms of coding and risk assessment that are prescribed by CSC conventions. It is not just the formal legal texts but also the cultural practices of actors that constitute conditions of possibility at the meso-level of analysis. The controlling discursive paradigm of the SITREP reports about Inmate Smith is risk rationality that focuses on minimizing potential “bads” or harms by containing security threats posed by inmates. The paradox of Smith’s agency being contained within a frame of offending trapped her into deeper and deeper enmeshment in closer and closer regulation of her every move.

Solitary confinement, forced injections, thousands of daily reports of new incidents, and hundreds of frequent charges imposed on Inmate Smith by this time are not just a simple risk management strategy. They are more. Together, they construct what Agamben describes as the “ban”, a continuing and definite exclusion of the carceral subject from community, an exclusion even amongst the excluded: the removal of the carceral subject from bios (social existence) within the prison population and its relegation

⁵⁴ Correctional Service Canada, “Maximum-security Female and Male Federal Offenders: A Comparison”, by Kelley Blanchette & Lawrence Motiuk, Catalogue No PS83-3/53E-PDF (Ottawa: Correctional Services Canada, March 1997) <online: http://publications.gc.ca/collections/collection_2010/scc-csc/PS83-3-53-eng.pdf>.

⁵⁵ *Ibid.*

to zoe or “bare life.”⁵⁶ In keeping with its commitment to security through risk rationality, the CCRA specifically provides for solitary confinement.

Analysis of the video of Inmate Smith’s biological death reveals at the micro-level in the moment of her death how the judgment of front line staff was paralyzed by orders from management and ultimately by security logic. This footage, which CSC fought hard to suppress,⁵⁷ depicts the death of Inmate Smith while several front line guards stood watching. It is scrupulously recorded with a time signature running on the film; the video recording starts at 6:45 AM on October 19, 2007. Testimony at the inquest indicates that guards had gathered outside Smith’s cell for at least 10 minutes prior to starting the videotape.⁵⁸ When the film begins, Inmate Smith is lying in a small corner of floorspace in her solitary cell, between the bed and the wall. Smith is positioned face down, gasping for breath, from asphyxiation by the ligature she had tied around her neck. It is certain from the footage that at least four guards (and at times five in addition to the one holding the camera) are gathered, standing continuously at the door to Inmate Smith’s cell for at least 10 minutes with the camera rolling. What they ostensibly do not know is that they are watching her die. The guards’ surveillance and inaction continue even while the gasping stops and Inmate Smith’s face turns visibly blue. They do enter the cell several times but do not assist her or remove the ligature from her neck for at least 10 minutes.

Narrative comments by guards that accompany the video footage taken while Inmate Smith lies dying consist of impersonal, matter of fact comments directed to Ashley Smith such as “[i]t’s been long enough. You need to take that off” and, calmly, without emotion: “Ashley” and hushed reassurances to one another such as “we don’t have to do anything.”⁵⁹ These comments are easily comprehensible as guards’ enactments of the behaviours they have been instructed to display. Perhaps they are also reminders by the guards to themselves or for posterity of prior directives not to intervene made by the managers who are the expected audience of the

⁵⁶ Agamben, *supra* note 16.

⁵⁷ In the series of motions discussed in the introduction to this article. See e.g. *Smith v Porter*, 2011 ONSC 2593, [2011] OJ No 1900; see also *Smith v Porter (Judicial Review)* 2011 ONSC 2844, 106 OR (3d) 254.

⁵⁸ CBC, “Behind the Wall” (12 November 2010), online: The Fifth Estate <<http://www.cbc.ca/fifth/episodes/2010-2011/behind-the-wall>> [CBC].

⁵⁹ *Ibid.*

video. The guards' attention to their audience calls attention to the subject position they occupy, a position not dissimilar to that of Inmate Smith. They are confined by a set of rules, closely surveilled but not assisted, by several higher levels of CSC management. This video, understood as a text produced under certain conditions with certain purposes is like a hall of mirrors. It presents an ominous enactment of a response to the question "who watches the watchers?"⁶⁰ and also to Coralee Smith's parting question aired at the end of the "Behind the Wall" documentary: "who gave that order [not to intervene]?" This reading of the video suggests that while an order was, in one sense, given by a particular bureaucrat, in turn, this bureaucrat was only one in a series of reflected images of authority that together make up a mirror maze where no agent is reachable, tangible or responsible.

Certainly, one individual, quite probably the Acting Warden, gave that order. However, it was given in the context of the widespread notoriety of Smith's case throughout the CSC management, and may very likely have been officially given by an authority figure who was not its originator. It is entirely plausible that a meeting of management lead to a consensus position ordering the official "orderer" to make the order. Alternatively, it is also plausible that the order resulted from informal pressure, or was a single actor's idea at a particular time. CSC has been manifestly resistant to releasing any records of what went on in this regard. The murky opaqueness of CSC's bureaucracies, and the apparent shady lack of co-ordination and accountability make the question of which individual functionary within it to blame unsolvable and its answer unsatisfactory. Certainly, there are actors who are more personally blameworthy than others for her death. However, my argument is that searching for them and finding someone to blame, or scapegoat, for that order, while it might be worthwhile, will not in itself produce change. Regardless of who actually gave the order, it was made not just possible but predictable in a rationalized bureaucracy and budget cycle guiding that bureaucrat as much as it did the guards, and anyone involved in the criminal and carceral institutions in which Inmate Smith was confined, by everyone and no one in particular.

⁶⁰ "Who watches the watchers?" or "Who watches the watchmen" *Quis custodiet ipsos custodes?* is a Latin phrase generally first attributed to the Satires of Roman poet Juvenal (Satire VI, lines 347-8).

The tenor of the guards' comments changes about 12:00 minutes into the video when they enter into the cell a second time and begin CPR. One cries out that she is inadequately trained for the task, swearing and saying she has not had CPR training for 11 years. The institution is scrupulous about recording of all that transpires but not, has not, clearly, paid comparable attention to preparing staff to help in emergencies. Emergency workers arrive at 7:10 AM and take over chest compressions. The 25 minutes depicted in the video are a microcosm of what happened in Inmate Smith's carceral life every day: surveillance, inaction, no assistance, avoidance. By the time the recording stops, Inmate Smith is dead.⁶¹

D. Inmate Smith and *Macro Power* – Power and Potential

As a technology of power, the official Inmate Smith figuration legitimates means of governance focused almost exclusively on containment and security. Discursive work done by the figure obfuscates the underlying incidents giving rise to her “maximum security” designation and make invisible the escalating pattern of a series of minor infractions and are deployed to characterize Inmate Smith as risky. The response deemed most appropriate to Smith's conduct in the context of her construction as risky would consist of increased containment and isolation. When transferred to CSC custody, Inmate Smith was constructed as risky on the basis of her youth corrections file, meaning that the high risk Inmate Smith construction preceded all reports and charges made about her while she was in CSC custody. The cumulative effect of these legislative and regulatory categories was to produce a weight of institutional discourse that constructed Inmate Smith as a dangerous person in need of containment. Inmate Smith is a figure on which hundreds of further incident reports and charges laid in Corrections custody were based. Security protocols were enacted as responses to refusals to comply by a featureless/ blank inmate with no appreciation for her particularity. The figure of the dangerous inmate in need of containment for security reasons supports regimes of rigid enforcement of rules against such an excluded and unmanageable being.

⁶¹ Much has been said about the usefulness of this video to the Smith Inquest and to the publicization of her case. Although it was mandatorily produced by CSC, massive efforts were undertaken to suppress it. Video footage of Ashley Smith's death is similar in this way to other official representations of her: they bear numerous interpretations and articulations and their uses are not easily predictable.

While it emerges from, and is articulated in, official documents that reinforce the internal logic of the correctional system, the figure of Inmate Smith is not inevitably deployed in support of maintenance of the correctional system and institutional status quo. After the death of Ashley Smith, representations that coalesce into substantially the same figure of Inmate Smith are also prominent in critiques of the correctional system. For instance, Sapers critiques the “governance model for women’s corrections” in place in CSC by mobilizing the representation of Ashley Smith as an inmate. Sapers identifies problems which led to the death of Inmate Smith as “a preventable culmination of several individual and system failures within the Correctional Service of Canada. These failures are symptoms of serious problems previously identified within Canada’s Federal Correctional system and are not applicable only to Ms. Smith.”⁶²

In this understanding, the Smith case is broadly relevant: what happens to Inmate Smith is a generalizable case of what might happen to any female inmate, and perhaps even any inmate, who becomes unmanageable in CSC’s “care and custody.” The patterns in treatment of offenders revealed by analysis of the Inmate Smith figure has the potential to confront clusters and structures of macro power and to question, and even refute, logics that Sapers has argued, both in advance of and in response to the inquest verdict, need to be changed. A March 2014 post on left-leaning independent news website Truth-out.org, for example, uses the Inmate Smith figure to bolster a claim that “solitary confinement becomes the perfect metaphor for the neo-liberal subject.”⁶³

The figure of Inmate Smith raises questions about the necropolitical operations of interlocking logics of exclusion and risk in the juridical field in their production of the juridical exclusions and legal deaths of inmates. These questions are broadly relevant to public policy about criminal law, administration of correctional systems, and youth criminal justice systems in Canada.

⁶² *Preventable Death*, *supra* note 50.

⁶³ Stuart J Murray & Dave Holmes, “A New Form of Homicide in Canada’s Prisons: The Case of Ashley Smith”, *truth-out.org* (10 March 2014) online: <<http://www.truth-out.org/news/item/22321-a-new-form-of-homicide-in-canadas-prisons-the-case-of-ashley-smith>>.

IV. INMATES IN THE CANADIAN PRISON CONTEXT

The figure of Inmate Smith can be deployed as a case that illustrates dangers of risk and security logic and reveals evils routinely perpetrated by a rationalized bureaucracy. While the Smith case has become uniquely celebrated, Ashley Smith's incarceration was, in many respects, not unusual. Inmate Smith is an exemplar of a type of which there are many. In 2012-2013 there were 41,049 offenders, both adults and youth, in custody on an average day.⁶⁴ Per capita, is a rate of 118 persons in custody per 100,000 people in Canada's general population.⁶⁵ With the growth in mandatory minimum sentences, and the overall inclination of the prior government to get "tough on crime," incarceration rates⁶⁶ (not crime rates) are at an all-time high in Canada. While Canada's change in Federal governments in 2015 may result ultimately in a change in circumstances, this change, while promised, in large part has not yet happened, and predictions made in recent years indicated that these numbers may be in the process of increasing.⁶⁷

Deaths of woman inmates in prison in Canada are repetitive touchstones in a long history of inattention, a broad, consistent trend with recurring similarities. Necropolitical theorization provides new language for understanding what is consistent about the patterns in the mistreatment of these inmates, and provides a way to re-read these cases as exemplars of the same general phenomenon.

The necropolitical exclusion experienced by Inmate Smith in custody bears significant similarities to recurring incidents relating to women in Canada's prisons. Concerns about Ashley Smith's treatment echo longstanding criticisms about treatment of inmates, especially woman inmates, in this country. Events giving rise to the inquiry into the 1994 incidents at Kingston's Prison for Women are similar to details of the Smith

⁶⁴ Statistics Canada, "Correctional service key indicators, 2012/2013", by Samuel Perreault (Ottawa: Statistics Canada, 2014).

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Office of the Correctional Investigator of Canada, *A Three Year Review of Federal Inmate Suicides (2011-2014) Final Report*, (Ottawa: Office of Correctional Investigator, 10 September 2014) online: <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20140910-eng.aspx>>.

case.⁶⁸ Inmate Smith should be understood in the context of the culture of risk logics implicated in disregard of disruptive inmates, especially women.⁶⁹ This context is well-described in existing literatures. The long history of willful disregard for woman inmates in Canada is well-documented.⁷⁰ Concerns have been repeatedly raised about the overuse of the maximum security designation and solitary confinement against woman inmates. These concerns are identified in the 1996 Arbour Report as reflecting a culture of lawlessness in prisons manifested in systemic “shortcomings... of the most serious nature.”⁷¹ Similar concerns are identified in the 2006 Human Rights Complaint by the Canadian Association of Elizabeth Fry Societies, which referenced a wide range of human rights abuses, including holding women in security conditions much more stringent than warranted and failing to meet women inmates’ basic health, cultural, and educational needs.⁷² The willful neglect and disregard of woman inmates in Canada’s prisons is also exemplified by the cases of Marlene Moore,⁷³ Lisa Neve,⁷⁴ Julie Bilotta,⁷⁵ and Dorothy Proctor.⁷⁶

⁶⁸ *Commission of Inquiry*, *supra* note 53.

⁶⁹ Kelly Hannah-Moffat & Carolyn Yule, “Gaining Insight, Changing Attitudes and Managing ‘Risk’: Parole Release Decisions for Women Convicted of Violent Crimes” (2011) 13:2 *Punishment & Society* 149 [Hannah-Moffat & Yule].

⁷⁰ See Ellen Adelberg & Claudia Currie, eds, *Too Few to Count: Canadian Women in Conflict with the Law*, (Vancouver: Press Gang Publishers, 1987); Hannah-Moffat & Yule, *supra* note 69.

⁷¹ *Commission Inquiry*, *supra* note 53 at 7.

⁷² Sunny Marriner & Dawn Moore, “Women’s Imprisonment: How Getting Better is Getting Worse” in D Jones, ed, *Humane Prisons* (Oxford: Radcliffe, 2006).

⁷³ Marlene Moore was Canada’s first female offender declared a “dangerous offender.” She died by suicide in prison in 1988. For discussion see Anne Kershaw & Mary Lasovich, *Rock-a-bye Baby: A Death Behind Bars* (Toronto: Oxford University Press, 1991).

⁷⁴ Who was declared a dangerous offender in 1994 after committing a series of minor crimes, a designation later overturned on appeal. Matthew Yeagar, “Ideology and Dangerousness: The Case of Lisa Colleen Neve” (2000) 9:1 *Critical Criminology* 9.

⁷⁵ Julie Bilotta gave birth by a breech birth in an Ottawa solitary confinement prison cell in 2012. The baby later died. Andrew Seymour, “Woman Who Gave Birth at Ottawa Jail Files \$1.3M Lawsuit”, *Ottawa Citizen* (23 September 2014), online: <<http://ottawacitizen.com/news/local-news/woman-who-gave-birth-at-ottawa-jail-files-1-3m-lawsuit>>.

⁷⁶ Dorothy Proctor & Fred Rosen, *Chameleon: the lives of Dorothy Proctor* (Far Hills, NJ:

Further, while her gender is significant, aspects of Ashley Smith's death bear similarities to persistent patterns in prisons. Segregation of inmates in forms of isolation has a long history of overuse in inmates in both the United States and Canada.⁷⁷ Deaths of inmates in Corrections custody are not unexpected; suicide and failures to respond to medical emergencies have, since the opening of Canada's prisons, been leading causes of inmate death. A study of deaths in CSC custody between 2001 - 2005 found that the majority of these were ruled suicides by CSC and also, that inmates commit suicide at 8 times the rate of the general population. Failures to administer CPR regularly recur along with persistent delays in seeking and obtaining health care support. These patterns predate the Smith case and continue after it. Illustratively, between the time that Ashley Smith died and the first inquest into her death commenced, between 2007 and 2010, another 130 inmates died in Federal Custody.⁷⁸

V. CONCLUSION

There are many possible ways to tell stories about Ashley Smith, and each narrative that could be told would, as I have argued in this article, involve selective processes in its telling and silences that make it into fiction. This article has discussed how CDA of the Inmate Smith figure as deployed in the official record of Ashley Smith allows understanding to go beyond the narrow question of how she died in prison on October 19, 2007 to ask broader questions about how she *came to* die there. It reveals the ways in which Inmate Smith was configured as socially and political dead long before her biological death. Understanding Ashley Smith as a case of the general type "inmate" through analysis of the figure of Inmate Smith that coalesces from a variety of texts in the case opens up potential for her

New Horizon Press, 1994). It is salient to the theorization presented in this article that treatment of woman prisoners is necropolitical that Dorothy Proctor repeatedly characterizes herself as a "throwaway".

⁷⁷ Lisa Kerr, "The Chronic Failure to Control Prisoner Isolation in US and Canadian Law" (2015) 40:2 Queen's LJ 483.

⁷⁸ Office of the Correctional Investigator, "Final Assessment of the Correctional Service of Canada's Response to Deaths in Custody", (Ottawa: Office of Correctional Investigator, 8 September 2010) online: <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20100908-eng.aspx>>.

example to be deployed in public debates about the interlocking utilitarian rationalities of risk and the logic of exception.

Progressive politics have instrumentalized the figure of Inmate Smith in opposition to prolonged use of solitary confinement in prisons. I do not disagree with the need to change how solitary confinement is used. Indeed, one of the voices raised in this activism has been my own. However, violences and wrongs done to Ashley Smith by social and educational institutions,⁷⁹ mental health facilities and prisons, do not start and end with isolation: she was tasered; she was pepper sprayed; she was beaten; she was tortured by confinement for long periods of time in “restraints”; she was given forced injections; she was drugged against her will in ways not supported by any diagnosis; her human rights and needs for basic necessities were ignored; she was touched, beaten, confined, and denied clothing in ways that would have, anywhere but here in her carceral context, been understood as sexual assaults; her sexual agency and autonomy were effaced.

An analysis of Inmate Smith offers a haunting reply to Ashley Smith’s mother Coralee at the end of “Behind the Wall” when she asks, “who gave that order, Hana?”⁸⁰ in reference to the non-intervention order that absolved the front line CSC staff from criminal charges. CDA reveals not a single order that killed Ashley Smith but a series of thousands of actions, inactions, decisions, and orders by a large number of actors in the youth justice, probation, education, adult justice, youth, and adult correctional systems that led to Ashley Smith’s social, legal, and biological deaths. This does not absolve individual actors in the CSC bureaucracy from accountability. Rather, it situates their actions and inaction in a context of systems of power that implicate many others in Ashley Smith’s death. Indeed, as a technology of governance, the discursive figure of Inmate Smith has powerful potential to implicate – and incite action by – us all.

When Agamben’s concept of *homo sacer*, Mbembe’s formulation of necropolitics,⁸¹ and Ong’s understanding of the carceral subject in solitary confinement as the archetypal neoliberal subject⁸² are considered, the

⁷⁹ Bromwich, *supra* note 6.

⁸⁰ CBC, *supra* note 58.

⁸¹ Mbembe, *supra* note 17.

⁸² Aihwa Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty* (Durham, NC: Duke University Press, 2006).

caseness of Inmate Smith opens up: it reveals her as a case of a type of which *we* are part. The inquest verdict of homicide in the Smith Case, rendered even after CSC counsel contended a homicide verdict was unavailable and unthinkable, is a marked break from the usual pattern of inquests yielding findings that responsabilize inmates for their own deaths documented by Sherene Razack.⁸³

The homicide verdict opens up questions about who is responsible for the lives of inmates, and interrogates violences perpetrated by the state and state actors. The verdict's assertion that inmates *can* be killed in Corrections custody in circumstances for which CSC is blameworthy is broadly relevant if read as a rejection of an inmate's logic-of-exception status as juridically dead already. This inquest verdict could be construed as a rejection of the assumption that Smith was *homo sacer*, of the logic of exception, of governing through crime and camps, and a condemnation of the monstrosity of CSC's rationalized bureaucratic logic. As is suggested by the 2015 Ministerial Mandate letter, the figure of Inmate Smith may yet be effectively deployed to confront the operating logics of risk and exclusion; it may be used towards making it imaginable to write another ending to the story, where the mirrors of surveillance reflecting in on each other are shattered and the inmate - the one in carceral solitary confinement, and also the neoliberal subject in general - is (more) free.

By law, the focus of the inquest in the Smith case was limited to the 11 months she spent in federal custody. However, without absolving CSC for responsibility in her death, it is clear from this analysis that much of what went wrong in the Smith case reveals problems with how she got there. A series of social, political, and juridical exclusions that were effectively forms of death are as much a part of the story of what led to the homicide of Ashley Smith as is solitary confinement. CDA of constructions of Inmate Smith in Ashley Smith's case reveals problems within the justice and correctional system generally, and solitary confinement in particular, that have not yet been remedied, and will not be corrected by small tweaks to ways, in which a tiny subset of offenders, however defined, is dealt with. On this analysis, the Smith case speaks to not just a need for change to the treatment of a small subset of mentally ill/female/youthful offenders in a narrow range of exceptional circumstances but rather to revolutionary

⁸³ Sherene Razack, *Dying From Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Toronto: University of Toronto Press, 2015).

change in how the correctional and the criminal justice systems in Canada are performed and conceived.

Manitoba's Mental Health Court: A Consumer Perspective

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ABSTRACT

Mental health courts (MHC) have been growing in popularity and use in Canada and elsewhere and are lauded as a humane mechanism to divert those with mental health conditions away from the formal justice system. Research to date has tended to focus on process questions of proper referral and quantitative outcomes of reoffence rather than on feedback from the consumer, the program participant. We report findings from a mixed methods study of mental health court participants (N=20) and use numeric rankings as well as narrative responses to present client perspectives. Findings were generally favourable towards mental health court staff and programming, though some areas were rated higher than others. Feelings of procedural fairness were high, and the use of rewards and sanctions was endorsed. Some concerns about the coercive nature of the program, however, were also expressed by participants.

Keywords: *mental health court, mixed-methods, procedural justice.*

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I. INTRODUCTION

Mental health courts (MHCs) are problem solving courts aimed to divert offenders with mental disorders from custody and have been operating in criminal justice systems world-wide for almost twenty years. While most frequently seen in the United States, MHCs are also operating in Australia, Britain, and Canada.¹ Evidence is accumulating that MHCs reduce days in custody and criminal recidivism, increase access to treatment, and reduce symptoms of mental illness.² Critics of mental health courts, however, have expressed grave concerns over the coercive nature of their operation and postulate that their existence merely diverts important forensic resources into a punitive criminal justice system, rather than into the health care system where treatment is more appropriately situated.³

Canada has five mental health courts operating in the provinces of Newfoundland, Nova Scotia, New Brunswick, Ontario, and Manitoba⁴, but empirical research on efficacy has been limited and evaluation remains a

¹ Richard D Schneider, "Mental Health Courts and Diversion Programs: A Global Survey" (2010) 33:4 Intl J L & Psychiatry 201.

² Padraic J Burns, Virginia Aldigé Hiday & Bradley Ray, "Effectiveness 2 Years Postexit of a Recently Established Mental Health Court" (2013) 57:2 Am Behav Sci 189 [Burns, Hiday & Ray]; P Ann Dirks-Linhorst & Donald M Linhorst, "Recidivism Outcomes for Suburban Mental Health Court Defendants" (2012) 37:1 Am J Crim Just 76 [Dirks-Linhorst & Linhorst]; Virginia Aldigé Hiday, Bradley Ray & Heathcote W Wales, "Predictors of Mental Health Court Graduation" (2014) 20:2 Psychol Pub Pol'y & L 191 [Aldigé Hiday et al]; Christine M Sarteschi, Michael G Vaughn & Kevin Kim, "Assessing the Effectiveness of Mental Health Courts: A Quantitative Review" (2011) 39:1 J Crim Just 12 [Sarteschi, Vaughn & Kim].

³ H Archibald Kaiser, "Too Good To Be True: Second Thoughts on the Proliferation of Mental Health Courts" (2011) 29:2 Canadian J of Community Mental Health 19 [Kaiser]; Cf Dawn Moore, *Criminal Artefacts: Governing Drugs and Users* (Vancouver: UBC Press, 2007) [Moore].

⁴ Anne E Bain, *The Impact of Therapeutic Jurisprudence: A Critical Study of Toronto's Mental Health Court* (Doctoral Dissertation, University of Michigan Faculty of Social Work and Anthropology, 2013); Mary Ann Campbell et al, "Multidimensional Evaluation of a Mental Health Court: Adherence to the Risk-Need-Responsivity Model" (2015) 39:5 Law & Hum Behav 489; Krista M Davis et al, "A Process Evaluation of Toronto's First Youth Mental Health Court" (2015) 57:2 Can J Corr 159; Quebec, Employment and Social Development Canada, *Mental Health Courts: Processes, Outcomes and Impact on Homelessness*, by Sue-Ann MacDonald et al (Montreal: Université du Montréal, 2014); *Nova Scotia Mental Health Court Report* (Nova Scotia: Provincial Court, 2014).

concern.⁵ This paper attempts to expand knowledge of Canadian MHCs generally and explore some of the critiques made of the MHCs punitive and coercive nature by hearing from participants of a relatively new mental health court in Winnipeg, Manitoba. A mixed methods design takes a "consumer perspective" approach that asks participants directly about what works in a mental health court, including their ratings of court and forensic staff, experiences with sanctions and rewards, perceptions of procedural justice, and the voluntary nature of their involvement. Likert ratings are supplemented by narrative qualitative offender responses on their lived experiences within the mental health court program.

II. LITERATURE REVIEW

The first mental health court was established in Broward County, Florida.⁶ The primary undertakings for MHCs after identification of mental health difficulties was providing outreach services, mobile crisis teams, home visit groups, and assertive community treatment (ACT) teams. ACT are multidisciplinary teams that work on behalf of their clients to access mental health resources and to follow up on treatment plans. MHCs across North America can be distinguished on the basis of four main features: the charges accepted, the adjudicative model, the sanctions applied, and the source of supervision. Some courts take only cases involving minor offences, other courts take more serious cases. Certain MHCs will give the accused the option of a pre-plea arrangement whereby charges are dropped upon successful completion of the program. Other jurisdictions insist on a guilty plea prior to mental health court admission.⁷ Thus, there are significant differences between MHCs, and this should be taken into consideration when attempts are made to generalize about them. Canadian courts appear willing to take more serious offenders than most American jurisdictions. Canadian courts also appear to achieve, on average, higher retention rates.⁸

⁵ Emily Slinger & Ronald Roesch, "Problem-Solving Courts in Canada: A Review and a Call for Empirically-Based Evaluation Methods" (2010) 33:4 *Intl J L & Psychiatry* 258.

⁶ Roger A Boothroyd et al, "The Broward Mental Health Court: Process, Outcomes and Service Utilization" (2003) 26:1 *Intl J L & Psychiatry* 55 at 55-56.

⁷ Henry J Steadman et al, "From Referral to Disposition: Case Processing in Seven Mental Health Courts" (2005) 23:2 *Behav Sci & Law* 215 at 225.

⁸ Johsua Watts & Michael Weinrath, "The Winnipeg Mental Health Court: Preliminary

Mental health courts have generally been found to at least moderately reduce recidivism and days in custody post-program, two important criminal justice outcomes.⁹ Mental health courts have been criticized, however, as detracting from proper treatment of those with mental health conditions who come in contact with the justice system.¹⁰ Canada signed on to the recent *Convention on the Rights of Persons with Disabilities*, ratified in 2010, which signaled a general move away from the medical model of mental illness and towards increasing the rights of those with mental health challenges and reducing stigma.¹¹ Contrary to this signing, mental health courts are thought to single out individuals with mental health conditions and put them on weekly public display. Rather than diminish stigma, MHCs amplify it by creating a distinct group in a special court setting, which creates an image of the mentally disordered as dangerous. Weekly meetings in front of a judge simply reinforce this shaming. Mental health courts are not without cost and their existence diverts dollars from a civil mental health system that might better serve the needs of those with serious mental health conditions.¹² Outcome studies are thought to focus too much on recidivism and not enough on wellbeing and relief from mental health symptoms. Furthermore, research conducted to-date has not been uniformly positive on reoffence reduction or improved life satisfaction, raising some doubt as to MHC efficacy.¹³

Findings on Program Implementation and Criminal Justice Outcomes" (2017) 36:1 Can J of Community Mental Health 65.

⁹ Burns, Hiday & Ray, *supra* note 2; Dirks-Linhorst & Linhorst, *supra* note 2; Aldigé Hiday et al, *supra* note 2; Sarteschi, Vaughn & Kim, *supra* note 2.

¹⁰ Kaiser, *supra* note 3.

¹¹ *Convention on the Rights of Persons with Disabilities*, 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

¹² Tammy Seltzer, "Mental Health Courts: A Misguided Attempt To Address the Criminal Justice System's Unfair Treatment of People with Mental Illnesses" (2005) 11:4 Psychol Pub Pol'y & L 570 [Seltzer].

¹³ Lorraine Lim & Andrew Day, "Mental Health Diversion Courts: A Prospective Study of Reoffending and Clinical Outcomes of an Australian Mental Health Court Program" (2016) 55:4 J of Offender Rehabilitation 254.

III. COERCION, PROCEDURAL JUSTICE AND VOLUNTARINESS OF PARTICIPATION

Moore has situated drug courts within the waning ideals of social welfarism and the refocus of the state on a neo-liberal definition of the criminal addict.¹⁴ An addicted person could be viewed as an individual dealing with a physical dependency that leads to crime, and that event could trigger a response and treatment by the healthcare system. Instead, criminal addicts are viewed as choosing to commit crimes, and the drug court is offered as an interdisciplinary strategy that helps the addict, by combining treatment with criminal justice supervision. This is proffered as a benevolent alternative to custody. Moore urges a more critical view of the underlying assumptions of problem solving courts, and consideration of alternative views of helping individuals who come in conflict with the law.¹⁵ Similarly, Seltzer argues that individuals with mental health conditions could be treated by medical professionals, even when their behaviour violates laws. Instead, it is a normative choice by the state to use mental health courts to provide treatment but also criminal justice supervision and sanctions.¹⁶

An operational criticism centres on the coercive nature of mental health courts. Although programs vary, participants are generally monitored through weekly status hearings in front of a judge, meetings with mental health professionals, and sometimes probation officers. Failure to comply with treatment such as refusing medication, not attending treatment sessions or failing drug screening tests can lead to serious sanctions. Researchers argue that the supposed voluntary nature of enrolment hides the forced nature of participation (i.e., "agree to join the program or go to jail"), or that recruits do not fully understand what is being asked of them.¹⁷ The informality of the court may well mask a lack of due process in ongoing proceedings. Furthermore, US researchers note that because of the potential sanctions imposed due to non-compliance with treatment or

¹⁴ *Supra* note 3.

¹⁵ *Ibid.*

¹⁶ Seltzer, *supra* note 12.

¹⁷ Allison D Redlich et al, "Enrollment in Mental Health Courts: Voluntariness, Knowingness, and Adjudicative Competence" (2010) 34:2 Law & Hum Behav 91 [Redlich, "Enrollment"].

restrictive conditions after a guilty plea, it is imperative that participants' agreement to enter into a contract with the mental health court be "knowing, intelligent and voluntary."¹⁸ A US study found that about half of MHC participants in two courts did not feel that the voluntariness of the program had been explained to them before admission and less than half knew that they could leave.¹⁹ In the end, much responsibility falls on defence counsel to ensure that their clients' comprehension and decisions meet these standards.

Procedural justice research has demonstrated the importance of interpersonal encounters between criminal justice agents, the public, and offenders.²⁰ Research has found that individuals are less concerned, than is commonly thought, with distributive justice, or the outcomes of criminal justice processes such as receiving a traffic ticket fine, arrest or incarceration. Individuals who come in contact with the criminal justice system tend to be more concerned with how fairly they believe that they were treated by criminal justice agents.²¹ Judges, police, and correctional workers have been found to positively influence compliance with the law by showing offenders respect, courtesy, consistent treatment, and a willingness to listen. In the case of mental health courts, investigators have found that, compared to a regular court setting, clients tended to rate MHCs higher on procedural justice principles such as fairness and respect, and lower on perceptions of coercion and punishment.²² The adherence of MHC judges to procedural justice principles during client court appearances has been found to have a positive impact on client well-being. Research has shown that judges tend to praise more than sanction in status hearings²³ and that a procedurally just approach by the judiciary has contributed to reduced mental health

¹⁸ Allison D Redlich & Alicia Summers, "Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry" (2012) 18:4 Psychol Pub Pol'y & L 626 at 626 [Redlich, "Voluntary"].

¹⁹ Redlich, "Enrollment", *supra* note 17 at 97.

²⁰ Karin A Beijersbergen et al, "Procedural Justice and Prisoners' Mental Health Problems: A Longitudinal Study" (2014) 24:2 Criminal Behaviour and Mental Health 100.

²¹ Tom R Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law" (2003) 30 Crime & Justice 283.

²² Norman G Poythress et al, "Perceived Coercion and Procedural Justice in the Broward Mental Health Court" (2002) 25:5: Intl J L & Psychiatry 517.

²³ Kelly Frailing, "How Mental Health Courts Function: Outcomes and Observations" (2010) 33:4 Intl J L & Psychiatry 207 [Frailing].

symptoms.²⁴ MHC participants who perceive higher levels of procedural justice tend to see their symptoms improve and are less likely to reoffend²⁵ and terminate program involvement and are more likely to persist in treatment or graduate.²⁶

IV. CANADIAN MENTAL HEALTH COURT RESEARCH AND CONSUMER REPORTS

In Canada, a New Brunswick study assessed participant feedback of 22 mental health court graduates.²⁷ Overall, clients expressed positive feelings towards the MHC and its staff, they tended to view it as a better experience than regular court, and felt that their mental health had improved during their time in the program. Resentment was expressed by some over the lengthy wait prior to being able to start the program and some felt that they did not need to be in the program for as long as they had. Some believed that court sheriffs could demonstrate a more sensitive attitude towards them when they attended mental health court. At least two clients felt more time could be spent on explanations of expectations and procedures. The majority of feedback, however, was very favourable. Interpretation of results should be done cautiously, however, as the sample consisted of graduates, not drop-outs, introducing selection bias as a caveat.

As noted earlier, the bulk of research on mental health courts is US based, and there is much to learn about the Canadian experience. In our study, using data from the Manitoba mental health court, we propose to

²⁴ Sarah Kopelovich et al, "Procedural Justice In Mental Health Courts: Judicial Practices, Participant Perceptions, and Outcomes Related To Mental Health Recovery" (2013) 36:2 Intl J L & Psychiatry 113 [Kopelovich et al]; Heathcote W Wales, Virginia Aldige Hiday & Bradley Ray, "Procedural Justice and the Mental Health Court Judge's Role in Reducing Recidivism" (2010) 33:4 Intl J L & Psychiatry 265 [Wales et al].

²⁵ Christina Pratt et al, "Predictors of Criminal Justice Outcomes Among Mental Health Courts Participants: The Role of Perceived Coercion and Subjective Mental Health Recovery" (2013) 12:2 Intl J of Forensic Mental Health 116.

²⁶ Kelli E Canada & Virginia Aldige Hiday, "Procedural Justice in Mental Health Court: an Investigation of the Relation of Perception of Procedural Justice to Non-adherence and Termination" (2014) 25:3 The J of Forensic Psychiatry & Psychology 321 [Canada & Hiday].

²⁷ Stephani Lane & Mary Ann Campbell, *Representing the Client Perspective of the Saint John Mental Health Court* (Honours Thesis, University of New Brunswick, 2009) [Lane & Campbell].

explore several important issues raised in the literature, using a consumer perspective to identify how MHC clients perceive the program. Participant ideas about the efficacy of various mental health court features, their perceptions of coercion and voluntariness in the program, and finally, their opinions on procedurally just behaviours exhibited (or not) by MHC court and treatment teams are all vital areas for policy makers to consider.

V. PROGRAM OVERVIEW

The Winnipeg mental health court was established in 2012 and emphasizes a therapeutic justice (problem-solving) approach; its local predecessors were the Winnipeg drug court and the Winnipeg family violence court. Significantly, the judge who led the MHC court team for much of the first two years of operation took on a leadership role in 2006 for Winnipeg's drug court; his experience was reported to be invaluable, particularly in the early stages. The program operates as a post plea second generation court, meaning that offenders must voluntarily plead guilty to obtain services and supervision of offenders is a collective effort by mental health and criminal justice system actors.²⁸ Like other MHCs, potential candidates for the Winnipeg program can be referred from both defence counsel and crown, corrections staff, and police, as well as health care facilities. The program excludes offenders facing sex charges, serious assaults, home invasions or criminal organization (gang or organized crime) offences, and they must not be gang members. Past gang or sex crime charges might also restrict entry. Candidate referrals must have a serious mental health condition such as schizophrenia, bi-polar disorder, or a mood disorder. A committee of crown prosecutors vet the initial application and, if approved, it is referred to the Forensic Assertive Community Treatment (FACT) team to verify an Axis I diagnosis and assess risk. They strive for a thirty day assessment period, or sooner. Clients can be accepted as Track I or II. Track I cases are placed under a recognizance with conditions pertaining to MHC participation. Track I cases may have charges stayed if successful, while Track II will usually receive a probationary disposition when they complete the program. Clients are expected to spend 18-24 months in the program, whereupon compliance leads to graduation.

The Winnipeg MHC court team consists of a judge, crown, defence counsel (Legal Aid supplied), and members of the Forensic Assertive

²⁸ Redlich, "Enrollment", *supra* note 17.

Community Treatment team. The FACT team is made up of one manager, four service providers, a part-time psychiatrist, and an administrative support staff. The court team meets weekly and participants attend court weekly (or less as they progress). The FACT team provides help finding housing, teaching life skills, coping strategies, scheduling of daily routines, assists in financial management, and medication management. The psychiatrist plays a lead role in helping determine appropriate dosage, in consultation with the participant, and other members of the FACT team. Medication compliance is expected. The Winnipeg MHC shares the task of supervision between health and justice team members by core competencies.

Incentives for treatment participation and program compliance include praise from the judge and FACT team, lowered court appearance requirements, reduced curfew restrictions and/or, elimination of urinalysis tests. During our research, some of the sanctions applied for misconduct such as missing meetings, not participating in treatment, or failing drug tests were censure from the judge at a weekly hearing, an increase in reporting, a curfew, and community work service. Custody was used as a sanction in only one reported case for non-compliance during the first two years of the program that we were able to confirm. Anecdotally, the judge did use the “threat” of custody as a sanction for non-compliant cases, but these incidents were not tracked.²⁹

VI. METHOD

As part of a process and preliminary program evaluation, we surveyed 20 mental health court participants. Our first instrument was a general 37 item questionnaire derived from prior research,³⁰ and we supplemented this with several open-ended questions we developed ourselves. This allowed us to mix quantitative with qualitative analysis of our consumer reports. We have five program dimensions rated on a Likert scale, described below. We also requested participants provide Likert ratings on procedural justice in

²⁹ Here, we do not define use of custody as a sanction in situations where a client had absconded and an arrest warrant had to be issued for non-appearance in court. In these cases, incarceration was not really applied as a sanction for lack of program adherence, but rather used to enforce serious breaches of the court recognizance.

³⁰ Merith Cosden et al, “Consumers’ Perspectives on Successful and Unsuccessful Experiences in a Drug Treatment Court” (2010) 45:2 Substance Use & Misuse 1033.

the operation of the program (12 questions), and then also asked two questions assessing perceptions of voluntary program involvement.

The four program features that we touched on included:

Helpfulness: participant opinion was sought on the utility of 14 items which include improving mental health, reducing criminal activity, improving relations with the criminal justice system, staying in treatment, improving relationships, assistance in work, education, finances, housing, accessing community housing, getting drug treatment, improving quality of life, and managing medication (if applicable).

Effectiveness of Program Features: eight questions asked participants to rank the effectiveness of key mental health court features such as interactions with the judge, encouragement to tell the truth, collaboration between court, and treatment teams, being accountable, medication assistance, help from treatment staff, access to a psychiatrist, and use of drug testing (note: only MHC clients with an identified substance abuse problem were subject to urinalysis).

Reward and Sanctions Effectiveness: ten items centred on client perceptions of reward (2 questions) and sanction (8 questions) efficacy. Rewards in the MHC were limited to verbal praise from the judge or treatment team. Evaluations of sanctions included judicial reprimands in open court, adding of curfews, community work, or treatment because of failures to comply with a treatment plan. More severe sanctions were also featured such as the requirement of residential treatment, a warrant issued for not attending court, threat of expulsion, and the possibility of a short term of incarceration for non-compliance.

General Feelings about the Mental Health Court Program: five questions asked participants to rate different aspects of the program, such as feeling involved in their treatment plan, noticing life improvements, feeling safe in the program, and a reversal question, whether or not time in the MHC felt more like punishment than treatment. The procedural justice questionnaire had been utilized by the research team in previous drug court evaluations, based largely on a popular instrument developed for drug court research.³¹

The qualitative portion of our study was comprised of seven open-ended questions. The first two concerned current circumstances around personal activity (how are you spending your days? (e.g., work, volunteering, attending school)) and health (how is your physical health?). The other

³¹ Denise C Gottfredson et al, "How Drug Treatment Courts Work: An Analysis of Mediators" (2007) 44:1 J Res Crime & Del 3.

questions explored areas such as how staff might be of help (how can the Mental Health Court staff best help you to avoid future problems with the law?), perceived advantages or disadvantages, if any, of the mental health court compared to traditional court and motivation to enter the MHC (why did you decide to enter the Mental Health Court program?).

VII. PROCEDURE

Our study was approved by both the University of Winnipeg Research and Ethics Board and the Winnipeg Regional Health Authority (WRHA) Research and Ethics Committee. Our initial study group consisted of 34 cases either currently or previously with the Winnipeg MHC; of these 20 completed surveys, only 6 formally declined, 3 left the program while the study was ongoing, and the other 5 were difficult to contact, missed appointments or had problems with scheduling. Because of the vulnerable nature of this target group, we went to significant lengths to ensure consent was informed and voluntary. First, Winnipeg mental health court staff advised their clients informally about our study, then we met with a large group after a court session one day and gave an overview of our research. MHC staff then referred clients interested in our study to a meeting with us at the FACT office. We reviewed the study again one on one with individuals who met with us, assuring them of confidentiality, that they did not have to participate unless they wished to, they could refuse to answer some questions if they desired, could leave at any time, or withdraw later if they changed their mind. Participants had to sign two informed consent documents, one approved by the University of Winnipeg, the other required by the WRHA. Interviews were conducted in private rooms at the FACT office. We had originally intended to pretest the questionnaires and then modify as necessary; however, there were no problems encountered in administration so we analyzed all surveys completed. Open-ended responses were transcribed verbatim by the interviewer and then reviewed for emergent themes.

The 20 participants ranged from 19-63 years of age (mean=37.6), 16 out of 20 were male, 70% were white (20% were Indigenous), and 80% were single. Most had an education of grade 11 or higher (75%) and a third reported being employed full time or part time. About half were on Track I status (charges might be stayed). Forty percent (40%) of clients were dealing with schizophrenia, 30% were bipolar and the rest managed some form of

depression. Surprisingly, 15 of 20 (75%) participants had been placed in the MHC for a violent offence conviction.³² The average time in program was 250 days. There was only one graduate at the time of the study.

VIII. STUDY FINDINGS

Mental health court clients reported spending their days in mostly constructive activities, or at least looking for things to engage in. Getting clients active is a targeted area for the FACT team. Clients reported involvement in treatment programs, association with their families, volunteering with community groups, and working. While some clients managed to be very busy, others struggled.

“I just finished school and am planning to return in February. I am currently volunteering at a coffee shop to help out and keep myself busy. Not only do I try to see my daughter a lot but I’m also trying to be a better parent, so started taking a parent and addiction course. I also try to attend regular AA meetings 5-6 times a week.”

“Currently I am a couch potato. However, I need to start looking for some sort of volunteering or part time work”

Overall, participants appreciated support from their FACT workers but some resented what they viewed as a coercive mandate to be active.

“The program kind of killed my social life, I used to see my friends a lot but now I just hang out at home. I live across the city so it’s hard for me to commute to the program, the travel time alone takes up a big chunk of my day. I’m in night school and looking for a part time job. I also am in the process in applying to Red River to attempt to get my red seal.”

“Being on a full curfew doesn’t really let me do anything, someone always knows where I am and I only go out when I’m forced to go to volunteer or go to the main office.”

Likert ratings ranged from 1 to 5, with 1 being “very unhelpful,” and 5 being “very helpful.” Another way to think about these average scores is to convert them to a score out of a 100, a percentage. So, a 4.0 out of 5 would be multiplied by 20 to become 80%, a 4.5 becomes 90% and so on. How to rank? There is always a certain amount of arbitrariness to Likert rankings,

³² This subsample is quite similar to the over-all sample of 35 that was part of our larger Winnipeg mental health court study. The high number of violent crimes referred reflects a willingness on the part of the court to take on serious cases, and likely improves the ability of the MHC to lower custody rates in Manitoba.

but ratings over 90% are high in any metric, and over 80% is still quite good. Conversely, rankings below 50% would suggest significant dissatisfaction with mental health court service.

Study participants (Table 1) rated the mental health court most highly in helping to improve mental health, staying in treatment, improving their quality of life, managing medication, and referral to community programs (4.4 - 4.8, or 88% - 96% approval). Lower but still quite positive ratings were observed for MHC aid to participants in reducing criminal activity, improving relationships with friends, getting educational counselling, and financial assistance (4.0 - 4.1, or 80% to 82% rank). Ratings for other items were still over 3.5 or higher (70%). Lower but still positive ratings were noted for improving relations with criminal justice system members or family, and assistance in getting housing or getting drug treatment (if applicable). Thus, the MHC appeared to be perceived as being more successful in providing help in its core traditional areas like reducing recidivism, program referrals, providing treatment, and medication, and improving mental health. Relationships are part of MHC team member responsibilities but are not core functions. That they were not rated quite as high for housing is not surprising; finding housing for low income individuals in Winnipeg is a significant challenge and FACT staff expressed concern about the amount of time that they had to spend trying to arrange accommodation, as it took away from other duties.³³

Responses to open-ended questions tended to confirm survey responses. Respondents were intent on trying to improve their lives. They mostly report entering the mental health court to avoid incarceration, but other reasons were also provided. Improving personal health, strengthening relations with family, and trying to improve overall well-being were also cited as important motivators.

“I entered the MHC to improve my quality of life and really make it a lot better. My main focus is being able to improve my health so I can successfully raise my daughter. Essentially, the MHC seemed like the best option for me because I did not want to go into custody.”

³³ For a collection of recent analyses on the dire state of Winnipeg's available low income housing, (particularly with respect to Winnipeg's inner city area, where most of the MHC clients resided) see Canadian Centre for Policy Alternatives-Manitoba, *Rising Rents, Condo Conversions, and Winnipeg's Inner City*, (Winnipeg: CCPA, 2012).

“I found out about the program through my defence counsel. I got into the program to help my life and make it better. I was on probation and I ended up breaching the conditions so I would have been facing jail time if it was not for this program

MHC clients generally found the program quite helpful (Table 2). Ratings were particularly high for having access to a psychiatrist (4.7, or 94%). Perhaps most importantly, participants rated the core feature of the mental health court, the court and treatment teams working together, as a most effective feature (4.7, 94%). Other key MHC components such as interaction with the judge, being encouraged to tell the truth, being accountable for their behaviour (from weekly status appearances in court) were also strongly endorsed, with averages ranging from 4.3 - 4.4. Treatment staff providing access to programs was similarly ranked high (4.3). Some of the more coercive elements of the program were still ranked favourably but not as high – drug testing was rated a 4.0 while having help with medication was ranked at 3.9. Proctors check up on some clients to ensure that they take medication in the evenings. We were told informally that such “help” was not always appreciated by clients, but some valued the assistance with medication.

Open ended responses were generally effusive over the judge and program staff. Participants perceived a sincere support being offered by MHC staff.

“The people in the program help me out a lot, they have explained my mental health issues thoroughly, and they give me lots of support and counselling. Also, having to come into the program and face case managers and the court team holds me very accountable to make sure I’m not drifting back into bad things. The meetings with the judge are good because I feel like he is on my side. It’s also great to have the possibility of getting out of jail.”

“I got arrested because I have really bad anger problems that I could not control. The people at the mental health court helped me avoid future problems with the law by going through a year of Dialectical Behaviour Treatment, which gave me the skills I needed to deal with my problems. The staff also help me avoid the justice system by helping me regulate my medication.”

Rewards were rated as more effective than sanctions by the study group (Table 3). Verbal praise from either the judge or FACT staff was viewed as very effective (4.8, or 96% satisfaction). The mean ratings on sanctions like a judicial reprimand or a short jail term were not as positive, dropping down to a range of 3.9 to 4.1, or 78% - 82%, but this approval is still relatively high. Most MHC clients perceived possible sanctions as an effective

deterrent. Some respondents, however, voiced considerable displeasure over the possibility of jail as a looming consequence:

“I do not like the threat of jail in this program. I do not think it's necessary in my case because I am motivated to engage in treatment.”

Perceptions of procedural justice were extremely high (4.5-4.9), with one exception. Participants felt the judge treated them fairly and with respect, listened, considered the facts, and treated people equally. Likewise, they felt that case managers were respectful and provided accurate information. The one exemption was “you or your lawyer have a chance to tell your side of the story,” which rated a 3.9 or 78%, still not a negative but not extremely positive. In our three visits to the court we observed most MHC clients as being fairly passive and quiet in conversation with the judge. Because of the limited time (usually an hour) available in court, we noted the judge, in most cases, did not spend any significant length of time chatting with the client, unless there was an issue or an unusual event since the last status hearing.³⁴

Some of the open-ended responses involved concerns about consistency in treatment, one of the nuanced features of procedural justice. Consistency in the application of rules and sanctions is an aspect of procedural justice that is difficult to always reconcile with individualized treatment. Thus, while individuals expect to be heard and have their personal situation and circumstances appreciated as part of procedurally just treatment, they may not approve of considerations given to others, which ends up construed as arbitrary treatment. Individualized treatment promoted by problem-solving courts can sometimes be perceived as overly lenient by peers.

“There are other people in this program who get caught over and over and they never get consequences. It reinforces that bad behaviour is okay for the rest of us.”

³⁴ Curiously, we had been involved in evaluating the Winnipeg drug treatment court (DTC) for a number of years and found a similar pattern in ratings. We surveyed drug court graduates with the identical procedural justice scale over seven years. Responses were also very positive and judges were rated highly, but the question about ‘telling their side’ invariably brought on the lowest rating. While we would not call either the MHC or DTC ‘assembly line’ in their courtroom service delivery, it does illustrate that problem-solving courts have some limitations in their ability to engage clients. See Justice Research Institute, *Winnipeg Drug Treatment Court Program Evaluation for Calendar Year 2014*, by Michael Weinrath & Joshua Watts (Winnipeg: University of Winnipeg, 2015).

“I think the program is great but it could put up with less crap and do a better job about filtering out some of the people who aren’t as involved in their treatment programs.”

When asked “Did anyone explain to you that you could have your case heard in regular court OR mental health court, it was your choice?” three of our twenty respondents (15%) felt that the voluntary nature of participation had not been explained prior to entering the program. Of those three, two were not sure when it was explained to them, and one never felt it had been adequately outlined. In our court observations, the prosecutor, defence counsel, and the judge went to great lengths to review the MHC agreement and its voluntary nature, often stopping during their explanations to ask ‘do you understand?’ and not proceeding until the client had said yes or at least nodded expressively. However, we did not attend all MHC admission hearings so it could be that more effort was made when researchers were in attendance. In addition, open court can be quite intimidating and clients may have agreed without listening carefully to terms and conditions that were discussed. One respondent was quite explicit in his feelings that he was coerced into a guilty plea.

“I do not like the time constraints and I really didn’t like the fact that I had to plead guilty when I was not fully responsible for my crime. The system is messed up to the point that this is the best way for me to get help for my mental illness.”

This participants’ comment raises two issues. First, the respondent’s view suggests that court room observation is not always a helpful method of assessing voluntariness; it is likely that a guilty plea had been forced and agreed to long before a sentencing hearing. Secondly, the feeling that the only way to get treatment is to enter the criminal justice system via the mental health court only reaffirms criticisms that resources should be diverted into forensic health, not the criminal justice system. Limiting forensic treatment, paradoxically, only seems to be encouraging crime, not preventing it.

Consistent with other Likert responses reported above, questions eliciting overall satisfaction ratings were positive – involvement in their treatment plan, observing life improvements, treatment team competence ratings ranged from 4.4 - 4.6 agreement (Table 5). Significantly, participants reported very high feelings of safety (4.8 or 96%) in the MHC program. A reversal question (to confirm clients were reading carefully rather than checking off the same box) asking if mental health court ‘felt more like

punishment than treatment' garnered a 2.6, indicating disagreement. Thought of another way, the reverse coding would be a mean of 4.4 or 88%, an indication that the program felt more like treatment than punishment.

General open-ended feedback was also positive about the MHC program and its court and treatment staff. When asked about complaints or concerns, however, a few participants had issues with program structure and requirements, finding reporting and curfews unnecessarily invasive. The coercive aspects of the program were prominent in their remarks.

"The only problem I have with the program is that it takes way too much time; I don't like having to come to court once a week and having to attend the case manager's office twice a week."

"Appearances in court last summer were too intensive and demanding. I was attending a course at work last summer and the demands at court resulted in me not doing very well. Also I liked the old MHC location more, this one is very inconvenient, maybe the MHC staff would benefit from mobile house visits."

"The MHC is way too time consuming, it is a little annoying having to go to court every week. The program also makes it hard for me to hang out with my friends as it is a lot more restrictive than regular probation."

These comments illustrate that at a certain point, the surveillance/reporting demands of the MHC begin to interfere with day to day activities for purposes not always clear. At least one client found it more, not less onerous than the criminal justice system's probation regime.

IX. DISCUSSION

The Winnipeg mental health court generally received very high ratings from participants who believed the program helped them along a number of dimensions including core goals of improving mental health and reduction of the criminal activity. Program components of status hearing interaction with the judge, accountability, and access to treatment resources were likewise considered important. Overall satisfaction was high in areas such as personal improvement, involvement in treatment planning, performance of the treatment team, feelings of safety, and perceptions of a therapeutic environment (as opposed to punishment). Like much of what

is found in the extant research, clients were very positive towards the MHC program.³⁵

Similar to other research, participants rated both rewards and sanctions as being effective parts of the MHC.³⁶ While rewards were ranked as more effective, sanctions such as curfews, punishments like work service or expulsion for non-compliance were generally viewed as fair by the vast majority of respondents.

On the other hand, our open-ended questions did elicit complaints about some of the more arduous features of the MHC. Curfews, length of time in the program, reporting to counselors, and the threat of jail did not sit well with some. The individual program plans tailored to individuals sometimes annoyed clients who felt a few of their peers did not work hard at their program but were still treated leniently. Yet despite these comments, mean ratings in our Likert scales showed that on the balance, participants valued their involvement in the MHC.

Procedural justice scores rated the highest of any of our scales; elevated ratings are quite common in related research.³⁷ The judge, court, and treatment teams were ranked highly when it came to providing assistance and were considered “procedurally just” in conducting their duties of: being fair, considering the facts, showing respect, treating individuals with dignity, and (for the most part) listening. These findings auger well in the long term for the Winnipeg program, given the positive outcomes such as completion, mental health improvement, and less recidivism associated with perceptions of procedural justice in past research. While there were three individuals who did not feel that they were adequately apprised of the voluntary nature of the program and some concerns were expressed about being coerced into a guilty plea, there was nothing close to the 50% “misinformed” threshold that was observed in another US study.³⁸

Findings generally support the operations of the Winnipeg mental health court. There are, however, considerable resources required to operate the MHC and pressures placed on those with mental health concerns must be carefully considered. Thus, we still feel that some of the

³⁵ Kelli E Canada & Alana J Gunn, “What Factors Work in Mental Health Court?: A Consumer Perspective” (2013) 52:5 J Offender Rehabilitation 311 [Canada & Gunn]; Frailing, *supra* note 23; Lane & Campbell, *supra* note 27.

³⁶ Canada & Gunn, *supra* note 35.

³⁷ Kopelovich et al, *supra* note 24; Wales et al, *supra* note 24; Canada & Hiday, *supra* note 26.

³⁸ Redlich, “Voluntary”, *supra* note 18.

more critical consumer reports by our respondents should be considered. Defence counsel in particular and the court team as a whole need to engage in stronger efforts to ensure clients appreciate the burdensome consequences of pleading guilty and entering into a mental health court program. Their option to leave the program and be sentenced (albeit facing a potentially punitive alternative) should be related from time to time by defence counsel. Pre-plea programs, whereby an offender does not plead guilty to enter the MHC, or even diversion at the police level are other options that limit the more coercive aspects of justice system involvement, but ensure treatment for those with mental health problems.

Our small sample limits the generalizability of our findings, as does the newness of the Winnipeg mental health court. Participants who talked to us may have been self-selected and biased towards the program. Most had not finished the program and their judgements may have been premature. Thus, although complaints about the coerciveness of the program were few, they may have been under-represented. Certainly, commentary around the length of the program, the administrative meetings with counselors, and their interference with day to day activities harken to Moore's (2007) cautions about the normative assumptions embedded in MHC operation.³⁹ Because it is an alternative to jail, administrative inconvenience and lengthier program involvement than is necessary are both justifiable because they are preferable to a prison term. Rather than consider what the client needs and provide it, the MHC

s require things that are justifiable in a criminal justice context, but not in a truly therapeutic one.

We feel our exploratory study makes a modest contribution to the Canadian mental health court literature, and feel that the consistency of our findings with other research provides support for our results. Future research should examine larger samples and might involve a more prospective study with regards to voluntary entrance into the mental health court. Observing and/or interviewing clients and court staff at various stages of referral and admission (rather than retrospective memory) will provide better insight into actions and decisions by participants and court members. Contrasting criminal justice requirements with therapeutic ones will help researchers keep their analysis balanced. While the use of official records

³⁹ *Supra* note 3.

and the opinions of program staff are important, to get a more complete picture, research should continue to engage clients in consumer reports.

Table 1: Perceived Helpfulness of the Mental Health Court in Improving Personal Circumstances

<i>How helpful was the MHC in ...</i>	MEAN
Improve mental health?	4.6
Reducing criminal activity?	4.1
Improve relationships with CJS members?	3.7
Helping to stay in treatment?	4.7
Improving relationships with family?	3.5
Improving relationships with friends?	4.0
Assistance in maintaining a job?	3.5
Getting educational counseling?	4.0
Getting financial assistance?	4.0
Improving quality of life?	4.7
Managing my medication (if applicable)?	4.8
Getting housing	3.9
Being referred to community programs?	4.4
Getting drug treatment (if applicable)?	3.8

Table 2: Perceived Helpfulness of Program Components

<i>How helpful were the following parts of the MHC?</i>	Mean
Interaction with Judge?	44.4
Being encouraged to tell the truth?	44.3
The court and treatment teams working together?	44.7
Being held accountable for my behaviour?	44.4
Someone assisting me with my medication?	33.9
Having treatment staff help me to access treatment programs?	44.3
Having access to a psychiatrist?	44.7
Drug testing?	44.0

Table 3: Perceived Effectiveness of Rewards & Sanctions

<i>How would you rate the effectiveness of...</i>	
Verbal praise from the judge?	4.8
Verbal praise from MHC staff?	4.8
Getting reprimand from judge in court for not following treatment plan?	4.1
The court adding curfew for not following my treatment plan?	4.0
Requiring community service for not following treatment plan?	4.2
Mandating or increasing attendance at self-help groups for not following treatment plan?	4.0
Attendance at residential treatment programs because of addiction problem?	4.0
The court likely issuing a warrant for my arrest for not following my treatment plan?	3.9
The court warning me I might be kicked out of the program for not following my treatment plan?	4.1
The court possibly putting me in jail for a few days for not following my treatment plan?	4.1

Table 4: Perceptions of Procedural Justice

<i>Overall, how much do you agree or disagree with the following statements?</i>	
Did you or your lawyer have a chance to tell your side of the story when you came to mental health court?	3.9
Did the judge listen to what you or your lawyer said when you came to mental health court?	4.7
Did the judge rely on reports from your case manager at the court hearings?	4.9
Was the information the judge had on your treatment participation and any illicit drug test accurate?	4.9
Did the judge try to consider all the facts in your circumstances?	4.6
Did the judge apply the rules about going to mental health court the same way for you as for the other defendants?	4.5
Did the judge follow the same rules every time about what would happen if you did not participate in treatment?	4.7
Were you treated politely and with respect by the judge?	4.9
Were you treated politely and with respect by your case manager?	4.9
Did you trust the judge to be fair to you in the hearings?	4.8

Table 5: Overall Satisfaction with the Mental Health Court⁴⁰

<i>How much do you agree or disagree with the following statements?</i>	
I am very involved with my treatment plan	4.6
I have noticed improvements in my everyday life since attending the MHC	4.4
I rate the performance of the treatment team very highly	4.6
I feel safe in the MHC program	4.8
My time in the MHC has felt more like punishment than treatment	2.6

⁴⁰ Kelli E Canada & Alana J Gunn, "What factors work in mental health court? A consumer perspective" (2013) 52 J of Offender Rehabilitation 311; Kelli E Canada & Virginia Aldige Hiday, "Procedural justice in mental health court: an investigation of the relation of perception of procedural justice to non-adherence and termination" (2014) 25:3 The J of Forensic Psychiatry & Psychology 321.

Tale of the Tape

Policing Surreptitious Recordings in the Workplace

JOHN BURCHILL*

[T]he law recognizes that we inherently have to bear the risk of the "tattletale" but draws the line at concluding that we must also bear, as the price of choosing to speak to another human being, the risk of having a permanent electronic recording made of our words.

R. v. Duarte (1990),
1 SCR 30 at 48, 53 CCC (3d) 1.

I. INTRODUCTION

Almost 130 years ago future United States Supreme Court Justice Louis Brandeis and Samuel Warren warned that “numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”¹ The right to privacy espoused by Brandeis and Warren was that each individual had the right to choose to share or not to share with others information about their ‘life, habits, acts, and relations.’

The *mechanical device* at the heart of the article was the advent of the ‘detective camera’ that could take instantaneous pictures. Previously the art of photography required an individual to knowingly participate in or consciously ‘sit’ for the creation of their picture. However, advances in photography made it possible to instantaneously and surreptitiously take pictures and distribute those to the world at large through newspapers,

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¹ Louis Brandeis & Samuel Warren, "The Right to Privacy" (1890) 4:5 Harv L Rev 193 at 195.

magazines or other forms of media.² Warren and Brandeis argued that the right to privacy was the right of each individual to exercise some control over information recorded about them by others which both reflected and affected their image or personality.

In *Alberta v UFCW, Local 401*³ the Supreme Court of Canada recently underscored the importance of a person's right to privacy given recent developments in technology, noting that the ability to control one's personal information is "intimately connected to their individual autonomy, dignity and privacy ... fundamental values that lie at the heart of a democracy."⁴ Moreover, the Court noted, these values are "increasingly significant in the modern context, where new technologies give organizations an almost unlimited capacity to collect personal information, analyze it, use it and communicate it to others for their own purpose."⁵

By simply appearing in public, in this case crossing a picket line, workers were being videotaped by members of the UFCW for the purpose of placing the images online to deter them from crossing. The Court stated that by being in public "an individual does not automatically forfeit his or her interest in retaining control over the personal information which is thereby exposed."⁶

Today micro digital recorders can surreptitiously record our every movement, conversations, and non-verbal communications, and then broadcast them instantaneously to the world at large through multiple forms of media.⁷ As such we should expect that what is whispered in the

² Until 1889 taking photographs was a complicated process. However, on September 4, 1888 George Eastman patented his photographic apparatus known as the improved 'detective camera', making it simple for amateur photographers to take pictures. The cameras went on sale in 1889 for \$25.00. US patent No. 388,850.

³ *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 SCR 733 [*Alberta v UFCW*]. Also see *R v Spencer*, 2014 SCC 42 at para 40, [2014] 2 SCR 212, "privacy also includes the related but wider notion of control over, access to and use of information, that is, 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'".

⁴ *Ibid* at para 19.

⁵ *Ibid* at para 20.

⁶ *Ibid* at para 27 [emphasis added].

⁷ Today you can buy an "8GB Mini HD Camcorder Spy Pen Video DVR DV Digital Video Recorder USB Surveillance Pinhole Cam" for less than George Eastman's original detective camera. See <<http://www.ebay.com/bhp/spy-pen>>.

closet today is being recorded and broadcast from the roof-tops if not stored for a similar purpose later on.

Indeed, when it comes to the workplace, the recordings are not often as overt as the picket line videotaping in *Alberta v UFCW*. *ABC News* reported that employees are increasingly using digital devices to *secretly* record conversations, and sometimes using the recordings to launch complaints against their employers. While the frequency of surreptitious workplace recordings is unknown, the article suggests that it happens often enough that employers should assume that all meetings with employees are being recorded.⁸

Employers understandably want control over the documentation of what occurs in their workplace and policies have been created by some employers that prohibit surreptitious recordings, specifically to address the need to:

- Foster and maintain frank discussions between employees, co-workers, and supervisors;
- Encourage the free flow of information within the organization;
- Protect confidential information and trade secrets;
- Prevent workplace disruption from fear such recordings are occurring; and
- Respect for the privacy of all employees, customers, and guests.

However, irrespective of policy, there is one profession that poses an interesting backdrop to the discussion on surreptitious workplace recordings ~ policing. With the push to equip all uniform police officers with body-worn cameras to record their activities and interactions with individuals in the field,⁹ what are the implications or expectations of privacy in the police workplace itself from one officer surreptitiously recording another officer?

The Calgary Police Service, which has a very robust body worn camera (BWC) policy, but does not yet issue them on a full scale, prohibits the

⁸ Ki Mae Heussner, "Are You Being Secretly Recorded at Work?" *ABC News* (19 April 2011), online: ABC <abcnews.go.com/Technology/secretly-recorded-work/story?id=13409126>.

⁹ Mike McCaig, "Survey: Almost All Police Departments Plan to Use Body Cameras, *Governing*" *Governing* (26 January 2016), online: *Governing* <<http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html>>. Nearly every large police department in a new nationwide survey said it plans to move forward with body-worn cameras, with 95 percent either committed to body cameras or having completed their implementation.

making of audio or visual recordings with a BWC for any purpose not permitted in the policy. It is prohibited to:

- Disseminate BWC images to any person or entity unless authorized by law;
- Use a BWC to record any activities that are not required for a valid law enforcement purpose;
- Use a BWC in a covert capacity;
- Use a non-police issued BWC or similar device;
- Knowingly record interactions with a confidential informant or otherwise any situation that would reveal confidential police investigative or tactical techniques;
- Record a strip search; and
- Record uninvolved bystanders or benign interactions with the public, to the extent reasonably possible.¹⁰

However, many police departments do not have such robust policies, or do not regulate the use of recording devices outside of specific investigations or for BWC (if they have them), in particular by off-duty members in the workplace; by members out of uniform (i.e. plainclothes officers); or by non-sworn staff members.

In *Rebutting the Presumption of Guilt*,¹¹ Craig MacMillan considered how personal interest recordings could help protect police officers in Canada against allegations of misconduct. Two possible approaches were that (1) the officer is not acting as an agent of the state when the recordings are made to protect their *personal* interests; or (2) if an officer is considered to be an agent of the state even where the records are to protect personal interest, there is no reasonable expectation of privacy in communications with *known* agents of the state.

However, I review the risks and consequences of such activities by examining analogous cases, drawing heavily on traditional doctrinal research to conclude that it may not only be unlawful, but that any evidence obtained may not be admissible in any proceedings, and that employees may be subject to discipline up to and including dismissal for engaging in surreptitious workplace recordings.

While my focus is on policing, the general discussion may be helpful to any corporate counsel or human resource manager faced with such a

¹⁰ Calgary Police Services, “Body Worn Cameras Ref #IN-007-1”, September 2015 update (Calgary: Bureau of Community Policing, 2015) [“Body Worn Cameras”] online: <https://www.calgary.ca/cps/Documents/Body_Worn_Camera_Policy.pdf> at 3-4.

¹¹ Craig S MacMillan, “Rebutting the Presumption of Guilt: How Can Police Officers Protect Themselves Against Allegations of Misconduct?” (1995) 1:1 Appeal 1 at 10-20.

situation in the workplace and provides some general ideas on having a broad-based policy to deal with surreptitious recording in the workplace.

II. SETTING THE STAGE

A. *Ledoux c Mont-Tremblant*

On July 3rd, 2017, the Quebec Court of Appeal ordered a new trial against Michel Ledoux, the former Chief of the Mont-Tremblant Police Department, for using surreptitious recording devices in the police station to identify officers involved in a psychological harassment campaign against him during contentious contract negotiations in early 2011.¹²

Some of the tactics used to intimidate or ‘destabilize’ the Chief during negotiations included the use of posters of him dressed as a member of the Ku-Klux-Klan, with a penis in his face, as a baboon having anal sex, and insulting messages associating him with sexually transmitted diseases and mental illness. A fake bomb was also placed outside his office door and a mannequin of him in uniform was hung in front of the station.

Fearing he would lose control of the department and to identify those responsible for the posters and to stop the harassment, he bought a surveillance system that included a clock and a key-chain, using department funds, and secretly placed these recording devices about the station. Some of the conversations recorded included the police union representatives and their lawyers.

Shortly after contract negotiations were concluded and a new collective agreement was adopted, the surreptitious recordings were discovered by another member of the Mont-Tremblant Police Department. The Sûreté du Québec was called in to investigate and criminal charges of illegal wiretapping and unlawful use of surveillance devices were subsequently laid against Chief Ledoux. A jury acquitted Chief Ledoux and in a 2015 wrongful dismissal decision, the Court of Quebec concluded that he was the victim of a “vicious and degrading” harassment campaign that justified

¹² *R c Ledoux*, 2017 QCCA 1041 at para 62, EYB 2017-281843. Also see Graeme Hamilton, “Quebec police chief harassed by his own officers ordered to face new trial” National Post (4 July 2017), online: National Post <<http://nationalpost.com/news/canada/quebec-police-chief-harassed-by-his-own-officers-ordered-to-face-new-trial/>>.

the resort to secret video and audio surveillance to identify his tormentors and ordered his reinstatement; the town settled out of court instead.¹³

B. *Floyd v New York*

On August 12, 2013, Justice Scheindlin upheld a class action law suit against the New York City Police Department (NYPD) for a pattern and practice of racial profiling and unconstitutional stop-and-frisks.¹⁴

The testimony included several police officers who began secretly recording their colleagues and supervisors at work. Recordings were made of roll call meetings, street encounters, of commanders, and supervisors. It included small talk and stationhouse banter. In all, hundreds of hours of police officers talking about their jobs were secretly recorded by other officers.¹⁵

Notwithstanding Warren and Brandeis' concern, *private* individuals may, in most jurisdictions, secretly record any conversations they participate in with another person. However the dynamic is altogether different in the workplace, especially when that individual is a police officer. In Canada, and in many US States, police officers must apply for a court order to record conversations they are party to unless there is a risk to their safety. Even then the records of such conversations made without a court order must be destroyed when the safety risk passes without incident. Unlawful recordings

¹³ *Ledoux c Mont-Tremblant (Ville de)*, 2015 QCCQ 6709 at para 628, [2015] JQ no 7117. Appeal for judicial review dismissed, *Mont-Tremblant (Ville de) c Massol*, 2016 QCCS 2091, [2016] JQ No 4172. Also see Graeme Hamilton, "Court orders reinstatement of Quebec police chief harassed by his own officers", *National Post* (5 August 2015), online: National Post <<http://nationalpost.com/news/canada/court-orders-reinstatement-of-quebec-police-chief-harassed-by-his-own-officers>>. The Court noted that, at the time, no other officers faced any discipline for their conduct in the affairs.

¹⁴ *Floyd v City of New York*, 959 F Supp (2d) 540 (SDNY 2013).

¹⁵ See testimony and recordings by Pedro Serrano, Adhyl Polanco, & Adrian Schoolcraft, "Floyd v New York City Trial Updates", (12 March 2013), Centre for Constitutional Rights, online: <<https://ccrjustice.org/floyd-v-new-york-city-trial-updates>>. Also see Scheindlin's decision, *supra* note 14 at 596, where she states:

Three NYPD officers from three precincts made secret recordings revealing institutional pressure to increase enforcement numbers: Officers Adrian Schoolcraft, Adhyl Polanco, and Pedro Serrano. The three officers' recordings provide a rare window into how the NYPD's policies are actually carried out. I give great weight to the contents of these recordings.

are generally inadmissible in both civil and criminal matters, and may be subject to some kind of sanction.

However, it is neither against the federal law or the state law in of New York for a police officer to covertly record or intercept private communications to which he or she is a party. This has been the case since at least 1971.¹⁶ As a result when one municipal or state police officer in New York secretly records another without their knowledge or consent, there is no prohibition on such conduct and any evidence gathered is generally admissible.

Nevertheless, while participant surveillance by non-state parties is not illegal, any evidence derived therefrom may still be excluded to protect the spirit of trust and confidence that needs to exist between the parties. For example, in the *Matter of Harry R. v Esther R.*, a New York Family Court judge held that secret recordings made by a father of his children in a custody dispute with his ex-wife were not admissible because the recordings violated the confidence and trust between the father and his children. The Judge stating:

These children, like any other children, are entitled to feel that they may communicate freely with their parents without fear that those communications will be recorded and revealed later. The court cannot prevent Mr. R from recording these conversations. But it can preclude their use in this proceeding, although otherwise admissible, to protect the spirit of trust and confidence that needs to exist between child and parent in order for the children's emotional health to be safeguarded.¹⁷

In Florida, like New York, it is not illegal for a law enforcement officer or state agent to surreptitiously record or intercept an electronic communication where they are a party to the communication. However the recording must be for the purpose of obtaining evidence of a criminal act.¹⁸

¹⁶ See *United States v White*, 401 US 745 (US S Ct 1971) [*White*]. Although there is a policy exception in the United States Attorneys' Manual where it is known that one of the parties to the conversation will be certain political or government officials such as a member of Congress, federal judge, Governor, or Attorney General of any State or Territory. See US, Office of the United States Attorneys, *US Attorneys' Manual*, (Washington: US Government Printing Office, 2002) at 9-7.302, online: USAM <http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/7mcrm.htm>.

¹⁷ *Matter of Harry R v Esther R*, 510 NYS (2d) 792 at 796 (NY Fam Ct 1986).

¹⁸ US, Title XLVII, *Criminal Procedure and Corrections*, Fla Stat 934 s 934.03(2)3(f) (2017). A criminal offence in Florida includes both felonies and misdemeanours, but does not

C. Officer Jackson's GoPro

On June 24, 2014 Miami Police Officer Marcel Jackson was using his own private GoPro audio/visual device to record his interactions with the public. On that day he conducted a traffic stop of Lieutenant David Ramras of the Miami Police Department's Internal Affairs and an altercation ensued. Jackson produced the recording to support his claims that Ramras was the aggressor, however he was relieved of duty and Ramras was reassigned.

Responding to public enquiries, Miami Police Chief Manny Orosa stated that Jackson had been relieved of duty, not because of any breach of the State's privacy laws, but because of Jackson's failure to preserve relevant evidence and public records.¹⁹ While working as a police officer any records made by Jackson belonged to the department. As such the recordings had to be maintained, preserved, and retained in accordance with Florida's *Public Records* statute (Title X, c. 119) and were subject to access and disclosure requests under that statute as well as in accordance with federal disclosure requirements in *Brady v Maryland* (similar to *Stinchombe* in Canada).²⁰

Outside of this exception for law enforcement in the collection of evidence, Florida is one of 12 states that prohibit the recording of conversations without "all party" consent. That is, it is illegal for anyone in Florida to covertly record a conversation to which they are a party without the prior consent of all participants. Any such recordings are inadmissible in either criminal or civil proceedings.

The harsh reality of this absolute prohibition was recently affirmed by the Florida Supreme Court in *McDade v State* where a 16-year old girl secretly recorded her step-father insisting she perform sexual acts with him in his bedroom. Her evidence was that she had been raped weekly since she was 10-years old and the recordings supported her evidence. McDade was convicted at trial and the admission of the recordings was affirmed on

include a noncriminal traffic violation of any provision of chapter 316 (Motor Vehicles) or any municipal or county ordinance (US, *Title XLVI Crimes*, Fla Stat 775 s 775.08 (2017)).

¹⁹ Charles Rabin & David Smiley, "Secret dash cam captures Miami cops' traffic stop scuffle", *Miami Herald* (14 July 2014), [Rabin & Smiley]. online: Miami Herald <www.miamiherald.com/news/local/community/miami-dade/article1975519.html>.

²⁰ In *Brady v Maryland*, 373 US 83 (US S Ct 1963), the US Supreme Court held that the prosecution must disclose all materially relevant evidence to the defence.

appeal that “any expectation of privacy McDade may have had is not one which society is prepared to accept as reasonable”. However this was overturned on further appeal by the state’s highest court based on a clear reading of relevant legislation:

Privacy expectations do not hinge on the nature of [a] defendant’s activities – innocent or criminal. In fact, many Fourth Amendment issues arise precisely because the defendants were engaged in illegal activity on the premises for which they claim privacy interests [internal citations omitted].

...

It may well be that a compelling case can be made for an exception from chapter 934’s statutory exclusionary rule for recordings that provide evidence of criminal activity—or at least certain types of criminal activities. But the adoption of such an exception is a matter for the Legislature. It is not within the province of the courts to create such an exception by ignoring the plain import of the statutory text.²¹

The law is opposite in Washington where, s. 9.73.090(2) of the Washington State *Privacy Act*, specifically requires police to obtain a court order before they can intercept communications with the consent of one of the parties:

(2) It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony.²²

Even recordings made by federal agents pursuant to federal laws, which allow consensual recordings, are inadmissible in state court proceedings

²¹ *McDade v State*, 2014 WL6977944 at 14 (S Ct Fla 2014), rev’ing 114 So (3d) 465, 467 (Fla (2d) DCA 2013). The court also applied its previous ruling in *State v Walls*, 356 So (2d) 294 (S Ct Fla 1978). As a result of this decision the Florida legislature passed an exception to the “all party” consent law, effective July 1, 2015, that allows recordings in cases involving an “unlawful sexual act or an unlawful act of physical force or violence against a child”.

²² US, *Violating Rights of Privacy*, RCW tit 9 s 9.73.090. online: RCW <<http://apps.leg.wa.gov/rcw/default.aspx?cite=9.73.090>>.

when the recordings are made in violation of the Washington statute.²³ Police testimony about such recorded conversations is also inadmissible in any civil or criminal case.²⁴

The law in Canada is similar to that in Washington. Other than *Ledoux*, there are no reported cases of police officers secretly recording other police officers while working in Canada, there are analogous cases from other sectors that suggest covert or surreptitious participant surveillance by police officers in the workplace without a court order may not be admissible in any proceedings principally because they may be against the law, but also because they would undermine the spirit of trust and confidence between the parties (employer v. union; employer v. employee; employee v. employee; supervisor v. subordinate).

III. CRIMINAL LAW

If a police officer is making a surreptitious recording while they are at work, are they making it as a police officer or as a private individual? Can the two ever be separated in the workplace? If the recording is being made at work, there must be workplace issues involved, even if they are perceived to be personal. In such cases all police departments in Canada have policies, regulations and Collective Agreements that outline how workplace issues are to be investigated ~ usually by Human Resources, Professional Standards (Internal Affairs) or Management. They may also be subject to Grievance Arbitration or outside agency review.²⁵

Even if it is a personal issue, like an off-duty relationship turned sour or concern about an extra-marital affair, isn't the officer still conducting an investigation if not collecting evidence or information? If they are collecting

²³ See *State v Williams*, 617 P (2d) 1012 (Wash Sup Crt 1980).

²⁴ US, *Admissibility of Intercepted Communication in Evidence*, RCW tit 9 s 9.73.060. online: RCW <<http://app.leg.wa.gov/RCW/default.aspx?cite=9.73.050>>. Also see Tara McGraw Swaminatha, "The Fourth Amendment Unplugged: Electronic Evidence Issues & Wireless Defenses" (2005) 7 Yale J L & Tech at 51.

²⁵ Cf The City of Winnipeg and The Winnipeg Police Association, *Collective Agreement* (Winnipeg: 26 March 2014) at 185. online: <http://winnipeg.ca/corp/CollectAgree/pdfs/WPA-CA-2012-2016-DRAFT.pdf>>. In such cases the Police Association may also be a party to the complaint. Also see Manitoba, The City of Winnipeg, "Schedule A to by-law No 7610/2000 - City of Winnipeg Police Service Regulations" (Winnipeg: 24 May 2000). online: <<http://clkapps.winnipeg.ca/dmis/documents/docext/bl/2000/2000.7610.pdf>>, regarding the reporting and investigation of internal disciplinary matters.

evidence, albeit for a personal reason, do the time, place, and subjects of the recording bring the workplace into it? If they are doing it to protect themselves from false allegations, who are they protecting themselves from – the public, criminals or colleagues? Does it matter? Is the public's expectation to be left alone from unwanted, secret recordings by the state any different from that of another officer? Is there a legitimate need that the recording device is even concealed?

As Craig MacMillan noted earlier, can there ever be an expectation of privacy when an individual is talking to a police officer that they (the police officer) will not record the conversation – at least in their note book? Even with a 911 emergency phone call, can a caller seriously expect their conversation will be private, if not recorded?²⁶ If there is no expectation of privacy, does it matter if it's the public the officer is dealing with or a fellow officer? Even if there is no expectation of privacy, are the police still entitled to retain a permanent copy the recording?²⁷

Police officers first experimented with body worn recording devices in England in 1994 to thwart allegations of invented confessions. In some English and US jurisdictions officers now wear body worn video cameras all the time.²⁸ However visibly displaying the devices and publicly announcing

²⁶ *Cf R v Monahan* (1981), 60 CCC (2d) 286, [1981] OJ No 70 (CA), aff'd [1985] 1 SCR 176, 16 CCC (3d) 576 without reasons, where a telephone call made to a police operator was recorded. It was not reasonable to expect that the communications in question, which threatened a police officer, would not be listened to or recorded by the police switchboard operator. However, see *Re Vancouver Police Order F13-12*, [2013] BCIPCD No 15, in which B.C. Privacy Adjudicator Flanagan held that the release of a 911 call to a third party, although lawfully recorded, would be an unreasonable invasion of privacy.

²⁷ The City of Winnipeg, *Records Management by-law No. 86/2010* (Winnipeg, 21 July 2010), s. 105(11). online: <http://clkapps.winnipeg.ca/dmis/docext/ViewDoc.asp?DocumentTypeId=1&DocId=5220>. The retention period for police investigative reports is 25 years after they become obsolete or superseded.

²⁸ Recent surveys suggest that about 25% of the United States 17,000 police agencies were using them, with fully 80% of agencies evaluating the technology. See Jan Stanley, "Police Body-Mounted Cameras: with Right Policies in Place, A Win for All", *American Civil Liberties Union* 2nd Version (March 2015). Online: <<https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>>.

the police department is making such recordings does take away any expectation of privacy a person has in being recorded.

Recording individuals by an agent of the state is a delicate balance between public and private rights, but it becomes a risky proposition when it is being done while the officer is working, especially when it is surreptitious. In what capacity is it being done? Why is it being done? Does the *Charter* apply? What about workplace privacy? What is the departmental policy on privacy in the workplace? What are the labour and employment issues?

A. *R v Duarte*

The *Criminal Code* of Canada does not necessarily prohibit people from surreptitiously recording their own conversations. However where a police officer is involved in making those recordings a one-party consent application must be made to a judge under s. 184.2.²⁹ There is an exception under s. 184.1 where there is a fear of bodily harm and the purpose is to protect against bodily harm. However, any recordings made under this section must be destroyed where the bodily harm or threat of bodily harm did not occur (usually applies to undercover officers or agents wearing the devices as a ‘safety-line’).

The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning.³⁰

Justice La Forest continued that if a person’s right to be left alone included their right to determine for himself when, how, and to what extent he will release personal information about himself, then clandestine recordings should only be made upon satisfying a detached judicial officer that an offence has been or is being committed and that interception of that communications stands to afford some evidence of it.

²⁹ *Criminal Code of Canada*, RC 1985, c C-46, s 184.2.

³⁰ *R v Duarte*, [1990] 1 SCR 30 at 44, 53 CCC (3d) 1. Per La Forest J for a unanimous court [*Duarte*].

Where the instrumentality of the state is involved, without the consent of the originator or intended recipient thereof, without prior judicial authorization, the Court was clear that a person's rights and freedoms guaranteed by the *Constitution* are infringed.³¹ *Duarte* firmly established that electronic surveillance falls under the rubric of section 8 of the *Charter*. As a result of the decision Parliament enacted sections 184.1 and 184.2 as part of a series of amendments to the *Criminal Code* in Bill C-109 in 1993.³²

Section 184.1 provides that a police officer may intercept private communications to which he or she is a party without warrant where there is a risk of bodily harm to the officer. However, the contents of the communications are inadmissible as evidence in any proceedings (including any subsequent application for a search warrant or wiretap) except where actual or threatened bodily harm occurs. If nothing suggests that bodily harm occurred or is likely to occur all recordings, notes, and transcripts must be destroyed. Otherwise prior judicial authorization is required *ex parte* and in writing to a provincial court judge or a judge of a superior court of criminal jurisdiction.

Furthermore, section 183.1 of the *Criminal Code* addresses one party consent to interceptions made by or intended to be received by multiple persons and confirms that a communication may be a "private communication" notwithstanding that it involves more than one other person.³³ Therefore, a communication to or involving a group of persons may be a "private communication". Determining whether it was in fact a private communication would be evaluated on a reasonableness standard that anyone *other than* the members of the group would intercept it.

This was exactly the issue before the Supreme Court in *R v Wong*,³⁴ decided a month after *Duarte*, where the police conducted electronic surveillance of a hotel room to determine whether it was being used as an

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 [Charter]*. Section 8 states that "Everyone has the right to be secure against unreasonable search or seizure".

³² An Act to Amend the *Criminal Code*, the *Crown Liability and Proceedings Act* and the *Radiocommunication Act* (Bill C-109), SC 1993, c 40, s 4.

³³ Although "private communications" refers to "the person intended by the originator to receive it" and is used in the singular, section 33(2) of the *Interpretations Act*, RSC 1985, c I-21, s 33(2) states: "Words in the singular include the plural, and words in the plural include the singular".

³⁴ *R v Wong*, [1990] 3 SCR 36, 60 CCC (3d) 360 [Wong].

illegal gambling den. The police entered the room and installed a camera to covertly record the activities. The Crown argued, and as found by the Ontario Court of Appeal, there was no reasonable expectation of privacy in the hotel room full of people, as “a person attending a function to which the general public has received an open invitation can have no interest in ‘being left alone’”.³⁵

Justice La Forest, again writing for the majority of the Supreme Court, stated that while a large number of people attended the hotel room “it is not part of the reasonable expectation of those who hold or attend such gatherings that as a price of doing so they must tacitly consent to allowing agents of the state unfettered discretion to make a permanent recording of the proceedings”.³⁶ Individuals do not automatically forfeit their privacy interests simply because they are surrounded by others.

Electronic surveillance also affects an individual’s section 7 and 11(d) *Charter* rights. Section 7 provides, “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.”³⁷ The Crown also has an obligation to preserve and disclose evidence as a principle of fundamental justice as set out in *R v Stinchcombe*.³⁸

Section 193(1) of the *Criminal Code* further provides that where a private communication has been intercepted without the consent, express or implied, of the originator thereof, and such private communication (or any part thereof) is willfully used or disclosed, that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Where there has been a lawfully obtained court order to intercept private communications, the courts have applied the exemption provided for in s. 193(2)(a), permitting the disclosure in civil proceedings of private communications intercepted in the course of criminal investigations, including police disciplinary hearings.³⁹ In addition the Court stated:

³⁵ *Ibid* citing Cory J at 48.

³⁶ *Ibid* at 51.

³⁷ *Supra* note 31 at s. 11(d). Section 11(d) states that “Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”.

³⁸ *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1 [*Stinchcombe*].

³⁹ *Imperial Oil v Jacques*, 2014 SCC 66 at para 71, [2014] 3 SCR 287, citing *Re Board of Commissioners of Police for City of Thunder Bay v Sundell* (1984), 15 CCC (3d) 574, 1984

[s]ection 193(2)(a) provides that a disclosure is not an offence under s. 193(1) if it is made “in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person who makes the disclosure may be required to give evidence on oath”. “Civil proceedings”, whether in a traditional form or not, always include an exploratory stage ... if Parliament had intended that the exemption would apply only at the time evidence is given, as the appellants argue, then it would not have included the words “or for the purpose”. Since it did include those words, we must assume that they are not redundant, must avoid depriving them of meaningful effect, or “effectivity”, and must recognize that they reflect an intention to give the exemption a generous scope that encompasses the exploratory stage of civil proceedings.⁴⁰

However, where electronic evidence has been unlawfully obtained or destroyed, section 24(2) of the *Charter* provides a remedy. Although intercepted communications are often regarded as real evidence, the reliability of which is seldom in question, section 24 states that where a court concludes that anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied, the evidence may be excluded. For example in *R v Malik and Bagri*, the Air India bombing trial, Justice Josephson held that the Canadian Security Intelligence Service (C.S.I.S.) had committed unacceptable negligence in erasing audiotapes containing recordings of intercepted conversations. As a result the right to disclosure under section 7 of the *Charter* had been violated.⁴¹

The admissibility of intercepted conversations raise a number of questions quite apart from the legality of the interception. Privately recorded conversations are more likely to be found inadmissible than those recorded by the state as it is often more difficult for private individuals to show the information is accurate, authentic, and trustworthy. For example, some of the requirements for admissibility include a showing that:

- 1) The recording device was capable of recording the events offered in evidence;
- 2) The operator was competent to operate the device;
- 3) The recording is authentic and correct;
- 4) Changes, additions, or deletions have not been made in the recording;
- 5) The recording has been preserved in a manner that is shown to the court;
- 6) The speakers on the tape are identified; and
- 7) The conversation elicited was made voluntarily and in good faith, without any kind of inducement.⁴²

CarswellOnt 1406 (Ont Div Ct), which in turn applied *Re Trumbley et al and Fleming et al*, (1984) 12 WCB 436, 5 OAC 368 (Ont Div Ct).

⁴⁰ *Ibid* at para 48. Internal citations omitted.

⁴¹ *R v Malik and Bagri*, 2004 BCSC 554 at para 22, 119 CRR (2d) 39.

⁴² *Cf R v Andalib-Goortani*, 2014 ONSC 4690, [2014] OJ No 4499 see below note 142.

In the United States the argument in favor of consent interceptions is that the speaker risks the indiscretion of his listeners and holds no superior legal position simply because a listener elects to record his statements rather than subsequently memorializing or repeating them.

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights ... For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, or (2) carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks".⁴³

However, the Court in *White* was not unanimous. Both Justices Douglas and Brennan dissented. Justice Brennan stating that "the threads of thought running through our recent decisions are that these extensive intrusions into privacy made by electronic surveillance make self-restraint by law enforcement officials an inadequate protection, that the requirement of warrants under the Fourth Amendment is essential to a free society."⁴⁴ When deciding *Duarte* the Supreme Court of Canada followed the general reasoning of the dissenting Justices in *White*.

This lack of 'self-restraint' by government officials has been considered by several courts in Canada, even where proper authorizations have been obtained. Specifically the untrammelled discretion by the police to intercept anyone they want without limitation has been found to be an unlawful delegation of a judge's function. The police cannot simply be 'walking microphones'.⁴⁵

⁴³ *White*, *supra* note 16 at 751.

⁴⁴ *Ibid*, at 761-62.

⁴⁵ See *R v Monte*, 1993 CarswellOnt 6918 at para 23 (Ont SC), 20 WCB (2d) 434 (WL Can); and *R v Lee*, 2002 BCSC 1912 at para 7, 80 WCB (2d) 910 applying *R v Paterson*, *Ackworth and Kovach*, [1985] OJ No 28, 18 CCC (3d) 137 (Ont CA), affirmed in *R v Ackworth*, [1987] 2 SCR 291, 39 CCC (3d) 575.

Furthermore evidence gathered during a valid consent authorization will be excluded where there was insufficient evidence to support a reasonable belief that such evidence would even be obtained in the supporting affidavit. An ex-post facto justification that incriminating evidence was obtained is insufficient. Bad faith and ignorance of *Charter* standards on behalf of the police cannot be rewarded or encouraged and the court must disassociate itself from such conduct.⁴⁶

B. Police Stations

Are police stations a private place? Is there any expectation of privacy that you will not be recorded in a police station, whether as a private individual or as a police officer?

In *R v Parsons* the Ontario Court of Appeal commented on the propriety of police surreptitiously filming an accused as he walked down a hallway inside the police station. The purpose of the film was to use it in a video line-up of other people walking down the same hall way, to show the victim of a robbery. The court applauded the use of this technique and found that it did not breach the accused's s. 7 rights under the *Charter*.⁴⁷

The Ontario Court of Appeal subsequently applied its decision in *Parsons* in *R v Pelland*,⁴⁸ a case where the police surreptitiously audio-recorded a suspect to create a repository of the accused's voice for possible future use as evidence of his identification. The recordings were subsequently used to produce a voice line-up for identification purposes in a sexual assault. In admitting the recordings the Court stated:

[...] we are not persuaded that the appellant had any reasonable expectation of privacy in the *sound of his voice*. The sound of one's voice is a physical characteristic much the same as a person's physical appearance. Accordingly, we are of the view

⁴⁶ *R c Laflamme*, 2013 QCCA 58, 117 WCB (2d) 1. Application for leave to appeal SCC dismissed without costs May 30, 2013 (docket 53268). Also see *R v Grant*, 2009 SCC 32 at para 75, [2009] 2 SCR 353:

[I]gnorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith.... Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct.

⁴⁷ *R v Parsons* (1993), 24 CR (4th) 112, 84 CCC (3d) 226 (Ont CA) [*Parsons*].

⁴⁸ *R v Pelland*, [1997] OJ No 1539, 99 OAC 62 (Ont CA) [*Pelland*].

that the surreptitious recording of the appellant's voice did not amount to a violation of his s. 8 Charter rights ... Similarly, we reject the appellant's submission that his right to security of person under s. 7 of the Charter was violated.⁴⁹

The Court of Appeal did not apply the Supreme Court's decision in *Duarte* or s. 184.2 of the *Criminal Code*. However, they did find the taking of the voice sample was 'insubstantial, of very short duration and left no lasting impression'. As such a distinction appears to have been made between the content or message in the recording and the mere sound of it.

In *R v Van Ossellaer* the accused was left alone in a police interview room with the video camera on. The accused spoke aloud to himself. The utterance was captured on video by means of a readily visible camera in the room. At least one police officer was monitoring the video-taping at all times, but the accused was never told that his statements were being monitored or that they were being recorded on video-tape. The Court held that even if the monitoring of the accused constituted a *Charter* breach, the reputation of the administration of justice would be adversely affected if such cogent and important evidence were excluded.⁵⁰

However, where there was regular signage throughout the police station and the accused was told he would be on videotape there is no issue of a *Charter* breach as in *R v Pickton*. Specifically the Court stated:

Although I am satisfied that Mr. Pickton possessed a subjective expectation of privacy for a limited period, I cannot conclude that it was objectively reasonable. Signs warning of video surveillance were posted in the booking area of the detachment. Cameras were in plain view in the facility and, most significantly, in his cell. Further, the police specifically warned Mr. Pickton that he would be subjected to audio and video monitoring and recording. In those circumstances, his subjective belief was simply not reasonable.⁵¹

While a readily visible camera is a factor to be considered along with proper signage and warnings, there is generally a reduced expectation of privacy when under arrest and in a police facility. Indeed *Parsons* and *Pelland* both suggest that there may be little or no expectation of privacy in one's physical presence or characteristics being recorded surreptitiously. In any

⁴⁹ *Ibid* at para 11-12.

⁵⁰ *R v Van Ossellaer*, 1999 WL 33203128 (BCSC), *aff'd* on other grounds, 2002 BCCA 464, 167 CCC (3d) 225. Leave to appeal SCC refused (2003), 192 BCAC 160 (note), 315 WAC 160 (note).

⁵¹ *R v Pickton*, 2006 BCSC 383 at para 79, 259 CCC (3d) 254, *aff'd* 2009 BCCA 299, 288 BCAC 246. Also see *R v Ramsoondar*, [2001] OJ No 897, 449 WCB (2d) 396 (Ont CJ).

event can there really be an objective expectation of privacy where the individual does not own, use, possess, control or regulate access to the place they are in, and where there are clear warnings given or signage present they are possibly being recorded?⁵²

In addition, concealed recording equipment might provide a benefit when dealing with sophisticated criminals to lull them into a false sense of security that they were not being recorded (however the police should *never* create a reasonable expectation of privacy by telling the accused they are not being recorded) or when running wiretap project where an accused is placed in an interview room with a co-accused, family member or an undercover officer. While the use of such equipment to record private conversations between two parties would require proper court authorization (see for example, in *R v Mojtahedpour*⁵³), concealed equipment would also be conducive to creating a false sense of privacy in such circumstances notwithstanding signage and warnings.

However, this would not extend to restricted areas of a police facility where the public (or prisoners) do not have access or which are inherently more private (toilet stalls, bathrooms, showers, change rooms, etc). In such cases cameras and other recoding equipment should either *not* be installed (i.e. private areas) or should be obvious and installed with reasonable notice to the police membership (common work areas) with reasons, along with proper signage (unless installed pursuant to a court order).

For example, even where there has been a clear warning and signage that a prisoner (who has a reduced expectation of privacy) may be recorded, privacy interests may trump such knowledge or consent. Such was the case in *R v Mok* where evidence of impaired driving was stayed where Ms. Mok was filmed using the toilet in her cell. Applying the Supreme Court's decision in *Wong* surveillance could, in appropriate circumstances, constitute an unreasonable search even where notice had been given verbally and in writing.⁵⁴

⁵² See *R v Edwards*, [1996] 1 SCR 128 at para 45, 104 CCC (3d) 136 for a list of factors to be considered where assessing a person's privacy interests in property.

⁵³ *R v Mojtahedpour*, [2003] BCJ No 48, 171 CCC (3d) 428, rev'ing [2001] BCJ No 1238, 50 WCB (2d) 298. The police placed the accused and his parents together in a victim assistance interview room to hopefully generate and record an inculpatory conversation between them.

⁵⁴ *R v Mok*, 2014 ONSC 64, [2014] OJ No 44, leave denied, 2015 ONCA 608, 82 MVR

Furthermore, like the decision in *Harry R. v Esther R.*⁵⁵ recordings that are neither illegal nor unlawful may still be excluded where they violate the confidence and trust between the parties. This is most evident in family law matters where one parent secretly records the other, or conversations with their children.

The concern, as noted by Justice Smith in *Norland v. Norland*, is that “it does not take much imagination to see how an adult could manipulate a conversation, particularly with a child, to make it appear that the child is unhappy living in the home of the other parent and wishes to live with them. Nor would it be difficult to orchestrate a conversation with a spouse to make that person appear aggressive and unreasonable”⁵⁶ Furthermore there is the background context and accuracy that such recordings capture what they purport to:

Another danger is that I have no guarantee that Ms. K has put forward the entire recording of those conversations that she has transcribed and exhibited to her affidavits. I note, for example, that the recording of S’s conversation on August 6th to begin like an epic tale: i.e.: in the middle of the action. What preceded the taped bits of that conversation? How did S come to be talking about that particular subject? Did S volunteer it out of the blue, so that Ms. K had to ask her to wait a moment then rush to get her tape recorder, then press record and finally signal S to continue? Did Ms. K have the recorder at the ready, then prompt S to talk about the mobile phone, and finally press record only after she had posed her question? Was the recorder running all the while and Ms. K made it seem as if it had been turned on just as S introduced the subject of her phone? These are obvious and troubling questions.⁵⁷

For more information on the admissibility of secretly recorded conversations in a family law context in Canada see “The Ten Evidence “Rules” That Every Family Lawyer Needs to Know.”⁵⁸

(6th) 1 (*Charter* violation found but stay issued by trial judge set aside on appeal); Also see *R v Stennett*, 2016 ONCJ 77, [2016] OJ No 729 and *R v Scott*, 2016 ONCJ 177, [2016] OJ No 1700 for similar decisions.

⁵⁵ *Supra* note 17. See also *Norland v Norland*, [2006] OJ No 5126 at para 63, [2007] WDFL 2768 (Ont SCJ).

⁵⁶ *Ibid.*

⁵⁷ *K(LK) v K(EJG)*, 2013 BCSC 2030 at para 96, [2013] BCJ No 2444.

⁵⁸ Rollie Thompson, Q.C., “The Ten Evidence “Rules” That Every Family Law Lawyer Needs to Know”, (2016) 35:3 Can Fam LQ 285 at 304-307.

IV. LABOUR LAW

Although an audio-recording in the workplace may frequently be considered relevant, it may nevertheless be inadmissible because to admit it would be (a) an unwarranted invasion of privacy; (b) it would have a chilling effect on the conduct of labour relations; or (c) because the party tendering it refused to disclose it prior to the hearing.

While employers may conduct investigations into employee behaviour where certain circumstances exist, this does not mean that they have an unqualified right to intrude on employee privacy. In this regard, arbitrators have developed a three-part test to balance privacy and management rights to implement workplace surveillance.

- (1) Was it reasonable to resort to surveillance?
- (2) Was the surveillance itself conducted in a reasonable manner?; and
- (3) Was there a less intrusive means available to the employer, or had the employer exhausted less intrusive means?

A further consideration is whether the employees had notification they may be monitored. While the arbitral decisions suggest that there is no definite requirement to notify employees they are being monitored, when the surveillance devices are installed covertly employers will be required to justify the surveillance more strictly. In fact, even where a group meeting is being covertly recorded by a manager present at the meeting, it may be deemed to be harassment.⁵⁹

In general, while it may be 'legal' for a non-state party to surreptitiously record a conversation with another party in Canada without their knowledge or consent, this is not conclusive in labour relations matters. Indeed, where the employer is a government employer, the reception of covertly recorded evidence is subject to attack on the ground that an employee's *Charter* rights may have been infringed.

Furthermore, in an early decision, Arbitrator Blasina canvassed police surveillance cases and the application of the *Charter* to the labour context. While neither applied to the case, he adopted the principles or "values" in *Duarte* and *Wong* relating to electronic audio surveillance in the workplace that, as a general rule of labour relations, an employer should not have any greater authority to covertly monitor its employees than the state is entitled

⁵⁹ *St. Mary's Hospital v Hospital Employee's Union* (1997), 64 LAC (4th) 250, 48 CLAS 288 (British Columbia) (Larson).

to monitor private citizens. He said that great circumspection is called for when an employer seeks to electronically monitor the activity of an employee and that it is “clearly ... at the extreme [edge] of the employer's authority under [the collective agreement]”.⁶⁰

However even prior to the decisions in *Duarte* and *Wong*, arbitrators would exclude covertly recorded evidence that would profoundly undermine harmonious labour relations. While tape-recording, if proved, can be the best evidence like a photograph or videotape, where the actions of the employer or employee were designed to subvert the collective bargaining relationship to admit into evidence a tape taken secretly would provide that technique with a degree of respectability quite undeserved.

For those who would say that lying by one party is less desirable than the taping of such lies, I would agree. I would, however, respond that the cure for lying does not rest with the possibility of every word said being taped, but does, rather, rest and is well served by the long-term work place requirement to build integrity and trust as well as by the short-term rigours of cross-examination. In short, persistent liars at the work place do not last.⁶¹

In *Siemens Westinghouse and C.A.W.* arbitrator Barrett reached a similar conclusion. Although the Union argued that the secret tape recording was relevant to a central matter in issue – credibility, and ought to be admitted he sided with the employer that there were strong policy considerations militating against the admission of such recordings.

Relying on *Greater Niagara General Hospital* and *Miletich* Barrett did not find any compelling reason of fairness that would lead him to overlook the

⁶⁰ *Re Steels Industrial Products v Teamsters Union, Local 213* (1991), 24 LAC (4th) 259 at 28, 25 CLAS 556 (Steels).

⁶¹ *Re Greater Niagara General Hospital v OPSEU, Local 215* (1989), 5 LAC (4th) 292, 14 CLAS 16 (Joyce). Also see *Re M Miletich and Hotel, Restaurant & Culinary Employees & Bartenders Union, Loc 40* (November 1, 1984) BCLRB No 398/84, at 10 [Miletich] where the panel stated that arbitrators:

[...] should not condone any practice which would have no other purpose than to create a climate of distrust and antagonism. It is our opinion that to allow the production of these tapes would be to interfere with, rather than to promote, proper relations between a union and its bargaining unit members ... to allow the tapes into evidence would be to encourage parties in every dispute, to distrust each other, to disrupt their desire for resolution and to prolong proceedings at the Labour Relations Board by interminable delays due to the necessity to adjudicate each and every application for admission of taped conversations into evidence .

negative consequences of admitting such evidence in a labour relations context. In addition he found the evidence to be self-serving, and accordingly ruled the tape recording to be inadmissible.⁶²

Similarly in *Jones v St. Jude Medical*⁶³ the United States Sixth Circuit Court of Appeals declined to find that an employee's secret recording of conversations with other employees, management, or clients were necessary under the United States *Civil Rights Act* to protect against discrimination. The Court did not see why the employee needed to violate the company's no-recording policy to oppose the employer's alleged discriminatory treatment and stated that other methods could have been pursued that complied with the employer's policies ~ she might have taken notes of the conversations, obtained the information she needed through legal discovery, or simply asked her interlocutors for permission to record.

While Jones argued that her conduct was reasonable because the recordings were not illegal; did not breach confidential information; were not disruptive of business operations; and were not disseminated beyond the litigation, the Court found that none of this absolved her of breaching the company's no-recording policy ~ which was not attacked ~ and her termination was upheld. The decision illustrates that a recording policy can generally provide a legitimate, non-discriminatory reason for disciplining an

⁶² *In Siemens Westinghouse and CAW-Canada, Local 512 (Willett) (Re)*, (2002) 114 LAC (4th) 264, 72 CLAS 20 (Barrett). Also see *Teamsters, Local 31 v DHL International Express Ltd*, (1995), 28 Can LRBR (2d) 297 at para 41, where the Canada Industrial Relations Board espoused a policy that evidence in the form of surreptitious audio recordings is normally inadmissible because of the paramount importance of maintaining trust and informality in the parties' ongoing relations:

It must be remembered that parties who appear before the Board typically continue in an ongoing labour relations relationship with one another. The successful functioning of that relationship is dependent, as far as possible, on mutual trust and respect. It is difficult to imagine how open and frank discussions, in an atmosphere of mutual trust and respect, could be carried on if either party was concerned that the other might be recording the conversation to be played back to the Board or in another forum at some subsequent period of time.

⁶³ *Jones v St. Jude Medical Center Inc*, 504 F App'x 473 (6th Cir 2012). Also see Michael J Gibson, "Just Because It's Legal Doesn't Mean You Can Do It: The Legality of Employee Eavesdropping and Illinois Workplace Recording Policies" (2015) 46:2 Loy U Chicago LJ 913.

employee, if the policy is focused appropriately to meet the stated needs and purposes of the company.

Two very recent decisions from the Canada Labour and Manitoba Labour Boards also supported the exclusion of secretly recorded audio tapes. In *Jazz Aviation v Canadian Airline Dispatchers' Assn.* Arbitrator Burkett balanced the relevance of the audio-recording with the impact on the collective bargaining relationship.⁶⁴

As part of his balancing process Burkett considered the decision of Arbitrator Weatherill in *Direct Energy and Unifor, Local 975* where he concluded that all relevant evidence should be admitted, but weighed. Although Weatherill considered the risk that surreptitious recordings served to undermine the trust required in sustaining harmonious and constructive collective bargaining relationships ~ an important matter of public policy ~ he applied the general rule set out by Justice L'Heureux-Dube in *R v L(D.O.)*, [1993] 4 SCR 419, to admit all relevant and probative evidence and allow the trier of fact to determine the weight which should be given to that evidence, in order to arrive at a just result.⁶⁵

Notwithstanding this general rule espoused by L'Heureux-Dube that all relevant and probative evidence should be admitted, applying the decisions in *Greater Niagara General Hospital and Miletich*, Arbitrator Burkett was not prepared to admit the recordings into evidence, deciding that the effect of doing so would seriously undermine the relationship between these parties and send the wrong message to the labour relations community that such practices were acceptable.⁶⁶ Nevertheless Burkett was prepared to admit into evidence any *viva voce* testimony of any Union witness who had not heard the tape or read a transcript of the tape.

A similar ruling, applying both *Greater Niagara General Hospital and Miletich*, was delivered by the Manitoba Labour Board (W.D. Hamilton, R. Panciera, J.H. Baker), holding that secret tape recordings were inadmissible. Recognizing that the authorities went both ways, the Board held that allowing the tapes into evidence would interfere with, rather than promote, proper relations between a union and its bargaining unit members. Based

⁶⁴ *Jazz Aviation LP v Canadian Airline Dispatchers' Assn.*, [2014] CLAD No 182, 244 LAC (4th) 244 (Burkett).

⁶⁵ *Ibid* at para 19, citing *Direct Energy and Unifor, Local 975 (Grievance of D Pialis -Days Off)* October 17, 2013 (Weatherill).

⁶⁶ *Ibid* at para 25.

on these policy considerations the Board ruled that the surreptitious recordings were inadmissible.⁶⁷

More recently, in *B.C. Ferry Service Inc.*, Arbitrator McEwen refused to admit secretly recorded conversations into evidence. However it was not the recording of the conversations she found objectionable, rather the clandestine nature of secret recordings in general without notice to the other participants. Adopting the decision in *Miletich* McEwen held that such conduct undermined labour relations and “to allow the tapes into evidence would be to encourage parties in every dispute to distrust each other, to disrupt their desire for resolution and to prolong proceedings.” Any party offering such evidence would have to demonstrate that the value of the evidence outweighed the damage to labour relations and the expectation of privacy.⁶⁸

This was probably most succinctly articulated by Vice President Sams in a recent Australian Fair Work Act decision:

In my view, there could hardly be an act which strikes at the heart of the employment relationship, such as to shatter any chance of re-establishing the trust and confidence necessary to maintain that relationship, than the secret recording by an employee of conversations he or she has with management. Although there may be sound reasons why an employee (or an employer for that matter) believes it is necessary to secretly tape workplace conversations, I consider such an act to be well outside the normal working environment and contrary to the well understood necessity for trust and fidelity in the relationship between employee and employer.⁶⁹

⁶⁷ *C (D) v MAHCP (Re)*, 2012 CLB 5047, 212 CLRBR (2d) 41 (MLB).

⁶⁸ *BC Ferry Service Inc v British Columbia Ferry and Marine Workers' Union* (Mehta Grievance), [2015] BCCAAA No 35, 123 CLAS 46 British Columbia Collective Agreement Arbitration, Joan I McEwen (Arbitrator), May 26, 2015, part IV.

⁶⁹ *Trevor Thomas v Newland Food Company Pty Ltd*, [2013] FWC 8220 at para 185. Also see *Lever v Australian Nuclear Science and Technology Organisation*, [2009] AIRC 784, where Deputy President Drake stated at para 103:

Applying ordinary Australian community standards I do not accept that any employee or any employer would be content to have any meeting they were attending secretly tape recorded. The ordinary conduct of personal, business and working relationships in our community is predicated on the basis that if there is to be any record of a meeting it will be agreed in advance. Anything else is quite properly described as sneaky. Its very sneakiness makes it abhorrent to ordinary persons dealing with each other in a proper fashion.

In Canada, Arbitrators have repeatedly upheld the privacy rights of employees, stating that “it is well established that persons do not by virtue of their status as employees lose their right to privacy and integrity of the person.”⁷⁰ However, where employees are meeting off-site in a social context, such recordings may be admissible in a labour arbitration hearing.

In a very recent grievance involving members of a firefighting crew in the Fort Nelson area, Arbitrator Dorsey made a preliminary ruling dismissing a union application to exclude surreptitiously recorded comments made during the course of a dinner conversation away from the firefighter’s base. While Dorsey held that covert recordings are generally inadmissible in labour disputes because their value is outweighed by the possible deleterious and chilling effect admissibility would have on workplace cooperation, collaboration, open settlement discussion and frank exchange in problem solving ~ in this case the after work social context of the situation removed it from workplace collaboration. As a result the “effect the recording might have on either the presentation of the union or employer’s case is secondary to the prejudicial effect exclusion of the recording will have on the credibility and acceptability of the outcome of this arbitration process”.⁷¹

The *Labour Relations Act*⁷² of Manitoba provides the legislative source for an arbitrator’s jurisdiction. The Act confers jurisdiction to deal with all disputes related to the collective agreement. The Supreme Court decisions in *Weber v Ontario* and *Board of Police Commissioners of the City of Regina v Regina Police Association* confirm that a statutorily appointed arbitrator has jurisdiction over all issues arising out of an agreement between parties.⁷³

⁷⁰ *Monarch Fine Foods Co Ltd v Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1978), 20 LAC (2d) 419, [1978] OLAA No 8 (Picher).

⁷¹ *British Columbia Government and Service Employees' Union v BC Public Service Agency (Admissibility of Surreptitious Recording Grievance)*; [2016] BCCAAA No 129, British Columbia Collective Agreement Arbitration, James E Dorsey, Q.C. (Arbitrator), October 27, 2016, at para 18, online: <https://www.scribd.com/document/334830828/BCGEU?irgwc=1&content=10079&campaign=Skimbit%2C%20Ltd.&ad_group=725X16461X464127faf8aa27f302349729606367d7&keyword=ft750noi&source=impactradius&medium=affiliate>.

⁷² *Labour Relations Act*, CCSM c L10.

⁷³ *Weber v Ontario*, [1995] 2 SCR 929, 24 OR (3d) 358 and *Board of Police Commissioners of the City of Regina v Regina Police Association Inc*, [2000] 1 SCR 360, 183 DLR (4th)14.

In *George v Anishinabek (Police Service)*, a discipline hearing into allegations of discreditable conduct, the Ontario Court of Appeal affirmed that where a dispute expressly or inferentially arises out of a collective agreement, an arbitrator has exclusive jurisdiction. That is, if “the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement,” then “the claimant must proceed by arbitration and the courts have no power to entertain an action in respect to that dispute”.⁷⁴

Where an employee is claiming a tortious violation, the correct forum is before an arbitrator *if* the underlying dispute is related to the collective agreement. Indeed cases after *Weber* confirm that arbitrators have exclusive jurisdiction over a variety of tort claims such as conspiracy, interference with contractual relations, deceit, negligence, negligent misrepresentation, infliction of mental distress, and defamation where the dispute essentially relates to the collective agreement.⁷⁵

Furthermore the Supreme Court has held that where legislation is employment related, such as the *Human Rights Code* and the *Employment Standards Code*, they are effectively read into collective agreements, granting an arbitrator jurisdiction where the dispute essentially relates to the collective agreement.⁷⁶ Assuming privacy legislation is also employment related to the claim, an arbitrator may apply that as well.

⁷⁴ *George v Anishinabek (Police Service)*, 2014 ONCA 581, 321 OAC 391, citing both *Weber* and *Regina Police Association*.

⁷⁵ *Blanco-Arriba v British Columbia*, [2001] BCJ No 2376 at para 39, 2001 BCSC 1557 (BC SC) (QL).

⁷⁶ *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324 (OPSEU)*, [2003] 2 SCR 157, 230 DLR (4th) 257. However, where the claim cannot be connected to the collective agreement see, *Toronto Police Services Board and Toronto Police Services Association*, 2006 CanLII 50481 (ON LA), where Arbitrator Surdykowski, stated at para 14: “Arbitrators do not have separate independent jurisdiction over tort or other claims that arises out of or with respect to an employment relationship unless the claim is connected to a collective agreement (...) That is, the essential character of the claim [must] expressly or inferentially concern the interpretation, application, administration or alleged violation of the particular collective agreement”.

V. PRIVACY LAW

A. The *Privacy Act*

The *Privacy Act*⁷⁷ of Manitoba is a short piece of legislation passed in 1970 that makes a privacy violation a tort. Its key provisions, contained in section 2, are:

- (1) A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person.
- (2) An action for violation of privacy may be brought without proof of damage.

Without limiting the generality of section 2, the privacy of a person may be violated ... 3(b) by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines, otherwise than as a lawful party thereto or under lawful authority conferred to that end. Remedies under section 4 may include:

- (a) award damages;
- (b) grant an injunction if it appears just and reasonable;
- (c) order the defendant to account to the plaintiff for any profits that have accrued, or that may subsequently accrue, to the defendant by reason or in consequence of the violation; and
- (d) order the defendant to deliver up to the plaintiff all articles or documents that have come into his possession by reason or in consequence of the violation.

Section 7 of the Act further provides that no evidence obtained by virtue or in consequence of a violation of privacy in respect of which an action may be brought under this Act is admissible in any civil proceedings.

Based in part on the 1967 *Report of the Royal Commission of Inquiry into Invasion of Privacy*⁷⁸ Manitoba's *Privacy Act* is unique from other provincial privacy legislation for its absolute exclusionary rule in civil cases and the fact it does not grant exclusive jurisdiction to any particular decision making body. As such an arbitrator in Manitoba could also consider a privacy breach where the dispute essentially relates to the collective agreement.

The origin of the 1967 *Royal Commission of Inquiry* was the discovery of eavesdropping devices in a hotel room occupied by a union leader. The devices had been placed there by a private investigator working for another union. The focus of the Commission was the nature and extent of the use

⁷⁷ *Privacy Act*, CCSM c P125.

⁷⁸ British Columbia, Office of the Deputy Provincial Secretary, *Commission of Inquiry into the Invasion of Privacy* (Victoria: The Queen's Printer 9 August 1967).

of recording devices and records thereof for the purpose of invading the privacy of persons or organizations ... with a view to determining whether any legislative enactment ... [was] necessary for the preservation of privacy as a civil right.⁷⁹

While the *Privacy Act* provides a personal remedy for any individual that has had their rights violated, arbitrators have tended to make the most use out of the provincial privacy legislation in workplace surveillance cases. The leading decision being *Doman Forest Products Ltd and IWA*, in which an employee was discharged based on video surveillance. When the employer sought to introduce the video evidence Arbitrator Vickers made the following comments:

The first thing to note is that the right to privacy is not absolute. It must be judged against what is “reasonable in the circumstances” and, amongst other things, is dependent upon competing interests such as “the relationship between the parties.” It may be violated by the “surveillance,” which I take to be both visual and electronic. The *Privacy Act*, therefore, gives the grievor a legal right to privacy in certain circumstances, quite apart from any contractual right he may have with the company.

...

While no specific provision exists in the collective agreement insuring a right to privacy it is, in my opinion, impossible to read this agreement outside of the value system imposed by the *Charter* and the statement of law contained in the *Privacy Act*. Indeed, the company did not argue that the *Privacy Act* was inapplicable.⁸⁰

The *Doman* decision has been applied regularly in Manitoba. In at least two decisions the fact an employee was covertly recorded in a public place did not negate their privacy rights. The issue to be determined was its reasonableness and level of intrusiveness.

Here, the surveillance of the grievor's activities was done at a public construction site. Again, I agree with Mr. Peltz that the *Privacy Act* does not *exempt* surveillance in public places from its ambit and neither does the arbitral case law exclude protection of an employee's privacy when the surveillance is done in public places ... It does go to the issue of whether or not a particular surveillance is “unduly” intrusive. The Manitoba legislation adopts similar templates because section 2(1)

⁷⁹ British Columbia, *Royal Commissions and Commissions of Inquiry under the Public Inquiries Act in British Columbia 1943-1980*, by Judith Antonik Bennett (Victoria: The Queen's Printer, 1982) at 20.

⁸⁰ *Doman Forest Products Ltd and IWA, Local 1-357* (1991), 13 LAC (4th) 275, [1990] BCCAAA No 401 (Vickers). Also see *United Steelworkers, Local 7552 v Agrium (Schulte Grievance)*, [2009] SLAA No 9, 185 LAC (4th) 296 (Hood).

makes it a tort for a person to “... substantially, unreasonably and without claim of right” violate the privacy of another person.⁸¹

In provinces that do not have their own privacy tort legislation, such as Ontario, the common law has stepped in to fill the void by recognizing that the law needs to protect people from unreasonable intrusion into their private lives. In *Jones v Tsige* the Ontario Court of Appeal outlined what needs to be proven to make out the tort at common law:⁸²

1. An unauthorized *intrusion*;
2. The intrusion was highly offensive to a reasonable person;
3. The matter intruded upon was private; and
4. The *intrusion* caused anguish and suffering (although the Court suggests this last one will be assumed when the first three are satisfied).

In *Angelo v Moriarty*, a common law claim of intrusion upon seclusion pursuant to the Court's inherent jurisdiction was brought against James Moriarty by the individual Board of Directors for the Fraternal Order of Police, Chicago Lodge No. 7. Moriarty, also a Board member, had posted two videos (with audio) of a private Board meeting from September 2013 on YouTube. The Plaintiffs contended that this “publication was highly offensive or objectionable to a reasonable person due, in part, to the implication set forth in the YouTube videos that the Plaintiffs ratified or allowed then-President of FOP #7 Michael Shields to violate the FOP's Constitution and By-Laws.”⁸³

The tort, as formulated in Illinois, is the same as that outlined in *Jones v Tsige*. However, the court dismissed the claim. While injury may have resulted from *uploading* the surreptitious recording, the way the tort is framed the injury must flow from the intrusion, in this case the actual making or recording of the videos, and *not* the publication. As a result the

⁸¹ *Canada Safeway Ltd v UFCW, Local 832*, [2003] MGAD No 10 at para 23, 72 CLAS 219 (Hamilton), quoting *Re New Flyer Industries Ltd v Canadian Auto Workers, Local 3003*, (2000) 85 LAC (4th) 304, 59 CLAS 76 (Peltz). Also see *Wong*, *supra* note 34, for the proposition that individuals do not automatically forfeit their privacy interests simply because they are surrounded by others.

⁸² *Jones v Tsige*, 2012 ONCA 32, 108 OR (3d) 241. Also see *Hopkins v Kay*, 2014 ONSC 321, 119 OR (3d) 251. In Manitoba see *Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44, 319 Man R (2d) 67 where the common law privacy tort was adopted by Monnin JA notwithstanding the existence of the Manitoba *Privacy Act*, *supra* note 77 regarding the misuse of his personal information.

⁸³ *Angelo v Moriarty*, 2016 WL 640525 Case No 15 C 8065 (ND Ill 2016).

court concluded that the plaintiff had failed to adequately allege the tort of intrusion upon seclusion because the alleged offensive conduct and subsequent harm resulted from the defendants' act of publication, not from an act of prying (intrusion). "In other words, Plaintiffs have pleaded themselves out of court by admitting that Defendant's publication of the videos on YouTube caused their injury".⁸⁴

Besides the *Privacy Act*, surveillance without consent or notification can also fall under provincial or federal privacy legislation regarding the collection, storage, retrieval, and disclosure of personal information. It will generally not apply in individual cases as the legislation seeks to balance competing rights and interests in the collection, use and disclosure personal information in the course of business operations.

However, police officers who secretly tape record other individuals while they are at work place themselves and the organization at risk. Having a policy prohibiting such recordings in the workplace can protect the organization and place the employee on notice if such recordings are occurring.

Firstly the *Freedom of Information and Protection of Privacy Act*⁸⁵ applies to public bodies ~ which police departments are. The Act regulates the collection, use, retention and disclosure of personal information, including:

- (h) information about the individual's political belief, association or activity,
- (i) information about the individual's employment or occupation, or occupational history,
- ...
- (l) the individual's own personal views or opinions, except if they are about another person,
- (m) the views or opinions expressed about the individual by another person.

The result is that secretly recording others while an officer is working subjects them to *FIPPA*'s requirements regarding the collection, use, retention and disclosure that information. *FIPPA* does not apply to private

⁸⁴ *Ibid*, Part III. Additional claims that Moriarty violated the *Federal Wiretap Act*, 18 USC § 2511, and the Illinois *Eavesdropping Statute* were also dismissed as Moriarty was a party to the communication. However, depending on the circumstances, a range of other legal remedies such as harassment, breach of confidence, nuisance, trespass, may still be available.

⁸⁵ *Freedom of Information and Protection of Privacy Act*, CCSM c F175 [*FIPPA*]. All provinces have similar legislation. For federal law enforcement agencies the *Privacy Act*, RSC, 1985, c P-21 would apply.

activities so it would not apply when an officer is not working, but it does beg the question if it is done while the officer is at work or in the workplace ~ who do the recordings belong to? We have already canvassed this issue that any records made while an officer is working are the property of the police agency. As such the officer has specific legal obligations regarding the collection, use, retention, and disclosure of those recordings.⁸⁶

Privacy can be defined as the state of desired “in access” or as freedom from unwanted access, with “access” meaning perceiving a person with one’s senses, including hearing them or obtaining information about them. Thus, speaking theoretically, a person’s privacy will be interfered with if another obtains, listens to, or finds out information about them against their wishes or enables others to do the same.

Most commentators agree that privacy is important because it promotes a number of other ends which are essential for human flourishing. For example, theorists such as Charles Fried, Stanley Benn, and James Rachels argue that privacy is necessary for the development of relationships. Friendship and intimacy would be impossible, they say, without the ability to reveal oneself more fully to some people than to others. Wider social interactions are also seen as dependent on people’s ability to include some and exclude others from their inner circle.⁸⁷

A person can be humiliated by exposure of something which he or she has no reason to be ashamed. The affront felt by a man who is photographed comforting his dying child in hospital is unlikely to be lessened because it makes him look like a caring father.⁸⁸

B. Charter Values

As discussed above, assessing the reasonableness of an expectation of privacy involves more than a factual inquiry; it also involves a normative one. As noted by Bennett, J.A. for a unanimous court of appeal, “in everyday experience people discuss matters and entrust their private thoughts with others holding the implicit expectation that the information will be kept confidential.”⁸⁹

⁸⁶ Also see *supra* note 1 where Officer Jackson was relieved from duty, not for making a recording with his personal GoPro device, but for failure to maintain, preserve and retain the recording in accordance with Florida’s *Public Records* statute. See also, *supra* note 19.

⁸⁷ *Law, Liberty, Legislation: Essays in honour of John Burrows QC*, Jeremy Finn & Stephen Todd, eds (Wellington, NZ: LexisNexis NZ, 2008) at 232.

⁸⁸ *Ibid.*

⁸⁹ *R v Craig*, 2016 BCCA 154 at paras 117-18, 130 WCB (2d) 32 [Craig].

While *Craig* dealt with on-line text messages sent to and held by a third party, the issue is similar – the receipt and retention of communications by a non-state agent. Craig had a direct interest in the recorded messages because he was party to them. They were a permanent record of his private communications.

The primary argument raised against an expectation of privacy in *Craig* was his “loss of control” over the message once sent [or said]. In other words ownership and control of the recordings by the recipient are relevant considerations. By simply communicating the information to another, he ran the risk that that person may reveal it to others.

This type of risk analysis is based on United States precedent that in communicating with another, an individual “takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to another... even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”⁹⁰

However such risk analysis is inconsistent with existing Canadian law.⁹¹ Accordingly, although ownership and control (of the records or recordings) are relevant considerations, they are not determinative nor should it be given undue weight. As noted by the court in *Craig*:

Although the expectation of privacy in these circumstances may be diminished somewhat, it is by no means obliterated. “A reasonable though diminished expectation of privacy is nonetheless a reasonable expectation of privacy, protected by s. 8 of the *Charter*” ... In the ordinary course, people reasonably expect the other party to maintain confidentiality in private communications.⁹²

Craig still had a privacy interest because he authored the content of the messages. As such, where the action or activity occurs in the police workplace, the *Charter* will apply. Even if the dispute or issue that led to the secret recording is determined to be a private one, albeit on work time or property, the *Charter* will still have some application in the subsequent use of that information.

⁹⁰ Cf *United States v Miller*, 425 US 435 at 442, (96 S Ct 1976). Also see *Hoffa v United States*, 385 US 293 at 302 (SC US 1966).

⁹¹ *Craig*, *supra* note 89 at paras 108-116.

⁹² *Ibid* at para 121, citing *R v Cole*, 2012 SCC 53 at para 9, [2012] 3 SCR 34 and *R v Buhay*, 2003 SCC 30 at para 22, [2003] 1 SCR 631.

Although the Supreme Court has held that the *Charter* does not apply to private, common law litigation directly, the judiciary must “apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution”.⁹³ In adopting such language the Court was careful to distinguish between *Charter* ‘values’ and *Charter* ‘rights’, limiting the application of the former to the interpretation of the common law.

Indeed, as we have already seen, *Charter* values have been imported into labour and employment law outside the criminal law context in workplace privacy cases such as *Re Steels Industrial Products*⁹⁴ and *Doman Forest Products*.⁹⁵

VI. BREACH OF CONFIDENCE

Breach of confidence deals with unauthorised use or disclosure of certain types of confidential information. While the majority of cases have concerned business records or trade secrets⁹⁶ it can apply to personal information as well. The elements of breach of confidence include components of breach of privacy.

First, the information itself must have the necessary quality of confidence about it. It applies only to information that remains confidential. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. It will not attach to trivial information. Third, there must be an unauthorized use of that information to the detriment of the party communicating it, which is not outweighed by the public interest in disclosure.⁹⁷

Breach of confidence is the misuse of confidential information, including information of a private character. It is a doctrine restraining the dissemination of confidential information improperly or surreptitiously obtained. As noted by Laws J in *Hellewell v Chief Constable of Derbyshire*:

⁹³ *Dolphin Delivery Ltd v RWDSU, Local 580*, [1986] 2 SCR 573 at 38, 33 DLR (4th) 174. Also see *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 92, 24 OR (3d) 865 (note) and *WIC Radio v Simpson*, 2008 SCC 40 at para 16, [2008] 2 SCR 420.

⁹⁴ *Supra* note 60.

⁹⁵ *Supra* note 80. Also see Lorne Sossin & Mark Friedman, “*Charter* Values and Administrative Justice” (2014) 67 SCLR (2d) 391.

⁹⁶ *Cf Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14.

⁹⁷ *Coco v A N Clark (Engineers) Ltd* (1969), [1969] RPC 41 at 47 (Ch).

If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on the public interest would be available.⁹⁸

Information provided to public authorities will most often include an obligation of confidence. For example the City of Winnipeg *Police Service Regulation By-law* specifically prohibits the disclosure of “confidential information to anyone who is not authorized to receive it”, including personnel information.⁹⁹

In the labour context, breach of confidence has been used to grant injunctions to suppress the further disclosure of confidential documents or information, even where they pass to third parties¹⁰⁰ or to discipline employees who have disclosed confidential information including details of a harassment complaint.¹⁰¹ Rather than seeking to prevent a privacy breach, it has also been used as a cause of action where disclosure has already occurred.¹⁰²

A duty of confidence will also arise whenever a party knows or ought to know that the other person can reasonably expect their privacy to be protected. This approach was used by Lord Goff in *Attorney-General v*

⁹⁸ *Hellewell v Chief Constable of Derbyshire*, [1995] 1 WLR 804 at 807 (QB). Also see *Francome v Mirror Group Newspapers Ltd*, (1984) 2 ALL ER 408, [1984] 1 WLR 892 regarding an injunction to stop the publication of transcripts of calls from an illegal recording device placed on the jockey John Francome’s private telephone line.

⁹⁹ The City of Winnipeg, *By-Law No. 7610/2000* (Winnipeg: 24 May 2000) s 20.05(c). online:
<<http://clkapps.winnipeg.ca/dmis/documents/docext/bl/2000/2000.7610.pdf>>.

¹⁰⁰ *Cf Fraser Health Authority v Hospital Employees’ Union*, 2003 BCSC 807, 226 DLR (4th) 563, *Telus v Telecommunications Workers’ Union*, 2005 BCSC 642, 46 BCLR (4th) 315 and *Cadbury Schweppes v FBI Foods*, [1999] 1 SCR 142, 59 BCLR (3rd) 1.

¹⁰¹ *Heritage Credit Union v USW, Local 1-405* (2009), 186 LAC (4th) 252, [2010] BCWLD 3397. Also see *GR Baker Memorial Hospital Society and HEU*, (1997), 50 CLAS 305, [1997] BCCAAA No 815, and *Yellowknife Education District No 1 and USWA, Local 8646* (1992), 28 CLAS 135, 1992 CarswellNat 2258.

¹⁰² *Kawartha Pine Ridge District School Board and Elementary Teachers’ Federation of Ontario* (2008), 169 LAC (4th) 353, 92 CLAS 369.

*Guardian Newspapers (No 2)*¹⁰³ and confirmed in *Campbell v MGN Ltd* by the House of Lords¹⁰⁴ Whether a duty arises will depend on all the circumstances of the relationship between the parties and the nature of the material in question.

In *Constable McPhee v Brantford Police Service* a police officer was dismissed, in part, for breach of confidence after he had accessed police databases on numerous occasions in an attempt to obtain personal information on individuals for his own private use and not for police business. His conduct was found to have seriously undermined the public's confidence and trust that officers will honour their sworn oath governing the use of confidential information systems. As one of the systems, CPIC, is managed by the RCMP, the conduct was found to have seriously eroded the trust with that agency under the terms of the operating agreements allowing the Brantford Police to access the system. The panel concluded that only a substantial meaningful penalty would prevent or reduce the damage to the reputation of the Service.¹⁰⁵

Courts have also been held that activities in public may, in certain circumstances, also attract a reasonable expectation of privacy. A person walking down the street, for example, can expect to be observed by others, but may not expect their movements to become a permanent record. This is especially so in the context of visual surveillance employed by the state.

For example, in *Peck v United Kingdom*¹⁰⁶ the applicant was recorded on a municipal CCTV system carrying a large knife shortly after a suicide attempt. The recording saved his life as the CCTV operator alerted the police. However, the subsequent dissemination of the footage to local newspapers and television stations in order to publicize the value of the CCTV system infringed his rights. Similarly in Canada, as noted by the Supreme Court in *R v Spencer* quoting Justice La Forest in *R v Wise* [1992] 1 SCR 527:

In a variety of public contexts, we may expect to be casually observed, but may justifiably be outraged by intensive scrutiny. In these public acts we do not expect to be personally identified and subject to extensive surveillance, but seek to merge into the 'situational landscape': p. 558 (emphasis added), quoting M. Gutterman, "A Formulation of the Value and Means Models of the Fourth Amendment in the

¹⁰³ *Attorney-General v Guardian Newspapers (No 2)*, [1990] 1 AC 109 (HL (Eng)).

¹⁰⁴ *Campbell v MGN Ltd*, [2004] 2 All ER 995 (HL (Eng)).

¹⁰⁵ *McPhee v Brantford Police Service*, 2012 CanLII 102122 (ON CPC) at para 127.

¹⁰⁶ *Peck v United Kingdom* (2003), 36 EHRR 41.

Age of Technologically Enhanced Surveillance” (1988), 39 *Syracuse L. Rev.* 647, at p. 706. The mere fact that someone leaves the privacy of their home and enters a public space does not mean that the person abandons all of his or her privacy rights, despite the fact that as a practical matter, such a person may not be able to control who observes him or her in public.¹⁰⁷

Furthermore, information, specifically audio recordings made by police officers while working, is the property of the police department, not the officer, and may not be used or disclosed without the permission of the department.¹⁰⁸ While “use” does require some active employment of the information for some purpose, it is extremely broad and could include threatened disclosure in order to influence another.¹⁰⁹ Such a use may also involve misfeasance in public office.

A. Misfeasance in Public Office

Where a police activity is undertaken in bad faith, a claim in misfeasance in public office may lie; this could occur where damaging information is obtained and used by an officer because of a grudge they have against the other person. A claim against of negligence may also lie where damages result.

In *Odhavji Estate v Woodhouse* the Supreme Court set out the essential elements of the tort of misfeasance in public office:

- a) The official engaged in unlawful conduct in the exercise of his or her public functions; and,
- b) The official was aware that the conduct in question was unlawful and likely to injure the plaintiff.¹¹⁰

Although a public officer may make a decision adverse to the interest of certain individuals, so long as the decision is rational, made in good faith, and it is not inconsistent with the obligations of public office, the tort will

¹⁰⁷ *R v Spencer*, 2014 SCC 43 at para 44, 375 DLR (4th) 255. Also see *Alberta v UFCW*, *supra* note 3, as well as *Aubry c Éditions Vice-Versa Inc*, [1998] 1 SCR 591, 339 DLR (4th) 379 regarding the application of the Quebec Charter to protect against non-consensual photography in public places and the harms to autonomy interests.

¹⁰⁸ Cf Vancouver Police Department, “Regulations and Procedures Manual”, (Vancouver: Police Department, May 2006) at s 1.9.1 [Vancouver Police Department], online: <<http://vancouver.ca/police/assets/pdf/manuals/vpd-manual-regulations-procedures.pdf>>.

¹⁰⁹ *Leach v Bryam*, 68 F Supp (2d) 1072 (D Minn 1999).

¹¹⁰ *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263.

not apply. However, Justice Iacobucci for the Court concluded that the tort was not just limited to the abuse of statutory powers, but was “more broadly based on unlawful conduct in the exercise of public functions generally”. He continued:

[T]here is no principled reason... why a public officer who wilfully injures a member of the public through intentional *abuse* of a statutory power would be liable, but not a public officer who wilfully injures a member of the public through an intentional excess of power or a deliberate failure to discharge a statutory duty. In each instance, the alleged misconduct is equally inconsistent with the obligation of a public officer not to intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.¹¹¹

Iacobucci concluded that the tort could be grounded in a broad range of misconduct, and that the essential question is whether the alleged misconduct is deliberate and unlawful. “Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties”.¹¹²

B. Whistleblower Protection

Information collected by or provided to public authorities will often include an obligation of confidence. Employees owe a duty of loyalty to their employers and are required, with certain exceptions, to disclose incidents of wrongdoing to their employer first in order to provide them with an opportunity to remedy it.

While most provinces and US states have whistleblower legislation that protects those who report suspected wrongdoing; such legislation usually sets forth specific categories of disclosures that are protected by law, with any disclosure falling outside those very specific boundaries being unprotected. Resort to social media, newspaper reporters, discussions with neighbors, or sharing information with patrons of a bar are not proper disclosure.

Whistleblowing occurs when employees reveal corporate wrongdoing, usually in their own organization and to the proper authorities. In April 2007 Manitoba’s *Public Interest Disclosure (Whistleblower Protection) Act* came

¹¹¹ *Ibid* at para 30.

¹¹² *Ibid* at para 29.

into force¹¹³ offering a mechanism for the disclosure of wrongdoings in the public service and provisions to protect whistleblowers. The Act covers the public service of Manitoba, including government agencies, departments, and specified offices. While it does not include municipal governments, recent attempts have been made to include them.¹¹⁴

Employees who reasonably believe that they have information that could show that a wrongdoing has been committed, or is about to be committed, can make a disclosure to his or her supervisor, a designated officer, or to the Ombudsman. A disclosure must be in writing and contain certain information required by the Act. Wrongdoing is defined as including:

- a) an offence under an Act or Regulation of the Legislature or the Parliament of Canada;
- b) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment; or
- c) gross mismanagement of public funds or a public asset.¹¹⁵

Such “up-the-ladder” reporting to a supervisor or designated officer reconciles an employee’s duty of loyalty to his or her employer with the public interest in the suppression of unlawful activity. Failure by a whistleblowing employee to try to resolve the matter otherwise may be categorized by courts and labour arbitrators as disloyal and inappropriate conduct. As noted by the Supreme Court of Canada in *Merk v Iron Workers Union, Local 771*:

Whistleblower laws create an exception to the usual duty of loyalty owed by employees to their employer. When applied in government, of course, the purpose is to avoid the waste of public funds or other abuse of state-conferred privileges or authority. In relation to the private sector (as here), the purpose still has a public interest focus because it aims to prevent wrongdoing “that is or is likely to result in an offence”. (It is the “offence” requirement that gives the whistleblower law a public aspect and filters out more general workplace complaints.) The underlying idea is to recruit employees to assist the state in the suppression of unlawful conduct. This is done by providing employees with a measure of immunity against employer retaliation.

...

¹¹³ *Public Interest Disclosure (Whistleblower Protection) Act*, CCSM c P217, [Whistleblower Act].

¹¹⁴ Bill 39, *The City of Winnipeg Charter Amendment and Public Interest Disclosure (Whistleblower Protection) Amendment Act*, 4th Session, 40th Leg, Manitoba, 2015.

¹¹⁵ *Whistleblower Act*, *supra*, note 113, s 3.

The general principles of labour relations provide, I believe, the appropriate context. In employment law, there is a broad consensus that the employee's duty of loyalty and the public's interest in whistleblowing is best reconciled with the "up the ladder" approach.¹¹⁶

While an employee can make a public disclosure without first going "up-the-ladder" where they reasonably believe that the matter constitutes an imminent risk of a substantial and specific danger to the life, health or safety of persons or to the environment, and that there is insufficient time to make a disclosure in accordance with the requirements of the Act, they must first make the disclosure to an appropriate law enforcement agency or the chief provincial public health officer (as applicable). Immediately thereafter, the employee must make the disclosure to his or her supervisor or a designated officer. Finally, the provisions that allow an employee to make a public disclosure are subject to any direction that the appropriate law enforcement agency or chief health officer considers necessary in the public interest, if any.¹¹⁷

When done in accordance with the Act, no reprisals may be taken against an employee, or directing that one be taken, because the employee has, in good faith, sought advice about making a disclosure in accordance with the Act, made a protected disclosure or cooperated in an investigation under the Act.

However, where an employee's alleged "wrongdoing" relates to his or her unfair treatment by the employer, such complaints must be grieved or arbitrated under applicable labour laws. Disclosure falling outside the very specific confines of the whistleblower legislation is unprotected. For example, in *Van Duyvenbode v Canada* the Ontario Court of Appeal dismissed the plaintiff's argument that his public letter writing campaign was protected by whistleblower legislation as his grievances consisted of personal workplace issues ~ not institutional wrong-doing that had a public interest component attached to them. As such his complaints should have been heard by the proper labour tribunal. There was no air of reality to his claim that he was a whistleblower.¹¹⁸

¹¹⁶ *Merk v International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70 at paras 14 and 16, [2005] 3 SCR 425. Also see *Haydon v Canada*, 2004 FC 749, [2005] 1 FCR 511, aff'd 2005 FCA 249, [2006] 2 FCR 3, leave to appeal SCC dismissed January 19, 2006 (Docket: 31153).

¹¹⁷ *Whistleblower Act*, *supra*, note 113, s 14(1)-(2).

¹¹⁸ *Van Duyvenbode v Canada (Attorney General)*, 2009 ONCA 11, [2009] OJ No 28, aff'ing 2007 CanLII 26614 (ON SC) at para 6.

Even where an employee has publicly disclosed instances of actual or perceived governmental wrongdoing, disciplinary action has followed. However, the discipline has usually resulted not from the violation of a specific statute, but because the employee has breached their common law duty of loyalty owed to his or her employer. In *Anderson v IMTT Quebec* the Federal Court of Appeal upheld Anderson's dismissal on the grounds that it resulted from the breakdown of the relationship of trust with his employer, his obvious lack of loyalty toward his employer and his attempts to discredit it, and not of anything to do with his whistleblowing disclosure:

[87] The reason for the dismissal was not that the complainant had sought compliance with or enforcement of the health and safety provisions of the Code, but merely that there had been a breakdown of the relationship of trust as a result of the complainant's clear lack of loyalty and the disrepute he had caused the company.

[88] The complainant acted disloyally toward the respondent when, on November 20, 2008, he forwarded an email regarding errors made by a colleague to Mr. Frédéric Perron, a health and safety technician and when, on March 16 and 30, 2009, he forwarded to the union president an email he had sent Mr. Fiset in which he questioned the competence of the terminal manager, as well as a copy of the complaint he had filed against Mr. Dion with the Ordre des ingénieurs du Québec.

[89] In his fierce determination to discredit the terminal manager and his colleagues, the complainant wound up discrediting [his employer].¹¹⁹

A mandatory prerequisite for whistleblowing involves the reporting of the wrongdoing "up-the-ladder" within the organization and that all such reporting mechanisms be exhausted before the confidential information may be disclosed externally. Even then it must first be reported to an enforcement or regulatory agency which shall be advised on any proposed release of information. As such surreptitiously recorded conversations, even if they allegedly involve allegations of wrongdoing, must be reported "up-the-ladder".

¹¹⁹ *Anderson v IMTT Quebec Inc*, 2013 FCA 90, para 19, [2013] FCJ No 346 quoting with approval 2011 CIRB 606 paras 85-87, 2011 CCRI 606.

VII. POLICE CODE OF CONDUCT

A. Deceit / Conduct Unbecoming

Police officers are held to high ethical standards. These standards are enforced both internally and externally through a number of mechanisms. For example the City of Winnipeg *Police Service Regulation By-law* provides that a member commits discreditable conduct where they act in an inappropriate manner, on or off duty, or in a manner likely to bring discredit upon the reputation of the Service; or makes a misleading, oral or written statement or entry in any document or record pertaining to their member's duties; or without proper authority conceals any evidence, document or record, or alters, erases, or adds to any entry therein.¹²⁰ Punishment can range from a warning to dismissal.

Other than the criminal law requirement that agents of the state obtain prior court authorization for covert surveillance where there is an expectation of privacy, there is no specific prohibition on covertly recording other police officers or members of the public. However, such a practice may be deemed likely to bring discredit upon the reputation of the Service. There are no cases on point. However, by analogy to the legal profession it could be deemed to be an unethical or deceitful practice to surreptitiously record other police officers.

B. Law Society Rules

Lawyers have very strict rules regarding the surreptitious recording of other lawyers or their clients. For example the Manitoba Law Society Code of Professional Conduct prohibits its members from using any device to

¹²⁰ *Supra* note 99, s 20(1)(e)-(g). Also see *City of Winnipeg Employee Code of Conduct* Part B, which states:

Employees must observe the highest standards of conduct in the performance of their duties, regardless of personal consideration. The public interest must be their primary concern. Their conduct in their official affairs must be above reproach at all times ... Employees must not engage in any conduct or activity ... which might detrimentally affect the City's reputation, make the employee unable to properly perform his or her employment responsibilities, cause other employees to refuse or be reluctant to work with the employee, or otherwise inhibit the City's ability to efficiently manage and direct its operations.

record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.¹²¹

Chapter XVI of the Canadian Bar Association Code of Professional Conduct rule on “Avoidance of Sharp Practices” extends this prohibition to “anyone else”, even if lawful, without first informing the other person of the intention to do so.¹²² The rationale for the rule, which also exists in the United States and other Commonwealth countries, is to increase public confidence in the legal profession. Surreptitious recording suggests trickery and deceit. In *People v Smith*, the Colorado Supreme Court stated:

The undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound.¹²³

Members of the Bar can only earn a reputation as persons of honor, integrity, and fair dealing where they do not resort to deceptive practices or artifice. Surreptitious recordings demean the Bar as a whole in addition to the particular attorney involved.¹²⁴

The Colorado Rule was also considered to apply to a lawyer’s conduct both in the representation of clients and in the lawyer’s conduct arising in their private life. Specifically, the ban on conduct involving dishonesty, deceit, fraud, or misrepresentation was deemed to apply regardless of whether the attorney was acting in professional or private capacity, but

¹²¹ Law Society of Manitoba, *Code of Conduct*, section 7.2-3. All other Law Societies in Canada have similar provisions. See for example s 7.2-3 Code of Conduct, Law Society of Upper Canada; s 7.2-3 of the Federation of Law Societies; and s 7.2-3 Law Society BC - Professional Conduct Handbook; and Chapter XVI.

¹²² The Canadian Bar Association Code of Professional Conduct, Chapter XVI, Avoidance of Sharp Practices, commentary 5. The Nova Scotia Barristers’ Society Handbook also includes “anyone else”.

¹²³ *People v Smith*, 778 P (2d) 685 at 687 (SC Colo 1989). Also see *People v Selby*, 606 P (2d) 45 (SC Colo 1979) where a criminal defense attorney secretly audio-taped a preliminary hearing in a courtroom, a conference with the district attorney, and the judge in the judge’s chambers. He used some of the recorded information in his motion to disqualify the judge. He was disbarred.

¹²⁴ See Colorado Bar, *Formal Opinions*, Opinion 112 (11/07) 4-37, Surreptitious Recording of Conversations or Statements. Adopted July 19, 2003. Online: <http://www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_112_2011.pdf>.

argued that rule applied only to private conduct when it is so grave as to call into question the lawyer's fitness to practice law.¹²⁵

This type of deceptive practice or misrepresentation was at issue in *Bayly (Re)*. There, a lawyer and Principal Secretary of the Northwest Territories telephoned the territorial Conflict of Interest Commissioner on behalf of the Deputy Premier. He did not tell her that the call was on speakerphone and that other people were present, or that the conversation was being recorded. The lawyer was subsequently brought before the Law Society of the Northwest Territories.¹²⁶

The decision-maker appointed by the Law Society of the Northwest Territories found that while the misinformation regarding the speakerphone was not deliberate, it "was such a great omission that the integrity of the legal profession could be brought into disrepute," thus breaching the rule that "[t]he lawyer must discharge with integrity all duties owed to clients, the court or tribunal or other members of the profession and the public." Although it was noted that Bayly "did not make the recording himself and was placed in that unenviable position by his employer," his failure to rectify the situation was nonetheless grievous:

The image of the member, the Deputy Premier and other senior government staff listening to [the Commissioner] on the speakerphone, while the call was tape recorded, without [the Commissioner's] knowledge, is an image that sears the respect that the public has for lawyers.¹²⁷

In *Nova Scotia Barristers' Society v Ayres*, another lawyer was disciplined for surreptitiously using a tape recorder to record a conversation with a client or former client, without first informing them of her intention to do so.¹²⁸ Although Ayre claimed the reasons for making the recordings were two-fold: to make "voice notes" and "to protect myself", which she felt was necessary due to her past experiences, including discrimination by others. As such she felt she did not violate the letter or spirit of the Rule as the

¹²⁵ See David B Isbell & Lucantonio N Salvi, "Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct" (1995) 8:4 *Geo J Leg Ethics* 791 at 816; and Patrick O'Rourke, "Discipline Against Lawyers for Conduct Outside the Practice of Law" (2003) 32:4 *Colo Lawyer* 75.

¹²⁶ *Bayly (Re)*, 2002 CanLII 53208 (NWT LS).

¹²⁷ *Ibid* at 5.

¹²⁸ *Nova Scotia Barristers' Society v Ayres*, 1998 NSBS 1. Also see *Law Society of Upper Canada v Paul Ross*, 2011 ONLSAP 4.

recordings were not done to take advantage of anyone. Furthermore, as she was not a state agent, and such recordings were not illegal.

The decision-maker appointed by the Barristers' Society agreed that such non-consensual recordings were not illegal. However, the gravamen of the ethical transgression lay in the absence of the client's knowledge and consent. Not whether it was criminal.

While Ayre argued that it was not unethical to protect oneself against liars and those who are motivated by discrimination, the decision-maker assumed without deciding that such recordings might in some exceptional cases be so justified and thereby not unethical, such was not the case and the actions in tape recording were not motivated by these concerns. Rather the tapes were used to discredit a client and also to support an independent complaint against the client. Furthermore, if the intent was innocent, then disclosure would have been made habitually.

In finding Ayre guilty of professional misconduct, the decision-maker stated that "it is a cornerstone of the legal profession that every lawyer has a duty to conduct his or her affairs with integrity. Integrity is the basis on which our rules of professional responsibility are founded. If we do not maintain this fundamental duty, the legal profession cannot expect to retain the public trust or preserve the reputation of the profession". After careful consideration of all of the foregoing, the Panel, by majority, hereby sentenced her to:

- a. a suspension for a minimum term of six months, and continuing until the Society shall have received an opinion of a qualified medical practitioner that the Member is medically and psychologically fit to practice law.
- b. attend and successfully complete the Skills Training component of the Bar Admission Course offered through the Nova Scotia Barristers' Society, within one year of the date of this decision;
- c. attend and successfully complete the Legal Profession and Professional Responsibilities Course offered through Dalhousie Law School, within one year of the date of this decision;
- d. reimburse the Society for its costs amounting to \$200,034.99.¹²⁹

It is also worth considering the New Zealand Court of Appeal decision in *Harder v Proceedings Commissioner* where it was pointed out that while consent recordings are not illegal, they may still be excluded where they are unfair. Not unlike the New York decision in *Matter of Harry R. v Esther R.*

¹²⁹ *Ibid* at 124-25.

the Court compared this to the Rules of Professional Conduct for Barristers and Solicitors which read:

It is an invasion of a person's privacy to tape a conversation without that person's consent. It is unprofessional and discourteous for one practitioner to do so in respect of another. If a practitioner wishes a conversation by telephone or otherwise to be taped, the specific consent of the other practitioner or employee must first be obtained. Practitioners should note Privacy Principles 2 to 4 of the Privacy Act 1993.¹³⁰

The Court then reasoned that unfairness had been made out. Lawyering is an honourable profession and the client was entitled to assume the lawyer would behave appropriately. The duty owed to his client did not entitle him to abandon proper professional standards.

In New York, where the law allows surreptitious recordings, the Association of the Bar of the City of New York is also more liberal. Providing that a lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good. However, undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice.¹³¹

Suffice to say, as a highly regulated profession, police officers should be held to no less a standard than lawyers in ensuring public trust and confidence.

C. Body Worn Cameras

Policies and procedures regarding overt recordings would equally apply to covert recordings in terms of security, storage, retention and disclosure. As many police agencies look at Body Worn Cameras as a means of

¹³⁰ *Harder v Proceedings Commissioner*, [2000] NZCA 129 (CA) citing paragraph 7 of New Zealand Law Society, *Rules of Professional Conduct for Barristers and Solicitors*, 1998.

¹³¹ The Associations of the Bar of the City of New York, *Re: Undisclosed Taping of Conversations by lawyers*, 2003-02. online: <<http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2003-02-undisclosed-taping-of-conversations-by-lawyers-1>>. Also see, Ohio Board of Commissioners on Grievances & Discipline, *Re: Surreptitious (Secret) Recording by Lawyers*, 2012-1, in which 10 state Bars are identified as holding that surreptitious recording is both illegal and unethical for lawyers. In 9 other states surreptitious recording is unethical, but allowed in certain circumstances.

recording police interactions with the public, guidelines have been issued identifying the risks and proper procedures for their use. For example in February 2015 the heads of all Canada’s privacy agencies endorsed the document “Guidance for the use of body-worn cameras by law enforcement authorities”.¹³²

The privacy commissioners were clear that before embarking on *overt* recordings, police agencies should establish written policies and procedures that clearly identify the program objectives and set out the rules governing the program. These policies and procedures should include the elements listed below:

- The legislative authorities for collecting personal information under the program.
- Criteria for context-specific continuous recording and/or turning cameras on and off, as applicable.
- Privacy protections for employees whose personal information is captured.
- Individuals’ right to make a complaint to the agency’s privacy oversight body regarding the management of a recording containing personal information.
- A provision for regular internal audits of the program.
- The name and contact information of an individual who can respond to questions from the public.
- The circumstances under which recordings can be viewed. Viewing should only occur on a need-to-know basis. If there is no suspicion of illegal activity having occurred and no allegations of misconduct, recordings should not be viewed.
- The circumstances under which recordings can be disclosed to the public, if any, and parameters for any such disclosure. For example,

¹³² Office of the Privacy Commissioner of Canada et al, *Guidance for the use of body-worn cameras by law enforcement authorities*, online: PCC <http://publications.gc.ca/collections/collection_2015/cpvpc-opc/IP54-61-2015-eng.pdf>.

faces and identifying marks of third parties should be blurred and voices distorted wherever possible.

- A mechanism for dealing with any breaches whereby personal information is accessed without authorization or disclosed contrary to the provisions of applicable privacy laws.
- A process for responding to requests for access to recordings, including access to personal information and access to information requests under freedom of information laws.
- Retention periods and disposal provisions.¹³³

These policies and procedures should be made available to the public to promote transparency and accountability. Furthermore retention policies for recordings, including recordings to be used as evidence, should be consistent with applicable laws, such as the *Canada Evidence Act* and the applicable *Police Services Act*, or municipal records retention by-laws.

Furthermore it should be clear that audio recordings made by police officers while working are the property of the police department, not the officer, and may not be used or disclosed without the permission of the department.¹³⁴ As such any rules and policies that apply to overt recording would apply equally to covert recordings including recordings made using an officer's own personal device.

D. BYOD (Bring Your Own Device)

Many employees want to bring their own personal communication devices to work ~ some for work purposes and others for personal reasons such as maintaining contact with friends and family. The current generation of cell phones, or smart phones, all have the capability to take pictures, videos, and make sound recordings. Generally there is no prohibition on employees bringing their own devices to work (BYOD).

Some of the main reasons companies are generally accepting of employees bringing their own devices are related to increased employee satisfaction, productivity gains (employees are happier, more comfortable and often work faster with their own technology), and cost savings (device

¹³³ *Ibid.*

¹³⁴ Cf "Body Worn Cameras", *supra* note 10. Also see Vancouver Police Department, *supra* note 108.

purchase and maintenance). Some 43% of employees even connect to their work emails on their own smartphones in order to get ahead and ease their workload.¹³⁵

While such practices as BYOD may be here to stay, they do create information and governance challenges when it comes to the use of personal devices at or for work purposes. These challenges include the duty to maintain the security and confidentiality of any work-related information used or stored on the device. Employers need to consider how BYOD policies can be integrated into the workplace, dealing with such diverse topics as social media, harassment and discrimination, records retention, compliance and ethics, as well as employee privacy. “Allowing employees to use their personal devices at work make it easier for them to defame the company, their co-workers, customers, vendors, competitors and others or to unlawfully harass their co-workers or subordinates ~ whether via social media, texting or good, old-fashioned phone calls. Employees using their personal devices may feel more at ease to engage in such inappropriate activity than they would on company-provided equipment”.¹³⁶

Law enforcement agencies also need to consider security issues surrounding information stored on such devices, outside of inappropriate use. For example a recent Freedom of Information request to the London Metropolitan Police revealed that 534 mobile phones, 115 BlackBerry devices, and 136 PDAs had been lost since 2010. While these were work issued devices, the risk from lost, stolen, or misplaced personal devices containing information recorded at work is perhaps even greater due to the lack of control an employer has over security applications (if any) on an employee’s personal device.

¹³⁵ Unify, “BYOD: Bring your own Policy”, 2nd ed (Germany: 2016), online <http://www.unify.com/~media/internet-2012/documents/white-paper/BYOP_Bring_Your_Own_Policy.pdf>. However, a recent survey by the Canadian Federation of Independent Business (CFIB), found that 61 per cent of Canadian employers said the biggest challenge to workplace productivity were their employees’ use of personal cellphones during work hours. Online: CFIB <<http://www.cfib-fcei.ca/english/article/7602-small-business-views-on-the-canadian-workforce.html>>.

¹³⁶ Paul G Lannon & Phillip M Schreiber, “BYOD Policies: What Employers Need to Know”, *HR Magazine* (1 February 2016), online: HRMagazine <<https://www.shrm.org/hr-today/news/hr-magazine/Pages/0216-BYOD-policies.aspx>>.

Once information is in the wrong hands the employer loses control over what is done with it. There have been cases where public officers have inappropriately recorded videos of crime scenes, victims, or witnesses with their personal devices and then seen them posted on social media. In 2010 Firefighter Terrance Reid used his personal phone to videotape the body of Dayna Kempson-Schacht, the victim in a fatal vehicle accident. Reid shared the video with other firefighters on his crew, one of whom began sending the video to others. It was subsequently posted online and from there it went worldwide, appearing on as many as 800 web sites.¹³⁷

While the vehicle was in public view, accessible to the general public, and could have legally been recorded by anyone in the vicinity, Reid was terminated by the fire department for “conduct unbecoming.” Six other firefighters were reprimanded for distributing the footage and the fire department for which Reid worked was sued. Had Reid been a private citizen, the video or pictures would have been his property. But because he was on duty at the time, the recordings were made in his capacity as a firefighter and not as a member of the public.

[Furthermore] if another vehicle had been involved in the accident or had another death occurred, the video images taken by Reid would have had to be properly preserved as evidence. If any part of the photographic evidence were deleted, changed, or misplaced, Reid could have been charged with “spoliation,” the misappropriation or destruction of evidence. Because spoliation can change the course of a criminal or civil case, the individual deleting such imagery could be sentenced to a term of imprisonment. In cases using spoliation as a defense, the defense attorney can argue that the missing images raise reasonable doubt, preserving his client's innocence. In a civil case, a judge can easily rule against one side for not properly preserving evidence. Other legal implications can be very expensive, as the entire department becomes a target for a lawyer retained by an offended family member.¹³⁸

¹³⁷ Kent Collins, “The Fire Department and Social Media: What's Your Policy?,” *Fire Engineering Magazine* (1 May 2012), online: Fire <<http://www.fireengineering.com/articles/print/volume-165/issue-5/features/the-fire-department-and-social-media-whats-your-policy.html>>.

¹³⁸ *Ibid.* Also see Rabin & Smiley, *supra* note 19, where Officer Jackson was relieved from duty, not for making a recording with his personal GoPro device, but for failure to maintain, preserve and retain the recording in accordance with Florida's Public Records statute. Also see Stephanie Lee, “Facebook murder picture horror inspires bill”, *Times Union* (31 March 2011), online: TimesUnion <<http://www.timesunion.com/local/article/Facebook-murder-picture-horror-inspires-bill-1315710.php>>, where New York EMT Mark Musarella took a picture of a homicide

Similar posts have resulted in the passage of police policies and guidelines regarding the use of social media. For example, the Detroit Police Department issued its guidelines in 2011 after an officer posted photos of a suspect wielding a machete on his Facebook page. That same year, the Albuquerque Police also barred department members from identifying themselves on social media. That order came shortly after an officer, involved in a fatal police shooting, was seen on Facebook describing his job as “human waste disposal.”¹³⁹

A Washington DC Metropolitan Police policy on *Photographs, Video Recordings, and Audio Recordings of Crime Scenes*, passed by the Chief Lanier in 2013, outlines procedures for officers taking photographs, video recordings, and audio recordings while on-duty, or acting in any official capacity at crime scenes, whether or not they are using police-issued or personal equipment. The policy restricts members in taking photographs, video recordings, and audio recordings of crime scenes, victims, and witnesses for only official law enforcement purposes. Further, “unless previously released by the Department, members shall not copy, print, e-mail, display, distribute or in any other manner permit photographs, video recordings or audio recordings related to any [] investigations to be viewed or released for other than official purposes”.¹⁴⁰

A BYOD responsible use policy will have little impact or enforceability if employees are not made aware of it, or the consequences if they do not comply with it. Further guidelines containing important recommendations that would enable organizations to reconcile organizational security concerns with their obligations pursuant to applicable privacy law were issued in 2015 by the Office of the Privacy Commissioner of Canada in a

victim with his cell phone and uploaded it to Facebook. Musarella was fired and charged with a misdemeanor before he pleaded guilty to a reduced charge of “disorderly conduct” and sentenced to 200 hours of community service.

¹³⁹ J D Goodman and Wendy Ruderman, “Police Dept. Sets Rules for Officers’ Use of Social Media”, *New York Times* (28 March 2013), online: NYTimes <<http://www.nytimes.com/2013/03/29/nyregion/new-york-police-dept-issues-guidelines-for-social-media.html>>.

¹⁴⁰ Metropolitan Police, District of Columbia, “Photographs, Video Recordings, and Audio Recordings of Crime Scene”, MPDC Policy SO-13-13, online: MPDC <https://go.mpdconline.com/GO/SO_13_13.pdf>.

joint release with the British Columbia and Alberta Information and Privacy Commissioners.¹⁴¹

VIII. EVIDENTIARY ISSUES

A. Authentication

All the cases dealing with the admissibility of electronic data go to show that such admissibility depends upon (1) their accuracy in truly representing the facts; (2) their fairness and absence of any intention to mislead; and (3) their verification on oath by a person capable of doing so.

However, the admissibility of intercepted conversations raises a number of questions quite apart from the legality of the interception. Privately recorded conversations are more likely to be found inadmissible than those recorded by the state as it is often more difficult for private individuals to show the information is accurate, authentic, and trustworthy. Some of the requirements for admissibility were previously discussed in the section on Criminal Law.

For example, in *R v Andalib-Goortani*,¹⁴² Justice Trotter excluded photographic evidence of a police officer (accused) taken in public by a 3rd party as it lacked authenticity and trustworthiness. While Justice Trotter held that such evidence is not presumptively inadmissible, like similar fact evidence, hearsay, or prior consistent statements, which does not mean it is *automatically* admissible. Instead it is *conditionally* admissible. Certain pre-conditions must be “established” on the basis of “some evidence”.

This proposition, he stated, is demonstrated in *R v Nikolovski* where the Supreme Court considered the admissibility of videotape evidence:

Once it is established that a videotape has not been altered or changed, and it depicts the scene of a crime, then it becomes admissible and relevant evidence.

¹⁴¹ Office of the Information and Privacy Commissioner of Canada et al, “Is a Bring Your Own Device (BYOD) Program the Right Choice for Your Organization?” (Gatineau: OIPC, August 2015), online: OIPC <<https://www.oipc.bc.ca/guidance-documents/1827>>.

¹⁴² *R v Andalib-Goortani*, 2014 ONSC 4690, [2014] OJ No 4499. Also see Dan Grice & Bryan Schwartz, “Social Incrimination: How North American Courts are Embracing Social Network Evidence in Criminal and Civil Trials” (2012) 36:1 Man LJ 221 at 236-249; and Rosemary Pattenden, “Authenticating ‘Things’ in English Law: Principles for Adducing Tangible Evidence in Common Law Jury Trials” (2008) 12:4 Int’l J Evidence & Proof 273.

Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but is to a certain extent, testimonial evidence as well.¹⁴³

The party wishing to make use of a photograph bears the burden of authentication. Recent experience shows that digital photographs can be changed to produce false images. Indeed, with the advent of computer software and programs such as Adobe Photoshop “it does not always take skill, experience, or even cognizance to alter a digital photo.”¹⁴⁴

Similarly in *Focus Building Services Ltd. and Construction and General Workers' Union, Local 602*, a British Columbia Industrial Relations Council appeal panel also expressed concern about tape recorded evidence. Where there was no doubt that such recordings could be of assistance in certain cases, particularly in assessing credibility, the party wishing to introduce it must first satisfy the panel of both the accuracy of the recordings and the justification for their admittance.

Authenticity requires as a minimum that the identity of the persons alleged to be taking part in a conversation be established, that the tape recordings are found to be accurate insofar as there are no omissions or deletions and the method used in taping a conversation ensures an accurate representation. The party wishing to introduce the tape recordings must also convince the panel that the probative value of the evidence is more significant than the consequences that taping conversations would have on sound industrial relations.¹⁴⁵

Similarly, in 2013, the English Employment Appeal Tribunal considered the case of *Vaughan v London Borough of Lewisham*, which involved an application to admit into evidence 39 hours of recordings the claimant had made of her interactions with managers and colleagues, to

¹⁴³ *Ibid* at para 26, citing *R v Nikolovski*, [1996] 3 SCR 1197, 141 DLR (4th) 647. Also referencing *R v Penney* [2002] NJ No 70 (QL) at 335 and 342, 163 CCC (3d) 329. Also see *R v George Jack Giroux*, 2013 NWTTC 4, [2013] 2 WWR 130, for audio recordings excluded for lack of authentication even though they were recorded in the Slave Correctional Centre in Yellowknife. However see *R v Bulldog*, 2015 ABCA 251, 326 CCC (3d) 385, where the claim will typically be not that it is something, but that it accurately represents something (a particular event).

¹⁴⁴ Zachariah B Parry, “Digital Manipulation and Photographic Evidence: Defrauding The Courts One Thousand Words At A Time” (2009) 2009:1 U Illinois JL Tech. & Pol’y 175 at 183.

¹⁴⁵ *Focus Building Services Ltd and Construction and General Workers' Union, Local 602*, [1997] CLAD No 126, 1987 CLB 12097, Industrial Relations Council, Appeal of BCLRB No 331/86.

support her claims of discrimination, victimisation and harassment, whistleblower detriment, and unfair dismissal.¹⁴⁶

Ms. Vaughan did not supply copies of the transcripts, nor the tapes and her application to submit the recordings as evidence was rejected on the grounds that she had not shown that they were relevant. On appeal Justice Underhill upheld the decision, stating:

We should say...that the practice of making secret recordings in this way is, to put it no higher, very distasteful; but employees such as the claimant will no doubt say that it is a necessary step in order to expose injustice. Perhaps they are sometimes right, but the respondent has already made it clear that it will rely on the claimant's conduct in making these covert recordings, as illustrative of the way in which her conduct had destroyed any relationship of trust and confidence between her and it.¹⁴⁷

In a separate decision the Employment Appeal Tribunal upheld the costs awarded against the Claimant estimated to be around £87,000, despite the fact she was unemployed and unrepresented before the tribunal.¹⁴⁸

However, even where authentication is not the issue, information that is surreptitiously obtained or misappropriated from a workplace to support a harassment and discrimination grievance (in this case by a compliance officer) – no matter how well-meaning – is likely to be inadmissible regardless of motivation. Self-help measures are not a justification. “Otherwise, it might be considered proper for any aggrieved individual to take and/or surreptitiously reproduce company (or for that matter union) documents in support of any grievance or other righteous cause, thereby undermining any semblance of mutual trust essential to the running of the workplace”¹⁴⁹

From a criminal or regulatory perspective this is not unlike the situation in *R v Law* where evidence of tax evasion located by the police in a safe stolen from the accused's business was found to be inadmissible. A police officer suspecting the accused of tax evasion photocopied documents from the recovered safe and forwarded them to Revenue Canada. Although

¹⁴⁶ *Vaughan v London Borough of Lewisham* (2013), [2013] EWHC 4118 (QB).

¹⁴⁷ *Ibid.*

¹⁴⁸ *Vaughan v London Borough of Lewisham*, Appeal No UKEAT/0533/12/SM, (2013), 2013 WL 2460246.

¹⁴⁹ *Ontario Public Service Employees Union v Ontario (Ministry of Finance)* (Fortin Grievance), [2017] OGSBA No 18 (Luborsky) at para 23, quoting *North Bay Nugget v North Bay Newspaper Guild, Local 30241* [Seguin Grievance], (2005) 82 CLAS 306, 143 LAC (4th) 106 (Ont Arb), at para 33.

admitting the evidence would not affect the fairness of the trial (it being real, discoverable, non-conscripted evidence), and excluding the evidence would compromise the Crown's case, the Supreme Court held the violation outweighed the State's interest in admitting the evidence.

The officer's approach, behaviour and disrespect for regular police procedures combined with his failure to leave responsibility for the investigation to taxation authorities when that option was available rendered his conduct sufficiently serious to exclude the photocopied documents ... The administration of justice would suffer greater disrepute from the admission of the evidence than from its exclusion.¹⁵⁰

IX. CONCLUSION

In 2011 *ABC News* reported that employees are increasingly using digital devices to record conversations in the workplace, and sometimes using the recordings to launch complaints against their employers. While the frequency of secret workplace recordings is unknown, the article suggests that it happens often enough that employers should assume that all meetings with employees are being recorded.¹⁵¹

As such it is to be expected in an era of mass digital communications that many police officers will be increasing their use of digital devices to secretly record conversations in the workplace and/or their interactions with the public, sometimes using such recordings to launch complaints against their employers.

Although Craig MacMillan suggested it may be possible for police officers to make personal interest recordings, where the recordings are covertly or surreptitiously made in the workplace of other officers without a court order, they may not be admissible in any proceedings for a number of reasons ~principally because such recordings may be unethical, it would be breach of confidence and privacy, and/or because it would undermine the spirit of trust and confidence between the parties. It may also be unlawful without a court order. However, with the potential of opposing rulings in the Michel Ledoux case between the civil and criminal courts, I anticipate this is a decision ripe for the Supreme Court of Canada to decide.

Nevertheless there is no guarantee that such recordings would not become public and police employers should have clear policies that such

¹⁵⁰ *R v Law*, 2002 SCC 10 at the headnote, [2002] 1 SCR 227.

¹⁵¹ *Supra* note 8.

practices are prohibited in the police workplace, adopting a similar policy to that of the United States Federal Aviation Administration:

Covert/secret taping, either audio or video, of any conversation or meeting occurring at the workplace or conversation or meetings off-site that deal with workplace issues and matters of official concern are prohibited. Examples of such meetings are promotion interviews, EEO meetings with a counselor or investigator, meetings between a manager and a subordinate, etc. This prohibition applies regardless of any State law which may permit covert/secret tape recording.¹⁵²

Employers understandably want control over the documentation of what occurs in the workplace. In addition employees may not realize it could be against the law. Prevention is the best precaution against such uses in the workplace. Otherwise there is, of course, no way of knowing whether you are being watched at any given moment by the thought police, “[y]ou have to live ~ do live, from habit that becomes instinct ~ in the assumption that every sound you made is overheard, and except in darkness, every movement scrutinized”.¹⁵³

¹⁵² US, Federal Aviation Administration, “Human Resources Policy Manual (HRPM) Volume 4: Employee Relations ER -4.1” (Washington: FAA, 2 March 2011).

¹⁵³ Paraphrasing George Orwell, *Nineteen Eighty-Four*, 1st ed (United Kingdom: Secker & Warburg, 1949).

Supreme Court of Canada in *World Bank Group v Wallace*: On Production of Records, Immunities of International Organizations and the Global Fight against Corruption

D M Y T R O G A L A G A N *

ABSTRACT

On 29 April 2016, the Supreme Court delivered a judgment in *World Bank Group v Wallace*, an unusual case in which persons charged with corruption of foreign public officials applied to a Canadian court for production of documents in possession of an international organization. This decision is of great importance for Canadian law for two reasons. First, it discusses the privileges and immunities of international organizations against compulsory production of documents in criminal cases. Second, it sets the relevant test for assessing applications for *O'Connor* third-party production orders brought within a challenge to a wiretap authorization under the *Garofoli* framework. The author argues that the Court correctly interpreted the provisions of the World Bank Group's governing documents on archival and personnel immunity in accordance with general principles of treaty interpretation, but did not take an opportunity to balance these immunities and assess their waiver against the accused's right to make a full answer and defense. The Court also followed its previous jurisprudence on challenges to wiretap authorizations and production of documents by third parties. Furthermore, this paper suggests the Court's reasoning was largely influenced by policy considerations, such as

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promotion of international cooperation and strengthening of Canada's role in the global fight against corruption.

Keywords: *Garofoli application, O'Connor application, production, third party records, international organizations, privileges and immunities, corruption.*

I. INTRODUCTION

In the *World Bank Group v Wallace*, an unusual case involving an international organization and allegations of corruption of foreign public officials, the Supreme Court of Canada (“the Court”) duly rejected the request for production of documents.¹ The author will first show how the Court correctly interpreted the provisions of the World Bank Group’s (“WBG”) governing documents on archival and personnel immunity in accordance with general principles of treaty interpretation. The Court, however, did not take an opportunity to balance the immunities (and to assess their waiver) against the accused’s right to make a full answer and defense. Secondly, the author will show that the Court followed previous jurisprudence on challenges to wiretap authorizations and production of documents by third parties.

This paper argues that the Court’s reasoning is largely influenced by policy considerations, namely the promotion of international cooperation (especially with such reputable international organizations as the WBG) and strengthening of Canada’s role in the global fight against corruption. As early as 1996, the President of the World Bank, James Wolfensohn, urged global leaders to “deal with the cancer of corruption,”² and in 1998 the *Corruption of Foreign Public Officials Act*³ was enacted, making it a criminal offence for a Canadian corporation or individual to bribe a foreign official.⁴

¹ *World Bank Group v Wallace*, 2016 SCC 15, [2016] 1 SCR 207 [*World Bank*].

² The World Bank, *People and Development: Annual Meetings Address by James Wolfensohn, President, Working Paper No 99712*, (1996) online: <<http://go.worldbank.org/PUC5BB8060>>.

³ *Corruption of Foreign Public Officials Act*, SC 1998, c 34 [CFPOA].

⁴ See Gerry Ferguson, *Global Corruption: Law, Theory and Practice: An Open Access Coursebook on Legal Regulations of Global Corruption under International Conventions and Under US, UK and Canadian Law*, 2nd ed (Victoria: The Author, 2017) at 1.72, 2.45-2.46. online: <<http://iclr.law.ubc.ca/global-corruption-law-theory-and-practice>>

In Canada, there have been several major convictions for foreign bribery, two cases are currently awaiting trial and investigations are underway in some 15-20 other cases.⁵ In *World Bank*, the Court put its decision in perspective right at the outset of the case:

Corruption is a significant obstacle to international development. It undermines confidence in public institutions, diverts funds from those who are in great need of financial support, and violates business integrity. Corruption often transcends borders. In order to tackle this global problem, worldwide cooperation is needed. When international financial organizations, such as the appellant World Bank Group, share information gathered from informants across the world with the law enforcement agencies of member states, they help achieve what neither could do on their own.⁶

However, without any sovereign territory of their own, international organizations are vulnerable to state interference. In light of this, member states often agree to grant international organizations various immunities and privileges to preserve their orderly, independent operation. Commonly, an organization's archives are shielded from interference, and its personnel are made immune from legal process.⁷

This paper will briefly set out the facts and procedural history of *World Bank* case and then analyze the Court's findings on the archival and personnel immunity of the WBG's Integrity Vice-Presidency (INT) and on the Canadian law on third-party production of records in criminal cases. Relying on the traditional doctrinal legal methods, the author will closely examine the text of the Court's decision and seek to position the judgment within the existing jurisprudence of the Court.

II. FACTS OF THE CASE

The Padma Multipurpose Bridge ("Padma Bridge") was expected to connect Dhaka, the capital and the largest city in Bangladesh, with the Southwest Region of the country.⁸ It was planned that several international development organizations, including the WBG, would provide most of the

[Ferguson].

⁵ *Ibid* at 1.72.

⁶ *Supra* note 1 at para 1.

⁷ *Ibid* at para 2.

⁸ The World Bank, *Bangladesh – Multipurpose Bridge Project: Environmental and Social Impact Assessment*, Executive Summary 58505 (2010) 1-5.

funds necessary to complete the project. The WBG consists of five separate international organizations headquartered in Washington, D.C., among them are the International Bank for Reconstruction and Development (“IBRD”) and the International Development Association (“IDA”), which together make up the World Bank.⁹ Within the structure of the WBG, it was the IDA that was to lend US\$1.2 billion of the total US\$2.9 billion estimated cost of the Padma Bridge.¹⁰

The Padma Bridge project, however, did not run as smoothly as expected. In 2010, the INT received the first email suggesting that there was corruption in the process for awarding the contract to supervise the construction of the Padma Bridge (the “Supervision Contract”).¹¹ Eventually, the INT received emails from four tipsters who alleged that Kevin Wallace and two other employees of SNC-Lavalin,¹² an engineering and construction group headquartered in Montreal, Quebec, and Zulfiqar Bhuiyan (allegedly a representative of a Bangladeshi official), conspired to bribe the committee of Bangladeshi officials to award the Supervision Contract to SNC-Lavalin. Within the INT, Mr. Haynes and Mr. Kim were assigned to investigate this alleged wrongdoing committed by the employees of the Canadian company.¹³

Once the INT contacted the Royal Canadian Mounted Police (“RCMP”) in March 2011 and shared the tipsters’ emails, investigative reports, and other documents, the RCMP sought and obtained three wiretap authorizations to intercept private communications pursuant to Part VI of the *Criminal Code*¹⁴ in order to obtain direct evidence of the

⁹ The World Bank, “About the World Bank” (2017), online: <<http://www.worldbank.org/en/about>>.

¹⁰ The World Bank, *Bangladesh Padma Multipurpose Bridge Project*, online: <<http://projects.worldbank.org/P111017/bangladesh-padma-multipurpose-bridge-project?lang=en&tab=financial>>.

¹¹ See *World Bank*, *supra* note 1 at paras 12-14; Ferguson, *supra* note 4 at 1.2-1.4.

¹² Mohammad Ismail (Director, International Projects) reported to Ramesh Shah (Vice-President of the International Division) who, in turn, reported to Kevin Wallace (Vice-President, Energy and Infrastructure).

¹³ *World Bank*, *supra* note 1 at paras 12-14.

¹⁴ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. The first wiretap authorization was granted on 24 May 2011 and other authorizations were granted on 24 June and 8 August 2011.

respondents' involvement in corruption of Bangladeshi public officials.¹⁵ Sgt. Jamie Driscoll, who was assigned to prepare an affidavit for the application, largely relied on the information shared by the INT, Mr. Haynes's knowledge of the bidding process for the Supervision Contract, and direct communication with one of the tipsters. Sgt. Driscoll did not make any handwritten notes of his work as affiant, and all his emails during the period of the investigation were lost due to a computer problem. Sgt. Driscoll testified that he did not make notes because, in preparation of the affidavits, he was relying on the work of others rather than actively investigating. The Crown charged the four respondents under the CFPOA and intended to present the intercepted communications at trial.¹⁶

Ultimately, the WBG was not satisfied with the Bangladeshi government's commitment to combat corruption. On the 29th of June 2012, the World Bank issued a press release stating that it had "credible evidence corroborated by a variety of sources which points to a high-level corruption conspiracy"¹⁷ and cancelled the IDA credit. Since then, the Padma Bridge project is funded from the Government of Bangladesh's own resources. As of January 2017, work on the main bridge is 35% complete and expected to be finished by November 2018.¹⁸

III. PROCEDURAL HISTORY AND HOLDING

The respondents challenged the wiretap authorizations that allowed the Crown to intercept communications which it planned to use at trial. In support of their *Garofoli*¹⁹ application to cross-examine the wiretap affiant, they brought an application in the Ontario Superior Court of Justice

¹⁵ *World Bank*, *supra* note 1 at paras 16-22, 102-111.

¹⁶ *World Bank*, *supra* note 1 at paras 12, 20-21, 102.

¹⁷ The World Bank, "World Bank Statement on Padma Bridge" (29 June 2012), online: <<http://www.worldbank.org/en/news/press-release/2012/06/29/world-bank-statement-padma-bridge>>.

¹⁸ Padma Multipurpose Bridge Project, "Present Status of the Project", online: <<http://www.padmabridge.gov.bd/cstatus.php>>.

¹⁹ *R v Garofoli*, [1990] 2 SCR 1421, [1990] SCJ No 115 [*Garofoli*]. More details on *Garofoli* applications and challenges to wiretap authorizations will be discussed later on in this article.

seeking an O'Connor²⁰ third-party production order requiring the WBG to produce a broad range of documents (the "INT's records").²¹ The trial judge had to address two issues raised in this application: (i) whether the WBG, as an international organization, had the privileges and immunities that made it immune from the jurisdiction of Canadian courts regarding an order for production of documents,²² and (ii) whether the documents sought in the context of a *Garofoli* application met the test for relevance.²³

The trial judge concluded that, in the case at hand, the WBG waived its immunity, giving Canadian courts jurisdiction to order production of documents, and the applicants satisfied the first stage of O'Connor framework for production of documents held by a third party. The trial judge ordered the WBG to produce some of the documents set out in the application.²⁴

²⁰ *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235 [O'Connor]. More details on O'Connor third-party production orders will be discussed later on in this article.

²¹ *Wallace v Canada*, 2014 ONSC 7449, [2014] OJ No 6534 (QL) [Wallace] at Appendix A:

- a. All notes, memoranda, emails, correspondence and reports received or sent by Mr. Paul Haynes of INT regarding the Investigation;
- b. All source documents from all so-called "tipsters" sent to INT, whether or not such information was shared with the RCMP as part of INT's cooperation with the RCMP investigation into the Padma Bridge Project;
- c. All emails and other communications between INT and the tipsters;
- d. Any sanctions or settlements entered into by the World Bank with any third parties as a result of the Investigation;
- e. Any other investigative materials relevant to the Investigation in the possession of other World Bank officials, including Christina Ashton-Lewis (Senior Institutional Intelligence Officer), Kunal Gupta (World Bank's Case Intake Unit), Laura Valli (Senior investigator) and Christopher Kim; and
- f. All communications between INT, representatives of SNC, representatives of the Bangladeshi government, members [of] the RCMP and/or the Crown regarding the Investigation, the related RCMP investigation and/or the charges or proceedings commenced by the Crown before the Courts in Ontario.

²² *Ibid* at paras 15-55.

²³ *Ibid* at paras 56-66.

²⁴ *Ibid* at para 67. The WBG was ordered to produce the documents set out in paragraphs (a), (b), (c) and (e) of the application (see *supra* note 21). The trial judge ruled, however, that a further hearing was necessary to address the relevance of documents referred to in paragraphs (d) and (f).

The WBG did not appear before the trial judge as it took the position that, being immune from the court process, it was not under an obligation to attend and assert immunity, and instead relied on the Crown to do so.²⁵ The WBG then appealed the trial judge's decision directly to the Supreme Court on the authority of *Dagenais v Canadian Broadcasting Corp.* and *A. (L.L.) v B. (A.)*,²⁶ which allows a third party affected by an order of a superior court judge to challenge that order before the Supreme Court.²⁷

Ultimately, the Supreme Court allowed the appeal and set aside the production order issued by the trial judge, as the Court held that the WBG's immunities covered the INT records and its personnel. These immunities had not been waived, and the INT records were not relevant under the *Garofoli* framework.²⁸ The subsequent section of this paper analyzes the reasons behind the conclusion reached by the Supreme Court.

IV. LEGAL ANALYSIS

This section analyzes two separate aspects of the Supreme Court reasoning in *World Bank*: (i) the archival and personnel immunities of the INT and (ii) the law of third party production of records in criminal cases.

A. The Archival and Personnel Immunities of the INT

This subsection covers the Court's reasoning as to the INT's immunities. It starts with the assessment of the INT's position in the WBG's overall structure and then turns to the character (whether absolute or functional) of the INT's immunities, the scope and alleged waiver of the INT's archival immunity, as well as the applicability and alleged waiver of the INT's legal process immunity for personnel.

1. Position of the INT in the World Bank Group's Overall Structure

Because the WBG, as a group of five separate international organizations, does not benefit from any immunities conferred by any treaty

²⁵ *Ibid* at para 20.

²⁶ *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 120 DLR (4th) 12; *A (LL) v B (A)*, [1995] 4 SCR 536, 130 DLR (4th) 422.

²⁷ *World Bank*, *supra* note 1 at para 31.

²⁸ *Ibid* at para 148.

and the parties had not made any claims of immunity under customary international law,²⁹ the Court had to dive into the texts of governing documents of the WBG's constituent organizations. Therefore, as a preliminary matter, the Court had to assess the position of the INT within the structure of the WBG.

The trial judge noted that Mr. Kim's earlier affidavit describes the INT as an independent unit within the WBG reporting directly to the President, but does not clarify whether the INT is structurally part of one of the five organizations that together comprise the WBG.³⁰ The judge decided to proceed on the basis that the INT is part of the IBRD, taking into account, first, that "[t]here is no sensible reason to conclude that the INT is somehow completely separate and apart from the entities that form the WBG" and, second, that there was some indirect evidence (including the fact that the letterhead used by the INT Director of Operations bears the name of the IBRD) that the WBG considers the INT part of the IBRD.³¹

The Supreme Court analyzed this matter in greater detail. The Court took into account that the legal foundation for the WBG's integrity regime is set out in the *IBRD* and *IDA Articles of Agreement*, which require the World Bank to make arrangements to ensure that the financing is used only for its intended purpose, with due attention to economy and efficiency, and without regard to political or other non-economic considerations.³²

²⁹ *Ibid* at para 43.

³⁰ *Wallace*, *supra* note 21 at para 24.

³¹ *Ibid* at para 25.

³² *World Bank*, *supra* note 1 at para 51; See *Bretton Woods and Related Agreements Act*, RSC 1985, c B-7, where the Articles of Agreement of the IBRD and the IDA are annexed as Schedules II and III [*Bretton Woods Act*]. The IBRD's and IDA's immunities, granted to them in their respective Articles of Agreement, have been implemented in Canada by two Orders in Council: *International Development Association, International Finance Corporation and Multilateral Investment Guarantee Agency Privileges and Immunities Order*, SOR/2014-137, and *International Monetary Fund and International Bank for Reconstruction and Development Order*, PC 1945-7421 (the "Orders in Council"). *IBRD Articles of Agreement*, amendment effective 16 February 1989, section 5(b) [*IBRD Agreement*] reads as follows:

(b) The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.

Therefore, the INT, being part of the WBG's integrity regime, benefits from the personal and archival immunities provided for in the *Articles of Agreement* of the IBRD or the IDA³³ because these immunities are identical, the Court decided not to determine conclusively whether the INT is covered by the IBRD's or the IDA's *Articles of Agreement*.³⁴

Such a conclusion logically flows from the texts of the IBRD's and IDA's *Articles of Agreement*, especially taking into account the circumstantial evidence referred to by the trial judge. It would be unreasonable to argue that the INT, a unit tasked with ensuring integrity in the execution of projects financed by the WBG, was designed to be a completely separate entity stripped of the privileges and immunities available to other organizations that comprise the WBG. It is unfortunate that neither the trial judge nor the Supreme Court could benefit from the testimony of the INT's representatives.

IDA Articles of Agreement, effective 24 September 1960, sections 1(g) and (h) of Article V reads as follows [*IDA Agreement*]:

(g) The Association shall make arrangements to ensure that the proceeds of any financing are used only for the purposes for which the financing was provided, with due attention to considerations of economy, efficiency and competitive international trade and without regard to political or other non-economic influences or considerations.

(h) Funds to be provided under any financing operation shall be made available to the recipient only to meet expenses in connection with the project as they are actually incurred.

³³ *World Bank*, *supra* note 1 at paras 50-51, 53; See also *IBRD Agreement*, *supra* note 32, sections 5 and 8 of Article VII; *IDA Agreement*, *supra* note 32, Article VIII. The two are virtually identical and provide as follows:

Section 5 Immunity of archives

The archives of the [INBR or IDA] shall be inviolable.

...

Section 8 Immunities and privileges of officers and employees

All governors, executive directors, alternates, officers and employees of the [IBRD or IDA]

(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the [IBRD or IDA] waives this immunity;

³⁴ *World Bank*, *supra* note 1 at paras 43, 50.

It should also be noted that, as it would be the case with other international treaties, the Supreme Court interpreted the *Articles of Agreement* of the IBRD and the IDA in accordance with the rules of interpretation set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*,³⁵ i.e. that the scope of the INT's immunities had to be interpreted "in accordance with the ordinary meaning of the treaty terms and in light of their purpose and object."³⁶ Such an approach to treaty interpretation is hardly surprising in light of the Court's earlier precedents³⁷ and the fact that 114 states are parties to the VCLT,³⁸ and even states that are not parties to the VCLT, for instance, the United States, consider many of its provisions to constitute customary international law on the law of treaties.³⁹

2. *Applicability of s. 3 of the IBRD's and IDA's Articles of Agreement*

One of the respondents, Mr. Bhuiyan, alleged that s. 3 of Article VII of the IBRD's or Article VIII of the IDA's *Articles of Agreement*⁴⁰ permits the Court to issue a document production order.⁴¹ The Court reasonably

³⁵ *Vienna Convention on the Law of Treaties*, 23 May 1969, Can TS 1980 No 37 (entered into force 27 January 1980) [VCLT].

³⁶ *World Bank*, *supra* note 1 at para 47.

³⁷ *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at paras 11-12, [2014] 3 SCR 431; *Thibodeau v Air Canada*, 2014 SCC 67 at para 35, [2014] 3 SCR 340; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at paras 51-52, 160 DLR (4th) 193; *Thomson v Thomson*, [1994] 3 SCR 551 at 577-78, 119 DLR (4th) 253.

³⁸ VCLT, *supra* note 35 at 331.

³⁹ US Department of State, "Vienna Convention on the Law of Treaties", online: <<http://www.state.gov/s/l/treaty/faqs/70139.htm>>.

⁴⁰ *IBRD Agreement*, *supra* note 32, Article VII s 3; *IDA Agreement*, *supra* note 32, Article VIII s 3. Both agreements are virtually identical and provide as follows:

Actions may be brought against the [IBRD or IDA] only in a court of competent jurisdiction in the territories of a member in which the [IBRD or IDA] has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the [IBRD or IDA] shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the [IBRD or IDA].

⁴¹ *World Bank*, *supra* note 1 at paras 54-55.

adopted the view that, because the IBRD and the IDA regularly engage in borrowing and lending and their creditors need access to courts to settle potential claims, s. 3 merely confirms that the IBRD and the IDA (unlike some other international organizations) may be sued in a court of a competent jurisdiction.⁴² Since the present case involved a request for document production directed at the INT's personnel in the context of a criminal investigation, it was "simply not the kind of action contemplated by s. 3."⁴³ The Court thus concluded that s. 3 was inapplicable to the case at hand.

3. Are the INT's Immunities Absolute or Functional?

The next issue that the Supreme Court had to deal with was the question whether the INT's immunities are absolute or functional. The respondents argued that immunities provided for in ss. 5 and 8 are "functional" (i.e. that a particular immunity applies only when the INT is able to demonstrate that it is necessary to carry out the INT's operations and responsibilities) as opposed to "absolute" (i.e. that the INT's immunities are not subject to the case-by-case determination of necessity).⁴⁴ The respondents referred to the text of s. 1, which provides that the privileges and immunities shall be accorded to the IBRD or the IDA to "enable the [IBRD or IDA] to fulfill the functions with which [they are] entrusted."⁴⁵

⁴² *World Bank*, *supra* note 1 at para 55; See August Reinisch & Jakob Wurm, "International Financial Institutions before National Courts" in Daniel Bradlow & David Hunter, eds, *International Financial Institutions and International Law* (Netherlands: Kluwer Law International, 2010) 103 at 123-24; Philippe Sands & Pierre Klein, *Bowett's Law of International Institutions*, 6th ed (London: Sweet and Maxwell, 2009) at 496 [Sands & Klein]. In *Osseiran v International Finance Corp*, 552 F (3d) 836 at 840 (DC Cir 2009), the court pointed out that "parties may hesitate to do business with an entity insulated from judicial process; promises founded on good faith alone are worth less than obligations enforceable in court."

⁴³ *World Bank*, *supra* note 1 at para 55.

⁴⁴ *Ibid* at para 56.

⁴⁵ *Ibid* at para 57; Citing the *IBRD Agreement*, *supra* note 32, Article VII s 1; *IDA Agreement*, *supra* note 32, Article VIII s 1. Both Agreements are virtually identical and provide as follows:

The Court came up with four counter-arguments and concluded that s. 1 is “merely a descriptive, purposive clause.”⁴⁶ First, s. 1, unlike ss. 3, 5 and 8, is not implemented in Canadian law through the Orders in Council.⁴⁷ Second, unlike the functional immunity of the Northwest Atlantic Fisheries Organization,⁴⁸ ss. 5 and 8 are not expressly made subject to any condition of functional necessity.⁴⁹ Third, s. 6 provides that the IBRD’s and the IDA’s property and assets shall be free from any restrictions only “[t]o the extent necessary to carry out the operations provided for in this [Article of Agreement]”.⁵⁰ These words would be redundant if the immunities set out in Article VII of the IBRD’s and Article VIII of the IDA’s *Articles of Agreement* were subject to the functional necessity requirement that the respondents attempted to read into s. 1.⁵¹ Fourth, the Court contrasted the immunities set out in the IBRD’s and IDA’s *Articles of Agreement* and the “broad and flexible immunity”⁵² provided for in Article 105 of the *Charter of the United Nations*.⁵³ Instead of relying on the functional

To enable the [IBRD or IDA] to fulfill the functions with which [they are] entrusted, the status, immunities and privileges [set forth or provided] in this Article shall be accorded to the [IBRD or IDA] in the territories of each member.

⁴⁶ *World Bank*, *supra* note 1 at para 58.

⁴⁷ *Ibid* at para 59.

⁴⁸ *Northwest Atlantic Fisheries Organization Privileges and Immunities Order*, SOR/80-64, s 3(1) states that this organization “shall have in Canada the legal capacities of a body corporate and shall, to such extent as may be required for the performance of its functions, have the privileges and immunities set forth in Articles II and III of the Convention for the United Nations” (emphasis added).

⁴⁹ *World Bank*, *supra* note 1 at para 59.

⁵⁰ *IDA Agreement*, *supra* note 32, Article VIII s 6; *IBRD Agreement*, *supra* note 32, Article VII s 6. The two Agreement are virtually identical and provide as follows:

To the extent necessary to carry out the operations provided for in [the Articles of Agreement] and subject to the provisions of [the Articles of Agreement], all property and assets of [the IBRD or the IDA] shall be free from restrictions, regulations, controls and moratoria of any nature.

⁵¹ *World Bank*, *supra* note 1 at para 60.

⁵² *Ibid* at para 61.

⁵³ *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) [*UN Charter*]. Article 105(1) &(2) of the UN Charter provide as follows (emphasis added):

approach, which prioritizes flexibility over certainty, the drafters decided to set out the specific immunities that would enable the IBRD and the IDA to pursue their objectives.⁵⁴ The Court thus concluded that to “import an added condition of functional necessity would undermine what appears to be a conscious choice to enumerate the specific immunities rather than to rely on one broad, functional grant of immunity.”⁵⁵

In general, Paul Gormley explains that the functional theory of immunity is:

[B]ased upon the nature of the act performed. In other words, the courts of the forum will look to the dispute, criminal or civil, and determine whether or not the action of the diplomat, consul, or person of a regional or international organization was functioning in his official capacity representing the interests of his government (or organization), or whether he was engaged in a personal matter having no relation to his official duties.⁵⁶

The shift towards functional privileges and immunities, i.e. towards more limited immunities than those enjoyed by diplomatic officials, represents the evolutionary process in the history of the law of international organizations.⁵⁷ In particular, whereas the “Covenant of the League of Nations” provided that “officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities,”⁵⁸

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1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

⁵⁴ *World Bank*, *supra* note 1 at paras 62-63.

⁵⁵ *Ibid* at para 63.

⁵⁶ Paul Gormley, “The Future Privileges and Immunities Required by the Personnel of Regional and International Organizations from the Jurisdiction of American Courts” (1963) 32:2 U Cin L Rev 131 at 133 [Gormley].

⁵⁷ Anthony Miller, “Privileges and Immunities of United Nations Officials” (2007) 4 Intl Organizations L R 169 at 174-179 [Miller (2007)]; Anthony Miller, “The Privileges and Immunities of the United Nations” (2009) 6 Intl Organizations L R 7 at 9-16 [Miller (2009)].

⁵⁸ “Covenant of the League of Nations” (1920) 1 League of Nations Off J 3 at 5 para 4 (emphasis added); See also, “Covenant of the League of Nations” (1920) 1 League of Nations Off J 3 at 5 para 5 (“buildings and other property occupied by the League or

the *UN Charter* describes privileges and immunities in functional terms, granting them only on connection with acts performed by the UN officials in the discharge of their duties.⁵⁹ Also, as early as in 1963, Paul Gormley wrote that the “trend in contemporary international law is for the nations to rely more heavily upon the functional test, (...) [as well as that] it is evident that a functional approach will be employed much more extensively, in particular as to the personnel of organizations”⁶⁰ and it “seems fairly obvious that the functional test, under which immunity is granted for necessary official actions, *will become the dominant international standard* in the future.”⁶¹ Since then, a number of authors have suggested that the immunities enjoyed by international organizations shall be functional and restricted, taking into account that “organizations clinging to their immunities produces harmful effects.”⁶²

It should be noted, however, that since the *Bretton Woods Agreement* was which was developed at the UN Monetary and Financial Conference held in July 1944,⁶³ it would be improper to read into the IBRD’s and the IDA’s *Articles of Agreement* the functional necessity requirement that was incorporated into Article 105 of the *UN Charter* signed on June 26th, 1945. Furthermore, Anthony Miller affirms that functional (rather than diplomatic) character of the privileges and immunities conferred on the UN officials “was a deliberate choice by the drafters of Article 105 of the Charter”⁶⁴ and explains this choice in the following manner:

This approach of formulating privileges and immunities in general terms, rather than as a series of detailed rules, enabled the drafters of the Charter to closely connect privileges and immunities to the realization of the purposes of the Organization, to the free functioning of its organs and to the independent exercise

its officials or by Representatives attending its meetings shall be inviolable”).

⁵⁹ Miller (2007), *supra* note 57 at 174.

⁶⁰ Gormley, *supra* note 56 at 134.

⁶¹ Paul Gormley, “The Future Privileges and Immunities Required by the Personnel of Regional and International Organizations from the Jurisdiction of American Courts: Part II” (1963) 32:3 U Cin L Rev 279 at 301 (emphasis in the original).

⁶² Cedric Ryngaert, “The Immunity of International Organizations Before Domestic Courts: Recent Trends” (2010) 7 Intl Organizations L R 121 at 124 [Ryngaert].

⁶³ “The Bretton Woods Agreement - I” (1945) 1:2 The World Today 71 at 71; Henry Morgenthau, “Bretton Woods and International Cooperation” (1945) 23:2 Foreign Affairs 182 at 182.

⁶⁴ Miller (2007), *supra* note 57 at 253.

of the functions and duties of officials, rather than trying to formulate concrete provisions dealing with particular privileges and immunities.⁶⁵

It appears that the drafters of the IBRD's and the IDA's *Articles of Agreement* made a deliberate choice to set out the privileges and immunities of these organizations in greater detail and free them from the functional necessity requirement. Moreover, the Court appropriately used the rule against surplusage to avoid reading the functional necessity requirement into s. 1 that would make the words "[t]o the extent necessary to carry out the operations provided for in this [Articles of Agreement]" in s. 6 redundant.⁶⁶

In the United States, the *International Organizations Immunities Act*⁶⁷ provides that certain international organizations, their property and assets "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments."⁶⁸ Such organizations may, however, "expressly waive their immunity for the purpose of any proceedings."⁶⁹ At the time the *IOIA* was enacted, foreign states enjoyed absolute immunity in the US courts, but the international community has since developed exceptions to foreign sovereign immunity and the *Foreign Sovereign Immunities Act*⁷⁰ codified this practice of restrictive immunity.⁷¹ The courts, however, have continued to uphold absolute immunity of international organizations covered by the *IOIA*.⁷² For instance, the D.C. District Court held the World Bank's immunity to be "absolute immunity foreign sovereigns enjoyed in 1945."⁷³ Steven Herz also argues that the *FSIA*, which imposes limits on the sovereign immunity of foreign governments, is itself limited by the terms of treaties in force at the time of its enactment, so that

⁶⁵ Miller (2009), *supra* note 57 at 16.

⁶⁶ *World Bank*, *supra* note 1 at para 60.

⁶⁷ *International Organizations Immunities Act*, 22 USC s 288-288I (1945) [*IOIA*].

⁶⁸ *Ibid* at s 288 a(b).

⁶⁹ *Ibid*.

⁷⁰ *Foreign Sovereign Immunities Act*, 28 USC s 1330, 1332, 1391(f), 1441(d) & 1602-1611 (1976) [*FSIA*].

⁷¹ Aaron Young, "Deconstructing International Organization Immunity" (2012) 44:1 *Geo J Int'l L* 311 at 314, 320-321.

⁷² *Ibid* at 314.

⁷³ *Hudes v Aetna Life Ins Co*, 806 F Supp (2d) 180 at 187 (DDC 2011), citing *Atkinson v Inter-Am Dev Bank*, 156 F (3d) 1335 at 1341 (DC Cir 1998).

immunities set out in the governing documents of international organizations to which the United States was a party in 1976 should be given full effect.⁷⁴

Cedric Ryngaert points that functional immunity of an international organization, if based on a treaty, typically reads “the international organization and its officials shall enjoy in the territory of its Member States such privileges and immunities as necessary for the fulfilment of its purposes”.⁷⁵ If construed narrowly, immunity attaches where “upholding jurisdiction would obstruct the fulfilment of the organization’s mission,” if broadly – “as soon as the suit against the organization relates to activities that bear a direct relation with the organization’s mission.”⁷⁶ In practice, such immunities are usually interpreted broadly and, even when courts deem immunities to be subject to functional necessity, “immunity becomes virtually absolute, as most activities of the organization somehow relate to the fulfilment of a function of the organization.”⁷⁷ August Reinisch and Ulf Weber explain this paradox as follows:

As opposed to states, the international legal personality of international organizations is generally considered to be functionally limited. In other words, international organizations enjoy legal personality only to the extent required to perform their functions. In a legal sense they are unable to act beyond their functional personality. Any acts not covered by such a limited personality are *ultra vires*. At the same time international organizations enjoy functional immunity, covering acts in the performance of their functions. Since international organizations can only act within the scope of their functional personality there is no room left for non-functional acts for which immunity would be denied.⁷⁸

Therefore, even if in *World Bank* case the respondents were successful in persuading the Court that the INT’s immunities set out in ss. 5 and 8 were functional, the ultimate result would be the same. Because the existence of the integrity regime is necessary for the WBC’s efficient

⁷⁴ Steven Herz, “International Organizations in US Courts: Reconsidering the Anachronism of Absolute Immunity” (2008) 31 *Suffolk Transnat’l L R* 471 at 529–530.

⁷⁵ Ryngaert, *supra* note 62 at 130.

⁷⁶ *Ibid.*

⁷⁷ *Ibid* at 146.

⁷⁸ August Reinisch & Ulf Andreas Weber, “In the Shadow of *Waite* and *Kennedy*: The Jurisdictional Immunity of International Organizations, the Individual’s Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement” (2004) 1 *Int’l Org L Rev* 59 at 63.

functioning, the INT would be able to enjoy the immunities in the case at hand.

The Court nevertheless noted that the scope of immunities set out in ss. 5 and 8 is to be “interpreted purposively, taking into consideration their object outlined in s. 1.”⁷⁹ While it is unclear what such restrictive interpretation would mean in practice, the author agrees that reasonable limitations may be imposed on the exercise of the IBRD’s and the IDA’s immunities. However, instead of relying on the functional immunities doctrine, which runs contrary to the text of the IBRD’s and the IDA’s *Articles of Agreement*, the Court could have analyzed the human rights implications of its decision on the INT’s immunities. The interveners, the British Columbia Civil Liberties Association and the Criminal Lawyers’ Association (Ontario), argued that the public interest in upholding the international organization’s immunity had to be balanced against the accused person’s constitutional right to make full answer and defense.⁸⁰ Unfortunately, the Court chose not to address the argument based on the *Canadian Charter of Rights and Freedoms*⁸¹ and, instead, relied solely on the text of the IBRD’s and the IDA’s *Articles of Agreement*.

4. Scope of the INT’s Archival Immunity

Once the Court established that the INT’s immunities are absolute, it had to interpret the scope of s. 5, which provides that the “archives of the [IBRD or the IDA] shall be inviolable.” The trial judge concluded, based on a dictionary definition, that the term “archives” encompasses only historical records, and the word “inviolable” presupposes protection from searches and seizures only, not from production for inspection or use.⁸²

The Supreme Court engaged in a significantly deeper analysis of the text of s. 5 and concluded that the word “archives” refers to the entire collection of the IBRD’s and IDA’s documents. The Court relied on (i) the definitions provided in various dictionaries,⁸³ (ii) the definitions in

⁷⁹ *World Bank*, *supra* note 1 at para 64.

⁸⁰ *Ibid* at para 40.

⁸¹ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c11 [*Canadian Charter*].

⁸² *Wallace*, *supra* note 21 at paras 54-55.

⁸³ *Black’s Law Dictionary*, 10th ed, *sub verbo* “archive”; *Canadian Oxford Dictionary*, 2nd ed, *sub verbo* “archive”; *Collins Canadian Dictionary*, *sub verbo* “archives”; *Lexis: le dictionnaire*

international treaties,⁸⁴ and (iii) the argument that narrow interpretation of the term “archives” would undermine the purpose of s. 5.⁸⁵ The Court recalled that international organizations are granted immunities to protect them from intrusions by member states and their courts, and shielding an entire collection of the international organization’s documents is paramount to ensuring their proper functioning.⁸⁶ To limit the scope of “archives” solely to historical documents “would leave exposed current and more sensitive documents, whose confidentiality is likely more important to the IBRD’s independent functioning.”⁸⁷

The Court thus concluded that current records and documents of the IBRD and the IDA form part of their “archives” and turned to analyze the term “inviolable”. Here the Court adopted a slightly different approach. The Court relied on (i) the history of international law, where the term “inviolable” traditionally implied the freedom from unilateral interference,⁸⁸ (ii) international law scholarship, which suggests that the “inviolability” of archives shields them from investigations, confiscations or

érudit de la langue française, sub verbo “archives”; Merriam-Webster’s Collegiate Dictionary, 11th ed, sub verbo “archive”; Multidictionnaire de la langue française, 5th ed, sub verbo “archives”.

⁸⁴ *Vienna Convention on Consular Relations*, 24 April 1963, Can TS 1974 No 25 art 1(1)(k) (entered into force 19 March 1967).

⁸⁵ *World Bank*, *supra* note 1 at paras 68-73.

⁸⁶ *Ibid* at para 71, citing *Amaratunga v Northwest Atlantic Fisheries Organization*, 2013 SCC 66 at paras 29-30, 45, [2013] SCR 866.

⁸⁷ *World Bank*, *supra* note 1 at para 73.

⁸⁸ *Ibid* at paras 75-78. See “Communications from the Swiss Federal Council Concerning the Diplomatic Immunities to be Accorded to the Staff of the League of Nations and of the International Labour Office” (1926) 7 *League of Nations Off J* 1422 at 1423; *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, Can TS 1948 No 2, art II, s 4 (entered into force 17 September 1946); *Vienna Convention on Diplomatic Relations*, 18 April 1961, Can TS 1966 No 29, art 24 (24 April 1964) .

any other kind of interference,⁸⁹ and (iii) the decisions of foreign courts.⁹⁰ Furthermore, the purpose of the IBRD's and the IDA's immunities is to shield the information, not merely documents, from *unilateral interference* so as to ensure the proper and independent functioning of these international organizations, and it was therefore "irrelevant whether this information is revealed in the context of a search and seizure or in the context of a compelled production order" because the "purpose underlying the immunity is thwarted in either case."⁹¹

Legal scholarship and case law of the United States support such an interpretation. With respect to the UN archives, Anthony Miller stated that the "inviolability of documents means that they cannot be taken, copied or otherwise used without UN consent" and this immunity extends to the information contained in such documents.⁹² Also, the D.C. District Court reversed a conviction of the United Nations' employee for refusing to answer a question before a subcommittee of the United States Senate, reasoning that the answer depended upon the information contained in the United Nations files, was privileged by the *UN Charter* and could not legally be revealed.⁹³

In summary, the Court held that immunity specified in s. 5 covers all documents and records stored by the INT from searches, seizures, and

⁸⁹ *World Bank*, *supra* note 1 at para 79; See James Fox, *Dictionary of International and Comparative Law*, 3rd ed (Dobbs Ferry, NY: Oceana Publications, 2003) *sub verbo* "inviolability"; GAOR, 42nd Sess, UN Doc A/CN.4/432 (1990) at 95-99; Wilfred Jenks, *The Proper Law of International Organisations* (London: Stevens & Sons, 1962) at 234; Charles Morton, *Les privilèges et immunités diplomatiques: Étude théorique suivie d'un bref exposé des usages de la Suisse dans ce domaine* (Lausanne: Imprimerie La Concorde, 1927) at 56-57; A S Muller, *International Organizations and their Host States: Aspects of their Legal Relationship* (The Hague: Kluwer Law International, 1995) at 205; Sands & Klein, *supra* note 42 at 502; Biswanath Sen, *A Diplomat's Handbook of International Law and Practice*, 3rd ed (The Hague: Martinus Nijhoff, 1980) at 117-118.

⁹⁰ *World Bank*, *supra* note 1 at para 79. See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)*, [2014] EWCA Civ 708 at para 61; *Taiwan v United States District Court for the Northern District of California*, 128 F (3d) 712 (9th Circ 1997); *Iraq v Vinci Constructions* (2002), 127 ILR 101 (Brussels CA); *Owens, Re Application for Judicial Review*, [2015] NIQB 29 at paras 63 & 69.

⁹¹ *World Bank*, *supra* note 1 at para 74.

⁹² Miller (2009), *supra* note 57 at 54.

⁹³ *Keeney v United States*, 218 F (2d) 843 (DDC 1954).

production orders.⁹⁴ The Court's reasoning diligently followed the rules of interpretation outlined in Articles 31 and 32 of the VCLT as the Court interpreted the treaty (i.e. the IBRD's and the IDA's *Articles of Agreement*) in accordance with the ordinary meaning of its terms (i.e. the terms "archives" and "inviolable" as used in international law) and took into account the purpose and object of the treaty (i.e. ensuring the proper and independent functioning of the IBRD and the IDA).

5. *Waiver of the INT's Archival Immunity*

The Supreme Court held that the IBRD's and the IDA's archival immunity cannot be waived.⁹⁵ The Court explained that (i) the inviolability of archives implies protection from all forms of *unilateral* interference, and *voluntary* disclosure of the INT's documents is not covered by s. 5, (ii) unlike s. 8, the text of s. 5 does not mention the possibility of waiver, and (iii) once a document is copied and transferred to a third party, the copy transferred no longer forms part of the "archives" and is no longer covered by s. 5.⁹⁶

This line of reasoning is not flawless. On the one hand, the Court properly applied the rule against surplusage in holding that, because s. 8 (dealing with the personnel immunity) provides for the possibility of waiver, whereas s. 5 (dealing with the archival immunity) does not mention such a possibility, the archival immunity is not subject to a waiver to the same extent as the personnel immunity. On the other hand, the Court failed to analyze if there is a conceptual difference between privilege and immunity in the context of waiver. For instance, does the Court's finding that the term "archives" includes current documents of international organizations mean that the IBRD or the IDA should argue they relied on a legal opinion of external counsel (or should they disclose a part of such an opinion)? Does this legal opinion still benefit them from archival immunity? In a similar case decided on the basis of Canadian law, the Court held that attorney-client privilege may be waived implicitly.⁹⁷ The author suggests that in this case the Court should have interpreted the waiver of the INT's archival immunity purposively, in light of s. 1 and with due regard to the respondents' constitutional right to make a full answer and defense. It appears that the Court, while deciding on this issue, was concerned

⁹⁴ *World Bank*, *supra* note 1 at para 81.

⁹⁵ *Ibid* at para 82.

⁹⁶ *Ibid* at para 83.

⁹⁷ *R v Campbell*, [1999] 1 SCR 565 at 611-615, 171 DLR (4th) 193.

primarily with the advancement of cooperation with international organizations and the global fight against corruption, rather than the technicalities of the IBRD's and the IDA's *Articles of Agreement* or the accused persons' rights.

6. *The INT's Legal Process Immunity for Personnel*

The appeal was not only concerned with the production of the INT records, but also with the subpoenas that required Mr. Haynes and Mr. Kim to give evidence. Therefore, the Court had to address the legal process immunity for the IBRD's and the IDA's personnel. It was undisputed that s. 8 provides a shield not only against civil suits and prosecutions, but also against legal processes such as subpoenas, and that Mr. Haynes and Mr. Kim acted in their official capacity when they obtained the documents and information sought by the respondents.⁹⁸ Therefore, the only contested issue was whether the INT's legal process for immunity of personnel was waived.

7. *Waiver of the INT's Legal Process Immunity for Personnel*

To decide whether the INT's legal process immunity for personnel had been waived, when the INT shared certain information with the RCMP, the Court had to rule if the IBRD's and the IDA's *Articles of Agreement* required express or implied (constructive) waiver. The INT never expressly waived personnel immunity and consistently reiterated that it shared information with the RCMP without prejudice to its immunity.⁹⁹

The Court held that the object and purpose of the IBRD's and the IDA's *Articles of Agreement* imply an express waiver requirement. First, implied waiver would subject the IBRD's and the IDA's immunities to case-by-case determination and thus require their representatives to appear in various national courts to argue whether their conduct amounted to a waiver.¹⁰⁰ Second, the concepts of implied waiver vary among different jurisdictions, and subjecting immunities set out in s. 8 that solely to express waivers would prevent attempts by member states (or their courts) to control

⁹⁸ *World Bank*, *supra* note 1 at para 87.

⁹⁹ *Ibid* at para 95.

¹⁰⁰ *Ibid* at para 90.

the IBRD or the IDA through application of these concepts.¹⁰¹ Finally, the Court noted that exposing the IBRD or the IDA to implied waivers would “have a chilling effect on collaboration with domestic law enforcement” and “would be harmful, since multilateral banks including the World Bank Group are particularly well placed to investigate corruption and to serve at the frontlines of international anti-corruption efforts.”¹⁰² In this manner the Court expressly recognized that its decision was directly influenced by considerations of the WBG’s role in the global fight against corruption.

The Court also rejected the application of common law selective waiver doctrine to the interpretation of international treaties (the IBRD’s and the IDA’s *Articles of Agreement*).¹⁰³ The trial judge confirmed that a party cannot selectively waive a privilege and, relying on “benefit/burden exception” to Crown immunity,¹⁰⁴ concluded that the WBG waived its immunities when it actively assisted the RCMP with the investigation and sought to benefit from the intercepted communications.¹⁰⁵ The judge acknowledged that the WBG, as an international organization, does not have the right to institute criminal proceedings on its own, but found that the WBG chose to cooperate with the RCMP due to the “desire to promote its own goal of ensuring the integrity of projects in which it is involved.”¹⁰⁶ To avoid the waiver, the WBG should have “simply advised the RCMP of the [corruption] allegations (...) and then left it to the RCMP to conduct its own investigation.”¹⁰⁷

The Supreme Court disagreed with this line of argument. In line with its general support of the Canadian government’s proactive role in the global fight against corruption, the Court found that the WBG could not have “benefitted” from the Crown’s prosecution of the respondents, because criminal prosecutions “are, by their very nature, in the interest of the public and not the complainant or any other private party.”¹⁰⁸ The

¹⁰¹ *Ibid* at para 92-93.

¹⁰² *Ibid* at para 94.

¹⁰³ *Ibid* at para 96.

¹⁰⁴ See *Sparling v Québec (Caisse de dépôt & de placement)*, [1988] 2 SCR 1015, 55 DLR (4th) 63.

¹⁰⁵ *Wallace*, *supra* note 21 at paras 29-36.

¹⁰⁶ *Ibid* at para 32, see also para 35.

¹⁰⁷ *Ibid* at para 33.

¹⁰⁸ *World Bank*, *supra* note 1 at para 98.

Court also correctly pointed out that the “benefit/burden exception” doctrine was irrelevant for the determination of an international organization’s immunity, since the doctrine is designed to cover a different category of cases – those where the Crown takes advantage of the rights provided for in the legislation but is not subject to the accompanying liabilities and restrictions, thus benefitting from more than the legislation was intended to provide.¹⁰⁹

While the Court’s decision to uphold the immunity set out in s. 8 is understandable in light of the underlying policy favoring international cooperation, in particular with the WBG, and zero tolerance approach to corruption, the author suggests that it would have been more appropriate to analyze the question of waiver (or estoppel) in light of international law, including the practice of the International Court of Justice,¹¹⁰ rather than to refer to inconsistencies between the concepts of implied waiver in different jurisdictions.

The Court chose to address this question, even though finding that the IBRD’s or the IDA’s immunities covered the INT’s archives and personnel (and these immunities had not been waived) rendered the second issue (the likely relevance of the INT’s records) moot.

B. Canadian Law on Third Party Production in Criminal Cases

In general, the law of third party records applies when an accused seeks the court’s assistance in gaining access to documents (other than documents created in the course of a criminal investigation) that contain information about the “third parties” in a proceeding (complainants and witnesses).¹¹¹ There are four different avenues open to an accused person seeking to gain

¹⁰⁹ *Ibid* at paras 97-98.

¹¹⁰ “Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)” [2005] ICJ Reports 168 at para 293; “Certain Phosphate Lands in Nauru (Nauru v Australia)” [1992] ICJ Reports 240 at paras 12-21. On implied and express waivers of diplomatic immunity, see also Richard Kay, “*United States v. Deaver: Implied and Express Waivers of Diplomatic Immunity*” (1988) 12:2 *Md J Int’l L & Trade* 259 at 271.

¹¹¹ David M Paciocco, “A Primer on the Law of Third Party Records” (2005) 9:2 *Can Crim L R* 157 at 158 [Paciocco, “A Primer”].

access to records. Some records are subject to *Stinchcombe*¹¹² disclosure, when others can be subpoenaed, accessed in accordance with the *Mills*¹¹³ framework or produced in accordance with the common law requirements laid out in *O'Connor*.¹¹⁴ The appropriate regime for access to records thus depends upon where the records are located and whether the third party has a reasonable expectation of privacy in such records.¹¹⁵

This subsection will draw a line between *Stinchcombe* and *O'Connor* regimes, set out the *Garofoli* framework for challenges to wiretap authorizations, then turn to the assessment of what a proper threshold for third-party production of records on a *Garofoli* application is, and conclude with a brief note on *O'Connor* and remedial framework applicable in cases where documentary evidence has been lost or never created.

1. *Stinchcombe* and *O'Connor*

In *World Bank*, the Court started the analysis of the domestic law of third party production in criminal cases by drawing a line between the *O'Connor* and *Stinchcombe* frameworks. The *O'Connor* framework addresses the right of an accused to obtain documents that are in possession of third parties and requires the accused to demonstrate that the documents sought are “logically probative to an issue at trial or the competence of a witness to testify”¹¹⁶ to justify production.¹¹⁷ In contrast, the *Stinchcombe* framework, applies when the documents are in possession or control of the Crown or the police. The burden is placed on the Crown to justify non-disclosure.¹¹⁸ These two frameworks serve the same purpose, that is “protecting an accused person’s right to make full answer and defence, while at the same time recognizing the need to place limits on disclosure when required.”¹¹⁹

Before turning the analysis to the requirements for *O'Connor* production order made within the *Garofoli* application, it is worth setting out both the *Stinchcombe* and *O'Connor* frameworks in greater detail. In

¹¹² *R v Stinchcombe*, [1991] 3 SCR 326, [1991] 1 WWR 97 [*Stinchcombe*].

¹¹³ Sections 278.1-278.9 of the *Criminal Code* as interpreted in *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1 [*Mills*].

¹¹⁴ Paciocco, “A Primer”, *supra* note 111 at 158-159.

¹¹⁵ *Ibid* at 158, 168-169.

¹¹⁶ *O'Connor*, *supra* note 20 at para 22 (emphasis in original).

¹¹⁷ *World Bank*, *supra* note 1 at paras 112, 115.

¹¹⁸ *Ibid* at paras 114-115.

¹¹⁹ *Ibid* at para 115.

Stinchcombe, the Court established the Crown's obligation to disclose all relevant information in its possession.¹²⁰ The Crown's discretion to withhold information is limited to "such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers."¹²¹ Because disclosure requests arise early in proceedings, when the defense "simply wants to know *if* the information *could* be relevant to the accused's case and thus will not argue the specific relevance of the information,"¹²² *Stinchcombe* sets a particular legal threshold, requiring disclosure of all but *clearly irrelevant* information.

Brian Gover points out that the *Stinchcombe* standard, which defines relevant information as "inculpatory or exculpatory information which, if withheld, would give rise to a *reasonable possibility* of impairment of the right of the accused to make full answer and defence,"¹²³ differs from the standard adopted in the United States, which states that "[t]he evidence is material only if there is a *reasonable probability* that, had the evidence been disclosed to the defence, the result of the proceeding would have been different."¹²⁴ Whereas the American framework looks to the probable outcome of the case, the Canadian standard asks whether the accused person's right to make full answer and defense was inhibited.¹²⁵

The Court's decision in *R v McNeil*¹²⁶ made the *Stinchcombe* disclosure obligation even "more muscular."¹²⁷ First, the Court confirmed that the Crown must disclose all material information, "[u]nless the information is

¹²⁰ *Stinchcombe*, *supra* note 112 at 331-346. See also Loretta Colton, "R v Stinchcombe: Defining Disclosure" (1995) 40:2 McGill LJ 525 at 527, 532-533 [Colton]; Andrew Flavelle Martin, "Beyond the Goudge Inquiry: Is the Coroner Part of 'The Crown' for *Stinchcombe* Disclosure Obligations?" (2009) 67 UT Fac L Rev 9 at 20-21, 34-35 [Martin]; Jodie van Dieen, "O'Connor and Bill C46: Differences in Approach" (1997) 23:1 Queen's LJ 1 at 3-4 [van Dieen].

¹²¹ *Stinchcombe*, *supra* note 112 at 336 (emphasis added).

¹²² Colton, *supra* note 120 at 534.

¹²³ Brian Gover, "Stinchcombe: Bad Case, Good Law?" (1991) 8 CR (4th) 307 at 310 (emphasis added).

¹²⁴ *United States v Bagley*, 473 US 667 at 682 (emphasis added).

¹²⁵ Colton, *supra* note 120 at 537.

¹²⁶ *R v McNeil*, 2009 SCC 3, [2009] 1 SCR 66 [McNeil].

¹²⁷ David Paciocco, "Stinchcombe on Steroids: The Surprising Legacy of *McNeil*" (2009) 62 CR (6th) 26 at 31, see also 28-31 [Paciocco, "Stinchcombe"].

clearly irrelevant, privileged, or its disclosure is otherwise governed by law.”¹²⁸ Furthermore, the Court held that (i) the police have a duty to disclose to the prosecuting Crown “all material pertaining to the investigation,”¹²⁹ and (ii) the Crown counsel, if put on notice of the existence of relevant information, is under an obligation to inquire further and obtain the information, if it is reasonably feasible.¹³⁰

An O’Connor application involves a two-step process.¹³¹ First, the accused has to demonstrate that the “information is likely to be relevant.”¹³² The aim of this threshold is to deter “speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming” requests for production.¹³³ Secondly, if the accused meets the “likely relevance” test, the documents are produced to the trial judge, who “must examine and weight the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence.”¹³⁴ It is important to note the fact that a production order has been granted does not automatically lead to the admissibility of evidence at trial.¹³⁵

Some commentators suggest that, to avoid “fishing expeditions,” the “likely relevance” standard has to be construed as “something more than information which is relevant in the sense of being logically probative” and include an “assessment of the utility of the record, such as its relation to a material issue between the parties.”¹³⁶ In *McNeil*, however, the Court confirmed that an “accused persons cannot be required, as a condition to accessing information that may assist in making full answer and defence, to demonstrate the specific use to which they might put information which

¹²⁸ *Ibid* at para 18.

¹²⁹ *Ibid* at para 52.

¹³⁰ *Ibid* at para 49.

¹³¹ See *McNeil*, *supra* note 126 at paras 28-32; *Martin*, *supra* note 120 at 21, 35; *Paciocco*, “*Stinchcombe*”, *supra* note 127 at 31-33; *van Dieen*, *supra* note 120 at 18-21.

¹³² *O’Connor*, *supra* note 20 at para 19.

¹³³ *Ibid* at para 24.

¹³⁴ *Ibid* at para 30.

¹³⁵ *van Dieen*, *supra* note 120 at 26.

¹³⁶ *Ibid* at 37.

they have not even seen.”¹³⁷ This limitation helps to avoid a Catch-22 situations where the accused is required to prove evidence he has not seen.

In summary, the “third-party” O’Connor threshold (“likely relevant”) is higher than the “first-party” Stinchcombe standard (not “clearly irrelevant”). It was the former, more stringent threshold that the Court had to apply in the context of a *Garofoli* application.

2. Challenges to Wiretap Authorizations under *Garofoli*

In 1990, the Court decided a number of cases that developed the law pertinent to the use of wiretaps.¹³⁸ In *Duarte*, the Court for the first time recognized that electronic surveillance constitutes a “search” within the meaning of s. 8 of the *Canadian Charter*.¹³⁹ In *Dersch*, the Court held that the accused does not need to show *prima facie* misconduct to be granted access to the sealed packet containing the documents relating to the wiretap authorization; the accused only needs to assert that the admission of the evidence is challenged and that access is required in order to permit full answer and defense.¹⁴⁰ The right of access to the officer’s wiretap affidavit thus gained constitutional status.¹⁴¹ Finally, the *Garofoli* framework assesses the reasonability of a wiretap authorization, i.e. whether the statutory preconditions were met.¹⁴² Even though *Garofoli* “was not strictly speaking a *Charter* case,”¹⁴³ the Court affirmed it in *R v Pires*; *R v Lising*,¹⁴⁴ “which

¹³⁷ McNeil, *supra* note 126 at para 29.

¹³⁸ *R v Duarte*, [1990] 1 SCR 30, 71 OR (2d) 575 [*Duarte*]; *Garofoli*, *supra* note 19; *R v Lachance*, [1990] 2 SCR 1490, [1990] SCJ No 116 (QL); *Dersch v Canada (AG)*, [1990] 2 SCR 1505, 77 DLR (4th) 473 [*Dersch*], *R v Zito*, [1990] 2 SCR 1520, 80 CR (3d) 311. See Nathan Forester, “Electronic Surveillance, Criminal Investigations, and the Erosion of Constitutional Rights in Canada: Regressive U-Turn or a Mere Bump in the Road Towards Charter Justice?” (2010) 73 Sask L Rev 23 at 49–56 [Forester].

¹³⁹ *Duarte*, *supra* note 138 at 42; Forester, *supra* note 138 at 49.

¹⁴⁰ *Dersch*, *supra* note 138 at 1517; Colton, *supra* note 120 at 544–545.

¹⁴¹ Forester, *supra* note 138 at 53.

¹⁴² *Garofoli*, *supra* note 19 at 1452. See also *Duarte*, *supra* note 138 at 44–46; Glen Luther, “Of Excision, Amplification and Standing: Making Sense of the Law of Evidence in the Context of Challenges to Warranted Searches” (2006) 11:1 Can Crim L Rev 1 at 4–5 [Luther].

¹⁴³ Luther, *supra* note 142 at 4.

¹⁴⁴ *R v Pires*; *R v Lising*, 2005 SCC 66, [2005] 3 SCR 343 [*Pires*].

now stands as the leading case on the process and standard of review in wiretap cases.”¹⁴⁵

In *World Bank*, the wiretap authorizations were sought and obtained under ss. 185 and 186 of the *Criminal Code*. An authorization may be given if it is “in the best interests of the administration of justice”¹⁴⁶ and where other investigative procedures “have been tried and have failed,” are “unlikely to succeed” or the matter is urgent so that “it would be impractical to carry out the investigation of the offence using only other investigative procedures.”¹⁴⁷

In *R v Araujo*,¹⁴⁸ the Court was called upon to determine the meaning of “investigative necessity” and rejected the “last resort” standard which would require the police to exhaust all other investigative means before applying for a wiretap authorization.¹⁴⁹ The Court concluded that a “pure last resort test would turn the process of authorization into a formalistic exercise that would take no account of the difficulties of police investigations targeting sophisticated crime.”¹⁵⁰ Instead, the Court held that “[t]here must be, practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry.”¹⁵¹ Although some commentators argue that the *Garofoli* standard, as confirmed in *Araujo*, impairs the accused’s right to make a full answer and defense, this test, “which is overwhelmingly deferential to authorizing judges,”¹⁵² remains good law.

¹⁴⁵ Forester, *supra* note 138 at 54-55.

¹⁴⁶ *Criminal Code*, *supra* note 14, s 186(1)(a).

¹⁴⁷ *Ibid* s 186(1)(b).

¹⁴⁸ *R v Araujo*, 2000 SCC 65, [2000] 2 SCR 992 [*Araujo*].

¹⁴⁹ Forester, *supra* note 138 at 65.

¹⁵⁰ *Araujo*, *supra* note 148 at para 29.

¹⁵¹ *Ibid* at para 29 (emphasis added).

¹⁵² Forester, *supra* note 138 at 66. Forester also points out that “it has never been enough for the accused to show that there were material errors or omissions in the affidavit, or otherwise deceitful conduct by the police, to have an authorization set aside” (p 54). As the Court held in *Garofoli*, *supra* note 19 at 1452 (emphasis added):

The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather

3. The Proper Threshold for Third Party Production on a *Garofoli* Application

In general, the accused may challenge the “facial validity” of the wiretap authorization, arguing that the record before the authorizing judge was insufficient to make out the statutory preconditions, or the “sub-facial validity” by arguing that the record before the authorizing judge did not accurately reflect what the affiant knew or ought to have known.¹⁵³ In *Pires* the Court affirmed that, since the wiretap authorization is a mere investigative tool, on a *Garofoli* application the judge tests whether the affiant has a “reasonable belief in the existence of the requisite statutory grounds”¹⁵⁴ for granting a wiretap authorization, not the ultimate truth of the allegations in the affidavit (this is a matter to be decided on trial).¹⁵⁵

The Court ruled that third party production within a *Garofoli* application serves the same purpose as cross-examination of the affiant, and these two forms of discovery should be treated alike.¹⁵⁶ In *Garofoli*, the Court concluded that an accused may cross-examine the affiant with the leave of the court.¹⁵⁷ The trial judge should grant leave when “satisfied that cross-examination is necessary to enable the accused to make full answer and defence” and a “basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization.”¹⁵⁸ Some commentators suggested that the accused should be permitted to cross-examine the affiant as of right to permit the accused to “probe the veracity of the police information” and thus unearth possible *Charter* violations.¹⁵⁹ The Supreme Court in *Pires*, however, clearly held that the “*Garofoli* leave requirement is entirely consistent with *Charter* principles” and “it would be unwise to

than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

¹⁵³ See *Araujo*, *supra* note 148 at paras 50-54; *Pires*, *supra* note 144 at para 41; *World Bank*, *supra* note 1 at para 120; *Luther*, *supra* note 142 at 5.

¹⁵⁴ *Pires*, *supra* note 144 at para 41.

¹⁵⁵ *Ibid* at paras 30, 41. See *World Bank*, *supra* note 1 at paras 119-122.

¹⁵⁶ *World Bank*, *supra* note 1 at paras 125, 132.

¹⁵⁷ *Garofoli*, *supra* note 19 at 1465.

¹⁵⁸ *Ibid*.

¹⁵⁹ *Forester*, *supra* note 138 at 55.

permit cross-examination of the affiant as of right.”¹⁶⁰ The relevant test is a “reasonable likelihood that cross-examination of the affiant will elicit testimony of *probative value to the issue for consideration by the reviewing judge*,” because the accused has “no constitutional right to adduce irrelevant or immaterial evidence.”¹⁶¹

In *World Bank*, the Court continued this restrictive approach. First, the relevance of the information sought is to be assessed in relation to the narrow issues on a *Garofoli* application, i.e. whether the affiant knew or ought to have known that information in the affidavit was false.¹⁶² Second, production of documents creates the risk of inadvertent identification of the tipsters.¹⁶³ Third, broad production requests may cause delays and derail pre-trial proceedings.¹⁶⁴ In summary, the “reasonable likelihood” standard for granting cross-examination or production of documents on *Garofoli* application is not unduly burdensome (the accused is not required to provide the evidence that the accused seeks to obtain), but, at the same time, it ensures that the accused (who already has access to the package of documents that was before the authorizing judge, as well as the rest of the investigative file disclosed under *Stinchcombe*) does not embark on a fishing expedition.¹⁶⁵

Such an approach appears reasonable in light of the need to preserve the identity of the tipsters and maintain a very broad scope for a respondents’ production request. In particular, out of four tipsters who emailed the INT, only one did not remain anonymous to the RCMP, whereas the second tipster shared his or her identity with the INT investigators, and two other tipsters did not reveal their identities either to the INT or the RCMP.¹⁶⁶ Earlier, “two of the four tipsters were found to be confidential informants under Canadian law” and, “[t]herefore, the identities of these two informants are protected by informer privilege.”¹⁶⁷ As the Court recognized in *R v Liepert*, it is “virtually impossible for the

¹⁶⁰ *Pires*, *supra* note 144 at para 38.

¹⁶¹ *Ibid* at para 3 (emphasis added).

¹⁶² *World Bank*, *supra* note 1 at para 128; see also *Pires*, *supra* note 144 at paras 3, 40-41.

¹⁶³ *World Bank*, *supra* note 1 at para 129; see also *Pires*, *supra* note 144 at paras 3, 36.

¹⁶⁴ *World Bank*, *supra* note 1 at para 130; see also *Pires*, *supra* note 144 at paras 3, 31.

¹⁶⁵ *World Bank*, *supra* note 1 at paras 133-134.

¹⁶⁶ *Ibid* at para 14.

¹⁶⁷ *Ibid* at para 15.

court to know what details may reveal the identity of an anonymous informer.”¹⁶⁸ Furthermore, the Court had authority, envisaged in *O'Connor*, to reject “disruptive, unmeritorious, obstructive and time-consuming” production requests.

In *World Bank*, the Court pointed out that on a sub-facial validity challenge the authorizing judge should not blur the distinction between the affiant’s knowledge and the knowledge of other people involved in the investigation.¹⁶⁹ First, while the INT records may be relevant to the ultimate truth of the allegations in the affidavits prepared by Sgt. Driscoll, it is not reasonably likely that they are of a probative value to what Sgt. Driscoll knew or ought to have known – Sgt. Driscoll simply did not consult those documents and nothing indicates that it was unreasonable for him to rely on the information already provided by the INT.¹⁷⁰ Secondly, Mr. Haynes, whose role as an intermediary between the tipsters and the affiant was similar to that of an informant handler, as a professional with a reputable organization and Sgt. Driscoll had no obligation to double-check his information with the original communications between the INT and the tipsters.¹⁷¹ Third, the respondents already benefitted from extensive disclosure.¹⁷² The only set of documents which could show what Sgt. Driscoll knew at the time he prepared the affidavits were Mr. Haynes’s notes of his conversations with Sgt. Driscoll, but there is no indication if

¹⁶⁸ *R v Leipert*, [1997] 1 SCR 281 at para 28, [1997] 3 WWR 457.

¹⁶⁹ *World Bank*, *supra* note 1 at para 137.

¹⁷⁰ *Ibid* at paras 138-139.

¹⁷¹ *Ibid* at paras 140-141. Sgt. Driscoll consulted many of these communications and sent the first draft of his affidavit to Mr. Haynes for review.

¹⁷² *Ibid* at paras 102-111, 142-143. Information disclosed to the respondents included the redacted wiretap and search warrant affidavits; all materials that were before the authorizing judges; transcripts and the original audio of all relevant intercepted communications; electronic notes made by Sgt. Driscoll at his initial meeting with the World Bank Group officials; every INT report that Sgt. Driscoll consulted; an electronic copy of the draft of the first affidavit (Sgt. Driscoll checked the content of the affidavit with Mr. Haynes for accuracy and to prevent the inadvertent identification of tipsters); handwritten notes of the investigation made by all of the main RCMP investigators; and more than one million items seized at SNC-Lavalin offices. The INT also provided to the RCMP copies of the entire email correspondence between Mr. Haynes and Sgt. Driscoll, and they were shared with the respondents.

Mr. Haynes made any such notes.¹⁷³ In summary, it was fair to require the respondents to demonstrate likely relevance of the INT records on the basis of the extensive information already available to respondents.¹⁷⁴

In conclusion, the Court did not modify either the *Garofoli* or *O'Connor* framework and did not reject the possibility that a third party production order may be issued within a *Garofoli* application. Instead, on the basis of existing precedents, the Court stipulated two conditions to be satisfied to obtain a production order for the purposes of a challenge to a wiretap authorization, namely a reasonable likelihood that (i) such third party records will be of probative value to the issues on the *Garofoli* application (and not merely demonstrate errors or omissions in the affidavit) and (ii) such records “support an inference that the affiant knew or ought to have known about the errors or omissions.”¹⁷⁵

The Court also noted that this narrow approach is dictated by “[p]olicy considerations.”¹⁷⁶ In other words, the Court’s decision in *World Bank* was influenced by considerations of efficiency in the global fight against corruption, which requires (i) allowing law enforcement agencies to use adequate investigative techniques, including electronic surveillance, and (ii) ensuring adequate protection of confidential informants (“tipsters” or whistleblowers).

4. *O'Connor, R v La, and the Loss of Evidence*

In *World Bank*, the respondents argued that because *Stinchcombe* disclosure was incomplete, since Sgt. Driscoll took no notes of his work preparing the affidavits and his emails were lost, the INT’s records (as third party records) are presumed relevant because the first party records were destroyed or never created.¹⁷⁷ The Court held that a proper avenue to address this issue would be within the framework set out in *R v La*¹⁷⁸ and not by modifying the *O'Connor* framework for third party records.¹⁷⁹

¹⁷³ *Ibid* at para 142.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* at para 124.

¹⁷⁶ *Ibid* at para 116.

¹⁷⁷ *Ibid* at para 144.

¹⁷⁸ *R v La*, [1997] 2 SCR 680, 148 DLR (4th) 608 [*La*].

¹⁷⁹ *World Bank*, *supra* note 1 at para 145.

Certainly, an obligation to create and preserve records is important because the accused's right to disclosure or production of documents is "effectively meaningless if such records do not exist."¹⁸⁰ In *La*, the Court held that if the prosecuting Crown has lost evidence that should have been disclosed to the accused, the Crown has a duty to explain what happened to that evidence and, unless the explanation satisfies the trial judge, the loss of evidence amounts to a breach of the *Charter*.¹⁸¹ Furthermore, the Court held that to establish a *Charter* breach, where the police do not create records, the accused needs to furnish "evidence which would justify the conclusion that the police failed to make a record *deliberately to avoid production*."¹⁸² The Court has not established any duty of third parties to create records.¹⁸³

Although the Court in *World Bank* did not rule on the possible implications of *La* (as this issue was not argued by the parties), in accordance with this legal framework and in light of disclosure of the draft affidavit and notes made by other RCMP investigators, as well as the fact that the INT voluntary provided all emails exchanged between Mr. Haynes and Sgt. Driscoll,¹⁸⁴ there was no indication that Sgt. Driscoll did not create handwritten notes to avoid disclosure, thus it is unlikely that the respondent's argument under *La* would have been successful.

V. CONCLUSION

In summary, the Supreme Court's decision in *World Bank* does not constitute a major reform of existing law on the immunity of international organizations or production of documents by third parties. It is rather an overhaul of the existing legal regime, where the Court diligently interpreted the IBRD's and the IDA's *Articles of Agreement* in accordance with general principles of treaty interpretation, giving the words of these documents their ordinary meaning and taking into account the objective and purpose of the

¹⁸⁰ Martin, *supra* note 120 at 22.

¹⁸¹ *La*, *supra* note 178 at para 1; See Graeme Mitchell, "R v La: The Evolving Right to Crown Disclosure and the Supreme Court Divided" (1997) 8 CR (5th) 179 at 179, 183-185.

¹⁸² *R v Buric*, [1997] 1 SCR 535 at 536, 114 CCC (3d) 95 (emphasis added). See also *R v Carosella*, [1997] 1 SCR 80, 142 DLR (4th) 595.

¹⁸³ Martin, *supra* note 120 at 22.

¹⁸⁴ *World Bank*, *supra* note 1 at para 146.

IBRD's and the IDA's governing documents, and held that the INT, an integral part of the WBG's integrity regime, benefits from the IBRD's and the IDA's archival and personnel immunities. Further, in line with policy aimed at fostering international cooperation and strengthening Canada's role in the global fight against corruption, the Court interpreted requirements for waiver of the INT's immunities strictly and did not engage in balancing the INT's immunity against the accused's right to make full answer and defense.

The Court also confirmed that the production of documents under *O'Connor* is subject to a higher threshold than disclosure under *Stinchcombe*, and this threshold is even higher when a production request is made within a *Garofoli* application that, by definition, deals with a limited number of issues related to wiretap authorizations. The Court thus confirmed that *O'Connor*, *Garofoli*, and *Pires* remain good law in Canada. The frameworks from the previous cases remain complex, and skilled defense work is necessary to ensure an accused person has the right to make a full answer and defense. Furthermore, in light of widespread corruption around the globe and increasing efforts of Canadian law enforcement agencies to combat corruption in international trade, it is likely that issues akin to those raised in *World Bank* will come before Canadian courts again in the near future. It remains to be seen, in particular, how the Supreme Court would apply a *La* remedial framework in a situation where third party records are ruled to be "likely relevant", when their production is prevented by the third party's immunity.

‘Animal Justice’ and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada

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ABSTRACT

With the recent developments surrounding *R v DLW* and the legal interpretation of ‘bestiality’ before the Supreme Court of Canada, animal law organizations such as *Animal Justice* insist that Canadians must recognize their obligation to protect the most vulnerable beings in their care, and not subject them to abuse. We argue that there were many avenues of interpretation open to the Supreme Court in adjudicating and addressing the legal definition of bestiality. The majority of the Supreme Court ultimately adopted a conservative approach to statutory interpretation. A strict legal construction and focus on original intent of Parliament foreclosed development of the law towards legal recognition of animal sentience and the concomitant implications for animal rights in Canadian law. In this paper we consider various routes by which a more progressive interpretation of bestiality could have been constructed by the Supreme Court of Canada. When the Supreme Court of Canada concluded that bestiality could only be interpreted as a penetrative offence, it avoided the chance for incremental legal change that could have contributed to the ways Canadians, laypersons, and legal professionals recognized animal

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consciousness. Animal protection and legal animal welfare apparatus in Canada still remain relatively adrift, and less developed than in countries like New Zealand.

I. INTRODUCTION

In socio-legal scholarship and activism, passionate debate and serious reflection on the treatment of animals in Canada have risen to prominence.¹ Some critical scholars note that Canadian animal protection law falls short when it comes to animal welfare; nonetheless, the regulatory field is portrayed by these scholars as on the verge of changing.² Scientific knowledge accumulated over many decades has amplified and demonstrated that animals are more than property – they are beings with emotions, consciousness, and sentience; yet legal regulations often administer animals as mechanistic property, to be utilized by human beings.³ Indeed, propelled by science and ethics, public interest in animal issues is mounting; there is a rising pressure for law reform to ensure that animal regulation be reflective of contemporary insights and values. Human beings have legal rights that are meant to ensure that our fundamental

¹ Maneesha Deckha, “Critical Animal Studies and Animal Law” (2012) 18 *Animal L* 207 [Deckha]; Will Kymlicka & Sue Donaldson, “Animals and the Frontiers of Citizenship” (2014) 34:2 *Oxford J of Leg Stud* 201 [Kymlicka & Donaldson, 2014]; Peter Sankoff, “The Animal Rights Debate and the Expansion of Public Discourse: Is it Possible for the Law Protecting Animals to Simultaneously Fail and Succeed?” (2012) 18 *Animal L* 281 [Sankoff]; Peter Sankoff, Vaughn Black & Katie Sykes, “Introduction” in P Sankoff, V Black & K Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc., 2015) [Sankoff, Black & Sykes]; John Sorenson, *About Canada: Animal Rights* (Winnipeg: Fernwood Publishing, 2010) [Sorenson].

² Lesli Bisgould, “Gay Penguins and Other Inmates in the Canadian Legal System” in J. Sorenson, ed, *Critical Animal Studies: Thinking the Unthinkable* (Toronto: Canadian Scholars’ Press Inc., 2014) [Bisgould]; Lesli Bisgould & Peter Sankoff, “The Canadian Seal Hunt as Seen in Fraser’s Mirror” in P Sankoff, V Black and K Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc., 2015) [Bisgould & Sankoff]; Will Kymlicka & Sue Donaldson, “Animal Rights and Aboriginal Rights” in P Sankoff, V Black & K Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc., 2015) [Kymlicka & Donaldson, 2015]; Katie Sykes, “Rethinking the Application of Canadian Criminal Law to Factory Farming” in P Sankoff, V Black & K Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc., 2015) [Sykes].

³ Deckha, *supra* note 1; Sankoff, Black & Sykes, *supra* note 1.

interests (such as our interest in life, liberty, and security of the person) cannot be overridden, except in limited circumstances and on a principled basis. The same cannot be said for animals.⁴ Humans have the right not to be treated as objects without consent, or as the means to somebody else's ends, sexual or otherwise. As we will discuss, the entitlements of animals for freedom from sexual (ab)use in Canada is anything but definitive. Indeed, in Canada, conceptions of rights for animals remains elusive in the current legislative framework.

While an examination of current debates surrounding animal welfare and protection laws is beyond the scope of our piece, it is noteworthy that present laws which seek to speak to animal welfare and protection acknowledge a "societal concern" about the well-being of animals.⁵ Even so, such laws often ultimately treat animals "as little more than commodities to be allocated, in whole or in parts, among competing human interests".⁶ Generally treated as property, animals are under the control of people for their exclusive use, and as such, property owners have the right to use their property as they see fit. And while the fundamental premises of property law have not changed much since the seventeenth century, humans who were once considered property or quasi-property have since fought and become legal persons. Animals, however, are the only sentient beings who remain property in law.⁷ Even inanimate constructs such as churches and corporations have become legal persons able to assert their interests in courtrooms and legal settings. Since acquiring the status of property, animals have been treated much like machines—objects "that do not think, feel, communicate, have their own interests, or matter in any moral way".⁸

In this paper, we explore how bestiality has been interpreted in Canada's Supreme Court. We examine how the Supreme Court case of *R v DLW* (2016)⁹ could have redefined bestiality in the *Charter*¹⁰ era. The main issue before the Supreme Court was whether bestiality, as a legal offence,

⁴ *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].

⁵ Bisgould & Sankoff, *supra* note 2.

⁶ *Ibid.*

⁷ Bisgould, *supra* note 2.

⁸ *Ibid* at 158.

⁹ *R v DLW*, 2016 SCC 22, [2016] 1 SCR 402 [SCC].

¹⁰ *Charter*, *supra* note 4.

should include all sexual activities perpetrated upon animals or whether the provisions at issue only criminalize penetrative coitus with animals. A narrow reading of the bestiality provisions, espousing a strict interpretation of the offence, was found by the British Columbia Court of Appeal and ultimately, by the Supreme Court of Canada (SCC) to only include coital and penetrative sex with animals in the bestiality offences. Interestingly, for the first time in history an animal rights advocacy group, *Animal Justice*,¹¹ was provided the right to intervene in the case in order to provide context to the SCC's assessment.

In its factum, *Animal Justice*¹² indicated that two fundamental values should be considered when assessing the scope of bestiality: (1) the need to protect vulnerable animals from the risks posed by improper human conduct; and (2) the wrongfulness of sexual conduct involving the exploitation of non-consenting participants.¹³ In issuing its decision using conservative approaches to statutory interpretation, the SCC missed an opportunity for a decision that could have been relatively transformative. How else might the Court have decided? A review of the literature reveals that some possibilities included that: (1) Canadian criminal law could recognize sexual abuse against animals beyond technical protections such as bans against animal penetration; (2) such recognition could have paved a legal path in which animals could be recognized as sentient beings in addition to conceptions of animals as mere property; and (3) judicial perceptions of harm and constructions of *risks* and negative effects of sexual conduct and (ab)use could have been used to constitute more than protections for victims of human against human sexual offences, but extended further into the realm of animal protection.

In this paper we consider ways that the *DLW*¹⁴ Supreme Court of Canada decision could have expanded protection for animals in Canada against harms. There were several options open to the highest court that could have paved the way for a progressive interpretation of anti-bestiality

¹¹ *Animal Justice*, "Home" online: <www.animaljustice.ca>.

¹² *R v DLW*, 2016 SCC 22, [2016] 1 SCR 402 (Factum of the Intervener (*Animal Justice*)), online: <http://www.scc-csc.ca/WebDocuments-DocumentsWeb/36450/FM030_Intervener_Animal-Justice.pdf> [Intervener].

¹³ *Ibid* at para 1.

¹⁴ SCC, *supra* note 9.

provisions in Canada's *Criminal Code*.¹⁵ Using a harms-based legal test (as for example in cases like *R v Labaye*¹⁶ (2005) discussed below), as a standard for what acts should be considered legal between humans and animals would have been a considerable shift in the protections of animals in Canada. Such a shift would have required somewhat radical reasoning by the Supreme Court in Canada. Less radical would be a judicial interpretation that attempted to contextualize the bestiality provisions by analogizing the prohibition to sexual assault based offences in the *Criminal Code*.¹⁷ Of course, the most radical result would have been a decision which recognized animals as sentient and cognizant beings – such a result would have troubled or complicated the property-based regime of animal markets in Canada, had massive economic ramifications, and was therefore never a possibility for the SCC in this case.

This paper begins with a brief discussion on the tensions that emerged between those that advocated for progressive versus incremental animal welfare law reforms. We see how the application of judicial interpretation poses more problems than solutions within Canadian adjudication. We review our method, in terms of how we believe legal texts can be mined for the logical reasoning that underpins them and for the social processes that impact upon them. We then shift our discussion to the case of *R v DLW*¹⁸ and alternate reasoning that could have been employed by the SCC. As we outline the circumstances of this criminal case, we unpack the legislative, factual, and judicial understandings of bestiality, and the issues that arise when such understandings are analyzed. Following this, we examine the intervener factum of *Animal Justice*¹⁹ to analyze the organization's rationale of the risks posed by failing to interpret the crime of bestiality widely. Taking these perspectives into account, we then propose ways that the *DLW*²⁰ Court could have dealt with the definition and interpretation of bestiality in a modern context. While the possibility exists for a judge to say that a law should be interpreted in the context of the modern version of its original

¹⁵ *Criminal Code*, RSC 1985, c C-46, s 445 [Code].

¹⁶ *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728 [Labaye].

¹⁷ *Ibid.*

¹⁸ SCC, *supra* note 9.

¹⁹ Intervener, *supra* note 12 at 5.

²⁰ SCC, *supra* note 9.

purpose, and that legislative reforms recognizing animal sentience has potential, we argue that Canada is an unlikely candidate for these reforms moving forward.²¹ This is further illustrated by the fact that only Justice Abella's dissent was willing to read the statute at issue in a modern context that avoided surplusage and manifest absurdity (discussed below). With the recent New Zealand animal welfare scheme that legally acknowledges the validity of animal sentience, we conclude our paper by examining how the *DLW SCC*²² decision missed an opportunity to galvanize Canadian animal welfare legal reforms.

This paper examines the potential judicial interpretation of human-animal relations, and while we provide possible alternatives of judicial determinations that could have been reached in *DLW*,²³ such options should not be read as mutually exclusive or as a comprehensive list of possibilities. We present our discussion as a means of opening up alternate interpretations for bestiality in Canada. The barrier impeding a judicial interpretation that would mark progress for the causes of animal welfare in Canada is the SCC's finding that bestiality was limited to penetrative coitus with an animal. Nevertheless, had the SCC accepted a wider definition of bestiality than the British Columbia Court of Appeal, the ruling might have moved beyond legal precedent and influenced conceptions of sexuality, choice, and the *risk of harm* as factors to consider in assessing the damage suffered by non-human animals – a tacit recognition of the sentience of animals.

II. A BRIEF NOTE ON ANIMAL WELFARE LEGISLATION, THE ABSENCE OF REVOLUTION AND METHOD

Arguing for a specific legislative and adjudicative outcome in the context of legislation pertaining to animals is a fraught exercise. Tensions emerge between those that advocate for incremental law reform versus those who argue that incrementalism is merely a gentler way of maintaining subjugation of non-human animals. Sankoff summarizes the tension succinctly with a query: “Is there good reason to enact laws protecting

²¹ Sankoff, Black & Sykes, *supra* note 1.

²² SCC, *supra* note 9.

²³ *Ibid.*

animals if those laws inherently recognize the continued exploitation... [of non human animals]?"²⁴ The tension is described by Sankoff as less a matter of philosophy than practice.²⁵ Sankoff ultimately eschews the binary approach, and grounding his work in Habermasian legal ethics, makes a compelling case for legislative approaches that provide room for "public dialogue" and consultation.²⁶ In doing so, he distinguishes between Canada's piecemeal approach to regulation of animals as opposed to New Zealand's animal protection legislation, noting that the latter has the best potential to engage public discussion and infuse values of non-human animal worth into public discourse.²⁷

As will become clear in our discussion, the lack of a flagship Canadian statute dealing with animal protection poses problems for the kinds of solutions courts can craft when addressing problems in the application of judicial interpretation. Piecemeal litigation and prosecution limits the ability of agents of social change to achieve social transformation. However, we see legal decisions as important for both their precedential impact and for the information they provide us about the nature of governance in countries such as Canada.

The discourse within such legal decisions can be viewed as one part of a larger project of governance.²⁸ Thinking of case law this way allows us to analyze both the social processes beginning outside of the law that become 'juridified,' as well as accounting for the ways law *structures* decisions that govern social outcomes.²⁹ By focusing on juridification and the structuring of decisions, we can make sense of how outcomes of modern law exhibit new and varied forms of power through the regulation of persons based on distributions around scientific norms.³⁰ As explained by Foucault,

²⁴ Sankoff, *supra* note 1.

²⁵ *Ibid.*

²⁶ *Ibid* at 284.

²⁷ *Ibid.*

²⁸ Alan Hunt, "Legal Governance and Social Relations: Empowering Agents and the Limits of Law" in M MacNiel, N Sargent & P Swan, eds, *Law, Regulation, and Governance* (Don Mills, ON: Oxford University Press, 2002) at 54 [Hunt, "Legal Governance"].

²⁹ Alan Hunt, "Law, Politics and the Social Sciences" in D Owen, ed, *Sociology After Postmodernism* (London: SAGE Publications, 1997) [Hunt].

³⁰ Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage Publications, 1999) [Dean]; Michel Foucault, "Two Lectures" in Colin Gordon, ed,

...the law operates more and more as a norm, and the juridical institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.³¹

Law can perform a symbolic function by identifying normative social values from which legal subjects are formed.³² However, as we will see, these non-legal social norms at times conflict with liberal norms – that is, with rights or other legislated social values. Our method takes legal text seriously and mines such text for reasoning and rhetoric. Our approach remains mindful of the doctrinal effects, but we also see other rationales underpinning the legal text. As we will demonstrate, the construction of a legal test is more than packaged precedent, but is a consolidated history of the present that reveals the judicial and social rationales of the cases and social phenomenon that preceded the case. One can trace these rationales from case to case in the same way as precedent can, but what we are studying is manifestly different. Our method examines the logics underpinning the articulations of legal tests, and we recognize the legal test itself as a type of technology that delivers the governmental effects of law separate and apart from the law that is itself created. There is, we contend, validity in analyzing law as a type of media, and media analyses can stand to be supported by textual and discursive analytics. What we do with law is no different than what a scholar like Brenda Cossman might do when she compares the development of sexual citizenship in popular culture (see television shows such as “Queer Eye for the Straight Guy” for example) with slower but nonetheless important changes in the conception of sexual citizenship in law.³³

In this way, even minute changes in judicial interpretations of animal law, though minor in terms of law reform deliverables, or in advancing the cause of ceasing animal exploitation, are still important. These sorts of microscopic changes that fill legislative lacunae provide critical opportunities in the ways that policy makers, legal professionals, and

Power/Knowledge: Selected Interviews and Other Writings 1972-1977” (New York: Pantheon, 1980) [Foucault]; Sankoff, *supra* note 1.

³¹ Foucault, *supra* note 30 at 144.

³² Hunt, “Legal Governance”, *supra* note 28; Sankoff, *supra* note 1; Desmond Manderson, “Symbolism and Racism in Drug History and Policy” (1999) 18 *Drug & Alcohol Rev* 179 [Manderson].

³³ Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Palo Alto: Stanford University Press, 2007) [Cossman].

laypeople may discuss animal rights. Even minor legal advances have the potential to bring into cultural consciousness new conceptions of ways to think of and discuss animal life and regulation. Certainly, wholesale legal change might provide a quicker course to achieve an activist agenda, but this does not lessen the need to understand the language of deployment of animal regulation uttered by Canadian courts generally, and within *DLW*³⁴ specifically. As we illustrate with the particular case of *DLW*,³⁵ it is by examining the variety of judicial interpretations of sexuality that have occurred throughout Canadian history that we can further explore the ways such decisions may influence societal discourse moving forward.

III. *DLW*: THE LEGISLATIVE, FACTUAL, AND JUDICIAL BACKGROUND

The original presentation of bestiality legislation emerged from English common law, and has its roots in Victorian conceptions of morality; prohibited conduct included 'unnatural' penetrations of vaginas or anuses by penises, whether by humans or animals.³⁶ This category of offences had been defined in early case law as 'sodomy' or 'buggery'.³⁷ As the law progressed, buggery with an animal was defined and applied as bestiality.³⁸ As a criminal offence, buggery was codified in Canada in 1869 in *An Act respecting Offences against the Person*³⁹, re-established in 1886 in *An Act respecting Offences Morals and Public Convenience*⁴⁰ in order to remove the minimum punishment of two years and maintain the life imprisonment sentence. Incorporated into the *Criminal Code*⁴¹ in 1892, the offence of buggery was stated as follows:

³⁴ SCC, *supra* note 9.

³⁵ *Ibid.*

³⁶ Imogen Jones, "A Bestly Provision: Why the Offense of 'Intercourse with an Animal' Must be Butchered" (2011) 75(6) J Crim L 528 at 528-529 [Jones].

³⁷ *Ibid.*; *R v Jacobs* (1817) Russ & Ry 331, 168 ER 830 [Jacobs]; *R v Reekspear* (1832) 1 Mood CC 342 [Reekspear].

³⁸ *R v Bourne* (1952) 36 Cr App R 1251 [Bourne].

³⁹ *Act respecting Offences against the Person*, SC 1869, c 20, s 63 [Offences against the Person].

⁴⁰ *Act respecting Offences against Public Morals and Public Convenience*, RSC 1886, c 157, s 1 [Offences against Public].

⁴¹ *Code*, *supra* note 15.

Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature.⁴²

The offence was then re-worded in the 1954 Amendment, which introduced the term 'bestiality' and removed the phrase 'either with a human being or with any other living creature':

Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.⁴³

Finally, through the 1985 Amendment, separate offences were created for anal intercourse (s. 159) and bestiality (s. 160). These two sections came into effect in January 1988, and they have been (and still are, currently) the standard for what judges use in their determinations for sexual offences involving the interactions between humans and animals.

The case before the SCC was an appeal from a decision from the British Columbia Court of Appeal that provided a narrow interpretation of the *Criminal Code*⁴⁴ offence of 'bestiality.' In *R v DLW*⁴⁵ the appellant was charged with a total of 14 sexual offences involving his two step children.⁴⁶ The alleged events occurred over a ten-year period. One of the most disturbing acts that the appellant engaged in with his step daughters was to compel the family dog to lick the vagina of his older step daughter by spreading peanut butter on her vagina when she was 16 years old. Once the appellant compelled the dog to engage in this act, he would videotape the interaction.⁴⁷ The appellant was then found guilty on 13 counts by the trial judge in the Supreme Court of British Columbia, including the one count of bestiality. However, the appellant only appealed the conviction on the bestiality count, and it was to be determined by the Court of Appeal whether penetration was an element of the bestiality offence.⁴⁸

Section 160 of the *Criminal Code*⁴⁹ maintains three different bestiality offences: the commission of bestiality (s. 160(1)), which carries a maximum sentence of 10 years; compelling bestiality (s. 160(2)), which carries the same penalty; and bestiality in the presence of a child (s. 160(3)): prohibiting both

⁴² *Ibid*, SC 1892, c 29, s 174 (55-56 Vict.) c 29.

⁴³ *Ibid*, SC 1953-54, c 51.

⁴⁴ *Code*, *supra* note 15.

⁴⁵ SCC, *supra* note 9.

⁴⁶ *R v DLW*, 2013 BCSC 1327 at para 1, BCJ no 1620 (QL) [BCSC].

⁴⁷ *R v DLW*, 2015 BCCA 169 at para 2, 325 CCC (3d) 73 [BCCA].

⁴⁸ *Ibid* at para 1.

⁴⁹ *Code*, *supra* note 15, s 160.

the act in the presence of a child, or inciting the child to commit the act) which carries a minimum of one year, with a maximum of 14 years, on indictment.

The trial judge, Romilly J., noted in his decision that the legal issue which required resolution was whether the current term of 'bestiality' should include acts of sexual touching with animals without penetration. In effect, he argued an expanded scope of interpretation for the meaning of bestiality. Furthermore, the trial judge noted that the term bestiality was undefined by the *Criminal Code*⁵⁰, and that other jurisdictions such as Australia prohibit any sexual activities against animals and favoured an approach consistent with the "criminalizing of non consensual act[s] generally."⁵¹

Romilly J. was of the opinion that in the case of the accused, the bestiality offence must reflect current views of what constitutes prohibited sexual acts.⁵² He noted that legislation related to mores should be read in a "modern context"⁵³, and also enunciated that the mores at the root of animal protection crimes included certain moral understandings:

Members of our society have a responsibility to treat animals humanely, which is especially true for domesticated animals that rely on us. Physical harm is not an essential element of bestiality; that is because, like many sexual offences in the Code,⁵⁴ the purpose of the bestiality provisions is to enunciate social mores. Those mores include deterring non-consensual sexual acts and animal abuse.⁵⁵

In so doing, he argued that current social values "abhor *all forms* of touching for sexual purposes on those who do not consent to it... 'bestiality' means touching between a person and an animal *for a person's sexual purpose*."⁵⁶ The trial judge relied on recorded guilty pleas for charges under s. 160 where a guilty plea was tendered for mere sexual touching of

⁵⁰ BCSC, *supra* note 46 at para 302.

⁵¹ *Ibid* at para 308; see also Legislative Assembly for the Australian Capital Territory, "Explanatory Statement for the *Crimes Legislation Amendment Bill 2010*" (2010), online: <http://www.austlii.edu.au/au/legis/act/bill_es/clab2010284/clab2010284.html> ["Explanatory Statement"].

⁵² BCSC, *supra* note 46 at para 310.

⁵³ *Ibid* at para 311.

⁵⁴ *Code*, *supra* note 15.

⁵⁵ BCSC, *supra* note 46 at para 310.

⁵⁶ *Ibid* at para 311-312.

animals.⁵⁷ Therefore, Romilly J. was able to justify a conviction for the accused for the bestiality offence.

However, the Court of Appeal disagreed with the trial judge, indicating in their decision that “the words of a statute are to be construed as they would have been the day after the statute passed”.⁵⁸ The majority agreed with the concurring reasons of McLaughlin J. (now C.J.), in *R v Cuerrier*⁵⁹ noting that caution must be exercised when approaching the definition of elements of old crimes:

Clear language is required to create crimes. Crimes can be created by defining a new crime, or by redefining the elements of an old crime. When courts approach the definition of elements of old crimes, they must be cautious not to broaden them in a way that in effect creates a new crime. Only Parliament can create new crimes and turn lawful conduct into criminal conduct. It is permissible for courts to interpret old provisions in ways that reflect social changes, in order to ensure that Parliament’s intent is carried out in the modern era. It is not permissible for courts to overrule the common law and create new crimes that Parliament never intended.⁶⁰

The Court of Appeal found that penetration remained an element of the offence even after the offence was amended in 1985 to separate out the offences of buggery (reworded as anal intercourse) and bestiality into different *Criminal Code* provisions.⁶¹ Nor was the Court convinced that the 1954 amendments prohibited non-penetrative sexual activities with animals: these amendments added the term bestiality (to the buggery offences) and removed the phrases “either with a human being or with any other living creature” - uniting the buggery offences and bestiality provisions in the same section.⁶² The Court of Appeal also referred to various annotations found in the *Criminal Code*⁶³ prior to 1985 and as late as 2015, and 1970s era Law Reform Commission work, all of which required penetration as an element of the offence.⁶⁴ The Appeals Court also noted a lack of Parliamentary committee engagement with the specific question of

⁵⁷ BCSC, *supra* note 46 at paras 311-312; italics emphasized.

⁵⁸ BCCA, *supra* note 47 at para 20.

⁵⁹ *R v Cuerrier*, [1998] 2 SCR 371, 162 DLR (4th) 513 [*Cuerrier*].

⁶⁰ *Ibid* at para 34.

⁶¹ BCCA, *supra* note 47 at para 23.

⁶² *Ibid* at para 21.

⁶³ *Code*, *supra* note 15.

⁶⁴ *Supra* note 60 at paras 21, 32.

penetration in the amendment processes.⁶⁵ The Appeals Court was thus able to create a straight link between the common law bestiality prohibition, the 1954 legislation, and the current *Criminal Code*⁶⁶ prohibition. The Court of Appeal thus acquitted the accused of the bestiality charge.

At the SCC, the majority upheld the Court of Appeal's decision.⁶⁷ The Court relied on the legal principle that there should be no new common law offences in the era of the *Criminal Code*.⁶⁸ The majority agreed that the statute should be read with the meaning that Parliamentarians had in mind at the point of drafting. Using similar reasoning to the Court of Appeal, the majority found that penetration was a required element of the offence of bestiality. In the absence of clear Parliamentary indications to alter the original meaning of the term, the majority was unable to interpret bestiality as a non-penetrative offence. The majority noted that:

It defies logic to think that Parliament would rename, redefine and create new sexual offences in a virtually complete overhaul of these provisions in 1983 and 1988 and yet would continue to use an ancient legal term with a well-understood meaning — bestiality — without further definition in order to bring about a substantive difference in the law. The new bestiality offences added in the 1988 revisions, while not changing the definition of the underlying offence, added protections for children in relation to that offence. There is nothing inconsistent with the purpose of these new provisions in the conclusion that the elements of bestiality remained unchanged. There is nothing “absurd” about protecting children from compulsion or exposure to this sort of sexual conduct. And, contrary to what Justice Abella writes, it does not follow that all sexually exploitative acts with animals that do not involve penetration are “perfectly legal”: para. 142. Section 160 is not the only protective provision. There were (and still are) other provisions in the *Code* which may serve to protect children (and others) from sexual activity that does not necessarily involve penetration: see, e.g., the current ss. 151 , 153 , 172 and 173 .⁶⁹

Justice Abella wrote a lone dissenting opinion noted that statutory interpretation should not be frozen in time, girded by the folly of strict construction and original intent. Justice Abella wrote that:

⁶⁵ *Supra* note 60 at para 37.

⁶⁶ *Code, supra* note 15.

⁶⁷ SCC, *supra* note 9.

⁶⁸ *Code, supra* note 15.

⁶⁹ SCC, *supra* note 9 at para 116.

We are dealing here with an offence that is centuries old. I have a great deal of difficulty accepting that in its modernizing amendments to the *Criminal Code*,⁷⁰ Parliament forgot to bring the offence out of the Middle Ages. There is no doubt that a good case can be made, as the majority has carefully done, that retaining penetration as an element of bestiality was in fact Parliament's intention.⁷¹

To assume the interpretation of the majority's view that the elements of buggery and bestiality were one and the same would mean that the addition of bestiality into the *Code*⁷² would be superfluous; Justice Abella argues that "[n]o legislative provision should be interpreted "to render it mere surplusage."⁷³

Justice Abella argued for a contextual approach to the interpretation of the statute. She noted that the majority's approach "completely undermines the concurrent legislative protections from cruelty and abuse for animals".⁷⁴ She also noted that statutory interpretation should not favour an interpretation that reproduces absurd results.

Section 160(3) is, in my respectful view, inarguably a reflection of Parliament's purpose to protect children from witnessing, or being compelled to commit, bestiality. If all Parliament intended was that children be protected from seeing or being made to engage in acts of *penetration* with animals, one could reasonably wonder what the point was of such an unduly restricted preoccupation. Since it is a "well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences" ...surely what Parliament must have intended was protection for children from witnessing or being forced to participate in *any* sexual activity with animals, period.⁷⁵

This lone dissent appeared to draw from the arguments raised by the intervenor, *Animal Justice*. Justice Abella referred to the animal welfarism context raised by the intervenor and adopted some of its arguments.

⁷⁰ *Code*, *supra* note 15.

⁷¹ SCC, *supra* note 9 at para 126.

⁷² *Code*, *supra* note 15.

⁷³ *R v Proulx*, 2000 SCC 5 at para 28, [2000] 1 SCR 61; *R v Kelly*, [1992] 2 SCR 170 at 188, 92 DLR (4th) 643 [*Kelly*]; *Attorney General of Quebec v Carrières Ste-Thérèse Ltée*, [1985] 1 SCR 831, 20 DLR (4th) 602 [*Carrières Ste-Thérèse Ltée*].

⁷⁴ SCC, *supra* note 9 at para 142.

⁷⁵ *Ibid* at para 147.

IV. ANIMAL JUSTICE'S INTERVENTION: THE (RISK OF) HARM TO ANIMALS

The factum of *Animal Justice*⁷⁶ analyzing *R v DLW*⁷⁷ (2015) cites *R v Menard*⁷⁸ (1978) as an example of how animal cruelty provisions in the *Criminal Code*⁷⁹ provide inadequate means of protecting animals from the risks of harm that arise when they are used for sexual purposes. The current sections create offences of wilfully killing, maiming, poisoning or injuring cattle (s. 444) and dogs, birds, or animals that are not cattle (s. 445).⁸⁰ The pre-existing prohibition prohibited the causation of “unnecessary pain, suffering or injury” to animals (then s. 387(1)(a)). In *Menard*⁸¹, the Quebec Court of Appeal was tasked with considering the meaning of unnecessary pain and suffering under the prohibition and ultimately found that such meaning required an assessment of multiple factors, depending upon the circumstances. First, it must be shown that the animal endured pain or suffering, beyond “the least physical discomfort.”⁸² Once this is proven, a court must take into account if the pain or suffering was inflicted “in pursuit of a legitimate purpose”.⁸³ Indeed, pain or suffering imposed for legitimate human purposes must be examined further; while pain or suffering imposed for “illegitimate purposes are always unnecessary”, inevitability of harm must be considered, as well as “the purpose sought and the circumstances of the particular case”.⁸⁴ This would include taking into account the “privileged place” which humans occupy in nature, relevant “social priorities, the means available [and] their accessibility”, and whether the suffering could have been reasonably avoided.⁸⁵

⁷⁶ Intervener, *supra* note 12 at 5.

⁷⁷ SCC, *supra* note 9.

⁷⁸ *R v Menard* (1978) 43 CCC (2d) 458 (WL Can) [*Menard*].

⁷⁹ *Code*, *supra* note 15.

⁸⁰ *Code*, *supra* note 15, ss 444, 445.

⁸¹ *Menard*, *supra* note 78 at para 46.

⁸² *Ibid.*

⁸³ *Ibid* at para 51.

⁸⁴ *Ibid.*

⁸⁵ *Ibid* at para 53.

As *Animal Justice*⁸⁶ indicates, a balancing approach is created from the latter part of the test which measures the social value of the activity—considering the importance of the purpose for inflicting pain and suffering—against the harm caused to the animal, and whether reasonable alternatives were available: “*Menard* makes it very clear that the more social value an activity creates, the more harm can be imposed on animals. In contrast, activities undertaken for illegitimate purposes cannot justify harm”.⁸⁷ According to *Animal Justice*,⁸⁸ touching animals for sexual gratification is an illegitimate activity in society, and as such, “it made sense for Parliament to prohibit this form of contact without any proof that the animal suffered harm”.⁸⁹ In other words, the bestiality offence is not designed to redress situations in which animals have suffered harm; instead, it is to recognize that bestiality, constituted within its nature, uses “vulnerable sentient beings for exploitive purposes and creates needless *risks of harm* by virtue of the wide range of sexual activities involved”.⁹⁰

Furthermore, *Animal Justice*⁹¹ indicates that “s. 445.1 requires proof of harm as an absolute requirement”. However, “without veterinary evidence or testimony describing an undeniable physical injury”, the *actus reus* becomes a more complex situation to discern, making the *mens rea* and the subsequent harm caused more difficult to establish.⁹² Proving bestiality,

⁸⁶ Intervener, *supra* note 12 at 5.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*; In his leading decision on s 387(1)(a), *Menard*, *supra* note 78 at para 46, Lamer J.A. (as he then was), recognized the significance of the 1954 Amendments, noting that “I dare to believe that we were given in 1953-4 a norm which was intended to be more sensitive to the lot which we reserve alas all too often to animals.”

⁹⁰ Intervener, *supra* note 12 at 5, italics in original; It is also consistent with other animal cruelty provisions that focus on risk and do not require proof of actual harm. See s 445(1)(b) (placing poison in a place where it can be consumed by animals) and s 445(1)(c) (failing to provide suitable and adequate food, shelter, and care for an animal).

⁹¹ Intervener, *supra* note 12 at 5.

⁹² Intervener, *supra* note 12 at 5; For instance, in *R v McRae*, 2002 BCPC 651 at para 22, 2002 CarswellBC 3443, McDermid J. indicated that evidence in which an animal yelped after being hit with a metal pole was insufficient to establish suffering: “The fact that [the trial judge] found [McRae] [was] ‘unnecessarily rough’ with the dog is not the same as being satisfied beyond a reasonable doubt that whatever the pain the respondent may have caused his dog exceeded ‘the least physical discomfort.’ The fact that the trial judge failed to draw the inferences [McRae] says [the trial judge] should have drawn does not constitute an error in law in the circumstances of this case.”

however, is more difficult than demonstrating physiological harm to animals. The very nature of bestiality indicates that the act will almost inevitably and typically occur in private,⁹³ suggesting that it will only be in rare instances that examination of the animal near to the time of offending will be possible.

Inevitably, *Animal Justice*⁹⁴ contends that the approach taken in *DLW*⁹⁵ (2013) leaves animals open to vulnerability and to numerous risks.⁹⁶ They insist that a wide array of activities will be permitted if bestiality is restricted to vaginal or anal intercourse. Such activities include (but are not limited to) digital penetration of the vagina or anus, the use of restraints (to permit sexual conduct to take place), physical manipulation of sexual organs, and penetration by the use of sexual implements.⁹⁷ Ultimately, these activities impose unnecessary risks upon the wellbeing of the animals involved, and as “relics of barbarism”, such acts may not have social utility in the modern era.⁹⁸ While it is clear that *Animal Justice*⁹⁹ makes a compelling argument for the rights and wellbeing of animals, the question remains of whether these views can influence Canadian adjudication. The SCC decision seems to answer this question in the negative. What were some other judicial approaches that the SCC could have undertaken to avoid the potential for a regressive decision?

⁹³ Cossman, *supra* note 33 at 7.

⁹⁴ Intervener, *supra* note 12 at 5.

⁹⁵ BCSC, *supra* note 46.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*; both the BC Court of Appeal and the appellant in *DLW* are somewhat vague about acts of this sort, as both repeatedly use the term ‘penetration’ rather than intercourse. Nevertheless, the court’s reasons in *DLW* make it significantly clear that the focus is not on penetration generally, but exclusively on contact between a penis and anus or a penis and vagina (for example, see Reasons for Judgement in *BCCA*, *supra* note 47 at 6, 21, and 36).

⁹⁸ Sorenson, *supra* note 1.

⁹⁹ Intervener, *supra* note 12 at 5.

V. IS THERE AN APPPOSITE AREA OF LAW? MODES OF MEANINGS FOR BESTIALITY IN CANADA

If McLaughlin C.J. is correct in her *Cuerrier*¹⁰⁰ (1998) comments that we must exercise caution when we approach the definition of elements of old crimes, it is because she relies on the *law of liberty*: that which is not expressly forbidden is allowed. Indeed, while animal abuse considers incursions on the animal, bestiality emphasizes carnal sins derived from Victorian and Judeo-Christian morality. As such, morphing the latter (bestiality) into the former (abuse) by having the SCC change the law would cover more activities, but for more empirically sound reasons (i.e. animal sentience versus opaque morality). The strict construction approach of the bestiality prohibition (i.e. where penetration was mandated) undertaken by the majority of the Supreme Court of Canada lays bare the Victorian sensibilities of sexual regulation, because rather than focusing on risk, the law would be aimed at merely condemnation of the immoral. If this is the case, then the SCC *DLW*¹⁰¹ decision stands in stark contrast to the interpretation of other morality-based laws rooted in Victorian morality, such as the obscenity and indecency provisions of the *Criminal Code*.¹⁰²

In *Sex and the Supreme Court*, Jochelson and Kramar traced the development of obscenity and indecency law in Canada to its current state - that is from its inception in the Victorian era *Hicklin*¹⁰³ case through to the SCC case of *Labaye*¹⁰⁴ in 2005. Legal scholars and socio-legal scholars alike would agree that the test in this time frame moved from being one that criminalized the indecent and obscene by targeting expression that corrupted the morals of children, men, and the working class (*Hicklin*¹⁰⁵), and eventually was re-articulated by the SCC. In this re-articulation, the SCC held that obscenity and indecency charges needed to be substantiated by assessing whether the Crown can establish the nature and degree of *harm* beyond a reasonable doubt.¹⁰⁶

¹⁰⁰ *Cuerrier*, *supra* note 59 at para 34.

¹⁰¹ SCC, *supra* note 9.

¹⁰² *Code*, *supra* note 15.

¹⁰³ *R v Hicklin*, LR 2 QB 360 (1868) (England).

¹⁰⁴ *Labaye*, *supra* note 16.

¹⁰⁵ *Supra* note 103.

¹⁰⁶ Richard Jochelson & Kirsten Kramar, "Governing through Precaution to Protect

Jochelson and Kramar argue legal tests *are* social constructions – that tests which govern the meaning of indecency and obscenity (once defined by community standards but now defined by the harms test) manifest relations of power through the combined efforts of legal language and discursive activity. Judges then are not simply applying legislation but are attempting to interpret legislation. In attempting to give meaning to the law of the sovereign, the judiciary attempts to give meaning to the words obscenity and indecency. The earlier attempt to give meaning to obscenity and indecency was articulated in the moral corruption standard, and the latter attempt by the Court to give meaning to the phrases is governed by the harm test. The creation of judicial tests is inherently both delegated and created, by which the state has provided the judiciary with the opportunity to interpret law and has thus delegated interpretive functions to an independent body. The body (the judiciary) in turn is charged with creating and constructing means of interpretation. In this construction process a judiciary is bound by precedent and the will of Parliament to be certain. However, the judiciary is also influenced by the social and political environment in which it finds itself. The judicial decision in this way is not profoundly different from other pieces of writing or art. The words represent a reflection and/or refraction of what is happening in the social world in place at the time of the writing. Therefore, the early obscenity and indecency jurisprudence understands moral corruption to be reflective of a certain Victorian tension underpinning the expression and consumption of sexuality at the time – for example, that the proliferation of pornography into the unruly classes was seen by high society to threaten the functioning of the social world at the time of the early decisions. Similarly, in *Labaye*¹⁰⁷, where the Court has shifted its approach in defining indecency and obscenity by the assessment of harm, the Court is also socially situated. The Court contended with legislative changes in the late 1950s to the meaning of obscenity and indecency. The Court had also faced the identity politics challenges of feminist activism in the context of both heterosexual

Equality and Freedom: Obscenity and Indecency Law in Canada after *R v Labaye* [2005]" (2011) 36:4 Can J of Sociology 283 at 297-298 [Jochelson & Kramar, 2011].

¹⁰⁷ *Labaye*, *supra* note 16.

pornography¹⁰⁸ and queer pornography.¹⁰⁹ In both cases, the Court had ruled in favour of censorship, but in the context of a swinger's club (*Labaye*),¹¹⁰ the SCC begins to question both the role of the community and of the effects of sexual expression on individuals and society.¹¹¹

The development of indecency and obscenity law in Canada leads to several observations about the Court's approach to moral law rooted in Victorian sensibilities. First, the Court is sensitive to identity politics concerns as illustrated by the types of harm articulated. Second, the Court, while purporting to require more stringent proof from the Crown, allows that risky behaviours may require less proof. Thus, the Court is animated by a precautionary logic that loosens evidentiary thresholds in more 'threatening' scenarios. Third, this precautionary logic aligns with a late modern anxiety, which views society as facing threat and in need of protection. Fourth, this precautionary logic is produced in the name of what is required to best serve the 'proper functioning of society'.¹¹² The proper functioning of society is something that Courts have been guarding since the early moral corruptibility approach and thus, it is interesting to observe that despite the differing social eras, the judiciary in both cases is interested in ensuring that society functions 'properly'. This functionalist account of the social world, together with the risk-based logics that emerged in late modernity allows for the creation of the harm test, which serves both of these rationales.¹¹³

The discussion of obscenity and indecency law's evolution in Canada dovetails well with thinking about ways that the SCC majority could have dealt with the interpretation of bestiality in a modern context. The prohibition against bestiality is rooted in the Victorian prohibitions against sodomy and buggery. These prohibitions were directly related to Judaeo-Christian ethics about moral forms of sexuality. The law reform over the last one hundred years has seen the gradual creation of separate bestiality provisions, and a lack of definition for the term bestiality. One approach to

¹⁰⁸ *R v Butler*, [1992] 1 SCR 452 at 464, 89 DLR (4th) 449 [*Butler*].

¹⁰⁹ *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120 [*Little Sisters*].

¹¹⁰ *Labaye*, *supra* note 16 at para 78.

¹¹¹ Jochelson & Kramar, 2011, *supra* note 106.

¹¹² *Ibid* at 290.

¹¹³ *Ibid* at 285.

filling the legislative lacunae would be to apply a harms-based test like the Court developed in *Labaye*.¹¹⁴ In *Labaye*,¹¹⁵ the majority noted that obscenity and indecency provisions could be made out when the nature of harms is identified and when the quantum of harm is significant enough to be incompatible with society's proper functioning.¹¹⁶ This approach identified prospective types of harms as actual physical or psychological harms to persons involved in indecency or obscenity, and affronts to liberty and harms to society through a predisposition to antisocial conduct.¹¹⁷ In effect, only when these harms were so severe that they interfered with the 'proper functioning of society' would the sanction of criminality be established.

However, a harm-based approach based on obscenity/indecency principles faces some real legal limits and it is easy to see why the majority of the SCC would not have been interested in using a similar analytical approach. The harms-based test in *Labaye*¹¹⁸ was developed as the Court tried to interpret the meaning of the community standards test that was the long-time arbiter of criminality in obscenity and indecency law. This opaque test required judicial clarification as the courts tried to give the judicial analysis contour and boundaries. In contrast, the bestiality prohibitions do not have a long-term judicial history of being queried using such parameters. As the judicial history of *DLW*¹¹⁹ makes clear, very few cases have struggled with the meaning of bestiality, and most of the non-penetrative convictions have occurred in the context of plea agreements. Thus the use of the *Labaye*¹²⁰ calculus as a measure of bestiality seems tortured given the different interpretive histories of indecency/obscenity and bestiality. Secondly, the harms articulated by the *Labaye*¹²¹ Court only contemplate harms to humans, harms of which are reflected in the constitutional order of Canada: protections of human liberty, equality, dignity, and security of the person. Without formal constitutional or otherwise legislated

¹¹⁴ *Labaye*, *supra* note 16 at paras 60-61.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* at para 23.

¹¹⁷ Jochelson & Kramar, 2011, *supra* note 106 at 296.

¹¹⁸ *Labaye*, *supra* note 16 at para 20.

¹¹⁹ SCC, *supra* note 9.

¹²⁰ *Labaye*, *supra* note 16 at para 19.

¹²¹ *Ibid.*

recognition for the sentience of animals, understanding similar harms for animals would be a major philosophical leap for a Court.

Nevertheless, there still exist means of linking the *Labaye*¹²² harm-based style of reasoning to the interpretation of bestiality prohibitions. Without a definition of bestiality in the *Code*¹²³, it could have been open to the SCC to consider that bestiality refers to sexual harms against an animal. Such a definition would link with the moral history of the prohibition. If obscenity and indecency originated in Victorian morality and its prevention of corruption of morals, and is now interpreted as a prohibition of harms that interfere with the proper functioning of society, would it not be appropriate to make similar claims about bestiality? Bestiality originated in Victorian prohibitions against immoral sex – sexual activities that would corrupt the lower classes, men, and children.¹²⁴

Might it be that the current bestiality prohibition could be similarly aimed at sexual conduct with animals that interferes with “the proper functioning of [human] society”? The SCC has already argued that disruption with the proper functioning of society equates with a disturbance of political fundamentals that underscore a Canadian democratic system. Sexual conduct with animals would trouble Canadian political values, such as interference with vulnerable populations, the obtainment of sexual fulfillment with a being that cannot consent, and the prohibition of activities that would have profound harms not just for non-human victims, but for vulnerable humans that were made complicit in the behaviour (children and other victims of forced bestiality). In order to make such an argument work, it would certainly require that a fundamental value of Canadian society have to be the prevention of animal suffering and the support of animal agency. These underlying values would be difficult for any level of court to assert, as the commodification of animals is directly linked to the Canadian economy and the food and agricultural industry.¹²⁵ The argument would also require that a test for indecency and obscenity be directly imported into the bestiality prohibitions, and given that the former relate to performance and expression-based offences, and that the latter relates to an offence directly against an animal, the importation may be

¹²² *Ibid.*

¹²³ *Code*, *supra* note 15.

¹²⁴ Jochelson & Kramar, 2011 *supra* note 106 at 291.

¹²⁵ Sorenson, *supra* note 1.

difficult for a court to accept. It is unsurprising that no member of the SCC elected to rely on obscenity and indecency law for guidance.

Other offences that occur directly and are rooted in Victorian sensibilities have also undergone seismic shifts in Canadian society. Prohibitions against rape have been modernized as sexual assault law, and Parliament has deliberately removed the penetrative aspects of sexual assault as constitutive of the crime. Sexual assault law has also undergone tremendous evolution, in part due to lobbying of activist Canadian feminist communities. As Jochelson and Kramar indicate, "the development of the consent provisions in Canada and the development of *Code* provisions [were] designed to ameliorate the disadvantages faced by complainants in sexual assault cases".¹²⁶ Sexual assault law slowly reformed since the 1980s as courts struggled to bring the provisions into alignment with constitutional values. Sexual assault law became organized as a series of graduated offences, and laws were passed that helped shutter the requirements of evidence that traumatized and disadvantaged victims of these crimes. Limits included the restriction of bringing a complainant's sexual history into a trial, and Parliament acted to create more fairness at trial for victims, and tailored and refined the meaning of consent.¹²⁷

Therefore, absent law reform and activism that changes the nature of evidence and consent in the context of bestiality provisions, similar changes in respect of animal sexual offences do not seem promising. While it is clear that the reform of sexual assault law was rooted in feminist activism, we must remember that at the core of the reform was a longstanding problem of human inequality (that, unfortunately, still persists today). The legal system disadvantaged women in the sexual assault context, and routinely re-victimized complainants through the process of sexual assault adjudication. The reforms sought to bring equality, dignity, and agency to all humans in the process. An apposite argument in the context of animals and the law could not be accomplished unless animals were given legal recognition as sentient, deliberative, worthy of agency, and capable of dignity on a scale of human equality, liberty, and security. While such recognition may indeed be worthy, this recognition would essentially amount to a revolution in our

¹²⁶ Richard Jochelson & Kirsten Kramar, "Essentialism Makes for Strange Bedmates: The Supreme Court Case of *J.A.* and the Intervention of *L.E.A.F.*" (2012) 30:1 Windsor YB Access Just 77 at 88 [Jochelson & Kramar, 2012].

¹²⁷ *Ibid.*

understanding of organic existence and the legal protection of human and non-human life. This is a matter which simply could not be completed in one adjudication.

Absent a large scale and Parliamentary response to calls for reform in the context of animal protection law, it could still be the case that bestiality could benefit from the law of sexual assault interpretation. It was open to the SCC to define bestiality as a relatively simple, but not necessarily penetrative act with an animal. This type of reasoning would take advantage of the relative lack of Parliamentary clarity in the development of the separate bestiality prohibition. In that void, and given the dearth of judicial interpretations, it was open for a judge to say, as Justice Abella in her dissent noted, that a law should be interpreted in the context of the modern version of its original purpose. In *Butler*,¹²⁸ the majority noted that while the law of obscenity once targeted moral corruption, its modern purpose, which linked with its moral corruptibility heritage, was the prevention of harm to the vulnerable.¹²⁹ Similarly, the bestiality prohibition, once linked to moral corruptibility by criminalizing immoral sex, could today be said to be linked to the prevention of harm to vulnerable, unwitting human participants and animal recipients of sexual touching. On this reading of the bestiality provisions, the offence could essentially be defined as the application of intentional sexual force to an animal without a legitimate medical or otherwise necessary purpose. The issue of consent would be avoided in this approach, and the issue of sentience of the animal could be avoided entirely. All that would be required is for a Crown to establish beyond a reasonable doubt that an accused intentionally touched an animal for a sexual purpose (without legitimate veterinary based reasons). The definition of 'sexual purpose' could be borrowed from the sexual assault jurisprudence. Sexual touching would be that which is viewed as sexual in all the circumstances of the accused as determined by a reasonable person.¹³⁰ As the *Chase*¹³¹ Court wrote:

The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: 'Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable

¹²⁸ *Butler*, *supra* note 108.

¹²⁹ *Ibid.*

¹³⁰ *R v Chase*, [1987] 2 SCR 293 at 302, 45 DLR (4th) 98 [*Chase*].

¹³¹ *Ibid.*

observer' ... The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant.¹³²

However, each of these options advances the protection of animals further than the Appellate and Supreme Court majority decision. One may query which of these calculi best interdigitates with conceptions of animal sentience? Bentham famously insisted, "The question is not, [c]an they *reason?* nor, [c]an they *talk?* but, [c]an they *suffer?*"¹³³ In his view, to ignore the suffering of sentient non-humans was to exhibit a bias akin to racial prejudice. While a true debate concerning sentience and animal rights are beyond our scope, we maintain Taylor's argument that to be sentient "is to have the power of perception by means of the senses."¹³⁴ Sentience is being subjectively aware, or entails consciousness. Typically, it connotes the capacity for positive or negative conscious experiences, including the capacity to feel pain. Sentience marks an important threshold, as we may decide that certain sentient entities are morally considerable, in which case within human deliberations we may decide that we are "morally obligated" to consider the interests of all those deemed legally sentient.¹³⁵

Legislative reform recognizing this sentience is possible, but scholars have noted that the Canadian context is an unlikely candidate for these reforms in the near future.¹³⁶ Sankoff argues that "although Canada has a long-held reputation for being progressive on social issues...the country is no haven for animals".¹³⁷ Noting that the legislative protections in Canada are "among the worst in the Western World", he nonetheless presciently pointed towards hopeful outcomes in countries such as New Zealand.¹³⁸ Indeed, in 2015, the sentience of animals was legislated in New Zealand.

¹³² *Ibid.*

¹³³ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Athlone Press, 1970) at 283 [Bentham].

¹³⁴ Angus Taylor, *Philosophy and the Case for Animals* in P Sankoff, V Black & K Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law Inc, 2015) at 13 [Taylor].

¹³⁵ *Ibid* at 14.

¹³⁶ Sankoff, *supra* note 1 at 281.

¹³⁷ *Ibid* at 294.

¹³⁸ *Ibid.*

New Zealand's animal welfare legislation¹³⁹ already established baseline protection for animal protection, but the 2015 amendments expanded the breadth of animal protections ensuring, among many other things, that in the course of animal testing that an assessment of the suitability of using non-sentient beings or non-living materials in lieu of sentient non-human animals be considered.¹⁴⁰ The long title of New Zealand's legislation will now read that it is an Act:

- (i) to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and, in particular,—
to recognise that animals are sentient:
- (ii) to require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals:
- (iii) to specify conduct that is or is not permissible in relation to any animal or class of animals:
- (iv) to provide a process for approving the use of animals in research, testing, and teaching:
- (v) to establish a National Animal Welfare Advisory Committee and a National Animal Ethics Advisory Committee:
- (vi) to provide for the development and issue of codes of welfare and the approval of codes of ethical conduct¹⁴¹

In effect, the New Zealand legislation effectively sets minimum standards for engagement with animals across a variety of activities and industries. Its declaration of sentience creates a type of constitutional era rights-based baseline recognition for animals.

The SCC's decision in *DLW*¹⁴² illustrates the stark contrast between these approaches and renders Canada's approach devastatingly feckless. Had Justice Abella's decision carried the day, the Court would have given content to bestiality that might set the stage for legal recognition of animals as sentient; this in turn might found some obligation to provide protection to animals on the basis of emerging morality. The narrow and strict constructionist approach of the Court of Appeal and SCC majority in

¹³⁹ For a summary of the amendments see <http://www.loc.gov/law/foreign-news/article/new-zealand-animal-welfare-legislation-recognizes-animals-as-sentient-bans-cosmetic-testing/> accessed May 9, 2017.

¹⁴⁰ *Animal Welfare Amendment Act (No 2) (NZ)*, 2015/49, s 4 [*Animal Welfare Amendment*].

¹⁴¹ *Ibid.*

¹⁴² SCC, *supra* note 9.

DLW¹⁴³, regrettably creates a decision for animal rights activists that is animal rights equivalent of the infamous *Dred Scott v Sandford* decision.¹⁴⁴

Even a narrow interpretation that would have avoided the strict constructionism and original intent statutory ethics of the SCC would have at least marked a turning point in our societal understandings of animals as creatures deserving of the measured consideration and protection of law. Using either a harm-based discourse like the law of obscenity and indecency, or developing a reasonable person standard for the assessment of sexual touching of animals, would have been an opening salvo towards the social construction of animals-as-sentient and as deserving of legal entitlements. While the case itself might do little to create vast protections for animals apprised of dignity, agency, actualization or other rights discourses, the decision could have marked a discussion in the direction towards progress. This kind of incrementalism could then have contributed to our societal conceptions of animal rights and entitlements that could pave the way for more sweeping legislative reforms in the future.

VI. CONCLUSION: (RE)IMAGINING HUMAN-ANIMAL RELATIONS

Animals are conceptually imprisoned in the legal system, and while some laws appear to protect animal interests, any meaningful effort to bring that protection to fruition “quickly collides with their entrenched status as things”.¹⁴⁵ We tend to overlook the fact that our present relationships with animals are a social construction, not a natural or historical constant.¹⁴⁶ In effect, property is a word embodying a particular legal relationship that humans have chosen to enforce—a choice that has the potential to render (and indeed has already rendered) animals vulnerable to greater exploitation, sexual or otherwise.

Until sweeping legislative reforms occur,¹⁴⁷ in terms of human-animal relations, there is a higher probability that, given the history of Canadian criminal cases dealing with sex(uality) and settled definitions of meaning

¹⁴³ *Ibid.*

¹⁴⁴ *Dred Scott v Sandford*, 60 US (19 How) 393 (1857).

¹⁴⁵ Bisguold, *supra* note 2 at 162.

¹⁴⁶ Sorenson, *supra* note 1.

¹⁴⁷ Recent attempts to modernize animal protection law in Canada were defeated on October, 5 2016.

interpreted by judges, future judicial determinations will continue to deny animal welfarism, and only begrudgingly focus on the ancillary harms to humans that occur in the face of animal exploitations (for example, the child forced to comply in coerced acts of bestiality). When a court recognizes harm as experienced by animals in the context of sexual touching, it will be a moment of discursive shift. The moment will represent the first time that a Canadian court recognizes agency on behalf of animals beyond the physical pain and suffering that animals endure in animal cruelty cases. This is a possibility that seems foreclosed absent legislative action in Canada's Parliament due to the SCC majority's decision that bestiality is a penetrative offence.

Certainly, the arguments of *Animal Justice*¹⁴⁸ indicate the need to protect vulnerable animals from the risks posed by improper human conduct has never been more of a concern for animal rights in modern Canadian society. However, even the internalization into the bestiality prohibitions of the progressive logics of the harm-based calculus of *Butler*¹⁴⁹ and *Labaye*¹⁵⁰ analysis should be met with a degree of skepticism. Harm-based calculi such as these, as we have demonstrated, represent modern iterations of moral corruptibility fears, and in the context of animal regulation, unlike indecency and obscenity, there are no constitutional tethering points to adhere to in the case of animal regulation. Indeed, the "proper functioning of society"¹⁵¹ can be guarded when a court imagines it is protecting human dignity, equality or liberty, but could a court so tether societal functioning to the same values in the context of animals? Canada's adjudicative and legislative approach has fallen far short of approaches such as New Zealand's legislative recognition of sentience. It may be many years before Canada legally recognizes animals as something more than mere property, let alone 'sentient beings'.

¹⁴⁸ Intervener, *supra* note 12 at 5.

¹⁴⁹ *Butler*, *supra* note 108.

¹⁵⁰ *Labaye*, *supra* note 16.

¹⁵¹ Sorenson, *supra* note 1.

Art in the Dichotomy of Freedom of Expression & Obscenity: An Anti-Censorship Perspective

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FEATURED STUDENT PAPER

ABSTRACT

This research paper looks at the judicial decisions in Canada including *R v Butler*, *R v Labaye*, and *R v Sharpe* to trace the court's evolving attitudes on obscenity. Specifically, this paper discusses visual arts in relation to censorship, obscenity, and pornography. The purpose of this paper is to show that the obscenity law restricts artistic freedom by requiring an unsubstantiated risk of harm. Consequently, this paper takes an anti-censorship feminist approach arguing there is profound educational value to be had in allowing artists to depict morally taboo subject matter. With this in mind, this paper offers a policy recommendation to eliminate the law of obscenity and indecency.

Keywords: *Labaye, Butler, Sharpe, Langer, artistic merit, obscenity, indecency, pornography, anti-pornography, censorship anti-censorship, freedom of expression, Canadian Charter of Rights and Freedoms, risk of harm, artistic expression.*

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I. INTRODUCTION

Under the banner of ‘pornography’, anti-pornography feminists have historically advocated for new obscenity legislation. Led by Catharine Mackinnon and Andrea Dworkin, these feminists argued that pornography should be suppressed because it leads to discrimination and violence against women.¹ Mackinnon and Dworkin argue that sexually explicit expression is inherently subordinating or degrading to women.² Notably, anti-pornography feminists hold the precarious belief that all images have a fixed meaning that can seduce viewers into imitative action.³ Convinced of the clear and pressing dangers of pornography, these feminists have used the law as a central tool in addressing harm.⁴ In 1992, the Supreme Court of Canada interpreted the Canadian obscenity law in *R v Butler*⁵ to embody Mackinnon and Dworkin’s concept of pornography and outlawed materials that are “degrading and dehumanizing” to women.⁶ Over the years, the courts have attempted to gradually devise a series of “objective” tests to reform the law on obscenity established in *Butler*. However, an inconsistency remains: the difficulty in scientifically establishing and interpreting a clear link between obscenity and harm.⁷

Under the united anti-pornography banner, successful campaigns against a wide range of sexually orientated expressions have been attacked. While pornography is ordinarily reserved for sexually explicit images whose sole purpose is aimed to cause sexual excitement, there are no clear lines between pornography and other areas of life such as visual art, film, literature, and theatre. Therefore, other areas of life are often confronted

¹ Brenda Cossman & Shannon Bell, “Introduction” in *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 18 [Cossman & Bell Introduction].

² *Ibid.*

³ Lisa Gotell, “Shaping Butler: The New Politics of Anti-Pornography” in *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 94 [Gotell].

⁴ Anna Gronau, “Women and Images: Towards a Feminist Analyst of Censorship” in Varda Burstyn, ed, *Women Against Censorship* (Vancouver: Douglas & McIntyre Ltd, 1985) at 95.

⁵ *R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449 [*Butler*].

⁶ *Ibid.*

⁷ Gotell, *supra* note 3 at 72.

and suppressed due to the similarities between pornography. In the case of visual art, censorship is rarely supported as artists understand that art prompts new ideas and may be deliberately shocking to challenge prevailing community standards. For example, Robert Mapplethorpe's exhibition "The Perfect Moment" opened on April 7th, 1990 in a climate of national cultural unrest.⁸ In his exhibition, he displayed graphic images of underground gay male sex and BDSM to draw on questions of censorship, homophobia, AIDS, and the law.⁹ The gallery director, Raphaela Platow said, despite the obscenity charge "[t]he majority of people decided it was really important to show works of art[,] even if they challenge a certain percentage of the population".¹⁰ Contrary to Mackinnon and Dworkin, many have campaigned for free expression.

With these feminist arguments in mind, this paper will argue that freedom of expression is a fundamental right established by the *Charter* that should not be dismissed. This paper recognizes that art has many different meanings. Consequently, by censoring materials based on a risk of harm, we stop the conversation on violence and silence those who try to confront it. In this respect, the law has the ability to moderate expression even when there is no harm in its production and the expression has a weak relationship to the construction of harmful acts.

Holding an anti-censorship view, I believe that sexual imagery should be liberated rather than repressed to allow for free expression. This is because "the right to freedom of expression rests on the conviction" that not only "'good' and popular expression [is protected], but also unpopular or even offensive expression."¹¹ As such, this paper will argue that censorship, based on narrow viewpoints and unsubstantiated evidence limits the expression of ideas and silences the very voices that can raise awareness toward social change. While strides have been made to refine the law, law reform is not the answer because it compromises the principles for freedom of expression by stifling the development of new and challenging art forms. Moreover, law reform does not prevent artists from defending

⁸ Nathan Smith, "Op-ed After 25 Years, Mapplethorpe's Photo Still Cracking the Bullwhip" *Advocate* (17 October 2014), online: <www.advocate.com>.

⁹ *Ibid.*

¹⁰ Grace Dobush, "25 years later: Cincinnati and the obscenity trial over Mapplethorpe art" *Washington Post* (24 October 2015), online: <<https://www.washingtonpost.com>>.

¹¹ *R v Sharpe*, 2001 SCC 2 at para 21, [2001] 1 SCR [Sharpe].

their work at considerable personal and financial costs. Consequently, this paper moves beyond alteration to suggest obscenity law be eliminated.

There are three parts to this paper. Part I will provide a historical overview of censorship and the arts. By following this history, this section illustrates a framework within which the current censorship of arts can be understood and opposed. In this section, I will outline the feminist split—those who favor legal limits on pornography (anti-pornography feminists) to combat harm versus those who oppose them (anti-censorship feminists). With this history in mind, I will suggest that art gives us knowledge needed to progress, and without access to uncensored art, the attainment of knowledge is hindered.

Part II will illustrate that the obscenity legislation restricts freedom of expression for at best an uncertain outcome. I will begin my analysis by explaining *R v Butler*, a case from 1992 that looked at whether obscene materials were fundamental freedoms protected under section 2(b) of the *Charter*.¹² This case chronicles the anti-pornography feminist belief and its continued influence on popular attitudes, public policy, and law. I will continue this section by reviewing the new harm-based test established in *R v Labaye*,¹³ which cited *Butler* to say that indecency can be determined by looking at harm or risk of harm.¹⁴ While artistic subject matter is not the principal controversy in these cases, I have nevertheless reviewed them in order to provide important insight into the relationship between freedom of expression, harm, and artistic merit. In this section, I will also discuss the cases *R v Sharpe* and *R v Langer*.¹⁵ The aim of this analysis is to show that artists are not properly protected under the current system due to the legacy of harm and morality.

Part III offers a policy recommendation. Holding the beliefs established above notably that the regulation of censorship is a hindrance to the acquisition of knowledge, an inconclusive recommendation to eliminate violence, and an imprecise law—this section will suggest censorship need not be criminal in nature.

In writing this paper, I situate myself as a female law student with an academic background in fine arts. I studied painting in London, Ontario and obtained my Bachelor of Fine Arts (Honours). I have a keen interest in

¹² *Supra* note 5.

¹³ *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728 [*Labaye*].

¹⁴ *Ibid* at para 32.

¹⁵ *Sharpe*, *supra* note 11; *R v Langer* (1995), 123 DLR (4th) 289, 97 CCC (3d) 290 [*Langer*].

ensorship laws but have admittedly no experiential grounding in it. I have concluded that censoring art offers an authoritarian, catchall solution to the societal problem of harm. As someone who studied painting and imagery, I believe artists can confront taboo subject matter in their work, by creating work that reveals hidden subtext. I believe the more we confront and understand violence and sexuality, the better we will be at acting against it.

II. BRIEF SURVEY OF ART HISTORY & FEMINISM

In this section, I will draw on the notion that censorship does not last, and does not work. Notably, history has shown that artworks accused of obscenity are normally reconsidered or reversed. This shows us that “while censors may be the enemy of art and other types of expression, time is usually the enemy of the censor.”¹⁶ Consequently, the artwork that censorship targets has a tendency of reappearing “even though this may occur after the death of the [maker], the judge, or the originally intended [viewers].”¹⁷ However, in the interim, censorship eradicates art from society by removing an artist’s ability to shed light on issues which in turn help viewers confront and understand violence and sexuality. In this vein, I will draw upon John Stuart Mill’s stance that multiple perspectives enrich judgment and intellect.¹⁸ Therefore, anti-pornography feminists’ fight for censorship ignores the fact that imagery is subject to multiple interpretations. In turn, they disregard the notion that an image may be offensive to some and thought provoking to others.

A. Censorship and the Arts

In Canada, early obscenity law was centered around preventing materials that would deprave and corrupt our society.¹⁹ For instance, the novel *Ulysses* by James Joyce was banned in Canada in 1922 for its explicit sexual content.²⁰ Notably, the book was attacked because it contained

¹⁶ Steven Dublin, “Arresting Images: Impolitic Art and Uncivil Actions” (1993) 23:3 J of Arts Management, L, & Society 255.

¹⁷ *Ibid.*

¹⁸ John Stuart Mill, *On Liberty* (Kitchener, Ont: Batoche Books Limited, 2001) at 42-43 [John Stuart Mill].

¹⁹ *R v Hicklin* (1868), LR 3 QB 360.

²⁰ Brenda Cossman, *Censorship and the Arts: Law, Controversy, Debate, Facts* (Toronto:

profanity and sexually suggestive narratives.²¹ Today, the book is widely available and considered a literary masterpiece as societal views on indecency and obscenity have changed. Specifically, Judge John M. Woolsey asserted that the novel was “transcendent, that it turned filth into art.”²²

In 1949, Robert Roussil displayed the sculpture *Family Group* outside the Montreal Museum of Fine Arts. The sculpture depicted a nude abstract family including a mother, father, and child. Police officers from *The Bureau for Prevention of Juvenile Delinquency* seized the work and Roussil lost his job as an art instructor.²³ Again, in 1951 Robert Roussil received protests regarding his work. This time, his sculpture portrayed a nude male and female embrace outside of the Agnes Lefort Gallery in Montreal.²⁴ However, complaints came from the public and the police were called to administer a city bylaw which forbade public displays of nudity. The sculpture was vandalized as a protest against its “obscene” nature. Today, Roussil’s work can be found in public parks and gardens in Canada and around the world. His expressions of sensuality, eroticism, and love are no longer rejected as society has progressed to recognize new literary methods and refrain from paternalistic attitudes.

By the 1980s, censorship battles began to center around a defence of women against violent, degrading, and sexist male aggression.²⁵ Consequently, the focus of the harm in pornography shifted from the representation of sex and nudity to the representation of the sexual subordinate women. Particularly, Canadian feminists began to make connections between violent and degrading imagery and sexual violence.²⁶ Many of these feminists even argued that pornography was the foundation of essentially all forms of exploitation and discrimination against women.²⁷

Ontario Association of Art Galleries, 1995) at 81 [Cossman, *Censorship*].

²¹ *United States v One Book Entitled Ulysses by James Joyce*, 72 F (2d) 705 (2d Cir 1934).

²² Laura Miller, “The Most Dangerous Book’: When “Ulysses” was obscene” *Salon* (15 June 2014) online <www.salon.com>.

²³ Cossman, *Censorship*, *supra* note 20 at 84.

²⁴ *Ibid.*

²⁵ Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights* (New York: Scribner, 1994) at 43 [Strossen].

²⁶ Cossman & Bell Introduction, *supra* note 1 at 18.

²⁷ Lisa Duggan, Nan Hunter & Carole S Vance, “False Promises: Feminist Anti-Pornography Legislation” (1993) 38 *NYL Sch L Rev* 133 at 136.

This belief was carried forward in 1984 when the Maximum Art Gallery in Toronto displayed a painting by Bill Stapleton in its front window. The painting showed a Mayan woman being raped by a Guatemalan soldier. When asked about the piece Bill Stapleton said, “[i]t was a hard subject to do, and I considered the effect it would have on people, but that’s what is happening down there....[i]t’s just awful, and it’s my responsibility as an artist to reveal what’s happening.”²⁸ As such, Stapleton saw his painting as an opportunity to shed light on the inequality and injustice faced around the world. He believed that art was a tool for bearing witness, and a weapon for achieving change. The explanation given by Stapleton supports John Stuart Mill’s opinion that “multiple viewpoints enhance judgment and intellect.”²⁹ Notably, Mill said, “only through diversity of opinion is there, in the existing state of human intellect, a chance of fair play to all sides of the truth.”³⁰ Consequently, throughout his text, Mill argues that silencing expression robs society of public debate. Therefore, Mill believes that artists need complete freedom of expression, which is free from censorship, in order to confront social issues. Mill contends, “the truth would lose something by their silence.”³¹ Yet, despite these liberal views, Stapleton’s voice was silenced as the police told the gallery curator to remove it from the window or risk obscenity charges.³² This is because the law of obscenity is justified by its supposed usefulness of protecting women from harm.

In contemporary obscenity and indecency cases, protecting society from harm continues to be a central feature of the law. In modern cases, morally evil images are repressed based on the notion that viewing harm promotes the commission of harm and immoral effects. However, as Mill’s harm principle contends, not all materials that are offensive to public morality are automatically harmful. Mill holds the belief that free speech can only be restricted if the speech causes harm to others.³³ Mill believed that in order

²⁸ Lynn King, “Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?” in Varda Burstyn, ed, *Women Against Censorship* (Vancouver: Douglas & McIntyre Ltd, 1985) at 87 [King].

²⁹ Jochelson & Kramar, *Sex & The Supreme Court: Obscenity and Indecency Laws in Canada* (Nova Scotia: Fernwood Publishing, 2011) at 15 [Jochelson & Kramar, *Sex & the Supreme Court*].

³⁰ John Stuart Mill, *supra* note 18 at 46.

³¹ *Ibid.*

³² King, *supra* note 28 at 87.

³³ Dany Lacombe, *Blue Politics: Pornography and the Law in the Age of Feminism* (Toronto:

to judge “whether a practice is harmful, one need not take into consideration the repercussion of such a practice on the general moral code.”³⁴ In respect to Stapleton, although his painting may have been morally repulsive to some viewers, there was no harm in its creation. Therefore, according to Mill’s theory, there would not be sufficient grounds for criminalization. However, Andrea Dworkin and Catharine Mackinnon refuse this notion. Their argument draws on the analogy between vice and treason, which assumes that both have the same damaging consequence on society and women.³⁵ In other words, they assume that exposure to representations of bad acts cause bad thoughts, which in turn cause bad behavior. In *R v Butler*, the Court affirmed this by effectively holding that viewing pornography is a catalyst for the commission of violent crimes against women.³⁶ This concept of imaginable harms has continued today in the new harm-based test established in *R v Labaye* which convicts based on mere risk of harm.³⁷

Arguing the aforementioned belief, Dworkin and Mackinnon have maintained the notion that pornographic images assert male dominance and the expression of male sexual power.³⁸ However, such a stance “decontextualizes sex and pornography from the social relations in which they take form and reduces them to a single force or truth: an aggressive male nature and culture desiring to oppress women.”³⁹ Nevertheless, Dworkin, Mackinnon and other anti-pornography feminists lobby for reform of the obscenity law to address violence against women. In this interest, anti-pornography feminists believe that the law should be used to ensure some form of sexual moral order.⁴⁰ Adopting an anti-pornography perspective, scholar Karen Busby wrote on behalf of Women’s Legal Education and Action Fund (LEAF) and stated that there are four options when considering the obscenity law. She said:

We could have accepted the law as it has been interpreted; supported a position that would have eliminated any criminal regulation of pornography; asked the

University of Toronto Press 1994) at 29-40 [Lacombe].

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 22.

³⁷ See Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29.

³⁸ Strossen, *supra* note 25 at 75.

³⁹ Lacombe, *supra* note 33 at 42.

⁴⁰ Gotell, *supra* note 3 at 64.

court to strike down the *Criminal Code* provision and to invite Parliament to introduce new legislation; or, asked the court to redefine the rationale for the *Criminal Code* obscenity provisions by focusing on its equality implication for women and children.⁴¹

In turn, LEAF chose the fourth option in an effort to reshape obscenity legislation. LEAF believed that the obscenity law was a central tool in addressing harm to women. LEAF grounded their legal argument on under s. 15 under 'equality of rights' in the *Canadian Charter of Rights and Freedoms*.⁴² Section 15 of the *Charter* prohibits certain forms of discrimination perpetrated by the government of Canada. LEAF challenged this section suggesting that pornography's harm to women is three-fold; it harms women in its creation, it glorifies sexual violence, and it maintains the patriarchal system thereby effecting women's right to equality under the law.⁴³ However, LEAF'S stance relied heavily on inconclusive social science evidence.⁴⁴

While these theorists mainly discuss erotica as feminist political speech, the concerns they raise, mainly violence against women, may be found in artworks including painting, sculpture, and photography. For instance, in 1983, Dworkin and Mackinnon drafted an ordinance for the Minneapolis City Council that treated pornography as a form of sex discrimination, making its production and distribution a ground for civil rights action. The ordinance defined pornography as the "graphic, sexually explicit subordination of women."⁴⁵ While the distinction between erotic art and pornography is debated, the criterion of pornography raised by Dworkin and Mackinnon frequently presents itself in art as artists depict abuse, rape and objectionable views of women and sexuality. For instance, Susan Gubar said, "in many instances art and pornography are indistinguishable" even though they construct their images differently and address dissimilar audiences.⁴⁶ Likewise, Nadine Strossen said, the term pornography "has

⁴¹ Karen Busby, "LEAF and Pornography: Litigating on Equality and Sexual Representations" (1994) 9:1 CJLS 165 at 168 [Busby].

⁴² *Canadian Charter of Rights and Freedoms*, s 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁴³ Lacombe, *supra* note 33 at 27.

⁴⁴ Gotell, *supra* note 3 at 92.

⁴⁵ Andrea Dworkin & Catharine MacKinnon, *Pornography and Civil Rights: A New Day For Women's Equality* (Minneapolis: Organizing Against Pornography, 1988) at 138.

⁴⁶ Susan Gubar, "Representing Pornography: Feminism, Criticism, and Depictions of

assumed such negative connotation that it tends to be used as an epithet to describe – and condemn—whatever sexually oriented expression the person using it dislikes.”⁴⁷ As such, legislation originally centered on pornography has often shifted its attention to art if the viewer dislikes the message portrayed.

In Hans Maes and Jerrold Levinson’s book, *Art and Pornography*, Levinson argues that the distinction between erotic art and pornography is that erotic art is intended to induce “sexual thoughts, feelings, imaginings, or desires that would generally be regarded as pleasant in themselves,” whereas pornography is described as “the physiological state that is prelude and prerequisite to sexual release”.⁴⁸ Thus, pornographic images are principally aimed at sexual arousal, whereas erotic images are aimed at stimulation. Levinson’s conclusion is that erotic art and pornography are mutually exclusive. However, In “Concepts of Pornography: Aesthetics, Feminism, and Methodology”, the author, Andrew Kania argues that distinction between pornography and erotic art is not as distinct as Levinson articulates.⁴⁹ The basis of Kania’s argument is that the main substance of pornography, the “eroticiz[ation] of women’s subordination,” has also been “a commonplace in art history,” which contributes to women’s oppression.⁵⁰ Kania contends that the role of some erotic art (which he calls “pornographic art”) can eroticize the subordination of women just as easily as pornography.⁵¹ With this relationship in mind, this paper views different feminist perspectives on pornography as synonymous or at least comparable to pornographic art.

In their book, *Bad Attitudes*, Cossman, Bell, and Gotell contend that anti-pornography feminism offers a “literalist approach to representation, within which images are understood to have a clear and unequivocal meaning that can be interpreted objectively.”⁵² Challenging anti-pornography feminism, Cossman, Bell and Gotell maintain that

Female Violation” (1987) 13:4 *Critical Inquiry* at 741 (Jstor).

⁴⁷ Strossen, *supra* note 25 at 18.

⁴⁸ Andrew Kania, “Concepts of Pornography: Aesthetics, Feminism, and Methodology” in Hans Maes & Jerrold Levinson, eds, *Art and Pornography: Philosophical Essays* (Oxford, United Kingdom: Oxford University Press, 2012) 254.

⁴⁹ *Ibid* at 257.

⁵⁰ *Ibid* at 273.

⁵¹ *Ibid*.

⁵² Cossman & Bell Introduction, *supra* note 1 at 25.

pornography is subject to more than one meaning: “any one sexual image provides dissonant interpretations of disgust, indifference, and arousal.”⁵³ Further, they argue, that “just like language, there is no intrinsic meaning in a visual image, the meaning of an image is decided by the way it is articulated, how the various elements are combined together.”⁵⁴ As such, they reason that sexual imagery should not be criminalized and the anti-pornography feminist approach is unsound in its denial to recognize this multiplicity of meaning. Cossman, Bell, Gotell and Ross believe freedom of speech furthers a number of valuable objectives including “truth seeking through open debate (free speech), participation in social and political decision-making, and individual self-fulfillment and human flourishing.”⁵⁵ Further, Cossman, Bell, and Gotell are generally unsupportive of the notion that exposure to sexually explicit materials provokes violent behavior. Thus, their thoughts closely align with Mills and his theory on harm.

In Bell’s chapter of *Bad Attitudes*, she advances the concept that multiple meanings reside in the same image, therefore, “the image can never be seen; it is and is not.”⁵⁶ Bell contends that MacKinnon and LEAF argue their belief as the one truth. However, Bell believes that pornography is “composed of many different genres that are open to many readings and thus many truths.”⁵⁷ Therefore, pornography is not direct or forthright.⁵⁸ Instead, it is “multiple, layered and highly contextual.”⁵⁹

Like pornography, erotic art can be open to many readings. For instance, like Stapleton, artists may depict taboo subject matter to show that violence and other wrongs against women continue to exist. As such, there are other compelling argument against censorship that feminist must consider. By censoring these materials, we stop the conversation on violence and silence those who try to confront it. With this in mind, I will adopt the anti-censorship feminist perspective put forth by Cossman, Bell, and Gotell

⁵³ *Ibid* at 8.

⁵⁴ *Ibid* at 26.

⁵⁵ Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 25.

⁵⁶ *Ibid* at 9.

⁵⁷ Shannon Bell, “On ne peut pas voir l’image [the image cannot be seen]” in *Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 201 [Bell].

⁵⁸ Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 42.

⁵⁹ *Ibid*.

that rather than being clear and unequivocal, the meaning of sexual representations is a site of political and discursive struggle that should be liberated rather than repressed to allow for free expression. Further, this paper will argue that not all materials that are offensive to public morality are automatically harmful. Therefore, the “risk of harm” element in case law is unsubstantiated. Unlike anti-pornography feminist who argue in favor of censorship to reduce harm, this paper will maintain the belief that censorship “cuts off critical analyses of the messages it sometimes endorses about human sexuality.”⁶⁰

III. EVOLUTION OF THE OBSCENITY LAW & FREEDOM OF EXPRESSION:

The following section will give a brief overview of current legislation regarding obscenity. Recognizing the complexity of sexual imagery as established by Cossman, Bell, and Gotell, I will argue that “risk of harm” or “harm” as suggested is not an appropriate standard for addressing obscenity in art. Finally, I will show that despite the artistic merit defence, artists continue to fight censorship battles and struggle to find precise meaning in the law. Taken congruently, this section will show that the law is imprecise in leaving artists at the mercy of the judicial system while simultaneously failing to address the perception of harm that the legislation and anti-pornography feminists strive to combat.

A. Harm & Risk of Harm

In Canada, the court case *R v Hicklin* set the governing standard for obscenity for nearly a century.⁶¹ The Court held that all materials tending “to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall” were obscene, regardless of its artistic or literary merit.⁶² While more recent cases have attempted to move from a discussion on morality to a discussion on harm, the standard of morality continues to linger in contemporary court

⁶⁰ *Ibid* at 32.

⁶¹ *Supra* note 19.

⁶² *Ibid* at 371.

decisions by maintaining a conviction based on the finding of indirect harm.⁶³

R v Butler: Community Standards Test

In February 1992, the Supreme Court of Canada, in the unanimous *R v Butler* decision, upheld the obscenity provision under s. 163(8) of the *Criminal Code*.⁶⁴ Section 163(8) of the *Code* provides that "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of (...) crime, horror, cruelty and violence, shall be deemed to be obscene".⁶⁵ While this case did not involve art specifically, the decision continues to shape what artistic expression will be granted protection.

In *Butler*, the Court concentrated on the anti-pornography campaign by the Women's Legal Education and Action Fund (LEAF). LEAF's legal team sought to have obscenity described as an exercise of sex discrimination that harms women's equality. Notably, intervening in *Butler* LEAF argued that pornography "increase[s] propensity to, or tolerance of physical aggression including sexual assault against women."⁶⁶ Consequently, LEAF advocated an anti-pornography and pro-censorship position informed by Mackinnon and Dworkin.

Disagreeing with LEAF, The British Columbia Civil Liberties Association (BCCLA) sought to protect freedom of expression. This lobby group was more concerned with the effects of criminal regulation on sexual freedom than the speculative harms associated with obscene materials.⁶⁷ In their factum BCCLA stated that pornography forces society to question conventional notions of sexuality. This in turn launches society into an

⁶³ Richard Jochelson & Kristen Kramar maintain that the history of the development of the (risk of) harm test for obscenity and indecency can be identified in four distinct phases: "(1) the *Hicklin* era (1868-1962); (2) the community standards era (1962-1992); (3) the community standards of tolerance for harm era (1992-2005); and (4) the "political harm" era (2005-present)." See "Governing through Precaution to protect Equality and Freedom: Obscenity and Indecency Law in Canada after *R v Labaye* [2005]" (2011) 36:4 *Canadian J of Sociology* 283 at 285 [Jochelson & Kramar, "Governing"].

⁶⁴ *Criminal Code*, RSC 1985, c C-46, s 163(8).

⁶⁵ *Ibid.*

⁶⁶ Busby, *supra* note 41 at 170.

⁶⁷ Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 41.

inherently political discourse that should not be stifled. However, the Court agreed with the main argument in LEAF's intervention modified the test for obscenity to account for harms that may be intrinsic in sexually explicit materials.⁶⁸

In the majority decision, Justice Sopinka writing for the Court states that there is sufficient evidence that depictions of degrading and dehumanizing sex harms society, and, in particular, adversely affects attitudes towards women.⁶⁹ However, the Court acknowledged that there is no direct link between pornography and discrimination or violence against women.⁷⁰ Nevertheless, the mere belief that such a connection exists was enough to justify the suppressing.⁷¹

Mr. Justice Sopinka states that the Court must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. He said,

[T]he portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.⁷²

Accordingly, a new test for determining whether representations are obscene emerged. However, the problem with this test is that it is grounded in sexual morality which categorizes sexual expression as either bad or good.⁷³

This decision, sparked controversy amongst feminist scholars. While some feminist claimed that this new test clarified the law, many anti-censorship feminists, argued that the *Butler* decision reinforced censorship of unconventional or alternative sexualities. This is because in applying this test, courts cannot help but continue to make judgments about legitimate

⁶⁸ Richard Jochelson, "After *Labaye*: The Harm Test of Obscenity, The New Judicial Vacuum, and the Relevance of Familiar Voices" (2009) 46:3 *Alta L Rev* 741 at 742 [Jochelson, "After *Labaye*"].

⁶⁹ *Butler*, *supra* note 5 at para 122. Justice Sopinka writing for Chief Justice Lamer (as he was then), La Forest, Cory, McLachlin, Stevenson, and Iacobucci.

⁷⁰ *Ibid* at para 117.

⁷¹ *Ibid*.

⁷² *Ibid* at para 62.

⁷³ Cossman & Bell Introduction, *supra* note 1 at 20-21.

and illegitimate sexual representations on the basis of their own subjective understanding of appropriate sexual norms and values.⁷⁴ In turn, this prevails the notion that some sex is good and some sex is bad.⁷⁵ As such, in applying this test, courts are required to make judgments about legitimate and illegitimate sexual representations on the basis of their own subjective beliefs towards appropriate sexual norms.

The concern regarding legitimate and illegitimate sexual representations is important to the consideration of art because artistic purpose is not readily distinguishable from pornography. Bell says, “[t]he majority of sexual depictions are somewhere in between pornography and art, are both pornography and art, both pornography and erotica, both pornography and philosophy.”⁷⁶ Thus, artists who wish to explore the boundaries of sex through provocative erotic art would be subject to similar regulations. Once again, because the “eroticiz[ation] of women's subordination,” has also been “a commonplace in art history,” similar arguments can be made against erotic art if subject to obscenity charges. For instance, A.W. Easton in “What’s Wrong with the (Female) Nude? A Feminist Perspective on Art and Pornography” argues that the traditional female nude in ‘high art’ sends a message of female inferiority promoting sexual inequality.⁷⁷ As such, Easton elaborates on the idea developed by MacKinnon on female subordination, a phenomenon that significantly maintains sex inequality. However, by reinforcing expression as either legitimate or illegitimate artists are forced to conform to legal notions of right and wrong. This inherently ignores the fact that there is educational value to be had in “wrong” or “morally evil” ideas. By classifying something as either good or bad, *Butler* assumes that society is not capable of critical analysis.

According to Koppelman, “[t]he state does not know enough about the consumers of pornography to intelligently censor what they get to think

⁷⁴ Brenda Cossman, “Feminist Fashion or Morality in Drag? The Sexual Subtext of the *Butler* Decision” in *Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision* (Toronto: University of Toronto Press, 1997) at 107.

⁷⁵ *Ibid* at 127.

⁷⁶ Bell, *supra* note 57 at 202.

⁷⁷ A W Eaton, “What’s Wrong with the (Female Nude)? A Feminist Perspective on Art and Pornography” in Hans Maes & Jerrold Levinson, eds, *Art and Pornography: Philosophical Essays* (Oxford, United Kingdom: Oxford University Press, 2012).

about, nor does it have any basis to feel confident that the readers deserve to be treated as if they were children in this way.”⁷⁸ As such, Koppelman holds that criminalizing pornography is a mistake because the notion that obscenity is harmful is not proven.⁷⁹ Cossman explains that this search for “harm” is ill-fated because “the harm attributed to pornography cannot be proven.”⁸⁰ Indeed, this is significant because this analysis does not consider the fact that there are multiple interpretations of one image. An image may be illegitimate to the subjective belief of the court while informative and thought provoking to another. However, because the test under *Butler* (and subsequent cases) is vague, the court will ultimately decide what they believe is legitimate and illegitimate sexual representation on their own subjective beliefs.

More recently, the Supreme Court of Canada, in *Labaye*, attempted to redefine the community standards of tolerance test.⁸¹ The problem with the new harm-based test in *Labaye* is that it continues to regulate unproven harms, silencing sexual representation. This in turn, may have negative repercussions for artists.

R v Labaye: New Harm-Based Test

In 2005, in *R v Labaye*, the accused operated a private club in Montreal that permitted couples and individuals to meet each other for group sex.⁸² The accused was charged with the crime of public indecency.⁸³ However, the Court largely analyzed the case under the Canadian obscenity doctrine as it had evolved from *Hicklin* through *Butler*. In this decision, the Supreme Court suggested that the community standard of tolerance approach is impossible to apply objectively. The Court said,

In a diverse, pluralistic society whose members hold divergent views, who is the “community”? And how can one objectively determine what the community, if one could define it, would tolerate, in the absence of evidence that community knew of and considered the conduct at issue? In practice, once again, the test tended to function as a proxy for the personal views of expert witnesses, judges

⁷⁸ Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 24.

⁷⁹ Andrew Koppelman, “Why Phyllis Schlafly is right (but wrong) about pornography” (2008) 31:1 Harv JL & Pub Pol’y 105 at 123.

⁸⁰ Jochelson, “After *Labaye*”, *supra* note 68 at 751.

⁸¹ *Supra* note 13.

⁸² *Ibid* at para 5.

⁸³ *Ibid* at para 1.

and jurors. In the end, the question often came down to what they, as individual members of the community, would tolerate.⁸⁴

With this inadequacy in mind, the Supreme Court replaced the community standard test in *Butler* with a new objective harm-based test.⁸⁵ The Court stated, “[h]arm or significant risk of harm is easier to prove than a community standard.”⁸⁶ The Court went on to establish the guidelines as to how to measure harm. The Court said, “[i]ndecent criminal conduct will be established where the Crown proves beyond a reasonable doubt the following two requirements:”

1. That, by its *nature*, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by, for example:

(a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty; or

(b) predisposing others to anti-social behaviour; or

(c) physically or psychologically harming persons involved in the conduct, and

2. That the harm or risk of harm is of a *degree* that is incompatible with the proper functioning of society.⁸⁷

As such, the first question is whether the conduct at issue harms, or presents a significant “risk of harm” to individuals or society. According to the Court, these categories of harms are grounded in values recognized by our Constitution and other fundamental laws in order to connect this area of law with the vast majority of criminal offences, which are based on the need to protect society from harm.⁸⁸ The second question asks whether the alleged harm rose to the level of incompatibility with the “proper functioning of society.”⁸⁹ In order to determine this, the Court suggested that, in most cases, expert evidence would be needed to establish actual

⁸⁴ *Ibid* at para 18.

⁸⁵ *Ibid*.

⁸⁶ *Ibid* at para 24.

⁸⁷ *Ibid* at para 62.

⁸⁸ *Ibid* at para 30.

⁸⁹ *Ibid*.

harm.⁹⁰ However, if the Crown relies on establishing a risk of harm rather than an actual harm, such evidence may be absent.⁹¹

The goal of this new test was to achieve objectivity and focus more directly on harm regarding political or constitutional values.⁹² However, even with the harm-based test, there is still uncertainty as to what conduct causes harm. This is because the trier of fact is not required to weigh social scientific evidence of harm.⁹³ Notably, a mere risk of harm rather than actual harm is sufficient. Thus, the claim that obscenity is dangerous continues to rest on unexamined conventions on societal beliefs and actions.

This finding of harm will continue to affect artists as artists often depict subject matter that may be unforeseen or alarming. This is especially relevant in cases of child pornography. While there has been no clarification in the application of the new harm-based test established in *Labaye* by either the Supreme Court or the lower courts, we can apply the standard theoretically to previous cases to show that its application would not be favourable to artists.

B. New Harm-Based Test: Application to *Sharpe* and *Langer*

The aim of this section is to show that the current law under *R v Labaye* is detrimental to society because it suppresses expression that involves no harm. While the *Labaye* test was an attempt to reconstruct the law established in *Butler*, the ruling is fundamentally flawed in that it criminalizes material without “empirical evidence of harm to justify the exercise of state power.”⁹⁴ In what follows, I will analyze the court case *R v Langer* [1995] and *R v Sharpe* [2001] to show that under the new standard of *Labaye*, these artists would be criminalized based on the “imagined negative effects of sexual conduct.”⁹⁵

In the pre-*Labaye* and post-*Butler* era, the problem of harm presented itself in the case of *R v Langer*.⁹⁶ In this decision, the Court examined Eli Langer’s sketches and paintings which depicted children engaged in sexually

⁹⁰ *Ibid* at para 60-61.

⁹¹ Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 67.

⁹² *Ibid* at 69.

⁹³ *Labaye*, *supra* note 13 at para 60.

⁹⁴ Richard Jochelson & Kristen Kramar, “Governing”, *supra* note 63 at 283.

⁹⁵ *Ibid*.

⁹⁶ *Langer*, *supra* note 15.

explicit activity. The Court referenced *Butler* stating that the purpose of obscenity legislation is to protect society from harm. The Court stated that the community standard of tolerance test established in *Butler* would apply to the case at hand. Notably, the Court stated, “it would be incongruous to measure harm with reference to community standards of tolerance when dealing with obscenity, and yet ignore those same standards when dealing with child pornography.”⁹⁷ Thus, the Court considered whether there was a risk of harm to children. In the Court’s view, there did not seem to be a realistic risk of harm to children. The Court reached this conclusion after comparing the paintings and drawings to the other types of child pornography which were filed as exhibits. In addition, the Court considered the differing opinions of the experts concerning the risk posed by Langer’s paintings.

In *R v Sharpe*, the accused was charged “with simple possession, and possession for the purposes of distribution or sale, of both his own written work and hundreds of pictures of teenage boys.”⁹⁸ John Robin Sharpe was acquitted on the charges relating to his written work. Ultimately, the Court decided that his work did not “advocate or counsel” the commission of crimes.⁹⁹ Although the written materials were “extremely violent” and “extremely disturbing”, the Court determined that they had some “literary merit.”¹⁰⁰

If *Langer* and *Sharpe* were revisited under the two-prong test established in *Labaye*, the accused would likely face tremendous difficulty due to the Courts commitment to safeguarding a normative, “properly functioning society.”¹⁰¹ Under the new harm-based test, a court would claim that depicting “child pornography” threatens autonomy, liberty and equality because this type of expression is not a “positive source of human expression, fulfillment and pleasure” in the traditional sense.¹⁰² As such, a court would likely argue that the images cause a risk of harm to society by “predisposing others to anti-social conduct.”¹⁰³

⁹⁷ *Ibid* at para 80.

⁹⁸ Bruce Ryder, “The Harms of Child Pornography Law” (2003) 36:1 UBC L Rev 101 at 125 [Ryder].

⁹⁹ *Sharpe*, *supra* note 11 at para 37.

¹⁰⁰ *Ibid* at para 138 and 107-15.

¹⁰¹ Jochelson & Kramar, “Governing”, *supra* note 63 at 298.

¹⁰² *Labaye*, *supra* note 13 at para 48.

¹⁰³ *Ibid* at para 58.

In Langer's artwork, he did not use live models. Instead, he drew from his imagination. Likewise, in Sharpe's written material, there were no children involved in the making of the novel. As such, a court would not be able to argue that there was harm to individuals participating in the conduct. However, under the new standard articulated in *Labaye*, a court would be able to rely on the element of risk of harm rather than an actual harm in respect to Langer and Sharpe's work. When the Crown is relying on establishing a risk of harm rather than an actual harm, evidence is not required.¹⁰⁴ This standard essentially allows a judge to substitute his or her own opinions in place of experts.¹⁰⁵ This is problematic because the question of whether materials can even be shown to cause people to act "in an anti-social" manner remains highly questioned. Consequently, June Ross contends, "a court *must* weigh expert evidence, and *must* be careful not to replace expert opinion with personal assessment."¹⁰⁶ Quoting *R v Cameron*,¹⁰⁷ Ross states,

[E]ven the most knowledgeable adjudicator should hesitate to rely on his own taste, his subjective appreciation, to condemn art. He does not advance the situation by invoking his right to apply the law and satisfying it by a formulary advertence to the factors which must be canvassed in order to register a conviction.¹⁰⁸

However, under *Labaye*'s analysis the justice system is able to convict artists based on the dislike of the idea expressed by permitting a risk of harm standard. As a result, the judicial system maintains the power to convict someone based on the notion of moral corruption. When harm is constructed on this basis, it is easy to find artists guilty of obscenity.

This line of thinking can be traced back to Dworkin and Mackinnon's analogy between vice and treason. As mentioned earlier, Dworkin and Mackinnon view images as having a fixed meaning that can seduce viewers into imitative action. In *Butler*, the Court assumed this notion and held that exposure to representations of bad acts cause bad thoughts, which in turn cause bad behavior. In 2005, the Court in *Labaye* is essentially doing the same thing. Therefore, if *Langer* and/or *Sharpe* were re-tried today, a court could adopt the notion that exposure to art that displays or illustrates

¹⁰⁴ *Ibid* at para 60.

¹⁰⁵ June Ross, "R v Sharpe and The Defence of Artistic Merit" (2001) 12:1 Const Forum Const 23 at 28 [Ross].

¹⁰⁶ *Ibid*.

¹⁰⁷ *R v Cameron* (1966) 2 OR 777, 58 DLR (2d) 486 (Ont CA).

¹⁰⁸ *Ibid* at 512.

violence causes bad behavior such as abuse and cruelty. Consequently, this belief will continue to criminalize a variety of creative expression in the absence of any persuasive evidence of a risk of harm. While imagery of this nature may be offensive to some people, it is not necessarily harmful. As Mill alleged and as this paper agrees, “having one’s morals challenged, is not a justification for censorship because offence falls short of a threshold of harm required to trigger the coercive power of the state.”¹⁰⁹ To find otherwise, would cause danger to artists as harm can mean many things.

In art, harm often represents a problem that needs to be challenged. It may also be cathartic for the inner psyche. For instance, Langer, in defending his work said that he has several close friends who were abused as children, and they have shared their memories with him.¹¹⁰ As such, he felt compelled to paint the actual experiences and the devastating impacts on the youthful victims. He said, “[t]o deny it is to deny a large part of our humanity.”¹¹¹ Therefore, while Langer’s artworks may be seen as abhorrent to some, it may help shed light on important issues to others. This in turn, helps viewers and victims combat and recognize violence and sexuality. Thus, there is “no intrinsic meaning in a visual image” the meaning of an image is decided by various elements.¹¹² Consequently, the meaning of sexual representations is a site of political and discursive struggle that should be liberated rather than repressed to allow for free expression.

In *R v Sharpe*, the Court supported my belief that art should be protected. The Court said, “works of art, even of dubious artistic value, are not caught at all” by the child pornography provisions of the *Criminal Code*.¹¹³ However, with the decision in *Labaye*, a court would now be required to assess whether there was a risk of harm based in the two-step harms-based test which removed the artistic merit defence recognised by *Sharpe*. Therefore, courts will have the power to trench unduly on civil liberties such as freedom of expression. Consequently, the courts give little or no consideration to freedom of expression guaranteed by the *Charter*.

With the evolution of *Labaye*, courts continue to govern expression based on the beliefs of a well-ordered society. In turn, this leaves artists at

¹⁰⁹ Jochelson & Kramar, *Sex & the Supreme Court*, *supra* note 29 at 13.

¹¹⁰ D’Arcy Jenish, “Sensitive or Obscene?”, *Maclean’s Toronto* (24 January 1994) 68, online: <www.proquest.com>.

¹¹¹ *Ibid.*

¹¹² Cossman & Bell Introduction, *supra* note 1 at 26.

¹¹³ *Sharpe*, *supra* note 11 at para 73-4.

the mercy of the subjective opinion of the court. As a result, the test in *Labaye* continues to ignore the fact that an image may be harmful in the subjective belief of the court while informative and thought provoking to a member of society. By censoring materials based on a risk of harm, we stop the conversation on violence and silence those who try to confront it.

IV. ARRIVING AT A POLICY

As I have attempted to show, Canada has continuously attempted to ban, destroy and outlaw representations that too drastically depart from the moral and aesthetic conventions of the day. However, as society evolves, charges are often overturned and new standards of tolerance emerge. Nevertheless, Canada continues to regulate images by formulating new tests to understand obscenity. In doing so, Canada has reframed the judicial test for obscenity over and over again. This in turn, has led to indefinite meaning in the law which criminalize harms that may be intrinsic in sexually explicit materials.

June Ross argues that if expression is to be controlled, “it should not be because of a risk of harm only, but on the basis of proven harm.”¹¹⁴ However, she qualifies this argument by stating that “[t]his would not make artistic expression, or other valuable forms of expression such as political expression, immune from all regulation, but it would make such expression immune from regulation based on only a reasoned apprehension of harm.”¹¹⁵ While this is a reasonable stance, it still allows artists to become entangled in an obscenity trial which requires artist to defend their work at considerable personal and financial cost. Therefore, the only way to eliminate this burden would be to strike down the obscenity law. However, because children are especially susceptible to harm there needs to be some measure to protect them. Consequently, it is difficult to think of a reasonable standard which allows for a balance of safekeeping and a complete pursuit of truth and intellect. With this and the earlier cases in mind, I ask: is the next step in history abolishing the law of obscenity or continuing to redefine the standard? In light of the limited actuarial data on the risk of harm caused by obscenity or indecency, I believe the obscenity law must be struck down to allow for freedom of expression and meaningful content.

¹¹⁴ Ross, *supra* note 105 at 29.

¹¹⁵ *Ibid.*

As illustrated, history has shown that those who try to suppress expression are seldom successful. Consequently, society's perspective on obscenity is flexible and responds to shifts in public acceptance of explicit material. Earlier this paper mentioned that images that are suppressed have a tendency of reappearing. In the age of technology, I believe if we try to censor imagery it will nevertheless find a way of reappearing on the Internet. Therefore, I believe it is time to retire the obscenity law as it allows for artistic freedom to be suppressed. Lynn King said, "when dealing with images – which ones should go and which ones can stay – no amount of tinkering with words can guarantee women a just law."¹¹⁶ Consequently, I believe there are better ways to confront violence and sexuality than law reforms on obscenity/indecency. For instance, Varda Burstyn argues:

If women find themselves coerced into sexual activity for pornography production, they should lay assault and rape charges against those responsible (...). If their pictures are published without their consent, they can sue for harassment, slander, libel and damages (...). But to suggest, as Andrea Dworkin and Catherina Mackinnon do in the U.S., and Susan Cole does in Canada, that the makers of the pornography in question be sued because the pornography itself is responsible for the assault is dangerous.¹¹⁷

In this, Burstyn believes that no matter how offensive or grotesque a work is, it should not be criminalized as obscene under the *Criminal Code*. However, if a work harms someone directly in its production, then there are other avenues of recourse to remedy the matter. Thus, she believes there is already proper legislation to address harm and obscenity laws only make it easier for educational materials to be suppressed.¹¹⁸

With Burstyn's perspective in mind, a similar argument can be made in regards to child pornography. If children are coerced into sexual performance, assault and abuse legislation can be used to lay a conviction. Therefore, there are appropriate cases for legal action when there is actual harm and a direct link between the material and harm to children. However, the obscenity law limits freedom of expression and is not the appropriate recourse as it can be used to target freedom of artistic expression based on intrinsic harm as established in *Labaye*. Bruce Ryder said:

¹¹⁶ King, *supra* note 28 at 79.

¹¹⁷ Varda Burstyn, "Beyond Despair: Positive Strategies" in Varda Burstyn, ed, *Women Against Censorship* (Vancouver: Douglas & McIntyre Ltd, 1985) at 160-161.

¹¹⁸ *Ibid.*

...the law causes harm to society by suppressing thoughts and expression concerning child and youth sexuality that involved no harm in production, fall short of advocating harm and that have at best a tenuous connection to the commission of harmful acts.¹¹⁹

In order to remedy this, the obscenity and indecency sections in the *Criminal Code* need to be eliminated as there are other means to address actual harm.

Supporting Burstyn, I believe that the element of “physical or psychological harm to individuals” in the *Labaye* test can be remedied by other legislation. Further, the other elements namely, “confronting members of the public with conduct that significantly interferes with their autonomy and liberty” or “predisposing others to anti-social behaviour” of the *Labaye* test should not be criminalized because being offended is not a justification for state interference. Without challenging moral norms, the society we live in stays static. As a result, eliminating obscenity and indecency from the *Criminal Code* would allow for charges in more appropriate circumstances. Moving forward, regulations could replace the criminal aspect of obscenity and indecency. Regulations would prevent members of the public from unwillingly confronting conduct or expression they do not wish to see. This could be done by restricting the expression to certain locations or requiring artists to incorporate explicit warnings in their exhibitions to caution their viewers.

V. CONCLUSION

In the foregoing analysis, I have examined the history of censorship, the reforms in case law to arrive at a policy recommendation regarding the practice of censorship within the artistic realm. I illustrated that censorship has always been justified in the name of public good and social order and has always been opposed in the name of freedom of expression and progress. Moreover, I explored the idea that the desire to censor has stemmed around the notion that pornography results in sexual violence and discrimination against women and children. I rebutted this belief by highlighting the competing anti-censorship feminist view on pornography and censorship.

Taking these opinions into account, I suggested that these theorists’ concerns relating to pornography apply to artworks including painting, sculpture, as well as photography. Subsequently, I outlined the *Butler* case

¹¹⁹ Ryder, *supra* 98 note at 103.

as a starting point for understanding how harm and violence is understood by the courts in the context of obscenity. I then outlined subsequent cases such as *Langer*, *Sharpe*, and *Labaye* to show that defining what is, and is not, harmful is highly debated. Consequently, I argued that risk of harm is not an appropriate standard especially in the context of visual art. This is because it is when art challenges prevailing aesthetics, morals, and subject matter that it is most likely to draw attention, receive notoriety, and provoke discussion. Without challenging artistic and moral norms, the society we live in stays static. Thus, censorship limits the ability of the artistic community to challenge the society we live in. While there is no easy conclusion on how to solve the paradox within artistic freedom and harm, courts must acknowledge that censorship hinders societies ability to learn and combat violence. Consequently, government needs to re-evaluate the obscenity and indecency and consider replacing it with regulation

Voluntary Intoxication and the *Charter*: Revisiting the Constitutionality of Section 33.1 of the *Criminal Code*

MICHELLE S. LAWRENCE*

ABSTRACT

Section 33.1 of the *Criminal Code* is a legislated form of guilt-by-proxy. It allows the court to substitute the *mens rea* of voluntary intoxication for the *mens rea* of general intent offences that involve an element of personal violence. It represents a revival of the controversial *Leary* rule, albeit with limited application to crimes of violence. Parliament enacted section 33.1 notwithstanding the unequivocal view of the majority of the Supreme Court of Canada in *R v Daviault* that the *Leary* rule violated sections 7 and 11(d) of the *Charter* and could not be justified under section 1. It would appear, from reasons that echo the decision of the majority in that case, that section 33.1 similarly offends the *Charter*. However, despite the passage of more than twenty years since its enactment, and sharply divided trial court rulings on the *Charter* question, the Supreme Court has yet to decide the issue. It is recommended on the basis of the analysis set out in this paper that the

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provision be struck. Alternatively, it is proposed that the courts interpret the provision in a manner that effectively incorporates the constitutionally required minimal fault standard. Either way, the question of the constitutionality of section 33.1 must be resolved, failing which accused persons in Canada face the disconcerting prospect of differential treatment at law depending largely on the jurisdiction in which their case proceeds.

KEYWORDS : *Intoxication defence, voluntary intoxication, Charter of Rights and Freedoms, principles of fundamental justice, right to make full answer and defence, substance abuse, addiction, extreme intoxication akin to automatism, extreme intoxication akin to insanity, substance-induced psychosis, mental disorder, violence against women, and children.*

I. INTRODUCTION

Historically, the law has viewed self-induced intoxication as the product of rational choice for which the accused is morally culpable. In his classic text, *A Treatise of the Pleas of the Crown*, Hawkins wrote that no leniency should be afforded to accused persons who commit offences while in a state of voluntary intoxication, saying that such a person “shall be punished for [the offence] as much as if he had been sober.”¹ Section 33.1 of the *Criminal Code*² is consistent with that norm. It is a legislated form of guilt-by-proxy, the purpose of which is to facilitate the prosecution of accused persons for violent acts committed in states of extreme intoxication. It operates so as to allow the court to rely on the *mens rea* of self-induced intoxication to establish the *mens rea* of the offence - and thereby ensure a conviction - in those cases where the Crown could not otherwise prove that the acts of the accused were either voluntary or intentional.

¹ William Hawkins, *A Treatise of the Pleas of the Crown* 8th ed by John Curwood (London, UK: C Roworth Bell Yard, 1824) Vol 1 at B2. See also, *inter alia*, David McCord, “The English and American History of Voluntary Intoxication to Negate *Mens Rea*” (1990) 11:3 J Legal Hist 372; Jerome Hall, “Intoxication and Criminal Responsibility” (1944) 57:1 Harvard LR 1045; and RU Singh, “History of the Defence of Drunkenness in English Criminal Law” (1933) 49 Law Q Rev 528.

² *Criminal Code*, RSC 1985, c C-46, s 33.1.

In the seminal 1994 case of *R v Daviault*,³ the majority of the Supreme Court of Canada was unequivocal in its view that the conviction of an accused person without proof of the minimal mental element of the offence offends the *Charter*⁴ in a manner “so drastic and so contrary to the principles of fundamental justice” that it cannot be justified under section 1.⁵ Parliament enacted section 33.1 notwithstanding the majority’s clear denunciation of the guilt-by-proxy regime under consideration in that case. In the circumstances, a *Charter* challenge to section 33.1 might have seemed inevitable.⁶ However, despite the passage of more than 20 years, and sharply divided trial court rulings on the question, the Supreme Court of Canada has yet to determine the constitutionality of the provision. It had the opportunity to do so in the relatively recent 2011 case of *R v Bouchard-Lebrun*⁷ but declined, ostensibly on the grounds that counsel had not raised the argument.⁸

It may be said that the Court’s reliance on section 33.1 in the *Bouchard-Lebrun* case reflects some underlying comfort with the provision.⁹ Even if that is the case, it is incumbent on the Court to explain how the use of guilt-by-proxy in section 33.1 can be reconciled with the *Charter*, if not for the benefit of coherence in the law itself then for the sake of those accused

³ *R v Daviault*, [1994] 3 SCR 63, 118 DLR (4th) 469 [*Daviault*].

⁴ *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.

⁵ *Ibid* at 92.

⁶ See Isabel Grant, “Second Chances: Bill C-72 and the *Charter*” (1995) 33:2 *Osgoode Hall LJ* 379 [Grant]; Martin Shain, “The *Charter* and Intoxication: Some Observations on Possible *Charter* Challenges to an Act to Amend the Criminal Code (*Self-Induced Intoxication*) 1995, C-72” (1996) 23:4 *Contemporary Drug Problems* 731; and Heather MacMillan-Brown, “No Longer ‘Leary’ About Intoxication: In the Aftermath of *R v Daviault*” (1995) 59:2 *Sask L Rev* 311.

⁷ *R v Bouchard-Lebrun*, 2011 SCC 58, [2011] 3 SCR 575 [*Bouchard-Lebrun*].

⁸ See Don Stuart, “Annotation on *Bouchard-Lebrun*” (2011) 89 *CR* (6th) 1; and HA Kaiser, “*Bouchard-Lebrun*: Unduly Limiting Toxic Psychosis and Reigniting the Dangerous Intoxication Debate” (2012) 89 *CR* (6th) 68, in which the authors criticize the decision of the Court not to initiate the *Charter* inquiry on its own motion. Kaiser described that decision as giving rise to a troubling new form of “osmotic constitutionalization.”

⁹ Cf Dennis J Baker & Rainer Knopff, “*Daviault* Dialogue: The Strange Journey of Canada’s Intoxication Defence” (2014-2015) 19:1 *Rev Const Stud* 35 [Baker & Knopff].

persons whose prosecution turns on the question. Until the constitutionality of section 33.1 is settled, accused persons in Canada face the unsettling prospect of differential treatment at law based largely on the jurisdiction in which they are prosecuted. At the moment, it appears that they will be subject to conviction under section 33.1 in British Columbia, Quebec and Nunavut, where lower courts have upheld the provision.¹⁰ They will not in Ontario or the Northwest Territories, where courts have declared it invalid.¹¹

This paper offers an overview of the legal and political controversies that emanated from the *Daviault* decision and inspired the subsequent enactment of section 33.1 of the *Criminal Code*. It describes the essential elements of section 33.1, so as to make some sense of the practical scope of the provision and the narrow factual circumstances to which it might properly be applied. It also reports the outcomes of lower court cases, few though they are in number, in which the constitutionality of the provision was assessed. It proceeds from there to consider the *Charter* question anew. It is argued in the result, for reasons which largely echo the decision of the majority in the *Daviault* case, that section 33.1 offends sections 7 and 11(d) of the *Charter* and cannot be justified under section 1. The paper concludes with the recommendation that the Court interpret the provision in a manner that effectively incorporates the constitutionally required minimal fault standard or, better yet, strike down the provision in its entirety and

¹⁰ *R v Vickberg* (1998), 16 CR (5th) 164, 54 CRR (2d) 83 (BCSC) [*Vickberg*]; *R v Dow*, 2010 QCCS 4276, 261 CCC (3d) 399 [*Dow*], appeal allowed on other grounds (2014) QCCA 1416; and *R v SN*, 2012 NUCJ 02, 99 WCB (2d) 841 [*SN*]. Other courts have similarly proceeded on the assumption that section 33.1 is constitutional without considering the *Charter* issue: *R v Peters*, 2014 BCSC 983, 114 WCB (2d) 420 [*Peters*]; *R c Côté*, 2013 QCCQ 4485, 2013 CarswellQue 4720; *R v Wells* (2013), 2013 CanLII 2932 (NL PC), 334 Nfld & PEIR 263 (Prov Ct); *R v Weitzel*, 2004 BCSC 1767, 64 WCB (2d) 161; *R v BJT*, 2000 SKQB 572, [2001] 4 WWR 741; *R v Martin*, [1999] OJ No 5066 (CA), 1999 CanLII 1708; *R v Frechette* (1999), 132 CCC (3d) 1, 118 BCAC 235 (BCCA); and *R v Bonnell*, 2015 NBCA 6, 321 CCC (3d) 247.

¹¹ *R v Dunn*, [1999] 28 CR (5th) 295, [1999] OJ No 5452 (Ont Sup Ct Just) [*Dunn*]; *R v Brenton* (1999), 28 CR (5th) 308, 180 DLR (4th) 314 (NWTSC) [*Brenton*], rev'd on other grounds 2001 NWTCA 1, 199 DLR (4th) 119; *R v Jensen*, [2000] OJ No 4870, 2000 CarswellOnt 6489 (Sup Ct Just) [*Jensen*]; *R v Cedeno*, 2005 ONCJ 91, 195 CCC (3d) 468 [*Cedeno*]; and *R v Fleming*, 2010 ONSC 8022, 94 WCB (2d) 252 [*Fleming*]. Cf *R v Decaire*, [1998] OJ No 6339 (Ct Just) [*Decaire*].

return to Parliament the task of formulating an offence that better matches the *mens rea* and *actus reus* of dangerous intoxication.

II. HISTORY OF SECTION 33.1

A. *R v Daviault*: Judicial Recognition of Extreme Intoxication Defence

The *Daviault*¹² case involved a factual matrix that is simultaneously pedestrian and peculiar. At issue were not uncommon allegations of sexual assault against a woman who was vulnerable by reason of age and disability. The accused was someone she knew. What makes the case unusual is the purported mental state of the accused at the time of the alleged offence. He was a chronic alcoholic. Although the accused did not take the stand at trial, it was suggested that he drank almost the entirety of a 40-ounce bottle of brandy in the hours preceding the alleged assault, in addition to a further seven or eight bottles of beer earlier in the day. A pharmacologist testified that consumption of these quantities and concentrations of alcohol would have produced in the accused a blood-alcohol ratio of between 400 and 600 milligrams per 100 milliliters of blood. Moreover, and more significantly, it was the opinion of the expert that extreme intoxication of this nature could trigger an episode of “l’amnésie-automatisme,” wherein the individual “loses contact with reality and the brain is temporarily dissociated from normal functioning” and “has no awareness of his actions ... and will likely have no memory of them the next day.”¹³

Arising from these facts was the question of whether an accused could assert a defence to the general intent offence of sexual assault on the basis of extreme intoxication akin to automatism. Until this case, it was well established in Canadian law that a partial defence was available in response to a charge of a specific intent offence if there was reasonable doubt as to whether the accused formed the specific intent required for conviction by reason of intoxication.¹⁴ In such a case, the accused would be acquitted of

¹² *Daviault*, *supra* note 3.

¹³ *Ibid* at 105.

¹⁴ The origins of the intoxication defence date to the 1920 decision of the *House of Lords* in *Director of Public Prosecutions v Beard*, [1920] AC 479, 12 ALR 846, which ruling the Supreme Court of Canada endorsed in the subsequent 1930 decision of *MacAskill v*

the specific intent offence and convicted instead of any lesser-included general intent offence.¹⁵ It was less clear, however, whether a *full* defence should be similarly available in response to a charge of a general intent offence in circumstances where the accused lacked even the modest degree of general intent required for conviction.

On this point, the majority of the Supreme Court of Canada previously ruled in the 1978 case of *Leary v The Queen*¹⁶ that intoxication is not a defence to a general intent offence. In most cases, it held, the *mens rea* of the offence could be inferred from the *actus reus* itself. Where the necessary inference could not be made, it was open to the court to substitute evidence that intoxication was voluntary. The use of substituted *mens rea* in this way came to be known as the *Leary* rule. Its purpose was to ensure the successful prosecution of accused persons for dangerous acts committed while impaired.¹⁷ Laudable though that aim might be, the *Leary* rule nonetheless became the target of judicial criticism, particularly after the *Charter* was enacted in 1982. In the *Bernard*¹⁸ case, for example, Wilson J. questioned its constitutionality. She suggested that an exception to the *Leary* rule might be required in cases of extreme intoxication, though she left the issue to be

The King, [1931] SCR 330, 55 CCC 81. See also *R v George*, [1960] SCR 871, 128 CCC 289 and *R v Robinson*, [1996] 1 SCR 683, 133 DLR (4th) 42. The equivalent American law is discussed in Douglas B Marlowe, Jennifer B Lambert & Robert G Thompson, "Voluntary Intoxication & Criminal Responsibility" (1999) 17:2 Behav Sci & L 195.

¹⁵ There is insufficient opportunity in this paper to discuss the merits of the distinction in law between "specific intent offences" and "general intent offences" for the purposes of the intoxication defence. Suffice it to say that the distinction has a long history in English and Canadian law: *Daviault*, *supra* note 3, at 115-126. It is a distinction that is nonetheless both curious and controversial. Ferguson pointedly describes it as "unprincipled, illogical and arbitrary": Gerry Ferguson, "The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation" (2012) 57 SCLR (2d) 111 at 123 [Ferguson]. Despite this criticism, in the relatively recent case of *R v Tatton*, 2015 SCC 33, [2015] SCR 574, the Supreme Court of Canada defended the distinction and affirmed its continued use.

¹⁶ *R v Leary*, [1978] 1 SCR 29, 74 DLR (3d) 103.

¹⁷ See *Daviault*, *supra* note 3 at 114, where Sopinka J. described what he characterized as the "sound policy considerations" underlying the *Leary* rule. He wrote that "[s]ociety is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community".

¹⁸ *R v Bernard*, [1988] 2 SCR 833, 45 CCC (3d) 1. See also *R v Penno*, [1990] 2 SCR 865, 59 CCC (3d) 344 [Penno].

decided in a future case.¹⁹ Dickson C.J. was not so hesitant. In a separate decision penned in *Bernard*, he characterized the *Leary* rule as a deviation from foundational principles of Canadian criminal law and a plain violation of sections 7 and 11(d) of the *Charter*.²⁰

It fell to the Supreme Court of Canada in *Daviault* to resolve the *Charter* question. On that issue, the Court divided. It was the reasoning of Cory J. that was supported by the majority. He described the *Leary* rule as “a true substitution” of self-induced intoxication for the *mens rea* of the offence notwithstanding the absence of “such a connection between the consumption of alcohol and the crime of assault that it can be said that drinking leads inevitably to the assault.”²¹ The *mens rea* requirement is fundamental and integral to Canadian criminal law, he held, and one that could not be satisfied by the substitution of the intention to become intoxicated because the latter “simply cannot lead inexorably to the conclusion that the accused possessed the requisite mental element to commit a sexual assault, or any other crime.”²² In the result, the majority concluded that the substitution of the *mens rea* of voluntary intoxication had the effect of eliminating the minimal *mens rea* element of the offence contrary to the principles of fundamental justice guaranteed in section 7 of the *Charter*. It likewise violated section 11(d) since it allowed for the conviction of the accused even in the face of reasonable doubt as to an essential element of the offence. In Cory J.’s words:

¹⁹ *Bernard*, *supra* note 18 at 889-890.

²⁰ *Ibid* at 850-851; Elizabeth Sheehy, “The Intoxication Defense in Canada: Why Women Should Care” (1996) 23:4 *Contemporary Drug Problems* 595 at 600. Sheehy reports that the divergence of judicial opinion in the *Bernard* case gave rise to some confusion on the question of whether an exception to the *Leary* rule ought to be recognized in cases of extreme intoxication akin to automatism or insanity. By way of illustration, she identified four cases decided after *Bernard* and prior to *Daviault* in which acquittals were granted in cases of extreme intoxication, and another five in which acquittals were denied in comparable circumstances.

²¹ *Daviault*, *supra* note 3 at 87-88.

²² *Ibid* at para 42. On this point, Cory J. applied the test articulated in *R v Vaillancourt*, [1987] 2 SCR 636, 39 CCC (3d) 118 and restated in *R v Whyte*, [1988] 2 SCR 3 at 18-19, 42 CCC (3d) 97, namely, that “[o]nly if the existence of the substituted fact leads inexorably to the conclusion that the essential element exists, with no other reasonable possibilities, will the statutory presumption be constitutionally valid”.

In my view, the mental element of voluntariness is a fundamental aspect of the crime which cannot be taken away by a judicially developed policy. It simply cannot be automatically inferred that there would be an objective foresight that the consequences of voluntary intoxication would lead to the commission of the offence. It follows that it cannot be said that a reasonable person, let alone an accused who might be a young person inexperienced with alcohol, would expect that such intoxication would lead to either a state akin to automatism, or to the commission of a sexual assault. Nor is it likely that someone can really intend to get so intoxicated that they would reach a state of insanity or automatism.²³

It was the view of the dissent, led by Sopinka J., that the principles of fundamental justice do not require strict symmetry between *actus reus* and *mens rea*. They require only that the two are sufficiently proportionate. Sopinka J. wrote that “[t]he principles of fundamental justice can exceptionally be satisfied provided the definition of the offence requires that a blameworthy mental element be proved and that the level of blameworthiness not be disproportionate to the seriousness of the offence.”²⁴ This is achieved in the *Leary* rule, he held, at least in relation to the offence of sexual assault:

There are a few crimes in respect of which a special level of *mens rea* is constitutionally required by reason of the stigma attaching to a conviction and by reason of the severity of the penalty imposed by law. Accordingly, murder and attempted murder require a *mens rea* based on a subjective standard. No exception from the principle of fundamental justice should be made with respect to these offences and, as specific intent offences, drunkenness is a defence.

By contrast, sexual assault does not fall into the category of offences for which either the stigma or the available penalties demand as a constitutional requirement subjective intent to commit the *actus reus*. Sexual assault is a heinous crime of violence. Those found guilty of committing the offence are rightfully submitted to a significant degree of moral opprobrium. That opprobrium is not misplaced in the case of the intoxicated offender. Such individuals deserve to be stigmatized. Their moral blameworthiness is similar to that of anyone else who commits the offence of sexual assault and the effects of their conduct upon both their victims and society as a whole are the same as in any other case of sexual assault. Furthermore, the sentence for sexual assault is not fixed. To the extent that it bears upon his or her level of moral blameworthiness, an offender's degree of intoxication at the time of the offence may be considered during

²³ *Daviault*, *supra* note at 91. Voluntariness is sometimes treated as an element of the *actus reus* of the offence: *R v Parks*, [1992] 2 SCR 871 at 1, 75 CCC (3d) 287 and *R v Théroux*, [1993] 2 SCR 5 at 12, 19 CR (4th) 194. Cory J. expressly stated at para 66 that his reasoning applies regardless of whether voluntariness is characterized as part of the *mens rea* or *actus reus* of an offence.

²⁴ *Ibid* at 118.

sentencing. Taking all of these factors into account, I cannot see how the stigma and punishment associated with the offence of sexual assault are disproportionate to the moral blameworthiness of a person like the appellant who commits the offence after voluntarily becoming so intoxicated as to be incapable of knowing what he was doing. The fact that the *Leary* rule permits an individual to be convicted despite the absence of symmetry between the *actus reus* and the mental element of blameworthiness does not violate a principle of fundamental justice.²⁵

Sopinka J. applied the same logic to section 11(d) of the *Charter*. He held that the voluntariness requirement is not absolute, and that prosecutions can proceed in the absence of proof of voluntariness on an exceptional basis where the accused is found to have brought about that condition through voluntary intoxication.

Cory J. firmly rejected the view that voluntary intoxication alone is sufficiently blameworthy to satisfy the requirements of the *Charter*. He aptly noted that “[v]oluntary intoxication is not yet a crime” and that “[a] person intending to drink cannot be said to be intending to commit a sexual assault.”²⁶ In the view of the majority, there must be a link between the *mens rea* requirements of the offence and the prohibited acts, “that is to say that the mental element is one of intention with respect to the *actus reus* of the crime charged...and reflect the particular nature of the crime.”²⁷ Moreover, “to deny that even a very minimal mental element is required for [the general intent offence of] sexual assault offends the *Charter* in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under s. 1.”²⁸

On the contrary, the majority held, accused persons who lack *mens rea* owing to extreme intoxication *akin to automatism or insanity* are entitled under the *Charter* to an acquittal. Cory J. set out the parameters of that defence – which included a rare reverse onus – as follows:

Just as in a situation where it is sought to establish a state of insanity, the accused must bear the burden of establishing, on the balance of probabilities, that he was in that extreme state of intoxication. This will undoubtedly require the testimony of an expert. Obviously, it will be a rare situation where an accused is able to establish such an extreme degree of intoxication. Yet, permitting such a procedure would mean that a defence would remain open that, due to the extreme degree of

²⁵ *Ibid* at 119-120.

²⁶ *Ibid* at 92.

²⁷ *Ibid*.

²⁸ *Ibid*.

intoxication, the minimal mental element required by a general intent offence had not been established. To permit this rare and limited defence in general intent offences is required so that the common law principles of intoxication can comply with the *Charter*.²⁹

In the result, the majority allowed the appeal and directed a new trial, presumably so the accused might have the opportunity to advance this new “*Daviault* defence” in accordance with the requirements set out above. That trial never took place, however, as the complainant died (of unrelated causes).³⁰ The Crown apparently attempted to adduce the complainant’s prior testimony as an exception to the rule against hearsay, but was not successful. The charge against the accused was dismissed.³¹

B. Bill C-72: Parliament Limits Scope of *Daviault* Defence

It is not known whether Cory J., or any of the other justices who supported his ruling, had any sense of the public furor their decision would spark. That furor was both swift and damning. Grant describes it in the following terms:

The suggestion that someone could be too drunk to be convicted of sexual assault shocked the public’s sense of justice and common sense. The facts of the case, that the victim was elderly and disabled, and that she was literally dragged from her wheelchair and sexually assaulted, brought the issue into stark focus for the public. Women’s groups were outraged and most media reports of the decision were negative. Even a United States State Department Country Report on Human Rights implicated *Daviault* as hindering the enforcement of laws prohibiting violence against women.³²

Subsequent lower court rulings, in which accused persons were acquitted of violent crimes in circumstances similar those of in *Daviault*,

²⁹ *Ibid* at 103.

³⁰ Robin Room, “Drinking, Violence, Gender and Causal Attribution: A Canadian Case Study in Science, Law and Policy” (1996) 23:4 *Contemporary Drug Problems* 649 at 650 [Robin].

³¹ *Ibid*.

³² Grant, *supra* note 6 at 383. See also Sheehy, *supra* note 20; Robin Room, *supra* note 30; Susan J Bondy, “Self-Induced Intoxication as a Defence in the Criminal Code of Canada: Issues and Discussion Around *Daviault v. R.*” (1996) 23 *Contemporary Drug Problems* 571 at 573-74; and Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto, ON: Thomson Carswell, 2014).

amplified the public outrage.³³ As Grant notes, “[i]t soon became apparent that the government had no choice but to act quickly...”³⁴

Less than five months after the Supreme Court of Canada rendered its decision in the *Daviault* case, the governing Liberal Party tabled Bill C-72, entitled *An Act to amend the Criminal Code (self-induced intoxication)*.³⁵ The Minister of Justice expressly addressed the *Daviault* decision in his comments to Parliament on the motion for second reading of the bill, and made plain his shared concern for the protection of women and children:

The *Daviault* judgment raised obvious concerns for members of Parliament and indeed for all Canadians. The whole question of accountability under the criminal law was brought into sharp focus.

Specific concerns related to crimes of violence against women and children. Indeed the *Daviault* case itself involved an allegation of sexual assault against a woman. In the weeks that followed the release of the *Daviault* case, there were other cases in various parts of Canada applying its principle, each case involving allegations of violence against women.

Concern grew that a person might be charged with murder and defend on the basis of intoxication. If the extent of intoxication was established to be sufficiently extreme, that person might walk out of the courtroom entirely free because they were incapable of performing a specific intent involving murder and because the intoxication was such that they were exculpated from the general intent crime of manslaughter. The result would be that they would face no sanction at all.

Concerns were also expressed that people might manipulate the legal principles so as to intoxicate themselves to some extent for the purpose of committing a crime. They would then intoxicate themselves further afterward before apprehension and rely upon the degree of intoxication overall to escape liability for the crime.³⁶

The drafters of Bill C-72 took the unusual step of articulating and particularizing these concerns in a lengthy preamble. That preamble warrants reproduction in full for the purposes of this analysis:

³³ See Sheehy, *supra* note 20 and Room, *supra* note 30.

³⁴ Grant, *supra* note 6 at 383.

³⁵ *An Act to amend the Criminal Code (self-induced intoxication)*, RSC 1995, c 32. In the years preceding the *Daviault* ruling, the federal government was engaged in a broader policy process, the object of which was to reform and modernize the *Criminal Code*. Among the proposed amendments under consideration at that time were specific provisions dealing within self-induced intoxication. The government accelerated that process – or at least those parts dealing with self-induced intoxication – as a result of *Daviault*. See Susan J Bondy, “A Summary of Public Consultation on Reform of the Criminal Code of Canada as Related to a Defense of Self-Induced Intoxication Resulting in Automatism” (1996) 23:4 *Contemporary Drug Problems* 583.

³⁶ *House of Commons Debates*, 35th Parl, 1st Sess, No 177 (27 March 1995) at 11037 (Hon Allan Rock) [*House of Commons Debates*].

WHEREAS the Parliament of Canada is gravely concerned about the incidence of violence in Canadian society;

WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantaging impact on the equal participation of women and children in society and on the rights of women and children to security of the person and to the equal protection and benefit of the law as guaranteed by sections 7, 15 and 28 of the Canadian Charter of Rights and Freedoms;

WHEREAS the Parliament of Canada recognizes that there is a close association between violence and intoxication and is concerned that self-induced intoxication may be used socially and legally to excuse violence, particularly violence against women and children;

WHEREAS the Parliament of Canada recognizes that the potential effects of alcohol and certain drugs on human behaviour are well known to Canadians and is aware of scientific evidence that most intoxicants, including alcohol, by themselves, will not cause a person to act involuntarily;

WHEREAS the Parliament of Canada shares with Canadians the moral view that people who, while in a state of self-induced intoxication, violate the physical integrity of others are blameworthy in relation to their harmful conduct and should be held criminally accountable for it;

WHEREAS the Parliament of Canada desires to promote and help to ensure the full protection of the rights guaranteed under sections 7, 11, 15 and 28 of the Canadian Charter of Rights and Freedoms for all Canadians, including those who are or may be victims of violence;

WHEREAS the Parliament of Canada considers it necessary to legislate a basis of criminal fault in relation to self-induced intoxication and general intent offences involving violence;

WHEREAS the Parliament of Canada recognizes the continuing existence of a common law principle that intoxication to an extent that is less than that which would cause a person to lack the ability to form the basic intent or to have the voluntariness required to commit a criminal offence of general intent is never a defence at law;³⁷

The actual amendments to the *Criminal Code* included in Bill C-72 were otherwise relatively short. They were limited to the addition of a new section 33.1, the terms of which are as follows:

- (1) It is not a defence to a offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection
- (2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or

³⁷ An Act to amend the *Criminal Code* (self-induced intoxication), *supra* note 35.

involuntarily interferes or threatens to interfere with the bodily integrity of another person.

- (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.³⁸

Parliamentarians engaged in a robust debate on the merits of the new provision, and the question of whether it would survive a *Charter* challenge. The Minister of Justice assured Parliament that it would.³⁹ Ultimately, Parliament voted to pass Bill C-72 without revision and without invoking the notwithstanding clause in the *Charter*. Section 33.1 was brought into force by regulation on September 15, 1995.⁴⁰

III. JUDICIAL INTERPRETATION OF SECTION 33.1

As noted at the outset of this paper, section 33.1 represents a form of guilt-by-proxy because it allows the court to rely on the *mens rea* of self-induced intoxication to establish the *mens rea* of a general intent offence. In effect, it revives the *Leary* rule, albeit with its application limited to general intent crimes of violence. Though the Supreme Court of Canada did not comment on the constitutionality of the provision in *Bouchard-Lebrun*, it did offer useful direction as to the circumstances in which it will apply. In particular, Le Bel J. held that the application of section 33.1 is subject to the following conditions:

- (1) The accused was intoxicated at the material time;
- (2) The intoxication was self-induced; and
- (3) The accused departed from the standard of reasonable care generally recognized in Canadian society by interfering or threatening to interfere with the bodily integrity of another person.⁴¹

What follows is a discussion of each of these conditions, for the purpose of defining the practical scope of the provision.

³⁸ *Ibid.*

³⁹ *Supra* note 36.

⁴⁰ *An Act to Amend the Criminal Code*, *supra* note 35, proclaimed in force September 15, 1995, SI/95-101, (1995) C Gaz II, 2677.

⁴¹ *Bouchard-Lebrun*, *supra* note 7 at para 89.

A. Condition One: “the accused was intoxicated at the material time”

It is perhaps obvious that section 33.1 applies only in those cases where the accused was intoxicated at the time of the offence. What is important to note is that the Crown need not prove the existence of any particular mental condition arising from that intoxication. In *Bouchard-Lebrun*, the Supreme Court of Canada made clear that the provision applies to “any mental condition that is the direct extension of a state of intoxication,” even if the onset of that mental condition was not a “normal effect” of intoxication.⁴² That said, the Crown need only have resort to section 33.1 if the nature and degree of intoxication is such that the individual was rendered “unaware of, or incapable of consciously controlling, their behaviour”⁴³ and “lacked the general intent or the voluntariness required”⁴⁴ for conviction as a result. This language clearly captures the mental state described in the *Daviault* case as “extreme intoxication akin to automatism or insanity.” That is a discrete and particular mental state. It is one that is qualitatively different than the experience of aggression or disinhibition typically associated with alcohol and certain other drug use,⁴⁵ for which no defence is available in Canadian law.

Pharmacological research suggests that only a limited class of substances can produce a mental state *akin to automatism*. These are known as dissociative anesthetics, and include ketamine (“Special-K”) and phencyclidine (“angel dust”).⁴⁶ Alcohol is not a dissociative anesthetic.⁴⁷ As early as October 1995, Kalant and others reported to the House of Commons Standing Committee on Justice and Legal Affairs that there was no scientific evidence to support the contention that intoxication by alcohol alone, no matter how extreme, could produce a mental state akin to

⁴² *Ibid* at para 91. In *Bouchard-Lebrun*, the Supreme Court of Canada specifically rejected the argument that toxic psychosis was excluded from the ambit of section 33.1 on the purported view that psychosis was not a normal effect of ecstasy use.

⁴³ *Criminal Code*, *supra* note 2, s 33.1(2).

⁴⁴ *Ibid* s 33.1(1).

⁴⁵ See Anne M Day et al, “Executive Functioning in Alcohol Use Studies: A Brief Review of Findings and Challenges in Assessment” (2015) 8:1 *Curr Drug Abuse Rev* 26.

⁴⁶ Harold Kalant, “Intoxicated Automatism: Legal Concept vs. Scientific Evidence” (1996) 23:4 *Contemporary Drug Problems* 631 at 643.

⁴⁷ *Ibid* at 638, wherein Kalant reported that, at most, alcohol may trigger automatism in those with underlying, independent physical and psychiatric disorders.

automatism.⁴⁸ As set out above, Parliament likewise noted in the preamble of Bill C-72 that it was “aware of scientific evidence that most intoxicants, including alcohol, by themselves, will not cause a person to act involuntarily.”⁴⁹ It is not known why the Crown did not call evidence to this effect in the *Daviault* case. It subsequently did so with success in the 2010 case of *R v Dow*.⁵⁰ In that case, the Quebec Superior Court found as a matter of fact that the accused’s allegations of alcohol-induced automatism were not scientifically supported. The court concluded on the strength of that evidence that “the defence of extreme intoxication akin to automatism induced by an over-consumption of alcohol does not exist anymore in Canadian criminal law.”⁵¹

It would appear, in reliance on *Bouchard-Lebrun*,⁵² that section 33.1 also captures experiences of substance-induced psychosis. Among those substances listed in the *Diagnostic and Statistical Manual of Mental Disorders* as potential triggers of psychosis are alcohol, cannabis, hallucinogens (including phencyclidine), inhalants, and stimulants (including cocaine), as well as sedatives, hypnotics, and anxiolytics.⁵³ That said, whether or not an episode of psychosis manifests in association with the use of one or more of these substances seems to depend not only on the pharmacological effect of the substances themselves but also the neurobiological constitution of the user and that user’s exposure to environmental stressors.⁵⁴ In the *Bouchard-*

⁴⁸ Canada, Parliament, House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, 35th Parl, 1st Sess, No 161 (13 June 1995). It does not appear on the basis of a survey of subsequent research that the findings articulated by Kalant have been subsequently challenged or otherwise displaced. See also *Dow*, *supra* note 10, wherein the court summarizes the contents of comparable expert evidence adduced by the Crown in that case.

⁴⁹ *An Act to amend the Criminal Code (self-induced intoxication)*, *supra* note 35.

⁵⁰ *R v Dow*, *supra* note 10 at paras 101-102.

⁵¹ *Ibid* at para 102. This outcome is consistent with more recent findings reported in Mark R Pressman & David S Caudill, “Alcohol-Induced Blackout as a Criminal Defense or Mitigating Facts: An Evidence-Based Review and Admissibility as Scientific Evidence” (2013) 58:4 J Forensic Sciences 932.

⁵² *Bouchard-Lebrun*, *supra* note 7.

⁵³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th Edition (Washington, DC: American Psychiatric Association, 2013) at 110-11 “Substance/Medication-Induced Psychotic Disorder.”

⁵⁴ See, *inter alia*, Gregory B Leong, Sarah E Leisenring & Margaret D Dean, “Commentary: Intoxication and Settled Insanity - Unsettled Matters” (2007) 35:2 J of the American

Lebrun case, the accused committed grievous assaults while in a state of ecstasy-induced psychosis, or what the court referred to as “toxic psychosis.” The assaults were intentional, and apparently justified in the mind of the accused on religious grounds.⁵⁵ It was found that, by reason of the psychosis, the accused was incapable of distinguishing right from wrong. In other words, he was in a state of extreme intoxication *akin to insanity*. Of particular significance is the fact that the Supreme Court of Canada applied section 33.1 notwithstanding evidence that the assaults were deliberate. This suggests that a psychotic intent to commit acts of violence does not constitute “general intent” for the purposes of section 33.1.⁵⁶

It is theoretically possible that section 33.1 could also apply in those cases where the nature and degree of intoxication, although not extreme, was sufficiently severe to cause the individual to make a mistake of fact as to an essential element of the offence and lack the general intent required for conviction as a result. By way of example, an accused may be convicted of the general intent offence of assaulting a police officer pursuant to section 33.1 even if he was mistaken as to the identity of the victim owing to the effects of intoxication. Resort to section 33.1 in such a case is only necessary, however, if the *Daviault* defence is found to extend to cases of mistake of fact.⁵⁷ This is an aspect of the *Daviault* ruling that has been largely

Academy of Psychiatry and the L 183; and Robert F Leeman, Jon E Grant & Marc N Potenza, “Behavioral and Neurological Foundations for the Moral and Legal Implications of Intoxication, Addictive Behaviors and Disinhibition” (2009) 27:2 Behav Sci Law 237.

⁵⁵ *Bouchard-Lebrun*, *supra* note 7 at para 13.

⁵⁶ *Cf R v Paul*, 2011 BCCA 46, 299 BCAC 85 wherein the accused was convicted of three counts of second-degree murder and two counts of attempted murder for shootings committed while in a state of drug-induced psychosis. See also *R v Courville* (1982), 2 CCC (3d) 118 (Ont CA), *aff'd* [1985] 1 SCR 847. Although the argument has yet to be advanced in Canadian law, it is open to the accused to argue that the actions of an accused in those circumstances, although intentional, lacked *moral* voluntariness due to psychosis: *R v Ruzic*, 2001 SCC 24, [2001] 1 SCR 687.

⁵⁷ Prior to the *Daviault* ruling, intoxication could not be advanced by way of defence to a general intent offence on the grounds that the intoxication caused a mistake of fact to an essential element of the offence: *R v Moreau*, 26 CCC (3d) 359, [1986] 51 CR (3d) 359 (Ont CA). When the Court recognized in that case a full defence in circumstances where the accused lacked general intent by reason of extreme intoxication *akin to automatism or insanity*, by implication it opened the door to a comparable defence in circumstances where the accused lacked general intent by reason of mistake of fact: Ferguson, *supra* note 15.

overlooked. To date, there are no reported cases in which section 33.1 has been considered in this context.⁵⁸

B. Condition Two: “the intoxication was self-induced.”

The application of section 33.1 is subject to proof that intoxication was self-induced. Parliament did not define “self-induced” either within section 33.1 or elsewhere in the *Criminal Code*, leaving it instead to the courts to give meaning to the term. The Nova Scotia Court of Appeal had that opportunity in the 2007 decision of *R v Chaulk*.⁵⁹ At issue was the question of whether the Crown is required under section 33.1 to prove a subjective awareness of the risk of intoxication, or whether awareness of that risk could be assessed on an objective standard. Bateman J.A canvassed lower court decisions on the question,⁶⁰ as well as earlier case law on the definition of voluntary intoxication applicable to the impaired driving offences in the *Criminal Code*.⁶¹ She formulated a three-part test that effectively synthesized these decisions. Intoxication is self-induced for the purposes of section 33.1 of the *Criminal Code*, she held, if:

- (i) The accused voluntarily consumed a substance which;
- (ii) S/he knew or ought to have known was an intoxicant and;
- (iii) The risk of becoming intoxicated was or should have been within his/her contemplation.⁶²

⁵⁸ *Ibid.* Ferguson, *supra* note 15, notes that in *Bernard*, Dickson C.J. identified a similar “mistake of fact gap” in the application of the *Leary* rule, and that this gap has been “largely ignored” since then. He characterizes it as a violation of sections 7 and 11(d), which cannot be justified under section 1. See also section 273.2(a)(i) of the *Criminal Code*, *supra* note 2, which specifically prohibits the defence of mistake of fact as to consent to sexual contact where that mistake arose from the accused’s self-induced intoxication .

⁵⁹ *R v Chaulk*, 2007 NSCA 84, 223 CCC (3d) 174 [*Chaulk*].

⁶⁰ *Ibid.*, citing *Vickberg*, *supra* note 10 and *Brenton*, *supra* note 11.

⁶¹ *Chaulk*, *supra* note 59: citing *R v King*, [1962] SCR 746, 35 DLR (2d) 386; *R v Mavin* (1997), 154 Nfld & PEIR 242 (CA), 119 CCC (3d) 38; *R v Rushton*, [1964] 1 CCC 382, 1963 CarswellNS17, (NSSCAD); *R v McDowell* (1980), 52 CCC (2d) 298, [1980] OJ No 488, (Ont CA); *R v Mack* (1975), 22 CCC (2d) 257, 1975 CarswellAlta 24, (Alta SCAD); and *R v Honish* (1991), 68 CCC (3d) 329, 85 Alta LR (2d) 129, (Alta CA), aff’d [1993] 1 SCR 458.

⁶² *Chaulk*, *supra* note 59 at para 47.

In other words, as Roach explains, “consumption of drugs or alcohol will be excluded as self-induced intoxication under section 33.1 only if the accused did not know and could not reasonably be expected to know the risk of becoming intoxicated.”⁶³

There is no apparent accommodation in the *Chaulk* test for circumstances of addiction, although it is worth noting that addiction was not part of the factual circumstances before that court in that case. Regardless, it would appear that consumption will be treated as voluntary without consideration of whether the individual was dependent on the drug and ingested it in response to a craving.⁶⁴ Practically speaking, evidence of addiction may in fact further the Crown’s case under section 33.1 to the extent it portrays the accused as an experienced user. It may be more readily inferred on the strength of such evidence that consumption was deliberate and done with subjective knowledge of the risks of intoxication, if not an actual intention to become intoxicated. An accused person in circumstances of co-occurring substance use and mental disorder (including addiction) must instead seek recourse through the defence of not-criminally-responsible-by-reason-of-mental-disorder pursuant to section 16 of the *Criminal Code*.⁶⁵

Of particular significance for the purposes of this analysis is the fact that, pursuant to *Chaulk*, the Crown need not adduce evidence of an intention on the part of the accused to commit the offence itself. It likewise does not need to prove actual or objective foresight of the risk that the accused might “voluntarily or involuntarily [interfere] or [threaten] to interfere with the bodily integrity of another person.”⁶⁶ The Crown need not even show actual or objective foresight of the risk that intoxication could render an accused person “unaware of, or incapable of consciously

⁶³ Kent Roach, *Criminal Law*, 5th ed (Toronto: Irwin, 2012) at 273. See also *Vickberg*, *supra* note 10, wherein section 33.1 was held not to apply because the accused had not intended to become intoxicated when he consumed Clonidine tablets prescribed for him to alleviate the symptoms of heroin withdrawal. He reasonably thought that the medication would improve his condition. The resulting intoxication was found by the court to be involuntary.

⁶⁴ See *R v Huppie*, 2008 ABQB 539, [2009] AWLD 1702.

⁶⁵ Whether the particular mental state constitutes a “mental disorder” for the purposes of that defence will turn on the application of the more holistic approach test: *Bouchard-Lebrun*, *supra* note 7 and Michelle Lawrence, “Drug-Induced Psychosis: Overlooked *Obiter Dicta* in *Bouchard-Lebrun*” (2016) 32 CR (7th) 151.

⁶⁶ *Criminal Code*, *supra* note 2, s 33.1(3).

controlling, their behaviour.”⁶⁷ The *Chaulk* test requires simply that the accused knew, or ought to have known, that there was a risk of intoxication arising from consumption. This is a strikingly low standard.

C. Condition Three: “the accused departed from the standard of reasonable care... by interfering or threatening to interfere with the bodily integrity of another person.”

Section 33.1 expressly imports a penal negligence standard of criminal fault.⁶⁸ Subsection 33.1(2) operates together with subsection 33.1(3) to deem acts of personal violence committed in a state of “self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour” to be marked departure from “the standard of reasonable care recognized in Canadian society.” For section 33.1 to apply, therefore, the Crown must prove only that the *actus reus* of offence included “an element of assault or any other interference or threat of interference by a person with the bodily integrity of another person.”⁶⁹ It obviously cannot do so in relation to property offences, such as the offence of break and enter contrary to section 348(1)(a) of the *Criminal Code*.⁷⁰ The *Daviault* defence remains available to accused persons charged with these offences.⁷¹

Otherwise, the Crown can rely on the penal negligence standard prescribed in subsection 33.1(2) to satisfy the *mens rea* requirements of general intent offences, notwithstanding that these offences require proof of subjective fault and voluntariness on the part of the accused. As noted in *Daviault*, however, certain crimes require a constitutionally compliant “special level of *mens rea*” due to the stigma associated with the offence and the severity of the sentence on conviction.⁷² An exception to section 33.1

⁶⁷ *Ibid*, s 33.1(2). See also *Chaulk*, *supra* note 59, J Benedet’s Annotation.

⁶⁸ *R v Hundal*, [1993] 1 SCR 867, 79 CCC (3d) 97 and *R v ADH*, 2013 SCC 28, [2013] 2 SCR 269.

⁶⁹ *Criminal Code*, *supra* note 2, s 33.1(3).

⁷⁰ This was one of the offences cited by the Supreme Court of Canada in *Bouchard-Lebrun* as outside the scope of section 33.1, by reason of the fact that it does not include an element of personal violence. The Court noted that the accused was acquitted of that charge, as well as a related charge against him under section 463, in reliance on the *Daviault* defence: *Bouchard-Lebrun*, *supra* note 7 at para 35.

⁷¹ *Ibid*. See also *R v Daley*, 2007 SCC 53 at para 43, 52 CR (6th) 221.

⁷² *Daviault*, *supra* note 3 at 119.

would have to be recognized for any offence that has a constitutionally protected minimum *mens rea* requirement of this nature. Although the argument has yet to be made in any reported cases, it might be said that section 33.1 cannot apply to the prosecution of charges of unlawful act manslaughter, as that offence has been held to specifically include proof of the *mens rea* of the unlawful act.⁷³ Arguably, in cases involving unlawful acts of assault, the *mens rea* requirement for those assaults would have to be subjective and could not be satisfied by the *mens rea* of self-induced intoxication alone.

IV. LOWER COURT RULINGS ON CHARTER QUESTION

The British Columbia Supreme Court was among the first to consider the constitutionality of section 33.1 of the *Criminal Code*. It did so in the 1998 case of *R v Vickberg*.⁷⁴ The accused in that case was charged with attempted murder and assault with a weapon. He admitted these acts and advanced the *Daviault* defence. The accused claimed to have been in a state of non-insane automatism, purportedly induced by the over-consumption of prescription drugs, namely Clonidine and Imovane, which he took for therapeutic purposes. Owen-Flood J. accepted this evidence, but determined that section 33.1 was not applicable by reason of the fact that intoxication was not “self-induced.” Owen-Flood J. nonetheless went on to consider the constitutionality of section 33.1. He concluded, albeit *obiter*, that the provision violated both sections 7 and 11(d) of the *Charter*, but was saved by section 1. He described the nature of the *Charter* breach in the following terms:

The section effectively eliminates the minimal required *mens rea* for the general intent offences to which it applies. It substitutes proof of voluntary intoxication for proof of the intent to commit an offence of general intent, most commonly, assault. It is also obvious that the section, on its face, imposes criminal liability in the potential absence of any voluntariness in the actions of the accused. The legal explanations provided by Crown counsel in attempting to establish the constitutionality of this provision have not persuaded me that any other

⁷³ *R v Creighton*, [1993] 3 SCR 3, 83 CCC (3d) 346 [Creighton]. See also *R v DeSousa*, [1992] 2 SCR 944, 95 DLR (4th) 595 [DeSousa], wherein the Court excluded absolute liability offences, which are arguably analogous, from the category of conduct captured by the offence of unlawfully causing bodily harm contrary to section 269 of the *Criminal Code*.

⁷⁴ *Vickberg*, *supra* note 10.

conclusion can reasonably be drawn. I hold that s. 33.1 of the *Criminal Code* violates ss. 7 and 11(d) of the *Charter*.⁷⁵

Ferteryga J. of the Ontario Court of Justice (General Division) reached the same conclusion later that year in the case of *R v Decaire*.⁷⁶ He expressly concurred with the reasoning of Owen-Flood J. in the *Vickberg* case with respect to the rational connection aspect of the *Oakes* test, and the view that “intoxication is a contributing factor to incidents of violence against women, children and others.”⁷⁷

However, the Ontario Superior Court of Justice reached the opposite result in the subsequent case of *R v Dunn*.⁷⁸ It was handed down one year after the *Vickberg* and *Decaire* decisions. Wallace J. preferred a narrow view of the objectives of Bill C-72. He characterized the assertions in the preamble as both “mis-statements” and “overstatements”:

First, respecting its 'mis-statement'. Based on its stated premise that violence negatively affects the equality rights of women and children, their security of person and their access to Principles of fundamental justice, the preamble represents that s. 33.1 will rectify the imbalance. The preamble invites a balancing of victims' interests against an accused's rights as it purports to ensure victims' protection guaranteed by s. 7 of the *Charter*. In fact, what s. 7 guarantees to all Canadians is that their lives will be safeguarded before the courts by principles of fundamental justice. Section 7 promises procedural and substantive justice. It is misleading, I respectfully suggest, for Parliament to draft a preamble to legislation that appears to equate victims' rights [with] society's interests, victims' are, undoubtedly, a component of society's interests but society's interests must also include a system of law, governed by the principles of fundamental justice. Second, the preamble overstates society's interest to be addressed by s. 33.1. To say that it protects victims generally, and women and children particularly, against the combined effect of alcohol and violence, is a significant overstatement. The section cannot accurately be said to address victims' s. 7 rights; nor does it address any special needs of women or of children; rather, it sets out to protect victims against intoxicated automatons who act violently.⁷⁹

Wallace J. determined that “the most society gains from s. 33.1 is the removal of one defence [from] violent, intoxicated automatons.”⁸⁰ He

⁷⁵ *Ibid* at para 84.

⁷⁶ *Decaire*, *supra* note 11.

⁷⁷ *Ibid* at para 13.

⁷⁸ *Dunn*, *supra* note 11.

⁷⁹ *Ibid* at 9-10.

⁸⁰ *Ibid* at para 10.

considered this to be an “extremely narrow degree of protection,” and a result which did not outweigh the broader social interest in “preserving *mens rea*...as an essential element of Canadian criminal law.”⁸¹ Wallace J. concluded that, although there is likely a rational connection between section 33.1 and the stated objectives of Parliament, given the reported link between intoxication and violence, and the disproportionate representation of women and children among victims of intoxicated offenders, section 33.1 failed the remaining branches of the proportionality test. In this regard he held as follows:

How serious is the infringement? In my view, there are few infringements that could be more serious. When an accused can be convicted without proof that he intended his actions or without proof that his actions were voluntary, then absolute liability has become a component of Canadian criminal justice, the presumption of innocence is eroded and principles of fundamental justice are seriously compromised. In my view, there is no acceptable proportionality between the good that s. 33.1 may achieve and the serious infringement of individual rights that it creates.⁸²

Likewise, in the 1999 case of *R v Brenton*, the Northwest Territories Supreme Court similarly concluded that section 33.1 violated the *Charter*. Echoing the words of Cory J. in *Daviault*, Vertes J. held that “to deny a defence of [extreme-intoxication-akin-to-automatism] offends the *Charter of Rights and Freedoms* in a manner that is so drastic and contrary to the principles of fundamental justice that it cannot be justified under s. 1 of the *Charter*.”⁸³ Then J., also of the Ontario Superior Court of Justice, reached the same conclusion in the 2000 case of *R v Jensen*.⁸⁴

Apart from these cases, and a 2005 decision of the Ontario Court of Justice in *R v Cedeno*, the question of the constitutionality of section 33.1

⁸¹ *Ibid.*

⁸² *Ibid* at para 13-14.

⁸³ *Brenton*, *supra* note 11 at 127. In its decision on the appeal from this judgment the Northwest Territories Court of Appeal declined to consider the constitutionality of section 33.1 on the view that there was “an insufficient factual foundation at trial upon which to mount a constitutional challenge” and that “this was not a proper case in which to engage this important constitutional issue”: *R v Brenton*, 2001 NWTCA 1 at para 1, 199 DLR (4th) 119. It found that the accused in this case had failed to establish as a matter of fact that he was in a state of extreme intoxication akin to automatism at the time of the offences. It restored the convictions for the general intent offences at issue in this case.

⁸⁴ *Jensen*, *supra* note 11.

lay dormant for almost a decade.⁸⁵ In fact, in the *Cedeno* case, D.W. Duncan J.J. characterized the law – in Ontario at least – as settled. In reliance on the *Jensen* decision and notwithstanding academic commentary to the contrary,⁸⁶ he held as follows:

Courts have given the section mixed reviews... However, the law in Ontario at this point appears to be that the section offends section 7 and 11(d) of the Charter and is not saved by section 1. It is therefore unconstitutional and of no force and effect...⁸⁷

The debate surrounding section 33.1 was subsequently revived with the 2010 decision of the Quebec Superior Court in *R v Dow*.⁸⁸ As noted above, in that case, the Quebec Superior Court rejected the accused's claim of alcohol-induced automatism on a factual basis:

The Court reckons that the judicial definition of extreme intoxication akin to automatism given by the Supreme Court in *Daviault* is inconsistent with the scientific evidence tendered in the case at bar, for situations involving over-consumption of alcohol alone. The scientific basis in *Daviault*, which was taken for granted then and after, led to a wrong conclusion. The latter must be set aside. This Court's decision ... determines that the defence of extreme intoxication akin to automatism induced by an over-consumption of alcohol does not exist anymore in Canadian criminal law. Therefore, it cannot be put to the jury.⁸⁹

The Court nonetheless went on to consider the accused's challenge to the constitutionality of section 33.1. On that question, the Court adopted a broad view of the objectives of Bill C-72, finding that they concern the protection of women, the effects of violence and related alcohol consumption, and the accountability of intoxicated offenders for criminal conduct. It further held that these objectives were sufficiently pressing and substantial to satisfy the first branch of the *Oakes* test. In relation to proportionality, the Court found that the means embedded in section 33.1 are rationally connected to the objectives of the legislation, that section 33.1 represents a minimal impairment of *Charter* rights, and that any deleterious effect is proportionate to the salutary benefit of the legislation. With respect to the latter in particular, François Huot J.S.C. concluded:

⁸⁵ *Cedeno*, *supra* note 11.

⁸⁶ *Ibid* at 16-17, citing K Smith, "Section 33.1: Denial of the *Daviault* Defence should be held Constitutional" (2000) 28 CR (5th) 350.

⁸⁷ *Ibid*. Cf *R v Goard*, 2014 ONSC 2215, 310 CCC (3d) 491.

⁸⁸ *Dow*, *supra* note 10.

⁸⁹ *Ibid* at paras 101-2.

[O]nly very few offenders could eventually be prejudiced by section 33.1, that is to say, those individuals:

- 1) charged with a general intent offence,
- 2) of violent nature,
- 3) committed after having voluntarily ingested,
- 4) one of the few drugs likely to bring about a state of automatism, and
- 5) being actually in a state of extreme intoxication.

What are the benefits, or salutary effects associated with the limitation? The most important is definitely the enhancement of the security and bodily integrity of Canadian citizens, and more particularly those of women and children. Studies tendered in evidence show that there is a close connection between violence and intoxication. Women and children represent particularly vulnerable targets for intoxicated offenders and deserve better protection in our free and democratic society.

Second, people who commit general intent crimes of violence while being in a state of extreme intoxication will not be allowed to rely on their intoxication to escape liability. They will be as criminally accountable for their behaviour as would be anybody performing the same acts while being sober. The Court agrees with the Intervener that it is reasonable for the legislator to impute blame on a perpetrator in such circumstances.

The legislation's deleterious effects are not insignificant. However, balancing the salutary and harmful repercussions of section 33.1, the Court concludes that the impact of the limitation is proportionate.⁹⁰

In the result, the trial judge found that section 33.1 was saved by section 1. The Nunavut Court of Justice reached the same outcome in the more recent case of *R v S.N.*⁹¹

In *R v Fleming*, which was handed down one month after the *Dow* decision, the Ontario Superior Court took the opposite view yet again.⁹² In that case, T.L.J. Patterson J. adopted the position previously expressed by the Ontario courts to the effect that section 33.1 violated both sections 7 and 11(d) of the *Charter*, and endorsed the reasoning articulated in *R v Dunn* concerning section 1. The Court specifically rejected the decision of the Quebec Superior Court in *R v Dow* with respect to section 1, and held that section 33.1 could not be justified under that provision.⁹³

⁹⁰ *Ibid* at paras 150-153.

⁹¹ *SN*, *supra* note 10.

⁹² *Fleming*, *supra* note 11.

⁹³ *Ibid* at paras 25-34.

V. REVISITING THE CONSTITUTIONAL QUESTION

A. Sections 7 and 11(d) of the *Charter*

Section 33.1 violates section 7 of the *Charter* to the extent that it facilitates the conviction of an accused person for a general intent offence in the absence of proof that the criminal act was either voluntary or intentional. It likewise violates section 11(d) rights to make full answer and defence by permitting the conviction of an accused person in the face of reasonable doubt as to an essential element of the offence. These are not controversial arguments. Indeed, it is the shared view of the lower courts that section 33.1 violates both sections 7 and 11(d) of the *Charter*.⁹⁴ It is important to note, however, that they are nonetheless subject to a finding that the *mens rea* of self-induced intoxication is not sufficiently culpable, or sufficiently connected to acts of violence, to be accepted as a legitimate substitute for the *mens rea* of the offence.

On this point, the majority in *Daviault* considered research on the critical question of the correlation between substance use and violence, including findings that the relationship was not causal in nature but was instead informed by a complex array of factors that included environmental and physiological inputs. It determined on the strength of that evidence that an intention to become intoxicated does not “lead inexorably” to the conclusion that the accused intended the offence.⁹⁵ It would be open to the Crown on a future *Charter* challenge to advance new evidence on this issue. Indeed, research on the correlation between substance use and violence has advanced considerably since 1994. It is apparent from a scan of the literature published since that time that scientists and scholars have gone on to apply varying methodologies to the study of whether, or the extent to which, particular types of substances or patterns of substance use contribute to violence generally and to the commission of specific categories of offences in particular.⁹⁶ There is insufficient opportunity in this paper to engage in

⁹⁴ See also, *inter alia*, Ferguson, *supra* note 15; David Paciocco, “The Legacy of *Daviault*: Part I The Constitutionality of Bill C-72” (1995) 2:4 *Sexual Offences L Reporter* 105; and Heather MacMillan-Brown, “No Longer ‘Leary’ About Intoxication: In the Aftermath of *R v Daviault*” (1995) 59(2) *Sask L Rev* 311.

⁹⁵ *Daviault*, *supra* note 3 at 90.

⁹⁶ See, *inter alia*, Christine Wekerle & Anne-Marie Wall, eds, *The Violence and Addiction Equation: Theoretical and Clinical Issues in Substance Abuse and Relationship Violence* (New

a full review of this research. Suffice it to say that their findings do not appear to displace, at least not at this point in time, the essential conclusions reached by Cory J. in *Daviault*. If anything, they are confirmed.⁹⁷

B. Section 1 of the *Charter*

Where the controversy lies is instead in the question of whether the violation of sections 7 and 11(d) can be justified under section 1 of the *Charter*. The applicable test is set out in *R v Oakes*.⁹⁸ It has two parts. The first requires the government to prove that the goal of the legislation is “pressing and substantial.” In other words, it must be important. It is doubtful that the government would fail that part of the test in relation to section 33.1, especially given the particularity of intention expressed in the preamble to Bill C-72.⁹⁹ At the heart of the constitutional question is instead the second part of the test that requires proportionality in the means by which Parliament seeks to achieve its goals. In this part of the *Oakes* test, the court must be satisfied that there is a rational connection between

York, NY: Brunner-Routledge, 2002); Stephen T Chermack et al, “Violence Among Men and Women in Substance Use Disorder Treatment: A Multi-Level Event-Based Analysis” (2010) 112:3 *Drug and Alcohol Dependence* 194; Cory A Crane et al, “Substance Use Disorders and Intimate Partner Violence Perpetration Among Male and Female Offenders” (2014) 4:3 *Psychology of Violence* 322; Neal Doran et al, “Adolescent Substance Use and Aggression” (2012) 39:6 *Criminal Justice & Behaviour* 748; Fleur L Kraanen et al, “Prediction of Intimate Partner Violence by Type of Substance Use Disorder” (2014) 46:4 *J Substance Abuse Treatment* 532; Alison B Hamilton & Nicholas E Goeders, “Violence Perpetrated by Women who Use Methamphetamine” (2010) 15:5 *J Substance Use* 313; Phillip H Smith et al, “Intimate Partner Violence and Specific Substance Use Disorders: Findings from the National Epidemiologic Survey on Alcohol and Related Conditions” (2012) 26:2 *Psychology of Addictive Behaviors* 236; and Monica F Tomlinson, Matthew Brown & Peter N S Hoaken, “Recreational Drug Use and Human Aggressive Behavior: A Comprehensive Review since 2003” 27 *Aggression & Violent Behavior* 9.

⁹⁷ See, *inter alia*, Sharon M Boles & Karen Miotto, “Substance Abuse and Violence: A Review of the Literature” (2003) 8:2 *Aggression and Violent Behaviour* 155; Peter N S Hoaken & Sherry H Stewart, “Drugs of Abuse and the Elicitation of Human Aggressive Behaviour” (2003) 28:9 *Addictive Behaviours* 1533; S Macdonald et al, “Predicting Violence Among Cocaine, Cannabis, and Alcohol Treatment Clients” (2008) 33:1 *Addictive Behaviours* 201. Note also that, in some studies, no such correlation was found. See e.g. Ian Martin et al, “Violence Among Street-Involved Youth: The Role of Methamphetamine” (2009) 15:1 *Eur Addict Res* 32.

⁹⁸ *R v Oakes*, [1986] 1 SCR 103, 24 CCC (3d) 321.

⁹⁹ See Grant, *supra* note 6 at 400-408.

section 33.1 and the goal of the legislation, that section 33.1 minimally impairs *Charter* rights, and that the salutary effects of the legislation outweigh the deleterious effects. These are examined below.

1. Rational connection

The first part of the proportionality analysis requires consideration of whether the provision under examination is rationally connected to the goal of the legislation. The aspirations of Parliament are plainly set out in the preamble to Bill C-72. They might well be characterized in broad terms as protection of the public.¹⁰⁰ Although the preamble speaks specifically of the need to protect women and children, and to safeguard their rights in particular, section 33.1 does not discriminate in its application. The question is whether there is a rational connection between the goal of protection of the public and the content of the provision itself. Clearly there is. At its most basic, section 33.1 forecloses the *Daviault* defence in circumstances that would otherwise produce acquittals. In this way it facilitates the attribution of criminal responsibility and the imposition of criminal sanction on individuals who commit violent acts while intoxicated.

2. Minimal Impairment

It will be considerably more difficult for the government to prove that section 33.1 minimally impairs the rights of accused persons guaranteed under sections 7 and 11(d) of the *Charter*. As noted above, it is on this question that the lower courts diverge markedly, with some characterizing the intrusion as modest and others as severe. Arguably, both points of view are correct. On the one hand, section 33.1 is narrow in scope. It is limited in its application to offenders who (a) commit general intent offences, (b) that involve an element of violence, (c) while intoxicated, (d) where intoxication was self-induced within the meaning of the *Chaulk* test, and (e) who lacked general intent or voluntariness as a result of that intoxication. Moreover, given what is known about the pharmacological effects of drugs and alcohol, it would appear that section 33.1 will be applied only in those cases where the accused (a) ingested a dissociative anesthetic and experienced dissociation as a result, or (b) consumed a psychogenic

¹⁰⁰ See, *inter alia*, *Vickberg*, *supra* note 10 and *Decaire*, *supra* note 11. See also the formulation of legislative purpose in *Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 SCR 180 [*Safarzadeh-Markhali*].

substance and experienced psychosis as a result. In Cory J.'s words, "[i]t is obvious that it will only be on rare occasions that evidence of such an extreme state of intoxication can be advanced and perhaps only on still rarer occasions is it likely to be successful."¹⁰¹ However, in those cases where section 33.1 is successfully applied, few though they may be, its impact is significant. Section 33.1 allows the conviction of the accused for conduct that was either involuntary or not intentional, and which the accused perhaps did not or could not have reasonably foreseen. It ensures a conviction where an acquittal would otherwise result. It is in this regard that the *Charter* breach might fairly be described as "drastic."¹⁰²

It is easy to point to reasonable alternative approaches that Parliament could have taken in pursuit of its goal of protection of the public. Perhaps the most obvious is the development of a specific offence for acts of criminal intoxication. After all, as Cory J. noted in *Daviault*, "it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk."¹⁰³ The Law Reform Commission of Canada recommended just that as early as 1982.¹⁰⁴ Of particular interest is Ferguson's recent proposal for the development of an alternate included offence to capture acts committed without the requisite intention due to

¹⁰¹ *Daviault*, *supra* note 3 at 100. A scan of reported cases included in the QuickLaw and CanLii databases revealed only two cases in the 2014-16 period in which section 33.1 was applied; namely, *R v Madood*, 2015 ABQB 611, 25 CR (7th) 130 and *Peters*, *supra* note 10.

¹⁰² *Daviault*, *supra* note 3 at 92-93.

¹⁰³ *Ibid* at 100. See also *Penno*, *supra* note 18 at 902-903.

¹⁰⁴ Law Reform Commission of Canada, "Criminal Law, The General Part: Liability and Defences" (1982) Ministry of Supply and Services Canada Working Paper 29, online: <<http://www.lareau-law.ca/LRCWP29ONE.pdf>>. Just prior to the enactment of Bill C-72, three bills were introduced (two in Parliament and one in the Senate), all of which proposed that the *Criminal Code* be amended to include this offence: Bill S-6, *An Act to amend the Criminal Code (dangerous intoxication)*, 1st Sess, 35th Parl, Canada, 1994-96; Bill C-303, *An Act to amend the Criminal Code (dangerous intoxication)*, 1st Sess, 35th Parl, Canada, 1994-95; and Bill C-305, *An Act to amend the Criminal Code (voluntary intoxication)*, 1st Sess, 35th Parl, Canada, 1994-95. For a discussion of comparable offences in Europe, see also See Articles 18.51-18.59 of Secretary of State for the Home Department & Secretary of State for Social Services, *Report of the Committee on Mentally Abnormal Offenders* (London, UK: Her Majesty's Stationery Office, 1975) and Benedikt Fischer & Jurgen Rehm, "Alcohol Consumption and the Liability of Offenders in the German Criminal System" (1996) 23:4 *Contemporary Drug Problems* 707.

intoxication.¹⁰⁵ There are other proposals, the relative merits of which vary on policy and political perspectives.¹⁰⁶ The point is simply that these alternatives exist. Although they may not have the popular appeal of Bill C-72, they link the requirements of *mens rea* to the prohibited consequences captured by the *actus reus* elements of the offence, as contemplated by the majority in *Daviault*. In that way, they further the goal of protection of the public without unduly interfering with *Charter* rights.

3. Proportionality

The final question within the second part of the *Oakes* test is whether the salutary effects of the provision outweigh the deleterious effects. In other words, does the ease of conviction generated by section 33.1 outweigh the derogation of the rights of accused persons to be free from criminal sanction for those acts committed involuntarily or without the requisite general intent. As noted above, the scope of section 33.1 is relatively narrow, and the number of accused persons affected by it is relatively few. The appropriate measure is not the *frequency* of the provision's application, however, but the *impact* of its application on an accused person's *Charter* rights.¹⁰⁷ In the case of section 33.1 the breach cannot be described as anything less than significant, severe, and grossly disproportionate. It exposes accused persons to the prospect of convictions for acts which they did not consciously control or which they did not intend. In doing so, it departs from foundational concepts of criminal fault embedded in Canadian criminal law. In the absence of evidence that establishes an incontrovertible link between substance use and violence, it is difficult to see how the provision might be characterized as reasonable, let alone demonstrably justified within the meaning of section 1.¹⁰⁸

¹⁰⁵ Ferguson, *supra* note 15.

¹⁰⁶ See, *inter alia*, Paul B Schabas "Intoxication and Culpability: Towards an Offence of Criminal Intoxication" (1984) 42:2 UT Fac L Rev 147; Tim Quigley, "Reform of the Intoxication Defence" (1987) 33 McGill LJ 1; and Andrea Onn, "Self-Induced Intoxication: Balancing Principles of Justice and Responsibility" (1996) 23:4 Contemporary Drug Problems 687. See also *House of Commons Debates*, *supra* note 36, at 11037-38.

¹⁰⁷ *Canada v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101; and *R v Michaud*, 2015 ONCA 585, 339 OAC 41 [Michaud].

¹⁰⁸ See, *inter alia*, *Carter v Canada*, 2015 SCC 5, [2015] 1 SCR 331; and *Safarzadeh-Markhali*, *supra* note 100, wherein McLachlin C.J. noted at para 57 that "[l]aws that deprive individuals of liberty contrary to a principle of fundamental justice are not easily

C. Remedy

It is recommended that the Court strike down section 33.1. Parliament is best suited to the task of developing the appropriate policy and legal response to the phenomenon of substance-induced violence, albeit within the confines of the *Charter*. It is nonetheless conceivable that the Court might prefer a judicial fix. After all, Parliament is justified in criminalizing drug and alcohol-fuelled violence, if not for the promotion and protection of victims then for the maintenance of social order more generally.

To that end, and subject to any minimal constitutional fault standard applicable to the offence at issue,¹⁰⁹ the Court could make the application of section 33.1 conditional on proof that the accused consumed intoxicants with actual or objective foresight of the risk that consumption could produce the mental states that section 33.1 captures. In other words, if the accused was actually aware, or ought to have been aware, that consuming the intoxicants could render him or her “unaware of, or incapable of consciously controlling, their behaviour,”¹¹⁰ there may be sufficient fault to support a conviction. That fault standard entails reckless or negligent assumption of the risks inherent in becoming unaware of, or unable to control, one’s behaviour. Arguably, though less than that prescribed by the majority in *Daviault*, it is nonetheless justified on the view that states of extreme intoxication are inherently dangerous and are conditions that the reasonable person should take steps to avoid. It should go without saying that others are at risk so long as individuals are not in control of their actions, or lack awareness of what they are doing. Additionally, or alternatively, the Court could require proof that the accused had actual or objective foresight of the risk that “he or she might interfere or threaten to interfere with the bodily integrity of another person while in that state of intoxication.”¹¹¹ Either way, the appropriate fault standard could be effectively incorporated through the adoption of a modified *Chaulk* test, wherein self-induced intoxication is defined to include the requisite degree

upheld.” *Cf R v Michaud*, *supra* note 107.

¹⁰⁹ See, *inter alia*, *Creighton*, *supra* note 73 and *DeSousa*, *supra* note 73.

¹¹⁰ *Criminal Code*, *supra* note 2, s 33.1(2).

¹¹¹ *Ibid*, s 33.1(3). In determining the applicable fault standard, the Court may be informed in its analysis by the reasoning of the majority in *Creighton*, *supra* note 73, wherein McLachlin J. (as she then was) made clear that an accused may be held responsible in law for unforeseen actions, and that there is no requirement of absolute symmetry between the moral fault of the accused and the prohibited consequences of a criminal act.

of fault, whether it be intentional consumption of known intoxicants coupled with an actual or objective awareness of the risk of onset of the mental states captured by section 33.1 and/or of the risk of the very acts of violence to which the provision is intended to apply.

Practically speaking, it should fall to the Crown in any given case to prove what actually was, or more importantly what ought to have been, in the contemplation of the accused in any given case. What the reasonable person might expect in relation to modest cannabis use, for example, could differ considerably from what should be expected from the excessive use of crystal methamphetamine. Though the proposed modification to the *Chaulk* test might appear at first blush to place a heavy burden on the Crown, that burden is mitigated by the fact that the Crown will have the ability to adduce evidence from medical experts called by the defence and likely also from the accused himself or herself. It must be remembered that the potential application of section 33.1 is triggered by the successful advancement of the *Daviault* defence. To make out that defence, the accused is subject to a reverse onus. The accused must adduce sufficient evidence to prove on a balance of probabilities that he or she was in a state of extreme intoxication akin to automatism at the time of the offence. As noted in *Daviault*, that will necessarily require the evidence of expert witnesses.¹¹² It likely also will require the accused to take the stand to attest to the nature and quantity of substances consumed and the experience of intoxication that resulted. The Crown may then cross-examine these witnesses on matters relevant to the application of section 33.1, including what the accused knew about the risks associated with use, and what the reasonable person ought to have known about the substances in question.

VI. CONCLUDING COMMENTS

It is truly disquieting to think that an accused person could escape criminal liability for acts of violence because of a mental state that they induced willingly or by their own recklessness. The question is not whether Parliament or the courts are justified in holding these individuals to account under the criminal law, but how they might properly do so. Section 33.1 has obvious political appeal. It pegs liability on an accused, for crimes otherwise committed without general intent or voluntariness, on the

¹¹² *Daviault*, *supra* note 3 at 103.

convenient view that acts of self-induced intoxication are themselves culpable. But this approach is crude and simplistic. It relies on anachronistic assumptions about alcohol and drug use. It overlooks the clinical realities of those who struggle with addiction, and those whose use of substances and experiences of intoxication might be motivated by, or the product of, neurobiological vulnerabilities. More importantly, it disregards foundational requirements of criminal fault, and unjustifiably offends principles of fundamental justice and the rights of accused persons to make full answer and defence.

For these reasons, section 33.1 violates the *Charter* and should be struck. That said, it would not be surprising if the Court preferred to either read in a fix, or otherwise interpret the provision in a manner that would bring it into compliance with the *Charter*. That could be achieved through the modification of the *Chaulk* test as noted above. The effect of that modification would be to individualize the application of section 33.1. Arguably, any law that seeks to assign criminal responsibility on the basis of substance use should be appropriately flexible in its application to accommodate the varying degrees of awareness and risk associated with diverse patterns of use. Patterns of consumption have evolved to include an array of more potent, mind-altering drugs. Some might be taken singularly, others in cocktails of varying content. Given these realities, the threshold for penal negligence must necessarily be case specific.

Either way, it is incumbent on the appellate courts to decide the question of the constitutionality of section 33.1 at the earliest opportunity, lest we default to the wholly unsatisfying form of osmotic constitutionalization that Kaiser has so aptly described in his critique of the *Bouchard-Lebrun* case.¹¹³ It is indeed regrettable that the Court could not resolve the *Charter* issue in that case. Baker and Knopf assume too much, however, when they characterize that decision as a “strategically camouflaged second look” at the constitutionality of the provision.¹¹⁴ Given the shortcomings of the trial record in *Bouchard-Lebrun*, and the complete lack of any evidentiary foundation on which the *Charter* argument could be properly assessed, it is understandable that the Court would defer the question to a future case.¹¹⁵ It might even be said that the Court acted

¹¹³ Kaiser, *supra* note 8.

¹¹⁴ Baker & Knopf, *supra* note 9 at 48.

¹¹⁵ See *MacKay v Manitoba*, [1989] 2 SCR 357, 61 DLR (4th) 385, wherein Cory J. cautioned

responsibly in doing so. Regardless, a decisive ruling is now long overdue. Narrow though the practical application of section 33.1 might be, the rights at stake are significant. Moreover, until the constitutionality of the provision is finally determined, accused persons will continue to be subject to differential treatment at law depending largely on the jurisdiction in which their case proceeds, and will risk divergent outcomes in the Canadian criminal justice system as a result.

against the determination of *Charter* challenges in the absence of a proper evidentiary foundation.

Making Numbers Count: An Empirical Analysis of “Judicial Activism” in Canada

MELANIE MURCHISON*

ABSTRACT

This paper empirically examines the decision making of the justices on the Supreme Court of Canada after the enactment of the *Charter* and before and after the events of September 11, 2001 (9/11) to determine if the levels of judicial activism on the Court have changed. The term judicial activism is used by academics, journalists, and citizens alike but the phenomenon is ill defined and often used as a pejorative term. The field of law, particularly in traditional doctrinal analysis, has been reluctant to adopt this approach, as few legal scholars have attempted to understand the phenomenon using empirical methodology. This paper adopts a hybrid content analysis empirical approach to depict the elusive, but widely cited, occurrence of “judicial activism” in Canada. Drawing upon an adapted and critiqued version of Cohn and Kremnitzer’s “multidimensional model of judicial activism”, this paper argues that there have been statistically significant shifts in judicial behaviour since 9/11. The Cohn and Kremnitzer model measures activism across multiple dimensions and this paper argues that empirical measurements of the phenomenon of “judicial activism” can contribute to broader understandings of the Canadian Supreme Court’s approaches to justice. In doing so, this paper projects two significant findings: firstly, that using a hybrid content analysis to analyse activism complements and challenges the existing methods for critiquing judicial

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behaviour and assessing judicial activism, and secondly, that the current approaches to understanding complex legal phenomena can be complemented and supplemented using empirical methodology.

Keywords: *Judicial Activism; Charter; Supreme Court of Canada; Hybrid Content Analysis; Comparative Constitutional Law; 9/11; Judicial Behaviour.*

The doctrine of precedent is a safeguard against arbitrary, whimsical, capricious, unpredictable and autocratic decision-making. It is of vital constitutional importance. It prevents the citizen from being at the mercy of an individual mind uncontrolled by due process of law.¹

I. INTRODUCTION

The concept of judicial activism is a subject widely discussed in academia, with little consensus emerging as to what it looks like or what defines it. It is a phenomenon that has been highly politicized but has remained largely fluid and ill defined, with jurists, citizens, and sometimes scholars taking an “I’ll know it when I see it” approach. According to Keenan Kmiec, a highly regarded scholar who studies judicial activism, in the years between 1990 and 1999, 3815 journal and law review articles were published that at least mentioned judicial activism and from 2000 to 2004 scholars had written a further 1817 articles.² This means that more than 450 publications a year that discussed judicial activism in some way were being published on average.³ When looking at American case law, 253 federal cases and 364 state cases in the United States used the words “judicial activism” in the year 2003 alone.⁴ It is expressly because of this lack of clarity and uniformity regarding a definition of judicial activism that this paper seeks to define it using an empirical approach. While numerous scholars have discussed judicial activism in a normative fashion and expressed their opinions on which cases are the most activist, or their preferences on whether or not activism is an acceptable behaviour for a

¹ John D Heydon, “Judicial Activism and the Death of the Rule of Law” (2004) 10:4 Otago L Rev 493 at 515 [Heydon] (emphasis added).

² Keenan Kmiec, “The Origin and Current Meanings of “Judicial Activism”” (2004) 92:5 Cal L Rev 1441 at 1442 [Kmiec].

³ *Ibid* 1442.

⁴ *Ibid* 1459.

Supreme Court to engage in, there remains a central question that needs to be solved. What is judicial activism, can it be quantifiably measured, and does its nature change over time? In seeking to answer this question, this paper adopts Lindquist and Cross's definition of activism which states that it is "a multifaceted concept" and that:

Activism is characterized by the Court's failure to act "like a judiciary"⁵. ... First, a judiciary should use "accepted interpretive methodology, it should interpret governing texts using approved canons of interpretation and other appropriate tools of the trade"⁶ and not distort the meaning of those texts simply to further judges' personal policy preferences. The accepted judicial methodology also involves some fealty to precedent and consistency with past decisions. While this legal model of judging is difficult to capture simply, it requires decisions according to tenets of the law, rather than the personal preferences of the judge.⁷

As such, this paper defines judicial activism as a legal phenomenon whereby the Court pushes institutional boundaries and changes the law in a way that is empirically significant, which helps quantify and enhance normative debates. As stated by Lindquist and Cross, "activism is best conceptualized in terms of a continuum between activism and restraint, with justices or Courts compared in terms of gradations along that continuum".⁸ Using this definition, this paper seeks to discover whether there have been statistically significant changes to the Canadian Supreme Court's level of activism in the *Charter* sections surrounding police powers post 9/11 (Sections 8, 9, 10(b) and 24(2)).⁹ In Canada, accusations of an "activist" Supreme Court have been made with increasing frequency since the enactment of the *Canadian Charter of Rights and Freedoms* (the *Charter*) in 1982.¹⁰ The *Charter* (most particularly the rights conferred in sections 7-11 and 24(2))¹¹ transformed the Canadian legal process, specifically in the area

⁵ *Ibid* 1471.

⁶ *Ibid* 1473.

⁷ Frank B Cross & Stefanie A Lindquist, "The Scientific Study of Judicial Activism" (2007) 91:6 *Minn L Rev* 1752 at 1765-66 [Lindquist & Cross]. Note, "cannons" is spelt with two N's in the original text.

⁸ Stephanie A Lindquist & Frank B Cross, *Measuring Judicial Activism* (Oxford University Press, 2009) at 31 [Lindquist & Cross, *Measuring Activism*].

⁹ *Canadian Charter of Rights and Freedoms*, ss 8, 9, 10(b), 24(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁰ *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Constitution Act].

¹¹ *Supra* note 9, ss 7-11, 24(2).

of criminal procedure. The provisions outlined in the *Charter* provide legal rights, which limit the power of state agents and guarantee fair treatment for detained individuals, as well as providing the Court with a tool to exclude unconstitutionally obtained evidence, or to strike down unconstitutional laws.¹² It is the job of the Supreme Court of Canada to interpret these rights and these constitutionally enshrined rights have therefore provided for an expanded power of judicial review. According to James Kelly, the way the Supreme Court approaches judicial review “advances a certain form of democracy... with judicial activism necessary to ensure that the intention of the framers for a more vigorous level of rights protections is achieved”.¹³ In this way, judicial activism can be seen as a necessary function to preserve a system of checks and balances that “prevent judicial supremacy from being the primary institutional outcome of the *Charter*”.¹⁴ This view of the role of the Court is supported by Jochelson and Kramar who have argued that a “constitutional guardianship role” emerges, as they are responsible for the interpretation of all *Charter* protections.¹⁵

In the years immediately following the *Charter's* enactment, several high profile cases that centred upon sections 7, 8, 9, 10(b) and 24(2) were decided by the Supreme Court, which conferred additional rights for citizens and imposed more restrictions on governments and police officers.¹⁶ These decisions provoked loud complaints from the Reform Party and the Canadian Alliance (now the Conservative Party of Canada), as well as national newspapers, who bemoaned the Court’s “activist” ways, stating the Court usurped parliamentary supremacy and “engaged in a frenzy of constitutional experimentation that resulted in the judiciary substituting its legal and societal preferences for those made by the elected representatives

¹² James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31(1) *Queen's L J* 1 at 2 [Stribopoulos].

¹³ James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Farmer's Intent* (Vancouver: UBC Press 2005) at 8 [Kelly].

¹⁴ *Ibid.*

¹⁵ Richard Jochelson & Kirsten Kramar, *The Disappearance of Criminal Law: Police Powers and the Supreme Court* (Winnipeg: Fernwood Publishing, 2014) at 17 [Jochelson & Kramar, 2014].

¹⁶ *Hunter v Southam Inc.*, [1984] 2 SCR 145, 11 DLR (4th) 641 [Southam Inc].

of the people”.¹⁷ This led Kent Roach to declare that the Supreme Court of Canada was itself on trial.¹⁸

In adopting an empirical approach, this paper draws upon an adapted and critiqued operationalization of Cohn and Kremnitzer’s 2005 “multidimensional model of judicial activism” which purports to measure activism using seventeen separate parameters across three separate categories.¹⁹ The Cohn and Kremnitzer model is novel as it created a wide multivariate lens with which to assess activism using the justice’s own words and contextualize it outside of any political framework. Its value is considered to lie in its ability to remove the traditional pejorative terminology associated with activism and its ability to create comparisons across different judicial eras. To adapt and operationalize the Cohn and Kremnitzer model and determine if there have been changes in the level of activism on the Supreme Court after 9/11, a hybrid content analysis methodology which utilises both qualitative and quantitative aspects of the method was chosen. The benefit of using both qualitative and quantitative content analysis is that it preserves the latent content and context in the written decisions but also measures the manifest content such as the number of judges writing opinions and whether or not the trial judge’s verdict was upheld. The operationalisation of the adapted Cohn and Kremnitzer model measured the judicial behaviour of the Court, and discovered that the level of activism on the Supreme Court of Canada decreased substantially after the events of 9/11. In using it here, criticism is made of the model’s inability to assert any causal relationships and the difficulty in ranking or separating variables and which variables should be prioritized. Regardless of the reasoning behind the measured shifts in the levels of activism however, it must be noted that these shifts are material in nature, can be measured and recorded and do not rely on mere judgment by the individual recorder. The aim of this paper is to discover whether the Cohn and Kremnitzer model actually measures activism, and not some other judicial metric, and if it does, whether the Supreme Court of Canada has changed its approach to constitutional adjudication of these four *Charter* rights since 9/11. 9/11 was chosen as the comparative metric for

¹⁷ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 3 citing Vic Toews, Floor of Parliament (2001) [Roach].

¹⁸ *Ibid.*

¹⁹ Margit Cohn & Mordechai Kremnitzer, “Judicial Activism: A Multidimensional Model” (2005) 18 Can J L & Jur 333 at 337, 339 [Cohn & Kremnitzer].

two reasons: firstly, as a watershed moment in both security and policing literature, it offers insight into the changing landscape of the adjudication of individual rights. Secondly, it would be expected, given patterns in the securitization literature and the perceived change in rights protection, that a seismic shift in the behaviour of the Court and their attitudes would be observed.

This paper will also add to the empirical understanding of judicial reasoning and provide further data and support for the process of theorizing and empiricising judicial decision-making. It makes no normative judgments about whether judicial activism is “good” or “bad” but instead argues that activism is identifiable and measurable, and thus this paper attempts to demonstrate the presence, or level of activism on the Court. James Kelly’s hypothesis that judicial activism has changed since the early days of *Charter* review will be empirically tested using an adapted version of the Cohn and Kremnitzer model.²⁰ The model has been used by other scholars and claims to measure judicial activism across multiple dimensions and variables; however, it has never been tested in Canada across multiple *Charter* sections nor has it been measured by measuring the individual variables, rather than to create an “activism score” of individual judges. The goal of undertaking empirical research of judicial activism is to remove “justificatory” weaknesses, take the Court’s own words more seriously, and provide substantial opportunities to understand and assess judicial analytics separately from the narrow measure of precedential effects.²¹

This research is not intended to replace traditional doctrinal interpretations of law, or to problematize normative conceptions of activism but to enhance the research on activism by creating a spectrum of normative and empirical understandings, rather than creating a dichotomy. The adapted, critiqued and operationalized Cohn and Kremnitzer model will not only enhance and expound upon the current ways of understanding judicial activism in Canada but will also help bridge the gap between purely normative, and purely empirical research. It will provide a new framework for legal academics to use when discussing the concept of activism more

²⁰ Kelly, *supra* note 13; Cohn & Kremnitzer, *supra* note 19.

²¹ Richard Jochelson, Michael Weinrath & Melanie J Murchison “Multidimensional Analysis of Judicial Decision-Making: Reframing Judicial Activism as the Study of Judicial Discourse (or taking the judgment out of the Judgment)” (2011) 2 *Annual Rev of Interdisciplinary Justice Research* 122 at 138-139 [Jochelson, Weinrath & Murchison, “Multidimensional”].

generally. This paper will then conclude by providing four recommendations for future activism research and will discuss the role of empirical methodology in judicial activism studies going forward.

II. METHODOLOGY

No case can have a meaning by itself! What counts, what gives you leads, what gives you sureness that is the background of the other cases in relation to which you must read the one.²²

Due to the lack of cohesion of the term “judicial activism”, attempts to empirically measure or quantify activism have been even more difficult. Value free empirical and quantifiable measurements of all social phenomena have their historical roots in the development of biological and psychological positivism and have created a separate type of positivism, called logical positivism or neo-positivism.²³ This movement embraced “verificationism”, or the ability to legitimize philosophical or theoretical debates using empirical methodology.²⁴ The desire to explain and understand observed behaviour through quantitative methodology dates back to the 19th century and Cesar Lombroso's book "the criminal man".²⁵ The scientific study of judicial behaviour has followed in those footsteps and, as stated by Lindquist and Cross, “while the law is not always easily reducible to a quantitative metric, political scientists have made some progress in designing simplified measures to capture legal concepts”.²⁶

This paper supports Lindquist and Cross’s view of the study of judicial behaviour by capturing the phenomenon of judicial activism using an empirical metric. As previously articulated there has never been a consistent definition of judicial activism that has been able to be measured as suggested by “verificationism”. This has led empirical scholars such as Young, Cohn, Kremnitzer, and Canon to reject official definitions and instead to measure,

²² Karl N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Dobbs Ferry, New York: Oceana Publications, 1960) at 49 [Llewellyn] (emphasis added).

²³ Rob White, Fiona Haines & Lauren Eisler, *Crime and Criminology*, 2nd ed (Oxford: University Press, 2012) Chapter 3 [White, Haines & Eisler].

²⁴ Michael Friedman, *Reconsidering Logical Positivism* (Cambridge: University Press, 1999) [Friedman].

²⁵ Cesare Lombroso, *Criminal Man*, translated by Mary Gibson & Nicole H Rafter, eds (Duke: University Press, 2006) [Lombroso].

²⁶ Lindquist & Cross, *Measuring Activism*, *supra* note 8 at 44.

rather than defining the term. This lack of cohesion has significant implications for developing an empirical method going forward: there is a long history of doctrinal scholarship in the field of activism, but, as scholars such as Choudhry and Hunter, Songer and Johnson and Emmett MacFarlane suggest, the role that social science methodology can play in understanding legal phenomenon is emerging.²⁷ This is not to suggest that empirical legal scholarship should replace doctrinal understandings of the law, but that empirical methodologies can augment traditional understandings of judicial behaviour, something that is a current limitation of doctrinal work. As Hall and Wright suggest, content analysis of judicial decisions, “does not displace traditional interpretive legal scholarship. Instead, it offers distinctive insights that complement the types of understanding that only traditional analysis can generate”.²⁸ It is in this sense that the use of empirical methodology, such as content analysis can offer legal scholars the “best of both worlds”. Content analysis holds value not only for traditional doctrinal scholars but also for theoretical scholars as they “frequently claim, for instance, that judges and the law respond predictably to various social, political, and market conditions empirical claims that researchers can systematically test”.²⁹

Simply put, this paper will empirically ascertain whether there have been any significant discursive changes in the level of activism and adjudication of police power *Charter* rights after the events of 9/11. The process of making a hypothesis as to whether or not there will be a definitively positive or negative shift in the amount of *Charter* rights protections afforded to individuals post 9/11 has been avoided, with the focus instead on allowing the data gathered dictate the findings. The research goal aims to illuminate what activism is and if it has changed through description, not to test hypotheses. As Carney states,

²⁷ Donald R Songer & Susan W Johnson, "Judicial Decision Making in the Supreme Court of Canada: Updating the Personal Attribute Model" (2007) 40:4 Can J of Political Science 911 at 916 [Songer & Johnson]; Emmett MacFarlane, "The Supreme Court of Canada and the Judicial Role: An Historical Institutional Account" (PhD Thesis, Queen's University, 2009) [unpublished] [MacFarlane]; Sujit Choudhry & Claire E Hunter, "Measuring Judicial Activism on the Supreme Court of Canada" (2004) 49:3 McGill LJ 525 [Choudhry & Hunter].

²⁸ Mark A Hall & Ronald F Wright, "Systematic Content Analysis of Judicial Opinions" (2008) 96(1) Cal L Rev 63 at 66 [Hall & Wright].

²⁹ *Ibid* 77.

Instead of seeking facts to prove or disprove a hypothesis, [a researcher is] simply recording details, each in itself too insignificant for [her] to be able to see-and thereby be biased by-its meaning. Only when [she] has all the facts can [she] see which are emphasized most, which least; only when all the facts are in can [she] see what is not there.³⁰

However, if one believes the rhetoric posited about the nature of terrorism, crime, and securitization in the wake of 9/11, this would suppose that an increased level in Supreme Court activism and deviation from inherent core values and rights protections has been taking place.³¹ The empiricisation of judicial activism using Cohn and Kremnitzer's model would give new and significant findings around which to base further legal scholarship.³²

Using the newly operationalized and adapted Cohn and Kremnitzer model to measure activism without its inherent politicization provides advantages in that it creates substantial opportunities to assess all of the complex facets of activism, instead of the narrow focus on precedential effects.³³ Most research in this area, particularly in Canada and the United States is conducted in response to judicial decisions regarding the constitutionality of previously enacted legislation. However, many Court decisions involving constitutional principles occur in the absence of legislation and instead are based on common law principles, which may lead traditional activism researchers who adhere to narrow definitions of activism to decide against analysis. For example, improper police conduct, or the expansion of police powers in Canada is analysed in a way that is largely separate from legislation, in part because wide-ranging police powers legislation has not been enacted in Canada, leaving the Court to decide whether there is a common law power for particular behaviour.³⁴ This

³⁰ Thomas F Carney, *Content Analysis: A Technique for Systematic Inference from Communications* (Winnipeg: University of Manitoba Press, 1972) 17 [Carney].

³¹ Colleen Bell, *The Freedom of Security: Governing Canada in the Age of Counterterrorism* (Vancouver: University of British Columbia Press, 2011) [Bell].

³² Richard Jochelson, Michael Weinrath & Melanie J Murchison "Searching and Seizing After 9/11" (2012) 35:1 Dal L Rev 179 at 195 [Jochelson, Weinrath & Murchison, after 9/11].

³³ Jochelson, Weinrath & Murchison, "Multidimensional", *supra* note 21.

³⁴ Richard Jochelson, "Multidimensional Analysis as a window into Activism Scholarship: Searching for Meaning with Sniffer Dogs" (2009) 24:2 CJLS 231 at 240 [Jochelson, Dogs]; Richard Jochelson "Crossing the Rubicon: of Sniffer Dogs, Justifications, and

model allows analysis of the Court's decisions in this context, even in the absence of legislation, because the goal is to measure the level of activism of the Court on significantly more factors than mere constitutional acceptability. In order to begin the process of analysing Supreme Court decisions, a methodological framework had to be chosen which would successfully measure the changes in activism of the Canadian Supreme Court from the inception of the *Charter* in 1982 to September 11, 2001 and from September 12, 2001 to the present. A content analysis methodology using both qualitative and quantitative approaches was chosen to operationalise the Cohn and Kremnitzer model to measure the Court's own judgments, and whether or not they are phrased in terms of activism or restraint, a very different assessment than previously undertaken in the literature.

The decision to use a content analysis methodology when undertaking an examination of judicial opinions is not a novel one, as many scholars, such as Hall and Wright, Mercer, and Lawlor have advocated the practice of conducting content analyses as the best way to understand patterns in judicial decision-making. While qualitative content analysis is exceptionally nuanced and labour intensive, quantitative content analysis is particularly useful when it is necessary to examine large quantities of data, as it provides an organized and efficient method of evaluation.³⁵ The goal of undertaking content analysis, when using it as a quantitative methodology, is to measure in a numerical and mathematical process the number of occurrences of a particular variable (i.e. their amount) inside of the individual categories.³⁶ This is the case in this paper, as the amount of activism is measured inside 17 variables across different eras in the Court.

Preemptive Deference" (2008) 13:2 Rev Const Stud 209 at 211 [Jochelson, Rubicon]; Richard Jochelson, "Trashcans and Constitutional Custodians: The Liminal Spaces of Privacy in the Wake of Patrick" (2009) 72(2) Sask L Rev 199 at 221 [Jochelson, Trashcans]; Richard Jochelson, "Talking Trash with the Supreme Court of Canada: The Reasonable Expectation of Privacy Under the Charter" (as cited in K Kramar, ed, *Criminology: Critical Canadian Perspectives* (Pearson Canada, 2011) 255 [Jochelson, Trash].

³⁵ US General Accounting Office, "Content Analysis: A Methodology for Structuring and Analyzing Written Material" (1 September 1996), online: <<http://www.gao.gov/products/PEMD-10.3.1>> [US General].

³⁶ Kimberly A Neuendorf, *The Content Analysis Guidebook* (Thousand Oaks, Cal: Sage Publications 2002) at 14 [Neuendorf].

Mark Hall and Ronald Wright begin their article “Systematic Content Analysis of Judicial Opinions” by remarking that lawyers (or “the mockingbirds of the academy” as they call them) “have yet to identify their own unique empirical methodology. Instead, empirical legal methods are often standard applications of basic social science methods to subjects of (sometimes trifling) legal interest”.³⁷ In their article, Hall and Wright propose that legal scholars adopt content analysis as their own, purely unique form of legal analysis, as when “one reads cases this way, one engages in a uniquely legal empirical method - a way of generating objective, falsifiable, and reproducible knowledge about what Courts do, and how and why they do it”.³⁸ They suggest that the requirements of a content analysis will be familiar to lawyers, as it “resembles the classic scholarly exercise of reading a collection of cases, finding common threads that link the opinions, and commenting on their significance” but is much more robust and empirical a method than simple case analysis.³⁹ Instead of trying to study causes and effects of law and legal institutions, or issues that relate to law, content analysis creates a scientific understanding of the law itself (within judicial opinions and other legal texts).

Using a content analysis methodology to understand judicial decisions allows for the recorded factual or legal content of judicial opinions to be consistently analysed. The adoption of a hybrid content analysis methodology (which uses both qualitative and quantitative aspects) preserves both the manifest and latent content present in judicial decisions and removes the criticism that some scholars have had, which is that the reductionist aspect of case coding tends to neglect matters of importance.⁴⁰ Indeed, Wallace Mendelson said that scholars who engage in strict word counting processes of understanding judicial behaviour:

fail to depict even dimly the subtleties of the judicial process. They do not, presumably because they cannot, measure the range of values that play in the jurisprudence of a Holmes, a Brandeis, a Stone, or a Cardozo-to mention a few departed heroes. . . . [T]he judge's art, when greatly practiced, is far too subtle to be

³⁷ Hall & Wright, *supra* note 28 at 63.

³⁸ *Ibid* at 64.

³⁹ *Ibid*.

⁴⁰ Howard Gillman, “What's Law Got to Do With It?” (2001) 26(2) *Law & Soc Inquiry* 465 [Gillman]; Wallace Mendelson, “The Neo-Behavioral Approach to the Judicial Process: A Critique” (1963) 57:3 *Am Pol Sci Rev* 593 at 595 [Mendelson].

measured by any existing behavioral technique. "The law," said Holmes, "is the painting of a picture-not the doing of a sum."⁴¹

The ability of legal scholars to accurately record the content of judicial decisions using a content analysis methodology has been a subject that has been widely discussed in empirical legal circles.⁴² Often these discussions centre on whether judicial decisions are affected by extra-legal factors, such as tenure, appointment process, religion and docket control, and whether the decisions themselves then are based on law, or on a political or personal metric instead.⁴³

Although content analysis has become more popular in recent years there are still problems with the methodology when it comes to adopting an "in their own words" project. Those who use content analysis to measure judicial decision-making must admit that the phenomenon of "judgment writing" (the process of crafting a judgment to appear a certain way, cannot be overlooked.⁴⁴ As Juliano and Schwab state "a judicial opinion is the

⁴¹ Mendelson, *ibid* at 602-603 (emphasis added).

⁴² David E Klein, *Making Law in the United States Courts Of Appeals* (Cambridge: Cambridge University Press 2002) [Klein]; Sara C Benesh & Wendy L Martinek, "State Supreme Court Decision Making in Confession Cases" (2002) 23:1 Justice System J 109 [Benesh & Martinek]; James J Brudney, "A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process" (1996) 74:4 NCL Rev 939 [Brudney]; Tracey E George & Lee Epstein, "On the Nature of Supreme Court Decision Making" (1992) 86:2 Am Pol Sci Rev 323 [George & Epstein]; Charles A Johnson, "Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions" (1987) 21:2 L & Soc'y Rev 325 [Johnson]; Daniel M Schneider, "Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases" (2001) 31:2 NM L Rev 325 [Schneider]; Jeffrey A Segal, "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981" (1984) 78:4 Am Pol Sci Rev 891 [Segal]; Joseph L Smith & Emerson H Tiller, "The Strategy of Judging: Evidence from Administrative Law" (2002) 31:1 J Leg Stud 61 [Smith & Tiller]; Donald R Songer & Susan Haire, "Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the US Courts of Appeals" (1992) 36(4) American J of Political Science 963 [Songer & Haire]; Paul J Wahlbeck, "The Development of a Legal Rule: The Federal Common Law of Public Nuisance" (1998) 32:3 L & Soc'y Rev 613 [Wahlbeck].

⁴³ Wahlbeck, *supra* note 42.

⁴⁴ Kimberly D Krawiec & Kathryn Zeiler, "Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta- Theories" (2005) 91:8 Va L Rev 1795 at 1832 [Krawiec & Zeiler]; Ann Juliano & Stewart J Schwab, "The Sweep of Sexual Harassment Cases" (2001) 86:3 Cornell L Rev 548 at 558-559 [Juliano & Schwab]; Hall & Wright, *supra* note 28 at 95.

judge's story justifying the judgment. The cynical legal realist might say that the facts the judge chooses to relate are inherently selective and a biased subset of the actual facts of the case."⁴⁵ While this is undoubtedly the case it does not create a fatal flaw in the use of content analysis, unless the research is proposing to assert causality or to predict future events (which this paper does not do). Hall and Wright state "few social scientists use content analysis to draw definitive cause-and-effect conclusions about complex events. Instead, they more often identify apparent associations of interest meriting further study".⁴⁶ They also offer two compelling reasons why the behaviour of "judgment writing" does not invalidate the use of content analysis methodology.⁴⁷

Firstly, Hall and Wright argue that social science is never, nor can it be, perfect, and that "reasonable approximations" suffice in both government and empirical analyses. To support this claim, they offer evidence that social scientists frequently survey members of the public about their own attitudes and behaviours, for example, to identify their voting preferences, with the assumption that the individuals are answering truthfully and accurately. Often however, this is not the case as "people sometimes fail to say what they really think, say what they imagine the researcher wants to hear, or try to maintain logical consistency across questions even if this distorts the truth".⁴⁸ In cases such as these, imperfect data must suffice as the ability to accurately determine attitudes or behaviours is either "too cost prohibitive or impossible".⁴⁹ While judges may similarly shade their views, or incorporate certain facts of a case at the expense of others the judgments are "near enough so that the savings in labor justifies the approximation".⁵⁰

Secondly, Hall and Wright state that:

the "bias" created when Courts justify their decisions may be precisely what a researcher wishes to study... Instead of predicting outcomes, content analysis is better suited to studying judicial reasoning itself, retrospectively. Scholars can use the method to learn more, for instance, about how results are justified. This type of study may be less relevant to practicing lawyers trying to gauge their cases' likely

⁴⁵ Juliano & Schwab, *supra* note 44.

⁴⁶ *Supra* note 26 at 99.

⁴⁷ *Ibid* at 100.

⁴⁸ *Ibid* at 97.

⁴⁹ *Ibid* at 97.

⁵⁰ *Ibid* at 97 citing Tyree.

outcomes, but it is perhaps more relevant to legal scholars seeking a measurable understanding of substantive law or the legal process.⁵¹

III. OPERATIONALIZATION OF THE MULTIDIMENSIONAL MODEL

There has been substantial debate among empirical legal scholars as to whether or not there has been a measurable change in the level of activism by the Supreme Court of Canada, with arguments relying heavily on specific cases, government or claimant win/loss rates, or individual justices' reasoning and voting records.⁵² While all of these metrics are important in understanding Supreme Court behaviour, they each fail to define activism and many are not broadly generalizable to larger "N" studies. Many of these studies also engage in content analysis but are purely quantitative in nature, measuring who won and who lost, how long each decision was, and how judges voted. These studies miss the latent content in the judicial decision that this paper seeks to analyse. By combining qualitative and quantitative content analysis into a hybrid content analysis, this paper proposes that a new approach to quantifying the overall level of activism in judicial decisions is required and it operationalises the multidimensional model of judicial activism first created by Cohn and Kremnitzer in 2005.

One of the reasons that there is a reluctance to apply the Cohn and Kremnitzer model in large "N" studies appears to stem from having a significant number of variables to analyse and the labour intensive nature of having to interpret and code each individual Court decision by hand, without the aid of a machine. The wide spectrum of analysis has also led some to say that conducting this type of analysis results in the measuring not of judicial activism, but some other kind of judicial diagnostic that is

⁵¹ *Ibid* at 98 (emphasis added).

⁵² Choudhry & Hunter, *supra* note 27 at 525; James B Kelly & Christopher P Manfredi, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) at 741 [Kelly & Manfredi]; Fredrick L Morton, Peter H Russell & Michael J Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30:1 Osgoode Hall LJ 1 at 12; Fredrick L Morton, Peter H Russell & Troy Riddell, "The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade, 1982-1992" (1995) 37:3 NJCL [Morton, Russell & Riddell]; James B Kelly, "The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999) 37:3 Osgoode Hall LJ 625 [Kelly].

independent and not applicable to the larger discussion.⁵³ This paper aims to test whether the Cohn and Kremnitzer model can measure changes to the level of activism on the Canadian Supreme Court after 9/11. To do this, a hybrid content analysis methodology, using both qualitative and quantitative content analysis of the judicial decisions was adopted. According to Hall and Wright, a content analysis methodology “works best when the judicial opinions in a collection hold essentially equal value, such as where patterns across cases matter more than a deeply reflective understanding of a single pivotal case. While conventional legal scholarship analyses issues presented in one case or a small group of exceptional or weighty cases, content analysis works by analysing a larger group of similarly weighted cases to find overall patterns”.⁵⁴ The criteria for the model are explored below.

IV. THE MULTIDIMENSIONAL MODEL: CHARTER SECTION VARIABLES: TRADITIONAL VISIONS OF ACTIVISM⁵⁵

Judicial stability – This measures whether the Court is ready to retract from its own or former decisions. When the Court affirms the decisions of all lower Courts the case is scored as a 1. When the Court overturns a previous decision and overturns legislation and creates new law, the case is scored as a 10.

Interpretation – Does a Court interpret a legal text in possible contradiction with assumed original intent of the Constitution or its plain linguistic meaning? Where the Court interprets the *Charter* section in light of an original intent or plain meaning approach the case is scored as a 1. Where the Court interprets the section in a way that is unremittingly interpretive, the case is scored as a 10.

Majoritarianism and autonomy – This measures whether the Court interferes with policies set by democratic processes and if it is willing to supply its own solution and/or policy: when the Court does not interfere with policies set by democratic policies or leaves all legislation unimpeached

⁵³ Daved Muttart, “One Step Forward, One Step Back: Measuring Activism in the Supreme Court of Canada” (2011) Social Science Research Network Working Paper [Muttart].

⁵⁴ Hall & Wright, *supra* note 28 at 65-66.

⁵⁵ Jochelson, Weinrath & Murchison, “Multidimensional”, *supra* note 21 at 132.

the case is scored as a 1. Where the Court struck down legislation and applied its own policy or solution the case is scored a 10.

Judicial reasoning: process/substance - This variable measures how heavily the Court relied, in its decision, on strict legal and procedural grounds. Where the Court entirely relied on strict legal or procedural grounds in making a decision it was scored a 1. Where the Court relied on open ended legal tests, such as reasonableness-based assessments, it was scored a 10.

Threshold activism - This measures the extent to which the Court was willing to forgive threshold hurdles. In this context, a rigorous application of threshold issues, such as the reasonable expectation of privacy as a gateway to accessing section 8 of the *Charter*, would score a 1 (the reasonable expectation of privacy is the main threshold issue in s 8 cases). Where the Court found reasons to allow for reasonable expectation of privacy where previous cases had not the case was scored a 10.

Judicial remit - This variable asks whether the Court's decision expands or redefines the jurisdiction of the Court. When the decision did not expand or redefine the jurisdiction of the Court the case was scored as a 1. A decision that expanded the judiciary's remit into areas previously immune from intervention was scored as a 10.

Rhetoric - This variable asks whether judicial decisions are used as platforms for expression of broader positions and values or whether the use of rhetoric was restricted in the Court's explication of legal principles. The absence of legal rhetoric (usually correlating with shorter decisions) was scored as a 1. High levels of extra-legal rhetoric combined with long discussions of political implications were scored at 10.

Obiter dicta - This measures how far the Court expands its opinion beyond the legal requirements of the specific case. When the Court did not delineate any obiter the case was scored as a 1. When the Court used extensive amounts of obiter and discussed issues not relevant to the case it was recorded as a 10.

Reliance on comparative sources - This examines how extensively the Court relied on foreign sources that are not legally binding in the domestic sphere. Where the Court used domestic law exclusively it was scored as a 1. When the Court used comparative sources to create new legal conceptions with extensive comparative referencing it scored a 10.

Judicial voices - Here, the extent of other judicial decisions besides the majority decision were examined. A unanimous decision scored a 1. On

occasions where there were two concurring and two dissenting judgments (the most judicial voices seen) a 10 was scored.

Extent of decision – Here whether the Court’s ruling expressly applied to a single or specified set of circumstances or whether the law that resulted had broad implications for larger sections of society was examined. If the Court simply applied the legal rules a 1 was scored. Where the Court created a new standard that effected broader populations it was scored as a 10.

Legal background – Here it was examined whether the legal framework on the basis of which the Court made its decision was inclusive and clear or whether the rules concerned were vague, complex, self-contradictory, or incomplete. Where the Court applied clear rules that did not extend beyond the prior case law it scored a 1. Where the framework was murky and when the Court generated a new framework for analysis a 10 was scored.

Variables: core values activism

Intervention and value content – This variable examined if the subject matter under examination was highly value laden in that it had bearing on democratic principles and human liberties domestically accepted. Where the case dealt with important human rights issues and the Court appeared to assert its guardianship of the Constitution, a 1 was scored. Where the Court declined to discuss the constitutional values at stake it scored a 10.

V. SAMPLE CASES

Each Cohn and Kremnitzer variable has a possible score of 1 – 10 and each of those scores corresponds to a particular behaviour or result by the Court. For example, the variable Judicial Stability is informative as to whether or not the Court overturned previous decisions, while the number indicates to what degree they varied from those previous decisions. A 1 would indicate that they did not overturn any previous decision, while a 10 would demonstrate that they both overturned not only a previous Supreme Court decision, but also legislation by making a new test. These cases will illustrate the differences in each variable specifically.

In order to better understand the process by which Cohn and Kremnitzer’s model can be operationalized, namely how some cases score as activist, while others restrained, it is important to understand how the coding decisions were made in each case. This section will explain how each of the variables were coded using two sample cases that illustrate the

substantial differences between activism and restraint in judicial discourse, using section 24(2) variables.

R v Grant and *R v Wittwer* are two cases that occurred within one year of each other: *R v Grant*⁵⁶, (2009) is one of the most activist cases included in the dataset, while *R v Wittwer*⁵⁷, (2008) decided just one year earlier is one of the most restrained (using the discourse model). In *Grant*, two plain clothed police officers stopped the accused, a younger black male, after noticing his “suspicious movements”.⁵⁸ After a brief conversation with these officers Grant disclosed that he was carrying marijuana and a firearm.⁵⁹ He was subsequently arrested. At trial, Grant submitted that his s. 8, 9 and 10(b) rights had been violated, and that the evidence should be excluded under s 24(2).⁶⁰ He was convicted at trial and the Court of Appeal upheld his conviction.⁶¹ In *Wittwer*, the police attempted to obtain a confession out of the accused by using his own previous admissions that the police knew had been obtained while committing violations of his right to counsel.⁶² After repeated questioning Wittwer confessed, but submitted that this confession was still a violation of his 10(b) right as the interrogations were all connected and he sought to have it excluded under section 24(2).⁶³

The decision in *Wittwer* is only 27 paragraphs long, while *Grant* is more than ten times that length at 230 paragraphs. The length of the *Grant* decision is strongly correlated with the score on both *Rhetoric* and *Obiter*, as rhetorical decision making requires space, and these behaviours tend to make the decisions longer. *Wittwer* scored a “1” on both *Rhetoric* and *Obiter* while *Grant* scored “10” on both. *Wittwer* is also a unanimous judgment with no mention of any extra-jurisdictional case law or social science evidence, while *Grant* uses extensive American case law. This means that *Wittwer* scored a “1” on both *Comparative Sources* and *Judicial Voices* but *Grant* scored an “8” and a “4” on the same variables respectively.

The only variables that received the same score in both cases were Judicial Remit and Majoritarianism and both scored 1s, as the Court

⁵⁶ *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 [*Grant*].

⁵⁷ *R v Wittwer*, 2008 SCC 33, [2008] 2 SCR 235.

⁵⁸ *Supra* note 56 at paras 4-6.

⁵⁹ *Ibid* at para 7.

⁶⁰ *Ibid* at paras 9, 2.

⁶¹ *Ibid* at para 10.

⁶² *Supra* note 57 at paras 2-4.

⁶³ *Ibid* at paras 3, 8.

neither expanded its jurisdiction in these cases, nor did it overturn democratically enacted legislation. In *Wittwer*, the Supreme Court overturned both the Appeal Court and the Trial Court's decisions and held that evidence obtained by violating Wittwer's section 10(b) right to counsel should have been excluded, and ordered a new trial.⁶⁴ Because the Supreme Court overturned both lower Court decisions, this case scored a 5 on *Judicial Stability*. Meanwhile in *Grant*, the Supreme Court agreed with both lower Court decisions on four out of the five charges, but overturned both lower Courts on the fifth charge. This behaviour alone would have led it also to score a 5 however, the Court goes further and completely overhauls the test for section 24(2), which then meets the criteria for a score of 8 on *Judicial Stability*. It is because of this substantial change in the exclusion of evidence test that *Grant* also scores the highest available measurement, a 10, for the variables *Legal Background*, *Judicial Reasoning*, and *Extent of Decision*. In *Wittwer*, the Court merely applies previously created tests, and the decision does not extend beyond any previous case law, so it scores the complete opposite and the lowest possible value, a 1 on the aforementioned variables. *Threshold Activism* measures the degree to which the Court is willing to forgive or overlook the threshold for the *Charter* protection (for section 24 (2) that threshold is whether or not there is a temporal connection between the breach and the remedy). *Wittwer* scores a 1 on this measurement, as the Court explicitly discusses the temporal connection and its importance, while *Grant* scores a 3, as the Court is willing to impose limits on this threshold in this case. The variable *Interpretation* measures the level of original intent and *Wittwer* scores a 1 on this variable, as the case holds true to what is set out in section 24(2). *Grant* scores a 3, however, as the majority in the decision does not discuss the original intent of the *Charter*, though the concurring justices do. Finally, in *Core Values*, the last variable measured, *Wittwer* scored a 1, as the justices in the case discuss the importance of the adherence to *Charter* values and protections and excluded the evidence because those values were violated by the police conduct in that case. In *Grant* there is no discussion of the inherent values at stake, but the justices do interpret those values purposively, so it scores 5.

It is important to note that because this model is measuring the four separate *Charter* sections from the *Charter's* inception until 2014, the legal tests needed to be created and in some cases, particularly section 24(2)

⁶⁴ *Supra* note 57 at para 27.

overhauled entirely. Cohn and Kremnitzer's metric is able to account for this and the case that made these significant changes (*R v Grant*, 2009) scored the highest of all cases measured in both time periods.

VI. MODEL CONSISTENCY

When using a multivariable model to measure a particular phenomenon, it is crucial to demonstrate how connected each of the variables are to one another. This is important, as the stronger the correlation between the variables, the greater the likelihood that the variables are interdependent, and related to one another. As the variables are all independent of each other, there are no dependant relationships that can be uncovered, but there are significant findings that can be determined through bivariate correlation analyses. These correlations are not able to determine which variable influences another, but it indicates how strongly the variables are connected to each other.

In order to determine the relationship between each of the variables, this paper will use the Pearson's R value, or the Pearson product-moment correlation coefficient to measure the linear dependence of one variable on another.⁶⁵ The Pearson coefficient ranges from -1, which is a pure linearly negative correlation and occurs when the y value decreases as the x value increases to +1, a purely linear positive correlation that occurs when the y value increases as the x value increases.⁶⁶ When applied to a population, as in this case, the formula for the Pearson coefficient is:

$$\rho_{X,Y} = \frac{\text{cov}(X, Y)}{\sigma_X \sigma_Y}$$

When conducting a content analysis of judicial decisions there are three distinct components that must be undertaken: (1) selecting cases, or "sampling"; (2) coding cases; and (3) analysing the case coding, often through statistical methods.⁶⁷

⁶⁵ RR Wilcox, *Introduction to Robust Estimation and Hypothesis Testing* (Boston: Academic Press 2005).

⁶⁶ *Ibid.*

⁶⁷ *Ibid* at 79.

VII. SAMPLING

To apply the hybrid content analysis to operationalize the Cohn and Kremnitzer model, a group of cases that would be used for analysis had to be chosen. The purpose of conducting this operationalization was to determine if the amount of activism on the Supreme Court had changed after 9/11 in cases that deal with the police powers *Charter* sections. In order to get a complete and accurate depiction of the level of activism before and after 9/11 throughout these *Charter* cases the sample for this study is all of the Supreme Court of Canada jurisprudence surrounding all four separate *Charter* sections: Search and seizure (section 8); arbitrary detention (section 9); right to counsel (section 10(b)); and exclusion of evidence (section 24(2)). It was not possible to use random sampling in this case as there was no way to guarantee that the sample in any way would be representative of the entire population.⁶⁸

All the cases were found on the legal databases which index Canadian Supreme Court decisions: Westlaw, QuickLaw, CanLii, and LexisNexis. The databases were then cross-referenced with each other to guarantee that all cases were included. After finding all of the cases and entering them into individual spreadsheets, the Supreme Court of Canada's website was then checked and all of the cases dealing with constitutional law were indexed to be sure that no case was missed. Cases that dealt with one of the relevant *Charter* sections but were less than ten paragraphs long were excluded, as there was insufficient relevant material to analyse. Cases that made a passing reference to a *Charter* section (such as the mention of section 8 in *Cloutier v Langlois*)⁶⁹ or that merely brought up a *Charter* section to compare it to another area of law were also excluded.

Each case was printed and read through for content and relevance to its *Charter* section twice before being coded. Some cases dealt with more than one of these issues and were therefore analysed multiple times, each time focusing solely on a specific *Charter* protection. For example, *R v Grant*⁷⁰ was analysed three separate times as it is a section 9 case, a section 10(b) case

⁶⁸ Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology*, 3rd ed (Thousand Oaks, Cal: Sage Publications 2013) [Krippendorff].

⁶⁹ *Cloutier v Langlois*, [1990] 1 SCR 158, 53 CCC (3d) 257 [Langlois].

⁷⁰ *Grant*, *supra* note 56; There are two *R v Grant* cases that were used in this analysis, one in 1993 and one in 2009. I am always referring to the latter unless expressly stated.

and a section 24(2) case.⁷¹ Another example is *R v Therens*, which was the first case post *Charter* to deal with section 10(b), the right to counsel protection, but was also a case that dealt with section 24(2), and the process of the exclusion of evidence.⁷² In this case, all nine of the Supreme Court Justices heard the case but only eight took part in the judgment. The Court agreed with the decisions of the two lower Courts and upheld the defendant's acquittal, dismissing the Crown's appeal.⁷³ This consistency in this decision means that the case scored a "1" in the "judicial stability" variable posited by Cohn and Kremnitzer in both the section 10(b) and 24(2) analysis. Below are the tables that demonstrate the number of cases found, versus the number of cases analysed for each variable.

Table 1: Total Number of Cases Found by *Charter* Section

Total Number of Cases Found			
Section	Number Included	Number Excluded	Total
Section 24(2)	98	318	416
Section 10(b)	45	37	82
Section 9	23	39	62
Section 8	90	73	163

⁷¹ *Ibid.*

⁷² *R v Therens*, [1985] 1 SCR 613, 1 DLR (4th) 655.

⁷³ *Ibid* at 654.

Table 2: Number of cases analysed by *Charter* Section

Number of Cases Analyse			
Charter Sections	Pre-9/11	Post-9/11	Total
Section 24(2)	72	26	98
Section 10(b)	37	8	45
Section 9	14	9	23
Section 8	54	36	90

VIII. CODING

In order to determine how each case should be scored for each individual variable, criteria were identified on which to base a scale ranking system for each of the variables. A 1-10 Likert scale was then developed and used throughout the analysis to code attributes of the decision. A 1 indicates the lowest level of judicial activism, while a 10 represents the most activist type of behaviour along the lines postulated by Cohn and Kremnitzer. Each case was assessed each time for every variable against the content analysis criteria for ranking, which was developed as an a priori design. In order to ensure reliability, this author established all of the decisions on the variables, coding rules and how they would be measured prior to the beginning of the coding process and these rules are laid out in appendices at the end of this paper.⁷⁴ "To make valid inferences from the text, it is important that the classification procedure be reliable in the sense of being consistent: Different people should code the same text in the same way".⁷⁵ This study's author personally coded all of the individual variables and cases, as a safeguard to limit any inter-coder reliability issues that may have

⁷⁴ Neuendorf, *supra* note 36 at 11.

⁷⁵ Steven Stemler, "An Overview of Content Analysis" (2001) 7(17) Practical Assessment, Research & Evaluation Electronic J 1 at 3 [Stemler].

arisen.⁷⁶ Throughout the entire project, human coding was employed instead of computer coding, as many of the metrics being measured could not be quantified accurately by any current computer program.⁷⁷ Human coding is common when conducting a content analysis, as “where the phenomena of interest to analysts are social in nature, mechanical measurements have serious shortcomings that only culturally competent humans can overcome”.⁷⁸ For example, the number of paragraphs in a decision is likely to be highly correlated with the amount of rhetoric in that decision, but it is not possible to score the variable “Rhetoric” on paragraph length alone. This study also avoided using “key word searches” to determine variable scores, and because of this, computer coding would have been detrimental to the overall project. This led to the creation of a codebook which had high intra-rater reliability, as cases were frequently re-coded without referring to previous analyses in order to check if the variables were being coded consistently. This project also has high reproducibility, or replicability as other individuals would be able to read the case and code the variables the same way if given the same codebook. For example, the variable “judicial stability” measures whether or not the Supreme Court agreed with lower Courts, and its previous decision-making. Anyone with the codebook would be able to determine that if the Supreme Court agreed with the trial Court, and the appeal Court, the case would score a “1”, and that score is not subject to any personal opinion or coder bias. Inter-rater reliability and replicability are two of the key features of conducting a content analysis of judicial decisions and have been argued by several scholars to be the most important and most overlooked pieces of conducting analyses on judicial decisions.⁷⁹ Once each of the cases had been analysed the variables were operationalized as interval variables within “Statistical Package for the Social Sciences” (SPSS) in order that differences could be ranked and meaningful comparisons made.

⁷⁶ *Ibid.*

⁷⁷ Krippendorf, *supra* note 68 at 127.

⁷⁸ *Ibid.*

⁷⁹ Jack Goldsmith & Adrian Vermeule, “Empirical Methodology and Legal Scholarship”, (2002) 69:1 U Chicago L Rev 153 at 155-57 [Goldsmith & Vermeule]; Lee Epstein & Gary King “The Rules of Inference” (2002) 69 U Chicago L Rev 1 [Epstein & King]; Hall & Wright, *supra* note 28 at 63.

IX. LIMITATIONS OF THE COHN AND KREMNITZER MODEL

Weaknesses in measurement, even when unavoidable, necessarily weaken our confidence in the results. The answer is neither to forgo the study while waiting in vain for the day when perfection can be attained nor to conduct the study and announce the results as final and infallible.⁸⁰

Cohn and Kremnitzer themselves discuss the difficulty in operationalizing this model as they suggest there are methodological issues that must be overcome and it is a model that has been subjected to mild criticism in the past.⁸¹ This largely stems from the overall weight assessed to each of the individual variables. As there are so many definitions of activism and no clear consensus as to what constitutes activism, critiques have arisen regarding the level of importance of each of the individual variables on its own. For example, some scholars have stated that their vision of activism has nothing to do with the number of extraneous sources used in a case by any given court, as the variable “Comparative Sources” measures. Does this mean that it is not an indicator of activism? Does the variable “Rhetoric” measure judicial activism just as much as the variable “Core Values”? Is it ½ the weight? How could or should it be determined? These are issues that are largely avoided by this thesis in two ways. The first is by demonstrating the strong correlations between all of the variables. When each of the variables is measured against each other, they show a significant relationship that is statistically unlikely to occur by chance. This demonstrates that while individual scholars may differ in their individual interpretations of what activism means to them personally, the framework is measuring a consistent metric and shows strong levels of reliability. Secondly, by not taking all of the individual variable scores and combining them into one overall “activism” score for each *Charter* section, each section is able to speak for itself and let the individual scholar place the emphasis where he or she desires. In keeping each of the individual variable scores visible, this allows for individual dissemination and comparison of all of the factors that contribute to activism, allowing for a more open and transparent overall analysis.

⁸⁰ Gregory C Sisk & Michael Heise, “Judges and Ideology: Public and Academic Debates About Statistical Measures” (2005) 99:2 NW UL Rev 743 at 792.

⁸¹ Cohn & Kremnitzer, *supra* note 19 at 59; *supra* note 8 at 36.

In their study of the activism level of individual judges on the US Supreme Court, which incorporated the variables identified by the activism scholars Canon, Young, Marshall, and Cohn and Kremnitzer, Lindquist and Cross chose only to use the variables that they felt were most “amenable to valid and replicable measurement”.⁸² They also discussed the difficulty in coding the variables identified by those four scholars, such as “judicial remit”, and “interpretation” stating “... [t]hey (the variables) are not amenable to objective measurement. Identifying cases according to these ... categories requires significant subjective determinations that are not likely to be replicable from one researcher to the next.”⁸³ Lindquist and Cross also stated that “reliance on interpretive theory such as originalism as a cue for judicial activism is thus impossible to replicate with any reasonable expectation of high inter-coder agreement.”⁸⁴ Lindquist and Cross were, however, concerned with the ideological voting behaviour of the US Supreme Court Judges and on their level of “result oriented judging”. That is not the purpose of this study and is one of the reasons the Cohn and Kremnitzer model has been reoriented toward a hybrid analysis using both qualitative and quantitative understandings of Court decision making, while maintaining the content analysis framework.

If the researcher is tasked with determining the content of what a Court said about its own decision-making, then the judgment call of the researcher is reduced to an exercise of coding rather than a decision about activism. The coding exercise of the researcher is then an attempt to record the voice of the Court itself and the text of the decision becomes the empirical source of primary research.⁸⁵

It is necessary to be mindful of potential criticisms from those who study judicial activism and would problematize the coding project of a discourse-based project.⁸⁶ For example, when relying on a Court’s own justifications and use of analysis, can the researcher make an informed decision about whether the Court was behaving in an activist or restrained fashion?

⁸² Lindquist & Cross, *Measuring Activism*, *supra* note 8 at 36.

⁸³ *Ibid.*

⁸⁴ *Ibid* at 37.

⁸⁵ Jochelson, Weinrath & Murchison, “Multidimensional”, *supra* note 21 at 192.

⁸⁶ See the debate between Jochelson, Richard & Melanie Murchison, “Measuring Activism and Restraint or How to Conflate Doctrine with Activism: A Response to Professor Riddell’s small-scale judicial output study” (2005) 58:1 *Canadian J Corr* 112 at 112-117; Troy Riddell, “Response to Jochelson and Murchison” (2016) 58:1 *Canadian J of Criminology and Criminal Justice* 117 at 117-118.

Ultimately, the development of the Cohn and Kremnitzer analysis was a response to the dissatisfaction with political accounts of Courts behaving in ways that were described as activist or restrained. The determination of restraint or activism is largely a quantitative response to a qualitative question. Discourse analysis provides a means of assessing larger quantities of cases and providing an empirical basis for qualitative conclusions about activism or restraint in terms of a Court's own language. Rather than begin the discussion with a political question (i.e., activist or not?), the discourse approach outlined seeks to measure a number of parameters and to hold off discussion of a Court's analysis until the primary research is gathered.

X. LIMITATIONS OF THE CANADIAN ADAPTATION

As with any study, the method adopted to measure judicial activism has potential limitations. The first limitation is not a critique of any one model of measurement, but instead, suggests that human coding can be susceptible to guesses, or errors in judgment. The number of judgment calls to be made in this type of analysis, regardless of the activism dimension, is open to influence (at the conscious or subconscious level) by the individual researcher. It is the broad challenge in operationalizing any model to minimize the amount of judgment calls needed to be made by the researcher. This operationalization of the model has attempted to eliminate the need for as many "judgment calls" as possible, by the creation of a strict coding key. This also has removed any guesswork and has negated issues surrounding interpretation. The second issue is that it is possible that individual scholars would suggest that there are different ways to measure the Cohn and Kremnitzer variables than the way this thesis chooses to measure them. While this is possible, the consistency with which the key in current use is applied negates any issues of systemic variability or replicability.

The second limitation of the application of the Cohn and Kremnitzer model to Canada is that the model was originally designed to measure judicial activism in common law Courts (Cohn herself first used it to examine a decision in the House of Lords) and the model may not be as easily transferable to a system that includes aspects of the civilian legal tradition. One of the two unique things about Canada is that it enjoys bijuralism, which means that there are two legal traditions which co-exist within a single state, (in this case, the civil and common law traditions) and

that many of the Justices are bilingual.⁸⁷ Since 1983 every decision of the Supreme Court has been published simultaneously in both English and French, though the decisions do not specify what the original language of writing was.⁸⁸ This allows for some ambiguity as to which language and what exact words each justice chose when writing their reasons. Each Justice also has three clerks who have been educated in different provinces and have different levels of fluency in both official languages which can affect the decisions. Controlling for the differences in style between each of the Justices and their clerks was not possible given that the decisions that were coded were all in English and some of the reasons from the judges may have been translated. Because this operationalization does not use a strict word coding model, the effects of the individual word choices may have been mitigated. However, it is possible that some subtleties and nuances in the French decisions which were translated may have been lost.

The Supreme Court of Canada experienced significant changes right after the turn of the century and they are completely unrelated to 9/11. For example, on January 7, 2000 Beverley McLachlin, the third female justice appointed to the Supreme Court bench was appointed the position of Chief Justice of the Supreme Court of Canada and as such, all of the cases that were coded post 9/11 occurred after her ascendance to the Chiefship. It is therefore possible that many of the changes that occurred during this time period are attributable to the new Chief Justice (the first female to hold this position) and her preferred doctrinal approach.⁸⁹ Wetstein and Ostberg examined strategic leadership on the Supreme Court and found that each

⁸⁷ Allard, France: "The Supreme Court of Canada and its Impact on the Expression of Bijuralism" in Canada, Department of Justice: The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Ottawa, Justice Canada, 2001, online: <http://justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b3-f3/bf3a.html>. It is also important to note that differences between legal systems are said, by some comparative constitutional law scholars, to be so fundamental that cross over is nearly impossible.

⁸⁸ Supreme Court of Canada "Role of the Court" (2016) online: <http://www.scc-csc.ca/court-cour/role-eng.aspx>.

⁸⁹ Chief Justice McLachlin has affirmed the right to dissent but has stated that she and her colleagues are "trying to reduce the unnecessary differences". The day after being appointed Chief Justice she expressed a desire to increase consensus. In 2000 the Supreme Court was accused of being "too fractured" and handing down too many split decisions, leaving the legal community confused about the law's direction, see Ulrike Schultz & Gisela, eds, *Women in the Judiciary* (New York: Routledge, 2012).

of the three most recent Chief Justices' voting behaviour changed substantially after being appointed chief, leading them to write more majority opinions and fewer dissents.⁹⁰

There were also other significant changes in the Court's composition after 9/11 and this too may have had a substantial effect. Justices McLachlin and LeBel are the only ones who were on the Court prior to 2001 (though LeBel retired effective November, 2014, and he was appointed only one year prior). As such, the Court's composition is almost entirely different than the previous era. Both the retirement of justices, as well as new appointments coming in would have had a huge impact on judicial decision-making. A prime example of this would be retirement of Justice Claire L'Heureux-Dubé, the second woman ever appointed to the Supreme Court and the first ever woman appointed from Quebec, who left the Court in 2002. L'Heureux-Dubé was frequently referred to as "The Great Dissenter" by colleagues and academics alike as she dissented 28.1% of the time, almost twice the average rate of dissent.⁹¹ Prior to 2000 the rate of unanimity on the Court was approximately 50% and it increased to 70% as of 2006, in large part because of L'Heureux-Dubé's retirement and her replacement by Justice Marie Deschamps and Chief Justice McLachlin's vocal reforms.

XI. PRE-9/11 DESCRIPTIVE DATA

In total, there were 178 individual analyses conducted on each of the Cohn and Kremnitzer variables for all four *Charter* sections pre 9/11 cases that met the selection criteria. Overall, the total mean score of all variables (obtained by adding all 13 variable means and dividing by 13) is 3.56. The variable "Judicial Voices" had the highest pre-9/11 mean score (4.65) while "Judicial Remit" had the lowest (1.51). All thirteen variables had a minimum value of 1, meaning that the lowest variable, the variable that indicates the most restraint, was used at least once. 12 out of the 13 variables had a range of 9, which indicates that each variable had each number in the

⁹⁰ ME Wetstein & CL Ostberg, "Strategic Leadership and Political Change on the Canadian Supreme Court: Analyzing the Transition to Chief Justice" (2005) 38:3 *Canadian J of Political Science* 653 at 670.

⁹¹ Marie-Claire Belleau, Rebecca Johnson & Christina Vinters, "Voicing an Opinion: Authorship, Collaboration and the Judgments of Justice Bertha Wilson" (2008) 41 *The Supreme Court L Rev: Osgoode's Annual Constitutional Cases Conference* 53 at 60-61. This measures her entire tenure on the court, which began in 1987.

Likert scale used at least once, including the highest value (10). The exception to this was the variable “Judicial Remit” which only had a range of 6 and a maximum score of 7. The standard deviations continue to be relatively large, which shows a high degree of variation across the Likert scale. The large variation in the standard deviations is not surprising, as each case is adjudicated on its individual merits, and previous cases are often not a predictor of new cases, particularly when measuring across all four *Charter* sections.

Table 3 Pre-9/11 Descriptive Statistics

	N	Min	Max	Mean	Std. Deviation
Judicial Stability	178	1	10	3.84	2.220
Interpretation	178	1	10	3.33	2.160
Majoritarian/Autonomy	178	1	10	1.69	1.650
Judicial Reasoning	178	1	10	3.21	2.208
Activism Threshold	178	1	10	3.35	2.111
Judicial Remit	178	1	7	1.51	1.085
Rhetoric	178	1	10	4.47	2.793
Obiter	178	1	10	3.20	2.368
Comparative Sources	178	1	10	2.52	2.285
Judicial Voices	178	1	10	4.65	3.009
Extent of Decision	178	1	10	4.14	2.976
Legal Background	178	1	10	3.55	2.776
Core Values	178	1	10	4.17	2.419

Overall, when the means of the first twelve indicia (the traditional visions of activism) are combined, a mean score of 3.29 is achieved. In comparison, the variable “core values”, which is the third dimension of activism (Core Values) as created by Cohn and Kremnitzer⁹² has a mean of 4.17. While the means for both groups are still relatively low (they are both below the median measurement of 5), the fact that the “core values” mean

⁹² Cohn & Kremnitzer, *supra* note 19.

is higher than the means recorded in the “traditional visions of activism”, demonstrates that the Court was less apt to adhere to its role as “the guardian of the Constitution” and to the strict protection of Constitutional rights and was relatively more activist than they were when it related to previous legal norms or rules, as set out in the first twelve variables. This is supported throughout the four *Charter* sections measured by the consistent creation of ancillary police powers in the early days of the *Charter*, which often infringed on individual liberties but were justified by the Court in the name of a significant state objective. When measuring each of the variables individually across the four *Charter* sections it is possible to determine both the highest and the lowest mean scores for each of the variables. Overall, each section had the highest mean score in at least two variables, but the lowest mean scores were much more highly concentrated in the mean scores of section 10(b).

Table 4 Table of Means Pre-9/11

Variables	Section 8 Mean	Section 9 Mean	Section 10(b) Mean	Section 24(2) Mean
Judicial Stability	4.07	3.07	4.24	3.61
Interpretation	3.24	3.60	3.11	3.46
Majoritarian/Autonomy	2.37	2.27	1.16	1.33
Judicial Reasoning	3.96	4.33	2.30	2.88
Activism Threshold	3.83	3.80	2.16	3.50
Judicial Remit	1.69	2.27	1.30	1.32
Rhetoric	4.31	4.53	3.76	4.64
<i>Obiter</i>	2.78	3.47	2.95	3.58
Comparative Sources	3.48	1.93	1.95	2.21
Judicial Voices	4.63	3.13	4.57	5.03
Extent of Decision	4.52	4.80	4.89	3.33
Legal Background	4.30	4.60	3.54	2.78
Core Values	5.38	3.93	3.24	3.82

Sections 8 and 9 each had four variables with the highest mean scores, while Section 24(2) had three (“Rhetoric”, “*Obiter*” and “Judicial Voices” and Section 10(b) had two (“Judicial Stability” and “Extent of Decision”). In contrast, Section 10(b) had the lowest mean score on seven out of the thirteen variables, while Section 9 had three (“Judicial Stability”, “Comparative Sources” and “Judicial Stability”), Section 24(2) had two (“Extent of Decision and “Legal Background”) and Section 8 had one (“*Obiter*”). The concentration of low mean scores in Section 10(b), in both the “traditional values” metric and the “Core Values” variable means that the Court generally acted in a manner that was much more restrained and in line with the Constitutional guardianship role it assumed after the enactment of the *Charter* than had happened in any other *Charter* section. This is likely because very few legal tests changed in section 10(b) and the right to counsel rarely required overturning any validly enacted laws or required significant reliance on comparative jurisprudence.

Overall, the pre-9/11 means demonstrate that the Court was acting with a significant amount of judicial restraint, as only one of the variables in one of the *Charter* sections achieved a mean greater than 5 (the halfway point, or median on the Likert scale) and when each *Charter* section was combined none of the variables had a mean greater than 5.

XII. POST- 9/11 DESCRIPTIVE DATA

There were 79 total analyses conducted on each of the Cohn and Kremnitzer variables post 9/11; less than half the number conducted in the pre-9/11 period. The methodological design of this project requires using the entire population of cases, rather than samples of those populations as these cases share a relatively uncommon characteristic and still a large enough population to achieve meaningful results. While some of the *Charter* sections have very small post 9/11 populations, which makes that *Charter* section more susceptible to larger standard deviation, the population is still considered robust. In the post 9/11 population, the ranges are identical to the ranges in the pre-9/11 group with only two exceptions. In the pre-9/11 group, the maximum values for both “Activism Threshold” and “Core Values” were 10, whereas in the post 9/11 population they only go as high as 9. The post 9/11 standard deviations are also quite similar to the pre-

9/11 levels as both show significant variability, a phenomenon to be expected when the ranges are larger.

Table 5 Post 9/11 Descriptive Statistics

		Min	Max	Mean	Std. Deviation
Judicial Stability	79	1	10	3.43	2.146
Interpretation	79	1	10	3.35	2.137
Majoritarian/Autonomy	79	1	10	1.57	1.774
Judicial Reasoning	79	1	10	2.87	1.890
Activism Threshold	79	1	9	3.76	2.191
Judicial Remit	79	1	7	1.47	1.239
Rhetoric	79	1	10	4.75	3.070
Obiter	79	1	10	3.48	2.621
Comparative Sources	79	1	10	1.75	1.480
Judicial Voices	79	1	10	3.92	2.859
Extent of Decision	79	1	10	3.67	2.881
Legal Background	79	1	10	3.05	2.552
Core Values	79	1	9	4.33	2.335

Overall, in the combined data set, the highest mean score was achieved by the variable “Rhetoric” (4.75) while the lowest mean score was “Judicial Remit” (1.47). “Judicial Remit” also had the lowest mean score in the pre-9/11 group, scoring 1.51. This indicates that throughout the entire period since the *Charter*, the Court was very unlikely to expand or go beyond the established jurisdiction of the Court. The range from highest mean to lowest mean is greater than 3 full likert scale point measurements, which demonstrates considerable flexibility in the variables measured. As the pre-9/11 data also shows a 3-point variation in the mean scores it appears that the fluctuation is consistent and that certain variables are more predisposed to activism than others. Once again, the variable “Core Values” (4.33) was higher than the average mean of the twelve “traditional visions of activism” (3.09) and this time, by an even bigger margin, more than a full Likert scale point.

Table 6 Table of Means Post- 9/1

Variables	Section 8 Mean	Section 9 Mean	Section 10(b) Mean	Section 24(2) Mean
Judicial Stability	3.42	3.00	4.25	3.36
Interpretation	2.86	3.00	4.13	3.84
Majoritarian/Autonomy	1.92	2.00	1.25	1.04
Judicial Reasoning	3.39	2.00	3.63	2.24
Activism Threshold	4.39	2.89	2.38	3.52
Judicial Remit	1.83	1.11	1.63	1.44
Rhetoric	3.53	6.22	3.63	5.80
<i>Obiter</i>	2.50	5.11	2.38	4.60
Comparative Sources	2.17	2.11	1.50	1.12
Judicial Voices	3.42	3.00	4.50	4.72
Extent of Decision	4.06	6.22	3.00	2.28
Legal Background	3.33	4.44	3.88	1.72
Core Values	4.42	3.78	4.63	4.40

The post-9/11 mean variables once again show considerable disparity but the highest mean scores were once again quite evenly distributed. Section 10(b) had the most variables achieving the highest scores with four, while sections 8 and 9 both achieved the highest mean scores on three variables and section 24(2) achieving the highest mean score on two variables. In contrast, section 8 and 10(b) tied for the lowest scoring variables with two, while section 9 had five, and section 24(2) had four. The lowest score on any variable for any of the sections was achieved by “Judicial Remit” in Section 9 cases (1.11), while the highest score was obtained by the variables “Rhetoric” and “Extent of Decision”, also in the section analysing section 9 cases (6.22). The means of each of the variables are clustered further apart than any of the individual *Charter* sections, and while there is variation in each *Charter* section, there are no significant outliers. Post-9/11 there is more variability across the different *Charter* sections, as the range from the lowest mean score (1.11) to the highest (6.22) is greater than the range prior to 9/11. As there were so few Section 9 cases after 9/11 it is not surprising that both the largest and the smallest results were achieved, as each case weighs much more in this population than when drawing from samples where there is a larger population size. While descriptive results are important on their own, it is necessary to compare these results in order to achieve the required result of determining whether or not is possible to ascribe any changes to the behaviour of the Court after 9/11.

XIII. PRE-AND POST-9/11 COMPARISONS

Using all the collected data, this section of the paper is able to evaluate the changes in the level of activism across all of the *Charter* sections after 9/11 and will be able to determine whether the changes achieve any level of statistical significance.

Table 7 How Variables Changed Post 9/11

Post 9/11 Variable Behaviour		
Charter Sections	Increase	Decrease
Section 24(2)	5	8
Section 10(b)	8	5
Section 9	4	9
Section 8	2	11
Total	19	33

When comparing all four *Charter* sections, it becomes apparent that there are significant trends in the behaviour of the Supreme Court after the events of 9/11 and that overall, activism decreased in a significant majority (63.5%) of the variable measurements after 9/11 (33/52). This indicates that the Court was speaking with increasing restraint post-9/11, which aligns with a post-terror, increasingly security conscious society as posited by Jochelson and Kramar and Bell.⁹³ Only one of the four sections showed an overall increase in the levels of activism after 9/11 (Section 10(b)), and that was the section with the smallest post 9/11 sample size (8 cases), which means that each of those cases counted for 12.5% of the total post 9/11 measurement and that one case had the potential to skew the results more drastically than in any other section. It is because of the small sample size that the pre-post analysis for section 10(b) is the least robust.

⁹³ Richard Jochelson & Kirsten Kramar, *The Disappearance of Criminal Law: Police Powers and the Supreme Court* (Winnipeg: Fernwood Publishing, 2014) [Jochelson & Kramar]; Colleen Bell, *The Freedom of Security: Governing Canada in the Age of Counterterrorism* (Vancouver: University of British Columbia Press, 2011) [Bell].

Table 8 – Pre and Post – 9/11 Mean Comparison

Variable List	Pre 9/11 Mean	Post 9/11 Mean	Mean Percentage Change
Judicial Stability	3.84	3.43	-10.7%
Interpretation	3.33	3.35	0.6%
Majoritarian/Autonomy	1.69	1.57	-7.1%
Judicial Reasoning	3.21	2.87	-10.6%
Activism Threshold	3.35	3.76	12.2%
Judicial Remit	1.51	1.47	-2.7%
Rhetoric	4.47	4.75	6.3%
Obiter	3.20	3.48	8.8%
Comparative Sources	2.52	1.75	-30.6%
Judicial Voices	4.65	3.92	-15.7%
Extent of Decision	4.14	3.67	-11.4%
Legal Background	3.55	3.05	-14.1%
Core Values	4.17	4.33	3.8%

In eight of the thirteen variables across all four of the *Charter* sections, the overall means on the judicial activism scale decreased after 9/11. Across the majority of variables it is evident that the Court is speaking in more restrained ways since 9/11 and can be considered much less activist than in the earliest days of the *Charter*. The largest shift in the activism score was achieved by the variable “Comparative Sources” which decreased by more than 30% after 9/11. This decrease could be attributed to the increase in domestic constitutional legal decisions available to the Court but is an important finding nonetheless. Others scholars have argued it would stand to reason that with the increase in judicial resources (the availability of the internet, international decisions and scholarship and the number judicial clerks available) that there might have been more reliance on non-binding judicial literature. It is clear from the data however, that this was not the case. It is also possible that the current Court composition prefers to use

more domestic sources, or that in the decisions they have considered since 9/11 that the previous trial judges have relied more exclusively on domestic decisions.

While the mean scores increased in the variables “Rhetoric”, “*Obiter*” and “Core Values”, they did so in small ways, increasing by less than 10% each (6.3%, 8.8%, and 3.8% respectively). The increases in “Rhetoric” and “*Obiter*” are strongly correlated with each other and demonstrate that the Court is more willing to weigh in on the political ramifications of their decisions and refrain from tailoring their decisions narrowly to the case at bar. The small increase in the variable “core values” aligns with the idea of securitization narratives becoming more prevalent and individual rights becoming less of a priority for the Court. The increase in the variable “Interpretation” is so insignificant it is likely due to chance fluctuation. The overall increase in restraint and the decrease in activism levels makes it appear that the Court wants to be seen to be treading more lightly and cautiously, though doing so in longer decisions, cautiously weighing out the ramifications of their verdicts and being cognisant of the political impact of their decisions. After careful examination of the empirical data collected across the four *Charter* sections it is now possible to explain the potential motivations of the Court for describing themselves in a more restrained way after 9/11.

XIV. CONCLUSION

This paper sought to fill a gap in the activism literature by using empirical methodology, specifically a hybrid content analysis, which utilizes both qualitative and quantitative aspects of the method, to define and measure judicial activism in the Canadian Supreme Court. Some scholars have openly argued against the use of empirical analysis in measuring legal behaviour, in some instances saying that the phenomenon is not measurable, and that, even if it is measurable, it is a pointless exercise.⁹⁴ This

⁹⁴ Emmett MacFarlane, “What We’re Talking About When We Talk About Judicial Activism” *Maclean’s* (23 February 2015), online: <<http://www.macleans.ca/politics/what-were-talking-about-when-we-talk-about-judicial-activism/>>. [MacFarlane]; Léonid Sirota, Here be No Dragons (Double Aspect Blog) online: Léonid Sirota <<https://doubleaspectblog.wordpress.com/2015/02/15/here-be-no-dragons/>>

paper challenges those claims and many of its underlying assumptions by using statistical analysis as a means to assess patterns in the elusive, but widely cited, phenomenon of “judicial activism” engaged in by the Supreme Court of Canada.

This paper also sought to demonstrate two key findings: that using new ways to analyse activism will complement and challenge the existing methods for critiquing judicial behaviour and assessing judicial activism, and that the current approaches to understanding complex legal phenomena can be accompanied and supplemented using empirical methodology. In order to achieve this goal of identifying and measuring activism in a new way this paper operationalized and adapted the Cohn and Kremnitzer “multidimensional model of judicial activism” created in 2005 and has applied it to the jurisprudence of the Supreme Court of Canada in the years following the enactment of the *Canadian Charter of Rights and Freedoms* in 1982 and before and after the events of September 11, 2001.⁹⁵ Overall, it was demonstrated that when the four *Charter* sections, used to measure the judicial behaviour of the Court, were analysed together, activism in the Supreme Court of Canada decreased substantially after the events of 9/11. Regardless of the reasoning behind the measured shifts in the levels of activism, it must be noted that these shifts are material in nature, can be measured and recorded and do not rely on mere judgment by the individual recorder. This can have a significant impact on activism studies going forward as it demonstrates that conjecture can be grounded in material and observable reality as opposed to political preferences or ideology. With this new metric with which to measure activism it is possible that the activism discussion can move beyond political biases or attitudinal voting behaviour and become grounded in measurable phenomenon. The Cohn and Kremnitzer model that this paper adapted and applied has the potential to augment both traditional doctrinal analysis and qualitative single case study because it places the decisions of the Court in a broader, more objective social context, whereas traditional activism analyses such as “win/loss” records serve not to explain or situate doctrinal analyses but to

[Sirota, No Dragons]; Léonid Sirota, Purely Hypothetical Dragons (Double Aspect Blog) <<https://doubleaspectblog.wordpress.com/2012/04/10/purely-hypothetical-dragons/>> [Sirota, Hypothetical Dragons]; Fredrick L. Morton & Rainer Knopff, *The Charter Revolution* (Peterborough, ON: Broadview Press 2000) at 13 [Morton & Knopff].

⁹⁵ Cohn & Kremnitzer, *supra* note 19.

question its very foundations. This paper does not suggest that empiricism should usurp black letter legal understandings of judicial activism but instead that content analyses can support doctrinal legal studies.⁹⁶ Empirical and doctrinal analyses are not adversaries and can have a symbiotic relationship, which can ultimately illuminate new answers to pressing legal questions.

The version of empiricism that this paper offers is more descriptive than adversarial in nature and has the potential to complicate and nuance doctrinal conclusions, rather than dismiss them outright. Traditional understandings of activism have suggested that the phenomenon occurs when individuals disagree with ultimate decisions arrived at by the Court and previously there has been no clear definition of activism created to understand how the Court sees itself. The operationalization of the Cohn and Kremnitzer model was able to determine the level of activism or restraint on the Court by undertaking a hybrid form of content analysis and using the Court's own discourse to make an objective measurement as to whether the Court is engaging in activism or restraint. As has been demonstrated throughout this paper, the way that the Court engages with police powers and reconciles those powers with individual liberty and the rights protected in the *Charter* (whether they guard them fastidiously or overrule them easily) that is an important moment in activism and is central to the findings of this paper. The Cohn and Kremnitzer model also allows measurement across the different dimensions in different times across the ancillary police era and demonstrates how the Court can be activist in some areas but restrained in others.

This paper offers four new recommendations based on the lessons learned throughout this process that future empirical judicial activism researchers should consider when undertaking their work. Firstly, it is important to minimize partisan judgments when analysing activism, as frequently activism debates have been synthesized into mere disagreement with a particular judicial decision. The use of strict measuring criteria that have been established prior to undertaking the work is critical to so as to avoid judgment calls later in the research. Using multiple coders to apply the framework, while labour intensive and potentially expensive, can also be extremely beneficial as long as inter-rater reliability has been assured. One of the lessons that was learned throughout the operationalization of

⁹⁶ Hall & Wright, *supra* note 28.

the Cohn and Kremnitzer model was that different individuals will interpret the same criteria differently, if strict parameters are not in place. If this author was going to operationalize the Cohn and Kremnitzer model again, using the same scaling, it would be beneficial to have a second coder to verify the coding scale and scheme to ensure higher levels of validity. Second, it is important that future activism researchers draw on a well-grounded model, which provides meaning and content to the terms activism and restraint. This was one of the reasons that this paper used an adapted version of the Cohn and Kremnitzer model, as concrete parameters for each variable had already been established and it was possible to statistically assess whether or not their metrics actually correlated with measuring activism. This is not to suggest that new research must build off an already existing model, but if a new model is to be operationalized it is key that the terms are well defined and that the model actually measures what is intended.

The third recommendation for future empirical activism scholars is closely related to recommendation two and it is that particular attention should be paid to the phenomenon that is purported to be measured. This seems obvious perhaps but it is imperative that the model that has been developed or operationalized measures something material and empirically observable rather than having the measurements of the model indicate a particular philosophy's desired outcomes. There is a significant difference between the two. The fourth and final recommendation that this paper makes is that any new model should be developed to both complement and complicate previous doctrinal findings rather than developing a method solely to question the legitimacy of a particular legal actor. This paper argues that it is the depoliticization of activism that is of the most importance in empirical work, and this must be ensured through careful model development and execution.

Moving forward, there are several interesting new projects that could be undertaken to further the activism analysis conducted in this paper. One of those projects would be to apply the Cohn and Kremnitzer model separately to each individual judicial opinion (majority, concurrences and dissents) divided by authorship to determine if there are recognisable differences in the level of activism by certain judges. That paper would also allow for a more detailed discussion on the composition of the Court and its diversity of language, appointment process, and previous judicial experience. Another application of the model could be to separate the judgments by

legal tradition to determine if justices from Quebec and the civil legal tradition demonstrate significantly different activism levels than the common law justices. Still another project could break up the Court's cases by judicial era (defined by changes in the Chief Justice) instead of using 9/11. This paper's author would welcome new applications of this operationalization as it would continue to shed new light on the phenomenon of judicial activism in Canada, while remaining non-partisan and empirically objective. It is clear from the results of this paper that the hybrid content analysis methodology offers an alternative account of activism by illustrating a more objectively measurable account of patterns in judicial decision-making (ones that are based on a set of observable, quantifiable criteria, rather than impressionistic and ultimately political, evaluation). The operationalization of the adapted Cohn and Kremnitzer model that this paper undertook has highlighted new ways of analysing activism that both complement and challenge the existing methods for measuring and understanding judicial behaviour, though it is certainly not the only possible measurement tool. This project demonstrated that it is possible to use empirical methodology to shed new light on the way Supreme Courts adjudicate individual rights cases, and the levels of activism that take place in those Courts. This paper challenges current activism scholars around the world to imagine how their own Courts have behaved across the same era and to adopt their own empirical framework of understanding judicial behaviour so that the activism debate can continue to be strengthened and significant cross-jurisdictional comparisons can be made. While there may be jurisdictional limitations of the Cohn and Kremnitzer model (it may not translate well to non-common law countries, for example), it could certainly be adapted for use in countries like the United Kingdom and the United States. Using this adapted version of the Cohn and Kremnitzer model would allow for interesting comparisons and create new comparative constitutional conversations.

XV. APPENDICES

Appendix A: List of Sections Used of the *Constitution Act, 1982 c. 11 (U.K.), Schedule B Part 1, Canadian Charter of Rights and Freedoms*

Legal Rights:

7. 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.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention;

(b) to retain and instruct counsel without delay and to be informed of that right;

Enforcement of Rights:

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a Court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances.

(2) 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.

Appendix B – Section 8 Variable List

Development of Likert Scales for each Cohn and Kremnitzer Indicia

Category 1 – Activism under the Traditional Vision

Judicial Stability – Here it is measured whether the Court is ready to retract from its own or former decisions. When the Court affirms the decisions of all lower Courts this is scored as being the lowest level of activism. When the Court overturns a previous decision and overturns legislation and creates new law, the case is scored as a 10, or the highest level of activism.

The Courts affirm the decisions of both lower Courts = 1

The Courts affirm the decisions of the lower Courts but make any changes to the previous decisions = 2

The Courts overturn a decision made by lower Court but affirms a decision by the appeal Court = 3

The Courts affirm a decision made by the lower Court but overturn a decision made by the appeal Court = 4

The Courts overturn both lower Court decisions = 5

The Courts change a law = 6

The Courts go beyond overturning lower Court decisions and overturn legislation as unconstitutional = 7

The Courts implement new tests or increase or change previously existing tests = 8

The Courts overturn a previous Supreme Court decision but do not create any new law = 9

The Courts overturn a Supreme Court previous decision and overturn legislation and create new law = 10

Interpretation - Does a Court interpret a legal text in possible contradiction with assumed original intent of the *Constitution* or its plain linguistic meaning? The decisions that interpret the law for its original meaning and avoid straying from the protections of the *Charter* will render lower numbers on the activism scale. Courts that use their position and power to interpret legal texts to suit their own intentions, straying from its original meaning, will be seen as highly activist.

The Supreme Court interprets section 8 as one's highest valued *Charter* protection against search and seizure, which offers unremitting protection of individual rights and liberties =1

The majority interprets section 8 as a valued *Charter* protection, but not one that is without limits as prescribed by law =2

The concurring justices discuss the high valued *Charter* protections, however the majority does not =3

The majority interprets the *Charter* as it was intended, but the dissent does not =4

Majority of the Court interprets the *Charter* to their own ends, but still discusses original intent of *Charter* =5

Charter is interpreted by all Court members to their own ends =6

The majority of the Court interprets the *Charter* to their own ends but a dissent holds true to the original interpretation=7

The Supreme Court is open to overriding section 8 *Charter* protection in favour of other interests =8

The Supreme Court interprets section 8 as being easily overridden =9

The Supreme Court interprets section 8 in a way that is contradictory from being a high protection from search and seizure =10

Majoritarianism and Autonomy – Here it is measured whether the Court interferes with policies set by democratic processes and if the Court is willing to supply its own solution and/or policy?

The Court does not interfere with policies set by democratic policies and leaves all legislation alone =1

The Court discusses the constitutionality of legislation, but ultimately upholds it =2

The Court splits on the constitutionality of legislation, but ultimately upholds it =3

The concurring decision would “read down” the legislation to amend the law, but the majority upholds the law =4

The dissent of the Court “reads down” the legislation to amend the law =5

The majority of the Court “reads down” the legislation to amend the law =6

The dissent would strike down legislation, but the majority would not =7

The majority strikes down legislation, the dissent would not have done so =8

The entire Court strikes down legislation = 9

The Court strikes down legislation and applies their own solution =10

Judicial Reasoning: Process/substance – With this indicia it is measured how heavily the Court relies on its decision on strict legal and procedural grounds. Where the Court relies entirely on strict legal or procedural grounds in making a decision the score is a 1. Where the Court relies on open ended legal tests, such as reasonableness based assessments a score of 10 is recorded.

The Court relies entirely on strict legal and procedural grounds = 1

The Court relies entirely on both strict legal and procedural grounds and adopted case law tests = 2

The Court mostly relies on legal and procedural grounds, but discusses an open ended test=3

The Court relies more on legal and procedural grounds, but also uses an open ended test = 4

The Court relies equally on legal and procedural grounds and open ended tests = 5

The dissent uses more open ended tests than legal and procedural grounds, but the majority does not = 6

The majority uses more open ended tests than legal and procedural grounds, but the dissent does not = 7

The Court uses legal and procedural grounds only to inform their reasons for using open ended tests =8

The Court uses legal and procedural grounds to create a new open ended test =9

The Court relies entirely on open ended tests = 10

Threshold Activism - This variable measured the extent to which the Court was willing to forgive threshold hurdles. In this context, a rigorous application of threshold issues such as the reasonable expectation of privacy as a gateway to accessing s 8 of the *Charter* would score a 1 (the reasonable expectation of privacy is the main threshold issue in s 8 cases). Where the Court found reasons to allow for a bypass of reasonable expectation of privacy, where previous cases have not, the case is scored as a 10.

Courts entirely defer to the threshold issue - reasonable expectation of privacy =1

The Court interprets reasonable expectation of privacy as important, but not always the most important factor =2

The threshold, or one's reasonable expectation of privacy, is interpreted as being of substantial importance but the Court imposes limits on it =3

The majority of the Court interprets reasonable expectation of privacy as exceedingly important, however the dissent varies from this view=4

There is no discussion of reasonable expectation of privacy or any thresholds =5

The dissent interprets reasonable expectation of privacy as incredibly important; however, the majority feels it is not above being overridden=6

Reasonable expectation of privacy is seen by the Court as being a consideration, but not an important one =7

Reasonable expectation of privacy is deemed to be unimportant in the case at bar=8

Reasonable expectation of privacy is almost entirely overlooked in favour of other doctrines =9

The Court entirely ignores reasonable expectation of privacy =10

Judicial Remit - This indicia asks whether the Court's decision expands or redefines the jurisdiction of the Court. When the decision did not expand or redefine the jurisdiction of the Court, the case was scored as a 1. A decision that expanded the judiciary's remit into areas previously immune from intervention was scored as a 10.

The decision does not expand or redefine the jurisdiction of the Court =1

The dissent would slightly redefine the jurisdiction of the Court = 2

The dissent would slightly expand the jurisdiction of the Court = 3

The decision does not expand the jurisdiction of the Court, but slightly redefines it = 4

The decision does not expand the Court's jurisdiction, but somewhat redefines it = 5

The decision does not expand the Court's jurisdiction, but redefines it entirely = 6

The decision slightly expands the jurisdiction of the Court and slightly redefines it = 7

The decision slightly expands jurisdiction and entirely redefines it = 8

The majority entirely expands and redefines the jurisdiction, but the dissent would not = 9

The decision entirely redefines and expands the jurisdiction of the Court = 10

Rhetoric – This indicia asks whether judicial decisions are used as platforms for expression of broader positions and values or whether the use of rhetoric was restricted to the explication of legal principles. The absence of legal rhetoric (usually correlating with shorter decisions) scored as a 1. High levels of extra-legal rhetoric combined with long discussions of political implications were scored at 10.

No rhetoric by the Courts and a very short decision = 1

Minimal rhetoric, still a fairly short decision = 2

Some expression of broad positions and values, but still a relatively short decision = 3

Substantial expression of values and positions, decision is longer than 30 paragraphs = 4

The Court engages in brief discussion of non-legal principles as well as potential implications = 5

The decision begins to become more about positions than law = 6

A lengthy decision (greater than 50 paragraphs); substantial discussion on non-legal issues = 7

A long decision; broad positions as well as political ideology discussed = 8

A very long decision (greater than 90 paragraphs) with substantial expression of non-legal principles and political values = 9

Extremely long decision (greater than 100 paragraphs) and copious amounts of rhetoric used = 10

Obiter Dicta – This indicia asks how far does the Court expand its opinion beyond the legal requirements of the specific case? When the Court did not delineate any *obiter* the case scored a 1. When the Court used extensive amounts of *obiter* and discussed issues not relevant to case a 10 was recorded.

Court does not discuss its opinion at all, no *obiter* = 1

Court does not expand its opinion beyond the case at bar = 2

Court briefly discusses potential ramifications of decision, but stays neutral = 3

Court discusses potential ramifications of decision at length, but stays neutral = 4

Court briefly discusses ramifications and appears to be expressing an opinion =5

Opinion clearly being expressed, ramifications expressed = 6

Ramifications of decision discussed in detail, opinions extend beyond the case at bar =7

Court uses substantial amounts of *obiter* = 8

Court uses substantial amounts of *obiter* and discusses issues not relevant to the case at bar = 9

Court uses extensive amounts of *obiter* and discusses issues not relevant to case at bar = 10

Reliance on Comparative Sources - Here it was examined how extensively the Court relied on foreign sources that are not legally binding in the domestic sphere. Where the Court used domestic law exclusively a 1 was scored. When the Court used comparative sources to create new legal conceptions with extensive comparative referencing the case scored a 10.

The Court uses domestic law exclusively = 1

The Court makes minimal references to the UK's common law or texts written by non-judges to understand law, not to change it = 2

Use of American law to understand law but not to change it, with minimal reference = 3

Use of comparative law to justify existing domestic laws, still fairly minimal reference = 4

Use of comparative law justifying existing domestic laws, extensive reference = 5

Use of comparative law to justify changing existing laws, minimal reference = 6

Use of comparative law to justify changing existing laws, extensive reference = 7

Use of comparative law to create new legal tests = 8

Use of comparative law to create new laws, minimal reference = 9

Use of comparative law to create new laws, extensive reference = 10

Judicial Voices - Here it was examined the extent of other judicial decisions besides the majority decision. A unanimous decision scored a 1. On occasions where there were two concurring and two dissenting judgments (the most judicial voices seen) the case scored a 10.

A unanimous decision = 1

One concurring decision with no additions to the overall law = 2

One concurring decision adding other law = 3

Two concurring decisions = 4

Two concurring decisions adding other law = 5

One dissent or three concurring decisions = 6

One concurring decision and one dissenting opinion = 7

One concurring decision adding other law and one dissent = 8

Two concurring judgments and one dissenting judgment or two dissenting judgments = 9

Two concurring judgments and two dissenting opinions = 10

Extent of Decision – Here it was examined whether the Court’s ruling expressly applied to a single or specified set of circumstances or whether the law that resulted had broad implications for larger sections of society. If the Court simply applied the legal rules the case scored a 1. Where the Court created a new standard that affected broader populations the case scored a 10.

The Court simply applies the rules set forth in the criminal code = 1

When the Courts narrow their application to the case at bar = 2

Application to case at bar, discussion on potential future standing = 3

Application to one or two other cases = 4

Application to a few cases as well as discussion on future standing = 5

Creation of a new standard which applies only to case at bar = 6

Creation of a new standard which applies to a few cases = 7

Creation of a new standard with a broad scope = 8

Creation of new powers then used in later cases = 9

Creation of a new standard that is then adopted into the common law = 10

Legal Background – Here it was examined whether the legal framework on the basis of which the Court made its decision were inclusive and clear or whether the rules concerned were vague, complex, self-contradictory or incomplete. The absence of a clear rule essentially requires the judiciary to extend its decision beyond the former case law. Once the Court does not or cannot abstain from deciding decision making in the later cases will almost necessarily involve some creative judicial expertise and will thus be activist.

Legal framework is clear, rules are clear, decision does not extend beyond prior case law = 1

Legal framework is clear, rules are clear, decision slightly extends beyond prior case law = 2

Legal framework is clear, rules are clear, decision extends well beyond prior case law = 3

Legal framework is clear, rules are not clear, but decision does not extend beyond prior case law = 4

Legal framework is clear, rules are not clear and decision extends beyond prior case law = 5

- No clear framework or rules, but decision does not extend beyond case at bar =6
- No clear framework or rules, Court adopts rules from other areas of law =7
- No clear framework or rules, Court makes new rules = 8
- No clear framework or rules, Court makes new rules that override old rules =9
- No clear framework or rules, Court makes new framework for analysis = 10

Category 3 – Activism and the Protection of Core Values

Variables: Core Values Activism

Intervention and value content – Here it was examined if the subject matter under examination was highly value laden in its bearing on democratic principles and human liberties accepted domestically. Where the case dealt with important human rights issues and the Court appeared to assert its guardianship of the *Constitution* the case scored a 1. Where the Court declined to discuss the constitutional values at stake or abdicated their guardianship, the case scored a 10.

- Unanimously high value context, *Charter* protections paramount = 1
- Majority discusses high value context, *Charter* protections paramount = 2
- Majority discusses high value context, *Charter* extremely important dissent does not = 3
- In a concurring statement, a justice discusses high value context = 4
- No value context discussion, but *Charter* is interpreted purposively = 5
- Majority discusses value context, but determines that it is not above being overridden = 6
- Dissent discusses high value context, but majority does not = 7
- Little mention of values, *Charter* discussion easily overridden = 8
- No discussion of value context, brief discussion of liberties, mostly technical decision = 9
- No one discusses value context at all, technical decision, not about liberties = 10

Appendix C – Section 8 Case List

- Aubry v Éditions Vice-Versa*, [1998] 1 SCR 591.
- Baron v Canada*, [1993] 1 SCR 416.
- British Columbia Securities Commission v Branch*, [1995] 2 SCR 3.
- Canada (Combines Investigation Acts, Director of Investigation and Research) v Southam Inc*, [1984] 2 SCR 145.

- Canada Inc v Quebec (Attorney General); Tabah v Quebec (Attorney General)*, [1994] 2 SCR 339.
- Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421.
- Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1991] 3 SCR 480.
- CanadianOxyChemicals Ltd v Canada (Attorney General)*, [1999] 1 SCR 743.
- Chatterjee v Ontario (Attorney General)*, [2009] 1 SCR 624.
- Cloutier v Langlois*, [1990] 1 SCR 158.
- Comité paritaire de l'industrie de la chemise v Potash; Comité paritaire de l'industrie de la chemise v Sélection Milton*, [1994] 2 SCR 406.
- Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403.
- Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053.
- Del Zotto v Canada*, [1999] 1 SCR 3.
- Dersch v Canada (Attorney General)*, [1990] 2 SCR 1505.
- Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326.
- Ell v Alberta*, [2003] 1 SCR 857.
- Figuroa v Canada (Attorney General)*, [2003] 1 SCR 912.
- Gosselin v Quebec (Attorney General)*, [2002] 4 SCR 429.
- Hill v Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129.
- Kourtesis v Canada (Minister of National Revenue - MNR)*, [1993] 2 SCR 5.
- Knox Contracting Ltd v Canada*, [1990] 2 SCR 338.
- Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, [2002] 3 SCR 209.
- Lavigne v Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773.
- Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120.
- Michaud v Quebec (Attorney General)*, [1996] 3 SCR 3.
- Maranda v Richer*, [2003] 3 SCR 193.
- Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97.

Proulx v Quebec (Attorney General), [2001] 3 SCR 9.

Quebec (Attorney General) v Laroche, [2002] 3 SCR 708.

Québec Inc v Quebec (Régie des permis d'alcool), [1996] 3 SCR 919.

R v AM, [2008] 1 SCR 569.

R v Araujo, [2000] 2 SCR 992.

R v Arp, [1998] 3 SCR 339.

R v Asante-Mensah, [2003] 2 SCR 3.

R v Bartle, [1994] 3 SCR 173.

R v Beare; *R v Higgins*, [1987] 2 SCR 387.

R v Beaulieu, [2010] 1 SCR 248.

R v Belnavis, [1997] 3 SCR 341.

R v Bernshaw, [1994] 1 SCR 254.

R v Boersma, [1994] 2 SCR 488.

R v Borden, [1994] 3 SCR 145.

R v Buhay, [2003] 1 SCR 631.

R v Campbell, [2011] SCC 32.

R v Caslake, [1998] 1 SCR 51.

R v Chaisson, [2006] 1 SCR 415.

R v Chow, [2005] 1 SCR 384.

R v CIP Inc, [1992] 1 SCR 843.

R v Clayton, [2007] 2 SCR 725.

R v Clement, [1996] 2 SCR 289.

R v Colarusso, [1994] 1 SCR 20.

R v Collins, [1987] 1 SCR 265.

R v Cook, [1998] 1 SCR 1113.

R v Cornell, [2010] 2 SCR 142.

R v Curragh Inc, [1997] 1 SCR 537.

R v Debot, [1989] 2 SCR 1140.

R v Dersch, [1993] 3 SCR 768.

R v Duarte, [1990] 1 SCR 30.

R v Duguay, [1989] 1 SCR 93.

R v Durette, [1994] 1 SCR 469.

R v Dymont, [1988] 2 SCR 417.

R v Edwards, [1996] 1 SCR 128.

R v Erickson, [1993] 2 SCR 649.

R v Evans, [1996] 1 SCR 8.

R v Feeney, [1997] 2 SCR 13.

R v Fitzpatrick, [1995] 4 SCR 154.

R v Fliss, [2002] 1 SCR 535.

R v Garofoli, [1990] 2 SCR 1421.

R v Généreux, [1992] 1 SCR 259.

R v Genest, [1989] 1 SCR 59.

R v Golden, [2001] 3 SCR 679.

R v Goldhart, [1996] 2 SCR 463.

R v Gomboc, [2010] 3 SCR 211.

R v Grant, [1993] 3 SCR 223.

R v Grant, [2009] 2 SCR 353.

R v Greffe, [1990] 1 SCR 755.

R v Hamill, [1987] 1 SCR 301.

R v Hape, [2007] 2 SCR 292.

R v Harrison, [2009] 2 SCR 494.

R v Heywood, [1994] 3 SCR 761.

R v Hufsky, [1988] 1 SCR 621.

R v Jacoy, [1988] 2 SCR 548.

R v Jacques, [1996] 3 SCR 312.

R v Jarvis, [2002] 3 SCR 757.

R v Jones, [1986] 2 SCR 284.

R v Kang-Brown, [2008] 1 SCR 456.

- R v Kokesch*, [1990] 3 SCR 3.
R v Lachance, [1990] 2 SCR 1490.
R v Ladouceur, [1990] 1 SCR 1257.
R v Law, [2002] 1 SCR 227.
R v Loewen, [2011] SCC 21.
R v MRM, [1998] 3 SCR 393.
R v Maccooh, [1993] 2 SCR 802.
R v Mann, [2004] 3 SCR 59.
R v McKarris, [1996] 2 SCR 287.
R v McKinlay Transport Ltd, [1990] 1 SCR 627.
R v Mellenthin, [1992] 3 SCR 615.
R v Meltzer, [1989] 1 SCR 1764.
R v Mills, [1986] 1 SCR 863.
R v Mills, [1999] 3 SCR 668.
R v Monney, [1999] 1 SCR 652.
R v Morelli, [2010] 1 SCR 253.
R v National Post, [2010] 1 SCR 477.
R v Nolet, [2010] 1 SCR 851.
R v O'Connor, [1995] 4 SCR 411.
R v Osolin, [1993] 4 SCR 595.
R v Patrick, [2009] 1 SCR 579.
R v Patriquen, [1995] 4 SCR 42.
R v Pires; R v Lising, [2005] 3 SCR 343.
R v Plant, [1993] 3 SCR 281.
R v Pohoretsky, [1987] 1 SCR 945.
R v RJS, [1995] 1 SCR 451.
R v Rodgers, [2006] 1 SCR 554.
R v SAB, [2003] 2 SCR 678.
R v Scott, [1990] 3 SCR 979.
R v Sharpe, [2001] 1 SCR 45.
R v Shearing, [2002] 3 SCR 33.
R v Shepherd, [2009] 2 SCR 527.
R v Shoker, [2006] 2 SCR 399.
R v Silveira, [1995] 2 SCR 297.
R v Simmons, [1988] 2 SCR 495.
R v Sinclair, [2010] 2 SCR 310.
R v Solomon, [1997] 3 SCR 696.
R v Stillman, [1997] 1 SCR 607.
R v Strachan, [1988] 2 SCR 980.
R v Tessier, [1991] 3 SCR 687.
R v Tessling, [2004] 3 SCR 432.
R v Therens, [1985] 1 SCR 613.
R v Thompson, [1990] 2 SCR 1111.
R v Wholesale Travel Group Inc, [1991] 3 SCR 154.
R v Wiggins, [1990] 1 SCR 62.
R v Wijesinha, [1995] 3 SCR 422.
R v Wiley, [1993] 3 SCR 263.
R v Wilson, [1990] 1 SCR 1291.
R v Wise, [1992] 1 SCR 527.
R v Wong, [1990] 3 SCR 36.
R v Yorke [1993] 3 SCR 647.
Reference re Assisted Human Reproduction Act, [2010] 3 SCR 457.
Reference re Motor Vehicle Act (British Columbia) S 94(2), [1985] 2 SCR 486.
RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199.

<i>Ruby v Canada (Solicitor General)</i> , [2002] 4 SCR 3.	<i>United States of America v Dynar</i> , [1997] 2 SCR 462.
<i>Schreiber v Canada (Attorney General)</i> , [1998] 1 SCR 841.	<i>United States of America v Kwok</i> , [2001] 1 SCR 532.
<i>Smith v Canada (Attorney General)</i> , [2001] 3 SCR 902.	<i>Weatherall v Canada (Attorney General)</i> , [1993] 2 SCR 872.
<i>Starr v Holden</i> , [1990] 1 SCR 1366.	<i>Winnipeg Child and Family Services v KLW</i> , [2000] 2 SCR 519.
<i>Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)</i> , [1990] 1 SCR 425.	<i>Vancouver (City) v Ward</i> , [2010] SCC 27.

Appendix D – Section 24(2) Variable List

Category 1 – Activism under the Traditional Vision

Judicial Stability – Here it was measured whether the Court was ready to retract from its own or former decisions. When the Court affirms the decisions of all lower Courts this is scored as being the lowest level of activism. When the Court overturns a previous decision and overturns legislation and creates new law, the case is scored as a 10, or the highest level of activism.

- The Courts affirm the decisions of both lower Courts = 1
- The Courts affirm the decisions of the lower Courts but make any changes to the previous decisions = 2
- The Courts overturn a decision made by lower Court but affirms a decision by the appeal Court = 3
- The Courts affirm a decision made by the lower Court but overturn a decision made by the appeal Court = 4
- The Courts overturn both lower Court decisions = 5
- The Courts change a law = 6
- The Courts go beyond overturning lower Court decisions and overturn legislation as unconstitutional = 7
- The Courts implement new tests or increase or change previously existing tests = 8
- The Courts overturn a previous Supreme Court decision but do not create any new law = 9
- The Courts overturn a Supreme Court previous decision and overturn legislation and create new law = 10

Interpretation – Does a Court interpret a legal text in possible contradiction with assumed original intent of the *Constitution* or its plain linguistic meaning? The decisions that interpret the law for its original meaning and avoid straying from the protections of the *Charter* will render lower numbers on the activism scale. Courts that use their position and power to interpret legal texts to suit their own intentions, straying from its original meaning, will be seen as highly activist.

The Supreme Court interprets section 24(2) as the safeguard against illegally obtained evidence and an important *Charter* protection =1

The majority interprets section 24(2) as a valued *Charter* protection, but not one that is without limits as prescribed by law =2

The concurring justices discuss the high valued *Charter* protections, however the majority does not =3

The majority interprets the *Charter* as it was intended, but the dissent does not =4

Majority of the Court interprets the *Charter* to their own ends, but still discusses original intent of *Charter* =5

Charter is interpreted by all Court members to their own ends =6

The majority of the Court interprets the *Charter* to their own ends but a dissent holds true to the original interpretation=7

The Supreme Court is open to overriding section 24(2) *Charter* protection in favour of other interests =8

The Supreme Court interprets section 24(2) as being easily overridden =9

The Supreme Court interprets section 24(2) in a way that is contradictory from being a high protection from illegally obtained evidence =10

Majoritarianism and Autonomy – Here it is measured whether the Court interferes with policies set by democratic processes and if the Court is willing to supply its own solution and/or policy?

The Court does not interfere with policies set by democratic policies and leaves all legislation alone =1

The Court discusses the constitutionality of legislation, but ultimately upholds it =2

The Court splits on the constitutionality of legislation, but ultimately upholds it =3

The concurring decision would “read down” the legislation to amend the law, but the majority upholds the law =4

The dissent of the Court “reads down” the legislation to amend the law =5

The majority of the Court “reads down” the legislation to amend the law =6

The dissent would strike down legislation, but the majority would not =7

The majority strikes down legislation, the dissent would not have done so =8

The entire Court strikes down legislation = 9

The Court strikes down legislation and applies their own solution =10

Judicial Reasoning: Process/substance – With this indicia it was measured how heavily the Court relies on strict legal and procedural grounds. Where the Court relies entirely on strict legal or procedural grounds in making a decision the case scored a 1. When the Court relies on open ended legal tests, such as reasonableness, the case scores a 10.

The Court relies entirely on strict legal and procedural grounds = 1

The Court relies entirely on both strict legal and procedural grounds and adopted case law tests = 2

The Court mostly relies on legal and procedural grounds, but discusses an open ended test =3

The Court relies more on legal and procedural grounds, but also uses an open ended test = 4

The Court relies equally on legal and procedural grounds and open ended tests = 5

The dissent uses more open ended tests than legal and procedural grounds, but the majority does not = 6

The majority uses more open ended tests than legal and procedural grounds, but the dissent does not = 7

The Court uses legal and procedural grounds only to inform their reasons for using open ended tests =8

The Court uses legal and procedural grounds to create a new open ended test =9

The Court relies entirely on open ended tests = 10

Threshold Activism – Here, it was measured the extent to which the Court was willing to forgive threshold hurdles. In this context, a rigorous application of threshold issue (in this section whether or not there is a temporal connection between the *Charter* violation and the remedy as outlined in s 24(2) of the *Charter*) would score a 1 (this is the main threshold issue in s 24(2) cases). Where the Court found reasons to allow for a bypass of the temporal connection, where previous cases have not, the case scored as a 10.

Courts entirely defer to the threshold issue – temporal connection =1

The Court interprets the temporal connection as important, but not always the most important factor =2

The temporal connection threshold is interpreted as being of substantial importance but the Court imposes limits on it =3

The majority of the Court interprets the temporal connection as exceedingly important, however the dissent varies from this view =4

There is no discussion of any thresholds =5

The dissent interprets the temporal connection as incredibly important; however, the majority feels it is not above being overridden =6

The temporal connection is seen by the Court as being a consideration, but not an important one =7

The temporal connection is deemed to be unimportant in the case at bar =8

The temporal connection is almost entirely overlooked in favour of other doctrines =9

The Court entirely ignores whether or not there is a threshold or temporal connection=10

Judicial Remit – This indicia asks whether the Court’s decision expands or redefines the jurisdiction of the Court. When the decision did not expand or redefine the jurisdiction of the Court, the case scored a 1. A decision that expanded the judiciary’s remit into areas previously immune from intervention was scored as a 10.

The decision does not expand or redefine the jurisdiction of the Court =1

The dissent would slightly redefine the jurisdiction of the Court = 2

The dissent would slightly expand the jurisdiction of the Court = 3

The decision does not expand the jurisdiction of the Court, but slightly redefines it =4

The decision does not expand the Court’s jurisdiction, but somewhat redefines it =5

The decision does not expand the Court’s jurisdiction, but redefines it entirely =6

The decision slightly expands the jurisdiction of the Court and slightly redefines it=7

The decision slightly expands jurisdiction and entirely redefines it =8

The majority entirely expands and redefines the jurisdiction, but the dissent would not =9

The decision entirely redefines and expands the jurisdiction of the Court = 10

Rhetoric – This indicia asks whether judicial decisions are used as platforms for expression of broader positions and values or whether the use of rhetoric was restricted to the explication of legal principles. The absence of legal rhetoric (usually correlating with shorter decisions) scored as a 1. High levels of extra-legal rhetoric combined with long discussions of political implications were scored as a 10.

No rhetoric by the Courts and a very short decision = 1

Minimal rhetoric, still a fairly short decision = 2

Some expression of broad positions and values, but still a relatively short decision = 3

Substantial expression of values and positions, decision is longer than 30 paragraphs = 4

The Court engages in brief discussion of non-legal principles as well as potential implications =5

The decision begins to become more about positions than law = 6

A lengthy decision (greater than 50 paragraphs); substantial discussion on non-legal issues =7

A long decision; broad positions as well as political ideology discussed =8

A very long decision (greater than 90 paragraphs) with substantial expression of non-legal principles and political values =9

Extremely long decision (greater than 100 paragraphs) and copious amounts of rhetoric used =10

Obiter Dicta - This indicia asks how far does the Court expand its opinion beyond the legal requirements of the specific case? When the Court did not delineate any *obiter* the case scored a 1. When the Court used extensive amounts of *obiter* and discussed issues not relevant to case a 10 was recorded.

Court does not discuss its opinion at all, no *obiter* = 1

Court does not expand its opinion beyond the case at bar = 2

Court briefly discusses potential ramifications of decision, but stays neutral = 3

Court discusses potential ramifications of decision at length, but stays neutral = 4

Court briefly discusses ramifications and appears to be expressing an opinion =5

Opinion clearly being expressed, ramifications expressed =6

Ramifications of decision discussed in detail, opinions extend beyond the case at bar =7

Court uses substantial amounts of *obiter* = 8

Court uses substantial amounts of *obiter* and discusses issues not relevant to the case at bar = 9

Court uses extensive amounts of *obiter* and discusses issues not relevant to case at bar = 10

Reliance on Comparative Sources - Here, it was examined how extensively the Court relied on foreign sources that are not legally binding in the domestic sphere. Where the Court used domestic law exclusively a 1 was scored. When the Court used comparative sources to create new legal conceptions with extensive comparative a 10 was scored.

The Court uses domestic law exclusively = 1

The Court makes minimal references to the UK's common law or texts written by non-judges to understand law, not to change it = 2

Use of American law to understand law but not to change it, with minimal reference = 3

Use of comparative law to justify existing domestic laws, still fairly minimal reference = 4

Use of comparative law justifying existing domestic laws , extensive reference = 5

Use of comparative law to justify changing existing laws, minimal reference = 6

Use of comparative law to justify changing existing laws, extensive reference = 7

Use of comparative law to create new legal tests = 8

Use of comparative law to create new laws, minimal reference = 9

Use of comparative law to create new laws, extensive reference = 10

Judicial Voices – Here the extent of other judicial decisions besides the majority decision was examined. A unanimous decision scored a 1. On occasions where there were two concurring and two dissenting judgments (the most judicial voices seen) the case scored a 10.

A unanimous decision = 1

One concurring decision with no additions to the overall law = 2

One concurring decision adding other law = 3

Two concurring decisions = 4

Two concurring decisions adding other law = 5

One dissent or three concurring decisions = 6

One concurring decision and one dissenting opinion = 7

One concurring decision adding other law and one dissent = 8

Two concurring judgments and one dissenting judgment or two dissenting judgments = 9

Two concurring judgments and two dissenting opinions = 10

Extent of Decision – Here it was examined whether the Court's ruling expressly applied to a single or specified set of circumstances or whether the law that resulted had broad implications for larger sections of society. If the Court simply applied the legal rules the case scored a 1. Where the Court created a new standard that affected broader populations the case scored a 10.

The Court simply applies the rules set forth in the criminal code = 1

When the Courts narrow their application to the case at bar = 2

Application to case at bar, discussion on potential future standing = 3

Application to one or two other cases = 4

Application to a few cases as well as discussion on future standing = 5

Creation of a new standard which applies only to case at bar = 6

Creation of a new standard which applies to a few cases = 7

Creation of a new standard with a broad scope = 8

Creation of new powers then used in later cases = 9

Creation of a new standard that is then adopted into the common law = 10

Legal Background – Here it was examined whether the legal framework on the basis of which the Court made its decision were inclusive and clear or whether the rules concerned were vague, complex, self-contradictory or incomplete. The absence of a clear rule essentially requires the judiciary to extend its decision beyond the former case law. Once the Court does not or cannot abstain from deciding decision making in the later cases will almost necessarily involve some creative judicial expertise and will thus be activist.

Legal framework is clear, rules are clear, decision does not extend beyond prior case law = 1

Legal framework is clear, rules are clear, decision slightly extends beyond prior case law = 2

Legal framework is clear, rules are clear, decision extends well beyond prior case law =3

Legal framework is clear, rules are not clear, but decision does not extend beyond prior case law =4

Legal framework is clear, rules are not clear and decision extends beyond prior case law =5

No clear framework or rules, but decision does not extend beyond case at bar =6

No clear framework or rules, Court adopts rules from other areas of law =7

No clear framework or rules, Court makes new rules = 8

No clear framework or rules, Court makes new rules that override old rules =9

No clear framework or rules, Court makes new framework for analysis = 10

Category 3 – Activism and the Protection of Core Values

Variables: Core Values Activism

Intervention and value content – Here it was examined if the subject matter under examination was highly value laden in its bearing on democratic principles and human liberties accepted domestically. Where the case dealt with important human rights issues and the Court appeared to assert its guardianship of the Constitution the case scored a 1. Where the Court declined to discuss the constitutional values at stake, the case scored a 10.

Unanimously high value context, *Charter* protections paramount =1

Majority discusses high value context, *Charter* protections paramount = 2

Majority discusses high value context, *Charter* extremely important dissent does not=3

In a concurring statement, a justice discusses high value context =4

No value context discussion, but *Charter* is interpreted purposively =5

Majority discusses value context, but determines that it is not above being overridden =6

Dissent discusses high value context, but majority does not =7

Little mention of values, *Charter* discussion easily overridden =8

No discussion of value context, brief discussion of liberties, mostly technical decision =9

No one discusses value context at all, technical decision, not about liberties= 10

Appendix E – Section 24(2) Case List

<i>Clarkson v The Queen</i> , [1986] 1 SCR 383	<i>R v Cook</i> , [1998] 2 SCR 597
<i>Mooring v Canada (National Parole Board)</i> , [1996] 1 SCR 75	<i>R v Cornell</i> , 2010 SCC 31
<i>Proulx v Quebec (Attorney General)</i> , [2001] 3 SCR 9	<i>R v Debot</i> , [1989] 2 SCR 1140
<i>R v A.M.</i> , [2008] 1 SCR 569	<i>R v Dersch</i> , [1993] 3 SCR 768
<i>R v Arp</i> , [1998] 3 SCR 339	<i>R v Duarte</i> , [1990] 1 S.C.R. 30
<i>R v Bartle</i> , [1994] 3 S.C.R. 173	<i>R v Duguay</i> , [1989] 1 SCR 93
<i>R v Beaulieu</i> , [2010] SCC 7	<i>R v Dymont</i> , [1988] 2 SCR 417
<i>R v Belnavis</i> , [1997] 3 SCR 341	<i>R v Edwards</i> , [1996] 1 SCR 128
<i>R v Black</i> , [1989] 2 SCR 138	<i>R v Elshaw</i> , [1991] 3 SCR 24
<i>R v Borden</i> , [1994] 3 SCR 145	<i>R v Evans</i> , [1993] 3 SCR 653
<i>R v Brown</i> , [2002] 2 SCR 185	<i>R v Evans</i> , [1991] 1 SCR 869
<i>R v Broyles</i> , [1991] 3 SCR 595	<i>R v Feeney</i> , [1997] 2 SCR 13
<i>R v Brydges</i> , [1990] 1 SCR 190	<i>R v Fliss</i> , [2002] 1 SCR 535
<i>R v Buhay</i> , [2003] 1 SCR 631	<i>R v Garofoli</i> , [1990] 2 S.C.R. 1421
<i>R v Burlingham</i> , [1995] 2 SCR 206	<i>R v Généreux</i> , [1992] 1 SCR 259
<i>R v Calder</i> , [1996] 1 SCR 660	<i>R v Genest</i> , [1989] 1 SCR 59
<i>R v Caslake</i> , [1998] 1 SCR 51	<i>R v Goldhart</i> , [1996] 2 SCR 463
<i>R v Clayton</i> , 2007 SCC 32	<i>R v Grant</i> , [1993] 3 SCR 223
<i>R v Cobham</i> , [1994] 3 SCR 360	<i>R v Grant</i> , 2009 SCC 32
<i>R v Colarusso</i> , [1994] 1 SCR 20	<i>R v Greffe</i> , [1990] 1 SCR 755
<i>R v Collins</i> , [1987] 1 SCR 265	<i>R v Hamill</i> , [1987] 1 SCR 301
	<i>R v Hape</i> , [2007] 2 SCR 292
	<i>R v Harper</i> , [2004] 1 SCR 827
	<i>R v Harrison</i> , 2009 SCC 34

- R v Hebert*, [1990] 2 SCR 151
R v Hynes, [2001] 3 SCR 623
R v I. (L. R.) and T. (E.), [1993] 4 SCR 504
R v Jacoy, [1988] 2 SCR 548
R v Jacques, [1996] 3 SCR 312
R v Jarvis, [2002] 3 SCR 757
R v Kang-Brown, [2008] 1 SCR 456
R v Kokesch, [1990] 3 SCR 3
R v Ladouceur, [1990] 1 SCR 1257
R v Latimer, [1997] 1 SCR 217
R v Law, 2002 SCC 10
R v Ling, [2002] 3 SCR 814
R v M.R.M., [1998] 3 SCR 393
R v Mann, [2004] 3 SCR 59
R v Manninen, [1987] 1 SCR 1233
R v Matheson, [1994] 3 SCR 328
R v McCrimmon, [2010] 2 SCR 402
R v Mellenthin, [1992] 3 SCR 615
R v Monney, [1999] 1 SCR 652
R v Morelli 2010 SCC 8
R v Nolet 2010 SCC 24
R v Orbanski; R v Elias, [2005] 2 SCR 3
R v Plant, [1993] 3 SCR 281
R v Pohoretsky, [1987] 1 SCR 945
R v Pozniak, [1994] 3 SCR 310
R v Prosper, [1994] 3 SCR 236
R v R.J.S., [1995] 1 SCR 451
R v Ross, [1989] 1 SCR 3
R v Schmautz, [1990] 1 SCR 398
R v Silveira, [1995] 2 SCR 297
R v Simmons, [1988] 2 SCR 495
R v Sinclair 2010 SCC 35
R v Singh 2007 SCC 48
R v Smith, [1987] 1 SCR 1045
R v Smith, [1992] 2 SCR 915
R v Stillman, [1997] 1 SCR 607
R v Strachan, [1988] 2 SCR 980
R v Suberu, 2009 SCC 33
R v Terry, [1996] 2 SCR 207
R v Therens, [1985] 1 SCR 613
R v Thompson, [1990] 2 SCR 1111
R v Tremblay, [1993] 2 SCR 932
R v Wijesinha, [1995] 3 SCR 422
R v Wiley, [1993] 3 SCR 263
R v Wise, [1992] 1 SCR 527
R v Wittwer, [2008] 2 SCR 235
R v Wong, [1990] 3 SCR 36
Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission) [1990] 1 SCR 425

Appendix F - Section 10(b) Variable List

Category 1 – Activism under the Traditional Vision

Judicial Stability – Here it was measured whether the Court is ready to retract from its own or former decisions. When the Court affirms the decisions

of all lower Courts this is scored as being the lowest level of activism. When the Court overturns a previous decision and overturns legislation and creates new law, the score of the case was a 10, or the highest level of activism.

The Courts affirm the decisions of both lower Courts = 1

The Courts affirm the decisions of the lower Courts but make any changes to the previous decisions = 2

The Courts overturn a decision made by lower Court but affirms a decision by the appeal Court = 3

The Courts affirm a decision made by the lower Court but overturn a decision made by the appeal Court = 4

The Courts overturn both lower Court decisions = 5

The Courts change a law = 6

The Courts go beyond overturning lower Court decisions and overturn legislation as unconstitutional = 7

The Courts implement new tests or increase or change previously existing tests = 8

The Courts overturn a previous Supreme Court decision but do not create any new law = 9

The Courts overturn a Supreme Court previous decision and overturn legislation and create new law = 10

Interpretation – Does a Court interpret a legal text in possible contradiction with assumed original intent of the *Constitution* or its plain linguistic meaning? The decisions that interpret the law for its original meaning and avoid straying from the protections of the *Charter* will render lower numbers on the activism scale. Courts that use their position and power to interpret legal texts to suit their own intentions, straying from its original meaning, will be seen as highly activist.

The Supreme Court interprets section 10(b) as the safeguard against denying counsel and an important *Charter* protection = 1

The majority interprets section 10(b) as a valued *Charter* protection, but not one that is without limits as prescribed by law = 2

The concurring justices discuss the high valued *Charter* protections, however the majority does not = 3

The majority interprets the *Charter* as it was intended, but the dissent does not = 4

Majority of the Court interprets the *Charter* to their own ends, but still discusses original intent of *Charter* = 5

Charter is interpreted by all Court members to their own ends = 6

The majority of the Court interprets the *Charter* to their own ends but a dissent holds true to the original interpretation = 7

The Supreme Court is open to overriding section 10(b) *Charter* protection in favour of other interests = 8

The Supreme Court interprets section 10(b) as being easily overridden = 9

The Supreme Court interprets section 10(b) in a way that is contradictory from being a high protection from the right to counsel = 10

Majoritarianism and Autonomy – Here it was measured whether the Court interferes with policies set by democratic processes and if the Court is willing to supply its own solution and/or policy?

The Court does not interfere with policies set by democratic policies and leaves all legislation alone = 1

The Court discusses the constitutionality of legislation, but ultimately upholds it = 2

The Court splits on the constitutionality of legislation, but ultimately upholds it = 3

The concurring decision would “read down” the legislation to amend the law, but the majority upholds the law = 4

The dissent of the Court “reads down” the legislation to amend the law = 5

The majority of the Court “reads down” the legislation to amend the law = 6

The dissent would strike down legislation, but the majority would not = 7

The majority strikes down legislation, the dissent would not have done so = 8

The entire Court strikes down legislation = 9

The Court strikes down legislation and applies their own solution = 10

Judicial Reasoning: Process/substance – With this indicia it was measured how heavily the Court relies on its decision on strict legal and procedural grounds. Where the Court relies entirely on strict legal or procedural grounds in making a decision the case scored a 1. Where the Court relies on open ended legal tests, such as reasonableness based assessments the case scored a 10.

The Court relies entirely on strict legal and procedural grounds = 1

The Court relies entirely on both strict legal and procedural grounds and adopted case law tests = 2

The Court mostly relies on legal and procedural grounds, but discusses an open ended test = 3

The Court relies more on legal and procedural grounds, but also uses an open ended test = 4

The Court relies equally on legal and procedural grounds and open ended tests = 5

The dissent uses more open ended tests than legal and procedural grounds, but the majority does not = 6

The majority uses more open ended tests than legal and procedural grounds, but the dissent does not = 7

The Court uses legal and procedural grounds only to inform their reasons for using open ended tests =8

The Court uses legal and procedural grounds to create a new open ended test =9

The Court relies entirely on open ended tests = 10

Threshold Activism – Here, it was measured the extent to which the Court was willing to forgive threshold hurdles. In this context, a rigorous application of threshold issues (in this case, whether or not a detention had taken place) as a gateway to accessing section 10(b) of the *Charter* would score a 1 (this is the main threshold issue in section 10(b) cases). Where the Court found reasons to allow for a bypass of detention, where previous cases have not, the case scored a 10.

Courts entirely defer to the threshold issue =1

The Court interprets threshold issue as important, but not always the most important factor = 2

The threshold is interpreted as being of substantial importance but the Court imposes limits on it = 3

The majority of the Court views the threshold as exceedingly important, however the dissent varies from this view = 4

There is no discussion of or any thresholds = 5

The dissent interprets the threshold as incredibly important; however, the majority feels it is not above being overridden = 6

The threshold is seen by the Court as being a consideration, but not an important one =7

The threshold is deemed to be unimportant in the case at bar=8

The threshold is almost entirely overlooked in favour of other doctrines =9

The Court entirely ignores the threshold question =10

Judicial Remit – This indicia asks whether the Court’s decision expands or redefines the jurisdiction of the Court. When the decision did not expand or redefine the jurisdiction of the Court, the case scored a 1. A decision that expanded the judiciary’s remit into areas previously immune from intervention was scored as a 10.

The decision does not expand or redefine the jurisdiction of the Court =1

The dissent would slightly redefine the jurisdiction of the Court = 2

The dissent would slightly expand the jurisdiction of the Court = 3

The decision does not expand the jurisdiction of the Court, but slightly redefines it =4

The decision does not expand the Court’s jurisdiction, but somewhat redefines it =5

The decision does not expand the Court's jurisdiction, but redefines it entirely =6

The decision slightly expands the jurisdiction of the Court and slightly redefines it=7

The decision slightly expands jurisdiction and entirely redefines it =8

The majority entirely expands and redefines the jurisdiction, but the dissent would not =9

The decision entirely redefines and expands the jurisdiction of the Court = 10

Rhetoric – This indicia asks whether judicial decisions are used as platforms for expression of broader positions and values or whether the use of rhetoric was restricted to the explication of legal principles. The absence of legal rhetoric (usually correlating with shorter decisions) was scored as a 1. High levels of extra-legal rhetoric combined with long discussions of political implications were scored at 10.

No rhetoric by the Courts and a very short decision = 1

Minimal rhetoric, still a fairly short decision = 2

Some expression of broad positions and values, but still a relatively short decision = 3

Substantial expression of values and positions, decision is longer than 30 paragraphs = 4

The Court engages in brief discussion of non-legal principles as well as potential implications = 5

The decision begins to become more about positions than law = 6

A lengthy decision; substantial discussion on non-legal issues = 7

A long decision; broad positions as well as political ideology discussed = 8

A very long decision (greater than 90 paragraphs) with substantial expression of non-legal principles and political values = 9

Extremely long decision (greater than 100 paragraphs) and copious amounts of rhetoric used =10

Obiter Dicta – This indicia asks how far does the Court expand its opinion beyond the legal requirements of the specific case? When the Court did not delineate any *obiter* the case scored a 1. When the Court used extensive amounts of *obiter* and discussed issues not relevant to the case a 10 was recorded.

Court does not discuss its opinion at all, no *obiter* = 1

Court does not expand its opinion beyond the case at bar = 2

Court briefly discusses potential ramifications of decision, but stays neutral = 3

Court discusses potential ramifications of decision at length, but stays neutral = 4

Court briefly discusses ramifications and appears to be expressing an opinion = 5

Opinion clearly being expressed, ramifications expressed = 6

Ramifications of decision discussed in detail, opinions extend beyond the case at bar = 7

Court uses substantial amounts of *obiter* = 8

Court uses substantial amounts of *obiter* and discusses issues not relevant to the case at bar = 9

Court uses extensive amounts of *obiter* and discusses issues not relevant to case at bar = 10

Reliance on Comparative Sources – Here, it was examined how extensively the Court relied on foreign sources that are not legally binding in the domestic sphere. Where the Court used domestic law exclusively a 1 was scored. When the Court used comparative sources to create new legal conceptions with extensive comparative referencing the case scored a 10.

The Court uses domestic law exclusively = 1

The Court makes minimal references to the UK's common law or texts written by non-judges to understand law, not to change it = 2

Use of American law to understand law but not to change it, with minimal reference = 3

Use of comparative law to justify existing domestic laws, still fairly minimal reference = 4

Use of comparative law justifying existing domestic laws, extensive reference = 5

Use of comparative law to justify changing existing laws, minimal reference = 6

Use of comparative law to justify changing existing laws, extensive reference = 7

Use of comparative law to create new legal tests = 8

Use of comparative law to create new laws, minimal reference = 9

Use of comparative law to create new laws, extensive reference = 10

Judicial Voices – Here it was examined the extent of other judicial decisions besides the majority decision. A unanimous decision scored a 1. On occasions where two concurring and two dissenting judgments were observed (the most judicial voices seen) the case scored a 10.

A unanimous decision = 1

One concurring decision with no additions to the overall law = 2

One concurring decision adding other law = 3

Two concurring decisions = 4

Two concurring decisions adding other law = 5

One dissent or three concurring decisions = 6

One concurring decision and one dissenting opinion = 7

One concurring decision adding other law and one dissent = 8

Two concurring judgments and one dissenting judgment or two dissenting judgments = 9

Two concurring judgments and two dissenting opinions = 10

Extent of Decision – Here it was examined whether the Court’s ruling expressly applied to a single or specified set of circumstances or whether the law that resulted had broad implications for larger sections of society. If the Court simply applied the legal rules the case scored a 1. Where the Court created a new standard that affected broader populations the case scored a 10.

The Court simply applies the rules set forth in the criminal code = 1

When the Courts narrow their application to the case at bar = 2

Application to case at bar, discussion on potential future standing = 3

Application to one or two other cases = 4

Application to a few cases as well as discussion on future standing = 5

Creation of a new standard which applies only to case at bar = 6

Creation of a new standard which applies to a few cases = 7

Creation of a new standard with a broad scope = 8

Creation of new powers then used in later cases = 9

Creation of a new standard that is then adopted into the common law = 10

Legal Background – Here it was examined whether the legal framework on the basis of which the Court made its decision were inclusive and clear or whether the rules concerned were vague, complex, self-contradictory or incomplete. The absence of a clear rule essentially requires the judiciary to extend its decision beyond the former case law. Once the Court does not or cannot abstain from deciding decision making in the later cases will almost necessarily involve some creative judicial expertise and will thus be activist.

Legal framework is clear, rules are clear, decision does not extend beyond prior case law = 1

Legal framework is clear, rules are clear, decision slightly extends beyond prior case law = 2

Legal framework is clear, rules are clear, decision extends well beyond prior case law = 3

Legal framework is clear, rules are not clear, but decision does not extend beyond prior case law = 4

Legal framework is clear, rules are not clear and decision extends beyond prior case law = 5

No clear framework or rules, but decision does not extend beyond case at bar = 6

No clear framework or rules, Court adopts rules from other areas of law = 7

No clear framework or rules, Court makes new rules = 8

No clear framework or rules, Court makes new rules that override old rules = 9

No clear framework or rules, Court makes new framework for analysis = 10

Category 3 – Activism and the Protection of Core Values

Variables: Core Values Activism

Intervention and value content – Here it was examined if the subject matter under examination was highly value laden in its bearing on democratic principles and human liberties accepted domestically. Where the case dealt with important human rights issues and the Court appeared to assert its guardianship of the *Constitution* the case scored a 1. Where the Court declined to discuss the constitutional values at stake, the case scored a 10.

Unanimously high value context, *Charter* protections paramount = 1
 Majority discusses high value context, *Charter* protections paramount = 2
 Majority discusses high value context, *Charter* extremely important dissent does not = 3
 In a concurring statement, a justice discusses high value context = 4
 No value context discussion, but *Charter* is interpreted purposively = 5
 Majority discusses value context, but determines that it is not above being overridden = 6
 Dissent discusses high value context, but majority does not = 7
 Little mention of values, *Charter* discussion easily overridden = 8
 No discussion of value context, brief discussion of liberties, mostly technical decision = 9
 No one discusses value context at all, technical decision, not about liberties = 10

Appendix G – Section 10(b) Case List

<i>British Columbia (Attorney General) v Christie</i> [2007] 1 SCR 873.	<i>R v Cook</i> , [1998] 2 SCR 597.
<i>Clarkson v the Queen</i> [1986] 1 SCR 383.	<i>R v Debot</i> , [1989] 2 SCR 1140.
<i>Dehghani v Canada (Minister of Employment and Immigration)</i> [1993] 1 SCR 1053.	<i>R v Elshaw</i> , [1991] 3 SCR 24.
<i>R v Bartle</i> , [1994] 3 SCR 569.	<i>R v Evans</i> , [1991] 1 SCR 869.
<i>R v Black</i> , [1989] 2 SCR 128.	<i>R v Feeney</i> , [1997] 3 SCR 1008.
<i>R v Borden</i> , [1994] 3 SCR 145.	<i>R v Grant</i> , [1993] 3 SCR 223.
<i>R v Brydges</i> , [1990] 1 SCR 190.	<i>R v Grant</i> , [2009] 2 SCR 353.
<i>R v Burlingham</i> , [1995] 2 SCR 206.	<i>R v Greffe</i> , [1990] 1 SCR 775.
<i>R v Cobham</i> , [1994] 3 SCR 360.	<i>R v Harper</i> , [1994] 3 SCR 343.
	<i>R v Harter</i> , [1995] 3 SCR 562.
	<i>R v Hebert</i> , [1990] 2 SCR 151.
	<i>R v I. (L.R.) and T. (E.)</i> , [1993] 4 SCR 504.

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|---|---|
| <i>R v Jacoy</i> , [1988] 2 SCR 548. | <i>R v Simmons</i> , [1988] 2 SCR 495. |
| <i>R v Latimer</i> , [1997] 1 SCR 217. | <i>R v Sinclair</i> , [2010] 2 SCR 310. |
| <i>R v M (M.R.)</i> , [1998] 3 SCR 393. | <i>R v Smith</i> , [1989] 2 SCR 368. |
| <i>R v Manninen</i> , [1987] 1 SCR 1233. | <i>R v Smith</i> , [1991] 1 SCR 714. |
| <i>R v Matheson</i> , [1994] 3 SCR 328. | <i>R v Strachan</i> , [1988] 2 SCR 980. |
| <i>R v McCrimmon</i> , [2010] 2 SCR 402. | <i>R v Suberu</i> , [2009] 2 SCR 460. |
| <i>R v Orbanski; R. v Elias</i> , [2005] 2 SCR 3. | <i>R v Therens</i> , [1985] 1 SCR 613. |
| <i>R v Pozniak</i> , [1994] 3 SCR 310. | <i>R v Thomsen</i> , [1988] 2 SCR 640. |
| <i>R v Prosper</i> , [1994] 3 SCR 236. | <i>R v Terry</i> , [1996] 2 SCR 207. |
| <i>R v Ross</i> , [1989] 2 SCR 3. | <i>R v Tremblay</i> , [1987] 2 SCR 435. |
| <i>R v Schmautz</i> , [1990] 1 SCR 398. | <i>R v Whittle</i> , [1994] 2 SCR 914. |
| | <i>R v Willier</i> , [2010] 2 SCR 429. |
| | <i>R v Woods</i> , [2005] 2 SCR 205. |

Appendix H – Section 9 Variable List

Category 1 – Activism under the Traditional Vision

Judicial Stability – Here it was measured whether the Court is ready to retract from its own or former decisions. When the Court affirms the decisions of all lower Courts this is scored as being the lowest level of activism. When the Court overturns a previous decision and overturns legislation and creates new law, the score of the case was a 10, or the highest level of activism.

- The Courts affirm the decisions of both lower Courts = 1
- The Courts affirm the decisions of the lower Courts but make any changes to the previous decisions = 2
- The Courts overturn a decision made by lower Court but affirms a decision by the appeal Court = 3
- The Courts affirm a decision made by the lower Court but overturn a decision made by the appeal Court = 4
- The Courts overturn both lower Court decisions = 5
- The Courts change a law = 6
- The Courts go beyond overturning lower Court decisions and overturn legislation as unconstitutional = 7
- The Courts implement new tests or increase or change previously existing tests = 8
- The Courts overturn a previous Supreme Court decision but do not create any new law = 9
- The Courts overturn a Supreme Court previous decision and overturn legislation and create new law = 10

Interpretation – Does a Court interpret a legal text in possible contradiction with assumed original intent of the *Constitution* or its plain linguistic meaning? The decisions that interpret the law for its original meaning and avoid straying from the protections of the *Charter* will render lower numbers on the activism scale. Courts that use their position and power to interpret legal texts to suit their own intentions, straying from its original meaning, will be seen as highly activist.

The Supreme Court interprets section 9 as the safeguard against denying counsel and an important *Charter* protection = 1

The majority interprets section 9 as a valued *Charter* protection, but not one that is without limits as prescribed by law = 2

The concurring justices discuss the high valued *Charter* protections, however the majority does not = 3

The majority interprets the *Charter* as it was intended, but the dissent does not = 4

Majority of the Court interprets the *Charter* to their own ends, but still discusses original intent of *Charter* = 5

Charter is interpreted by all Court members to their own ends = 6

The majority of the Court interprets the *Charter* to their own ends but a dissent holds true to the original interpretation = 7

The Supreme Court is open to overriding section 9 *Charter* protection in favour of other interests = 8

The Supreme Court interprets section 9 as being easily overridden = 9

The Supreme Court interprets section 9 in a way that is contradictory from being a high protection from the right to counsel = 10

Majoritarianism and Autonomy – Here it was measured whether the Court interferes with policies set by democratic processes and if the Court is willing to supply its own solution and/or policy?

The Court does not interfere with policies set by democratic policies and leaves all legislation alone = 1

The Court discusses the constitutionality of legislation, but ultimately upholds it = 2

The Court splits on the constitutionality of legislation, but ultimately upholds it = 3

The concurring decision would “read down” the legislation to amend the law, but the majority upholds the law = 4

The dissent of the Court “reads down” the legislation to amend the law = 5

The majority of the Court “reads down” the legislation to amend the law = 6

The dissent would strike down legislation, but the majority would not = 7

The majority strikes down legislation, the dissent would not have done so = 8

The entire Court strikes down legislation = 9

The Court strikes down legislation and applies their own solution = 10

Judicial Reasoning: Process/substance – This indicia measures how heavily the Court relies on its decision on strict legal and procedural grounds. Where the Court relies entirely on strict legal or procedural grounds in making a decision the case scored a 1. Where the Court relies on open ended legal tests, such as reasonableness based assessments the case scored a 10.

The Court relies entirely on strict legal and procedural grounds = 1

The Court relies entirely on both strict legal and procedural grounds and adopted case law tests = 2

The Court mostly relies on legal and procedural grounds, but discusses an open ended test = 3

The Court relies more on legal and procedural grounds, but also uses an open ended test = 4

The Court relies equally on legal and procedural grounds and open ended tests = 5

The dissent uses more open ended tests than legal and procedural grounds, but the majority does not = 6

The majority uses more open ended tests than legal and procedural grounds, but the dissent does not = 7

The Court uses legal and procedural grounds only to inform their reasons for using open ended tests =8

The Court uses legal and procedural grounds to create a new open ended test =9

The Court relies entirely on open ended tests = 10

Threshold Activism – Here, it was measured the extent to which the Court was willing to forgive threshold hurdles. In this context, a rigorous application of threshold issues (in this case, whether or not an arbitrary detention had taken place) as a gateway to accessing section 9 of the *Charter* would score a 1 (this is the main threshold issue in section 9 cases). Where the Court found reasons to allow for a bypass of detention, where previous cases have not, the case scored a 10.

Courts entirely defer to the threshold issue =1

The Court interprets the threshold issue as important, but not always the most important factor = 2

The threshold is interpreted as being of substantial importance but the Court imposes limits on it = 3

The majority of the Court views the threshold as exceedingly important, however the dissent varies from this view = 4

There is no discussion of or any thresholds = 5

The dissent interprets the threshold as incredibly important; however, the majority feels it is not above being overridden = 6

The threshold is seen by the Court as being a consideration, but not an important one =7

The threshold is deemed to be unimportant in the case at bar =8

The threshold is almost entirely overlooked in favour of other doctrines =9

The Court entirely ignores the threshold question =10

Judicial Remit – This indicia asks whether the Court’s decision expands or redefines the jurisdiction of the Court. When the decision did not expand or redefine the jurisdiction of the Court, the case scored a 1. A decision that expanded the judiciary’s remit into areas previously immune from intervention was scored as a 10.

The decision does not expand or redefine the jurisdiction of the Court =1

The dissent would slightly redefine the jurisdiction of the Court = 2

The dissent would slightly expand the jurisdiction of the Court = 3

The decision does not expand the jurisdiction of the Court, but slightly redefines it =4

The decision does not expand the Court’s jurisdiction, but somewhat redefines it =5

The decision does not expand the Court’s jurisdiction, but redefines it entirely =6

The decision slightly expands the jurisdiction of the Court and slightly redefines it=7

The decision slightly expands jurisdiction and entirely redefines it =8

The majority entirely expands and redefines the jurisdiction, but the dissent would not =9

The decision entirely redefines and expands the jurisdiction of the Court = 10

Rhetoric – This indicia asks whether judicial decisions are used as platforms for expression of broader positions and values or whether the use of rhetoric was restricted to the explication of legal principles. The absence of legal rhetoric (usually correlating with shorter decisions) was scored as a 1. High levels of extra-legal rhetoric combined with long discussions of political implications were scored at 10.

No rhetoric by the Courts and a very short decision = 1

Minimal rhetoric, still a fairly short decision = 2

Some expression of broad positions and values, but still a relatively short decision = 3

Substantial expression of values and positions, decision is longer than 30 paragraphs = 4

The Court engages in brief discussion of non-legal principles as well as potential implications = 5

The decision begins to become more about positions than law = 6

A lengthy decision; substantial discussion on non-legal issues = 7

A long decision; broad positions as well as political ideology discussed = 8

A very long decision (greater than 90 paragraphs) with substantial expression of non-legal principles and political values = 9

Extremely long decision (greater than 100 paragraphs) and copious amounts of rhetoric used = 10

Obiter Dicta – This indicia asks how far does the Court expand its opinion beyond the legal requirements of the specific case? When the Court did not delineate any *obiter* the case scored a 1. When the Court used extensive amounts of *obiter* and discussed issues not relevant to the case a 10 was recorded.

Court does not discuss its opinion at all, no *obiter* = 1

Court does not expand its opinion beyond the case at bar = 2

Court briefly discusses potential ramifications of decision, but stays neutral = 3

Court discusses potential ramifications of decision at length, but stays neutral = 4

Court briefly discusses ramifications and appears to be expressing an opinion = 5

Opinion clearly being expressed, ramifications expressed = 6

Ramifications of decision discussed in detail, opinions extend beyond the case at bar = 7

Court uses substantial amounts of *obiter* = 8

Court uses substantial amounts of *obiter* and discusses issues not relevant to the case at bar = 9

Court uses extensive amounts of *obiter* and discusses issues not relevant to case at bar = 10

Reliance on Comparative Sources – Here, it was examined how extensively the Court relied on foreign sources that are not legally binding in the domestic sphere. Where the Court used domestic law exclusively a 1 was scored. When the Court used comparative sources to create new legal conceptions with extensive comparative referencing the case scored a 10.

The Court uses domestic law exclusively = 1

The Court makes minimal references to the UK's common law or texts written by non-judges to understand law, not to change it = 2

Use of American law to understand law but not to change it, with minimal reference = 3

Use of comparative law to justify existing domestic laws, still fairly minimal reference = 4

Use of comparative law justifying existing domestic laws, extensive reference = 5

Use of comparative law to justify changing existing laws, minimal reference = 6

Use of comparative law to justify changing existing laws, extensive reference = 7

Use of comparative law to create new legal tests = 8

Use of comparative law to create new laws, minimal reference = 9

Use of comparative law to create new laws, extensive reference = 10

Judicial Voices - Here it was examined the extent of other judicial decisions besides the majority decision. A unanimous decision scored a 1. On occasions where two concurring and two dissenting judgments were observed (the most judicial voices seen) the case scored a 10.

A unanimous decision = 1

One concurring decision with no additions to the overall law = 2

One concurring decision adding other law = 3

Two concurring decisions = 4

Two concurring decisions adding other law = 5

One dissent or three concurring decisions = 6

One concurring decision and one dissenting opinion = 7

One concurring decision adding other law and one dissent = 8

Two concurring judgments and one dissenting judgment or two dissenting judgments = 9

Two concurring judgments and two dissenting opinions = 10

Extent of Decision - Here it was examined whether the Court's ruling expressly applied to a single or specified set of circumstances or whether the law that resulted had broad implications for larger sections of society. If the Court simply applied the legal rules the case scored a 1. Where the Court created a new standard that affected broader populations the case scored a 10.

The Court simply applies the rules set forth in the criminal code = 1

When the Courts narrow their application to the case at bar = 2

Application to case at bar, discussion on potential future standing = 3

Application to one or two other cases = 4

Application to a few cases as well as discussion on future standing = 5

Creation of a new standard which applies only to case at bar = 6

Creation of a new standard which applies to a few cases = 7

Creation of a new standard with a broad scope = 8

Creation of new powers then used in later cases = 9

Creation of a new standard that is then adopted into the common law = 10

Legal Background - Here it was examined whether the legal framework on the basis of which the Court made its decision were inclusive and clear or

whether the rules concerned were vague, complex, self-contradictory or incomplete. The absence of a clear rule essentially requires the judiciary to extend its decision beyond the former case law. Once the Court does not or cannot abstain from deciding decision making in the later cases will almost necessarily involve some creative judicial expertise and will thus be activist.

Legal framework is clear, rules are clear, decision does not extend beyond prior case law = 1

Legal framework is clear, rules are clear, decision slightly extends beyond prior case law = 2

Legal framework is clear, rules are clear, decision extends well beyond prior case law = 3

Legal framework is clear, rules are not clear, but decision does not extend beyond prior case law = 4

Legal framework is clear, rules are not clear and decision extends beyond prior case law = 5

No clear framework or rules, but decision does not extend beyond case at bar = 6

No clear framework or rules, Court adopts rules from other areas of law = 7

No clear framework or rules, Court makes new rules = 8

No clear framework or rules, Court makes new rules that override old rules = 9

No clear framework or rules, Court makes new framework for analysis = 10

Category 3 – Activism and the Protection of Core Values

Variables: Core Values Activism

Intervention and value content – Here it was examined if the subject matter under examination was highly value laden in its bearing on democratic principles and human liberties accepted domestically. Where the case dealt with important human rights issues and the Court appeared to assert its guardianship of the *Constitution* the case scored a 1. Where the Court declined to discuss the constitutional values at stake, the case scored a 10.

Unanimously high value context, *Charter* protections paramount = 1

Majority discusses high value context, *Charter* protections paramount = 2

Majority discusses high value context, *Charter* extremely important dissent does not = 3

In a concurring statement, a justice discusses high value context = 4

No value context discussion, but *Charter* is interpreted purposively = 5

Majority discusses value context, but determines that it is not above being overridden = 6

Dissent discusses high value context, but majority does not = 7

Little mention of values, *Charter* discussion easily overridden = 8

No discussion of value context, brief discussion of liberties, mostly technical decision= 9

No one discusses value context at all, technical decision, not about liberties = 10

Appendix I – Section 9 Case List

- Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.
- Caisse populaire Desjardins de Val-Brillant v Blouin*, [2003] 1 SCR 666.
- Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 SCR 865.
- Canada (Attorney General) v McArthur*, 2010 SCC 63.
- Charkaoui v Canada (Citizenship and Immigration)*, [2008] 2 SCR 326.
- Dumas v Leclerc Institute*, [1986] 2 SCR 459.
- Guimond v Quebec (Attorney General)*, [1996] 3 SCR 347.
- Law Society of British Columbia v Mangat*, [2001] 3 SCR 113.
- May v Ferndale Institution*, [2005] 3 SCR 809.
- R v A.M.*, [2008] 1 SCR 569.
- R v Asante-Mensah*, [2003] 2 SCR 3.
- R v B.(K.G.)*, [1993] 1 SCR 740.
- R v Bain*, [1992] 1 SCR 91.
- R v Beare; R. v Higgins*, [1988] 2 SCR 387.
- R v Brooks*, [2000] 1 SCR 237.
- R v Chaisson*, [2006] 1 SCR 415.
- R v Clayton*, [2007] 2 SCR 725.
- R v Conway*, 2010 SCC 22.
- R v Currie*, [1997] 2 SCR 260.
- R v Decorte*, [2005] 1 SCR 133.
- R v Duguay*, [1989] 1 SCR 93.
- R v Généreux*, [1992] 1 SCR 259.
- R v Grant*, [1993] 3 SCR 223.
- R v Grant*, 2009 SCC 32.
- R v Hape*, [2007] 2 SCR 292.
- R v Harrison*, 2009 SCC 34.
- R v Heywood*, [1994] 3 SCR 761.
- R v Hufsky*, [1988] 1 SCR 621.
- R v Jacques*, [1996] 3 SCR 312.
- R v Johnson*, [2003] 2 SCR 357
- R v Kang-Brown*, [2008] 1 SCR 456.
- R v Knoblauch*, [2000] 2 SCR 780.
- R v Latimer*, [1997] 1 SCR 217.
- R v Loewen*, 2011 SCC 21.
- R v Luxton*, [1990] 2 SCR 711.
- R v Lyons*, [1987] 2 SCR 309.
- R v M (S.H.)*, [1989] 2 SCR 446.
- R v MacKenzie*, 2013 SCC 50.
- R v Mann*, [2004] 3 SCR 59.
- R v Mellenthin*, [1992] 3 SCR 615.
- R v Milne*, [1992] 1 SCR 697.
- R v Monney*, [1999] 1 SCR 652.
- R v Montour*, [1995] 2 SCR 416.
- R v Nasogaluak*, 2010 SCC 6.
- R v Noble*, [1997] 1 SCR 874.
- R v Nolet*, 2010 SCC 24.

R v Orbanski; R v Elias, [2005] 2
SCR 3.
R v Pearson, [1992] 3 SCR 665.
R v S.J.L., 2009 SCC 14.
R v Simmons, [1988] 2 SCR 495.
R v Storrey, [1990] 1 SCR 241.
R v Suberu, 2009 SCC 33.
R v Wilson, [1990] 1 SCR 1291.
RJR -
- *MacDonald Inc. v Canada (Attorney
General)*, [1994] 1 SCR 311.
Starr v Houlden, [1990] 1 SCR
1366.
Sunrise Co. v Lake Winnipeg (The),
[1991] 1 SCR 3.
*Travelers Insurance Co. of Canada v
Corriveau et al.*, [1982] 2 SCR 866.
United States of America v Kwok,
[2001] 1 SCR 532.
Vancouver (City) v Ward, [2010]
SCC 27.
Winters v Legal Services Society,
[1999] 3 SCR 160.